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 10

APPEAL FROM NOTICE OF ENTRY OF DECISION AND ORDER

IN THE EIGHTH JUDICIAL DISTRICT COURT

TRAVIS BARRICK
NEVADA BAR #9257
GALLIAN, WILCOX, WELKER
OLSON & BECKSTROM, L.C.
540 E. ST. LOUIS AVENUE
LAS VEGAS , NEVADA 89104
(702 892-3500

ATTORNEY FOR APPELLANT

CHRIS OWENS
CLARK COUNTY, NEVADA
DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89155
(702) 671-2500

CATHERINE CORTEZ-MASTO
NEVADA BAR #3926
NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NEVADA 89701
(775) 684-1265

ATTORNEYS FOR RESPONDENT

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

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KIRSTIN BLAISE LOBATO,

Petitioner,

vs.

WARDEN OF FMWCC,
and THE STATE OF NEVADA,

Respondents.

CASE NO. C177394

DEPT. NO. II

PETITIONER LOBATO'S ANSWER TO THE STATE'S RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND MOTION FOR APPOINTMENT OF COUNSEL

Date of Hearing: _____

Time of Hearing: _____

COMES NOW Petitioner Kirstin Blaise Lobato, in Pro Per, and hereby submits the attached Answer in response to the STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION).

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

ANSWER TO STATE'S RESPONSE AND SUPPORTING POINTS AND AUTHORITIES

For the Court's convenience the Petitioner will follow the order in which the Response is structured with the same headings [and some comments by Petitioner to correct the heading's wording] for easy comparison to the Response.

STATEMENT OF THE CASE

The Response does not make mention that the final judgment was entered in the Petitioner's case on October 16, 2009, when the CLERK'S CERTIFICATE JUDGMENT AFFIRMED was filed.

Argument

I

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

The Response only partially states the Nevada standard for considering the new evidence claims in the Petitioner's habeas petition by omitting two exceptions to untimeliness applicable to the Petitioner's writ of *habeas corpus*. The Nevada Supreme Court ruled regarding new evidence in *Browning v. State*, 120 Nev. 347, 91 P.3d 39 (2004):

> To raise this issue as a habeas claim, Browning must demonstrate good cause for its untimeliness and actual prejudice. Or absent good cause, Browning must demonstrate that a fundamental miscarriage of justice would occur if this court failed to consider this claim. *Id.*

The two exceptions to untimeliness are for "good cause," and "that a fundamental miscarriage of justice would occur if this court failed to consider this claim." *Id*. They are both applicable to the Petitioner's writ of *habeas corpus.*

Each of the Petitioner's twenty-four new evidence grounds explains the "actual prejudice" to the Petitioner caused by the failure of the jury to consider the new evidence claim and "that a fundamental miscarriage of justice would occur if this court failed to consider this claim" because each claim of new evidence individually and/or cumulative with the weight of other new evidence supports that she is actually innocent of her convicted crimes under the standard established by the U.S. Supreme Court 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." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995).

The federal "actual innocence" standard set forth in ***Schlup*** requires only a 51% probability ("more likely than not") that a reasonable juror would have not have convicted based on the new evidence. The writ of ***habeas corpus'*** explanation of the new evidence claims also demonstrate they satisfy Nevada's effectively indistinguishable standard that they would "render a different result probable on retrial." ***Pacheco v. State***, 81 Nev. 639, 408 P.2d 715 (Nev. 12/13/1965). The federal and Nevada standards for granting a ***habeas*** petition based on new evidence is dramatically lower standard than the proof beyond a reasonable doubt standard required for conviction.

What the Petitioner did not explain in her writ of ***habeas corpus*** is "good cause for untimeliness." Since the Response raises the issue the Petitioner will explain. After the Petitioner's conviction her trial/appellate counsel David Schieck and appellate counsel JoNell Thomas would not conduct any investigation of possible new evidence in her case during the period of her direct appeal, which wasn't completed until ***more than three years*** after her verdicts on October 6, 2006. They refused to do so even after being informed in a letter dated January 19, 2009, that new DNA techniques developed ***after*** the Petitioner's trial enable the testing of evidence in her case that could scientifically identify the DNA profile of Duran Bailey's murderer(s). The evidence that can now be tested by the new DNA techniques include the swabs of semen recovered from Duran Bailey's rectum and penis that was handled by Bailey's murderer (or one of them). (See writ of ***habeas corpus*** Exhibit 71.)

The Petitioner's conviction became final on October 16, 2009. Schieck was requested to turn over case files so the Petitioner could begin preparation for her ***habeas corpus*** petition, and after letters were sent to Schieck and Thomas on October 27, 2009, Schieck turned over case files on November 4, 2009, that included documents and the color crime scene and autopsy photographs. (See writ of ***habeas corpus*** Exhibits 94 and 95.) Based on the information turned over to the Petitioner, forensic entomologist Dr. Gail Anderson was contacted less than two weeks later and in November 2008 she agreed to review ***pro bono*** the evidence in the Petitioner's case for the determination of Duran Bailey's time of death. Dr. Anderson provided a report dated December 17, 2009. (See writ of ***habeas corpus*** Exhibit 1.) Forensic scientist George Schiro was also contacted in November 2008 and he agreed to review ***pro bono*** the evidence in the Petitioner's case. Schiro first

Affidavit is dated November 24, 2009. (See writ of *habeas corpus* Exhibit 43.) Two months after the Petitioner obtained her case files forensic pathologist Dr. Glenn Larkin provided his report on January 5, 2010, after a thorough review and analysis of the medical evidence. (See writ of *habeas corpus* Exhibit 4.) The nine *pro bono* experts and eighteen witnesses who provided a Report or Affidavit included in the writ of *habeas corpus* were contacted within a few months after the Petitioner was provided with her case files by Schieck on November 4, 2009. In fact, because there were documents not in those files the Petitioner sent Schieck and Thomas letters on December 18, 2009, and he didn't provide additional files until February 4, 2010 – nearly four months after her conviction became final and his representation of her ended. The Petitioner could not have been more reasonably diligent in discovering the new evidence included in her writ of *habeas corpus* because she could only begin to pursue doing so after obtaining her case files from her attorneys and finding out what documents and photographs were in them. The new evidence obtained by the Petitioner's diligence after obtaining her case files includes but isn't limited to:

- New expert forensic entomology evidence that Duran Bailey died between 8:01 p.m. and "around 10 p.m." on July 8, 2001.
- New expert forensic pathology evidence that Bailey died between 8 p.m. and "around 10 p.m." on July 8, 2001.
- New expert psychology evidence the Petitioner's Statement describes the sexual assault of her at the Budget Suites Hotel weeks before Bailey's murder.
- New expert dental evidence that the Petitioner's baseball bat wasn't used during Bailey's murder.
- New expert forensic science shoe evidence that the shoes the Petitioner was wearing during the sexual assault she describes in her Statement were not worn during Bailey's murder.
- New expert forensic science shoeprint evidence that the Petitioner's shoeprints don't match those of a person who was present at the crime scene before and after Bailey began bleeding.
- New expert polygraph evidence that the Petitioner is truthful that she had nothing to do with Bailey's murder.
- New alibi evidence the Petitioner's Statement refers to the sexual assault of the Petitioner at the Budget Suites Hotel weeks before Bailey's murder.
- New alibi evidence that the Petitioner was in Panaca the entire weekend of July 6, 7 and 8.
- New exculpatory evidence that methamphetamine was readily available in Panaca and Lincoln County in July 2008.
- New exculpatory evidence that methamphetamine was not readily available on the street around the Nevada State Bank in July 2008.
- New third-party culprit evidence the Mexican friends of Diann Parker murdered Duran Bailey.

- New legal evidence that the Petitioner was prosecuted for a non-existent violation of NRS 201.450.
- New expert crime scene reconstruction evidence that Bailey was lying down during the entire time of the assault that resulted in his murder.
- New expert crime scene photographic evidence that Bailey was alive after his rectum wound was inflicted.
- New evidence the Petitioner's convictions were based on false evidence.
- New evidence of jury misconduct that at least one juror decided the Petitioner was guilty before the close of evidence.
- New evidence of police perjury.
- New evidence of prosecutor misconduct.

Also, in 2010 the world-renowned Innocence Project in New York accepted the Petitioner's case to pursue DNA testing of biological evidence in her for scientific proof of her innocence by both identifying that she is excluded and identifying the DNA profile of Bailey's assailant(s).

Furthermore, it is a hollow argument to claim that the Petitioner wasn't diligent, because with the resources of the LVMPD and other law enforcement services available to the prosecution to investigate the death of Mr. Bailey, the Petitioner was able through her due diligence to discover the new evidence in her writ of ***habeas corpus*** in a few months that the prosecution was unable to discover during the more than ***six years*** that elapsed from Mr. Bailey's murder on July 8, 2001, to the beginning of the Petitioner's trial in September 2006.

Furthermore, the Petitioner not only had "good cause" for untimeliness, but as the Court in ***Browning*** stated, it is excused if "a fundamental miscarriage of justice would occur if this court failed to consider this claim." The Petitioner doesn't have a lone claim of new evidence as in the ***Browning*** case but twenty-four, and contrary to the Respondent's assertion, it is explained in each of the new evidence grounds why she is actually innocent and it is more probable than not that no reasonable juror would convict her after considering the new evidence.

Furthermore, the Respondent has misstated the Nevada Supreme Court's precedent on new evidence that may be cumulative to trial evidence. Completely opposite of the Respondent's representation, the Court in ***Pacheco v. State***, 81 Nev. 639, 408 P.2d 715 (Nev. 12/13/1965) made it clear that the Nevada precedent is new evidence ***can be*** cumulative to trial evidence. "We, also, have acknowledged that newly discovered evidence which is cumulative ***may not be enough*** to

warrant another trial," *State v. Randolph*, 49 Nev. 241, 242 P.2d 697 (1926). The standard in Nevada is new evidence that is merely cumulative *may not be enough* to warrant a new trial, not that it isn't allowed to be considered. In 2008 the Nevada Supreme Court overturned a murder conviction in *Valdez v. State*, 196 P.3d 465, 124 Nev. 97 (Nev. 11/26/2008) based on the cumulative effect of three individual errors that were not sufficient by themselves to warrant a new trial. *Id*. at ¶112. The Petitioner's case includes among its many claims those same three errors: inadequate jury instruction, prosecutor misconduct and juror misconduct. Furthermore, based in part on *cumulative* evidence, in 2009 the U.S. Supreme Court granted the *writ of certiorari* in the *habeas* case of *Cone v. Bell*, 129 S.Ct. 1769, 173 L.Ed.2d 701, 556 U.S. ___ (U.S. 04/28/2009). The Court stated in regards to the prosecution's concealment of *Brady* evidence, "It is possible that the suppressed evidence, **viewed cumulatively**, may have persuaded the jury …" *Id*. at ¶73. (emphasis added to original) The fact is that new evidence claims that could have by some argument been considered cumulative with trial evidence have likely been relied on to some degree in many of the 258 cases of exoneration by DNA evidence in the United States as of September 1, 2010 according to the Innocence Project in New York. All new exculpatory evidence, no matter how compelling by itself, fits into the framework of the case as a whole.

B. Defendant has not satisfied the actual innocence standard.

The Response misstates the U.S. Supreme Court's actual innocence standard set forth in *Schlup v. Delo*, 513 U.S. 298, 322, 115 S.Ct. 851 (1995), which is, "the petitioner must show that the constitutional error **"probably"** resulted in the conviction of one who was actually innocent." *Id*. at 322. (emphasis added to original.) In adopting the very lenient "probably" standard that a habeas petitioner must satisfy the Court wrote:

> Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution *325 of a person who is entirely innocent.[41] **Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system**. That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U. S. 358, 372 (1970) (Harlan, J., concurring). See also T. Starkie, Evidence 756 (1824) ("The maxim of the law is . . . that it is better that ninety-nine .

> . . offenders should escape, than that one innocent man should be condemned"). See generally Newman, Beyond "Reasonable Doubt," 68 N. Y. U. L. Rev. 979, 980—981 (1993). *Id*. at 324-5. (emphasis added to original.)

The Response falsely – and disingenuously – claims the Petitioner's writ of ***habeas corpus*** does not provide new evidence establishing "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence presented in habeas proceedings." ***Schlup***, 513 U.S. at 327.

The Response does not include any response whatsoever to Ground 23 that is a claim of the Petitioner's actual innocence based on the cumulative weight of the Petitioner's new evidence considered collectively and not individually. The Response's failure to acknowledge or respond to Ground 23, which is a significant issue in the writ of ***habeas corpus***, constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The Response's failure to respond to Ground 23 is a confession of error that the Petitioner's new evidence meets the ***Schlup*** standard of the Petitioner's actual innocence of her convicted charges, because "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." ***Schlup***, 513 U.S. at 327.

Furthermore, among the new evidence is an Affidavit sworn under penalties of perjury that then Clark County Assistant District Attorney William Kephart told the witness, "We are going to show you how to legally lie on the stand." (See Exhibit 11, writ of ***habeas corpus***) Furthermore that same witness states in his Affidavit that during his meeting with ADA Kephart and ADA Sandra DiGiacomo prior to the Petitioner's trial:

> ● I told them Blaise was innocent of the murder committing in July because she told a number of people in late May and June about being attacked by a man and

stopping him from raping her by using her knife to cut or try to cut his penis, so the murder in July and the attempted rape of Blaise in May were different events.
● They told me they didn't care if Blaise was innocent. (*Id.*)

Furthermore Kephart and DiGiacomo threatened the witness that he could end up "in prison if I didn't say what they wanted when I was on the stand testifying." (*Id.*)

Consequently, there is credible new evidence by a witness willing to testify under oath in open court to evidence that then ADA Kephart and ADA DiGiacomo coached a witness to lie, threatened him with prison if he tried to testify truthfully, and they prosecuted the Petitioner, Kirstin Blaise Lobato, while either knowing or having reason to believe she is innocent of Duran Bailey's murder.

Considering that new evidence, it is almost incomprehensible that Kephart, who is now the Clark County Chief Deputy District Attorney, signed the Response that argues the Petitioner has not met the U.S. Supreme Court's standard of actual innocence that "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup*, 513 U.S. at 327. The federal "actual innocence" standard requires only a 51% probability ("more likely than not") that a reasonable juror would not have convicted based on the new evidence. Nevada's standard is indistinguishable. *Pacheco v. State*, 81 Nev. 639, 408 P.2d 715 (Nev. 12/13/1965) (The new evidence would "render a different result probable on retrial.").

The standard used to evaluate new evidence of actual innocence 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." *Schlup v. Delo*, 513 U.S. at 327 – sets a significantly lower threshold for evaluation of the new evidence to determine it warrants granting the Petitioner a new trial, than the proof beyond a reasonable doubt standard required for conviction.

Furthermore, the Petitioner's new evidence isn't considered in isolation but in light of **all** the evidence that was **and was not admitted into evidence at trial** that may complement the Petitioner's new evidence in establishing she is actually innocent under the *Schlup* standard. In *Schlup* the court ruled: "the habeas court **must make its determination** concerning the petitioner's innocence "**in light of all the evidence**, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and **evidence tenably claimed to have been wrongly**

excluded or to have **become available only after the trial**." *Schlup*, 513 U. S. at 328. (emphasis added to original) The US Supreme Court reaffirmed that principle when it granted the writ of *certiorari* in the 2006 *habeas* case of *House v. Bell*, 126 S.Ct. 2064, 547 U.S. 518, 165 L.Ed.2d 1 (U.S. 06-12-2006) ("In sum, considering "all the evidence," *Schlup*, 513 U. S. at 328.")

Furthermore, the U.S. Supreme recognized in *House*, *supra*, that new evidence **rebutting** trial evidence is permissible for consideration in a *habeas* petition, and in fact the U.S. Supreme Court ruled that House met the *Schlup* standard in part based on his new expert evidence rebutting prosecution trial testimony about blood evidence. In 2009 the U.S. Supreme Court granted the *writ of certiorari* in the *habeas* case of *Cone v. Bell*, 129 S.Ct. 1769, 173 L.Ed.2d 701, 556 U.S. ___ (U.S. 04/28/2009), stating in regards to the prosecution's concealment of *Brady* evidence, "The evidence might also have **rebutted** the State's suggestion that Cone had manipulated his expert witnesses into falsely believing he was a drug addict when in fact he did not struggle with substance abuse." *Id*. at ¶73.

Furthermore, in granting the *writ of certiorari* in the *habeas* case of *Miller-El v. Cockrell*, 123 S.Ct. 1029, 537 U.S. 322, 154 L.Ed.2d 931 (U.S. 02/25/2003), the U.S. Supreme Court considered the Petitioner's rebuttal evidence of a prosecutor's argument ("In rebuttal of the prosecution's explanation…" ¶77)

The Nevada Supreme Court recognized in 1865, " The rule of law and of common sense is, that where there is a reasonable doubt as to whether a prisoner has committed the act or offense with which he stands charged, he must be acquitted, whether that doubt arises from a defect in the evidence introduced by the State or from the evidence introduced in rebuttal by the defendant." *State of Nevada v. Waterman et al.*, 1 Nev. 543, ¶50 (Nev. 12/31/1865) The Response does not provide any authority that that reasoning concerning rebuttal evidence does not apply with equal force to a writ of *habeas corpus* where the standard the Petitioner must meet to be granted relief is dramatically lower than "reasonable doubt."

That the U.S. Supreme Court considers rebuttal evidence and rebuttal argument in *habeas* cases is important for the Court to be aware of because the Response falsely argues without any case support, that Petitioner's new evidence that the Response characterizes as "rebuttal" evidence

shouldn't be considered or somehow given less consideration. The Response does not provide any legal basis for that argument and the Petitioner requests that the Court summarily disregard every negative inference to what the Response characterizes as "rebuttal" evidence. The U.S. Supreme Court considers rebuttal evidence as evidence in a ***habeas*** proceeding, and the Response presents no case support to the contrary, even though the Petitioner think most of the Response's references to rebuttal evidence are inaccurate. Rebuttal evidence is literally a part of every ***habeas corpus*** petition based on new evidence, and in fact the Innocence Project in New York reports that more than 75% of DNA exonerations are based on new DNA evidence rebutting the eyewitness evidence relied on by the jury to convict the innocent defendant.

Furthermore, the cumulative evidence of grounds can constitute a violation of the Petitioner's constitutional rights and warrant granting the Petitioner's ***habeas corpus*** petition, even though individual grounds don't do so by their allegation of a violation of the Petitioner's right to a due process, a fair trial, an impartial jury, effective assistance of counsel, etc. The Nevada Supreme Court ruled in ***Evans v. State***, 117 Nev. 609, 28 P.3d 498 (Nev. 07/24/2001), "The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.*fn95 Evans argues that such an effect exists here." *Id*. at ¶167. In 2009 the U.S. Supreme Court granted the ***writ of certiorari*** in the ***habeas*** case of ***Cone v. Bell***, supra, in part based on the fact that evidence viewed cumulatively, may have persuaded the jury …" *Id*. at ¶73.

The Petitioner's new evidence also must be viewed "collectively" and not piece meal or individually, since evidence that by itself can be deemed harmless, may not be when considered collectively with other evidence. In May 2010 the federal Ninth Circuit Court of Appeals ruled:

> As is usually the case with **pieces of evidence, each item of information** Kristi sought to introduce **gave meaning and coherence** to Garza's admission, put it in context, and explained it. The state court of appeal, however, addressed each item independently without connecting it to the chain of circumstances, **thereby missing the probative force of the whole chain**." *Lunbery v. Hornbeak*, No. 08-17576 (9th Cir. 2010) at ¶68. (emphasis added to original)

That the Petitioner's prosecutors didn't, and still don't (since Kephart signed the Response) believe she is guilty is reflected in another issue that runs throughout her writ of *habeas corpus*. The Petitioner states many dozens of times variations of the following: "At trial the prosecution did not present any physical, forensic, eyewitness, documentary, surveillance or confession evidence the Petitioner was anywhere in Clark County, Nevada at any time on July 8, 2001 – the day of Bailey's murder." (Writ of *habeas corpus*, 235) The Response does not deny a single time that the Petitioner wasn't anywhere in Clark County on July 8, 2001 – but only asserts that she was convicted by the jury and her convictions were affirmed on direct appeal. The Response's failure to deny the Petitioner wasn't in Clark County on the day of Bailey's murder is consistent with the Petitioner's new evidence that she was in Panaca on July 6, 7 and 8, and since she was in Panaca it is physically impossible she committed her convicted crimes and she is actually and factually innocent. That is why she has been able to obtain so much new evidence.

The Petitioner's twenty-one new evidence grounds include forensic entomology, forensic pathology, and forensic scientific expert evidence that is even more compelling than the new witness evidence regarding Kephart and DiGiacomo referred to above, and they unquestionably meet the federal (*Schlup*) and Nevada (*Pacheco*) actual innocence standards for new evidence in a writ of *habeas corpus*.

1. **New entomology evidence (Grounds 1-3).** [Petitioner notes that heading should be – New forensic entomology and forensic pathology evidence (Grounds 1-3)]

The Response makes numerous misstatements regarding Grounds 1 and 3, and does not either deny or address the substance of the new evidence in Grounds 1 and 3, or the new evidence in Ground 2 at all.

The Response to Grounds 1-3 is primarily based on the argument that Dr. Simms testified a body becomes completely stiff from rigor mortis 24 hours after death. However, what the Response doesn't state is that Dr. Simms own testimony on *cross-examination* undermines the Response's assertion. Dr. Simms testified on cross-examination:

> Q. And you'd indicated that rigor mortis is usually fully formed by 12 to 18 hours?
> A. 12 to 18 to 24, I probably kinda move it out to 24, but you know there's a continuum kinda from when it starts after a few hours to when it finally gets formed,

> And you know, **I don't have any problem with 12 to 24 hours as a good time frame**. (Trans. VIII-20-21, 9-20-2006)

Dr. Simms also testified on re-cross examination there is a "probability" Bailey died eight hours prior to his body's examination at 3:50 a.m. by the coroner's investigator who described Bailey as "stiff." (Trans. VIII-78-79, 9-20-2006) Consequently that testimony shortens to 8 hours the time that Dr. Simms testified it takes a body to fully develop rigor mortis – 3:50 a.m. ("stiff") minus 7:50 p.m.(time of death) = 8 hours to fully develop rigor mortis.

Furthermore, Dr. Simms provided sworn testimony during the Petitioner's preliminary hearing that Bailey died "more likely than not some time within 12 hours of when he was discovered." ***State v. Lobato***, No. C177394, Reporter's Transcript of Preliminary Hearing, 08-07-2001, 33.) That means he died sometime between moments before his body was discovered "around 10 p.m." and 10 a.m. on July 8. Dr. Simms' testimony reduces to about six hours the time it takes for full rigor mortis to develop – 3:50 a.m. ("stiff") minus 10:00 p.m.(approx. time of death) = about 6 hours to fully develop rigor mortis. Dr. Simms has never recanted his preliminary hearing testimony that he gave in August 2001 less than a month after Bailey's autopsy when the details were still fresh in his mind. Prior to testifying at the Petitioner's first trial Dr. Simms confirmed to her attorney Philip Kohn that Bailey died no more than 10-12 hours before discovery of his body.

Thus completely contrary to the Response's false assertion, Dr. Simms' sworn testimony in the Petitioner's case establishes that Bailey could have died as early as minutes before his body's discovery "around 10 p.m.", which means he was in full rigor mortis ("stiff") 6 hours or less after his death.

Furthermore, the Response falsely and misleadingly makes the declarative statement "Bailey died within 8 to 24 hours from the time he was examined at the scene." (Response, 5) Dr. Simms did not testify positively, but only that there is a "probability" Bailey died within 8-to-24 hours of the examination. (Trans. VIII-78-79, 9-20-2006) There is a huge difference between a definite statement and a "probability," and in fact, Dr. Simms' preliminary hearing testimony establishing Bailey could have died "around 10 p.m." and been in full rigor mortis less than six hours later is proof of that.

Consequently, the truth is that Dr. Simms' has provided unrepudiated testimony in the Petitioner's case that is 100% consistent with Bailey's time of death between 8 p.m. and "around

10 p.m." which is when the new forensic entomology and the forensic pathology evidence in Grounds 1, 2, and 3 establishes he died.

Ground 1 and 3 – New Forensic Entomology Evidence

Furthermore, the Response does not address the veracity of the new forensic entomology evidence in Ground 1 that to a "reasonable medical certainty" Duran Bailey died after sunset at 8:01 p.m., "most probably" after dark at 9:08 p.m., and that it is not "possible that the remains were present during the entire daylight hours of 8 July 2001." (Exhibit 1, writ of *habeas corpus*, 5) Nor does it address the veracity of the new forensic entomology evidence in Ground 3 that because of the absence of bites by nocturnal predators (in particular cockroaches) Bailey's body could not have lain in the trash enclosure for any significant length of time after dark at 9:08 p.m. without being fed on.

Dr. Gail S. Anderson, Ph.D is one of the three forensic entomologists who provided a Report about Duran Bailey's time of death. Dr. Anderson reviewed the State's Response to the new forensic entomology evidence. Dr. Anderson's response is attached to this as Exhibit 1, and it states in part:

> Forensic Entomology is a well recognized science with a history going back over a thousand years. Its' modern roots go back well over one hundred years. Board Certification has been available since 1996 and both Dr. Goff and I are certified as Board Certified Forensic Entomologists with the American Board of Forensic Entomology (ABFE). I am presently Vice-Chair of ABFE and Dr. Goff has been Chair in the past and was the inaugural Chair. There are thousands of published studies in this field, published in prestigious journals with several national and international societies devoted exclusively to forensic entomology, including the North American Forensic Entomology Association (I am past president) and the European Association of Forensic Entomology. We have a strong presence in the American Academy of Forensic Sciences.
>
> …
>
> [In Ms. Lobato's case] I am not attempting to look at a photograph to age insects, I am simply looking for the **presence or absence** of insects. This is a very simple thing to determine from a series of photographs. I and other forensic entomologists have carefully examined these photographs and see no evidence whatsoever of carrion insects, either as flies or as clumps of eggs.
>
> …
>
> The State comments twice that the photographs were examined years after they were taken. This has no relevance whatsoever. The photographs are as clear a representation of the image photographed today as they were years ago. The photographs are well taken and in excellent condition. There age is of no

> consequence. In fact, as they can now be examined in electronic format, this allows the observer to increase the size of the image at will, almost as if one were using a microscope.
>
> My original opinion stands, and I do not feel that the State's response to the insect evidence has any validity whatsoever.
> (See Attached Exhibit 1, Dr. Gail M. Anderson's Response, 7 September 2010, 1-3.)

Dr. Anderson makes clear that the Response's one effort to cast an aspiration on the new forensic entomology evidence – that the three doctors relied on crime scene and autopsy photos – "has no relevance whatsoever" to their analysis of the Petitioner's case, and the State's response to the insect evidence has no "validity whatsoever." *Id.*

None of the three forensic entomologists identified either fly eggs or predator (including cockroach) bites on Duran Bailey's body from official full color crime scene and autopsy photographs. Consistent with their findings is none of the crime scene analysts or the Coroner's Investigator who examined his body at the scene, included in their respective notes and reports that they observed any signs of insects or eggs in Bailey's wounds or orifices, or that he had a single predator bite. In addition, ME Lary Simms did not make any reference in his Autopsy Report, or in his Preliminary Hearing or trial testimony that he observed any insects or eggs in Bailey's wounds or orifices, or that he had a single predator bite. As Dr. Anderson notes in her Response of September 7, 2010, clumps of fly eggs could have been visible in Bailey's "myriad" of wounds and his orifices after exposure for even a few minutes during daylight, and "These would have been extremely noticeable even to the untrained eye." (*Id.* at 2.) Consequently there is 100% consistency between the findings of the forensic entomologists that no fly eggs were present on Bailey's body and the many people, including ME Simms, who personally saw his body.

Because the Response attempts to cast aspersions on the validity of the forensic entomology evidence, the Petitioner will add that a fourth forensic entomologist, Dr. Jason H. Byrd, Ph.D. who has much experience in predator (cockroach) bites on dead bodies agreed to review *pro bono* the same photographic evidence as the other experts. Dr. Byrd was only asked to review the photos for predator bites. He was not asked to provide a time of death for Bailey, and he reported the following on February 1, 2010:

> I found no evidence of roach scavenging on the body. Additionally, I found no evidence of eggs from the insect family Calliphoridae. (See attached Exhibit 2, Report of Dr. Jason H. Byrd, February 1, 2010.) (Note: Calliphoridae are commonly known as blow-flies, carrion flies, bluebottles, greenbottles, or cluster flies.)

Dr. Byrd is one of the fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology (ABFE), and he is the Educational Program Director with the William R. Maples Center for Forensic Medicine, Department of Pathology, Immunology and Laboratory Medicine, University of Florida, College of Medicine, in Gainesville, Florida.

So four forensic entomologists, three of whom are among the elite fifteen in North America certified by the ABFE, have reviewed the crime scene and autopsy photos, that as Dr. Anderson points out in her Response can be superior to an in person examination because an area of a photo can be increased in size "almost as if one were using a microscope." (See Attached Exhibit 1, 2) Those four forensic entomologists have all independently arrived at the same conclusions: Bailey neither had any fly eggs nor predator bites on his corpse. That means based on the science of forensic entomology "with a history going back over a thousand years," that to a "reasonable scientific certainty" Bailey died after sunset, which was at 8:01 p.m. on July 8, 2001, and "most probably" he died after dark, which was at 9:08 p.m.

The Response does not deny or address the science of entomology or the new forensic entomology evidence upon which Bailey's time of death is determined in Ground 1 and 3, and that constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

Rigor Mortis

The Response hinges its challenge to the new forensic entomology evidence in Ground 1 and 3, and presumably the new forensic pathology evidence the Response is silent about in Ground

2, on Dr. Simms' testimony that a body doesn't become completely "stiff" from rigor mortis until 24 hours after death. (Response, 4) Apart from having nothing to do with the forensic entomology evidence in Grounds 1 and 3, that argument fails for a number of reasons, and some of those reasons are explained above.

The Response falsely claims the Petitioner does not contradict or challenge the accuracy of Dr. Simms testimony regarding Bailey's rigor mortis/time of death. The writ of ***habeas corpus*** specifically states:

> Exhibit 101 also illustrates how misled the jury was by Medical Examiner Lary Simms' uncontested trial testimony that it is "possible" Bailey could have died as early as 3:50 am, and lain in the trash enclosure for more than 18 hours before being discovered. (Writ of ***habeas corpus***, 28, 31.)

Dr. Simms testimony about Bailey's time of death was based on his testimony about Bailey's rigor mortis. If the jury was misled about Bailey's time of death, then it was misled about Dr. Simms' testimony regarding Bailey's rigor mortis upon which it was based. (Trans. VIII-78-79, 9-20-2006) Furthermore, the issue of Bailey's rigor mortis is specifically addressed in Dr. Glenn M. Larkin's Affidavit attached as Exhibit 4 to the writ of ***habeas corpus***, and which is referred to in Grounds 1, 2 and 3. Grounds 1, 2 and 3 all specifically state: "Petitioner incorporates by reference the facts in the supporting exhibits." Consequently, all the information in Dr. Larkin's Affidavit referred to in Grounds 1, 2, and 3 is a part of the writ of ***habeas corpus***.

Dr. Larkin's Affidavit undermines the veracity of Dr. Simms' testimony regarding Bailey's rigor mortis that he relied on to determine his time of death, and that the jury relied on to convict the Petitioners. Dr. Larkin is a forensic pathologist with 46 years experience and a leading expert on the subject of determining time of death. Dr. Larkin's Affidavit states:

> Rigor is a fickle sign, and cannot be used alone to determine the estimated time of death. A person actively involved in exercise—as in a fight for life—will enter RIGOR quicker than a person not exercising. See table of rigor mortis according to twenty experts. (Exhibit 4, 7, writ of ***habeas corpus***)

The table of rigor mortis according to twenty experts is on pages 12 and 13 of Dr. Larkin's Affidavit (writ of ***habeas corpus*** Exhibit 4).

The table of rigor mortis according to twenty experts (including Dr. Cyrus H. Wecht and Dr. Larkin) with published work about rigor mortis, shows that a body reaches peak rigor mortis from between a **minimum of 4 hours** and a **maximum of 18 hours**. Only two of the experts reported a range of 12 to 18 hours for peak rigor mortis, and one reported 8 to 18 hours for peak rigor mortis. Not a single one of these experts reported that it takes 24 hours for a body *in any case* to reach maximum stiffness. Yet Dr. Simms testified on direct examination "at about 24 hours your body is stiff." (Trans. VII-144, 09-19-2006) Dr. Simms' testimony **exceeded by six hours** the maximum of 18 hours it takes for a body to become "stiff" reported by any of these twenty published experts, and **exceeded by 20 hours** the four-hour minimum time it takes. The Response does not deny or address the rigor mortis research by the twenty medical experts cited in Dr. Larkin's Affidavit. (Exhibit 4, 12-13, writ of *habeas corpus*)

Since the Response focuses on rigor mortis, the Petitioner will add that the research of the 20 experts cited in Exhibit 4 is supported by Niederkorn's research that "is commonly cited in textbooks." (Derrick J. Pounder, "Postmortem Changes And Time Of Death," Department of Forensic Medicine, University of Dundee, 1995, 8.) Niederkorn made observations of rigor mortis in 113 cases "with scrupulous exactness." *Id.* He found that the completion of rigor mortis within 6 hours of death occurred in 82% of the cases and within 8 hours after death occurred in 88% of the cases. Rigor mortis was complete in 97% of the cases within 10 hours, and the longest it took was 13 hours after death in one case (less than 1%). The shortest it took was 2 hours.

Duran Bailey's body was "stiff" when examined by Pierce-Stauffer about 6 hours after it was discovered "about 10 p.m", which means the rigor mortis research supports that there is an 82% probability Bailey died "about 10 p.m." and an 88% probability he died by 8 p.m. Those probabilities, in conjunction with the twenty experts cited in Exhibit 4, provides compelling new evidence supporting the new forensic entomology and forensic pathology determinations that Bailey's time of death was between 8 p.m. and "around 10 p.m." So the new forensic entomology evidence in Ground 1 and 3 (and the new forensic pathology evidence in Ground 2 and 3) is consistent with the published rigor mortis literature in Exhibit 4. Furthermore, Niederkorn's

research shows the latest Bailey could have died was 2:50 p.m. – and there is less than a 1% probability of that – while there is a 97% probability he died after 5:50 p.m.

Furthermore, the rigor mortis research supports Dr. Simms' own testimony that undercuts the Response's argument that he testified it takes "24 hours" after death for a body to become "stiff," because he testified there is a "probability" Bailey died as early as 7:50 p.m. (Trans. VIII-78-79, 9-20-2006) (Bailey died 8-24 hours before his body's exam at 3:50 a.m.) That means Bailey would have become "stiff" in only 8 hours – 7:50 pm to his 3:50 am exam on July 9. Even that testimony by Dr. Simms exceeds by four hours the 20 experts minimum time for full rigor mortis, and so it misled the jury. In addition, Dr. Simms' "24 hour" rigor mortis testimony is undercut by his testimony during the preliminary hearing that Bailey died "more likely than not some time within 12 hours of when he was discovered." ***State v. Lobato***, No. C177394, Reporter's Transcript of Preliminary Hearing, 08-07-2001, 33.) That testimony by Dr. Simms means Bailey could have died minutes before his body was discovered "around 10 p.m."

Simms testimony during the Petitioner's preliminary hearing when the details of Bailey's autopsy would have been fresh in his mind, allowed for Bailey to have died from 8 p.m. to "around 10 p.m.", which is the period of time the new forensic entomology and forensic pathology evidence in Grounds 1, 2 and 3 establishes he died.

Ground 2 – New Forensic Pathology Evidence

The Response doesn't deny or address Ground 2's new forensic pathology evidence that based on medical science:

> "Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk." (Exhibit 4, 8.)

Ground 2 is supported by Dr. Larkin's Affidavit in which he writes about the "four captains of the Men of Death" and that "environmental" temperature is the "main determining variable" affecting a body's changes after death, including rigor mortis and decomposition. Las Vegas has extreme heat in July. Dr. Larkin notes the early July extreme heat conditions inside the trash enclosure, and that Bailey's defensive wounds on his fingers suggest he was exerting himself just

before death. Dr. Larkin writes that "A person actively involved in exercise—as in a fight for life—will enter RIGOR quicker than a person not exercising. See table of rigor mortis according to twenty experts." (Exhibit 4, 7) Dr. writes that the "torrid" conditions in the trash enclosure and the minimal internal cooling inside Bailey's body means that "all the captains of death moved at an accelerated pace." (Exhibit 4, 7) The extreme heat and Bailey's physical exertion means he would have become "stiff" from rigor mortis faster than normal and more quickly returned to a flaccid state, and his body's decomposition would have accelerated.

As Dr. Larkin explains, the condition of Bailey's body under the torrid conditions in the trash enclosure and his physical exertion were factored in his determination that "Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk." (Exhibit 4, 8.) That means Bailey died between 8 p.m. and "around 10 p.m." when his body was discovered. (Trans. IV-54, 9-14-2006) Dr. Larkin also determined, consistent with the new forensic entomology evidence in Ground 1, "The lack of blow fly infestation suggests an even shorter time between Bailey died and was discovered." (Exhibit 4, 8.); and there was "the absence of predatory animal bites." (Exhibit 4, 2)

The Response restates some of Dr. Simms' testimony from Petitioner's trial in response to the new forensic entomology evidence in Ground 1 and 3 – but that does not address Ground 2 and the basis upon which Dr. Larkin determined his new forensic pathology evidence of Bailey time of death. The Response is silent about Ground 2 and acts as if it simply doesn't exist.

The Response's failure to deny or address or even make any mention of Ground 2's new forensic pathology evidence constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The jury relied on Dr. Simms' expert evidence to convict the Petitioner, including his testimony about Bailey's possible time of death, and his rigor mortis testimony that Bailey could have become "stiff" 24 hours after his death. That testimony had the extraordinary prejudicial effect of misleading the jury to believe Bailey "possibly" could have died as late as 3:50 a.m. on July 8. The evidence related above about rigor mortis research and the new forensic entomology and forensic pathology evidence completely discredits Dr. Simms' testimony about rigor mortis and Bailey's possible time of death the jury relied on to convict the Petitioner. The prosecution buttressed Simms' erroneous and misleading testimony by negatively commenting on the veracity of the Petitioner's three alibi witnesses who testified she was in Panaca from after midnight until after 7 am: The prosecution "refreshed" the "minds" of the jurors that they were relatives and their testimony was "new" because they hadn't testified during a prior proceeding.

The Response falsely states on page 5 – "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." There is no such claim in Grounds 1-3, which states:

> The prosecution also argued to the jury that credible alibi witnesses placed Petitioner on July 8, 2001, at her parents' home in Panaca, Nevada from "11:30 a.m. through that night," and that a telephone call from the Lobato home to the cell phone of Petitioner's step-mother Rebecca Lobato at "10 a.m." was probably made by the Petitioner in Panaca. (writ of *habeas corpus*, 24)

It is in the trial record that the prosecution "refreshed" the "minds" of the jurors during their argument that the alibi witness evidence established the Petitioner **was in Panaca** on July 8 from at least "11:30 a.m. through that night," and that she probably there at "10 a.m." and made a telephone call to her step-mother. (Trans. XIX-130, 10-5-06) It is a fact that the prosecution did not challenge the unrebutted alibi evidence at trial establishing the Petitioner was "probably" in Panaca from 10 a.m., and definitely there from 11:30 a.m. through about 1 a.m. on July 9. The prosecution also did not challenge in closing arguments the unrebutted alibi evidence by four witnesses that she left Panaca for Las Vegas after midnight (around 1 a.m.) on July 9, 2001. ADA Sandra DiGiacomo "refreshed" the "minds" of the jurors during her closing argument:

> "And people see her from 11:30 a.m. through the night. You have multiple witnesses that came in and marked on the little calendar. And look too, the phone call from the house to her mother to her cell phone `cause she's at work is about 10:00 a.m. That's probably when the defendant got home." (Trans. XIX-130, 10-5-2006)

The unrebutted alibi evidence the Petitioner was in Panaca from the mid-to-late morning of July 8 until the early morning of July 9 was compelling enough that the prosecution did not challenge that it established she was in Panaca during that entire period of time. In contrast, the prosecution's closing arguments openly challenged the defense about many issues, including the evidence of the three alibi witnesses who placed the Petitioner in Panaca on July 8 from after midnight until after 7 am: The prosecution tried to denigrate the credibility of that testimony by "refreshing" the juror's "minds" that those witnesses were "relatives" and they provided "new" testimony. (Trans. XIX 137, 10-5-2006)

Indeed it was for the jury to decide during deliberations the credibility of the alibi witnesses – and the Petitioner specifically states in Grounds 1-3 the "prosecution also ***argued*** to the jury that credible alibi witnesses" established she was in Panaca from 11:30 a.m. until around 1 a.m. on July 9 when Doug Twining arrived in Panaca and she travelled with him to Las Vegas. (Trans. XIX-130, 10-5-2006) The Petitioner never states the prosecution *told* the jury she was in Panaca during that period of time, only that they agreed with the defense during their argument that the evidence at trial established she was in Panaca from the mid-to-late morning of July 8 until the early morning of July 9.

