

1 IT IS HEREBY ORDERED that the Defendant's Motion for Limited Discovery for  
2 Good Cause shall be, and it is denied without prejudice as premature pursuant to NRS  
3 34.780.

4 DATED this 17<sup>th</sup> day of February, 2011.

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6   
7 DISTRICT JUDGE

gln

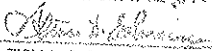
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9 DAVID ROGER  
10 DISTRICT ATTORNEY  
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14 Chief Deputy District Attorney  
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DISTRICT COURT

CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA )

7 Plaintiff, )

8 vs. )

10 KIRSTIN BLAISE LOBATO, )

11 Defendant. )

CASE NO. C177394  
DEPT. NO. 2

12  
13 BEFORE THE HONORABLE VALORIE J. VEGA, DISTRICT JUDGE  
14 TUESDAY, MARCH 1, 2011 AT 10:30 A.M.

15 **RECORDER'S TRANSCRIPT RE:**  
16 **HEARING: PETITION FOR WRIT OF HABEAS CORPUS**  
17 **HEARING: MOTION FOR COURT CLERK TO ASSIGN A CIVIL CASE**  
18 **NUMBER AS REQUIRED BY NRS**

18 **APPEARANCES:**

19 FOR THE STATE:

SANDRA K. DIGIACOMO  
Chief Deputy District Attorney  
and

21 TYLER SMITH  
Deputized Law Clerk

23 FOR THE DEFENDANT:

TRAVIS N. BARRICK, ESQ.

25 Recorded by: LISA A. LIZOTTE, COURT RECORDER

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INDEX OF EXHIBITS

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1 (TUESDAY, MARCH 1, 2011 AT 10:30 A.M.)

2 THE COURT: Let the record reflect that this is the time to handle  
3 the case on Page 6 of the morning calendar, which is State versus Lobato  
4 under C177394. Ms. Lobato is present together with her counsel, two  
5 prosecuting attorneys are present as well, Mr. Barrick is together with Ms.  
6 Lobato and Mr. Smith and Ms. Digiacomio for the State.

7 We have a number of matters to address today. The first  
8 is the motion for the Court Clerk to assign a civil case number as required by  
9 NRS which was a motion that Mr. Barrick had adopted. You may be heard.

10 MR. BARRICK: Thank you, Your Honor. For anybody that  
11 follows sports they'll remember the Barry Bonds and his homerun season  
12 and Pete Rose and his 4,000 hit season, and several cyclists and their Tour  
13 de France wins will always have an asterisk by their name because  
14 somewhere along the line they made a mistake or did something wrong, and  
15 in this case here too, this case, we believe, was errantly filed as a criminal  
16 case number, and the question is going to be, are we going to fix it now or  
17 later or is there always going to be an asterisk by this case, an explanation  
18 somewhere in the history of the case that a mistake was made down at the  
19 counter.

20 Now, whether the mistake was made by Petitioner's  
21 surrogate or the clerk behind the counter, who arguably had a higher duty  
22 than the person on the public side of the counter, is not really the point, it's  
23 are we going to fix it. Now, having some experience in the governmental  
24 agencies, I'm sure you can understand that I – it strikes me that the Court  
25 has – the Court has probably inquired with the Clerk of the Court as to what

1 remedy, if possible, would the administrators recommend because most of  
2 us know administrators typically run the show.

3 THE COURT: Actually I have not.

4 MR. BARRICK: That was a faulty assumption on my part, but  
5 you understand the premise, that, you know, administrators have more  
6 power and sway than they often are willing to admit, so the remedy is  
7 simple, Your Honor. If the Court simply orders a new case number start,  
8 this docket would end with, for all further proceedings, go to this other case  
9 number and then the new docket would start and say, for all prior  
10 proceedings, go back to that case number, to the prior case number. That's  
11 all we're asking, Your Honor.

12 THE COURT: Okay. I neglected to state for the record that Ms.  
13 Lobato is obviously present in custodial status. Mr. Smith?

14 MR. SMITH: Well, Your Honor, this is just a matter of statutory  
15 construction. This is -- she's challenging her underlying conviction. NRS  
16 34.730 says if you're challenging your conviction, the litigator conviction,  
17 it's filed with the original proceeding to which it relates. It's a criminal case,  
18 this is a criminal matter, this is not a civil matter, and I would just submit it  
19 on that, Your Honor. It's under the statute NRS 34.730(3).

20 MR. BARRICK: Your Honor, I think he's kind of reading the  
21 syntax backwards. All the file from the previous case is supposed to be  
22 filed with the petition is how I read it.

23 THE COURT: I probably do six to eight post-conviction petitions  
24 for writ of habeas corpus monthly. They always get filed in the same  
25 criminal case when what they are challenging relates to the conviction. The

1 Court denies the motion pursuant to NRS 34.730(3) and ask that Mr. Smith  
2 prepare the order and pass it by Mr. Barrick for review prior to submission to  
3 the Court.

4 The second issue to address is something that we just  
5 received yesterday.

6 MR. BARRICK: Your Honor, before we proceed, may we  
7 approach?

8 THE COURT: Yes.

9 (Whereupon, an off-the-record discussion was had.)

10 THE COURT: Okay. What I received yesterday was a  
11 document entitled, Supplemental Exhibits to Petitioner's Answer in Support  
12 of Petition for Writ of Habeas Corpus. After receiving that courtesy copy of  
13 that document, I received a courtesy copy of a document entitled, State's  
14 Opposition of Motion to Strike Defendant's Supplemental Exhibits to  
15 Petitioner's Answer in Support of Petition for Writ of Habeas Corpus.

16 Mr. Barrick has indicated that he's not going to oppose that  
17 State's motion to strike; is that correct?

18 MR. BARRICK: That's correct, Your Honor.

19 THE COURT: Okay. Then the State's motion to strike the  
20 supplemental exhibits will be granted as unopposed pursuant to EDCR 3.20,  
21 and, again, the Court will ask that the State prepare the order and pass it by  
22 Mr. Barrick for review prior to submission to the Court.

23 MR. BARRICK: If I may, Your Honor, the last time that an order  
24 was submitted on this case it didn't make it past my desk, so please  
25 admonish the State.

1 MR. SMITH: The previous time we weren't instructed to pass it  
2 by Mr. Barrick, we were just asked to prepare the order, Your Honor, so I  
3 mean I guess that's probably what the secretary assumed.

4 THE COURT: Okay. For all of the orders that issue today, I'm  
5 going to ask that they be reviewed by both sides.

6 MR. SMITH: No problem, Your Honor.

7 MR. BARRICK: Thank you.

8 THE COURT: Okay.

9 MR. BARRICK: Would it be possible at this moment, Your  
10 Honor, just to renew our motion to appoint counsel? I understand that you  
11 already ruled on the motion and my understanding was that it was pertaining  
12 to me, and I think the State kind of enjoyed making fun of me because I'm  
13 not qualified to be appointed, but perhaps the Court would entertain  
14 appointing Mr. Oram.

15 THE COURT: Two things, procedurally there is no rule that  
16 allows a motion for reconsideration of a criminal motion, and I'm not going  
17 to entertain an oral motion today absent points and authorities. We are  
18 proceeding forward with the hearing now on the Defendant's Post-  
19 Conviction Petition for Writ of Habeas Corpus.

20 There are two things that I want to make of record. I'm  
21 going to ask that counsel approach.

22 (Whereupon, an off-the-record discussion was had.)

23 THE COURT: Okay. I have distributed to counsel four  
24 documents which I'm going to have marked as Court's Exhibits. The first  
25 three pertain to Ground 43, and the Court takes Judicial notice of these

1 documents which are on file of record in the case. The first is an  
2 information filed August 9<sup>th</sup> of 2001 together with a list of witnesses which  
3 include Ford and Renhard, R-e-n-h-a-r-d. That will be marked as Court's  
4 Exhibit 1 for the purposes of today's hearing.

5 (Whereupon, Court's Exhibit Number 1  
6 was marked for identification.)

7 THE COURT: The second is a notice filed September 14<sup>th</sup> of  
8 2001 indicating Ford, Renhard and Wahl, W-a-h-l.

9 (Whereupon, Court's Exhibit Number 2  
10 was marked for identification.)

11 THE COURT: The third is a notice filed August 21<sup>st</sup>, 2006  
12 indicating Kristina Paulette. They indicate other individuals as well, but  
13 those are the individuals that were referenced in Ground 43.

14 (Whereupon, Court's Exhibit Number 3  
15 was marked for identification.)

16 THE COURT: Then the Court's going to have marked as Court's  
17 Exhibit Number 4 a document pertaining to Ground 52. Ground 52 contains  
18 an error of fact. It indicates that the Court was a colleague in the DA's  
19 office with prior State's counsel, Mr. Kephart, who recently joined the  
20 bench, and that is incorrect. I departed the DA's office in 1989 to take the  
21 bench at Municipal Court. He did not enter the DA's office until 1990.  
22 Neither he and I were colleagues nor were Ms. Digiacomo and I ever  
23 colleagues in the DA's Office. We never worked there – I never worked  
24 with either of them at the same time in the DA's Office. Thank you,  
25 counsel.

1  
2 (Whereupon, Court's Exhibit Number 4  
3 was marked for identification.)

4 THE COURT: Mr. Barrick, you may be heard.

5 MR. BARRICK: Good morning, Your Honor. The Petitioner's  
6 writ of habeas corpus petition contains more than 20 new evidence grounds,  
7 includes new evidence from nine experts, new evidence from at least 18  
8 witnesses, that includes entomology evidence by three of North America's  
9 leading forensic entomologists, new forensic pathology evidence by one of  
10 the United State's leading forensic pathologists, who's an expert at  
11 determining time of death, an important fact in this case, a fact of -- central  
12 in the dispute, new expert impressions by a federal crime laboratory veteran  
13 of 25 years, new evidence of the leading -- one of the country's leading  
14 psychology experts in evaluating a defendant's statement made to the  
15 police, new crime scene analysis and forensic science evidence by highly  
16 experienced forensic scientists and crime scene analysts, new dental  
17 evidence by a dental surgeon, and Petitioner's new evidence that includes  
18 nine new alibi witnesses that have exculpatory evidence that the jury did not  
19 hear.

20 An evidentiary hearing would provide this Court with the  
21 opportunity to evaluate the new evidence of these many witnesses by  
22 seeing and hearing them in person and them being subjected to cross-  
23 examination. State argues repeatedly that -- under *Herrera* that these  
24 statements and this new evidence should be viewed with skepticism  
25 because these affidavits of the affiants have not been subject to cross-

1 examination, and on numerous occasions some of those experts have  
2 precisely been offered for cross-examination by way of depositions prior to  
3 the evidentiary hearing or at evidentiary hearing. And then the State then  
4 goes on to say, well, because they weren't deposed or they weren't subject  
5 to cross-examination, their affidavits or their testimony or their evidence  
6 should be viewed with skepticism. So the State wants it both ways.

7           The State also suggests that the Petitioner, Ms. Lobato,  
8 wants to use an evidentiary hearing as a discovery tool, which is kind of  
9 backwards because I believe all the evidence – the discovery's been done by  
10 researchers and persons working on her case. The evidence has already  
11 been produced, and it's not as if Ms. Lobato wants to go fishing for  
12 evidence that she doesn't know exists, and that's been the rule in cases  
13 where the Court has denied an evidentiary hearing for random discovery  
14 purposes.

15           Here we have evidence to put before the Court that she  
16 was not in Las Vegas at the time, and, that, in fact, she did not kill Duran  
17 Bailey. She has 101 exhibits, more than two dozen new witnesses. The  
18 State also, I'm going to say – I'm not exactly sure which case it is, but the  
19 State says you can't just make barenaked allegations in support of a  
20 petition, and I think that's not the case here. That's quite the opposite. I  
21 think Ms. Lobato's case has brought up significant amounts of evidence that  
22 the Court is entitled to look at if it so chooses, and these are not barenaked  
23 allegations.

24           The State's response – their reference to the *Marshall* case  
25 actually helps the petitioner because there the District Court denied an

1 evidentiary hearing and dismissed its writ, and the Nevada Supreme Court  
2 wrote – the Nevada Supreme Court actually reversed and granted him –  
3 ordered the Court to give an evidentiary hearing.

4           The Petitioner has 23 grounds based on actual evidence,  
5 and the State is very, very consistent in asserting the *Calderon* standard  
6 regarding new evidence and actual evidence. *Calderon* came after the  
7 *Schlup* case. But *Calderon* was a death penalty case, and this is not a death  
8 penalty case, and, in fact, the *Schlup* case says that claims of actual  
9 innocence that are not death penalty are more appropriately covered under  
10 the *Carrier* standard and distinguishing the *Sawyer* standard incorporated  
11 into the *Calderon* case.

12           So the State has taken the *Calderon* case and tried to make  
13 it cast a shadow larger than it deserves, and, in fact, under the *Carrier*  
14 standard, a claim requires a petitioner, such as Ms. Lobato, to support her  
15 allegations of constitutional error with new reliable evidence, whether it be  
16 exculpatory scientific evidence – this is *Schlup* at 324 – whether it be  
17 exculpatory scientific evidence, which I think we have a -- quite a  
18 substantial amount of, trustworthy eyewitness accounts, which I think, you  
19 know, the Court is entitled to hear witnesses and subject them to cross-  
20 examination for their trustworthiness, or critical physical evidence that was  
21 not presented at trial.

22           I think Ms. Lobato meets this test, the *Carrier* test, on all  
23 three counts, and on that basis we're asking for an evidentiary hearing.  
24 And, lastly, the State wants to hold up the order affirming conviction from  
25 the Supreme Court, and, again, ask it to cast a larger shadow than it really

1 deserves. They use it ubiquitously throughout their response saying, well,  
2 wait, order of affirmations dealt with all these issues, and consequently  
3 she's not entitled to relief because the Court upheld her conviction. And yet  
4 the issues raised in the appeal that the Supreme Court affirmed are not the  
5 same issues that are raised here. So we have, I believe, met the standard in  
6 *Carrier* that there is scientific evidence available, there's trustworthy  
7 eyewitness and there's critical physical evidence available for the Court  
8 should it choose to entertain an evidentiary hearing.

9                   As for the – and, lastly, Your Honor, if you know what it  
10 means when a lawyer says lastly it means nothing. Lastly, Your Honor, on  
11 the ineffectiveness of counsel arguments, the State is quite accurate, and  
12 the Petitioner agrees, that *Strickland* is the test to apply when deciding  
13 whether or not counsel was ineffective, but the State leaps over the first  
14 prong to get to the second prong, and the first prong is the reasonableness  
15 of the inquiry that the Defense counsel provided, and where Defense  
16 counsel did no inquiry, that the Court has held that can hardly satisfy the  
17 first prong where for whatever reasons, either budget constraints or  
18 resources or whatever, Ms. Lobato's case was underinvestigated, and on  
19 that basis we're saying the first test, the first prong in the *Strickland* test,  
20 has not been satisfied, meaning you don't get to whether or not the  
21 ineffectiveness was material if they never even made the inquiry.

22                   You can't say, well, those were tactical decisions, unless  
23 the tactic was fully developed or reasoned out if there was information  
24 supporting the decision, and so for the State to say that Defense counsel  
25 made tactical decisions, and, therefore, those are not subject to examination

1 is to belie the facts of the case, that things were not investigated, therefore,  
2 there was no reasonable inquiry on those grounds. Your Honor, thank you.  
3 Proceeding going forward I'm prepared to submit the bulk of the grounds on  
4 the pleadings unless for some reason you – there might be a wobbler and  
5 that you would like clarification. We would be prepared to argue whenever  
6 you ask, otherwise we'll be prepared to submit on the pleadings.

7 THE COURT: Okay. Thank you, Mr. Barrick. I would like the  
8 record to reflect that the highlighting that's on Court's Exhibits 1 through 4  
9 was placed there by the Court and was not on the original. As you  
10 mentioned, this is not a death penalty case, however, there are 79 grounds  
11 in this petition and it is the most extensive petition that I have ever reviewed  
12 in a non-death penalty case.

13 I have, as we are going to proceed with arguments from  
14 the State, a question for the State with regard to Ground Number 23. If you  
15 look at your pleadings, the State's response to the Defendant's petition, on  
16 Page 3 and about the middle of the page it says, Argument Number 1,  
17 Defendant's claims of newly discovered evidence do not warrant relief,  
18 Grounds 1 through 21 and 23. And so you address 23 there, but then when  
19 you get into the body of your response at Page 16 and Page 17, you  
20 address, coming up to Page 16, 1 through 21, and then at Page 16 at Line  
21 19 you begin addressing 22 and 24 and at the top of Page 17 refer back to  
22 Section 1 on Page 3. But you don't specifically address Ground 23  
23 numerically, so I wanted a clarification from the State on that.

24 MR. SMITH: If I remember correctly, Your Honor, a lot of – a  
25 lot of these grounds were very repetitive, and if my memory serves me,

1 Ground 23 was sort of like a culmination of 1 through 21 argument, so it  
2 was like a summary of all those separate claims. And putting all those  
3 separate claims into Ground 23, and Ground 23 argued that these claims  
4 entitled her to a new trial or entitled her to some sort of relief, if I remember  
5 correctly. I don't have the petition in front of me, but –

6 THE COURT: So you wish to incorporate by reference all of  
7 your arguments as to Grounds 1 through 21 into your response to Ground  
8 23?

9 MR. SMITH: Yes, Your Honor.

10 THE COURT: Very well.

11 MR. SMITH: That would be correct.

12 THE COURT: Thank you for that clarification. Okay. Who will  
13 be arguing for the State?

14 MR. SMITH: I will, Your Honor.

15 THE COURT: You may be heard.

16 MR. SMITH: Your Honor, first I'd like to address the grounds of  
17 new evidence. It's kind of separated into two categories here. The first  
18 category is whether or not entitles the Defendant to a new trial. Now, under  
19 the NRS 176.515 you have to raise grounds of new evidence within two  
20 years of the verdict. The verdict in this case was on October 6<sup>th</sup> of 2006.  
21 The petition wasn't filed until May 5<sup>th</sup> of 2010. So we have approximately a  
22 four year difference there.

23 So it's untimely, number one. Number two, the evidence  
24 can't be cumulative. A lot of this is cumulative evidence. We had plenty of  
25 alibi witnesses that were presented in the trial. Another 5 or 10 saying the

1 exact same thing is just cumulative evidence. It's also evidence that could  
2 have been discovered with reasonable diligence at the time of trial. All of  
3 this evidence that they brought forward could have been discovered at that  
4 time. There was nothing preventing them from discovering that evidence if  
5 they had – with reasonable diligence.

6 And, finally, it's got to be admissible. You know, there's a  
7 lot of these claims that's just completely inadmissible evidence. We have  
8 polygraph exams, inadmissible evidence. We have hearsay, inadmissible  
9 evidence. We have an affidavit from an individual just giving his opinion that  
10 the Defendant's innocent, that's inadmissible evidence. So those really are  
11 not good enough for relief.

12 Now we look at sort of an actual innocence standard.  
13 Now, it's important to note that no court has ever held that actual  
14 innocence, a claim of actual innocence by itself, is grounds for habeas relief  
15 as a constitutional violation. It has to be in conjunction with another  
16 violation. If you look at the *Herrera* case, claims of actual innocence based  
17 on newly discovered evidence have never been held to state a ground for –  
18 this is in Federal Court – for federal habeas relief absent an independent  
19 constitutional violation occurring in the underlying State criminal proceeding.  
20 So you need both and that's something that's really important too to keep in  
21 mind.

22 It's a hard standard, it's extremely rare that it's ever even  
23 been held to have been met, and, again, it has to be reliable evidence not  
24 presented at trial, that no reasonable juror would have convicted absent this  
25 evidence in conjunction with the constitutional error.

1                   Now, we've got various grounds, we have the entomology  
2 evidence. A lot of the new expert evidence does nothing more than try and  
3 contradict what the State presented with its experts. You have to have  
4 factual innocence, not legal insufficiency, and just trying to counterdict – or  
5 contradict, excuse me, the State's expert is simple legal insufficiency  
6 arguments. It's not enough. And, again, a lot of it was cumulative.

7                   Now, we have Grounds 22 and 24 I just want to address  
8 briefly. These are conspiracy theory claims with no evidence to support. I  
9 would suggest those should be summarily dismissed. We have the *Brady*  
10 claims that are also pure speculation that somehow the State knew that Mr.  
11 Bailey was some sort of confidential informant. There's no evidence to  
12 support that other than, I believe, it was a phone number written on a  
13 napkin.

