Kirstin B. Lobato 95558
NAME, BACK NO.

FMWCC
PRISON

c/o Michelle Ravell, Attorney in Fact
ADDRESS

5813 Santa Catalina Las Vegas NV 89108
CITY, STATE, ZIP
702-321-3277

michelleravell@cox.net
PETITIONER IN PROPER PERSON

COPY

FILED

MAY 5 1 28 PM '10

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

KIRSTIN BLAISE LOBATO Petitioner, vs. WARDEN OF FMWCC, and THE STATE OF NEVADA, Respondent.	CASE NO. C 177394 DEPT. NO. II PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND MOTION FOR APPOINTMENT OF COUNSEL DATE: TIME:

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Florence McClure Womens Correctional Center, Clark county

2. Name and location of court which entered the judgment of conviction under attack: Clark County District Court, Las Vegas NV

3. Date of judgement of conviction: 10/6/06

4. Case number: C 177394

5. (a) Length of sentence: 13 Years Min to 35 years max

(b) If sentence is death, state any date upon which execution is scheduled:

_____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No XX

If "yes", list crime, case number and sentence being served at this time:

_____

7. Nature of offense involved in conviction being challenged:

Voluntary manslaughter w/deadly weapon, sexual penetration of a dead human body

_____

8. What was your plea? (Check one)

(a) Not guilty XX

(b) Guilty _____

(c) Guilty but mentally ill _____

(d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

_____

_____

_____

_____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury XX

(b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No XX

12. Did you appeal from the judgement of conviction? Yes XX No _____

13. If you did appeal, answer the following:

(a) Name of court: NV Supreme Court

(b) Case number or citation: 49087

(c) Result: Denied

(d) Date of result: May 19, 2009

14. If you did not appeal, explain briefly why you did not:

_____

_____

15. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgement in any court, state or federal? Yes ____ No ____

16. If your answer to No. 15 was "yes," give the following information:

(a) as to any first petition, application or motion:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(b) as to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes _____ No ____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes _____ No ____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ___ No ____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

_____

_____

_____

_____

_____

_____

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? Yes: _____ No: XX

If yes, identify: _____

_____

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) See pages 9-13. "Habeas Petition Grounds and Reasons for not presenting them on direct appeal." The Grounds are based on New Evidence, IAC Claims not proper for direct appeal, and Brady violations.

19. Are you filing this petition more than 1 year following the filing of the judgement of conviction or the filing of a decision on direct appeal?

Yes: ___ No: XX If yes, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

_____

_____

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgement under attack? Yes ____ No XX

If yes, state what court and the case number: _____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

TRIAL ATTORNEY: David Schiek

DIRECT APPEAL: JoNell Thomas

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgement under attack? Yes XX No _____ If yes, specify

. . .

where and when it is to be served, if you know: _____

Clark County Detention Center when sentences of judgment under attack are completed.

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one:

SEE ATTACHED PAGES WITH GROUND ONE, AND ALSO GROUNDS TWO THROUGH SEVENTY-NINE.

Supporting FACTS (Tell your story briefly without citing cases or law.):

SEE ATTACHED PAGES WITH SUPPORTING FACTS FOR GROUND ONE, AND ALSO THE SUPPORTING FACTS FOR GROUNDS TWO THROUGH SEVENTY-NINE.

IN ADDITION, I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME FILE A SUPPLEMENTAL PETITION AND POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION

(b) Ground two:

SEE ATTACHED PAGES WITH GROUND TWO, AND ALSO GROUNDS THREE THROUGH SEVENTY-NINE.

Supporting FACTS (Tell your story briefly without citing cases or law.):

SEE ATTACHED PAGES WITH SUPPORTING FACTS FOR GROUND TWO, AND ALSO THE SUPPORTING FACTS FOR GROUNDS THREE THROUGH SEVENTY-NINE.

IN ADDITION, I AM INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL APPOINTED TO HELP ME FILE A SUPPLEMENTAL PETITION

AND POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION

WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he may be entitled in this proceeding; and pursuant to NRS 34.820 moves this Court for an Order to appoint counsel to assist Petitioner in these proceedings.

EXECUTED at FMWCC Prison on 4-29-10, 2008.