The prosecution made the concession the Petitioner was in Panaca probably from "10 a.m.," and definitely from "11:30 a.m. through that night" while it was doing its best to convict her by convincing the jury that she was in Las Vegas when Duran Bailey was murdered "sometime before sunup" which on July 8 was at 5:30 a.m. (Exhibit 29, writ of *habeas corpus*) The prosecution was convinced the trial testimony established the Petitioner was in Panaca "probably" from "10 am" and definitely from "11:30 a.m." until early on the morning of the 9th when testimony by multiple witnesses corroborated by telephone records established she left for Las Vegas, and that is what the prosecution "refreshed" the "minds" of the jury about during their arguments. So it is common

sense to think that a "reasonable" juror would come to the same conclusion as the prosecution which was doing its best to convict the Petitioner.

Furthermore, the prosecution did not breathe one word during the trial or their closing arguments suggesting they believed Bailey was murdered on the mid-to-late morning, afternoon or evening of July 8, and that was because of the Petitioner's credible alibi witnesses establishing she was in Panaca. The entire focus of the prosecution's case was Bailey was murdered "sometime prior to sunup" and to establish the Petitioner could have been on Las Vegas in the early morning of July 8 they went all out to discredit her alibi witnesses who saw her in Panaca from after midnight until after 7am.

Consequently, it is only by ignoring the trial evidence concerning the credible alibi witnesses referred to in Grounds 1-3 that the Response on page 5 can make a claim about what is in fact a non-existent "fatal flaw" that those Grounds rely on the prosecution's argument, and not the trial testimony by almost a dozen alibi witnesses and telephone records establishing the Petitioner was in Panaca from "probably 10 a.m. and definitely from 11:30 a.m. until around 1 a.m. the following morning. And in fact, the very Jury instruction No. 41 cited in the Response states in the part NOT highlighted in bold:

> 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 …. (**Response, 5)

The prosecution's discussion of the Petitioner being in Panaca from "11:30 a.m. through that night" was in the words of instruction 41, "refreshing in [the jurors] minds the evidence" introduced during the trial. The Petitioner's reliance in Ground 1-3 on the trial testimony of numerous alibi witnesses establishing she was in Panaca from the mid-to-late morning of July 8 until the early morning of July 9 is common sense, and she would be foolish not to take advantage of the fact that the prosecution conceded the credibility of that alibi witness testimony, by including it in her writ of *habeas corpus.*

The Response falsely states on Page 6, "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." The prosecution made no such argument and it is not in the

trial record on the pages cited. That sentence of the Response is false and deceptive, and therefore the Petitioner requests that the Court strike that sentence from the Response and give it no consideration.

Furthermore, the prosecution **could not have** made that argument (at least legitimately) because there was **zero** evidence presented at trial the Petitioner was in Las Vegas on the evening of July 8 – **100% of the evidence** at trial was she was in Panaca "probably" from 10 a.m. and definitely from 11:30 a.m. until about 1 a.m. on July 9.

The Response misstates on Page 6 the nature of the new evidence in Grounds 1-3 by the Petitioner's four expert witnesses, by stating "These experts' declarations do nothing more than rebut the expert testimony of Dr. Simms as to when Bailey died." (Response, 6)

Dr. Simms' testimony established the latest "possible" time of Bailey's death was 7:50 p.m. (Trans. VII-20, VII-21 9-20-06) The Report/Affidavits of the three forensic entomologists and the forensic pathologist that are included as Exhibits in the writ of *habeas corpus* include evidence not introduced at trial and that the jury COULD NOT have considered: that Bailey died sometime after 8 p.m. and he could have died within minutes before his body was discovered "around 10 p.m." The jury never considered that Bailey died within two hours of his body's discovery – because there was no evidence introduced about it.

New evidence submitted in **any** case somehow puts some trial evidence in a different complexion than the trier of fact relied on – that is what makes it "new evidence." There is no question about the importance of the Petitioner's new forensic entomology and forensic pathology evidence that Bailey died sometime during the two hours between 8 p.m. and "around 10 p.m." on July 8, because the trial testimony establishes she was in Panaca until around 1 a.m. on July 9, and that unrebutted alibi evidence is so compelling the prosecution "refreshed" the "minds" of the jurors about it.

The three forensic entomologists and the forensic pathologist can testify at an evidentiary hearing and be subjected to cross-examination about their Affidavit/Reports, so the reference to *Herrera* is inapplicable. Furthermore, all of the experts are providing their expertise *pro bono* and they have no personal connection of any kind to the Petitioner.

The Response falsely and misleadingly states the three forensic entomology and one forensic pathology Reports/Affidavits "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." (Response, p. 6) It was the prosecution – not the Petitioner – that introduced evidence at trial about rigor mortis and Bailey's time of death. Dr. Simms was the prosecution's expert witness – not the Petitioners – and it was he that testified full rigor mortis develops 24 hours after death and it is possible Bailey died as early as 3:50 a.m. It was the prosecution that argued to the jury that the Petitioner's alibi witnesses establishing she was in Panaca from after midnight until after 7 a.m. on July 8 were not credible because they were relatives and their testimony was "new" and that the evidence established Bailey was murdered "sometime before sunup." (Trans. XIX 121, 10-5-06) The Petitioner's unrebutted alibi evidence she was in Panaca "probably" from 10 a.m. and definitely from 11:30 a.m. through around 1 a.m. on July 9 was so credible that the prosecution "refreshed" the "minds" of the jurors about it during their closing argument. However, the prosecution not only did not acknowledge the credibility of her alibi witnesses who saw her from after midnight until after 7 a.m. – but tried to denigrate their truthfulness by arguing they were relatives and they hadn't testified about that previously. (Trans. XIX 137 10-5-06)

The entire focus of the prosecution in their arguments about the evidence to the jury, and their theory of the crime upon which the Petitioner was prosecuted was that Bailey was murdered "sometime before sunup" on July 8. So at trial the unrebutted alibi evidence that the Petitioner was in Panaca "probably" from 10 a.m. and definitely from "11:30 a.m. through the night." (Trans. XIX 130, 10-5-06) didn't make any difference to the outcome of the trial – because the Petitioner did not introduce ANY evidence about Bailey's time of death, much less that he died after 9:30 a.m. (The earliest she could have been in Las Vegas based on trial testimony that the fastest "possible" travel time from Las Vegas to Panaca by car is two hours and the unchallenged alibi evidence established she was in Panaca at least by 11:30 a.m., and probably at "10 a.m.")

Consequently, the new forensic entomology and forensic pathology evidence of Bailey's time of death sometime between 8 p.m. and "around 10 p.m." provides new evidence the jury did not have to seriously consider that Bailey died after 9:30 a.m. – when her alibi evidence credibly

establishes she could not have been in Las Vegas, and not even the prosecution challenged the veracity of that alibi evidence when they "refreshed" the "minds" of the jurors about her alibi evidence during their argument.

The Response misstates the nature and importance of the Petitioner's new forensic entomology and forensic pathology evidence in concluding by stating, "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." (Response, p. 6) To summarize what has been stated previously, the testimony of the prosecution's lone medical expert at trial established it is "possible" Bailey died as late as 7:50 p.m. on July 8, 2001, and since the Petitioner presented no expert time of death testimony, the jury did not consider any evidence that Bailey could have died anytime after 7:50 p.m. The new forensic entomology evidence in Ground 1 establishes to a "reasonable scientific certainty" that Duran Bailey died after sunset at 8:01 p.m. on July 8, 2001, and "most probably after dark at 9:08 p.m. The new forensic pathology evidence in Ground 2 establishes that "more likely than not" Bailey died within two hours of his body's discovery at about 10 p.m., which means he died sometime between 8 p.m. and 10 p.m. The new forensic entomology and forensic pathology evidence in ground 3 establishes that Bailey died sometime after it dark at 9:08 p.m.

The four experts involved in Grounds 1, 2 and 3 based their determinations on their individual analysis of the evidence, not by finding things about Dr. Simms' testimony they disagreed with as suggested by the Response.

As explained previously the Response does not make any credible attempt to address, refute or even challenge the new evidence in Grounds 1, 2 and 3, and therefore under Nevada State precedent the Responses to Grounds 1, 2 and 3 individually and cumulatively constitute a "confession of error" ***Polk v. State,*** 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id.*** at ¶28). See also, ***Bates v. Chronister,*** 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id.*** at ¶27) See also, ***Moore v. State,*** 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or

logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The new evidence in Grounds 1, 2 and 3 of Bailey's time of death after 8 p.m. on July 8, 2001, individually and cumulatively, in conjunction with the credible trial alibi witness evidence the Petitioner was in Panaca "probably" from 10 a.m. and definitely from 11:30 a.m. through about 1 a.m. on July 9, establishes individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence presented in habeas proceedings." ***Schlup v. Delo***, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995). That same new evidence meets the Nevada standard in ***Pacheco v. State***, 81 Nev. 639, 408 P.2d 715 (Nev. 12/13/1965).

2. Dr. Redlich's opinion on Defendant's "false confession" (Ground 4). [Petitioner notes that this heading does not accurately state the substance of the claim that is actually – New evidence the Petitioner's Statement was not a "confession" (Ground 4)]

The heading of the Response to Ground 4 falsely and misleadingly describes it, because the substance of Ground 4's new expert psychology evidence is the Petitioner's Statement has nothing whatsoever to do with Duran Bailey's murder.

Dr. Allison Redlich has a Ph.D in Developmental Psychology with a focus on psychology and the law. She has been published extensively in peer-reviewed publications. Dr. Redlich is one of the leading experts in her field in North America and she is willing to testify during an evidentiary hearing and be subjected to cross-examination about her Report dated February 10, 2010. That Report is Exhibit 5 in the writ of *habeas corpus*. So the Response's reference to *Herrera* is inapplicable.

The Response falsely and misleadingly states: "Dr. Redlich simply peruses over the evidence already adduced at trial and relays her subjective opinion…" (Response, 6)

Dr. Redlich's Report about the Petitioner's Statement of July 20, 2001, is based on her many years of training that includes techniques for analyzing a defendant's statement for its truthfulness. Neither the defendant nor the prosecution introduced the testimony of a psychology expert qualified to analyze the Petitioner's Statement and determine if it is a confession as the

prosecution contended and in fact told the jury. (Trans. XII-59-60 9-27-06) Consequently, it is impossible that Dr. Redlich's Report does not provide new evidence based on her years of specialized psychological training that the jury did not consider. That is proven by her Report that states in part:

> In addition, in proven false confession cases, there is often no other evidence linking the suspect to the crime except the false confession statement. Similarly, in some of these cases, there is an absence of evidence that is consistent with the commission of the crime and/or the confession statements. To my knowledge, there is no physical evidence linking Ms. Lobato to Mr. Bailey's murder, as well as a lack of corroborating evidence given the manner of the murder.
>
> Another commonality found in proven false confession cases is that the confession statements are not generative in they do not lead to new evidence and/or tell the police details that are not already known. To my understanding, Ms. Lobato's statements did not provide any new evidence or information concerning the Bailey murder. (Exhibit 5, writ of ***habeas corpus***, 2)

Although the Petitioner did not confess to her convicted crimes, as a frame of reference for evaluating her statement Dr. Redlich refers to proven false confession cases – and the similarities of the statement of those innocent persons and the Petitioner's Statement.

Among the "materials" Dr. Redlich reviewed to arrive at her expert determination is the written LVMPD transcript of the Petitioner's Statement, which the jury did not have access to because only the audio of the Statement was introduced into evidence. The Petitioner is very emotional in the audio and her words freely poor out, so the hard copy the jury did not have to examine allowed Dr. Redlich to carefully examine the Petitioner's words.

The Response falsely and misleadingly states: "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. … As such, this is not new evidence, just the same evidence presented in different form." (Response, 6)

The Response ignores that Dr. Redlich's Report is an expert professional analysis of the Petitioner's Statement based on her specialized psychology training and education. The jury didn't hear any qualified expert testimony of any kind regarding the Petitioner's Statement, much less

expert psychology testimony, and therefore it is impossible that her Report and testimony at requested evidentiary hearing could be "redundant.

Professional reports cite relevant case facts in the course of giving context to their analysis of a case. Whole paragraphs of Dr. Redlich's Report are devoted to providing the new evidence of her analysis of the Petitioner's Statement that the jury did not hear any testimony about. Two of those paragraphs are cited above. No expert in Dr. Redlich's field testified, so she provides the expert analysis of the Petitioner's Statement the jury did not hear explaining **why** it describes the attempted rape of the Petitioner at a Las Vegas hotel's parking lot in different area of Las Vegas weeks before Bailey's murder in a bank's trash enclosure. As such there is no question that Dr. Redlich's Report is new evidence that would invaluably assist the jury in evaluating the event described in the Petitioner's Statements.

The Response also falsely and misleadingly refers to Dr. Redlich's Report as a "statement." (Response, 6) Dr. Redlich's Report is on the letterhead of the State University of New York at Albany – School of Criminal Justice where she teaches. As stated previously, she is willing to testify during an evidentiary hearing about her analysis of the Petitioner's Statement.

The Response falsely and misleadingly states: "… as even Dr. Redlich admits, Defendant's theory of the case was that her statement pertained to a separate event and was not a "confession." (Response, 7) Dr. Redlich makes no such admission, and to the Petitioner's knowledge Dr. Redlich doesn't even know the "Defendant's theory of the case." She does not mention "theory" or "theory of the case" in her Report that concerns issues related to the Petitioner's Statement.

The Response also cites: *In re Detention of Law*, 146 Wash.App. 28, 41, 204 P.3d 230, 236 (Wash.App. Div. 1, 2008), which is a Washington State case that has no legal weight in Nevada. Obviously there are no Nevada Supreme Court cases that have any relevance to the new evidence in Dr. Redlich's Report. The Petitioner requests that the Court strike all references to the Washington case and give it no consideration. However, if the Court wants to consider dueling out of state cases, the exact opposite conclusion was reached in the Texas case of ***State v. Dodson***, No. 05-07-00649-CR, TX Ct. Crim. Appeals, 3-10-2008, in which expert false confession evidence was admitted when the Defendant denied confessing. Also, in the August 2010 case of ***U.S. v.***

McGinnis, ARMY 20071204, US Army Ct. Crim. Appeals, 08-19-2010, the defendant's conviction was overturned on appeal because the trial court did not allow a false confessions expert to testify that the defendant's statement was not a confession.

The text of NRS 50.275 should be considered when evaluating the admissibility of Dr. Redlich's testimony:

> Testimony by experts. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge. *Id*.

Dr. Redlich's Report and her expert testimony during an evidentiary hearing would directly relate to "assist[ing] the trier of fact to understand" why the Petitioner's Statement is about the attempted rape of her at a different location in a different part of town, during a different month, and by a different person than Duran Bailey, and his murder at the Nevada State Bank on July 8, 2001. The jury heard no expert psychology testimony explaining that her Statement is not a confession to Bailey's murder. The jury only heard Det. Thowsen's testimony during which he tried to convey to the jury his belief that it was a confession to Bailey's murder, by such techniques as that the Petitioner "jumbled" and "minimized" in her Statement, (Trans. XIII-69,71, 9-27-06), and the prosecution's declaration during Thowsen's testimony that she "confessed" in her Statement. (Trans. XIII–59-60, 9-27-06)

Furthermore, the Response does not deny or even mention a key aspect of Ground 4: the new expert evidence by Dr. Redlich that the Petitioner did not "minimize" or "jumble" details in her Statement. Dr. Redlich writes in her Report:

> Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her. (Exhibit 5, writ of ***habeas corpus***, 2)

The Response ignores Dr. Redlich's new evidence that the Petitioner did not "minimize" or "jumble" in her Statement, even though Detective Thowsen's testimony that he believed she did was among the most important – if not the most important – prosecution testimony at trial – because it was the only "evidence" for the jury to consider that even tangentially linked the

Petitioner to Bailey's murder. Thowsen's testimony was relied on by the prosecution to state to the jury during trial the Petitioner's Statement was a "confession" (Trans. XII-59-60 9-27-06), and argue to the jury that the evidence showed the reason her Statement doesn't match Bailey's murder is because she was "minimizing" and jumbling" (Trans. XIX-129-130, 10-5-06)

Since the Response does not deny or even address Ground 4's claim the petitioner did not "minimize" or "jumble" details in her Statement, it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The Response also falsely asserts that Dr. Redlich's testimony is "inadmissible" without citing a single statute or Nevada Supreme Court or U.S. Supreme Court ruling supporting that "bare" assertion. In contrast, the U.S. Supreme Court ruled that a defendant has the due process right to call "witnesses in his favor" in ***Washington v. Texas***, 388 U.S. 14, 17-19 (1967). That due process right includes calling witnesses whose testimony is "material and favorable to his defense," ***United States v. Valenzuela-Bernal***, 458 U.S. 858, 867 (1982). There is no question that Dr. Redlich's Report and proposed testimony at an evidentiary hearing is "material" because it concerns the Petitioner's Statement that the prosecution introduced into evidence at trial, and there is no question that it is "favorable to [her] defense." Consequently, Dr. Redlich's testimony is admissible.

Dr. Redlich provides relevant and admissible expert evidence concerning the Petitioner's Statement that the jury did not have available during deliberations to understand that she was describing a completely different event than Bailey's murder. Since the prosecution stated during the trial and argued to the jury that her Statement was a confession to Bailey's murder, there is no question that Dr. Redlich's calm and rational explanation of why it isn't, particularly in light of the

absence of any details about Bailey's murder in her Statement, makes "it more likely than not that no reasonable juror would have convicted her in light of the new evidence presented" in Ground 4, individually or cumulative with other evidence.

The Response fails to deny or address the substance of Ron Slay's Affidavit of February 10, 2010, (Exhibit 9, writ of *habeas corpus*). Slay is an expert polygraph examiner and his Affidavit states in part:

> 3. I am the owner of Western Security Consultants in Las Vegas, Nevada.
>
> 4. I have performed many polygraph examinations for the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office.
>
> 7. On December 3, 2001, Ms. Lobato came to my office for her polygraph examination.
>
> 10. After conducting the examination I asked Ms. Lobato's attorney, Mr. Kohn, if I/we could meet with Clark County District Attorney Stuart Bell so I could explain to DA Bell why I was certain of Ms. Lobato's truthfulness regarding Mr. Bailey.
>
> 11. I was confident if I thoroughly explained how Ms. Lobato's polygraph examination provided convincing evidence to me of her truthfulness regarding Mr. Bailey's murder, that DA Bell would seriously consider dismissing the criminal charges against Ms. Lobato. *Id.*

There is no question that Slay is an expert and reliable polygraph examiner because the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office all use and rely on his services to assess a person's truthfulness.

Slay's Affidavit explains that he has new evidence regarding his evaluation of the truthfulness of the Petitioner, and her stepmother who is one of her alibi witness. Evaluating the truthfulness of a person about specific issues relevant to a criminal case is precisely the reason the CCDA and other law enforcement agencies rely on Slay's expertise.

The Response states: "Moreover polygraph results are inadmissible at trial unless there is a written stipulation signed by the prosecuting attorney, the defendant, and defense counsel. (Response, 7) The Petitioner has offered the new evidence in Slay's Affidavit that she did not "confess" to Bailey's murder, so the only thing that can bar it from being considered is the Respondent's failure to acknowledge what is already known, the Clark County District Attorney's

Office and other Nevada law enforcement related organizations recognize him as an expert and reliable polygraph examiner at evaluating a witness' truthfulness.

The Response also fails to deny or substantively address the new evidence of Doug Twining's voluntary statement that the Petitioner "confessed" to him that in May 2001 she was sexually assaulted in Las Vegas and defended herself with her knife. (See Exhibit 10, Voluntary Statement of Douglas Howell Twining.) The Response merely states: "Doug Twinning's voluntary statement is also insufficient to meet the *Calderon* standard." (Response, 7) Twining's new evidence was offered in conjunction with the new evidence of Redlich and Slay, and in light of all the other new evidence, so it is not to be considered in isolation as the Response suggests.

None of the new evidence in Ground 4 that the Petitioner did not confess to Bailey's murder in her Statement and that it describes a rape attempt against her in May 2001 was considered by the Petitioner's jury. Based on the new evidence in Ground 4, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup,* at 327.

3. Cumulative alibi witness evidence (Ground 5). [Petitioner notes that this heading doesn't state the substance of the claim that is actually – New alibi witness evidence establishes the Petitioner's Statement describes a different event than Bailey's murder (Ground 5)]

The Response erroneously argues the Petitioner's nine new alibi witnesses in Ground 5 are precluded from consideration as new evidence by the law of the case doctrine. (Response, 7-8) The Response cites ***Hall v. State***, 91 Nev. 314, 315 (1975), but it is inapplicable to Ground 5 because *Hall* involved a factually and legally different situation. The Petitioner is raising an entirely new legal basis for admission of the alibi witness evidence, and she is not making a "more detailed and precisely focused argument" of the legal issue decided by the trial court and affirmed on appeal as the Response erroneously argues. The Response also cites ***Pellegrini v. State***, 117 Nev. 860, 34 P.3d 519 (2001), but it is not applicable because the Petitioner is not attempting to reargue a prior ruling of the new legal basis in Ground 5 for admissibility of the evidence.

Ground 5 includes nine alibi witnesses who were informed by the Petitioner prior to July 8, 2001 – the day of Bailey's murder – that she fought off a rape attempt in Las Vegas by trying to cut

or stab at her assailant's penis or abdomen. None of the witnesses are related to Petitioner, in May through July 2001 some of them lived in Las Vegas and some in Panaca, they have not kept in contact with Petitioner, and several now live in such diverse places as Hawaii and New Mexico. All of the alibi witnesses corroborate to varying degrees, the Petitioner's Statement on July 20, 2001, that describes her fending a rape assault in the parking lot of an east Las Vegas Budget Suites Hotel weeks before the date of Bailey's death. ("[O]ver a month ago" from the July 20 date of the Statement. Writ of ***habeas corpus***, 41)

As the Response describes, the Petitioner's trial counsel attempted to have two alibi witnesses testify about their knowledge that prior to July 8 the Petitioner described fending off a sexual assault in Las Vegas with her knife by trying to cut her assailant's penis. Petitioner's counsel made two arguments for the testimony's admissibility: under a theory of "the completeness of the statement," and NRS 51.105. (Trans. XVI- 77-79, 10-2-2006) Based on those two legal arguments of counsel the trial court ruled the testimony was inadmissible and the appeals court did not reverse. Ground 5 does not reargue those rulings, but brings up legal issues that have never been considered.

The Response does not deny or even address a key issue of Ground 5 that, "The above nine witnesses provide new reliable, trustworthy and credible alibi evidence not presented at Petitioner's trial that is admissible by state and federal hearsay exceptions." (Writ of ***habeas corpus***, 46)

The Response also does not deny or even address a key issue of Ground 5 that:

> All of the new alibi witnesses can provide testimony:
> 1. That the Petitioner is credible in describing a rape attempt in her statement that happened prior to July 8, 2001.
> 2. Rebutting Thowsen's opinion testimony the Petitioner was not credible and had not been truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
> 3. Rebutting Thowsen's opinion testimony as not credible, by establishing the Petitioner was in fact credible and truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
> 4. Rebutting the foundation of the prosecution's case and argument to the jury that the Petitioner's Statement was a de facto confession because she was not credible and had not been truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
> (Writ of ***habeas corpus***, 46)

The Response doesn't deny that Thowsen's testimony opened the door to admitting the Petitioner's rebuttal alibi evidence, or that the "foundation of the prosecution's case" opened the door to the Petitioner's rebuttal alibi evidence.

The new alibi witness evidence is admissible under NRS 51.075 – which is a legal issue not raised at trial, and which neither the trial court nor the appellate court has ever considered or ruled on. NRS 51.075 states:

> NRS 51.075 General exception; other exceptions illustrative.
>
> 1. A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.

The Response does not deny or even challenge that the "nine witnesses provide new reliable, trustworthy and credible alibi evidence not presented at Petitioner's trial." (Writ of ***habeas corpus***, 46) Confirming the "accuracy" of their testimony are the many points of similarity between the information in those nine witnesses' seven affidavits and two statements and the Petitioner's Statement of July 8, 2001, that the **prosecution introduced** into evidence. The Petitioner's Statement consists of her responding to questions asked by two LVMPD homicide detectives, and the detectives had the latitude to question her about everything they considered relevant to their investigation of Bailey's murder and they had unlimited time to do so. Consequently, "assurances of accuracy [were] not likely to be enhanced by calling the declarant as a witness, even though [s]he [wa]s available." (NRS 51.075) The "special circumstances" referred to in NRS 51.075 are satisfied by the fact that the Fifth Amendment to the U.S. Constitution protects the right of the Petitioner not to testify, and it cannot be a requirement of NRS 51.075 or any other Nevada law that for the Petitioner to obtain benefit of the law she must surrender her Constitutionally protected Fifth Amendment rights. The U.S. Supreme Court ruled in *Griffin v. California*, 380 U.S. 609 (1965) that no penalty can be imposed on the Petitioner for her exercise of her Fifth Amendment right to remain silent: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614.

The U.S. Supreme Court has also recognized in a number of different contexts that receipt of a benefit cannot be conditioned on the threat that a person must waive their Fifth Amendment rights to remain silent. In some situations a person can be compelled to testify or provide information if they are granted immunity from prosecution – but not if the person is a defendant. *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (U.S. 05/27/2003) summarizes some of these cases. See ¶43, which also cites *Griffin v. California*, "no "penalty" may ever be imposed on someone who exercises his core Fifth Amendment right not to be a "witness" against himself in a "criminal case."" (*Id*. ¶43)

The evidence by the nine new alibi witnesses is also admissible under Federal Rules of Evidence Rule 807, a hearsay exception which states in part:

> Rule 807. Residual Exception.
> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. …

The new alibi witness evidence meets the first (A) prong of FRE 807 because it "is offered as evidence of [the] material fact" that the sexual assault the Petitioner describes in her Statement occurred just as she clearly states ("over a month ago") before July 8, 2001 – the day of Bailey's murder.

The new alibi witness evidence meets the second (B) prong of FRE 807 because it "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.", because they are the only known way to prove the Petitioner was credible and truthful in her statement that the rape attempt she describes occurred weeks prior to the date of Bailey's murder.

The new alibi witness evidence meets the third (C) prong of FRE 807 because the "general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence," and the "nine witnesses provide new reliable, trustworthy and credible alibi

evidence not presented at Petitioner's trial" that the sexual assault she describes in her Statement occurred prior to July 8, 2001, which means it was a different event than Bailey's murder.

The new alibi witness evidence meets the requirement of FRE 807 that it has the "equivalent circumstantial guarantees of trustworthiness" as other FRE hearsay exceptions, because of the points of similarity between the new evidence by the nine witnesses and the Petitioner's Statement of July 20, 2001, that the **prosecution introduced** into evidence.

The new alibi evidence by the nine witnesses is unquestionably new evidence because the jury did not hear evidence that the Petitioner told ANYONE prior to July 8, 2001, that she had been sexually assaulted at the Budget Suites Hotel in east Las Vegas and that she escaped in her car after attempting once to cut at her assailant's penis, just as she describes in her Statement. And that evidence is admissible under NRS 51.075 and FRE 807. As Ground 5 explains:

> If just one of these non-relative witnesses is deemed credible that Petitioner told them about the Budget Suites assault prior to July 8, 2001, then Thowsen's opinion testimony the jury relied on to convict the petitioner is not credible and dead wrong, and the prosecution's argument that her Statement refers to Duran Bailey's murder fails and the Petitioner is absolved of any guilt of her convicted crimes.
> (Writ of *habeas corpus*, 45)

Whatever doubts that could possibly linger that the alibi witness testimony is admissible under NRS 51.075 and FRE 807 are dispelled by the U.S. Supreme Court case of *Chambers v. Mississippi*, 410 U. S. 284 (1973). *Chambers* involved three people who heard a confession. Their testimony was ruled inadmissible hearsay and the state court affirmed. Chamber's filed a writ of *habeas corpus*, and after being denied at all lower levels, the Supreme Court granted his *writ of certiorari* that the testimony had improperly been excluded as hearsay. The Court ruled:

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense. … In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense.

> In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302

The Court ruled that the hearsay was admissible because the hearsay statements were made under circumstances that provided assurance of their reliability: the confessions were made spontaneously, corroborated by some other evidence in the case, and were self-incriminatory. *Id.* at 300-01.

The Petitioner "spontaneously" "confessed" to the nine new witnesses prior to the date of Bailey's murder that she used her knife to try and cut or stab at a would be rapist's penis in Las Vegas at the Budget Suites Hotel; the witness evidence is consistent with the Petitioner's LVMPD Statement and her "sheer number of independent confessions provided additional corroboration for each." *Id.* at 300; and the Petitioner's statements to the witnesses were self-incriminatory. (Depending on how the police and prosecutors viewed what she did, they may have thought that her using her knife to repel the would-be rapist constituted excessive force on her part and thus she assaulted him.)

The following paragraph from *Chambers* in which a few words are substituted to reflect the Petitioner's case shows how closely the circumstances of the *Chambers* case parallels the Petitioner's case:

> The trial court refused to allow her to introduce the testimony of Pyszkowski, McBride, etc. Each would have testified to the statements purportedly made by Lobato on multiple occasions shortly after the sexual assault against her at the Budget Suites Hotel. The State Supreme Court approved the exclusion of this evidence on the ground that it was hearsay. *Chambers* at 298 modified for *State v Lobato*.

However, post-conviction investigation by the Petitioner has resulted in her now having **nine** alibi witnesses and not the few she had at trial. Furthermore, the Response misstates the law of the case as an absolute doctrine and misapplies it to the extraordinary circumstances of the Petitioner's case. The U. S. Supreme Court noted in *Arizona v. California, et al.*, 103 S. Ct. 1382, 460 U.S. 605 (1983):

> "Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a

> court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. … **Law of the case directs a court's discretion, it does not limit the tribunal's power**." *Id*. at 619.

The Court then defined that one circumstance where the law of the case "does not limit the tribunal's power" is if to do so "would work a manifest injustice.":

> "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Id*. at fn. 8.

The Petitioner's case is one involving the most "manifest injustice" imaginable: the conviction and imprisonment of an actually innocent woman. The nine new alibi witnesses establish the Petitioner's Statement refers to a different event than Bailey's murder and thus that she is actually innocent of her convicted crimes. Considering *Arizona v. California, et al*. the law of the case is trumped if it will perpetrate a "manifest injustice." Consequently, even if, arguendo, the law of the case doctrine was somehow considered to apply to the Petitioner's new alibi evidence under NRS 51.075, it still would not prevent consideration of the new evidence of those nine new witnesses because to do so "would work a manifest injustice."

Furthermore, considering the "manifest injustice" exception to law of the case as recognized in *Arizona v. California*, the Nevada Supreme Court's ruling in the Petitioner's direct appeal on her counsel's arguments regarding admissibility of the alibi evidence under a theory of "the completeness of the statement" and NRS 51.105 should be considered null. The prosecution did not challenge the excluded trial alibi testimony as being either not credible or not trustworthy, and the exclusion of reliable testimony establishing the Petitioner's actual innocence not only defeats the purpose of the hearsay rule to exclude unreliable testimony, but it defeats the purpose of a trial to ascertain the truth and prevent the "manifest injustice" an innocent person's conviction. In the Petitioner's case, "The testimony rejected by the trial court here bore persuasive assurances of trustworthiness" (*Chambers* at 302), and therefore, the jury was barred from hearing evidence establishing that her Statement is not about Bailey's murder, and in the interests of justice it should have been admitted. Consistent with the Petitioner's analysis that Law of the Case is being improperly applied to the trial objections to the alibi evidence, the Ninth Circuit Court of Appeals

recently ruled "However, as Chambers teaches, depending on the facts and circumstances of the case, at times a state's rules of evidence cannot be mechanistically applied and must yield in favor of due process and the right to a fair trial. 410 U.S. at 302. As in ***Chambers***, the excluded testimony here "bore persuasive assurances of trustworthiness" and "was critical to [Kristi's] defense." ***Id***. California's application of its evidentiary rules denied Kristi her constitutional right to present a defense." ***Lunbery v. Hornbeak***, No. 08-17576 (9th Cir. 05/25/2010) at ¶72.

There is another mitigating factor in favor of not applying the law of the case to "the completeness of the statement," and NRS 51.105 that were considered by the Nevada Supreme Court in their affirmation of February 5, 2009. It was not raised as an issue, and the Court did not consider the legal argument that the State's objection to admittance of the Petitioner's alibi evidence under the theory of "the completeness of the statement," and NRS 51.105 was conditional: If the Petitioner waived her Fifth Amendment right to remain silent and testified, the prosecution would drop their objection to admittance of the alibi witness testimony. Thus the prosecution was conditioning the Petitioner's right to defend herself only by waiving her Fifth Amendment rights. (See, Trans. XVI-81, 10-2-06, "Right. And they have the opportunity to get her statements out through their client if she wishes to testify again.") For the State to dictate that the Petitioner could only obtain the benefit of presenting a key aspect of her alibi defense by waiving her Fifth Amendment rights is prohibited by *Griffin v. California*, 380 U.S. 609, 614 (1965). As noted above in the recent case of ***Lunbery v. Hornbeak***, ***supra***, the Ninth Circuit overturned a conviction in part because "California's application of its evidentiary rules denied Kristi her constitutional right to present a defense." ***Id***. at ¶72.

The U.S. Supreme Court ruled that a defendant has the due process right to call "witnesses in his favor" in ***Washington v. Texas***, 388 U.S. 14, 17-19 (1967). That due process right includes calling witnesses whose testimony is "material and favorable to his defense," ***United States v. Valenzuela-Bernal***, 458 U.S. 858, 867 (1982). The prosecution cannot be allowed to ignore or misapply state hearsay laws and exceptions, or hide behind misapplication of the law of the case doctrine to deprive the Petitioner of her federally guaranteed rights to due process of law and a fair trial. State statutes, whether properly applied or not, cannot ever trump the Petitioner's due process

right to call "witnesses in [her] favor," who are "material and favorable to [her] defense." There is no question that the Petitioner's nine new alibi witnesses are "witnesses in [her] favor" and that they provide evidence that is "material and favorable to [her] defense" because it directly relates to the credibility and truthfulness of the Petitioner's Statement that the prosecution introduced into evidence at trial, and rebutting Det. Thowsen's testimony about that Statement and rebutting the foundation of the prosecution's case and arguments to the jury for the Petitioner's conviction based on the false assumption her Statement constitutes a *de facto* confession to Duran Bailey's murder. ***Washington v. Texas***, 388 U.S. at 17-19, and ***United States v. Valenzuela-Bernal***, 458 U.S. at 867, respectively. Consequently, the new evidence of the Petitioner's nine alibi witnesses is admissible.

Furthermore, the State's Response does not attempt to address the substance of the issues in Ground 5, only arguing that consideration of it is precluded by "law of the case"; therefore, if as the Petitioner argues, Ground six must be considered on its merits, the failure of the Response to address the issues of Ground Six should be deemed a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

Based on the new alibi witness evidence in Ground 5, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." ***Schlup***, 513 U.S. at 327.

> **4**. Cumulative alibi witness evidence (Ground 6). [Petitioner notes that this heading doesn't state the substance of the claim that is actually – New alibi witness evidence the Petitioner was in Panaca on July 6, 7 and 8 and not under the influence of methamphetamine (Ground 6)]

The Response doesn't deny or make any attempt to even answer the new evidence claim in Ground 6 that the Petitioner "wasn't under the influence of methamphetamine on" July 6, 7 and 8, 2001. The Petitioner was prosecuted and the prosecution "refreshed" the "minds" of the jurors

during their closing argument that they believed the evidence showed she was under the influence of methamphetamine when she allegedly committed her accused crimes, which accounts for the extreme brutality of the crimes. The jury convicted the Petitioner on that basis, and in fact the trial judge specifically mentioned the Petitioner's methamphetamine use during the Petitioner's sentencing and the judge relied on it as a reason to give her a severe sentence. (Sentencing Trans. 28-30, 02-07-2007)

The prosecution's contention the jury and judge relied on that the Petitioner was under the influence of methamphetamines on July 6, 7 and 8 was an irreplaceable foundation of the prosecution's case – because there was simply no other explanation for how a 100-pound 18-year-old girl could inflict the injuries Bailey suffered unless she was under the influence of methamphetamine – and in fact the prosecution argued to the jury that is what the evidence showed and the trial judge specifically mentioned that during sentencing:

> "THE COURT: With this case there were many, many, many photographs taken at the crime scene. And of the nearly 30 years that I've been working in the criminal justice system this case and two others I think -- that I recall vividly were this bloody and violent. And all three of the cases involved methamphetamine." (Sentencing Trans. 28-30, 02-07-2007)

The Respondents cannot now try and rewrite the history of the case by trying to argue that the new evidence the Petitioner was not under the influence of methamphetamines on July 6, 7 and 8, which they have admitted is a "confession of error", really isn't devastating to the foundation of Petitioner's convictions, because even the trial judge admitted on the record how crucial it was to the prosecution's case.

Also, the Response is misleading and doesn't meaningfully respond to Ground 6's claim of new alibi evidence by stating, "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. (Response, 8)

During closing arguments the prosecution "refreshed" the "minds" of the jurors that they believed the evidence showed the Petitioner was not in Panaca during the period of time from at least the afternoon of Friday July 6 until "probably" 10 am on definitely on 11:30 a.m. Sunday July

8. (Trans. XIX-120 (10-5-06), and XIX-130 (10-5-06)) The prosecution's argument precluded the petitioner from being in Panaca at any time on Saturday July 7. The Petitioner's conviction is proof of the jury's acceptance of at least some or all of that argument of what the evidence showed. The new alibi evidence would have made it impossible for the prosecution to have credibly made that argument to the jury because it provides trustworthy proof the Petitioner was in Panaca from Friday afternoon through 10 am Sunday morning.

The Respondents are trying to have their cake and eat it too. At trial the prosecution vigorously argued the evidence showed the Petitioner wasn't in Panaca from Friday afternoon until mid-to-late Sunday morning, and now the Response is arguing that because the new credible and trustworthy evidence irrefutably proves that she was in Panaca during that period of time that it is "merely cumulative" to the trial evidence.

If the new alibi evidence had been introduced at trial, the prosecution could not have credibly "refreshed" the "minds" of the jurors during argument that she wasn't in Panaca during the evening of July 6, at anytime on July 7, and it would have shortened to 10 am the time that she was positively known to have been in Panaca by a non-relative the jury could have deemed to be credible and trustworthy. The Nevada Supreme Court has ruled that cumulative new evidence is admissible, with the only limitation that by itself it "may not be enough to warrant another trial." ***State v. Randolph***, 49 Nev. 241, 242 P.2d 697 (1926). But Randolph doesn't preclude cumulative evidence from being enough, just that it "may not be." Furthermore, based in part on ***cumulative*** evidence, in 2009 the U.S. Supreme Court granted the ***writ of certiorari*** in the ***habeas*** case of ***Cone v. Bell***, 129 S.Ct. 1769, 173 L.Ed.2d 701, 556 U.S. ___ (U.S. 04/28/2009). The Court stated in regards to the prosecution's concealment of ***Brady*** evidence, "It is possible that the suppressed evidence, **viewed cumulatively**, may have persuaded the jury …" ***Id.*** at ¶73. (emphasis added to original)

Given that the prosecution's theory of the crime was that the Petitioner was not in Panaca from the afternoon of July 6 until the late morning of July 8, and that is what it argued to the jury the evidence showed, it is not even reasonable to suggest that the new alibi evidence she was in Panaca on the evening of July 6, during the day and evening of July 7, and at 10 am on July 8 could not have had an impact on the jurors' perception of the case and their deliberations and verdict.

