

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,

Petitioner,

vs.

STATE OF NEVADA,

Respondents.

* * *

Case No.: 58913

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APPELLANT'S OPENING BRIEF

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II. JURISDICTIONAL STATEMENT.

a. Basis of Supreme Court's appellate jurisdiction.

This Court has jurisdiction over this action by way of NRS 177, NRS 34 and NRAP 3C.

b. Filing dates establishing timeliness of appeal.

On March 12, 2007, Ms. Lobato filed a Notice of Appeal.

On February 5, 2009, the Nevada Supreme Court affirmed Ms. Lobato's conviction. Ms. Lobato filed a petition for rehearing which was denied on March 27, 2009. Ms. Lobato filed a petition for en banc reconsideration which was denied on May 19, 2009.

On October 14, 2009, remittitur issued.

On May 5, 2010, Ms. Lobato filed the instant Petition.

On March 17, 2011, the District Court held its hearing on Ms. Lobato's Petition.

On June 16, 2011, the District Court filed its Findings of Fact, Conclusions of Law and Order, which was the District Court's final order on Ms. Lobato's Petition.

On August 1, 2011, Ms. Lobato filed the instant appeal.

On August 2, 2011, Notice of Entry of the District Court Order was filed.

c. The instant appeal is from a final order of the District Court which denied Ms. Lobato's Petition.

1 **III. STATEMENT OF THE ISSUES.**

2 A. The District Court prejudicially erred in failing to consider and
3 grant relief based on new evidence of Ms. Lobato's actual innocence, which
4 thereby deprived her of her federal and state rights to due process, a fair
5 trial, prohibiting cruel and unusual punishment and equal protection.

6 B. The State failed to disclose exculpatory and impeachment
7 evidence to Ms. Lobato per *Brady*, and she suffered material prejudice,
8 which thereby deprived her of her federal and state rights to due process
9 and a fair trial.

10 C. Ms. Lobato's counsel rendered ineffective assistance of counsel
11 per *Strickland*, and her counsel's deficiency was prejudicial, which thereby
12 deprived her of her federal and state rights to effective assistance of
13 counsel, due process and a fair trial.

14 D. The District Court prejudicially erred in failing to conduct an
15 evidentiary hearing on Ms. Lobato's claims based upon the State's failure
16 to disclose evidence per *Brady*, and ineffective assistance of counsel per
17 *Strickland*.

18 **IV. STATEMENT OF THE CASE.**

19 **A. First Trial.**

20 On August 9, 2001, Kirstin Blaise Ms. Lobato was charged by way
21 of Information with Murder With Use of a Deadly Weapon (Open Murder)
22 and Sexual Penetration of a Dead Human Body. [1 App.1-3] Ms. Lobato's
23 jury trial began on May 7, 2002. On May 18, 2002, Ms. Lobato was found
24 guilty of First Degree Murder with Use of a Deadly Weapon and Sexual
25 Penetration of a Dead Human Body.
26

27 On August 27, 2002, Ms. Lobato was sentenced as follows: Count 1
28

1 – First Degree Murder with Use of a Deadly Weapon, to a maximum of
2 fifty (50) years and a minimum parole eligibility of twenty (20) years plus
3 an equal and consecutive term for use of a deadly weapon; Count 2 –
4 Sexual Penetration of a Dead Human Body, to a maximum of fifteen (15)
5 years and a minimum parole eligibility of five (5) years, to run concurrently
6 with Count 1; further, a Special Sentence of Lifetime Supervision imposed
7 to commence upon release of any term of probation parole, or
8 imprisonment, two hundred and thirty-three (233) days credit for time
9 served. A Judgment of Conviction (Jury Trial) was filed September 16,
10 2002.
11

12 Ms. Lobato filed a Notice of Appeal on October 15, 2002. On
13 September 3, 2004, the Nevada Supreme Court reversed Ms. Lobato's
14 conviction and remanded for a new trial. Lobato v. State, 120 Nev. 512, 96
15 P.3d 765 (2004). [1 App.126-142] Remittitur issued on September 24,
16 2004.
17

18 **B. Second Trial.**

19 Ms. Lobato's second trial began on September 11, 2006. [2
20 App.253-1038]
21

22 On October 6, 2006, Ms. Lobato was found guilty of Voluntary
23 Manslaughter with Use of a Deadly Weapon and Sexual Penetration of a
24
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1 Dead Human Body. [2 App. 240]

2 On February 2, 2007, Ms. Lobato was sentenced as follows: Count 1
3 – Voluntary Manslaughter With Use of a Deadly Weapon, to a maximum of
4 one hundred twenty (120) months with a minimum parole eligibility of
5 forty-eight (48) months, plus and equal and consecutive term for the use of
6 a deadly weapon; Count 2 – Sexual Penetration of a Dead Human Body, to
7 a maximum of one hundred eighty (180) months with a minimum parole
8 eligibility of sixty (60) months, Count 2 to run consecutive with Count 1,
9 with one thousand five hundred forty-four (1,544) days credit for time
10 served. It was further ordered that a special sentence of lifetime supervision
11 be imposed upon release from any term of imprisonment, probation, or
12 parole. Additionally, Ms. Lobato was ordered to register as a sex offender
13 upon any release from custody. [5 App. 1036-1047]
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19 Ms. Lobato filed a Notice of Appeal on March 12, 2007. On
20 February 5, 2009, the Nevada Supreme Court affirmed Ms. Lobato's
21 conviction. [5 App. 1112-1116] Ms. Lobato filed a petition for rehearing
22 which was denied on March 27, 2009. [5 App. 1117-1128] Ms. Lobato filed
23 a petition for en banc reconsideration which was denied on May 19, 2009.
24 [5 App. 1129-1140] Remittitur issued on October 14, 2009. [5 App. 1148-
25 49] Ms. Lobato filed the instant original and timely petition on May 5, 2010
26
27
28

1 (the "Petition"). [6 App.1150-1920]

2 **V. STATEMENT OF THE FACTS.**

3 **A. Scene and Circumstances of the Murder.**

4 Duran Bailey was found dead in a Nevada State Bank's trash
5 enclosure on the west side of Las Vegas on July 8, 2001 at around 10:00
6 p.m. (the "July Murder"). [2 App. 267] Mr. Bailey had been severely
7 beaten, stabbed in his face, neck, abdomen, rectum, hands, arm, and fingers,
8 many teeth had been knocked out, his jaw was broken, his penis was
9 amputated, he had abrasions on his face, and the back of his skull was
10 fractured. [2 App. 415-16] His pants were around his knees. [2 App. 284] In
11 his pocket were found several scraps of paper with telephone numbers, one
12 of which arguably belonged to a LVMPD officer. [9 App.1815]

13 Medical Examiner Dr. Larry Simms determined at autopsy Mr.
14 Bailey's cause of death was "blunt head trauma," [6 App. 1206] which
15 caused brain swelling. [2 App. 446]

16 Dr. Simms opined at trial that wounds to Mr. Bailey's abdomen,
17 rectum, and penis were post-mortem. [2 App. 419]

18 Dr. Simms believed many of the wounds were inflicted with a sharp
19 instrument, such as a knife, but it was possible they were caused by
20 scissors. [2 App. 416, 425] No weapon was ever recovered. [2 App.264]

1 Dr. Simms testified Bailey's skull fracture was more consistent with
2 the back of his head hitting the sharp concrete curb around the edge of the
3 trash enclosure than being hit by a blunt object such as a bat because there
4 was no depression in his skull. [2 App. 430]
5

6 Dr. Simms performed an examination of Mr. Bailey's body on July
7 9 and at trial estimated to a reasonable medical certainty that Mr. Bailey's
8 death occurred 12 to 18 hours prior to an examination at 3:50 a.m. at the
9 crime scene. [2 App. 443] Mr. Bailey had a blood alcohol level of .11 and
10 his blood also included a breakdown product of cocaine. [2 App. 435]
11
12 There was semen in his rectum. [2 App. 448]
13
14

15 Dr. Simms testified this July Murder was not characteristic of a
16 female perpetrator and that none of the other murders he had been involved
17 with during his career that had similar characteristics were committed by a
18 woman. [2 App. 439] Defense criminology expert Brent Turvey likewise
19 testified that the manner of the July Murder was associated with male
20 perpetrators. [4 App. 819-20, 828]
21
22

23 **B. Ms. Lobato's Description of the May Budget Suites Assault.**
24

25 Ms. Lobato was an 18-year-old girl and resident of Panaca of who
26 had recently graduated from high school in Lincoln County. [5 App. 943]
27

28 Ms. Lobato spent time in Las Vegas in the spring of 2001 working

1 with a friend. [Exhibit 125A at 17, 2 App. 310; 4 App. 902] She stayed in
2 Las Vegas with friends, sometimes at the Budget Suites Hotel at Nellis
3 Boulevard and Flamingo near the Boulder Highway, and sometimes at their
4 homes. [2 App. 353; Exhibit 125A at 3]

6 Ms. Lobato has consistently claimed that prior to June 20, 2001, she
7 was sexually assaulted in the parking lot of a Budget Suites Hotel on Las
8 Vegas' east side (the "May Budget Suites Assault"), and she used the
9 butterfly knife that she carried for self-protection to escape from her
10 assailant. [Exhibit 125A at 3-5, 27; 2 App. 355; 5 App. 989] Ms. Lobato
11 admitted that she was using methamphetamine during the time that she was
12 attacked. [Exhibit 125A at 4, 18. 2 App. 355]

16 Ms. Lobato told Dixie Tienken, a school teacher in Panaca, about
17 the May Budget Suites Assault. [2 App. 297] Ms. Tienken testified as a
18 State's witness that Ms. Lobato told her the man who attacked her was
19 similar in size to Ms. Tienken's grandson, who was more than 6 foot tall
20 and weighed more than 200 pounds.¹ [2 App. 311] Ms. Tienken testified it
21 was her understanding Ms. Lobato stabbed the man in the abdomen and cut
22 his penis, but Ms. Tienken did not say that Ms. Lobato stabbed him
23 anywhere else or that she punched him, used a baseball bat, knocked his
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¹ Bailey was 5 foot 10 inches tall and weighed 133 pounds at autopsy. [2 App. 448]

1 teeth out, cut off his penis. [2 App. 312] Ms. Tienken testified Ms. Lobato
2 told her “that she saw the man stand up” after she got away from him. [2
3 App. 312]
4

5 Ms. Lobato also told Michele Austria about the May Budget Suites
6 Assault. [2 App. 367] Ms. Austria testified as a State’s witness that Ms.
7 Lobato told her only that she slashed at the man’s penis and did not say that
8 Ms. Lobato repeatedly stabbed her attacker in other locations, beat him,
9 gave him two black eyes, cut off his penis, or beat him with a baseball bat,
10 and she did not say the man was dead. [2 App. 373]
11

12 Ms. Lobato specifically told the police that she discussed the May
13 Budget Suites Assault with a woman in east Las Vegas nicknamed
14 Mumblelina more than a month prior to the date of her interrogation on July
15 20, 2001. [3 App. 673] Mumbelina told Ms. Lobato that she too had been
16 sexually assaulted and it could have been by the same man who assaulted
17 Ms. Lobato. [3 App. 673]
18

19 Sometime after Ms. Lobato told Ms. Tienken about the May Budget
20 Suites Assault, Ms. Tienken told her friend Laura Johnson, the Lincoln
21 County Juvenile Probation Officer, about the May Budget Suites Assault.
22 Several days later, Ms. Johnson called the Las Vegas Metropolitan Police
23 Department (“LVMPD”) inquiring whether they had any cases where a man
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1 suffered an injury to his penis. [2 App. 306, 399, 407-08; 7 App. 605] At no
2 time did Ms. Johnson personally speak with Ms. Lobato or attempt to
3 contact her. [2 App. 412]
4

5 **C. LVMPD Interrogation of Ms. Lobato.**

6 On July 20, 2001, LVMPD detective Thomas Thowsen and his
7 partner James LaRochelle drove to Panaca and interrogated Ms. Lobato,
8 who gave a voluntary statement (the "Voluntary Statement"). The
9 detectives were accompanied by Crime Scene Analyst Maria Thomas who
10 took photos and sealed Ms. Lobato's car for transport to Las Vegas. [3 App.
11 568-69] The detectives advised Ms. Lobato they were aware she had been a
12 victim of sexual assault as a 6-year-old child. [3 App. 607, 669-70] Ms.
13 Lobato began to sob and cry. [3 App. 607] While Ms. Lobato was sobbing
14 and crying, the detectives obtained her Miranda waiver. [3 App. 669-70]
15 The detectives obtained the Miranda waiver by having her read and sign a
16 card while in her emotional state. [3 App. 669] Ms. Lobato continued
17 crying during the interrogation. [3 App. 669, 683]
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23 Subsequently, Ms. Lobato was shown a photo of Mr. Bailey by the
24 detectives and she didn't recognize him. [7 App. 1479, 1490]
25

26 **D. Facts Introduced at Trial.**

27 **1. The State's theory of the Crime.**

28

1 The State advanced the theory that Ms. Lobato left Panaca on July 6
2 and drove to Las Vegas in her car to obtain methamphetamine. Upon
3 finding Mr. Bailey, she killed and mutilated him and raced back to Panaca.
4
5 [5 App. 1005-06]

6 In her closing, Ms. Lobato argued the State (i) erred by hastily
7 arresting and charging her without conducting any investigation
8 whatsoever, [5 App. 1014, 1020-21] and (ii) justified her arrest and
9 prosecution by conflating two completely different events – the May
10 Budget Suites Assault and Mr. Bailey’s July Murder weeks later. [5 App.
11 1021]

12 With no direct evidence linking Ms. Lobato to Mr. Bailey’s July
13 Murder, the prosecution argued it was *possible* she committed the crime, [5
14 App. 1011, 1027] and on rebuttal argued it was too coincidental for two
15 men to have suffered injuries to their penises, so the alleged sexual assault
16 against Ms. Lobato and the July Murder of Mr. Bailey must be the same
17 event. [5 App. 1013] The prosecution argued Dr. Simms’ testimony
18 supported that Mr. Bailey died on the morning of July 8 [5 App. 1005], and
19 yet conceded that alibi witness evidence established Ms. Lobato was in
20 Panaca on July 8 from at least “11:30 a.m. through the night,” and that she
21 probably there at “10 a.m.” and made a telephone call to her step-mother. [5
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1 App. 1008]

2 **2. Motive.**

3 The State offered no evidence Ms. Lobato drove to Las Vegas on
4 July 6, that she knew Mr. Bailey, that she had ever been to the Nevada State
5 Bank, or that she had a motive for the killing of Mr. Bailey. Testimony
6 established Mr. Bailey used only crack cocaine, marijuana and alcohol (and
7 not methamphetamine), [2 App. 435, 473, 4 App. 700]; and alcohol and
8 cocaine was in his blood when he died. [2 App. 435] In contrast, there was
9 no testimony Ms. Lobato ever used any crack cocaine, or any
10 methamphetamine at any time in the month of July 2001, and there was
11 none in her system on July 5 and July 7, 2001 – only one day prior to Mr.
12 Bailey's murder. [4 App. 750]

13 **3. Time of Death.**

14 Dr. Simms testified that he believed to a reasonable medical
15 certainty Mr. Bailey's time of death was between 9:50 a.m. and 3:50 p.m.
16 on July 8, between 12 to 18 hours prior to examination of his body at 3:50
17 a.m. on July 9. [2 App. 443] Dr. Simms also testified there was a 5%
18 probability Mr. Bailey died between 8 to 24 hours prior to examination of
19 his body, which would have been between 3:50 a.m. and 7:50 p.m. on July
20 8. [2 App. 457]

1 The route from Las Vegas to Panaca that is 165 miles is primarily on
2 a two-lane highway and takes approximately three hours to travel. [4 App.
3 761] In order to have committed the July Murder and be back in Panaca at
4 10 a.m., Ms. Lobato would have to have departed Las Vegas by 7 a.m.

6 **4. Ms. Lobato's Alibi Evidence.**

7
8 Substantial evidence was presented by prosecution and defense
9 witnesses that support Ms. Lobato's contention that she was in Panaca
10 continuously from July 2 through the early morning of July 9.

11
12 State's witness Stephen Pyszkowski testified he hoped to celebrate
13 July 4th with Ms. Lobato in Las Vegas, but she cancelled their plans
14 because she wanted to return to Panaca before the 4th. [2 App. 357]

15
16 State's witness Michelle Austria testified that she saw Ms. Lobato in
17 Panaca on July 4. [2 App. 367] She specifically recalled going four-
18 wheeling with Ms. Lobato in Panaca on July 8. [2 App. 374]

19
20 Jo Wuori testified she lived next door to Ms. Lobato in Panaca
21 and she recalled seeing Ms. Lobato between 11:00 a.m. and 1:00 p.m. on
22 July 8 when she was on a 4-wheeler. [4 App. 751-52]

23
24 Clint Hohman recalled seeing Ms. Lobato in Panaca around July 2
25 and again on July 8 at around 11:30 a.m. when he saw her four-wheeling
26 with Austria. [4 App. 880-81]
27
28

1 State's witness Paul Brown, another Panaca resident, recalled seeing
2 Ms. Lobato on July 7 and 8. [2 App. 384]

3 State's witness Christopher Carrington testified he saw Ms. Lobato
4 in Panaca on July 5, 6, 7 and in the morning, afternoon and evening of July
5 8 up until he left Ms. Lobato's house between 10:30 and 11 p.m. [2 App.
6 461-62, 465-66, 470]
7

8
9 Shayne Kraft recalled that Ms. Lobato returned to Panaca from Las
10 Vegas a couple of days before the 4th of July, they spent time together at
11 Ms. Lobato's house on July 4, and she saw her again on July 8 from about
12 6:30 p.m. until 8:00 p.m. [4 App. 771] Shayne's husband, John Kraft,
13 testified he saw Ms. Lobato on July 8 at around 7:00 a.m. and later that day
14 around 8:00 p.m. [4 App. 779, 780]
15

16
17 Kendre Thunstrom talked with Ms. Lobato in front of her house on
18 July 8 right before sunset. [4 App. 886]
19

20 Ms. Lobato's sister, Ashley, testified Ms. Lobato returned to Panaca
21 from Las Vegas a couple of days before the 4th of July. [4 App. 889] She
22 recalled Ms. Lobato was sick, slept a lot, and did not eat well. [4 App. 889]
23 She saw Ms. Lobato on July 8 and spent a couple of hours with her in mid-
24 afternoon, and she last saw her at about 12:20 a.m. on July 9 when Ms.
25 Lobato was getting ready to go to Las Vegas with her friend Doug Twining
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1 who was driving from Las Vegas to pick her up. [4 App. 891]

2 Ms. Lobato's father, Lorenzo, testified Ms. Lobato returned to
3 Panaca on July 2 and stayed until July 9 at about 1:00 a.m. when she left for
4 Las Vegas with Twining. [4 App. 917] Lorenzo saw Ms. Lobato every night
5 when he came home from work and every morning when he awoke. [4 App.
6 903, 905] He testified Ms. Lobato was tired and ill when she arrived in
7 Panaca. [4 App. 904]

10 Ms. Lobato's stepmother, Rebecca, testified Ms. Lobato returned to
11 Panaca from Las Vegas on July 2. [5 App. 930] Rebecca saw her at their
12 house every day through the early morning of July 9. [5 App. 934-937] Ms.
13 Lobato wasn't feeling well and on July 5 and Rebecca took Ms. Lobato to
14 the doctor and then stayed home with her on July 6. [9 App. 1653] During
15 the doctor visit on July 5, Ms. Lobato discussed the fact she suffered from
16 depression and anxiety. [5 App. 934] Also during that doctor's visit Ms.
17 Lobato's blood was drawn for testing and on the morning of July 7 Rebecca
18 collected a urine sample for testing. [5 App. 956] The blood and the urine
19 both tested negative for methamphetamine. [5 App. 1005] Rebecca
20 reviewed telephone bills which were admitted as exhibits, and the bills
21 reflected telephone calls from her home phone to Mr. Twining on July 6, 7
22 and 8. [5 App. 938] Ms. Lobato was the person who called Twining. [5

1 App. 938] The last two calls were on July 8 at 5:06 pm and 6:38 p.m. [5
2 App. 946] On July 9, around 1:00 a.m. Ms. Lobato was picked up by Mr.
3 Twining. [5 App. 937] She stayed with Mr. Twining in Las Vegas until July
4 13 when she returned to Panaca. [5 App.937]

6 Twining testified Ms. Lobato left Las Vegas on July 2 and he picked
7 her up in Panaca early on July 9. [5 App. 984, 987] His cell phone record
8 was introduced as an exhibit and it reflected calls that he made to Ms.
9 Lobato in Panaca on July 2, 3, 4, 5, 7 and 8. [5 App. 986] When Mr.
10 Twining stopped for gas in Alamo on the way to Panaca he talked with a
11 Lincoln County Sheriff's Deputy. [5 App. 991] Mr. Twining's cell phone
12 records show he called Panaca at 10:46 p.m. from Alamo. [5 App. 987] The
13 records show that at 12:45 a.m. on July 9, Mr. Twining called Ms. Lobato's
14 house, which he testified was so Ms. Lobato could guide him to the house.
15 [5 App. 987]

16 Several Panaca residents testified Ms. Lobato's car was parked in
17 the same position after her return to Panaca in early July and that it did not
18 ever move until it was seized by the police on July 20, 2001. [Carrington, 2
19 App. 471]; [neighbor Robert McCrosky, 4 App. 791-92]; [neighbor Jeanette
20 McCrosky, 4 App. 795]; [Lorenzo Lobato, 4 App. 903]. Ms. Lobato told
21 police that after the attack she left her car at Jeremy Davis' house for about
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1 a week. [3 App. 665] Davis testified Ms. Lobato left her car at his house in
2 the last week of May 2001. [6 App. 1122] Stephen Pyszkowski testified that
3 Ms. Lobato hid her car at an apartment complex near his house because she
4 was afraid someone might recognize her car, and her car was towed from
5 that apartment complex on June 6, 2001. [2 App. 358, 631-62]
6

7
8 **5. The State's Challenge to the May Budget Suites Assault as a**
9 **Defense.**

10 Although the District Court allowed testimony by prosecution and
11 defense witnesses that Ms. Lobato had told them about the May Budget
12 Suites Assault, the court sustained the State's objections to testimony that
13 they were told about the May Budget Suites Assault at any time *prior* to the
14 date of Mr. Bailey's murder. Pyszkowski, [2 App. 358]; Heather McBride,
15 [3 App. 603-05]; and Lorenzo Lobato. [5 App. 912]
16

17 Lorenzo's testimony that Ms. Lobato told him in June 2001 that she
18 had "done something" was objected to by the State and the court sustained.
19 [5 App. 912] Lorenzo's testimony was preceded by Det. Thowsen's
20 testimony that at the time of Ms. Lobato's arrest at her Panaca residence he
21 heard her tell Lorenzo "I'm sorry daddy. Told you I did something awful."
22 [3 App. 654]
23

24 The State attempted to refute Ms. Lobato's defense based upon the
25 May Budget Suites Assault by claiming that it never happened. [3 App.
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28

1 663-64. 673, 686] No employee who actually worked at the Budget Suites
2 in May, June or July 2001 testified. The State's witness, Zachory Robinson,
3 went to work at the Budget Suites Hotel a couple months before May 2002.
4 [4 App. 739] That was about 10 months after Ms. Lobato was assaulted at
5 the Budget Suites. [3 App. 673] Mr. Robinson testified he did not see any
6 security officer reports from May, June and July 2001 concerning a man
7 with an injured penis or blood being found on the hotel grounds near the
8 fountain area. [4 App. 736] Mr. Robinson admitted on cross-examination he
9 did not know who the general manager was in 2001 and he did not have any
10 conversation with that person about any event in 2001. [4 App. 738] Mr.
11 Robinson also testified he did not know what the Budget Suites' policies
12 were in 2001. [4 App. 738] Mr. Robinson also testified he did not know any
13 security officers employed in 2001, how many there were, or any
14 information about their shifts or duties. [4 App. 738] No Budget Suites
15 records were entered into evidence. Ms. Lobato's lawyers didn't object on
16 the basis of NRS Chapter 51 or federal constitutional confrontation grounds
17 to Mr. Robinson's hearsay testimony about the records and the Budget
18 Suites Hotel in 2001.