SIGNATURE

Kristen Lobato 95558

PRINT NAME INMATE #

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

SIGNATURE

Kristen Lobato 95558

PRINT NAME INMATE #

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Petition for Writ of Habeas Corpus (Post Conviction) filed in District Court Case number _____ does not contain the social security number of any person.

DATED: 4-29-10

SIGN

Kristin Lobato

PRINT NAME

95558

INMATE NO.

79 Habeas Corpus Petition Grounds and Reasons for not presenting them on direct appeal.
Attachment to Number 18 (on page 5).

(a) Ground 1. New forensic entomology evidence that Duran Bailey's time of death in Las Vegas was after sunset on July 8, 2001, when the Petitioner was 170 miles away in Panaca, Nevada.

(b) Ground 2. New forensic pathology evidence that Bailey's time of death was after 8 pm on July 8, 2001, when the Petitioner was 170 miles away in Panaca.

(c) Ground 3. New forensic entomology and forensic pathology evidence that Bailey's body did not have cockroach and other predator bites, which establishes his time of death was close to discovery of his body in Las Vegas, when Petitioner was 170 miles away in Panaca.

(d) Ground 4. New expert psychology evidence the Petitioner's Statement describing a sexual assault at an east Las Vegas hotel is not a confession to Bailey's murder at a west Las Vegas bank.

(e) Ground 5. New alibi witness evidence the sexual assault at the Budget Suites Hotel described in the Petitioner's Statement occurred prior to July 8, 2001, undermining the credibility of Detective Thomas Thowsen's opinon testimony the Petitioner's Statement is a *de facto* confession that the prosecution relied on in their arguments to the jury.

(f) Ground 6. New alibi witness evidence the Petitioner was in Panaca on July 6, 7, and 8, 2001, and she wasn't under the influence of methamphetamine, so she could not have murdered Bailey in Las Vegas on July 8 while under the influence of methamphetamine.

(g) Ground 7. New forensic pathology evidence that more than one person was involved in Duran Bailey's murder, and it excludes the Petitioner.

(h) Ground 8. New forensic pathology and crime scene evidence Duran Bailey was alive when his rectum was injured means the Petitioner was convicted of a non-existent violation of NRS 201.450.

(i) Ground 9. New forensic pathology evidence that on July 8, 2001, Bailey experienced two attacks two hours apart and likely separated by a meal.

(j) Ground 10. New forensic pathology evidence related to the circumstances and time of Bailey's murder excludes the Petitioner as a perpetrator.

(k) Ground 11. New forensic science evidence establishes the Petitioner's shoes could not have been worn by Bailey's murderer.

(l) Ground 12. New forensic science evidence establishes the shoeprints imprinted in blood on cardboard covering Bailey and on concrete leading out of the trash enclosure were made by his murderer, and the Petitioner's shoeprints are excluded.

(m) Ground 13. New forensic science evidence excludes the Petitioner and her car from the crime scene, and undermines the prosecution's theory of the crime.

(n) Ground 14. New witness evidence Bailey did not live in the trash enclosure where he was murdered establishes the Petitioner could not have known to go there.

(o) Ground 15. New witness evidence that in July 2001 methamphetamine was readily available in Panaca where Petitioner was living and nearby towns, so she would have no reason to go to Las Vegas.

(p) Ground 16. New third-party culprit evidence that Diann Parker's Mexican friends murdered Bailey.

(q) Ground 17. New evidence that three checks drawn from Bailey's Nevada State Bank account were negotiated for cash one to three days after his death.

(r) Ground 18. New forensic science, dental, and crime scene evidence the prosecution's theory was impossible that Bailey was hit in the mouth by a baseball bat in the trash enclosure's northwest corner, and fell backwards and hit his head on the south curb.

(s) Ground 19. New legal evidence Petitioner was convicted of a non-existent alleged violation of NRS 201.450.

(t) Ground 20. New witness evidence of jury misconduct that at least four jurors discussed the case prior to the close of evidence, and at least one juror had decided on the Petitioner's guilt.

(u) Ground 21. New evidence LVMPD Detective Thomas Thowsen testified perjuriously multiple times in an effort to falsely link the Petitioner to Bailey's murder.

(v) Ground 22. New evidence of police and prosecutor misconduct by prosecuting the Petitioner when they had evidence the Petitioner did not murder Bailey or cut his rectum after death.