The new alibi witnesses in Ground 6 executed sworn notarized Affidavits, and they are willing to testify at an evidentiary hearing and be subjected to cross-examination, so the reference to *Herrera* is inapplicable.

The U.S. Supreme Court ruled that a defendant has the due process right to call "witnesses in his favor" in ***Washington v. Texas***, 388 U.S. 14, 17-19 (1967). That due process right includes calling witnesses whose testimony is "material and favorable to his defense," ***United States v. Valenzuela-Bernal***, 458 U.S. 858, 867 (1982). There is no question that the Petitioner's new alibi witnesses establishing she was in Panaca from Friday afternoon (July 6) to 10 a.m. on Sunday morning (July 8) are "witnesses in [her] favor" and that they provide evidence that is "material and favorable to [her] defense" because it directly relates to the Petitioner's alibi defense that she was in Panaca the entire weekend of July 6, 7 and 8 (and from the days of July 2 to July 9). ***Washington v. Texas***, 388 U.S. at 17-19, and ***United States v. Valenzuela-Bernal***, 458 U.S. at 867, respectively. Consequently, the new evidence of the Petitioner's nine alibi witnesses is admissible.

The Response's "failure to respond" to the Petitioner's new evidence claim in Ground 6 that she was not under the influence of methamphetamine on July 6, 7 and 8 constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id***. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id***. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." ***Id***. at 647.)

If the jury had known the new alibi evidence the Petitioner was in Panaca on July 6, 7 and 8, individually and cumulative with other evidence, including the Respondent's non-denial of the claim in Ground 6 that the Petitioner "wasn't under the influence of methamphetamine on" July 6, 7 and 8, 2001, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." ***Schlup***, 513 U.S. at 327.

5. Evidence that Bailey was allegedly murdered by more than one assailant and who were skilled with medical knowledge or animal husbandry (Ground 7). [Petitioner notes that to state the substance of the claim it should read – New evidence Bailey was murdered by more than one assailant and at least one was skilled with medical knowledge or animal husbandry (Ground 7)]

The Response to Ground 7 is non-responsive to its claims and doesn't deny or meaningfully address them.

The prosecution argued when "refreshing" the "minds" of the jurors that they believed the evidence proved Bailey was killed "sometime before sunup," as early as 3:50 a.m. by a lone assailant when it was dark in the trash enclosure.

After examining the official crime scene and autopsy photos, forensic pathologist Dr. Larkin determined based on his 46 years of experience and training that after Bailey's penis was amputated there was a separate act of "mutilation of his groin area." (Exhibit 4, writ of ***habeas corpus***, 5) That the groin injury was inflicted by a person "skilled either with medical knowledge or animal husbandry," and both of that person's hands were required, "one hand to stretch the skin, and the other hand to cut through the sub cutis on the stretch." (*Id*., 5, 8) To accomplish that skilled cutting procedure in a dark trash enclosure, Dr. Larkin logically opined that artificial light would be required, and states that the evidence "suggests that a third hand was involved to supply light, or that the perpetrator(s) has a head lamp." (*Id*., 5) This new forensic pathology evidence completely undercuts the basis upon which the jury convicted the Petitioner. There was no evidence at trial the Petitioner has any "medical knowledge or animal husbandry" training. (*Id*., 5, 8) There was no evidence at trial the Petitioner ever at any time in her life had a "head lamp", much less on the day Bailey was murdered. There was no evidence at trial that Bailey's wounds required at least two people to be involved.

The response does not even attempt to refute the new evidence, the Response simply tries to personally attack Dr. Larkin and say that his expert analysis is "absurd" to suggest that Bailey's multiple assailants needed light to skillfully inflict the wounds on his body. Dr. Larkin knows the circumstances of lighting and skill that it took for a person to carefully and precisely inflict

Bailey's groin skinning injury about which there was no testimony at trial – the lawyers who wrote the Response do not have his knowledge and decades of experience.

Almost nine years after Bailey's murder, it took Dr. Larkin to observe from the official photos what had been overlooked by everyone involved and about which there was no testimony – the cut at the base of Bailey's penis is a fraction of the size of the cut to his groin – which can only logically mean there was a separate act of mutilation after his penis amputation. (See Exhibits 31 and 34, writ of *habeas corpus*).

The Response is also trying to rewrite the record by claiming Dr. Laufer's testimony that a single stab wound to Bailey's neck (carotid artery) – that he describes as "it certainly appears that it was either a very lucky one or someone knew what they were cutting." (Response, 9) – has the same level of certainty about "knowledge of anatomy" as Dr. Larkin's new evidence that the person who inflicted Bailey's groin injury had "medical knowledge or animal husbandry" training. Quite to the contrary of the Response's assertion, Dr. Larkin's new evidence doesn't allow for any possibility of "luck" – he positively asserts the person was skilled. The jury did not hear any evidence that any of Bailey's wounds could only have been inflicted by a person with "medical knowledge or animal husbandry" training, and there was no evidence at trial that the Petitioner had ever had either.

The Response also misstates the nature of Dr. Larkin's new evidence in Ground 7. He doesn't rebut Dr. Simms' testimony, he adds to it by filling in some of the blanks in Dr. Simms' testimony. Dr. Simms testified Bailey's penis was amputated, while Dr. Larkin adds that his groin was skillfully "skinned" after that, and that because of the skill involved artificial light by a "third party" would have been necessary if he was killed "prior to sunup" – or after sunset on July 8 as Dr. Larkin's new forensic pathology evidence in Ground 2 shows. (*Id.* 5, 8)

Dr. Larkin is willing to testify at an evidentiary hearing and be subjected to cross-examination about his Affidavit, so any reference to *Herrera* is inapplicable.

The Response doesn't make any attempt to meaningfully respond or answer the new evidence claims in Ground 7, only calling "absurd" Dr. Larkin's expert analysis artificial light was required by the person who skillfully "skinned" Bailey's groin if it wasn't performed during

daylight, and making reference to an unrelated statement by Dr. Laufer that the person who inflicted a single stab wound to Bailey's neck could either be "very lucky" or that they "knew what they were cutting." The failure of the Response to Ground 7 "to address a significant issue" constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

If the jury had known the new forensic pathology evidence in Ground 7 that Bailey was murdered by more than one person and that one of those people had "medical knowledge or animal husbandry" training, individually or cumulative with other new evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." ***Schlup***, 513 U.S. at 327.

> **6**. Evidence that Bailey was allegedly alive when anally penetrated with the knife. (Ground 8). [Petitioner notes that to state the substance of the claim it should read – New evidence Bailey was alive when anal wound inflicted (Ground 8)]

The Response completely ignores the inconvenient truth that Dr. Simms' unequivocally testified that Duran Bailey's wound in his "**rectum was ante-mortem**," during the Petitioner's preliminary hearing on August 7, 2001. (***State v. Lobato***, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 32. (Emphasis added to original.) Thus Dr. Simms testified less than a month after Bailey's autopsy when the details were fresh in his mind that Bailey's rectum wound was inflicted when he was alive. Dr. Simms then testified 5-1/2 years **after Bailey's autopsy** that his rectum wound was post-mortem – i.e., inflicted when he was dead. (Trans VII-86, 9-19-06) The failure of Petitioner's counsel to cross-examine Dr. Simms about his prior inconsistent testimony regarding Bailey's rectum injury is one of the ineffective assistance of counsel claims in Ground 42.

Dr. Larkin's new forensic pathology evidence that "Bailey survived either conscious or not, a short time after being attacked." (Exhibit 4, 8, writ of ***habeas corpus***), is 100% consistent with Dr. Simms Preliminary Hearing testimony less than a month after Bailey's autopsy. The Response's intimation that Dr. Larkin's examination of the crime scene and autopsy photographs was somehow an inferior method of observation to Dr. Simms' seeing Bailey's body is defeated both by Dr. Simms' Preliminary Hearing testimony consistent with Dr. Larkin's new evidence and Dr. Anderson's observation in her Response dated September 7, 2010:

> The photographs are well taken and in excellent condition. There age is of no consequence. In fact, as they can now be examined in electronic format, this allows the observer to increase the size of the image at will, almost as if one were using a microscope. (See attached Exhibit 1, 2)

The Response does not deny or even address or attempt to refute the new photographic evidence that Bailey bled from his rectum wound. (See Exhibit 50, writ of ***habeas corpus***) There is a very clearly visible pool of blood under his anus, where he was rolled or otherwise moved after he experienced his rectum injury. That is visual evidence Bailey was ***alive and bleeding*** after he experienced his rectum wound. Dr. Larkin was not aware of this corroborating evidence when he wrote his Affidavit.

The Response is incorrect in asserting that Dr. Larkin's conclusion Bailey was alive when his rectum wound was inflicted disagrees with the trial testimony of Dr. Laufer. The Response misstates the record and appears to be confused about Dr. Laufer's testimony regarding Bailey's rectum wound. Dr. Laufer testified he believes Bailey's rectum wound was caused by him being kicked in the rear-end, because he had treated many patients in the ER that had similar wounds. (Trans. XII-57, 9-26-06) Consequently, Bailey could have very definitely been alive when the wound was inflicted because Dr. Laufer only treated live patients in the emergency room. In fact, Dr. Laufer did not testify Bailey was dead when the rectum wound was inflicted. The Response misstates Dr. Laufer's testimony because it did not make it "impossible for the wound to Bailey's anus to be inflicted while he was alive." (Response, 10)

The Response doesn't deny or even address the new evidence that it is not uncommon for a person to live for a period of time even with severe blood loss. (Exhibit 56, writ of ***habeas corpus***)

Dr. Larkin is willing to testify at an evidentiary hearing and be subjected to cross-examination about his Affidavit, so the reference to *Herrera* is inapplicable.

Based on the new evidence forensic pathology evidence in Ground 8 that Bailey was alive when his rectum wound was inflicted, the new photographic evidence he was alive and bleeding after the wound was inflicted, Dr. Simms' Preliminary Hearing testimony that Bailey's rectum wound was "ante-mortem", and the new evidence that a person can live for a period of time in spite of severe bleeding, none of which the jury considered in find the Petitioner guilty of violating NRS 201.450 that requires a person to be dead, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted her in light of the new evidence presented in habeas proceedings." *Schlup*, 513 U.S. at 327.

> **7**. Possibility of two separate attacks (Ground 9). [Petitioner notes that to state the substance of the claim it should read – New evidence Bailey experienced two separate attacks on the night he died (Ground 9)]

The Response misstates, fails to substantially address, and does not even deny the new evidence claims in Ground 9.

The Response misleadingly uses "possibility" in its first sentence: "Defendant's argument concerning the "possibility" that Bailey was subjected to two separate attacks …" (Response, 10) The word "possibility" appears nowhere in Ground 9.

The Petitioner positively states, "Simms ruled as a Cause of Death that "Bailey died as a result of BLUNT HEAD TRAUMA."(Autopsy Report of Duran[d] Bailey, Clark County Coroner's Office, July 9, 2001.), and he testified at trial that Bailey's skull fracture was consistent with being contemporaneous with that injury and his brain swelling that began at least two hours prior to death. (writ of *habeas corpus*, 56-57) The Response does not deny or address any of those claims.

The Petitioner positively states, "The fracture to Bailey's head and the resultant brain swelling that occurred two hours prior to his death directly point to Bailey being subjected to two separate attacks on July 8, 2001." (writ of *habeas corpus*, 56) The Response does not deny or address that claim.

The Petitioner positively states, Bailey had ""digesting meat and vegetable food particles" in his stomach at autopsy. Vegetables can take 30 to 50 minutes to digest, so the undigested vegetables in Bailey's stomach supports that he ate a meal shortly before the second attack which occurred in the trash enclosure. (*Id.*, 57) The Response does not deny or address that claim.

The Petitioner positively states, "Bailey's head injury was inflicted during the first attack on him two hours before the assault in the Nevada State Bank's trash enclosure where his body was found." (*Id.*, 57) The Response does not deny or address that claim.

The Petitioner positively states, "Bailey would have died from the swelling of his brain caused by the first attack's "blunt head trauma" even if the second attack had never occurred. So while the many visible beating, cutting and stabbing wounds Bailey experienced in the second attack that took place at the trash enclosure mar Bailey's physical appearance … they were superfluous to him dying." (*Id.*, 57) The Response does not deny or address that claim.

The Response does not deny or even address the new evidence that a person can function for a period of hours after suffering what is in fact a fatal brain injury such as Bailey experienced. (*Id.*, 57)

The Petitioner positively states, "During their argument the prosecution falsely and misleadingly conflated into one event the two distinct time periods that … Bailey experienced injuries. …The jury was also unaware of the new evidence supporting that Bailey ate a meal of meat and vegetables between those two events. (*Id.*, 57) The Response does not deny or address that claim.

The Petitioner positively states, "Steven King provides new evidence in his "Affidavit of Steven King" dated February 17, 2010, that based on his personal knowledge Diann Parker's Mexican friends killed Bailey, is consistent with the medical evidence that on July 8 Bailey was subjected to two attacks and the new evidence that he could have had a meal in between them." (*Id.*, 58) The Response does not deny or address that claim.

The new evidence is compelling that Bailey "experienced two grave injury-causing events" on the evening of July 8 separated by at least two hours, and given that the digestion time of vegetables is "30 to 50 minutes," there is an overwhelming probability he ate a meal less than an

hour prior to his death – and that meal was after the event that caused the brain swelling that Simms ruled was his cause of death. The Response does not deny or address that claim.

King provides new evidence that the Mexican friends of Parker were the people who attacked and inflicted the many stabbing, cutting and beating wounds inflicted on Bailey at the Nevada State Bank … and those are precisely the injuries that the Petitioner was accused and convicted of inflicting. There was a prior event somewhere unknown during which Bailey's head injury was inflicted by person or persons unknown. The prosecution has not breathed a single word since the day of the Petitioner's arrest in July 2001 – and none during her trial – suggesting that they have any reason to even believe there is the "possibility" she inflicted any wound on Bailey anywhere other than the trash enclosure at the Nevada State Bank.

The Response's failure to deny or substantially address the new evidence claims in Ground 9 constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

If the jury had known the new evidence that Bailey experienced two grave injury causing events on the night he died, and the new evidence that it was during the first attack at a place unknown by persons unknown that his fatal brain injury was inflicted, and it was during the second attack that the Mexicans committed the acts the Petitioner was accused of committing at the Nevada State Bank, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup*, 513 U.S. at 327.

8. Dr. Larkin's affidavit does not establish a claim of actual innocence (Ground 10). [Petitioner notes that this heading does not accurately state the substance of the claim that is actually – New forensic pathology evidence establishes Duran Bailey was murdered by someone other than the Petitioner (Ground 10)]

The Response misstates, fails to substantially address, and does not even deny the new evidence claims in Ground 9.

Dr. Larkin is willing to testify at an evidentiary hearing and be subjected to cross-examination about his Affidavit, so the reference to *Herrera* is inapplicable.

Dr. Larkin is a forensic pathologist with 46 years experience and he is a leading authority in the United States at determining time of death, so it is improper for the **lawyers** writing the Response to make an unsubstantiated personal attack on him just because they don't like evidence in his Affidavit (Exhibit 4, writ of *habeas corpus*) that they allege is "not based upon medical science." (Response p. 11) Dr. Larkin's determination that in the dark trash enclosure it would take a "third hand" to hold a light so that another person could use one hand to stretch Bailey's skin and the other to skillfully cut Bailey's groin **after** his penis was amputated is not only based on "medical science" of what it takes to accomplish such a procedure, it is just plain common sense. The Response takes out of context Dr. Larkin's determination regarding the Petitioner being able to defend herself. What he states is: "7. Because of the disparity of size, and Lobato's squeamishness to blood, it is unlikely that she could have defended herself against a streetwise Bailey." (Exhibit 4, 8) Bailey was 42 and the Petitioner was 18. Bailey was taller and heavier than Petitioner, and there was testimony he lived on the street and was a very violent person. It doesn't take a forensic pathologist to determine that in a contest between the two only a fool would not bet on Bailey.

The Response falsely states that "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." (Response, 11) Dr. Larkin's new evidence in Ground 10 that undermines at least eight key aspects of the prosecution's case against Petitioner comprises more than 10 pages of the writ of *habeas corpus*, and the Response doesn't deny or attempt to answer any of them. Those eight key aspects are summarized below with the page number in Exhibit 4 in parenthesis:

- "There is a good probability that more than one person was involved in this attack and murder," (8) and "Given the poor lighting, it suggests that a third hand was involved to supply light, or that the perpetrator(s) has a head lamp."(5)

Dr. Simms did not testify about this.

● "The perpetrator either had some medical knowledge, or experience skinning an animal." (5)

Dr. Simms did not testify about this.

● " There is a good probability that more than one person was involved in this attack and murder. At least one perpetrator was skilled either with medical knowledge or animal husbandry to effect the mutilation of Bailey's groin area."(5)

Dr. Simms did not testify about this.

● "A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds." (8)

Dr. Simms did not testify about this, and he wasn't even questioned if a "hunting knife" could have been used to inflict Bailey's wounds.

● "Bailey survived either conscious or not, a short time after being attacked." (8)

Dr. Simms did not testify about this.

● "Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk." (8)

Dr. Simms did not testify about this, and he wasn't even questioned as to if Bailey could have been murdered between minutes before his body was discovered and two hours before.

● "No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites." (2.)

Dr. Simms did not testify about this.

● "Because no brain sections were made, the timing of the head wounds with respect to the other wounds cannot be determined." (8)

Dr. Larkin points out there is insufficient data for him to form a conclusion, so he must defer to Dr. Simms.

The Response makes no effort to either deny or answer these key points of Dr. Larkin's analysis of the forensic pathology evidence.

The Response's failure to either deny or substantially address the new evidence claims in Ground 10 constitutes a "confession of error" *Polk v. State,* 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State,* 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The Response's observation that Dr. Larkin and Dr. Laufer came to differing conclusions about the murder weapon is instructive because both did have the same conclusion: That a cutting instrument radically different than a "butterfly knife" was used to inflict Bailey's wounds. Dr. Larkin's Affidavit is evidence he conducted a significantly more in-depth analysis of the medical evidence than did Dr. Laufer.

The Response misstates, fails to substantially address, and does not even deny the new evidence claims in Ground 9., and therefore, it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

Dr. Larkin's new forensic pathology evidence undermines or contributes to undermining at least eight key aspects of the prosecution's case against the Petitioner, and the Response makes no effort to deny or answer them. If the jury had known the new forensic pathology evidence in Ground 10, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." ***Schlup***, 513 U.S. at 327.

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

The Response doesn't make any attempt to address or logically refute the new evidence claims in Ground 11 and 12, and in fact it doesn't even mention anything whatsoever concerning Ground 11.

Ground 11 concerns George Schiro's analysis of Ground 11's new shoe evidence and how it relates to the crime scene (Exhibit 42, writ of ***habeas corpus***). Ground 12 concerns Mr. Schiro and

William Bodziak's analysis of new cardboard shoeprint evidence and Mr. Schiro's analysis of how it relates to the crime scene (Exhibit 44, writ of *habeas corpus*). Mr. Schiro and Mr. Bodziak are working on the Petitioner's case *pro bono* and they are willing to testify about their Affidavits/Reports and be subjected to cross-examination, so the reference to *Herrera* is inapplicable.

The Response's recitation of Brent Turvey's testimony about the crime scene is not relevant to Grounds 11 or 12. Mr. Schiro's Affidavits are based on new evidence and his expert analysis of how that new evidence relates to the crime scene. Furthermore, the Response acknowledges "Mr. Turvey did not specialize in footwear impressions," whereas Mr. Schiro is a shoeprint identification and blood analysis expert. Ground 12 states the prosecution relied on Mr. Turvey's testimony to argue to the jury that the shoeprint evidence didn't exclude the Petitioner. (writ of *habeas corpus*, 74) Ground 11 and 12 provide Mr. Schiro's expert shoeprint and crime scene analysis the jury did not hear and that renders Mr. Turvey's "non-expert" shoeprint testimony irrelevant.

The Response's statement misleading and inaccurately that Mr. Turvey "specifically mentioned Mr. Schiro's report in his testimony." (Response, 12) Mr. Turvey's testimony the Response refers to is:

> Q Important testimony of another expert witness at the first trial?
> A Yeah. George Schiro from Louisiana. Yes.
> (Trans. XVI-172, 10-2-06)

Mr. Turvey did not "specifically mention Mr. Schiro's report"; he stated knowledge of prior testimony by "George Schiro." That's it. In fact, Mr. Schiro did not testify about shoeprint evidence during the Petitioner's first trial, so the Response's reference to Mr. Turvey's testimony about Mr. Schiro's prior testimony is irrelevant to Grounds 11 and 12.

Ground 11

The Response completely ignores and does not deny Ground 11 that concerns the black high-heeled shoes the Petitioner describes in her Statement she was wearing the night she was sexually assaulted in the parking lot of the Budget Suites Hotel over a month prior to July 20, 2001. (Exhibit 42, writ of *habeas corpus*) The shoes were seized as evidence at the time she was arrested on July 20,

2001, and they were excluded as having any of Bailey's DNA on them when tested by the by the LVMPD Forensic Laboratory (See Exhibit 36, LVMPD Forensic Lab Report, August 6, 2001.)

The prosecution did not deny or challenge during the Petitioner's preliminary hearing or her two trials, and the Response does not deny she was truthful in her Statement that during the sexual assault she was wearing the black high-heeled shoes taken into evidence. The Petitioner was charged, tried and convicted on the basis that the event described in her Statement was Bailey's murder and not a sexual assault at the Budget Suites Hotel weeks before he died.

The bottom line of Mr. Schiro's expert forensic science analysis is that Bailey could not have been murdered by the Petitioner wearing her black high-heeled shoes. (See Exhibit 42, 3rd Affidavit of George J. Schiro, Jr., February 15, 2010, esp. No. 18-22.)

The Response's failure to mention anything whatsoever concerning Ground 11, or meaningfully or logically respond to its new evidence claims constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

Mr. Schiro's new forensic science analysis establishes the shoes the Petitioner was wearing during the event described in her Statement could not have been worn during Bailey's killing. If the jury had known the new forensic science evidence, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup*, 513 U.S. at 327.

Ground 12

The Response doesn't make any attempt to address or logically refute the new evidence claims in Ground 12.

Ground 12 involves new shoeprint evidence on the cardboard that was covering Bailey's torso. The cardboard was not entered into evidence during the Petitioner's trial.

When Petitioner's counsel turned over her case files it included several high quality color photographs of shoeprints on the cardboard There are both shoeprints imprinted in blood and a shoeprint imprinted on the cardboard. (See Exhibits 90 and 91, writ of ***habeas corpus***)

Mr. Schiro's expert shoeprint impressions analysis is the same shoe model made the shoeprints on the cardboard covering Bailey and the shoeprints imprinted in blood on the concrete leading away from his body. Mr. Schiro's expert forensic science crime scene analysis is the new evidence "suggests that the person wearing the shoe was present before and after blood was shed at the scene and the wearer of the shoe concealed Mr. Bailey's body with trash." (See Exhibit 44, 2nd Affidavit of George J. Schiro Jr., February 4, 2010, 3-4)

Corroborating that the cardboard and concrete shoeprints were made by the same shoe pattern is the new evidence of a Report dated June 28, 2010, by impressions expert William Bodziak. This Report provides the hard copy analysis that Mr. Bodziak reported in an email on April 7, 2010, and that is cited on page 77 of the Petitioner's writ of ***habeas corpus*** filed on May 5, 2010. Mr. Bodziak's conclusions include:

> "Comparison of the impressions depicted in the Q1, Q2, Q3, Q4, Q5 and Q6 photographs determined they all were produced by the same Spitfire design of footwear. No other patterns are present which could be associated with any other footwear design." (See attached Exhibit 3, Bodziak Report, June 28, 2010.)

The Response's failure to make any attempt to address, or meaningfully or logically respond to the new evidence claims in Ground 12 constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

Mr. Schiro's and Mr. Bodziak's new shoeprint impressions evidence establish the bloody and non-bloody shoeprints on the cardboard covering Bailey's torso are the same shoe pattern as the bloody shoeprints imprinted on the concrete leading away from Bailey's body. Mr. Schiro's forensic science and crime scene analysis establishes the person who made those shoeprints "was present before and after blood was shed at the scene and the wearer of the shoe concealed Mr. Bailey's body with trash." That person would have had to be Bailey's killer and Ms. Lobato's shoes are excluded as making any of the shoeprints. If the jury had known the new impressions and forensic science and crime scene analysis evidence, individually and cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

> **10. Neither George Schiro's nor Dr. Lewis's affidavits support a claim of actual innocence (Grounds 13 and 18).** [Petitioner notes that this heading does not accurately state the substance of the claims that is actually – New forensic science evidence and crime scene analysis and reconstruction excludes Petitioner and her car from the crime scene (Ground 13) and, New forensic science, dental and crime scene evidence the prosecution's theory of the crime is physically impossible because: the trash enclosure's interior dimensions are insufficient (Ground 18)]

The Response deals with Grounds 13 and 18, and they will be answered separately.

Ground 13

The Response falsely and inaccurately states "Mr. Schiro's affidavit, which is nothing more than cumulative evidence that was already presented at trial and rejected by the jury." (Response, 12) Mr. Schiro's Affidavits provide at least 12 areas of new evidence on pages 82-84 of the writ of *habeas corpus.*

The Response's failure to deny, address, or meaningfully or logically respond to any of Mr. Schiro's 12 areas of new evidence in Ground 13 that excludes the Petitioner and her car from being at the crime scene constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to

provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The Response misleadingly states in regards to the 12 areas of new evidence "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." (Response, 12)

Mr. Schiro's Affidavits provide new evidence beyond Mr. Turvey's testimony and the jury did not hear that new evidence and thus could not have considered it in their deliberations. Furthermore, Mr. Turvey could not have testified about some of the new evidence because he does not have anywhere near the range of expertise that Mr. Schiro has supporting his expert opinions.

The Response's negative inference about cumulative evidence is erroneous. New evidence that can be considered cumulative has no less weight than any another evidence, and as with other evidence by itself it may or may not warrant a new trial. See *Pacheco v. State*, *supra*; and, *State v. Randolph*, *supra*. Furthermore, based in part on *cumulative* evidence, in 2009 the U.S. Supreme Court granted the *writ of certiorari* in the *habeas* case of *Cone v. Bell*, *supra*, recognizing that the "evidence, **viewed cumulatively**, may have persuaded the jury …" *Id*. at ¶73. (emphasis added)

Furthermore, Mr. Schiro's new expert evidence stands on its own. Mr. Turvey's testimony can be disregarded completely and it will not reduce the exculpatory weight of Mr. Schiro's new expert evidence one iota.

The Response also falsely and misleadingly summarizes Dr. Lewis' new expert dental evidence, "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. (Response, 12)

Dr. Lewis does not make any mention whatsoever of damage to Bailey's "mouth" – only that use of a bat would have "fragmented" Bailey's teeth:

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

Dr. Lewis' Affidavit is the first expert dental evidence ever presented in the Petitioner's case, and it establishes a baseball bat could not have knocked out Bailey's six teeth that were found intact and bunched together.

Aside from Dr. Laufer being a medical doctor, not an expert dental surgeon, the Response's assertion that he provided "the same testimony at trial" as is in Dr. Lewis' Affidavit is erroneous. On the page cited by the Response Dr. Laufer testified:

> Q. Okay. Now you had testified that you believe that it's certainly possible that you can bust somebody's teeth out by using a metal bat, is that correct?
> A. Yes.
> (Trans. XIV-127-128, 9-28-2006)

Dr. Laufer's testimony was about the hypothetical, it is "possible" **to bust** a person's teeth out with a bat. That is considerably different than Dr. Lewis' unqualified new evidence directly related to the crime scene evidence that six of Bailey's teeth **were not fragmented**, and "I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat." (See Exhibit 100, writ of *habeas corpus*) The prosecution "refreshed" the "minds" of the jury during closing that they believed the evidence showed the Petitioner's bat was used to knock out Bailey's teeth and knock him over. Dr. Lewis' new dental evidence establishes Bailey was not struck in the mouth with *any* baseball bat.

The Response is misleading and to a degree tries to rewrite the record of the case in stating:

> 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. (Response, 13)

Dr. Simms was the medical examiner and he did not provide any expert crime scene analysis. That is precisely one of Mr. Schiro's areas of expertise. Mr. Schiro analyzed a number of different aspects of the crime scene – while Dr. Simms only testified about Bailey's wounds. Schiro's new evidence that Bailey could not have been "standing or kneeling" when attacked is based on "crime scene evidence and blood splatter evidence" that was not heard by the jury at trial and which did not factor into Dr. Simms' testimony.

Mr. Schiro's multiple Affidavits provide 12 specific aspects of new expert forensic science and crime scene analysis and reconstruction that the jury did not hear about and could not have considered. Dr. Lewis' Affidavit provides specific new expert dental evidence the jury did not hear and could not have considered. Consequently, the Response's reference to *Hargrove v. State*, 100 Nev. 498 (1984) is inapplicable.

The Response misleadingly states "Defendant also, again, attempts to rely on the State's theory presented during closing argument." (Response, 13) Ground 13 doesn't mention the word "theory", but it does state the new evidence is contrary to "the prosecution's arguments the jury relied on to convict the Petitioner, …" Jury instruction no. 41 states in part:

> 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; …

Based on instruction 41 the prosecution "refreshed" the "minds" of the jury about the evidence at trial during their argument, and the new evidence in Ground 13 refutes evidence the prosecution "refreshed" the jury about during their closing argument. The prosecution's theory of the crime was based on the evidence they "refreshed" the "minds" of the jury about during arguments, so any mention of theory would be irrelevant anyway.

If the jury had known the new forensic science, crime scene analysis and reconstruction, and dental evidence in Ground 13, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

Ground 18

The Response does not deny, address, or meaningfully or logically respond to Ground 18, and that constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of

error." *Id*. at ¶27) See also, *Moore v. State,* 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The Response makes no effort to respond to Ground 18. The word "trash enclosure" isn't even in the Response for Ground 18, even though that Ground solely concerns new evidence related to the "trash enclosure."

All of the new evidence in Ground 18 specifically relates to aspects of the crime and/or crime scene, and the jury did not hear and could not have considered that new evidence. So the Response's reference to *Hargrove v. State,* 100 Nev. 498 (1984) is inapplicable.

The Response misleadingly states "Defendant also, again, attempts to rely on the State's theory presented during closing argument." (Response, 13) Ground 18 states the new evidence is contrary to "the prosecution's argument upon which the jury convicted the Petitioner, …"

Based on jury instruction 41 the prosecution "refreshed" the "minds" of the jury about the evidence at trial during their argument, and the new evidence in Ground 18 refutes that evidence. The prosecution's theory of the crime was based on the evidence they "refreshed" the "minds" of the jury about during arguments, so any mention of theory would be irrelevant anyway.

If the jury had known the new forensic science, dental and crime scene evidence in Ground 18, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

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

The Petitioner agrees the prosecution argued that Bailey "stayed" in the trash enclosure, and not that he "lived" there. But whatever the phrase used to describe Bailey "staying" in the trash enclosure, it doesn't change the substance of Ground 14 because the State agrees it argued he "stayed" there "sometimes on the weekends." Bailey was homeless so some people would refer to wherever he was sleeping at any given time as where he "lived." Some people would refer where to Bailey slept sometime on weekends as where he "lived" for those days, the prosecution chose to

refer to it as where he "stayed." Given Bailey's homeless state, whether describing where he slept was where he "lived or where he "stayed" is insignificant.

Whatever the wording used, the Response does not attempt to rebut or deny any of the new evidence in Ground 14 that Bailey did not stay (or live) in the trash enclosure, it merely recites the argument and trial evidence that Ground 14 refutes. The Response's statement – "Even if Bailey did not live in the trash enclosure, substantial evidence was presented which showed he frequently spent time there." (Response, 14) – is pure speculation. A homeless person in the area could have been the person who "frequently spent time there," because no personal item other than the clothes and shoes Bailey would have worn were found in the trash enclosure. Bailey's body was found by a homeless man who stayed in the area. (Trans. IV-58, 9-14-06)

Steven King knew Bailey and lived in the Grand View Apartments about 100 yards north of the Nevada State Bank. King positively states twice in his Affidavit of February 17, 2010, that Bailey (whom King knew by his nickname of "St Louis") "did not live at the Nevada State Bank." (Exhibit 8, writ of ***habeas corpus***) King is willing to testify at an evidentiary hearing and be subjected to cross-examination so the Response's reference to ***Herrera*** is inapplicable. Since the Petitioner's new evidence that Bailey did not stay/live in the trash enclosure is based on the first-hand knowledge of King and other specific evidence in Ground 14, the Response's reference to *Hargrove v. State*, is inapplicable.

The Response misleadingly states, "Defendant also, again, attempts to rely on the State's theory presented during closing argument." (Response, 14) Ground 14 doesn't mention the word "theory. In the Facts section it does state "the prosecution's argument that the Petitioner went there the early morning of July 8, 2001, to buy methamphetamine from him …" Jury instruction no. 41 states in part:

> 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; …

Based on instruction 41 the prosecution "refreshed" the "minds" of the jury about the evidence at trial during their argument, and the new evidence in Ground 14 refutes evidence the

prosecution "refreshed" the jury about during their closing argument. The prosecution's theory of the crime was based on the evidence they "refreshed" the "minds" of the jury about during arguments, so any mention of theory by the Petitioner would be irrelevant anyway – unless the Response is arguing that the prosecution's "theory of the crime" was fabricated out of thin air and not on evidence. The Response concedes the prosecution "refreshed" the "minds" of the jurors during argument that the evidence showed "somehow they end up back at his place." (Response, 13). The Response cannot now try and rewrite the record by claiming that it doesn't make any difference if Bailey didn't stay/live at the trash enclosure, because that is the basis on which the Petitioner was prosecuted and convicted by the jury.

The Response also does not attempt to answer or even deny that if as the Petitioner's new evidence shows he did not stay/live at the trash enclosure, then the entire basis of the Petitioner's prosecution fails. There is no dispute that Bailey was murdered in the trash enclosure, and the Petitioner's unrebutted new evidence establishes he did not stay/live there. Consequently, it is not possible that "somehow they end back at his place" because it wasn't "his place." King's Affidavit provides a reasonable explanation for Bailey's murder and how he ended up in the trash enclosure where he did not live. The Response tries to discount King's new evidence by claiming it is "speculative at best," (Response, 13), but much of it is based on his first-hand knowledge of Bailey, Parker, the Mexicans and the area.

If the jury had known the new evidence in Ground 14 that Bailey did not stay/live in the trash enclosure on weekends or otherwise, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

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

The Response does not deny or meaningfully respond to the new evidence in Ground 15.

The Response falsely states contrary to the actual content of Ground 15, "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…" (Response 14) That ignores that Ground 15 provides new evidence – the trustworthiness of which the Response does not deny – undermines the jury's verdict.

The Response dismisses Ground 15's new evidence that in July 2001 methamphetamine was readily available within walking distance of where the Petitioner lived with her parents in Panaca and other nearby towns in Lincoln County and cities in Utah, by presenting the defense that it is not significant enough "new evidence" because it is "highly likely" the jurors relied on extrinsic out-of-court evidence not admitted at trial to convict the Petitioner. ("It is highly likely that the jury was already aware that illegal narcotics are available in Lincoln County, Nevada.") (Response, 14)

Consequently, the Response admits there was no evidence introduced at trial that "In July 2001 methamphetamine was available in Panaca within walking distance of the Lobato's home, and other places in Lincoln County." (writ of ***habeas corpus***, 90); and that the cities "… Cedar City and St George, Utah are much closer options to obtain methamphetamine than Las Vegas …" (writ of ***habeas corpus***, 90). Furthermore, the Response does not deny or challenge the truthfulness of that new evidence about the availability of methamphetamine in numerous towns and cities that didn't require the extended 340-mile round trip to Las Vegas.

The prosecution "refreshed" the juror's "minds" during argument that the evidence showed the Petitioner was not in Panaca from the Friday of July 6 until "probably" at 10 a.m. and definitely at 11:30 a.m. on Sunday July 8, and that (other than travel time) she was in Las Vegas during that period of time. (Trans. XIX-130 (10-5-06)) The prosecution also "refreshed" the juror's "minds" they believed the evidence showed she went to Las Vegas to get methamphetamine. (Trans. XIX-195, 10-5-06)

The prosecution also "refreshed" the juror's "minds" during argument that they believed the evidence showed Bailey was murdered "sometime before sunup" (Trans, XIX 121, 10-5-06) while the Petitioner was in Las Vegas, and that she was high on methamphetamine at the time. (Trans XIX-191, 194, 10-5-06) The prosecution requested and was granted jury instruction no. 27, an "involuntary intoxication" instruction, so that commission of an act under the influence of methamphetamine couldn't be used by the jury to reduce the charge.

The Petitioner's convictions are proof that the jury agreed with the prosecution's assessment of the evidence, the key component of which is the Petitioner specifically went to Las Vegas to get methamphetamine and she was high on it when Bailey was killed "sometime before sunup" on July 8. based on Dr. Simms' testimony establishing his latest possible time of Bailey's death was 3:50 a.m. (Trans. VIII-78-79, 9-20-2006) The judge specifically mentioned the Petitioner's methamphetamine use during the Petitioner's sentencing and the judge relied on it as a reason to give her a more severe sentence. (Sentencing Trans. 28-30, 02-07-2007)

The prosecution's argument that the evidence proved – and that the jury and judge accepted – that the Petitioner went to Las Vegas on July 6 to obtain methamphetamines and that she was high on them between 3:50 a.m. and "sunup" on July 8 was an irreplaceable foundation of the prosecution's case. The trial judge specifically mentioned during sentencing:

> "THE COURT: With this case there were many, many, many photographs taken at the crime scene. And of the nearly 30 years that I've been working in the criminal justice system this case and two others I think -- that I recall vividly were this bloody and violent. **And all three of the cases involved methamphetamine**." (Sentencing Trans. 28-30, 02-07-2007) (emphasis added)

The Response cannot now try and rewrite the history of the case by arguing the new evidence the Petitioner was not under the influence of methamphetamines on July 6, 7 and 8 isn't devastating to the foundation of Petitioner's convictions, because even the trial judge admitted on the record during sentencing how crucial it was to her conviction.

The new evidence in Ground 15 undercuts the very foundation of the Petitioner's conviction by proving through Kendre Thunstrom's Affidavit that:

> In July 2001 methamphetamine was available in Panaca within walking distance of the Lobato's home, and other places in Lincoln County." (See Exhibit 21, writ of *habeas corpus*.)

The Response does not deny that or the new evidence methamphetamine also would have been available in "the nearby Lincoln County towns of Caliente or Pioche, or Alamo," or that the fair-sized cities of Cedar City, Utah and St. George, Utah were sources of methamphetamine and they are both much closer to Panaca than Las Vegas. (Ground 15, 90)

The Response to Ground 15's new evidence is to suggest that the record of the Petitioner's trial and sentencing should be disregarded and replaced by the jury's reliance on out-of-court evidence about which there was no testimony: "It is highly likely that the jury was already aware that illegal narcotics are available in Lincoln County, Nevada." (Response, 14) In other words, the Response's defense to Ground 15 is that in deciding to convict the Petitioner the juror's engaged in prejudicial misconduct by violating jury instruction no. 34 that specifically instructed them to only consider evidence introduced at trial:

> **"The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel."**

See also jury 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." (emphasis added to original)

Consequently, the Response's defense to the new evidence Ground 15 is that the jury committed prejudicial jury misconduct by deliberately violating jury instructions 33 and 34 (and possibly other instructions) in convicting the Petitioner by relying on extrinsic out-of-court "evidence," because even though no evidence was admitted at trial about the availability of methamphetamine in Panaca and other Lincoln County towns, "It is highly likely that the jury **was already aware** that illegal narcotics are available in Lincoln County, Nevada." (Response, 14)

So the Response not only admits, but asserts as its defense that the only way for the jurors to not have considered the absence of evidence that methamphetamine was readily available in Panaca and other Lincoln County towns, which could have resulted in the Petitioner's acquittal, was for them to have relied on extrinsic out-of-court evidence they were "already aware" and which was absolutely prohibited in their deliberations by jury instructions 33 and 34 (and possibly other instructions). The Response doesn't even attempt to answer the question of how the jury came to be "aware" of this evidence prohibited by instructions 33 and 34 that they relied on to convict the Petitioner. The

Petitioner's right to a fair trial and due process was violated by the juror's prejudicial misconduct of relying on extrinsic outside information not admitted into evidence to convict her.