14                  Now, I want to address the ineffective assistance of  
15 counsel claims very briefly. In the Defendant's reply to our opposition, a lot  
16 of the term, confession of error, was thrown around quite a bit citing the  
17 recent *Polk* case. Your Honor, that pertains to appellate issues under the  
18 Nevada Rules of Appellate Procedure. It does not pertain to habeas –  
19 original habeas proceedings in the District Court, number one. Number two,  
20 the State methodically addressed each ground in the Defendant's petition.  
21 So the *Polk* case is completely inapplicable.

22                  Any issues that were substantively raised on direct appeal  
23 and either denied by the Nevada Supreme Court or found to be harmless  
24 error prevents any kind of prejudice from being found. In ineffective  
25 assistance of counsel, you have to find ineffective assistance and prejudice.

1 Well, if the Nevada Supreme Court has already said, one, you're not entitled  
2 to relief on this because you're incorrect, or, two, even though you're  
3 correct it's harmless error, you can't meet the prejudice prong. Any issues  
4 that are – if – any issues that are assumed to be substantive issues in this  
5 petition are barred because they weren't raised on direct appeal under NRS  
6 34.810, however, in the ineffective assistance of counsel realm those can  
7 be considered, but substantively they can't, only under issues of ineffective  
8 assistance of counsel.

9                   We have the better investigation. Mr. Barrick spoke about  
10 that. You can't just say, my attorney didn't investigate enough. You have  
11 to bring forth facts that says had he investigated, this is what he would  
12 have uncovered and this would have changed the outcome of the  
13 proceeding. You have none of that in any of it. We just say, my attorney  
14 did a poor job of investigating. Well, we need to know how this would have  
15 helped you and what would have been uncovered, and that's under the  
16 *Molina* case.

17                   And a lot of their – I want to address something very  
18 briefly. A lot of their claims have to do with calling people dishonest – I  
19 shouldn't say that. I'm sorry. A lot of the Defendant's claims have a lot to  
20 do with calling people dishonest, liars, unethical, and a lot of it has to do  
21 with simply a different interpretation of the evidence. I myself have been  
22 called unethical in some of these pleadings. A lot of -- there's been  
23 conspiracy theories about the District Attorneys Office, about Your Honor,  
24 about all kinds of people, and they're all just based on speculation, wild  
25 accusations and are doing nothing more than trying to defame character.

1 And then finally there are some issues of ineffective  
2 appellate counsel. They have to show had these issues been brought, there  
3 would have been a reasonable probability of success on appeal. None of  
4 their arguments have shown that. Many of the issues that they have  
5 brought, as ineffective assistant counsel claims, were raised and rejected.  
6 Many of the substantive issues they say that their appellate counsel should  
7 have raised have been rejected with the Nevada Supreme Court. Those  
8 can't be re-litigated. It's the law of the case.

9 And, finally, just an evidentiary hearing is completely  
10 unwarranted. The State has shown in its pleadings none of these claims are  
11 grounds for relief even if they are true, so an evidentiary hearing would just  
12 be a waste of time, Your Honor, and with that I'll submit it on the pleadings.

13 THE COURT: Mr. Barrick?

14 MR. BARRICK: Thank you, Your Honor. I think the State is  
15 incorrect that new evidence has to be admissible when it's being considered  
16 for purposes of habeas petition because I believe that's a trial function and  
17 not a petition – habeas petition review, so just a minor point there. The  
18 problem with *Herrera* was the affidavits were based on hearsay and that's  
19 not the situation here, so these affidavits and this new evidence is not  
20 subject to the same flaws that were subject – the affidavits in *Herrera* were  
21 subject to.

22 The State tries to say that Ms. Lobato's experts are  
23 somehow simply trying to put a different spin on the same set of facts when  
24 the reality is there's facts in the new evidence that were not addressed and  
25 not considered by the State's experts, for example, the State's experts

1 made no comment about the entomology, the fact that there were no bugs,  
2 there were no roaches or any signs of depredation of the corpse at the time  
3 they examined it. That's completely new, that's outside the scope of their  
4 expert's testimony or any notes whatsoever, so that brings it, again, out  
5 from under the shadow that they try to cast.

6 I believe in *Molina* or *Mulder* they try to say the cum –  
7 most of the claims are cumulative. Let the record reflect, Your Honor, I did  
8 not write this petition, and so I'm not apologizing for it inasmuch that I  
9 wouldn't have done it this way, but the fact is they're –

10 THE COURT: You did adopt it.

11 MR. BARRICK: I did, and I thank you, Your Honor. But  
12 cumulative evidence is not automatically barred by consideration. Relevant  
13 factors to consider are whether the issue of guilt is close and the quantity  
14 and character of the error and the gravity of the crime charged, and so  
15 cumulative error is not an automatic bar. So I think the State  
16 mischaracterizes the role of cumulative evidence.

17 Lastly, Your Honor, their statement that actual innocence  
18 has never been held to be grounds for habeas corpus petition completely  
19 belies the entire purpose of the habeas petition scheme in America. We  
20 have a way for someone to challenge the validity of their conviction outside  
21 the criminal trial context, and I think that that's – it's absurd to suggest that  
22 Ms. Lobato is not entitled to challenge the validity of her conviction simply  
23 because the State feels like they did a good job prosecuting her. Submit it,  
24 Your Honor.

1 THE COURT: A search for the truth should always be the goal  
2 of any justice system. Upon consideration of the arguments today and upon  
3 review of the extensive briefing that was done on this petition, the Court  
4 makes the following findings and decisions: As to Grounds 1, 2 and 3, they  
5 are denied pursuant to the case of *D'Agostino*, it's capital D, paren, capital  
6 *A-g-o-s-t-i-n-o, versus State*, 112 Nev. 417 from 1996.

7 MR. BARRICK: For clarification, Your Honor, is that on the – to  
8 merit a new trial, newly discovered evidence must be evidence that could  
9 not have been discovered through reasonable diligence either before or  
10 during trial?

11 THE COURT: Through reasonable diligence either before or  
12 during trial.

13 As to Ground Number 4, it is denied pursuant to the same  
14 case, *D'Agostino versus State*, as well as the cases of *Herrera, H-e-r-r-e-r-a,*  
15 *versus Collins*, 506 U.S. 390 from 1993 and *Jackson versus State*, 116  
16 Nev. 334 from 2000.

17 As to Ground 5, it is denied as the issue was previously  
18 ruled on by the Nevada Supreme Court in *Lobato versus State*, 120 Nev.  
19 522 from 2004 and is, therefore, barred pursuant to *Hall versus State*, 91  
20 Nev. 314 from 1975 and *Pellegrini, P-e-l-l-e-g-r-i-n-i, versus State*, 117 Nev.  
21 860 from 2001.

22 Ground Number 6 is denied pursuant to NRS 34.810.

23 Ground Number 7 is denied pursuant to *Herrera versus*  
24 *Collins* and NRS 34.810.

1 Ground Number 8 is denied pursuant to *Herrera versus*  
2 *Collins* and NRS 34.810.

3 Ground Number 9 is denied pursuant to *Hargrove, H-a-r-g-r-*  
4 *o-v-e, versus State*, 100 Nev. 498 from 1984, NRS 34.810, *Herrera versus*  
5 *Collins* as well.

6 Ground Number 10 is denied pursuant to *Hargrove versus*  
7 *State* and NRS 34.810.

8 Ground Number 11 is denied pursuant to *Herrera versus*  
9 *Collins* and NRS 34.810.

10 Ground Number 12 is denied pursuant to *Herrera versus*  
11 *Collins* and NRS 34.810.

12 Ground Number 13 is denied pursuant to *Herrera versus*  
13 *Collins*, NRS 34.810 and *Hargrove versus State*.

14 Ground 14 the Court finds that the King affidavit contains  
15 mere speculation. This is merely a legal theory that could have been  
16 presented at trial. There is no quote, unquote, new evidence, unquote,  
17 presented. This ground is denied, Ground 14, pursuant to *Herrera versus*  
18 *Collins* and NRS 34.810.

19 Ground 15 is denied pursuant to *Hargrove versus State*.

20 Ground 16, again, the King affidavit is speculative and  
21 based on belief and not based on any evidence or actual knowledge. Ground  
22 16 is denied pursuant to *Herrera versus Collins* and NRS 34.810.

23 Ground 17 is denied pursuant to *Herrera versus Collins*,  
24 NRS 34.810 and *Hargrove versus State*.

25

1 Ground 18 is denied pursuant to *Herrera versus Collins* and  
2 NRS 34.810.

3 Ground Number 19 is denied pursuant to *Herrera versus*  
4 *Collins*, NRS 34.810, NRS 201.450 and *Lobato versus State*, 120 Nev. 522  
5 from 2004.

6 Ground Number 20 is denied pursuant to *Herrera versus*  
7 *Collins* and NRS 34.810.

8 Ground 21 is denied as the issue was previously ruled upon  
9 by the Nevada Supreme Court and is, therefore, barred pursuant to *Lobato*  
10 *versus State*, 120 Nev. 522 from 2004 and *Hall v. State*, 91 Nev. 314 from  
11 1975 and NRS 34.810.

12 Ground 22 is denied pursuant to *Herrera versus Collins*,  
13 NRS 34.810 and *Hargrove versus State*.

14 Ground 23 is denied pursuant to all of the law cited under  
15 Grounds 1 through 22 inclusive.

16 Ground 24 is denied pursuant to *Herrera versus Collins* and  
17 NRS 34.810.

18 Ground 25 is denied pursuant to *Herrera versus Collins* and  
19 NRS 34.810.

20 Ground 26 is denied pursuant to *Herrera versus Collins* and  
21 NRS 34.810.

22 Ground 27 is denied pursuant to *Strickland versus*  
23 *Washington*, 466 U.S. 668, 104 S. Ct. 2052 from 1984.

24 Ground 28 is denied pursuant to *Strickland versus*  
25 *Washington*.

1 Ground 29 is denied pursuant to *Strickland versus*  
2 *Washington*.

3 Ground 30 is denied pursuant to *Strickland versus*  
4 *Washington, Molina versus State*, 120 Nev. 185 from 2004 and *Hargrove*  
5 *versus State*.

6 Ground 31 is denied pursuant to *Strickland versus*  
7 *Washington, Molina versus State* and *Hargrove versus State*.

8 Ground 32 is denied pursuant to *Strickland versus*  
9 *Washington* and *Rhyne, R-h-y-n-e, versus State*, 118 Nev. 1 from 2002.

10 Ground 33 is denied pursuant to *Strickland versus*  
11 *Washington* and *Rhyne versus State*.

12 Ground 34 is denied pursuant to *Strickland versus*  
13 *Washington* and *Rhyne versus State*.

14 Ground 35 is denied pursuant to *Strickland versus*  
15 *Washington, Rhyne versus State* and *Ennis, E-n-n-i-s, versus State*, 122  
16 Nev. 694 from 2006.

17 Ground 36 is denied pursuant to *Strickland versus*  
18 *Washington* and *Rhyne versus State*.

19 Ground 37 is denied pursuant to *Strickland versus*  
20 *Washington, Herrera versus Collins* and NRS 34.810.

21 As to Grounds 38, 39, 40 and 41, the ruling is the same  
22 for all four. The Court finds that the things complained of in these grounds  
23 are ultimately and were ultimately the call of lead trial counsel, and that the  
24 Defendant has not shown that there would – that they would have led to  
25 any different outcome, therefore, these four grounds are denied pursuant to

1 *Strickland versus Washington, Herrera versus Collins*, NRS 34.810 and  
2 *Rhyne versus State*.

3 Ground 42 is denied pursuant to *Strickland versus*  
4 *Washington, Rhyne versus State* and *Herrera versus Collins* and NRS  
5 34.810.

6 Ground 43 is denied pursuant to *Strickland versus*  
7 *Washington, Herrera versus Collins*, NRS 34.810 and the notices on file  
8 which have been marked as Court's Exhibits 1, 2 and 3.

9 Ground 44 is denied pursuant to *Strickland versus*  
10 *Washington, Rhyne versus State, Herrera versus Collins* and NRS 34.810.

11 Ground 45 is denied pursuant to *Strickland versus*  
12 *Washington, Ennis versus State, Herrera versus Collins* and NRS 34.810.

13 Ground 46 is denied pursuant to *Rowland versus State, R-*  
14 *o-w-l-a-n-d*, 118 Nev. 31 from 2002, *Hall versus State, Strickland versus*  
15 *Washington, Herrera versus Collins* and NRS 34.810.

16 Ground 47 is denied pursuant to *Hall v. State, Pellegrini v.*  
17 *State, Strickland versus Washington, Herrera versus Collins* and NRS  
18 34.810.

19 Ground 48 is denied pursuant to *Strickland versus*  
20 *Washington, Herrera versus Collins* and NRS 34.810.

21 Ground 49 is denied pursuant to *Riker, R-i-k-e-r, versus*  
22 *State*, 111 Nev. 1316 from 1995, *State versus Green*, 81 Nev. 173 from  
23 1965 and *Ennis v. State*.

24 Ground 50 is denied pursuant to *Rhyne v. State, Strickland*  
25 *versus Washington, Herrera versus Collins* and NRS 34.810.

1 Ground 51 is denied pursuant to *Lobato versus State, Hall*  
2 *versus State*.

3 Ground 52 is denied pursuant to *Hargrove versus State*,  
4 100 Nev. 498 from 1984.

5 Ground 53 is denied pursuant to *Strickland versus*  
6 *Washington, Herrera versus Collins* and NRS 34.810.

7 Ground 54 is denied pursuant to *Strickland versus*  
8 *Washington, Rhyne v. State, Lobato versus State, Hall v. State* and *Ennis*  
9 *versus State*.

10 Ground 55 is denied pursuant to *Strickland versus*  
11 *Washington* and *Rhyne v. State*.

12 Ground 56 is denied pursuant to *Molina versus State*, 120  
13 Nev. 185 from 2004 and *Strickland versus Washington*.

14 Ground 57 cited to the case of *Melendez, M-e-l-e-n-d-e-z*,  
15 *hyphen, Diaz, D-i-a-z, versus Massachusetts*, 129 S. Ct 2527, U.S. 625,  
16 2009. Pursuant to our State statutes, we have in NRS Chapter 51, 51.135,  
17 record of regularly conducted activity, 51.145, absence of entry and records  
18 of regularly conducted activity, 51.315, general exception, which is the  
19 catch-all statute, and the exceptions to the hearsay rule, hearsay being  
20 defined under NRS 51.035, the quote, unquote absence of information in a  
21 report is non-testimonial and the Defense was able to cross-examine Mr.  
22 Robinson.

23 Counsel at the time of trial did not have the benefit of the  
24 *Melendez-Diaz* decision and cannot be deemed ineffective because of it. In  
25 any event, it's an absence of information that's non-testimonial, therefore,

1 the Court denies Ground 59 pursuant to NRS Chapter 51, *Ennis versus State*  
2 and *Strickland versus Washington*.

3 MR. BARRICK: Your Honor, was that 57, not 59?

4 THE COURT: It's 57. It is Ground 57.

5 MR. BARRICK: Would you be so kind as just give me the root  
6 side on *Melendez-Diaz*?

7 THE COURT: It is 129 S. Ct. 2527 from 2009.

8 MR. BARRICK: Thank you.

9 THE COURT: You're welcome. It actually has to do with  
10 forensic laboratory personnel's certificates of analysis and affidavits that  
11 were submitted in that *Melendez-Diaz* case.

12 Ground 58 is denied pursuant to *Hargrove versus State*.

13 Ground 59 the Court notes that it would have denied such  
14 a motion, and the Court denies this ground pursuant to *Lobato versus State*,  
15 *Ennis versus State* and *Hargrove versus State*.

16 Ground 60 is denied pursuant to *Strickland versus*  
17 *Washington*, *Weber versus State*, W-e-b-e-r, 121 Nev. 554 from 2005, *Guy*,  
18 *G-u-y, versus State*, 108 Nev. 770 from 1992 and *Ennis versus State*.

19 Ground 61 is denied pursuant to *Strickland versus*  
20 *Washington*, NRS 175.221 and *Lord, L-o-r-d, versus State*, 107 Nev. 28  
21 from 1991.

22 Grounds 62 and 63, the ruling is the same as to those two.  
23 They are both denied pursuant to NRS 201.450, *Lobato versus State*,  
24 *Strickland versus Washington*, *Herrera versus Collins*, *Ennis versus State* and  
25 NRS 34.810.

1 Ground 64 is denied pursuant to *Yarborough, Y-a-r-b-o-r-o-*  
2 *u-g-h, versus Gentry*, 540 U.S. 1 from 2003, *Rhyne versus State* and  
3 *Strickland versus Washington*.

4 Ground 65 is denied pursuant to *Rice, R-i-c-e, versus State*,  
5 113 Nev. 1300 from 1997 and *Strickland versus Washington*.

6 Ground 66 is denied pursuant to *Yarborough versus Gentry*  
7 and *Strickland versus Washington*.

8 Ground 67 is denied pursuant to *Domingues, D-o-m-i-n-g-u-*  
9 *e-s, versus State*, 112 Nev. 683 from 1996, *Ennis versus State* and  
10 *Strickland versus Washington*.

11 MR. BARRICK: Your Honor, on *Domingues*, what was the year  
12 of the *Domingues* case?

13 THE COURT: 1996.

14 MR. BARRICK: Thank you.

15 THE COURT: Ground 68 is denied pursuant to *Rowland versus*  
16 *State*, 118 Nev. 31 from 2002, *Ennis versus State* and *Strickland versus*  
17 *Washington*.

18 Ground 69 is denied pursuant to *State v. Green*, 81 Nev.  
19 173 from 1965, *Ennis v. State* and *Strickland versus Washington*.

20 Ground 70 is denied pursuant to *Strickland versus*  
21 *Washington, Hargrove versus State* and *Ennis v. State*.

22 Ground 71 is denied pursuant to *D'Agostino versus State*,  
23 *Herrera versus Collins, Rhyne versus State* and *Strickland versus*  
24 *Washington*.

1                   Ground 72 is denied pursuant to NRS 34.810, *Hall versus*  
2 *State, Lobato versus State and Strickland versus Washington.*

3                   Ground 73 –

4                   MR. BARRICK: Your Honor, I'm barely able to keep up with it.  
5 I'm trying. Could you read just a little slower for me, please?

6                   THE COURT: You want me to repeat 72?

7                   MR. BARRICK: No, I got it.

8                   THE COURT: You got it? Okay.

9                   MR. BARRICK: But we're just getting close to the end.

10                  THE COURT: Ground 73 concerns a letter, and the Court finds  
11 that a letter carries even less weight than an affidavit which is addressed in  
12 *Herrera*. The Court, therefore, denies pursuant to *Herrera, Hargrove, Molina*  
13 *and Strickland*. Also the science has advanced since the time of the trial  
14 and appellate counsel must review the job that was done at the trial and the  
15 performance of trial counsel which cannot be deficient if such scientific  
16 advancements did not exist and were not available at the time.

17                  The Court did receive a courtesy copy recent – I guess  
18 yesterday it came in of a petition with regard to DNA testing. Has that been  
19 filed?

20                  MR. BARRICK: It's in the cue, Your Honor.

21                  THE COURT: Okay. So it's electronically being filed through  
22 WIZnet?

23                  MR. BARRICK: Yeah, attempted. It's unusual, so we're not  
24 sure how the people at WIZnet are going to react to something coming  
25 across their desk that they've never seen before.

1 THE COURT: It's the first such motion that I've ever seen as  
2 well.

3 MR. BARRICK: Which is kind of why the uncertainty in my  
4 answer is because I'm not aware of any other being filed under that statute.

5 THE COURT: It's a petition pursuant to NRS 176.0918, so I  
6 guess once it does get filed, then it will be assigned a hearing date down the  
7 road.

8 MR. BARRICK: And on the pleadings we did –

9 THE COURT: That particular petition, I wanted to make clear  
10 from the record, is not being reviewed and decided upon by this Court  
11 today.

12 MR. BARRICK: Thank you. And we did assign – make sure –  
13 on the caption we put Department 2 so that they knew at least by default  
14 that's where it's headed.

15 THE COURT: It appears that that's where –

16 MR. BARRICK: We didn't put a case number but we did put  
17 Department 2 because –

18 THE COURT: Oh.

19 MR. BARRICK: -- the statute says it has to come back to you.

20 THE COURT: Right.

21 MR. BARRICK: I'm just saying we tried to help the clerks down  
22 there.

23 THE COURT: Okay. Thank you for clarifying that.  
24  
25

1 Under Ground 74 the Court denies pursuant to *Lobato*  
2 *versus State*, NRS 34.810, *Hall versus State* and *Strickland versus*  
3 *Washington*.

4 Ground 75 is denied pursuant to *Lobato versus State*, *Hall*  
5 *versus State*, *Strickland versus Washington* and EDCR 3.20.

