IN THE SUPREME COURT OF THE STATE OF NEVADA

***

KIRSTIN BLAISE LOBATO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

MOTION FOR RECONSIDERATION AND MODIFICATION OF THE COURT'S ORDER DENYING AMICUS CURIAE BRIEF

COMES NOW, DUSTIN DINGMAN, counsel for the amicus curiae, the Justice Institute, Proving Innocence, and the Worldwide Women's Criminal Justice Network, and respectively moves for leave to file this motion for reconsideration of the MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ("*Motion*") and the MOTION FOR LEAVE TO ADD AMICUS CURIAE ("*Motion To Join*"), and for Modification of this Court's ORDER DENYING MOTION ("*Order*") for filing of the amicus curiae brief ("*Brief*"). This Motion is made pursuant to and based upon all pleadings and papers on file herein, NRAP Rule 27(b), and the following Memorandum of Points and Authorities.

Dated this 16th day of May 2012.

By: _____
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MEMORANDUM OF POINTS AND AUTHORITIES

The amicus curiae, the Justice Institute, Proving Innocence, and the Worldwide Women's Criminal Justice Network ("WWCJN") (collectively the "*Amici*"), respectively request that this Court reconsider its *Order* denying the filing of the amicus curiae brief in support of the Appellant's ("Lobato's") opening brief, and modify its *Order* for the following reasons.

A. This Court Overlooked The Controlling Law And Did Not Apply The Legal Standard Mandated By NRAP 29(c)(1) & (c)(2)

In denying the *Motion* and the *Motion To Join* this Court's *Order* prejudicially overlooked the controlling law, and failed to apply the correct legal standard mandated for evaluating the filing of the *Amici's Brief* set forth in NRAP 29(c)(1) & (c)(2). First, (c)(1) requires that the amicus must have an "interest", which identically tracks FRAP 29(b)(1). Second, (c)(2) requires that the brief must be "desirable", which is more liberal than FRAP 29(b)(2) that requires both that a brief is "desirable," and that it is "relevant to the disposition of the case." *Id.*

Furthermore, NRAP 29(d) exactly tracks the requirement of FRAP 29(c) that an amicus brief must "indentify the party or parties supported and indicate whether the brief supports affirmance or reversal." – which prevents an amicus from feigning disinterest or impartiality for the desired outcome.

A leading federal case related to the application of FRAP 29 and what constitutes "interest" ((b)(1)), and that a brief is "desirable" and "relevant" ((b)(2)) was authored by U.S. Supreme Court Justice Samuel Alito in *Neonatology Associates, PA v. CIR*, 293 F. 3d 128 (3rd Cir. 2002), when he was a Circuit Court judge. In *Neonatology* the Appellant was well-represented, the five amici had a direct special and pecuniary interest in the outcome, and the Respondent opposed their brief. *Id.* at 129-30.

Justice Alito specifically rejected that an amicus is impartial and cannot be motivated by a special interest or pecuniary concerns. *Id.* at 131-32. He noted that "Rule 29 requires that an amicus have an "interest" in the case," *Id.* at 131, and that:

> "... the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making. Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend.
>
> ...A quick look at Supreme Court opinions discloses that corporations, unions, trade and professional associations, and other parties with "pecuniary" interests appear regularly as amici. ... Parties with pecuniary, as well as policy, interests also appear as amici in our court. (citation omitted) I thus reject the appellants' argument that an amicus must be an impartial person not motivated by pecuniary concerns." *Id.* at 131-32.

Justice Alito also specifically rejected that the quality of a party's representation has any relevance to the filing of an amicus brief supporting that party:

> "Rule 29 does not contain any such provision. ... Even when a party is very well represented, an amicus may provide important assistance to the court. ... Accordingly, denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance." *Id.* at 132.

Justice Alito also ruled that determining whether a brief is "desirable" warrants an expansive interpretation of Rule 29:

> "The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent. The decision whether to grant leave to file must be made at a relatively early stage of the appeal. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful. Indeed, it is frequently hard to tell whether an amicus brief adds anything useful to the briefs of the parties without thoroughly studying those briefs and other pertinent materials, and it is often not feasible to do this in connection with the motion for leave to file. ... Under these circumstances, it is preferable to err on the side of granting leave. If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.
>
> ... For all these reasons, I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals. ... "Even when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned."" (citation omitted)." *Id.* at 132-33. (underlining added)[1]

[1] Neither the State in its opposition to the *Motion* nor this Court by way of its

Based on his analysis of Rule 29's requirements, Justice Alito ruled, "I believe that the amici have stated "an interest in the case," and it appears that their brief is "relevant" and "desirable" since it alerts the merits panel to possible implications of the appeal." *Id.* at 133. In so ruling Justice Alito specifically rejected the two arguments in opposition that under Rule 29 the amici be impartial and support an unrepresented or inadequately represented party. *Id.* at 130.[2]

Neonatology substantively mirrors the Ninth Circuit's precedents regarding "interest" in *Hoptowit v. Ray*, 682 F. 2d 1237 (9th Cir. 1982) that the amicus "acted exclusively on behalf of the points of view taken by the inmates. ... Amicus did, of course have an interest in vindicating federal constitutional rights. There is no rule, however, that amici must be totally disinterested." *Id.* at 1260; and in *Funbus v. California PUC*, 801 F.2d 1120 (9th Cir.1986) that the "amici's direct interest in the outcome of this litigation" was not relevant, because "they take a legal position and present legal arguments in support of it, a perfectly permissible role for an amicus." *Id.* at 1125. (underlining added)

The Ninth Circuit's precedent in *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) substantively mirrors *Neonatology* that

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Order disputes the *Amici's* "brief is timely and well-reasoned."

[2] Those are substantively the same arguments the State relied on to oppose The Justice Institute as amicus and the *Motion*. See, "Opposition To Motion For Leave To Submit Brief As Amicus Curiae," No. 58913, March 14, 2012, 2-3.

a "desirable" amicus brief helps ensure that justice may be done:

> "These amici fulfilled the classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl*, 694 F.2d at 204. (underlining added)

Yet, in spite of the clear dictates of NRAP 29(c)(1) & (c)(2), and (d), and the Ninth Circuit's precedents and *Neonatology*, this Court's *Order* did not take into consideration either of the only two factors relevant to evaluating the filing of the *Brief* – the *Amici's* "interest" and that the *Brief* is "desirable." (The *Brief* is attached hereto as Exhibit 1.)