The U.S. Supreme Court has stated the principle, "One touchstone of a fair trial is an impartial trier of fact – "**a jury capable and willing to decide the case solely on the evidence before it**."" *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (emphasis added). The Response doesn't just acknowledge the jury didn't determine its verdict based "solely on the evidence before it," but asserts that it didn't do so as its defense to Ground 15, thus admitting under *McDonough Power Equipment, Inc.* that the Petitioner was denied a fair trial.

A leading Nevada Supreme Court case on the juror misconduct of relying on extrinsic out-of-court information that wasn't admitted into evidence to convict, is *Meyer v. State*, 80 P.3d 447, 119 Nev. 554 (Nev. 12/19/2003). In reversing the conviction based on the juror's misconduct of relying on extrinsic non-admitted evidence, the Court stated in part:

> "Juror misconduct" falls into two categories: (1) **conduct by jurors contrary to their instructions or oaths**, and (2) attempts by third parties to influence the jury process. The first category includes jurors failing to follow standard admonitions not to discuss the case prior to deliberations, accessing media reports about the case, conducting independent research or investigation, discussing the case with nonjurors, **basing their decision on evidence not admitted**, … ¶30
>
> The general rule at common law was that jurors may not impeach their own verdict. However, common law also recognized an exception to that general rule. **Where the misconduct involves extrinsic information** or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted. An extraneous influence includes, among other things, publicity or media reports received and discussed among jurors during deliberations, **consideration by jurors of extrinsic evidence**, and third-party communications with sitting jurors. … ¶34
>
> The Federal Rules of Evidence recognize this distinction, and the general rule and exception are embodied in Rule 606(b). ¶35
>
> Thus, **proof of misconduct must be based on objective facts** and not the state of mind or deliberative process of the jury. ¶37
>
> This court, interpreting NRS 50.065, has stated that a motion for a new trial may only be premised upon **juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct** without regard to the state of mind and mental processes of any juror. ¶38
>
> Before a defendant can prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: **(1) the occurrence of juror misconduct**, and (2) **a showing that the misconduct was prejudicial**. Once such a showing is made, **the trial court should grant the**

motion. Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict. ¶40 *Id.* (emphasis added)

Ground 15 satisfies the first prong of jury misconduct because the Response admits it is "highly likely" the jurors relied on extrinsic out-of-court information not admitted into evidence that methamphetamine was available in Lincoln County at the time of Bailey's murder – which the jurors had to have done because there was no evidence admitted concerning that. The jurors' misconduct was disregarding jury instruction 41 specifically instructed them that they were only to consider evidence introduced by "testimony," exhibits", or "facts admitted or agreed to by counsel."

Ground 15 satisfies the second prong of jury misconduct because there is no way of knowing exactly what extrinsic out-of-court information the jury relied on, or its accuracy. One can only guess, just as the jurors would have had to, because to the knowledge of the Petitioner none of the jurors lived in Panaca or Lincoln County on the weekend of July 6-8, 2001. They might have thought, 'well, you can probably usually find it there if you look hard enough, but maybe it wasn't available that weekend and that is why she had to go to Las Vegas.' A guessing game is required to try and understand the nature, scope, and truthfulness of the extrinsic out-of-court evidence about the availability of methamphetamine in Lincoln County that the jury relied on to convict the Petitioner. The Petitioner had no opportunity to challenge the accuracy of the extrinsic evidence the jury relied on through cross-examination, and that is why the Nevada Supreme Court recognized in ***Meyer v. State***, "Because the [jury] misconduct involves extrinsic evidence, the Confrontation Clause is implicated." ***Id.*** at 73. So the Petitioner's right of cross-examination under ***Crawford v. Washington***, 124 S.Ct. 1354, 541 U.S. 36, 158 L.Ed.2d 177 (U.S. 2004) and its progeny, was violated by the jury's reliance on out-of-court extrinsic evidence. The Response admits – "It is highly likely that the jury **was already aware** that illegal narcotics are available in Lincoln County, Nevada." (Response, 14) – and that prejudicial jury misconduct is its defense to Ground 15. Consequently, the jury's misconduct depriving the Petitioner of her right of confrontation must be factored into the determination of granting the Petitioner's writ of ***habeas corpus*** and vacating her convictions.

In 2008 the Nevada Supreme Court reversed a capital conviction and ordered a retrial in part on the jury misconduct of violating a jury instruction, ruling "The jury misconduct also denied

Valdez his Sixth Amendment right to a fair trial by an impartial jury." *Valdez v. State*, 196 P.3d 465, 124 Nev. 97 (Nev. 11/26/2008), ¶60. So the Petitioner's "Sixth Amendment right to a fair trial by an impartial jury" was also violated by the jury's misconduct of relying on extrinsic out-of-court evidence. Consequently, the jury's misconduct depriving the Petitioner of her right to a fair trial by impartial jurors must be factored into the determination of granting the Petitioner's writ of ***habeas corpus*** and vacating her convictions.

The FRE 606(b) exceptions allowing consideration of jury misconduct are discussed in *Tanner et al. v. United States*, 107 S. Ct. 2739, 483 U.S. 107 (U.S. 06/22/1987).

The failure of the Response to deny or substantively respond to the new evidence in Ground 15 constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

If the jury had known the positive, undisputed, and legally admitted new evidence that in July 2001 methamphetamine was readily available in Panaca and nearby towns and the Utah cities of Cedar City and St. George that were much closer than Las Vegas, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

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

The Response deals with Grounds 16 and 17, and they will be answered separately.

Ground 16

The Response misstates the scope of Ground 16 and its new evidence. Steven King did not testify and he was never asked to give a Statement. King provides significant new evidence based on his own personal knowledge.

King is willing to testify at an evidentiary hearing and be subjected to cross-examination about his Affidavit, so the reference to *Herrera* is inapplicable.

The Response ignores that Steven King was Diann Parker's domestic partner at the time of her alleged rape by Bailey on July 1, 2001, that she reported, and his murder a week later. He remained her domestic partner until her death in January 2005. (Exhibit 8, 1) The Response also ignores that King is the only person available who knew Parker, Bailey, and the Mexicans, and he was familiar with the area around the Nevada State Bank.

Although most of King's Affidavit is based on his personal knowledge, the information confided in him by his domestic partner Parker is admissible under NRS 51.315(1.)(a) and (b) (General exception; other exceptions illustrative.) or other hearsay exceptions.

The Response falsely states, "King's testimony is also cumulative and simply repeats much of the testimony of Diann Parker." (Response, 15) King's Affidavit provides significant new evidence about Parker, Bailey, and the Mexicans that he implicates in Bailey's murder. Furthermore, King unequivocally states, "I am absolutely certain that Kirstin Blaise Lobato did not murder 'St Louis.'" (King knew Bailey by his nickname "St Louis.") (Exhibit 8, 2) However, to the degree that King's Affidavit does provide evidence corroborated by Parker's testimony, it helps to satisfy NRS 51.315(1.)(a): "Its nature and the special circumstances under which it was made offer strong assurances of accuracy." Parker's testimony was subjected to cross-examination by the prosecution. While contending that some of King's Affidavit is hearsay, the Response doesn't breathe one word suggesting that King isn't a truthful or reliable witness. As the U.S. Supreme Court noted in *Chambers v. Mississippi*, 410 U. S. 284, 302 (1973), "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302 King's Affidavit has new evidence "directly affecting the ascertainment of guilt," so it is a circumstance anticipated by *Chambers* where "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

King's Affidavit provides new evidence filling in holes in Parker's testimony – particularly that she omitted critical information about her ongoing personal relationship with the Mexicans,

that the Mexicans were in the country illegally and so had no recourse to the legal system to deal with Bailey, that the Mexicans had compelling motives to inflict grave harm on Bailey, and that they "vanished" from their apartment about the time Detectives Thowsen and LaRochelle questioned the manager at the Grand View Apartments about the Mexicans. (Exhibit 8, 1-2)

King provides critical evidence the jury did not hear that makes it clear the Mexicans had the motive to personally deal with Bailey, and living only 100 yards north of the Nevada State Bank, they had the means and opportunity to kill him.

The Response inaccurately states an "anonymous individual" wrote the "Injustice Central blog" article that is Exhibit 54 in the writ of ***habeas corpus***. The blog specifically identifies the blog article's author is Tony, the Injustice Central blog is that of Tony Rivera, and it lists the time and date it was posted. It is not unusual that individual articles on a blog carry the author's first name. The blog includes at least 31 articles about the Petitioner's case, which show Mr. Rivera has a considerable grasp of the facts in the public record about the Petitioner's case. As the Petitioner explains, Mr. Rivera is a Hispanic male who knows Mexican culture wrote the excerpt from the "Injustice Central blog" (Exhibit 54, writ of ***habeas corpus***). Mr. Rivera's article comes from his first-hand knowledge, so it is unfortunate the Respondents think Mexican culture is "borderline racist." The fact is Mr. Rivera's article provides personal knowledge of why the "seven to nine Hispanic males" who lived in the apartment where Bailey slapped Parker would have killed him in the fashion in which his body was found, when they learned Bailey raped Parker after they warned him to stay away from her, and after he also assaulted the girlfriend of one of the Mexicans about the same time. Any testimony by Mr. Rivera about information in his article that may not be based on his personal knowledge is at least admissible under NRS 50.265 (Opinions: Lay witnesses.), or other hearsay provisions.

Martin Yant is a licensed private detective, and his Affidavit has new evidence about one of the illegal Mexicans who rented the apartment were Bailey slapped Parker and who there is reason to believe is the Mexican who had words with Bailey outside their apartment afterwards. That Mexican is Daniel Martinez, and Yant discovered he was using the SSN of a man who died in Michigan in 1987. (Exhibit 26, writ of ***habeas corpus***). Martinez was one of the Mexican friends of

Diann Parker and one of the Mexicans considered as possible suspects in Bailey's murder. Thowsen testified that prior to the Petitioner's arrest he obtained information from the Grand View Apartment's manager about the Mexicans who rented Apartment 822. Martinez was one of those men. Thowsen testified he ran that information through SCOPE and the Mexicans came up clean. Thowsen's testimony could not have been truthful because if he had run Martinez's information, he would have discovered Martinez was using a dead man's SSN. At that point no one had been arrested in Bailey's murder, and information Martinez was using a dead man's Social Security Number would have justified further investigation under the circumstances of him being a suspect in Bailey's murder investigation. Particularly because Parker testified that Bailey was easily identifiable because "he usually wore a red hat." (Trans XIV-25, 9-28-06) A search of Martinez's apartment 822 before he and the other Mexicans "vanished" within days after Thowsen's visit to the Grand View Apartments could have resulted in discovery of Bailey's "red hat," his personal ID, and his checking account information that wasn't at the crime scene.

Ground 16 provides specific new third-party culprit evidence the Mexicans murdered Bailey that the jury did not hear and could not have considered. Consequently, the Response's reference to ***Hargrove v. State***, 100 Nev. 498 (1984) is inapplicable.

If the jury had known the new third-party culprit evidence in Ground 16, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." ***Schlup v. Delo***, 513 U.S. at 327.

Ground 17

The Response does not deny, address, or meaningfully or logically respond to Ground 17, and that constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to

provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

Ground 17 is based on Bailey's final Nevada State Bank statement, and an Affidavit based on the expert and personal knowledge of a Financial Service Supervisor who worked at the Nevada State Bank in 2001. (Exhibit 25, writ of ***habeas corpus***) The Affidavit details the processing of checks in July 2001, and provides the new evidence that three checks drawn from Bailey's checking account were likely cashed one to three days after his death.

Bailey's identification and his checking account information were not found on his person or at the crime scene. There is no question that whoever cashed the three checks after his death had his checking account information. A more than reasonable explanation is that whoever killed Bailey took that information from him and used it to cash the checks.

The Response tries to pretend this new check cashing evidence is not important, stating, "However, there is no evidence presented which shows who cashed those particular checks, who they were written to, or when they were written." (Response, 15) That response brings to mind one thing that **is known** about the new check cashing evidence, at no time since the day of the Petitioner's arrest has the prosecution breathed one word suggesting she cashed one, much less three checks drawn on Bailey's NSB checking account. And not a single item belonging to Bailey or any of his DNA was recovered from any personal item of the Petitioner or her car. So there is no basis to believe based on the record of the Petitioner's case that she was ever in possession of anything that belonged to Bailey – much less his checkbook or checking account information or his personal ID. The prosecution had Bailey's final NSB bank statement in their possession prior to the Petitioner's trial, and with all of the LVMPD's investigative resources it made no effort to subpoena, **or even ask** the Nevada State Bank for copies of the three checks that have since been destroyed. (Exhibit 25, writ of ***habeas corpus***) So it is completely hollow and disingenuous for the Response to use as a defense to Ground 17 that the Petitioner doesn't "who cashed those particular checks, who they were written to, or when they were written." (Response, 15) Particularly since the Response doesn't deny the truthfulness and reliability of the new evidence in Ground 17.

The only reasonable explanation is the three checks likely cashed one to three days after Bailey's death were cashed by a person or persons involved in his murder, and there is no basis to believe that person was the Petitioner. If the jury had known the new check cashing evidence in Ground 17, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

14. NRS 201.450 (Ground 19).

The Response does not deny, address, or meaningfully or logically respond to the legal argument in Ground 19 that the Petitioner was convicted of a non-existent violation of Nevada's necrophilia law – NRS 201.450.

The Response erroneously responds to the legal argument in Ground 19, "Defendant has done nothing more than rehashed her arguments from her previous direct appeal." (Response, 15) Ground 19 raises a new legal issue that was not a part of the reversal of her 2002 convictions, and that is apparent from the Nevada Supreme Court's ruling the Response misstates. The ruling actually states:

> "We also reject Lobato's remaining claims of error, including the assertion that NRS 201.450 was unconstitutionally applied and is void for vagueness."
> *Lobato v. State*, 120 Nev. 512, 522, 96 P.3d 765, 772 (2004).

The Petitioner's new legal argument does not challenge that ruling. Ground 19 sets forth that based on the evidence, the wound to Bailey's rectum does not constitute a violation of the necrophilia law — NRS 201.450. The bill was drafted by the Washoe County District Attorney's Office, and during testimony before the Nevada State Assembly and Senate hearings prior to enactment of the necrophilia law, their representative made it crystal clear that it only applies to acts with a dead body that constitute sexual assault on a live person, and that the law established the same punishment for a sex act performed with a dead body as with a live person:

> "Mr. Basl went on to say that he does not believe the bill needs to be amended by adding a series of other felony and/or other offenses: that part of the problem as far as the way dead bodies are handled, is covered already by existing legislation, but the one area that is completely void of mention is the area of sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate,

> (Senate Judiciary Hearing, April 5, 1983, 788 (Underlining added to original.)) Basl testified before the Senate committee, as he had before the Assembly committee, that the sponsors seeking to criminalize necrophilia wanted "to make the penalty conform to those for sexual assault [of a live person]." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 789.))
> (Writ of ***habeas corpus***, 111-112.)

The Response does not deny or address in any way that new evidence that has never before been raised in the Petitioner's case. It is logical that the necrophilia law – NRS 201.450 – only criminalizes sex acts with a dead body that constitute sexual assault on a live person, because it was enacted in response to a man's sexual intercourse with the corpse of a seven-year-old girl. (writ of ***habeas corpus***, 111)

The Response does not deny or even address Ground 19's new evidence that:

> NRS 201.450 is known as Nevada's necrophilia law, and the legislative history of the statute makes clear that it only criminalizes sexual activity with a corpse that would be considered a sexual assault on a live person. The prosecution did not allege, or argue that Petitioner engaged in an act of necrophilia with Bailey, and the jury did not convict the Petitioner on the basis she engaged in sexual relations with Bailey's rectum after his death. The necrophilia law's origin, legislative history, and intended scope all support that the Petitioner was convicted of a non-existent violation of NRS 201.450, and that the prosecution did not even allege a valid violation of the necrophilia law. (writ of ***habeas corpus,*** 110-111)

The Response erroneously states, "Defendant's "new evidence" is not evidence of factual innocence but an allegation of legal insufficiency." (Response, 16) The evidence establishes Bailey's rectum wound was not a sex act with his body that would be considered a sexual assault on a live person, and that means that the Petitioner was convicted of a non-existent crime and that she is actually innocent of her convicted violation of engaging in necrophilia with Bailey – NRS 201.450.

As explained above, the Response misstates, fails to substantially address, and does not even deny the new evidence claim in Ground 19, and therefore it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in

their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

If the jury had known the new evidence that the wound to Bailey's rectum does not constitute a violation of Nevada's necrophilia law – NRS 201.450 – then individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995).

15. Juror misconduct (Ground 20).

The Response is confused, because Ground 20 involves jury misconduct. Ground 20 alleges "the Petitioner was prejudiced by the juror's misconduct and she was not found guilty beyond a reasonable doubt of each and every essential element of each charge based on all evidence presented prior to the close of evidence, and due to juror misconduct the Petitioner was denied her state and federal constitutional fifth and sixth amendment rights to due process of law, an impartial jury, and a fair trial." (writ of *habeas corpus*, 115)

The Response does not deny, address, or meaningfully or logically respond to the new evidence claims in Ground 20 that four jurors openly discussed the merits of the Petitioner's case prior to the close of the evidence and that one of those jurors expressed her opinion the Petitioner was guilty. The Response does not deny or challenge the accuracy or truthfulness of the new witness evidence. (Exhibits 24 and 72, writ of *habeas corpus*) The juror's misconduct was in direct defiance of the judge's specific instruction prior to every adjournment for lunch, a "stretch break," or after the day's proceedings:

> "During this recess you're admonished not to converse among yourselves or with anyone else on any subject connected with this trial. You're not to read, watch or listen to any reporter or commentary on the trial or any person connected with the trial by any medium of information, including, without limitation, newspaper, television, radio and Internet, You're not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you." (writ of *habeas corpus*, 116)

The Response's failure to deny, address, or meaningfully or logically respond to the jury misconduct detailed in Ground 20 constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The U.S. Supreme Court has stated the principle, "One touchstone of a fair trial is an impartial trier of fact – "a jury capable and willing to decide the case solely on the evidence before it."" ***McDonough Power Equipment, Inc. v. Greenwood***, 464 U.S. 548, 554 (1984). The Response doesn't deny that Ground 20 presents new evidence the Petitioner's verdict wasn't based "solely on the evidence before it," and thus the Petitioner was denied a fair trial.

A leading Nevada Supreme Court case on juror misconduct is ***Meyer v. State***, 80 P.3d 447, 119 Nev. 554 (Nev. 12-19-2003). In reversing the conviction based on the juror's misconduct, the Court stated in part:

> "Juror misconduct" falls into two categories: (1) **conduct by jurors contrary to their instructions or oaths**, and (2) attempts by third parties to influence the jury process. The first category includes **jurors failing to follow standard admonitions not to discuss the case prior to deliberations**, accessing media reports about the case, conducting independent research or investigation, discussing the case with nonjurors, basing their decision on evidence not admitted, … ¶30
>
> …
>
> Thus, **proof of misconduct must be based on objective facts** and not the state of mind or deliberative process of the jury. ¶37
>
> This court, interpreting NRS 50.065, has stated that a motion for a new trial may only be premised upon **juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct** without regard to the state of mind and mental processes of any juror. ¶38
>
> Before a defendant can prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: **(1) the occurrence of juror misconduct**, and (2) **a showing that the misconduct was prejudicial**. Once such a showing is made, **the trial court should grant the**

> **motion**. Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict. *Id.* ¶40

Ground 20 satisfies the first prong of jury misconduct because the Response does not deny that the jury misconduct occurred exactly as it is documented in Ground 20.

Ground 20 satisfies the second prong of jury misconduct because the Response does not deny that "the Petitioner was prejudiced by the juror's misconduct and she was not found guilty beyond a reasonable doubt of each and every essential element of each charge based on all evidence presented prior to the close of evidence, …" (writ of habeas corpus, 115)

In 2008 the Nevada Supreme Court overturned the convictions in ***Valdez v. State***, 196 P.3d 465, 124 Nev. 97 (Nev. 11/26/2008) in part based on the prejudicial jury misconduct of prematurely forming an opinion – which is what happened in the Petitioner's case and which the Response does not deny. The Court stated:

> "**When a juror prematurely forms an opinion in a case, the burden shifts to the defendant to change the juror's opinion, which violates the defendant's right to an impartial jury**. Not only is it more difficult to change a juror's premature decision, but **a juror may be reluctant to change his or her opinion after disclosing it to the other jurors**." *Id.* at ¶61. (emphasis added)

The unchallenged evidence in Ground 20 not only establishes under *Valdez* that the premature opinions of the jurors unconstitutionally shifted the burden of proof to the Petitioner, but by the jurors disclosing their opinion to other jurors may have been "reluctant to change his or her opinion after disclosing it to the other jurors." *Id.* at ¶61

Consequently, due to juror misconduct the Petitioner was denied her state and federal constitutional fifth and sixth amendment rights to due process of law, an impartial jury, and a fair trial, and individually or cumulative with other evidence it warrants that her convictions are vacated.

16. Witness perjury (Ground 21).

The Response does not deny Ground 21's new evidence that Detective Thomas Thowsen committed perjury about five key issues. The Response's assertion that Ground 21's new evidence of Thowsen's perjury "are bare allegations" is false because they are based in part on Thowsen's direct and unqualified Testimony at the Petitioner's first trial:

> THE COURT: The record shall reflect that when he said in here somewhere he referred to a black binder that's to his right, which contains numerous documents, is about five inches thick.
> Q. (By Mr. Kohn) I believe that's his **homicide book**, is that correct detective?
> A. (By Mr. Thowsen) That's correct.
> Q. **And that has everything you did in the case; everything that was done in the case; is that correct?**
> A. **Yes**.
> (3 App. 734-735; Trans. III-99-100 (5-10-02)) (Emphasis added to original.)
> (writ of *habeas corpus*, 118)

That testimony was not recanted at the Petitioner's second trial.

Thowsen then testified at the Petitioner's second trial (the subject of her writ of *habeas corpus*) about the five key areas of his investigation of Bailey's murder detailed in Ground 21 that he had no record of any kind supporting his testimony. That testimony was not only contrary to Thowsen's prior testimony, but it was unsupported by the LVMPD Officer's Report dated August 22, 2001. The Officer's Report meticulously details the name and address of every individual and organization contacted in the course of the detective's investigation of Duran Bailey's murder. It also records the date and time of when people were talked with by Detectives Thowsen and James LaRochelle. Nowhere in that report does it mention:

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

The Petitioner's allegations are specific and supported by the case record and therefore the Response's reference to *Hargrove* is irrelevant.

The Response inaccurately states, "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." (Response, 16)

The Nevada Supreme Court only considered Thowsen's hearsay regarding the first three issues listed above – they did not consider anything regarding Thowsen's alleged investigation at the Budget Suites Hotel or of the Mexicans – and the Court made that ruling based on fatally incomplete evidence. The Court did not know that Thowsen's testimony they were ruling on was not only hearsay but also perjurious, or that Thowsen's hearsay testimony was only admitted into evidence because of Assistant District Attorney William Kephart's gross prosecutorial misconduct of first lying to the trial judge that Thowsen's testimony would not be hearsay in order to induce her to admit it, and then lying after the fact to the judge that it wasn't hearsay to convince her not to strike it from the record. (writ of *habeas corpus*, 125)

The Petitioner's new evidence establishes that the Nevada Supreme Court's ruling regarding Thowsen's hearsay testimony was fatally infected with Thowsen's perjury and Kephart's lying (prosecutorial misconduct and frauds on the court) to the judge to first get that perjurious testimony admitted and then to prevent it from being stricken from the record. (See Grounds 18 and 51) In answer to that the Response merely states: "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." (Response, 16)

However, in an effort to avoid the consequences of the newly discovered evidence of Thowsen's perjury and Kephart's prosecutorial misconduct of repeatedly lying to the trial judge, the Response misapplies *Hall*, which states, "The law of a first appeal is the law of the case on all subsequent appeals **in which the facts are substantially the same**." *Hall*, 91 Nev. at 315. (emphasis added to original). The Nevada Supreme Court only considered that Thowsen's testimony was hearsay – **not that it was also perjurious**. Furthermore, the Court didn't consider at all that Thowsen's perjurious testimony **was elicited by Kephart after he lied to the trial judge** to admit that perjurious testimony and that **he again lied to the judge to convince her not to strike Thowsen's perjurious testimony**.

It bears repeating that the Response does not deny Ground 21's claims that Thowsen committed perjury regarding the five investigations referred to above that he testified he conducted (and the Nevada Supreme Court only considered his hearsay testimony regarding the first three) – but which he did not conduct. It also bears repeating that the Response does not deny Ground 21's claim that ADA William Kephart, now the Clark County Chief Deputy District Attorney, committed prejudicial prosecutorial misconduct by lying to the trial judge to induce her to first admit Thowsen's perjurious testimony, and then not to strike it.

It is beyond question that the facts in the Petitioner's writ of *habeas corpus* regarding the new evidence of Thowsen's perjurious testimony and Kephart's repeated lying to the trial judge regarding Thowsen's perjurious testimony are dramatically different than those that the Nevada Supreme Court considered when they made their ruling.

The Response misstates the law of the case as an absolute doctrine and misapplies it to the extraordinary circumstances in Ground 21 regarding Thowsen's repeated perjurious testimony and Kephart's repeated lying to the judge. The U. S. Supreme Court noted in *Arizona v. California, et al.*, 103 S. Ct. 1382, 460 U.S. 605 (1983):

> "Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. … **Law of the case directs a court's discretion, it does not limit the tribunal's power**." *Id*. at 619.

The Court then defined that one circumstance where the law of the case does not "does not limit the tribunal's power" is if to do so "would work a manifest injustice.":

> "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Id*. at fn. 8.

The circumstances in the Petitioner's case that the jury relied on the perjurious testimony of the lead homicide detective to convict her is the most extreme "manifest injustice" imaginable. It mandates that the law of the case cannot apply to any portion of the Nevada Supreme Court's affirmation of the Petitioner's convictions regarding Thowsen's "hearsay" testimony. Kephart lied to the judge to enable Thowsen to have the opportunity to commit perjury (hearsay) regarding the

non-existent searches by him (or his secretary) for NRS 629.041 reports of groin area or penis wounds in May, June and July 2001; his non-existent contacts with hospitals concerning treatment of an injured or severed penis in May, June and July 2001; and his non-existent contacts with urologists concerning repair of a severed penis in May, June and July 2001. Those are the three areas of testimony that the Nevada Supreme Court only considered as hearsay – and which are now known to have also been perjurious – and which the Response does not deny were perjurious.

The reason Kephart and Thowsen went to such extreme lengths is because the Petitioner Statement of July 20, 2001, describes in detail the attempted rape of her at a Budget Suites Hotel in east Las Vegas "over a month ago" – which was prior to June 20, 2001, and more than 18 days prior to Duran Bailey's murder on July 8, 2001. Thowsen's perjurious (hearsay) testimony was intended to undermine the Petitioner's credibility and truthfulness, and convince the jury her Statement is actually about Bailey's murder in the trash enclosure for a west Las Vegas bank. Thowsen's perjurious (hearsay) testimony was indispensible to the prosecution because if the jury accepted at face value the Petitioner's Statement describing her attempted rape in east Las Vegas a number of weeks before Bailey's murder in west Las Vegas, there is an overwhelming probability she would have been acquitted, since the prosecution does not deny in the Response the Petitioner's repeated statements in her writ of ***habeas corpus*** that there is no physical, forensic, eyewitness, surveillance, documentary or confession evidence she had been anywhere in Clark County at anytime on July 8, 2001 – the day of Bailey's murder.

If the jury had known that Thowsen's testimony about the five investigations detailed in Ground 21 was perjurious and those investigations had not been conducted, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." ***Schlup v. Delo***, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995).

II

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

[Petitioner notes that this heading does not accurately state the substance of the claims that is actually – New evidence of police and prosecutor misconduct in maliciously and negligently prosecuting the Petitioner (Ground 22) and, New evidence the Petitioner's conviction was based on false evidence. (Ground 24)]

The Response doesn't make any attempt to meaningfully address or logically or legally refute the new evidence claims in Ground 22 and 24.

The Response inaccurately and sensationally states, "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 …" (Response, 16) The word "conspiracy" does not appear anywhere in Grounds 22 or 24. Ground 22 describes "police and prosecutorial misconduct" that resulted in the Petitioner's "malicious prosecution." Ground 24 describes "New evidence the Petitioner's conviction was based on false evidence."

The Response also falsely states, "Defendant has provided no support for these claims, and they are nothing more than accusations extrapolated from the evidence discussed in Section I." (Response, 16-17)

The Response erroneously cites ***Hargrove v. State*** that is inapplicable to Grounds 22 or 24 because those Grounds are supported by credible and trustworthy evidence, and they state "specific factual allegations" that entitle the Petitioner relief under the ***Schlup*** actual innocence standard.

Grounds 22 and 24 deal with a different set of facts and legal issues, so they will be deal with separately.

Ground 22

Ground 22 is supported by evidence that includes eight new credible and trustworthy witnesses, and the Response makes no effort to challenge the evidence of those witnesses.

The Response fails to make any attempt to address or meaningfully or logically respond to the new evidence claims in Ground 22 and that constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d

865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

If the jury had known the new evidence in Ground 22 that the Petitioner was maliciously prosecuted by the prosecutors and police who know she is innocent of Bailey's murder, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

Ground 24

Ground 24 cites new evidence that identifies 13 specific areas of false evidence upon which the jury relied to convict the petitioner. That new evidence includes ten new credible and trustworthy witnesses and the new evidence of six experts in several different areas of expertise, and the Response makes no effort to challenge any of that new evidence.

The Response fails to make any attempt to address, or meaningfully or logically respond to the new evidence claims in Ground 24 and that constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

If the jury had known the new evidence in Ground 24 that the Prosecution was relying on false evidence, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

III

DEFENDANT'S BRADY CLAIMS ARE WITHOUT MERIT

(GROUNDS 25 & 26) [Petitioner notes that this heading does not accurately state the substance of the claims that is actually – Prosecution failed to disclose Brady evidence of Duran Bailey's involvement with law enforcement (Ground 25) and, Prosecution failed to disclose the Brady evidence that a suspect in Bailey's murder was using a dead man's social security number. (Ground 26)]

Grounds 25 and 26 state specific detailed claims under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny that are supported by new evidence the Response does not deny, and consequently the reference to *Hargrove v. State* is inapplicable.

The Supreme Court **rejected** in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995) limiting *Brady* as the Response falsely suggests it is limited, "the rule encompasses evidence "known only to police investigators and not to the prosecutor." (Response, 17) The Court actually ruled in *Kyles* the opposite that, "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.

Kyles also establishes the important principle that in determining its materiality of the suppressed evidence it is to be "considered collectively, not item-by-item." *Id*. at 436. And, "[T]he character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Id*. at 439, 115 S.Ct. 1555.

A leading Nevada case regarding *Brady* is *Mazzan v. Warden*, 993 P.2d 25, 116 Nev. 48 (Nev., 2000), which states in part:

> *Brady* and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. … Failure to do so is a violation of due process regardless of the prosecutor's motive. … **Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist**. … In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed. Id.
>
> **This materiality "does not require demonstration by a preponderance" that disclosure of the evidence would have resulted in acquittal**. … Nor is it a sufficiency of the evidence test; a defendant need not show that "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." … **A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial.** … In Nevada,

after a specific request for evidence, a Brady violation is material if there is a reasonable possibility that the omitted evidence would have affected the outcome.

In determining its materiality, the undisclosed evidence must be considered collectively, not item by item. *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555. "[T]he character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Id*. at 439, 115 S.Ct. 1555.

…

Due process does not require simply the disclosure of "exculpatory" evidence. Evidence also must be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks. ... Furthermore, "[d]iscovery in a criminal case is not limited to investigative leads or reports that are admissible in evidence." … Evidence "need not have been independently admissible to have been material."

….

If he proves that the withheld evidence was material under Brady, that will establish actual prejudice. See *Strickler*, 527 U.S. at ___, 119 S.Ct. at 1949. Id. (emphasis added to original)

Grounds 25 and 26 deal with different *Brady* evidence, and they are explained separately.

Ground 25

The Response inaccurately describes the *Brady* claim in Ground 25, which is very straightforward. The prosecution failed to disclose Duran Bailey's involvement with law enforcement, and the Response doesn't deny that. As detailed in Ground 25 the telephone number of a Las Vegas police officer was written on two different items recovered from Bailey's pants pockets. (writ of *habeas corpus*, 159) Ground 25's reference to the letter "D" that was in fact found next to the police officer's telephone numbers is an interesting aspect of the situation, but what it stood for has no bearing on the substance of Ground 25, and consequently the Response's reference to *Hargrove* is irrelevant. The Response doesn't deny that:

"As a person with his ear to the street scene, it is reasonable that Bailey was a source of information to law enforcement.

Bailey's undisclosed ties to law enforcement changes the complexion of the Petitioner's case, because any number of known and unknown persons with the means an opportunity could have had a motive to take care of Bailey by killing him if they had found out he was providing information to the police. … It can also explain why Bailey's extensive criminal history in Las Vegas includes only one conviction. His record includes several incidents of domestic battery prior to his

> alleged beating and rape of Diann Parker on July 1, 2001. (Exhibit 62, Duran Bailey LVMPD Criminal History.)" (writ of *habeas corpus*, 159-160)

The Response does not deny that the prosecution failed to disclose Bailey's ties to law enforcement. The Response ignores that when misleadingly stating – "Defendant presented ample evidence which alleged that Bailey was killed by someone other than her…" (Response, 18) – because the jury heard **no evidence** that Bailey could have been murdered by any number of individuals who didn't want their business disclosed to the LVMPD. Bailey's ties to law enforcement was third-party culprit evidence of a completely different character than that presented at trial. Of course, that would have added to the motive for the illegal Mexican friends of Diann Parker to murder him if they thought he was going to cause them trouble.

Furthermore, the Response does not deny the claim in Ground 25 that:

> "The undisclosed officer could be a material witness in Bailey's murder and have valuable and unique information of assistance in identifying the person or persons who murdered Bailey." (writ of *habeas corpus*, 160)

The prosecution's failure to disclose Bailey's ties to law enforcement that the Response does not deny, meets ***Brady's*** three-prong test:

1. The evidence is favorable to the Petitioner.

2. The evidence was withheld by the state.

3. The evidence is material to the jury's determination of the Petitioner's guilt, and she was prejudiced.

If the jury had known the non-disclosed *Brady* evidence in Ground 25, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." ***Schlup v. Delo***, 513 U.S. at 327.

Ground 26

The Response falsely and misleadingly states that private investigator Martin Yant has "access to any social security number in the United States …" (Response, 18) The Affidavit of Mr. Yant, who provided his services *pro bono* and has assisted in the exoneration of 15 wrongly convicted individuals, states in part:

> 3. On or about December 11, 2009, I conducted a search of online databases I have access to for the names and Social Security numbers of Alejandro Cruz, SSN ***-**-****, and Daniel Martinez, SSN 3**-0*-0***.
> 4. A search of Alejandro Cruz, SSN 6**-**-**** resulted in the discovery of information that included he is AKA Arriaga Alejandro Cruz, his SSN was issued in 1999 in California, and his DOB is September 1, 1973.
> 5. A search of Daniel Martinez, SSN 3**-0*-0*** resulted in the discovery that there is no such person with that SSN.
> 6. SSN 3**-0*-0*** is assigned to Clarence R. Hartung, who died on September 28, 1987 in Oakland, Michigan at the age of 80.
> (Exhibit 26, writ of *habeas corpus*)

The Response does not deny or challenge the accuracy of the new evidence in Exhibit 26 that the prosecution did not disclose to the Petitioner's trial counsel that Mr. Martinez was using a dead man's SSN.

The Response falsely states "…, the fact that the Hispanic individuals, **now claimed** by Defendant to be "the real killers, …" (Response, 18) The Petitioner's third-party culprit defense at trial was the Mexican friends of Diann Parker – that included Alejandro Cruz and Daniel Martinez – had the motive, means, and opportunity to murder Bailey.

Martinez was considered enough of a suspect by Det. Thowsen prior to the Petitioner's arrest that he testified he obtained information about him and Cruz – who rented Apartment 822 – from the manager at the Grand View Apartments and ran their SCOPE's. After the Petitioner's arrest days later, Martinez and the suspicious circumstances suggesting he could have been involved in Bailey's murder were seemingly forgotten by Thowsen.

The Response does not deny that the prosecution failed to disclose to the Petitioner's trial counsel:

> "… that there is no such person as Daniel Martinez assigned the Social Security Number 3**-0*-0***, that LVMPD Detectives Thomas Thowsen and James LaRochelle knew that person was one of the Mexicans who argued with Duran Bailey on July 1, 2001, and was "watching out" so Diann Parker wouldn't be accosted by Duran Bailey, and after running a criminal background check on the man known as Daniel Martinez with SSN 3**-0*-0*** the detectives knew there was no such person, …" (writ of *habeas corpus,* 160)

If Petitioner's counsel had known that at trial, it would have immeasurably assisted her third-party culprit defense because:

> If Petitioner's jury had known that the Mexicans were in the county illegally, and that Martinez was illegally using the SSN of a dead American, it could be expected to influence their consideration that the Mexicans murdered and mutilated Bailey as retaliation for what he did to Parker and one of their girlfriends in the week or so preceding his death. Knowing there was a factual basis for the Petitioner's third-party culprit defense, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt and acquitted her. (writ of *habeas corpus,* 162)

The prosecution's failure to disclose the information about Martinez that the Response does not deny, meets *Brady's* three-prong test:

1. The evidence is favorable to the Petitioner.

2. The evidence was withheld by the state.

3. The evidence is material to the jury's determination of the Petitioner's guilt, and she was prejudiced.

If the jury had known the non-disclosed *Brady* evidence in Ground 26, individually or cumulative with other evidence, "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup v. Delo*, 513 U.S. at 327.

IV
DEFENDANT'S COUNSEL PROVIDED EFFECTIVE ASSISTANCE

[Petitioner notes that this heading does not accurately state the substance of the claims that are actually – Defendant's Counsel Did Not Provide Effective Assistance]

The Response makes several critical misstatements regarding *Strickland v. Washington*, 104 S. Ct. 2052, 466 U.S. 668 (U.S. 05-14-1984) and its application to the Petitioner's ineffective assistance of counsel claims. The Petitioner corrects them in this section below.

The best way to understand *Strickland* is the words of the ruling itself that imposes a two-part test for evaluating an ineffective assistance of counsel claim seeking reversal of a conviction:

The first part is, "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland* at 687-688. The second part is, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Strickland* at 694. Furthermore, the second part's "reasonable probability" standard means the Petitioner proves prejudice by *less than* a preponderance of the evidence, "On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. *Strickland* at 693.

Strickland advises the following in evaluating an ineffective assistance of counsel claim (The Petitioner asserts that wherever there is a conflict between *Strickland* and the state cases cited by the Response that *Strickland* prevails as the ruling case law):

> Representation of a criminal defendant entails certain basic duties. … From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause… Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a **reliable adversarial testing process**." *Strickland* at 688.
>
> …
>
> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland* at 689.
>
> …
>
> **Thus, a court deciding an actual ineffectiveness claim 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**. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic [*Strickland* at 690] choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. **In other words, counsel has a duty to make reasonable investigations or to make a reasonable**

> **decision that makes particular investigations unnecessary.** In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Strickland* at 690-91.
> …
> One type of actual ineffectiveness claim warrants a similar, though more limited, **presumption of prejudice**. In *Cuyler v. Sullivan*, 446 U.S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an **actual conflict of interest**. In those circumstances, **counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties**. *Strickland* at 692. (emphasis added to original)
> …
> Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. *Strickland* at 693.
>
> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. … On the other hand, we believe that **a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case**. *Strickland* at 693. (All emphasis added to original.)