6 Ground 76 is denied pursuant to *Ennis versus State* and  
7 *Strickland versus Washington*.

8 Ground 77 is denied based on all of the law cited in the  
9 rulings on Grounds 1 through 76 as well as the case of *Mulder, M-u-l-d-e-r,*  
10 *versus State*, 116 Nev. 1 from 2000. Because this is a homicide case and  
11 the Defendant's own words constituted compelling evidence, then she was  
12 twice convicted, so guilt was not a close call.

13 On Ground 78 it is denied pursuant to the law cited in the  
14 rulings of Grounds 1 through 24 pertaining to evidence, NRS 176.515, *Ennis*  
15 *versus State* and *Mulder versus State*.

16 MR. BARRICK: This is the last one, Your Honor. You could  
17 throw us a bone.

18 THE COURT: Ground 79 is denied pursuant to *Hargrove versus*  
19 *State* and *Strickland versus Washington*.

20 As an overall wrap-up, the Court finds that throughout the  
21 petition the Defendant sought appointment of counsel, sought evidentiary  
22 hearings and sought new trial, none of which are warranted here. The Court  
23 had some new affidavits presented but they were unsubstantiated and based  
24 on mere belief or speculation. There was no significant quote, unquote new  
25 evidence presented. The Defendant got some new people to review the old

1 evidence presented at trial that was available at trial and to elaborate upon  
2 it, but that's pretty much the extent of it.

3           The Court's going to ask that the State prepare the order  
4 and pass it by Mr. Barrick for review prior to submission to the Court.

5           MR. SMITH: Your Honor, if I may request also a transcript. It  
6 might be a little easier for us to prepare the order and get all your rulings in  
7 there.

8           THE COURT: Very well.

9           MR. SMITH: Thank you, Your Honor.

10          THE COURT: The Court will ask that the Court Recorder have a  
11 transcript from the ruling prepared.

12          MR. SMITH: Thank you, Your Honor.

13          THE COURT: That should just be from today's proceedings.  
14 You're probably going to need it anyway down the road, so - okay. Is there  
15 anything further to address today?

16          MR. SMITH: Not from the State, Your Honor.

17          THE COURT: Very well. Thank you, everyone. That concludes  
18 these proceedings and we'll go off the record.

19               (Whereupon, the proceedings concluded.)

20                       \* \* \* \* \*

21

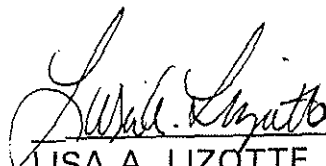
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1 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
2 audio/visual proceedings in the above-entitled case to the best of my ability.

3  
4   
5 LISA A. LIZOTTE  
6 Court Recorder  
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1 **ORDR**

2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 Tyler D. Smith  
6 Deputized Law Clerk  
7 Nevada Bar #011870  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 KIRSTIN BLAISE LOBATO,  
12 #1691351

13 Defendant.

CASE NO: 01C177394

DEPT NO: II

14 FINDINGS OF FACT, CONCLUSIONS OF  
15 LAW AND ORDER

16 DATE OF HEARING: March 1, 2011  
17 TIME OF HEARING: 10:30 A.M.

01C177394  
FFCO  
Findings of Fact, Conclusions of Law and C  
1476166



18 THIS CAUSE having come on for hearing before the Honorable Valorie J. Vega,  
19 District Judge, on the 1st day of March, 2011, the Petitioner being present, Represented by  
20 TRAVIS BARRICK<sup>1</sup>, the Respondent being represented by DAVID ROGER, District  
21 Attorney, by and through Sandra K. DiGiacomo, Chief Deputy District Attorney, and Tyler  
22 D. Smith, Deputized Law Clerk, and the Court having considered the matter, including  
briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the  
Court makes the following findings of fact and conclusions of law:

23 PROCEDURAL HISTORY

24 On August 9, 2001, Kirstin Blaise Lobato, hereinafter "Defendant," was charged by  
25 way of Information with Murder With Use of a Deadly Weapon (Open Murder) and Sexual  
26 Penetration of a Dead Human Body. Defendant's jury trial began on May 7, 2002. On May  
27  
28

1. Exhibit 4 attached hereto shows Mr. Barrick's written approval  
of this order.

CLERK OF THE COURT

JUN 16 2011

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CLERK OF THE COURT

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

11 Defendant filed a Notice of Appeal on October 15, 2002. On September 3, 2004, the  
12 Nevada Supreme Court reversed Defendant's conviction and remanded for a new trial.  
13 Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Remittitur issued on September 24,  
14 2004.

15 Defendant's second trial began on September 11, 2006. On October 6, 2006,  
16 Defendant was found guilty of Voluntary Manslaughter With Use of a Deadly Weapon and  
17 Sexual Penetration of a Dead Human Body. On February 2, 2007, Defendant was sentenced  
18 as follows: Count 1 – Voluntary Manslaughter With Use of a Deadly Weapon, to a  
19 maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-  
20 eight (48) months, plus and equal and consecutive term for the use of a deadly weapon;  
21 Count 2 – Sexual Penetration of a Dead Human Body, to a maximum of one hundred eighty  
22 (180) months with a minimum parole eligibility of sixty (60) months, Count 2 to run  
23 consecutive to Count 1, with one thousand five hundred forty-four (1,544) days credit for  
24 time served. It was further ordered that a special sentence of lifetime supervision be imposed  
25 upon release from any term of imprisonment, probation, or parole. Additionally, Defendant  
26 was ordered to register as a sex offender upon any release from custody.

27 Defendant filed a Notice of Appeal on March 12, 2007. On February 5, 2009, the  
28 Nevada Supreme Court affirmed Defendant's conviction. Defendant filed a petition for

1 rehearing which was denied on March 27, 2009. Defendant filed a petition for en banc  
2 reconsideration which was denied on May 19, 2009. Remittitur issued on October 14, 2009.  
3 Defendant filed the instant petition on May 5, 2010.

4 FINDINGS OF FACT

5 1. The Court adopts the procedural history outlined above as its first finding of  
6 fact.

7 2. As to Grounds 1, 2, and 3, involving the affidavits of Dr. Gail S. Anderson, Dr.  
8 Linda-Lou O'Connor, Dr. M. Lee Goff, and Dr. Glenn M. Larkin, the affidavits are simply  
9 an elaboration or opinion based upon the evidence available and presented at trial. It was  
10 available before or during trial with reasonable diligence. Thus, it is not newly discovered.

11 3. As to Ground 4, involving Dr. Redlich's affidavit, the affidavit is simply an  
12 elaboration or opinion based upon the evidence available and presented at trial. It was  
13 available before or during trial with reasonable diligence. Thus, it is not newly discovered.  
14 Moreover, as an alternate opinion of evidence that was presented at trial, it does not establish  
15 actual innocence. In so far as Defendant cites polygraph examinations, those would have  
16 been inadmissible without a written stipulation signed by the prosecuting attorney, the  
17 defendant, and defense counsel.

18 4. As to Ground 5, involving the voluntary statements of several witnesses who  
19 claim that Defendant allegedly confided in them about cutting a man's penis prior to the  
20 victim's death, this issue was previously ruled on by the Nevada Supreme Court in Lobato v.  
21 State, 120 Nev. 512, 522, 96 P.3d 765 (2004) and is therefore barred by the doctrine of law  
22 of the case.

23 5. As to Ground 6, involving the affidavits of Marily Parker Anderson, Kimberly  
24 Isom Grindstaff, Kendre Thunstrom, and Jose Lobato, these individuals were known to  
25 Defendant at the time of trial. Thus, it is not newly discovered evidence. Moreover, as a  
26 claim of newly discovered evidence, this ground is procedurally barred under NRS 34.810  
27 since it could have been raised in a timely motion for new trial. Defendant has failed to  
28 demonstrate good cause to overcome the procedural bar.

1           6.     As to Grounds 7 and 8, involving Dr. Larkin's affidavit, the affidavit is simply  
2 an elaboration or opinion based upon the evidence available and presented at trial. It was  
3 available before or during trial with reasonable diligence. Thus, it is not newly discovered.  
4 Moreover, as a claim of newly discovered evidence, this ground is procedurally barred under  
5 NRS 34.810 since it could have been raised in a timely motion for new trial. As an alternate  
6 opinion of evidence that was presented at trial, it does not establish actual innocence. Thus,  
7 Defendant has failed to demonstrate good cause to overcome the procedural bar.

8           7.     As to Ground 9, involving the petitioner's claim that the victim was "possibly  
9 subjected to two separate attacks," this is a bare allegation which is insufficient for relief.  
10 This evidence was available before or during trial with reasonable diligence. Thus, it is not  
11 newly discovered. Moreover, as a claim of newly discovered evidence, this ground is  
12 procedurally barred under NRS 34.810 since it could have been raised in a timely motion for  
13 new trial. As an alternate opinion of evidence that was presented at trial, it does not establish  
14 actual innocence. Thus, Defendant has failed to demonstrate good cause to overcome the  
15 procedural bar.

16           8.     As to Ground 10, involving Dr. Larkin's affidavit, the affidavit is simply an  
17 elaboration or opinion based upon the evidence available and presented at trial. Moreover, as  
18 a claim of newly discovered evidence, this ground is procedurally barred under NRS 34.810  
19 since it could have been raised in a timely motion for new trial. Since it was also available  
20 before or during trial with reasonable diligence, it is not newly discovered. Thus, Defendant  
21 has failed to demonstrate good cause to overcome the procedural bar. Moreover, many of Dr.  
22 Larkin's opinions are bare allegations insufficient for relief.

23           9.     As to Grounds 11 and 12, involving the affidavit of George J. Schiro, Jr., this  
24 evidence was available before or during trial with reasonable diligence. Thus, it is not newly  
25 discovered. Moreover, as a claim of newly discovered evidence, this ground is procedurally  
26 barred under NRS 34.810 since it could have been raised in a timely motion for new trial. As  
27 an alternate opinion of evidence that was presented at trial, it does not establish actual

28 ///

1 innocence. Thus, Defendant has failed to demonstrate good cause to overcome the  
2 procedural bar.

3 10. As to Ground 13, involving the affidavit of George J. Schiro, Jr., the affidavit  
4 is simply an elaboration or opinion based upon the evidence available and presented at trial.  
5 Moreover, as a claim of newly discovered evidence, this ground is procedurally barred under  
6 NRS 34.810 since it could have been raised in a timely motion for new trial. Since it was  
7 also available before or during trial with reasonable diligence, it is not newly discovered. As  
8 an alternate opinion of evidence that was presented at trial, it does not establish actual  
9 innocence. Thus, Defendant has failed to demonstrate good cause to overcome the  
10 procedural bar. Moreover, many of Mr. Schiro's opinions are bare allegations insufficient for  
11 relief.

12 11. As to Ground 14, involving that affidavit of Steven King, the court finds that  
13 the affidavit contains mere speculation. Furthermore, the assertion that the victim did not  
14 live in the trash enclosure where he was murdered is merely a legal theory that could have  
15 been presented at trial. This ground does not constitute "new evidence." Moreover, as a  
16 claim of newly discovered evidence, this ground is procedurally barred under NRS 34.810  
17 since it could have been raised in a timely motion for new trial. Since it was also available  
18 before or during trial with reasonable diligence, it is not newly discovered. As a speculative  
19 opinion it does not establish actual innocence. Thus, Defendant has failed to demonstrate  
20 good cause to overcome the procedural bar.

21 12. As to Ground 15, regarding the defendant's access to methamphetamine in  
22 Lincoln County, NV, it is a bare allegation insufficient for relief.

23 13. As to Ground 16, also involving the affidavit of Steven King, the court finds  
24 that the affidavit contains mere speculation which is based on belief and not evidence or  
25 actual knowledge. Moreover, as a claim of newly discovered evidence, this ground is  
26 procedurally barred under NRS 34.810 since it could have been raised in a timely motion for  
27 new trial. Since it was also available before or during trial with reasonable diligence, it is

28 ///

1 not newly discovered. As a speculative opinion it does not establish actual innocence. Thus,  
2 Defendant has failed to demonstrate good cause to overcome the procedural bar.

3 14. As to Ground 17, involving the victim's financial information, the allegation  
4 that the victim's checks were allegedly cashed by the perpetrator of the crime is a bare  
5 allegation insufficient for relief. Moreover, as a claim of newly discovered evidence, this  
6 ground is procedurally barred under NRS 34.810 since it could have been raised in a timely  
7 motion for new trial. Since it was also available before or during trial with reasonable  
8 diligence, it is not newly discovered. As a speculative opinion, it does not establish actual  
9 innocence. Thus, Defendant has failed to demonstrate good cause to overcome the  
10 procedural bar.

11 15. As to Ground 18, involving the affidavits of George J. Schiro, Jr. and Mark  
12 Lewis, DDS, the affidavits are simply an elaboration or opinion based upon the evidence  
13 available and presented at trial. They were available before or during trial with reasonable  
14 diligence. Thus, they are not newly discovered evidence. Moreover, as a claim of newly  
15 discovered evidence, this ground is procedurally barred under NRS 34.810 since it could  
16 have been raised in a timely motion for new trial. As an alternate opinion of evidence that  
17 was presented at trial, it does not establish actual innocence. Thus, Defendant has failed to  
18 demonstrate good cause to overcome the procedural bar.

19 16. As to Ground 19, concerning the constitutionality of NRS 201.450, the  
20 constitutionality of the statute was upheld by the Nevada Supreme Court in Lobato v. State,  
21 120 Nev. 512, 522, 96 P.3d 765, 772 (2004), and therefore this claim does not establish  
22 "actual innocence." Moreover, this ground is procedurally barred under NRS 34.810 since it  
23 could have been raised in a timely motion for new trial or on direct appeal. Since it was  
24 available before or during trial with reasonable diligence, it is not newly discovered. Thus,  
25 Defendant has failed to demonstrate good cause to overcome the procedural bar.

26 17. As to Ground 20, involving the affidavit of John Albert Kraft, as a claim of  
27 newly discovered evidence, this ground is procedurally barred under NRS 34.810 since it  
28 could have been raised in a timely motion for new trial. Since it could have been timely

1 discovered with reasonable diligence, it is not newly discovered. Moreover, as it regards  
2 alleged juror misconduct, the affidavit does not establish a viable claim of actual innocence.  
3 Thus, Defendant has failed to demonstrate good cause to overcome the procedural bar.

4 18. As to Ground 21, involving Detective Thowsen's testimony, this issue was  
5 previously ruled on by the Nevada Supreme Court in Lobato v. State 49087 Order of  
6 Affirmance 2/5/09, and is, therefore, barred from further consideration by the doctrine of law  
7 of the case. Moreover, as a claim of newly discovered evidence, this ground is procedurally  
8 barred under NRS 34.810 since it could have been raised in a timely motion for new trial.  
9 Since it could have been timely discovered with reasonable diligence, it is not newly  
10 discovered. Thus, Defendant has failed to demonstrate good cause to overcome the  
11 procedural bar.

12 19. As to Ground 22, involving allegations of malicious prosecution and police  
13 misconduct, Defendant's claims consist of bare allegations insufficient for relief. Moreover,  
14 as a claim of newly discovered evidence, this ground is procedurally barred under NRS  
15 34.810 since it could have been raised in a timely motion for new trial. Since it could also  
16 have been timely discovered with reasonable diligence, it is not newly discovered. As a bare  
17 allegation, this ground also does not establish a viable claim of actual innocence. Thus,  
18 Defendant has failed to demonstrate good cause to overcome the procedural bar.

19 20. As to Ground 23, Grounds 1 through 22 fail to establish that Defendant is  
20 entitled to relief.

21 21. As to Ground 24, involving claims of alleged "false evidence," these claims  
22 are largely based upon the affidavits and arguments presented in Grounds 1-23. As claims of  
23 newly discovered evidence, this ground is procedurally barred under NRS 34.810 since it  
24 could have been raised in a timely motion for new trial. Since it could have been timely  
25 discovered reasonable diligence, it is not newly discovered. As it is also based upon  
26 speculative opinions, it does not establish a valid actual innocence claim. Thus, Defendant  
27 has failed to demonstrate good cause to overcome the procedural bar.

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1           22. As to Grounds 25 and 26, involving Defendant's claims of Brady violations,  
2 these claims are barred under NRS 34.810 since they could have been raised in a timely  
3 motion for a new trial or on direct appeal. Since they were also available with reasonable  
4 diligence, it is not newly discovered. As they are also based upon speculative opinions and  
5 alternate interpretations of the evidence presented at trial, they do not establish a valid actual  
6 innocence claim. Thus, Defendant has failed to demonstrate good cause to overcome the  
7 procedural bar.

8           23. As to Ground 27, regarding trial counsel's alleged failure to investigate the  
9 "Mexicans" as the real killers, Defendant has failed to establish that counsel's conduct fell  
10 below an objective standard of reasonableness. Defendant has also failed to establish that,  
11 but for counsel's alleged errors, the outcome of the trial would have been different. Thus,  
12 Defendant is not entitled to relief under Strickland v. Washington, 466 U.S. 668 (1984). (11/11)

13           24. As to Ground 28, regarding trial counsel's alleged failure to investigate the  
14 phone numbers recovered from the victim's person, Defendant has failed to establish that  
15 counsel's conduct fell below an objective standard of reasonableness. Defendant has also  
16 failed to establish that, but for counsel's alleged errors, the outcome of the trial would have  
17 been different. Thus, Defendant is not entitled to relief under Strickland.

18           25. As to Ground 29, regarding trial counsel's failure to investigate the victim's  
19 financial information, Defendant has failed to establish that counsel's conduct fell below an  
20 objective standard of reasonableness. Defendant has also failed to establish that, but for  
21 counsel's alleged errors, the outcome of the trial would have been different. Thus, Defendant  
22 is not entitled to relief under Strickland.

23           26. As to Grounds 30 and 31, regarding trial counsel's failure to obtain Ms.  
24 Parker's DNA sample and alleged failure to investigate and subpoena information on  
25 reported knife wounds, these are bare allegations which are insufficient for relief. Moreover,  
26 Defendant has failed to establish the counsel's conduct fell below an objective standard of  
27 reasonableness. Defendant has also failed to establish that, but for counsel's alleged errors,  
28 the outcome of the trial would have been different since she has not shown how a better

1 investigation would have rendered a more favorable outcome probable. Thus, Defendant is  
2 not entitled to relief under Strickland.

3 27. As to Grounds 32, 33, and 34, regarding trial counsel's failure to call Detective  
4 LaRochelle and Detective Thowsen's secretary to testify and counsel's failure to subpoena  
5 LVMPD documents to impeach Detective Thowsen's testimony, it is counsel's ultimate  
6 responsibility to decide which witnesses to call, if any. Moreover, Defendant has failed to  
7 satisfy either prong of Strickland since she has not demonstrated what testimony or  
8 information such actions would have revealed.

9 28. As to Ground 35, regarding counsel's failure to move to exclude evidence of  
10 Defendant's drug use, it is counsel's ultimate responsibility to decide if and when to object.  
11 Any such motion made by counsel would have been futile since the evidence was relevant,  
12 and Defendant has failed to demonstrate that it was legally inadmissible. Counsel cannot be  
13 deemed ineffective for failing to make futile objections or motions. Thus, Defendant is not  
14 entitled to relief under Strickland.

15 29. As to Ground 36, regarding counsel's failure to file a motion for discovery, it  
16 is counsel's ultimate responsibility to decide what motions to file. Moreover, Defendant has  
17 failed to demonstrate the counsel was deficient or that she was prejudiced because she has  
18 not delineated what evidence such a motion would have uncovered. Thus, Defendant is not  
19 entitled to relief under Strickland.

20 30. As to Ground 37, regarding counsel's failure to move to dismiss her charge of  
21 violating NRS 201.450, insofar as Defendant may be raising this as substantive claim, it is  
22 barred pursuant to NRS 34.810 as it could have been raised in a timely motion for new trial  
23 or on direct appeal. Insofar as Defendant is raising this as a claim of ineffective assistance of  
24 counsel, Defendant has failed to demonstrate that counsel was deficient or that she was  
25 prejudiced. She is therefore not entitled to relief under Strickland. Defendant has failed to  
26 show good cause to overcome the procedural bar.

27 31. As to Grounds 38, 39, 40, and 41, regarding counsel's failure to call a forensic  
28 entomologist, a psychologist, a forensic pathologist, and a forensic scientist, insofar as

1 Defendant may be raising these as substantive claims, they are barred pursuant to NRS  
2 34.810 as they could have been raised in a timely motion for new trial. As alternate opinions  
3 of evidence that was presented at trial, they do not establish actual innocence. Moreover,  
4 these grounds are ultimately and were ultimately the call of the lead trial counsel. Defendant  
5 has failed to demonstrate that had counsel taken such action it would have led to a different  
6 outcome at trial. She is therefore not entitled to relief under Strickland. Thus, Defendant has  
7 failed to demonstrate good cause to overcome the procedural bar.