(w) Ground 23. New forensic entomology, forensic pathology, forensic science, crime scene reconstruction, psychology, alibi witness, dental, third-party culprit, police perjury, and prosecution and police misconduct evidence establishes the Petitioner is actually and factually innocent of murdering Bailey and the post-mortem cutting of his rectum on July 8, 2001.

(x) Ground 24. New evidence the Petitioner's conviction was based on false evidence.

(y) Ground 25. *Brady* violation. The prosecution failed to disclose the relationship between Bailey and law enforcement.

(z) Ground 26. *Brady* violation. The prosecution failed to disclose to Petitioner there is no such person as Daniel Martinez with SSN ***-**-****.

(aa) Ground 27. Petitioner's counsel prejudicially failed to investigate Diann Parker's Mexican friends as Bailey's killers.

(bb) Ground 28. Petitioner's counsel prejudicially failed to investigate seven unique handwritten telephone numbers that were found in Bailey's pants pockets that could have resulted in discovery of Bailey's killer, exculpatory witnesses, or other exculpatory evidence.

(cc) Ground 29. Petitioner's counsel prejudicially failed to subpoena Bailey's Nevada State Bank records, including three checks that were likely negotiated by his killer after his murder.

(dd) Ground 30. Petitioner's counsel failed to obtain a court order to test Diann Parker's DNA, and to compare her DNA and fingerprints with crime scene evidence to tie her Mexican friends to Bailey's murder.

(ee) Ground 31. Petitioner's counsel failed to investigate reports filed under NRS 629.041.

(ff) Ground 32. Petitioner's counsel prejudicially failed to subpoena LVMPD Detective LaRochelle to impeach Detective Thowsen's testimony regarding investigations he testified he conducted to verify the assault described in the Petitioner's Statement of July 20, 2001.

(gg) Ground 33. Petitioner's counsel prejudicially failed to subpoena LVMPD Detective Thowsen's secretary to impeach his testimony regarding a search of NRS 629.041 reports filed in May, June and July 2001 that he testified he directed her to perform.

(hh) Ground 34. Petitioner's counsel prejudicially failed to subpoena the LVMPD manuals, protocols, memorandums, and/or regulations homicide detectives are required to follow when conducting a homicide investigation to impeach Detective Thowsen's testimony.

(ii) Ground 35. Petitioner's counsel prejudicially failed to file motion *in limine* to exclude all testimony about Petitioner's prior methamphetamine use that had no relevance to Bailey's murder.

(jj) Ground 36. Petitioner's counsel failed to file discovery request for all discoverable materials.

(kk) Ground 37. Petitioner's counsel failed to file Motion to Dismiss the NRS 201.450 charge prior to trial on the basis it alleged a non-existent violation of the necrophilia law by the Petitioner.

(ll) Ground 38. Petitioner's counsel prejudicially failed to retain a forensic entomologist and introduce expert entomology testimony about Bailey's time of death.

(mm) Ground 39. Petitioner's counsel prejudicially failed to retain a psychologist and introduce expert testimony the Petitioner's Statement is not a confession to Bailey's murder.

(nn) Ground 40. Petitioner's counsel prejudicially failed to retain a forensic pathologist and introduce exculpatory expert forensic pathology testimony about the medical evidence related to Bailey's murder.

(oo) Ground 41. Petitioner's counsel failed to retain forensic scientist and blood pattern expert George Schiro, and introduce his exculpatory testimony about Duran Bailey's murder.

(pp) Ground 42. Petitioner's counsel prejudicially failed to cross-examine ME Lary Simms about Bailey's time of death and his rectum wound that was inconsistent with Simms' preliminary hearing testimony that Bailey died within 12 hours of his body's discovery and that his rectum wound was ante-mortem.

(qq) Ground 43. Petitioner's counsel prejudicially failed to object that the prosecution did not comply with the required statutory notice of expert luminol and/or phenolphthalein testimony by Louise Renhard, Daniel Ford, Thomas Wahl and Kristina Paulette.

(rr) Ground 44. Petitioner's counsel prejudicially failed to introduce into evidence Petitioner's exculpatory black shoes she was wearing when assaulted at the Budget Suites Hotel.