The one thing that rings throughout the *Strickland* ruling is that counsel's performance regarding an action is to be judged as "reasonable" or "unreasonable" in light of the circumstances under which a decision is made, except for actions that automatically create a presumption of prejudice, such as an "actual conflict of interest." *Strickland* at 692.

The Petitioner requests that the Court strike and give no consideration to the following deceptive passage in the Response that is lifted out of context and misleadingly changes the meaning of the Nevada Supreme Court's ruling regarding evaluation of a strategy decision by counsel, in the case of *Doleman v State*, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996). The offending description is on Response page 19, lines 12-15:

> 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. (Response, 19, lines 12-15.)

The Petitioner requests that the actual paragraph that provides the context of the *Doleman* ruling be substituted for the above excerpt that by itself is misleading of the Court's intent and the requirement imposed by *Strickland*:

> **In order to satisfy the objective standard of reasonableness, trial counsel must make a sufficient inquiry into the information that is pertinent to his client's case.** Strickland, 466 U.S. at 690-91. **Once a reasonable inquiry is made, counsel should make a reasonable strategy decision on how to proceed with his client's defense.** Id. A strategy decision, such as who should be called as a witness, is a tactical decision that is "virtually unchallengeable absent extraordinary circumstances." Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) (citing Strickland, 466 U.S. at 691); State v. Meeker, 693 P.2d 911, 917 (Ariz. 1984). *Doleman* at 846. (emphasis added to original)

Thus, the entire analysis of a strategic or tactical decision hinges on whether counsel made the required ("must") "sufficient inquiry into the information that is pertinent to his client's case," and then "counsel should make a reasonable strategy decision on how to proceed with his client's defense." *Id*. Only **after** it has been determined that the counsel made "a sufficient inquiry into the information that is pertinent to his client's case to make a reasonable strategy decision," *Id*. is it considered "virtually unchallengeable absent extraordinary circumstances." *Id*. *Doleman* makes clear that as with ever other claim evaluated under *Strickland*, any strategy decision that cannot meet the stringent test of being reasonable can be challenged as prejudicial to the Petitioner. The Response's offending passage that the Petitioner requests the Court to strike completely turns *Strickland* on its head by making the false statement "Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." (Response, 19) That is a misstatement of *Doleman* that actually requires a reasonableness analysis of all "strategy decisions," and the underlying *Strickland* ruling requires the same.

The Petitioner notes that the Response leaves out the important information of the standard used to determine if the prejudicial conduct by counsel undermines confidence in "the outcome in the case." *Strickland* at 693. The Response states: "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, citing *Strickland*, 466 U.S. at 687-89, 694." (Response, 20) However, the Response leaves out the critically important information in *Strickland* that the "probability" standard the Petitioner must meet is **less than a 50% probability** she was prejudiced by her counsel's errors, either individually or cumulatively. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. … On the other hand, we believe that **a defendant need not show that counsel's**

deficient conduct more likely than not altered the outcome in the case." *Strickland* at 693. (emphasis added to original) Consequently, under *Strickland* after prejudice has been established, the standard of proof the Petitioner must meet to undermine confidence in "the outcome in the case" is *less than* the 50% of preponderance of the evidence.

The Petitioner also specifically challenges the Response's statement that on its face doesn't comport with *Strickland*:

> 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), …" (Response, 19)

There is nothing in *Strickland* about "strong and convincing proof," and that standard is so vague that it amounts to no standard at all. Is it 60%, 80% or 99% — no one knows because it is entirely left up to the habeas judge in each case to determine the standard by which a claim is to be judged for prejudice, and that violates the Petitioner's right to due process. What *Strickland* states on this matter should be the controlling law:

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance… *Strickland* at 689.

The Petitioner will also bring to the Court's attention that errors by counsel that by themselves are not sufficient to undermine confidence in the outcome of the Petitioner's trial, may do so when considered cumulatively. The Nevada Supreme Court outlined in *Big Pond v. State*, 101 Nev. 1, 692 P.2d 1288 (1985), the three relevant factors for evaluating cumulative evidence: "These include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* In *Big Pond* the Court reversed the conviction based on cumulative errors, so it provides a guideline for evaluating the cumulative evidence in the Petitioner's case:

> In this case, appellant was charged with a serious felony. The evidence against him, although substantial enough to convict him in an otherwise fair trial, was not overwhelming. We cannot say without reservation that the verdict would have been the same in the absence of error. The nature of the errors, while not in themselves

> particularly egregious, together had the effect of unfairly undermining appellant's credibility and defense in a rather close case. The cumulative effect of the errors was to deny appellant his right to a fair trial. Accordingly, we conclude that the judgment of conviction must be reversed. *Id*. at 3

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

The Response misstates and doesn't meaningfully respond to the substance of Grounds 27, 28, 29, 30, and 31.

The citation of *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) is irrelevant and inapplicable to Grounds 27 to 31, because they essentially allege that her counsel didn't understand the evidence enough to know that he needed to conduct necessary investigations and subpoenaing of evidence.

The Response is so non-responsive to Grounds 27, 28, 29, 30, and 31 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Grounds 27, 28, 29, 30, and 31 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Grounds 27, 28, 29, 30, and 31, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Grounds 32, 33 and 34.

The citation of ***Rhyne***, 118 Nev. 1, 9, 38 P.3d 163, 168 is irrelevant and inapplicable to Grounds 32 to 34, because they allege that her counsel was ineffective for failing to call witnesses and subpoena documents that could provide evidence Detective Thomas Thowsen's testimony was perjurious about critical aspects of the Petitioner's case the jury relied on to convict her.

The reference to the Nevada Supreme Court's affirmation is irrelevant and inapplicable because the Court did not consider the issue that Det. Thowsen's testimony was actually perjurious and fabricated out of thin air, and thus it was not hearsay but lies.

The Response is so non-responsive to Grounds 32, 33 and 34 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Grounds 32, 33 and 34 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Grounds 32, 33, and 34, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 35.

The Response to Ground 35 attempts to almost completely rewrite the record of the Petitioner's case. The following corrects false statements in the Response that are not in the record:

1. There was no testimony Duran Bailey was a drug dealer.
2. There was testimony he shared crack cocaine with one woman.
3. There was only testimony that Bailey used crack cocaine.
4. There was no testimony the Petitioner had a "methamphetamine habit," only that she used methamphetamine off and on.
5. There was no testimony the Petitioner has ever at any time in her life used crack cocaine.
6. There was no testimony the Petitioner "went back to Las Vegas" at any time other than on the early morning of July 9, 2001 – which was after Bailey's body was found.
7. There was no testimony that the Petitioner at any time in her life had any kind of "encounter with Bailey."
8. There was no testimony that Bailey and the Petitioner had ever met or even seen each other across Las Vegas Boulevard, at any time in their lives, and there was no testimony of any kind of a trade between Bailey and the Petitioner.
9. The testimony established the last known time the Petitioner used methamphetamine was sometime prior to July 2, 2001, when she returned to Panaca from Las Vegas. That was six days prior to Bailey's murder.
10. The testimony established Bailey only used crack cocaine (and his autopsy establishes cocaine was in his system at the time of his death), and the Petitioner only used methamphetamine – and her last known use of methamphetamine was sometime prior to six days before his death.
11. The testimony established that when the Petitioner stayed in Las Vegas she hung out with other methamphetamine users on Vegas' east side, and not a single one of those people testified they used crack cocaine or that they ever saw the Petitioner do so.
12. Methamphetamine and crack cocaine are two completely different drugs, and a meth user would have no more reason to seek out a crack cocaine user than someone seeking steak and prawns would go to McDonalds.

The Response attempts to counter Ground 35 by the subterfuge of trying to rewrite the record of the Petitioner's case. The Response also does exactly what the prosecution did at trial to confuse and mislead the jury and which is the basis of Ground 35, it conflates the two completely different drugs methamphetamine and crack cocaine under the umbrella of "narcotics" and "drugs." (Response 21) The Response's inability to counter Ground 35 with facts from the case record provides support for the Petitioner's argument that her counsel should have filed a motion ***in limine*** to exclude her

methamphetamine use that the record shows ended sometime prior to July 2, 2001, and thus it had no relevance to her prosecution for the murder of a crack cocaine user on July 8, 2001.

The Response is so non-responsive to Ground 35 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The conduct of Petitioner's counsel in Grounds 35 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Grounds 35, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 36.

The Response ignores that the failure to file a formal discovery request that would involve a Court order to produce all discoverable documents precluded Petitioner's counsel from actually knowing if all discovery material was turned over, and from seeking sanctions if the prosecution failed to comply with the Court's order. It is known for a fact the Response is not truthful in stating "defense counsel already had access to all discoverable materials." (Response, 22), because the prosecution failed to turn over at least the witness statement for Marilyn Parker (Anderson), which to date has never been provided by the prosecution. (See, Exhibit 20, writ of *habeas corpus*, no. 6)

Ms. Parker had valuable trustworthy exculpatory alibi evidence that the Petitioner was positively known to be in Panaca on the evening of July 6, the late afternoon of July 7, and at 10 a.m. on July 8, 2001. That evidence was known to the prosecution, it wasn't disclosed to the defense, and Ms. Parker (Anderson's) evidence wasn't presented at trial. If the jury had known that evidence it could have affected their verdict.

Although it is known the prosecution failed to disclose all discoverable evidence, it isn't known just how much discoverable evidence the prosecution didn't turn over, and the only way to have known that was for Petitioner's counsel to file a formal discovery motion that wasn't done. The only reasonable explanation for counsel's inaction was laziness or indifference to the responsibilities of representing the Petitioner.

The Response is so non-responsive to Ground 36 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Grounds 36 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Grounds 36, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 37.

The Response falsely states without any legal or logical argument and contrary to the record of the Petitioner's case, "the Nevada Supreme Court rejected her claims concerning NRS 201.450 on direct appeal." (Response, 22)

The Petitioner recites the explanation for why the Petitioner was charged, prosecuted and convicted of a non-existent violation of NRS 201.450 in this Answer's section 14. NRS 201.450 (Ground 19), and she incorporates that herein. As extensively detailed in the section 14. NRS 201.450 (Ground 19), the Nevada Supreme Court has never considered or ruled on the legal issues involved in the failure to file the Motion To Dismiss that is the subject of Ground 37.

The Response is so non-responsive to Ground 37 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The conduct of Petitioner's counsel in Ground 37 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 37, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Grounds 38, 39, 40 and 41.

The Response makes no attempt to present any legal or logical argument to counter either in this section or in the respective sections for the new evidence by each of the experts, how individually and cumulatively they do not provide new evidence that in the new evidence section under the ***Schlup*** standard, and in this section under the ***Strickland*** standard doesn't warrant the granting of a new trial to the Petitioner. The Response substitutes simply saying it doesn't for actually providing a coherent explanation of why.

Furthermore, the Response doesn't provide a cogent legal argument based on Nevada Supreme Court precedent that the Petitioner's new evidence is not admissible – it suggests the Court should simply trust it by only reciting a statute without any legal analysis of relevant case law. The Petitioner provides the analysis that her new evidence is admissible in A. Defendant must raise new evidence within two years of verdict.

With even a minimum level of diligence and concern for representing the Petitioner, her trial counsel could have learned all of the new exculpatory forensic entomology, forensic pathology, expert psychology, expert forensic science and impressions evidence in Grounds 38, 39, 40 and 41. Her counsel did not do so.

In May 2010 the 9th Circuit Court of Appeals overturned a California state conviction in *Lunbery v. Hornbeak*, No. 08-17576 (9th Cir. 2010). The concurrence by Judge Hawkins sets forth in detail how the petitioner was prejudiced by the failure of defense counsel to call one expert that had been retained, a psychology expert skilled in false confessions:

> But a tactical decision infers a calculated reason to do or not do something. Here there was no reason not to call Dr. Ofshe and every reason to do so. The record fairly smacks of incompetence, from the conflicting note to file, to the attorneys pointing fingers at one another, to the failure to even communicate the decision to the expert. It is also far from clear whether any decision, reasoned or not, was ever made here or by whom. Even though "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," the decision to prematurely limit an investigation may be, in and

> of itself, unreasonable. [*Strickland*] Id. at 690-91 ("[C]counsel has a duty to make reasonable investigations."). ¶68

As *Strickland* itself points out, "[C]counsel has a duty to make reasonable investigations." *Strickland* at 690-691. Unlike the deficient counsel in *Lunbery* who at least had contacted and retained the expert but simply didn't call him as a witness, Petitioner's counsel made no effort to retain the experts in Grounds 38, 39, 40 and 41 who each provide new exculpatory evidence in their respective fields.

The Response is so non-responsive to Grounds 38, 39, 40 and 41 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Grounds 38, 39, 40 and 41 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The error in Grounds 38, 39, 40 and 41, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 42.

The Response falsely and misleadingly describes the substance of Ground 42, by omitting that it states:

> Petitioner was … prejudiced by counsel's objectively unreasonable failure to cross-examine ME Lary Simms about his testimony regarding Bailey's time of death and his rectum wound that was irreconcilably inconsistent with his exculpatory testimony during Petitioner's preliminary hearing on August 7, 2001, even though Simms did not testify at trial there were any new confounding factors that warranted revising his preliminary hearing testimony that Bailey died within 12 hours of his body's discovery around 10 p.m. and that Bailey's rectum wound was inflicted while he was alive … (writ of habeas corpus, 216)

As explained thoroughly in Ground 42, and which the Response completely ignores, Dr. Simms' preliminary hearing testimony was that Bailey died "some time within 12 hours of when he was discovered." (***State v. Lobato***, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 32-33.) That means he died between the time of his body's discovery "around 10 p.m." and 10 a.m.. That is exculpatory evidence that could have resulted in the Petitioner's acquittal if the jury had know about it – but they didn't because counsel failed to cross-examine him about it. Based on the evidence at trial the absolute latest the Petitioner could have been in Las Vegas was 9:30 am on July 8 – which was before Bailey's time of death according to Dr. Simm's preliminary hearing testimony. Contrary to the Response's assertion, Simms' trial testimony that Bailey could have died as early as 3:50 a.m. was not only radically different than his preliminary hearing testimony, but it put Bailey's time of death outside when it is positively known from the trial evidence the Petitioner was not in Las Vegas. (The foregoing is based on the prosecution's view of the evidence, the Petitioner's alibi defense which she reiterates, is she was not in Clark County at any time between July 2 and July 9, 2001.

As explained thoroughly in Ground 42 and which the Response completely ignores, Dr. Simms' specific and unequivocal preliminary hearing testimony was that Bailey's rectum wound was "ante-mortem" – it was inflicted while he was alive. ***Id***. at 32. That means quite simply that the Petitioner was charged with a non-existent violation of NRS 201.450 that at a minimum requires that a person be dead. If the jury had known that exculpatory evidence it could have resulted in the Petitioner's acquittal of Count 2 – but they didn't because her counsel failed to cross-examine Dr. Simms about it.

The Response also ignores that Simms did not testify at trial there were any new confounding factors that warranted revising his preliminary hearing testimony about Bailey's time of death or his rectum wound.

The failure to cross-examine Dr. Simms to expose his prior inconsistent testimony that could have resulted in the outright or partial acquittal of the Petitioner was not a strategic decision by counsel. The only reasonable explanation is laziness, inattention or that he simply didn't care – none of which are excusable reasons under ***Strickland.***

The Response is so non-responsive to Ground 42 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id.*** at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id.*** at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." ***Id.*** at 647.)

The conduct of Petitioner's counsel in Ground 42 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88., Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 42, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 43.

Ground 43 primarily concerns the failure of the Petitioner's counsel to object to prosecution witnesses Thomas Wahl, Daniel Ford, Louise Renhard and Kristina Paulette's expert testimony

about luminol and/or phenolphthalein testing and analysis in general, and the luminol and/or phenolphthalein testing conducted in Petitioner's case in particular, because the prosecution failed to conform with the expert witness notice requirements of NRS 174.234 (2), and those witnesses weren't qualified by the Court to provide that expert testimony as required by NRS 50.275.

The Response doesn't deny the notice requirements of NRS 174.234 (2) for admittance of expert testimony or that they applied to the testimony of the four witnesses. That statute has four notice requirements:

> "The statute requires that for all expert testimony [1] **21 days notice is required prior to trial**, [2] **a C.V. detailing the expert witness' expertise is required**, [3] **any reports prepared by the expert about the case must be provided to the opposing party**, and [4] **a brief statement regarding the subject matter and the substance of the expert's expected testimony is required**." (writ of *habeas corpus*, 221)

As a defense to Ground 43 the Response states the prosecution complied with NRS 174.234 (2), "All witnesses were noticed as experts in the field of crime scene analysis which includes luminol and/or phenolphthalein testing." (Response, 23) However, that response is not a defense, but it is an admission the statute's requirements weren't met regarding expert testimony about luminol and/or phenolphthalein testing and analysis by any of the four witnesses, because the Response doesn't even pretend the prosecution provided the mandatory 21-day notice about "the subject matter and the substance of the expert's expected testimony is required." That admission is confirmed by the fact that there is nothing in the record of the Petitioner's case that the prosecution provided the "required" 21 days notice – or any notice at all – about **any** of their expert testimony at trial. The case files the Petitioner's counsel turned over to her do not have any notice filed by the prosecution and the Court docket doesn't list the filing of any expert witness notice. Furthermore, the Response doesn't attempt to make an offer of proof the prosecution complied with any of the four notice requirements of NRS 174.234 (2) – it simply says the prosecution complied.

So Ground 43 contends, and the Response doesn't provide any evidence to the contrary, that the prosecution didn't provide [1] 21 days notice of the witnesses expert testimony prior to trial, [2] a C.V. detailing the expert witness' expertise was not provided as required, [3] it is

unknown if any/all reports prepared by the four witnesses regarding luminol and/or phenolphthalein testing and analysis was provided as required, and [4] the required brief statement regarding the subject matter and the substance of the witnesses expected expert testimony regarding luminol and/or phenolphthalein testing and analysis was not provided. (See, Ground 43, writ of *habeas corpus*)

Yet, even though the prosecution made no known effort to comply with the mandatory requirements of NRS 174.234 (2). Petitioner's counsel did not object to the four witnesses' "expert" testimony about luminol and/or phenolphthalein testing and analysis, and counsel also did not argue that it should be excluded because the prosecution acted in bad faith by not complying with the requirements of NRS 174.234 (2).

Furthermore, the Response doesn't deny or even mention the Petitioner's claim that the four prosecution witnesses testifying about luminol and/or phenolphthalein testing were not qualified as experts by the Court as required by NRS 50.275. (See, writ of *habeas corpus,* 220) That constitutes a "confession of error" that the four witnesses testified as experts about luminol and/or phenolphthalein testing and analysis without being qualified as required by NRS 50.275. *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

In 2008 the Nevada Supreme Court extensively analyzed the factors that go into weighing qualification of an expert under NRS 50.275 in *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 07-24-2008). The Court ruled the district court abused its discretion by allowing the expert testimony of a witness who hadn't been properly qualified. None of the factors set out in *Hallmark v. Eldridge* was applied by the Court to the expertise of Wahl, Ford, Renhard and Paulette regarding luminol or phenolphthalein testing and analysis because the Court didn't ask them a single question about their expert qualifications regarding those tests and their analysis of them as required by statute.

The principles set out in *Hallmark v. Eldridge* were affirmed by the Court in 2010 in *Higgs v. State*, 222 P.3d 648 (Nev. 01/14/2010).

During Petitioner's trial the prosecution did not offer expert testimony about luminol or phenolphthalein testing and analysis in general, or the Petitioner's case in particular, by any person who had been noticed to the defense in accordance with NRS 174.234 (2), and qualified by the court as required by NRS 50.275 to provide expert testimony about luminol or phenolphthalein testing. Consequently the Petitioner's jury was contaminated by the improper testimony of four witnesses who should not have been allowed to testify as experts about luminol or phenolphthalein testing or analysis – however, they were allowed to do so because Petitioner's counsel failed to make a single objection to those witnesses testifying as experts.

Furthermore, the Response is completely silent about Ground 43's claim that Wahl's testimony regarding the luminol and phenolphthalein testing in the Petitioner's case was hearsay because he had no personal knowledge of the actual testing. That constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

Petitioner's counsel could have excluded all prosecution's expert testimony about luminol and phenolphthalein testing and analysis if that testimony had simply been objected to under NRS 174.234 (2) and NRS 50.275. The prosecution used the luminol and phenolphthalein testing to repeatedly suggest during testimony, and then vigorously argue during closing that it is "possible" there could have been blood in the Petitioner's car, in spite of the negative confirmatory tests. There was no physical, forensic, eyewitness or confession evidence tying the Petitioner to the crime. So exclusion of the improper and inadmissible expert luminol and phenolphthalein testimony could have resulted in a different verdict at trial since the prosecution used that

testimony to try to tie the Petitioner to the crime scene.

Objection to the luminol and phenolphthalein testimony that could have resulted in the Petitioner's acquittal was not a strategic decision by counsel. The only reasonable explanation is laziness, inattention or that he simply didn't care – none of which are valid reasons for ineffective assistance of counsel under ***Strickland.***

The Response is so non-responsive to Ground 43 that in its entirety it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id***. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id***. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." ***Id***. at 647.)

The conduct of Petitioner's counsel in Ground 43 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 43, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 44.

The Response misleadingly describes the substance of Ground 44, by omitting that it states:

> Petitioner was … prejudiced by counsel's objectively unreasonable failure to introduce Petitioner's black high-heeled open-toed platform shoes into evidence that the prosecution did not contest she was wearing when they argued she murdered Duran Bailey … (writ of habeas corpus, 223)

The Response omits that the jury was provided general testimony by LVMPD crime lab technician Joel Geller about a number of different shoes he tested and excluded from matching crime scene evidence, and one of those was the Petitioner's black high-heeled shoes. (X-116-17, 127, 130-31, 9-15-2006) That is it. The shoes were not entered into evidence and it was not brought to the jury's attention that those shoes are the only known item that the Petitioner was wearing during her attempted rape described in her Statement of July 20, 2001. Consequently those shoes are literally the single most important piece of evidence in existence regarding the prosecution's attempt to link the Petitioner to Bailey's murder. Petitioner's counsel did not have the shoes examined by an expert to see if they could be excluded from the crime or enter them into evidence so the jury could examine them and evaluate if they thought it is possible the Petitioner could have inflicted the carnage on Bailey while wearing those shoes that are in near pristine condition. (Exhibits 37-40, writ of *habeas corpus*)

The Response does not deny the Petitioner was wearing the black high-heeled shoes during the incident described in her Statement of July 20, 2001.

The Response is misleading because it tries to gloss over that the Petitioner's black high-heeled shoes are unique evidence and no other evidence of its type was introduced at trial.

Ground 44 includes the new evidence of the post-conviction examination of those black high-heeled shoes by Mr. George Schiro, a forensic scientist, blood analysis expert, and crime scene analyst. He reports:

> 19. It is my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then it is highly likely that she would have left at the scene bloody shoeprints corresponding to the sole patterns of the black high heeled shoes.
> 20. No bloody shoeprints corresponding to the sole patterns of the black high heeled shoes were identified or documented at the scene of Mr. Bailey's murder.
> 21. It is also my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then Mr. Bailey's blood would have been present on the black high heeled shoes.
> 22. None of Mr. Bailey's blood was found on the black high heeled shoes.
> (See Exhibit 42, writ of habeas corpus)

The Response does not deny the reliableness of Mr. Schiro's report or its new evidence.

If the jury had known that the Petitioner's shoes she was wearing during the assault she describes in her Statement could not have been worn during Bailey's murder, it would have been valuable exculpatory evidence that could have resulted in a different verdict at trial. As ***Strickland*** itself points out, "[C]counsel has a duty to make reasonable investigations." ***Strickland*** at 690-691. The failure to investigate the black high-heeled shoes was particularly unreasonable under the circumstances of their exculpatory value.

The Response is so non-responsive to Ground 44 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id.*** at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id***. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." ***Id***. at 647.)

The conduct of Petitioner's counsel in Ground 44 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 44, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 45.

The Response falsely and misleadingly describes the substance of Ground 45, by omitting that it states:

> Petitioner was … prejudiced by counsel's objectively unreasonable failure to object to a butterfly knife demonstration by LVMPD Detective Thomas Thowsen, for failing to

> object to Detective Thowsen's expert testimony about butterfly knives without meeting the pretrial requirements of NRS 174.234(2) and qualification by the court, and for suggesting and insisting that the prosecution introduce into evidence a butterfly knife that was not the Petitioner's knife and that the Petitioner had never seen or touched, and that did not have any connection whatsoever to the Petitioner or to the crime she was charged with, and in fact the knife had been provided by LVMPD Detective Thomas Thowsen … (writ of habeas corpus, 227-228)

The Response misstates ***Strickland***, which actually states, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic." ***Strickland*** at 690. Ground 45 essentially argues that Petitioner's counsel assisted the prosecution to convict the Petitioner by insisting on introduction into evidence the butterfly knife that had no connection whatsoever to the Petitioner or the crime and belonged to Det. Thowsen. Yet the Response is completely silent on how her counsel's ***de facto*** aiding the prosecution was a strategic decision made with the interests of the Petitioner in mind.

The Response also engages in the attempted reading of what was in defense counsel Schieck's mind four years ago at trial by ascribing a motivation to him for insisting on introduction of the knife. The Petitioner requests that the Court strike that portion of the Response as completely without foundation (23, line 24-26). At an evidentiary hearing the Respondent's could question Schieck and ask him why he acted as he did.

The Response does not make any legal or logical argument that Det. Thowsen's testimony was improper expert testimony, merely saying "did not provide expert testimony" without any explanation or citation.

In sum the Response to Ground 45 amounts to no response at all, which isn't surprising because Petitioner's counsel made her conviction that much easier by insisting on introduction of the knife into evidence. The Petitioner isn't accusing her counsel of deliberately sabotaging her case because she isn't going to try and read his mind about his motivations at the time, but however benign his intentions may have been, his action had the practical effect of directly assisting the prosecution. In a very close case like the Petitioner's in which there is no physical, eyewitness or confession evidence linking her to the crime, anything – such as introducing Det. Thowsen's

butterfly knife into evidence – could have tipped the scales for the jury to convict her instead of acquitting her.

The Response is so non-responsive to Ground 45 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The conduct of Petitioner's counsel conduct in Ground 45 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 45, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

K. Defense Counsel's Failure to Vouch for Alibi Witness's Credibility and Failure to Argue for the Admission of Hearsay Testimony (Ground 46).). [Petitioner notes that this heading is false and misleading and doesn't state the substance of the claim that is actually – Counsel Failed To Correctly Argue For Admissibility Of Alibi Witness Testimony (Ground 46)]

The Response misstates, is misleadingly and doesn't meaningfully respond to the substance of Ground 46.

Contrary to the Response's assertion, nowhere in Ground 46 does it suggest that Petitioner's counsel should have "vouched" for the credibility of her alibi witnesses. The Response makes that up out of thin air because it is nowhere in Ground 46. Consequently the Petitioner

requests that the Court strike from the Response p. 24, lines 4 to 7. The Response completely ignores that Ground 46 states:

> Petitioner's counsel did not argue that Thowsen's testimony opened the door to admission of the alibi witness testimony in the interests of justice under both state and federal hearsay exceptions based on one or more of the following:
>
> 1. The alibi witnesses would have been testifying about Petitioner's **credibility** in describing a rape attempt in her statement that happened prior to July 8, 2001.
> 2. To **rebut** Thowsen's opinion testimony the Petitioner was not credible and had not been truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
> 3. To **rebut** Thowsen's opinion testimony as not credible, by establishing the Petitioner was in fact credible and truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
>
> Neither did Petitioner's counsel argue that the alibi witness testimony was admissible in the interests of justice under both state and federal hearsay exceptions because the foundation of the prosecution's case is the assumption the Petitioner was not credible and not truthful in her Statement about when and where the assault occurred and what happened during it, and that it is a *de facto* confession to Bailey's murder and mutilation. The Petitioner's alibi testimony rebuts the prosecution's claim and establishes the Petitioner is credible and truthful in her Statement describing that the assault occurred prior to July 8, 2001, and other details, and that there is no rational basis on which to believe her Statement is a confession to Bailey's murder. (writ of *habeas corpus*, 231-232)

Ground 46 brings up entirely new factual and legal grounds for admissibility of the alibi witness testimony that were not a part of the Petitioner's direct appeal and which the Nevada Supreme Court did not consider. Consequently, the reference to *Hall* is inapplicable because *Hall* involved a factually and legally different situation.

The Response's failure to even attempt to meaningfully address Ground 46, or provide any legal or logical argument refuting its substance, and "to address a significant issue" constitutes a "confession of error." *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or

logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The Petitioner explains at length that the Nevada Supreme Court has never considered or ruled on the legal issues related to the Petitioner's new legal arguments concerning her alibi witnesses in this Answer's section **3**. Cumulative alibi witness evidence (Ground 5). [Petitioner notes that this heading doesn't state the substance of the claim that is actually – New alibi witness evidence (Ground 5)], and she incorporates those arguments herein. As that section explains, the alibi witness testimony was/is admissible under at least NRS 51.075, and in federal courts under FRE 807.

The conduct of Petitioner's counsel in Ground 46 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 46, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Grounds 47 and 48. The Response falsely and misleadingly misstates the substance of Ground 47 which is:

> Petitioner was … prejudiced by counsel's objectively unreasonable failure to object to Detective Thomas Thowsen's expert psychology testimony regarding the Petitioner's psyche, on the ground the prosecution acted in bad faith by failing to conform with NRS 174.234(2) … (Writ of *habeas corpus*, 234)

Petitioner's trial counsel did not object that Det. Thowsen was providing expert psychology testimony regarding the Petitioner's psyche, her appellate counsel did not raise that issue on appeal, it wasn't argued during oral arguments, and the Nevada Supreme Court did not consider or make any ruling regarding Det. Thowsen giving expert psychology testimony. The Court cannot make a

ruling on an issue that was never presented to it or that it ever considered. The Response's citations regarding law of the case are irrelevant to Ground 47.

Consequently, the Response's failure to even attempt to meaningfully address Ground 47, provide any legal or logical argument refuting its substance, and "to address a significant issue" constitutes a "confession of error." ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

As explained in Ground 47 the jury relied on Det. Thowsen's expert psychology testimony that was essential to provide a basis for the jury to believe that the Petitioner's Statement that didn't include a single detail of Bailey's murder or its location, was in fact about his murder, and not about the attempted rape at the Budget Suites Hotel described in detail in her Statement. Counsel's timely objection to Det. Thowsen's expert psychology testimony would have prevented that testimony, or if overruled, it would have preserved the issue for direct appeal, which it wasn't. Which is why there is not one word in the Petitioner's appellate briefs or the Nevada Supreme Court's affirmation mentioning Det. Thowsen's expert psychology testimony.

The Response goes beyond falsely and misleadingly misstating the substance of Ground 48, which is:

> Petitioner was … prejudiced by counsel's objectively unreasonable failure to object and make a motion for a mistrial based on irreparable contamination of the jury by Detective Thomas Thowsen's testimony in response to a juror's question about whether he investigated around the Budget Suites Hotel on Boulder Highway for a witness to the sexual assault Petitioner describes in her Statement of July 20, 2001 – "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." – which was not just an opinion of Detective Thowsen's unequivocally stated as a fact, but his statement was that of an experienced homicide detective directly and unquestionably branding the Petitioner as a liar and "guilty" of Bailey's murder, and Thowsen's declaration was so prejudicial that no curative instruction could undo or correct its prejudice to the

> Petitioner's state and federal constitutional rights to and unbiased and impartial jury, due process of law and a fair trial …(Writ of *habeas corpus*, 239)

The Response falsely and completely contrary to the record, claims that Det. Thowsen was not talking about the incident described in the Petitioner's Statement – which he was because it is in the record. The juror's question was about Det. Thowsen looking for a witness at the Budget Suites to the assault described in the Petitioner's Statement, so the Response's attempt to rewrite the record is foolish. The meaning of his response was unmistakable given the context – no use looking for a witness at the Budget Suites to the sexual assault described in the Petitioner's statement because "We know it happened on West Flamingo." – which means Bailey's murder. Thowsen's testimony had the practical effect of him accusing the Petitioner of murdering Bailey.

Even though Thowsen accused the Petitioner of murdering Bailey, Petitioner's counsel did not object. The Response's dismissive attitude of the possible harm caused by Thowsen's accusation as the lead detective is stunning given that it is prohibited and reversible error for a witness to express an opinion, much less certainty about the guilt of a defendant because it usurps the jury's function as the finder of fact. Experts can't give an opinion about the guilt of a defendant, See, ***Winiarz v. State***, 104 Nev. 43, 50-51, 752 P.2d 761 766 (1988); and, ***Lickey v. State***, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992). Neither can a lay witness express an opinion about the truthfulness of a defendant's statement to the police. ***Cordova v. State***, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000). A witness cannot express a direct opinion about the defendant's guilt. ***U.S. v. Espinosa***, 827 F.2d 604, 612 (9th Cir. 1987). It was a denial of due process for two police officers to express an opinion about the victim in ***Mauer v. Dept. of Corrections***, 32 F.3d 1286, 1287 (8th Cir. 1994).

Dr. Redlich is one of the leading psychology experts in the United States at evaluating a witness statement for whether it relates to a crime. The failure of the Response to meaningfully address or provide any logical or legal argument of why Petitioner's counsel was not deficient for failing to retain her or a psychology expert of equal skill constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d

865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The failure to retain a psychology expert to analyze the Petitioner's Statement and have him or her testify at trial was particularly unreasonable under the circumstances of the exculpatory value of that testimony. As *Strickland* itself points out, "[C]counsel has a duty to make reasonable investigations." *Strickland* at 690-691.

The conduct of Petitioner's counsel in Grounds 47 and 48 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The error in Grounds 47 and 48, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response ignores the substance of Ground 49 by taking a "who me?" and a "what's the big deal" approach to ADA Kephart's false declaration during Det. Thowsen's testimony that the Petitioner gave "her confession" to him. (Trans. XIII–59-60, 9-27-06) There was no testimony at trial that the Petitioner confessed to Bailey's murder. Zero. Because she didn't. Yet Petitioner's counsel did not object to ADA Kephart's false declaration.

Consequently, the Response falsely claims that Kephart was only making a "comment on testimony" – because there was no testimony during the trial that her Statement to Thowsen was a confession. Consequently, ADA Kephart's declaration that the Petitioner gave "her confession" to

Thowsen could only have been an expression of his personal opinion, and there is a long line of cases that the prosecutor misconduct of expressing a personal opinion is reversible error. The Nevada Supreme Court ruled in ***Collier v. State***, 101 Nev. 473, 705 P.2d 1126 (Nev. 9/5/1985) that it is reversible prosecutor misconduct for a prosecutor to express personal opinions because:

> "Such an injection of personal beliefs into the argument detracts from the "unprejudiced, impartial, and nonpartisan" role that a prosecuting attorney assumes in the courtroom. By stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney. Prosecutors therefore must not express their personal beliefs, as was done here. ¶29

ADA Kephart abandoned his ""unprejudiced, impartial, and nonpartisan" role" as a prosecutor when he chose to declare the Petitioner's Statement is a confession without any evidence at trial to support it. *Id*. Furthermore, "by invoking the authority of his or her own supposedly greater experience and knowledge," *Id*. the jury was likely to accept at face value his declaration that effectively introduced into the trial "false" evidence that could never have been introduced legitimately because there is no evidence it is true. Thus Kephart's false declaration contaminated the entire trial and it is not even reasonable to think it didn't have an effect on the jury's verdict.

In 2008 the Court overturned the convictions in ***Valdez v. State***, 196 P.3d 465, 124 Nev. 97 (Nev. 11/26/2008) that included the prosecutor's expression of his personal opinion:

> This court has long recognized that a prosecutor should be "'unprejudiced, impartial, and nonpartisan,'" and he should not inject his personal opinion or beliefs into the proceedings or attempt to inflame the jury's fears or passions in the pursuit of a conviction. The comment in this case aroused emotions and invoked the prosecutor's personal opinion. For these reasons, we conclude that the comment was improper. *Id*. at ¶85

ADA Kephart's false declaration that the Petitioner gave "her confession" to Thowsen could be expected to have the effect to "inflame the jury's … passions in the pursuit of a conviction," and cause them to have "aroused emotions" against the Petitioner that the Court condemned in *Valdez*. *Id*. ADA Kephart's declaration would be expected to short-circuit the deliberative process when the jury retired – because it is unlikely they would forget the one time in

the trial that the prosecutor declared the Petitioner gave "her confession" to Thowsen – even though it never happened. However, because of her counsel's failure to object, the jury was unaware Kephart's declaration was false.

The Court overturned the conviction in ***Aesoph v. State***, 102 Nev. 316, 721 P.2d 379 (Nev. 6/26/1986) based on the prosecutor's misconduct of injecting his personal "beliefs and opinions" during closing arguments. The Court ruled, "This could only serve to influence the jury to rely upon the prosecutor's expertise and authority, rather than objectively weighing the evidence." ***Id***. ADA Kephart didn't wait for closing arguments to inject his personal opinion into the proceedings, but it likely was just as devastating on the Petitioner's rights to due process, an impartial jury, and a fair trial.

As noted ADA Kephart's misconduct went beyond expressing the personal "beliefs and opinions" condemned in ***Aesoph*** and actually interfered with the jury's role as fact finder by declaring she confessed to Thowsen, when no evidence was presented at trial that she did. The failure of Petitioner's counsel to object could only of had the effect of compounding the error, because if he had objected they would have a reason to believe it wasn't' true – but with no objection the logical conclusion for the jurors would be to assume it is true, even though it isn't.

Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (Nev. 12/21/1988) was another overturned case involving the prosecutorial misconduct of the prosecutor expressing his personal opinion about the evidence. See also, ***Collier v. State***, 101 Nev. 473, 705 P.2d 1126 (1985); ***McGuire v. State***, 100 Nev. 153, 677 P.2d 1060 (1984); ***Owens v. State***, 96 Nev. 880, 620 P.2d 1236 (1980)."

The Response' citation to ***Green v. State*** is not applicable to Ground 49, because ADA Kephart's ***de facto*** personal declaration the Petitioner is guilty because she gave "her confession" to Det. Thowsen infected the trial with the most extreme form of prosecutor misconduct imaginable, and far beyond that in the ***Green***.

Kephart's misconduct violated clear and long-standing rules of law in Nevada. His misconduct deprived the Petitioner of her right to due process and a fair trial by an impartial jury, and given that there was no direct evidence linking her to the crime and the prosecution's case was

circumstantial based on speculation and inferences about what different things might mean, any particular factor, such as Kephart's declaration could have tipped the scales for the jury to convict.

The conduct of Petitioner's counsel in Ground 49 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, it "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 49, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 50.

Det. Thowsen testified unequivocally under oath during the Petitioner's first trial:

> Q. (By Mr. Kohn) I believe that's his **homicide book**, is that correct detective?
> A. (By Mr. Thowsen) That's correct.
> Q. **And that has everything you did in the case; everything that was done in the case; is that correct?**
> A. **Yes**. (3 App. 734-735; Trans. III-99-100 (5-10-02)) (Emphasis added to original.)

Yet Ground 50 documents that five key areas of Det. Thowsen's testimony at Petitioner's second trial upon which the jury depended to convict her are not included in either his "homicide book," or in the Officer's Report dated August 22, 2001, that meticulously details what Thowsen and LaRochelle did during their investigation of Duran Bailey's murder. So to all appearances Thowsen was committing perjury on a massive scale during the Petitioner's trial by fabricating testimony extremely prejudicial to her – but her counsel never once asked Thowsen a question about the fact his testimony wasn't supported by either his "homicide book" or the official Officer's Report about Bailey's murder investigation.

The Response falsely states that Ground 50 is "focusing on one line of testimony" because the Officer's Report corroborates that Thowsen's testimony at the first trial was truthful. Thowsen's testimony at the first trial was clear and unambiguous, there is nothing to misinterpret

about it, especially since the Officer's Report corroborates it.

