IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Post Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the district court erred in denying Appellant's petition with regard to new evidence not presented at trial.
2. Whether the district court erred in denying Appellant's petition with regard to alleged Brady violations.
3. Whether Appellant's trial counsel was ineffective.
4. Whether Appellant's appellate counsel was ineffective.
5. Whether cumulative error warrants reversal.

STATEMENT OF THE CASE

On August 9, 2001, the State of Nevada, by way of Information, charged Kirstin Lobato (hereinafter "Appellant") with one (1) count Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165) and one (1) count Sexual Penetration of a Dead Human Body (Felony – NRS 201.450). (I Appellant's Appendix hereinafter "AA" 1-3). A jury subsequently found Appellant guilty of both charges. (Id. at 133). Thereafter, this Court reversed and remanded for a new trial. (Id. at 127-41). Remittitur issued September 29, 2004. (Id. at 126).

On October 6, 2006, a jury found Appellant guilty of Voluntary Manslaughter With Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. (II AA 240-41). On February 2, 2007, the district court sentenced Appellant to the Nevada Department of Corrections as follows: Count 1 – Forty Eight (48) to One Hundred Twenty (120) Months, plus a equal and consecutive Forty Eight (48) to One Hundred Twenty (120) Months for the Deadly Weapon enhancement; Count 2 – Sixty (60) to One Hundred Eighty (180) Months, to run consecutive to Count 1. (Id. at 243). Additionally, the district court imposed a special sentence of lifetime supervision and ordered Appellant to register as a sex offender upon release. (Id. at 244). The district court entered a Judgment of Conviction on February 14, 2007. (Id. at 242-44). On February 5, 2009, this Court affirmed the Judgment of Conviction. (V AA 1112-16). Additionally, this Court denied Appellant's motions for rehearing and for en banc reconsideration. (Id. at 1128, 1140). The United States Supreme Court denied Appellant's petition for writ of certiorari. (Id. at 1147). Remittitur issued October 14, 2009. (Id. at 1149).

On May 5, 2010, Appellant filed a Petition for Writ of Habeas Corpus alleging seventy nine (79) grounds for relief. (VI AA 1150-IX AA 1935). On August 20, 2010, the State filed a Response to Appellant's Petition. (Id. at 1936-77). Appellant replied to the State's Response on October 2, 2010. (X AA 1978-85). On November 23, 2010, Appellant filed a Motion for Discovery. (XI AA 2189-98). On December 16, 2010, Appellant a second Motion for Discovery specifically as to "cardboard shoeprint evidence". (Id. at 2202-14). On December 22, 2010 and January 10, 2011, the State opposed Appellant's motions for discovery. (Id. at 2215-19, 2224-27). The district court denied Appellant's motions for discovery on January 13, 2011. (Id. at 2228-30). On March 1, 2011, following argument from counsel, the district court denied Appellant's Petition. (Id. at 2250-61). The district court entered a Findings of Fact, Conclusions of Law and Order

Denying Appellant's Petition on June 16, 2011. (Id. at 2263-91). Notice of Entry of Decision and Order was filed on August 2, 2011. (Id. at 2295).

On August 1, 2011, Appellant filed a Notice of Appeal. (Id. 2293-94). Appellant filed, and the State received, an opening brief on March 5, 2012. The State responds below.

STATEMENT OF THE FACTS

Trial

The Crime Scene

Around 10:00 p.m. on July 8, 2001, Richard Shott was dumpster diving in a parking lot across the street from the Palms Casino when he discovered Duran Bailey's body. (II AA 267, 273). Duran Bailey was homeless, 5'10" tall and weighed 133 pounds. (II AA 271, 284). The dumpster was enclosed by three brick walls and two (2) large doors on one side. (II AA 281, III AA 491, 598). Bailey's body was lying beside the dumpster covered and surrounded by trash. (III AA 598). Next to the enclosure was an area of covered parking for the adjacent apartment complex. (II AA 276, III AA 601). The parking structure was visible from the inside of the dumpster enclosure. (II AA 276, III AA 598, 681).

After removing all the trash piled on top of Bailey's body, the police discovered Mr. Bailey was badly beaten, had been stabbed multiple times, and his penis was amputated. (II AA 284). Bailey had an irregular slash wound which penetrated his rectum which was inflicted post-mortem, or after death. (II AA 419, 424).

Appellant's Statements

Sometime within two weeks of July 4, 2001, Appellant told Michelle Austria that someone tried to attack her in Las Vegas and she slashed at his penis. (II AA 368, 272, 378). Michelle claimed the conversation could have occurred the weekend prior to July 4th, 2001. (II AA 373). Appellant told Michelle that, as a

result of the incident, she was depressed because she was afraid she may have killed the man. (II AA 367-70, 376-77). Appellant told Michelle she was going to see a doctor to deal with her conscience. (II AA 369). Appellant did not tell Michelle when this alleged attack occurred, but Michelle assumed it could have occurred a few weeks before Appellant relayed the story. (II AA 368, 375).

Approximately a week before Appellant was arrested on July 20, 2001, Rusty Brown, Michelle's boyfriend, overheard a conversation between Appellant and Michelle wherein Appellant said she cut a man's penis off with her knife in Las Vegas. (II AA 381-82).

Dixie Tienken was one of Appellant's high school teachers in Panaca, Nevada. (II AA 297). At the time of trial, Dixie had known Appellant for approximately twelve (12) years. (Id). Around July 11, 2001, in the early morning hours, Appellant drove her father's truck to Dixie Tienken's house in Panaca. (II AA 298, 327). Appellant woke up Dixie and said "I really need to talk to you" and "I've done something bad." (II AA 298, 327). Appellant told Dixie that a man tried to sexually assault her in Las Vegas and Appellant grabbed his penis, cut it off, and threw it. (II AA 300-01). Appellant said the incident occurred west of the I-15 on one of the streets named after a hotel. (II AA 301). Appellant described her attacker as old and smelly. (II AA 301-02). While absent from her police statements and prior testimony, at trial Dixie claimed Appellant also said the attacker was big and African American. (II AA 301-02). After cutting of the man's penis Appellant ran to her car and went to a friend's house to shower because she had "ick" all over her. (II AA 300, 303).

Based on Appellant's demeanor, Dixie believed the incident occurred a few days prior to Appellant arriving at Dixie's house. (II AA 303, 327-28). Dixie and Appellant looked through Las Vegas newspapers to see if there were any reports of a man with a severed penis. (II AA 304). At trial, Dixie claimed for the first time,

that she and Appellant looked at newspapers as far back as July 1, 2001. (II AA 303-304, 315, 399). Dixie claimed that, although she believed the attack occurred within a few days, she looked for newspaper articles as far back as July 1, 2001, because she knew people on drugs often confuse dates. (II AA 315).

At trial Dixie claimed Appellant drove her dad's truck to Dixie's house because Appellant's ex-boyfriend vandalized her car. (II AA 304). However, at the first trial Dixie testified that Appellant did not drive her car because she was afraid someone saw her car at the crime scene. (II AA 304-05). Dixie eventually admitted the alleged vandalism was a completely unrelated incident. (II AA 306).

Around July 18, 2001, Dixie relayed Appellant's confession to Laura Johnson, a Lincoln County juvenile probation and parole officer. (II AA 298-99, 306, 407). Laura testified that Dixie also told her Appellant's parents were hiding Appellant's car and they were considering painting and/or selling the car after cleaning it out. (II AA 307, 408, 412). Laura testified further that Dixie told her that Appellant told Dixie that Appellant was hiding out in Panaca. (II AA 408). Laura testified that, prior to the instant trial, Dixie tried to convince Laura that, at the time Dixie told Laura about Appellant's confession, Dixie said the attacker was African American. (II AA 410). Laura testified that Dixie "absolutely did not" tell her this at the time of the confession and "[Dixie] made [Laura] very angry because …she couldn't continue to change her story." (II AA 413). Laura contacted Las Vegas police and relayed Appellant's confession to Detective Thowsen, the lead detective on the case, on July 20, 2001. (II AA 409, 411, III AA 597). Detective Thowsen immediately drove to Panaca and took Laura's statement. (II AA 409). Based on Laura's statement, Detective Thowsen did not talk to Dixie before contacting Appellant as he was afraid Dixie would warn Appellant the police were looking for her. (III AA 606).

When Detective Thowsen arrived at Appellant's home in Panaca, he introduced himself as a Las Vegas homicide detective told Appellant he needed to ask her about "an incident that recently happened in Las Vegas in which I'd understood that she's been attacked and had to defend herself[.]" (III AA 607, 648). Detective Thowsen thereafter told Appellant he "knew she'd been hurt in the past" and Appellant replied "I didn't think anybody would miss him." (III AA 648). Appellant thereafter waived her Miranda rights and made a statement which was played for the jury and admitted as State's Exhibit 125A. (III AA 648-49, 652).

Appellant told Detective Thowsen the man assaulted her in a parking lot on Boulder Highway near a fountain, which is consistent with the Budget Suites where Appellant claimed she sometimes stayed[1]. Appellant said as she got out of car, a big, black, old, smelly man grabbed her from behind. Appellant took her butterfly knife out of her pocket, grabbed and cut the attacker's penis. Appellant stated she was trying to cut it off, but did not know if she succeeded. Appellant claimed she did not know whether she hit or cut him anywhere else, but stated it was possible she hit him with a baseball bat. Appellant got in her car and drove off and she claimed the man was lying on the ground crying when she left. Appellant discarded all her clothing but does not remember where. Appellant claimed she drove her car to her ex boyfriend, Jeremy Davis', house to hide it and left it there for a week. Appellant did not remember what happened to the knife.

Appellant told Detective Thowsen that, at the time of the offense, she had been awake for several days using methamphetamine.

[1] As this statement was played for the jury at trial such is not on record in Appellant's Appendix and the State cannot provide citations. However, the statement is included on State's Exhibit 125A, which has already been transmitted to the Court.

Upon conclusion of the interview, Detective Thowsen placed Appellant under arrest. (III AA 652). While Appellant was being escorted out of her home, she told her mother "Mom, I did it, now I have to do what I have to do." (III AA 654). Appellant then told her father "I'm sorry daddy. Told you I did something awful." (III AA 654).

Appellant's Vehicle

Appellant's car, a red 1984 Pontiac Fiero, was seized by law enforcement and delivered to the Metro Crime Lab for analysis. (III AA 493-494, 507, 657). Crime Scene Analyst Louise Renhard processed the vehicle on July 22, 2001. (III AA 507). Ms. Renhard utilized Luminol testing on the interior of the vehicle, which yielded presumptive positive results for the presence of blood in several locations. (III AA 510-515). Specifically, the Luminol testing yielded presumptive positive results for the presence of blood on the driver's side floral seat cover, the driver's side factory installed seat cover, the driver's side interior door panel and the driver's side floor board. (III AA 510-512). Ms. Renhard noted that the vehicle was old and not very clean, however, the seat covers were very clean as though they had been laundered. (III AA 512).

DNA analyst Thomas Wahl conducted further testing on the areas which yielded presumptive positive results for blood. (III AA 332-337). Mr. Wahl utilized Phenolphthalein testing which yielded presumptive positive results for the presence of blood on the seat covers and door panel. (III AA 335). Mr. Wahl was unable to confirm that the presumptive positive areas were blood, however, noted that human blood which has been degraded through cleaning solutions would not yield a confirmatory result. (III AA 336).

Uniqueness of Victim's Injuries

Detective Thowsen acknowledged that due to the unique nature of the injury to Bailey, with regard to the penis amputation, the LVMPD withheld this detail

from the public to see if they would get any independent feedback, which would be indicative of someone with firsthand knowledge of the crime. (III AA 604). Information regarding Bailey's penis amputation was not released to the public until Appellant's arrest report was filed after July 20, 2001. (III AA 604).

Detective Thowsen continued his investigation by researching police records throughout Clark County, Nevada, for the months of May, June, and July 2001 to locate any sort of documentation of penis injuries involving stabbing or severing of the penis or groin area. (III AA 660-662). Detective Thowsen did not locate any other reports of that nature. (III AA 662). Detective Thowsen acknowledged that NRS 629.041 requires healthcare providers to mandatorily report injuries inflicted by knife or firearm, which do not appear to be accidental, to law enforcement. (III AA 661). Detective Thowsen further highlighted the significance that not only did Appellant know Bailey's penis was severed, but she also knew the corroborating details that Bailey was African American, older and had a particular odor about him. (III AA 665).

SUMMARY OF THE ARGUMENT

Appellant's seven hundred seventy (770) page petition below and instant one hundred thirty (130) page opening brief are redundant and disjointed. Throughout the State's response it has attempted to present responses to Appellant's claims in a logical, concise manner while still attempting to mirror the structure of Appellant's brief. However, such proved to be a significant challenge. As such, out of an abundance of caution, the State notes it disputes all claims of error Appellant alleges against the State and/or the district court.

ARGUMENT

An appellant must "present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Browning v. State, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004), citing Maresca v. State, 103 Nev. 669, 673, 748

P.2d 3, 6 (1987). On appeal, this Court will defer to the district court's factual findings if supported by substantial evidence and not clearly erroneous, but it reviews the district court's application of the law to those facts de novo. See Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

I
NEW EVIDENCE CLAIMS

Appellant alleged numerous claims related to what she characterizes as new evidence, all of which the district court denied. As explained further below, the district court asserted several reasons for denying each claim. One of the reasons the district court gave for denying many of the claims was the proffered evidence was not "new" evidence under Nevada law relating to motions for a new trial because such was available at trial through due diligence. Appellant claims that claims of actual innocence based on new evidence raised in petitions must be considered without regard to whether the evidence was available at trial. However, Appellant confuses "gateway" and "freestanding" claims of actual innocence.

In Schlup, the United States Supreme Court considered whether and when a claim of actual innocence permitted a petitioner to overcome procedural bars and allow a court to reach the substantive claims of constitutional error alleged in an untimely and/or successive habeas petition. 513 U.S. 298. The court found claims of actual innocence amount to "manifest injustice" to overcome procedural bars where new reliable evidence demonstrates that it is more likely than not that no reasonable juror would have found the petitioner guilty. Id.; House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 (2006). Such claims are coined "gateway" claims because, the initial showing of innocence only raises doubt in the petitioner's guilt to undermine confidence in the verdict without assurance that the trial lacked constitutional error, therefore a review of the underlying constitutional claims is required. Id. The showing of innocence must be so strong that a court cannot have confidence in the outcome of the trial. Schlup, 513 U.S. at 316. As such, when a

petitioner presents a compelling Schlup claim, such only permits the petitioner to overcome procedural bars. Whether the petitioner ultimately receives relief from the conviction turns on the merits of the underlying constitutional claims. Schlup, 513 U.S. at 315 (Schlup's claim of innocence does not by itself provide a basis for relief, it depends critically on the validity of his Strickland and Brady claims).

Appellant cites Snow v. State, 105 Nev. 521, 799 P.2d 96 (1989) and D'Agostino v. State, 112 Nev. 417, 915 P.2d 264 (1996) as authority which allows Appellant to seek habeas review on the grounds of new evidence outside of the time limitation for raising a motion for new trial pursuant to NRS 176.515(3). The holdings in Snow and D'Agostino create a very narrow exception expressly limited to capital cases. See Snow, 105 Nev. 521; and D'Agostino, 112 Nev. 417. Therefore, Appellant cannot rely on Snow and D'Agostino, and is not entitled to relief on such basis because she is not a capital defendant.

Even if this Court were to apply the very narrow exception reserved for capital defendants, presented in Snow and D'Agostino, to Appellant's non-capital case, Appellant must still meet the criteria for an untimely motion for new trial pursuant to NRS 176.515(3) and Hennie v. State, 114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998).

> NRS 176.515(1) provides: "The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence." Subparagraph (3) of the statute provides that "a motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt." Substantively, to justify a new trial, evidence must be: (1) newly discovered; (2) material to the defense; (3) such that it could not with reasonable diligence have been discovered and produced for trial; (4) not cumulative; (5) such as to render a different result reasonably probable on retrial; (6) not an attempt only to contradict a former witness or impeach or discredit her, unless the witness impeached is so important that a different result at trial is reasonably probable; and (7) the best evidence the case admits.

Hennie, 114 Nev. at 1289-1290, 968 P.2d at 764 (citing Callier v. Warden, 111 Nev. 976, 901 P.2d 619 (1995)). All seven elements of the test are conjunctive and must be shown in order to warrant a new trial. Id. The movant is required to provide the district court a factual showing of each of the foregoing requirements; conclusory allegations are insufficient. Pacheco v. State, 81 Nev. 639, 641-642, 408 P.2d 715, 716 (1965). This Court will not address those factors for the first time on appeal. Id. Whether to grant a new trial on grounds of newly discovered evidence is discretionary and the district court's decision will not be reversed on appeal absent an abuse of discretion. Funches v. State, 113 Nev. 916, 923-924, 944 P.2d 775, 779-780 (1997); Porter v. State, 94 Nev. 142, 149-150, 576 P.2d 275, 279-280 (1978) (citing Lightford v. State, 91 Nev. 482, 538 P.2d 585 (1975)).

Appellant failed to make a factual showing of the aforementioned seven requirements to warrant a new trial pursuant to NRS 176.515(3) and Hennie. Thus, even if this Court were to apply the very narrow exception reserved for capital defendants, presented in Snow and D'Agostino, to Appellant's non-capital case, Appellant has failed to meet the criteria necessary to warrant a new trial pursuant to NRS 176.515(3) and Hennie. Therefore, the district court did not abuse its discretion in denying Claims 1-24 on such basis, as addressed in each individual claim below.

District and state courts are split on whether evidence that was available at trial can support a Schlup claim. However, such is not at issue here as Appellant's petition is not procedurally barred. Appellant attempts to assert underlying constitutional claims of due process and cruel and unusual punishment, however, Appellant's Claims 1-24, do not allege constitutional error at trial, were not procedurally barred and simply raise the issue of new evidence not raised at trial.

In this case, the time limitation procedural bar of NRS 176.515(3) took effect on October 14, 2011, however, Appellant improperly raised Claims 1-24

based on new evidence in a habeas petition filed on May 5, 2010. That is, because the procedural bar of NRS 176.515(3) was not in effect when Appellant raised new evidence claims in a habeas petition, Appellant cannot rely on Snow and D'Agostino, which only allow for new evidence claims to be brought in a habeas petition when the procedural bar of NRS 176.515(3) is in effect. Snow, 105 Nev. at 523, and D'Agostino, 112 Nev. at 425. Thus, Appellant cannot rely on the aforementioned cases in order to circumvent filing a timely motion for new trial based on new evidence through a timely habeas petition. Appellant's Claims 1-24 are therefore are not "gateway" claims as in Schlup, because they were not procedurally barred and did not assert an underlying constitutional claim.