26 The State also offered Det. Thowsen's testimony on direct
27 examination that he had searched police records for May, June and July of
28

1 2001 for a man with an injury to his groin area or penis and that there were
2 none.² On cross-examination, he retracted this testimony and admitted that
3 it was his secretary that had actually searched for those NRS 629.041
4 reports. [3 App. 661-62] On cross-examination, he also testified that he had
5 contacted unknown urologists and unknown persons at Las Vegas hospitals
6 and was told that there was no record of a man's penis being stabbed or
7 severed during May, June and July of 2001. [3 App.674-76] Ms. Lobato's
8 counsel did not object on constitutional confrontation grounds to Det.
9 Thowsen's hearsay testimony about what he was told and what his secretary
10 told him she was told about reports of groin area or penis injuries by
11 unidentified persons. [3 App. 690-91]

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16 **E. Discrepancies between Ms. Lobato's Voluntary Statement**
17 **and the July Murder.**

18 There are multiple significant discrepancies between Ms. Lobato's
19 Voluntary Statement and the evidence regarding the scene and
20 circumstances of the July Murder.
21

22 In Ms. Lobato's Voluntary Statement, she told the detectives that the
23 May Budget Suites Assault occurred in a parking lot near the fountain at the
24 Budget Suites Hotel on Boulder Highway closest to Sam's Town Casino,
25
26

27
28 ² Medical care providers are required by NRS 629.041 to file a report for the
treatment of non-accidental gunshot and knife wounds.

1 and a shopping center was across the street. She did not mention the
2 Nevada State Bank, West Flamingo or a trash enclosure in her statement. [3
3 App. 673] Exhibit 125A at 3, 20. In contrast, the July Murder occurred
4 eight miles away in the trash enclosure for a Nevada State Bank and there
5 was no fountain in the vicinity of the July Murder. [3 App. 672]
6

7
8 In Ms. Lobato's Voluntary Statement, she told the detectives that the
9 May Budget Suites Assault occurred late at night and she was dressed up
10 from going out when she was attacked. [Exhibit 125A at 4, 7, 12] In
11 contrast, Dr. Simms testified that to a reasonable degree of medical
12 certainty that Mr. Bailey's time of death was during daylight hours,
13 between 9:30 a.m. and 3:50 p.m. [2 App. 443]
14
15

16 In Ms. Lobato's Voluntary Statement, she described her assailant as
17 alive and crying when she escaped in her car. [Exhibit 125A at 7; 3 App.
18 672] In contrast, Dr. Simms testified that Mr. Bailey continued to be
19 attacked after he was dead and several injuries were post-mortem. [2 App.
20 418, 423; 3 App. 672]
21
22

23 In Ms. Lobato's Voluntary Statement, she stated that she did not
24 move her assailant and she did not cover him with anything. [Exhibit 125A
25 at 7-8] In contrast, trial testimony was offered that Mr. Bailey had been
26 moved and then covered with trash and cardboard. [2 App. 282; 3 App.
27
28

1 600] In Ms. Lobato's Voluntary Statement, she told the detectives that she
2 used a butterfly knife to defend herself, [Exhibit 125A at 5, 11; 3 App. 663,
3 672]; and trial testimony established a butterfly knife is sharp on both
4 edges. [3 App. 663] In contrast, trial testimony was offered that Mr.
5 Bailey's wounds were made with a single-edged knife or weapon and a
6 defense expert opined that his injuries could have been inflicted with
7 scissors. [2 App. 418; 5 App. 968, 970]
8

9
10 In Ms. Lobato's Voluntary Statement, she told the detectives that
11 she did not know if she actually cut her assailant's penis [Exhibit 125A at
12 6]; because it was dark and late at night. [Exhibit 125A at 7] In contrast,
13 Mr. Bailey's penis, genitals and surrounding skin were completely severed
14 from his abdomen. [3 App. 498]
15

16
17 In Ms. Lobato's Voluntary Statement, she told the detectives she did
18 not remember hitting her assailant with anything. [Exhibit 125A at 6] In
19 contrast, Mr. Bailey was severely beaten and had dozens of external and
20 internal injuries. [2 App. 415-16, 418]
21

22
23 In Ms. Lobato's Voluntary Statement, she described the man who
24 assaulted her as being really big and a giant compared to her, who was 5'-6"
25 and weighed about 120 pounds at the time. [Exhibit 125A at 5] In contrast
26 to Ms. Lobato's description of her assailant, Mr. Bailey was 5'-10" tall and
27
28

1 weighed 133 pounds. [2 App. 448]

2 In Ms. Lobato's Voluntary Statement, she told the detectives that her
3 assailant smelled of alcohol and dirty diapers. [Exhibit 125A at 4] In
4 contrast, there was no testimony that Mr. Bailey smelled of either alcohol or
5 dirty diapers.
6

7 In Ms. Lobato's Voluntary Statement, she did not describe her
8 assailant bleeding, or having any blood on herself, her clothing, or her car.
9 In contrast, the scene of Mr. Bailey's murder was extremely bloody since
10 he had lost about 2 quarts (1/2 a gallon) of blood, [2 App. 457], and
11 shoeprints leading away from Mr. Bailey's body were imprinted in blood
12 on the concrete and on cardboard covering Mr. Bailey's body (the "Bloody
13 Shoeprints."). [3 App. 500] As a result, Dr. Simms testified it was probable
14 that the person who killed Mr. Bailey would have left bloody footprints at
15 the scene based upon the amount of blood loss caused by Mr. Bailey's
16 injuries. [2 App. 440]
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22 In contrast, the State has never produced any of Ms. Lobato's shoes
23 with Mr. Bailey's blood on them. Ms. Lobato's black high-heeled platform
24 shoes, that she stated she was wearing during the May Budget Suites
25 Assault, were impounded at the time of her arrest [3 App. 571; Exhibit
26 125A at 12, 25], and none of Mr. Bailey's blood (or any foreign blood) was
27
28

1 found on those shoes. [2 App. 331] In addition, there was testimony at trial
2 that the Bloody Shoeprints were two and a half sizes larger than Ms.
3 Lobato's shoe size and the shoeprint did not match any of her shoes. [2
4 App. 441; 3 App. 500, 536-37, 569-70; 4 App. 783]

6 In Ms. Lobato's Voluntary Statement, she told the detectives that
7 she escaped from her assailant in her car. [Exhibit 125A at 8] While fresh
8 tire tracks were found next to the murder scene [3 App. 523], the tires on
9 Ms. Lobato's care were excluded as the source of those tire tracks. [3 App.
10 589]
11

13 **F. Alternate Suspects to the Crime.**

14 A woman named Diann Parker was seen observing the crime scene
15 by a police officer who had taken a report from her that Mr. Bailey beat and
16 repeatedly raped her on July 1, 2001, a week prior to his death. [6 App.
17 1241-42]
18

19 Ms. Parker lived in an apartment complex that was a short walking
20 distance from where Bailey's body was found. [3 App. 679] Ms. Parker
21 stated that on the day Mr. Bailey raped her she was visiting some Hispanic
22 men who lived in her apartment complex when Mr. Bailey came into their
23 apartment and slapped her. [4 App. 696] The Hispanic men told Mr. Bailey
24 to leave and one of them followed Mr. Bailey out and told him not to hurt
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1 Ms. Parker. [4 App. 696] Mr. Bailey returned that night and pushed himself
2 into Ms. Parker's apartment and then beat and raped her. [4 App. 696-97]
3 She ran outside naked to get help and a Hispanic woman walking by saw
4 her, but he grabbed her and threw her back into the apartment. [4 App. 697]
5 During the attack, Mr. Bailey kicked her, beat her, held a knife against her
6 throat, and tried to sodomize her three or four times but was unable to do
7 so. [4 App. 697, 702] Ms. Parker did not immediately report the rape to the
8 police because Mr. Bailey repeatedly threatened to kill her, but she did
9 make a report on July 4 after he banged on her door and window. [4 App.
10 697] Police officers came to her apartment on July 5 and she gave a
11 statement. [4 App. 697] They took her to University Medical Center where
12 photographs were taken. [4 App. 698] Photographs of injuries to Ms.
13 Parker's shoulder, neck, leg, arm, eyes, and face were shown to the jury. [4
14 App. 698] One photo showed a puncture wound over the carotid artery on
15 the right side of her neck. [4 App. 699]

16 Ms. Parker had known Mr. Bailey for several months and previously
17 had consensual sexual relations with him. [4 App. 701] Mr. Bailey used
18 crack cocaine, marijuana and alcohol, but she did not ever know him to use
19 methamphetamine. [4 App. 700] Ms. Parker told the police that reporting
20 Mr. Bailey was going to get her killed and if they did not catch him, she
21

1 would be dead. [4 App. 705] The police officer told her “you gotta do what
2 you gotta do to protect yourself.” [4 App. 705] When she reported Mr.
3 Bailey for rape, she asked the police officers for protection but they did not
4 give her any. [4 App. 707] Ms. Parker’s Hispanic friends knew Mr. Bailey
5 had raped her. [4 App. 701]

6
7
8 Detective Thowsen testified he met with Ms. Parker and her
9 roommate on July 9, 2001 and based upon their demeanors concluded they
10 were not suspects in Mr. Bailey’s murder. [3 App. 602] Det. Thowsen
11 admitted he did not take a crime scene analyst to her apartment, as he did
12 when he later arrested Ms. Lobato, and he did not inspect Ms. Parker’s
13 shoes or apartment with luminal for blood. [3 App. 679] The manager of
14 Ms. Parker’s apartment complex provided Det. Thowsen with information
15 about her Hispanic male neighbors. [3 App. 680] Det. Thowsen testified he
16 ran the men’s information and learned they did not have criminal histories,
17 and decided not to interview them or inspect their footwear for blood. [3
18 App. 680, 682] Det. Thowsen also testified he did not keep a record of the
19 men’s names. [3 App. 680]

20
21
22 In addition, given the presence of a LVMPD officer’s telephone
23 number in Mr. Bailey’s pocket [9 App. 1815], it was possible that Mr.
24 Bailey was a police informant, an issue neither investigated nor disclosed
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1 by the prosecution.

2 **G. Facts Introduced Post-Conviction.**

3 As itemized below, Ms. Lobato's petition included more than twenty
4 grounds, based on new evidence by more than 30 expert, alibi and fact
5 witnesses not presented at trial of her actual innocence. [6 App. 1173-1281]
6 There was also one ground based on new evidence of jury misconduct, one
7 ground based on new evidence of police perjury, one ground based on new
8 evidence of police and prosecutor misconduct and malicious prosecution,
9 one ground based on Ms. Lobato's actual innocence, one ground based on
10 new evidence that Ms. Lobato's conviction was based on false evidence,
11 two grounds based on Brady violations of the prosecution's failure to
12 disclose exculpatory and/or impeachment evidence, and 51 grounds based
13 on ineffective assistance of counsel. [6 App. 1163-72]
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19 **H. Summary of Facts.**

20 Simply stated, no physical, forensic, eyewitness, informant, or
21 confession evidence links Ms. Lobato to either the July Murder or Mr.
22 Bailey.
23

24 Consistent with Ms. Lobato's statement, not a single person testified
25 as to seeing her in Las Vegas on July 8 and no one testified to seeing Ms.
26 Lobato or her car on the road between Las Vegas and Panaca on July 8.
27
28

1 Tire prints were left in the parking lot and over a planter median in
2 the immediate vicinity of the scene, but they did not match Ms. Lobato's
3 car. [3 App. 501, 583]
4

5 The shoeprints imprinted in blood leading away from Mr. Bailey's
6 body didn't match Ms. Lobato's shoes or shoe size. [4 App. 783]
7

8 Fingerprints were identified on the edge of the dumpster enclosure
9 and on garbage found near Mr. Bailey, but they did not match Ms. Lobato's
10 prints. [3 App. 506, 524, 540, 582]
11

12 Foreign DNA was found on a piece of gum that was covered with
13 Mr. Bailey's blood, but Ms. Lobato was excluded as the source. [2 App.
14 330]
15

16 Two cigarette butts found on Mr. Bailey's body contained foreign
17 DNA but Ms. Lobato was excluded as a source. One butt contained DNA
18 from an unknown male and the other contained a mixture in which the
19 major profile was consistent with Mr. Bailey and the minor profile was
20 from an unknown person and Ms. Lobato was excluded. [4 App. 800]
21

22 A pubic hair from Mr. Bailey's sexual assault kit contained a DNA
23 mixture: the major portion was from Mr. Bailey and the minor portion was
24 from an unknown person and Ms. Lobato was excluded. [3 App. 591]
25

26 No blood was found on a bat that was kept in Ms. Lobato's car and
27
28

1 Dr. Simms testified it was unlikely a baseball bat caused the injury to Mr.
2 Bailey's head. [2 App. 331,445; 3 App. 516]

3 Fingernail clippings and swabbings from Mr. Bailey's hands did not
4 reveal any foreign DNA. [2 App. 337]

5 Ms. Lobato's car was impounded but no evidence tying the car to
6 Mr. Bailey's crime scene was found. [3 App. 507] Ms. Lobato's 17-year-
7 old used car was tested with luminol and phenolphthalein, which react to
8 the presence of iron and copper bearing substances, and blood is one of
9 numerous natural and artificial substances – that include common
10 household cleaners – that can cause a positive reaction; and there were a
11 few areas in her car which showed a positive reaction, but confirmatory
12 scientific tests were negative for the presence of blood and no DNA or other
13 evidence related to Bailey was present in her car. [3 App. 510-13, 518, 559]

14 **VI. SUMMARY OF THE ARGUMENT.**

15 The State has incarcerated the wrong person for the murder of Duran
16 Bailey. Ms. Lobato is actually and factually innocent because she was in
17 Panaca 165 miles from Las Vegas at the time of Bailey's murder.

18 Ms. Lobato asserts in her timely and original Petition that her
19 convictions were obtained in violation of her federal and state rights to due
20 process, confrontation, compulsory process, a fair and impartial jury, a fair
21

1 trial, effective assistance of counsel, barring cruel and unusual punishment,
2 and that she is actually innocent. (U.S. Const. Amend. V, VI, VIII, XIV;
3 Nevada Const. Art.I, sec. 1, 3, 6, 8)
4

5 Ms. Lobato's Petition includes more than 20 grounds based on new
6 evidence not presented at trial by more than 30 expert, alibi, third-party
7 culprit, and fact witnesses that prove her actual innocence. Her Petition also
8 includes grounds based on new evidence of prejudicial jury misconduct,
9 police perjury, prosecution and police misconduct in maliciously and
10 negligently prosecuting Ms. Lobato, and *Brady* violations. There are also 51
11 grounds of ineffective assistance of counsel that includes emails between
12 Ms. Lobato's lawyers describing their concerns they were providing
13 deficient representation.
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18 Ms. Lobato's Petition includes new evidence in support of all four
19 theories of her defense at trial. First, new expert and alibi witness evidence
20 proves her actual innocence because she was in Panaca, 165 miles from Las
21 Vegas at the time of Mr. Bailey's murder so it is physically impossible she
22 committed the crimes at issue. Second, new expert and alibi witness
23 evidence proves her actual innocence because her Voluntary Statement
24 describes the attempted rape of her at the Budget Suites Hotel in east Las
25 Vegas in late May 2001, and it has nothing to do with Duran Bailey's
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1 murder about six weeks later at the Nevada State Bank in west Las Vegas.
2 Third, new witness and documentary evidence proves her actual innocence
3 by implicating Diann Parker's Hispanic friends who had a compelling
4 motive to murder Mr. Bailey, and the means and opportunity to commit the
5 crime. Fourth, new forensic science proves her actual innocence by not just
6 excluding her from the crime, but among other things it identifies the exact
7 size, model and brand of Wal-Mart shoe that Mr. Bailey's killer wore.
8
9

10 The State's case at trial was based on conjecture and inferences. The
11 State had no physical, forensic, eyewitness, documentary, CCTV, or
12 confession evidence linking Ms. Lobato to the crime, and no evidence was
13 presented at trial Ms. Lobato and her car were anywhere in Clark County at
14 any time on July 8, 2001. Furthermore, the State had no evidence Ms.
15 Lobato had ever been to where Mr. Bailey was murdered, that she knew
16 him, or that she knew specific details of the location, circumstances, and
17 manner of Mr. Bailey's death. The State claimed Ms. Lobato's Voluntary
18 Statement implicated her in the crime, but it doesn't describe Mr. Bailey,
19 the date, time, and location of the crime, or a single one of the multitude of
20 beating, stabbing and cutting injuries that the State's medical expert
21 testified Mr. Bailey suffered before he died.
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Further, the State has made the mutually exclusive arguments: If Ms.

1 Lobato's newly proffered evidence was available, then defense counsel was
2 ineffective for not producing it at trial. If the newly proffered evidence was
3 not available, then defense counsel was not ineffective, but then the
4 evidence is new and it is permissible for the District Court to review it by
5 way of Ms. Lobato's Petition.
6

7
8 As explained herein, Ms. Lobato argues her new evidence of her
9 actual innocence not presented at trial in her original and timely Petition is
10 reviewable on its merits, and it is also evidence of her counsel's
11 constitutionally deficient representation for failing to investigate and
12 producing this evidence during trial.
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14

15 The District Court erred in denying Ms. Lobato's Petition and in
16 denying her request for an evidentiary hearing on issues raised in her
17 Petition.
18

19 **VII. ARGUMENT.**

20 Ms. Lobato is claiming actual innocence of the murder of Mr. Bailey
21 in her timely and original Petition. She is requesting this Court to vacate her
22 convictions, or in the alternative to order a limited evidentiary hearing on
23 Grounds 25, 26, 32, 33, and 55.
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26 Ms. Lobato asserts her new evidence not presented at trial proves
27 she did not murder Mr. Bailey and at the time of the crime she was at home
28

1 in Panaca 165 miles from Las Vegas. The public faith in the administration
2 of justice demands a critical re-evaluation of this case by an independent
3 and impartial court with all of the available evidence.
4

5 The State's theory and narrative of the crime is that "sometime
6 before sunup" on July 8, 2001, Ms. Lobato attacked, overpowered, beat,
7 stabbed and mutilated Mr. Bailey, by herself, in a tightly enclosed dumpster
8 area. According to the State's narrative his body lay exposed in the intense
9 heat of July for more than 16 hours in the open air next to a dumpster until
10 its discovery "around 10 p.m.", without exhibiting any of the usual,
11 customary or expected signs of decomposition, insect infestation, or
12 scavenging of his body. The State's position that Mr. Bailey's time of death
13 was "sometime before sunup" is critical to the State's timeline that the very
14 early morning was the only period on July 8 when it was even remotely
15 possible for Ms. Lobato to be in Las Vegas. That is because the State
16 admitted during argument that telephone records and credible and
17 un rebutted alibi testimony by witnesses for the State and defense
18 established Ms. Lobato was in Panaca from at least "11:30 a.m. through the
19 night," and that she probably there at "10 a.m." [5 App. 1008] If Mr. Bailey
20 died after 8:30 a.m., under the State's theory and narrative, it is impossible
21 Ms. Lobato committed the crimes, with a three-hour travel time from Las
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1 Vegas to Panaca.

2 The State's evidentiary basis for Ms. Lobato's convictions is her
3 Voluntary Statement and there are only two critical words in the Voluntary
4 Statement in common with the crime: black and penis.³ All the remaining
5 elements of the Voluntary Statement are patently inconsistent with the facts
6 of Mr. Bailey's murder; i.e., the date of the murder, the time of the murder,
7 the physical description of the location of the murder, the circumstances of
8 the murder and the size and age of the victim.

9 The State is asking this Court to allow it to cherry-pick only those
10 very limited elements of Ms. Lobato's the Voluntary Statement that support
11 its theory of the case and to ignore or diminish the dozens of documented
12 and clearly contradictory elements of her Voluntary Statement. The State is
13 asking this Court to turn a blind eye to the compelling evidence an
14 eighteen-year-old victimized by a sexual assault at the Budget Suites Hotel
15 has been victimized a second time by being convicted of crimes she did not
16 commit.

