IN THE SUPREME COURT OF THE STATE OF NEVADA

***

KIRSTIN BLAISE LOBATO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

APPELLANT'S REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page Numbers**

Statutes

Rules

I. STATEMENT OF THE FACTS.

The Appellant Kirstin Lobato ("Lobato") makes the following corrections to material misstatements in the "Statement Of The Facts" in the Respondent's Answering Brief (hereinafter "RAB", "Answer" or "State").

The record belies the State's factually false assertion three times Lobato made a "confession." [RAB 5] There was no testimony Lobato made a "confession" or admission to Duran Bailey's homicide – or to even being in Clark County on July 8, 2001 – and there is no such "confession" or admission in her police Statement on July 20, 2001[1] (hereinafter "Statement"). [Exhibit 125A]

The record belies the State's multiple assertions Lobato had unique knowledge of Bailey's injuries, when her Statement doesn't describe a single one of Bailey's more than 30 unique post or ante-mortem injuries, including his fatal head injury, and she doesn't mention blood. [Exhibit 125A; AOB 4; 1 App. 26; 2 App. 415-6; RAB 8] The record belies the State's assertion Bailey smelled like Lobato's Budget Suites Hotel assailant because there was no testimony Bailey smelled "Like old alcohol and dirty diapers almost." [Exhibit 125A 4; RAB 8; AOB 20]

The record belies the State's context of Lobato's statement – "I didn't think anybody would miss him" – because she was referring to the "really big" man who

[1] On February 23, 2012 this Court granted Lobato's Motion to Transmit Exhibit 125A which is an audiotape of her interrogation on July 20, 2001. The tape's transcript was not admitted at trial but was presented to the jury by video display. [3 App. 652] The page numbers herein and Lobato's Opening Brief refer to the audiotape's transcript.

attempted to rape her at the Budget Suites Hotel that she identified occurred weeks prior to July 8, 2001. [Exhibit 125A 8, 27; RAB 6]

The State materially takes out of context both Detective Thomas Thowsen's ("Thowsen") testimony – "I'm sorry daddy. Told you I did something awful." – about Lobato's comment to Lorenzo Lobato, because she was referring to their conversation in June 2001 – prior to Bailey's July homicide[2], and Thowsen's testimony about Lobato's comment to Rebecca Lobato that immediately preceded her comment to Lorenzo, "Mom, I did it, now I have to do what I have to do." [AOB 15; RAB 7; 5 App. 912; 3 App. 654; Reply Exhibit 2]

The record belies the State's assertion regarding Dixie Tienken's testimony about when her conversation with Lobato occurred, because Tienken's testimony and her unrebutted Affidavit support the conversation could have occurred in June 2001 – prior to Bailey's July homicide. [2 App. 298; 8 App. 1593; RAB 4] The record belies the State's assertion Tienken testified Lobato told her, "I've done something bad," because the State's Attorney made that statement. [2 App. 298; RAB 4] Tienken testified repeatedly she and Lobato did Internet research on Tienken's computer "back to June 1st" for a man with an injured penis, so the record belies the State's false

[2] Lorenzo Lobato's Affidavit, and his testimony she made the comment in June 2001, which was stricken after the State objected [5 App. 912], can be considered for their probative value in Lobato's habeas proceeding for two reasons: the State's misleading assertion opens the door to rebuttal; and her Petition includes actual innocence claims that allow consideration of "all the evidence" including non-admitted evidence. Schlup v. Delo, 513 U.S. 298, 327-328 (1995); House v. Bell, 547 U.S. 518, 538 (2006).

assertion twice they only looked back to July 1, 2001. [2 App. 315, 399; RAB 4-5]

The record belies the State's assertions regarding CSA Louise Renhard's testimony because she didn't testify Lobato's car seat covers were "laundered," and she didn't testify the positive preliminary luminol tests were for "blood" while testifying luminol "is not very specific" and "it reacts to other irons" and "coppers" bearing substances. [3 App. 510-512; RAB 7]

The record belies the State's assertions regarding crime lab technician Thomas Wahl's testimony because he didn't testify the weak positive preliminary luminol and phenolphthalein test results were "for blood," he did testify the confirmatory tests were "negative" for blood, and he didn't testify cleaning of Lobato's car seat "would not yield a confirmatory result." [RAB 7; 2 App. 335-6] Furthermore, Wahl testified "I'm not an expert in that [blood cleaning]…" [2 App. 336-7]

II. ARGUMENT.

The State fails to adequately address Lobato's arguments in her **original and timely** post-conviction habeas corpus petition ("Petition") she was 165 miles from Las Vegas at the time of Bailey's homicide and she is actually innocent of her convicted crimes. The State raises new matters and makes a multitude of factual and legal assertions belied by the record concerning the District Court's prejudicial legal and factual errors in denying Lobato's 79 grounds for relief.

Any significant issue not addressed by the State is "a confession of error" under

NRAP 31(d), Polk v. State, 126 Nev.Op.No. 19, 233 P.3d 357, 360-61 (2010) (In granting habeas relief, "we invoke our authority under NRAP 31(d) and consider the State's silence to be a confession of error on this issue."), and Bates v. Chronister, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984); A Minor v. Mineral Co. Juv. Dep't, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979); and Moore v. State, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (Hereinafter "*Polk et al*."). The State cannot avoid failing to address significant issues by generally asserting: "the State notes it disputes all claims of error Appellant alleges against the State and/or the district court." [RAB 8]

A. NEW EVIDENCE GROUNDS.

1. Material new matters, errors and omissions by the State.

The record belies the State's assertion grounds "1-24 are based solely on Appellant's alleged innocence," when they assert her convictions violate her state and federal rights "to due process of law and a fair trial." [RAB 12 n.2; 6 App. 1173-1296 and 7 App. 1502]

The State misstates State ex rel. Orsborn v. Fogliani, 82 Nev. 300, 417 P.2d 148 (1966) in arguing it is inapplicable to Lobato's new evidence grounds. [RAB 13; AOB 35-41, 49, 52] The State doesn't address this Court collaterally reviewed Orsborn's new evidence not presented at the time of his conviction for which he was sentenced to prison, and granted relief under NRS 34.360 and his circumstances that "justify the extraordinary remedy" to rectify a manifest injustice. *Id*. at 302.

The State doesn't address that like *Orsborn*, Lobato's new evidence grounds are filed under NRS 34.360. [AOB 35-7, 48-9]

The State doesn't address this Court relied on *Orsborn* in ruling in Snow v. State, 105 Nev. 521, 523-4, 779 P.2d 96 (1989) new evidence of Snow's innocence could be collaterally reviewed in a habeas corpus petition which protected Snow's due process and equal protection rights, and that this Court applied *Snow's* holding to include prisoners not sentenced to death in D'Agostino v. State, 112 Nev. 417, 425, 915 P.2d 264, 269 (1996). [AOB 35-7]

The State falsely asserts "The holdings in Snow and D'Agostino create a very narrow exception expressly limited to capital cases," because no exception to NRS 176.515(3) was created in *Snow*, 105 Nev. at 523-4; and *D'Agostino*, 112 Nev. at 425. [RAB 10] Based on the non-capital *Orsborn* case, *Snow* and *D'Agostino* protect every prisoner's due process and equal protection rights from being prejudiced by NRS 176.515(3)'s two-year time limit. Herrera v Collins, 506 U.S. 390, 405 (1993) specifically rejects "that under our Constitution" there is a difference between new evidence habeas claims by a prisoner sentenced to prison or death. The State doesn't address the significant issue Lobato was prejudicially deprived of equal protection by the District Court's failure to review her new evidence grounds. [AOB 34] Allen v. State, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984); See also, Truax v. Corrigan, 257 U.S. 312, 336 (1921).

Except for Ground 23, the record belies the State's new assertion "Claims 1-24 are "freestanding" claims of actual innocence," and the State cites no legal authority review of Ground 23 would have a "disruptive effect," which wouldn't be possible with dismissal of her charges. [RAB 12-3; AOB 79-80] The State acknowledges *Herrera* supports habeas review if state law doesn't provide for "freestanding claims of actual innocence." [RAB 12] A pardon under NRS Chapter 213 only relieves "penalties and forfeitures," Nevada v. Foley, 15 Nev. 64, 67 (1880), thus per *Herrera* Lobato can only pursue Ground 23's claim in her Petition.

The record and federal law belie the State's new assertion, "Appellant confuses "gateway" and "freestanding" claims of actual innocence," because Lobato's new evidence grounds assert her convictions violate the U. S. Constitution, so her claims would be federal claims under 28 U.S.C. §2254(a) if they were in a federal petition. [RAB 9]

The State doesn't address the significant issue new evidence in Lobato's Petition is evidence not presented at trial and it is irrelevant when that evidence became known to her. [AOB 37-40]

The State doesn't address the significant issue the standard of proof for Lobato's actual innocence grounds (excluding Ground 23) is, "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" presented in habeas proceedings. Schlup v. Delo, 513 U.S. 298, 327 (1995) [AOB 42-4]

The State falsely asserts *Herrera* sets an "extraordinarily high" proof standard for Ground 23's "freestanding" factual innocence claim because the *Herrera* comment was hypothetical and only relates to federal courts. 390 U.S. at 417, 426; [RAB 12] The State ignores state courts unaffected by federalism have ruled Ground 23's freestanding factual innocence claim is evaluated by a "clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment," State ex rel Amrine v. Roper, 102 S.W.3d 541, 548 (Mo. 2003) (and cases cited therein), while Illinois has adopted the preponderance proof standard. People v. Washington, 171 Ill.2d 475, 479-80, 665 N.E.2d 1330, 1337 (1996).

The State doesn't address only collateral review applies to Lobato's Petition's new evidence grounds under NRS 34.360, while spending five pages irrelevantly discussing direct review of a new trial motion under NRS 176.515(3). [RAB 9-15; AOB 34-53]

The record belies the State's assertion: "In this case, the time limitation procedural bar of NRS 176.515(3) took effect on October 14, 2011." [RAB 11] This Court ruled NRS 176.515(3)'s two-year time-limit begins "after the verdict or finding of guilt." *Snow*, 105 Nev. at 523-4, and not "after the conclusion of all appeals..." *D'Agostino*, 112 Nev. at 425. Lobato's verdict was on October 6, 2006 and the two-year time bar took effect on October 7, 2008, thus the State falsely asserts "the procedural bar of NRS 176.515(3) was not in effect when Appellant

raised new evidence claims in a habeas petition" filed on May 5, 2010. [RAB 11-2]

Lobato filed a timely Petition under NRS 34.360, yet the State falsely asserts: "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 (1998)." [RAB 10] The State only cites cases involving an NRS 176.515 motion which includes *Hennie*, and disregards NRS 176.515(3) doesn't apply to an untimely motion or habeas petition. *Snow*, 105 Nev. at 523-4. [RAB-10-1]

The record belies the State's assertion Lobato doesn't specifically argue *D'Agostino* supports collateral review of her new evidence. [RAB 15; AOB 48-9]

2. Common material new matters, errors and omissions by the State.

The following apply to new evidence Grounds 1-24 and 78 as **highlighted** except where noted.