B. This Court Misapprehended And Overlooked The Material Fact The State Doesn't Oppose The Amicus Curiae Proving Innocence and WWCJN

This Court's *Order* made the prejudicial material misapprehension of fact that "The motions are opposed." *Id.* at 1. By doing so this Court overlooked that the Respondent ("State") did not oppose the granting of the *Motion To Join*. That motion clearly stated – without opposition by the State – that "The amicus curiae, the Justice Institute, Proving Innocence, and the WWCJN are non-profit public interest organizations that are specifically interested in post-conviction cases involving an Appellant claiming actual innocence. ... Consequently, this Court's understanding of issues in Lobato's *Opening Brief* and its correct application of law to those issues is of paramount "interest" to each of the amicus curiae. See NRAP 29(c)(1)." *Id.* at 2-4. Neither did the State oppose the filing of the *Brief* by

Proving Innocence and the WWCJN because it met the relevant factors under *Miller-Wohl*, *Id.* at 4-7, and "Consequently, "an amicus brief is desirable," NRAP 29(c)(2)." *Id.* at 7.

Consequently, the *Order* denying the filing of the *Brief* was based on this Court's prejudicial misapprehension and overlooking of key material facts necessary to evaluate the *Motion*. Namely that the State did not oppose the *Motion To Join* or oppose that as explained therein Proving Innocence and WWCJN have an "interest" under NRAP 29(c)(1), and that the filing of the *Brief* by the amicus curiae Proving Innocence and WWCJN is "desirable" under NRAP 29(c)(2).

C. This Court Misapprehended Material Facts And Overlooked The Controlling Law That The State Made No Substantive Opposition To Amicus Curiae The Justice Institute

This Court's *Order* prejudicially misapprehended material facts and overlooked the controlling statute and case law related to the State's opposition to the amicus curiae the Justice Institute, on the basis it is "not impartial but also on the basis that their interests are adequately represented in the case and that the amicus brief is unnecessary [because of the size of the Appellant's opening brief]." *Order* at 1.

The State's opposition is legally irrelevant because an amicus must have an interest in the case and cannot be impartial to the outcome. NRAP 29(c)(1) & (d).

See also, *Hoptowit*, 682 F. 2d at 1260; *Funbus*, 801 F.2d at 1125; and *Neonatology*, 293 F. 3d at 131-3. There is no question the Justice Institute satisfies NRAP 29(c)(1) because the State argued it has an interest and is not impartial, "Opposition To Motion For Leave To Submit Brief As Amicus Curiae," No. 58913, March 14, 2012, 2-3, and in accordance with NRAP 29 (d) the *Brief* supports the Appellant. Furthermore, this Court's *Order* does not dispute the Justice Institute has an interest in the Appellant's ("Lobato's") case.

The State's opposition is also legally irrelevant because whether the *Brief* supported by the Justice Institute is "desirable" under NRAP 29(c)(2) is unrelated to the quality of Lobato's representation or the size of her opening brief under that rule and case law. See e.g., *Neonatology*, 293 F. 3d at 132. The *Amici's Brief* correctly supplements the efforts of Lobato's counsel with law and arguments that assist this Court to have a more comprehensive and accurate legal framework to understand the issues. *Id.* at 132-3; and *Miller-Wohl*, 694 F.2d at 204. The *Amici's Brief* cites 37 cases – including nine U.S. Supreme Court cases – related to the five grounds argued in the *Brief*, while Lobato's opening brief cites only one case in support of those grounds (59, 64, 72, 74 and 77).

D. This Court's Order Misapprehended Material Facts And Overlooked The Relevant Law

This Court's *Order* relied on the rationale that: "The issues addressed in the

proposed amicus brief are addressed in the 129-page opening brief and it does not appear that the amicus "add[s] something distinctive to the presentation of the issues;" rather, it appears that the amicus is "serving as a mere conduit for the views of one of the parties.""

Yet, the *Order* cites no court ruling or statute supporting that either of its conclusions warrants denial of the *Motion*. In fact the quote relied on is the opinion of a law professor in a legal text that was unsupported by reference to any court ruling, and which as explained above is contrary to both NRAP 29(c)(1) and (d), and *Miller-Wohl*, *Hoptowit*, *Funbus* and *Neonatology*. This Court's *Order* overlooks the law that to be "desirable" an amicus brief is **required** to serve as a "conduit for the views of one of the parties" by supporting that party. *Id.*, and see also NRAP 29(d).

Also contrary to this Court's ruling, an amicus brief is limited to issues raised in the brief it supports, so there is no legal authority for the *Order's* rejection of the *Brief* based on the fact it (correctly) addresses issues in Lobato's opening brief. See, *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 861-62 (9th Cir. 1982) (The party appealing frames the issues.); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 163 n. 8 (2nd Cir. 2004) (Court would not consider issues not raised by the petitioner.); *Bano v. Union Carbide Corp.*, 273 F.3d 120, 127 n. 5 (2nd Cir. 2001) (Court would not consider issues only raised by the amicus.); *Eldred v.*

Reno, 239 F.3d 372, 378 (D.C. Cir. 2001) (Issue only raised by an amicus is not proper.); and, *Resident Council of Allen Parkway Village v. U.S. Dept. of Housing & Urban Development*, 980 F.2d 1043, 1048-50 (5th Cir. 1993) (Amicus cannot expand scope of appeal by raising issues not raised by a party to the appeal.)

Furthermore, this Court's *Order* prejudicially misapprehended the material fact that the *Amici's Brief* is *prima facie* "desirable" under NRAP 29(c)(2) and distinct from Lobato's opening brief by supplementing its arguments and drawing attention to law that it doesn't raise. See, *Miller-Wohl*, 694 F.2d at 204; and, *Neonatology*, 293 F. 3d at 133. The *Brief* cites 37 cases –including nine U.S. Supreme Court rulings – related to the five grounds argued in the *Brief*, while Lobato's opening brief cites only one case in support of those grounds. It is difficult to imagine that any amicus brief ever filed in this Court supplements a party's opening brief or draws attention to law that escaped attention in that brief more than does the *Amici's Brief*.

Each of the grounds argued in the *Brief* involve significant matters of public importance because they concern state and federal constitutional issues related to due process, a fair trial, effective assistance of counsel, and that the facts support Ms. Lobato's actual and factual innocence.[3] *Amici's Brief* clearly meets the requirements of NRAP 29(c)(2) and the case law because it presents arguments

[3] Neither the State in its opposition to the *Motion* nor this Court by way of its *Order* disputes Lobato's is "a case of general public interest." *Miller-Wohl*, 694 F.2d at 204.

and controlling or relevant Nevada Supreme Court and federal circuit and U.S. Supreme Court precedents related to those grounds that are not addressed in Lobato's opening brief.