By contrast, Claims 1-24 are "freestanding" claims of actual innocence. "Freestanding" claims of actual innocence are those wherein a petitioner alleges actual innocence alone, rather than actual innocence supported by a claim of constitutional deficiency, warrants relief[2]. See Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993). The United States Supreme Court acknowledged in Herrera that claims of actual innocence based on newly discovered evidence have never been held as a ground for habeas relief absent an independent constitutional violation occurring in the underlying criminal proceeding. Id. In Herrera, the United States Supreme Court found federal habeas relief was not available for freestanding claims of actual innocence where state law provides an avenue to pursue the claim. Id. Such an avenue exists where state law allows for pardon or clemency, even if the law excludes the petitioners claim in the judicial arena due to procedural bars applicable to writs and motions for new trials. Id. The Court assumed, for the sake of argument, that such claim may exist where a petitioner was sentenced to death and state law precluded any relief, but stated the standard

[2] The State acknowledges that Appellant's Claims 25-79 combine claims of alleged constitutional error and actual innocence. However, 1-24 are based solely on Appellant's alleged innocence.

for actual innocence in such situation would be extraordinarily high and require a petitioner to "unquestionably establish" his innocence. Herrera, 506 U.S. at 417; Schlup, 513 U.S. at 317. Further, a freestanding claim of actual innocence, if it exists at all, has never been held to be available in a non-capital case. Herrera, 506 U.S. at 404-405, 416-417.

This Court has never recognized freestanding claims of actual innocence, even for petitioners sentenced to death. State ex rel. Orsborn v. Fogliani, 82 Nev. 300, 471 P.2d 148 (1966), cited by Appellant, is inapposite as in Orsborn the defendant learned that the prior felony, upon which his Nevada conviction for ex-felon in possession of a firearm was based, actually was not a felony. Id. As such, the "new evidence" did not establish that Orsborn was factually innocent of a committed crime, rather that the conduct was not prohibited. Id. To the contrary, is where petitioners have asserted claims of actual innocence in a timely petition, which represents freestanding claims, as is the case here. Further, it would be unwise for this Court to recognize freestanding claims of actual innocence as to either capital cases or non-capital cases because of the disruptive effect that entertaining such claims would have on the need for finality in capital cases and the enormous burden that would be placed on the State to retry cases in which evidence and witnesses may no longer be available due to the passage of time. Additionally, the reliability of the criminal adjudication would suffer as memory erodes and witnesses disperse over the passage of time.

Appellant asserts that the district court misapplied Herrera by citing Justice O'Connor's concurrence in that the affidavits in support of Appellant's petition should be treated with a fair amount of skepticism. Appellant attempts to support this assertion by citing the majority holding that if the testimony contained in the affidavits was presented at trial, the jury would have ultimately decided their credibility. However, the majority also held that "In the new trial context, motions

based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations." Herrera, 506 U.S. at 417. Precisely is the case here. Appellant then asserts that pursuant to Schlup, the reviewing tribunal is not bound by the rules of admissibility and may consider the probative value of the evidence. Appellant's argument fails in that admissibility is not the key issue, as the majority in Herrera reaffirms the need for caution and skepticism in reviewing such affidavits because the reviewing tribunal lacks the benefit of cross-examination in making credibility determinations which directly effects probative value.

Appellant asserts that the district court misapplied D'Agostino in that the holding allowed for Appellant to raise new evidence claims in a habeas petition. As discussed above, the holding in D'Agostino allows for defendants to raise claims of newly discovered evidence in a habeas petition when the evidence was discovered after the two year time limitation to file a motion for new trial pursuant to NRS 175.515(3) has elapsed. Such is not the case here, as Appellant's claims of newly discovered evidence were improperly raised in a habeas petition a mere seven months following Remittitur, and well within the two year limitation to raise such claims in a motion for new trial. D'Agostino further affirms the constitutionality of the two year time limitation per NRS 175.515(3). 112 Nev. at 425. Thus, Appellant has improperly attempted to circumvent the procedural course.

D'Agostino further addresses what is considered new evidence for purposes of filing a motion for new trial pursuant to NRS 175.515(3). In D'Agostino it was discovered that several charges pending against the State's key witness were dismissed after trial, when at the trial, the witness denied any possible favorable treatment by the State. Id. at 423. This Court found that since the issue of favorable treatment regarding pending charges had been explored at trial, the information

that the witness later had pending charges dismissed was not such to render a different result probable upon retrial and thus the evidence was not newly discovered. Id. This Court found further that "To merit a new trial, newly discovered evidence must be evidence that could not have been discovered through reasonable diligence either before or during trial." Id. (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991)). This Court found that the evidence discussed above did not amount to newly discovered evidence to merit a new trial in applying the reasonable diligence standard. D'Agostino, 112 Nev. at 423. In this case, Appellant has entirely ignored the holding and analysis in D'Agostino with regard to what constitutes newly discovered evidence.

Appellant asserts that the district court erred in its application of NRS 34.810 by denying Claims 1, 4, 6-14, 24 and 78 as barred because they could have been raised in a timely motion for new trial. Appellant bases this argument on her assertion that she may raise new evidence claims after the two year time limit imposed by NRS 176.515(3) pursuant to D'Agostino. As has been thoroughly discussed above, Appellant cannot rely on D'Agostino, as her new evidence claim could have been raised in a timely motion for new trail, but instead was improperly raised in a timely habeas petition. Thus, the court correctly applied NRS 34.810 to the aforementioned Claims.

Appellant further asserts that by failing to raise NRS 34.810 as an affirmative defense, the State waived it as such, and the district court had no basis to raise it sua sponte. However, the procedural default rules regarding habeas proceedings are not an affirmative defense that must be raised by the State. State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003). Further, the district court may raise the issue of procedural default sua sponte when the default is obvious from the face of the petition. Vang v. Nevada, 329 F.3d 1069, 1073 (9th Cir 2003).

1/2/3. Entomology and Pathology Evidence That Bailey Died After Sunset on July 8, 2001

Appellant claimed new entomology and pathology evidence showed Bailey did not die until after 8:00 p.m. on July 8, 2001. (VI AA 1174-81). Based merely on photos of Bailey, three entomologists claimed the absence of blow fly activity shows Bailey died after 8:00 p.m. (Claim 1). (Id. at 1174-78). Four entomologists also noted the absence of cockroach or other predatory animal bites, which Appellant claimed supported the conclusion that Bailey died shortly before Shott discovered the body (Claim 3). (Id. at 1182-84). Additionally, a forensic pathologist opined, based solely on review of pictures, that Bailey died in the early evening, a few hours before discovery (Claim 2). (Id. at 1179-81). The district court denied Claims 1, 2 and 3 as the affidavits merely expressed an elaboration or opinion based upon the evidence available and presented at trial. As such, the opinions were not newly discovered evidence under D'Agostino. (XI AA 2265, 2281). In this case, Appellant's Claims 1, 2, and 3 elaborate on the evidence available and presented at trial, and thus pursuant to D'Agostino, do not constitute newly-discovered evidence. Therefore the district court correctly denied the Claims.

Appellant's Claims 1, 2 and 3 merely involve opinions based upon review of pictures as to Bailey's time of death as a means of countering the extensive testimony of Dr. Simms, who conducted the autopsy of Bailey and concluded a window of time as to Bailey's time of death. (II AA 443). As such, Appellant has only demonstrated differing opinions between the Dr. who performed the autopsy and others whom have only reviewed photos. While this Court does not recognize freestanding claims of actual innocence such as those presented in Appellant's Claims 1, 2 and 3, the Claims fall exceedingly short of meeting the extraordinarily high burden of unquestionably establishing Appellant's innocence pursuant to Herrera.

4. Psychology Evidence That Appellant's Statement Is Not A Confession To The Murder

Appellant claimed new evidence proves her statement to police was not a confession to Bailey's murder (Claim 4). (VI AA 1185-90). Appellant based this claim on "new" evidence in the form of a psychologist's opinion following review of trial testimony, evidence, and Appellant's statement to police. (Id. at 1186). Appellant argued old evidence, including a polygraph test and Doug Twining's statement to police, bolstered this claim[3]. (Id. at 1188-89). The district court denied Claim 4 as the psychologist's affidavit merely expressed an elaboration or opinion based upon the evidence available and presented at trial. (XI AA 2265). As such, the opinions were not newly discovered evidence under D'Agostino. (Id. at 2281). The district court further denied Claim 4 pursuant to Herrera in that post trial affidavits should be treated with a degree as skepticism as such are obtained without the benefit of cross examination. 506 U.S. at 417, 423.

The district court also found Claim 4 does not establish actual innocence as such is simply an alternate opinion of the evidence presented at trial. (XI AA 2265). The district court was correct in this ruling for two reasons. First, freestanding claims of actual innocence are not recognized in Nevada. Second, the existence of mere alternate opinions of evidence presented at trial does not unquestionably establish Appellant's innocence.

Finally, the district court noted the polygraph examinations were inadmissible without a stipulation from Appellant, Appellant's trial counsel, and the State. (Id. at 2265, 2281); Jackson v. State, 116 Nev. 334, 997 P.2d 121 (2000). Appellant argues that Schlup allows for the reviewing tribunal to consider the

[3] Appellant referred to a polygraph test, conducted at the request of prior counsel, after which the polygraph examiner opined that Appellant did not kill Bailey and Rebecca Lobato did not create a false alibi for Appellant. (VI AA 1188-89). Appellant also referred to Doug Twining's police statement wherein he claimed Appellant told him about the sexual assault before Bailey's killing. (Id. at 1189). As Appellant does not contend these points are new evidence, such are irrelevant to the instant claim.

probative value of relevant evidence despite inadmissibility. First, the affidavit of the polygraph examiner simply states that Appellant was inconsistent throughout the exam and that examiner Ron Slay did not believe she killed Bailey, yet he declined to complete a report stating that Appellant passed the entire exam. (VII AA 1570-1571). Second, the probative value of the exam, if any, is clouded by the examiner's own reservations coupled with the questionable nature of such exams inherent in their treatment by the courts. While Nevada does not recognize freestanding claims of actual innocence, it is clear that the polygraph exam fails to meet the extraordinarily high burden of unquestionably establishing Appellant's innocence based upon the foregoing analysis.

5. Witness Statements That Budget Suites Sexual Assault Occurred Before the Homicide

Appellant claimed "new" witness[4] statements support her story that the Budget Suites attack occurred prior to Bailey's homicide as the potential witnesses claim Appellant told them about the attack before the homicide (Claim 5). (VI AA 1190-95). Witnesses who testified at Appellant's trial provided six out of nine of these "new" statements. One of the remaining three claims to have provided her statement to police. (VI AA 1192). The district court correctly denied Claim 5 as Appellant was attempting to re-litigate issues, through cumulative evidence, that this Court already ruled on in Lobato v. State, 120 Nev. 512, 522, 96 P.2d 765 (2004). (XI AA 2265). Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelton v. State, 115 Nev. 396, 414-415, 990 P.2d 1263, 1275 (1999)). As such, the law of the case barred Claim 5. Id.

[4] Appellant relies on the following potential witnesses' statements: Steven Pyszkowski, Cathy Reininger, Michele Austria, Heather McBride, Dixie Tienken, Doug Twining, Daniel Lisoni, Kimberlee Grindstaff, and Christopher Collier. (VI AA 1193-94).

While this Court does not recognize freestanding claims of actual innocence, Defendant's claim that "new" statements from alibi witnesses, the majority of whom testified at trial, does not meet the extraordinarily high burden of unquestionably establishing Appellant's innocence pursuant to Herrera, but simply represents a more detailed and focused argument made after reflection upon the previous proceedings, which is specifically barred by Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

6. Witness Statements That Appellant Was In Panaca on July 6th, 7th, and 8th; and Was Not Under the Influence of Methamphetamine

Appellant claimed "new" witness statements support her claims that she was in Panaca on July 6-8th, 2001, and was not under the influence of methamphetamine. (VI AA 1196-99). Specifically, Appellant offered the following: Marilyn Parker told the District Attorney's Office that she saw Appellant in Panaca on the evening of July 6th, the afternoon of July 7th, and that she called Appellant in Panaca on July 8th at approximately 10:00 a.m.; Kimberlee Grindstaff saw Appellant in the evening on July 7th and she did not appear to be under the influence of drugs; Kendre Thunstrom claims she saw Appellant in Panaca on the evening of July 8th, consistent with her testimony at trial, and she did not appear to be under the influence of drugs; Jose Lobato, Appellant's grandfather, claims Appellant called him in El Paso on July 7th and he "believe[d] she was in Panaca" and that he "believe[d] she sounded and acted normal". (Id. at 1196-98). Appellant claims these statements are bolstered by the polygraph test referred to in Claim 4. (Id. at 1198-99). The district court denied Claim 6 as the individuals were known at the time of trial, therefore such was not new evidence pursuant to D'Agostino. (XI AA 2265). Finally, the district court found that the evidence was barred under NRS 34.810 as such evidence could have been presented to the trial court or on direct appeal, and Appellant failed to demonstrate good cause to overcome the procedural bar. Id.

While this Court does not recognize freestanding claims of actual innocence, Defendant's Claim 6 represents merely cumulative alibi witness testimony and falls far short of meeting the extraordinarily high burden of unquestionably establishing Appellant's innocence, which is necessary in asserting a freestanding claim of actual innocence, pursuant to Herrera.

7. Pathology Evidence That More Than One Person Killed Bailey

Appellant claimed "new" evidence, in the form of an expert opinion based on review of the photos, that more than one person perpetrated Bailey's killing. (VI AA 1200-02). Appellant based this claim on a forensic pathologist's opinion that "there is a good probability that more than one person was involved in this attack". (Id. at 1200-01). The pathologist believed more than one person participated in Bailey's killing because someone had to provide the perpetrator with light to commit the crime. (Id. at 1201). The pathologist further opined, based on review of the photos, that one of theses perpetrators was skilled with medical knowledge or animal husbandry. (Id.) The district court denied Claim 7 as the pathologist's affidavit was an elaboration or opinion of evidence presented at trial and therefore does not establish actual innocence. (XI AA 2266). Further, the district court found that, as the opinion was based on the evidence at trial, such was not new evidence. (Id.) Finally, the district court found that as a claim of newly discovered evidence such was barred under NRS 34.810 as Appellant failed to raise the claim in a motion for a new trial and Appellant failed to demonstrate good cause to overcome the procedural bar. Id. As discussed and analyzed above, the district court correctly applied D'Agostino and NRS 34.810, and thus did not err in denying Claim 7 on such basis.

While this Court does not recognize freestanding claims of actual innocence, Defendant's Claim 7 represents an alternate opinion as to evidence presented at trial, simply surmising that it was possible that more than one person was involved

in Bailey's killing, which does not establish that Appellant was not involved in the killing, and fails to meet the extraordinarily high burden of unquestionably establishing Appellant's innocence pursuant to Herrera.

8. Pathology and Crime Scene Evidence That Bailey Sustained Rectal Injuries Prior To Death

Appellant claimed "new" evidence demonstrated the wound to Bailey's rectum was inflicted before he died. (VI AA 1202-04). The "new" evidence Appellant cited is a pathologist's opinion, based on review of photos, and photos showing Bailey's body superimposed over the crime scene that depict blood underneath where his rectum laid. (Id. at 1203-04). Appellant claims this position is supported by Dr. Simms' preliminary hearing testimony that the rectum wounds were inflicted ante mortem. (Id. at 1204). The district court denied Claim 8 as the pathologist's affidavit was an elaboration or opinion of evidence presented at trial and therefore does not establish actual innocence. (XI AA 2266). Further, the district court found that, as the opinion was based on the evidence at trial, such was not new evidence. (Id.) Finally, the district court found that as a claim of newly discovered evidence such was barred under NRS 34.810 as Appellant failed to raise the claim in a motion for a new trial and Appellant failed to demonstrate good cause to overcome the procedural bar. (Id.) As discussed and analyzed above, the district court correctly applied D'Agostino and NRS 34.810, and thus did not err in denying Claim 8 on such basis.

While this Court does not recognize freestanding claims of actual innocence, Defendant's Claim 8 represents an alternate opinion, merely based upon review of photographs, as to evidence presented at trial, and fails to meet the extraordinarily high burden of unquestionably establishing Appellant's innocence, which is necessary in a freestanding claim of actual innocence pursuant to Herrera.

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9. Pathology Evidence That Bailey Sustained Two Separate Attacks

Appellant claimed one sentence of Dr. Simms' testimony established that Bailey suffered two (2) separate attacks and the blunt force trauma to the head was inflicted during the first attack. (VI AA 1205-07). Appellant argued Claim 9 was supported by the fact that Bailey had partially digested food in his stomach, which Appellant opined was the result of Diann Parker's friends taking Bailey to dinner before they killed him. (Id. at 1206-07). The district court correctly denied Claim 9 as a bare and unsupported allegation. (XI AA 2266); Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Further, the district court found the argument was available at trial and therefore not newly discovered. (XI AA 2266). To the extent such could be construed as "newly discovered evidence", Claim 9 was barred by NRS 34.810 for failure to bring in a timely motion for a new trial and Appellant failed to demonstrate good cause to overcome the procedural bar. (Id.) Finally, the district court found that Claim 9 was an alternate opinion of evidence presented at trial and did not prove actual innocence. (Id.) As discussed and analyzed previously, the district court correctly applied D'Agostino and NRS 34.810, and thus did not err in denying Claim 9 on such basis.

While Claim 9 was correctly denied pursuant to Hargrove, such a bare allegation does not prove Appellant's actual innocence, as it would require the stacking of additional unsupported inferences. Thus, while this Court does not recognize freestanding claims of actual innocence, Appellant's unsupported allegation in Claim 9 falls well short of meeting the extraordinary burden of unquestionably establishing her innocence pursuant to Herrera.

10. Pathology Evidence Related to the Circumstances and Time of Bailey's Homicide

Appellant claimed "new" evidence established that, due to the "circumstances of Duran Bailey's death" Appellant could not have killed Bailey. (VI AA 1207-18). Claim 10 simply summarized and reiterated pathologist Dr.

Larkin's report that Appellant relied upon to support Claims 2, 7 and 8. (Id.) The district court denied Claim 10 as Dr. Larkin's affidavit was an elaboration or opinion on the evidence presented at trial and therefore was not new evidence and did not establish actual innocence. (XI AA 2266). The district court found further that many of Dr. Larkin's opinions are bare allegations insufficient for relief. (Id.) The district court also noted that, to the extent Larkin's opinion could be considered new evidence, such was precluded by NRS 34.810 as Appellant failed to bring the claim in a timely motion for a new trial and did not provide good cause for such failure. (Id.) The district court correctly denied Claim 10 as a bare allegation pursuant to Hargrove, and as established previously, correctly applied D'Agostino and NRS 34.810 in denying Claim 10 on such additional grounds.