17 Further, the State has made the mutually exclusive arguments: If the
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26 ³ Ms. Lobato stated she used her pocket butterfly knife to defend herself, Exhibit
27 125A at 3-5, 27, while no weapon was found at Bailey's crime scene. [2 App. 264]
28 Lobato's medical expert Dr. Lauffer opined the weapon was scissors. [5 App. 968,
970] Dr. Simms testified the weapon was a sharp instrument that could possibly
have been scissors. [2 App. 416, 425]

1 Ms. Lobato's newly proffered evidence was available, then defense counsel
2 was ineffective for not producing it at trial. If the newly proffered evidence
3 was not available, then defense counsel was not ineffective, but then the
4 evidence is new and it is permissible for the District Court to review it by
5 way of Ms. Lobato's Petition.
6

7
8 In contrast, by way of her original and timely Petition, Ms. Lobato
9 has presented an exhaustive list of challenges to the State's theory of the
10 case, which the District Court improperly denied without reviewing on their
11 merits or conducting an evidentiary hearing. This Court should vacate the
12 District Court Order denying her Petition, or, in the alternative, order the
13 District Court to conduct a limited evidentiary hearing on Grounds 25, 26,
14 32, 33, and 55.
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17
18 **A. Standard of Review on Appeal.**

19 This Court reviews the grant or denial of habeas corpus relief de
20 novo, and likewise reviews the district court's conclusions of law de novo,
21 Gallego v. McDaniel, 124 F.3d 1065, 1069 (9th Cir. 1997), *cert. denied*, 524
22 U.S. 917, 922 (1998).
23

24 A district court's ruling involving mixed questions of law and fact is
25 reviewed de novo by this Court. McNelson v. State, 115 Nev. 396, 990 P.2d
26 1263, 1268 (1999).
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28

1 Purely factual findings of the district court supported by substantial
2 evidence are entitled to deference when reviewed on appeal. Riley v. State,
3 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).
4

5 “A defendant seeking post-conviction relief cannot rely on
6 conclusory claims for relief but must support any claims with specific
7 factual allegations that if true would entitle him or her to relief.” Evans v.
8 State, 117 Nev. 609, 621, 28 P.3d 498, 507, citing Pangallo v. State, 112
9 Nev. 1533, 1536, 930 P.2d 100, 102 (1996). “The defendant is not entitled
10 to an evidentiary hearing if the allegations are belied or repelled by the
11 record.” *Evans*, 117 Nev. at 621.
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15 Here, Ms. Lobato challenges the District Court’s denial of her
16 original and timely Petition on three main issues: (i) new, exculpatory
17 evidence not presented at trial, (ii) Brady violations by the State’s
18 prosecutors, and (iii) ineffective assistance of counsel claims. On all three
19 issues challenged below, Ms. Lobato presented specific factual allegations
20 that, if true, would entitle her to relief because they meet the standard of
21 proof required for each of those issues. None of the factual allegations
22 raised by Ms. Lobato are belied or repelled by the record. On the contrary,
23 all of her factual allegations directly undermined the State’s theory of the
24 case and the legal basis for her convictions which were obtained from a jury
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1 deprived of the total picture of the crime and Ms. Lobato's defenses to the
2 crime.

3 "Further, a court must dismiss a habeas petition if it presents claims
4 that either were or could have been presented in an earlier proceeding,
5 unless the court finds both cause for failing to present the claims earlier or
6 raising them again and actual prejudice to the petitioner." *Evans*, 117 Nev.
7 at 622, citing NRS 34.810.
8

9
10 Here, Ms. Lobato presents an original and timely Petition that
11 exclusively presents claims for collateral review for the first time. There has
12 been no "earlier proceeding" for her to present her claims collaterally, so
13 NRS 34.810 is inapplicable. See, Pelligrini v. State, 117 Nev. 860, 34 P.3d
14 519, 535 (2001) (Procedural default under NRS 34.810 doesn't apply to
15 ineffective assistance of counsel grounds in an original and timely habeas
16 corpus petition.)
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20 **B. New Evidence.**

21 Ms. Lobato was prejudicially deprived of her federal and state rights
22 to due process, a fair trial, prohibiting cruel and unusual punishment, and
23 equal protection of the law (U.S. Const. amend. V, VIII, XIV; Nevada
24 Const. Art. I, Sec. 1, 3, 6, 8) by the District Court's failure to review on
25 their merits Grounds 1-24 and 78 of her Petition. These Grounds are based
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1 on new evidence of her actual innocence which was not presented at trial.
2 In summarily denying those grounds as procedurally defaulted by
3 misapplying NRS 176.515(3) and NRS 34.810, the District Court's error
4 requires this Court to review those grounds on their merits *de novo*.
5

6 Ms. Lobato's Petition includes more than 20 grounds based on new
7 evidence not presented at trial of her actual innocence by (i) twelve experts
8 (eleven working pro bono on her case), (ii) thirteen alibi witnesses, (iii)
9 three alternate suspect witnesses and (iv) seven fact witnesses, which are
10 detailed in more than 40 professional reports, affidavits, statements, and
11 documents incorporated in her Petition as exhibits.
12
13

14 **1. Standard of Review.**

15 It is black letter law in Nevada under this Court's precedents in
16 *Orsborn, Snow* and *D'Agostino* that Ms. Lobato has the right to collateral
17 review of new evidence of her actual innocence in her original and timely
18 Petition, which was not presented at trial. State ex rel. Orsborn v. Fogliani,
19 82 Nev. 300, 417 P.2d 148 (1966); Snow v. State, 105 Nev. 521, 523, 779
20 P.2d 96, 97 (1989); D'Agostino v. State, 112 Nev. 417, 421, 915 P.2d 264,
21 269 (1996).
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26 This Court ruled in *Snow*, "While NRS 176.515(3) precludes direct
27 review of Snow's conviction, Snow may still seek collateral review of his
28

1 claimed newly discovered evidence by petitioning for a writ of habeas
2 corpus.” *Id.* at 97. *Snow* was based on this Court’s precedent in *Orsborn*
3 that collateral review of a claim of innocence in an original habeas corpus
4 petition is available “to allow the presentation of questions of law which
5 cannot otherwise be reviewed, or that are so important as to render ordinary
6 procedure inadequate and justify the extraordinary remedy.” *Id.* at 97, citing
7 *Orsborn*, 82 Nev. at 301; and, Director, Dep’t of Prisons v. Arndt, 98 Nev.
8 84, 85, 640 P.2d 1318, 1319 (1982). *See also*, Brecht v. Abrahamson, 507
9 U.S. 619, 633 (1993) (Collateral review in “the writ of habeas corpus has
10 historically been regarded as an extraordinary remedy, “a bulwark against
11 convictions that violate ‘fundamental fairness.’”); and Kuhlmann v. Wilson,
12 477 U. S. 436, 452 (1986) (“...a prisoner retains a powerful and legitimate
13 interest in obtaining his release from custody if he is innocent of the charge
14 for which he was incarcerated.”) Mr. Snow was sentenced to death. *Snow*,
15 105 Nev. at 523.

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22 In *D’Agostino*, this Court expanded *Snow*’s holding to include
23 prisoners not sentenced to death: “we conclude, as we did in *Snow*, that
24 D’Agostino would not be foreclosed from seeking habeas relief despite the
25 two-year period of limitations under NRS 176.515(3).” *D’Agostino*, 112
26 Nev. at 421. Mr. D’Agostino was awaiting resentencing at the time of this
27
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1 Court's ruling, *Id.* at 265, and in 1997 he was sentenced to life in prison
2 without parole.

3 This Court's rulings in *Orsborn*, *Snow* and *D'Agostino* are
4 consistent with the Court's authority to set aside a petitioner's conviction
5 and order their immediate release from custody, as this Court did in
6 *Orsborn*, if that is the appropriate relief to "dispose of the case as justice
7 may require." NRS 34.470(2). The aforementioned cases each had only the
8 new evidence of one witness or fact, while Ms. Lobato's petition has new
9 evidence by more than 30 witnesses.
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13 Consequently, under this Court's precedents in *Orsborn*, *Snow* and
14 *D'Agostino*, the statutory restrictions placed on direct review of a motion
15 for a new trial under NRS 176.515 don't apply to collateral review of Ms.
16 Lobato's original and timely habeas corpus petition.
17
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19 **a. Actual Innocence Grounds Are Substantive Federal**
20 **Constitutional Claims.**

21 Ms. Lobato's grounds based on new evidence of her actual
22 innocence are substantive federal due process claims. Schlup v. Delo, 513
23 U.S. 298, 314 (1995); Garner v. Louisiana, 368 U.S. 157, 163 (1961); and,
24 cruel and unusual punishment claims, Robinson v. California, 370 U.S. 660,
25 667 (1962).
26
27

28 **b. Standard of Evidence For Actual Innocence Grounds.**

1 Ms. Lobato argues the correct evidence standard to evaluate her
2 grounds based on new evidence of her actual innocence is that it is “new
3 reliable evidence—whether it be exculpatory scientific evidence,
4 trustworthy eyewitness accounts, or critical physical evidence—that was
5 not presented at trial.” Schlup v. Delo, 513 U.S. 298, 324 (1995). *See also*,
6 Herrera v Collins, 506 US 390, 417-18 (1993) (The Court relied on new
7 evidence not presented at trial in making its ruling.); *Schlup*, 513 U.S. at
8 316-17, 332 (Remanded based on new evidence not presented at trial.);
9 House v. Bell, 547 U.S. 518, 551 (2006) (Habeas relief granted based on
10 new evidence not presented at trial.); and, In Re Troy Anthony Davis, 557
11 US ___, 130 S. Ct. 1 (2009) (Remand to assess new evidence not presented
12 at trial by seven witnesses to determine if Davis was actually innocent.).
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18 The U.S. Supreme Court clarified in *Schlup* that the reviewing court
19 “is not bound by the rules of admissibility that would govern at trial.
20 Instead, the emphasis on ‘actual innocence’ allows the reviewing tribunal
21 also to consider the probative force of relevant evidence,” *Schlup*, 513 U.S.
22 at 327. Also, under *Schlup* if any one ground is not sufficient to warrant
23 relief, the *habeas* court is to make an evaluation cumulatively “in light of
24 all the evidence.” *Id.*, at 328. *See also* House v. Bell, 547 U.S. 518, 538
25 (2006) (“the habeas court must consider ‘all the evidence,’ old and new.”)
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28

1 The U.S. Ninth Circuit Court of Appeals held in Griffin v. Johnson,
2 350 F. 3d 956 (9th Cir. 2003) that in the context of an actual innocence
3 ground, new evidence is evidence not “introduced to the jury at trial,”
4 regardless of whether it “was available to the defendant during his trial.”
5
6 *Griffin*, 350 F.3d at 963 (emphasis in original) “Because none of this
7 evidence was presented to the trial court, we conclude that it constitutes
8 “new ... evidence ... that was not presented at trial,” *Schlup*, 513 U.S. at
9 324.” *Id.*

12 Consistent with the Ninth Circuit’s interpretation, many state courts
13 have adopted a new evidence standard for actual innocence habeas claims
14 consistent with the *Schlup* standard: Missouri - “the evidence supporting the
15 conviction must be assessed in light of all of the evidence now available.”
16
17 State ex rel Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003); New
18 Mexico - “we will not be constrained by the requirements applicable to
19 motions for a new trial. Instead, we examine the evidence presented and
20 evaluate any reliable evidence.” Montoya v. Ulibarri, 163 P.3d 476, 487
21 (N.M. 2007); Texas - new recantation evidence by a single witness 13 years
22 after conviction established claim for actual innocence, Ex parte Elizondo,
23 947 S.W.2d 202, 210 (Tex. Crim. App. 1996); New York - “In this respect,
24 a court conducting a hearing on a claim of innocence should admit into
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1 evidence any reliable evidence whether in admissible form or not.” People
2 v Cole, 765 N.Y.S.2d 477, 1 Misc. 3d 531 (Sup. Ct., Kings Cty. 2003),
3 citing Bousley, 523 US at 623-624; Schlup, 513 US at 327-328; Herrera,
4 506 US at 443.

6 *Orsborn* is consistent with *Schlup* and *Griffin* because the
7 petitioner’s conviction of being a felon in possession of a firearm was based
8 on his prior conviction that was a misdemeanor and not a felony, which he
9 or his counsel could have been expected to know, but which nevertheless
10 was not presented at the time of his conviction. *Orsborn*, 82 Nev. at 301.
11 This Court collaterally reviewed Mr. Orsborn’s original petition and
12 granted relief based on the new evidence he was “wrongfully imprisoned”
13 without conducting any analysis of his new evidence other than determining
14 it wasn’t presented at the time of his conviction. *Id.* Likewise, in *Snow* and
15 *D’Agostino*, this Court specifically ruled the Appellants could pursue
16 collateral review of their new evidence claims in an original habeas petition
17 regardless of restrictions imposed on direct review of “new evidence” by
18 NRS 176.515. *Snow*, 105 Nev. at 523; *D’Agostino*, 112 Nev. at 421.

24 By way of its Response to Ms. Lobato’s grounds based on new
25 evidence, the State makes the errant argument that the law applicable to
26 direct review of a motion for a new trial under NRS 176.515 applies to
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1 collateral review of her new evidence claims in her original and timely
2 habeas corpus petition, which argument is directly contrary to this Court's
3 precedents in *Orsborn*, 82 Nev. at 301; *Snow*, 105 Nev. at 523; and,
4 *D'Agostino*, 112 Nev. at 421. The State argued that pursuant to *D'Agostino*,
5 Ms. Lobato was not entitled to introduce new evidence because it "could
6 have clearly discovered through reasonable diligence and raised in a timely
7 manner." [9 App. 1938-39] The State plainly misapplied *D'Agostino*
8 because the cited quote refers to Mr. D'Agostino's error of making a
9 **motion for a new trial** based on his new evidence, that this Court
10 specifically stated he could rectify by making a new evidence claim in an
11 original habeas petition: "D'Agostino would not be foreclosed from seeking
12 habeas relief despite the two-year period of limitations under NRS
13 176.515(3)." *D'Agostino*, 112 Nev. at 421. That is exactly what Ms. Lobato
14 has done in her Petition.

15
16 By way of its Order, the District Court made the prejudicial error of
17 ruling in agreement with the State that Ms. Lobato's new evidence Grounds
18 1-4, 23 and 78 are procedurally defaulted under the portion of this Court's
19 ruling in *D'Agostino* applicable only to a motion for a new trial under NRS
20 176.515, and that Grounds 6-14, 16-19, 21 and 22 were procedurally
21 defaulted because "they could have been raised in a timely motion for a
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1 new trial.” under NRS 176.515. [11 App. 2265-69, 2281] As explained in
2 the preceding paragraph pertaining to the State’s argument adopted by the
3 District Court, procedural default under NRS 176.515 is inapplicable to Ms.
4 Lobato’s new evidence claims in her original and timely Petition, which are
5 to be reviewed on their merits under this Court’s precedents in *Orsborn*, 82
6 Nev. at 301; *Snow*, 105 Nev. at 523; and, *D’Agostino*, 112 Nev. at 421.
7

8
9 **c. Standard of Proof For Actual Innocence Grounds.**

10 Ms. Lobato and the State agree the proper standard of proof to
11 evaluate on their merits her grounds of her actual innocence is, “it is more
12 likely than not that no reasonable juror would have convicted him in light of
13 the new evidence” presented in habeas proceedings. *Schlup*, 513 U.S. at 327.
14 The district court doesn’t dispute *Schlup* is the correct standard of proof.
15 Illinois has adopted the *Schlup* consistent standard for granting a claim of
16 actual innocence that a petitioner’s new evidence would “probably change
17 the result on retrial.” *People v. Washington*, 171 Ill.2d 475, 665 N.E.2d
18 1330, 1337 (1996).
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23 *Schlup*’s preponderance standard for collateral review of new
24 evidence of actual innocence is similar to Nevada’s “different result probable
25 upon retrial” standard for granting a motion for a new trial on direct review.
26
27 *Pacheco v. State*, 81 Nev. 639, 641, 408 P.2d 715, 716 (1965).
28

1 *Schlup*'s standard of proof for a new evidence claim is more
2 demanding than that for granting a petitioner's ineffective assistance of
3 counsel claim, because to satisfy the "reasonable probability" standard a
4 petitioner "need not show that counsel's deficient conduct more likely than
5 not altered the outcome in the case" Strickland v. Washington, 466 U.S.
6 668, 693 (1984).
7

8
9 *Schlup*'s standard of proof is also more demanding than that for
10 granting a habeas petitioner's claim based on non-disclosed evidence,
11 because to satisfy the "reasonable probability" standard under Brady v.
12 Maryland, 373 U.S. 83 (1963), "does not require demonstration by a
13 preponderance that disclosure of the suppressed evidence would have
14 resulted ultimately in the defendant's acquittal." Kyles v. Whitley, 514 U.S.
15 419, 434 (1995).
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19 In *Orsborn*, this Court did not state its standard of proof for
20 determining the "petitioner was wrongfully imprisoned," other than he "is
21 not guilty." *Orsborn*, 82 Nev. at 301. Ms. Lobato encourages this Court to
22 apply the *Schlup* evidence standard that "it is more likely than not that no
23 reasonable juror would have convicted him in light of the new evidence"
24 presented in habeas proceedings, *Schlup*, 513 U.S. at 327, which exceeds the
25 Supreme Court's proof standard for granting habeas relief to Ms. Lobato for
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1 a violation of her constitutional rights under both *Brady* and *Strickland*.

2 The State also suggests the proof standard under *Pacheco*, 81 Nev. at
3 641, for granting a motion for a new trial is applicable to Ms. Lobato's
4 habeas new evidence grounds. [9 App. 1939] Ms. Lobato expressly rejects
5 that *Pacheco* is directly applicable to her habeas new evidence grounds.
6
7 However, as explained above the *Pacheco* standard is similar to the *Schlup*
8 standard, so the State's argument is an affirmation of Ms. Lobato's argument
9 that the Schlup standard is the correct proof standard for determining if her
10 new evidence grounds require relief.
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12

13 **2. Elements of the Claim.**

14 By way of her Petition, Ms. Lobato has raised no less than 23
15 grounds of new evidence to challenge the validity of her conviction, and in
16 ground 23 that she is actually innocent. Each ground is supported by new
17 material and credible evidence that was not presented at trial. Unlike the
18 State, she is not "grasping at straws" or seeking to draw scant inferences.
19
20 Ms. Lobato's Petition is grounded on a solid factual foundation which
21 screams for a proper independent judicial re-evaluation with the benefit of
22 all of the available evidence.
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26 **a. Expert Evidence.**

27 By way of its Order, the District Court prejudicially erred and
28

1 deprived Ms. Lobato of her federal and state constitutional rights to due
2 process, compulsory process, confrontation, and a fair trial by summarily
3 rejecting consideration on its merits of her new evidence by twelve experts
4 she obtained post-conviction in support of new evidence grounds 1-4, 7-8,
5 10-13, 18, 23-24, and 78. The District Court didn't cite any relevant legal
6 authority and explain its applicability to the specific facts of the new expert
7 evidence in Ms. Lobato's Petition. NRS 50.275 does not distinguish
8 between expert evidence on the basis of whether it is offered at trial or post-
9 conviction as direct evidence in support of a party's position or as rebuttal
10 evidence:
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15 If scientific, technical or other specialized knowledge will assist the
16 trier of fact to understand the evidence or to determine a fact in issue, a
17 witness qualified as an expert by special knowledge, skill, experience,
18 training or education may testify to matters within the scope of such
knowledge.⁴ NRS 50.275

19 Ms. Lobato's Petition includes new evidence prepared by nationally
20 and internationally recognized experts. The District Court's Order does not
21 dispute that all the experts Ms. Lobato obtained evidence from post-
22 conviction are eminently qualified to testify regarding their "specialized
23 knowledge."
24
25

26 Furthermore, the District Court's Order does not aver that any of
27

28 ⁴ The District Court's Jury Instruction 36 regarding expert testimony at trial was consistent with NRS 50.275.

1 Ms. Lobato's expert evidence will not "...assist the trier of fact to
2 understand the evidence or to determine a fact in issue ..." Neither did the
3 District Court deny that Ms. Lobato's expert evidence "is "relevant and the
4 product of reliable methodology." Hallmark v. Eldridge, 124 Nev. 492, 189
5 P.3d 646, 650 (2008).
6

7
8 Consequently, all of Ms. Lobato's expert evidence is admissible
9 under NRS 50.275.⁵ The State's arguments for summary rejection of Ms.
10 Lobato's expert evidence mirrored the District Court's Order. Furthermore,
11 summary rejection of Ms. Lobato's new expert evidence has no legal basis
12 because in reviewing her Petition claiming her actual innocence a court
13 must review "all probative evidence irrespective of its admissibility at trial.
14 *Schlup*, 513 U.S. at 327.
15
16

17
18 In granting habeas relief in House v. Bell, 547 U.S. 518 (2006), the
19 Supreme Court relied on exculpatory new expert evidence not presented at
20 trial. *Id.* 547 U.S. at 542-44, 552-54. Exactly as Ms. Lobato, Mr. House
21 claimed his expert evidence obtained post-conviction proved his actual
22 innocence by undercutting and rebutting the State's case at trial: "Thus,
23 whereas the bloodstains, emphasized by the prosecution, seemed strong
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27 ⁵ Ron Slay's new expert polygraph evidence is admissible for consideration in Ms.
28 Lobato's Petition, *Schlup*, 513 U.S. at 327.