E. This Court's Order Based On Misapprehended Material Facts and Overlooked Law Creates The Appearance Of Discrimination Against Lobato

Justice Alito discussed an issue in *Neonatology* raised by this Court's *Order*:

> "A restrictive policy with respect to granting leave to file may also create at least the perception of viewpoint discrimination. Unless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable. A restrictive policy may also convey an unfortunate message about the openness of the court." *Neonatology*, 293 F. 3d at 133. (underlining added)

It is almost inconceivable this Court would not grant a motion for an amicus brief in support of the State in this case that was submitted by the Nevada District Attorneys Association, the National District Attorneys Association, the Association of Prosecuting Attorneys, or another professional group unmistakably aligned with the State's interest, and where there would be no question of their partiality for the State's position on the issues.

The *Amici* are among the relatively few "actual innocence" organizations, which unmistakably have an interest in supplementing the efforts of Lobato's counsel and drawing this Court's attention to relevant law. *Miller-Wohl*, 694 F.2d at 204. Yet even though as explained above the facts, NRAP 29(c)(1), (c)(2) and

(d), and case law clearly supports the filing of the *Brief*, this Court's *Order* misapprehended material facts and overlooked the controlling NRAP rules and case law. Justice Alito's concern expressed in *Neonatology* is directly applicable to the situation created by this Court's *Order*: this Court would be open to assistance by a possible amicus for the State, but not for Lobato.

"The perception of viewpoint discrimination" under the circumstances of Lobato's appeal and this Court's denial of the *Amici's Brief* is magnified because the State is represented by lawyers skilled in post-conviction appeals and they have at their disposal the combined legal expertise of the Clark County District Attorney's Office and the Nevada State Attorney General's Office to assist them. In contrast, Lobato is an indigent high school graduate represented by a *pro bono* civil lawyer with a small firm and no previous post-conviction experience. The contest of Lobato trying to vindicate her constitutional rights alone against the State's opposition is as if unlike David, she only has a pea shooter and not a slingshot to defend herself against Goliath's might.

This Court can dispel "the perception of viewpoint discrimination" decried by Justice Alito by reconsidering its *Order* in light of the material facts, NRAP 29 (c)(1), (c)(2) and (d), and the law relevant to the *Motion*, the *Motion To Join*, and the filing of the *Amici's Brief* that is based on the United States Supreme Court's recognition that "the central purpose of any system of criminal justice is to convict

the guilty and free the innocent." *Herrera v Collins*, 506 US 390, 398 (1993).

F. Conclusion

The *Amici* have the "interest" required by NRAP 29(c)(1), and neither the State nor this Court by way of its *Order* opposes the *Amici's* interest.

The *Amici's Brief* is "desirable" as required by NRAP 29(c)(2), and neither the State nor this Court by way of its *Order* state a legally relevant reason opposing that the *Amici's Brief* meets *Miller-Wohl's* criteria for determining it is "desirable", and that it also clearly satisfies the "desirable" standard Justice Alito applied in *Neonatology*.

For all the foregoing reasons the *Amici's Brief* meets the requirements of NRAP 29(c)(1) and (c)(2), and the *Amici* respectively request that this Honorable Court GRANT this motion to reconsider the *Amici's Motion* for leave to file the *Brief* and MODIFY its May 9, 2012 *Order* accordingly.

Dated this 16th Day of May, 2012.

Respectfully submitted,

By: _____
Dustin Dingman, SBN 7678
The Law Office of Dustin Dingman
Counsel for Amicus Curiae

Form 16. Certificate of Compliance

I hereby certify that this motion for reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

It has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

I further certify that this motion complies with the page or type volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points or more, and contains 2,984 words.

Dated this 16th day of May, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on May 16, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

***

KIRSTIN BLAISE LOBATO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

BRIEF OF AMICUS CURIAE THE JUSTICE INSTITUTE IN SUPPORT OF APPELLANT KIRSTIN BLAISE LOBATO AND REVERSAL OF THE DISTRICT COURT'S JUDGMENT

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

The *amicus curiae*, the Justice Institute, promotes awareness of issues related to wrongful convictions in general and specific cases of the possible conviction of an actually innocent person. The Justice Institute is an IRS approved 501(c)(3) non-profit organization that is incorporated as a non-profit corporation in the State of Oregon and it operates from Seattle, Washington.

The Justice Institute operates the website www.justicedenied.org founded in 1999 which acts as a resource center and makes information available generally concerning wrongful convictions, and specifically concerning cases of persons with evidence of their actual innocence seeking post-conviction relief.

Consequently, the Justice Institute has a substantial interest in ensuring that courts have correctly interpreted the evidence to convict the guilty and acquit the innocent, and is well-situated to assist this Court in ensuring that post-conviction issues are properly considered under the applicable case law. The Justice Institute's interest in the judicial system's proper consideration of post-conviction claims is particularly compelling where a district court's erroneous rulings have resulted in the continued incarceration of an Appellant the evidence supports is actually innocent. The Justice Institute is convinced the case of the Appellant is one of those cases.

ARGUMENT

I. The State did not introduce evidence at trial to prove every essential element of the Appellant's charged crimes beyond a reasonable doubt as required by *Jackson v. Virginia*, 443 U.S. 307 (1979), and thus the District Court prejudicially erred in denying her petition for a writ of habeas corpus grounds 59, 64, 72 and 74 that her counsel provided prejudicially deficient assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) in violation of her federal rights to due process, a fair trial, and effective assistance of counsel.

In re Winship, 397 U.S. 358 (1970) the U.S. Supreme Court held that due process under the federal constitution requires that the State must introduce evidence proving guilt of every essential element beyond a reasonable doubt. Relying on *Winship* the Court held in *Jackson v. Virginia,* 443 U.S. 307, 319, 324 (1979): "the applicant is entitled to habeas corpus relief if it is found that, upon the record evidence adduced at the trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324. See also, *Koza v. State,* 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

Granting relief based on insufficiency of the evidence amounts to acquittal under the Double Jeopardy Clause. *Burks v. United States,* 437 U.S. 1, 18 (1978) ("the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient."); see also, *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981) (Double Jeopardy Clause bars retrial if conviction vacated based on insufficient evidence.); and *State v Purcell*, 110 Nev. 1389, 887 P.2d 276, 279 (1994) ("If there is truly insufficient evidence, a defendant must be

acquitted.").

The State's Criminal Information in this case charged:

> "That KIRSTIN BLAISE LOBATO, the Defendant(s) above named, having committed the crimes of MURDER WITH THE USE OF A DEADLY WEAPON (OPEN MURDER) (Felony – NRS 200.010, 200.030, 193.165); and SEXUAL PENETRATION OF A DEAD HUMAN BODY (Felony – NRS 201.450), on or about the 8th day of July 2001, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada." 1 App. 1.