The record belies the State's assertions the District Court denied Grounds 1-24 "pursuant to NRS 176.515(3) and Hennie." [RAB 11; 11 App. 2287] The District Court didn't cite *Hennie* and didn't deny **any** of **Grounds 1-24** on the basis of NRS 176.515(3), thus the State falsely argues, "Therefore, the district court didn't abuse its discretion in denying Claims 1-24 on such basis." [*Id.*]

The record belies the State's assertion **Grounds 5-22 and 24** were denied based on *D'Agostino*. [RAB 12; 11 App. 2287] The State doesn't address the District Court prejudicially misapplied the direct review standards of a new trial

motion and *D'Agostino* to deny **Grounds 1-4, 23 and 78**. [AOB 35-44, 48-9; 11 App. 2287, 2291; RAB 10-15]

The State falsely asserts 27 times regarding **Grounds 1-24 and 78** a non-existent quote from *Herrera* that for relief Lobato would have "to "unquestionably establish" her innocence." [RAB 12-36, 92]

The record belies the State's assertion 24 times regarding **Grounds 1-22, 24 and 78** that those grounds are "free-standing" claims of factual and actual innocence. [RAB 16-36, 92; 6 App. 1173-1296 and 7 App. 1502]

The State confesses error under *Polk et al*. by failing to address the significant issues: "...none of NRS 34.810 provisions apply to **Grounds 6-14, 16-24 and 78** in Lobato's original and timely Petition," and the District Court prejudicially misapplied NRS 34.810's provisions related to an untimely or second or successive petition to deny the above grounds. [AOB 52; RAB 15; 11 App. 2282, 2287, 2291] See, State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Given the untimely and successive nature of Riker's petition…") The State miscites State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003) as a defense to the State's District Court waiver of procedural default as an affirmative defense because *Haberstroh* only relieves the State from asserting procedural default for a successive petition. *Id.* at 180; [RAB 15; AOB 52-3] Consistent with Vang v. Nevada, 329 F.3d 1069, 1073 (9th Cir. 2003) the Supreme Court ruled the State's waiver of procedural default can require review of

a petitioner's claims. Wood v. Milyard, 132 S.Ct. 1826, 1834-5, 566 U.S.__(2012). The State doesn't address there was no legal basis for the District Court's *sua sponte* application of NRS 34.810 to the above grounds, and doesn't assert harmless error. *Vang*, 329 F.3d at 1073. [RAB 15; AOB 52-3; 11 App. 2287, 2291]

The State doesn't allege the District Court erred not finding any of Lobato's more than thirty alibi, expert, third-party culprit and fact witnesses are not credible, reliable and trustworthy with unrebutted new material evidence not presented at trial. [11 App. 2265-69, 2281; AOB 45, 50]

The State confesses error under *Polk et al.* by failing to address the significant issue the District Court prejudicially erred violating Lobato's constitutional rights by rejecting her expert evidence "in support of new evidence **Grounds 1-4, 7-8, 10-13, 18, 23-24, and 78**." [AOB 44-8; 11 App. 2265-69, 2281] The State doesn't assert harmless error.

The State confesses error under *Polk et al.* by failing to address the District Court prejudicially erred denying **Grounds 1-4, 7-13, 18, 23-24 and 78** contrary to House v. Bell, 547 U.S. 518, 542-4, 552-4 (2006) in which habeas relief was granted "based on new expert evidence that was an elaboration or opinion based upon the evidence available and presented at trial." [AOB 48; 11 App. 2265-69, 2281]

The State confesses error under *Polk et al.* by failing to address the significant issue the District Court prejudicially misapplied *Herrera* to summarily deny review of

Lobato's new witness evidence on its merits in **Grounds 7-9, 11-14, 16-20, 22 and 24**. [RAB 20-36, 92; AOB 49-50; 11 App. 2287] The State only defends *Herrera's* misapplication to **Grounds 4, 23 and 78**. [RAB 17, 35, 92] The State doesn't address the U. S. Supreme Court bases its habeas rulings on witness evidence in the form of Affidavits, statements, expert reports, etc., as does this Court. [AOB 38, 49-50]; Mazzan v. Warden, 116 Nev. 48, 65, 993 P.2d 25, 35-6 (2000). The State disregards the Supreme Court treated *Herrera's* new evidence with "a fair degree of skepticism" by reviewing the content, context and source of the four affidavits at issue before determining they were insufficient for relief. 506 U.S. at 417-18, 423; [RAB 13] The State misstates Lobato's argument the rules of admissibility don't apply, and after *Herrera* the Supreme Court remanded in *Schlup* so new witness evidence could be evaluated. 513 U.S. at 332; [RAB 13-4; AOB 49-50]

The State confesses error under *Polk et al*. by failing to address the significant issue the District Court prejudicially misapplied Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984) to **Grounds 9-10, 13, 15, 17, 22-23 and 78**, because those grounds contain specific details of "a factual background, names of witnesses or other sources of evidence demonstrating...entitlement to relief." *Id.* at 502. The State disregards this Court ruled in *Hargrove* on the merits of Hargrove's claims that "raised allegations supported by factual claims," *Id*., exactly as Lobato's above claims do. The State misapplied *Hargrove* to **Grounds 14 and 16**,

which are not in the District Court's Order. [RAB 26-9; 11 App. 2287]

3. <u>Specific grounds material new matters, errors and omissions</u>.

Grounds 1, 2 and 3. The State confesses error under *Polk et al.* by failing to address two significant issues: First, "the District Court prejudicially erred summarily denying Ground['s 1, 2 and] 3 because Ms. Lobato's new unrebutted expert evidence (i) rebuts and impeaches the credibility of Dr. Simms' testimony supporting Bailey could have died as early as 3:50 a.m. on July 8, (ii) fatally undermines the State's narrative that Bailey died "sometime before sunup," and (iii) proves she is actually innocent [under *Schlup's* standard]." Second, the State waived a District Court affirmative defense to Dr. Glenn Larkin's new evidence Bailey died "within two hours before discovery" of his body around 10 p.m. – "The Response doesn't deny or address Ground 2's new forensic pathology evidence…" [AOB 37-44, 56-60; 10 App. 1995-6]

The State doesn't address that with Bailey's death after 8:30 a.m. on July 8 it is physically impossible Lobato committed her convicted crimes, and her unrebutted new evidence impeaches and rebuts Dr. Simms' testimony Bailey died before 8 p.m. [AOB 30-1, 55-60] The record belies the State's assertion Lobato's <u>five</u> experts relied "solely on review of pictures." [RAB 16; 7 App. 1520, 1529, 1537; 10 App. 2168]

Ground 4. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 4 because Ms. Lobato's new unrebutted expert evidence (i) rebuts and impeaches Det. Thowsen's

testimony that Ms. Lobato's Voluntary Statement was about Mr. Bailey's murder…, (ii) fatally undermines the basis of the State's narrative and (iii) proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 60]

The record belies the State's assertions: (i) Ron Slay's new expert polygraph evidence lacks probative value when he swears: "I am certain Lobato is innocent of Bailey's murder."; and (ii) Lobato doesn't assert Slay and Douglas Twining provide new evidence. [6 App. 1185-9; RAB 17-8; AOB 46-8, 60]

Ground 5. The State confesses error under *Polk et al.* by failing to address two significant issues: First, "The District Court prejudicially erred…denying Ground 5 because Ms. Lobato's new unrebutted alibi witness evidence (i) rebuts and impeaches Det. Thowsen's testimony that Ms. Lobato's Voluntary Statement was about Mr. Bailey's murder…, (ii) fatally undermines the basis of the State's narrative, and (iii) proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 61] Second, law of the case doesn't bar Ground 5, which involves different legal and factual issues than Lobato v. State, 120 Nev. 512, 522, 96 P.3d 765 (2004), and the two witnesses in *Lobato* testified on remand. [4 App. 790, 794; AOB 61; RAB 18-9]

The record belies the State's assertion the District Court ruled Lobato's nine alibi witnesses would be cumulative with trial evidence. [11 App. 2265; RAB 18]

Ground 6. The State confesses error under *Polk et al.* by failing to address "the District Court prejudicially erred…denying Ground 6 because Ms. Lobato's

new unrebutted alibi witness evidence fatally undermines the State's narrative she had been in Las Vegas without sleep for three consecutive days (July 6-8) while on a methamphetamine binge …; and proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 62]

The record belies the State's assertion the District Court ruled Ground 6 presents "cumulative" new evidence. [RAB 20; 11 App. 2265]

Ground 7. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 7 because Lobato's new expert evidence fatally undermines the State's narrative she alone murdered Bailey; and proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 63]

The record belies the State's assertion twice Dr. Larkin relied only on "photos." [6 App. 1200-02; 7 App. 1537; RAB 20]

Ground 8. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 8 because Ms. Lobato's new evidence proves she is actually innocent [under *Schlup's* standard] and "is not guilty" of violating the Necrophilia law NRS 201.450 because "no crime was committed."" [AOB 37-44, 64; RAB 21]

The State doesn't deny Bailey's rectal injury was ante-mortem and thus "[T]here is not presented a fact question for resolution" that NRS 201.450 wasn't violated. *Orsborn*, 82 Nev. at 302, 304; [6 App. 1202-5]

Ground 9. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 9 because Ms. Lobato's new evidence fatally undermines the State's narrative by proving it is impossible all of Mr. Bailey's injuries were inflicted within a short period of time; and proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 64-5]

The record belies the State's bald assertion Ground 9 involves "unsupported inferences," when it is based on Bailey's death from "Blunt Head Trauma" inflicted hours before the events alleged in Counts I and II occurred. [RAB 22; 6 App. 1205-7]

Ground 10. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 10 because Ms. Lobato's new expert evidence fatally undermines the State's narrative because the State has never alleged any cutting instrument other than her two-edged pocket knife was used on Mr. Bailey; and proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 66; RAB 22-3]

The record belies the State's assertion Ground 10 "summarized and reiterated" the evidence in "Claims 2, 7 and 8." [*Id.*]

Ground 11. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 11 because Ms. Lobato's new expert evidence fatally undermines the State's narrative the May Budget Suites assault and Mr. Bailey's murder are the same event because Ms. Lobato's

high-heeled platform shoes were not worn at Bailey's murder; and proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 66]

Ground 12. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 12 because Ms. Lobato's new expert evidence fatally undermines the State's narrative it is "possible" the bloody shoeprint impressions leading away from Mr. Bailey's body were there coincidentally and unrelated to his murderer…; and proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 67]

The record belies the State's assertion William Bodziak's new expert evidence Lobato's shoes didn't make the shoeprints imprinted on the cardboard "were presented at trial." [RAB 24; 6 App. 1226]

Ground 13. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 13 because Ms. Lobato's new evidence (i) fatally undermines the State's narrative that it is "possible" Mr. Bailey was beaten with a bat while standing and a bat knocked out his teeth, and it is "possible" blood was found in Ms. Lobato's car; and (ii) proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 67-8]

The record belies the State's assertions, "...George Schiro's "new" opinions, which reiterated the evidence, presented at trial and Schiro's opinions as stated in Claims 11 and 12." [RAB 25-6; 6 App. 1227-36]