(ss) Ground 45. Petitioner's counsel prejudicially insisted the prosecution introduce into evidence a butterfly knife that had no connection to the Petitioner, Bailey, or the crime.

(tt) Ground 46. Petitioner's counsel prejudicially failed to properly argue the Petitioner's alibi witness evidence is trustworthy and admissible under state and federal hearsay exceptions.

(uu) Ground 47. Petitioner's counsel prejudicially failed to object that the prosecution did not comply with the required statutory notice of expert psychology opinion testimony by Detective Thowsen.

(vv) Ground 48. Petitioner's counsel prejudicially failed to object and make a motion for a mistrial after Detective Thowsen's declared in response to a juror's question – "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." – when Thowsen's declaration was not fact but his personal opinion, and it irreparable prejudiced Petitioner's rights to an unbiased and impartial jury, due process of law, and a fair trial.

(ww) Ground 49. Petitioner's counsel prejudicially failed to object and make a motion for a mistrial when during Detective Thowsen's direct testimony ADA William Kephart committed egregious prosecutorial misconduct by falsely declaring the Petitioner gave Thowsen "her confession" to Bailey's murder, and Kephart's prosecutorial misconduct fatally prejudiced the Petitioner's rights to an unbiased and impartial jury, due process, and a fair trial.

(xx) Ground 50. Petitioner's counsel prejudicially failed to use available information to impeach Detective Thowsen's testimony about his alleged investigations to verify the sexual assault at the Budget Suites Hotel described in the Petitioner's Statement.

(yy) Ground 51. Petitioner's counsel prejudicially failed to object on confrontation grounds to Detective Thowsen's testimony about what he said his secretary told him she learned from searching for NRS 629.041 reports, and what he said Las Vegas urologists and hospital personal told him they did regarding a cut or severed penis in May, June and July 2001.

(zz) Ground 52. Petitioner's counsel prejudicially failed to object and make a motion for a mistrial based on ADA Kephart's egregious prosecutorial misconduct of suborning perjury from Detective Thowsen about searches of NRS 629.041 reports he did not conduct, misrepresenting to Judge Vega what Thowsen's direct testimony about the NRS 629.041 reports would be, and then misrepresenting to Judge Vega what Thowsen's testimony had been.

(aaa) Ground 53. Petitioner's counsel prejudicially failed to use available information to cross-examine Detective Thowsen to impeach his testimony regarding what he said the Petitioner said about the holding cell she was in after her arrest.

(bbb) Ground 54. Petitioner's counsel failed to question Detective Thowsen during cross-examination about the information regarding Petitioner's sexual assaults as a child that he used to extract the Petitioner's waiver of her *Miranda* rights to determine if they were legally obtained.

(ccc) Ground 55. Petitioner's counsel prejudicially failed to use available information to impeach Laura Johnson's credibility during her cross-examination.

(ddd) Ground 56. Petitioner's counsel prejudicially failed to investigate and introduce testimony about the area of Las Vegas where methamphetamine was readily bought in June and July 2001.

(eee) Ground 57. Petitioner's counsel prejudicially failed to object on confrontation grounds to Zachory Robinson's hearsay testimony about Budget Suites Hotel reports from May to July 2001.

(fff) Ground 58. Petitioner's counsel prejudicially failed to file a pre-trial motion for the disclosure of Detective Thowsen history of giving false testimony, his disciplinary record for dishonest and/or unethical conduct, and his history of mental health issues.

(ggg) Ground 59. Petitioner's counsel prejudicially failed to make a NRS 175.381(1) motion for Judge Vega to advise the jury to acquit the defendant of all charges at the close of the State's case, at the close of the defense's case, and after at the State's rebuttal, on the basis the prosecution did not introduce evidence proving beyond a reasonable doubt all the essential elements of the crimes charged and there was insufficient evidence for the jury to find her guilty.

(hhh) Ground 60. Petitioner's counsel prejudicially failed to object to jury instructions 26 and 33 that empowered the jury to determine her "guilt or innocence," and eliminated her "presumption of innocence" by shifting the burden to her to prove her innocence.