Richard Shott testified by deposition he found Duran Bailey's body around 10 p.m. on July 8, 2001 in the trash enclosure for a Nevada State Bank in Las Vegas, which is in Clark County. 2 App. 267. There was no testimony Bailey died anywhere other than where his body was found, and that was the State's theory and narrative of the crime. 2 App. 255; 5 App. 1006.

Clark County Medical Examiner Dr. Lary Simms testified Duran Bailey died on July 8, 2001. 2 App. 443, 457, which was the State's basis for Count I.

Dr. Simms also testified an injury to Bailey's rectal area was post-mortem, which was the State's basis for Count II. 2 App. 419.

Thus the evidence at trial established the person who murdered Bailey did so on July 8, 2001, it occurred in Clark County, and after his death a person injured his rectal area. Consequently, to prove the Appellant (hereinafter "Lobato") committed the crimes the State had to introduce evidence individually proving beyond a reasonable doubt the four essential elements of the crime: 1) she was in

Clark County (Las Vegas); 2) on July 8, 2001 at the time of the crime; 3) she was the assailant who murdered Bailey; and 4) she was the assailant who post-mortem inflicted Bailey's rectal area injury.[1] 1 App. 1.

If Lobato was not in Clark County, on July 8, 2001 and specifically at the time of Bailey's murder, and when his rectal area was injured, it is not possible she was his assailant.

At trial every witness for the State and the defense who testified they saw or talked with Lobato on July 8, 2001[2] stated they did so when she was at or near her home in Panaca, 165 miles north of Las Vegas. 4 App. 761. There was no testimony by any person who saw or talked with her when she was anywhere other than Panaca during the entire 24-hours of July 8, 2001, and there was no physical evidence such as a CCTV video or a gas receipt she was not in Panaca on July 8. Lobato does not state in her police Statement on July 20, 2001 (hereinafter "Statement") that she in Clark County at anytime on July 8, 2001. Exhibit 125A. The trial evidence Lobato was in Panaca is consistent with the fact that neither the District Court's Order, 11 App. 2263, denying Lobato's habeas corpus petition (hereinafter "Petition"), nor the State disputes Lobato's statement of fact:

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[1] These are only four of the charged crimes essential elements.

[2] State witnesses, 2 App. 374; 2 App. 384; 2 App. 461-62 and 465-66, 470. Defense witnesses, 4 App. 751-52; 4 App. 880-81; 4 App. 771; 4 App.779-80; 4 App. 886; 4 App. 891; 4 App. 917; 5 App. 935-37 and 5 App. 986-87.

> "No physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence was introduced at trial placing the Petitioner in Clark County at any time on July 8, 2001, the day of Duran Bailey's murder." 6 App.1368-69; 9 App.1936-77.

The State's claimed during its opening statement, and then in the absence of introducing evidence it claimed during its closing argument, that Lobato was in Clark County (Las Vegas) at the time of Bailey's murder on July 8, 2001. 2 App. 257; 5 App. 1008.

Furthermore, neither the district court nor the State denies that, "Likewise, no forensic tests of the Petitioner's personal items and car tested positive for Bailey's DNA or blood, and none of her DNA or fingerprints were found on any crime scene evidence." 7 App.1425-26. Additionally, the tires on Lobato's car were excluded as the source of fresh tire tracks found next to the murder scene. 3 App. 523, 589.

The State did not introduce any "physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence ... that establishes she committed the crimes." 7 App. 1486. Neither the district court nor the State denies that fact. 11 App. 2280; 9 App. 1972-73.

One of Lobato's defenses at trial was her Statement and all her comments to people she confided in were related to her using her pocket knife to fend off an attempted sexual assault at the Budget Suites Hotel closest to Sam's Town Casino in east Las Vegas, which she described as happening prior to June 20, 2001 –

weeks before Bailey's murder. Exhibit 125A at 3-5, 11, 20, 27. She described in her statement and to all those she talked to that her assailant was alive when she escaped from him. Exhibit 125A at 7. State witness Jeremy Davis provided testimony consistent with Lobato's statement concerning her leaving her car at his house after the Budget Suites assault, which identifies it occurred in the last week of May 2001. 2 App. 391.

There is no mention in Lobato's Statement about her assailant's rectum, and no witness for the State or defense testified she ever mentioned anything about her assailant's rectum or anus. In fact, the State introduced no evidence Lobato inflicted Bailey's rectal area injury that was the basis for Count II. The State only introduced Dr. Simms' testimony about the injury – not who inflicted it.

In the absence of introducing evidence, the State's claimed during its opening statement and then claimed during its closing argument that Lobato was Bailey's assailant based on her Statement and nondescript comments she made to several acquaintances, during which Lobato never made any reference to ever killing or mutilating the dead body of any person at any time – much less Bailey on July 8, 2001. 2 App. 256-258; 5 App. 1006-1009, 1022; Exhibit 125A.

It is a prejudicial federal due process violation for a conviction to be based on speculation, conjecture or unreasonable inferences. See, *Juan H. v. Allen*, 408 F.3d 1262, 1269 (9th Cir. 2005); *United States v. Lewis*, 787 F.2d 1318, 1323 (9th

Cir. 1986); *Newman v. Metrish*, 543 F.3d 793, 797 (6th Cir. 2008); and *O'Laughlin v. O'Brien*, 568 F.3d 287, 308 (1st Cir. 2009); See also, *Konold v Sheriff, Clark County*, 94 Nev. 289, 579 P. 2d 768, 769 (1978), and *State v Luchetti*, 87 Nev. 343, 486 P. 2d 1189, 1191 (1971).

The jury only had the State's speculation, conjecture and unsubstantiated inferences upon which to determine Lobato was in Clark County, on July 8, 2001 at the time of Bailey's murder because all the testimony at trial was she was in Panaca the entire 24-hours of July 8, and there was no testimony she murdered Bailey, and then inflicted his rectal injury.

Since the unrebutted evidence at trial by witnesses for the State and the defense established Lobato was in Panaca the entire 24-hours of July 8, 2001, and there was no testimony she murdered Bailey (Count I) and then inflicted his rectal injury (Count II), the State did not prove those four essential elements of the crime and "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson, supra*, at 324, and *Winship, supra*, and her conviction violates her federal constitutional rights to due process and a fair trial. *Id.* Lobato is also entitled to acquittal under *Burks*, 437 U.S. at 18.