8 32. As to Ground 42, regarding counsel's cross-examination of Dr. Simms  
9 concerning the victim's time of death, Defendant has failed to demonstrate that counsel was  
10 ineffective or that she was prejudiced. The manner of cross-examination and the  
11 development of defenses is ultimately counsel's responsibility. Defendant is therefore not  
12 entitled to relief under Strickland. Insofar as Defendant may be raising this issue as a  
13 substantive claim, it is barred pursuant to NRS 34.810 since it could have been raised at trial  
14 or on direct appeal. Moreover, as an alternate view of the evidence adduced at trial, it does  
15 not establish a valid claim of actual innocence. Thus, Defendant has failed to demonstrate  
16 good cause to overcome the procedural bar.

17 33. As to Ground 43, regarding counsel's failure to object to the testimony of  
18 Thomas Wahl, Daniel Ford, Louise Renhard, and Kirstina Paulette, Defendant has failed to  
19 demonstrate that counsel was ineffective or that she was prejudiced. As demonstrated by  
20 Court's Exhibits 1, 2, and 3, all witnesses were properly noticed by the State. Defendant is  
21 therefore not entitled to relief under Strickland. Insofar as Defendant is raising this issue as a  
22 substantive claim, it is barred pursuant to NRS 34.810 since it could have been raised at trial  
23 or on direct appeal. As this issue is one of expert witness qualifications, it does not establish  
24 a valid claim of actual innocence. As such, Defendant has failed to demonstrate good cause  
25 to overcome the procedural bar.

26 34. As to Ground 44, regarding counsel's failure to enter Defendant's black shoes  
27 into evidence, Defendant has failed to demonstrate that counsel was deficient or that she was  
28 prejudiced. The presentation of defense and evidence is ultimately counsel's responsibility.

1 Thus, Defendant is not entitled to relief under Strickland. Insofar as Defendant may be  
2 raising this issue as a substantive claim, it is barred pursuant to NRS 34.810 since it could  
3 have been raised with the trial court or on direct appeal. Moreover, as an alternate view of  
4 the evidence adduced at trial, it does not establish a valid claim of actual innocence. Thus,  
5 Defendant has failed to demonstrate good cause to overcome the procedural bar.

6 35. As to Ground 45, regarding counsel's failure to object to the admission of  
7 Defendant's butterfly knife into evidence, Defendant has failed to demonstrate that counsel  
8 was deficient or that she was prejudiced. The presentation of defense and evidence is  
9 ultimately counsel's responsibility. Defendant has also failed to delineate a legal basis upon  
10 which counsel could have objected, and any such objection by counsel would have been  
11 futile. Thus, Defendant is not entitled to relief under Strickland. Insofar as Defendant may be  
12 raising this issue as a substantive claim, it is barred pursuant to NRS 34.810 since it could  
13 have been raised with the trial court or on direct appeal. Moreover, as an alternate view of  
14 the evidence adduced at trial, it does not establish a valid claim of actual innocence. Thus,  
15 Defendant has failed to demonstrate good cause to overcome the procedural bar.

16 36. As to Ground 46, regarding counsel's failure to vouch for the credibility of  
17 alibi witnesses, Defendant has failed to demonstrate that counsel was deficient or that she  
18 was prejudiced. Vouching for the credibility of witnesses is improper. Defendant is therefore  
19 not entitled to relief under Strickland. Insofar as Defendant may be raising this issue as a  
20 substantive claim, it is barred pursuant to NRS 34.810 since it could have been raised with  
21 the trial court or on direct appeal. Moreover, as an alternate view of the evidence adduced at  
22 trial, it does not establish a valid claim of actual innocence. Thus, Defendant has failed to  
23 demonstrate good cause to overcome the procedural bar. Finally, Defendant raised this issue  
24 on direct appeal, and it was denied by the Nevada Supreme Court in Lobato v. State 49087  
25 Order of Affirmance 2/5/09. It is therefore barred by the doctrine of law of the case.

26 37. As to Ground 47, regarding counsel's failure to object to Detective Thowsen's  
27 testimony on the basis that he was not noticed as an expert and gave improper opinion  
28 testimony, Defendant has failed to demonstrate that counsel was deficient or that she was

1 prejudiced. Defendant is therefore not entitled to relief under Strickland. Insofar as  
2 Defendant may be raising this issue as a substantive claim, it is barred pursuant to NRS  
3 34.810 since it could have been raised with the trial court or on direct appeal. Moreover, as  
4 an alternate view of the evidence adduced at trial, it does not establish a valid claim of actual  
5 innocence. Thus, Defendant has failed to demonstrate good cause to overcome the  
6 procedural bar. Finally, Defendant raised this issue on direct appeal, and it was denied by the  
7 Nevada Supreme Court in Lobato v. State 49087 Order of Affirmance 2/5/09. It is therefore  
8 also barred by the doctrine of law of the case.

9 38. As to Ground 48, regarding counsel's failure to object to Detective Thowsen's  
10 testimony in response to a juror's question that he did not do further investigation at the  
11 Budget Suites because he knew "it happened on West Flamingo," Defendant has failed to  
12 demonstrate that counsel was deficient or that she was prejudiced. She is therefore not  
13 entitled to relief under Strickland. Insofar as Defendant may be raising this issue as a  
14 substantive claim, it is barred pursuant to NRS 34.810 since it could have been raised at trial  
15 or on direct appeal. Moreover, as an alternate view of the evidence adduced at trial, it does  
16 not establish a valid claim of actual innocence. Thus, Defendant has failed to demonstrate  
17 good cause to overcome the procedural bar.

18 39. As to Ground 49, regarding counsel's failure to object to the State's referral to  
19 Defendant's statement as a "confession," this statement did not constitute prosecutorial  
20 misconduct, and Defendant has failed to demonstrate that the remark was patently  
21 prejudicial. The prosecutor was commenting on testimony, asking the jury to draw  
22 inferences from the evidence, and stating fully his views as to what the evidence shows,  
23 which is permissible. Any objection by counsel would have been futile, and counsel  
24 therefore cannot be deemed ineffective.

25 40. As to Ground 50, regarding counsel's cross-examination of Detective Thowsen  
26 on his investigation pertaining to the Budget Suites and any reports or incidents of injuries to  
27 an individual's groin or penis, Defendant has failed to demonstrate that counsel was deficient  
28 or that she was prejudiced. Moreover, the manner of cross-examination and the presentation

1 of defense is ultimately counsel's responsibility. She is therefore not entitled to relief under  
2 Strickland. Insofar as Defendant may be raising this issue as a substantive claim, it is barred  
3 pursuant to NRS 34.810 since it could have been raised with the trial court or on direct  
4 appeal. Moreover, as an alternate view of the evidence adduced at trial, it does not establish  
5 a valid claim of actual innocence. Thus, Defendant has failed to demonstrate good cause to  
6 overcome the procedural bar.

7 41. As to Ground 51, regarding Detective Thowsen's hearsay testimony pertaining  
8 to his investigation of other reports of incidents of a severed or slashed penis, this issue was  
9 raised on direct appeal. The Nevada Supreme Court found it to be harmless error in Lobato  
10 v. State 49087 Order of Affirmance 2/5/09. This claim is therefore barred by the doctrine of  
11 law of the case.

12 42. As to Ground 52, regarding counsels' failure to object and move for a mistrial  
13 based upon alleged frauds on the court, this is a bare allegation insufficient for relief.  
14 Moreover, as shown in Court's Exhibit 4, Ground 52 contains an error of fact. Judge Vega  
15 was not a colleague in the Clark County District Attorney's Office with either former Chief  
16 Deputy District Attorney William Kephart or Chief Deputy District Attorney Sandra  
17 DiGiacomo.

18 43. As to Ground 53, regarding counsel's cross-examination of Detective  
19 Thowsen, Defendant has failed to demonstrate that counsel was deficient or that she was  
20 prejudiced. She is therefore not entitled to relief under Strickland. Insofar as Defendant may  
21 be raising this issue as a substantive claim, it is barred pursuant to NRS 34.810 since it could  
22 have been raised with the trial court or on direct appeal. Moreover, as an alternate view of  
23 the evidence adduced at trial, it does not establish a valid claim of actual innocence. Thus,  
24 Defendant has failed to demonstrate good cause to overcome the procedural bar.

25 44. As to Ground 54, regarding counsel's failure to determine the source of  
26 Detective Thowsen's knowledge regarding the past sexual abuse of Defendant, Defendant  
27 has failed to demonstrate that counsel was deficient or that she was prejudiced. Moreover,  
28 the manner of cross-examination and the presentation of defense is ultimately counsel's

1 responsibility. She is therefore not entitled to relief under Strickland. Insofar as Defendant  
2 claims this rendered her Miranda waiver involuntary, Defendant previously challenged the  
3 admission of her statement as involuntary based upon these same arguments, and it was  
4 rejected by the Nevada Supreme Court in Lobato v. State, 120 Nev. at 522, 96 P.3d at 772  
5 (2004). The Court's ruling on this issue constitutes the law of the case, and it may not be  
6 revisited.

7 45. As to Ground 55, regarding counsel's cross-examination of Laura Johnson,  
8 Defendant has failed to demonstrate that counsel was deficient or that she was prejudiced.  
9 Moreover, the manner of cross-examination and the presentation of defense is ultimately  
10 counsel's responsibility. She is therefore not entitled to relief under Strickland.

11 46. As to Ground 56, regarding counsel's failure to investigate the availability of  
12 methamphetamine in Las Vegas, Defendant has failed to demonstrate how a better  
13 investigation would have rendered a more favorable outcome probable. Defendant has failed  
14 to demonstrate that counsel was deficient or that she was prejudiced. She is therefore not  
15 entitled to relief under Strickland.

16 47. As to Ground 57, regarding counsel's failure to object to the testimony of  
17 Zachary Robinson, this testimony was admissible pursuant to NRS Chapter 51. Under NRS  
18 51.135 it is admissible as a record of a regularly conducted business activity. Under NRS  
19 51.145, it is also admissible as an absence of entry and records of a regularly conducted  
20 business activity. It is also admissible under the catch-all provision of NRS 51.315. Insofar  
21 as Defendant cites Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), counsel at the  
22 time of trial did not have the benefit of that decision and cannot be deemed ineffective  
23 because of it. In any event, the absence of information in a report is non-testimonial, and  
24 defense counsel was able to cross-examine Mr. Robinson. As such, any objection would  
25 have been futile, and counsel cannot be deemed ineffective.

26 48. As to Ground 58, regarding counsel's failure to obtain the State's alleged  
27 "liar's list," this is a bare allegation insufficient for relief.

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1           49. As to Ground 59, regarding counsel's failure to move for a directed acquittal  
2 per NRS 175.381, the court notes that it would have denied such a motion. Moreover,  
3 Defendant challenged her conviction on the basis of insufficient evidence on direct appeal  
4 which was rejected by the Nevada Supreme Court in Lobato v. State 49087 Order of  
5 Affirmance 2/5/09. As such, any such motion would have been futile, and counsel cannot be  
6 deemed ineffective. This is also a bare allegation insufficient for relief.

7           50. As to Ground 60, regarding counsel's failure to object to Jury Instruction No.s  
8 26 and 33, similar instructions were upheld by the Nevada Supreme Court in Weber v. State,  
9 121 Nev. 554 (2005) and Guy v. State, 108 Nev. 770 (1992), respectively. As such, any  
10 objection by counsel would have been futile, and he cannot be deemed ineffective under  
11 Strickland.

12           51. As to Ground 61, regarding counsel's failure to object to Jury Instruction No.  
13 31 defining reasonable doubt, the same instruction was upheld by the Nevada Supreme Court  
14 in Lord v. State, 107 Nev. 28 (1991). Moreover, NRS 175.211 mandates that no other  
15 definition of reasonable doubt may be given. As such, counsel cannot be deemed ineffective  
16 under Strickland.

17           52. As to Grounds 62 and 63, regarding counsel's failure to submit alternative  
18 instructions on NRS 201.450 which included an element of sexual intent, this argument was  
19 rejected by the Nevada Supreme Court in Lobato v. State, 120 Nev. 512, 522, 96 P.3d 765,  
20 772 (2004). As such, any such attempt by counsel would have been futile, and Defendant is  
21 not entitled to relief under Strickland. Insofar as Defendant may be raising this issue as a  
22 substantive claim, it is barred pursuant to NRS 34.810 since it could have been raised at trial  
23 or on direct appeal. Moreover, as an alternate view of the evidence adduced at trial, it does  
24 not establish a valid claim of actual innocence. Thus, Defendant has failed to demonstrate  
25 good cause to overcome the procedural bar.

26           53. As to Ground 64, regarding counsel's failure to argue during closing that the  
27 State had failed to prove each element beyond a reasonable doubt, review of counsel's  
28 summation is highly deferential because of the broad range of legitimate defense strategy at

1 that stage, and Defendant has failed to overcome this high standard. Moreover, the  
2 presentation of defense is ultimately defense counsel's responsibility. As such, Defendant  
3 has failed to demonstrate that counsel was deficient or that she was prejudiced. She is not  
4 entitled to relief under Strickland.

5 54. As to Ground 65, regarding counsel's failure to object to the State's opening  
6 statement, Defendant has failed to demonstrate that any of the prosecutor's statements could  
7 not be proved at trial or were made in bad faith. Therefore, the statements did not constitute  
8 prosecutorial misconduct. As such, any objection by defense counsel would have been futile,  
9 and he cannot be deemed ineffective. Defendant is therefore not entitled to relief under  
10 Strickland.

11 55. As to Ground 66, regarding counsel's failure to object to the prosecutor's  
12 argument in closing regarding the victim's head wounds, counsel is given wide latitude in  
13 deciding how to best represent a client during closing arguments. Defendant has failed to  
14 demonstrate that counsel was deficient or that she was prejudiced. She is therefore not  
15 entitled to relief under Strickland.

16 56. As to Ground 67, regarding counsel's failure to object to the prosecutor's  
17 argument concerning Defendant's guilt, the prosecutor was providing his belief in  
18 Defendant's guilt as a conclusion from the evidence presented, which is permissible. Any  
19 objection by counsel would have been futile, and counsel cannot be deemed ineffective.  
20 Defendant has failed to demonstrate that counsel was deficient or that she was prejudiced.  
21 She is therefore not entitled to relief under Strickland.

22 57. As to Ground 68, also regarding counsel's failure to object to the prosecutor's  
23 argument that several alibi witnesses had not testified previously, the prosecutor's argument  
24 pertained to the credibility of the witnesses. As this case involves numerous material  
25 witnesses and the outcome depended on which witnesses were telling the truth, reasonable  
26 latitude should be given to the prosecutor to argue the credibility of the witness. As such, any  
27 objection by counsel would have been futile, and counsel cannot be deemed ineffective.

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1 Defendant has failed to demonstrate that counsel was deficient or that she was prejudiced.  
2 She is therefore not entitled to relief under Strickland.

3 58. As to Ground 69, regarding counsel's failure to object to the prosecutor's  
4 argument that the positive presumptive tests for blood in Defendant's car were physical  
5 evidence linking her to the crime scene, the prosecutor was commenting on testimony,  
6 asking the jury to draw inferences from the evidence, and stating fully his views as to what  
7 the evidence shows, which is permissible. As such, any objection by counsel would have  
8 been futile, and counsel cannot be deemed ineffective. Defendant has failed to demonstrate  
9 that counsel was deficient or that she was prejudiced. She is therefore not entitled to relief  
10 under Strickland.

11 59. As to Ground 70, regarding counsel's failure to object to alleged "false  
12 arguments" made by the prosecutor, these are bare allegations insufficient for relief. As such,  
13 any objection by counsel would have been futile, and counsel cannot be deemed ineffective.  
14 Defendant has failed to demonstrate that counsel was deficient or that she was prejudiced.  
15 She is therefore not entitled to relief under Strickland.

16 60. As to Ground 71, regarding counsel's failure to retain a dental expert, it is  
17 ultimately counsel's responsibility to control the presentation of defense. Insofar as  
18 Defendant is raising this issue as a substantive claim, as an alternate opinion of evidence that  
19 was presented at trial, it does not establish actual innocence. Since it was also available  
20 before or during trial with reasonable diligence, it is not newly discovered. Defendant has  
21 failed to demonstrate that counsel was deficient or that she was prejudiced. She is therefore  
22 not entitled to relief under Strickland.

23 61. As to Ground 72, regarding counsel's failure to file a motion for judgment of  
24 acquittal per NRS 175.381(2) due to insufficient evidence, the sufficiency of the evidence  
25 issue was raised on direct appeal and rejected by the Nevada Supreme Court in Lobato v.  
26 State 49087 Order of Affirmance 2/5/09. The Court's ruling on this constitutes the law of the  
27 case, and it may not be revisited. Defendant has failed to demonstrate that counsel was  
28 deficient or that she was prejudiced. She is therefore not entitled to relief under Strickland.

1           62. As to Ground 73, regarding counsel's alleged inadequate post-trial  
2 investigation, this ground concerns a letter which the Court finds carries less weight than an  
3 affidavit. This is a bare allegation insufficient for relief. Defendant has also failed to  
4 demonstrate how a better investigation would have rendered a more favorable outcome  
5 probable. Furthermore, the science has advanced since the time of trial, and appellate  
6 counsel must review the job that was done at the trial and the performance of trial counsel  
7 which cannot be deficient if such scientific advancements did not exist and were not  
8 available at the time.

9           63. As to Ground 74, regarding appellate counsel's alleged failure to raise the  
10 sufficiency of the evidence on appeal, this issue was indeed raised on direct appeal and  
11 rejected by the Nevada Supreme Court in Lobato v. State 49087 Order of Affirmance 2/5/09.  
12 This claim is therefore belied by the record. Defendant has failed to demonstrate that counsel  
13 was deficient or that she was prejudiced. She is therefore not entitled to relief under  
14 Strickland. Insofar as Defendant may be raising this issue as a substantive claim, it is barred  
15 pursuant to NRS 34.810 since it could have been raised on direct appeal. Defendant has  
16 failed to demonstrate good cause to overcome the procedural bar.

17           64. As to Ground 75, regarding appellate counsel's alleged failure to raise the  
18 denial of her motion to suppress on appeal, this issue was indeed raised on direct appeal and  
19 rejected by the Nevada Supreme Court in Lobato v. State 49087 Order of Affirmance 2/5/09.  
20 This claim is therefore belied by the record. Defendant has failed to demonstrate that counsel  
21 was deficient or that she was prejudiced. She is therefore not entitled to relief under  
22 Strickland. Insofar as Defendant may be raising this issue as a substantive claim, it is barred  
23 pursuant to EDCR 3.20 since the 15-days before trial deadline has passed.

24           65. As to Ground 76, regarding appellate counsel's failure to argue in her petition  
25 for rehearing that the Nevada Supreme Court's ruling was based upon a false assumption of  
26 fact, such an action by counsel would have been futile. Counsel cannot therefore be deemed  
27 ineffective. Defendant has failed to demonstrate that counsel was deficient or that she was  
28 prejudiced. She is therefore not entitled to relief under Strickland.

66. As to Ground 77, there is no cumulative error as to warrant relief. This is a homicide case, and the Defendant's own words constituted compelling evidence. Defendant was also twice convicted. As such, guilt was not a close call.

67. As to Ground 78, Defendant's claims of new evidence are insufficient to warrant relief.

68. As to Ground 79, regarding Defendant's claim that her counsel failed to diligently represent her, these are bare allegations insufficient for relief. Defendant has failed to demonstrate that counsel was deficient or that she was prejudiced. She is therefore not entitled to relief under Strickland.

## CONCLUSIONS OF LAW

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

2. Post-trial affidavits are “obtained without the benefit of cross-examination.” Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). They should be “treated with a fair degree of skepticism.” Id. at 423, 113 S.Ct. at 853 (O’Connor, J., concurring). A claim of “actual innocence” is not itself a constitutional claim, but “instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.” Id. at 404, 113 S.Ct. at 862. Assuming, *arguendo*, an independent claim of actual innocence exists, the threshold for showing such a claim is “extraordinarily high.” Id. at 419, 113 S.Ct. at 870 (1993).

3. Polygraph results are inadmissible at trial unless there is a written stipulation signed by the prosecuting attorney, the defendant, and defense counsel. Jackson v. State, 116 Nev. 334, 997 P.2d 121 (2000).

4. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (*quoting Walker v. State*, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of

1 the law of the case cannot be avoided by a more detailed and precisely focused argument  
2 subsequently made after reflection upon the previous proceedings.” Hall, 91 Nev. at 316,  
3 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct  
4 appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d  
5 519 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

6 5. Absent a showing of good cause and prejudice, claims which could have been  
7 presented to the trial court or on direct appeal are barred. NRS 34.810(1)(b).