Appellant's Claim 10 represents an unsupported elaboration or opinion on evidence presented at trial. While the district court correctly denied Claim 10 as a bare allegation as to evidence presented at trial, such claim is not exculpatory by nature, but rather an alternate opinion of how and when the crime occurred. While Nevada does not recognize freestanding claims of actual innocence, such claim falls exceedingly short of unquestionably establishing Appellant's innocence pursuant to Herrera.

11. Forensic Evidence That the Killer Was Not Wearing Appellant's Shoes

Appellant claimed "new" evidence established that Bailey's killer was not wearing the shoes Appellant claimed she was wearing at the time of the alleged sexual assault. (VI AA 1218-22). To support such claim, Appellant reiterated the evidence presented at trial, and relied on a forensic scientist George Schiro's[5] opinion, based on a review of photos of the shoes, that one could not perpetrate the instant crime without leaving blood on the shoes and the shoes at issue did not

[5] Schiro testified for the defense at Appellant's first trial, but did not testify at the second trial.

leave the prints at the scene. (Id. at 1221-22). The district court denied Claim 11 as Schiro's affidavit was simply an elaboration or alternate opinion of the evidence presented at trial and did not establish actual innocence. (XI AA 2266-67). The district court held further that Schiro's opinion was available prior to trial and therefore was not new evidence. (Id.) To the extent such could be considered new evidence, the claim was barred by NRS 34.810 for Appellant's failure to bring the claim in a timely motion for a new trial or provide good cause for failure to bring in a motion for new trial. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 11.

Appellant's Claim 11 was correctly denied as an elaboration or alternate opinion of evidence presented at trial with regard to the whether the shoes Appellant alleged she wore were present at the crime scene. Such a claim is not exculpatory by nature with regard to the crimes to which Appellant was convicted, but merely asserts an opinion that Appellant's shoes would have left prints at the scene and would have blood on them if Appellant committed the crime in the shoes that she alleged. While Nevada does not recognize freestanding claims of actual innocence, Appellant's Claim 11 does not unquestionably establish her innocence pursuant to Herrera.

12. Forensic Evidence That the Killer Left Shoeprints at the Scene

Appellant claimed that "new" evidence showed the footprints left at the scene must have been made by Bailey's killer. (VI AA 1222-26). The "new" evidence is forensic scientist George Schiro's affidavit wherein he opines the killer made the bloody footprints because there are multiple matching footprints, allegedly made by a "Spiritfire" sneaker, some of which are bloody and some of which are not. (Id.) William Bodziak, a shoeprint expert whose findings that Appellant did not leave the footprints were presented at trial, agreed the footprints

were made by the "Spiritfire" sneaker. (Id.) The district court denied Claim 12 as Schiro's affidavit was simply an elaboration or alternate opinion of the evidence presented at trial and does not prove actual innocence. (XI AA 2266-67). Further, Schiro's opinion was available prior to trial and therefore was not new evidence. (Id.) To the extent such could be considered new evidence, the claim was barred by NRS 34.810 for Appellant's failure to bring the claim in a timely motion for a new trial or provide good cause for failure to bring in a motion for new trial. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 12.

While the district court correctly denied Appellant's Claim 12 as an elaboration or alternate opinion as to evidence presented at trial, such claim does not unquestionably establish Appellant's innocence, but rather attempts to show the presence of another person at the crime scene at an unknown time. Thus, the claim does not prove Appellant's actual innocence, but merely presents an alternate opinion of a tangential piece of evidence presented at trial. While Nevada does not recognize freestanding claims of actual innocence, Appellant's Claim 12 fails to unquestionably establish her innocence pursuant to Herrera.

13. Forensic Evidence Excluding Appellant and Her Car from the Crime Scene

Appellant claimed "new" forensic science evidence and crime scene analysis excludes Appellant and her car from the crime scene. (VI AA 1227-36). Appellant relied on forensic scientist George Schiro's "new" opinions, which reiterated the evidence, presented at trial and Schiro's opinions as stated in Claims 11 and 12. (Id.) Appellant claimed Mr. Schiro's new opinions were supported by a dentist's opinion that Bailey's teeth were not knocked out with a baseball bat. (Id. at 1235). The district court denied Claim 13 as Schiro's affidavit was simply an elaboration or alternate opinion of the evidence presented at trial rather than evidence establishing actual innocence. (XI AA 2267). Further, Schiro's opinion was

available prior to trial and therefore was not new evidence. (Id.) To the extent such could be considered new evidence, the claim was barred by NRS 34.810 for Appellant's failure to bring the claim in a timely motion for a new trial or provide good cause for failure to bring in a motion for new trial. (Id.) The district court further found many of Mr. Schiro's opinions are bare allegations insufficient for relief. Hargrove, 100 Nev. 498. As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 13 on those grounds. Further, the district court correctly applied Hargrove in denying Claim 13 based upon the bare allegations of Mr. Schiro with regard to alternate theories of the crime scene.

While the district court correctly denied Appellant's Claim 13 as an unsupported elaboration or alternate opinion as to evidence presented at trial, such claim does not unquestionably establish Appellant's innocence. Rather, Claim 13 merely attempts to raise questions as to whether Bailey was standing when his teeth were knocked out and whether his blood was in Appellant's car. Such a claim is not exculpatory in excluding Appellant from the crime scene, but merely attempts to raise unsupported alternate opinions regarding evidence presented at trial. While Nevada does not recognize free standing claims of actual innocence, Appellant's Claim 13 fails to unquestionably establish her innocence pursuant to Herrera.

14. Witness Evidence That Bailey Did Not Live In the Trash Enclosure

Appellant claims "new" evidence, in the form of an affidavit from Steven King, Diann Parker's roommate, establishes that Bailey did not live in the trash enclosure and therefore Appellant would not know to find him there. (VI AA 1236-39). The district court denied Claim 14 as King's affidavit was based on speculation and therefore does not establish actual innocence. (XI AA 2267); Hargrove, 100 Nev. 498. Additionally, the district court found whether Bailey

lived in the trash enclosure is not new evidence but a legal theory that could have been presented at trial. (XI AA 2267). To the extent the claim could be considered a claim of new evidence, the district court found NRS 34.810 barred the claim as Appellant did not provide good cause for failure to bring the claim in a timely motion for a new trial. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 14 on those grounds. Further, the speculative nature of Mr. King's statement is not overcome by presenting the same in the form of an affidavit, thus the district court correctly denied Claim 14 as a bare allegation pursuant to Hargrove.

The district court correctly denied Appellant's Claim 14 as merely speculative and failing to prove actual innocence. Additionally, Claim 14 is not exculpatory by nature in that even if Bailey did not live in the trash enclosure, such fact does not prove Appellant did not kill him there. While Nevada does not recognize freestanding claims of actual innocence, Appellant's Claim14 falls well below unquestionably establishing her innocence pursuant to Herrera.

15. Witness Evidence That Methamphetamine Was Available In Panaca in July, 2001

Appellant claimed "new" evidence provided in an affidavit from Kendre Thunstrom's affidavit establishes that methamphetamine was available in and close to Panaca, therefore Appellant would not have to drive to Las Vegas to obtain methamphetamine. (VI AA 1239-41). The district court denied Claim 15 as a bare allegation insufficient to warrant relief. (XI AA 2267); Hargrove, 100 Nev. 498.

The district court correctly denied Claim 15 as a bare allegation pursuant to Hargrove, as Thunstrom's affidavit does nothing more than claim that a drug was available in Panaca a decade prior without providing any indication of who the source was, where they lived or that Appellant was acquainted with them to the extent necessary to procure the drug. Further, such claim serves only to attempt to explain a single basis at to why Appellant would not travel to Las Vegas, and as

such, is not exculpatory by nature. That is, even if methamphetamine was available in Panaca during the timeframe in question, such does not establish that Appellant had access to the same or did not have other reasons to travel to Las Vegas. While Nevada does not recognize freestanding claims of actual innocence, the bare allegation made in Claim 15 falls exceedingly short of unquestionably proving Appellant's innocence pursuant to Herrera.

16. Evidence Implicating Diann Parker's Friends

Appellant claims "new" evidence exists because Steven King believes some Hispanic men that lived near Diann Parker killed Bailey. (VI AA 1241-51). In his affidavit, King explains that, in addition to Parker's rape, Bailey also attacked the girlfriend of one of the Hispanic men that lived near Parker. (Id. at 1244). Additionally, King claims Parker was closer friends with the Hispanic men than presented at trial and that, after testifying at the first trial, Parker told King that Appellant could not have killed Bailey. (Id. at 1244-45). Further, King claims the Hispanics were illegal immigrants and "vanished" after police took Parker's statement on July 23, 2001. (Id.) Appellant also cited to a blog, that is no longer available on the internet with an unidentified writer, claiming that all Hispanics talk to one another, therefore "the local Hispanic community knew about [Parker's] rape, and the "machismo" present in Hispanic culture, akin to Antonio Banderas' acting style which would encourage Parker's neighbors to kill Bailey. (Id. at 1246-48). Appellant further claimed new evidence showed one of the Hispanic men, using the name Daniel Martinez, provided Detective Thowsen with a false social security number. (Id. at 1249). Appellant surmised that the Daniel Martinez that lived near Parker was the same Daniel Martinez that pled guilty to Assault With a Deadly Weapon on November 16, 2004. (Id. at 1250).

The district court denied Claim 16 as King lacked personal knowledge therefore his affidavit was based on speculation and therefore does not establish

actual innocence. (XI AA 2267-68); Hargrove, 100 Nev. 498. The district court correctly denied Claim 16 as a speculative bare allegation pursuant to Hargrove, as King's affidavit amounts to nothing more than an unsupported, ethnically stereotypical shot in the dark. Additionally, as King's statement was available before or during trial, such was not new evidence. (XI AA 2267-68). Further, the district court found NRS 34.810 precluded the claim as Appellant failed to demonstrate good cause for failure to assert the claim in a timely motion for a new trial. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 16 on those grounds.

The district court correctly denied Claim 16 as purely speculative and not based upon the personal knowledge of the affiant. While Nevada does not recognize freestanding claims of actual innocence, clearly the speculative nature of Claim 16 fails to unquestionably establish Appellant's innocence pursuant to Herrera.

17. Evidence That Someone Cashed Checks From Bailey's Bank Account after His Death

Appellant claimed "new" evidence in the form of an affidavit from Daniel Smades, an employee of Nevada State Bank, establishes that checks were cashed from Bailey's account after his death. (VI AA 1251-53). Appellant claims Smades' affidavit exonerates her because the killer must have cashed the checks and police did not find any evidence related to Bailey in Appellant's possession. (Id.) The district court denied Claim 17 as a bare and speculative allegation insufficient to warrant relief or establish actual innocence. (XI AA 2268). The district court correctly denied Claim 17 pursuant to Hargrove, as the claim represents nothing more than banking records which are not tied to anyone other than Bailey. Thus, Appellant's claim that the killer must have cashed checks on Bailey's account is a speculative leap unsupported by the facts presented. Additionally, the district court

ruled that since the bank records were available before or during trial with reasonable diligence, they were not newly discovered. Further, the district court found that, even if considered a claim of new evidence, the claim was procedurally barred under NRS 34.810 as Appellant did not demonstrate good cause for failing to bring the claim in a timely motion for a new trial. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 17 on those grounds.

The district court correctly denied Claim 17 as an unsupported bare allegation. The fact that a check was cashed from Bailey's bank account does not establish that his killer did the same, and further is not exculpatory from Appellant's standpoint. There is a logical disconnect in such reasoning which is unsupported by anything more than a bare allegation. While Nevada does not recognize freestanding claims of actual innocence, Claim 17 fails to unquestionably establish Appellant's innocence pursuant to Herrera.

18. Evidence That the Killer Did Not Hit Bailey in the Mouth by A Baseball Bat in the Northwest Corner of the Trash Enclosure

Appellant claims "new" evidence demonstrates the killrer could not have attacked Bailey in a manner consistent with the State's suggestions as to the step by step progression of the attack[6]. (VI AA 1253-59). The "new" evidence which allegedly establishes Appellant's claim is a scale diagram of the trash enclosure, George Schiro's opinion discussed above, and a dentist, Mark Lewis' opinion. (Id.) The district court denied Claim 18 as the affidavits were simply an elaboration or alternate opinion based on evidence presented at trial, which were available before or during trial with reasonable diligence, and therefore are not new evidence and

[6] "[T]he prosecution's theory of the crime is physically impossible because: the trash enclosure's interior dimensions are insufficient for Bailey to have been hit in the mouth by a bat in the northwest corner and fallen backwards and hit his head on the southwest curb; his teeth were not knocked out by a bat; and, neither his blood nor his teeth were found in the northwest corner where they would have been based on the prosecution's argument". (XI AA 1253).

do not establish actual innocence. (XI AA 2268). Further, the district court found that NRS 34.810 barred Claim 18 as Appellant did not establish good cause for failure to bring a timely motion for a new trial. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 18 on those grounds.

The district court correctly denied Claim 18 as an elaboration or alternate opinion as to evidence presented at trial, which does not prove Appellant's actual innocence, but merely suggests an alternate sequence of events. As such, Claim 18 is not exculpatory by nature. While Nevada does not recognize freestanding claims of actual innocence, Appellant's Claim 18 clearly does not unquestionably establish her innocence pursuant to Herrera.

19. Legal Evidence That Appellant Was Convicted Of A "Non Existent Violation" Of NRS 201.450

Appellant claimed "new" evidence in the form of legislative history established that Appellant did not violate NRS 201.450, Sexual Penetration of a Dead Human Body. (VI AA 1259-64). The district court denied Claim 19 as the legislative history and legal research was available before and during trial therefore such was not new evidence. (XI AA 2268). Further, the district court found such did not establish actual innocence as this Court already upheld the constitutionality of NRS 201.450 in Lobato v. State, 120 Nev. 512, 522, 96 P.3d 772 (2004). (Id.) Finally, the district court found NRS 34.810 barred Claim 19 as Appellant did not establish good cause for failing to bring a timely motion for a new trial. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 19 on those grounds.

The district court correctly denied Claim 19 as it fails to establish Appellant's actual innocence. Appellant's claim attempts to argue the legislative intent of NRS 201.450 as embracing only specific sex acts with a dead body, while ignoring the previously established constitutionality of the law with respect to any

sexual penetration of a dead body which was established by the facts in the case. Thus, Appellant's claim simply seeks to limit the application of NRS 201.450. While Nevada does not recognize freestanding claims of actual innocence, Appellant's Claim 19 fails to unquestionably establish her innocence pursuant to Herrera.

20. Witness Evidence of Jury Misconduct

Appellant claimed affidavits of John Kraft[7] and Hans Sherrer[8] established jury misconduct as the affiants claimed jurors were discussing the case prior to the close of evidence and one juror indicated she believed Appellant was guilty. (VI AA 1264-66). The district court denied Claim 20 as such was not new evidence and does not establish a viable claim of actual innocence. (XI AA 2268-69). Further, the district court found NRS 34.810 precluded Claim 20 as Appellant failed to establish good cause for failing to bring the claim in a timely motion for a new trial. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 20 on those grounds.

The District court correctly denied Claim 20 as such does not establish a viable claim of actual innocence. Claim 20 is not exculpatory by nature in that two alleged instances of jurors discussing the case prior to deliberations does not establish that Appellant did not murder Bailey. While Nevada does not recognize

[7] Of concern to the State is that John Kraft is related to Appellant, and thus there is a substantial basis for bias when considering his statements concerning Appellant's case. (IV AA 778).

[8] Of concern to the State is that Hans Sherrer is President of "The Justice Institute", which has been actively engaged in raising money for Appellant's defense and post-conviction proceedings. (IX AA 1791-1795; X AA 2171, 2173; XI AA 2198). Further, Hans Sherrer is the author of a book about Appellant's case, which is on sale for $20. See http://justicedenied.org/kbl_habeas.htm; (IX AA 1871-1873). Thus, there is inherent bias in any statement by Mr. Sherrer with regard to Appellant's case.

free standing claims of actual innocence, Appellant's Claim 20 clearly fails to unquestionably establish her innocence pursuant to Herrera.

21. Evidence That Detective Thowsen Committed Perjury

Appellant claims "new" evidence establishes that Detective Thowsen committed perjury during his testimony regarding his investigation into the Budget Suites assault and Diann Parker's friends. (VI AA 1266-75). To support Claim 21, Appellant points to a statement from Metro that there is no way to search records for medical personnel reports of knife wounds which allegedly demonstrates Detective Thowsen, nor his secretary, searched for reports related to Appellant's attacker. (Id.) Additionally, Appellant pointed to Daniel Martinez's false social security number which allegedly demonstrates Martinez's SCOPE did not return a clean record. (Id.) Finally, Appellant points to various alleged discrepancies in Detective Thowsen's testimony during the first and second trials. (Id.) The district court denied Claim 21 as it related to issues already determined by this Court in Lobato v. State, Case No. 49087, Order of Affirmance. (XI AA 2269). To the extent Claim 21 related to other issues, the district court found NRS 34.810 precluded Claim 21 as Appellant did not establish good cause for failure to present the claim in a timely motion for a new trial. (Id.) Additionally, the district court found Claim 21 was not based on new evidence as the evidence was available at or before trial through reasonable diligence. (Id.) As previously established, the district court correctly applied D'Agostino and NRS 34.810, thus no error occurred in the denial of Claim 21 on those grounds.

The district court correctly denied Claim 21 in part under the law of the case doctrine as the claim had been ruled on by the Nevada Supreme Court. Further, claim 21 is not exculpatory by nature in that it does not prove Appellant did not kill Bailey, but rather attempts to call into to question aspects of Detective Thowsen's testimony. While Appellant included a letter from Metro general

counsel stating that, in 2009, over eight years after the murder, Metro did not have a method to search for the NRS 629.041 reports, such does not demonstrate Detective Thowsen and his secretary did not seek such documents. Appellant asserts Detective Thowsen perjured himself by testifying that everything he did in the investigation was in the homicide book he prepared, but that he did not prepare a report with regard to his investigation of the alleged Budget Suites Hotel incident. Such assertion fails to prove that Appellant did not kill Bailey, and merely attempts to split hairs with respect to Detective Thowsen's testimony regarding his documentation of the investigation. Appellant asserts that Detective Thowsen perjured himself when he testified that he ran Daniel Martinez's social security number and it showed he had a clean record, because Daniel Martinez was using a false social security number. Again, such assertion is not exculpatory by nature and does not prove Appellant's actual innocence. While Nevada does not recognize freestanding claims of actual innocence, Appellant's Claim 21 falls well short of unquestionably establishing her innocence pursuant to Herrera.