Lobato had the constitutional right to effective assistance of counsel during her trial proceedings. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). The Supreme Court established a two prong test in Strickland: "First, the defendant

must show that counsel's performance was deficient. ... Second, the defendant must show that the deficient performance prejudiced the defense." *Id.*

Deficient representation is that which falls "below an objective standard of reasonableness." *Id.* at 688. To establish deficient representation "the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."" *Id.* at 689.

To establish prejudice, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Under the "reasonable probability" standard prejudice is established by *less than* a preponderance of the evidence, "On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693.

Lobato had the constitutional right to effective assistance of counsel in her direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 395-97 (1985). *Strickland's* two-prong deficient conduct and prejudice test applies to evaluating a claim of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 US 259, 289 (2000). To prove prejudice Lobato must show that but for her appellate counsel's deficient conduct she would have had a reasonable probability of success on appeal. *Heath*

v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991).

This Court ruled in *Kirksey v State*, 112 Nev. 980, 923 p.2d 1102, 1107 (1996), "A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review. (citation omitted) This court evaluates a claim of ineffective assistance of trial counsel under the "reasonably effective assistance" test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984)."

Yet given the above facts and law, at trial and in her direct appeal, 5 App. 1048, Lobato's counsel inexplicably ignored the key issues in her trial that the State failed to meet its federal and state constitutional burden of proving by competent evidence every essential element of her charged crimes beyond a reasonable doubt. *Jackson, supra*, at 324, and *Winship*, *supra*.

The following are grounds in Lobato's Petition.

A. Ground 59 – Prejudicial failure of counsel to make NRS 175.381(1) motions. 7 App. 1427.

The NRS doesn't provide for a motion for a judgment of acquittal prior to the verdict. However, NRS 175.381(1) allows the district court to advise the jury to acquit based on the prosecution's failure to introduce evidence sufficient to prove every essential element of the alleged offenses beyond a reasonable doubt.

Lobato's counsel did not make a motion under NRS 175.381(1). 7 App. 1427.

This Court in *Milton v State*, 111 Nev. 1487, 908 P. 2d 684, 688 (1995), stated the giving of an advisory instruction to acquit under NRS 175.381 "rests within the sound discretion of court." *Id.* The judge in *Milton* provided a comprehensive three paragraph explanation for why he didn't do so. *Milton* cited *Lenz v. State*, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981), in which this Court ruled, "The trial court did not abuse its discretion when it declined to offer an advisory verdict on the appellant's behalf, given the evidence which had been presented by the State to link the appellant to the crime." *Id.* at 66. Lobato's case is profoundly dissimilar to *Milton* and *Lenz* because neither the State nor the Court disputes the facts underlying this claim that:

> "the prosecution's failure to introduce evidence sufficient to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt, and most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes..." 7 App. 1427.

In light of the State's failure to introduce evidence proving beyond a reasonable doubt the essential elements that Lobato was in Clark County, on July 8, 2001, and that she was Bailey's assailant, it would have been an objectively reasonable decision for her counsel to have made a NRS 175.381(1) motion for the district court to advise the jury to acquit her at the close of the State's evidence, at

the close of the defense's evidence, and at the close of the prosecution's rebuttal evidence. 7 App. 1427. The district court would have been required as a matter of law under *Winship* and *Jackson* to have granted the motion and so instructed the jury. With an explanation from the district court to the jury about the State's fatal failure to introduce evidence proving the essential elements that Lobato was in Clark County, on July 8, 2001, and that she was Bailey's assailant – there is no reasonable basis to think she would have been convicted because "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson, supra*, at 324.

Consequently, the deficient conduct and prejudice prongs of *Strickland* are satisfied by this ineffective assistance of counsel ground. First, the performance of Lobato's counsel was objectively unreasonable for failing to make a NRS 175.381(1) motion because it can never be considered sound strategy, *Id.* at 689, for Lobato's counsel to fail to make a motion that would have been expected to ensure she wasn't convicted in violation of *Winship* and *Jackson*. Second, her counsel's deficient conduct was prejudicial under *Strickland* because it "undermines confidence in the outcome" since there is far more than "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694 – it is a near certainty considering she "need not show that counsel's deficient conduct more likely than

not altered the outcome in the case." *Id.* at 693.

The district court prejudicially erred denying this ground for the following reasons. First, the district court determined without explanation "that it would have denied such a motion." 11 App. 2277. Second, the failure of Lobato's counsel's to make NRS 175.381(1) motions was not an issue in her direct appeal. Third, this Court did not rule in *Lobato v. State*, No. 49087 (2009) on the factual and legal basis of this ground, and if it had, this Court would have been required to vacate Lobato's convictions under *Winship* and *Jackson*, which would have barred her retrial. *Burks*, *supra*, at 18. Fourth, in light of the information herein, this Court's general ruling in *Lobato* (2009) concerning sufficiency of the evidence is inapplicable under any circumstance to this ground under *Arizona v. California, et al.*, 460 U.S. 605, 618 (1983) that the law of the case doctrine "does not limit the tribunal's power," and "...it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Id.* at fn.8. This Court relied on *Arizona* in ruling in *Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519, 535-36 n.107 (2001), "However, it cannot be seriously disputed that a court of last resort has limited discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted." Lobato's conviction is the most extreme "manifest injustice" imaginable considering the State introduced no evidence she was within 165 miles of Las

Vegas on the day of Mr. Bailey's murder, and there is no physical, forensic, eyewitness or confession evidence she committed either of her charged crimes. Fifth, the district court prejudicially misapplied *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984), because unlike *Hargrove* this ground is based on "a factual background, names of witnesses or other sources of evidence demonstrating ... entitlement to relief." *Id.* at 502.

B. Ground 64 – Prejudicial failure of counsel to request an essential elements instruction or argue to the jury that the State failed to prove every essential element of the Appellant's charged crimes. 7 App. 1446.

An accurate instruction on the essential elements of a charge is required by the federal constitution's Fifth, Sixth and Fourteenth amendment guarantees of due process, a fair trial, and a fair and impartial jury, and a defendant's corresponding state rights, and failure to so instruct the jury constitutes reversible error. See *United States v. Gaudin*, 515 U.S. 506, 510, 522-23 (1995) (Conviction reversed because jury wasn't instructed about every essential element.); *Rossana v State*, 113 Nev. 375, 382, 934 P. 2d 1045, 1050 (1997) (Failure to instruct about essential element of crime is constitutional error requiring reversal.); and, *Wegner v State*, 116 Nev. 1149, 14 P. 3d 25, 29-30 (2000) (Conviction reversed because erroneous instruction of an essential element was constitutional violation that "relieved the State of its burden to prove every element of the crime charged.")