The evidence that Thowsen's testimony was liberally littered with perjury that the jury relied on as truthful testimony to convict her is very serious, but the Response seems to take the attitude that it is no big deal.

The only opportunity the jury had to learn that Thowsen's testimony wasn't truthful was during his cross-examination by the Petitioner's counsel – but he made no effort to do so. Thowsen's testimony as the lead homicide detective was critical to the prosecution, and counsel's failure to expose that much of it was either false or doubtful at best, likely affected the outcome of the trial by allowing the jury to erroneously believe all his testimony was truthful. Particularly since in a very close case like the Petitioner's in which there is no physical, eyewitness or confession evidence linking her to the crime, any prejudicial testimony – such as Det. Thowsen's suspect testimony – could have tipped the scales for the jury to convict instead of acquitting her.

The Response is so non-responsive to Ground 50 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The conduct of Petitioner's counsel in Ground 50 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 50, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 51.

The Response also falsely and misleadingly misstates the substance of Ground 51, which states in part:

> Petitioner was … prejudiced by counsel's objectively unreasonable failure to object on confrontation grounds to the hearsay testimony of LVMPD Detective Thomas Thowsen about what he said his secretary told him she had learned from searching for reports by Las Vegas medical care providers filed under NRS 629.041 for May, June and July 2001, and his hearsay testimony about what he said Las Vegas hospital personal and urologists told him regarding the treatment of an injured or severed penis during May, June and July 2001, and if Petitioner's counsel had objected on confrontation grounds Thowsen's hearsay testimony would have been stricken under *Crawford v. Washington*, 541 US 36 (2004) *et al.*

The Response also makes no mention that Ground 51 raises an entirely new issue of law that the Nevada Supreme Court did not consider and is not part of their ruling affirming the Petitioner's convictions. The Court did not consider that Thowsen's hearsay testimony was barred by *Crawford* and that the trial court would have stricken it if Petitioner's counsel had made the proper objection. The Court only considered the state hearsay law, not that Thowsen's testimony was barred by the Petitioner's constitutional right to confront the witnesses against her. Consequently the references to *Hall* and law of the case are inapplicable.

The Response is so non-responsive to Ground 51 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The conduct of Petitioner's counsel in Ground 51 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of

counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 51, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 52.

The Response sensationally uses the word conspiracy to characterize the conduct described in Ground 52 when the Petitioner does not do so. The Response falsely characterizes Judge Vega when in fact Ground 52 portrays her as the person duped by ADA Kephart's repeated lies that are on the record, and the Response doesn't deny them. That record is documented in Ground 52 and the Response is completely silent about it.

The Response erroneously cites ***Hall*** and the law of the case regarding Thowsen's testimony, but Hall doesn't apply because the Nevada Supreme Court ruled in the Petitioner's case on the basis that his testimony was hearsay under state law, they did not consider that his testimony was actually perjurious and fabricated out of thin air, and that it was procured through ADA Kephart's lies to the trial judge and his frauds on the court. That is a radically different set of facts and law that apply to his testimony than the Court ruled on.

Yet, even though Petitioner's counsel knew ADA Kephart wasn't telling the truth to the trial judge, he did not object and make a record of the situation. Counsel's knowledge is known because of counsel's subsequent oral argument to the Nevada Supreme Court.

The Response is completely non-responsive to Ground 52 and it doesn't address or make any legal or logical arguments refuting the claims in Ground 52, consequently it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id.*** at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in

the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 52 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 52, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and doesn't meaningfully respond to the substance of Ground 53.

Ground 53 is very straightforward, but the Response chooses to not meaningfully respond to the evidence in Ground 53 that Det. Thowsen didn't testify truthfully about non-existent alleged comments the Petitioner made concerning alleged similarities between the holding cell where she was taken after her arrest and the trash enclosure where Bailey was murdered. Ground 53 exposes that those similarities between the holding cell and the trash enclosure are figments of Thowsen's imagination, and that nothing the Petitioner could have said about the holding cell has any relevance to Bailey's murder.

The Petitioner's counsel did not cross-examine Thowsen to expose that his trial testimony was inconsistent with the Arrest Report written the day of the Petitioner's arrest, his preliminary hearing testimony 18 days after her arrest, the LVMPD Officer's Report written by Thowsen and his partner James LaRochelle 15 days after the preliminary hearing, and Thowsen's testimony during the Petitioner's first trial. If Petitioner's counsel had revealed to the jury on cross-examination that there was no basis to believe Thowsen's testimony was truthful about what the

Petitioner allegedly said in the holding cell, they would have had a factual basis to disregard it.

In a very close case like the Petitioner's in which there is no physical, eyewitness or confession evidence linking her to the crime, anything – such as Det. Thowsen's false testimony about the holding cell – could have tipped the scales for the jury to convict her instead of acquitting her.

As documented in Ground 53, Thowsen's trial testimony was radically different than his previous testimony, and it is unfortunate the Response doesn't seem to place any value on police witnesses testifying truthfully.

Furthermore the Response completely ignores Ground 53 explanation of how the Petitioner was gravely prejudiced by both ADA DiGiacomo and ADA Kephart repeatedly mentioning Thowsen's testimony about what he alleged the Petitioner said in the holding cell to try and link her to the trash enclosure where Bailey was murdered. (See writ of habeas corpus, 265-266) However, Ground 52 also details that those arguments about were false and embellishments of Thowsen's testimony that itself wasn't truthful. All of those arguments constitute misconduct because "A prosecutor may not argue facts or inferences not supported by the evidence." ***Williams v. State***, 103 Nev. 106, 734 P.2d 700 (Nev. 3/31/1987) (See, ***Collier v. State***, 101 Nev. 473, 705 P.2d 1126 (1985).

The Response is non-responsive to Ground 53 and it doesn't address or make any legal or logical arguments refuting the claims in Ground 53, consequently it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 53 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of

counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 53, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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).

The Response falsely states that the manner of cross-examination by the Petitioner's counsel can't be challenged under *Strickland*. *Strickland* doesn't directly address cross-examination, but for the issues it does address it sets the standard that decisions by counsel are viewed from the standard of their reasonableness under the circumstances. *Strickland* at 690-91.

There is no evidence why Petitioner's counsel didn't cross-examine Det. Thowsen about the source of his information about the Petitioner's childhood. All that is known is that he had the opportunity to do so, and he didn't. The only source of that information is Thowsen, and depending on his source and whether he obtained it illegally, Thowsen's testimony could have provided new information to challenge the legality of the Petitioner's *Miranda* waiver.

The Response misapplies *Hall* and law of the case to the issue of admissibility of the Petitioner's Statement, and Ground 75 explains in depth that the original *Miranda* hearing in the Petitioner's case was so deficient that it doesn't meet the minimum standards necessary to constitute law of the case, and it was based on that hearing that the Nevada Supreme Court ruled.

The Response doesn't deny or even mention Ground 54's claim that "Thowsen's sadistic torture like psychological tactic that induced an emotional state in the Petitioner could have affected her rational judgment to the point she could not provide a valid waiver of her rights." (writ of habeas corpus, 269) Not only did the Nevada Supreme Court not consider that Det. Thowsen *de facto* psychologically tortured the Petitioner to extract her *Miranda* waiver, but the U.S. Supreme Court barred the use of "mental torture and coercion" in the questioning of a suspect more than 70 years ago in *Chambers et al. v. Florida*, 60 S. Ct. 472, 309 U.S. 227 (U.S. 02/12/1940).

The Petitioner makes specific and detailed allegations in Ground 54 so the reference to *Hargrove* is inapplicable.

The Response's reference to ***Rhyne*** has no application to Ground 54, and that ruling doesn't even include the word cross-examination, and likewise the reference to ***Ennis*** has no application to Ground 54.

The Petitioner's prosecution is based on one thing: the prosecution's interpretation of her Statement. Without her Statement as evidence the entire house of cards built around her Statement would collapse. Consequently, her counsel was obligated to do everything possible to learn information that could be used to challenge her Statement's admissibility. Her counsel didn't do that.

The Response is so non-responsive to Ground 54 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id.*** at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id***. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." ***Id***. at 647.)

The conduct of Petitioner's counsel in Ground 54 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 54, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response doesn't meaningfully respond to the substance of Ground 55.

The Response falsely states that the manner of cross-examination by the Petitioner's counsel can't be challenged under ***Strickland***. ***Strickland*** doesn't directly address cross-examination, but for the issues it does address, it sets the standard that decisions by counsel are viewed from the standard of their reasonableness under the circumstances. ***Strickland*** at 690-91.

The purpose of cross-examining Laura Johnson would have been to clarify and/or expose glaring inconsistencies between her trial testimony and her prior police statement and/or to inform the jury that there was much to the story that wasn't disclosed from her direct testimony. Petitioner's counsel didn't even attempt to do that.

Contrary to the Response, without hearsay Petitioner's counsel could have extracted information from Johnson about what she said and did that would have made it plain to the jury that she either disbelieved or had extreme doubts that the incident Dixie described to her was Bailey's murder. Since the Petitioner only became a suspect because of Laura Johnson's exploratory telephone call to the LVMPD on July 20, 2001, it would have been invaluable to the Petitioner to have her counsel expose on cross-examination the exculpatory inconsistencies between her prior police statement and her testimony, and the things she said and did that evidenced she was doubtful of the Petitioner's guilt. There is no basis to believe that the failure of Petitioner's counsel to effectively cross-examine Parker and conceal the truth from the jury was a "reasonable decision." ***Strickland*** at 691.

The Response's reference to ***Rhyne*** has no application to Ground 55, and that ruling doesn't even include the word cross-examination, and likewise the reference to ***Ennis*** has no application to Ground 55.

The Response is non-responsive to Ground 55, and it uses obfuscation instead of addressing or making legal or logical arguments refuting the claims in Ground 55. Consequently it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id***. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id***. at ¶27) See also,

Moore v. State, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The Petitioner's prosecution is based on one thing: The prosecution's interpretation of her Statement. Without her Statement as evidence, the entire house of cards built around her Statement would collapse. Consequently, her counsel was obligated to do everything possible to expose during cross-examination of Ms. Johnson that the incident Ms. Tienken described to her was not Bailey's murder. Her counsel didn't even attempt to do that.

The conduct of Petitioner's counsel in Ground 55 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 55, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response doesn't meaningfully respond to the substance of Ground 56, substituting saying they disagree with its evidence without any explanation for why.

Ground 56 is supported by the affidavit of an experienced Las Vegas private investigator about where "methamphetamine and other drugs" could be bought in Las Vegas openly from "street vendors" in June and July 2001. (Exhibit 23, writ of ***habeas corpus***) The affidavit specifically excludes the area around the Nevada State Bank as one of those areas. The Response presents no evidence to refute that other than misstating what the affidavit actually says and denigrating it by calling it "absurd" – without presenting any evidence to support that assertion.

The Petitioner incorporates herein her Answer in section 12. The availability of methamphetamine in Panaca (Ground 15). That explains in detail the issue in Ground 56 from the

perspective of the Petitioner's new evidence about the availability of methamphetamine in Panaca in June and July 2001.

The Response asserts as a defense to Ground 56 that the jurors deliberately violated their oaths and relied on extrinsic out-of-court evidence prohibited by jury instruction no. 34, which specifically instructed them to only consider evidence introduced at trial:

> **"The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel."** (emphasis added to original)

See also jury 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." (emphasis added to original)

Consequently, the Response's defense to Ground 56 is that the jury committed prejudicial jury misconduct by deliberately violating jury instructions 33 and 34 (and possibly other instructions) in convicting the Petitioner by relying on extrinsic out-of-court "evidence," because even though **no evidence** was admitted at trial about the availability of methamphetamine in Las Vegas in June and July 2001. (Response, 29)

That defense by the Response proves the Petitioner's claim her counsel was constitutionally deficient because even the Response acknowledges the only way the jury could have known about the availability of methamphetamine in Las Vegas in June and July 2001 was for them to violate their oaths of office and rely on extrinsic out-of-court evidence that had not been admitted into evidence – particularly since there was no evidence from *voir dire* that any of the jurors had been regular methamphetamine users during June and July 2001, so they could only have relied on third-hand extrinsic information not admitted into evidence about where it was readily available in June and July 2001.

As *Strickland* itself points out, "[C]counsel has a duty to make reasonable investigations." *Strickland* at 690-691. Petitioner's counsel didn't do that. Consequently, the reference to *Molina v. State* is inapplicable.

The Response is non-responsive to the substance of Ground 56, and consequently it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 56 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 56, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response doesn't meaningfully respond to the substance of Ground 57, and the Response provides evidence Petitioner's counsel was ineffective for failing to object to all of Zachary Robinson's testimony as hearsay that was not based on his personal knowledge, under *Crawford v. Washington*, 541 US 36 (2004) *et al*.

The Response admits that Mr. Robinson testified about "security records of the Budget Suites Hotel" that he had not prepared. Mr. Robinson had no personal knowledge about the Budget Suites Hotel in May, June or July 2001 because he didn't begin working there until about March

2002. (Trans. XIV-182, 9-28-06 ("a couple months before" May 2002) However, his hearsay testimony encompassed in Ground 57 goes went beyond the "security records" that Petitioner's counsel did not object to, because he also testified about conditions at the Budget Suites Hotel in May, June and July 2001, about which he had no personal knowledge. (Trans. XIV-170, 9-28-06)

The Response defends Mr. Robinson's hearsay testimony about the "security records" on the basis it was admissible under NRS 51.135 and NRS 51.145, yet neither one of those exceptions is applicable:

> NRS 51.135 Record of regularly conducted activity. A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, **as shown by the testimony or affidavit of the custodian or other qualified person**, is not inadmissible under the hearsay rule **unless the source of information** or the method or circumstances of preparation **indicate lack of trustworthiness**.

The prosecution did not present **"testimony or affidavit of the custodian or other qualified person"** authenticating the "security records" about which Robinson testified, and, in fact the prosecution made no effort to introduce the "security records" into evidence. Consequently, Robinson's testimony was inadmissible under NRS 51.135.

Furthermore, the U.S. Supreme Court specifically extended its *Crawford* ruling in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (U.S. 06-25-2009) to encompass testimony about a report because they are testimonial, and a defendant has the constitutional right to confront the person who authored a report:

> "This case involves little more than the application of our holding in *Crawford v. Washington*, 541 U. S. 36. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error. We therefore reverse the judgment of the Appeals Court of Massachusetts and remand the case for further proceedings not inconsistent with this opinion. *Id.* at ¶76.

Although *Melendez-Diaz* was decided after the Petitioner's trial so her counsel did not have benefit of it, that decision is based on "application" of the U.S. Supreme Court's 2004 *Crawford* ruling that her counsel would be expected to know about and upon which he could have based an objection to Robinson's hearsay testimony – just as Melendez-Diaz's lawyer did and which

resulted in the U.S. Supreme Court's ruling. *Melendez-Diaz* was decided while the Petitioner's direct appeal was pending.

Since Robinson's testimony regarding the "security records" was inadmissible, his testimony was inadmissible under NRS 51.145 regarding the absence of information from those "security records."

If Petitioner's counsel had objected to all of Robinson's hearsay testimony under *Crawford*, including his hearsay testimony about the "security records," it could be expected that it would have been ruled inadmissible at trial – particularly since the hearsay exceptions cited by the Response are inapplicable to Robinson's hearsay testimony.

As explained in Ground 57, which the Response makes no effort to refute or challenge, Robinson's hearsay testimony was extremely prejudicial to the Petitioner, and her counsel made no effort to exclude it.

The Response is so non-responsive to Ground 57 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 57 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 57, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

Ground 58 makes the very specific allegation that her lawyer failed to make any effort whatsoever to seek information that could be used on cross-examination to undermine the credibility of Det. Thowsen's testimony. As *Strickland* itself points out, "[C]counsel has a duty to make reasonable investigations." *Strickland* at 690-691. Ground 58 explains in detail that Det. Thowsen's testimony was an indispensible cornerstone of the prosecution's case and that an indispensible part of any reasonable trial strategy would be to undercut every possible aspect of his testimony. Any competent defense lawyer would be expected to do that because of the specificity of Ground 58's claims the Response's reference to *Hargrove v. State* is inapplicable.

What Petitioner's counsel would have discovered from seeking all available information about Det. Thowsen is unknown, and that is precisely the point, that information is unknown because her counsel didn't make any effort whatsoever to obtain it. "[C]counsel has a duty to make reasonable investigations." *Strickland* at 690-691. It is no defense to Ground 58 that it isn't known what would have been discovered had her lawyer conducted a "reasonable investigation" of Det. Thowsen, but he conducted no investigation at all.

The Response does not deny the prejudice to the Petitioner alleged in Ground 58.

Neither does the Response deny that "the Clark County District Attorney Office's [has a] "Liar's List" of law enforcement officers known to have given false and/or perjurious testimony or false sworn statements in connection with any case …" (writ of *habeas corpus*, 275), and that Det. Thowsen was on it at the time of trial.

The Response is so non-responsive to Ground 58 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its

position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 58 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 58, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner or dismissal of her charges.

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

The Response doesn't meaningfully respond to the substance of Ground 59, substituting saying they disagree with it without any logical argument explaining why.

How the trial judge would have ruled on a NRS 175.381(1) motion is unknown, and it is unknown precisely because the Petitioner's counsel didn't make the motion. The trial judge could have granted that motion, particularly if counsel had explained:

> "… the prosecution's failure to introduce evidence sufficient to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt, and most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes …" (writ of *habeas corpus*, 278)

The Response does not deny that no evidence was introduced at trial that "the Petitioner was anywhere in Clark County at any time on July 8, 2001," which was an essential element of her accused offenses. Consequently, there are sound reasons to believe the trial judge would have granted an NRS 175.381(1) motion on the basis of insufficient evidence to prove every essential element, which she would have been expected to do, considering the trial evidence. If as she would be expected to do, she had explained her reasoning in her ruling, it is difficult to imagine

that the Nevada Supreme Court would have disturbed that ruling on appeal by the State. The Nevada Supreme Court wasn't presented with the issue of the judge granting an NRS 175.381(1) motion so it is irrelevant they affirmed the Petitioner's convictions under the issues they were presented with.

How the judge would have ruled is unknown, and that is precisely the point of Ground 59. That is unknown because her counsel didn't make any effort whatsoever to file an NRS 175.381(1) motion at the appropriate times. It was not reasonable for Petitioner's counsel to have done nothing when filing an NRS 175.381(1) motion could have reasonably been expected under the circumstances to have resulted in her directed acquittal. Consequently the reference to ***Ennis*** is inapplicable.

The Response is so non-responsive to Ground 59 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id.*** at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id.*** at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." ***Id***. at 647.)

The conduct of Petitioner's counsel in Ground 59 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 59, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response doesn't meaningfully respond to the substance of Ground 60, citing inapplicable case law and does not in any way denying that jury instructions 26 and 33 unconstitutionally shifted the burden of proof to her to prove her innocence, and that instruction 26 also allowed the jury to determine the Petitioner's "guilt" by a standard of proof of the jury's choosing, and not proof beyond a reasonable doubt. The Petitioner's counsel did not object to either instruction 26 or 33.

The Response defends Ground 60's claim that jury instruction 26 unconstitutionally shifted the burden of proof to her and that the jury was allowed to determine her guilty by a standard of proof of their choosing by citing two case inapplicable to those issues. ***Weber v. State***, 121 Nev. 554, 119 P.3d 107 (2005) concerns a challenge to the flight aspect of instruction 26, not that the instruction shifts the burden of proof. ("Weber contends that the jury was erroneously instructed on flight in regard to his actions after the April 2002 crimes." *Id*.) The Court in ***Weber*** was not presented with the burden shifting or the jury applying a standard of proof of their choice that are claims at issue in Ground 60 regarding jury instruction 26, and the Court did not rule on those issues. The Response also cites ***Walker v. State***, 113 Nev. 853, 944 P.2d 762 (1997), which doesn't concern instruction 26 and was about, "Walker contends that this instruction violates his right to due process, because a jury's theory of criminal liability must be unanimous." *Id*. Again the legal issue in ***Walker*** was different than the burden shifting or the jury applying a standard of proof of their choice that are claims at issue in Ground 60 regarding jury instruction 26, and the Court did not rule on those issues.

Likewise, the Response defends Ground 60's claim that jury instruction 33 unconstitutionally shifted the burden of proof to her by citing a case inapplicable to that issue. ***Guy v. State***, 108 Nev. 770, 839 P.2d 578 (Nev. 09-03-1992) concerned a challenge to the instruction based on that it could confuse the jury about his culpability, and the Court ruled, "In effect, this instruction admonishes the jury to ignore Pendleton's culpability when determining whether

appellant is guilty as charged." ¶44 The Court in *Guy* was not presented with the burden shifting claim at issue in Ground 60 regarding jury instruction 33, and the Court did not rule on that issue.

The Response does not deny Ground 60's claims that jury instruction 26 shifted the burden of proof to the Plaintiff and that it allowed the jury to apply a standard of proof of their choice to determine the Petitioner's guilt. Likewise, the Response does not deny Ground 60's claim that jury instruction 33 shifted the burden of proof to the Plaintiff. It merely cites three inapplicable cases. Consequently the reference to *Ennis* is inapplicable.

The Response does not address or make any legal or logical argument of why the Petitioner was not prejudiced by jury instructions 26 and 33 in spite of any possibly conflicting instructions – they merely **say** she wasn't prejudiced.

The Response is so non-responsive to the substance of Ground 60 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 60 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 60, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner or dismissal of her charges.

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

The Response does not meaningfully respond to the substance of Ground 61, and the answer is so devoid of substance that it doesn't even mention the three key issues:

1. The federal Ninth Circuit Court of Appeals abandoned its model reasonable doubt jury instruction that was similar to jury instruction 31 because it was constitutionally insufficient to ensure that a defendant would only be convicted beyond a reasonable doubt as mandated by the U.S. Supreme Court. See, *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970). (See Exhibit 81, writ of *habeas corpus*)

2. That the reasonable doubt instruction in the combined jury instruction 31 doesn't meet the proof beyond a reasonable doubt standard set by the U.S Supreme Court in *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970).

3. That the combined jury instruction 31 cannot overcome the conflicts with jury instructions 26 and 33 to confuse the jurors into not knowing exactly how they were to evaluate the Petitioner's "guilt or innocence" and what standard of proof they were to apply to make that determination.

None of the cases cited by the Response address any of those key issues, none of which Petitioner's counsel objected to.

It is no defense that the Nevada Legislature has codified jury instruction 31 because the legislature cannot vote to suspend the Petitioner's rights to an impartial jury, due process of law and a fair trial, as the Petitioner alleges in Ground 61 was done by jury instruction 31.

The Response does not deny Ground 61's claim that the wording of jury instruction 31 does not meet the federal constitution's mandate that the Petitioner can only be convicted beyond a reasonable doubt, only claiming that the Nevada Supreme Court has upheld it, albeit on different grounds than the Petitioner raises. Neither does the Response deny the claim in Ground 61 that jury instructions 26 and 33 diluted instruction 31 and created a confusing situation for the jury by overtly shifting the burden of proof to the Plaintiff and that instruction allowed the jury to apply a standard of proof of their choice to determine the Petitioner's guilt.

The conduct of Petitioner's counsel in Ground 61 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 61, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response does not meaningfully respond to the substance of Grounds 62 and 63, and the answer is so devoid of substance that it doesn't even mention the substantial evidence in those grounds directly quoting from the Nevada State Legislative and Senate hearings prior to enactment of the necrophilia law – NRS 201.450 – that it only applies to an act committed on a dead body that constitutes sexual assault on a live person. (writ of *habeas corpus*, 286-288, 292-294):

> Basl testified before the Senate committee, as he had before the Assembly committee, that the sponsors seeking to criminalize necrophilia wanted "to make the penalty conform to those for sexual assault [of a live person]." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 789.))

The Response does not deny the legislative testimony concerning the scope of the necrophilia law prior to its enactment or that the intent of the legislature was to limit it to the same acts on a dead body as would constitute sexual assault on a live person.

The Response's three defenses are irrelevant. First, the motive of a person is not an element of sexual assault, so the ruling in *Doyle v. State,* 112 Nev. 879, 899 fn. 8, 921 P.2d 901, 914 fn. 8 (1996) is irrelevant and has no application to Grounds 62 or 63. Second, sexual gratification is likewise not an element of sexual assault so the reference to the first trial and the Court's ruling ordering a new trial is irrelevant and has no application to Grounds 62 or 63. Third, the bare jury instruction 24 by itself, given the state's theory and arguments that were contrary to the legislative intent in enacting the necrophilia law – NRS 201.450 – would be expected to confuse the jury and

cause them to misapply the instruction without a qualification that the statute only applies to the same acts on a dead body as would constitute sexual assault on a live person.

Petitioner's counsel did not object to jury instruction 24 as submitted and did not propose an alternate that would ensure the Petitioner would not be convicted of a non-existent violation of the necrophilia law – NRS 201.450 – since based on the evidence at trial, no violation of that statute was committed by whoever killed Mr. Bailey.

The Response is so non-responsive to Grounds 62 and 63 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Grounds 62 and 63 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Grounds 62 and 63, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response does not deny the claim in Ground 64:

> No physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial the Petitioner and her car were anywhere in Clark County's 8,091 square miles at any time on July 8, 2001. (writ of *habeas corpus*, 298)

Neither does the Response deny the claim in Ground 64 that Petitioner's counsel did not explain that to the jury during argument. Nor does the Response deny the claim in Ground 64 that Petitioner's counsel did not explain to the jury during argument that an essential element the State **had** to prove beyond a reasonable doubt was that the Petitioner was in Clark County. Nor does the Response deny the claim in Ground 64 that:

> The only information the jury had to rely on that the Petitioner had been in Clark County on July 8 and at the scene of Bailey's murder was the prosecution's speculative argument to the jury it is "possible" she was there. The prosecution's argument was entirely speculative because no evidence was introduced at trial she had been in Clark County at any time on July 8. . (writ of habeas corpus, 298)

The Response's defense to Ground 64 is that the jury exercised "common sense" in voting the Petitioner guilty in spite of her counsel's failure to make any effort whatsoever to specifically explain the single most important aspect of her case – there was no evidence presented at trial she was in Clark County at any time on the day of Mr. Bailey's murder. It is unknown how the jury arrived at their verdict, but what is known, if one wants to consider "common sense," is that her lawyer failed to point out the single most important aspect of her case for the jury to consider. Because of her counsel's failure to do that, one can't state with any degree of certainty what degree of consideration the jury gave to the arguments he did make regarding the evidence.

The Response is so non-responsive to Ground 64 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 64 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of

counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 64, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response does not meaningfully respond to the substance of Ground 65, and it is so devoid of substance that it doesn't even mention the key claim in Ground 65:

> Petitioner was … prejudiced by counsel's objectively unreasonable failure to object during the prosecution's opening statement to dozens of false statements of evidence that would be presented or facts proven …" . (writ of ***habeas corpus***, 299)

Petitioner's counsel knew, or would be expected to know from familiarly with her case as her counsel, that the 29 statements made by the prosecution during opening statements were false and would not be substantiated by evidence at trial. Those 29 false statements are detailed in Exhibit 75 (writ of ***habeas corpus***) and each explains what the truth is, which both her counsel and the prosecutors would have known from the record of the case.

Yet, her counsel failed to object a single time to the prosecutor's misconduct of infecting the jury with an enormous number of falsehoods about alleged evidence prejudicial to the Petitioner that would not be introduced at trial. Counsel's error was compounded by failing to object to more than 250 improper prosecution arguments during closing. (See Ground 70, and Exhibit 76).

The Response acknowledges "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)" However, it ignores that the liberal sprinkling of blatant falsehood throughout the prosecution's opening argument can only disingenuously be ascribed to anything other than bad faith by the prosecution.

A directly relevant case is ***Thomas v. State***, 120 Nev. 37, 83 P.3d 818 (2004) in which the Nevada Supreme Court ruled:

> Thomas claims that his trial and appellate counsel failed to challenge numerous improper remarks by the prosecutors. **To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. The statements should be considered in context,** and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." We conclude that two of the remarks in question, made in the closing argument of the penalty phase, were improper and that counsel unreasonably failed to challenge them. We need not decide whether this failure was prejudicial since we have already determined that a new penalty hearing is necessary. ***Id.*** at 47; 83 P.3d at 825,

When evaluating the prosecutor's misconduct, the Nevada Supreme Court ruled in ***Butler v. State***, 120 Nev. 879, 102 P.3d 71 (2004), "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."

The Petitioner documents that the prosecution made 29 false statements about the evidence during their opening arguments and 250 more during their closing arguments (See Ground 70, and Exhibit 76). Petitioner's counsel did not object to a single one of them.

The Response falsely states that the counsel's failure to object to any of the prosecution false statements during their opening can't be challenged under *Strickland*. *Strickland* doesn't directly address opening statements, but for the issues it does address it sets the standard that decisions by counsel are viewed from the standard of their reasonableness under the circumstances. *Strickland* at 690-91. It is not reasonable that Petitioner's counsel did not object to any of the false statements documented in Ground 65 and Exhibit 75 (writ of habeas corpus).

The Response is so non-responsive to Ground 65 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 65 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 65, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response does not meaningfully respond to the substance of Ground 66, because it doesn't involve interpretation of the evidence, but the testimony of Dr. Simms that Mr. "Bailey's skull fracture was consistent with being contemporaneous with his brain swelling that began two hours or so before he died." (writ of habeas corpus, 301. Based on testimony cited on that page from Trans. VIII-36-37, 9-20-06) This is one of the most straightforward Grounds in the Petitioner's writ of *habeas corpus*.

Dr. Simms was the prosecution's medical expert, and contrary to Dr. Simms' testimony:

> The prosecution argued to the jury that Bailey's "skull fracture occurs when he falls" after being "punched" in the mouth. (XIX-123-4, 10-5-06) The prosecution made variations of that argument during their closing and rebuttal arguments, including that his skull fracture was caused by the Petitioner hitting him in the mouth with her bat. (writ of *habeas corpus*, 301.)

See also,

> "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." (Trans. XIX-198, 10-5-06)

And,

> "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." (Trans. XIX-210, 10-5-06)

Petitioner's counsel did not object a single time to the prosecutor misconduct of misstating the evidence by their own expert medical witness that falsely infected the jury with the idea that Bailey's head wound was contemporaneous with his many stabbing and beating wounds inflicted where he was murdered. Yet based on the prosecution's own theory of the crime that it argued to the jury, the Petitioner couldn't have inflicted his fatal head wound because it was inflicted at least two hours before his other wounds. The new evidence supporting Dr. Simms' trial testimony that Bailey experienced two separate attacks two hours apart is detailed in Ground 9, writ of ***habeas corpus***, 56), and that new evidence is incorporated herein.

A directly relevant case for the prosecutor misconduct in Ground 66 is ***Thomas v. State***, 120 Nev. 37, 83 P.3d 818 (2004) in which the Nevada Supreme Court ruled:

> Thomas claims that his trial and appellate counsel failed to challenge numerous improper remarks by the prosecutors. **To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. The statements should be considered in context,** and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." We conclude that two of the remarks in question, made in the closing argument of the penalty phase, were improper and that counsel unreasonably failed to challenge them. We need not decide whether this failure was prejudicial since we have already determined that a new penalty hearing is necessary. ***Id.*** at 47; 83 P.3d at 825,

When evaluating the prosecutor's misconduct, the Nevada Supreme Court ruled in ***Butler v. State***, 120 Nev. 879, 102 P.3d 71 (2004), "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."

There is no question the prosecutor's false arguments about Dr. Simms' testimony were in bad faith, because he was their own expert witness.

Strickland doesn't directly address closing arguments, but for the issues it does address, it sets the standard that decisions by counsel are viewed from the standard of their reasonableness under the circumstances. ***Strickland*** at 690-91. It is not reasonable that Petitioner's counsel did not object to the prosecution's false statements during closing about Bailey's head wound.

The Response is so non-responsive to Ground 66 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 66 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 66, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response misstates and tries to downplay, and doesn't even attempt to meaningfully address the substance of Ground 67. ADA Kephart went far beyond the misconduct of expressing his person opinion the Petitioner was guilty, what he did was exhort the jury to take the **action** of following his lead and **physically** "mark" their ballot "guilty" like he did:

> "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." (Trans. XIX-213, 10-5-06)

That argument didn't just express Kephart's personal opinion about the Petitioner's guilt in an effort to convince the jury to **think** about the case as he does, by saying something such as 'I

think she's guilty' – he exhorted them to follow his lead and take the same **physical action** on their ballots and "mark it as I did."

The Nevada Supreme Court ruled in *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (Nev. 9/5/1985) that it is reversible prosecutor misconduct for a prosecutor to express personal opinions because:

> "Such an injection of personal beliefs into the argument detracts from the "unprejudiced, impartial, and nonpartisan" role that a prosecuting attorney assumes in the courtroom. By stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney. Prosecutors therefore must not express their personal beliefs, as was done here. ¶29

ADA Kephart didn't just commit prosecutor misconduct by "an injection of personal beliefs into the argument," but he injected his personal plea for the jurors to follow his **personal action** and "mark" their ballots "guilty" like he did. The Response makes no effort to counter Ground 67's statement of why ADA Kephart's exhortation is reversible prosecutorial misconduct that is exactly in line with the rationale of the Court in *Collier* of why a prosecutor has an undue amount of influence over jurors and must be held to account for improperly exercising that influence over the judgment of jurors:

> "Kephart has a position of great responsibility. Kephart's personal vote for conviction would be expected to carry particular weight with the other jurors during their deliberations, and have an influence on them far beyond that of any other person with the possible exception of the judge. Kephart's argument created the impression he was a quasi-13th juror hovering in the background of the jury room. (writ of *habeas corpus*, 303)

ADA Kephart's misconduct was compounded by the failure of Petitioner's counsel to object, which could be expected to convey to the jury that there was nothing wrong with the prosecutor encouraging them to take their ballots, pencil in hand, and physically "mark it as I did, guilty." In an extremely close case such as the Petitioner's was, because there is no physical, forensic, eyewitness, surveillance video or confession evidence that the Petitioner was at the bank parking lot where the crime occurred, any little thing can be what tipped the scales for the jury to convict her. The prosecution's case consisted of speculations and inferences that their

circumstantial evidence supported finding the Petitioner guilty. Petitioner's counsel opened his closing argument by pointing this out to the jury. (Trans. XIX-150-154, 10-5-06) Certainly one can imagine that a juror wavering between voting 'not guilty' and 'guilty' would think, 'Prosecutor Kephart marked his ballot guilty and he knows all about the case, so that must be the right thing to do.' In other words, ADA Kephart's misconduct of encouraging the jurors to take the same **personal action** he took, could certainly have had the effect of causing any number of jurors to ultimately substitute ADA Kephart's personal opinion about the case for their own judgment in order to overcome their possible "reasonable doubts."

The Petitioner knows of no other Nevada case in which a prosecutor exhorted the jurors to take action by following his lead such as ADA Kephart did, and "now, and it's time for you to mark it as I did, guilty…" And certainly no case where defense counsel didn't even bother to object to the misconduct that could be expected to have the prejudicial effect on the Petitioner of directly influencing the jury's verdict. It is unconscionable that Petitioner's counsel didn't object.

In 2008 the Court overturned the convictions in ***Valdez v. State***, 196 P.3d 465, 124 Nev. 97 (Nev. 11/26/2008) that included the prosecutor's expression of his personal opinion:

> This court has long recognized that a prosecutor should be "'unprejudiced, impartial, and nonpartisan,'" and he should not inject his personal opinion or beliefs into the proceedings or attempt to inflame the jury's fears or passions in the pursuit of a conviction. The comment in this case aroused emotions and invoked the prosecutor's personal opinion. For these reasons, we conclude that the comment was improper. *Id*. at ¶85

ADA Kephart's call to action for the jurors to vote guilty like he did could be expected to have the effect to "inflame the jury's … passions in the pursuit of a conviction," and cause them to have "aroused emotions" that the Court condemned in *Valdez*. *Id.* ADA Kephart's statement that would be expected to short-circuit the jury's deliberative process, was along the line of 'Let's join hands and convict the Petitioner together' – and it was more appropriate for a football team locker room than a court room.

The Court overturned the conviction in ***Aesoph v. State***, 102 Nev. 316, 721 P.2d 379 (Nev. 6/26/1986) based on the prosecutor's misconduct of injecting his personal "beliefs and opinions"

during closing arguments. The Court ruled, "This could only serve to influence the jury to rely upon the prosecutor's expertise and authority, rather than objectively weighing the evidence." Id.

As noted ADA Kephart's misconduct went beyond expressing the personal "beliefs and opinions" condemned in *Aesoph* and encompassed what he did and what he wanted the jury to do – follow his lead and find the Petitioner guilty by taking their ballots and "mark it as I did, guilty."

Witherow v. State, 104 Nev. 721, 765 P.2d 1153 (Nev. 12/21/1988) was another overturned case involving the prosecutorial misconduct of the prosecutor expressing his personal opinion about the evidence.

As the Court also noted in *Aesoph*, "We have consistently held that prosecutors must not inject their personal beliefs and opinions into their arguments to the jury." *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985); *McGuire v. State*, 100 Nev. 153, 677 P.2d 1060 (1984); *Owens v. State*, 96 Nev. 880, 620 P.2d 1236 (1980)."

By encouraging the jury to take the action of marking their ballots and vote the Petitioner guilty as he did, ADA Kephart committed grossly prejudicial misconduct that went beyond anything the Petitioner knows the Nevada Supreme Court has addressed, and Petitioner's counsel did not object, which compounded that error.

For three reasons The Response's defense fails – "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." First, under *Collier et al.* it is prejudicial misconduct for ADA Kephart to have "simply" provided his personal belief about the meaning of the evidence. So the Response "confesses error." Second, there was no testimony at trial that the Petitioner "confessed," so it is impossible that ADA Kephart could have "corroborated" a non-existent "confession." Third, the corroboration referred to is among the prosecutor misconduct detailed in Ground 70 as being argument that "misstates evidence and states facts not in evidence." See Exhibit 86, 23.)

The Response's additional defense – "The fact that the prosecutor had a belief in Defendant's guilt was already apparent to the jury." (Response 34) – is completely contrary to and undermines the Nevada Supreme Court's bright line rule that, "We have consistently held that

prosecutors must not inject their personal beliefs and opinions into their arguments to the jury." *Aesoph*, *supra*. That is supported by the other cases cited herein with similar rulings. ADA Kephart abandoned his role as an "unprejudiced, impartial, and nonpartisan" prosecutor by not just expressing his personal opinions about the Petitioner's guilt, but advocating that the jury engage in the same personal action as he did by taking their jury ballots and "mark it as I did, guilty." A prosecutor can think anything he or she wants to think – and whether the jury were mind readers is not an issue in the Petitioner's case or any of the Nevada Supreme Court cases recognizing that it is reversible prejudicial prosecutor misconduct for a prosecutor to express his or her personal opinion regarding the evidence.

Counsel's failure to object to the prosecutorial misconduct of ADA Kephart's statement on its face meets ***Strickland's*** two-part test for determining ineffective assistance of counsel:

First, at the time of trial there were many Nevada Supreme Court opinions creating the bright line rule that a prosecutor cannot cross – they "must not inject their personal beliefs and opinions into their arguments to the jury. *Collier v. State,* 101 Nev. 473, 705 P.2d 1126 (1985). Petitioner's counsel would be expected to know that, yet he did not object, and that "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88.

Second, ADA Kephart exhortation for the jury to act as he had personally acted went far beyond the expression of personal opinion about the evidence that the Nevada Supreme Court has consistently ruled constitutes prejudicial prosecutor misconduct – so absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 67, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

The Response is so non-responsive to Ground 67 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in

their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

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

The Response does not meaningfully respond to the substance of Ground 68, because it completely ignores that the closing arguments of ADAs William Kephart and Sandra DiGiacomo's denigrating the credibility of three defense witnesses for testifying when they did not at the Petitioner's first trial prejudicially shifted the burden of proof to the Petitioner. Several alibi witnesses testified they saw the Petitioner from after midnight until after 7 am on July 8, 2001 – the day of Bailey's murder (writ of *habeas corpus*, 304-306). Those witnesses were willing and able to testify during the Petitioner's first trial, but her trial counsel did not have them testify.