22. Evidence of Police and Prosecutor Misconduct

Appellant claimed that "new" evidence showed police and the prosecutors engaged in malicious prosecution against Appellant with knowledge that Appellant was innocent. (VI AA 1275-82). To support such claim, Appellant reiterated the evidence presented at trial; summarized the foregoing claims; and alleged Deputy District Attorney Bill Kephart instructed Stephen Pyszkowski to lie during testimony. (Id.) The district court denied Claim 22 as such consisted of bare allegations insufficient to warrant relief or establish actual innocence. (XI AA 2269). Pursuant to Hargrove, the district court correctly denied Claim 22 as a bare allegation. The district court also found the evidence was available before or at trial and therefore not new evidence. (Id.) As previously established, the district court correctly applied D'Agostino with regard to what constitutes new evidence,

and thus no error occurred in the district court denying Claim 22 on such grounds. Further, the district court found NRS 34.810 barred Claim 22 as Appellant failed to establish good cause for failure to file a timely motion for a new trial. (XI AA 2269). As discussed previously, the district court correctly applied NRS 34.810, and thus no error occurred in the denial of Claim 22 on such basis.

The district court correctly denied Claim 22 as unsupported bare allegations which do not establish a viable claim of actual innocence. Thus, while Nevada does not recognize freestanding claims of actual innocence, Appellant's Claim 22 clearly fails to unquestionably establish her innocence pursuant to Herrera.

23. Cumulative New Evidence

Appellant reiterated evidence presented at trial and summarized the foregoing claims and alleged such established actual innocence. (VI AA 1282-96). The district court denied Claim 23 as Claims 1-22 did not entitle Appellant to relief. (XI AA 2269). The district court correctly denied Claim 23 as established through the aforementioned grounds of denial in Claims 1-22.

24. Evidence That Appellant's Conviction Is Based On False Evidence

Appellant reiterated evidence presented at trial and summarized the foregoing claims and alleged such established her conviction was based on false evidence. (VI AA 1296-1307). The district court denied Claim 24 as Claims 1-23 were barred by NRS 34.810; not based on new evidence; and/or insufficient to establish an actual innocence claim. (XI AA 2269). The district court did not err in denying Claim 24 in its application of NRS 34.810 and D'Agostino as analyzed previously.

The district court correctly denied Claim 24 as it was based upon speculative opinions which fail to establish a valid actual innocence claim. While Nevada does not recognize freestanding claims of actual innocence, Appellant's assertion of

speculative opinions in Claim 24 fails to unquestionably establish her innocence pursuant to Herrera.

II
BRADY CLAIMS

Pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), the State must disclose favorable evidence to the defense where such is material to guilt or punishment. Determining whether the State adequately disclosed required information is a question of fact and law, therefore this Court reviews allegations of Brady violations de novo. Mazzan v. Warden, 116 Nev. 48, 66 (2000).

Brady and its progeny require the State to disclose evidence favorable to the defense when evidence is material to either guilt or punishment. Id. "There are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the State, either intentionally or inadvertently; and (3) prejudice ensued, i.e. the evidence was material." Id. at 67.

As to the third component of a Brady violation, materiality, the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense". U.S. v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-400 (1976). If the defense generally requested the withheld evidence, it is constitutional error if there is a *reasonable probability* that the result would have been different if the evidence was disclosed. Mazzan, 116 Nev. at 66. (emphasis added). If the defense specifically requested the evidence, a Brady violation is material if there is a *reasonable possibility* that the omitted evidence would have affected the outcome. Id. (emphasis added). To determine materiality, undisclosed evidence must be considered collectively, not item by item. State v. Bennett, 119 Nev. 589, 600 (2003).

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25. State Failed To Disclose a Relationship Between Bailey And Law Enforcement

Appellant claims the State failed to disclose an alleged relationship between Bailey and law enforcement and thereby violated Brady. (VI AA 1308-12). The district court denied Claim 25 as such was a speculative opinion and alternate interpretation of the evidence presented at trial and not new evidence. (XI AA 2270). Further, the district court denied Claim 25 as the speculative opinion and alternate interpretation of the evidence contained therein do not establish actual innocence. (Id.).

In Claim 25 Appellant contends that based upon a piece of paper with a telephone number written on it which allegedly belonged to a police officer, allegedly in Bailey's possession when his body was discovered, the State violated Brady in not disclosing an alleged relationship Bailey had with law enforcement. (VI AA 1308-12). Appellant supports this contention with an affidavit from none other than Hans Sherrer. (IX AA 1815). Mr. Sherrer's affidavit states that in November 2009, he became aware of handwritten telephone numbers recovered from Bailey's pants pockets, that one number was written twice with the letter "D" beside it, and that the number with the letter "D" beside it is a law enforcement officer's telephone number. (Id.). Mr. Sherrer's affidavit goes on to claim that in July 2001, a staff member of the Clark County Coroner's Office called one of the numbers, a woman named Vivian answered and she claimed to have known Bailey for four years. (Id.). Mr. Sherrer states that this is documented in Clark County Coroner Case Number 01-04231. (Id.).

Claim 25 fails on every level. First, the blatant bias of Hans Sherrer has been previously established in Footnote 8. Given Mr. Sherrer's personal interest in this case, his affidavit must be considered as inherently biased and skewed in Appellant's favor in order to serve his personal interest and gain. Second, Mr. Sherrer's affidavit is factually wrong. Mr. Sherrer states that the telephone

numbers in question were recovered from Bailey's pants pockets. (IX AA 1815). Senior Crime Scene Investigator Maria Thomas testified that she impounded evidence recovered from Bailey's body bag in conjunction with his autopsy. (II AA 481-482, III AA 578-579). Ms. Thomas testified further that the telephone numbers in question were written on a post-it note, not found in Bailey's pants pocket, but rather adhered to his body inside of the body bag. (III AA 579). Given that Bailey's body was discovered in a trash dumpster enclosure and covered with various items of trash, it is highly likely that the post-it note with the phone numbers was an item of discarded trash that ended up sticking to Bailey's clothing as his body lay amongst the rubbish. Third, the fact that the letter "D" was written next to a number does not establish that the number belonged to a police officer. Mr. Sherrer makes this unsupported and bare allegation with absolutely no explanation or rational analysis. Fourth, Mr. Sherrer's assertion that in July 2001, one of the numbers was called and a woman named Vivian answered, claiming to know Bailey for four years, does not establish that Vivian was a law enforcement officer. Again, Mr. Sherrer has failed to make a logical connection to his claim. Nothing is provided which indicates the woman named Vivian was a police officer. Thus, Mr. Sherrer's affidavit is from a biased source, is factually incorrect and fails to connect and corroborate the bare allegations it sets forth.

In conducting a Brady analysis of Claim 25, it is clear that Appellant's claim was correctly denied. First, in applying the analysis of the foregoing paragraph, it is clear that the evidence in question is not favorable to defense. In fact, the evidence in question likely represents nothing more than a random piece of trash that found its way into a dumpster amongst various and unconnected bits of garbage. Second, the State did not withhold the evidence. The evidence was listed on the evidence impound sheet provided to defense, which trial counsel David Schieck cross-examined Ms. Thomas about (III AA 575-578). Ms. Thomas

testified specifically about the post-it note with the telephone numbers at trial. (III AA 578-579). As Appellant has failed to provide rational and factual support to the bare allegation that Bailey had a relationship with law enforcement, the same could not have been withheld by the State as it did not exist. Third, again applying the analysis of the foregoing paragraph, it is clear that the evidence in question is not material as it lacks any tendency to prove the existence of the bare allegation that Bailey had a relationship with law enforcement. Therefore, prejudice did not ensue because defense knew of the evidence and Bailey did not have a relationship with law enforcement. Thus, the district court correctly denied Claim 25 as it was based upon speculative opinion and alternate interpretation of the evidence presented at trial. Thus, the phone number was not material to Appellant's defense, and as such, no prejudice occurred. Therefore the district court did not err in denying Claim 25.

26. State Failed to Investigate Diann Parker's Friends as Alternate Suspects

Appellant claimed the State failed to disclose that Diann Parker's friend known as Daniel Martinez was using a false social security number and thereby violated Brady. (VI AA 1309-11). The district court denied Claim 26 as such was a speculative opinion and alternate interpretation of the evidence presented at trial and not new evidence or indicative of actual innocence claim. (XI AA 2270).

Appellant's Claim 26 is based upon the affidavit of private investigator Martin Yant. (VIII AA 1627). Mr. Yant stated that on December 11, 2009, he ran a search of the social security number provided by Daniel Martinez, and that it came back as the social security number belonging to Clarence R. Hartung, who passed way in 1987. (Id.). Appellant then attempts to assert that Detective Thowsen testified untruthfully by stating he used social security numbers to run criminal background checks on Ms. Parker's Friends (including Martinez) and the

records were clean. Appellant then claims that the State therefore violated Brady by failing to disclose Martinez was violating federal immigration laws.

Claim 26 fails for a multitude of reasons. First, Claim 26 is based upon a factual misrepresentation by Appellant. On page eighty-three (83) of Appellant's Opening Brief, Appellant claims Detective Thowsen testified that he used social security numbers to run criminal background checks on Ms. Parker's Friends (including Martinez) and their records were clean. Appellant even cites the trial transcript at III AA 680 in support of this contention. A review of the trial transcript at III AA 680 reveals that Appellant has made a false representation to this Court, as such testimony does not exist. (III AA 680). Rather, Detective Thowsen was asked by Appellant's trial counsel Mr. Schieck "Did you make any notations of their names or if you ran them what the results were?" (Id.). Detective Thowsen responded "I do remember running them. I don't have a permanent record of that." (Id.). On direct examination, Detective Thowsen stated "upon checking them further, found them to be without criminal records." (III AA 603). Detective Thowsen never testified that he utilized social security numbers in his background check of Martinez. Therefore, Appellant's assertion that Detective Thowsen knew Martinez was violating federal immigration laws is unsupported. Second, a social security number would not be necessary to run an individual's name through a local criminal database, such as SCOPE. Such a background check would not reveal information contained in the Social Security Death Index, which Appellant utilized to support Claim 26. Third, if an individual such as Martinez had never been arrested or convicted of federal immigration violations, such information would not appear when a background check was done. This was the essence of Detective Thowsen's testimony on direct exam when he stated they were without criminal records. Thus, Claim 26 attempts to assert a Brady violation in a roundabout manner through the use of factually incorrect references to

testimony and Social Security information searches which do not mirror Detective Thowsen's criminal background checks and what he knew.

In conducting a Brady analysis of Claim 26, it is clear that Appellant's claim was correctly denied. First, evidence that Martinez was using a false Social Security Number is not favorable to the defense in that it does not prove Martinez was Bailey's killer or that Appellant did not kill Bailey. A federal immigration law violation would be irrelevant and disconnected to the homicide investigation. Further, in applying the analysis of the foregoing paragraph, even if Martinez was using a false Social Security Number, nothing has established that Detective Thowsen knew this information, and even if he had, such information would not create any likelihood for him to believe Martinez was involved in the gruesome slaying. Second, the State did not withhold evidence. Detective Thowsen testified that he ran a background check and no criminal record appeared. While Martinez may have been in violation of a federal immigration law, he had not been convicted as such. Further, the fact that Appellant utilized a private investigator to search sensitive Social Security information pertaining to Martinez is indicative that Appellant had the information on Martinez they needed to conduct such searches. Appellant has failed to establish that the State withheld evidence. Third, the evidence of Daniel Martinez's false Social Security Number is not material to Appellant's case, as it does in way bolster Appellant's defense. As discussed above, even if Martinez was utilizing a false Social Security Number, presumably for purposes of employment, such fact does not increase the likelihood that Appellant did not kill Bailey or that Martinez did. The evidence would be unrelated to any claim of defense or implication of guilt. Thus, Appellant was not prejudiced in that the alleged evidence is not material.

Appellant has failed to establish how the confidence of the jury in the trustworthiness of the police investigation would have diminished if a homicide

detective learned of an unrelated identity theft in the course of his investigation. Thus, Appellant's claim is based upon speculative opinion and alternative interpretation of evidence presented at trial, and was rightfully denied.

The bare allegation that the police should have known Daniel Martinez was committing identity theft does not establish impropriety as to the police investigation of Bailey's killing. As such, this evidence was neither favorable nor material to the defense. Thus, the district court did not err in denying Appellant's Claim 26.

III
INEFFECTIVE ASSISTANCE CLAIMS

Appellant alleges various errors of counsel amounted to ineffective assistance in violation of the Sixth Amendment. The State responds to each in turn.

Claims of ineffective assistance of counsel present mixed questions of law and fact subject to independent review. Browning v. State, 120 Nev. 347, 91 P.3d 39 (2004). Strickland v. Washington provides a two-prong test to determine whether counsel was ineffective:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Bennett v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995). Surmounting Strickland's high bar is never an easy task. Padilla v. Kentucky, 559 U.S. ---, ---, 130 S.Ct. 1473, 1485 (2010). Bare and conclusory claims are insufficient to warrant relief. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). A petitioner's claims must be supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Id.

With respect to the first prong, a defendant is not entitled to errorless counsel. Rather, "'Deficient' assistance of counsel is representation that falls below an objective standard of reasonableness." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997) citing to Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992), cert. denied, 507 U.S. 921, 113 S.Ct. 1286 (1993). A defendant must show counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. Harrington v. Richter, 131 S.Ct. 770, 787 (2011). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms', not whether it deviated from best practices or most common custom." Strickland, 466 U.S. at 690. There are countless ways to provide effective assistance in any given case and there is a "*strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689 (emphasis added). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996), citing Strickland, 466 U.S. at 689. "Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach'. Harrington, 131 S.Ct. at 789. "Judicial review of a lawyer's representation is highly deferential." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (quoting Strickland, 466 U.S. at 689).

As such, an evidentiary hearing is not required simply because counsel's actions are challenged as being an unreasonable strategic decision. Harrington v. Richter, 131 S.Ct. 770, 788 (2011). Counsel need not confirm every aspect of strategic basis for his or her actions as there is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics

rather than "sheer neglect." Id., citing Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003), Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. at 688, 104 S.Ct. 2052 (emphasis added).

In order to meet the second prong of the test, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different or an omitted issue on appeal possessed a reasonable probability of success. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996). For prejudice, it is not sufficient to show alleged errors had some conceivable effect on the proceedings, the error must render the result of the trial unreliable. McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009); Harrington v. Richter, 131 S.Ct. 770, 787-88 (2011). The court may consider both prongs in any order and need not consider them both when a defendant's showing on either prong is insufficient. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

Appellant, relying on Richter v. Hickman, 578 F.3d 944 (9th Cir. 2009), claims the district court applied an incorrect standard of prejudice and erroneously found counsel was not deficient in failing to hire various experts to supplement the expert testimony they did provide. (Appellant's Opening Brief hereinafter "AOB" 87-90). However, Richter v. Hickman was expressly overruled by the United States Supreme Court in Harrington v. Richter in an opinion dripping with contempt for the Ninth Circuit's repeated erroneous treatment of ineffective assistance claims. 131 S.Ct. 770. In Harrington, the Supreme Court overruled the Ninth Circuit's opinion that counsel was ineffective for failing to retain a blood spatter expert. Id. The Supreme Court noted, with regard to the plethora of experts available today, that counsel may make reasonable decisions to balance resources.

Id. at 789. Simply because an expert may have been useful does not mean counsel is deficient for failing to obtain such expert. Id. To the contrary, the Supreme Court explicitly noted that a defense strategy attempting to cast suspicion of doubt is often favorable to one that attempts to prove a certainty that exonerates. Id. at 790. Further, the Supreme Court explained a defendant must show a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Id. at 787-88. A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id. Further, as to prejudice, the Supreme Court explained:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U.S. ——, ——, 130 S.Ct. 383, 390, 175 L.Ed.2d 328 (2009) (per curiam) (slip op., at 13); Strickland, 466 U.S., at 693, 104 S.Ct. 2052. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. *Id.*, at 696, 104 S.Ct. 2052. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id., at 693, 697, 104 S.Ct. 2052. The likelihood of a different result must be substantial, not just conceivable. Id., at 693, 104 S.Ct. 2052.

Harrington v. Richter, 131 S. Ct. 770, 791-92, 178 L. Ed. 2d 624 (2011). The State hereby applies the foregoing analysis to all of Appellant's ineffective assistance of counsel claims below which are based upon her reliance on Richter v. Hickman, 578 F.3d 944, which was subsequently overruled by the United States Supreme Court. Harrington, 131 S.Ct. 770.

As to Molina v. State, 120 Nev. 185, 87 P.3d 553 (2004), Appellant claims the language in Molina stating that counsel is not required to exhaust all resources does not apply to the instant case because she went to trial, rather than pled guilty. (AOB 90-91). The ultimate inquiry of ineffective assistance, however, is whether counsel made reasonable decisions regarding representation, which includes decisions that certain investigations are unnecessary. See Harrington, 131 S.Ct.

770. So long as such is the case, whether a defendant pleads guilty or goes to trial, counsel would not be deficient for failing to exhaust all resources. Further, even where a defendant claiming ineffective assistance due to failure to investigate went to trial, he or she still has to show the proposed investigation would have resulted in favorable information to the defense and that, had such information been uncovered, there is a reasonable probability of a different outcome at trial. See Hernandez v. State, 124 Nev. 978, 194 P.3d 1235 (2008); Browning, 120 Nev. 347; Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998). The State hereby applies the foregoing analysis to all of Appellant's ineffective assistance of counsel claims below which assert that the district court erred in its application of Molina.

Appellant also challenges the district court's reliance on Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002) for the longstanding principle that which witnesses to call and other aspects of defense theory are within counsel's discretion. (AOB 91-92). Appellant claims such is not applicable to the instant matter because here, unlike Rhyne, the issue is not the district court's interference with representation, but rather ineffective assistance of counsel. (Id.) However, the same principles are at issue. In fact, this Court's opinion in Rhyne cited several cases relating to ineffective assistance for the proposition at issue. Rhyne, 118 Nev. 1, citing Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); U.S. v. Miller, 643 F.2d 713 (10th Cir. 1981); Gustave v. U.S., 627 F.2d 901 (9th Cir. 1980); Johnson v. State, 117 Nev. 153, 17 P.3d 1008 (2001). Appellant fails to cite any authority that disputes the established maxim that counsel determines how to present the defense theory. The State hereby applies the foregoing analysis to all of Appellant's ineffective assistance of counsel claims below which assert that the district court erred in its application of Rhyne.