Even though as explained above the State does not deny failing to introduce evidence proving the essential elements that Lobato was in Clark County, on July 8, 2001, and that no physical, forensic, eyewitness or confession evidence was introduced identifying her as Bailey's murderer or the person who injured his rectal area post-mortem, her counsel failed to both request an essential elements instruction and to argue to the jury that the State failed to introduce evidence to prove all essential elements of her charged crimes beyond a reasonable doubt and therefore she must be acquitted. 7 App. 1446.

Neither the district court, 11 App. 2277-78, nor the State, 9 App. 1967-68, denies Lobato's counsel did not raise the issue at trial that the State failed to introduce evidence to prove every essential element, and thus the State failed to meet its constitutional burden of proof under *Winship* and *Jackson*.

It is not enough to simply say, "Well, the jury found Lobato guilty." It is an undisputed fact the jury found her guilty without knowing the State had the specific constitutional burden of introducing evidence to prove beyond a reasonable doubt every essential element, including that she was in Clark County, on July 8, 2001, and that she was the assailant for both Counts I and II, as required by *Winship* and *Jackson*. That violation of Lobato's federal and state rights to due process, a fair trial, and a fair and impartial jury also mandates reversal of her

convictions under *Gaudin*, *supra*, at 510, 522-23, and *Rossana*, 113 Nev. at 382, 934 P. 2d at 1050.

The State offers as a defense – without legal support – that the jury's reliance on "common sense" relieved the State of its constitutional burden to introduce evidence proving every essential element beyond a reasonable doubt. 9 App. 1968.

Consequently, the deficient conduct and prejudice prongs of *Strickland* are satisfied by this ineffective assistance of counsel ground. First, the performance of Lobato's counsel was objectively unreasonable for failing to request an essential elements instruction or argue to the jury that the State failed to prove all essential elements of the charged crimes. 7 App. 1446. It cannot be considered sound strategy, *Id.* at 689, for Lobato's counsel to fail to request a jury instruction and to make arguments to the jury that would have been expected to ensure she wasn't convicted in violation of *Winship* and *Jackson*. Second, her counsel's deficient conduct was prejudicial under *Strickland* because it "undermines confidence in the outcome" since there is far more than "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694 – it is a near certainty considering she "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693.

The district court prejudicially erred denying this ground without explanation that her counsel exercised "legitimate defense strategy," 11 App. 2277, and "presentation of defense is ultimately defense counsel's responsibility." 11 App. 2278. Under *Strickland* neither of those findings has any relevance to this ground nor alters the fact Lobato's counsel had the constitutional responsibility to act within "prevailing professional norms," *Id.* at 688. Failing to request a jury instruction or make arguments to the jury that could reasonably be expected to result in Lobato not being convicted cannot be excused as strategy because it "undermines confidence in the outcome," and thus is prejudicial and requires the granting of relief under *Strickland.*

C. Ground 72 – Prejudicial failure of counsel to make NRS 175.381(2) motion. 7 App. 1471.

NRS 175.381(2) provides that a motion for a judgment of acquittal based on insufficient evidence must be made within 7 days after the jury is discharged.

Lobato's counsel did not file a motion for a judgment of acquittal under NRS 175.381(2). 7 App. 1471.

Neither the district court, 11 App. 2279, nor the State, 9 App. 1971, disputes the facts underlying this claim that:

> "the prosecution introduced insufficient evidence to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt, and most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was

> introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes..." 7 App. 1471.

In light of the State's failure to introduce evidence proving the essential elements that Lobato was in Clark County, on July 8, 2001, and that she was Bailey's assailant in Counts I and II, it would have been an objectively reasonable decision for her counsel to have made a NRS 175.381(2) motion for the district court to enter a judgment of acquittal. 7 App. 1471. The district court would have been required as a matter of law under *Winship* and *Jackson* to have granted the motion based on the State's fatal failure to introduce evidence proving every essential element, because "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson, supra*, at 324.

Consequently, the deficient conduct and prejudice prongs of *Strickland* are satisfied by this ineffective assistance of counsel ground. First, the performance of Lobato's counsel was objectively unreasonable for failing to make a NRS 175.381(2) motion because it cannot be considered sound strategy, *Id.* at 689, for Lobato's counsel to fail to make a motion that could be expected to ensure her acquittal under *Winship* and *Jackson*, based on *Burks, supra* and *Purcell, supra*. Second, her counsel's deficient conduct was prejudicial under *Strickland* because it "undermines confidence in the outcome" since there is far more than "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694 – it is a near certainty considering she "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693.

The district court prejudicially erred denying this ground for the following reasons. First, the district court determined without explanation, "Defendant has failed to demonstrate that counsel was deficient or that she was prejudiced." 11 App. 2279. Second, the prejudicial failure of Lobato's counsel's to make a NRS 175.381(2) was not an issue in her direct appeal, and thus *Hall v State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975), has no applicability because this Court did not rule in *Lobato* (2009) on the factual and legal basis of this ground. Third, in light of the information herein, this Court's general ruling in *Lobato* (2009) concerning sufficiency of the evidence is inapplicable under any circumstance to this ground under *Arizona*, 460 U.S. at 618 that the law of the case doctrine "does not limit the tribunal's power," and "...it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Id.* at fn.8. This Court relied on *Arizona* in ruling in *Pellegrini*, 117 Nev. 860, 34 P.3d at 535-536 n.107, "However, it cannot be seriously disputed that a court of last resort has limited discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted." Lobato's

conviction is the most extreme "manifest injustice" imaginable considering the State doesn't deny it introduced no evidence she was within 165 miles of Las Vegas on the day of Mr. Bailey's murder, and there is no physical, forensic, eyewitness or confession evidence she committed either of her charged crimes. Fourth, the district court prejudicially misapplied procedural default under NRS 34.810 because this ground is raised in Lobato's original and timely Petition, and this Court ruled in *Pellegrini*, 117 Nev. 860, 34 P.3d at 535, "claims of ineffective assistance of counsel brought in a timely first post-conviction petition for a writ of habeas corpus are not subject to dismissal on grounds of waiver..."

D. Ground 74 – Prejudicial failure of appellate counsel to correctly argue and brief this Court in Appellant's direct appeal Argument A. that there is insufficient evidence to support Appellant's convictions. 7 App. 1478.

As explained above the State relied on assumptions, speculation, conjecture and unreasonable inferences to support their theory and narrative that Lobato was in Las Vegas on July 8, 2001 and that she was Bailey's assailant, because there was no physical, forensic, eyewitness or confession evidence to prove those essential elements. Detective Thomas Thowsen was the primary support for the State's speculation based prosecution with his testimony that he assumed her Statement was about Bailey's murder and she was the perpetrator. 3 App. 663-6, 673, 686. However, opinion testimony based on "theoretical conclusions or

inferences" cannot be relied on by the State as a substitute for the failure to introduce sufficient evidence. *United States v. Boissoneault*, 926 F.2d 230, 234 (2d Cir. 1991).