ADA DiGiacomo argued during closing:

> "And then you have John Kraft. John and Ashley and her father are all new. They did not testify previously. The come in here and they say that she was there the morning of July 8 at 7:00 a.m. That's new". (Trans. XIX-137, 10-5-06)

ADA Kephart then repeated that argument during rebuttal:

> "And for the first time -- and also we hear from Mr. Lobato. He comes in here and now he tells you that at 7 o'clock in the morning John, who we hear from the first time, came over and woke me up and asked me on that particular day, when he was leaving a week later, to help out with checking with my family when I'm gone, the first time". (Trans. XIX-190, 10-5-06)

Petitioner's counsel did not object to those comments.

The Nevada Supreme Court has repeatedly ruled that it is misconduct for prosecutors to comment about a witness who was not called because it shifts the burden of proof to the defense to explain why the witness wasn't called. *Ross v. State*, 106 Nev. 924, 926, 803 P.2d 1104, 1105 (1990); and, *Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 882 (1996). *Ross* made clear by referencing *In re Winship*, 397 U.S. 358 (1970) that the prosecutor's shifting of the burden of proof violates a defendant's rights to due process, an impartial jury, and a fair trial.

In the Petitioner's case the prosecutors used a variation of that prejudicial tactic by emphasizing to the jury that the witnesses had not **previously** been called to testify, effectively shifting the burden of proof to the defense to explain why the witnesses had not previously been called. There was nothing about the witnesses' testimony that suggested they weren't truthful, so the prosecutors took the backdoor of suggesting that they weren't truthful because they had not testified before. What Kephart and DiGiacomo did was convey to the jury that because they hadn't previously testified John Kraft, Larry Lobato and Ashley Lobato were liars without actually mouthing the words. It is improper for a prosecutor to call a defense witness a "liar," *Ross* at 927-28, but inferring it by commenting that a witness didn't previously testify can have just as insidious of an effect on the juror's judgment by shifting the burden to a defendant to provide an explanation.

Kraft and Larry Lobato were key alibi witnesses because they established the Petitioner was in Panaca from shortly after midnight until after 7 am on July 8, while the prosecution's entire case was based on Bailey being murdered 170 miles away in Las Vegas "sometime before sunup" at 5:30 am and 3:50 am – which was his latest probable time of death based on the testimony of ME Simms. So unless Kraft and Larry Lobato could be smeared as liars, there was a high probability the jury would acquit the Petitioner. The prosecution tactic to smear the truthfulness of the witnesses not only violated the principles of *Ross* and *Whitney*, but in *Witherow v. State*, 104 Nev. 721, 765 P.2d 1153 (Nev. 12/21/1988) the Court ruled, "This statement amounts to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence. The statement was improper. …"it was for the jury, and not the prosecutor, to say which witnesses were telling the truth. . . ." *Id*. The prosecution's arguments that made it appear to the jury that the alibi witnesses weren't truthful because they hadn't previously testified were prejudicial misconduct that shifted the burden of proof to the Petitioner and interfered with the jury's function as the finder of fact, and warrant reversal under *Ross, Whitney*, and *Witherow*.

When evaluating the prosecutor's misconduct, the Nevada Supreme Court ruled in *Butler v. State*, 120 Nev. 879, 102 P.3d 71 (2004), "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."

There is no question the prosecutor's comments were in bad faith because they knew the reason the witnesses hadn't testified previously is because the Petitioner's counsel did not either call or subpoena them to testify, not because they weren't willing to do so.

Strickland doesn't directly address closing arguments, but for the issues it does address, it sets the standard that decisions by counsel are viewed from the standard of their reasonableness. *Strickland* at 691. It is not reasonable that Petitioner's counsel did not object to the prosecution's false statements during closing about the witnesses not testifying previously – particularly because it implicated the unconstitutional shifting of the burden of proof to the Petitioner.

The Response is so non-responsive to Ground 68 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 68 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 68, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response does not meaningfully respond to the substance of Ground 69, because it completely ignores that during closing arguments ADAs William Kephart and Sandra

DiGiacomo's unequivocally stated three separate times contrary to the evidence variants of the comment, "there was blood in that car." (Trans. XIX-147, 10-5-06 (by ADA DiGiacomo). See also, (Trans. XIX-148, 10-5-06 (by ADA DiGiacomo); and (Trans. XIX-188, 10-5-06 (by ADA Kephart)

Those were false statements unsupported by the evidence. The testimony at trial is that the scientific confirmatory tests excluded blood from being in the Petitioner's car, and the Response does not deny that fact, which they can't because it is true and established by the record.

The Response's defense is that the prosecutors had the "right to comment on testimony" about the preliminary luminol and phenolphthalein tests that had positive results, but the Response ignores that the confirmatory scientific tests proved those preliminary test results were for something other than blood or that they were false positives.

The prosecutor's statements were not based on the trial evidence but were blatantly prejudicial false statements. They were made in bad faith because even the Response doesn't deny that the confirmatory scientific tests disproved that blood was found in the Petitioner's car.

In *Thomas v. State*, 120 Nev. 37, 83 P.3d 818 (2004) the Nevada Supreme Court ruled regarding allegations of prosecutor misconduct:

> Thomas claims that his trial and appellate counsel failed to challenge numerous improper remarks by the prosecutors. **To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. The statements should be considered in context,** and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." We conclude that two of the remarks in question, made in the closing argument of the penalty phase, were improper and that counsel unreasonably failed to challenge them. We need not decide whether this failure was prejudicial since we have already determined that a new penalty hearing is necessary. *Id.* at 47; 83 P.3d at 825.

When evaluating the prosecutor's misconduct, the Nevada Supreme Court ruled in ***Butler v. State***, 120 Nev. 879, 102 P.3d 71 (2004), "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."

Strickland doesn't directly address closing arguments, but for the issues it does address, it sets the standard that decisions by counsel are viewed from the standard of their reasonableness. *Strickland* at 691. It is not reasonable that Petitioner's counsel did not object to the prosecution's false statements during closing about the alleged blood in the Petitioner's car, because defense expert Brent Turvey was one of the witnesses who testified the confirmatory tests excluded blood.

The Response is so non-responsive to Ground 69 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 69 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 69, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response does not meaningfully respond to the substance of Ground 70 because it completely ignores the more than 250 improper closing and rebuttal arguments that are documented in Exhibit 76, and it doesn't cite a single example of why **any of them** are not prosecutor misconduct.

Many of the multiple false statements of fact, misstatements of evidence, comments about facts not in evidence, etc., are specifically documented in detail in Ground 70. The Response does not attempt to deny or refute a single one of those or the more than 250 prosecutor statements documented in Exhibit 76 as not true or that they are not improper argument.

In *Thomas v. State*, 120 Nev. 37, 83 P.3d 818 (2004) the Nevada Supreme Court ruled regarding allegations of prosecutor misconduct:

> Thomas claims that his trial and appellate counsel failed to challenge numerous improper remarks by the prosecutors. **To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process. The statements should be considered in context,** and "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." We conclude that two of the remarks in question, made in the closing argument of the penalty phase, were improper and that counsel unreasonably failed to challenge them. We need not decide whether this failure was prejudicial since we have already determined that a new penalty hearing is necessary. *Id.* at 47; 83 P.3d at 825,

When evaluating the prosecutor's misconduct, the Nevada Supreme Court ruled in *Butler v. State*, 120 Nev. 879, 102 P.3d 71 (2004), "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."

The Response's defense is the allegations are "bare" and "naked." That is ridiculous because Ground 70 is 10 pages long, and the Response doesn't make any effort whatsoever to explain how a single documented instance of prosecutor misconduct is mistaken.

All the prosecutor's statements in Ground 70 were made in bad faith because the prosecutors knew what the trial evidence was since they had been involved in the Petitioner's case for more than four years (since prior to her first trial).

Strickland doesn't directly address closing arguments, but for the issues it does address, it sets the standard that decisions by counsel are viewed from the standard of their reasonableness under the circumstances. *Strickland* at 690-91. It is not reasonable that Petitioner's counsel did not object to **any** of the more than 250 improper prosecution statements during closing.

The Response is so non-responsive to Ground 70 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 70 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 70, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response does not meaningfully respond to the substance of Ground 71 because it completely ignores that Dr. Lewis is a dental surgeon, and he is the first dental expert since the Petitioner's arrest in July 2001 to evaluate the evidence for whether a baseball bat could have caused the damage to Bailey's teeth. His expert opinion is, "In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat." (Exhibit 100, writ of ***habeas corpus***) The jury did not hear that testimony, which demolishes the prosecution's theory of the crime and argument to the jury about the trial evidence that the Petitioner's baseball bat was used to knock out Bailey's teeth, because the Petitioner's counsel did not even investigate the possibility of having a dental expert examine the evidence or testify.

Dr. Lewis' new expert dental evidence is the first dental evidence in the Petitioner's case, so it is impossible that it is cumulative to the dental testimony of any witness. Ground 71 relates the testimony of Dr. Simms and Dr. Laufer – both of whom are medical doctors and not dental experts – to highlight the difference between Dr. Lewis' new dental evidence and the testimony of those non-dental experts.

As *Strickland* itself points out, "[C]counsel has a duty to make reasonable investigations." *Strickland* at 690-691. In May 2010 the 9th Circuit Court of Appeals overturned a California state conviction in ***Lunbery v. Hornbeak***, No. 08-17576 (9th Cir. 2010). The concurrence by Judge Hawkins sets forth in detail how the petitioner was prejudiced by the failure of defense counsel to call one expert that had been retained, a psychology expert skilled in false confessions. It is not reasonable that Petitioner's counsel did not make any effort to investigate retaining or having a dental expert testify because a central aspect of the prosecution's case is their allegation Bailey's teeth were knocked out by the Petitioner's baseball bat in an effort to tie her to the crime scene. Dr. Lewis' new evidence establishes how gravely the Petitioner was prejudiced by her counsel's failure to retain and have a dental expert testify that Bailey's teeth weren't knocked out with a baseball bat.

In an extremely close case such as the Petitioner's was, because there is no physical, forensic, eyewitness, surveillance video or confession evidence that the Petitioner was at the bank parking lot where the crime occurred, any little thing can be what tipped the scales for the jury to convict her. Certainly one can imagine that a juror wavering between voting 'not guilty' and 'guilty' would think, 'Dr. Lewis testified that in his expert opinion Bailey's teeth weren't knocked out with a baseball bat, and so I just don't think the prosecution proved its case beyond a reasonable doubt, so I'm going to vote not guilty.'

The Response is so non-responsive to Ground 71 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its

position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 71 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 71, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response doesn't meaningfully respond to the substance of Ground 72, substituting saying they disagree with it without any logical argument explaining why.

How the trial judge would have ruled on a NRS 175.381(2) motion is unknown, and it is unknown precisely because the Petitioner's counsel didn't make the motion. The trial judge could have granted that motion, particularly if counsel had explained:

> "… the prosecution's failure to introduce evidence sufficient to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt, and most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes …" (writ of habeas corpus, 278)

The Response does not deny that no evidence was introduced at trial that "the Petitioner was anywhere in Clark County at any time on July 8, 2001," which was an essential element of her accused offenses. Consequently, there are sound reasons to believe the trial judge would have granted an NRS 175.381(2) motion on the basis of insufficient evidence to prove every essential element, which she would have been expected to do considering the trial evidence. If as she would

be expected to do, she had explained her reasoning in her ruling, it is difficult to imagine that the Nevada Supreme Court would have disturbed that ruling on appeal by the State. How the judge would have ruled is unknown, and that is precisely the point of Ground 59. That is unknown because her counsel didn't make any effort whatsoever to file an NRS 175.381(2) motion at the appropriate time. It was not reasonable for Petitioner's counsel to have done nothing when filing an NRS 175.381(2) motion could have reasonably been expected under the circumstances to have resulted in her directed acquittal; consequently the reference to ***Ennis*** is inapplicable.

The Response is so non-responsive to Ground 72 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The conduct of Petitioner's counsel in Ground 72 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 72, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

The Response does not meaningfully respond to the substance of Ground 73 because it completely ignores that it sets out in detail how DNA testing techniques developed after the Petitioner's trial and prior to the completion of her direct appeal can test potentially exculpatory

crime scene evidence that could not be tested at the time of trial. Petitioner's appellate counsel made no effort to investigate or pursue that new DNA testing.

Ground 73 explains in detail how each of the new tests could result in exculpatory new evidence, including the testing of Bailey's penis swabs because whoever murdered him handled his penis. The Response completely ignores the actual substance of Ground 73 by falsely stating she "has failed to show how this investigation would have benefited her." (Response, 37) In fact, if her counsel had pursued the DNA testing and it had been completed, she could already be a free person because of the new exculpatory evidence, and not still in prison. There can be no greater prejudice to the Petitioner by her counsel's failure to act than that.

As ***Strickland*** itself points out, "[C]counsel has a duty to make reasonable investigations." ***Strickland*** at 690-691. Petitioner's counsel did not make any effort to investigate the new DNA testing techniques or pursue testing of the crime scene evidence that could result in new scientific evidence proving she is actually innocent of Mr. Bailey's murder. That establishes how gravely the Petitioner was prejudiced by the failure of her counsel to investigate and purse the DNA testing.

The Response is so non-responsive to Ground 73 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id***. at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id***. at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." ***Id***. at 647.)

The conduct of Petitioner's counsel in Ground 73 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 73, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

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

These are three separate Grounds involving different legal issues, so the Petitioner will address each one separately.

Ground 74

The Response misstates and does not meaningfully respond to the substance of Ground 74.

Ground 74 explains at length the Petitioner's conviction was based on rampant speculation and inferences all built on what the prosecution considered to be a few circumstantial facts. Petitioner's counsel argued at length during his closing about how the prosecution's case was built on a house of speculation and inferences that the Petitioner had anything to do with Bailey's murder. (Trans XIX-150-154, 10-5-06) Then in the Petitioner's appeal brief, her appellate counsel spent all of one sentence in her 53-page brief on the central legal issue in her case – that it was based on speculation and inferences built on top of a few disparate facts: "Additionally, it must be determine whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn." *Kirstin Blaise Lobato vs. The State of Nevada*, No. 49087, Supreme Court of The State of Nevada, Appellant's Opening Brief, December 26, 2007, 15.) There was no explanation or argument whatsoever about how "uncertain inferences" and speculation about the evidence factored into her conviction.

Consequently, in affirming her conviction, the Court did not consider the legal issue of the rampant speculation, conjecture, and uncertain inferences upon which her prosecution was based – and upon which the jury convicted her.

One of the best explanations of how and why the Petitioner's appellate counsel was deficient is in the June 2009 opinion by the federal First Circuit Court of Appeals overturning a conviction that, just like the Petitioner's, was based on uncertain inference piled upon uncertain inference and speculation and conjecture about what evidence might possibly mean that was

substituted by the prosecution for actual evidence. In ***O'Laughlin v. O'Brien***, 568 F.3d 287 (1st Cir. 06-10-2009) the court recited an extensive analysis of the case and concluded, "Based on the record before us and drawing all reasonable inferences in favor of the prosecution, we hold that it would be overly speculative to conclude O'Laughlin to be the assailant beyond a reasonable doubt." *Id.* at ¶119. O'Laughlin cited the federal Ninth Circuit Court of Appeals case of ***Juan H. v. Allen***, 408 F.3d 1262 (9th Cir. 06-02-2005) in which the Court overturned a California state conviction based on speculation and unfounded inferences. "Speculation and conjecture cannot take the place of reasonable inferences and evidence - whether direct or circumstantial. … Such a lack of evidence violates the Fourteenth Amendment guarantee that an accused must go free unless and until the prosecution presents evidence that proves guilt beyond a reasonable doubt. See ***In re Winship***, 397 U.S. at 365-68." *Id.* at ¶86. The Ninth Circuit ruled in ***United States v. Lewis***, 787 F.2d 1318, 1323 (9th Cir. 1986) ("[M]ere suspicion or speculation cannot be the basis for creation of logical inferences.") (See also, ***Newman v. Metrish***, 543 F.3d 793 (6th Cir. 10/06/2008) "Here, if we consider all of the evidence in the light most favorable to the prosecution, there remains reasonable doubt because we are limited by what inferences reason will allow us to draw." ¶47.)

Thowsen's opinion testimony that he believed the Petitioner "minimized" and "jumbled" in her statement even could have been attacked under the theory it was based on "theoretical conclusions or inferences," but it wasn't'. (See, ***United States v. Bois-soneault***, 926 F.2d 230, 234 (2d Cir. 1991). "An expert's testimony as to a theoretical conclusion or inference does not rescue a case that suffers from an underlying insufficiency of evidence to convict beyond a reasonable doubt." *Id.*)

The single strongest argument to overturn the Petitioner's conviction was that it is based on conjecture, speculation and unfounded inferences, yet Petitioner's appellate counsel ignored that entire issue in her 53-page brief except for one general sentence that was unsupported by any analysis and argument, and there is no mention of it in the Nevada Supreme Court's ruling affirming her conviction, and there is no basis to believe they considered it.

There is no rational or even reasonable reason for why Petitioner's appellate counsel ignored in her brief the single strongest legal issue that could have resulted in overturning her convictions.

The Response is so non-responsive to Ground 74 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The conduct of Petitioner's counsel in Ground 74 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 74, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

Ground 75

The Response misstates and does not meaningfully respond to, and completely ignores the substance of Ground 75.

Ground 75 explains at length that Judge Vega abused her discretion by misapplying the "law of the case" doctrine in denying the Petitioner's "Motion *In Limine* To Exclude Statements Made By Ms. Lobato" at her second trial, because there had been no briefing of case law, expert testimony, or argument, or any consideration whatsoever of the complex legal, psychological and ethical issues involved in admission of the Petitioner's Statement and a related comment, during the hearing on May 10, 2002, during which Vega ruled without any reasonable deliberation that the

Petitioner's Statement was admissible, and therefore that ruling was not binding for the Petitioner's retrial. It is also explained in Ground 75 that the hearing on May 10, 2002, took less time than it takes some people to eat a Big Mac, and that lightning fast hearing was to decide the single most important evidentiary issue in the Petitioner's case.

However, Petitioner's appellate counsel did not even raise the critical issue that Judge Vega abused her discretion by misapplying the "law of the case" doctrine in denying the Petitioner's "Motion *In Limine* To Exclude Statements Made By Ms. Lobato."

The Response falsely states that the Nevada Supreme Court ruled on the issue of Judge Vega's abuse of discretion by misapplying the "law of the case," because it wasn't included in the brief filed by appellate counsel, and there is no mention of it in the Order of Affirmance, 2-5-06.

There is no rational or even reasonable reason for why Petitioner's appellate counsel ignored in her brief the issue of Judge Vega's abuse of discretion by misapplying the "law of the case" to the issue of excluding her Statement.

The Response is so non-responsive to Ground 75 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id.* at 647.)

The conduct of Petitioner's counsel in Ground 75 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 75, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

Ground 76

The Response does not meaningfully respond to the substance of Ground 76.

Ground 76 explains at length that the Nevada Supreme Court based its February 5, 2009, affirmation of the Petitioner's convictions on two false assumptions of fact – that "based on Lobato's admission, there was substantial evidence that she committed the murder," and that the State introduced "evidence of positive luminol and phenolphthalein tests for blood." – when neither of those rationales is either factually true or supported by the record. (Quotes from *Order of Affirmance*, Nevada Supreme Court, 2-5-09.)

Those are direct quotes from the Court's affirmation, yet, it is an incontrovertible fact there was no evidence at trial that the Petitioner made any "admission" to committing her convicted crimes, and in fact there was no testimony at trial by anyone even alleging she made a confession. Likewise, it is a fact there was no evidence at trial that there was a "positive luminol and phenolphthalein tests for blood" – and in fact the scientific evidence at trial was the exact opposite.

The Court's affirmation unambiguously states that the Petitioner's convictions were affirmed solely on the basis of her "admission," but she never made an "admission" of guilt, so the Court made the biggest mistake imaginable. It affirmed the convictions of the Petitioner solely on the basis of a provably false factual basis. Since there was no "admission" by the Petitioner, then there is no basis for the Court to have affirmed her convictions. Based on the rationale stated by the Court for affirming the Petitioner's convictions and the fact that they grievously erred by somehow thinking she made what is in fact a non-existent "admission" of guilt, then when notified of the error, the Court could have been expected to take a step back and corrected the error by reversing her convictions.

However, Petitioner's appellate counsel did not even include that issue in the Petition for Rehearing filed on February 12, 2009, or in the Petition for En Banc Re-Hearing filed on March 31, 2009. Furthermore, there is no evidence that appellate counsel even considered including in

those documents a correction of the erroneous factual basis upon which the Petitioner's convictions were affirmed.

There is no rational or even reasonable reason for why Petitioner's appellate counsel failed to include a correction of the Court's error in the Petition for Rehearing, or in the Petition for En Banc Re-Hearing.

It is telling that the Response describes the Court basing the affirmation of the Petitioner's convictions on a provably false factual basis as "frivolous," without making any attempt to explain why correcting the record to reflect the truth so that the Court could correct its error and reverse her convictions would be anything but the right thing to do – even for the prosecution.

The Response is so non-responsive to Ground 76 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 76 was not based on a reasonable strategic or tactical decision, and it meets *Strickland's* two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." *Strickland*, 466 U.S. at 687-88.

The errors in Ground 76, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, *Brady*, and jury misconduct Grounds, warrant a new trial for Petitioner.

V

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

[Petitioner notes that this heading does not accurately state the substance of the claims that is actually – Petitioner's counsel committed cumulative error in representing the Petitioner, (Ground 77)]

Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985) is cited by the Response, and it includes the three relevant factors for evaluating cumulative evidence: "These include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id*. *Big Pond* is much more instructive than *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854 - 855 (2000) that the Response emphasizes, because in *Big Pond* the Court reversed the conviction based on cumulative errors, so it provides a guideline for evaluating the cumulative evidence in the Petitioner's case:

> In this case, appellant was charged with a serious felony. The evidence against him, although substantial enough to convict him in an otherwise fair trial, was not overwhelming. We cannot say without reservation that the verdict would have been the same in the absence of error. The nature of the errors, while not in themselves particularly egregious, together had the effect of unfairly undermining appellant's credibility and defense in a rather close case. The cumulative effect of the errors was to deny appellant his right to a fair trial. Accordingly, we conclude that the judgment of conviction must be reversed. *Id*. at 3

The Petitioner states many dozens of times variations of the following: "At trial the prosecution did not present any physical, forensic, eyewitness, documentary, surveillance or confession evidence the Petitioner was anywhere in Clark County, Nevada at any time on July 8, 2001 – the day of Bailey's murder." (Writ of *habeas corpus*, 235) The Response does not deny a single time that the Petitioner wasn't anywhere in Clark County on July 8, 2001 – but only asserts that she was convicted by the jury and her convictions were affirmed on direct appeal. It can't be denied that the jury convicted the Petitioner of serious felonies, but by the Response's failure to deny there was no evidence she was in Clark County on the day of the murder, the jury could not have considered the evidence "overwhelming," and likely thought the case was close. The fact the jury deliberated over the course of two days is also evidence that the jury did not consider the evidence of guilt "overwhelming," and that it was close, and in fact both the prosecution and defense where attributed in the press after the trial as considering the verdict was a "compromise."

(See, Joshua Longobardy, "Kirsten Blaise Lobato is accused in a gruesome slaying. Did she do it?," *Las Vegas Weekly*, October 12-18, 2006.)

The sole determination then under ***Big Pond*** is if, "The nature of the errors, while not in themselves particularly egregious, together had the effect of unfairly undermining appellant's credibility and defense in a rather close case." *Id*.

The case of ***Witherow v. State***, 104 Nev. 721, 765 P.2d 1153 (Nev. 12/21/1988) is directly relevant to the Petitioner's case because the Court determined the cumulative error of two claims constituted reversible error. The Petitioner's claims include the same two cumulative errors that warranted reversal in *Witherow* – Presentation of false facts to the jury (Grounds 66, 69 and 70) and the prosecutor expressed his personal opinion about the evidence (Grounds 49, 67, 68 and 70). And that is only the tip of the iceberg of the Petitioner's cumulative evidence. The Court ruled in *Witherow*:

> Appellant was charged with a serious felony. The evidence against him was substantial enough to convict him in an otherwise fair trial. However, it cannot be said without reservation that the verdict would have been the same in the absence of error. Together the errors had the effect of undermining appellant's defense. Thus, the cumulative effect of the errors [104 Nev. 721, Page 725] denied appellant his right to a fair trial. Therefore, appellant's conviction must be reversed. *Id*. at ¶20-22.

Furthermore, cumulative error in **only one aspect of a case** is sufficient to reverse a conviction, without even considering other areas of cumulative error. Based on the cumulative error of racial bias alone, in 2005 the Supreme Court reversed the conviction in *Miller-El v. Dretke*, 125 S.Ct. 2317, 545 U.S. 231, 162 L.Ed.2d 196 (U.S. 06/13/2005) ruling, "It is true, of course, that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is **viewed cumulatively** its direction is too powerful to conclude anything but discrimination." *Id*. at ¶100. (emphasis added to original) That is significant, because the Petitioner's writ of habeas corpus includes a number of particular areas that by themselves warrant reversal of her conviction based, if not on individual error, then certainly on cumulative error. The Petitioner will cite several examples of those below.

The Response to Ground 77 fails to substantially address, or logically or legally argue that any combination of the many dozens of ineffective assistance of counsel claims included in the

fifty Grounds encompassed by Ground 77 does not constitute cumulative error, and it does not cite a single example from the writ of ***habeas corpus*** to support the catch-all phrase that the Petitioner "has failed to make out a valid claim or present any cogent arguments for any of the issues she has raised."; and, "She has not shown that any errors actually occurred throughout the adjudication of this case." (Response, 39) The Response substitutes those catch-all phrases for any kind of "cogent argument" of why the Petitioner's many dozens of ineffective assistance of counsel claims in her 50 IAC Grounds don't constitute cumulative error. If the Response is to be believed, those many dozens of claims don't constitute cumulative error solely because the Response says they don't – without actually stating a single reason why they don't. The Response doesn't even attempt to apply the three relevant factors for evaluating cumulative evidence set forth in ***Big Pond***, ***supra***. The Response simply asserts the evidence of error isn't cumulative because it says it isn't.

The Response to Ground 77 doesn't even cite ***Strickland v. Washington***, 466 U.S. 668 104 S.Ct. 2052 (1984) a single time, which established the U.S. Supreme Court's standards for evaluation of individual ineffective assistance of counsel claims, and certainly has application to the cumulative effect of individual errors insufficient by themselves to warrant reversal.

One area in which the principle of cumulative error applies – as set forth in ***Miller-El v. Dretke*** – are the emails by the Petitioner's ***pro bono*** counsel, Shari Greenberger, to lead counsel Clark County Special Public Defender David Schieck, and by Greenberger to several experts in the case. Although that is compelling evidence of ineffective assistance of counsel, the Response doesn't even mention them. In those emails concern about the Petitioner not being provided effective assistance of counsel is openly discussed. (See Exhibits, 86, 87, 88, writ of ***habeas corpus***) One of those emails documents 15 different areas of concern, and that email states in part:

> 3) **We are concerned about the lack of your contributions in terms of ongoing legal advice, research and writing, and overall trial strategy.**
> 8) **You previously have voiced concern about budget constraints at your office regarding the expenses in this case**.
> 9) **We are concerned about your attitude of indifference towards this case in general, especially in light of the fact that Ms. Lobato is facing the rest of her life in prison.**
> 10) On the trip to San Francisco, where we had arranged a joint defense counsel meeting with you and Ms. Lobato, **you never attended**.

> 11) On the multiple trips to Panaca, and defense investigation in Lake Havasu and Arizona, **you have never accompanied the defense team or participated.**
> 12) You have suggested not filing the motion we have drafted moving to exclude any subsequent bad acts the State may seek to introduce against Ms. Lobato. **We believe that motion should be lodged with the court to preserve the record**.
> 13) **You have** repeatedly advised us you would clear time in your schedule to meet with us on trips to Las Vegas, but have **had little to no time blocked off to meet with us.**
> 14) **We must have an investigator who can help with all of the issue outlined in my comprehensive memo I submitted to you two weeks ago. The trial date is rapidly approaching and we have nowhere to turn for investigation**.
> (Exhibit 86, writ of *habeas corpus*) (emphasis added to original)

The Response is dead silent about the cumulative effect of Schieck's ongoing pervasive attitude of indifference and lack of involvement in preparation for the Petitioner's defense. Schieck's documented lackadaisical attitude and actions belying his "I Don't Care" what happens to the Petitioner approach to her case, infected every aspect of the Petitioner's defense.

As Greenberger's emails prove, she (and likely her associate, *pro bono* co-counsel Sara Zalkin) were in open conflict with Schieck and his attitude of indifference and actual interference with the Petitioner mounting an effective defense. Since Schieck was lead counsel and he had control of the Petitioner's defense – all Greenberger and Zalkin could do was wail into the wind. Again the Response completely ignores the cumulative effect that negative situation had on the Petitioner's defense that Greenberger specifically documents in Exhibit 86, 87 and 88.

Exhibit 86 also documents that many key trial decisions by her counsel were not strategic decisions – they were based on Schieck's desire to save money by not investigating important witnesses and retaining experts critical to the Petitioner's defense. (See Exhibit 86, No. 8. "You previously have voiced concern about budget constraints at your office regarding the expenses in this case.") Schieck was more interested in saving money than in effectively representing the Petitioner, or making tactical decisions based on increasing the probability of her acquittal. Witnesses the jury did not hear because of Schieck's desire to save money could have given testimony undermining the prosecution's evidence and provided the jury with the evidence necessary for them to determine the prosecution had not proven its case beyond a reasonable doubt.

So any of counsel's decisions attributable to wanting to save money must be included in any analysis of cumulative error prejudicial to the Petitioner.

The Petitioner asserts that the actual conflict of interest Mr. Schieck had of loyalty to his "budget" over his loyalty to representing the Petitioner constitutes a "presumption of prejudice" in his representation that requires reversal of the Petitioner's conviction. The *Strickland* ruling states:

> One type of actual ineffectiveness claim warrants a similar, though more limited, **presumption of prejudice**. In *Cuyler v. Sullivan*, 446 U.S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an **actual conflict of interest**. In those circumstances, **counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties**. *Strickland* at 692. (emphasis added to original)

The Petitioner also asserts that Mr. Schieck's pervasive "attitude of indifference" towards the Petitioner's case falls below the standard of reasonable conduct set forth in *Strickland*:

> Representation of a criminal defendant entails certain basic duties. … From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause… **Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process**." *Strickland* at 688. (emphasis added to original)

The Petitioner believes it is legitimate to assert that Mr. Schieck's performance was so deficient that it amounted to the denial of the assistance of counsel that is presumed to be prejudicial. The U.S. Supreme Court ruled in *Strickland*: "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland* at 688.

Regarding the reasonableness of a tactical decision, in 2010 the Ninth Circuit Court of Appeals ruled in *Lunbery v. Hornbeak*, No. 08-17576 (9th Cir. 05/25/2010):

> But **a tactical decision infers a calculated reason to do or not do something**. Here there was no reason not to call Dr. Ofshe and every reason to do so. **The record fairly smacks of incompetence**, from the conflicting note to file, **to the attorneys pointing fingers at one another**, to the failure to even communicate the decision to the expert. **It is also far from clear whether any decision, reasoned or not, was ever made here or by whom**. Even though "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," the decision to prematurely limit an investigation may be, in and of itself, unreasonable. Id. at 690-91 ("[**C]counsel has a duty to make reasonable investigations."**).

> As the Supreme Court explained in *Wiggins v. Smith*, **a premature choice to abandon a potentially fruitful avenue can make "a fully informed decision with respect to [ ] strategy impossible" and render counsel's performance deficient**. 539 U.S. 510, 527-28 (2003). *Id*. at ¶81-82. (emphasis added to original)

The Petitioner believes that the cumulative evidence of ineffective assistance of counsel in Ms. Greenberger's emails is sufficient to satisfy the principle in *Miller-El v. Dretke*, and by themselves warrant reversal of the Petitioner's convictions, although that doesn't preclude that evidence from being considered cumulatively with other evidence. (This ineffective assistance of counsel error by counsel is also detailed in Ground 79.)

Another area in which the principle of cumulative error in one area applies as set forth in *Miller-El v. Dretke*, is ADA William Kephart and ADA Sandra DiGiacomo's prosecutor misconduct by making comments during arguments about the truthfulness of key defense alibi witnesses that prejudicially shifted the burden of proof to the Petitioner – and Petitioner's counsel did not object. Several alibi witnesses testified that they saw the Petitioner from after midnight until after 7 am on July 8, 2001 – the day of Bailey's murder. Those witnesses were willing and able to testify during the Petitioner's first trial, but her trial counsel did not have them testify.

ADA DiGiacomo argued during closing:

> "And then you have John Kraft. John and Ashley and her father are all new. They did not testify previously. The come in here and they say that she was there the morning of July 8 at 7:00 a.m. That's new". (Trans. XIX-137, 10-5-06)

ADA Kephart then repeated that argument during rebuttal:

> "And for the first time -- and also we hear from Mr. Lobato. He comes in here and now he tells you that at 7 o'clock in the morning John, who we hear from the first time, came over and woke me up and asked me on that particular day, when he was leaving a week later, to help out with checking with my family when I'm gone, the first time". (Trans. XIX-190, 10-5-06)

The Nevada Supreme Court has repeatedly ruled that it is misconduct for prosecutors to comment about a witness who was not called because it shifts the burden of proof to the defense to explain why the witness wasn't called. *Ross v. State*, 106 Nev. 924, 926, 803 P.2d 1104, 1105 (1990); and, *Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 882 (1996). In the Petitioner's case the prosecutors used a variation of that prejudicial tactic by emphasizing to the jury that the witnesses

had not **previously** been called to testify, effectively shifting the burden of proof to the defense to explain why the witnesses had not previously been called and to prove the witnesses were not liars. There was nothing about the witnesses' testimony that suggested they weren't truthful, so the prosecutors took the backdoor of suggesting that they weren't truthful because they had not testified before. What Kephart and DiGiacomo did was convey to the jury that John Kraft, Larry Lobato and Ashley Lobato liars without actually mouthing the words. Kraft and Larry Lobato were key alibi witnesses, because they established the Petitioner was in Panaca from shortly after midnight until after 7 am on July 8, while the prosecution's entire case was based on Bailey being murdered 170 miles away in Las Vegas "sometime before sunup" at 5:30 am and 3:50 am – which was his latest probable time of death based on ME Simms' testimony. (Trans. VIII-20-21, 9-20-2006) So unless Kraft and Larry Lobato could be smeared by the prosecution and have the jury think they were liars, there was a high probability the jury would acquit the Petitioner. The prosecution tactic to smear the truthfulness of the witnesses not only violated the principles of *Ross* and *Whitney*, but in *Witherow v. State*, 104 Nev. 721, 765 P.2d 1153 (Nev. 12/21/1988) the Court ruled, "This statement amounts to an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence. The statement was improper. …"it was for the jury, and not the prosecutor, to say which witnesses were telling the truth. . . ." The prosecution's arguments that made it appear to the jury that the alibi witnesses weren't truthful because they hadn't previously testified were prejudicial and warrant reversal under *Ross*, *Whitney*, and *Witherow*. (This prosecutor misconduct is also individually the basis for Ground 68.)

Those errors were compounded by ADA Kephart expressing his personal opinion that the Petitioner was guilty, and he exhorted the jury to follow his lead and mark their jury ballot guilty like he did:

> "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." (Trans. XIX-213, 10-5-06)

The Nevada Supreme Court ruled in *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (Nev. 9/5/1985) that it is prosecutorial misconduct for a prosecutor to express personal opinions because:

> "Such an injection of personal beliefs into the argument detracts from the "unprejudiced, impartial, and nonpartisan" role that a prosecuting attorney assumes in the courtroom. By stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney. Prosecutors therefore must not express their personal beliefs, as was done here. ¶29

In 2008 the Court overturned the convictions in ***Valdez v. State***, 196 P.3d 465, 124 Nev. 97 (Nev. 11/26/2008) based on cumulative evidence that included the prosecutor's expression of his personal opinion:

> This court has long recognized that a prosecutor should be "'unprejudiced, impartial, and nonpartisan,'" and he should not inject his personal opinion or beliefs into the proceedings or attempt to inflame the jury's fears or passions in the pursuit of a conviction. The comment in this case aroused emotions and invoked the prosecutor's personal opinion. For these reasons, we conclude that the comment was improper. *Id*. at ¶85

The Court overturned the conviction in ***Aesoph v. State***, 102 Nev. 316, 721 P.2d 379 (Nev. 6/26/1986) based on the cumulative effect of the prosecutor's injection of personal beliefs during closing argument and other prejudicial comments, at 322-323.

There is no question that ADA Kephart's exclamation to the jury to follow his lead and take the action – "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." (Trans. XIX-213, 10-5-06) – was intended to inflame the passion of the jury to short-circuit their deliberative process in a way that has been ruled reversible error by the Nevada Supreme Court.

The Response, falsely and contrary to the content of the many Grounds alleging ineffective assistance of counsel, states, "She has only made bare allegations, and there is no reasonable question of Defendant's guilt." (Response, 39) That statement is false, first, because every ineffective assistance of counsel Ground is supported by specific detailed allegations supported by evidence, and second, because United States District Court Judge Gloria Navarro is on the public record as declaring the Petitioner is actually innocent of murdering and mutilating Bailey. Judge Navarro was interviewed by the Las Vegas ***Review-Journal*** when she represented the Petitioner, and she was quoted as directly stating with no qualification whatsoever, "She placed her belief in

the justice system, and **she ended up being convicted of a crime that she did not commit**." (See attached Exhibit 4, Judge Gloria Navarro interview.) (emphasis added to original)) Judge Navarro has never suggested she does not continue to be as certain today of the Petitioner's actual innocence as she was during that interview. That is supported by the fact that Judge Navarro specifically referenced that interview – Glenn Puit, *Convicted Killer Turned Down Plea Deal*, LAS VEGAS REVIEW-JOURNAL, May 29, 2002 – on page 8 of the "US Senate Committee On The Judiciary: Questionnaire For Judicial Nominees" that she filled out after United States Senator Harry Reid nominated her to be a United States District Court Judge. The U.S. Senate relied on that questionnaire in determining Judge Navarro was qualified for the lifetime appointment as a U.S. District Court Judge, and she was confirmed by a unanimous 98-0 vote by the U.S. Senate. (See attached Exhibit 5, "98-0 Senate Vote - Nevada's Navarro joins federal bench," Las Vegas ***Review-Journal***, 05-05-2010.) Judge Navarro has an intimate understanding of the basic facts of the Petitioner's case, and the U.S. Senate thinks Judge Navarro's legal judgment is reasonable enough to entrust her with a lifetime judicial appointment. Consequently, the Response's assertion that "there is no reasonable question of Defendant's guilt." has made Judge Navarro a material witness in the Petitioner's writ of *habeas corpus* case, and she will be subpoenaed as a witness during the Petitioner's evidentiary hearing.

Furthermore, in making the claim that "there is no reasonable question of Defendant's guilt." the Response ignores the new evidence in the writ of *habeas corpus* that on March 24, 2010, 14 lawyers were among 20 persons who unanimously voted to endorse the Petitioner's case as a miscarriage of justice and that she is actually and factually innocent based on a thorough review and assessment of evidence, documents and materials relevant to her case. (See, writ of *habeas corpus*, 146) Those 20 people comprise the board of the Association in the Defence of the Wrongly Convicted (AIDWYC) that is based in Toronto, Canada and has assisted in overturning the convictions of twenty persons. (writ of *habeas corpus*, 146) AIDWYC's issued a statement that "AIDWYC believes after a thorough review and assessment of Ms. Lobato's case that she is innocent." The assessment that the Petitioner is innocent by an organization with a long track record of carefully and correctly assessing a convicted person's actual innocence can certainly be

considered to provide evidence, contrary to the Response's assertion, that "there is [a] reasonable question of Defendant's guilt."

Furthermore, Steven King is the only person who is known to have been acquainted with Diann Parker, Bailey, and the Mexicans, and he has unequivocally sworn under penalties of perjury, "I am absolutely certain that Kirstin Blaise Lobato did not murder 'St Louis.'" (King knew Bailey by his nickname, "St Louis.") (Exhibit 8, 2) King's unique personal knowledge certainly establishes that "there is [a] reasonable question of Defendant's guilt."