(iii) Ground 61. Petitioner's counsel prejudicially failed to object to jury instruction 31's " more weighty affairs of life" reasonable doubt standard, and the prejudice of instruction 31 was compounded by jury instructions 26 and 33 that empowered the jury to determine the Petitioner's "guilt or innocence," and eliminated her "presumption of innocence" by shifting the burden to her to prove her innocence.

(jjj) Ground 62. Petitioner's counsel prejudicially failed to submit a NRS 201.450 jury instruction that properly stated the law.

(kkk) Ground 63. Petitioner's counsel prejudicially failed to object to the NRS 201.450 jury instruction that did not properly state the law.

(lll) Ground 64. Petitioner's counsel prejudicially failed to explain to the jury that the prosecution had not proved each essential element of each charge.

(mmm) Ground 65. Petitioner's counsel failed to object during the prosecution's opening statement to false claims the Petitioner's counsel knew would not be proved during the trial.

(nnn) Ground 66. Petitioner's counsel prejudicially failed to object to prosecution closing and rebuttal arguments that Bailey's skull was fractured at the same time his external injuries were inflicted, when ME Simms testified it was contemporaneous with Bailey's brain swelling that began at least two hours before his death.

(ooo) Ground 67. Petitioner's counsel prejudicially failed to object and make a motion for a mistrial when during ADA Kephart's rebuttal argument he committed irreparable prosecutorial misconduct by telling the jury he personally believes the Petitioner is guilty and the jurors should follow his lead and mark their ballots to convict her as he did: "it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body."

(ppp) Ground 68. Petitioner's counsel prejudicially failed to object during the prosecution's closing and rebuttal arguments that prejudicially disparaged the honesty of defense alibi witnesses.

(qqq) Ground 69. Petitioner's counsel prejudicially failed to object and make a motion for a mistrial when ADAs Sandra DiGiacomo and William Kephart committed egregious and irreparable prosecutorial misconduct during closing and rebuttal arguments, respectively, by declaring the Petitioner said she had blood on her, her clothes were bloody and that she got in her car bloody, when there was no evidence introduced at trial supporting those fatally prejudicial claims.

(rrr) Ground 70. Petitioner's counsel failed to object or make a motion for a mistrial based on the irreparable prosecutorial misconduct of more than 250 false, fabricated, and otherwise improper prosecution arguments that were used as a substitute for evidence of the Petitioner's guilt.

(sss) Ground 71. Petitioner's counsel prejudicially failed to retain a dental expert and introduce exculpatory expert dental testimony that Bailey's teeth were not knocked out by a baseball bat.

(ttt) Ground 72. Petitioner's counsel failed to make a NRS 175.381(2) motion for a judgment of acquittal within 7 days after the jury's verdict on the basis the prosecution did not introduce evidence proving beyond a reasonable doubt the essential element she was "within Clark County" at the time Bailey was murdered and there was insufficient evidence for the jury to find her guilty.

(uuu) Ground 73. Petitioner's counsel failed to file a post-verdict motion for DNA testing of crime scene evidence by new DNA testing techniques developed after the Petitioner's conviction.

(vvv) Ground 74. Petitioner's counsel failed to brief and argue in her Nevada Supeme Court direct appeal's "insufficiency of the evidence" claim that her convictions were based on an inverted pyramid of speculative inferences piled on speculation that the jury relied on as a substitute for actual evidence proving her guilt beyond a reasonable doubt.

(www) Ground 75. Petitioner's counsel failed to brief and argue to the NSC that the Petitioner's statements were not voluntary, and that Judge Vega misapplied the "law of the case" doctrine.

(xxx) Ground 76. Petitioner's counsel prejudicially failed to include as argument in the "Petition For Rehearing" and the "Petition For Reconsideration En Banc" that the NSC's ruling affirming the Petitioner's convictions was based on two false assumptions of fact.

(yyy) Ground 77. Cumulative prejudicial errors by Petitioner's trial and appellate counsel supports vacating Petitioner's conviction and dismissal of the charges or a new trial.

(zzz) Ground 78. Cumulative new exculpatory evidence supports vacating the Petitioner's conviction and dismissal of the charges or a new trial.

(aaaa) Ground 79. Petitioner's counsel failed to diligently represent her prior to, during, or after trial.