Appellant also challenges the district court's reliance on Ennis v. State, 122 Nev. 694, 137 P.3d 167 (2006) for the principle that defense counsel cannot be

deemed ineffective for failing to make futile objections and motions. Appellant attempts to distinguish her case from Ennis by merely asserting that Appellant's claims are not futile. As addressed in the individual claims below, Appellant has failed to establish that the district court erred in its application of Ennis.

To the extent Appellant challenges the district court's reliance on Herrera because it cited the concurring opinion, the majority echoed the concurrence's concern and stated:

> In the new trial context, motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross examination and an opportunity to make credibility determinations…Although we are not presented with a new trial motion per se, we believe the likelihood of abuse is as great or greater here.

Herrera, 506 U.S. at 417 (internal citations omitted). Further, contrary to Appellant's claims the majority did not "rule" that affidavits are the equivalent to testimony. See Herrera, 506 U.S. at 418. In conducting a theoretical analysis as to whether the defendant could establish a claim the Supreme Court already determined did not exist, the Court noted that had the statements contained in the affidavits been presented at trial the jury would have had to have made credibility determinations. Id. Thereafter, the Court found the affidavits at issue absolutely did not establish innocence. Id. Thus, Appellant's claim that the district court erred in its application of Herrera is without merit, as the majority in Herrera established a holding consistent with which the district court relied. The State hereby applies the foregoing analysis to all of Appellant's ineffective assistance of counsel claims below which assert that the district court erred in its application of Herrera.

Appellant additionally claims the district court erred in relying on Hargrove, 100 Nev. 498, because unlike defendant Hargrove, Appellant provided the district court with proposed witnesses' names and intended testimony. (AOB 95-96). However, while Appellant did provide numerous affidavits of proposed testimony, the mere proffer does not render her claims valid. As more fully explained in the

specific claims below, many of Appellant's proposed witnesses themselves intended to present testimony which consisted of "bare and naked" or speculative allegations. Simply because a third party, rather than Appellant herself, rendered inadequate information to support a claim does not excuse failure to comply with the mandates of Hargrove.

27. Failure to Investigate Diann Parker's Neighbors

Appellant claimed counsel was deficient for failing to investigate Diann Parker's neighbors and such investigation would have yielded Steven King's theory that the neighbors killed Bailey and that one of the neighbors was using a false social security number. (VI AA 1312-16). Appellant claimed this information would have led to an acquittal. (Id.) The district court denied Claim 27 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2270).

Appellant fails to demonstrate the district court erred, as Mr. King's theory is not based on personal knowledge, but rather a subjective opinion with no supporting facts, such is irrelevant, speculative, and inadmissible evidence. Mr. King's affidavit is simply a statement of bare and naked allegations made in hindsight, nearly nine years after the murder. Hargrove, 100 Nev. 498. Appellant failed to demonstrate deficiency in Mr. Schieck's conduct by not investigating Ms. Parker's neighbors further. Additionally, Appellant has failed to establish that had Mr. Schieck conducted such investigation, it would have yielded evidence consistent with the speculative theory of Mr. King made in hindsight nine years after the murder. Therefore, the district court did not err in denying Appellant's Claim 27 through its application of Strickland.

28. Failure to Investigate Telephone Numbers Allegedly Found In Bailey's Pockets

Appellant claimed counsel was deficient for failing to investigate the phone numbers allegedly found in Bailey's pocket and such investigation "could" have produced a person, including the alleged law enforcement representative, who

"could" provide further investigative leads, such as Bailey's time of death. (VI AA 1316-18). Appellant claimed this information would have led to an acquittal. Id. The district court denied Claim 27 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2270).

As established previously through Ms. Thomas' trial testimony, the phone numbers in question were not found in Bailey's pocket, but rather stuck to his clothing, amongst other rubbish covering Bailey's body, which was indicative of the numbers being random trash which Bailey was covered with at the crime scene. Further, Appellant failed to provide any support to her theory that the phone number belonged to a detective, simply citing an affidavit wherein Hans Sherrer claims "On or about November 13, 2009, I became aware that the telephone number with a letter 'D' beside it is a law enforcement officer's telephone number." (IX AA 1815). Further, even if the number did belong to a detective, Claim 28 is entirely based on speculation. Hargrove, 100 Nev. 498. Appellant failed to demonstrate deficiency or prejudice. Therefore, the district court did not err in denying Appellant's Claim 28 through its application of Strickland.

29. Failure to Subpoena Bailey's Bank Records

Appellant claimed counsel was deficient for failing to investigate Bailey's bank records and such investigation would have yielded statements showing someone cashed checks from Bailey's account after his death. (VI AA 1318-20). Appellant claimed this information would have led to an acquittal. (Id.) The district court denied Claim 28 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2270).

Appellant cannot demonstrate deficiency or prejudice as Appellant fails to demonstrate there was any indication at the time that Bailey's bank records were of significance, thus Appellant has failed to establish that Mr. Schieck's conduct fell below an objective standard of reasonableness. Further, Appellant cannot connect

the person who cashed the checks to Bailey's killer. Thus, Claim 29 is based on mere speculation, which fails to establish that the outcome of the trial would have been different had Mr. Schieck subpoenaed Bailey's bank records. Therefore, the district court did not err in denying Appellant's Claim 29 through its application of Strickland.

30. Failure to Obtain a Court Order to Obtain Diann Parker's DNA and Fingerprints

Appellant claimed counsel was deficient for failing to move to obtain Diann Parker's DNA and fingerprints. (VI AA 1321-23). Appellant claimed such failure prejudiced Appellant because, if Parker's DNA and/or fingerprints matched that at the crime scene, Appellant would have been acquitted. (Id.) The district court denied Claim 30 as a bare allegation insufficient to warrant relief. (XI AA 2270). Further, the district court found Appellant failed to demonstrate deficiency and prejudice as Appellant could not show how the proposed investigation would have rendered a more favorable result probable. (Id. at 2270-71).

Claim 30 was in fact a bare allegation based on speculation per Hargrove as Appellant did not and cannot show the proposed requests would have even been granted, much less would have lead to favorable information which would have rendered a more favorable result probable. Diann Parker fully cooperated with law enforcement at the earliest stages of the investigation, allowed detectives to search her apartment the day after the murder and was ruled out as a suspect. (III AA 602-603). Additionally, Ms. Parker reported to police that Bailey had raped her a week prior to his murder. (Id.) This fact, coupled with Bailey's lifestyle as a homeless man, creates the probability that Bailey may have had remnants of Ms. Parker's DNA still about his person, which would have been entirely unrelated to his killing. Lastly, because the crime scene was a trash dumpster enclosure, and Bailey's body was covered in random rubbish, there likely existed a plethora of various individual's DNA and/or fingerprints in the direct vicinity, who like Ms.

Parker, were completely unconnected to the crime. Given this analysis, Appellant has failed to show Mr. Schieck's conduct fell below an objective standard of reasonableness and that the outcome of the trial would have been different had he moved to obtain Ms. Parker's DNA and/or fingerprints. Appellant therefore fails to demonstrate the district court erred in denying Claim 30 through its application of Strickland, Hargrove and Molina.

31. Failure to Investigate NRS 629.041 Reports

Appellant claimed counsel was deficient for failing to investigate and/or obtain a court order for NRS 629.041 or police reports for knife wounds to a person's groin area. (VI AA 1323-25). Appellant claimed such failure prejudiced Appellant because, if her attacker sought medical attention and the medical professionals completed a NRS 629.041 report, the proposed investigation would have yielded the identity of Appellant's attacker and the jury would have returned a not guilty verdict. (Id.) The district court denied Claim 31 as a bare allegation insufficient to warrant relief. (XI AA 2270). Further, the district court found Appellant failed to demonstrate deficiency and prejudice as Appellant could not show how the proposed investigation would have rendered a more favorable result probable. (Id. at 2270-71).

Claim 31 was in fact a bare allegation based on speculation per Hargrove as Appellant did not and cannot show the proposed requests would have lead to favorable information which would have rendered a more favorable result probable. Mr. Schieck's decision to aggressively cross-examine Detective Thowsen with regard to his investigation into NRS 629.041 and related police reports as opposed to conducting an independent investigation himself does not establish that his conduct fell below an objective standard of reasonableness. Appellant cited to a letter from the North Las Vegas Police Department referring to police reports involving a knife wound. (IX AA 1869). Appellant did not include

the actual reports to demonstrate any of them could in any way relate to the alleged Budget Suites assault. As such, Appellant has failed to establish that the outcome of the trial would have been different had Mr. Schieck independently investigated NRS 629.041 and related police reports, and Appellant therefore fails to demonstrate the district court erred in denying Claim 31 through its application of Strickland, Hargrove and Molina.

32. Failure to Subpoena Detective LaRochelle to Impeach Detective Thowsen

Appellant claimed counsel rendered a deficient performance by failing to depose and subpoena Detective Thowsen's partner, Detective LaRochelle, to expose inconsistencies and undermine Detective Thowsen's credibility. (VI AA 1325-26). Appellant claimed such failure created prejudice because, had Appellant presented such testimony, she would have been acquitted. (Id.) The district court denied Claim 32 because Appellant failed to demonstrate what testimony or information the testimony would have yielded and therefore did not show deficiency or prejudice. (XI AA 2271). Further, the district court noted that what witnesses to call, if any, is counsel's ultimate responsibility. (Id.)

Claim 32 was in fact a bare allegation based on speculation per Hargrove as Appellant did not and cannot show the proposed testimony would have lead to favorable information which would have rendered a more favorable result probable. In all likelihood, Detective LaRochelle testimony would have bolstered the testimony of Detective Thowsen, as they worked in close conjunction in investigating the murder. Thus, Mr. Schieck's decision not to call Detective LaRochelle as a witness does not establish that his conduct fell below an objective standard of reasonableness and did not prejudice Appellant. Therefore, Appellant has not demonstrated that the district court erred in denying Claim 32 through its application of Strickland and Rhyne.

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33. Failure to Subpoena Detective Thowsen's Secretary to Impeach Detective Thowsen

Appellant claimed counsel was deficient for failing to subpoena Detective Thowsen's secretary to establish that she never completed a records search for NRS 629.041 reports. (VI AA 1327-28). Appellant claimed such failure created prejudice because, had the jurors heard such testimony, they would have acquitted Appellant. (Id.) The district court denied Claim 33 because Appellant failed to demonstrate what testimony or information the testimony would have yielded and therefore did not show deficiency or prejudice. (XI AA 2271). Further, the district court noted that what witnesses to call, if any, is counsel's ultimate responsibility. Id.

Appellant's claim is based on the speculative proposition that Detective Thowsen's secretary did not conduct a records search. While Appellant included a letter from Metro general counsel stating that, in 2009, over eight years after the murder, Metro did not have a method to search for the NRS 629.041 reports, such does not demonstrate Detective Thowsen's secretary did not seek such documents. (VIII AA 1753). The letter, in response to a request for records from a private citizen, stated that the records were "likely contained within confidential documents pursuant to NRS 179A.070 or *Donrey v. Nevada*". (Id.) Assuming that eight (8) years prior to the letter Metro used similar record keeping policies, there is no evidence to suggest Detective Thowsen's secretary could not and/or did not search the records cited in the letter for NRS 629.041 reports. In all likelihood, Detective Thowsen's secretary would have bolstered Detective Thowsen's testimony as she was directly assisting him in the administrative duties associated with his investigation. As such, Mr. Schieck's decision not to call Detective Thowsen's secretary as a witness does not establish that his conduct fell below an objective standard of reasonableness and did not prejudice Appellant. Appellant

therefore fails to demonstrate the district court erred in denying Claim 33 through its application of Strickland and Rhyne.

34. Failure to Subpoena Internal Police Documents to Impeach Detective Thowsen

Appellant claimed counsel was deficient for failing to subpoena internal police documents showing Metro's policies as to how to conduct a homicide investigation. (VI AA 1328-30). Appellant claimed such subpoena would have permitted defense counsel to impeach Detective Thowsen's testimony. (Id.) Appellant argued such failure resulted in prejudice because such information would have resulted in an acquittal. (Id.) The district court denied Claim 34 because Appellant failed to demonstrate what testimony or information the testimony would have yielded and therefore did not show deficiency or prejudice. (XI AA 2271). Further, the district court noted that what witnesses to call, if any, is counsel's ultimate responsibility. (Id.)

Appellant has failed to establish how the information referenced would have been used to impeach Detective Thowsen, which would have then resulted in an acquittal. Rather, Appellant merely asserts that the information could have provided information to impeach Detective Thowsen. At trial, it was established that Detective Thowsen was a twenty-nine year police veteran who had investigated four to five hundred homicides in his career. (III AA 597, 663). Detective Thowsen provided extensive testimony that took the jury through his meticulous process of investigating Bailey's killing. As such, Mr. Schieck chose to skillfully cross-examine Detective Thowsen as to the substance of his investigation, rather than attempt to find a methodical inconsistency which would not change the substance of the evidence supporting Appellant's conviction. Appellant's speculative claim remains unsupported, and thus fails to establish Mr. Schieck's conduct in not obtaining such documents fell below an objective standard of reasonableness. Further, Appellant's speculative claim fails to establish

that the outcome of the trial would have been different, or a more favorable result would have occurred, thus no prejudice occurred. Therefore, Appellant has failed to demonstrate that the district court erred in denying Claim 34 through its application of Strickland and Rhyne.

35. Failure to File a Motion in Limine to Exclude References to Appellant's Methamphetamine Use

Appellant claimed counsel was deficient for failing to move to exclude references to her methamphetamine use and/or link Appellant's methamphetamine use to Bailey's crack use. (VI AA 1330-32). Appellant argued such created prejudice as the State's general use of the term "drug use" prejudiced Appellant and had the jury understood she did not use crack, like Bailey, they would have acquitted Appellant. (Id.) The district court denied Claim 35 as counsel holds the ultimate responsibility of when to object and the proposed motion was futile as the evidence was relevant and Appellant did not demonstrate that such was inadmissible. (XI AA 2271).

Evidence of Appellant's methamphetamine use was clearly relevant to explain her admitted lack of memory as to details with regard to dates and locations surrounding Bailey's murder due to her being awake and under the influence of methamphetamine for days on end. Further, Appellant's methamphetamine use was relevant in the context of Detective Thowsen's testimony as he described that in his experience in taking statements from individuals who were under the influence of methamphetamine when they committed a crime, they tend to jumble things together, put unrelated memories together, remember things strangely and sometimes not remember things at all. (III AA 664). As such, a motion in limine to exclude such information would have been futile. Here, the State has established that Appellant's claim would have been futile, and therefore the district court did not err in applying Ennis as a basis of denial. Thus, Appellant has failed to show deficiency or prejudice, and the district

court did not err in denying Claim 35 through its application of Strickland, Rhyne and Ennis.

36. Failure to File a Discovery Request

Appellant claimed counsel was deficient for failing to file a formal discovery motion. (VI AA 1332-33). Appellant claimed such created prejudice as, if such motion led to exculpatory evidence to impeach Detective Thowsen, the jurors would have returned a not guilty verdict. (Id.) The district court denied Claim 36 as Appellant failed to demonstrate deficiency because counsel decides which motions to file. (XI AA 2271). Further, the district court found Appellant failed to demonstrate prejudice because Appellant did not establish what exculpatory evidence the proposed discovery motion would have uncovered. (Id.)

Appellant has failed to demonstrate what information a discovery motion would have yielded. Therefore, Appellant cannot show that such a motion would have led to information that would have been used to impeach Detective Thowsen, which would have then led to an acquittal. Mr. Schieck demonstrated a superior knowledge of the evidence in the case through his cross-examinations of the State's witnesses. Further, the fact that Appellant has raised only two meritless Brady claims is indicative of the fact that a formal discovery motion would not have yielded exculpatory evidence. Thus, Appellant has failed to show deficiency or prejudice, and has failed to demonstrate that the district court erred in denying Claim 36 through its application of Strickland and Rhyne.

37. Failure to File a Motion to Dismiss the NRS 201.450 Charge

Appellant claimed counsel was deficient for failing to move to dismiss the NRS 201.450 charge of Sexual Penetration of a Dead Human Body alleging there was no evidence that Appellant engaged in post mortem sexual relations with Bailey. (VI AA 1334-39). Appellant claimed such failure created prejudice because counsel failed "to represent her interests". (Id. at 1339). The district court

denied Claim 37 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2271).

Appellant's claim is predicated upon an attempt to argue the legislative intent of NRS 201.450 as embracing only specific sex acts with a dead body, while ignoring the previously established constitutionality of the law with respect to any sexual penetration of a dead body which was established by the facts in the case. Thus, Appellant's claim would require a limited application of NRS 201.450, which is not consistent with the broad range of acts encompassed by the statute including "any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another." Appellant's slashing and stabbing of Bailey's corpse's rectum meets this definition. Therefore, Appellant has failed to show deficiency or prejudice, and has failed to demonstrate that the district court erred in denying Claim 37 in its application of Strickland and Herrera.

38-41. Failure to Retain the Following Expert Witnesses: Forensic Entomologist, Psychologist, Pathologist, and George Schiro

Appellant claimed counsel was deficient for failing to retain an entomologist, psychologist, pathologist, and/or George Schiro to testify as to the claims set forth in Claims 1-4, 7-14, 18. (VI AA 1339-65). Appellant argued such failure created prejudice as the proposed testimony would have lead to an acquittal. (Id.) The district court denied Claims 38-41 as what witnesses to call is counsel's decision therefore Appellant did not establish deficiency. (XI AA 2271-72). Further, as alternate opinions of the evidence presented at trial, such did not establish actual innocence. (Id.) Additionally, Appellant could not establish the proposed expert testimony would have led to a different result at trial and therefore show prejudice. (Id.)

Appellant fails to show that defense counsel's performance fell below an objective standard of reasonableness by not retaining a forensic entomologist, a

psychologist, a forensic pathologist and George Schiro. Appellant's claim asserts alternate opinions of evidence produced at trial, and thus, Appellate's counsel cannot be deemed deficient for calling other witnesses in presenting the defense, as such is defense counsel's ultimate responsibility.

Appellate is unable to show prejudice, as she has been unable to establish that the proposed list of witnesses and their accompanying testimony, merely presenting alternate opinions of evidence presented at trial, would have resulted in an acquittal or different outcome at trial. To the contrary, Mr. Schiro testified in Appellant's first trial, in which she was convicted of Murder With Use of A Deadly Weapon, a much more severe crime than Voluntary Manslaughter, which is what Appellant was convicted of in the second trial where Mr. Schieck opted not to call Mr. Schiro as a witness. Appellant was not prejudiced by Mr. Schieck's decision to not call Mr. Schiro as a witness, but rather benefited from such tactical decision in being convicted of a lesser offense.