1 evidence of House's guilt at trial, the record now raises substantial
2 questions about the blood's origin." *Id.* at 548. Just as in *House*, Ms.
3 Lobato's new expert evidence raises "substantial questions" about blood
4 and alleged blood evidence "emphasized by the prosecution," as well as
5 many other relevant and material issues. [6 App.1222, 1227, 1236, 1296]
6
7 The Supreme Court determined that on the basis of Mr. House's post-
8 conviction expert evidence rebutting the State's case at trial:
9

10
11 Yet the central forensic proof connecting House to the crime—the
12 blood and the semen—has been called into question, ... had the jury heard
13 all the conflicting testimony—it is more likely than not that no reasonable
14 juror viewing the record as a whole would lack reasonable doubt." *Id.* at
15 554. (emphasis added)

16 The U.S. Supreme Court placed significant weight on Mr. House's
17 new post-conviction expert evidence because it rebutted a "central theme in
18 the State's narrative linking House to the crime," *Id.* at 541. Ms. Lobato's
19 Petition explains at considerable length that her post-conviction evidence by
20 her twelve experts likewise fatally undercuts or rebuts in numerous ways
21 "the State's narrative linking [her] to the crime." *Id.*
22

23 Yet contrary to NRS 50.275, and *House* and *Schlup*, by way of its
24 Order the District Court summarily rejected consideration of Ms. Lobato's
25 expert evidence by finding without relying on any relevant legal authority,
26 that it was "simply an elaboration or opinion based upon the evidence
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1 available and presented at trial. Thus, it was not newly discovered.” [11
2 App. 2265, 2267-68] *House* exposes that the reason the District Court cited
3 no authority for its finding is because there is none, because in *House*, the
4 U. S. Supreme Court granted habeas relief based on new expert evidence
5 that was an elaboration or opinion based upon the evidence available and
6 presented at trial. *Id.* 542-44, 552-54.
7

8
9 The District Court further prejudicially erred by rejecting Ms.
10 Lobato’s expert evidence as “newly discovered,” because as explained
11 previously all evidence in Ms. Lobato’s original and timely Petition that
12 wasn’t presented at trial is new evidence for collateral review of her
13 conviction. *Schlup*, 513 U. S., at 328; *House*, 547 U.S. at 538, 541; *Griffin*,
14 350 F. 3d at 963; *Orsborn*, 82 Nev. at 301.
15
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18 Here, the State has argued that the expert testimony is not
19 “evidence” and therefore, new expert testimony is not “new evidence,” but
20 merely “cumulative.” [9 App. 1938-39] As explained above the State’s
21 arguments lack merit because as explained herein Ms. Lobato’s expert
22 evidence is new because it wasn’t presented at trial, and because it is new it
23 cannot be “cumulative” with trial evidence that was introduced at trial.
24
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26 **3. The District Court erred in application of the relevant**
27 **statutes and case law.**

28 ***D’Agostino*** - By way of its Order regarding Grounds 1-4, 23 and 78

1 the District Court prejudicially erred citing D'Agostino v. State, 112 Nev.
2 417, 423, 915 P.2d 264, 267 (1996) in support of its finding that those
3 grounds were procedurally barred because the evidence presented in Ms.
4 Lobato's Petition was "not newly discovered" under NRS 176.515. [11
5 App. 2265, 2270] In *D'Agostino*, the Appellant relied on new evidence to
6 file an untimely motion for a new trial which was subject to direct review
7 under NRS 176.515. *D'Agostino*, 915 P.2d at 267. This Court ruled that as a
8 prisoner not sentenced to death D'Agostino could raise his new evidence
9 claim in an original habeas corpus petition that would be subject to
10 collateral review. *Id.* at 269. See also, *Snow*, 105 Nev. at 523; *Orsborn*, 82
11 Nev. at 301. Ms. Lobato has raised her new evidence claims in her original
12 and timely Petition exactly as the Court ruled that Mr. D'Agostino could
13 do. Thus, the District Court facially misapplied *D'Agostino* to Ms. Lobato's
14 Petition.
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20 ***Herrera*** - By way of its Order regarding Grounds 4, 7-9, 11-14, 16-
21 20, 22-24 and 78, the District Court cited Justice O'Connor's concurrence
22 in Herrera v. Collins, 506 U.S. 390, 417 (1993) in support of its finding that
23 the affidavits presented in Ms. Lobato's Petition should be "treated with a
24 fair amount of skepticism." [11 App. 2265-69, 2281]
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The District Court prejudicially misapplied *Herrera* because the

1 majority ruled a habeas petitioner's affidavits are "testimony," *Id.* at 418,
2 and "Had this sort of testimony been offered at trial, it could have been
3 weighed by the jury, along with the evidence offered by the State and
4 petitioner, in deliberating upon its verdict. Since the statements in the
5 affidavits contradict the evidence received at trial, the jury would have had
6 to decide important issues of credibility." *Id.* A jury can be expected to have
7 given considerable weight to the testimony by Ms. Lobato's witnesses after
8 they were subjected to cross-examination because neither the District Court
9 nor the State raise a specific objection that her affiants are not reliable,
10 trustworthy, or credible. *Schlup*, 513 U. S. at 324, 328. Furthermore,
11 evaluation of Ms. Lobato's affidavits "is not bound by the rules of
12 admissibility ... the emphasis on 'actual innocence' allows the reviewing
13 tribunal also to consider the probative force of relevant evidence," *Id.*, at
14 327.

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20 ***Jackson*** - By way of its Order regarding Grounds 4, 23 and 78, the
21 District Court cited *Jackson v. State*, 116 Nev. 334, 997 P.2d 121 (2000) in
22 support of its finding that "polygraph results are inadmissible at trial unless
23 there is a written stipulation signed by the prosecuting attorney, the
24 defendant, and defense counsel." [11 App. 2265, 2269, 2281] The District
25 Court prejudicially misapplied *Jackson* to the above grounds because
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1 *Schlup* clarifies that the habeas reviewing court “is not bound by the rules
2 of admissibility that would govern at trial. Instead, the emphasis on ‘actual
3 innocence’ allows the reviewing tribunal also to consider the probative
4 force of relevant evidence,” Schlup, 513 U.S. at 327.

6 ***Hall*** - By way of its Order regarding Grounds 5, 21, 23 and 78, the
7 District Court cited Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798
8 (1975) in support of its finding that “law of a first appeal is the law of the
9 case on all subsequent appeals in which the facts are substantially the
10 same.” [11 App. 2265, 2269, 2281]
11

13 The District Court prejudicially misapplied *Hall* to the above
14 grounds because either the law applicable to the facts of the above grounds
15 was not previously ruled on by this Court, or the facts are different than
16 those upon which this Court ruled.
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19 ***Pelligrini*** - By way of its Order regarding Grounds 5, 23 and 78, the
20 District Court cited Pelligrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) in
21 support of its finding that “issues previously decided on direct appeal may
22 not be reargued in a habeas petition.” [11 App. 2265, 2269, 2281]
23

25 The District Court prejudicially misapplied *Pelligrini* to the above
26 grounds because Ms. Lobato’s actual innocence in Ground 23 was not an
27 issue argued on direct appeal, and Ms. Lobato’s alibi witness evidence in
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1 Grounds 5 and 78 was not an issue argued in *Lobato* (2004) cited by the
2 District Court. [11 App. 2265.]

3 **NRS 34.810** - By way of its Order regarding Grounds 1 4, 6-14, 16-
4 24 and 78, the District Court cited NRS 34.810 in support of its finding that
5 Ms. Lobato's claims were barred because "they could have been raised in a
6 timely motion for a new trial." [11 App. 2265-69, 2281]
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9 The District Court prejudicially erred because Ms. Lobato's
10 evidence not presented at trial may be brought before the Court for
11 collateral review, "even after the two-year time limit imposed by NRS
12 176.515(3) has run, in a petition for a writ of habeas corpus." *D'Agostino*,
13 112 Nev. at 426, citing Snow v. State, 105 Nev. at 523. Moreover, the
14 District Court's non-specific reference to NRS 34.810 provides no rationale
15 for imposing the two-year rule for direct review of a motion for a new trial
16 under NRS 176.515(3) to Ms. Lobato's original and timely Petition in light
17 of *D'Agostino*, *Snow* and *Orsborn*, 82 Nev. at 301.
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22 Furthermore, by failing to raise NRS 34.810 as an affirmative
23 defense to Ms. Lobato's new evidence grounds, the State waived it and the
24 District Court had no colorable legal basis to raise it *sua sponte*. Vang v.
25 Nevada, 329 F. 3d 1069, 1073 (9th Cir 2003) ("Procedural default is an
26 affirmative defense. (citation omitted) Generally, the state must assert the
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28

1 procedural default as a defense to the petition before the district court;
2 otherwise the defense is waived.”).

3 ***Hargrove*** - By way of its Order regarding Grounds 9-10, 13, 15, 17,
4 22-23 and 78, the District Court cited Hargrove v. State, 100 Nev. 498, 502,
5 686 P.2d 222, 225 (1984) in support of its finding that “‘bare’ and ‘naked’
6 allegations are not sufficient, nor are those belied or repelled by the record.”
7 [11 App. 2266-69, 2281] In *Hargrove*, the defendant appealed the denial of
8 his motion to withdraw his guilty plea, which the district denied without an
9 evidentiary hearing. By way of his appeal, the defendant claimed that
10 “certain witnesses could establish his innocence” but his pleadings did not
11 include “the witnesses’ names or their intended testimony.” *Hargrove*, 100
12 Nev. at 502.

13 The District Court prejudicially misapplied *Hargrove* because Ms.
14 Lobato’s above actual innocence grounds contain the specific details of “a
15 factual background, names of witnesses or other sources of evidence
16 demonstrating ... entitlement to relief” of a new trial. *Id.* at 502. Which was
17 the exact evidence lacking in *Hargrove*.

18 ***Mulder*** - By way of its Order regarding 78, the District Court cited
19 Mulder v. State, 116 Nev. 1, 992 P.2d 845 (2000) in support of its finding
20 that “Defendant’s claims of new evidence are insufficient to warrant relief.”
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1 [11 App. 2281]

2 The District Court prejudicially misapplied *Mulder* that concerned a
3 direct appeal and the cumulative effect of trial errors – not collateral review
4 of actual innocence claims and evaluation of their cumulative effect at issue
5 herein. Ms. Lobato submits, as argued herein, that her new evidence is
6 evaluated cumulatively “in light of all the evidence.” *Schlup*, 513 U.S. at
7 328 (See also *House*, 547 U.S. at 538, “the habeas court must consider ‘all
8 the evidence,’ old and new.”), under *Schlup*’s standard that “it is more likely
9 than not that no reasonable juror would have convicted [her] in light of the
10 new evidence presented in habeas proceedings.” *Id.* at 327.
11

12 ***Ennis*** – By way of its Order regarding Ground 78, the District Court
13 cited *Ennis v. State*, 122 Nev. 694, 137 P.3d 167 (2006) in support of its
14 finding that “Defendant’s claims of new evidence are insufficient to warrant
15 relief.” [11 App. 2281]
16

17 The District Court prejudicially misapplied *Ennis* that concerned
18 post-conviction ineffective assistance of counsel claims and a *Crawford*
19 challenge to hearsay testimony – but no actual innocence claims, or their
20 cumulative evaluation. Ms. Lobato submits, as argued herein, that her new
21 evidence is evaluated cumulatively “in light of all the evidence.” *Schlup*,
22 513 U.S. at 328 (See also *House*, 547 U.S. at 538, “the habeas court must
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1 consider ‘all the evidence,’ old and new.”), under *Schlup*’s standard that “it
2 is more likely than not that no reasonable juror would have convicted [her] in
3 light of the new evidence presented in habeas proceedings.” *Id.* at 327.
4

5 **4. Specific Grounds of Actual Innocence.**

6 **Ground 1.** [6 App. 1173] New expert evidence not presented at trial
7 by three internationally known forensic entomologists – Dr. Gail S.
8 Anderson, Dr. Linda-Lou O’Connor, and Dr. M. Lee Goff – that
9 scientifically establishes Mr. Bailey died after sunset at 8:01 p.m. on July 8,
10 2001. No expert entomology evidence was presented at trial.
11
12

13 Dr. Anderson states in her Report dated December 17, 2009:

14 “Blow flies are attracted to human remains, and any other carrion or
15 meat product, in order to lay their eggs. Eggs are laid within minutes of the
16 remains being located by blow flies, meaning that they are laid within a
17 very short time after death, usually minutes. ...

18 ... Blow flies are **diurnal** animals, meaning they are **only active**
19 **during daylight hours.** ...

20 Therefore, if remains are found after dark and show no evidence of
21 insect activity, yet all other conditions are appropriate for insect flight, then
22 it is concluded that the victim died after dark. ...

23 I have reviewed the photographs in order to see whether or not
24 insects had located the remains and laid eggs. Although the remains would
25 have been extremely attractive to insects due to the extensive wounds and
blood present at the scene, I do not see any evidence of insect activity. ...

26 In consideration of the above, it is my opinion as a forensic
27 entomologist, ... that to a reasonable scientific certainty Mr. BAILEY’s
28 death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most
probably after full dark at 21:08 h (9:08 pm). I do not believe that it is

1 possible that the remains were present during the entire daylight hours of 8
2 July 2001.” (Bold in original) [7 App. 1519, 1521-22; 6 App. 1174-75]

3 Dr. O’Connor [7 App. 1528] and Dr. Goff [7 App 1534]
4 independently arrived at the conclusions there were no blowfly eggs on Mr.
5 Bailey’s body and he died after sunset (8:01 p.m.). Thus, Mr. Bailey died at
6 least 8-1/2 hours after Ms. Lobato is positively known to have been in
7 Panaca at 11:30 a.m.
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9
10 Dr. Anderson reviewed the State’s Response [9 App. 1939-41] and
11 responded: “My original opinion stands, and I do not feel that the State’s
12 response to the insect evidence has any validity whatsoever.” [10 App.
13 2167-68; 10 App. 1990-91]
14

15 Dr. Simms’ Autopsy Report doesn’t mention the presence of any
16 blow fly eggs. [10 App. 2168] The new entomology evidence impeaches
17 the credibility of Dr. Simms’ trial testimony about Mr. Bailey’s time of
18 death that didn’t take into consideration the absence of blow fly eggs.
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21 As set forth above, the District Court erred in its application of
22 *D’Agostino* and the District Court prejudicially erred summarily denying
23 Ground 1 because Ms. Lobato’s new unrebutted expert evidence (i) rebuts
24 and impeaches the credibility of Dr. Simms’ testimony, (ii) fatally
25 undermines “the State’s narrative” that Mr. Bailey died “sometime before
26 sunup,” and (iii) proves she is actually innocent.
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1 **Ground 2.** [6 App. 1179] New expert evidence by forensic
2 pathologist Dr. Glenn M. Larkin establishes that “to a reasonable medical
3 and scientific certainty that Bailey was killed ... within two hours before
4 discovery. The lack of blow fly infestation suggests an even shorter time
5 between [when] Bailey died and was discovered.” [7 App.1544] Dr.
6 Larkin’s new evidence relies on evidence not introduced at trial, including
7 20 expert medical studies of rigor mortis and the absence of blow fly eggs.
8 [7 App. 1537, 47]

9 Dr. Larkin’s cited 20 rigor mortis studies, of which only three
10 reported the maximum time it takes a body to become stiff is 18 hours after
11 death. [7 App. 1547] Thus, the absolute earliest Mr. Bailey could have died
12 was 9:50 a.m. on July 8, based on his body being “stiff” when examined at
13 3:50 a.m. on July 9. [7 App. 1538] The travel time from Las Vegas to
14 Panaca is three hours [4 App. 761], so if Mr. Bailey died after 8:30 a.m.
15 under the State’s theory and admission during argument, [5 App. 1008] it is
16 physically impossible that Ms. Lobato committed the crimes. The State did
17 not respond to Dr. Larkin’s new forensic pathology evidence of Mr.
18 Bailey’s time of death. [9 App. 1939-41]

19 Dr. Larkin’s new evidence (i) rebuts and impeaches the credibility of
20 Dr. Simms’ trial testimony that “at about 24 hours your body is stiff” [2
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1 App. 433] and (ii) rebuts and impeaches his testimony there was a 5%
2 probability Mr. Bailey died up to 24 hours before examination of his body
3 at 3:50 a.m. on July 9. [2 App. 457] Dr. Simms' testimony was the basis of
4 the State's narrative and argument Mr. Bailey was murdered "sometime
5 before sunup" on July 8.
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8 As set forth above, the District Court erred in its application of
9 *D'Agostino* and the District Court prejudicially erred summarily denying
10 Ground 2 because Ms. Lobato's new unrebutted expert evidence (i) rebuts
11 and impeaches the credibility of Dr. Simms' testimony supporting he could
12 have died as early as 3:50 a.m. on July 8, (ii) fatally undermines the State's
13 narrative that Mr. Bailey died "sometime before sunup" and (iii) proves that
14 she is actually innocent.
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18 On November 23, 2010, Ms. Lobato filed a Motion for Limited
19 Discovery for the purpose of deposing Dr. Larkin as soon as possible, due
20 to his failing health (the "Larkin Motion"). [11 App. 2189] The State
21 opposed the Larkin Motion and on March 2, 2011, the District Court denied
22 it, citing NRS 34.780, as being premature. [11 App. 2230]
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25 **Ground 3.** [6 App 1181] New expert evidence not presented at trial
26 by four forensic entomologists and forensic pathologist Dr. Larkin that the
27 lack of insect or rodent bites on Mr. Bailey's body establishes he died
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1 shortly before it was discovered around 10 p.m. There was no testimony at
2 trial Mr. Bailey's body wasn't scavenged.

3 Dr. Anderson wrote in her report dated December 17, 2009: "Also,
4 notes by Las Vegas Metropolitan Police Department Crime Scene Analyst
5 Louise Renhard state: "Beer can partially filled – cockroach infested". ...
6 Cockroach feeding on fresh remains often cause distinctive marks on the
7 body No such marks were observed in the photographs I reviewed." [7
8 App. 1522-23; 7 App. 1564]

9 The absence of scavenging of Mr. Bailey's body was also reported
10 by Dr. O'Connor [7 App. 1530-31], Dr. Goff [7 App. 1534], Dr. Jason H.
11 Byrd (Board Certified forensic entomologist) [10 App. 1992; 10 App. 2170]
12 and, Dr. Larkin. [7 App. 1538]

13 The State offered no rebuttal, 9 App. 1940, to Ms. Lobato's factual
14 statement: "The absence of predatory bites is significant because Bailey's
15 body could not have lain for any significant length of time in the dark
16 garbage strewn trash enclosure without being descended on by predatory
17 flesh eaters such as cockroaches and rats." [6 App. 1184]

18 The new evidence in Ground 3 rebuts and impeaches the credibility
19 of Dr. Simms' trial testimony about Mr. Bailey's time of death because he
20 didn't take into consideration the absence of scavenging.
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1 As set forth above, the District Court erred in its application of
2 *D'Agostino* and the District Court prejudicially erred summarily denying
3 Ground 3 because Ms. Lobato's new unrebutted expert evidence (i) rebuts
4 and impeaches the credibility of Dr. Simms' testimony supporting Mr.
5 Bailey could have died as early as 3:50 a.m. on July 8, (ii) fatally
6 undermines the State's narrative that Mr. Bailey died "sometime before
7 sunup," and (iii) proves that she is actually innocent.
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10 **Ground 4.** [6 App 1185] New expert evidence not presented at trial
11 by psychologist Dr. Alison Redlich and polygraph examiner Ron Slay that
12 Ms. Lobato's Voluntary Statement doesn't refer to Mr. Bailey's murder. [7
13 App. 1550, 1570] There was no expert psychology or polygraph testimony
14 at trial. Mr. Slay's new evidence is admissible for Ms. Lobato's Petition.
15
16 *Schlup*, 513 U. S. at 327.
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19 As set forth above, the District Court erred in its application of
20 *D'Agostino*, *Herrera*, and *Jackson* and the District Court prejudicially erred
21 in summarily denying Ground 4 because Ms. Lobato's new unrebutted
22 expert evidence (i) rebuts and impeaches Det. Thowsen's testimony that
23 Ms. Lobato's Voluntary Statement was about Mr. Bailey's Murder [3 App.
24 663-6, 673, 686], (ii) fatally undermines was the basis of the State's
25 narrative and (iii) proves that she is actually innocent.
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1 **Ground 5.** [6 App. 1190] New evidence not presented at trial by
2 nine alibi witnesses that Ms. Lobato told about the May Budget Suites
3 Assault prior to Mr. Bailey's murder on July 8, 2001. This alibi evidence
4 wasn't introduced at trial so the State's argument it is cumulative is belied
5 by the record. [9 App. 1942-3] The States theory and narrative of the crime
6 was based on Det. Thowsen's opinion testimony that the May Budget
7 Suites Assault and Mr. Bailey's Murder were the same event. [3 App. 663-
8 64, 673, 686; 5 App. 1013, 1025, 1027]

9 As set forth above, the District Court erred in its application of *Hall*,
10 *Pelligrini*, and *Lobato* (2004). The District Court's Order is belied by the
11 record because in *Lobato*, 120 Nev. at 522, this Court ruled the District
12 Court didn't err in excluding the testimony of two witnesses at trial not
13 properly noticed under NRS 174.234, which is irrelevant to this Ground.

14 The District Court prejudicially erred summarily denying Ground 5
15 because Ms. Lobato's new unrebutted alibi witness evidence (i) rebuts and
16 impeaches Det. Thowsen's testimony that Ms. Lobato's Voluntary
17 Statement was about Mr. Bailey's Murder [3 App. 663-6, 673, 686], (ii)
18 fatally undermines was the basis of the State's narrative, and (iii) proves
19 that she is actually innocent.

20 **Ground 6.** [6 App. 1196] New evidence not presented at trial by
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1 four alibi witnesses that Ms. Lobato wasn't under the influence of
2 methamphetamine when she spent the entire weekend of July 6, 7 and 8,
3 2001 in Panaca. Evidence that Ms. Lobato wasn't under the influence of
4 methamphetamine wasn't presented at trial so the State's argument it is
5 cumulative is belied by the record. [9 App. 1943]

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8 As set forth above, the District Court erred in its application of NRS
9 34.810 and the District Court prejudicially erred in summarily denying
10 Ground 6 because Ms. Lobato's new un rebutted alibi witness evidence
11 fatally undermines the State's narrative that she had been in Las Vegas
12 without sleep for three consecutive days (July 6-8) while on a
13 methamphetamine binge [5 App. 1005]; and proves she is actually innocent.
14
15

16 **Ground 7.** [6 App. 1200] New expert forensic pathology evidence
17 by Dr. Larkin that, in a separate act of mutilation after Mr. Bailey's penis
18 was amputated, his groin area was carefully skinned by a person "skilled
19 either with medical knowledge or animal husbandry," and it is likely
20 multiple people were involved in Mr. Bailey's murder. [7 App. 1544] There
21 was no evidence at trial Ms. Lobato had any specialized skills. [6 App.
22 1200] The State's narrative was that Ms. Lobato alone inflicted all of Mr.
23 Bailey's injuries while on a three-day methamphetamine binge. [9 App.
24 1837]
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1 As set forth above, the District Court erred in its application of NRS
2 34.810 and *Herrera* and the District Court prejudicially erred in summarily
3 denying Ground 7 because Ms. Lobato's new expert evidence fatally
4 undermines the State's narrative that she alone murdered Mr. Bailey; and
5 proves she is actually innocent.
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8 **Ground 8.** [6 App. 1202] New expert forensic pathology evidence
9 and photographic evidence that Mr. Bailey's rectal area injury was inflicted
10 while he was alive (ante-mortem). That injury was the predicate for Ms.
11 Lobato's conviction of violating Nevada necrophilia law NRS 201.450 –
12 sexual penetration of a dead human body.
13
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15 Dr. Larkin states in his report: "It is my opinion to a reasonable
16 medical and scientific certainty that Mr. Bailey survived either conscious or
17 not, a short time after being attacked." [7 App. 1544] Dr. Larkin's new
18 evidence is corroborated by the testimony of Dr. Simms during Ms.
19 Lobato's preliminary hearing on August 7, 2001 – less than a month after
20 his autopsy of Mr. Bailey.
21
22

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

25 A. (By Dr. Simms) Not every one of the stab wounds, for instance,
26 in the rectum was ante-mortem, several were ante-mortem. [1 App.
27 35]

28 Dr. Simms did not testify at trial of any new medical evidence that

1 would cause him to revise his preliminary hearing testimony, and he wasn't
2 cross-examined about his prior inconsistent testimony when he testified at
3 trial that Bailey's rectal area wound was "post-mortem." [2 App. 419]
4

5 The new photographic evidence establishes Mr. Bailey had
6 significant blood loss after his rectum wound was inflicted. The State didn't
7 object [9 App. 1944-45] to Ms. Lobato's factual statement: "This new
8 photographic evidence establishes Bailey was alive and his heart was
9 continuing to pump blood after his rectum was cut." [6 App. 1204]
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12 As set forth above, the District Court erred in its application of NRS
13 34.810 and *Herrera* and the District Court prejudicially erred in summarily
14 denying Ground 8 because Ms. Lobato's new evidence proves she is
15 actually innocent and "is not guilty" of violating NRS 201.450 because "no
16 crime was committed." *Orsborn*, 82 Nev. at 302, *Robinson*, 370 U.S. at
17 667; *Garner*, 368 U.S. at 163.
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20 If this Court vacates Ms. Lobato's conviction of Count II but not
21 Court I, she should be remanded for resentencing that includes elimination
22 of her requirement of registering as a sex offender and elimination of her
23 special sentence of lifetime supervision after her release from prison. [2
24 App. 242]
25
26

27 **Ground 9.** [6 App. 1205] New evidence not presented at trial that
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1 on July 8, 2001, Mr. Bailey experienced an attack two hours before he was
2 attacked in the trash enclosure, and that the two attacks were likely
3 separated by a meal. The State's narrative was that all Mr. Bailey's injuries
4 were inflicted in a short period of time in the trash enclosure by Ms.
5 Lobato. [5 App. 1006-7]

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8 As set forth above, the District Court erred in its application of NRS
9 34.810, *Herrera* and *Hargrove* and the District Court prejudicially erred
10 summarily denying Ground 9 because Ms. Lobato's new evidence fatally
11 undermines the State's narrative by proving that it is impossible that all of
12 Mr. Bailey's injuries were inflicted within a short period of time; and
13 proves she is actually innocent.
14

15
16 **Ground 10.** [6 App. 1207] New expert forensic pathology evidence
17 by Dr. Larkin not presented at trial related to eight key areas the manner,
18 circumstances and time of Bailey's murder that excludes Ms. Lobato as a
19 perpetrator.
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22 Dr. Larkin's new evidence establishes among other things "that to a
23 reasonable medical and scientific certainty": "A single edged knife, either a
24 non-serrated kitchen knife, a butcher knife or hunting knife was used to
25 inflict the knife wounds." [7 App. 1544] A weapon was not recovered. [2
26 App 264] The State alleged Ms. Lobato's pocket butterfly knife was used to
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1 inflict Mr. Bailey's wounds, and the testimony at trial was her knife was
2 sharp on both edges. [3 App. 663]

3 As set forth above, the District Court erred in its application of NRS
4 34.810 and *Hargrove* and the District Court prejudicially erred in
5 summarily denying Ground 10 because Ms. Lobato's new expert evidence
6 fatally undermines the State's narrative because the State has never alleged
7 that any cutting instrument other than her two-edged pocket knife was used
8 on Mr. Bailey; and proves she is actually innocent.