Ground 14. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 14 because Ms. Lobato's new witness evidence (i) fatally undermines the State's narrative Mr. Bailey stayed in the trash enclosure where he was murdered because people who knew Mr. Bailey knew he didn't stay there, so it is not possible Ms. Lobato, who lived 165 miles away in Panaca, could have known he stayed there; and (ii) proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 68; RAB 26-7]

The record belies the State's assertions (i) Ground 14 is "merely speculative," because Steven King's Affidavit contains dozens of unrebutted assertions of fact, and (ii) "Claim 14 is not exculpatory," because the State's trial narrative and argument was Bailey stayed in the trash enclosure and alleged Lobato knew where he was. [RAB 27; 6 App. 1236-9]

Ground 15. The State confesses error under *Polk et al*. by failing to address three significant issues: First, Lobato's constitutional rights were violated by the jurors' misconduct of relying on extrinsic evidence to find the essential element she was in Clark County on July 8, 2001. Second, a new trial is required because "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Meyer v. State, 119 Nev. 554, 80 P.3d 447, 455 (2003). [RAB-27-8; AOB 28, 68-71] The State doesn't assert harmless error. Third, "the District Court prejudicially erred…denying Ground 15 because Ms. Lobato's new witness

evidence (i) fatally undermines the State's narrative [she] must have been in Las Vegas on July 6 to 8, because she needed to make the 330-mile round-trip from Panaca to obtain methamphetamine; and (ii) proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 71; 5 App. 1005-8; 6 App. 1239-41]

The record belies all the State's assertions contradicting the State's trial narrative and argument alleging Lobato specifically traveled to Las Vegas the weekend of July 6-8, 2001 to obtain methamphetamine. [*Id.*]

Ground 16. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 16 because Ms. Lobato's new evidence fatally undermines the State's narrative Parker's "Mexican" friends did not have a compelling motive to kill Mr. Bailey; and proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 72]

The State's failure to address Parker's friends had the means, opportunity and a compelling motive is significant because no evidence was presented Lobato had a motive—or even knew Bailey or had ever been to the Nevada State Bank—and "From beginning to end the case is about who committed the crime. When identity is in question, motive is key." *House*, 547 U.S. at 540. [AOB 10; RAB 29]

The record belies the State's assertions, "King's statement was…not new evidence" and is "purely speculative," because King's Affidavit obtained more than three years after trial contains dozens of unrebutted assertions of fact based on

his personal knowledge. [RAB 29; 7 App. 1567-8]

Lobato referenced an article available online identifying its author, so the record belies all the State's assertions to the contrary. [RAB 28; 8 App. 1723-4]

Ground 17. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 17 because Ms. Lobato's new evidence (i) fatally undermines the State's narrative Ms. Lobato was the person who murdered Mr. Bailey, when she didn't cash the three checks drawn on his bank account after his murder; and (ii) proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 72]

The record belies all the State's false assertions and misrepresentations of this ground's unrebutted facts supporting Bailey's assailant is the only person with the means and opportunity to cash his checks. [RAB 29-30; 6 App. 1251-53]

Ground 18. The State confesses error under *Polk et al*. by failing to address "the District Court prejudicially erred…denying Ground 18 because Ms. Lobato's new evidence (i) fatally undermines the State's narrative it is "possible" Mr. Bailey's teeth were knocked out and he was knocked over after being hit in the mouth with a baseball bat, and that he then hit his head on the concrete curb; and (ii) proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 73; RAB 30-31]

Ground 19. The State confesses error under *Polk et al*. by failing to address two significant issues: First, "the District Court prejudicially erred…denying Ground

19 because Lobato's new evidence proves she was convicted of a non-existent violation of NRS 201.450 and she is actually innocent [under *Schlup's* standard] and "not guilty" of Count II because "no crime was committed." [AOB 37-44, 75-6] Second, the record belies the District Court's ruling Ground 19 is barred by law of the case of *Lobato* (2004). [AOB 73-4; 11 App. 2268; 6 App. 1259-64]

The record belies the State's assertion Ground 19 "simply seeks to limit the application of NRS 201.450," and the State doesn't address Bailey's body was not sexually assaulted as the legislature intended for application of the Necrophilia Law. [6 App. 1259-64; RAB 32; AOB 73-6]

Ground 20. The State materially ignores the District Court prejudicially erred denying Ground 20 that establishes Lobato's constitutional rights were violated by the four jurors' prejudicial misconduct of discussing "the merits of Petitioner's case prior to the close of evidence and at least one juror expressed her opinion the Petitioner was guilty…" [6 App. 1264-6; RAB 32-3]

The State disregards misconduct includes "jurors failing to follow standard admonitions not to discuss the case prior to deliberations..." *Meyer*, 80 P.3d at 453, and Lobato should be granted a new trial because "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." *Id.* at 455.

The State doesn't allege the District Court erred in not finding John Kraft and Hans Sherrer are biased, and the State's new assertion Kraft and Sherrer are

biased is unsupported by the State's new factually false assertions. [*Id*.; RAB, 32 n. 7 and 8; Reply Exhibits 3 and 6; 11 App. 2268-9]

Ground 21. The State confesses error under *Polk et al*. by failing to address three significant issues: First, "The District Court prejudicially erred…denying Ground 21 because Ms. Lobato's new evidence fatally undermines the State's narrative the May Budget Suites Assault and Mr. Bailey's murder are the same event; and proves she is actually innocent [under *Schlup's* standard]." [AOB 37-44, 76-8] Second, "This Court should also reverse Lobato's convictions and Order a new trial because Det. Thowsen's perjurious testimony the jury relied on to convict her violated her federal rights…" [AOB 78; 6 App. 1266-75] Third, the record belies the State's assertion Ground 21 is barred by law of the case, because Thowsen's perjury was not an issue in Lobato v. State, No. 49087 (2009). [AOB 76-8; RAB 33-4]

The record belies the State's assertions (i) Thowsen's testimony that was the "lynchpin of the State's case" wasn't perjurious, and (ii) the evidence of his perjury is not exculpatory. [*Id.*]

Ground 22. The State confesses error under *Polk et al*. by failing to address two significant issues: First, "the District Court prejudicially erred…denying Ground 22 because Ms. Lobato's new evidence fatally undermines the State's narrative that the May Budget Suites assault and Mr. Bailey's murder are the same event; and proves she is actually innocent [under *Schlup's* standard]" [AOB 37-44,

78-9; RAB 34-5; 6 App. 1275-1282] Second, "This Court should also reverse Lobato's convictions and Order a new trial because the State's prosecution of Lobato when they had evidence she is innocent and with the intention of eliciting testimony that wasn't truthful to procure her conviction violated her federal rights to due process and a fair trial, and requires that her conviction "must fall under the Fourteenth Amendment." [*Id.*]; Napue v. Illinois, 360 U.S. 264, 269 (1959).

Ground 23. The State confesses error under *Polk et al*. by failing to address the District Court prejudicially erred denying Ground 23 because new unrebutted "forensic entomology, forensic pathology, forensic science, crime scene reconstruction, psychology, alibi witnesses, dental, third-party culprit, police perjury, and prosecution and police misconduct evidence establishes the Petitioner is actually and factually innocent of any involvement with the murder and cutting of Duran Bailey's rectum on July 8, 2001," which evidence includes Bailey died after sunset at 8:01 p.m. when the State concedes Lobato was in Panaca. [6 App. 1282-95; RAB 35; AOB 79-80]

As set forth above the State materially misstates *Herrera* in stating it established an "unquestionably" innocent standard of proof for Ground 23, when a consensus of State courts is the "clear and convincing" standard applies while Illinois applies the preponderance standard. [RAB 13] The State fails to address that if Ground 23 is granted Lobato's charges should be dismissed. [AOB 80]

Ground 24. The State confesses error under *Polk et al*. by failing to address

two significant issues: First, "the District Court prejudicially erred…denying Ground 24 because Lobato's new evidence proves she was convicted on the basis of false evidence. Lobato's new evidence fatally undermines the State's narrative in at least 13 key areas where the jury relied on the false evidence to convict Lobato." [AOB 80-1; 6 App. 1296-1307; RAB 35-6] Second, "This Court should reverse Lobato's convictions and Order a new trial because the State's reliance on false evidence to procure her conviction violated her federal rights …." [*Id.*]

The record belies the State's assertion Ground 24 is "based upon speculative opinions," because it is based on unrebutted new material evidence by more than 30 credible witnesses. [*Id.*]

Ground 78. The State fails to conduct a cumulative error analysis and doesn't address the significant issue the District Court "prejudicially erred in summarily denying Ground 78 because the cumulative weight of Lobato's new evidence proves she is actually innocent [under *Schlup's* standard] and "wrongfully imprisoned," and this Court should grant Lobato's requested "relief of reversing her convictions and Order dismissal of the charges if this Court finds the State has insufficient evidence in light of her new evidence." [AOB 37-44, 125-129; RAB 91-92; 7 App. 1502]

The State fails to substantively address the standard of proof for Lobato's actual innocence grounds is, "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence" presented in habeas

proceedings. [AOB 42-4; 125-26] As set-forth above the State misapplies *Herrera* to this ground and falsely asserts a non-existent "unquestionably" innocent standard under *Herrera.* [RAB 92; AOB 42-4; 6 App. 1282]

As set-forth above, with the exception of Ground 23 the record belies the State's assertion "Claims 1-24" are "freestanding" claims of actual innocence." [RAB 12, 92; AOB 37, 79-80; 6 App. 1173-1307]

The State fails to address the District Court prejudicially erred citing Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006) to deny this ground. [AOB 54-5]

B. STATE'S FAILURE TO DISCLOSE EVIDENCE GROUNDS.

1. Common material new matters, errors and omissions by the State.

The following apply to Grounds 25 and 26 as **highlighted**.

Grounds 25 and 26 only claim the State's non-disclosure of material evidence per Brady v. Maryland, 373 U.S. 83 (1963), so the record belies the State's assertion they "combine claims of alleged constitutional error and actual innocence." [6 App. 1308-11; AOB 81-5; RAB 12 n.2]

The State doesn't address the District Court relied on the fact "The State doesn't deny the evidence in **Grounds 25 and 26** wasn't disclosed to her trial counsel." [AOB 83; 11 App. 2270]

The State confesses error under *Polk et al*. by failing to address the District Court prejudicially erred ruling **Grounds 25 and 26** "...were procedurally barred

under NRS 34.810...." [AOB 83-4; 11 App. 2270] Procedural default doesn't apply to Lobato's *Brady* claims in her original and timely Petition. *Mazzan*, 116 Nev. at 67.