8 6. Claims asserted in a petition for post-conviction relief must be supported with  
9 specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v.  
10 State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not  
11 sufficient, nor are those belied and repelled by the record. Id.

12 7. Counsel cannot be deemed ineffective for failing to make futile objections or  
13 motions. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

14 8. Trial counsel has the “immediate and ultimate responsibility of deciding if and  
15 when to object, which witnesses, if any, to call, and what defenses to develop.” Rhyne v.  
16 State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

17 9. In order to assert a claim for ineffective assistance of counsel a defendant must  
18 prove that he was denied “reasonably effective assistance” of counsel by satisfying the two-  
19 prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64  
20 (1984). *See also* State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this  
21 test, the Defendant must show first that his counsel's representation fell below an objective  
22 standard of reasonableness, and second, that but for counsel's errors, there is a reasonable  
23 probability that the result of the proceedings would have been different. Strickland, 466 U.S.  
24 at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev.  
25 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). The court  
26 begins with the presumption of effectiveness and then must determine whether or not the  
27 petitioner has proved disputed factual allegations underlying his ineffective-assistance claim

28 ///

1 by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33  
2 (2004).

3 10. The United States Supreme Court has held that there is a constitutional right to  
4 effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v.  
5 Lucey, 469 U.S. 387, 396-97, 105 S.Ct. 830, 836-837 (1985); *see also* Burke v. State, 110  
6 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to  
7 claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong  
8 test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Williams v.  
9 Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275  
10 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). In order to prove that  
11 appellate counsel's alleged error was prejudicial; the defendant must show that the omitted  
12 issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins,  
13 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

14 11. Counsel may not vouch for the veracity of a witness. *See* Rowland v. State,  
15 118 Nev. 31, 39 P.3d 114 (2002). Furthermore, while it is generally improper for a  
16 prosecutor to call the defendant or a witness a liar, "when a case involves numerous material  
17 witnesses and the outcome depends on which witnesses are telling the truth, reasonable  
18 latitude should be given to the prosecutor to argue the credibility of the witness-even if this  
19 means occasionally stating in argument that a witness is lying." *Id.*, at 39, 39 P.3d at 119.

20 12. NRS 201.450 is constitutionally firm. Lobato v. State, 120 Nev. 512, 522, 96  
21 P.3d 765, 772 (2004).

22 13. A defendant who contends that her attorney was ineffective because he did not  
23 adequately investigate must show how a better investigation would have rendered a more  
24 favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004).

25 14. The standard of review for prosecutorial misconduct rests upon Defendant  
26 showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v.  
27 State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995).

28 ///

1           15. Under State v. Green, 81 Nev. 173, 400 P.2d 766 (1965), the prosecutor has  
2 the right to comment on testimony, to ask the jury to draw inferences from the evidence, and  
3 has the right to state fully his views as to what the evidence shows. Id. at 176.

4           16. On direct appeal, the Nevada Supreme Court concluded that the admission of  
5 Detective Thowsen's testimony concerning his investigation of other reports of incidents of a  
6 severed or slashed penis was harmless error. Lobato v. State 49087 Order of Affirmance  
7 2/5/09.

8           17. Defendant challenged the admission of her statement to the police as  
9 involuntary based upon the same argument that the psychological tactic used by the officers  
10 rendered her statement involuntary on direct appeal, and it was rejected by the Nevada  
11 Supreme Court. Lobato v. State, 120 Nev. 512, 522 (2004). Moreover, the Court also  
12 rejected Defendant's claim that the State had improperly used privileged information from  
13 her medical files. Id.

14           18. Defendant challenged her conviction on the basis of insufficient evidence on  
15 direct appeal which was rejected by the Nevada Supreme Court. Lobato v. State 49087 Order  
16 of Affirmance 2/5/09.

17           19. The language contained in Jury Instruction No. 26 was upheld by the Nevada  
18 Supreme Court in Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005).

19           20. The language contained in Jury Instruction No. 33 was upheld by the Nevada  
20 Supreme Court in Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992).

21           21. The definition of reasonable doubt contained in Jury Instruction No. 31 was  
22 upheld by the Nevada Supreme Court in Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548,  
23 554-56 (1991). Moreover, NRS 175.211 states:

24           1. A reasonable doubt is one based on reason. It is not mere  
25 possible doubt, but is such a doubt as would govern or control a  
26 person in the more weighty affairs of life. If the minds of the  
27 jurors, after the entire comparison and consideration of all the  
28 evidence, are in such a condition that they can say they feel an  
abiding conviction of the truth of the charge, there is not a  
reasonable doubt. Doubt to be reasonable must be actual, not  
mere possibility or speculation.

2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this State.

22. NRS 201.450 does not contain an element of sexual intent. Lobato, 120 Nev. 512, 522, 96 P.3d 765, 772.

23. "Counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 4 (2003). As such, "judicial review of a defense attorney's summation is therefore highly deferential." Id.

24. A prosecutor may not make statements in opening arguments which cannot be proved at trial. Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997) (modified on other grounds by Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002)). However, misconduct does not lie unless such a statement is made in bad faith. Id. at 1312-1313, 949 P.2d at 270.

25. "Statements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable." Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (Nev., 1996) (citing Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)).

26. Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854 - 855 (2000); see also Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

27. N.R.S. 176.515 states:

1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

2. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.

1 3. Except as otherwise provided in NRS 176.0918, a motion for a new  
2 trial based on the ground of newly discovered evidence may be made  
only within 2 years after the verdict or finding of guilt.

3 4. A motion for a new trial based on any other grounds must be made  
4 within 7 days after the verdict or finding of guilt or within such further  
time as the court may fix during the 7-day period.

5 28. EDCR 3.20. Motions.

6 (a) Unless otherwise provided by law or by these rules, all motions must  
7 be served and filed not less than 15 days before the date set for trial.  
8 The court will only consider late motions based upon an affidavit  
9 demonstrating good cause and it may decline to consider any motion  
filed in violation of this rule...

10 29. "Hearsay means a statement offered in evidence to prove the truth of the matter  
11 asserted..." NRS 51.035.

12 30. NRS 51.315 states:

13 1. A statement is not excluded by the hearsay rule if:

14 (a) Its nature and the special circumstances under which it was made  
15 offer strong assurances of accuracy; and

16 (b) The declarant is unavailable as a witness.

17 2. The provisions of NRS 51.325 to 51.355, inclusive, are illustrative  
and not restrictive of the exception provided by this section.

18 31. "A memorandum, report, record or compilation of data, in any form, of acts,  
19 events, conditions, opinions or diagnoses, made at or near the time by, or from information  
20 transmitted by, a person with knowledge, all in the course of a regularly conducted activity,  
21 as shown by the testimony or affidavit of the custodian or other qualified person, is not  
22 inadmissible under the hearsay rule unless the source of information or the method or  
23 circumstances of preparation indicate lack of trustworthiness." N.R.S. 51.135.

24 32. "Evidence that a matter is not included in the memoranda, reports, records or  
25 data compilations, in any form, of a regularly conducted activity is not inadmissible under  
26 the hearsay rule to prove the nonoccurrence or nonexistence of the matter, if the matter was  
27 of a kind of which a memorandum, report, record or data compilation was regularly made  
28 and preserved." N.R.S. 51.145.

*This is non-testimonial and therefore  
factually distinct from the reports addressed in Melendez-Diaz v.  
MA, 129 S.Ct. 2527 (2009) citing to Crawford v. WA, 541 U.S. 36  
(2004).*

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1           33.    Grounds 1, 2, and 3 are denied pursuant to D'Agostino v. State, 112 Nev. 417,  
2 423, 915 P.2d 264, 267 (1996).

3           34.    Ground 4 is denied pursuant to D'Agostino v. State, 112 Nev. 417, 915 P.2d  
4 264 (1996), Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993), and Jackson v. State,  
5 116 Nev. 334, 997 P.2d 121 (2000).

6           35.    Ground 5 is denied pursuant to Hall v. State, 91 Nev. 314, 315, 535 P.2d 797,  
7 798 (1975) and Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001).

8           36.    Ground 6 is denied pursuant to NRS 34.810.

9           37.    Grounds 7, 8, 11, 12, 14, 16, 18, 20, 24, 25, and 26 are denied pursuant to  
10 Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993) and NRS 34.810.

11          38.    Grounds 9, 13, 17, 22 are denied pursuant to Hargrove v. State, 100 Nev. 498,  
12 502, 686 P.2d 222, 225 (1984), Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993),  
13 and NRS 34.810.

14          39.    Ground 10 is denied pursuant to Hargrove v. State, 100 Nev. 498, 502, 686  
15 P.2d 222, 225 (1984) and NRS 34.810.

16          40.    Ground 15 is denied pursuant to Hargrove v. State, 100 Nev. 498, 502, 686  
17 P.2d 222, 225 (1984).

18          41.    Ground 19 is denied pursuant to Herrera v. Collins, 506 U.S. 390, 417, 113  
19 S.Ct. 853 (1993), NRS 34.810, NRS 201.450, and Lobato v. State, 120 Nev. 512, 522  
20 (2004).

21          42.    Ground 21 is denied pursuant to Lobato v. State, 120 Nev. 512, 522 (2004),  
22 Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975), and NRS 34.810.

23          43.    Ground 23 is denied pursuant to the law cited under Grounds 1 through 22,  
24 inclusive.

25          44.    Grounds 27, 28, 29, are denied pursuant to Strickland v. Washington, 466 U.S.  
26 668, 104 S.Ct. 2052 (1984).

27 ///

28 ///

1           45.    Grounds 30 and 31 are denied pursuant to Strickland v. Washington, 466 U.S.  
2   668, 104 S.Ct. 2052 (1984), Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004), and  
3   Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

4           46.    Grounds 32, 33, 34, 36, 55 are denied pursuant to Strickland v. Washington,  
5   466 U.S. 668, 104 S.Ct. 2052 (1984) and Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

6           47.    Ground 35 is denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
7   S.Ct. 2052 (1984), Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002), and Ennis v. State, 122  
8   Nev. 694, 137 P.3d 1095 (2006).

9           48.    Ground 37, 43, 48, 53 is denied pursuant to Strickland v. Washington, 466  
10   U.S. 668, 104 S.Ct. 2052 (1984), Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853  
11   (1993), and NRS 34.810.

12          49.    Grounds 38, 39, 40, 41, 42, 44, 50 are denied pursuant to Strickland v.  
13   Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), Herrera v. Collins, 506 U.S. 390, 417,  
14   113 S.Ct. 853 (1993), Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002), and NRS 34.810.

15          50.    Ground 45 denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
16   S.Ct. 2052 (1984), Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993), Ennis v.  
17   State, 122 Nev. 694, 137 P.3d 1095 (2006), and NRS 34.810.

18          51.    Ground 46 is denied pursuant to Rowland v. State, 118 Nev. 31, 39 P.3d 114  
19   (2002), Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975), Strickland v. Washington, 466 U.S.  
20   668, 104 S.Ct. 2052 (1984), Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993), and  
21   NRS 34.810.

22          52.    Ground 47 is denied pursuant to Hall v. State, 91 Nev. 314, 535 P.2d 797  
23   (1975), Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001), Strickland v. Washington, 466  
24   U.S. 668, 104 S.Ct. 2052 (1984), Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853  
25   (1993), and NRS 34.810.

26          53.    Ground 49 is denied pursuant to Riker v. State, 111 Nev. 1316, 1328, 905 P.2d  
27   706, 713 (1995), State v. Green, 81 Nev. 173, 400 P.2d 766 (1965), and Ennis v. State, 122  
28   Nev. 694, 137 P.3d 1095 (2006).

1 54. Ground 51 is denied pursuant to Lobato v. State 49087 Order of Affirmance  
2 2/5/09 and Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

3 55. Grounds 52, 58 are denied pursuant to Hargrove v. State, 100 Nev. 498, 686  
4 P.2d 222 (1984).

5 56. Ground 54 is denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
6 S.Ct. 2052 (1984), Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002), Lobato v. State, 120  
7 Nev. 512, 522 (2004), Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975), and Ennis  
8 v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

9 57. Ground 56 is denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
10 S.Ct. 2052 (1984) and Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004).

11 58. Ground 57 is denied pursuant to NRS Chapter 51 (NRS 51.035, 51.135,  
12 51.145, and 51.315), Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006), and Strickland v.  
13 Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

14 59. Ground 59 is denied pursuant to Lobato v. State 49087 Order of Affirmance  
15 2/5/09, Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006), and Hargrove v. State, 100 Nev.  
16 498, 686 P.2d 222 (1984).

17 60. Ground 60 is denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
18 S.Ct. 2052 (1984), Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005), Guy v. State, 108  
19 Nev. 770, 839 P.2d 578 (1992), and Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

20 61. Ground 61 is denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
21 S.Ct. 2052 (1984), <sup>NRS 115.221</sup> and Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991).

22 62. Grounds 62 and 63 are denied pursuant to Lobato v. State, 120 Nev. 512, 522  
23 (2004), NRS 201.450, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984),  
24 Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993), Ennis v. State, 122 Nev. 694,  
25 137 P.3d 1095 (2006), <sup>NRS 201.450</sup> and NRS 34.810.

26 63. Ground 64 is denied pursuant to Yarborough v. Gentry, 540 U.S. 1, 5-6, 124  
27 S.Ct. 1, 4 (2003), Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and  
28 Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002).

1 64. Ground 65 is denied pursuant to Rice v. State, 113 Nev. 1300, 1312, 949 P.2d  
2 262, 270 (1997) and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

3 65. Ground 66 is denied pursuant to Yarborough v. Gentry, 540 U.S. 1, 5-6, 124  
4 S.Ct. 1, 4 (2003) and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

5 66. Ground 67 is denied pursuant to Domingues v. State, 112 Nev. 683, 917 P.2d  
6 1364 (1996), Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006), and Strickland v.  
7 Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

8 67. Ground 68 is denied pursuant to Rowland v. State, 118 Nev. 31, 39 P.3d 114  
9 (2002), Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006), and Strickland v. Washington,  
10 466 U.S. 668, 104 S.Ct. 2052 (1984).

11 68. Ground 69 is denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
12 S.Ct. 2052 (1984), State v. Green, 81 Nev. 173, 400 P.2d 766 (1965), and Ennis v. State, 122  
13 Nev. 694, 137 P.3d 1095 (2006).

14 69. Ground 70 is denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
15 S.Ct. 2052 (1984), Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and  
16 Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

17 70. Ground 71 is denied pursuant to D'Agostino v. State, 112 Nev. 417, 915 P.2d  
18 264 (1996), Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993), Strickland v.  
19 Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), and Rhyne v. State, 118 Nev. 1, 38 P.3d  
20 163 (2002).

21 71. Grounds 72, and 74 are denied pursuant to NRS 34.810, Lobato v. State 49087  
22 Order of Affirmance 2/5/09, Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975), and  
23 Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). NRS 34.810

24 72. Ground 73 is denied pursuant to Herrera v. Collins, 506 U.S. 390, 113 S.Ct.  
25 853 (1993), Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), Molina v. State,  
26 120 Nev. 185, 87 P.3d 533, 538 (2004), and Hargrove v. State, 100 Nev. 498, 502, 686 P.2d  
27 222, 225 (1984). (See also NRS 176.0918.).

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1 73. Ground 75 is denied pursuant to Lobato v. State 49087 Order of Affirmance  
2 2/5/09, Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975), Strickland v. Washington,  
3 466 U.S. 668, 104 S.Ct. 2052 (1984), and EDCR 3.20.

4 74. Ground 76 is denied pursuant to Strickland v. Washington, 466 U.S. 668, 104  
5 S.Ct. 2052 (1984) and Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

6 75. Ground 77 is denied pursuant to the law cited in the denial of Grounds 1-76  
7 and Mulder v. State, 116 Nev. 1, ~~17, 992 P.2d 845, 854 - 855~~ (2000).

8 76. Ground 78 is denied pursuant to the law cited in the denial of Grounds 1-24  
9 pertaining to evidence, NRS 176.515, Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006),  
10 and Mulder v. State, 116 Nev. 1, ~~17, 992 P.2d 845, 854 - 855~~ (2000).

11 77. Ground 79 is denied pursuant to Hargrove v. State, 100 Nev. 498, 502, 686  
12 P.2d 222, 225 (1984) and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

13 78. The request for counsel was moot when Mr. Barrick confirmed as counsel  
ORDER and the requests for an evidentiary  
hearing and new trial are both unwarranted.

14 THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas  
15 Corpus (Post-Conviction) shall be, and it is, hereby denied.

16 DATED this 14<sup>th</sup> day of June, 2011.

17  
18   
DISTRICT JUDGE SL

19  
20 DAVID ROGER  
21 DISTRICT ATTORNEY  
Nevada Bar #002781

22  
23 BY 

24 Tyler D. Smith  
25 Deputized Law Clerk  
Nevada Bar #011870  
26  
27  
28

**Jason, Debbie**

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**From:** Smith, Tyler  
**Sent:** Tuesday, May 24, 2011 11:23 AM  
**To:** Daniels, Deana; Jason, Debbie  
**Subject:** FW: Lobato Findings of Fact

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**From:** Smith, Tyler  
**Sent:** Tuesday, May 24, 2011 11:17 AM  
**To:** 'Travis N. Barrick'  
**Subject:** RE: Lobato Findings of Fact

Travis:

Thank you for your response. I have no problem with that correction and will make sure the Order is revised to reflect it. I'll go ahead and forward the document to Judge Vega.

Thank you for your professionalism and courtesy throughout this process. I will see you at the next hearing on June 7th.

Tyler

---

**From:** Travis N. Barrick [mailto:tbarrick@gwwwo.com]  
**Sent:** Tuesday, May 24, 2011 11:07 AM  
**To:** Smith, Tyler  
**Cc:** Travis N. Barrick  
**Subject:** RE: Lobato Findings of Fact

Tyler:

Out of respect for all the work you put into the Order, I poured through it, the case law, the Order of Affirmance, the Petition and the Transcript.

Though I disagree completely with the outcome, you did a splendid job on the Order and I have only one objections/corrections (other than to put my name in CAPS just like yours).

In paragraph 38, page 12, I would like it to read: As to Ground 48, regarding counsel's failure to object to Detective Thowsen's testimony in response to a juror's question that he did not do further investigation ...

Thank you for your patience.

Travis N. Barrick, Esq.

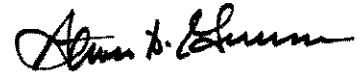


**GALLIAN  
WILCOX**  
WELKER, OLSON  
& BECKSTROM, LLC

540 E. St. Louis Avenue

***EXHIBIT "1"***

NOAS  
Travis Barrick, #9257  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM, L.C.  
540 E. St. Louis Avenue  
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Attorneys for Petitioner



CLERK OF THE COURT

Electronically Filed  
Aug 02 2011 03:20 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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KIRSTIN BLAISE LOBATO,

Petitioner,

Vs.

THE STATE OF NEVADA,

Respondent.

Case No.: C177394

Dept No.: II

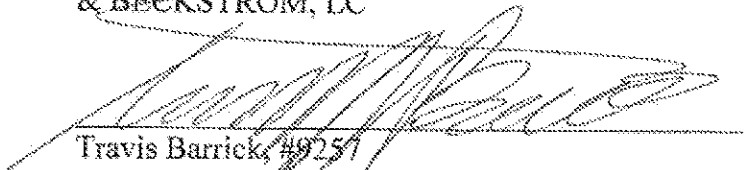
**NOTICE OF APPEAL**

**NOTICE OF APPEAL**

Notice is hereby given that Kirstin Blaise Lobato, petitioner named above, hereby appeals to the Supreme Court of Nevada from the Order denying her Petition for Habeas Corpus, the Order for which was filed on June 16, 2011. As of the date of this Notice of Appeal, no Notice of Entry of Order has been filed or served upon Ms. Lobato.

DATED this   7  <sup>th</sup> day of August 2011.