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12 **Ground 11.** [6 App. 1218] New expert evidence by forensic
13 scientist George Schiro that the black open-toed platform shoes with 4" to
14 5" heels Ms. Lobato was wearing during the May Budget Suites Assault
15 were not worn by Mr. Bailey's murderer.

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18 As set forth above, the District Court erred in its application of NRS
19 34.810 and *Herrera* and the District Court prejudicially erred summarily
20 denying Ground 11 because Ms. Lobato's new expert evidence fatally
21 undermines the State's narrative that the May Budget Suites Assault and
22 Mr. Bailey's murder are the same event because Ms. Lobato's high-heeled
23 platform shoes were not worn at Mr. Bailey's murder; and proves she is
24 actually innocent.

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27 **Ground 12.** [6 App. 1222] New expert evidence by forensic
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1 scientist George Schiro and impressions expert William J. Bodziak that the
2 crime scene shoeprints imprinted in blood were made by a person present at
3 the crime scene “before and after” Mr. Bailey began bleeding. Ms. Lobato’s
4 shoes were excluded both for size and pattern as the source of any crime
5 scene shoeprint.
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8 As set forth above, the District Court erred in its application of NRS
9 34.810 and *Herrera* and the District Court prejudicially erred in summarily
10 denying Ground 12 because Ms. Lobato’s new expert evidence fatally
11 undermines the State’s narrative that it is “possible” the bloody shoeprint
12 impressions leading away from Mr. Bailey’s body were there coincidentally
13 and unrelated to his murderer [4 App. 838]; and proves she is actually
14 innocent.
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18 **Ground 13.** [6 App. 1227] New expert evidence by forensic
19 scientist George Schiro and dental surgeon Dr. Mark Lewis, and new
20 documentary evidence, which excludes Ms. Lobato and her car from the
21 crime scene.
22

23 As set forth above, the District Court erred in its application of NRS
24 34.810, *Herrera* and *Hargrove* and the District Court prejudicially erred in
25 summarily denying Ground 13 because Ms. Lobato’s new evidence (i)
26 fatally undermines the State’s narrative that it is “possible” Mr. Bailey was
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1 beaten with a bat while standing and a bat knocked out his teeth, and it is
2 “possible” blood was found in Ms. Lobato’s car; and (ii) proves she is
3 actually innocent.
4

5 **Ground 14.** [6 App. 1236] New witness evidence that Mr. Bailey
6 did not stay in the trash enclosure where he was murdered, so Ms. Lobato
7 couldn’t have known where to find him.
8

9 As set forth above, the District Court erred in its application of NRS
10 34.810 and *Herrera* and the District Court prejudicially erred summarily
11 denying Ground 14 because Ms. Lobato’s new witness evidence (i) fatally
12 undermines the State’s narrative that that Mr. Bailey stayed in the trash
13 enclosure where he was murdered because people who knew Bailey knew
14 he didn’t stay there, so it is not possible that Ms. Lobato, who lived 165
15 miles away in Panaca, could have known he stayed there; and (ii) proves
16 she is actually innocent.
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20 **Ground 15.** [6 App. 1239] New witness evidence that
21 methamphetamine was readily available within walking distance of where
22 Ms. Lobato lived in Panaca in July 2001. To tie Ms. Lobato to Mr. Bailey’s
23 murder the State’s theory and narrative was that Ms. Lobato drove the 330-
24 mile round-trip from Panaca to Las Vegas on the weekend of July 6 to 8,
25 2001 to obtain methamphetamine. [5 App. 1005, 1008, and 1024] There
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27
28

1 was no testimony at trial about the availability of methamphetamine in
2 Lincoln County in July 2001, the need to travel to Las Vegas to obtain it, or
3 that Ms. Lobato was in Clark County on July 6-8.
4

5 By way it's Response, the State's defense to Ground 15 is "It is
6 highly likely that the jury was already aware that illegal narcotics are
7 available in Lincoln County, Nevada." [9 App. 1949]
8

9 Jury Instruction 34 stated: "The evidence which you are to consider
10 in this case consists of the testimony of the witnesses, the exhibits, and any
11 facts admitted or agreed to by counsel." [1 App. 232]
12

13 Jury instruction 33 stated: "You are here to determine the guilt or
14 innocence of the Defendant from the evidence in the case. ... So, if the
15 evidence in the case convinces you beyond a reasonable doubt of the guilt
16 of the Defendant, you should so find..." [1 App. 231]
17

18 The State's admitted reliance by the jury on extrinsic evidence as
19 proof beyond a reasonable doubt of the essential element that Ms. Lobato
20 was in Clark County on July 8, 2001, in disregard of their jury instructions
21 is prejudicial jury misconduct. The U.S. Supreme Court stated in Taylor v.
22 Kentucky, 436 U.S. 478, 485 (1978): "This Court has declared that one
23 accused of a crime is entitled to have his guilt or innocence determined
24 solely on the basis of the evidence introduced at trial ..." See, e. g., Estelle
25
26
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28

1 v. Williams, 425 U. S. 501 (1976).” Ms. Lobato’s federal and state rights to
2 due process and a fair trial by competent evidence introduced at trial is
3 based on her presumption of innocence and the State’s burden to prove her
4 guilt of every essential element beyond a reasonable doubt. *Taylor*, 436
5 U.S. at 485-486; Jackson v. Virginia, 443 U.S. 307, 324.
6

7
8 In reversing a conviction in part based on the jury’s failure to follow
9 a jury instruction, this Court ruled in Valdez v. State, 124 Nev. 97, 107, 196
10 P. 3d 465, 475, (2008), “A jury's failure to follow a district court's
11 instruction is intrinsic juror misconduct.”
12

13 The State’s admission the jury engaged in misconduct to convict Ms.
14 Lobato by relying on extrinsic evidence is proof Ms. Lobato’s federal Fifth,
15 Sixth and Fourteenth Amendment rights were prejudiced because “there is a
16 reasonable probability or likelihood that the juror misconduct affected the
17 verdict.” Meyer v. State, 119 Nev. 554, 562, 80 P.3d 447, 455 (2003). This
18 Court also ruled in *Meyer* that “ [b]ecause the misconduct involves extrinsic
19 evidence, the Confrontation Clause is implicated...” *Id.* at 567. Since the
20 jury relied on extrinsic evidence to convict her, Ms. Lobato’s right of cross-
21 examination under Crawford v. Washington, 124 S.Ct. 1354 (U.S. 2004), et
22 al., was violated.
23
24
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26

27 The new evidence that wasn’t introduced at trial is in Kendre
28

1 Thunstrom's Affidavit dated March 4, 2010, in which she swears: "In July
2 2001 methamphetamines was available in Panaca within walking distance
3 of the Lobato's home, and other places in Lincoln County" [8 App.
4 1614]Ms. Thunstrom's Affidavit is based on her personal knowledge as "a
5 recovering drug addict" who lived in Panaca in July 2001. Ms. Thunstrom's
6 new evidence establishes no one in Panaca needed to make the 6-hour
7 round-trip to Las Vegas to obtain methamphetamine. [4 App. 761]
8
9

10
11 As set forth above, the District Court erred in its application of
12 *Hargrove* and the District Court prejudicially erred in summarily denying
13 Ground 15 because Ms. Lobato's new witness evidence (i) fatally
14 undermines the State's narrative that Ms. Lobato must have been in Las
15 Vegas on July 6 to 8, because she needed to make the 330-mile round-trip
16 from Panaca to obtain methamphetamine; and (ii) proves she is actually
17 innocent.
18
19

20
21 This Court should also reverse Ms. Lobato's convictions based on
22 the prejudicial violation of her federal and state rights to due process, a fair
23 trial, a fair and impartial jury, confrontation, and the presumption of
24 innocence by the juror's misconduct of relying on extrinsic evidence, and
25 "there is a reasonable probability or likelihood that the juror misconduct
26 affected the verdict." *Meyer*, 80 P.3d at 447.
27
28

1 **Ground 16.** [6 App. 1241] New third-party guilt evidence that
2 Parker's "Mexican" friends had a compelling motive to murder Mr. Bailey
3 because he not only raped and beat their good friend Diann Parker after
4 they told him to leave her alone, but he also assaulted one of their
5 girlfriends.
6

7 As set forth above, the District Court erred in its application of NRS
8 34.810 and *Herrera* and the District Court prejudicially erred in summarily
9 denying Ground 16 because Ms. Lobato's new evidence fatally undermines
10 the State's narrative that Parker's "Mexican" friends did not have a
11 compelling motive to kill Mr. Bailey; and proves she is actually innocent.
12

13 **Ground 17.** [6 App. 1251] New third-party guilt evidence that three
14 checks drawn from Mr. Bailey's Nevada State Bank account were
15 negotiated for cash one to three days after his death. The State has never
16 alleged Ms. Lobato cashed the three checks.
17

18 As set forth above, the District Court erred in its application of NRS
19 34.810, *Herrera* and *Hargrove* and the District Court prejudicially erred in
20 summarily denying Ground 17 because Ms. Lobato's new evidence (i)
21 fatally undermines the State's narrative that that Ms. Lobato was the person
22 who murdered Mr. Bailey, when she didn't cash the three checks drawn on
23 his bank account after his murder; and (ii) proves she is actually innocent.
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1 **Ground 18.** [6 App. 1253] New expert evidence by forensic
2 scientist Schiro and dental surgeon Dr. Lewis, and new documentary
3 evidence, that a baseball bat wasn't used during Mr. Bailey's murder to
4 knock his teeth out and knock him over. Ms. Lobato was a single woman
5 and she kept a baseball bat in her car. [4 App. 897]
6

7 As set forth above, the District Court erred in its application of NRS
8 34.810 and *Herrera* and the District Court prejudicially erred in summarily
9 denying Ground 18 because Ms. Lobato's new evidence (i) fatally
10 undermines the State's narrative that it is "possible" Mr. Bailey's teeth were
11 knocked out and he was knocked over after being hit in the mouth with a
12 baseball bat, and that he then hit his head on the concrete curb; and (ii)
13 proves she is actually innocent.
14

15 **Ground 19.** [6 App. 1259] New legal evidence that Ms. Lobato was
16 convicted in Count II of a non-existent violation of Nevada's Necrophilia
17 Law – NRS 201.450. The NRS 201.450 charge was based on Dr. Simms
18 trial testimony a "long irregular slash wound in his [Bailey's] rectal area"
19 was inflicted post-mortem. [2 App. 415, 419]
20

21 The State waived any rebuttal to the substance of Ground 19 that the
22 legislative intent of NRS 201.450 was to only criminalize sex related acts
23 with a dead body [9 App. 1950-51] which was not an issue raised or ruled
24
25
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28

1 on by this Court in Lobato v. State, 120 Nev. 512, 522, 96 P.3d 765 (2004).
2 [1 App. 127]

3 The necrophilia law NRS 201.450 was enacted in response to the
4 inability of the Washoe County District Attorney's Office (WCDA) to
5 prosecute a man for having sexual intercourse with a corpse. [8 App. 1735;
6 1741] The WCDA co-sponsored the bill, and their representative testified
7 during a hearing the sole purpose of the bill was to criminalize sexual
8 relations with a corpse because: "the way dead bodies are handled, is
9 covered already by existing legislation, but the one area that is completely
10 void of mention is the area of sexual assaults being committed on dead
11 bodies." [8 App. 1743]

12 NRS 201.450 specifically identifies that sexual acts including
13 "cunnilingus, fellatio" and "sexual intercourse" are prohibited with a dead
14 body.
15

16 NRS 201.450 established an essential element of the offense is the
17 State must prove beyond a reasonable doubt that a sex act was committed
18 with a dead body. [8 App. 1738, 1743]
19

20 This Court ruled in Steward v. Steward, 111 Nev. 295, 890 P. 2d
21 777, 781 (1995), "When interpreting a statute, any doubt as to legislative
22 intent must be resolved in favor of what is reasonable, as against what is
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1 unreasonable, so as to avoid absurd results.”

2 The unreasonableness of the State disregarding the legislative intent
3 by applying NRS 201.450 to the slashing underneath Mr. Bailey’s “rectal
4 area” has had the “absurd result” of Ms. Lobato being convicted of
5 engaging in a sex act with a dead body that the State does not allege she had
6 sex with, and her conviction is completely contrary with “the reason or
7 spirit of the [Necrophilia] law.” Welfare Div. v. Washoe Co. Welfare
8 Dep’t., 88 Nev. 635, 637, 638, 503 P.2d 457, 458-459 (1972).

9 Furthermore, sexual assault is a general intent crime, Honeycutt v.
10 State, 118 Nev. 660, 56 P. 3d 362, 368-69 (2002), and the State did not
11 present any evidence to prove the essential element that intent to commit a
12 sex act was involved in the slashing underneath Mr. Bailey’s rectal area.
13 Jackson, 443 U.S. at 324 and In re Winship, 397 U. S. 358 (1970).

14 Ground 19 is based on the application of NRS 201.450 to the
15 specific facts of Mr. Bailey’s case, consequently the record belies the
16 District Court ’s Order denying Ground 19 on the basis it concerns “the
17 constitutionality of NRS 201.45” that was ruled on in Lobato (2004). [11
18 App. 2268]

19 As set forth above, the District Court erred in its application of NRS
20 34.810, NRS 201.450, *Herrera*, and Lobato (2004) and the District Court
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1 prejudicially erred in summarily denying Ground 19 because Ms. Lobato's
2 new evidence proves she was convicted of a non-existent violation of NRS
3 201.450 and she is actually innocent, and "not guilty" of Count II because
4 "no crime was committed." Orsborn, 417 P.2d at 150; Robinson, 370 U.S.
5 at 667; Garner, 368 U.S. at 157.
6

7
8 Ms. Lobato's new evidence also proves her conviction of Count II is
9 unconstitutional because the State failed to introduce evidence of the
10 essential elements that a sex act was committed with Mr. Bailey's body,
11 and that whoever injured his rectal area had the requisite intent. Jackson,
12 443 U.S. at 324; *In re Winship*, 397 U. S. 358 (1970).
13
14

15 If this Court vacates Ms. Lobato's conviction of Count II but not
16 Court I, Ms. Lobato should be remanded for resentencing that includes
17 eliminating her requirement of registering as a sex offender and elimination
18 of her special sentence of lifetime supervision after her release from prison.
19 [2 App. 242]
20
21

22 **Ground 21.** [6 App. 1266] New evidence that Det. Thowsen
23 testified perjurally about material matters multiple times in an effort to
24 falsely link Ms. Lobato to Mr. Bailey's murder.
25

26 Det. Thowsen perjurally testified (i): that he or his secretary
27 searched for reports filed with the LVMPD for groin area or penis wounds
28

1 in May, June and July 2001,⁶(ii) that he contacted hospitals and urologists
2 concerning treatment of an injured or severed penis in May, June and July
3 2001, (iii) that he went to the Budget Suites Hotel to investigate Ms.
4 Lobato's Voluntary Statement, and (iv) that Daniel Martinez had a clean
5 record when he ran a criminal record check.
6

7
8 Det. Thowsen's perjurious material testimony was a lynchpin of the
9 State's case. The Supreme Court "has consistently held that a conviction
10 obtained by the knowing use of perjured testimony is fundamentally unfair,
11 and must be set aside if there is any reasonable likelihood that the false
12 testimony could have affected the judgment of the jury." United States v.
13 Agurs, 427 U.S. 97, 103 (1976). *See, Jimenez v. State*, 112 Nev. 610, 918 P.
14 2d 687, 695 (1996) ("the trial testimony of the [] detective was at best
15 inaccurate and at worst perjury."). The Supreme Court held in Napue v.
16 Illinois, 360 U. S. 264, 269 (1959), " [f]irst, it is established that a
17 conviction obtained through use of false evidence, known to be such by
18 representatives of the State, must fall under the Fourteenth Amendment."
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22

23 As set forth above, the District Court erred in its application of NRS
24 34.810, *Hall* and Lobato (2009). The issue of Det. Thowsen's perjury
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26

27 ⁶ LVMPD General Counsel Liesl Freedman provided new evidence in her letter
28 dated December 4, 2009 that the LVMPD doesn't possess the capability to search
for those reports. [8 App. 1753]

1 wasn't ruled on in Lobato (2009). Consequently, the District Court's Order
2 is belied by the record that this ground is barred by law of the case. [11
3 App. 2269]
4

5 The District Court prejudicially erred in summarily denying Ground
6 21 because Ms. Lobato's new evidence fatally undermines the State's
7 narrative that the May Budget Suites Assault and Mr. Bailey's murder are
8 the same event; and proves she is actually innocent.
9

10 This Court should also reverse Ms. Lobato's convictions and Order a
11 new trial because Det. Thowsen's perjurious testimony the jury relied on to
12 convict her violated her federal rights to due process and a fair trial, and
13 requires that her conviction "must fall under the Fourteenth Amendment."
14
15 *Napue*, at 269.
16

17 **Ground 22.** [6 App. 1275] New witness evidence of police and
18 prosecutor misconduct in maliciously and negligently prosecuting Ms.
19 Lobato when they had evidence from at least 8 witnesses that Ms. Lobato is
20 actually innocent and had no involvement in Mr. Bailey's murder.
21

22 As set forth above, the District Court erred in its application of NRS
23 34.810, *Herrera* and *Hargrove* and the District Court prejudicially erred
24 summarily denying Ground 22 because Ms. Lobato's new evidence fatally
25 undermines the State's narrative that the May Budget Suites Assault and
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1 Mr. Bailey's murder are the same event; and proves she is actually
2 innocent.

3 This Court should also reverse Ms. Lobato's convictions and Order a
4 new trial because the State's prosecution of Ms. Lobato when they had
5 evidence she is innocent and with the intention of eliciting testimony that
6 wasn't truthful to procure her conviction violated her federal rights to due
7 process and a fair trial, and requires that her conviction "must fall under the
8 Fourteenth Amendment." *Napue*, at 269.

9
10
11 **Ground 23.** [6 App. 1282] New forensic entomology, forensic
12 pathology, forensic science, crime scene reconstruction, psychology, alibi
13 witness, dental, third-party culprit, police perjury, and prosecution and
14 police misconduct evidence establishes Ms. Lobato is actually and factually
15 innocent of her convicted crimes.

16
17
18
19 As set forth above, the District Court erred in its application of
20 *D'Agostino, Hall, Hargrove, Herrera, Jackson, Pelligrini, Lobato* (2004)
21 and (2009), and NRS 34.810 and the District Court prejudicially erred by in
22 summarily denying Ground 23 because the new evidence in Grounds 1-19,
23 and 21-22 in conjunction with the evidence admitted and not admitted at
24 trial proves Ms. Lobato is actually innocent and "wrongfully imprisoned,"
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1 *Orsborn*, 417 P.2d at 150; *Robinson*, 370 U.S. at 667; *Garner*, 368 U.S. at
2 163.

3 Ms. Lobato submits this Court should reverse her convictions and
4 Order her immediate release from custody on the basis that a finding of
5 actual innocence presupposes the State has insufficient evidence to convict
6 her. Burks v. United States, 437 U. S. 1, 18 (1978) (“the Double Jeopardy
7 Clause precludes a second trial once the reviewing court has found the
8 evidence legally insufficient.”); *See also*, Hudson v. Louisiana, 450 US 40,
9 44-45 (1981); and, State v Purcell, 110 Nev. 1389, 887 P.2d 276, 279
10 (1994).

11
12 **Ground 24.6** App 1296. New evidence not presented at trial the
13 State relied on false evidence about 13 key aspects of Ms. Lobato’s case the
14 jury relied on to find her guilty.

15 The false evidence was all prejudicial to Ms. Lobato, because it
16 constituted the meat of the State’s case and its narrative and arguments
17 about the evidence that the jury relied on to convict Ms. Lobato.