The State confesses error under *Polk et al.* by failing to address for **Grounds 25 and 26** "The District Court prejudicially misapplied *Herrera...*", and the State doesn't assert the District Court erred (i) not finding Hans Sherrer and Martin Yant are not credible witnesses with unrebutted new material evidence, and (ii) not making a finding of bias by Sherrer. [AOB 84; 11 App. 2270]

The State doesn't address the significant issue the District Court prejudicially erred arbitrarily denying **Grounds 25 and 26** without conducting *Brady's* three-part test and not even citing *Brady*. [11 App. 2270; 2287; AOB 81-5] The District Court's arbitrary denial is a federal and state due process violation requiring this Court's reversal. See United States v. Bagley, 473 U.S. 667, 684, 685A (1985) (Failure to apply *Brady's* "reasonable probability" standard requires reversal.); Mott v. Warden, 91 Nev. 593, 540 P.2d 1061 (1975) and Boswell v. Warden, 91 Nev. 284, 534 P.2d 1263 (1975) (Arbitrary habeas denial is reversible *sua sponte*); See also, Williams v. Taylor, 529 U.S. 362, 397, 399 (2000) (Failure to apply Strickland v. Washington, 466 U.S. 668, 693-94 (1984) "reasonable probability" standard requires reversal.)

The State's explanation of *Brady's* "reasonable probability" standard is materially incomplete, because it "does not require demonstration by a preponderance" disclosure would have likely changed the outcome. Kyles v.

Whitley, 514 U.S. 419, 434 (1995); *Mazzan*, 116 Nev. at 66. [AOB 82; RAB 36]

The State materially disregards *Brady's* requirement for the breadth of evidence that must be disclosed. *Mazzan*, 116 Nev. at 67; [AOB 84-5; RAB 36]

2. Specific grounds material new matters, errors and omissions.

Ground 25. The State doesn't assert the District Court erred not finding any of the facts underlying this ground are not correct, including (i) the State failed to disclose Bailey's involvement with law enforcement, (ii) a police officer's telephone number was written on two items recovered from Bailey's pants pockets, and (iii) that officer may be a witness with material evidence relevant to Bailey's homicide. [11 App. 2270; 6 App. 1308-9]

The State doesn't dispute the telephone number at issue is that of a police officer, and the State's new and irrelevant assertion Sherrer is biased and has a "personal interest" in Lobato's case is factually false. [RAB 37; 6 App. 1308-9; Reply Exhibit 6]

The record belies every new assertion the State makes regarding CSA Maria Thomas and the officer's telephone number, because Thomas' testimony and the "Evidence Impound Report" she signed establish it was recovered from Bailey's pants pockets. [2 App. 486; Reply Exhibit 1] Thus the record belies the State's assertion "Mr. Sherrer's affidavit is factually wrong," and this Court should disregard the State's assertions regarding the officer's phone number from page 37, line 23 to page 39, line 11. [RAB 37-9; 6 App. 1308-09]

The record belies the State's every new assertion alleging the telephone numbers were on a post-it note, because Thomas didn't testify any telephone numbers were found on a post-it note. [2 App. 481-87, 3 App. 564-80, esp. 579; RAB 38-9]

Lobato learned post-conviction about the officer's telephone number, and the record belies the State's assertion "the evidence was listed on the evidence impound sheet provided to the defense." [RAB 38; 6 App. 1308-09; AOB 82-3]

The record belies and contradicts the State's unreferenced assertions Bailey wasn't involved with law enforcement. [RAB 37-9; 6 App. 1308-09] The record belies the State's new assertion Vivian is alleged to be the police officer at issue, which Ground 25 doesn't allege. [*Id.*] The record belies the State's multiple assertions regarding the letter "D" next to what is undisputedly the officer's number. [*Id.*; 9 App. 1815] The record belies the State's assertion Ground 25 is unsupported or bare, and the District Court made no such finding. [*Id.*; 11 App. 2270]

The State improperly attempts to substitute its *Brady* three-part analysis for the analysis the District Court prejudicially failed to conduct. [RAB 38-9; 11 App. 2270]

Ground 26. The State doesn't assert the District Court erred not finding any of the facts underlying this *Brady* ground are not correct, including (i) the State failed to disclose suspect Daniel Martinez was using the Social Security Number ("SSN") of a dead man, and (ii) Thowsen couldn't have determined Martinez didn't have a criminal record without using his SSN. [RAB 39-42; 11 App. 2270; AOB 83; 6 App. 1309-11]

The State asserts the new unsupported defense Thowsen didn't use Martinez' SSN to determine he didn't have a criminal record, which ignores that after Thowsen obtained Martinez' name and SSN he was using, Thowsen testified "upon checking them further, found them to be without criminal records." [8 App. 1718; 3 App. 603; 6 App. 1309-11; 9 App. 1952-53] The State disregards Thowsen couldn't have run a records check on the suspect "Daniel Martinez" and determined he didn't have a record without using his SSN as a unique personal identifier because in 2001 there were at least 14 persons in Clark County with a telephone in the name Daniel or D. Martinez, and the Nevada DOC website lists nine convicted individuals named Daniel Martinez. [3 App. 603; Reply Exhibits 4 and 5] Ground 26 quotes Thowsen's trial testimony the same as the State, and Lobato herein corrects her Opening Brief's page 83 "that he used a Social Security Number to run criminal background checks," to his testimony "I do remember running them." [AOB 83; 6 App. 1309-11]

The State improperly attempts to substitute its *Brady* three-part analysis for the analysis the District Court prejudicially failed to conduct. [RAB 39-42; 11 App. 2270]

C. INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS.

1. Material new matters, errors and omissions by the State.

Grounds 27-77 and 79 only claim prejudicial ineffective assistance of counsel violations per *Strickland*, so the record belies the State's assertion they "combine claims of alleged constitutional error and actual innocence." [RAB 12 n.2; AOB 109-129]

The State repeatedly falsely asserts *Strickland's* "reasonable probability" standard of prejudice, which is Lobato "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." 466 U.S. at 693-94.

The record belies the State's assertion Lobato's counsel wasn't "deficient in failing to hire various experts to supplement the expert testimony they did provide," because all Lobato's experts provide new evidence not presented at trial. [RAB 44; 6 App. 1339-65, 7 App. 1468-70]

The State materially omits the statement in Harrington v. Richter, 562 U.S.__, 131 S.Ct. 770, 789 (2011): "It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts..." [RAB 43]

The record belies the State's assertion Lobato's grounds claiming her counsel prejudicially failed to investigate and present expert evidence rely on Richter v. Hickman, 578 F.3d 944, 952-53 (9th Cir. 2009), because *Strickland* and four other cases are also cited. [AOB 86-7; RAB 44-5]

The State falsely asserts the ruling in *Richter* that Richter's counsel provided ineffective assistance of counsel under *Strickland* was "expressly overruled by the United States Supreme Court in Harrington v. Richter." [RAB 44] *Harrington*, 131 S.Ct. at 790, **specifically let stand** the Ninth Circuit ruling in *Richter*, 578 F.3d at 961, "counsel's deficient performance was prejudicial" under *Strickland*. *Harrington* **only** overturned the Ninth Circuit's ruling regarding 28 U.S.C. §2254(d) – which **only**

applies to federal courts – and the Supreme Court **specifically warned** courts against confusing *Strickland* with 28 U.S.C. §2254(d). *Harrington*, 131 S.Ct. at 788.

Consequently, the Ninth Circuit's ruling Richter's counsel was prejudicially ineffective under *Strickland* for failing to investigate, consult with, or call a blood spatter expert at trial is precedential for this Court. *Richter*, 578 F.3d at 961. *Richter* is directly on point because Lobato's *Strickland* claims based on new expert evidence support her defense and "refuted the prosecution's explanation" for aspects of her case. *Id*. at 962. This Court should disregard the State's Answer from page 44 line 17 through page 45 line 21 that are based on federal 28 U.S.C. §2254(d) review.

The State doesn't address *Strickland's* requirement that to make an informed judgment counsel must make reasonable investigations *before* settling on trial strategy, 466 U.S. at 690-91, and the failure to do so can "render counsel's performance deficient." [AOB 86-7] The State ignores, "the traditional deference owed to the strategic judgments of counsel is not justified where there was not an adequate investigation 'supporting those judgments,'" Correll v. Ryan, 539 F.3d 938, 948-49 (9th Cir. 2008) (quoting Wiggins v. Smith, 539 U.S. 510, 521 (2003)); See also, Warner v. State, 102 Nev. 635, 729 P.2d 1359, 1361 (1986). [AOB 86-7]

2. Common material new matters, errors and omissions by the State.

The following apply to Lobato's *Strickland* Grounds 27-77 and 79 as **highlighted** except where noted.

The State doesn't assert the District Court erred (i) not finding the material facts stated in **Grounds 27-42, 44-77, 79** are not true, relevant, and admissible for consideration, and (ii) not finding Lobato's "affiants are not reliable, trustworthy, or credible." [AOB 99-100; 11 App. 2270-81]

The State confesses error under *Polk et al.* by failing to address the District Court's plain prejudicial error of arbitrarily denying **Grounds 49, 51, 52, 58 and 59** without relying on *Strickland* and making a finding of deficiency and prejudice. [11 App. 2274-77; 2288-91; AOB 94] The State disregards that violation of Lobato's due process and effective assistance of counsel rights requires relief. *Williams*, 529 U.S. at 397, 399 (Failure to apply *Strickland's* "reasonable probability" standard is reversible error.); *Mott*, 91 Nev. 593 and *Boswell*, 91 Nev. 284 (Arbitrary habeas denial is reversible *sua sponte*.); Pellegrini v. State, 117 Nev. 860, 34 P.3d 519, 533-4 (2001). (Issues of constitutional dimension can be addressed *sua sponte*.)

The State confesses error under *Polk et al.* by failing to address the District Court arbitrarily and prejudicially failed to apply *Strickland's* less than a preponderance "reasonable probability" standard, 466 U.S. at 693, to **Grounds 27-31, 38-41 and 56** and instead applied one or more greater than a preponderance standards of its own making. [11 App. 2270-72, 2276; AOB 94] The State ignores relief is required under *Williams*, 529 U.S. at 397, 399, and *Strickland.*

The State confesses error under *Polk et al.* by failing to address the District

Court arbitrarily failed to make the required finding detailing how **Grounds 27-42, 44-77 and 79** fail *Strickland's* deficiency and prejudice tests considering the unrebutted facts in those grounds. [11 App. 2270-81; AOB 94]

The State materially errs opposing **Grounds 29-32, 34, 38-41 and 43** by disregarding *Strickland's* prejudice standard and applying one or more greater than a preponderance standards of its own making. [RAB 50-52, 55, 58-9, 62; AOB 94]

The State confesses error under *Polk et al.* by failing to address the District Court prejudicially misapplied NRS 34.810 to bar review of **Grounds 37-43-48, 50, 53, 62-63, 72, 74 and 77** by asserting "they could have been raised in a timely motion for a new trial." [11 App. 2271-81; AOB 34] See *Pellegrini*, 34 P.3d at 535 (Procedural default doesn't apply to ineffective assistance of counsel grounds in an original and timely habeas petition.).