GALLIAN WILCOX WELKER, OLSON  
& BECKSTROM, LC




Travis Barrick, #9257  
540 E. St. Louis Avenue  
Las Vegas, Nevada 89104  
Attorneys for Petitioner

1 CERTIFICATE OF MAILING

2 I HEREBY CERTIFY that on the 1<sup>st</sup> day of August, 2011, a copy of the foregoing  
3 upon each of the parties by hand delivery and depositing a copy of same in a sealed envelope in  
4 the U. S. mail, registered, first-class postage fully prepaid, and addressed to those counsel of  
5 record:  
6

7 David Rogers, Esq.  
8 District Attorney's Office  
9 200 Lewis Avenue  
10 Las Vegas, Nevada 89155

Catherine Cortez-Masto, Esq.  
Office of the Attorney General  
555 E. Washington Avenue, Suite 3900  
Las Vegas, NV 89101

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15 An Employee of  
16 GALLIAN, WILCOX, WELKER  
17 OLSON & BECKSTROM LC  
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FILED

AUG 02 2011

*Ann L. Johnson*  
CLERK OF COURT

1 NOED

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA  
4

5 KIRSTIN B. LOBATO,

6 Petitioner,

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,  
10

Case No: 01C177394  
Dept No: II

NOTICE OF ENTRY OF  
DECISION AND ORDER

11 PLEASE TAKE NOTICE that on June 16, 2011, the court entered a decision or order in this matter, a  
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you  
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is  
15 mailed to you. This notice was mailed on August 2, 2011.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 By: *Lee Gunter*  
18 Lee Gunter, Deputy Clerk

19 CERTIFICATE OF MAILING

20 I hereby certify that on this 2 day of August 2011, I placed a copy of this Notice of Entry of Decision and  
21 Order in:

22 The bin(s) located in the Office of the District Court Clerk of:  
23 Clark County District Attorney's Office  
24 Attorney General's Office – Appellate Division

25 ☒ The United States mail addressed as follows:

26 Kirstin Lobato # 95558  
4370 Smiley Rd.  
North Las Vegas, NV 89115

Travis Barrick  
540 E. St. Louis Ave.  
Las Vegas, NV 89104

27 *Lee Gunter*  
28 Lee Gunter, Deputy Clerk

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KIRSTIN BLAISE LOBATO,

$$\begin{array}{c} ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \\ ) \end{array}$$

Electronically Filed  
Jan 30 2012 04:55 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

VS.

$$\begin{pmatrix} \cdot \\ \cdot \\ \cdot \\ \cdot \\ \cdot \end{pmatrix}$$

Respondent.

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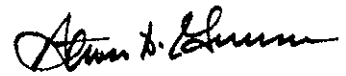
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CLERK OF THE COURT

1 NOTC  
2 Travis Barrick, #9257  
3 GALLIAN, WILCOX, WELKER  
4 OLSON & BECKSTROM, L.C.  
5 540 E. St. Louis Avenue  
6 Las Vegas, Nevada 89104  
7 Telephone: (702) 892-3500  
8 Facsimile: (702) 386-1946  
9 Attorneys for KIRSTIN B. LOBATO

10 **DISTRICT COURT**  
11 **CLARK COUNTY, NEVADA**

12 \* \* \*

13 STATE OF NEVADA,

14 Plaintiff,

15 KIRSTIN B. LOBATO;

16 Defendant.

17 } Case No.: C177394  
18 } Dept No.: II

19 **NOTICE OF APPEARANCE**

20 PLEASE TAKE NOTICE that Travis Barrick, Esq., of GALLIAN, WILCOX,  
21 WELKER, OLSON & BECKSTROM, LC, is hereby making an appearance and is counsel of  
22 record on behalf of Defendant, KIRSTIN LOBATO, in the above captioned matter.

23 ///

24 ///

25 ///

1 Copies of all future pleadings/correspondence regarding the within matter should be sent  
2 to the undersigned.

3 DATED this 5 day of November, 2010.  
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5


6  
7 By: 

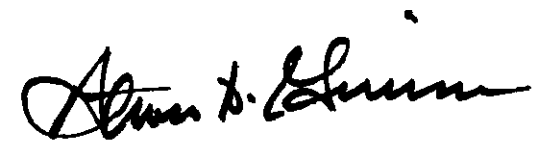
8 Travis Barrick, #9257  
9 Gallian Wilcox Welker  
10 Olson & Beckstrom, LC  
11 540 E. St. Louis Avenue  
12 Las Vegas, Nevada 89104  
13 (702) 892-3500  
14 Attorneys for Defendant  
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**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 5<sup>th</sup> day of November, 2010, a copy of the foregoing  
upon each of the parties by faxing and depositing a copy of same in a sealed envelope in the U.  
S. mail, first-class postage fully prepaid, and addressed to those counsel of record:

David Rogers, Esq.  
District Attorney's Office  
200 Lewis Avenue  
Las Vegas, Nevada 89155

  
An Employee of  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM LC



CLERK OF THE COURT

MOT  
Travis Barrick, #9257  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM, L.C.  
540 E. St. Louis Avenue  
Las Vegas, Nevada 89104  
Telephone: (702) 892-3500  
Facsimile: (702) 386-1946  
Attorneys for Petitioner

**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

**NOTICE OF MOTION AND MOTION  
FOR LIMITED DISCOVERY FOR GOOD  
CAUSE**

**NOTICE OF MOTION AND MOTION FOR LIMITED DISCOVERY FOR  
GOOD CAUSE**

Petitioner, Kirstin Blaise Lobato, by and through her counsel of record, Travis Barrick, hereby submits her Motion for Limited Discovery for Good Cause ("Motion"). This Motion is based upon the papers and pleadings on file herein, and upon such oral argument as the Court should entertain at the hearing thereon.

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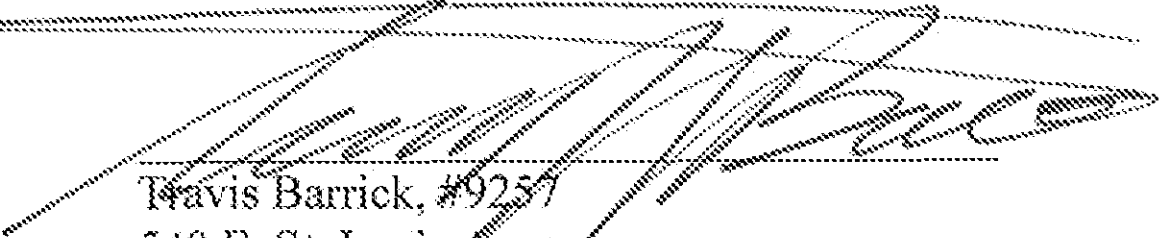
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1 DATED this 23<sup>rd</sup> day of November 2010.

2 GALLIAN WILCOX WELKER, OLSON  
3 & BECKSTROM, LC

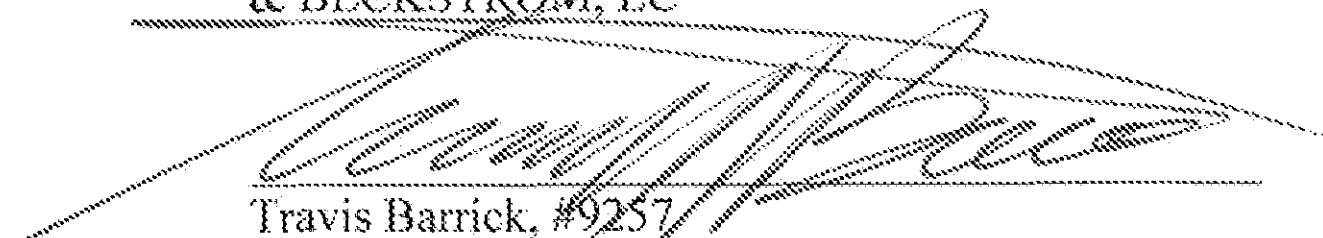
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5 Travis Barrick, #9257  
6 540 E. St. Louis Avenue  
7 Las Vegas, Nevada 89104  
8 Attorneys for Petitioner

9  
10 **NOTICE OF MOTION**

11 PLEASE TAKE NOTICE that counsel for Petitioner will bring the aforementioned  
12 Motion for Limited Discovery for Good Cause on for hearing before the above entitled Court in  
13 Department II on the 15<sup>th</sup> day of December, 2010, at 1:30 pm.

14 DATED this 23<sup>rd</sup> day of November 2010.

16 GALLIAN WILCOX WELKER, OLSON  
17 & BECKSTROM, LC

18   
19 Travis Barrick, #9257  
20 540 E. St. Louis Avenue  
21 Las Vegas, Nevada 89104  
22 Attorneys for Petitioner

23 **I. BACKGROUND FACTS.**

24 Kirstin Lobato is currently incarcerated at the Florence McClure Women's Correctional  
25 Center ("FMWCC"), following a conviction in 2006 of voluntary manslaughter with the use of a  
26 deadly weapon and sexual penetration of a dead human body, arising from the death of Duran  
27 Bailey.

28 On May 5, 2010, Ms. Lobato, in pro per status, filed her Petition for Writ of Habeas  
Corpus (Post-conviction) and Motion for Appointment of Counsel (the "Petition"), wherein she

1 raised seventy-nine grounds challenging the conviction. In Grounds #7, 8 and 10 of the Petition,  
2 Ms. Lobato raises significant scientific issues regarding various theories of the crime advanced  
3 by the prosecution, specifically the time of death of Mr. Bailey. On each of the aforementioned  
4 Grounds, Dr. Glenn M. Larkin has reviewed the evidence and trial transcripts and has developed  
5 expert opinions regarding alternate theories of the crime.

6 On November 23, 2010, Dr. Larkin contacted counsel for Ms. Lobato and informed  
7 counsel that his health was “unstable” and that his deposition should be taken “as early as  
8 possible.”<sup>1</sup>

## 9 II. POINTS AND AUTHORITIES.

### 10 A. Good cause exists to conduct limited discovery.

11 The Nevada Revised Statutes (“NRS”) give this Court the discretion to allow discovery  
12 upon a showing of good cause.<sup>2</sup> In the *Brady* case, the Ninth Circuit has confirmed that a habeas  
13 petitioner “is not entitled to discovery as a matter of ordinary course.”<sup>3</sup> However, good cause  
14 exists “where specific allegations before the court show reason to believe that the petitioner  
15 may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief....”<sup>4</sup>  
16 Where good cause exists, “it is the duty of the court to provide the necessary facilities and  
17 procedures for an adequate inquiry.”<sup>5</sup>

18 Here, good cause exists to allow the parties to depose Dr. Larkin as soon as practical,  
19 because of his failing health. Should he die without being deposed, the Court, the State and Ms.

20  
21  
22 <sup>1</sup> See Paragraph 2 of the Affidavit of Travis Barrick, Esq., attached hereto as Exhibit 1.

23 <sup>2</sup> NRS 34.780 Applicability of Nevada Rules of Civil Procedure; discovery.

24 1. The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with NRS 34.360 to  
25 34.830, inclusive, apply to proceedings pursuant to NRS 34.720 to 34.830, inclusive.

26 2. After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery  
27 available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause  
28 shown grants leave to do so.

3. A request for discovery which is available under the Nevada Rules of Civil Procedure must be accompanied  
by a statement of the interrogatories or requests for admission and a list of any documents sought to be produced.

<sup>3</sup> Bracy v. Gramley, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997).

<sup>4</sup> *Bracy*, 520 U.S. at 908-09, 117 S.Ct. 1793 (quoting Harris v. Nelson, 394 U.S. 286, 300, 89 S.Ct. 1082, 22  
L.Ed.2d 281 (1969) (alteration in original)).

<sup>5</sup> *Harris*, 394 at 300, 89 S.Ct. 1082.

1 Lobato would be deprived of the opportunity to depose Dr. Larkin regarding his expert opinions  
2 regarding the time of Mr. Bailey's death, a critical fact in the State's case against Ms. Lobato.

3 The fact that the Court has not yet granted the writ nor ordered a hearing on the Petition  
4 does not change the fact that good cause exists to allow for Dr. Larkin's deposition before he is  
5 incapacitated or dies.

6 **B. Discovery is properly conducted at the state court level.**

7 The discretion that this Court enjoys regarding discovery is not unbounded. The doctrine  
8 of federal-state comity rests on the conclusion that habeas petitioners have the obligation to  
9 exhaust their claims in state court.<sup>6</sup> Citing the *Keeney* case, the U.S. District Court of Nevada in  
10 the *Sherman* case stated that "[t]he state court is the appropriate forum for resolution of factual  
11 issues in the first instance and creating incentives for the deferral of factfinding to later federal-  
12 court proceedings can only degrade the accuracy and efficiency of judicial proceedings."<sup>7</sup>

13 Here, Ms. Lobato is seeking limited discovery under the purview of the state court as the  
14 appropriate forum to exhaust her state claims and is not seeking to defer factfinding to later  
15 federal court proceedings.

16 **III. CONCLUSION.**

17 Because of the rapidly deteriorating health of Dr. Larkin, good cause exists to allow  
18 limited discovery for the purpose of taking Dr. Larkin's deposition. Petitioner requests that this  
19 Court enter such an Order allowing for Dr. Larkin's deposition as soon as practical.

20 DATED this 23 day of November, 2010.

21  
22 By: 

23 Travis Barrick, #9257  
24 Gallian Wilcox Welker  
25 Olson & Beckstrom, LC  
26 540 E. St. Louis Avenue  
27 Las Vegas, Nevada 89104  
28 (702) 892-3500  
Attorneys for Petitioner

29 <sup>6</sup> *Sherman v. McDaniel*, 333 F.Supp.2d 960 (D.Nev. 2004).

<sup>7</sup> *Sherman* at 969-70, citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992),  
superceded by statute as stated in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000)

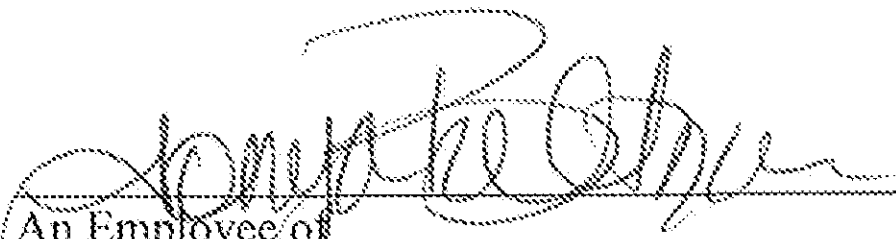
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 24<sup>th</sup> day of November, 2010, a copy of the foregoing  
upon each of the parties by faxing and depositing a copy of same in a sealed envelope in the U.  
S. mail, first-class postage fully prepaid, and addressed to those counsel of record:

David Rogers, Esq.  
District Attorney's Office  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Catherine Cortez Mastos, Esq.  
Attorney General  
555 E. Washington Avenue  
Las Vegas, Nevada 89101

  
An Employee of  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM LC

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## **EXHIBIT 1.**

AFFIDAVIT OF TRAVIS BARRICK, ESQ.

STATE OF NEVADA       )  
                                  )       SS:  
COUNTY OF CLARK       )

I, Travis Barrick, having been first duly sworn on oath, deposes and states as follows:

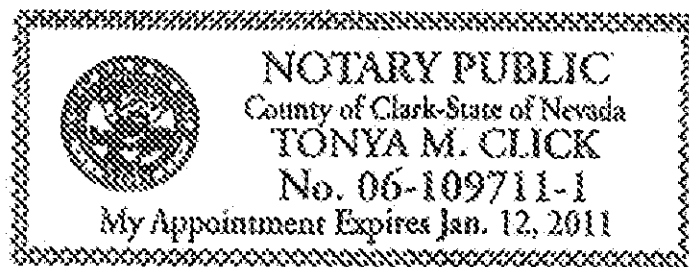
1. I am a resident of Clark County, Nevada over the age of 18 years old and have personal knowledge of the facts and circumstances referenced herein.
2. On November 23, 2010, I received a letter from Dr. Larkin wherein he informed me that his health was "unstable" and that his deposition should be taken "as early as possible." (See letter from Dr. Larkin, dated November 23, 2010, attached hereto as Exhibit A.)
3. On November 9, 2010, the Court set hearings for a series of pending motions in the instant matter, as well as a status check on the Petition, to be heard on December 15, 2010.
4. Further, Affiant sayeth not.

DATED this 23<sup>th</sup> day of November, 2010

  
TRAVIS BARRICK, ESQ.

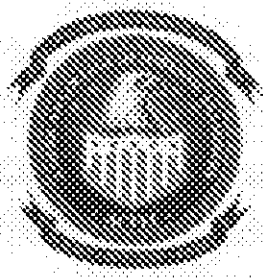
SUBSCRIBED and SWORN to before me this 23<sup>th</sup> day of November, 2010

  
NOTARY PUBLIC in and for said  
County and State.



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## **EXHIBIT A.**



G M Larkin MD  
3700 SHAMROCK DR  
CHARLOTTE NC USA  
704-940-8512  
GMLARKINMD@YAHOO.COM

FORENSIC PATHOLOGY • LEGAL MEDICINE

(23 November 2010)

Travis Barrick, Esq  
540 E St Louis Avenue  
Las Vegas NV 89104-2559

RE : Motion to allow early deposition/ *Kristin "Blaise" Lobato v State of Nevada*

Dear Mr Barrick ,

As a result of four (4) heart attacks in the last nine (9) years and their complications, I cannot travel by air. Because of an AK (above knee) amputation of my right leg, I am wheelchair bound, would require first class travel, and a nurse to accompany me. Add to those three hospitalizations for urinary track infection and cellulitis of my one leg with MRSA (Methicillin Resistant *Staphylococcus aureus* (MSRA) and I need either four(4) or six(6) injections of insulin a day.

I just returned from ten (10) days in hospital for recurrent severe cellulitis, and loaded with intravenous antibiotics have been fighting chronic fatigue, along with early renal insufficiency.

In order to fly to Nevada, I would need a Registered Nurse to accompany me; I am wheelchair bound , unable to wash or dress myself. I would have to fly first class because I cannot flex my knee for any extended time.

With my health unstable as it is, it is to your benefit to get my deposition as early as possible.

Sincerely,

HIC LOCUS ES UBI MORS GAUDET SUCCURENTI VITAE  
FIAT JUSTITIA RUAT CAELUM  
NON VI SEDE ARTE

G M Larkin MD  
3700 SHAMROCK DR  
CHARLOTTE NC USA  
704-940-8512  
GNLARKINMD@YAHOO.COM

FORENSIC PATHOLOGY • LEGAL MEDICINE

G M Larkin MD  
G M Larkin MD

Copy to Hans Shirrer

Sincerely,  
G M Larkin MD  
G M Larkin MD  
CC: Hans Scherrer (Justice Denied)

HIC LOCUS ES UBI MORS GAUDET SUCCURENTI VITAE  
FIAT JUSTITIA RUAT CAELUM  
NON VI SEDE ARTE

  
CLERK OF THE COURT

NOT  
Travis Barrick, #9257  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM, L.C.  
540 E. St. Louis Avenue  
Las Vegas, Nevada 89104  
Telephone: (702) 892-3500  
Facsimile: (702) 386-1946  
Attorneys for Petitioner

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

**NOTICE OF STATE'S FAILURE TO  
TIMELY FILE OPPOSITION TO  
PETITIONER'S MOTION FOR LIMITED  
DISCOVERY FOR GOOD CAUSE**

**NOTICE OF STATE'S FAILURE TO TIMELY FILE OPPOSITION TO  
PETITIONER'S MOTION FOR LIMITED DISCOVERY FOR GOOD CAUSE**

Petitioner, Kirstin Blaise Lobato, by and through her counsel of record, Travis Barrick, hereby submits her Notice of State's Failure to Timely File Opposition to Petitioner's Motion for Limited Discovery for Good Cause ("Motion").

On November 23, 2010, Ms. Lobato filed her Motion. As of December 13, 2010, the State has failed to file an opposition to Ms. Lobato's Motion.

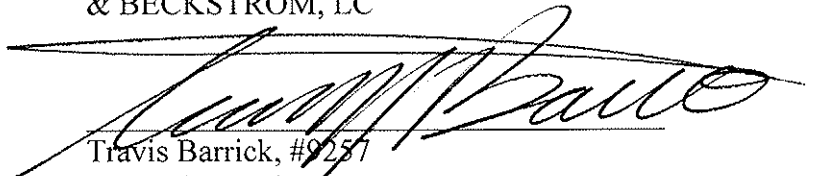
Under either Rule 2.20 or Rule 3.20 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada (the "Local Rules"), the statutory period for the filing of an opposition has run. Under both Rule 2.20 and Rule 3.20 of the Local Rules, "[f]ailure of the

1 opposing party to serve and file written opposition may be construed as an admission that the  
2 motion is meritorious and a consent to granting of the same.”

3 Because the State has failed to file an opposition to Ms. Lobato’s Motion, she  
4 respectfully requests that this Court find that her Motion is meritorious and grant the same.

5  
6 DATED this 13<sup>th</sup> day of December 2010.