Furthermore, Ron Slay is a Nevada state licensed polygraph examiner who has performed over 27,000 examinations. Slay is a member of the American Polygraph Association, the National Polygraph Association, and other professional organizations. He is the owner of Western Security Consultants in Las Vegas, Nevada. Slay has "performed many polygraph examinations for the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office. Slay conducted a polygraph examination of the Petitioner on December 3, 2001. Slay's conclusion is, "I am certain Ms. Lobato is innocent of Mr. Bailey's murder." (See Exhibit 9, writ of ***habeas corpus***) The fact that Clark County law enforcement agencies rely on Slay's skill at ascertaining the truthfulness of a criminal suspect or a defendant establishes beyond question that "there is [a] reasonable question of Defendant's guilt."

The Response is so non-responsive to Ground 77 that it constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." ***Id.*** at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." ***Id.*** at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." ***Id.*** at 647.)

When all of the ineffective assistance of counsel Grounds (27-76 and 79) are considered cumulatively, the errors by Petitioner's counsel that were not based on a reasonable strategic or tactical decision meets ***Strickland's*** two-part test for determining ineffective assistance of counsel.

First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent the prejudicial conduct of Petitioner's counsel, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors by counsel individually or cumulatively, and also cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

VI

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

[Petitioner notes that this heading does not accurately state the substance of the claims that is actually – Petitioner's New Evidence Grounds Warrant Relief, (Ground 78)]

The Response inaccurately states without any logical or legal explanation whatsoever that the Petitioner's new evidence is untimely. It merely cites NRS 176.515(3) that by itself doesn't establish the relevance or applicability of that statute to the Petitioner's case.

The Nevada Supreme Court's precedent regarding how to evaluate the timeliness of new evidence claims is ***Browning v. State***, 120 Nev. 347, 91 P.3d 39 (2004). Yet, the Response doesn't even mention *Browning*. The Petitioner previously in this Answer explained in detail that the new evidence in her writ of ***habeas corpus*** meets the exceptions set forth in ***Browning***, and the Petitioner incorporates that explanation into this Answer for Ground 78. That explanation is in the section Argument I – A. Defendant must raise new evidence within two years of verdict.

The Response doesn't deny, make any mention whatsoever, or present any legal or logical argument why the exceptions set forth in ***Browning*** do not apply to the Petitioner's case and the admissibility of her new evidence. The Response's failure to meaningfully respond to the issue of the admissibility of the Petitioner's new evidence under one of more of the exceptions set forth in ***Browning*** constitutes a "confession of error" ***Polk v. State***, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id.* at ¶28). See also, ***Bates v. Chronister***, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id.* at ¶27) See also, ***Moore v. State***, 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to

provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

Furthermore, the Response is confused because Ground 78 concerns new evidence only, so the Petitioner requests that the Court strike and give no consideration to the following inapplicable and irrelevant statements in Ground 78 – "She has not shown that any errors actually occurred throughout the adjudication of this case …"; and, "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…" (Response, 39, lines 21-27.)

The Response falsely states that the Petitioner has only made "bare allegations," and even a casual perusal of her new evidence Grounds shows every one of them makes very specific and detailed claims. For example, in Ground 1 three forensic entomologists, two of which are among the 15 in North America certified by the American Board of Forensic Entomology, have provided new scientific evidence that to a "scientific certainty" Duran Bailey died after sunset (8:01 p.m.), and that he "most probably" died after dark (9:08 p.m.) on July 8, 2001 – a period of time when the undisputed evidence at trial establishes the Petitioner was in Panaca. The Petitioner's unrebutted alibi evidence was so compelling that even the Prosecution conceded during closing arguments, when they were trying do everything possible to convince the jury to convict her, that she was in Panaca "probably" from 10 a.m. and definitely from "11:30 a.m. through that night" when she left for Las Vegas about 1 a.m. on July 9. Since the Petitioner was in Panaca at the time of Bailey's death 170 miles away in Las Vegas, it is physically impossible that she could have under any scenario imaginable had anything to do with his death. The new evidence in Ground 1 about Bailey's time of death after 8 pm is directly corroborated by the new forensic pathology evidence in Ground 2 and the new forensic pathology and forensic entomology evidence in Ground Three, and the cumulative effect of those three Grounds is that if the jury had known that new scientific and medical evidence of Bailey's time of death "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup*, 513 U.S. at 327.

The Response also falsely and contrary to the content of the many new evidence Grounds states, "…there is no reasonable question of Defendant's guilt." (Response, 39) That statement is false, first, because every new evidence Ground is supported by specific detailed allegations supported by evidence, and second, because United States District Court Judge Gloria Navarro is on the public record as declaring the Petitioner is actually innocent of murdering and mutilating Bailey. Judge Navarro was interviewed by the Las Vegas *Review-Journal* when she represented the Petitioner, and she was quoted as directly stating with no qualification whatsoever, "She placed her belief in the justice system, and **she ended up being convicted of a crime that she did not commit**." (See attached Exhibit 4, Judge Gloria Navarro interview.) (emphasis added to original)) Judge Navarro has never suggested she does not continue to be as certain today of the Petitioner's actual innocence as she was during that interview. That is supported by the fact that Judge Navarro specifically referenced that interview – Glenn Puit, *Convicted Killer Turned Down Plea Deal*, LAS VEGAS REVIEW-JOURNAL, May 29, 2002 – on page 8 of the "US Senate Committee On The Judiciary: Questionnaire For Judicial Nominees" that she filled out after United States Senator Harry Reid nominated her to be a United States District Court Judge. The U.S. Senate relied on that questionnaire in determining Judge Navarro was qualified for the lifetime appointment as a U.S. District Court Judge, and she was confirmed by a unanimous 98-0 vote by the U.S. Senate. (See attached Exhibit 5, "98-0 Senate Vote - Nevada's Navarro joins federal bench," Las Vegas *Review-Journal*, 05-05-2010.) Judge Navarro has an intimate understanding of the basic facts of the Petitioner's case, and the U.S. Senate thinks Judge Navarro's legal judgment is reasonable enough to entrust her with a lifetime judicial appointment. Consequently, the Response's assertion that "there is no reasonable question of Defendant's guilt." has made Judge Navarro a material witness in the Petitioner's writ of *habeas corpus* case, and she will be subpoenaed as a witness during the Petitioner's evidentiary hearing.

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To counter the cumulative weight of the Petitioner's more than 20 new evidence Grounds that encompass more than 140 pages of the writ of *habeas corpus* and dozens of exhibits and include new evidence by nine experts and new evidence by at least 18 witnesses, the Response merely makes the

statement, "Defendant is unable to satisfy the test laid out in *Mulder*." (Response, 39) That is it. No explanation whatsoever of how or why the new evidence allegedly doesn't satisfy the test.

Furthermore, the Response doesn't attempt to refute, or even deny that the Petitioner meets *Schlup's* actual innocence standard for relief when the Petitioner's new evidence isn't considered in isolation but cumulatively in light of **all** the evidence that was **and was not admitted into evidence at trial** that may complement the Petitioner's new evidence in establishing she is actually innocent under the *Schlup* standard that "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup,* 513 U. S. at 327. In *Schlup* the court ruled: "the habeas court **must make its determination** concerning the petitioner's innocence "**in light of all the evidence**, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and **evidence tenably claimed to have been wrongly excluded or** to have **become available only after the trial**." *Schlup,* 513 U. S. at 328. (emphasis added to original) The US Supreme Court reaffirmed that principle when it granted the writ of *certiorari* in the 2006 *habeas* case of *House v. Bell*, 126 S.Ct. 2064, 547 U.S. 518, 165 L.Ed.2d 1 (U.S. 06-12-2006) ("In sum, considering "all the evidence," *Schlup*, 513 U. S. at 328.")

The Response also fails to meaningfully address or present any legal or logical argument why the Petitioner's new evidence Grounds don't cumulatively establish that "it is more likely than not that no reasonable juror would have convicted [her] in light of the new evidence presented in habeas proceedings." *Schlup,* 513 U. S. at 327. Consequently, the Response constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State,* 93 Nev. 645, 572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

Based on the cumulative weight of the Petitioner's new evidence Grounds, she meets the U. S. Supreme Court's actual innocence standard 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." *Schlup v. Delo*, 513 U.S. at 327. That new evidence either by itself, or cumulative with the Petitioner's ineffective assistance of counsel, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

VII

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

[Petitioner notes that this heading does not accurately state the substance of the claims that is actually – Petitioner's Counsel Failed To Diligently Represent The Petitioner Or The Interests Of Petitioner, (Ground 79)]

The Response misstates and doesn't make any attempt whatsoever to respond to the substance of Ground 79. The Petitioner will go as far as to state that the Response goes to unprofessional lengths to denigrate Ground 79 without explaining its foundation for doing so, apparently in the hope that the Court doesn't actually read Ground 79 and understand the inaccuracy of the Response's description of it compared with the reality of what Ground 79 actually says.

Ground 79 is 12 pages long with extremely detailed claims that include:

1. Emails from Petitioner's *pro bono* counsel Shari Greenberger to lead counsel David Schieck and from Greenberger to two experts. (See, Exhibits 86 to 88, writ of ***habeas corpus***) Key passages of those emails are documented in Section V of this Answer and in Ground 79 of the writ of ***habeas corpus***, so they won't be repeated her. However, they can be summarized that lead counsel Schieck had a lackadaisical "attitude of indifference towards this case in general" and non-involvement in trial preparation, and that Greenberger and Schieck were in a state of constant conflict and Schieck who interfered with Greenberger's efforts to adequately prepare the Petitioner's defense.

That isn't the Petitioner saying these things – it is her *pro bono* counsel Greenberger – and Schieck has failed to turn over all his files from representing the Petitioner, so it is unknown what additional information he is concealing that provides even more evidence of his ongoing conflict with Greenberger that hampered their representation of the Petitioner. Furthermore, the Response's sensationalistic and false accusation that Ground 79 is based on "some sort of conspiracy on the part of her counsel to convict her." (Response, 40), is not supported by the Response, and it can only be intended to distract the Court from actually reading and evaluating Ground 79 on its merits.

2. Schieck failed to investigate a dental expert.

3. Schieck failed to arrange a meeting between polygraph examiner Ron Slay and the District Attorney that could have resulted in dismissal of the charges based on Slay's determination from his examination of the Petitioner that she is absolutely innocent of Duran Bailey's murder. (See Exhibit 9, writ of *habeas corpus*)

4. Schieck failed to retain expert crime scene analyst and forensic scientist George Schiro.

5. Schieck failed to retain psychology expert Richard Leo, who is one the world's foremost experts at analyzing a defendant's statement.

6. Schieck did not investigate the 7 telephone numbers found in Bailey's pants pocket, and it was only during the post-conviction investigation of the Petitioner's case that it was discovered the prosecution failed to disclose that one of those numbers written on two separate pieces of paper is that of a Las Vegas law enforcement officer.

7. Schieck did not retain a forensic entomologist.

8. Schieck did not retain a forensic pathologist to fully examine the evidence in the Petitioner's case.

As the Petitioner states in Ground 79:

> The magnitude of the prejudice to the Petitioner, and that the testimony of these experts would have resulted in the Petitioner's acquittal, is established by the new evidence the experts in those disciplines have discovered post-conviction in the Petitioner's case. (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009; Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010; Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010; Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010; Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010; Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010; and, Exhibit 100, Affidavit of Mark Lewis, DDS, April 26, 2010.) (writ of *habeas corpus*, 365)

The Response is so non-responsive to Ground 79 that it constitutes a "confession of error" *Polk v. State*, 233 P.3d 357, 126 Nev. 19 (Nev. 06/03/2010) ("we … consider the State's silence to be a confession of error on this issue." *Id*. at ¶28). See also, *Bates v. Chronister*, 100 Nev. 675, 691 P.2d 865 (Nev. 12/7/1984) ("failure to respond to this argument in the three pages of argument in their answering brief as a confession of error." *Id*. at ¶27) See also, *Moore v. State*, 93 Nev. 645,

572 P.2d 216, 217 (1977) (The failure to provide "argument, legal or logical, to support" its position constitutes "confession of error" because the Respondent had "in effect filed no brief at all." *Id*. at 647.)

The conduct of Petitioner's counsel in Ground 79 was not based on a reasonable strategic or tactical decision, and it meets ***Strickland's*** two-part test for determining ineffective assistance of counsel. First, counsel's conduct "fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 687-88. Second, absent counsel's prejudicial conduct, "there is a reasonable probability that the result of the proceedings would have been different." ***Strickland***, 466 U.S. at 687-88.

The errors in Ground 79, individually or cumulative with other errors by counsel, and cumulative with the Petitioner's new evidence, ***Brady***, and jury misconduct Grounds, warrant a new trial for Petitioner.

VIII

THE APPOINTMENT OF COUNSEL IS IN THE DISCRETION OF THE COURT

The Petitioner does not have any objection to the Response's citation of the law pertaining to appointment of counsel in a ***habeas corpus*** proceeding.

The Response does not object to the Petitioner's request for appointment of counsel.

The Petitioner's request for appointment of counsel is properly in her writ of ***habeas corpus*** and she has filed the proper document establishing she is indigent, so she qualifies based on her financial status.

The Petitioner believes she qualifies for appointment of counsel based on the guidelines in NRS 34.750 that are cited in the Response. Particularly considering the complex legal issues in the Petitioner's writ of ***habeas corpus***, the extraordinary difficulty in understanding those issues and complying with the court procedures, and that Counsel is necessary for her to proceed with discovery that includes seeking to obtain all discoverable documents that the prosecution did not disclose to her trial counsel (at least one of these documents is listed in this Answer's section – D. Counsel's Failure to File a Motion for Discovery (Ground 36), and case file information that her trial counsel has thus far failed to turn over to her. That is important because NRS 34.750(c) states

one of the guidelines for appointment of counsel is that "Counsel is necessary to proceed with discovery." The Petitioner would also need the assistance of counsel for an evidentiary hearing.

IX
AN EVIDENTIARY HEARING IS NOT REQUIRED

[Petitioner notes that this heading doesn't state the substance of what the Petitioner requests that is actually – An Evidentiary Hearing Is Required)]

The Petitioner's writ of ***habeas corpus*** includes more than 20 new evidence grounds that include new evidence from nine experts and new evidence by at least 18 witnesses. That new evidence includes new forensic entomology evidence by three of North America's leading forensic entomologists – including one who was listed by ***Time*** magazine as one of the top five global innovators in the Criminal Justice Field in this century, new forensic pathology evidence by one of the United States' leading forensic pathologists expert at determining time of death, new expert impressions evidence by a 25-year veteran of the FBI Crime Laboratory, new psychology evidence by one of the country's leading psychology experts at evaluating a defendant's police statement, new crime scene analysis and forensic science evidence by a highly experience forensic scientist and crime scene analyst, new dental evidence by a dental surgeon, and the Petitioner's new evidence also includes nine new alibi witnesses that have exculpatory evidence the jury did not hear. All of the Petitioner's expert are working on her case ***pro bono***.

An evidentiary hearing would provide the Court the opportunity to evaluate the new evidence of these many witnesses by seeing and hearing them in person and subjected to cross-examination. The Response is talking out of both sides of its mouth by opposing an evidentiary hearing because it has repeatedly stated throughout the Response that the Petitioner's new expert and alibi witnesses "should be treated with a fair degree of skepticism" because "post-trial affidavits are "obtained without the benefit of cross-examination."" (Response, 6, 8-11 and 14), and then at the end of the Response they are opposed to the very forum that will provide them with the opportunity to cross-examine those witnesses – an evidentiary hearing. The Response cannot legitimately argue out the right side of its mouth that the new expert and alibi witnesses should be viewed skeptically because they haven't been subjected to cross-examination, and at the same time argue out of the left side of its mouth that the Petitioner should not be granted an evidentiary

hearing so those witnesses can be subjected to cross-examination.

The Petitioner wants an evidentiary hearing because she has complete confidence that every one of her new witnesses provides truthful, credible, trustworthy and material new evidence.

There is no basis whatsoever in reality for the Response's false and completely unsubstantiated claim that the Petitioner wants to use an evidentiary hearing as a "discovery tool." (Response, 41) The Response not only doesn't provide any evidence whatsoever to support that baseless claim, but it is absurd given that the 79 Grounds in the Petitioner's writ of ***habeas corpus*** are supported by 101 Exhibits and more than two dozen new witnesses.

The Response has repeatedly stated that the Petitioner's writ of ***habeas corpus*** only sets forth "bare" allegations, and it does it again in opposing an evidentiary hearing, but it has not attempted to substantiate that claim previously in the Response, and it doesn't do so here. Stating something is bare is not a substitute for actually explaining how and why it is, and the Response makes no effort whatsoever to do so. The Petitioner can only surmise that it is because it can not do so.

The Response's reference to *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994) is of benefit to the Petitioner. Marshall raised **four** issues in his writ of ***habeas corpus*** based solely on the ineffectiveness of his trial and appellate counsel. The District Court denied him an evidentiary hearing and dismissed his writ. On appeal the Nevada Supreme Court not only granted Marshall relief, but wrote, "The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief." *Id.* at 1333.

The Petitioner has 23 Grounds based on new evidence of actual innocence, 1 Ground based on new evidence of jury misconduct, 2 Grounds based on Brady violations, 50 Grounds based on ineffectiveness of trial and appellate counsel, 1 Ground based on her actual innocence, 1 Ground based on cumulative ineffectiveness of trial and appellate counsel, and 1 Ground based on cumulative new evidence of her actual innocence.

The shear magnitude of the substantive issues in the Petitioner's case makes the case by itself that an evidentiary hearing is required.

The alternative to an evidentiary hearing is for the Court to grant the Petitioner's writ of ***habeas corpus*** on the written pleadings.

Dated this 24 day of September 2010.

Kirstin Blaise Lobato 95558

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

EXHIBIT 1

FACULTY OF ARTS & SOCIAL SCIENCES
SCHOOL OF CRIMINOLOGY

778 782 3589
ganderso@sfu.ca
7 September 2010

street address
ASSC 1 10125
778-782-3213 (Tel.)
778-782-4140 (Fax)

mailing address
School of Criminology
8888 University Drive
Burnaby BC Canada
V5A 1S6

To Whom it May Concern,

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

The following is the State's Response to Kirstin Blaise Lobato's writ of habeas corpus, p. 5.

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. ... She [Ms. Lobato] has simply provided expert opinions based upon an examination of photographs years later.

My response to the State's above response to Ms. LOBATO's Habeas Corpus petition:-

Forensic Entomology is a well recognized science with a history going back over a thousand years. Its' modern roots go back well over one hundred years. Board Certification has been available since 1996 and both Dr. Goff and I are certified as Board Certified Forensic Entomologists with the American Board of Forensic Entomology (ABFE). I am presently Vice-Chair of ABFE and Dr. Goff has been Chair in the past and was the inaugural Chair. There are thousands of published studies in this field, published in prestigious journals with several national and international societies devoted exclusively to forensic entomology, including the North American Forensic Entomology Association (I am past president) and the European Association of Forensic Entomology. We have a strong presence in the American Academy of Forensic Sciences.

Although it is always preferable to attend the scene personally and to examine the body itself, this is not always possible. In most cases, a forensic entomologist is asked to estimate the elapsed time since death based on the stage of development and consequent age of the insects present. This normally includes collecting the insects, preserving some at

the scene to prove the insect's stage of development, and raising the rest to adulthood for identification.

In a different case from that of Ms. LOBATO, where the decedent has been dead for a few hours or more it is, admittedly, hard to give any specific answers about the age of the insects, as the entomologist can see eggs, or if longer than a few hours, the larvae or maggots on the remains, but cannot identify the species from a photograph. The insects need, preferably to be raised to adulthood, or at the least, examined under a microscope. This means that it is true that, in a case where the decedent had been dead for longer, it is difficult to give an accurate assessment of elapsed time since death from a photograph.

However, Ms. LOBATO'S case is ENTIRELY different. I am not attempting to look at a photograph to age insects, I am simply looking for the **presence or absence** of insects. This is a very simple thing to determine from a series of photographs. I and other forensic entomologists have carefully examined these photographs and see no evidence whatsoever of carrion insects, either as flies or as clumps of eggs. Had the remains been at the site for the length of time suggested, then the remains would have had large quantities of eggs in the form of creamy white clumps, in many areas of the body, specifically at wound sites (which were myriad) and at orifices. These would have been extremely noticeable even to the untrained eye. Therefore, a simple assessment of the photographs is entirely adequate to determine that no insects were present so the decedent cannot have been dead at that site for the length of time suggested by the State and in fact, cannot have been dead for very long, when discovered. Had the remains been present during daylight hours, there would have been eggs.

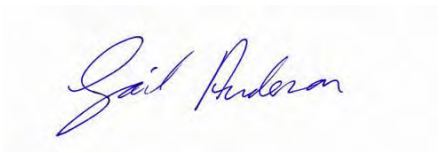
The lack of insect eggs on the remains is, in fact indirectly corroborated by the report of the medical examiner and in his testimony at both the preliminary hearing and the trial. He made no mention at any point of the presence of insect eggs or any insect activity on the remains and he examined the body itself. This supports my conclusions based on the photographs.

The State comments twice that the photographs were examined years after they were taken. This has no relevance whatsoever. The photographs are as clear a representation of the image photographed today as they were years ago. The photographs are well taken and in excellent condition. There age is of no consequence. In fact, as they can now be examined in electronic

format, this allows the observer to increase the size of the image at will, almost as if one were using a microscope.

My original opinion stands, and I do not feel that the State's response to the insect evidence has any validity whatsoever.

Yours sincerely,



Gail S. Anderson, Ph.D.
Professor

Co-Director, Centre for Forensic Research,
Associate Director, School of Criminology
Diplomate of the American Board of Forensic Entomology
Co-Director, Centre for Forensic Research
Fellow – American Academy of Forensic Sciences
Fellow- Canadian Society of Forensic Sciences

EXHIBIT 2

Email from Dr. Jason Byrd, February 1, 2010, regarding his review of crime scene and autopsy photographs in the case of Kristin Blaise Lobato.

From:"Jason H. Byrd" <jhbyrd@forensic-entomology.com>
To:"Hans Sherrer" <hsherrer@justicedenied.org>
Subject: Re: Kirstin Blaise Lobato case referral by Dr. Gail Anderson - RESPONSE
Date sent: Mon, 1 Feb 2010 21:41:29 -0500

Hello-

Upon review of the photos you provided at the link below, I found no evidence of roach scavenging on the body. Additionally, I found no evidence of eggs from the insect family Calliphoridae.

Regards,
Dr. Jason Byrd

****
Added note of explanation to the original email:

Dr. Jason H. Byrd, Ph.D., is Educational Program Director with the William R. Maples Center for Forensic Medicine, Department of Pathology, Immunology and Laboratory Medicine, University of Florida, College of Medicine. He is one of only fifteen forensic entomologists certified by the American Board of Forensic Entomology.

EXHIBIT 3

Bodziak Forensics
William Bodziak
38 Sabal Bend
Palm Coast, FL 32137
Tel: 386-447-3567 Fax: 386-447-3568

Supplementary Report – Examination of Footwear Impression Evidence

June 28, 2010

Ms. Michelle Ravell
6309 W. Alexander Road
Las Vegas, NV 89108

RE: Kirstin Lobato
Footwear Impression Evidence

Dear Ms. Ravell

Pursuant to your request a review was made of footwear evidence in this case submitted to date. That evidence is described below.

Items Described in Report dated March 27, 2002

Q1 Photograph of right shoe impression in blood on concrete

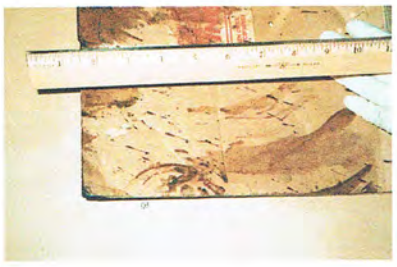
Q2 Photograph of right shoe impression in blood on concrete

Photographs of bloody footwear impressions on cardboard, sent via email on January 20, 2010, further described as Q3, Q4, Q5 and Q6

Q3

Q4

Q5



Q6

K1 Two inked impressions and tracing of KIRSTIN LOBATO's right foot.

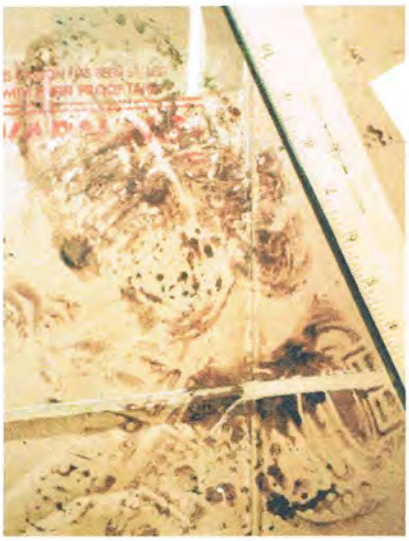
Also submitted were emailed photographs of Defendant's Exhibits A, B and E introduced during Ms. Lobato's trial on May 10, 2002, as well as color photographs of the area depicted in Defendant's Exhibits A and B.

Prior Examination

In February 2002, I was provided photographs of the Q1 and Q2 impressions and requested to determine the size of the shoe that produced those shoe prints as they were believed to be much larger than a shoe that Kirstin Lobato would wear. I was, at that time, unable to determine the brand name or manufacturer of that shoe. I compared the dimensions of the Q1 and Q2 impressions with other footwear of a similar sole type in the marketplace, and found that those impressions most closely corresponded to a U.S. men's size 9 athletic shoe. A woman that would wear a U.S. men's size 9 athletic shoe would wear the American women's size equivalent of size 10. To make a comparison between the feet of Kirstin Lobato and the Q1 and Q2 impressions, I requested inked impressions and tracings of her right foot. Those were submitted to me on March 13, 2002 and are described above as K1. Using those tracings and a Brannock device, I found the length of Lobato's foot equaled a U.S. men's size of size 6 to 6½. The American woman's size equivalent of that would be approximately 7½. In addition, I superimposed the K1 impressions of Lobato's right foot over top of the Q1 and Q2 impressions, revealing Lobato's foot to be considerably smaller than the Q1 and Q2 impressions. These findings were reported in my prior report dated March 27, 2002.

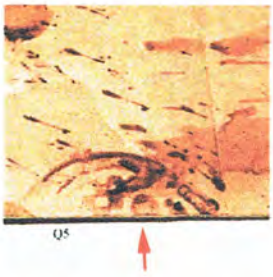
Supplemental Examination

On January 20, 2010 I was provided four additional photographs of pieces of cardboard containing footwear impressions. On February 6, 2010, I was provided a copy of a Foster & Freeman Crimeshoe.com report that identified the bloody shoe impressions on Q1 through Q4 as an Athletic Works Spitfire shoe sold through the Wal-Mart stores. Below is a picture of that shoe along side one of the crime scene impressions.

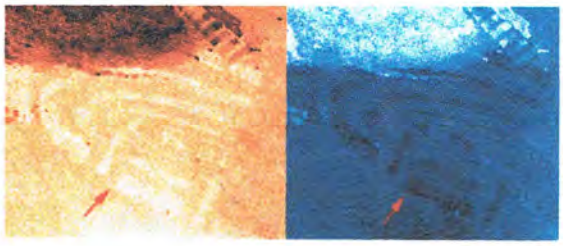


Comparison of the impressions depicted in the Q1, Q2, Q3, Q4, Q5 and Q6 photographs determined they all were produced by the same Spitfire design of footwear. No other patterns are present which could be associated with any other footwear design. The impressions depicted in the Q1 through Q5 photographs are bloody impressions. The impression on the edge of Q5 is very partial but represents the inner heel area of that design. The impression depicted in the Q6 photograph is either dry dust or residue and represents the outer heel area of the Spitfire design shoe. An enlarged photograph of that area is below. On the left is a portion of the heel area as normally seen. On the right is an inverted print of that area showing the impression in a darker version.

Q-5



Q-6



Additional examination of the dust and bloody prints, chemical and physical enhancement of the impressions on those items and more accurate sizing would be possible with access to the original cardboard items. The enhancements cannot be performed without the original impressions. Because the Q3 through Q6 photographs were not taken properly, the ability to examine and photograph the original evidence would allow for more accurate dimensional analysis.

Should you have any questions regarding this report, please feel free to contact me.

Respectfully submitted,

William J. Bodziak

EXHIBIT 4

Wednesday, May 29, 2002

Convicted killer turned down plea deal

Kirstin Lobato faces at least 40 years in prison when she is sentenced for the killing and mutilation of a homeless man. Photo by Jeff Scheid.

By GLENN PUIT
REVIEW-JOURNAL

Prior to her conviction on a first-degree murder charge, Kirstin Lobato turned down a deal that offered three years in prison for the killing and sexual mutilation of a homeless man.

Defense attorney Gloria Navarro said Tuesday that Lobato, who now faces at least 40 years in prison when she is sentenced July 2, refused to plead guilty because she knew she was innocent.

"She placed her belief in the justice system, and she ended up being convicted of a crime that she did not commit," Navarro said.

On May 18, a Clark County jury convicted Lobato, 19, of first-degree murder and sexual penetration of a corpse in the slaying of Duran Bailey, who was bludgeoned and stabbed to death behind a West Flamingo Road trash bin last summer. His penis was severed after death.

Special Public Defender Philip Kohn and Navarro filed a motion Tuesday seeking a new trial for Lobato, saying a crucial witness in the Panaca woman's trial is a proven liar.

Korinda Martin told jurors she and Lobato were at the Clark County Detention Center and Lobato confessed to her about killing Bailey.

"She was boasting about it," Martin testified.

Martin, a former nurse serving time for robbing and coercing one of her patients, said Lobato had described Bailey as her drug connection.

Now, Lobato's attorneys say they have proof from police that Martin perjured herself during the trial.

"She was the linchpin, the star witness, the most important witness," Navarro said. "She is the only one who connects my client to the scene."

Navarro said when Martin testified, Kohn grilled her about the possibility that Martin had fabricated letters sent to a judge on Martin's behalf in her own criminal case.

"She denied it under oath, and she was very convincing," Navarro said.

But the defense attorneys subsequently had the letters examined by Las Vegas police. Navarro said a handwriting analysis by police shows that Martin did fabricate the letters.

"Clearly, she would say anything to help herself; she would even commit perjury," Navarro said.

Clark County Chief Deputy District Attorney William Kephart has said Martin's account of the Lobato confession was highly credible and was one part of a litany of facts showing Lobato is guilty.

During his closing argument in the trial, Kephart said Lobato met up with Bailey when Lobato was at the end of a three-day drug binge.

During the trial, authorities played for the jury a taped statement in which Lobato told police about stabbing at a man's penis while fending off a sexual assault in Las Vegas. They also presented Martin's testimony and a handful of witnesses who said Lobato made other incriminating statements about cutting off a man's penis.

The defense contended those statements related to another incident and that Lobato never met Bailey.

Not mentioned in the defense's motion for a new trial is the fact that during their deliberations, the jury in the case sent some seemingly curious notes to District Judge Valorie Vega.

The jurors "were scared of her (Lobato's) family," Navarro said, not elaborating about the contents of the notes.

Also not in the motion is the fact that the jury in the Lobato case chose to deliberate until nearly 2 a.m. on a Saturday before returning its verdict. Jurors were given that option by Vega, who also gave them a chance to complete their deliberations at a later date.

Navarro said it's possible that those issues could be the subject of future appeals.

Also in their motion, Kohn and Navarro argue that Lobato deserves a new trial because of a decision to limit the testimony of a defense forensics expert who was going to say there was no physical evidence tying Lobato to the bloody crime scene.

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BEST OF LAS VEGAS

002179

EXHIBIT 5

May. 05, 2010

98-0 SENATE VOTE: Nevada's Navarro joins federal bench

Nevada's Navarro joins federal bench

By STEVE TETREAULT and CARRI GEER THEVENOT
STEPHENS WASHINGTON BUREAU

WASHINGTON -- Gloria Navarro had no idea that Wednesday was the day the Senate would decide whether to confirm her as Nevada's newest federal judge.

Navarro, 42, said a staffer from Senate Majority Leader Harry Reid's office called her over the lunch hour and asked whether she had access to a TV. A co-worker in the civil division of the Clark County district attorney's office quickly found the confirmation hearing online, while Navarro alerted her mother and husband.

The nominee caught the tail end of the Senate's roll call vote. The Senate approved Navarro 98-0.

"Gloria Navarro has proven throughout her personal and professional life that she embodies the values our country cherishes: hard work, discipline and respect for the rule of law," said Reid, D-Nev., who nominated her for the post.

Navarro said she received her first congratulatory call from Sen. John Ensign, R-Nev.

"Senator Reid called and, bless his heart, he apologized for not giving me prior notice," Navarro said.

The confirmation means Navarro, a chief deputy district attorney, will become the first Hispanic woman to join the federal bench in Nevada.

"I think diversity on the federal bench is important, so she is a pioneer in that sense," said Carl Tobias, a former law professor at the University of Nevada, Las Vegas.

Navarro replaces Brian Sandoval, who gave up the lifetime appointment to run for governor.

While Navarro's confirmation was a foregone conclusion, Tobias said Reid probably deserves credit for moving the process along so quickly. Tobias, who now teaches at the University of Richmond in Virginia, said 101 vacancies remain on U.S. district and appellate courts.

Navarro was approved by the Senate Judiciary Committee in early March, but a final vote on her confirmation, and those of several other nominees, was held up as Republicans and Democrats remained at loggerheads over approving new judges.

With Navarro, the Senate on Wednesday confirmed Nancy Freudenthal by a 96-1 vote to be a U.S.

district judge in Wyoming and Denzil Price Marshall by voice vote to become a federal judge in the Eastern District of Arkansas.

Navarro said she does not know when she will start her new job; she first must fill out forms from the Justice Department's Office of Legal Policy. Tobias estimated she will start in four to six weeks.

When Navarro moves into her new office in the Lloyd George U.S. Courthouse in downtown Las Vegas, she will be working across the street from the building where her grandparents, parents, aunts, uncles and cousins became U.S. citizens. Navarro, the child of Cuban immigrants, speaks both English and Spanish.

Navarro said she found it noteworthy that Reid first called to talk to her about the judicial position on Sept. 11, that President Barack Obama nominated her for the job on Christmas Eve and that the Senate confirmed her on Cinco de Mayo.

"I'm thinking we've got to have the investiture on the Fourth of July or something," she joked.

Navarro joined the district attorney's office in 2005. Her husband, Brian Rutledge, works as a chief deputy district attorney in the office's criminal division.

From 2001 to 2004, Navarro worked for the Clark County special public defender's office, where she handled murder cases. She worked in private practice from 1994 to 2001.

Contact Stephens Washington Bureau Chief Steve Tetreault at stetreault@stephensmedia.com or 202-783-1760. Contact reporter Carri Geer Thevenot at cgeer@ reviewjournal.com or 702-384-8710.

Find this article at:
http://www.lvrj.com/news/senate-approves-gloria-navarro-as-federal-judge-92891624.html

Check the box to include the list of links referenced in the article.

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

COPY

EIGHTH JUDICIAL 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. II
) Docket
)
)
)

CERTIFICATE OF SERVICE BY MAIL

I, Carol Mesalic, hereby certify, pursuant to N.R.C.P. 5(b), that on this 30 day of the month of September of the year 2010 I mailed a true and correct copy of the foregoing **PETITION LOBATO'S NOTICE OF MOTION AND MOTION FOR AND EXPEDITED HEARING AND MOTION FOR AN EXTENSION OF TIME TO FILE AND ANSWER TO THE STATE'S RESPONSE, PETITIONER LOBATO'S NOTICE OF MOTION AND MOTION FOPR THE COURT CLERK TO ASSIGN A CIVIL CASE NUMBER AS REQUIRE BY THE NRS, PETITIONER LOBATO'S NOTICE OF MOTION AND MOTION FOR RECUSAL OF JUDGE VALORIE VEGA, PETITIONER LOBATO'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION AND VACATING OF THE COURT'S ORDER STRIKING THREE MOTIONS BY PETITIONER, AND PETITIONER'S RESPONSE T5O THE STATE'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, OPPOSITION TO IMPROPER MOTIONS FOR RECUSAL OF JUDGE VEGA, EXPEDITED HEARING AND EXTENSION OF TIME AND ASSIGNMENT OF A CIVIL CASE NUMBER, PETITIONER LOBATO'S ANSWER TO THE STATE'S RESPONSE TO THE PETITION OF WRIT OF HABEAS CORPUS (POST CONVICTION) AND MOTION FOR APPOINTMENT OF COUNSEL** addressed to:

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

Carol Mesalic
3299 Mission Creek Ct
Las Vegas, NV

Kirstin Blaise Lobato #95558

FMWCC

4370 Smiley Rd

Las Vegas, NV 89115

FILED

Oct 11 12 56 PM '10

CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KIRSTIN BLAISE LOBATO) Case No. C-177394

Petitioner in proper person) Dept. No. II

) Docket

v.)

Warden of FMWCC and)

State of Nevada)

CERTIFICATE OF SERVICE

I, Maureen Flansburg, hereby certify, pursuant to N.R.C.P. 5(b), that on this 2nd and 3rd day of the month of October of the year 2010 I faxed a true and correct copy of the foregoing **SUPPLEMENT TO PETITIONER LOBATO'S MOTION FOR RECUSAL OF JUDGE VALORIE VEGA** and **PETITIONER LOBATO'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION AND VACATING OF THE COURT'S ORDER STRIKING THREE MOTION'S BY PETITIONER, AND PETITIONER'S RESPONSE TO THE STATE'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, OPPOSITION TO IMPROPER MOTIONS FOR RECUSAL OF JUDGE VEGA, EXPEDITED HEARING, AND EXTENSION OF TIME, AND ASSIGNMENT OF CIVIL CASE NUMBER** and **PETITIONER LOBATO'S ANSWER TO THE STATE'S RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND MOTION FOR APPOINTMENT OF COUNSEL** to:

Sheryl Foster, Warden FMWCC

702-668-7204

Attorney General

775-688-1822

Maureen Flansburg

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Maureen Flansburg

4808 Canadian Dr

Las Vegas, NV 89130

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*** ACTIVITY REPORT ***
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ST. TIME	DESTINATION NUMBER	DESTINATION ID	NO.	MODE		PGS.	RESULT	
*08/16 18:53	5623743		0024	TRANSMIT	COL	1	NG	03'3
							1	
*08/16 18:58	5623743		0025	TRANSMIT	ECM	13	OK	09'2
*08/30 13:08	5623743		0026	TRANSMIT	ECM	6	OK	04'2
*09/01 12:54	9926880		0027	TRANSMIT	ECM	1	OK	00'2
*09/30 09:16	2483766		0028	TRANSMIT	ECM	3	OK	03'1
*10/01 08:56	2483766		0029	TRANSMIT	ECM	2	OK	01'1
*10/02 13:31	7024552294	District Attn	0030	I/F	ECM	39	OK	09'0
*10/02 14:35	17756881822	Attorney General	0031	I/F	ECM	2	NG	00'5
							2	
*10/02 14:53	6519219	FMWCC - Warden	0032	I/F		0	NG	00'0
							0	#018
*10/02 14:59	17756881822	Attorney General	0033	I/F	ECM	25	OK	11'1
*10/02 15:23	6519219	Warden - FMWCC	0034	I/F		0	NG	00'0
							0	#018
*10/02 15:46	6519219	Warden - FMWCC	0035	I/F		0	NG	00'0
							0	#018
*10/03 00:14	7026519219	Warden - FMWCC	0036	I/F		0	NG	00'0
							0	#018
*10/03 00:17	17756881822	Attorney General	0037	I/F	ECM	39	OK	10'5
*10/03 00:36	17756881822	Attorney General	0038	I/F	ECM	178	NG	77'4
							178	
10/03 07:45	17756881822	Attorney General	0039	I/F	ECM	10	NG	03'4
							10	
10/03 08:08	6519219	Warden - FMWCC	0040	I/F		0	NG	00'0
							0	#018
10/03 12:09	6687204	Warden - FMWCC	0041	I/F	ECM	25	OK	13'5
10/03 12:51	6687204	Warden - FMWCC	0042	I/F	ECM	39	OK	20'0
10/03 21:11	6687204	Warden - FMWCC	0043	I/F	ECM	188	OK	119'0