The State doesn't address the significant issues regarding **Grounds 38-41 and 71**: (i) "in *House*, the U. S. Supreme Court granted habeas relief based on new expert evidence that was an elaboration or opinion based upon the evidence available and presented at trial." [AOB 48]; and (ii) "all the experts Lobato obtained evidence from post-conviction are eminently qualified to testify regarding their "specialized knowledge."" [AOB 45]

The State confesses error under *Polk et al.* by failing to address Lobato's counsel was deficient for failing to conduct any investigation regarding the new

post-conviction exculpatory expert evidence detailed in **Grounds 38-41, 44, 71 and 79**, thus her counsel failed to base a strategy on the informed decision required by *Strickland, et al.* [6 App. 1339-65; 7 App. 1468-70; AOB 86-7]

The State misstates Molina v. State, 120 Nev. 185, 190, 87 P.3d 553, 558 (2004) that doesn't apply to **Grounds 30-31, 56, 73 and 77**, because Lobato's counsel didn't conduct the investigations necessary to make *Strickland's* required informed strategic choices. 466 U.S. at 690-94. [RAB 45; AOB 90-1]

The State miscites Rhyne v. State, 118 Nev. 1, 9 n.3, 38 P.3d 163, 168 n.3 (2002) that involved a direct appeal and doesn't apply to *Strickland* **Grounds 32-36, 38-42, 44, 50, 54-55, 64, 71, and 77**, and also miscites Johnson v. State, 117 Nev. 153, 17 P.3d 1008, 1014 (2001) ("The accused has the ultimate authority to make certain fundamental decisions regarding the case...") that undercuts its position. [RAB 46] The State also miscites three federal cases pre-dating *Strickland's* standards for constitutional error. 466 U.S. at 687. [*Id.*]

The State misstates Lobato's objection to the prejudicial misapplication of *Ennis*, 137 P.3d. at 1102-3, by the District Court which didn't cite facts from **Grounds 35, 45, 49, 54, 57, 59-60, 62-63, 67-70, 76 and 77** to support its bald assertion an objection or motion would be futile. [RAB 46-7; AOB 98-9; 11 App. 2271-81]

The State confesses error under *Polk et al*. by failing to address the District Court prejudicially misapplied *Hargrove*, 100 Nev. at 502, to **Grounds 30-31,**

52, 58-59, 70, 73, 77 and 79, because those grounds contain details of "a factual background, names of witnesses or other sources of evidence demonstrating ...entitlement to relief" of a new trial." [AOB 95-6; RAB 47-8; 11 App. 2288-91] The State disregards this Court ruled on *Hargrove's* claims that "raised allegations supported by factual claims," *Id*. at 502, which Lobato's above grounds do.

Lobato incorporates herein all arguments in the New Evidence section related to the District Court's prejudicial misapplication of *Herrera*. The State misapplies *Herrera* in newly asserting the District Court's blanket rejection of Lobato's new witness evidence in **Grounds 37-48, 50, 53, 62, 63, 71, 73 and 77** was consistent with the Supreme Court's decision Herrera's affidavits weren't sufficient to prove his actual innocence. [RAB 47; AOB 99-100] The State materially disregards *Herrera* only involved an "actually innocent" claim, 390 U.S. at 393, 417, while all the above only involve *Strickland* claims.

The State falsely asserts *Herrera* doesn't refer to affidavits as testimony when it states "Had this sort of testimony been offered at trial..." *Herrera*, 506 U.S. at 418, and under NRS 199.145 Lobato's affiants can be subjected to criminal prosecution the same as testifying in court. Eakins v. Nevada, 219 F.Supp.2d 1113, 1121 (D.Nev. 2002).

3. Specific grounds material new matters, errors and omissions.

Ground 27. The State doesn't address Lobato's counsel was deficient for failing to investigate Diann Parker's Hispanic friends because evidence would

have been discovered they had motive, means and opportunity to kill Bailey supporting Lobato's third-party culprit defense, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [6 App. 1312-16; RAB 48]

The record belies the State's assertion this ground relies on "irrelevant, speculative, and inadmissible evidence" because King's Affidavit contains dozens of unrebutted assertions of fact based on his personal knowledge. [*Id.*]

Ground 28. The State doesn't address this ground's unrebutted facts establish Lobato's counsel was deficient for failing to investigate the telephone numbers recovered from Bailey's pants pocket and particularly the police officer's number because it deprived the jury of knowing Bailey's involvement with law enforcement, which supports her third-party culprit defense, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [RAB 48-9; 2 App. 486; Reply Exhibit 1; 6 App. 1316-18]

The record belies the State's assertions this ground "is entirely based on speculation," and the telephone numbers weren't found in Bailey's pants pocket, which is disproven by CSA Thomas' testimony and Evidence Impound Report. [*Id.*]

Ground 29. The State doesn't address this ground's unrebutted facts establish Lobato's counsel was deficient for failing to investigate who cashed Bailey's three checks after his homicide because his assailant is the only person

who reasonably had the means and opportunity to cash them, which exculpatory evidence supports her third-party culprit defense, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [RAB 49-50; 6 App. 1318-20]

The record belies the State's assertions there is no indication Bailey's "bank records were of significance" and this ground "is based on mere speculation." [*Id.*]

Ground 30. The State doesn't address this ground's unrebutted facts establish Lobato's counsel was deficient for failing to investigate comparison of Diann Parker's DNA and fingerprints with the crime scene evidence because she had motive, means, and opportunity and she admitted in her audiotaped police statement that the morning after Bailey's homicide she had a bloody "pants and shirt." [6 App. 1321-23] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [*Id.*]

Ground 31. The State doesn't address Lobato's counsel was deficient for failing to investigate for NRS 629.041 records and police reports of knife injuries in May and June 2001, because her counsel could have determined if there had been a report consistent with the Budget Suites Hotel assault Lobato described in her Statement that she told many people about before Bailey's homicide, and if so the jury would have had a factual basis to determine her Statement is truthful. [6 App. 1323-25] Thus by *Strickland's* less than a preponderance prejudice standard

there is a "reasonable probability" her trial's outcome was unreliable.

Ground 32. The State doesn't substantively address this ground's unrebutted facts establish Lobato's counsel was deficient for failing to investigate and subpoena Detective James LaRochelle, who was present during the interview of key witnesses and events, and LaRochelle's testimony "could have exposed the magnitude of Thowsen's false testimony for the jury to consider." [6 App. 1325-26; RAB 52] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

The record belies the State's assertion this ground is based "on speculation per Hargrove," and the District Court made no such finding. [*Id.*; 11 App. 2271]

Ground 33. The State doesn't address this ground's unrebutted facts establish Lobato's counsel was deficient for failing to investigate and subpoena Thowsen's secretary because LVMPD General Counsel Liesl Freedman is on record asserting Metro "does not have a method to search its records by knife wounds reported pursuant to NRS 629.041," and his secretary's testimony "could have exposed the magnitude of Thowsen's false testimony for the jury to consider." [6 App. 1327-28; RAB 53; 8 App. 1753] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

The State doesn't address Thowsen's testimony was about searching for NRS 629.041 records, and the record belies State's new unsupported speculation

his secretary possibly looked through other records. [*Id.*]

Ground 34. The State doesn't address the unrebutted facts establish Lobato's counsel was deficient for failing to subpoena LVMPD documents related to conducting a homicide investigation, because they would have enabled exposure during Thowsen's cross-examination his testimony was false he conducted four investigations related to Lobato's Statement, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [6 App. 1328-30]

Ground 35. The State doesn't address the unrebutted facts establish Lobato's counsel was deficient for failing to make a motion *in limine* to exclude all references to her use of methamphetamine—that ended prior to July 2001 and has no relevance to Bailey's death on July 8—which would bar the prosecution from using "drugs" and "drug use" that prejudicially linked her to Bailey's use of crack cocaine which she never used. [6 App. 1330-32] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

Ground 36. The State doesn't substantively address Lobato's counsel was deficient because informed strategic decisions couldn't be made without filing a discovery motion as set forth in Kimmelman v. Morrison, 477 U.S. 365, 385-87 (1986) (*Strickland* deficiency established by "total failure to conduct pretrial discovery."), and it is known the State failed to disclose material evidence bolstering her defense including prosecution notes of interviews of key alibi witnesses Steve

Pyszkowski, Twining, Tienken, and Marilyn Anderson. [6 App. 1277-82, 1332-33; Reply Exhibit 7] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

Ground 37. The State doesn't address the significant issue Lobato's counsel was deficient for failing to make a motion to dismiss Count II because Nevada's Necrophilia Law "only criminalizes sexual activity with a corpse that would be considered a sexual assault on a live person," and the State didn't introduce evidence or even allege Bailey's body was sexually assaulted, so Count II charges Lobato with a non-existent violation of NRS 201.450. [6 App. 1334-39] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

Grounds 38-41—<u>Common issue</u>. The record belies the State's false and misleading assertions regarding forensic scientist George Schiro's testimony in Lobato's first trial that was limited because the District Court sustained <u>the State's objection</u> he wasn't properly noticed as an expert, which was affirmed in *Lobato* (2004). [1 AppR. 1-15; RAB 59; 6 App. 1358-65; 8 App. 1700-05] Schiro only testified about <u>two of the ten</u> areas detailed in Ground 41, both of which Brent Turvey testified about in Lobato's second trial, thus Schiro's testimony was immaterial to the verdict in Lobato's second trial and evaluation of **<u>Grounds 38-41</u>**. [*Id.*]

Ground 38. The State doesn't address Lobato's counsel was deficient as set

forth above for failing to conduct any investigation regarding the unrebutted new exculpatory expert forensic entomology evidence about which there was no evidence at trial, that scientifically proves Bailey died after sunset at 8:01 p.m. on July 8, 2001, when the State concedes Lobato was in Panaca, which "establishes it is a scientific and physical impossibility the Petitioner committed her convicted crimes." [6 App. 1339-44; AOB 9-10] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

Ground 39. The State doesn't address Lobato's counsel was deficient as set forth above for failing to conduct any investigation regarding the unrebutted new exculpatory expert psychology evidence about which there was no evidence at trial, that "conclusively establishes Petitioner's Statement is not a confession to Bailey's murder," which is corroborated by the absence of any essential elements of Lobato's charged crimes in her Statement. See Opper v. United States, 348 U.S. 84, 90 (1954) (Admission of essential elements is same character as a confession); Smith v. United States, 348 U.S. 147, 154 (1954); and United States v. Corona-Garcia, 210 F.3d 973, 980 (9th Cir. 2000). [Exhibit 125A; 1 App. 1-2; 6 App. 1344-47] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

Ground 40. The State doesn't address Lobato's counsel was deficient as set forth above for failing to conduct any investigation regarding the unrebutted new

exculpatory expert forensic pathology evidence about which there was no evidence at trial—including that Bailey died after 8 p.m. on July 8—which undermines "key aspects of the prosecution's case." [6 App. 1348-57] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

Ground 41. The State doesn't address Lobato's counsel was deficient as set forth above for failing to conduct any investigation regarding eight areas of unrebutted new exculpatory expert forensic science evidence about which there was no evidence at trial— including Lobato's shoeprints don't match those of Bailey's assailant—which undermines "key aspects of the prosecution's case." [6 App. 1358-65] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

Ground 42. The State materially misstates the record in newly asserting Lobato's counsel wasn't deficient for failing to cross-examine Dr. Simms about his Preliminary Hearing testimony Bailey's injury "in the rectum was ante-mortem" and he "probably" died between minutes before his body's discovery and 12 hours later, in order to undermine the credibility of his trial testimony that "expanded Bailey's time of death to include time outside of the Petitioner's alibi, and...provided a basis for the "sexual penetration of a dead body" charge." [1 App. 35-6; RAB 61; 6 App. 1365-68] Thus by *Strickland's* less than a preponderance prejudice standard there is

a "reasonable probability" her trial's outcome was unreliable.