7 GALLIAN WILCOX WELKER, OLSON  
8 & BECKSTROM, LC

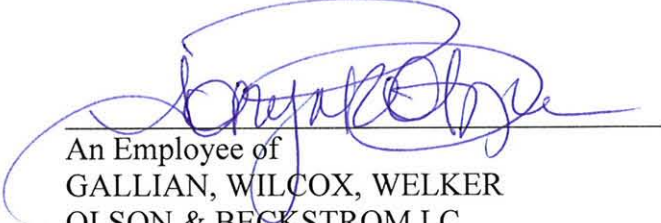
9   
10 Travis Barrick, #9257  
11 540 E. St. Louis Avenue  
12 Las Vegas, Nevada 89104  
13 Attorneys for Petitioner  
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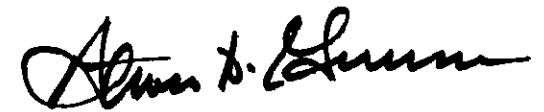
1 **CERTIFICATE OF MAILING**

2 I HEREBY CERTIFY that on the 13<sup>th</sup> day of December, 2010, a copy of the foregoing  
3 upon each of the parties by faxing and depositing a copy of same in a sealed envelope in the U.  
4 S. mail, first-class postage fully prepaid, and addressed to those counsel of record:  
5

6  
7 David Rogers, Esq.  
8 District Attorney's Office  
9 200 Lewis Avenue  
10 Las Vegas, Nevada 89155

11 Catherine Cortez Masto, Esq.  
12 Attorney General  
13 555 E. Washington Avenue  
14 Las Vegas, Nevada 89101

15   
16 An Employee of  
17 GALLIAN, WILCOX, WELKER  
18 OLSON & BECKSTROM LC  
19  
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CLERK OF THE COURT

MOT  
Travis Barrick, #9257  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM, L.C.  
540 E. St. Louis Avenue  
Las Vegas, Nevada 89104  
Telephone: (702) 892-3500  
Facsimile: (702) 386-1946  
Attorneys for Petitioner

**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

**NOTICE OF MOTION AND MOTION  
FOR LEAVE TO CONDUCT LIMITED  
DISCOVERY OF CARDBOARD  
SHOEPRINT EVIDENCE**

**NOTICE OF MOTION AND MOTION FOR LEAVE TO CONDUCT LIMITED  
DISCOVERY OF CARDBOARD SHOEPRINT EVIDENCE**

Petitioner, Kirstin Blaise Lobato, by and through her counsel of record, Travis Barrick, hereby submits her Motion for Leave to Conduct Limited Discovery of Cardboard Shoeprint Evidence ("Motion"). This Motion is based upon the papers and pleadings on file herein, and upon such oral argument as the Court should entertain at the hearing thereon.

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///

1 DATED this 15<sup>th</sup> day of December 2010.

2 GALLIAN WILCOX WELKER, OLSON  
3 & BECKSTROM, LC

4 

5 Travis Barrick, #9257  
6 540 E. St. Louis Avenue  
7 Las Vegas, Nevada 89104  
8 Attorneys for Petitioner

9 **NOTICE OF MOTION**

10 PLEASE TAKE NOTICE that counsel for Petitioner will bring the aforementioned  
11 Motion for Leave to Conduct Limited Discovery of Cardboard Shoeprint Evidence on for  
12 hearing before the above entitled Court in Department II on the 13<sup>th</sup> day of January, 2011, at  
13 ~~10:30 am.~~  
14 9:00 AM

15 DATED this 15<sup>th</sup> day of December 2011.

16 GALLIAN WILCOX WELKER, OLSON  
17 & BECKSTROM, LC

18 

19 Travis Barrick, #9257  
20 540 E. St. Louis Avenue  
21 Las Vegas, Nevada 89104  
22 Attorneys for Petitioner

23 **I. BACKGROUND FACTS.**

24 Kirstin Lobato is currently incarcerated at the Florence McClure Women's Correctional  
25 Center ("FMWCC"), following a conviction in 2006 of voluntary manslaughter with the use of a  
26 deadly weapon and sexual penetration of a dead human body, arising from the death of Duran  
27 Bailey.

28 On May 5, 2010, Ms. Lobato, in pro per status, filed her Petition for Writ of Habeas  
Corpus (Post-conviction) and Motion for Appointment of Counsel ("Petition"), wherein she  
raised Ground 12 regarding shoe prints on cardboard recovered from the crime scene.

1       **II.       POINTS AND AUTHORITIES.**

2       **A.   Good cause exists to grant limited discovery regarding cardboard imprinted with**  
3       **bloody shoeprints.**

4       **a.   The shoeprint evidence.**

5       Ground 12 of Ms. Lobato's Petition details the possible exculpatory evidence provided  
6       by cardboard covering the body of Duran Bailey (the "Cardboard").<sup>1</sup> Crime scene investigators  
7       obtained evidence of three categories of shoe prints at the scene: (i) non-bloody shoeprints on  
8       the concrete, (ii) bloody shoeprints on the concrete and (iii) bloody shoeprints on the Cardboard.

9       Criminologist George J. Schiro, Jr.,<sup>2</sup> has reviewed all the photographic evidence of the  
10      various shoeprints and determined that they were all made by "a men's U.S. size 9 or women's  
11      U.S. size 10 "Spitfire" model ... shoe manufactured for WalMart by Athletic Works"<sup>3</sup>

12      In particular, Mr. Schiro's examination of the photographs of the Cardboard revealed "a  
13      non-bloody partial right heel pattern that has the same heel pattern as the "Spitfire" model right  
14      shoe."<sup>4</sup> In his opinion, "on the top part of this heel print is a transfer pattern of blood indicating  
15      that the heel print came before the transfer of blood and before the right shoe stepped in blood  
16      creating the bloody shoeprints found on the concrete."<sup>5</sup> To Mr. Schiro, "this suggests that the  
17      person wearing the ["Spitfire"] shoe was present before and after blood was shed at the scene  
18      and that the wearer of the ["Spitfire"] shoe concealed Mr. Bailey's body with trash."<sup>6</sup>

19      In order to determine if this sequence of events is supported by the shoeprint patterns  
20      and blood transfer patterns, the Cardboard "must be thoroughly examined."<sup>7</sup> In addition,  
21      "measurements of the bloody and non-bloody shoeprints on the cardboard must be taken to  
22      determine if they are the same size or if they are two different sized shoes."<sup>8</sup>

23      <sup>1</sup> Grounds 23, 24, 41 and 44 also reference the shoeprints imprinted on the Cardboard.

24      <sup>2</sup> See the 4<sup>th</sup> Affidavit of George J. Schiro, Jr., attached hereto as Exhibit 1.

25      <sup>3</sup> Schiro Affidavit at 33.

26      <sup>4</sup> Schiro Affidavit at 35.

27      <sup>5</sup> Schiro Affidavit at 36.

28      <sup>6</sup> Schiro Affidavit at 37.

<sup>7</sup> Schiro Affidavit at 38.

<sup>8</sup> Schiro Affidavit at 39.

1 Mr. Schiro is willing to examine the Cardboard at his own expense and “the examination  
2 and documentation of the cardboard can be accomplished without altering the original  
3 evidence.”<sup>9</sup>

4 **b. Standard of Proof.**

5 In the *Schlup* case,<sup>10</sup> the United States Supreme Court has established that the standard  
6 of proof that Ms. Lobato must meet to have a new evidence claim granted is “it is more likely  
7 than not that no reasonable juror would have convicted him in light of the new evidence  
8 presented in habeas proceedings.”

9 The State’s theory of the case is that the various shoeprints at the scene were made by an  
10 unknown disinterested person who came upon Mr. Bailey’s dead body in the enclosure.

11 Mr. Schiro’s Report dated March 8, 2010 (the “Schiro Report”), is Exhibit 45 to tMs.  
12 Lobato’s Petition. Mr. Schiro describes the importance of the shoeprints imprinted on the  
13 cardboard:

14 Bloody and non-bloody patent shoeprints with the same tread pattern were photographed  
15 and documented at the crime scene. A non-bloody shoeprint on one of the pieces of  
16 cardboard had a blood transfer stain deposited over it. This indicates that someone  
17 stepped on the cardboard, then this blood transfer stain was deposited over a portion of  
18 this non-bloody shoeprint. This indicates that the person wearing these shoes could have  
19 been present before and after the bloodshed took place at the scene. The non-bloody  
20 shoeprint and cardboard should be examined further and analyzed.

21 The bloody shoeprints could have only been left by the person concealing Mr. Bailey’s  
22 body because all of the blood was covered by the trash concealing his body. Cardboard  
23 was first used to cover his body, then the trash was used to further conceal his body and  
24 the blood. While the body and blood were being concealed with trash, the source of the  
25 shoeprints stepped in blood and tracked them out upon exiting the enclosure.

26 If Mr. Schiro’s theory of the case is supported by an examination of the crime scene  
27 evidence, then the wearer of the “Spitfire” shoe is more likely than not the killer of Mr. Bailey.  
28 And because trial testimony by LVMPD impressions expert Joel Geller excluded Ms. Lobato as the  
source of the bloody shoeprints,<sup>11</sup> then it is more likely than not that Ms. Lobato was not at the scene  
before or after the blood was shed and therefore was not the killer of Mr. Bailey.

<sup>9</sup> Schiro Affidavit at 41 and 42.

<sup>10</sup> *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995).

<sup>11</sup> (Trans. XI-114, 9-25-2006.)

1                   **c. Ms. Lobato has good cause for requesting limited discovery of the Cardboard**  
2                   **shoeprint evidence.**

3                   The US Supreme Court ruled in the *Bracy* case<sup>12</sup> that where a petitioner has shown good  
4 cause, they are entitled to limited discovery to develop the facts supporting their contention.  
5 There, the Court specifically stated that “[we] conclude that petitioner has shown “good cause”  
6 for discovery under Rule 6(a). In *Harris*, we stated that “[w]here specific allegations before the  
7 court show reason to believe that the petitioner may, if the facts are fully developed, be able to  
8 demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary  
9 facilities and procedures for an adequate inquiry.”<sup>13</sup> Although *Bracy* specifically relates to  
10 discovery under the federal *habeas* statute, the broad principle upon which the Supreme Court relied  
11 is that a *habeas* petitioner should be able to fully develop facts that will “demonstrate that he is . . .  
12 entitled to relief.” That general principle of law is as applicable to discovery in a Nevada *habeas*  
13 proceeding under NRS 34.780 as it is in a federal *habeas* proceeding under 28 U.S.C. §2254 Rule  
14 6(a).

15                   Here, through no fault of her own, Ms. Lobato did not have access to the Cardboard  
16 prior to the filing of her Petition. As a result, she was not able to have the bloody shoeprints  
17 sized and the new exculpatory evidence was not included in her Petition. It would be contrary to  
18 the interests of justice for Ms. Lobato to be penalized by not having the new evidence of the  
19 cardboard shoeprint sizing available to the finder of fact, when it may provide conclusive  
20 exculpatory evidence.

21                   **d. Discovery is properly conducted at the state court level.**

22                   The discretion that this Court enjoys regarding discovery is not unbounded. The doctrine  
23 of federal-state comity rests on the conclusion that *habeas* petitioners have the obligation to  
24 exhaust their claims in state court.<sup>14</sup> Citing the *Keeney* case, the U.S. District Court of Nevada in  
25 the *Sherman* case stated that “[t]he state court is the appropriate forum for resolution of factual  
26  
27

28 <sup>12</sup> *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793 (U.S. 06/09/1997).

<sup>13</sup> *Bracy*, 520 U.S. at 908-909.

<sup>14</sup> *Sherman v. McDaniel*, 333 F.Supp.2d 960 (D.Nev. 2004).

1 issues in the first instance and creating incentives for the deferral of factfinding to later federal-  
2 court proceedings can only degrade the accuracy and efficiency of judicial proceedings.”<sup>15</sup>

3 Here, Ms. Lobato is seeking limited discovery under the purview of the state court as the  
4 appropriate forum to exhaust her state claims and is not seeking to defer factfinding to later  
5 federal court proceedings.

6 **III. CONCLUSION.**

7 The Court has good grounds to exercise its discretion in allowing limited discovery of  
8 the cardboard shoeprint evidence and the Petitioner humbly requests that the Court do so.

9 DATED this 15 day of December, 2010.

12  
13 By: 

14 Travis Barrick, #9257  
15 Gallian Wilcox Welker  
16 Olson & Beckstrom, LC  
17 540 E. St. Louis Avenue  
18 Las Vegas, Nevada 89104  
19 (702) 892-3500  
20 Attorneys for Petitioner  
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<sup>15</sup> *Sherman* at 969-70, citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992),  
superceded by statute as stated in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000)

1 CERTIFICATE OF MAILING

2 I HEREBY CERTIFY that on the 14<sup>th</sup> day of December, 2010, a copy of the foregoing  
3 upon each of the parties by faxing and depositing a copy of same in a sealed envelope in the U.  
4 S. mail, first-class postage fully prepaid, and addressed to those counsel of record:  
5  
6

7 David Rogers, Esq.  
8 District Attorney's Office  
9 200 Lewis Avenue  
10 Las Vegas, Nevada 89155

11   
12 An Employee of  
13 GALLIAN, WILCOX, WELKER  
14 OLSON & BECKSTROM LC  
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# **EXHIBIT 1.**

**4th AFFIDAVIT OF GEORGE J. SCHIRO, JR.**

STATE OF LOUISIANA

PARISH OF IBERIA

I, George J. Schiro, Jr., being duly sworn, depose and state as follows:

1. I have a Master of Science Degree in Industrial Chemistry-Forensic Science from the University of Central Florida, as well as a Bachelor of Science Degree in Microbiology from Louisiana State University.

2. I hold a certificate of Professional Competency in Criminalistics issued by the American Board of Criminalistics, with the specialty area of Molecular Biology.

3. I have over 25 years of experience as a forensic scientist and crime scene investigator.

4. For approximately four years, I was employed as a Criminalist with the Jefferson Parish Sheriff's Office Crime Lab in Metairie, Louisiana.

5. Following my employment with the Jefferson Parish Sheriff's Office Crime Lab, I was employed for approximately fourteen years as a Forensic Scientist with the ASCLD-LAB accredited Louisiana State Police Crime Lab in Baton Rouge.

6. While there, I worked in several areas including shoeprint identification and bloodstain pattern analysis.

7. For over eight years I have been employed as a Forensic Chemist – DNA Technical Leader by the ASCLD-LAB accredited Acadiana Criminalistics Laboratory in New Iberia, Louisiana.

8. My current duties include serology, bloodstain pattern analysis, crime scene investigation, and DNA analysis.

9. Throughout my career, I have attended over 40 professional schools, workshops, meetings, and symposia dealing with various aspects of forensic science.

10. This continuing education included specialized training in shoeprint identification and specialized training in bloodstain pattern analysis.

11. I have also provided training on various aspects of forensic science, bloodstain pattern analysis, and crime scene investigation to numerous criminal justice organizations locally, statewide, nationally, and internationally.

12. I have worked over 3000 cases, some of which included shoeprint identification and bloodstain pattern analysis.

13. I have testified as an expert for either the prosecution or defense in over 150 trials in 29 Louisiana parishes, one Arkansas county, one California county, one Florida county, one Mississippi county, one Missouri county, one Nevada county, one New York county, one Texas county, one West Virginia county, federal court and two Louisiana city courts.

14. Several of these expert testimonies were in bloodstain pattern analysis and shoeprint identification.

15. I have also consulted on cases in 23 states, for the United States Army and Air Force, and in the United Kingdom.

16. I am a fellow of the American Academy of Forensic Sciences, a member of the Association for Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

17. In April of 2002, I was contacted by Gloria Navarro with the Clark County Special Public Defender's Office to review documents and photographs from the homicide of Duran Bailey.

18. I was requested to conduct a crime scene reconstruction and provide forensic science interpretation for the trial in State of Nevada v. Kirstin Lobato, Case No. C177394.

19. I determined that bloody shoeprints were photographed and documented at the crime scene. I also determined that these bloody shoeprints could have only been left by the person concealing Mr. Bailey's body because all of the blood was covered by the trash concealing his body. I also determined that the cardboard was first used to cover his body, then the trash was used to further conceal his body and the blood. I further determined that while the body and blood were being concealed with trash, the source of the shoeprints stepped in blood and tracked them out upon exiting the enclosure.

20. William J. Bodziak's report dated March 27, 2002 states that these shoeprints "...most closely correspond to a U.S. men's size 9 athletic shoe of this type. The American women's size equivalent would be approximately size 10." His report further states "...the length of the LOBATO right foot equates to U.S. men's sizes between 6 to 6 1/2. The American women's size equivalent would be approximately size 7 1/2. The right foot size of KIRSTEN LOBATO would therefore be at least 2 1/2 sizes smaller than the estimated crime scene shoe size."

21. The Las Vegas Metropolitan Police Department (LVMPD) Crime Scene Report dated 07-20-01 by Crime Scene Analyst II Jenny Carr states that "...a pair of black and white "Nike Air" size 7.5 tennis shoes were recovered, by myself, from the hands of Kirsten Lobato and impounded into evidence." I determined that these shoes are the same size of shoes that Mr. Bodziak states Ms. Lobato would normally wear.

22. I determined that based upon the shoe size of the impressions and the size of the shoes received from Ms. Lobato, Ms. Lobato is excluded as the source of the bloody shoeprints found at the crime scene. There is no indication that any shoes in Ms. Lobato's possession were size 10 or that they matched the bloody shoeprints found at the scene.

23. I further determined that the crime scene shoeprints were never sent to the FBI and entered into the FBI Shoeprint Database. This database could have provided investigative information, such as, is the shoe a male or female style shoe; whether the shoe is an expensive, exclusively made shoe or a common, inexpensive shoe; or if the shoe is widely distributed or if it had limited distribution.

24. On December 11, 2009, Mr. Hans Sherrer provided me with examination quality photographs of the bloody shoeprints on the concrete at the scene of Mr. Bailey's homicide.

25. On January 20, 2010, Mr. Sherrer provided me with four photographs of possible shoeprints on cardboard recovered from Mr. Bailey's homicide scene.<sup>1</sup>

26. This was the first time that I saw the photographs of the cardboard and its associated shoeprints.

27. An examination of the cardboard photographs revealed two distinct bloody shoeprints.

28. I determined that the two bloody shoeprints on the cardboard have the same sole pattern as the two bloody shoeprints photographed on the concrete.

29. I determined that both sets of patterns are from a right shoe.

30. On January 31, 2010, I submitted photographs of the two bloody shoeprints on the concrete and the two bloody shoeprints on the cardboard to Foster + Freeman's shoeprint database at <https://secure.crimeshoe.com/home.php>.

31. On February 1, 2010, I received a report from Foster + Freeman indicating that the sole pattern is from a "Spitfire" model right shoe manufactured for WalMart by Athletic Works.

---

<sup>1</sup> These photos show the same shoeprints that were entered into evidence as Defense Exhibit E (marked 5-10-02, C177394) during Ms. Lobato's trial in May 2002.

32. On February 1, 2010, I made an inquiry to WalMart hoping to obtain contact information for Athletic Works to determine manufacturing and distribution information for that model of shoe. As of the date of this affidavit, no one has provided me with Athletic Works' contact information.

33. I determined that, given the information provided by Mr. Bodziak, the bloody shoeprints on the concrete are from a men's U.S. size 9 or women's U.S. size 10 "Spitfire" model right shoe manufactured for WalMart by Athletic Works.

34. There is no indication that any shoes in Ms. Lobato's possession were size 10 or that they matched the bloody shoeprints found at the crime scene.

35. Further examination of the cardboard photographs revealed a patent non-bloody partial right heel pattern that has the same heel pattern as the "Spitfire" model right shoe.

36. I determined that on top of part of this patent heel print is a transfer pattern of blood indicating that the heel print came before the transfer of blood and before the right shoe stepped in blood creating the bloody shoeprints found on the concrete.

37. This 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.

38. The cardboard must be thoroughly examined to determine if this sequence of events is supported by the shoeprint patterns and blood transfer patterns.

39. Measurements of the bloody and non-bloody shoeprints on the cardboard must be taken to determine if they are of the same size or if they are two different sized shoes.

40. Sizing of the shoeprints on the cardboard, a thorough examination of the shoeprints on the cardboard, and a thorough examination of the blood transfer pattern would provide valuable new evidence relating to the crime scene reconstruction.

41. The examination and documentation of the cardboard can be accomplished without altering the original evidence.

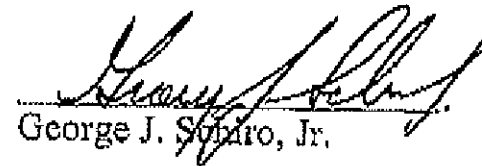
42. If time, scheduling, and finances permit, I can personally fly to Las Vegas and thoroughly examine and document the cardboard.

43  
43. If this cardboard has not been destroyed, it should be preserved.

44  
44. The cardboard should be documented and examined thoroughly.  
45

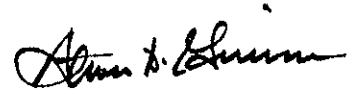
45  
44. There is no physical evidence associating Kirstin Lobato with Duran Bailey or the  
on crime scene. Ms. Lobato is also excluded as the source of key physical evidence found at the  
crime scene.

I swear that the foregoing is true and correct to the best of my knowledge.

  
George J. Sobiro, Jr.