Even though Lobato was linked to Bailey's murder based on the State's unbridled speculation in their opening statement, by Det. Thowsen's testimony, and in their closing and rebuttal arguments, in her direct appeal Argument A concerning insufficiency of the evidence her counsel did not even raise the issue that the State failed to introduce evidence to prove each and every essential element beyond a reasonable doubt. 5 App. 1070. Furthermore, there was only one sentence in Argument A concerning the reliance of the State's case on speculation: "Additionally, it must be determine whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn." 5 App. 1071. That one tepid sentence was deficient in not even alleging that Lobato's conviction based on conjecture and speculation violated her federal and state rights to due process and a fair trial under *Winship* and *Jackson*, because the State failed to introduce competent evidence to prove beyond a reasonable doubt each essential element.

Neither the district court, 11 App. 2280, nor the State, 9 App. 1972-73, disputes the truthfulness of Lobato's statement:

> If Petitioner's counsel had correctly and fully briefed the Nevada Supreme Court on the law and circumstances of her prosecution to

> show it is based on a "house of unsubstantiated speculative inferences" built on top of Detective Thowsen's speculative assumption that she confessed to Bailey's murder in her Statement, it can be expected that the Court would have vacated her conviction on the basis of insufficiency of the evidence. 7 App. 1487.

The Ninth Circuit granted habeas relief in *Juan*, 408 F.3d at 1269, ruling evidence cannot be replaced by "speculation and conjecture." In granting habeas relief the Sixth Circuit ruled in *Newman*, 543 F.3d at 797, "...conspicuously absent is any evidence placing Newman at the scene of the crime. ... Without additional evidence placing him at the scene of the crime, there is only a reasonable speculation that Newman himself was present." The First Circuit ruled in *O'Laughlin*, 568 F.3d at 308, "Based on the record before us ... we hold that it would be overly speculative to conclude O'Laughlin to be the assailant beyond a reasonable doubt." This Court granted habeas relief in *Konold*, 94 Nev. 289, 579 P.2d at 769, on the basis inference of identity as a crime's perpetrator was insufficient.

There is every reason to think this Court would have vacated Lobato's conviction if her appellate counsel had properly briefed and argued Argument A to this Court as detailed in this ground.

Furthermore, if this Court vacated her conviction on insufficiency of the evidence it would have resulted in her acquittal, *Burks, supra* and *Purcell, supra*, and her immediate release from custody because at that point she would have been

"wrongfully imprisoned." *State ex rel. Orsborn v. Fogliani*, 82 Nev. 300, 417 P.2d 148, 150 (1966).

The deficient conduct and prejudice prongs of *Strickland* are satisfied by this ineffective assistance of counsel ground. First, the performance of Lobato's appellate counsel was objectively unreasonable for failing correctly argue and brief this Court in her direct appeal that the State relied on speculation and conjecture as a substitute for introducing evidence to prove beyond a reasonable doubt every essential element. 7 App. 1478. It cannot be considered sound strategy, *Id.* at 689, for Lobato's counsel to fail to make an argument to this Court on direct appeal that she was unconstitutionally convicted in violation of *Winship* and *Jackson*, which could be expected to have resulted in the vacating of her conviction and her immediate release from custody. Second, her counsel's deficient conduct was prejudicial under *Strickland* because it "undermines confidence in the outcome" since there is far more than "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding [in this Court] would have been different." *Id.* at 694 – it is a near certainty considering she "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Prejudice is also established because as noted above, if this grounds issue had been raised on direct appeal where the burden is considerably higher on an Appellant to show prejudice than on collateral review under *Strickland*,

vacating of Lobato's convictions and her acquittal would have been required under *Jackson* and *Winship*.

The district court prejudicially erred denying this ground for the following reasons. First, the district court determined without explanation, "Defendant has failed to demonstrate that counsel was deficient or that she was prejudiced." 11 App. 2280. Second, this ground is based on the prejudicial failure of Lobato's counsel's to raise on direct appeal the issue that the State relied on speculation and conjecture to secure her convictions and did not introduce evidence proving beyond a reasonable doubt every essential element, and therefore this Court did not rule on this issue. Thus *Hall*, 91 Nev. at 315, 535 P.2d at 798, has no applicability because this Court did not rule in *Lobato* (2009) on the factual and legal basis of this ground, and the district court's Order prejudicially erred in stating "This claim is therefore belied by the record." 11 App. 2280. Third, in light of the information herein, this Court's general ruling in *Lobato* (2009) concerning sufficiency of the evidence is inapplicable under any circumstance to this ground under *Arizona*, 460 U.S. at 618, that the law of the case doctrine "does not limit the tribunal's power," and "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Id.* at fn.8. This Court relied on *Arizona* in ruling in *Pellegrini*, 117 Nev. 860, 34 P.3d at 535-536 n.107, "However, it cannot be seriously disputed that a court of last resort has limited

discretion to revisit the wisdom of its legal conclusions when it determines that further discussion is warranted." Lobato's conviction is the most extreme "manifest injustice" imaginable considering the State doesn't deny it introduced no evidence she was within 165 miles of Las Vegas on the day of Mr. Bailey's murder, and there is no physical, forensic, eyewitness or confession evidence she committed her charged crimes. Fourth, the district court prejudicially misapplied NRS 34.810 because this ground is raised in Lobato's original and timely Petition, and this Court ruled in *Pellegrini*, 117 Nev. 860, 34 P.3d at 535, "claims of ineffective assistance of counsel brought in a timely first post-conviction petition for a writ of habeas corpus are not subject to dismissal on grounds of waiver..."

II. The District Court prejudicially erred in denying ground 77 that her counsel cumulatively provided prejudicially deficient assistance of counsel in grounds 27-76 and 79 under *Strickland v. Washington*, 466 U.S. 668 (1984), in violation of her federal rights to due process, a fair trial, and effective assistance of counsel.

If any one ineffective assistance of counsel claim is insufficient to warrant relief, multiple claims may warrant relief under *Strickland* when considered cumulatively. *U.S. v. Frederick*, 78 F.3d 1370, 1381 (9th Cir 1996). Relevant factors to consider in evaluating "cumulative errors are: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Mulder v. State*, 116 Nev. 1, 992 P.2d 845, 854-55 (2000). See also, *Strickland, supra,* at 696.