Ground 43. The State doesn't substantively address Lobato's counsel was deficient for failing to object to the "expert" phenolphthalein and/or luminol testimony by four witnesses because of the State's bad faith failure to comply with NRS 174.234(2) and the trial court's failure to comply with NRS 50.275, and the State relied on that inadmissible "expert" testimony to argue it was "possible" there was blood in Lobato's car, which this Court relied on to affirm in *Lobato* (2009). [6 App. 1368-71; RAB 61-2; 10 App. 2080-84] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. The State disregards the four witnesses' "suggestive" identification testimony violated Lobato's federal due process right under Manson v. Brathwaite, 432 U.S. 98, 113-14 (1977) ("Identification testimony"…"unnecessarily suggestive" is inadmissible.)

The record belies the State's factually false assertions the State complied with NRS 174.234(2) regarding the testimony by its four witnesses as phenolphthalein and/or luminol "experts," and the State doesn't address its failure to comply was in bad faith because they had two years to prepare for trial. [*Id.*]

The State doesn't dispute Lobato's counsel failed to object to the trial court's prejudicial failure to qualify the four witnesses as "experts" in luminol and/or phenolphthalein before allowing their testimony as required by NRS 50.275. [*Id.*] See Mulder v. State, 116 Nev. 1, 13, 992 P.2d 845, 852 (2000);

Hallmark v. Eldridge, 124 Nev. 492, 499-500, 189 P.3d 646 (2008). *Hallmark* can be considered under Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

Ground 44. The State doesn't substantively address Lobato's counsel was deficient for failing to present expert testimony and introduce into evidence the shoes she wore during the incident described in her Statement, because her shoes and that testimony would have positively excluded her from being present during Bailey's bloody homicide, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [6 App. 1372-76]

Ground 45. The State doesn't address Lobato's counsel was deficient for (i) failing to object to Thowsen's testimony concerning his personal pocketknife he carried into the courtroom the State alleged was similar to Lobato's pocketknife described in her Statement, and (ii) insisting its admittance as Exhibit 262 although the State offered no probative connection between Thowsen's pocketknife and Bailey's homicide, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1376-77; 3 App. 662]

Ground 46. The State doesn't address Lobato's counsel was deficient for failing to properly argue Lobato's right to due process required in the interests of justice under arbitrary rules (Chambers v. Mississippi, 410 U.S. 284, 302 (1973)), and law of the case exceptions (Arizona v. California, 460 U.S. 605, 618 n.8 (1983); *Pellegrini*, 34 P.3d at 535-36 n.107), that Thowsen's testimony opened the door to admission of

Lobato's alibi testimony (Holmes v. South Carolina, 547 U.S. 319, 324-25 (2005)) rebutting his testimony that attempted to tie her Statement to Bailey's homicide. [7 App. 1379-82; RAB 63-4] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

This ground doesn't involve "vouching," so the record belies the State's application of Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). [*Id.*]

Ground 47. The State doesn't substantively address Lobato's counsel was deficient for failing to object and moving to strike Thowsen's prejudicial "expert" psychology testimony by which he tried to tie Lobato to Bailey's homicide by offering his "expert" opinions of why her Statement doesn't match his homicide. Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000) (Police officer doesn't inherently testify as an expert.) [7 App. 1383-87; RAB 64-6] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

The record belies the State's assertion *Lobato* (2009) ruled on Thowsen's "expert" psychological testimony without the State complying with NRS 174.234(2) or the court qualifying him under NRS 50.275. [*Id.*]

Ground 48. The State doesn't substantively address Lobato's counsel was deficient for failing to object and move for a mistrial in response to Thowsen's opinion testimony that effectively (i) branded her as a liar for describing the Budget Suites

assault in her Statement and (ii) declared she was guilty. United States v. Perez, 9 Wheat. 579, 580 (1824) (Mistrial required when "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.", cited by Glover v. Dist. Ct., 125 Nev.Adv.Op. 55; 220 P.3d 684, 701 (2009). See, *Cordova*, 116 Nev. 669, citing Flynn v. State, 847 P.2d 1073, 1075 Alaska Ct.App.1993) (Improper for police officer to give opinion about defendant's truthfulness and infer guilt.) [7 App. 1388-93; RAB 66] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [*Id.*]

Ground 49. The State doesn't substantively address Lobato's counsel was deficient for failing to object and move for a mistrial (*Perez*, 9 Wheat. at 580) after the prosecutor falsely stated during fact finding Lobato made a "confession," thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1388-93; RAB 67]

The record belies the State's assertions (i) the prosecutor's statement Lobato made a "confession" occurred during argument and (ii) her Statement is "highly incriminating," when it has no essential elements of Bailey's homicide. *Smith*, *Opper*, and *Corona-Garcia* (Page cites above in Ground 39). [*Id.*]

The State misapplies Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (2005) (Plain error established by "patently prejudicial" comments.) and miscites State v. Green, 89 Nev. 173, 176, 400 P.2d 766 (1965) that didn't involve

a false statement of matters not in evidence during fact finding, while disregarding United States v. Young, 470 U.S. 1, 11 (1985) (Prejudice determined by "whether the prosecutor's conduct affected the fairness of the trial."); Darden v. Wainwright, 477 U.S. 168, 181-82 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); and Greene v. State, 113 Nev. 157, 931 P.2d 54, 62 (1997). [*Id.*]

Ground 50. The State doesn't substantively address Lobato's counsel was deficient for failing to effectively cross-examine Thowsen to impeach his testimony about four investigations there is no evidence he conducted and which the jury relied on to convict her, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [RAB 68-9; 7 App. 1395-99]

Ground 51. The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to object on confrontation grounds to Thowsen's testimony about what others told him about reports and records concerning an injured penis in May, June, and July 2001 that *Lobato* (2009) only determined was inadmissible hearsay, thus under *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [*Id.*] The State doesn't assert harmless error. [7 App. 1399-1401; RAB 69]

Ground 52. The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to object and move for a mistrial (*Perez,* 9

Wheat. at 580) for the prejudicial prosecutor misconduct of materially misleading the trial court about Thowsen's untruthful hearsay testimony that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643; and *Darden*, *Young* and *Greene* (Page cites above in Ground 49.). [RAB 69-70; 7 App. 1402-9] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

The State doesn't assert the District Court erred not finding any of the material facts related to the prosecutor misconduct are not true and relevant. [*Id.*]

Ground 53. The State doesn't substantively address Lobato's counsel was deficient for failing to use available evidence to impeach Thowsen's facially untruthful and possibly perjurious testimony regarding what she allegedly told him in the holding cell after her arrest that the jury relied on to convict her, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [RAB 70-1; 7 App. 1409-15]

Ground 53 states Lobato's counsel failed "to use available information to cross-examine…Thowsen...", so the record belies the State's assertion she doesn't explain how her counsel "was to have impeached Detective Thowsen." [*Id.*]

Ground 54. The State doesn't substantively address Lobato's counsel was deficient for failing to investigate or cross-examine Thowsen to learn how he obtained the information he used as a "sadistic torture-like psychological tactic" to

obtain her *Miranda* waiver, which information her counsel could have used to exclude her Statement. [7 App. 1416-18; RAB 71-2] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

The State misapplies law of the case and Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975) because *Lobato* (2004) didn't rule on the factual basis of Ground 54. [*Id.*]

Ground 55. The State doesn't address Lobato's counsel was deficient because "the jury didn't know about the false and inconsistent aspects of [Laura] Johnson's Statement and testimony because Petitioner's counsel did not cross-examine her about any of them," and consequently her credibility as a key witness wasn't impeached, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1418-21]

Ground 56. The State doesn't address the significant issue this ground is based on private investigator Skye Campbell's post-conviction Affidavit that defeats the State's new assertion it is an "absurd possibility" Lobato's counsel could have obtained prior to trial the evidence in this ground. [7 App. 1421-22; RAB 73-4]

The State doesn't address Lobato's counsel was deficient for failing to obtain prior to trial the very evidence Lobato obtained post-conviction that undermines the State's narrative and argument at trial alleging she went to Las Vegas to obtain methamphetamine from Duran Bailey around the Nevada State Bank, thus by

Strickland's less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [*Id.*; 5 App. 1005-6]

Ground 57. The State confesses error under *Polk et al*. by failing to address Lobato's constitutional rights were violated by her counsel's failure to object on confrontation grounds to Zachory Robinson's hearsay testimony about the *alleged* contents of *alleged* Budget Suite Hotel records prepared by *unknown others* that weren't introduced into evidence, under Crawford v. Washington, 541 U.S. 36 (2004); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), *et al*. [RAB 74; 7 App. 1423] *Melendez-Diaz* can be considered under *Griffith*, 479 U.S. at 328. The State doesn't assert harmless error, and *Polk* involved a confrontation issue. [7 App. 1423; RAB 74]

The State's arguments Robinson's testimony wasn't inadmissible hearsay fail because Robinson had no personal knowledge about anything or anyone related to the Budget Suites Hotel in May, June, or July 2001 he testified about, and the State didn't introduce the *alleged* records into evidence as required by NRS 51.135. [7 App. 1423; 4 App. 733-47; RAB 74] See, Witherow v. State, 104 Nev. 721, 765 P.2d 1153, 1155 (1988); DeRosa v. District Court, 115 Nev. 225, 985 P.2d 157, 161 (1999); Snow v. State, 101 Nev. 439, 705 P.2d 632, 638 (1985); Theriault v. State, 92 Nev. 185, 547 P.2d 668, 672 (1976).

The State's assertion NRS 51.145 allowed Robinson's hearsay testimony is erroneous because admission of the records as a foundation for his testimony is

required. [*Id.*] See, Hamm v Sheriff, 90 Nev. 252, 254, 523 P.2d 1301, 1302 (1974) (Business records hearsay exception requires foundation of custodian of record or other qualified person identifying records introduced into evidence.).

The State ignores Robinson's hearsay testimony was inadmissible under any circumstance. Flores v. State, 121 Nev. 706, 714-5, 120 P.3d 1170, 1176 (2005), which cites *Crawford*, 541 U.S. at 61-2 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.").