18 The U.S. Supreme Court has consistently held that a conviction
19 based on false evidence cannot stand because it violates a defendant’s
20 federal rights to due process and a fair trial. Miller v. Pate, 386 U. S. 1, 7
21 (1967); Napue v. Illinois, 360 U. S. 264, 269 (1959); United States v.
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1 Agurs, 427 U.S. 97, 103 (1976). As explained in Grounds 21 and 22 herein,
2 much of the false evidence was known or should have been known by the
3 State to be false at the time it was presented to the jury.
4

5 As set forth above, the District Court erred in its application of NRS
6 34.810 and *Herrera* and the District Court prejudicially erred in summarily
7 denying Ground 24 because Ms. Lobato's new evidence proves she was
8 convicted on the basis of false evidence. Ms. Lobato's new evidence fatally
9 undermines the State's narrative in at least 13 key areas where the jury
10 relied on the false evidence to convict Ms. Lobato.
11

12 This Court should reverse Ms. Lobato's convictions and Order a
13 new trial because the State's reliance on false evidence to procure her
14 conviction violated her federal rights to due process and a fair trial, and
15 requires that her conviction "must fall under the Fourteenth Amendment."
16 *Napue*, at 269.
17

18 **C. Brady Violations.**

19 The State failed to disclose exculpatory and impeachment evidence
20 to Ms. Lobato per *Brady*, and she suffered material prejudice, which
21 thereby deprived her of her federal and state rights to due process and a fair
22 trial. (U.S. Const. Amend. V, XIV; Nevada Const. Art.I, Sec. 1, 3, 8.)
23

24 **1. Standard of Review.**

1 Determining whether the State adequately disclosed information
2 under Brady “involves both factual and legal questions and requires de
3 novo review by this Court.” Lay v. State, 116 Nev. 1185, 1193, 14 P.3d
4 1256, 1262 (2000).

6 **2. Elements of the Claim.**

7 “*Brady* and its progeny require a prosecutor to disclose material
8 evidence favorable to the defense; evidence is material if there is a
9 reasonable probability that the result would have been different if it had
10 been disclosed.” *Evans*, 117 Nev. at 626, ref. Jimenez v. State, 112 Nev.
11 610, 618-9, 918 P.2d 687, 692 (1996). “Such a reasonable probability is
12 shown when the nondisclosure undermines confidence in the outcome of
13 the trial.” *Evans*, 117 Nev. at 626, citing Kyles v. Whitley, 514 U.S. 419,
14 434 (1995).

19 **3. Specific Grounds.**

20 By way of Ground 25 of her Petition, Ms. Lobato raised a material
21 fact that was not provided by the prosecution nor was it presented to the
22 jury; namely, that a LVMPD officer’s phone number was found in Mr.
23 Bailey’s pants pocket on two separate pieces of paper. [9 App. 1815]

26 The prosecution had the phone numbers and never disclosed the fact
27 that they belonged to an LVMPD officer. The lack of an investigation into
28

1 this material fact or the presentation of this fact at trial raises the reasonable
2 possibility that the jury would have reasonable doubts as to the credibility
3 of the State's investigation into the murder.
4

5 By way of Ground 26 of her Petition, Ms. Lobato raised a material
6 fact that was not provided by the prosecution nor was it presented to the
7 jury; namely, that the prosecution withheld material evidence implicating
8 the trustworthiness of the police investigation and the testimony of a key
9 prosecution witness. Specifically, Detective Thowsen testified at trial (i)
10 that he used a Social Security Number to run criminal background checks
11 on persons whom Ms. Lobato alleged as alternate suspects for the murder [3
12 App. 680], and (ii) that the persons' records were clean. [3 App. 680]
13
14
15

16 Detective Thowsen's testimony is a based upon a factual
17 impossibility; namely, that the name and the SSN Detective Thowsen
18 claimed to have run for Daniel Martinez do not match. In fact, Detective
19 Thowsen should have put him on notice that Mr. Martinez was committing
20 a crime by using the SSN of a dead man.
21
22

23 The State doesn't deny the evidence in Grounds 25 and 26 wasn't
24 disclosed to her trial counsel. [9 App. 1952-53]
25

26 By way of the District Court's Order, it prejudicially erred by
27 finding these claims were procedurally barred under NRS 34.810 because
28

1 they “could have been raised in a timely motion for a new trial or on direct
2 appeal,” such evidence was presumably “available with reasonable
3 diligence.”⁷ The non-disclosed evidence was unknown to Ms. Lobato’s trial
4 counsel and her first opportunity for review of the State’s *Brady* violation
5 was in her Petition.
6

7
8 The District Court also held that Ms. Lobato’s claims for *Brady*
9 violations based on affidavits were barred under Herrera v. Collins, 506
10 U.S. 390, 417-(1993). The District Court prejudicially misapplied *Herrera*
11 for two reasons: First, the Supreme Court ruled in *Herrera* that a habeas
12 petitioner’s affidavits are “testimony,” *Id.* at 418, and neither the District
13 Court nor the State raise a specific objection that her affiants are not
14 reliable, trustworthy, or credible witnesses. *Schlup*, 513 U. S. at 324, 328.
15 Second, the reliability of Ms. Lobato’s affiants is verified by the fact the
16 State doesn’t deny the evidence underlying her *Brady* claims wasn’t
17 disclosed.
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22 Moreover, the State knew or should have known the identity of the
23 officer behind the phone numbers and the impossibility of Detective
24 Thowsen’s testimony and such evidence “must be disclosed if it provides
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26
27 ⁷ Because the rationale offered by the District Court under NRS 34.810 goes more
28 to the ineffective assistance of counsel claims, that finding is challenged at a
different point herein.

1 grounds for the defense to attack the reliability, thoroughness, and good
2 faith of the police investigation.” *Lay*, 116 Nev. at 1194, citing *Kyles*, 514
3 U.S. at 442 n. 13, 445-51. Ms. Lobato challenge to the thoroughness of the
4 police investigation was a key issue at trial and in her direct appeal [5 App.
5 1089-1097]. The evidence the State’s didn’t disclose was invaluable for the
6 jury’s evaluation of guilty and this Court’s evaluation of the merits of her
7 appeal.
8

9
10 The State’s non-disclosure meets all three of *Brady*’s prongs: First,
11 the evidence was favorable impeachment or exculpatory evidence for Ms.
12 Lobato. Second, the State doesn’t deny the evidence was not disclosed.
13 Third, “the evidence is material either to guilt or to punishment” and there
14 is a reasonable probability “the nondisclosure undermines confidence in the
15 outcome of the trial.” *Evans*, 117 Nev. at 626, citing *Kyles v. Whitley*, 514
16 U.S. 419, 434.
17

18
19 The District Court erred in denying Ms. Lobato an evidentiary
20 hearing on the prosecution’s failure to make the requisite disclosures under
21 *Brady*.
22

23 **D. Ineffective Assistance of Counsel.**

24
25 Ms. Lobato’s counsel rendered ineffective assistance of counsel per
26 Strickland, *supra*, and her counsel’s deficient conduct was prejudicial,
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28

1 which thereby deprived her of her federal and state rights to effective
2 assistance of counsel, due process and a fair trial. (U.S. Const. Amend. V,
3 VI, XIV; Nevada Const. Art.I, sec. 1, 3, 8.)
4

5 **1. Standard of Review.**

6 A claim of ineffective assistance of counsel “presents a mixed
7 question of law and fact, subject to independent review.” *Evans*, 117 Nev.
8 at 621, citing *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107
9 (1996).
10

11 **2. Elements of the Claim.**

12 To establish ineffective assistance of counsel, a claimant “must
13 show both that the counsel’s performance was deficient and that the
14 deficient performance prejudiced the defense.” *Evans*, 117 Nev. at 621,
15 citing *Kirksey*, 112 Nev. at 987, citing *Strickland v. Washington*, 466 U.S.
16 668, 687 (1984).
17

18 **a. Deficient Performance.**

19 Deficient performance is “representation that falls below an
20 objective standard of reasonableness.” *Kirksey*, 112 Nev. at 987. Judicial
21 review of lawyer’s representation is highly deferential, and a defendant
22 “must overcome the presumption that a challenged action might be
23 considered sound strategy.” *Strickland*, 466 U.S. at 689. The premature
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1 choice to abandon a potentially fruitful avenue of investigation can make “a
2 fully informed decision with respect to[] strategy impossible” and render
3 counsel’s performance deficient. Wiggins v. Smith, 539 U.S. 510, 527-28
4 (2003).
5

6 In Richter v. Hickman, 578 F.3d 944, 952-53 (9th Cir. 2009), the
7 Ninth Circuit found ineffective assistance of counsel where counsel failed
8 to investigate and present at trial critical expert testimony about blood
9 evidence, ruling, “This is indeed precisely what *Strickland* requires.” *Id.*
10 *See also*, Lunbery v. Hornbeak, 605 F.3d 754, 763-64 (9th Cir. 2010)
11 (concurrence discussing the prejudice to the defendant by counsel’s failure
12 to present at trial critical expert psychology testimony); Sanborn v. State,
13 107 Nev. 399, 812 P. 2d 1279, 1283-84 (1991) (finding ineffective
14 assistance of counsel in part based on counsel’s failure to conduct pretrial
15 investigation of muzzle blast evidence that undermined the prosecution’s
16 case and “that counsel's failures were so severe that they rendered the jury's
17 verdict unreliable.”); and Warner v. State, 102 Nev. 635, 729 P.2d 1359
18 (1986) (finding ineffective assistance of counsel for failure to conduct
19 adequate pretrial investigation).
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26 Further, “ [if] the cumulative effect of errors committed at trial
27 denies the appellant his right to a fair trial, this court will reverse the
28

conviction.” Hamick v. State, 112 Nev. 304, 312, 913 P.2d 1280, 1288 (1996), citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). There, this Court stated the relevant factors to consider in deciding whether errors are harmless or prejudicial include whether “the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.” *Big Pond*, 101 Nev. at 3.

b. Prejudice to the Defense.

To show prejudice, the claimant “must show a reasonable probability that but for the counsel’s errors the result of the trial would have been different.” *Kirksey*, 112 Nev. at 998. Reasonable probability is defined as “a probability sufficient to undermine confidence in the outcome.” McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing *Strickland*, 466 U.S. at 687-88, 694. See also, *Richter*, 578 F.3d at 952, citing *Strickland*, 466 U.S. at 694. Because the State’s burden at trial is beyond a reasonable doubt, any doubt in the outcome is sufficient to show prejudice. “It is clear . . . that [Richter] *need not* show that [counsel’s] deficient conduct more likely than not altered the outcome in the case. This ‘preponderance’ standard was explicitly rejected in *Strickland*.” *Richter*, 578 F.3d at 952, (emphasis in original), citing Sanders v. Ratelle, 21 F.3d 1446, 1461 (9th Cir. 1994) (citing *Strickland*, 466 U.S. at 693).

1 On this point, the District Court's Order, citing Duhamel v. Collins,
2 955 F.2d 962, 967 (5th Cir. 1992) for the proposition that Ms. Lobato "must
3 show that the omitted issue would have had a reasonable probability of
4 success on appeal," is *patently erroneous*. [11 App. 2283] First of all, this
5 matter is not before this Court on direct appeal and secondly, this 5th Circuit
6 case was decided three years before *Schlup*.
7

8
9 It is this Court that "must determine that any errors are harmless
10 beyond a reasonable doubt." Hamick v. State, 112 Nev. 304, 312, 913 P.2d
11 1280, 1288 (1996), citing Witherow v. State, 104 Nev. 721, 724, 765 P.2d
12 1153, 1155 (1988). Evidence against the defendant "must be substantial
13 enough to convict him in an otherwise fair trial, and it must be said without
14 reservation that the verdict would have been the same in the absence of
15 error." *Witherow*, 104 Nev. at 724.
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18
19 Here, it is the absence of "substantial" evidence that marks this case.
20 As stated above, the State has no physical, forensic, eyewitness or
21 confession evidence linking Ms. Lobato to the crime The sum of the
22 evidence introduced at trial is conjecture and circumstantial.
23
24

25 Numerous critical issues went uninvestigated and un-litigated by
26 Ms. Lobato's counsel and their individual and cumulative effect was to
27 deprive her of adequate representation before, during and after trial. It
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1 would be no insult to Nevada's justice system to find that Ms. Lobato's
2 defense failed to provide her "an otherwise fair trial."

3 **3. The State's arguments are inapplicable.**
4

5 By way of its Response to Grounds 27-30 [9 App. 1955-56], the
6 State argues that defense counsel was not ineffective for failing to conduct
7 investigations to contradict the State's version of events because defense
8 counsel "is not required to unnecessarily exhaust all available public or
9 private resources." Molina v. State, 120 Nev. 185, 190, 87 P.3d 553, 538
10 (2004).
11

12
13 The State misapplies and takes this Court's ruling in *Molina* out of
14 context. Molina concerned a post-conviction challenge to the sufficiency of
15 the investigation by Mr. Molina's counsel prior to his guilty plea. Mr.
16 Molina's counsel went to some length to review the case with him prior to
17 Mr. Molina's agreement to plead guilty. Afterwards, Mr. Molina sought to
18 undo his voluntary choice to plead guilty by claiming his lawyer wasn't
19 prepared for trial. *Id.*
20
21

22
23 In contrast, Ms. Lobato went to trial and the above grounds concern
24 investigations her counsel didn't conduct that as she explains in detail,
25 would be expected to result in evidence that would have assisted the trier of
26 fact to find her not guilty. It is precisely that failure of her counsel to
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1 conduct those investigations that “undermine confidence in the outcome,”
2 *McNelson*, 115 Nev. at 403, of her trial, either individually or cumulative
3 with other evidence. As Ms. Lobato explains, her counsel didn’t conduct
4 any investigation related to any of the above grounds that concerned key
5 issues in her case.
6

7
8 By way of its Response to Grounds 33 and 38-42, the State argues
9 that “it is defense counsel’s ultimate responsibility of deciding if and when
10 to object and which witnesses to call, if any.” [9 App. 1956, 1957-58],
11 referencing Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002), fn 3. In
12 *Rhyne*, the issue raised was that, by way of an *ex parte* hearing, the district
13 court “had erred by injecting itself into the attorney-client relationship”
14 when there was a dispute between the defendant and his attorney over
15 calling a certain witness. *Rhyne*, 118 Nev. at 3. Following the *ex parte*
16 hearing, the district court ordered the attorney to call the witness. On
17 appeal, the defendant alleged that the district court’s interference turned out
18 to be prejudicial. The issue at play was the district court’s interference, not
19 an ineffective assistance of counsel claim where defense counsel failed to
20 investigate or pursue impeachment of a witness.
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26 Here, in contrast to *Rhyne*, Ms. Lobato and her defense counsel were
27 not in a conflict over calling a certain witness and there is no evidence that
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1 the District Court improperly intervened in the attorney-client relationship.

2 Thus, the State's reliance on *Rhyne* is misplaced and overstated.

3
4 By way of its Response to Ground 71, the State argues that Dr.
5 Lewis's opinion should not be considered by the District Court was because
6 it was "obtained without the benefit of cross-examination." [9 App. 1971],
7 citing *Herrera*, 506 U.S. at 417. The oddity of the State's argument is that if
8 the District Court had granted an evidentiary hearing that the State opposed,
9 Dr. Lewis would have been available for cross-examination, the very reason
10 that the State cited for excluding his affidavit.
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13 The State's argument misapplies *Herrera* because the majority ruled
14 a habeas petitioner's affidavits are "testimony," *Id.* at 418, and "Had this
15 sort of testimony been offered at trial, it could have been weighed by the
16 jury, along with the evidence offered by the State and petitioner, in
17 deliberating upon its verdict. Since the statements in the affidavits
18 contradict the evidence received at trial, the jury would have had to decide
19 important issues of credibility." *Id.* A jury can be expected to have given
20 considerable weight to Dr. Lewis' testimony after he was subjected to
21 cross-examination because the State does not raise a specific objection that
22 he is not a reliable, trustworthy, or credible witness. *Schlup*, 513 U. S. at
23 324, 328. Furthermore, Ms. Lobato's habeas grounds are to be evaluated "in
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1 light of all the evidence” *Id.*, at 328. See also House v. Bell, 547 U.S. 518
2 (2006) (“the habeas court must consider ‘all the evidence.’” *Id.* at 538.)

3 By way of its Response to Ground 73, the State argues that the
4 failure of defense counsel to pursue post-conviction DNA testing was not
5 ineffective assistance of counsel because Ms. Lobato failed “to show how a
6 better investigation would have rendered a more favorable outcome
7 probable,” [9 App. 1972], citing *Molina*, 120 Nev. at 87.
8

9 The State misstates *Molina* and Ms. Lobato’s burden because
10
11 *Strickland* specifically rejects the need show prejudice by a preponderance.
12
13 *Id.*, 466 U.S. at 693.
14

15 The State egregiously misapplies *Molina* to Ground 73 because Ms.
16 Lobato specifically details what exculpatory scientific evidence could be
17 expected to result from the DNA testing her counsel failed to pursue —
18 including the likely identification of the DNA profile of the actual murderer
19 — that would be sufficient to “undermine confidence in the outcome,”
20
21 *McNelson*, 115 Nev. at 403, either individually or cumulative with other
22 evidence. In contrast with the detail in Ms. Lobato’s Ground 73, this Court
23 ruled against *Molina* specifically because “*Molina* has not addressed the
24 quality of evidence that Heggie would have developed with additional
25 preparation, and we cannot discern from this record what it was about the
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1 defense case that a more adequate investigation would have uncovered.”

2 *Molina*, 120 Nev. at 87.

3
4 **4. The District Court’s findings are overbroad, imprecise and**
5 **erroneous.**

6 *Strickland* - By way of its Order regarding Grounds 27-48, 50, 53-
7 57 and 60-79, the District Court cited *Strickland* in support of its finding
8 that Ms. Lobato failed to establish that “counsel’s conduct fell below an
9 objective standard of reasonableness” and that “but for counsel’s alleged
10 errors, the outcome of the trial would have been different.” [11 App. 2270-
11 76]
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13

14 The District Court prejudicially misapplied *Strickland* because the
15 U.S. Supreme Court specifically rejected the need of a habeas petitioner to
16 show prejudice by a preponderance. *Id.*, 466 U.S. at 693. This error alone
17 requires reversal of the District Court’s denial of these grounds because
18 they were evaluated by a standard rejected by the Supreme Court. *Id.*, See
19 also, *Richter*, 578 F.3d at 952.
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21

22 Furthermore, nowhere in the District Court’s Order is a factual
23 finding of **how** each of Ms. Lobato’s grounds failed the *Strickland* test.
24

25 **NRS 34.810** - By way of its Order regarding Ground 37-43, 44-48,
26 50, 53, 62-63, 72, 74 the District Court cited NRS 34.810 in support of its
27 finding that Ms. Lobato’s claims were barred because “they could have
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1 been raised in a timely motion for a new trial.” [11 App. 2271-72]

2 The District Court prejudicially erred because Ms. Lobato’s
3 evidence not presented at trial may be brought before the Court for
4 collateral review, “even after the two-year time limit imposed by NRS
5 176.515(3) has run, in a petition for a writ of habeas corpus.” *D’Agostino*,
6 112 Nev. at 426, citing *Snow*, 105 Nev. at 523. Moreover, the District
7 Court’s non-specific reference to NRS 34.810 provides no rationale for
8 imposing the two-year rule for direct review of a motion for a new trial
9 under NRS 176.515(3) to Ms. Lobato’s original and timely Petition in light
10 of *D’Agostino*, *Snow* and *Orsborn*, 82 Nev. at 301.
11

12 Furthermore, the State waived NRS 34.810 as an affirmative defense
13 to Ms. Lobato’s ineffective assistance of counsel grounds, and the District
14 Court had no colorable legal basis to raise it *sua sponte*. *Vang*, 329 F. 3d at
15 1073 (“Procedural default is an affirmative defense. (citation omitted)
16 Generally, the state must assert the procedural default as a defense to the
17 petition before the district court; otherwise the defense is waived.”)
18

19 ***Hargrove*** - By way of its Order regarding Grounds 30, 31, 52, 58,
20 59, 70, 73 and 79, the District Court cited Hargrove v. State, 100 Nev. 498,
21 502, 686 P.2d 222, 225 (1984) in support of its finding that “‘bare’ and
22 ‘naked’ allegations are not sufficient, nor are those belied or repelled by the
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1 record.” [11 App. 2270-71, 2275-77, 2279-80] In *Hargrove*, the defendant
2 appealed the denial of his motion to withdraw his guilty plea, which the
3 district denied without an evidentiary hearing. By way of his appeal, the
4 defendant claimed that “certain witnesses could establish his innocence” but
5 his pleadings did not include “the witnesses’ names or their intended
6 testimony.” *Hargrove*, 100 Nev. at 502.
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8
9 The District Court prejudicially misapplied *Hargrove* because Ms.
10 Lobato’s above ineffective assistance of counsel grounds contain the
11 specific details of “a factual background, names of witnesses or other
12 sources of evidence demonstrating ... entitlement to relief” of a new trial.
13 *Id.* at 502. Which was the exact evidence lacking in *Hargrove*.
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16 ***Molina*** - By way of its Order regarding Grounds 30, 31, 56, 73 and
17 77, the District Court cited Molina v. State, 120 Nev. 185, 190, 87 P.3d
18 553, 538 (2004) in support of its finding that Ms. Lobato failed to show
19 “how a better investigation would have rendered a more favorable outcome
20 probable.” [11 App.2270-71, 2276, 2280-81]
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22
23 The District Court prejudicially misapplied *Molina* because Ms.
24 Lobato specifically details in each of the above grounds the evidence
25 sufficient to “undermine confidence in the outcome,” *McNelson*, 115 Nev.
26 at 403, either individually or cumulative with other evidence, that could
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1 have been expected to result from an investigation by her counsel. In
2 contrast with the specific detail in Ms. Lobato's grounds, this Court ruled
3 against Molina specifically because "Molina has not addressed the quality
4 of evidence that Heggie would have developed with additional preparation,
5 and we cannot discern from this record what it was about the defense case
6 that a more adequate investigation would have uncovered." Molina, 120
7 Nev. at 87.