Sworn to and subscribed before me on  
this 3<sup>rd</sup> day of December, 2010.

  
Notary Cheryl C. Reaux #11635

  
CLERK OF THE COURT

**OPPS**  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
TYLER D. SMITH  
Deputized Law Clerk  
Nevada Bar #0011870  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KIRSTIN BLAISE LOBATO,  
#1691351

Defendant.

CASE NO: 01C177394

DEPT NO: II

**STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR LIMITED DISCOVERY  
AND NOTICE OF STATE'S FAILURE TO FILE A TIMELY RESPONSE**

DATE OF HEARING: January 13, 2011

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through TYLER D. SMITH, Deputized Law Clerk, and hereby submits the attached Points and Authorities in Support of its Opposition to Defendant's Motion for Limited Discovery and Notice of State's Failure to File a Timely Response.

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

///

///

///

002215

O:Travis Barrick COMPANY:Gallian, Wilcox, Welker, Olson &amp; Beckstrom, LC

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On August 9, 2001, Kirstin Blaise Lobato, hereinafter "Defendant," was charged by  
4 way of Information with Murder With Use of a Deadly Weapon (Open Murder) and Sexual  
5 Penetration of a Dead Human Body. Defendant's jury trial began on May 7, 2002. On May  
6 18, 2002, Defendant was found guilty of First Degree Murder With Use of a Deadly Weapon  
7 and Sexual Penetration of a Dead Human Body. On August 27, 2002, Defendant was  
8 sentenced as follows: Count 1 - First Degree Murder With Use of a Deadly Weapon, to a  
9 maximum of fifty (50) years and a minimum parole eligibility of twenty (20) years plus and  
10 equal and consecutive term for use of a deadly weapon; Count 2 -- Sexual Penetration of a  
11 Dead Human Body, to a maximum of fifteen (15) years and a minimum parole eligibility of  
12 five (5) years, to run concurrently with Count 1; further, a Special Sentence of Lifetime  
13 Supervision imposed to commence upon release of any term of probation, parole, or  
14 imprisonment; two hundred thirty-three (233) days credit for time served. A Judgment of  
15 Conviction (Jury Trial) was filed September 16, 2002.

16 Defendant filed a Notice of Appeal on October 15, 2002. On September 3, 2004, the  
17 Nevada Supreme Court reversed Defendant's conviction and remanded for a new trial.  
18 Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Remittitur issued on September 24,  
19 2004.

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

O:Travis Barrick COMPANY:Gallian, Wilcox, Welker, Olson & Beckstrom, LC

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

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

8 Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on May 5,  
9 2010. The State filed its Response to Defendant's Petition for Writ of Habeas Corpus (Post-  
10 Conviction) on August 20, 2010. Defendant filed her Answer to the State's Response on  
11 October 2, 2010. Defendant's petition is currently on calendar for November 9, 2010.

12 Ms. Michelle Revell filed a Motion for the Recusal of Judge Vega, Motion for  
13 Expedited Hearing and Extension of Time, and a Motion for the Assignment of a Civil Case  
14 Number on Defendant's behalf on September 7, 2010. The State filed a Motion to Strike on  
15 September 14, 2010, because those motions were fugitive documents. The court *sua sponte*  
16 struck the motions and granted the State's motion to strike on September 17, 2010.

17 Subsequently, on September 21, 2010, Defendant filed a Motion for the Recusal of  
18 Judge Vega. The State filed a Motion to Strike, or in the Alternative, Opposition to  
19 Defendant's Motion for Recusal of Judge Vega on September 29, 2010. On October 5, 2010,  
20 that matter was transferred to District Court Department VIII. Defendant's motion was  
21 denied by the Honorable Douglas Smith, District Court Judge on October 20, 2010.

22 Defendant filed her Motion for Limited Discovery on November 23, 2010. Defendant  
23 filed her Notice of State's Failure to Timely File Opposition on December 13, 2010.  
24 Defendant's Motion for Discovery was originally scheduled to be heard on December 15,  
25 2010. However, due to scheduling conflicts the Court has since rescheduled the motion to  
26 January 13, 2011. The State's opposition is as follows.

27 ///

28 ///

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1 ARGUMENT

2 I

3 **DEFENDANT IS NOT ENTITLED TO POST-CONVICTION DISCOVERY**

4 In so much as Defendant is requesting post-conviction discovery, such discovery is  
5 not available except on a showing of good cause after a writ has been granted.

6 “**After the writ has been granted** and a date set for the hearing, a party may  
7 invoke any method of discovery available under the Nevada Rules of Civil  
8 Procedure if, and to the extent that, the judge or justice for good cause shown  
9 grants leave to do so.”

10 N.R.S. 34.780(2) (emphasis added). In this case, no writ has been granted. Furthermore,  
11 Defendant has failed to delineate any good cause for such discovery. The failing health of  
12 Defendant’s expert, while unfortunate, does not constitute good cause as the court has yet to  
13 determine whether or not Dr. Larkin’s opinions are grounds to grant the writ. As such, her  
14 motion should be denied.

15 Defendant’s argument that the State’s alleged failure to file a timely opposition to her  
16 motion should be construed by this court as an admission that it is meritorious is absurd.  
17 Defendant is essentially arguing she is entitled to a default ruling. However, default  
18 judgments against the State are inappropriate in habeas proceedings. See Warden v. O’Brian,  
19 93 Nev. 211, 562 P.2d 484 (1977).

20 CONCLUSION

21 Based upon the foregoing arguments, Defendant’s motion must be denied.

22 DATED this 22nd day of December, 2010.

23 Respectfully submitted,

24 DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781

25 BY /s/ Tyler D. Smith

26 TYLER D. SMITH  
27 Deputized Law Clerk  
28 Nevada Bar #0011870

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing was made this 22nd day of  
December, 2010, by facsimile transmission to:

TRAVIS BARRICK, ESQ.  
FAX: (702) 386-1946

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

  
CLERK OF THE COURT

RPLY  
Travis Barrick, #9257  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM, L.C.  
540 E. St. Louis Avenue  
Las Vegas, Nevada 89104  
Telephone: (702) 892-3500  
Facsimile: (702) 386-1946  
Attorneys for Petitioner

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

**REPLY IN SUPPORT OF MOTION FOR  
LIMITED DISCOVERY FOR GOOD  
CAUSE**

Date: January 13, 2011  
Time: 9:00 am

**REPLY IN SUPPORT OF MOTION FOR LIMITED DISCOVERY FOR GOOD  
CAUSE**

Petitioner, Kirstin Blaise Lobato, by and through her counsel of record, Travis Barrick, hereby submits her Reply in Support of Motion for Limited Discovery for Good Cause ("Reply"). This Reply is based upon the papers and pleadings on file herein, and upon such oral argument as the Court should entertain at the hearing thereon.

**I. POINTS AND AUTHORITIES.**

**A. The State overextends a blanket prohibition of discovery.**

The State cites the NRS 34.780<sup>1</sup> for the proposition that because the writ has not been granted, Ms. Lobato is not entitled to discovery *of any kind*. By way of such a proposition, the State would strip the District Court of *any* discretion regarding discovery.

<sup>1</sup> NRS 34.780 Applicability of Nevada Rules of Civil Procedure; discovery.

I. The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with NRS 34.360 to 34.830, inclusive, apply to proceedings pursuant to NRS 34.720 to 34.830, inclusive.

1 On the contrary, in the *Bracy* case, while the Ninth Circuit has confirmed that a habeas  
2 petitioner "is not entitled to discovery as a matter of ordinary course,"<sup>2</sup> good cause exists  
3 "where specific allegations before the court show reason to believe that the petitioner may, if the  
4 facts are fully developed, be able to demonstrate that he is ... entitled to relief...."<sup>3</sup> Where good  
5 cause exists, "it is the duty of the court to provide the necessary facilities and procedures for an  
6 adequate inquiry."<sup>4</sup>

7 As proffered, the State's proposition would in all cases bar the District Court from  
8 performing a particular "duty" to provide "procedures" for an "adequate inquiry." As stated in  
9 the *Sherman* case, the doctrine of federal-state comity rests on the conclusion that habeas  
10 petitioners have the obligation to exhaust their claims in state court.<sup>5</sup> Citing the *Keeney* case, the  
11 U.S. District Court of Nevada in the *Sherman* case stated that "[t]he state court is the  
12 appropriate forum for resolution of factual issues in the first instance and creating incentives for  
13 the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and  
14 efficiency of judicial proceedings."<sup>6</sup>

15 As set forth in the *Byford* case<sup>7</sup>, the District Court is required to make findings of fact in  
16 granting or denying Ms. Lobato's Petition and "enter an order that sets forth specific findings of  
17 fact and conclusions of law to support its decision disposing of them."<sup>8</sup> By way of its argument  
18

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19 2. After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery  
20 available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause  
shown grants leave to do so.

21 3. A request for discovery which is available under the Nevada Rules of Civil Procedure must be accompanied  
22 by a statement of the interrogatories or requests for admission and a list of any documents sought to be produced.

23 <sup>2</sup> *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997).

24 <sup>3</sup> *Bracy*, 520 U.S. at 908-09, 117 S.Ct. 1793 (quoting *Harris v. Nelson*, 394 U.S. 286, 300, 89 S.Ct. 1082, 22  
L.Ed.2d 281 (1969) (alteration in original)).

25 <sup>4</sup> *Harris*, 394 at 300, 89 S.Ct. 1082.

26 <sup>5</sup> *Sherman v. McDaniel*, 333 F.Supp.2d 960 (D.Nev. 2004).

27 <sup>6</sup> *Sherman* at 969-70, citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992),  
superceded by statute as stated in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000).

28 <sup>7</sup> *Byford v. The State of Nevada*, 156 P.3d 691 (2007).

<sup>8</sup> *Byford* at 692.

1 above, the State would deprive the District Court of any mechanism to resolve factual issues in  
2 advance of an evidentiary hearing.

3 **B. The State's reliance on *Warden v. O'Brian* is misplaced.**

4 The State errs in equating Ms. Lobato's **Petition** with her **Motion**. The State cites the  
5 case of *Warden v. O'Brian*<sup>9</sup> for the proposition that default judgments against the State are  
6 always inappropriate in *habeas* proceedings. There, the petitioner sought a total release from  
7 custody because the warden had failed to sign the State's Return. When the District Court  
8 granted the petitioner's Motion to Strike and granted his Petition, the Supreme Court reversed  
9 and simply stated that "default judgments in habeas proceedings are not available as procedure  
10 to empty state prisons."<sup>10</sup>

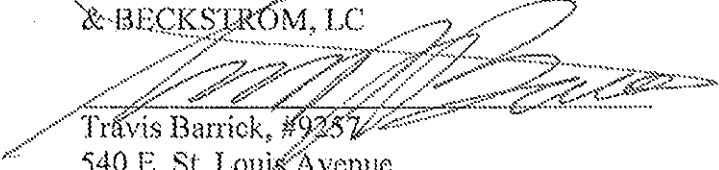
11 Here, Ms. Lobato Motion for Limited Discovery is not seeking that she be "blindly and  
12 arbitrarily" released from prison.<sup>11</sup> Granting her motion because the State failed to timely  
13 respond would not equal the entry of a default judgment against the State. Thus, the blanket  
14 prohibition stated in the *Warden v. O'Brian* case is inapplicable and the District Court retains its  
15 discretion as set forth above.

16 **II. CONCLUSION.**

17 The District Court retains its full discretion to grant Ms. Lobato's request for limited  
18 discovery and the Petitioner humbly requests that this Court enter such an Order allowing for  
19 Dr. Larkin's deposition as soon as practical.

20 DATED this 4<sup>th</sup> day of January 2011.

21 GALLIAN WILCOX WELKER, OLSON  
22 & BECKSTROM, LC

23   
24 Travis Barrick, #9257  
25 540 E. St. Louis Avenue  
26 Las Vegas, Nevada 89104  
Attorneys for Petitioner

27 <sup>9</sup> *Warden v. O'Brian*, 93 Nev. 211, 562 P.2d 484 (1977).

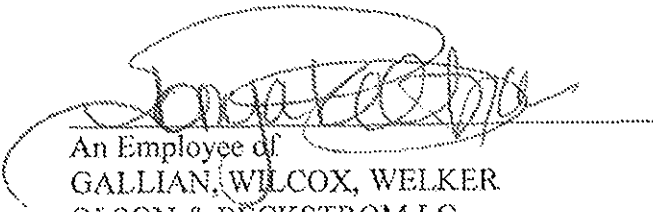
28 <sup>10</sup> *Warden v. O'Brian* at 485 (citing *Allen v. Perini*, 424 F.2d 134 (6<sup>th</sup> Cir. 1970).

<sup>11</sup> See *Marshall v. Geer*, 140 Colo. 305, 344 P.2d 440, 442 (1959), which held that the court "should not blindly and arbitrarily release a prisoner, not entitled to release, because of a late return and answer or even because of total lack of a return or answer."

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 5<sup>th</sup> day of January, 2011, a copy of the foregoing  
was served upon each of the parties by faxing and depositing a copy of same in a sealed  
envelope in the U. S. mail, first-class postage fully prepaid, and addressed to those counsel of  
record:

David Rogers, Esq.  
District Attorney's Office  
200 Lewis Avenue  
Las Vegas, Nevada 89155

  
An Employee of  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM LC

  
CLERK OF THE COURT

**OPPS**

DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781  
TYLER D. SMITH  
Deputized Law Clerk  
Nevada Bar #011870  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KIRSTIN BLAISE LOBATO,  
#1691351

Defendant.

CASE NO: 01C177394

DEPT NO: II

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR LIMITED DISCOVERY  
OF CARDBOARD SHOEPRINT EVIDENCE

DATE OF HEARING: January 13, 2011

TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
TYLER D. SMITH, Deputized Law Clerk, and hereby submits the attached Points and  
Authorities in Support of its Opposition to Defendant's Motion for Limited Discovery of  
Cardboard Shoeprint Evidence.

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

///

///

O:Travis Barrick COMPANY:Gallian, Wilcox, Welker, Olson & Beckstrom, LC

**POINTS AND AUTHORITIES**

**STATEMENT OF THE CASE**

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

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

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

O:\Travis Barrick COMPANY:Gallian, Wilcox, Welker, Olson & Beckstrom, LC

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

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

8 Defendant filed a Petition for Writ of Habeas Corpus (Post-Conviction) on May 5,  
9 2010. The State filed its Response to Defendant's Petition for Writ of Habeas Corpus (Post-  
10 Conviction) on August 20, 2010. Defendant filed her Answer to the State's Response on  
11 October 2, 2010. Defendant's petition is currently on calendar for November 9, 2010.

12 Ms. Michelle Revell filed a Motion for the Recusal of Judge Vega, Motion for  
13 Expedited Hearing and Extension of Time, and a Motion for the Assignment of a Civil Case  
14 Number on Defendant's behalf on September 7, 2010. The State filed a Motion to Strike on  
15 September 14, 2010, because those motions were fugitive documents. The court *sua sponte*  
16 struck the motions and granted the State's motion to strike on September 17, 2010.

17 Subsequently, on September 21, 2010, Defendant filed a Motion for the Recusal of  
18 Judge Vega. The State filed a Motion to Strike, or in the Alternative, Opposition to  
19 Defendant's Motion for Recusal of Judge Vega on September 29, 2010. On October 5, 2010,  
20 that matter was transferred to District Court Department VIII. Defendant's motion was  
21 denied by the Honorable Douglas Smith, District Court Judge on October 20, 2010.

22 Defendant filed the instant motion on December 16, 2010. The State's opposition is  
23 as follows.

## 24 ARGUMENT

### 25 I

#### 26 **DEFENDANT IS NOT ENTITLED TO POST-CONVICTION DISCOVERY**

27 In so much as Defendant is requesting post-conviction discovery, such discovery is  
28 not available except on a showing of good cause after a writ has been granted.

O:Travis Barrick COMPANY:Gallian, Wilcox, Welker, Olson & Beckstrom, LC

1 "After the writ has been granted and a date set for the hearing, a party may  
2 invoke any method of discovery available under the Nevada Rules of Civil  
3 Procedure if, and to the extent that, the judge or justice for good cause shown  
4 grants leave to do so."

5 N.R.S. 34.780(2) (emphasis added). In this case, no writ has been granted. Furthermore,  
6 since Defendant has failed to delineate any good cause for such discovery at all, she has  
7 clearly failed to establish good cause to circumvent the clear and unambiguous wording of  
8 the statute and conduct discovery before a writ has been granted.

9 **CONCLUSION**

10 Based upon the foregoing arguments, Defendant's motion must be denied.

11 DATED this 10th day of January, 2011.

12 Respectfully submitted,

13 DAVID ROGER  
14 Clark County District Attorney  
Nevada Bar #002781

15  
16 BY Tyler D. Smith  
17 TYLER D. SMITH  
18 Deputized Law Clerk  
19 Nevada Bar #011870

20  
21 **CERTIFICATE OF FACSIMILE TRANSMISSION**

22 I hereby certify that service of the above and foregoing was made this 10th day of  
23 January, 2011, by facsimile transmission to:

24 TRAVIS BARRICK, ESQ.  
25 FAX: (702) 386-1946

26 BY: /s/ J. Georges  
27 Secretary for the District Attorney's Office  
28

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CLERK  
COURT

1 **ORDR**  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 SANDRA K. DIGIACOMO  
6 Chief Deputy District Attorney  
7 Nevada Bar #006204  
8 200 Lewis Avenue  
9 Las Vegas, NV 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,  
12 Plaintiff,

13 -vs-

14 KIRSTIN BLAISE LOBATO,  
15 #1691351

16 Defendant.

Case No. 01C177394  
Dept No. II

17 **ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO CONDUCT**  
18 **LIMITED DISCOVERY OF CARDBOARD SHOEPRINT EVIDENCE**

19 DATE OF HEARING: 01-13-11  
20 TIME OF HEARING: 10:30 A.M.

21 THIS MATTER having come on for hearing before the above entitled Court on the  
22 13th day of January, 2011, the Defendant being present, represented by TRAVIS BARRICK,  
23 ESQ., the Plaintiff being represented by DAVID ROGER, District Attorney, through  
24 SANDRA K. DIGIACOMO, Chief Deputy District Attorney, and TYLER SMITH,  
25 Deputized Law Clerk, and the Court having heard the arguments of counsel and good cause  
26 appearing therefor,

27 ///

28 ///

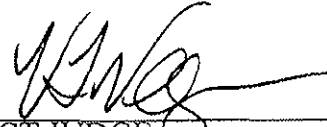
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01C177394  
ODM  
Order Denying Motion  
1238801




1 IT IS HEREBY ORDERED that the Defendant's Motion for Leave to Conduct  
2 Limited Discovery of Cardboard Shoeprint Evidence shall be, and it is denied without  
3 prejudice as premature pursuant to NRS 34.780.

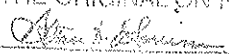
4 DATED this 8<sup>th</sup> day of February, 2011.

5  
6   
7 DISTRICT JUDGE SCG

8  
9 DAVID ROGER  
10 DISTRICT ATTORNEY  
11 Nevada Bar #002781

12   
13 SANDRA K. DIGIACOMO  
14 Chief Deputy District Attorney  
15 Nevada Bar #006204  
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TRUE AND CORRECT COPY  
OF THE ORIGINAL ON FILE

  
CLERK OF THE COURT

● ORIGINAL ●

S129

1 **ORDR**

2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 SANDRA K. DIGIACOMO  
6 Chief Deputy District Attorney  
7 Nevada Bar #006204  
8 200 Lewis Avenue  
9 Las Vegas, NV 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

**FILED**

MAR 2 9 43 AM '11

*Agnes S. Robinson*  
CLERK OF DISTRICT COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

01C177394  
ODM  
Order Denying Motion  
1271230



11 THE STATE OF NEVADA,  
12 Plaintiff,

13 -vs-

14 KIRSTIN BLAISE LOBATO,  
15 #1691351

16 Defendant.

Case No. 01C177394  
Dept No. II

17 **ORDER DENYING DEFENDANT'S MOTION FOR LIMITED DISCOVERY**  
18 **FOR GOOD CAUSE**

19 DATE OF HEARING: 01-13-11  
20 TIME OF HEARING: 10:30 A.M.

21 THIS MATTER having come on for hearing before the above entitled Court on the  
22 13th day of January, 2011, the Defendant being present, represented by TRAVIS BARRICK,  
23 ESQ., the Plaintiff being represented by DAVID ROGER, District Attorney, through  
24 SANDRA K. DIGIACOMO, Chief Deputy District Attorney, and TYLER SMITH,  
25 Deputized Law Clerk, and the Court having heard the arguments of counsel and good cause  
appearing therefor,

CLERK OF THE COURT  
MAR 2 - 2011  
RECEIVED