Specifically, Appellant's Claim 38 merely involves opinions based upon review of pictures as to Bailey's time of death as a means of countering the extensive testimony of Dr. Simms, who conducted the autopsy of Bailey and concluded a window of time as to Bailey's time of death. (II AA 443). As such, Appellant has only demonstrated differing opinions between the Dr. who performed the autopsy and others whom have only reviewed photos, and does not establish that such evidence would have changed the outcome of the trial.

Further, Appellant's Claim 39 involves a psychologist's opinion that Appellant's statement to police was not a confession, but her cooperating with police questioning. (VI AA 1346). Again, as an alternate opinion of evidence presented at trial with regard to the semantics of what is a confession and what is a cooperating statement to police, that does not challenge the content of the

statement itself, Appellant has failed to establish that such evidence would have changed the outcome of the trial.

Further, Appellant's Claim 40 involves multiple opinions of a forensic pathologist with regard to the crime scene, based upon review of photos. The pathologist simply surmised alternate opinions with regard to evidence at trial, and thus, Appellant failed to establish that such evidence would have changed the outcome of the trial.

Further, Appellant's Claim 41 involves several opinions of forensic scientist George Schiro with regard to shoeprints and blood evidence. The claim is not exculpatory, but merely provides alternate opinions with regard to evidence presented at trial. As such, Appellant has failed to establish that the evidence in Claim 41 would have changed the outcome of the trial.

Appellant's counsel Mr. Schieck ultimately succeeded in reducing the Murder charge to Voluntary Manslaughter through his strategic defense of Appellant without the use of the experts raised in Claims 38-41. Appellant cannot establish that such experts would have changed the outcome of the trial, however, to the contrary, Appellant was convicted of the more severe charge of Murder in the first trial when expert Mr. Schiro testified. Thus, it has been empirically shown through Appellant's first trial that Claims 38-41 fail. Therefore, Appellant has failed to demonstrate that the district court erred in denying Claims 38-41 in its application of Strickland, Herrera and Rhyne.

42. Failure to Cross Examine Dr. Simms as to Inconsistent Testimony

Appellant claimed counsel was deficient for failing to cross examine Dr. Simms as to alleged inconsistencies between preliminary hearing testimony and trial testimony regarding the time of death and whether Bailey's rectum wound was inflicted ante or post mortem. (VI AA 1365-68). Appellant claimed this failure created prejudice as, had counsel conducted the proposed cross examination, the

jury would have returned a not guilty verdict. (Id.) The district court denied Claim 42 as Appellant failed to demonstrate deficiency because the manner of cross examination and defense theories is ultimately counsel's responsibility. (XI AAA 2272). Further, the district court found Appellant failed to demonstrate the failure led to prejudice. (Id.) Finally, the district court found the claim was simply an alternate view of the evidence adduced at trial and therefore did not establish actual innocence. (Id.)

Appellant failed to show that defense counsel's performance fell below an objective standard of reasonableness with regard to Claim 42. Pursuant to Strickland and Rhyne, the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. Thus, no deficiency occurred.

Further, Appellant has failed to show prejudice in that she cannot establish that such cross examination would have led to a more favorable result at trial. Dr. Simms testified at the preliminary hearing that he had not done specific testing to determine Bailey's time of death, however, he stated that because the body was not manifesting any significant degree of decomposition, Bailey died within twenty-four hours of being discovered. (I AA 35-36). At trial, Dr. Simms testified that due to the level of rigor mortis present and the level of decomposition present, he placed Bailey's time of death between eight and twenty-four hours prior to the coroner declaring him dead at 3:50 AM on July 9, 2001. (II AA 433-434). Bailey was discovered around 10:00 PM on July 8, 2001. (II AA 267, 273). Dr. Simms testified at the preliminary hearing that he placed Bailey's time of death within twenty-four hours of being discovered, which would have been the time interval between 10:00 PM July 7, 2001, and 10:00 PM July 8, 2001. Dr. Simms testified at trial that he placed Bailey's time of death between eight and twenty-four hours prior to the coroner declaring him dead at 3:50 AM on July 9, 2001, which would

have been the time interval between 3:50 AM July 8, 2001, and 7:50 PM July 8, 2001. Dr. Simms' testimony was not inconsistent as to the time of death in that the time range overlapped but for a couple of hours. Therefore, any attempt by Mr. Schieck to cross-examine Dr. Simms as to his testimony regarding Bailey's time of death at the preliminary hearing compared to his trial testimony would have been fruitless as the testimony was consistent. As such, Appellant cannot show prejudice, and the court correctly denied Claim 42 in its application of Strickland, Rhyne and Herrera.

Further, Dr. Simms testified at the preliminary hearing and the trial that the slash wound that penetrated Bailey's rectum was inflicted post mortem due to the lack of hemorrhaging that resulted, which is indicative of a post mortem wound. (II AA 419, 424, I AA 30-31). Therefore, even if Mr. Schieck had cross-examined Dr. Simms with regard to any alleged inconsistency, Dr. Simms would have been able to establish the medical rationale that supported his finding that the wound to the rectum was inflicted post mortem. As such, Appellant cannot show prejudice, and the court correctly denied Claim 42 in its application of Strickland, Rhyne and Herrera.

43. Failure to Object to State's Failure to Provide Notice of Luminol or Phenolphthalein Testimony

Appellant claimed counsel was deficient for failing to object to expert testimony from Thomas Wahl, Daniel Ford, Louise Renhard and Kristina Paulette as to luminol or phenolphthalein testing because the State failed to properly notice such experts under NRS 174.234(2). (VI AA 1368-71). Appellant claimed such failure created prejudice because, had counsel objected, the district court would have precluded the testimony and the jury would have acquitted Appellant. (Id.) The district court denied Claim 43 as the State properly noticed the experts, therefore Appellant failed to demonstrate deficiency or prejudice. (XI AA 2272).

Further, the district court found that the claim did not establish actual innocence. (Id.)

Appellant's Claim 43 was inaccurate, as the State properly noticed the witnesses as experts in the field of crime scene analysis, which includes luminol and/or phenolphthalein testing, memorialized as Court's Exhibits 1, 2 and 3. (XI AA 2254). Thus, Appellant cannot show deficiency for failure to raise a futile objection, and as such, cannot show prejudice, because no more favorable result would have occurred. Therefore, the district court did not err in denying Claim 43 in its application of Strickland and Herrera.

44. Failure to Introduce Appellant's Shoes into Evidence

Appellant claimed counsel was deficient for failing to introduce the shoes Appellant claimed she wore at the time of the assault into evidence. (VII AA 1372-76). Appellant argued such failure created prejudice because, had the jurors seen the shoes, they would have returned a verdict of not guilty. (Id.) The district court denied Claim 44 because Appellant failed to demonstrate deficiency or prejudice. (XI AA 2272-73). The district court noted that the presentation of defense and evidence is ultimately counsel's responsibility. Further, the claim was an alternate view of evidence presented at trial such did not demonstrate actual innocence. (Id.)

Appellant failed to show that defense counsel's performance fell below an objective standard of reasonableness with regard to Claim 44. Pursuant to Rhyne, defense counsel has the ultimate authority to control the presentation of defense. While the shoes were not offered into evidence, argument and testimony regarding the shoes occurred, thus entry of the shoes into evidence would have been cumulative. (II AA 262; III AA 570, 583-584, 586, 678; V AA 1016). In fact, photographs of the shoes were admitted into evidence as State's exhibit number 154. (III AA 570). Moreover, Appellant's arguments regarding the shoes go

towards the issue that no physical evidence was presented which connected her to the scene. Thus, Appellant has failed to demonstrate deficiency and prejudice, as evidence of the shoes had been presented. Therefore, the district court did not err in denying Claim 44 in its application of Strickland, Rhyne and Herrera.

45. Admission of a Butterfly Knife into Evidence

Appellant claimed counsel was deficient for failing to object to Detective Thowson's testimony and demonstration regarding the butterfly knife. (VII AA 1376-78). Appellant also argued counsel was deficient for allowing the State to admit the demonstrative butterfly knife into evidence. (Id.) Appellant claimed such led to prejudice because, but for such deficiency, the jury would have acquitted Appellant. (Id.) The district court denied Claim 45 as Appellant failed to demonstrate deficiency or prejudice as the objection would have been futile. (XI AA 2273).

Appellant's assertion is based on the premise that the claim is not futile. Here, a butterfly knife was entered into evidence as a demonstrative exhibit as to the weapon Appellant admitted to possessing and using to inflict wounds on her alleged attacker. Thus, the demonstrative exhibit was relevant. The State has established that Appellant's claim would have been futile, and therefore the district court did not err in applying Ennis as a basis of denial. Therefore, Appellant has failed to show that counsel was deficient by not raising a futile objection, and thus no prejudice occurred. As such, the district court did not err in denying Claim 45 in its application of Strickland, Herrera and Ennis.

46. Failure to "Properly Argue" That Appellant's Hearsay Evidence Was Admissible

Appellant claimed counsel was deficient for failing to argue hearsay evidence as to when the Budget Suites assault occurred was trustworthy and admissible to rebut Detective Thowsen's testimony. (VII AA 1379-82). Appellant claimed such failure resulted in prejudice because had the jurors heard the

inadmissible hearsay statements, they would have returned a verdict of not guilty. (Id.) The district court denied Claim 46 as barred by the law of the case because this Court already denied Appellant's arguments regarding the proposed hearsay testimony. (XI AA 2273); Lobato v. State, Case No. 49087, Order of Affirmance. Further, Appellant failed to demonstrate deficiency or prejudice because Appellant's proposed objection was improper. (XI AA 2273).

Appellant also claims the district court erred in its application of Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002), however, Appellant fails to address the basis for the district courts application, that it is improper for counsel to vouch for the veracity of a witness. Rather, Appellant attempts to distinguish the facts in Rowland, instead of addressing the principle that it is improper for counsel to vouch for the veracity of a witness. Thus, the district court did not err in its application of Rowland as a basis for denial. Appellant also claims the district court erred in its application of Hall in that the facts or law in which this Court previously ruled on are different, and thus not the law of the case. Appellant's claim with regard to Hall is inaccurate, as this court previously ruled on the preclusion of the offered hearsay evidence in Lobato v. State 49087, and thus the district court did not err in denying the claim.

Appellant has failed to show that counsel was deficient in failing to raise an improper argument which would have been futile pursuant to Rowland and Strickland, thus no prejudice resulted. As such the district court did not err in denying Claim 46 in its application of Strickland, Herrera, Rowland and Hall.

47. Failure to Object to State's Failure to Notice Detective Thowsen as an Expert Witness in the Field of Psychology

Appellant claimed counsel was deficient for failing to object to Detective Thowsen's testimony that Appellant characterized as expert psychology opinion testimony. (VII AA 1383-87). Appellant claimed such failure prejudiced Appellant because, had counsel objected to the testimony, the testimony would have been

excluded and the jurors would have issued a not guilty verdict. (Id.) The district court denied Claim 47 because Appellant failed to demonstrate deficiency or prejudice. (XI AA 2273-74). Additionally, as Appellant raised this Court denied the claim on direct appeal, the law of the case barred the claim. (Id.); Lobato v. State, Case No. 49087, Order of Affirmance.

Appellant also claims the district court erred in its application of Hall, Pelligrini and Lobato, however, Appellant predicates such claim on the notion that this Court has not previously ruled on the issue presented in Claim 47, which is inaccurate. In fact, this Court previously rejected the issue raised in Appellant's Claim 47 in Lobato, 49087, Order of Affirmance, p.2 ln 1. Thus the district court did not err in denying Appellant's claim under the doctrine of the law of the case.

Further, Appellant's Claim 47 is predicated upon characterizing Detective Thowsen's testimony regarding his experience in taking statements from methamphetamine users and referring to Appellant's statement as a confession because she provided details of the crime that were not public knowledge as "expert" testimony because Detective Thowsen has a degree in psychology. Never in Detective Thowsen's testimony did he refer to his background in psychology. Rather, Detective Thowsen described the significance he attributed to Appellant providing details of the crime not known to the public which is indicative of someone with firsthand knowledge. It does not take an expert in psychology to determine this, but rather any detective who pays attention to detail. Further, Detective Thowsen described that in his experience as a law enforcement officer taking statements from methamphetamine users, such individuals tend to jumble, minimize or even forget aspects of an occurrence. Again, this was not testimony from an expert witness in the field of psychology, but rather an experienced law enforcement officer.

Therefore, Appellant has failed to show that counsel was deficient and no prejudice resulted. As such, the district court did not err in denying Claim 47 in its application of Strickland, Hall, Pelligrini and Herrera.

48. Failure to Object and Move for a Mistrial Following Detective Thowsen's Testimony

Appellant claimed counsel was deficient for failing to object and move for a mistrial following Detective Thowsen's testimony in response to a juror question that "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (VII AA 1388-93). Appellant claimed such failure resulted in prejudice because had counsel objected, either the mistrial would have been granted or the issue would have been preserved for appeal. (Id.) The district court denied Claim 48 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2274).

Appellant has failed to show deficiency as the basis for such objection is lacking and a motion for mistrial would have been denied on the same grounds. Further, Detective Thowsen's testimony, taken into context, was "They had no reports in the area. So there there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (VII AA 1388). Detective Thowsen was referring to the fact that he had investigated NRS 629.041 reports, police reports for knife wounds to a person's groin area and reports of attempted sexual assaults in the Budget Suites area. Therefore, in context, Detective Thowsen was simply stating there was no reason to search for a witness to Bailey's killing at the Budget Suites since it was absolutely clear from the evidence that Bailey was killed in the trash enclosure. Therefore, the basis for Mr. Schieck to raise an objection was lacking, and would have been futile. Thus, no prejudice occurred and the district court did not err in its denial of Claim 48 in its application of Strickland and Herrera.

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49. Failure to Object and Move for a Mistrial Due to Prosecutorial Misconduct in Referring to Appellant's Statement as a Confession

Appellant claimed counsel was deficient for failing to object and move for a mistrial when Deputy District Attorney Bill Kephart referred to Appellant's statement as a confession. (VII AA 1393-95). Appellant claimed such failure resulted in prejudice because either the mistrial would have been granted or the issue would have been preserved for appeal. (Id.) The district court denied Claim 49 as Appellant failed to demonstrate deficiency or prejudice as the comment was not improper therefore an objection and/or motion for mistrial would have been futile. (XI AA 2274).

Appellant claims the district court erred in its application of Riker v. State, 111 Nev. 1316, 905 P.2d 706 (2005) and State v. Green, 89 Nev. 173, 400 P.2d 766 (1965), by attempting to distinguish the cases from the case at bar in terms of the strength of the evidence. Appellant's claim is misplaced, as the district court applied the principles in Riker and Green that Appellant must show the prosecutor's conduct was patently prejudicial and that a prosecutor has the right to comment on testimony, respectively. The district court correctly ruled that Appellant failed to demonstrate that the prosecutor's comment that her statement was a "confession" was patently prejudicial, when in fact her statement was highly incriminating and could be characterized as such. The district court correctly applied Green, in that the prosecutor was commenting on Appellant's statement and asking the jurors to draw inferences from the evidence. Further, the district court did not err in denying Appellant's claim as such an objection and/or motion for mistrial would have been futile given that the prosecutor's comments were proper. Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Thus, Appellant has failed to show counsel was deficient and no

prejudice resulted. As such, the district court did not err in denying Claim 49 in its application of Riker, Green and Ennis.

50. Failure to Impeach Detective Thowsen's Testimony Regarding His Investigations to Verify the Budget Suites Sexual Assault

Appellant claimed counsel was ineffective for failing to attempt to elicit certain testimony pertaining to Detective Thowsen's investigation of the Budget Suites and any reports or incidents of injuries to an individual's groin or penis during cross examination of Detective Thowsen to diminish his credibility. (VII AA 1395-99). Appellant claimed such failure resulted in prejudice as, had counsel conducted the proposed cross examination, the jury would have acquitted Appellant. (Id.) The district court denied Claim 50 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2274-75). Further, the district court found Appellant was not entitled to relief as cross examination is ultimately counsel's responsibility. (Id.)

Appellant has failed to demonstrate counsel was deficient in conducting a specific cross-examination of Detective Thowsen, as the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision pursuant to Rhyne and Strickland.

Further, Appellant is focusing on one line of testimony in her first trial when defense counsel asked Detective Thowsen if "everything you did in the case" was contained in his "homicide book," to which Detective Thowsen answered "Yes." (VII AA 1396). In the second trial, Mr. Schieck cross-examined Detective Thowsen at length about his investigation pertaining to the Budget Suites and any reports or incidents of injuries to an individual's groin or penis. (III AA 671-676, 687-688). Mr. Schieck elicited testimony from the detective concerning the fact that he had no record of those actions. (Id.) Therefore, in Claim 50, Appellant is playing with semantics by attempting to show that Detective Thowsen committed himself to an absolute by simply answering "yes" in a general statement. Appellant

has not established prejudice as such an overdelicate attempt to impeach would likely have been unsuccessful when taken with the totality of Detective Thowsen's testimony. Therefore, the district court did not err in denying Claim 50 pursuant to its application of Rhyne, Strickland and Herrera.

51. Failure to Object For Confrontation Clause Violations During Detective Thowsen's Testimony

Appellant claimed counsel was deficient for failing to object to Detective Thowsen's testimony regarding penis injury reports as a violation of the Confrontation Clause. (VII AA 1399-02). Appellant claimed such failure resulted in prejudice as, had counsel objected, the testimony would have been stricken and the jury would have acquitted Appellant. (Id.) The district court denied Claim 51 as the law of the case barred the claim because this Court considered the claim on appeal and found the testimony was harmless error. (XI AA 2275); Lobato v. State, Case No. 49087, Order of Affirmance.

Appellant claims the district court erred in its application of Hall and Lobato, loosely asserting that the facts and law previously ruled upon are different. This Court previously ruled that Detective Thowsen's hearsay testimony regarding penis injury reports was harmless error. Thus, the district court did not err in denying Appellant's claim under the doctrine of the law of the case. Therefore, Appellant has failed to show deficiency and prejudice, and the district court did not err in denying Claim 51 in its application of Hall and Lobato.

52. Failure to Object and Move for a Mistrial Due To Prosecutorial Misconduct for Suborning Perjury from Detective Thowsen

Appellant claimed counsel was deficient for failing to object and move for a mistrial for the State's alleged deliberate misrepresentations to the district court and because the State allegedly suborned perjury. (VII AA 1402-09). Appellant also insinuated a prior employment relationship between Judge Vega and Deputy District Attorney Bill Kephart led to improper rulings. (Id.) Appellant claimed such failure prejudiced Appellant as, had counsel objected, the issue would have been

preserved for appeal and this Court would have reversed Appellant's conviction. (Id.) The district court denied Claim 52 as a bare allegation insufficient to warrant relief. (XI AA 2275). Further, the district court noted Appellant's claim relied on an error of fact, specifically, Judge Vega did not work with Deputy District Attorneys Bill Kephart or Sandra DiGiacomo at the Clark County District Attorney's Office. (Id.)