10 ***Rhyne*** – By way of its Order regarding Grounds 32-36, 38-42, 44,
11 50, 54-55, 64, 71 and 77, the District Court cited Rhyne v. State, 118 Nev.
12 1, 8, 38 P.3d 163, 167 (2002) in support of its finding that defense counsel's
13 performance was not deficient because trial counsel has the "immediate and
14 ultimate responsibility of deciding if and when to object, which witnesses,
15 if any to call, and what defenses to develop." [11 App. 2271-77, 2279,
16 2281] In *Rhyne*, the issue raised was that, by way of an *ex parte* hearing, the
17 district court "had erred by injecting itself into the attorney-client
18 relationship" when there was a dispute between the defendant and his
19 attorney over calling a certain witness. *Rhyne*, 118 Nev. at 3. Following the
20 *ex parte* hearing, the district court ordered the attorney to call the witness.
21 On appeal, the defendant alleged that the district court's interference turned
22 out to be prejudicial. The issue at play was the district court's interference,
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1 not an ineffective assistance of counsel claim where defense counsel failed
2 to investigate or pursue impeachment of a witness.

3 Here, in contrast to *Rhyne*, Ms. Lobato and her defense counsel were
4 not in a conflict over calling a certain witness and there is no evidence that
5 the District Court improperly intervened in the attorney-client relationship.
6 Thus, the fact and holding of *Rhyne* are inapplicable and do not support the
7 District Court's finding.
8

9
10 *Ennis* – By way of its Order regarding Grounds 35, 45, 49, 54, 57,
11 59, 60, 62, 63, 67-70, 76 and 77, the District Court cited Ennis v. State, 122
12 Nev. 694, 137 P.3d 167 (2006) in support of its finding that defense counsel
13 “cannot be deemed ineffective for failing to make futile objections or
14 motions.” [11 App. 2271, 2273-81] In *Ennis*, the defendant testified at trial
15 that he stabbed the victim, but that it was in self-defense. He based his
16 ineffective assistance of counsel argument in his habeas petition on his
17 attorney's failure to object to hearsay testimony that was not central to his
18 conviction, for which there was already substantial evidence. Thus, his
19 attorney's tepid objection was overruled because the specific testimony
20 objected to was (i) within an exception to the hearsay rule and (ii) not
21 material to the conviction.
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27 Here, in contrast, Ms. Lobato has not admitted to committing the
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1 crime and there is no substantial evidence linking her to the crime. Thus, in
2 contrast to *Rhyne*, the cumulative failure, actions and omissions set forth in
3 her Petition were not all futile or within hearsay exceptions and the issues
4 that should have been raised were material to the conviction.
5

6 ***Herrera*** - By way of its Order regarding Grounds 37-48, 50, 53, 62,
7 63, 71, 73 and 77, the District Court cited Herrera v. Collins, 506 U.S. 390,
8 417-(1993) in support of its finding that defense counsel's performance was
9 not deficient because the affidavit evidence relied on by Ms. Lobato were
10 "obtained without the benefit of cross-examination" and should be "treated
11 with a fair degree of skepticism." [11 App. 2271-75, 2277, 2279-81]
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14
15 The District Court prejudicially misapplied *Herrera* because the
16 majority ruled a habeas petitioner's affidavits are "testimony," *Id.* at 418,
17 and "Had this sort of testimony been offered at trial, it could have been
18 weighed by the jury, along with the evidence offered by the State and
19 petitioner, in deliberating upon its verdict. Since the statements in the
20 affidavits contradict the evidence received at trial, the jury would have had
21 to decide important issues of credibility." *Id.* A jury can be expected to have
22 given considerable weight to the testimony by Ms. Lobato's witnesses after
23 they were subjected to cross-examination because neither the District Court
24 nor the State raise a specific objection that her affiants are not reliable,
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1 trustworthy, or credible. *Schlup*, 513 U. S. at 324, 328.

2 **Hall** - By way of its Order regarding Grounds 46-47, 51, 54, 72, 74-
3 75 and 77, the District Court cited Hall v. State, 91 Nev. 314, 315, 535 P.2d
4 797, 798 (1975) in support of its finding that defense counsel's performance
5 was not deficient for failing to take certain acts because the "law of a first
6 appeal is the law of the case on all subsequent appeals in which the facts are
7 substantially the same." [11 App. 2273-76, 2279-81]
8

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10 The District Court prejudicially misapplied *Hall* to the above
11 grounds because either the law applicable to the facts of the above grounds
12 was not previously ruled on by this Court, or the facts are different than
13 those upon which this Court ruled.
14

15
16 **Rowland** - By way of its Order regarding Grounds 46, 68 and 77, the
17 District Court cited Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119
18 (2002) in support of its finding that defense counsel's performance was not
19 deficient for failing to take certain acts because "reasonable latitude should
20 be given to the prosecutor to argue the credibility of the witness – even if
21 this means occasionally stating argument that a witness is lying." [11 App.
22 2273, 2278-79, 2281]
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26 In *Rowland*, the defendant admitted hitting the victim, but denied
27 intending to kill him. By way of his habeas petition, the defendant
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1 challenged his conviction on the basis that the prosecutor engaged in
2 numerous instances of misconduct. In denying his appeal, this Court stated
3 that there was “overwhelming evidence of Rowland’s guilt and instances of
4 prosecutorial impropriety did not deprive Rowland of a fair trial.” *Rowland*,
5 118 Nev. at 37.
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7
8 Nevertheless, in declining to set aside the conviction, this Court
9 retained the jurisdiction to review prosecutorial misconduct, even if not
10 properly objected to at trial, “which affects the defendant’s substantial
11 rights, if the error either: “(1) had a prejudicial impact on the verdict when
12 viewed in context of the trial as a whole, or (2) seriously affects the
13 integrity or public reputation of the judicial proceedings.” *Rowland*, 118
14 Nev. at 37, fn. 2, citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050,
15 1054 (1993) (vacated on other grounds, citations omitted) and NRS
16 178.602.
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20 Further, this Court stated that “ [the] level of misconduct necessary
21 to reverse a conviction depends upon how strong and convincing is the
22 evidence of guilt.” Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339-40
23 (1998). “If the issue of guilt or innocence is close, if the state’s case is not
24 strong, prosecutor misconduct will probably be considered prejudicial.”
25
26 Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).
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1 Here, unlike in *Rowland*, the issue of guilt or innocence is not close
2 because the State has no physical, forensic, eyewitness or confession
3 evidence linking Ms. Lobato to the crime. The sum of the evidence
4 introduced at trial is conjecture and circumstantial. Viewed in the context of
5 the whole, where Ms. Lobato's alibi was a central theme of her defense, the
6 prosecutor's actions in disparaging the credibility of Ms. Lobato's alibi
7 witnesses that the State offered no evidence to rebut, "seriously affects the
8 integrity or public reputation of the judicial proceedings" and the District
9 Court prejudicially erred in denying Ms. Lobato's Petition or, in the
10 alternative, conducting an evidentiary hearing on these Grounds.
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15 Further, under *Rowland*, this Court retains the jurisdiction to review
16 the prosecutor's actions *sua sponte* and find that the prosecutor's
17 misconduct "will probably be considered prejudicial."
18

19 ***Pelligrini*** - By way of its Order regarding Grounds 47 and 77, the
20 District Court cited *Pelligrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001) in
21 support of its finding that defense counsel's performance was not deficient
22 for failing to take certain acts because "issues previously decided on direct
23 appeal may not be reargued in a habeas petition." [11 App. 2273-74, 2281]
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26 The District Court prejudicially misapplied *Pelligrini* to the above
27 grounds because the failure of Ms. Lobato's counsel to object to Detective
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1 Thowsen's expert psychology testimony regarding Ms. Lobato on the basis
2 the State acted in bad faith by failing to comply with NRS 174.234(2), and
3 that he was allowed to testify without being qualified as a psychology
4 expert by the District Court as required by NRS 50.275, was not argued in
5 *Lobato* (2009) cited by the District Court. [11 App. 2273-74.]
6

7
8 ***Riker*** - By way of its Order regarding Grounds 49 and 77, the
9 District Court cited *Riker v. State*, 111 Nev. 1316, 1328, 905 P.2d 706, 713
10 (2005) in support of its finding that defense counsel's performance was not
11 deficient for failing to take certain acts because the defendant bears the
12 burden of showing "that the remarks made by the prosecutor were 'patently
13 prejudicial.'" [11 App. 2274, 2281] In *Riker*, the defendant was captured
14 after a high-speed chase, driving the murder victim's work van. At the
15 hearing where entered a guilty plea, he admitted to the underlying facts of
16 the murder. By way of his *habeas* petition, the defendant alleged
17 prosecutorial misconduct during the penalty phase. In denying the
18 misconduct claim, this Court held that "because *Riker* failed to object, this
19 court should review the alleged prosecutorial misconduct only if it is
20 considered plain error," and he would have to show the misconduct was
21 "patently prejudicial." *Riker*, 111 Nev. at 713.
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28 Here, unlike the case in *Riker*, Ms. Lobato did not enter a guilty plea

1 or admit to any of the facts of the murder. Neither is there any physical or
2 testimonial evidence linking Ms. Lobato to the crime. Thus, according to
3 Rowland, “ [the] level of misconduct necessary to reverse a conviction
4 depends upon how strong and convincing is the evidence of guilt.” Oade v.
5 State, 114 Nev. 619, 624, 960 P.2d 336, 339-40 (1998). “If the issue of guilt
6 or innocence is close, if the state’s case is not strong, prosecutor misconduct
7 will probably be considered prejudicial.” Garner v. State, 78 Nev. 366, 374,
8 374 P.2d 525, 530 (1962). Thus, the burden of proof of prosecutorial
9 misconduct is low and the District Court abused its discretion in denying
10 Ms. Lobato’s request for an evidentiary hearing on these grounds.
11

12 ***Green*** - By way of its Order regarding Grounds 49, 69, and 77, the
13 District Court cited State v. Green, 89 Nev. 173, 176, 400 P.2d 766,
14 769(1965) in support of its finding that defense counsel’s performance was
15 not deficient for failing to take certain acts because “the prosecutor has the
16 right to comment on testimony, to ask the jury to draw inferences from the
17 evidence, and has the right to state fully his views as to what the evidence
18 shows.” [11 App. 2274, 2279, 2281] In *Green*, the defendant was convicted
19 of jointly robbing an auto shop of approximately \$172 and was “positively
20 identified by two credible eye witnesses to the crime.” *Green*, 89 Nev. at
21 174. By way of a motion for a new trial, the defendant alleged prosecutorial
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1 misconduct from “the prosecutor’s statement to the jury that they might
2 infer guilt from the fact that the [defendant] has \$95 in his possession
3 immediately after the crime.”
4

5 Here, unlike in *Green*, the State has no eyewitness testimony linking
6 Ms. Lobato to the crime, while the prosecutor was entitled to comment on
7 the contents of the Voluntary Statement, there was no evidence presented
8 that the Voluntary Statement was a “confession” or that there was “blood in
9 that car.” [5 App. 1008 and 1012, respectively] Therefore, it was prejudicial
10 misconduct for the prosecutor to make such statements to the jury and the
11 District Court abused its discretion in denying Ms. Lobato’s request for an
12 evidentiary hearing on this issue.
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16 ***Guy*** - By way of its Order regarding Grounds 60 and 77, the District
17 Court cited *Guy v. State*, 108 Nev. 770, 839 P.2d 578 (1992) in support of
18 its finding that defense counsel’s performance was not deficient for failing
19 to object to Jury Instructions 26 and 33 because “similar instructions were
20 upheld by the Nevada Supreme Court.” [11 App. 2277, 2281]
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23 The District Court prejudicially misapplied *Guy* that concerned a
24 challenge that instructions with wording comparable to Instructions 26 and
25 33 weren’t appropriate to the specific crimes charged. *Id.*, 839 P.2d 583. In
26 contrast, Ms. Lobato claim is her counsel was prejudicially deficient for
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1 failing to object to Instructions 26 and 33 on the basis they violated her
2 federal and state rights to an impartial jury, due process of law and a fair
3 trial by relieving the State of its burden of proof and shifting the burden to
4 Ms. Lobato to prove her innocence.
5

6 -*Weber* - By way of its Order regarding Grounds 60 and 77, the
7 District Court cited Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005) in
8 support of its finding that defense counsel's performance was not deficient
9 for failing to object to Jury Instructions 26 and 33 because "similar
10 instructions were upheld by the Nevada Supreme Court." [11 App. 2277,
11 2281]
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14 The District Court prejudicially misapplied *Weber* that concerned a
15 challenge that the instruction wasn't appropriate to the specific crimes
16 charged. Weber, 119 P.3d at 126. In contrast, Ms. Lobato claim is her
17 counsel was prejudicially deficient for failing to object to Instruction 26 on
18 the basis it violated her federal and state rights to an impartial jury, due
19 process of law and a fair trial by relieving the State of its burden of proof
20 and shifting the burden to Ms. Lobato to prove her innocence.
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24 *Lord* - By way of its Order regarding Grounds 61 and 77, the
25 District Court cited Lord v. State, 107 Nev. 28 (1991) in support of its
26 finding that defense counsel's performance was not deficient for failing to
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1 object to Jury Instructions 31 because “the same instruction was upheld by
2 the Nevada Supreme Court.” [11 App. 2277, 2281]

3 The District Court prejudicially misapplied *Lord* because Ms.
4 Lobato’s claim is her federal and state rights to an impartial jury, due
5 process of law and a fair trial were violated by her counsels prejudicial
6 failure to object to Instruction 31, and how it’s prejudicial effect of
7 relieving the State of its burden of proof was compounded by Instructions
8 26 and 33 that shifted the burden to Ms. Lobato to prove her innocence.
9 That is not an issue that was ruled on by this court in *Lord*.

10 *Yarborough* – By way of its Order regarding Grounds 64, 66 and
11 77, the District Court cited Yarborough v. Gentry, 540 U.S. 1, 5-6, 124
12 S.Ct. 1, 4 (2003) in support of its finding that, because “review of counsel’s
13 summation is highly deferential,” Ms. Lobato “failed to demonstrate that
14 counsel was deficient or that she was prejudiced.” [11 App. 2277-78, 2281]
15 In *Yarborough*, the defendant admitted to stabbing the victim, but claimed
16 the stabbing was accidental, and claimed that his defense attorney omitted
17 arguments relevant to his culpability from closing. The U.S. Supreme Court
18 considered the arguments **made and not made** in summation and
19 concluded that the omitted arguments “were not so clearly more persuasive
20 than those that counsel discussed that their omission can only be attributed
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1 to a professional error of constitutional magnitude.” *Yarborough*, 540 U.S.
2 at 9. Thus, the question is whether the omitted arguments are central to the
3 case or merely tangential or cumulative and whether the omissions are a
4 “calculated risk.” *Id.* at 10.
5

6 Here, Ms. Lobato has never admitted to the murder of Mr. Bailey.
7
8 Thus, the questions of (i) whether or not Ms. Lobato was even in Clark
9 County on the day of the Murder or (ii) whether or not Mr. Bailey was
10 subject to two separate attacks on the day of the Murder were central to her
11 defense, and the fact that defense counsel failed to pursue these lines in
12 closing was not a mere rhetorical device or tangential to her defense. Thus,
13 the failure was deficient and prejudicial.
14
15

16 ***Dominguez*** – By way of its Order regarding Grounds 67 and 77, the
17 District Court cited *Dominguez v. State*, 112 Nev. 683, 917 P.2d 1364
18 (1996) in support of its finding that a prosecutor is entitled to provide “his
19 belief in [Ms. Lobato]’s guilt as a conclusion from the evidence presented.”
20 [11 App. 2277-78, 2281] In *Dominguez*, the prosecutor’s unobjectionable
21 comments (i) “drew a conclusion of ... guilt from the evidence introduced
22 at trial and (ii) “simply echo the commonly held notion that ‘crime does not
23 pay.’” *Dominguez*, 112 Nev. at 696.
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Here, the prosecutor went way beyond drawing a conclusion and

1 echoing commonly held notions. Rather, the prosecutor specifically asked
2 the jurors to “mark [your ballot] as I did.” [5 App. 1028] Such directives to
3 the jury go beyond mere communication of conviction. Thus, defense
4 counsel’s failure to object was both deficient and prejudicial.
5

6 ***Mulder*** - By way of its Order regarding 77, the District Court cited
7 Mulder v. State, 116 Nev. 1, 992 P.2d 845 (2000) in support of its finding
8 that “there is no cumulative error as to warrant relief.” [11 App. 2281]
9 *Mulder* cites Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985),
10 that the relevant factors to consider in deciding whether errors are harmless
11 or prejudicial “include whether the issue of innocence or guilt is close, the
12 quantity and character of the error, and the gravity of the crime charged.”
13 *Id.*
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18 **5. Specific Grounds of Ineffective Assistance of Counsel.**

19 **Ground 27.** [6 App. 1312] Ms. Lobato’s counsel prejudicially failed
20 to investigate Diann Parker’s Mexican friends as Mr. Bailey’s killers. As set
21 forth above, the District Court erred in its application of *Strickland*.
22

23 **Ground 28.** [6 App. 1316] Ms. Lobato’s counsel prejudicially failed
24 to investigate seven unique handwritten telephone numbers that were found
25 in Mr. Bailey’s pants pockets that could have resulted in discovery of Mr.
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1 Bailey's killer, exculpatory witnesses, or other exculpatory evidence. As set
2 forth above, the District Court erred in its application of *Strickland*.

3 **Ground 29.** [6 App. 1318] Ms. Lobato's counsel prejudicially failed
4 to subpoena Mr. Bailey's Nevada State Bank records, including three check
5 that were likely negotiated by his killer after his murder. As set forth above,
6 the District Court erred in its application of *Strickland*.
7

8 **Ground 30.** [6 App. 1321] Ms. Lobato's counsel prejudicially failed
9 to obtain a court order to test Diann Parker's DNA, and to compare her
10 DNA and fingerprints with crime scene evidence to tie her Mexican friends
11 to Mr. Bailey's murder. As set forth above, the District Court erred in its
12 application of *Strickland*, *Hargrove* and *Molina*.
13

14 **Ground 31.** [6 App. 1323] Ms. Lobato's counsel prejudicially failed
15 to investigate reports filed under NRS 629.041. As set forth above, the
16 District Court erred in its application of *Strickland*, *Hargrove* and *Molina*.
17

18 **Ground 32.** [6 App. 1325] Ms. Lobato' counsel prejudicially failed
19 to subpoena LVMPD Detective LaRoche to impeach Detective
20 Thowsen's testimony regarding investigations he testified he conducted to
21 verify the assault described in Ms. Lobato's Statement of July 20, 2001. As
22 set forth above, the District Court erred in its application of *Strickland* and
23 *Rhyne*.
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1 **Ground 33.** [6 App. 1327] Ms. Lobato's counsel prejudicially failed
2 to subpoena LVMPD Detective Thowsen's secretary to impeach his
3 testimony regarding a search of NRS 629.041 reports filed in May, June,
4 and July 2001 that he testified he directed her to perform. As set forth
5 above, the District Court erred in its application of *Strickland* and *Rhyne*.
6

7 **Ground 34.** [6 App. 1328] Ms. Lobato's counsel prejudicially failed
8 to subpoena the LVMPD manuals, protocols, memorandums, and/or
9 regulations homicide detectives are required to follow when conducting a
10 homicide investigation to impeach Detective Thowsen's testimony. As set
11 forth above, the District Court erred in its application of *Strickland* and
12 *Rhyne*.
13

14 **Ground 35.** [6 App. 1330] Ms. Lobato's counsel prejudicially failed
15 to file motion in limine to exclude all testimony about Ms. Lobato's prior
16 methamphetamine use that had no relevance to Mr. Bailey's murder. As set
17 forth above, the District Court erred in its application of *Strickland*, *Ennis*
18 and *Rhyne*.
19

20 **Ground 36.** [6 App. 1332] Ms. Lobato's counsel prejudicially failed
21 to file discovery request for all discoverable materials. As set forth above,
22 the District Court erred in its application of *Strickland* and *Rhyne*.
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1 **Ground 37.** [6 App. 1334] Ms. Lobato's counsel prejudicially failed
2 to file a Motion to Dismiss the NRS 201.450 charge prior to trial on the
3 basis it alleged a non-existent violation of the necrophilia law by Ms.
4 Lobato. As set forth above, the District Court erred in its application of
5 *Strickland, Herrera* and NRS 34.810.
6

7 **Ground 38.** [6 App. 1339] Ms. Lobato's counsel prejudicially failed
8 to retain a forensic entomologist and introduce expert entomology
9 testimony about Mr. Bailey's time of death. As set forth above, the District
10 Court erred in its application of *Strickland, Herrera and Rhyne* and NRS
11 34.810.
12

13 **Ground 39.** [6 App. 1344] Ms. Lobato's counsel prejudicially failed
14 to retain a psychologist and introduce expert testimony Ms. Lobato's
15 Statement is not a confession to Mr. Bailey's murder. As set forth above,
16 the District Court erred in its application of *Strickland, Herrera, Rhyne* and
17 NRS 34.810.
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19 **Ground 40.** [6 App. 1348] Ms. Lobato's counsel prejudicially failed
20 to retain a forensic pathologist and introduce exculpatory expert forensic
21 pathology testimony about the medical evidence related to Mr. Bailey's
22 murder. As set forth above, the District Court erred in its application of
23 *Strickland, Herrera, Rhyne* and NRS 34.810.
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1 **Ground 41.** [6 App. 1358] Ms. Lobato's counsel prejudicially failed
2 to retain forensic scientist and blood pattern expert George Schiro, and
3 introduce his exculpatory testimony about Mr. Bailey's murder. As set forth
4 above, the District Court erred in its application of *Strickland, Herrera,*
5 *Rhyne* and NRS 34.810.
6