The State confesses error under *Polk et al*. by failing to address the confrontation issue and meritlessly addressing the hearsay issue Lobato's counsel was deficient for failing to object to Robinson's inadmissible hearsay testimony the jury relied on concerning what may or may not have occurred at the Budget Suites Hotel in May, June, or July 2001, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [*Id.*]

Ground 58. The State doesn't substantively address Lobato's counsel was deficient for failing to seek discovery of Thowsen's disciplinary and mental health history in order to impeach his testimony as one of the key witnesses the jury relied on to convict her, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1424-27]

Ground 59. The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to make an NRS 175.381(1) motion the

District Court would have been legally obligated to grant, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1427-29]

The State ignores that because "the prosecution failed to present any physical, forensic, medical, eyewitness, surveillance, documentary, or confession evidence" supporting the essential elements of Counts I and II Lobato was in Clark County on July 8, 2001 and Bailey's assailant, the District Court was legally obligated to grant an NRS 175.381(1) motion under In re Winship, 397 U.S. 358, 364 (1970); Jackson v. Virginia, 443 U.S. 307, 319, 324 (1979); and Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). [7 App. 1427-29; 1 App. 1-2] The State materially disregards Lobato's due process rights were violated by the jury basing its verdict on the prosecution's speculation, conjecture, and unreasonable inferences. [*Id.*]; See, Juan v. Allen, 408 F.3d 1262, 1269 (9th Cir. 2005); United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir. 1986); United States v. Yoakam, 116 F.3d 1346, 1349-50 (10th Cir. 1997); Newman v. Metrish, 543 F.3d 793, 797 (6th Cir. 2008); and O'Laughlin v. O'Brien, 568 F.3d 287, 308 (1st Cir. 2009); See also, Konold v Sheriff, 94 Nev. 289, 579 P.2d 768, 769 (1978); and State v Luchetti, 87 Nev. 343, 486 P.2d 1189, 1191 (1971) (Insufficient identification evidence warrants relief.)

In asserting law of the case the State disregards the general ruling in *Lobato* (2009) didn't address the State's failed to introduce evidence proving every

essential element beyond a reasonable doubt (See Ground 74), and this Court can revisit its ruling as a manifest injustice under *Arizona*, 460 U.S. at 618 fn.8; and *Pellegrini*, 34 P.3d at 535-36 n.107.

Ground 60. The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to object to Instructions 26 and 33 that reduced the prosecution's constitutional burden by allowing the jury to convict on less than evidence proving every essential element beyond a reasonable doubt. *Winship*, *Jackson*, and *Koza*. (Page cites above in Ground 59.). See, Francis v. Franklin, 471 U.S. 307, 326 (1985) (Jury instruction relieving the prosecution's burden of proof is due process violation); and Rose v. State, 127 Nev.Adv.Op. No. 43, 255 P.3d 291, 298 n.2 (2011) (Jury instruction relieving prosecution's burden of proof is due process violation.). [7 App. 1429-31; RAB 76] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [*Id.*] The State doesn't assert harmless error. [*Id.*]

Ground 61. The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to object to Instruction 31 that in conjunction with Instructions 26 and 33 reduced the prosecution's constitutional burden by allowing the jury to convict on less than evidence proving every essential element beyond a reasonable doubt. *Winship, Jackson*, and *Koza*. (Page cites above in Ground 59.) See *Francis*, 471 U.S. at 326; and *Rose*, 255 P.3d at

298 n.2. [7 App. 1431-34; RAB 76-7] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. The State doesn't assert harmless error. [*Id.*]

Grounds 62 and 63. The State doesn't substantively address Lobato's counsel was deficient for failing to object to Instruction 24, which reduced the State's burden for conviction, and for failing to propose an instruction comporting with NRS 201.450's legislative intent, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1434-46; RAB 77-8]

The record belies the State's assertions: (i) law of the case bars these grounds, when *Lobato* (2004) didn't address the Legislature's intent in enacting the Necrophilia Law; (ii) *Lobato* (2004) ruled on the "element of sexual gratification," when it didn't, *Id*. at 522; and (iii) jury Instruction 24 "comported word for word with NRS 201.450," when it leaves out the key elements identifying it only criminalizes sexual assault. [*Id.*] The State doesn't address Instruction 24 unconstitutionally reduced the State's burden by transforming NRS 201.450 into a strict liability offense. [*Id.*]; Honeycutt v. State, 118 Nev. 660, 56 P.3d 362, 368-69 (2002) (Sexual assault is a general intent crime.)

Ground 64. Lobato incorporates herein all facts, arguments and case law set forth above in Ground 59 related to the evidence presented at trial, essential elements, and the State's burden of proof.

The State confesses error under *Polk et al*. by failing to (i) address Lobato's counsel was deficient for failing to submit an essential elements instruction and explain to the jury the State had to present evidence proving each essential element of Counts I and II beyond a reasonable doubt, and (ii) argue the jury was obligated to acquit Lobato because the State failed to meet its burden. See United States v. Gaudin, 515 U.S. 506, 510, 522-23 (1995) (Conviction reversed because jury wasn't instructed about every essential element.); Rossana v State, 113 Nev. 375, 382, 934 P.2d 1045, 1050 (1997) (Failure to instruct about essential element is reversible error.), and Wegner v State, 116 Nev. 1149, 14 P.3d 25, 29-30 (2000) (Erroneous essential elements instruction is reversible error.). [7 App. 1446-7; RAB 78-9] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. The State doesn't assert harmless error and materially miscites Yarborough v. Gentry, 540 U.S. 1, 5-6 (2003) and *Rhyne*. [AOB 107-8]

Ground 65. The State doesn't substantively address the significant issue Lobato's counsel was deficient for failing to object and make a motion for a mistrial that was a manifest necessity because "the jury was conditioned by [the prosecutor's 29] false claims to believe there is evidence of the Petitioner's guilt that in fact does not exist." *Perez*, 9 Wheat. at 580; Arizona v. Washington, 434 U.S. 497, 512-13 (1978) (Judge can declare mistrial to prevent counsel from being "allowed an unfair advantage" for improper opening statement.); United States v.

Dinitz, 424 U.S. 600, 611 (1976) (Mistrial for due process violation of prosecutor opening statement misconduct.) [7 App. 1448-9; 9 App. 1819-23; RAB 79] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable.

The record belies the State's assertion the 29 materially false statements of evidence during opening statements documented in Exhibit 75 can be dismissed as "semantics," and the State doesn't attempt to disprove a single false statement or that they weren't made in bad faith. [*Id.*] The State misstates Rice v. State, 113 Nev. 1300, 949 P.2d 262, 270 (1997) (No "bad faith" for prosecutor's single false evidence claim.).

Ground 66. The State's confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to object to the prosecution's arguments all Bailey's injuries occurred at the same time, when his fatal fracture to the back of his head occurred at least two hours prior to the crimes alleged in Counts I and II, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1449-51; RAB 80]

The State (i) miscites *Yarborough* because counsel's errors were not a strategic decision and owed no deference, and (ii) ignores the prosecutor's misstatements that "affected the fairness of the trial" are reversible error under *Young*, *Darden*, *Donnelly*, and *Greene*. (Pages cites above in Ground 49.)

Ground 67. The State confesses error under *Polk et al*. by failing to address

Lobato's counsel was deficient for failing to object during argument the prosecutor exhorted the jurors to take the physical action of following his lead and marking their ballot based on his personal opinion when he specifically instructed them, "it's time for you to mark it as I did, guilty …", thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1452-53; RAB 81]

The State disregards the prosecutor's personal exhortation is reversible error, Valdez v. State, 124 Nev. 97, 196 P.3d 465, 478 (2008) ("a prosecutor should … not inject his personal opinion or beliefs into the proceedings or attempt to inflame the jury's fears or passions in the pursuit of a conviction."); Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985) ("…by invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney."); Aesoph v. State, 102 Nev. 316, 721 P.2d 379, 383 (1986); *Witherow*, 765 P.2d at 1155-56; Berger v. United States, 295 U.S. 78, 88 (1935); State v. Graves, 668 NW 2d 860, 874 (IA Sup. Ct. 2003) (Prosecutor can't vouch for defendant's guilt.), and Lobato was denied due process by the prosecutor prejudicially infecting her trial with unfairness. *Donnelly*, *Darden*, *Young*, and *Greene*. (Page cites above in Ground 49.) [*Id.*]

The State misstates Dominguez v. State, 112 Nev. 683, 917 P.2d 1364, 1366 (1996), and falsely asserts Lobato doesn't distinguish her case from *Dominguez* that

involved prosecutor arguments about evidence and common notions. [*Id*.; AOB 108-9]

Ground 68. The State doesn't address Lobato's counsel was deficient for failing to object the prosecutor "prejudicially smeared and disparaged the credibility and truthfulness of [three] defense alibi witnesses...because they had not previously been called as witnesses," which unconstitutionally shifted the burden of proof to her, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [RAB 81-2; 7 App. 1453-5]

The State ignores the prosecutor's misconduct was prejudicial error, Ross v. State, 106 Nev. 924, 926, 803 P.2d 1104, 1105-06 (1990) (Prosecutor's unobjected to comments about absence of testimony was plain error.); and Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996) (Prosecutor's objected to comments about absence of testimony was reversible error.), that unconstitutionally shifted the burden of proof to Lobato to prove her witnesses' truthfulness. *Ross*, 803 P.2d at 1105-06, referencing *Winship*. [RAB 81-2; 7 App. 1453-55] The State miscites *Ennis*, and *Rowland*, 118 Nev. at 39 that involved a witness who admitted giving prior untruthful testimony. [RAB 81; AOB 98-102]

Ground 69. The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to object and move for a mistrial as a manifest necessity (*Perez,* 9 Wheat. at 580; *Glover*, 220 P.3d at 701) when the State repeatedly argued her guilt was proved by (i) statements she never made, and

(ii) matters not in evidence about blood on her, her clothes, and her car, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1455-8; RAB 82-3]

The State miscites *Ennis*, and *Green* that concerned argument about trial evidence, while this ground concerns argument about which no evidence was offered. [*Id.*] The State ignores confirmatory scientific Hematrace and DNA tests of Lobato's car were negative for any blood, and there was no evidence Lobato told anyone blood was on her, her clothes, or her car after the incident described in her Statement, yet the prosecutors falsely argued four times she said that. [*Id*.] The State ignores prosecutor misconduct of prejudicial arguments is a due process violation under *Young*, *Darden*, *Donnelly*, *Greene*, and *Glover* (Page cites above in Grounds 48 and 49.), and about matters not in evidence specifically under Schrader v. State, 102 Nev. 64, 714 P.2d 1008, 1009 (1986) (Conviction reversed because "A defendant has a right to a verdict based on the evidence admitted at trial.") and *Collier*, 705 P.2d at 1129.