Appellant claims the district court erred in its application of Hargrove. However, Claim 52 was in fact a bare allegation based on speculation per Hargrove as Appellant did not and cannot show that the prosecutor suborned perjury from Detective Thowsen. Had such an objection been made at trial by Mr. Schieck, the basis to support such objection would have been lacking, as it is now, and a motion for mistrial would have been denied on the same grounds. Thus, the district court did not err in denying Claim 52 pursuant to its application of Hargrove. As such, Appellant has failed to show deficiency and prejudice.

53. Failure to Impeach Detective Thowsen as to Appellant's Comments in the Holding Cell

Appellant claimed counsel was deficient for failing to ask specific questions as to Appellant's comments that the holding cell looked like the area of the attack during Detective Thowsen's testimony; and failure to object to the State's arguments regarding the same comments. (VII AA 1409-15). Appellant claimed such failure created prejudice because, had counsel objected, the jury would have acquitted Appellant. (Id.) The district court denied Claim 53 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2275).

Appellant has failed to demonstrate counsel was deficient in conducting a specific cross-examination of Detective Thowsen, as the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision pursuant to Strickland.

In Claim 53 Appellant fails to explain how Mr. Schieck was to have impeached Detective Thowsen. Appellant attempts to split hairs with regard to Detective Thowsen's testimony in the first and second trials which relays the same message but does not use identical words. (VII AA 1410; III AA 659). Further, Appellant's discussion of the differences between the holding cell and the trash enclosure where Bailey's body was found is inconsequential because the jury received photographs of both, and thus could make its own determination. (III AA 536, 658). Thus, Appellant has failed to establish prejudice. As such, the district court did not err in denying Claim 53 in its application of Strickland and Herrera.

54. Failure to Cross Examine Detective Thowsen as to the Voluntariness of Appellant's Statements

Appellant claimed counsel was deficient for failing to file a pretrial motion or cross examine Detective Thowsen to determine how he obtained information that Appellant was sexually abused as a child. (VII AA 1416-18). Appellant claimed that had such motion or cross examination exposed illegal tactics to obtain information of Appellant's sexual abuse, such would have provided grounds to exclude Appellant's statement. (Id.) Appellant claimed the failure resulted in prejudice because the foregoing would have resulted in the district court excluding Appellant's statement and therefore an acquittal. (Id.) The district court denied Claim 54 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2275-76). Additionally, as the manner of cross examination is ultimately left to counsel, the district court found Appellant was not entitled to relief. (Id.) To the extent Appellant was attempting to re-litigate the voluntariness of Appellant's statements, the law of the case barred the claim as this Court already found the statement was admissible. (Id.); Lobato v. State, 120 Nev. at 522.

Appellant has failed to show deficiency as the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision pursuant to Rhyne and Strickland. Further, Appellant fails to present a cogent

argument as to how the manner in which Detective Thowsen acquired the information makes her *Miranda* waiver involuntary. Additionally, Appellant filed a Motion In Limine to exclude her statements made to Detective Thowsen following her waiver of Miranda, which the district court denied. (I AA 143-175). Thus, Appellant has failed to establish prejudice.

Appellant claims the district court erred in its application of Hall and Lobato, loosely asserting that the facts and law previously ruled upon are different. However, this Court previously rejected Appellant's challenge as to whether her Miranda waiver was voluntary in Laboto, 120 Nev. at 522, and thus the district court did not err in denying the claim under the doctrine of the law of the case.

Appellant also claims the district court erred in applying Ennis, however, as discussed above, Appellant's assertion is based on the premise that the claim is not futile. Clearly Appellant's claim would have been futile as the issue could not be re-litigated. Thus, Appellant the district court correctly denied Claim 54 in its application of Strickland, Rhyne, Hall, Lobato and Ennis.

55. Failure to Impeach Laura Johnson's Credibility

Appellant claimed counsel was deficient for failing to ask specific questions during cross examination to impeach Laura Johnson. (VII AA 1418-21). Appellant claimed, but for such failure, the jury would have acquitted Appellant. (Id.) The district court denied Claim 55 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2276). The district court noted that, as cross examination and presentation of the defense is ultimately counsel's responsibility, Appellant was not entitled to relief. (Id.)

Appellant has failed to show deficiency as the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision pursuant to Rhyne and Strickland. Further, Claim 55 centers on the fact that witnesses Laura Johnson and Dixie Tienken testified inconsistently with regard to

several issues. The jury heard the testimony of both witnesses and therefore was able to make weight and credibility determinations as such. Therefore, Appellant has failed to establish prejudice through the lack of Mr. Schieck cross-examining Ms. Johnson with regard to the inconsistencies between her testimony and Ms. Tienken's testimony, because the jury had already been presented the inconsistent testimony. Thus, the district court did not err in denying Claim 55 in its application of Strickland and Rhyne.

56. Failure to Investigate and Introduce Testimony as to Where Methamphetamine Was Sold in Las Vegas

Appellant claimed that counsel was deficient for failing to investigate and/or present testimony as to where in Las Vegas methamphetamine was available at the time of the murder. (VII AA 1421-22). Appellant claimed such failure created prejudice because, had the jurors heard such testimony, they would have returned a verdict of not guilty. (Id.) The district court denied Claim 56 as Appellant did not demonstrate how the proposed investigation would have rendered a more favorable outcome probable. (XI AA 2276). As such, Appellant failed to demonstrate deficiency or prejudice. (Id.)

Appellant failed to demonstrate how a better investigation as to the availability of methamphetamine in Las Vegas would have rendered a more favorable result. The likelihood of Mr. Schieck obtaining credible information with regard to where methamphetamine could have been acquired in Las Vegas during a two month window of time more than five years preceding his representation of Appellant is an absurd possibility. Further, even if such information was obtained, it does not establish that Appellant obtained methamphetamine at such location, given the obvious fact that it was available at multiple locations. Even further, such information would negate the evidence of Appellant's guilt provided by her own statements and thus would not have resulted in a more favorable outcome at trial.

Thus, Appellant has failed to show deficiency and prejudice, and the district court did not err in denying Claim 56 in its application of Molina and Strickland.

57. Failure to Object For Confrontation Clause Violations During Zachory Robinson's Testimony

Appellant claimed that counsel was deficient for failing to object to Zachory Robinson's testimony as hearsay, irrelevant, without foundation, and/or as a Confrontation Clause violation because he did not work at Budget Suites at the time of the alleged assault. (VII AA 1423). Appellant claimed such created prejudice as absent Robinson's testimony, the jurors would have returned a verdict of not guilty. (Id.) The district court denied Claim 57 as Appellant's proposed grounds for objection lacked merit, therefore the objections were futile and Appellant could not demonstrate deficiency or prejudice. (XI AA 2276).

Appellant's claim lacks merit as NRS 51.135 and NRS 51.145 allow such testimony as a regularly conducted business activity. Mr. Robinson's testimony at issue in Claim 57 was simply that there were no entries of someone's penis being cut, slashed or cut off contained in the Budget Suites security reports, which were kept as an ordinary business activity, for the time frame of May through July of 2001 (IV AA 736-738). An objection to such testimony that falls within an exception to hearsay is clearly futile. Therefore Appellant has failed to demonstrate deficiency and prejudice, and thus the district court did not err in denying Claim 57 in its application of NRS 51.135, NRS 51.145, Strickland and Ennis.

58. Failure to Move To Disclose Detective Thowsen's Personnel Records

Appellant claimed counsel was deficient for failing to move for discovery of Detective Thowsen's personnel records, which may have disclosed information to diminish Detective Thowsen's credibility. (VII AA 1424-27). Appellant claimed such failure resulted in prejudice because, had information existed to diminish Detective Thowsen's credibility and the defense used such to impeach Detective Thowsen, the jury would have returned a verdict of not guilty. (Id.) The district

court denied Claim 58 as a bare allegation insufficient to warrant relief. (XI AA 2276).

Claim 58 is in fact a bare allegation based on speculation per Hargrove as Appellant did not and cannot show that disclosure of Detective Thowsen's personnel records would have led to information which ultimately would have resulted in acquittal. Appellant's claim fails to provide any basis of support. As such, Appellant has failed to demonstrate deficiency and prejudice, and the district court did not err in denying Claim 58 in its application of Hargrove.

59. Failure to Move for a Directed Acquittal

Appellant claimed counsel was deficient for failing to move for a directed acquittal, resulting in prejudice because Appellant was denied due process and a fair trial. (VII AA 1427-29). The district court denied Claim 59 as it would have denied such motion and this Court already denied Appellant's claim of insufficient evidence on appeal, therefore the motion would have been futile and Appellant did not show deficiency or prejudice. (XI AA 2277); Lobato v. State, Case No. 49087, Order of Affirmance. Further, the district court found the claim was a bare allegation insufficient to warrant relief. (Id.)

Claim 58 is in fact a bare allegation based on speculation per Hargrove as Appellant did not and cannot show that the district court would have granted such motion. To the contrary, the district court noted that it would have denied such motion, and a challenge as to the sufficiency of the evidence on direct appeal was rejected by this Court in Lobato. Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Here, such a claim was futile, thus the Appellant has failed to show deficiency and prejudice. Therefore the district court did not err in denying Claim 59 in its application of Hargrove and Ennis.

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60. Failure to Object to Jury Instructions 26 And 33

Appellant claimed counsel was deficient for failing to object to jury instructions 26 and 33 as altering the State's burden of beyond a reasonable doubt and the presumption of innocence. (VII AA 1429-31). Appellant claimed such failure resulted in prejudice because Appellant was denied due process and a fair trial. (Id.) The district court denied Claim 60 because the proposed objections would have been futile as this Court previously upheld similar instructions. (XI AA 2277); Weber v. State, 121 Nev. 554 (2005); Guy v. State, 108 Nev. 770 (1992). Appellant therefore failed to demonstrate deficiency or prejudice. (XI AA 2277).

Appellant claims that the district court erred in its application of Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992) and Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005), in that the wording of the instructions shifted the burden of proof. The district court did not err in denying Appellant's claim as identical instructions have been upheld by this Court in Guy and Weber. Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Here, such a claim was futile, thus the Appellant has failed to show deficiency and prejudice. Therefore the district court did not err in denying Claim 60 in its application of Strickland, Ennis, Guy and Weber.

61. Failure to Object to Jury Instruction 31

Appellant claimed counsel was deficient for failing to object to jury instruction 31 because the Ninth Circuit allegedly rejected similar instructions and instruction 31 combined with instructions 26 and 33 eliminated the presumption of innocence and the State's burden. (VII AA 1431-34). Appellant claimed such failure resulted in prejudice because the jury was confused as to the proper standards. (Id.) The district court denied Claim 61 because, as the instruction is

required by NRS 175.211 and upheld in Lord v. State, 107 Nev. 28 (1991), counsel was not deficient. (XI AA 2277).

Appellant also claims the district court erred in its application of Lord, erroneously asserting that the reasonable doubt instruction relieved the State of its burden of proof. The district court did not err in denying Appellant's claim as this Court's holding in Lord upholds the exact reasonable doubt instruction at issue and is further mandated as the sole reasonable doubt instruction to be given pursuant to NRS 175.211. As such, Appellant has failed to demonstrate deficiency and prejudice. Thus, the district court did not err in denying Claim 61 in its application of Strickland, Lord and NRS 175.221.

62/63. Failure to Submit a NRS 201.450 Instruction That "Properly Stated" The Law

Appellant claimed that counsel was deficient for failing to submit a jury instruction that NRS 201.450 required the State to prove Appellant had post mortem sexual relations with Bailey (Claim 62). (VII AA 1434-40). Appellant additionally claimed counsel was deficient for failing to object to the State's proposed instruction for NRS 201.450 for creating a strict liability offense and reducing the State's burden of proof. (VII AA 1440-46). Appellant claimed such failures prejudiced Appellant as, had the jury been instructed consistent with Appellant's proposals, it would have returned a verdict of not guilty as to the NRS 201.450 charge. (Id. at 1434-46). The district court denied Claim 62 and 63 as Appellant failed to demonstrate deficiency or prejudice because this Court already rejected the instant argument on appeal, therefore the proposed instruction or objection would have been futile. (XI AA 2277); Lobato v. State, 120 Nev. 512.

The district court correctly denied Appellant's Claims 62 and 63 as this Court previously rejected the alternative instructions proposed by Appellant, which added the element of sexual gratification to the offense, in Lobato. Therefore Appellant has failed to show deficiency. Further, the State's proposed jury

instruction comported word for word with NRS 201.450. (VII AA 1445). No more accurate instruction could have been given than the State's proposed instruction which mirrored the required elements necessary to prove the crime, thus Appellant has failed to show prejudice.

Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Here, such a claim was futile, thus the Appellant has failed to show deficiency and prejudice. Therefore the district court did not err in denying Claims 62 and 63 in its application of Strickland, Ennis, Herrera and NRS 201.450.

64. Failure to Explain That the State Did Not Prove Appellant's Guilt Beyond a Reasonable Doubt

Appellant claimed counsel was deficient for failing to explain the State's burden and that it failed to meet such burden. (VII AA 1446-47). Appellant claimed such created prejudice because, had defense counsel made the proposed statements, the jury would have acquitted Appellant. (Id.) The district court denied Claim 64 as Appellant failed to demonstrate deficiency or prejudice. (XI AA 2277-78). The district court noted that review of closing statements is highly deferential to counsel as the presentation of the defense is ultimately defense counsel's responsibility. (Id.)

Appellant claims the district court erred in applying Yarborough by attempting to distinguish the facts of this case. Appellant's claim as to Yarborough is erroneous in that she asserts that Mr. Schieck was deficient for failing to make two specific arguments as to alibi and alternate theory of the case, whereas the district court correctly applied Yarborough in denying the claim based upon the deference given to defense counsel's closing because of the broad range of legitimate defense strategies available. Further, defense counsel's decisions as to what to emphasize in his closing argument is a strategic decision per Strickland. See also Rhyne, supra. Thus, Appellant has failed to demonstrate deficiency.

Appellant's Claim 64 focuses on the element of murder that the State must prove she was within Clark County when she committed the crime. Based upon the entirety of the evidence presented by the State, the jury was in a position to make an obvious inference with regard to the jurisdictional element of the crime. Further, Mr. Schieck did argue at trial that Appellant was not in Las Vegas at the time of the killing as part of the alibi defense presented. (V AA 1017-1020). Thus, Appellant has failed to establish prejudice. Therefore the district court did not err in denying Claim 64 in its application of Strickland, Yarborough and Rhyne.

65. Failure to Object During Opening Statements

Appellant claimed counsel was deficient for failing to object during the State's opening statement to "dozens of false statements". (VII AA 1448-49). Appellant claimed such failure created prejudice because the State tainted the jury and but for the State's comments, the jury would have returned a verdict of not guilty. (Id.) The district court denied Claim 65 as the statements did not constitute misconduct therefore objection would have been futile. (XI AA 2278). As such, Appellant failed was not entitled to relief. (Id.)

Appellant claims the district court erred in its application of Rice v. State, 113 Nev. 1300, 949 P.2d 262 (1997), in claiming that the prosecutor made statements in opening arguments which he could not prove at trial. However, Claim 65 is another example of Appellant twisting semantics, whereas the prosecutor's statements were simply an interpretation of the evidence ultimately presented which was in opposition to Appellant's interpretation and characterization of the same. Thus, the district court did not err in its application of Rice in finding that Appellant failed to demonstrate that any of the prosecutor's statements could not be proven at trial or were made in bad faith. Thus, Appellant has failed to demonstrate deficiency and prejudice, and the district court did not err in denying Claim 65 in its application of Strickland and Rice.

66. Failure to Object to Closing Statements as to When Bailey's Skull Was Fractured

Appellant claimed counsel was deficient for failing to object to various statements during the State's closing and rebuttal statements. (VII AA 1449-51). Appellant claimed such failure resulted in prejudice as, had the jury heard a version of events consistent with that proposed by Appellant, they would have returned a verdict of not guilty. (Id.) The district court denied Claim 66 as Appellant failed to demonstrate deficiency or prejudice because counsel is given wide latitude in deciding how to represent a client during closing statements. (XI AA 2278).

Appellant claims the district court erred in applying Yarborough by attempting to distinguish the facts of this case. Appellant's claim as to Yarborough is erroneous in that she asserts that Mr. Schieck was deficient for failing to object to the prosecutor's closing and rebuttal arguments concerning Bailey's head wounds, whereas the district court correctly applied Yarborough in denying the claim based upon the deference given to defense counsel in deciding how to best represent a client during closing arguments. Further, defense counsel's decisions as to what to emphasize in his closing argument is a strategic decision per Strickland. See also Rhyne, supra. Thus, Appellant has failed to demonstrate deficiency.

While Appellant does not agree with the State's interpretation of the evidence as argued in closing and rebuttal, the jury was presented with the evidence and was free to make their own inferences and decisions based upon the same. Additionally, Mr. Schieck presented Appellant's interpretation of the evidence during his closing. As such, Appellant has failed to show prejudice, and thus the district court did not err in denying Claim 66 in its application of Strickland and Yarborough.

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67. Failure to Object and Move for a Mistrial Due to Rebuttal Statement as to Personal Opinion of Guilt

Appellant claimed counsel was deficient for failing to object and move for a mistrial upon the State's expression of what Appellant construed as a personal opinion of Appellant's guilt. (VII AA 1452-53). Appellant claimed such failure resulted in prejudice as the comment led to an impartial jury and an unpreserved issue for appeal. (Id.) The district court denied Claim 67 as the State's comment was not improper therefore an objection and/or motion for mistrial would have been futile. (XI AA 2278). As such, Appellant failed to demonstrate prejudice or deficiency. (Id.)

Appellant claims the district court erred in its application of Dominguez v. State, 112 Nev. 683, 917 P.2d 1364 (1996), in that the prosecutor's directives to the jury went beyond mere communication of conviction. Appellant fails to distinguish the prosecutor's comments from the holding in Dominguez in that it is permissible for a prosecutor to provide his belief in Appellant's guilt as a conclusion from the evidence presented. The district court did not err in its application of Dominguez, and thus any objection would have been futile. Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Here, such a claim was futile, thus the Appellant has failed to show deficiency and prejudice. Therefore the district court did not err in denying Claim 67 in its application of Strickland, Dominguez and Ennis.