7 **Ground 42.** [6 App. 1365] Ms. Lobato's counsel prejudicially failed
8 to cross-examine ME Larry Simms about Mr. Bailey's time of death and his
9 rectum wound that was inconsistent with Simms' preliminary hearing
10 testimony that Mr. Bailey died within 12 hours of his body's discovery and
11 that his rectum wound was ante mortem. As set forth above, the District
12 Court erred in its application of *Strickland, Herrera, Rhyne* and NRS
13 34.810.
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17 **Ground 43.** [6 App. 1368] Ms. Lobato's counsel prejudicially failed
18 to object that the prosecution did not comply with the required statutory
19 notice of expert luminol and/or phenolphthalein testimony by Louise
20 Renhart, Daniel Fox, Thomas Wahl and Kristina Paulette. As set forth
21 above, the District Court erred in its application of *Strickland, Herrera* and
22 NRS 34.810.
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26 **Ground 44.** [7 App. 1372] Ms. Lobato' counsel prejudicially failed
27 to introduce into evidence Ms. Lobato's exculpatory black shoes she was
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1 wearing when assaulted at the Budget Suites Hotel. As set forth above, the
2 District Court erred in its application of *Strickland, Herrera, Rhyne* and
3 NRS 34.810.
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5 **Ground 45.** [7 App. 1376] Ms. Lobato's counsel prejudicially
6 insisted the prosecution introduce into evidence a butterfly knife that had no
7 connection to Ms. Lobato, Mr. Bailey, or the crime. As set forth above, the
8 District Court erred in its application of *Strickland, Herrera, Ennis* and
9 NRS 34.810.
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12 **Ground 46.** [7 App. 1376] Ms. Lobato's counsel prejudicially failed
13 to properly argue Ms. Lobato's alibi witness evidence is trustworthy and
14 admissible under state and federal hearsay exceptions. As set forth above,
15 the District Court erred in its application of *Strickland, Herrera, Hall* and
16 *Rowland*.
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19 **Ground 47.** [7 App. 1383] Ms. Lobato's counsel prejudicially failed
20 to object that the prosecution did not comply with the required statutory
21 notice of expert psychology opinion testimony by Detective Thowsen. As
22 set forth above, the District Court erred in its application of *Strickland,*
23 *Herrera, Hall, Lobato* (2009), *Pelligrini*, and NRS 34.810.
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26 **Ground 48.** [7 App. 1388] Ms. Lobato's counsel prejudicially failed
27 to object and make a motion for a mistrial after Detective Thowsen's
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1 declared in response to a juror's questions –“there's no sense looking for a
2 witness to something that we know didn't happen there. We know it
3 happened on West Flamingo.” [3 App. 686] Ms. Lobato's rights to an
4 unbiased and impartial jury, due process of law, and a fair trial. As set forth
5 above, the District Court erred in its application of *Strickland*, *Herrera* and
6 NRS 34.810.
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9 **Ground 49.** [7 App. 1393] Ms. Lobato's counsel prejudicially failed
10 to object and make a motion for a mistrial when during Detective
11 Thowsen's direct testimony ADA William Kephart committed egregious
12 prosecutorial misconduct by falsely declaring Ms. Lobato gave Thowsen
13 “her confession” to Mr. Bailey's murder, and Kephart's prosecutorial
14 misconduct fatally prejudice Ms. Lobato's rights to an unbiased and
15 impartial jury, due process, and a fair trial. As set forth above, the District
16 Court erred in its application of *Ennis*, *Riker*, and *Green*.
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20 **Ground 50.** [7 App. 1395] Ms. Lobato's counsel prejudicially failed
21 to use available information to impeach Detective Thowsen's testimony
22 about his alleged investigation to verify the sexual assault at the Budget
23 Suites Hotel described in Ms. Lobato's Statement. As set forth above, the
24 District Court erred in its application of *Strickland*, *Herrera*, *Rhyne* and
25 NRS 34.810.
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1 **Ground 51.** [7 App. 1399] Ms. Lobato's counsel prejudicially failed
2 to object on confrontation grounds to Detective Thowsen's testimony about
3 what he said his secretary told him she learned from searching for NRS
4 629.041 reports, and what he said Las Vega urologists and hospital personal
5 told him they did regarding a cut or severed penis in May, June and July
6 2001. As set forth above, the District Court erred in its application of *Hall*
7 and *Lobato* (2009).
8
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10 **Ground 52.** [7 App. 1402] Ms. Lobato's counsel prejudicially failed
11 to object and make a motion for a mistrial based on ADA Kephart's
12 egregious prosecutorial misconduct of suborning perjury from Detective
13 Thowsen about searches of NRS 629.041 reports he did not conduct,
14 misrepresenting to Judge Vega what Thowsen's direct testimony about the
15 NRS 629.041 reports would be, and then misrepresenting to Judge Vega
16 what Thowsen's testimony had been. As set forth above, the District Court
17 erred in its application of *Hargrove*.
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22 **Ground 53.** [7 App. 1409] Ms. Lobato's counsel prejudicially failed
23 to use available information to cross-examine Detective Thowsen to
24 impeach his testimony regarding what he said Ms. Lobato said about the
25 holding cell she was in after her arrest. As set forth above, the District
26 Court erred in its application of *Strickland*, *Herrera* and NRS 34.810.
27
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1 **Ground 54.** [7 App. 1416] Ms. Lobato's counsel prejudicially failed
2 to question Detective Thowsen during cross-examination about the
3 information regarding Ms. Lobato's sexual assaults as a child that he used
4 to extract Ms. Lobato's waive of her Miranda rights to determine if they
5 were legally obtained. As set forth above, the District Court erred in its
6 application of *Strickland, Hall, Rhyne, Ennis*, and Lobato (2004).
7

8
9 **Ground 55.** [7 App. 1418] Ms. Lobato's counsel prejudicially failed
10 to use available information to impeach Laura Johnson's credibility during
11 her cross-examination. As set forth above, the District Court erred in its
12 application of *Strickland* and *Rhyne*.
13

14
15 **Ground 56.** [7 App. 1421] Ms. Lobato's counsel prejudicially failed
16 to investigate and introduce testimony about the area of Las Vegas where
17 methamphetamine was readily bought in June and July 2001. As set forth
18 above, the District Court erred in its application of *Strickland* and *Molina*.
19

20 **Ground 57.** [7 App. 1423] Ms. Lobato's counsel prejudicially failed
21 to object on confrontation grounds to Zachory Robinson's hearsay
22 testimony about Budge Suites Hotel reports from May to July 2001. As set
23 forth above, the District Court erred in its application of *Strickland, Ennis*
24 and NRS 51.
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1 **Ground 58.** [7 App. 1424] Ms. Lobato’s counsel prejudicially failed
2 to file a pre-trial motion for the disclosure of Detective Thowsen history of
3 giving false testimony, his disciplinary record for dishonest and/or unethical
4 conduct and his history of mental health issues. As set forth above, the
5 District Court erred in its application of *Hargrove*.
6

7 **Ground 59.** [7 App. 1427] Ms. Lobato’s counsel prejudicially failed
8 to make a NRS 175.381(I) motion for Judge Vega to advise the jury to
9 acquit the defendant of all charges of the close of the State’s case, at the
10 close of the defense’s case, and after at the State’s rebuttal, on basis the
11 prosecution did not introduce evidence proving beyond a reasonable doubt
12 all the essential elements of the crimes charged and there was insufficient
13 evidence for the jury to find her guilty. As set forth above, the District
14 Court erred in its application of *Hargrove* and *Ennis*.
15
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17 **Ground 60.** [7 App. 1429] Ms. Lobato’s counsel prejudicially failed
18 to object to jury instructions 26 and 33 that empowered the jury to
19 determine her “guilt or innocence” and eliminated her “presumption of
20 innocence” by shifting the burden to her to prove her innocence. As set
21 forth above, the District Court erred in its application of *Strickland*, *Ennis*,
22 *Guy* and *Weber*.
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1 **Ground 61.** [7 App. 1431] Ms. Lobato’s counsel prejudicially failed
2 to object to jury instruction 31’s “more eighty affairs of life” reasonable
3 doubt standard, and the prejudice of instruction 31 was compounded by jury
4 instructions 26 and 33 that empowered the jury to determine Ms. Lobato’s
5 “guilt or innocence,” and eliminated her “presumption of innocence” by
6 shifting the burden to her to prove her innocence. As set forth above, the
7 District Court erred in its application of *Strickland*, *Lord* and NRS 175.221.
8
9

10 **Ground 62.** [7 App. 1434] Ms. Lobato’s counsel prejudicially failed
11 to submit a NRS 201.450 jury instruction that properly stated the law. As
12 set forth above, the District Court erred in its application of *Strickland*,
13 *Ennis*, *Herrera*, NRS 34.810 and NRS 201.450.
14
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16 **Ground 63.** [7 App. 1440] Ms. Lobato’s counsel prejudicially failed
17 to object to the NRS 201.450 jury instruction that did not properly state the
18 law. As set forth above, the District Court erred in its application of
19 *Strickland*, *Ennis*, *Herrera*, NRS 34.810 and NRS 201.450.
20
21

22 **Ground 64.** [7 App. 1446] Ms. Lobato’s counsel prejudicially failed
23 to explain to the jury that the prosecution had not proved each essential
24 element of each charge. As set forth above, the District Court erred in its
25 application of *Strickland*, *Rhyne*, and *Yarborough*.
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1 **Ground 65.** [7 App. 1448] Ms. Lobato's counsel prejudicially failed
2 to object during the prosecution's opening statement to false claims Ms.
3 Lobato's counsel knew would not be proved during the trial. As set forth
4 above, the District Court erred in its application of *Strickland* and *Rice*.
5

6 **Ground 66.** [7 App. 1449] Ms. Lobato's counsel prejudicially failed
7 to object to prosecution closing and rebuttal arguments that Mr. Bailey's
8 skull was fractured at the same time his external injuries were inflicted
9 when ME Simms testified it was contemporaneous with Mr. Bailey's brain
10 swelling that began at least two hours before his death. As set forth above,
11 the District Court erred in its application of *Strickland* and *Yarborough*.
12
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14 **Ground 67.** [7 App. 1452] Ms. Lobato's counsel prejudicially failed
15 to object and make a motion for a mistrial when during ADA Kephart's
16 rebuttal argument he committed irreparable prosecutorial misconduct by
17 telling the jury he personally believes Ms. Lobato is guilty and the jurors
18 should follow his lead and mark their ballots to convict her as he did "it's
19 time for you to mark it as I did, guilty of first degree murder with the use of
20 deadly weapon, and guilty of sexual penetration of a dead human body." As
21 set forth above, the District Court erred in its application of *Strickland*,
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26 *Ennis* and *Dominguez*.
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1 **Ground 68.** [7 App. 1453] Ms. Lobato's counsel prejudicially failed
2 to object during the prosecution's closing and rebuttal arguments that
3 prejudicially disparaged the honesty of defense alibi witnesses. As set forth
4 above, the District Court erred in its application of *Strickland*, *Ennis* and
5 *Rowland*.
6

7 **Ground 69.** [7 App. 1455] Ms. Lobato's counsel prejudicially failed
8 to object and make a motion for a mistrial when ADA Sandra DiGiacomo
9 and William Kephart committed egregious and irreparable prosecutorial
10 misconduct during closing and rebuttal arguments, respectively, by
11 declaring Ms. Lobato said she had blood on her, her clothes were bloody
12 and that she got in her car bloody, when there was no evidence introduced
13 at trial supporting those fatally prejudicial claims. As set forth above, the
14 District Court erred in its application of *Strickland*, *Ennis* and *Green*.
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19 **Ground 70.** [7 App. 1458] Ms. Lobato's counsel prejudicially failed
20 to object or make a motion for mistrial based on the irreparable
21 prosecutorial misconduct of more than 250 false, fabricated, and otherwise
22 improper prosecution arguments that were used as a substitute for evidence
23 of Ms. Lobato's guilt. As set forth above, the District Court erred in its
24 application of *Strickland*, *Ennis* and *Hargrove*.
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1 **Ground 71.** [7 App. 1468] Ms. Lobato’s counsel prejudicially failed
2 to retain a dental expert and introduce exculpatory expert dental testimony
3 that Mr. Bailey’s teeth were not knocked out by a baseball bat. As set forth
4 above, the District Court erred in its application of *Strickland, Herrera,*
5 *Rhyne* and *D’Agostino*.
6

7 **Ground 72.** [7 App. 1471] Ms. Lobato’s counsel prejudicially failed
8 to make a NRS 175.381(2) motion for a judgment of acquittal within 7 days
9 after the jury’s verdict on the basis of the prosecution did not introduce
10 evidence proving beyond a reasonable doubt that essential element she was
11 “within Clark County” at the time of Mr. Bailey was murdered and there
12 was insufficient evidence for the jury to find her guilty. As set forth above,
13 the District Court erred in its application of *Strickland, Hall* and NRS
14 34.810.
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19 **Ground 73.** [7 App. 1473] Ms. Lobato’s counsel prejudicially failed
20 to file a post-verdict motion for DNA testing of crime scene evidence by
21 new DNA testing techniques developed after Ms. Lobato’s conviction. As
22 set forth above, the District Court erred in its application of *Strickland,*
23 *Hargrove, Herrera, Molina* and NRS 34.810.
24
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26 **Ground 74.** [7 App. 1478] Ms. Lobato’s counsel prejudicially failed
27 to brief and argue in her Nevada Supreme Court direct appeal’s
28

1 “insufficiency of the evidence” claim that her convictions were based on
2 inverted pyramid of speculative inferences piled on speculation that the jury
3 relied on a substitute for actual evidence proving her guilt beyond a
4 reasonable doubt. As set forth above, the District Court erred in its
5 application of *Strickland*, *Hall* and NRS 34.810.
6

7
8 **Ground 75.** [7 App. 1489] Ms. Lobato’s counsel prejudicially failed
9 to brief and argue to the NSC that Ms. Lobato’s statements were not
10 voluntary, and that Judge Vegas misapplied the “law of the case” doctrine.
11 As set forth above, the District Court erred in its application of *Strickland*,
12 *Hall*, *Lobato* (2009) and EDCR 3.20.
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15 **Ground 76.** [7 App. 1495] Ms. Lobato’s counsel prejudicially failed
16 to include as argument in the “Petition for Rehearing” and the “Petitioner
17 for Reconsideration En Banc” that the NSC’s ruling affirming Ms. Lobato’s
18 conviction was based on two false assumptions of fact. As set forth above,
19 the District Court erred in its application of *Strickland* and *Ennis*.
20
21

22 **Ground 77.** [7 App. 1502] Cumulative prejudicial errors by Ms.
23 Lobato’s trial and appellate counsel in Grounds 27-76 and 79 supports
24 vacating Ms. Lobato’s conviction and dismissal of the charges or a new
25 trial.
26

27 This Court prejudicially denied this ground by failing to apply all
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1 three *Mulder* factors as mandated by this Court.

2 First, the issue of Ms. Lobato's innocence or guilt was extremely
3 close at trial because the State introduced no physical, forensic, eyewitness
4 or confession evidence linking Ms. Lobato to the crime; the jury deliberated
5 over two days before returning a significantly reduced verdict from the
6 first-degree murder with which she was charged; and both the State and Ms.
7 Lobato's counsel were attributed in the press to considering the verdict a
8 juror's compromise. [10 App. 2145-46] Consequently, the record belies the
9 District Court's inexplicable finding, "guilt was not a close call." [11 App.
10 2281] Particularly because that finding was solely based on the irrelevant
11 rationale that "Defendant was convicted twice," and that "the Defendant's
12 own words constituted compelling evidence," when the State introduced no
13 evidence Ms. Lobato made any confession to Mr. Bailey's murder, or even
14 being in Clark County on the day of the crime.
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20 Second, the extreme quantity and prejudicial character of error by
21 Ms. Lobato's trial and appellate counsel detailed in her 51 claims are
22 supported by scientific reports, alibi and fact witness evidence, and the trial
23 and appellate record. The quantity and character of the prejudicially
24 deficient conduct by Ms. Lobato's counsel was completely ignored by the
25 District Court's Order.
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1 Third, Ms. Lobato was charged with first-degree murder, which the
2 District Court's order acknowledges.

3 The cumulative prejudice to Ms. Lobato by her counsel's deficient
4 conduct significantly exceeded that in *Big Pond*, and this Court ruled in that
5 case, "The cumulative effect of the errors was to deny appellant his right to
6 a fair trial." *Big Pond*, 101 Nev. 3.
7

8
9 Consequently, Ms. Lobato's Ground 77 should be granted on the
10 cumulative weight of her counsel's prejudicially deficient conduct per
11 *Strickland*.

12
13 As set forth above, the District Court erred in its application of
14 *D'Agostino, Dominguez, Ennis, Guy, Hall, Hargrove, Herrera, Jackson,*
15 *Lord, Molina, Mulder, Pelligrini, Rhyne, Rice, Riker, Rowland, Green,*
16 *Strickland, Weber, Yarborough*, NRS 34.810, NRS 175.221, NRS 201.450,
17 NRS Chapter 51 and EDCR 3.20.
18

19
20 **Ground 78.** [7 App. 1502] The cumulative weight of Ms. Lobato's
21 new evidence not presented at trial proves her actual innocence. [7 App.
22 1502] If any single ground is not sufficient to warrant relief, the *habeas*
23 court is to make an evaluation cumulatively "in light of all the evidence"
24 whether new, or admitted or not admitted at trial. *Schlup*, 513 U.S. at 328.
25 See also *House*, 547 U.S. at 538.
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1 Ms. Lobato submits that under *Schlup*, evaluating the cumulative
2 weight of her new evidence is a balancing test. As each ground of new
3 evidence is added to the scale, does consideration of its exculpatory value tilt
4 the scale to make it “more likely than not that no reasonable juror would
5 have convicted him [or her] in light of the new evidence” presented in
6 *habeas* proceedings. *Schlup*, 513 U.S. at 327.
7

8
9 Grounds 1, 2, and 3 prove Mr. Bailey died after 8 p.m., when even
10 the State admitted during argument Ms. Lobato was in Panaca.
11

12 Grounds 4 and 5 prove Ms. Lobato’s Voluntary Statement was about
13 the attempted rape of her at the Budget Suites Hotel weeks before Mr.
14 Bailey’s murder.
15

16 Ground 6 proves she was in Panaca the entire weekend of July 6 to 8
17 and didn’t use methamphetamine during that time period.
18

19 Grounds 7, 9 and 10, 12, 13, and 18 prove the crime scene evidence
20 and the manner and circumstances of the crime don’t match Ms. Lobato or
21 her car.
22

23 Grounds 8 and 19 prove Ms. Lobato was convicted of a non-existent
24 violation of NRS 201.450.
25

26 Ground 11 proves the shoes she was wearing during the May Budget
27 Suites Assault weren’t worn at the scene of Mr. Bailey’s murder.
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1 Ground 14 proves no one could have known to find Mr. Bailey at
2 the trash enclosure, much less Ms. Lobato living 165 miles away.

3 Ground 15 proves Ms. Lobato had no reason to go to Las Vegas on
4 the weekend of July 6-8, 2001, and the State's defense was the jury engaged
5 in the prejudicial misconduct of relying on extrinsic evidence as proof
6 beyond a reasonable doubt of the essential element she was in Clark County
7 on July 8, 2001.
8

9 Ground 16 and 17 prove the Hispanic friends of Ms. Parker had the
10 motive, means and opportunity to murder Mr. Bailey and then cash his
11 checks.
12

13 Ground 21 proves Det. Thowsen committed extensive perjury to
14 assist the State to convict Ms. Lobato.
15

16 Ground 22 proves the State prosecuted Ms. Lobato while in
17 possession of evidence proving her innocence.
18

19 Ground 23 proves Ms. Lobato is actually innocent.
20

21 Ground 24 proves Ms. Lobato was convicted on the basis of false
22 evidence.
23

24 Ms. Lobato submits that the cumulative weight of her new evidence
25 not only proves her actual innocence, but her actual innocence is why the
26 State's case at trial was so weak that it didn't introduce any "physical,
27
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1 forensic, eyewitness, documentary, surveillance or confession evidence the
2 Petitioner was anywhere in Clark County, Nevada at any time on July 8,
3 2001.” [6 App. 1282]
4

5 As set forth above, the District Court erred in its application of
6 *Mulder, D’Agostino, Hall, Hargrove, Herrera, Jackson, Pelligrini, Ennis,*
7 *Lobato* (2004) and (2009), and NRS 34.810. The District Court also erred in
8 its application of NRS 176.515, that it is inapplicable to Ms. Lobato’s
9 grounds based on new evidence not presented at trial, under the holdings in
10 *Orsborn*, 417 P.2d at 149; *Snow*, 779 P. 2d at 97; *D’Agostino*, 915 P.2d
11 269. The District Court prejudicially erred in summarily denying Ground
12 78 because the cumulative weight of Ms. Lobato’s new evidence proves she
13 is actually innocent and “wrongfully imprisoned,” *Orsborn*, 417 P.2d at
14 150; *Robinson*, 370 U.S. at 667; *Garner*, 368 U.S. at 163.
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19 Ms. Lobato argues this Court should grant the relief of reversing her
20 convictions and Order dismissal of the charges if this Court finds the State
21 has insufficient evidence in light of her new evidence. *Burks*, 437 U. S. at
22 18 (“the Double Jeopardy Clause precludes a second trial once the
23 reviewing court has found the evidence legally insufficient.”). *See also,*
24 *Hudson v. Louisiana*, 450 US 40, 44-45 (1981); and, *State v Purcell*, 110
25 Nev. 1389, 887 P.2d 276, 279 (1994). In the alternative this Court should
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1 Order a new trial.

2 **Ground 79.** [7 App. 1503] Ms. Lobato's counsel prejudicially failed
3 to diligently represent her prior to, during, or after trial. As set forth above,
4 the District Court erred in its application of *Strickland* and *Hargrove*.
5

6 **VIII. CONCLUSION.**

7
8 The State has made the mutually exclusive arguments: If the
9 evidence was available, then defense counsel was ineffective for not
10 producing it at trial. If the evidence was not available, then defense counsel
11 was not ineffective, but then the evidence is new and is permissible for
12 review by way of Ms. Lobato's Petition.
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15 The District Court erred in denying Ms. Lobato's Petition and her
16 request for evidentiary hearing on Ground 25, 26, 32, 33, and 55. This
17 Court should reverse the conviction or, in the alternative, vacate the ruling
18 of the District Court denying Ms. Lobato's Petition and order the District
19 Court to hold evidentiary hearings on the issues raised in the Petition.
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22 Respectfully submitted,

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24 By: 

25 Travis N. Barrick, SBN 9257
26 Gallian, Wilcox, Welker,
27 Olson & Beckstrom, LC
28 Pro bono counsel for Petitioner

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Form 9. Certificate of Compliance

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Pursuant to NRAP 32(a)(8), this brief is formatted in Times New Roman, size 14 font, with 1" margins on all sides.

Pursuant to the Court's Order on February 23, 2012, this body of this Opening Brief contains no more than 29,024 words.

Dated this 5 th day of March, 2012.

By: 

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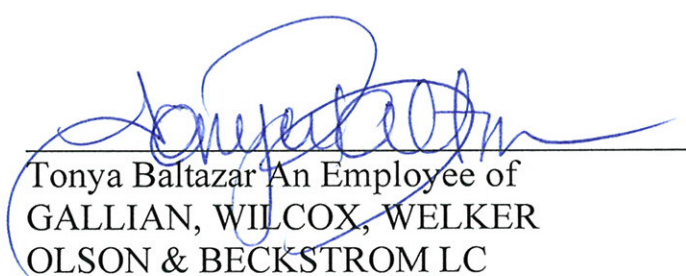
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8th day of March, 2012, a copy of the foregoing upon each of the parties by hand delivery and depositing a copy of same in a sealed envelope in the U. S. mail, registered, first-class postage fully prepaid, and addressed to those counsel of record:

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