As the above explanations of grounds 59, 64, 72 and 74 detail, the State's case was extraordinarily weak. The State introduced no evidence Lobato was in Clark County on July 8, 2001 and no physical, forensic, eyewitness or confession evidence she either murdered Bailey or injured his rectal area post-mortem. After two days of deliberation the jury convicted on the significantly reduced charge of voluntarily manslaughter, and it was reported in the press that counsel for both the State and Lobato acknowledged the jury compromised, thus there were juror holdouts for acquittal. 10 App. 2145-46.

The Ninth Circuit ruled in *Frederick*, "In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *Id.* at 1381. The record supports the slightest degree of cumulative error by Lobato's counsel likely tipped the scale for the jury and "altered the outcome in the case."

Lobato's ineffective assistance of counsel grounds 38-41 and 71 are based on new expert evidence not presented at trial she obtained post-conviction.

Ground 38 and 40. New forensic entomology, 6 App. 1173-80, 1339, and forensic pathology, 6 App. 1181, 1348, evidence establishes to a reasonable scientific certainty Bailey died between 8 p.m. and "around 10 p.m." on July 8, 2001. This unrebutted new evidence establishes she didn't murder Bailey because

the State admitted during closing arguments unrebutted alibi evidence establishes she was in Panaca from at least "11:30 a.m. through the night." 5 App. 1008.

Ground 40. New forensic pathology and photographic evidence establishes Bailey was alive after his rectum wound was inflicted. 6 App. 1202, 1348. This unrebutted new evidence establishes Lobato is not guilty of Count II.

Ground 41. New forensic science evidence Lobato's shoeprints don't match those of the person who was present at the crime scene before and after Bailey began bleeding. 6 App. 1222, 1358. This unrebutted new evidence establishes she was not present during Bailey's murder.

Ground 39 and 41. New psychology evidence, 6 App. 1185, 1344, and new forensic science evidence the shoes Lobato wore during the sexual assault described in her Statement were not worn during Bailey's murder, 6 App. 1218, 1358, establishes her Statement and Bailey's murder are different events. This unrebutted new evidence establishes her Statement is not about Bailey's murder, which was the basis of her prosecution.

Ground 71. New dental evidence establishes Bailey was not hit in the mouth with a baseball bat. 6 App. 1253, 7 App. 1468. This unrebutted new evidence establishes Lobato's baseball bat could not have been used to knock out Bailey's teeth and knock him over which was a key part of the State's speculative narrative of the crime.

Lobato's new evidence is proof she did not murder Bailey, and it is "reasonably probable" the cumulative effect of that evidence combined with the jury being properly informed and instructed about all the essential elements of the crimes – grounds 59, 64, 72 and 74 – would have altered the outcome. Thus Lobato's counsel was prejudicially deficient under *Strickland* for failing to make any effort to obtain the exculpatory evidence prior to trial because it "undermines confidence in the outcome." *Id.* at 694. See, *Richter v. Hickman*, 578 F.3d 944, 952-53 (9th Cir. 2009) (Petitioner prejudiced by counsel's failure to investigate and present critical expert testimony, "This is indeed precisely what Strickland requires."); See also, *Sanborn v. State*, 107 Nev. 399, 812 P. 2d 1279, 1283-84 (1991), and *Warner v. State*, 102 Nev. 635, 729 P.2d 1359, 1361 (1986).

There is even more of a "reasonable probability" the outcome would have been different when the cumulative effect of Lobato's ineffective assistance of counsel grounds 49, 52, 65, 67, 69 and 70 are considered that detail her counsel's failure to make almost 300 objections to rampant prejudicial prosecutor misconduct from the beginning of the State's opening statement to the end of their rebuttal argument, which enabled the State to convince the jury to convict Lobato on the basis of speculation and conjecture. 7 App. 1393, 1402, 1448, 1452, 1455, 1458. Claims of prosecutor misconduct are considered for whether "that conduct appears likely to have affected the jury's discharge of its duty to judge the

evidence fairly." *Frederick*, *supra* at 1379. As detailed in the above grounds Lobato's trial was so thoroughly infected with prosecutor misconduct the jury wasn't able to fairly judge the absence of evidence.

When the cumulative effect of Lobato's 51 ineffective assistance of counsel grounds is considered, there is no reasonable possibility her counsel's deficient conduct didn't "undermine confidence in the outcome," mandating relief under *Strickland*.

In 2008 this Court granted relief in *Valdez v. State*, 124 Nev. 97, 196 P.3d 465, 481 (2008) based on the cumulative effect of three errors not sufficient individually to warrant relief. This Court specifically noted it couldn't "allow prosecutors to engage in misconduct by overlooking cumulative error..." *Id.* This Court also reversed the convictions in *Big Pond v. State*, 101 Nev. 1, 692 P.2d 1288, 1289 (1985) and *Witherow v. State*, 104 Nev. 721, 765 P. 2d 1153, 1156 (1988) based on cumulative errors. The number of egregious errors by Lobato's counsel dwarfs the combined errors in *Valdez*, *Big Pond* and *Witherow* that resulted in relief.

The district court prejudicially erred denying this ground without explanation, "there is no cumulative error as to warrant relief." 11 App. 2281.

III. Conclusion

Ms. Lobato was prejudiced under *Strickland* by her counsel's multitude of

prejudicial errors that include failing to prevent the State from obtaining her conviction by substituting speculation and conjecture for evidence proving essential elements of her accused crimes beyond a reasonable doubt, and failing to attempt to obtain critical evidence supporting her actual innocence or prevent extensive prosecutor misconduct.

All available evidence supports Ms. Lobato's actual innocence and this Court can rescue her from her legal quagmire by reversing the district court's Order and granting the appropriate relief of acquittal and her immediate release from custody, or in the alternative a new trial.

Respectfully submitted,

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Form 9. Certificate of Compliance

I hereby certify that I have read this *amicus curiae* 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)(4)-(6), this brief is formatted in Times New Roman, size 14 font, with 1" margins on all sides.

Pursuant to NRAP Rule 32(a)(7)(ii) and NRAP Rule 29(e) this brief's type-volume is no more than 7,000 words.

Dated this 12th day of March, 2012.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 12th day of March, 2012, a copy of the foregoing was deposited in a sealed envelope in the U.S. Mail, first-class postage fully prepaid, and addressed to the counsels of record:

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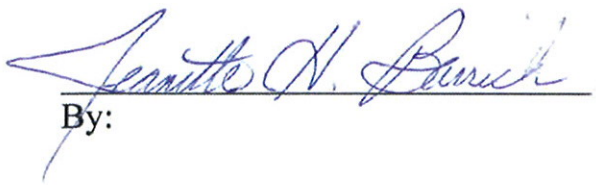

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