68. Failure to Object To Closing and Rebuttal Statements Disparaging Witness Credibility

Appellant claimed counsel was deficient for failure to object to the State's comments during closing which Appellant described as disparaging the credibility of Appellant's witnesses. (VII AA 1453-55). Appellant claimed such failure resulted in prejudice because, had counsel objected and the district court sustained each objection, the jury would have returned a verdict of not guilty. (Id.) The

district court denied Claim 68 as the State's comments were not objectionable, therefore any objection would have been futile. (XI AA 2278-79). As such, Appellant failed to demonstrate deficiency or prejudice. (Id.)

Appellant claims the district court erred in its application of Rowland. Appellant attempts to distinguish the facts in Rowland, by asserting that the evidence of guilt in Rowland was much stronger. However, Appellant ignores the principle established in Rowland, that reasonable latitude shall be given to the prosecutor to argue the credibility of witnesses when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, which was the basis for the district court's application of Rowland in denying Appellant's claim. Therefore, no misconduct occurred when the prosecutor raised argument as to the credibility of Appellant's alibi witnesses, and thus, the district court did not err in denying Appellant's claim pursuant to Rowland, noting that any such objection would have been futile. Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Here, such a claim was futile, thus the Appellant has failed to show deficiency and prejudice. Therefore the district court did not err in denying Claim 68 in its application of Strickland, Rowland and Ennis.

69. Failure to Object and Move for a Mistrial to Closing and Rebuttal Statements as to Appellant Being "Bloody" After the Crime

Appellant claimed counsel was deficient for failing to object and move for a mistrial in response to the State's comments during testimony regarding blood on Appellant and/or in her car after the killing. (VII AA 1455-58). Appellant claimed such resulted in prejudice because the State's comments contaminated the jury and counsel's failure to object resulted in an unpreserved issue for appeal. (Id.) The district court denied Claim 69 as the State's comments were permissible therefore

any objection would have been futile. (XI AA 2279). The district court found Appellant therefore failed to demonstrate deficiency or prejudice. (Id.)

Appellant claims the district court erred in its application of Green. Appellant erroneously asserts that there was no evidence presented with regard to blood in her car which would allow the application of Green in permitting the prosecutor to comment on the testimony and ask the jurors to draw inferences from the evidence. To the contrary, the positive presumptive test for blood in Appellant's car provided the basis for the prosecutor to comment on the evidence pursuant to Green. Thus, the prosecutor's comments were permissible, no misconduct occurred and any objection would have been futile. Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Here, such a claim was futile, thus the Appellant has failed to show deficiency and prejudice. Therefore the district court did not err in denying Claim 69 in its application of Strickland, Green and Ennis.

70. Failure to Object or Move for a Mistrial Due to Prosecutorial Misconduct for Various Additional "Improper" Statements

Appellant claimed counsel was deficient for failing "to object to each of more than two hundred and fifty improper and prejudicial closing and rebuttal arguments" and/or move for a mistrial due to the comments. (VII AA 1458-67). Appellant claimed such failure resulted in prejudice because the State's comments tainted the jury and the failure to object resulted in an unpreserved error on appeal. (Id.) The district court denied Claim 70 as Appellant's characterization of the statements as "false arguments" are bare allegations insufficient to warrant relief. (XI AA 2279). The district court found the proposed objections would have been futile therefore Appellant failed to demonstrate deficiency or prejudice. (Id.)

Appellant's Claim 70 is nothing more than a sweeping allegation not supported by a factual basis. Many of the statements raised by Appellant have

already been discussed above. Appellant claims that the alleged improper statements were used as a substitute for evidence of her guilt. However, the jury was presented with the evidence offered by both the State and Appellant, and was free to make their own determinations independent of the opposing argument and interpretations of the evidence presented by the State and Appellant. Thus, the district court did not err in its application of Hargrove as Appellant's claim was in fact a bare allegation, and any such objection would have been futile. Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Here, such a claim was futile, thus the Appellant has failed to show deficiency and prejudice. Therefore the district court did not err in denying Claim 70 in its application of Strickland, Hargrove and Ennis.

71. Failure to Retain a Dental Expert

Appellant claimed counsel was deficient for failing to retain a dental expert to testify that Bailey's teeth were not knocked out by a hit with a baseball bat. (VII AA 1468-70). Appellant claimed such failure prejudiced Appellant because, had the jury heard such testimony, it would have returned a verdict of not guilty. (Id.) The district court denied Claim 71 as decisions as to what witnesses to call is counsel's ultimate responsibility. (XI AA 2279). Additionally, Appellant failed to demonstrate deficiency or prejudice. (Id.) To the extent Appellant was attempting to raise a substantive claim, the district court found the claim was an alternate opinion of the evidence presented at trial, therefore such was not "new" evidence and did not establish actual innocence. (Id.)

It was ultimately Mr. Schieck's responsibility to control the presentation of defense and what witnesses to call pursuant to Strickland and Rhyne. Thus Appellant has failed to demonstrate deficiency by counsel not retaining a dental expert.

Further, the affidavit of Appellant's dental expert, Mark Lewis DDS, contained in her petition, does nothing more than surmise that a bat was not used to knock Bailey's out because Dr. Lewis would expect the teeth to be fragmented, and not in tact, because of the force necessary to remove the teeth with a bat. Mr. Lewis based his opinion on photos and testimony. As Appellant pointed out, no dental expert testified at trial. Dr. Lewis made a generalized opinion with regard to an amount of force necessary when he had not reviewed dental records of Bailey nor knew what condition Bailey's gums and teeth were in at the time of the crime. Obviously the amount of force required to knock out someone's teeth can vary greatly depending upon an individual's dental health. Dr. Lewis provided no basis for analysis as such. Additionally, whether or not a bat was used to knock out Bailey's teeth is neither exculpatory nor determinative of whether or not Appellant killed him. Thus, Appellant has failed to establish prejudice.

Additionally, the opinion of Dr. Lewis, or another dental expert, was available before or during trial with reasonable diligence, and thus is not new evidence pursuant to D'Agostino.

Therefore, the district court did not err in denying Claim 71 in its application of Strickland, Rhyne, Herrera and D'Agostino.

72. Failure to Move For a Judgment of Acquittal Because the State Failed To Prove Appellant Was In Clark County at the Time of the Killing

Appellant claimed counsel was deficient for failing to move to set aside the verdict alleging the State failed to prove Appellant's guilt beyond a reasonable doubt. (VII AA 1471-73). Appellant claimed such failure resulted in prejudice because such failure violated Appellant's right to due process and a fair trial. (Id.) The district court denied Claim 72 because, as this Court found the State presented sufficient evidence to support Appellant's conviction, the law of the case barred

Claim 72. (XI AA 2279). Additionally, the district court found Appellant failed to demonstrate deficiency or prejudice. (Id.)

Appellant claims the district court erred in its application of Hall by loosely asserting that the law and facts previously ruled upon are different. Appellant's claim is erroneous as she previously raised the issue of sufficiency of the evidence on direct appeal, and this Court rejected such claim in Lobato. Therefore, the law of the case barred Appellant from asserting Claim 72. Thus, Appellant has failed to show deficiency.

Further, and as discussed previously in Claim 64, based upon the entirety of the evidence presented by the State, a fact finder was in a position to make an obvious inference that Appellant committed the killing within Clark County, with regard to the jurisdictional element of the crime. Therefore, Appellant has failed to establish prejudice. Thus, the district court did not err in denying Claim 72 in its application of Strickland and Hall.

73. Failure to Move for DNA Testing Of Crime Scene Evidence By Way of New Techniques

Appellant claimed counsel was deficient for failing to file a motion for DNA testing by way of new techniques. (VII AA 1473-78). Appellant claimed such failure lead to prejudice because, had counsel requested DNA testing and the district court granted such motion, new DNA techniques may demonstrate that her DNA was not on various items at the crime scene. (Id.) To support such claim, Appellant quoted a letter allegedly sent to trial and appellate counsel from a blog writer outlining potential opportunities for DNA testing in Appellant's case. (Id.) The district court denied Claim 73 as a bare allegation insufficient to warrant relief as the letter carried little weight. (XI AA 2280). Further, the district court found Appellant failed to demonstrate how the proposed testing would have rendered a more favorable outcome probable and therefore failed to demonstrate prejudice.

(Id.) Additionally, the district court noted the petition is intended to challenge counsel's performance at trial, at which time the quoted science did not exist. (Id.)

Appellant claims the district court erred in its application of Hargrove. Appellant predicates this claim through her erroneous interpretation of Herrera. Appellant bases Claim 73 on a letter from an internet blogger claiming new scientific techniques are now available. The District court did not err in denying Appellant's claim as the letter carried less weight than a post conviction affidavit which is already viewed with suspicion pursuant to Herrera. As such, Claim 73 is a bare allegation pursuant to Hargrove. Appellant has failed to establish deficiency, in that the alleged new scientific technique was not available at the time Mr. Schieck represented Appellant. Further, Appellant has failed to demonstrate how the proposed testing and further investigation would render a more favorable result, and thus no prejudice occurred. Therefore, the district court did not err in denying Claim 73 in its application of Strickland, Hargrove, Herrera and Molina.

Most importantly, Appellant's Claim 73 fails to establish prejudice because her present counsel filed a Petition Requesting Post-Conviction DNA Testing Pursuant to NRS 176.0918 on March 1, 2011, which was denied by the district court with Findings of Fact and Conclusions of Law entered on July 27, 2011. Appellant filed Notice of Appeal on September 1, 2011, and the Nevada Supreme Court, Case Number 59147, dismissed Appellant's appeal on January 12, 2012, with Remittitur issuing on February 7, 2012. Thus, Appellant's Claim 73 is barred by the law of the case as outlined above. Therefore, Appellant's Claim 73 was correctly denied, in that had Mr. Schieck moved for DNA testing as present Appellant counsel did, such motion would have been denied, and thus no deficiency or prejudiced occurred.

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IV
INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

74. Failure to Present Specific Theories within Appellant's Sufficiency of the Evidence Claim on Appeal

Appellant claimed counsel was deficient on appeal for failing to "correctly" argue Appellant's sufficiency of the evidence claim on appeal. (VII AA 1478-89). Appellant alleged such counsel's failure to present the exact argument she presented in the petition results in prejudice because, had counsel presented such argument, this Court would have vacated Appellant's conviction. (Id.) The district court denied Claim 74 as counsel did in fact raise sufficiency of the evidence on appeal, therefore the record belied Appellant's claim. (XI AA 2280); Lobato v. State, Case No. 49087, Order of Affirmance; Hargrove, 100 Nev. 498. Further, the district court found Appellant failed to demonstrate deficiency or prejudice. (Id.)

Appellant claims the district court erred in its application of Hall by loosely asserting that the law and facts previously ruled upon are different. Appellant's claim is erroneous as she previously raised the issue of sufficiency of the evidence on direct appeal, and this Court rejected such claim in Lobato. Thus, Appellant's claim is belied by the record. Therefore, Appellant has failed to show deficiency and prejudice, and the district court did not err in denying Claim 74 in its application of Strickland and Hall.

75. Failure to Argue Appellant's Statements Were Involuntary on Appeal

Appellant claimed counsel was deficient on appeal for failing to "correctly brief and argue" that Judge Vega incorrectly applied the doctrine of the law of the case in denying Appellant's motion to exclude her statement to police. (VII AA 1489-95). Appellant claimed such failure led to prejudice as, had appellate counsel argued the claim consistent with Appellant's proposed argument, this Court would have vacated Appellant's convictions. (Id.) The district court denied Claim 75 as

the record belied Appellant's claim that counsel did not raise the issue on appeal. (XI AA 2280); Lobato v. State, Case No. 49087, Order of Affirmance. Additionally, the district court found Appellant failed to demonstrate deficiency or prejudice. (Id.)

Appellant also claims the district court erred in its application of Hall by loosely asserting that the law and facts previously ruled upon are different. Appellant's claim is erroneous as she previously raised the issue of the denial of her Motion In Limine to exclude her statement to police on direct appeal, and this Court rejected such claim in Lobato. Thus, Appellant's claim is belied by the record. Therefore, Appellant has failed to show deficiency and prejudice, and the district court did not err in denying Claim 75 in its application of Strickland, Hall, and Lobato.

76. Failure To Claim Appellant's Convictions Were Based On False Assumptions Of Fact In Requesting Rehearing And Reconsideration En Banc

Appellant claimed appellate counsel was deficient for failing to make certain claims in the petition for rehearing to this Court. (VII AA 1495-02). Specifically, Appellant claimed counsel should have argued this Court affirmed Appellant's conviction based on two false assumptions of fact: first, that based on Lobato's admission there was substantial evidence that she committed the homicide; and second, that the State introduced evidence of positive luminol and phenolphthalein tests for blood. (Id. at 1495). Appellant claimed this failure resulted in prejudice because, had appellate counsel made such argument, either this Court would have reversed itself or the factual "errors" could have been alleged in the petition for reconsideration en banc. (Id.) The district court denied Claim 76 as the proposed argument was futile. (XI AA 2280). As such, the district court found Appellant failed to demonstrate deficiency or prejudice. (Id.)

Appellant's argument is frivolous, and therefore it would have been futile for appellate counsel to raise the issue. Appellant's assertion that her admission, which provided this Court with substantial evidence that she committed the homicide, was a false assumption of fact is belied by the record. Appellant made incriminating statements uniquely tying her to the killing, the majority of which were tape recorded. Further, Appellant's assertion that the basis of this Court's affirmance of her conviction with regard to the evidence of positive luminol and phenolphthalein tests for blood was a false assumption of fact is also belied by the record. Evidence presented through the testimony of Ms. Renhard and Mr. Wahl clearly established that several areas inside of Appellant's car tested presumptively positive for the presence of blood. (III AA 332-337, 510-515). Further, Mr. Wahl elaborated on the condition of the seat covers appearing to have been recently laundered and explained that a confirmatory test for blood fail when the blood has been degraded by heavy cleaning solvents. (Id.)

Appellant also claims the district court erred in applying Ennis, however, as discussed above Appellant's assertion is based on the premise that the claim is not futile. Here, such a claim was futile, thus the Appellant has failed to show deficiency and prejudice. Therefore the district court did not err in denying Claim 76 in its application of Strickland and Ennis.

V
CUMULATIVE ERROR

77. Cumulative Error Based On Ineffective Assistance of Trial and Appellate Counsel

Appellant claimed ineffective assistance based on the cumulative effect of the foregoing alleged errors. (VII AA 1502). The district court denied Claim 77 as guilt was not a close call because Appellant's own words constituted compelling evidence of the crime and two (2) separate juries found Appellant guilty. (XI AA 2281).

Appellant claims the district court erred in its application of Mulder v. State, 116 Nev. 1, 992 P.2d 845 (2000). Appellant claims that Mulder applies to the cumulative effect of trial errors reviewed on direct appeal, and raises Claim 77 with reference to the alleged errors delineated in Claims 27-76 and 79. The State hereby incorporates all aforementioned arguments and analysis in this brief pertaining to Appellant's claims 27-76 and 79. As such, the district court did not err in applying Mulder to the issue of cumulative error.

Additionally, Appellant argues that the alleged series of errors delineated in claims 27-76 and 79, when taken together, amount to reversible error. Appellant cites no authority for the proposition that instances of ineffective assistance of counsel are amenable to cumulative-error analysis and the Nevada Supreme Court has never issued such a holding. But cf. Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (concluding that prejudice may result from cumulative effect of multiple counsel deficiencies). The State submits that such an analysis is not appropriate when determining whether trial or appellate counsel was ineffective. Nevertheless, to the extent that this Court entertains an independent cumulative error claim, Appellant has failed to make out a valid claim for any one of the issues she has raised and therefore there is no "error" to cumulate. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Therefore, the district court did not error in denying Claim 77.

78. Cumulative New Evidence Requires Dismissal of the Charges or a New Trial

Appellant claimed the cumulative effect of her various claims of "new" evidence demonstrating "actual innocence" warrants reversal. (VII AA 1502). The district court denied Claim 78 as Appellant's claims of new evidence were insufficient to warrant relief. (XI AA 2281).

Appellant's claim with regard to the cumulative effect of her new evidence proving her actual innocence is based upon Appellant's freestanding claims of actual innocence presented in Claims 1-24. The State hereby incorporates all aforementioned arguments and analysis contained in this brief pertaining to Appellant's Claims 1-24. As such, the district court did not err in denying Appellant's claim. Further, the district court did not err in its application of all aforementioned holdings pertaining to Appellant's Claims 1-24.

Appellant claims the Schlup standard for gateway claims of actual innocence should be applied to Claims 1-24. However, Appellant is again mistaken, as Claims 1-24 represent freestanding claims of actual innocence as previously addressed. As previously presented, Herrera provides the correct standard for evaluating freestanding claims of actual innocence in that Appellant must unquestionably establish her innocence. While this Court does not recognize freestanding claims of actual innocence, it is clear through the incorporation of the State's aforementioned arguments and analysis, that Appellant's Claims 1-24 fail to meet the extraordinarily high burden of unquestionably establishing Appellant's innocence.

79. Failure to Diligently Represent Appellant Before, During or After Trial

Appellant claimed ineffective assistance by alleging counsel failed to diligently represent Appellant because special public defender David Shieck did not authorize unlimited funds for various expert witnesses. (VII AA 1504-14). Appellant cited a letter allegedly sent to Mr. Shieck prior to trial from co-counsel Shari Greenberger outlining various differences of opinion and difficulties in communication. (Id.) Appellant reiterated the foregoing ineffective assistance claims as prejudice created by Mr. Shieck's "indifference" to the case. (Id.) The district court denied Claim 79 as a bare allegation insufficient to warrant relief. (XI

AA 2281). The district court also found Appellant failed to demonstrate deficiency or prejudice. (Id.)

Appellant attempts to distinguish her case from Hargrove by claiming she has specific facts and evidence to support her allegation, which Hargrove did not. Appellant's specific facts and evidence amount to a summation of the previously raised ineffective assistance claims and letter from co-counsel acknowledging differences in opinion. The State hereby incorporates all arguments and analysis pertaining to Appellant's ineffective assistance claims contained in this brief. As such, Appellant has failed to show deficiency by counsel and no prejudice occurred. Thus, the district court did not err in denying Appellant's claim 79.

CONCLUSION

WHEREFORE, based upon the foregoing, the State respectfully requests that this Honorable Court affirm the district court's denial of Appellant's Petition for Writ of Habeas Corpus.

Dated this 5th day of July, 2012.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more and contains 14,000 words or does not exceed 30 pages.
3. **Finally, 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 NRAP 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.

Dated this 5th day of July, 2012.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 5th day of July, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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