Ground 70. The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to object and move for a mistrial because of the prosecutor's blatant misconduct of making more than 250 "improper and prejudicial closing and rebuttal arguments [documented in Exhibit 76] that were used as a substitute for evidence of the Petitioner's guilt not introduced during trial" that prejudicially infected the proceedings with unfairness, thus by *Strickland's* less than a

preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1458-67; 9 App. 1825-47; RAB 83-4; AOB 121]

The State doesn't address a single one of the more than 250 prejudicial prosecutor arguments in Exhibit 76 which "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly*, 416 U.S. at 643, and disregards reversal is required under *Young*, *Darden*, *Donnelly*, *Greene* and *Glover* (Page cites above in Grounds 48 and 49.); the arguments based on personal opinions require reversal under *Valdez*, *Aesoph*, *Witherow*, *Collier* and *Berger* (Page cites above in Ground 67); the multitude of arguments about matters not in evidence require reversal under *Schrader*, 714 P.2d at 1009, *Collier*, 705 P.2d at 1129, and People v. Hill, 17 Cal. 4th 800, 827-28, 847, 952 P.2d 673 (Cal. SC 1998) (Prosecutor arguing matters not in evidence "circumventing the rules of evidence" is reversible error.); and the prosecutor's cumulative misconduct requires reversal under *Valdez*, 196 P.3d at 481 (This Court couldn't "allow prosecutors to engage in misconduct by overlooking cumulative error…") [7 App. 1458-67; 9 App. 1825-47; RAB 83-4]

Ground 71. The State doesn't address Lobato's counsel was deficient as set forth above for failing to conduct any investigation regarding the unrebutted exculpatory post-conviction expert dental evidence that "establishes Bailey's six intact teeth would have been shattered if he had been hit in the mouth with a bat," which disproves the State's trial narrative and arguments Lobato used her baseball

bat to knock out Bailey's teeth and that blow knocked him over, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1468-70; RAB 84-5]

D.D.S. Mark Lewis' expert opinions are unrebutted, yet the State makes broad new unsupported allegations regarding "the force required to knock out someone's teeth." [7 App. 1468-70; 9 App. 1918; RAB 85] The record belies the State's assertions: (i) Dr. Lewis made a "generalized opinion" when his Affidavit states "…I do not believe that a baseball bat was used to knock out Bailey's teeth…," (ii) "Dr. Lewis based his opinion on photos and testimony," and (iii) Dr. Lewis' new expert evidence isn't exculpatory or relevant. [*Id.*]

This is a *Strickland* ground, so the State's arguments concerning new evidence and *D'Agostino* are inapplicable. [*Id.*]

Ground 72. Lobato incorporates herein all facts, arguments, and case law set forth above in Ground 59 related to the evidence presented at trial, essential elements, and the State's burden of proof.

The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to make an NRS 175.381(2) motion because with the absence of <u>any</u> evidence proving the essential elements Lobato was in Clark County on July 8, 2001 <u>and</u> Bailey's assailant, the District Court was legally obligated to grant the motion (*Winship*, *Jackson*, and *Koza*. (Page cites above in Ground 59.)), and her due process

rights were violated by the jury basing its verdict on the prosecution's speculation, conjecture, and unreasonable inferences. *Juan*, *Lewis*, *Yoakam*, *Newman*, and *O'Laughlin*; See also *Konold*, and *Luchetti*. (Page cites above in Ground 59.) [7 App. 1471-3; RAB 85-6;] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [*Id*.]

The record belies the State's assertion the jury could "make an obvious inference" about the above essential elements in the absence of evidence, and as set forth above in Ground 15 the jury prejudicially relied on extrinsic evidence to decide the jurisdictional element. [RAB 86; AOB 68-71; 6 App. 1239-41]

In asserting law of the case, the State disregards the general ruling in *Lobato* (2009) didn't consider the issue the State failed to prove every essential element beyond a reasonable doubt, and this Court can revisit its ruling as a manifest injustice under *Arizona*, 460 U.S. at 618 n.8; and *Pellegrini*, 34 P.3d at 535-36 n.107. [RAB 85-6]

Ground 73. The State confesses error under *Polk et al*. by failing to address Lobato's counsel was deficient for failing to conduct any investigation or file a post-verdict motion regarding the three new DNA testing techniques developed after her trial that can test the crime scene evidence – including the semen recovered from Bailey's rectum – to scientifically exclude Lobato from her convicted crimes and identify the DNA profile of Bailey's assailant. [7 App. 1473-8; RAB 86-7] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable

probability" the DNA testing would establish her trial's outcome was unreliable.

The record belies the State's assertion the law of case No. 59147 applies because that appeal was dismissed on jurisdictional defects without addressing its merits. Lobato v. State, No. 59147 (2012) (Order Dismissing Appeal, 1-12-12); [*Id.*]

The record belies the State's assertions (i) Lobato's "petition is intended to challenge counsel's performance at trial," and (ii) that David Schieck was not Lobato's counsel when informed of the three new DNA testing techniques, and all assertions about how he learned of those techniques are irrelevant. [*Id.*]

Ground 74. Lobato incorporates herein all facts, arguments and case law set forth above in Ground 59 related to the evidence presented at trial, essential elements, and the State's burden of proof.

The State confesses error under *Polk et al*. by failing to address Lobato's appellate counsel was deficient for failing to argue in her direct appeal Argument A the State failed to introduce evidence proving every essential element of Counts I and II beyond a reasonable doubt (*Winship*, *Jackson*, and *Koza* (Page cites above in Ground 59.)), and that her convictions were unconstitutionally "based on a series of assumptions, interpretations, inferences, conjectures, and speculations by the prosecution" See, United States v. Boissoneault, 926 F.2d 230, 234 (2d Cir. 1991); *Juan*, *Lewis*, *Yoakam*, *Newman*, and *O'Laughlin*; See also *Konold* (Page cites above in Ground 59.). [RAB 88; 7 App. 1478-89; 9 App. 2139-41] Thus by *Strickland's* less

than a preponderance prejudice standard there is a "reasonable probability" that but for her counsel's deficient conduct she would have had success on appeal. Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir. 1991); Smith v. Robbins, 528 U.S. 259, 289 (2000).

The State doesn't dispute: "If Petitioner's counsel had correctly and fully briefed the Nevada Supreme Court … it can be expected the Court would have vacated her convictions on the basis of insufficiency of the evidence." *Winship; Jackson;* and *Koza*. (Page cites above in Ground 59.) [7 App. 1487; RAB 88] The State disregards *Strickland's* prejudice standard is significantly lower than for direct appeal.

The State misapplies law of the case and *Hall*, and even if *arguendo Lobato* (2009) applies, the State disregards this Court can revisit its ruling as a manifest injustice under *Arizona*, 460 U.S. at 618 n.8; and *Pellegrini*, 34 P.3d at 535-36 n.107.

Ground 75. The State confesses error under *Polk et al*. by failing to address Lobato's appellate counsel was deficient for failing to argue in her direct appeal Argument H-1 the District Court prejudicially misapplied law of the case to deny exclusion of Lobato's Statement, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" that but for her counsel's deficient conduct she would have had success on appeal. *Heath*, 941 F.2d at 1132; *Smith*, 528 U.S. at 289. [7 App. 1489-94; RAB 88-9] The State disregards *Strickland's* prejudice standard is significantly lower than for direct appeal.

The State doesn't acknowledge this ground's claim of error and misapplies

law of the case and *Hall*, and even if *arguendo Lobato* (2009) applies, the State disregards this Court can revisit its ruling as a manifest injustice under *Arizona*, 460 U.S. at 618 n.8; and *Pellegrini*, 34 P.3d at 535-36 n.107. [*Id.*]

Ground 76. The State doesn't address Lobato's appellate counsel was deficient for failing to argue in her Petition For Rehearing and Petition For Reconsideration En Banc that rehearing was "necessary to promote substantial justice," Gordon v. District Court, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998), because under NRAP 40(c)(2)(A) this Court "overlooked or misapprehended a material fact in the record" Lobato didn't make an admission to Bailey's homicide, and no blood from any person was found in her car. [RAB 89-90; 7 App. 1495-1502] Thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" that but for her counsel's deficient conduct she would have had success on appeal. *Heath*, 941 F.2d at 1132; *Smith*, 528 U.S. at 289.

The record belies the State's assertion Lobato made "incriminating statements uniquely tying her to the killing" because the State doesn't deny "there was no testimony during Petitioner's trial she made any admission to Bailey's murder or that she knew any specific details of the crime … Neither did she identify a single landmark at the scene of Bailey's murder," and the State doesn't deny there are no essential elements of Lobato's charged crimes in her Statement. *Smith*, *Opper*, and *Corona-Garcia* (Pages cites above in Ground 39.). [*Id.*; Exhibit 125A] Consequently, there

was no factual basis for this Court's ruling "based on Lobato's admission, there was substantial evidence that she committed the murder." *Lobato* at 4 (2009).

The State doesn't deny "The public record in Petitioner's case is absolutely crystal clear: no blood was found in the Petitioner's car." [7 App. 1499] Thus there was no factual basis for this Court's ruling based on "positive luminol and phenolphthalein tests for blood" in Lobato's car. *Lobato* at 2 (2009).

As set forth above in the Statement Of The Facts, the record belies the State's multiple false assertions concerning Renhard and Wahl's testimony. [RAB 90]

Ground 79. The State doesn't substantively address Lobato's counsel was deficient for his "lackadaisical attitude toward his representation of the Petitioner and his fatally deficient failure to diligently and effectively represent her prior to, during, or after trial," thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [7 App. 1503-14; RAB 92-3]

The record belies the State's assertions this ground is about (i) her public defender "did not authorize unlimited funds for various expert witnesses," (ii) "differences of opinion and difficulties in communication," and (iii) it is solely based on a "letter from co-counsel." [RAB 92-3; 7 App. 1503-14]

The State doesn't address that "Beginning at least a year prior to Petitioner's trial and continuing up to the eve of trial, Greenberger expressed grave concern about…

[lead counsel] Schieck's "attitude of indifference towards this case in general," and that less than a month before trial she wrote Schieck: "I am concerned specifically with preventing an ineffective assistance of counsel claim in this case…" [7 App. 1503]

Ground 77. The State disregards their case was so weak that after deliberating for two days the jury convicted on the significantly reduced charge of voluntary manslaughter, and the State doesn't address the slightest degree of cumulative deficient conduct by Lobato's counsel's detailed in Grounds 27-76 and 79 warrants a new trial because it likely tipped the scale for the jury to convict and not acquit or have a mistrial, thus by *Strickland's* less than a preponderance prejudice standard there is a "reasonable probability" her trial's outcome was unreliable. [AOB 123-5, 6 App. 1312-71, 7 App. 1372-1514; 10 App. 2145-6]

The State's falsely asserts "the Nevada Supreme Court has never issued [] a holding" ineffective assistance of counsel claims under *Strickland* are reviewed for their cumulative effect, when this Court and federal courts have repeatedly done so. See, Sanborn v. State, 107 Nev. 399, 404, 812 P.2d 1279, 1283-4 (1991); *Witherow*, 765 P.2d at 1156; *Warner*, 729 P.2d at 1361; Big Pond v. State, 101 Nev. 1, 692 P.2d 1288, 1289 (1985); Alcala v. Woodford, 334 F.3d 862, 883 (9th Cir 2003); U.S. v. Frederick, 78 F.3d 1370, 1381 (9th Cir.1996) ("In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors."); *Williams*, 529 U.S. at 397-98; and Rompilla

v. Beard, 545 U.S. 374, 393 (2005). See also, Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) ("The Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal.") Thus there is no legal basis for the State's assertion, "The State submits that such an analysis is not appropriate when determining whether trial or appellate counsel was ineffective." [RAB 91; AOB 123-5]

III. CONCLUSION.

The State fails to adequately address the District Court's prejudicial legal and factual errors in denying Lobato's 79 grounds for relief. Therefore, this Court should reverse her convictions and order a new trial, or if appropriate, order dismissal of her charges.

Dated this 27th day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this 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.

Pursuant to NRAP 32(a)(4)-(6), this brief is formatted in Times New Roman, size 14 font, with 1" margins on all sides.

Pursuant to this Court's Order of November 27, 2012, excluding the parts exempted by NRAP 32(a)(7)(C), this Reply Brief contains no more than 14,813 words.

Dated this 27th day of December, 2012.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 27th day of December, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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