Habeas Corpus Petition Grounds One (1) To Seventy-Nine (79) and Supporting Facts

KIRSTIN BLAISE LOBATO
v.
WARDEN OF FMWCC and
THE STATE OF NEVADA

IN THE EIGHT JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

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New forensic entomology evidence that Duran Bailey's time of death was after sunset on July 8, 2001, in Las Vegas, when it is known the Petitioner was 170 miles away in Panaca.

(b) Ground two. 29
New forensic pathology evidence that Duran Bailey's time of death was after 8 pm on July 8, 2001, in Las Vegas when it is known the Petitioner was 170 miles away in Panaca.

(c) Ground three. 32
New entomology and forensic pathology evidence that Duran Bailey's body did not have cockroach and other predator bites establishes his time of death was close to discovery of his body in Las Vegas, when it is known the Petitioner was 170 miles away in Panaca.

(d) Ground four. 36
New expert psychology evidence the Petitioner's Statement is not a confession to Bailey's murder, and it describes a rape assault at a Budget Suites Hotel in east Las Vegas that occurred weeks before Bailey's murder.

(e) Ground five. 41
New alibi witness evidence the rape assault at the Budget Suites Hotel described in the Petitioner's Statement occurred prior to July 8, 2001, which undermines the credibility of Detective Thomas Thowsen's opinion testimony the Petitioner's Statement is a *de facto* confession, that the prosecution relied on in their jury arguments.

(f) Ground six. 47
New alibi witness evidence the Petitioner was in Panaca on July 6, July 7, and July 8, 2001, and she wasn't under the influence of methamphetamine.

(g) Ground seven. 51
New forensic pathology evidence that more than one person was involved in Duran Bailey's murder, and the Petitioner is excluded as the person who amputated his penis, corroborating that her Statement was about a different incident than Bailey's murder.

(h) Ground eight. 53
New forensic pathology and crime scene evidence Duran Bailey was alive when his rectum was injured, so the Petitioner was convicted of a non-existent violation of NRS 201.450, which requires "sexual penetration" of a dead person.

(i) Ground nine. 56
New forensic pathology evidence that on July 8, 2001, Bailey experienced two attacks two hours apart that were likely separated by a meal.

(j) Ground ten. 58
New forensic pathology evidence related to the circumstances and time of Duran Bailey's murder excludes the Petitioner as a perpetrator.

(k) Ground eleven. 69
New forensic science evidence establishes the Petitioner's black high-heeled open-toed platform shoes could not have been worn by Duran Bailey's murderer.

(l) Ground twelve. 73
New forensic science evidence establishes the shoeprints imprinted in blood on cardboard and on concrete leading out of the trash enclosure were made by Duran Bailey's murderer, and the Petitioner's shoeprints are excluded.

(m) Ground thirteen. 78
New forensic science evidence excludes the Petitioner and her car from the crime scene, and undermines the prosecution's theory of the crime.

(n) Ground fourteen. 87
New witness evidence Duran Bailey did not live in the trash enclosure where he was murdered establishes the Petitioner could not have known to go there "sometime before sunup"on July 8, 2001.

(o) Ground fifteen. 90
New witness evidence that in July 2001 methamphetamine was readily available in Panaca within walking distance of the where the Petitioner was living, and in other nearby towns.

(p) Ground sixteen. 92
New third-party culprit evidence that Diann Parker's Mexican friends murdered Duran Bailey.

(q) Ground seventeen. 102
New third-party culprit evidence that three checks drawn from Duran Bailey's Nevada State Bank account were negotiated for cash one to three days after his death.

(r) Ground eighteen. 104
New forensic science, dental and crime scene evidence the jury convicted the Petitioner based on the prosecution's impossible theory of the crime that Bailey was hit in the mouth in the trash enclosure's northwest corner, and fell backwards and hit his head on the southwest curb.

(s) Ground nineteen. 110
New legal evidence the Petitioner was convicted of a non-existent violation of NRS 201.450 (Nevada's necrophilia law).

(t) Ground twenty. 115
New witness evidence of jury misconduct that at least four of Petitioner's jurors discussed the merits of the case prior to the close of evidence, and at least one of those jurors had decided on the Petitioner's guilt.

(u) Ground twenty-one. 117
New evidence LVMPD Detective Thomas Thowsen testified perjuriously multiple times in an effort to falsely link the Petitioner to Duran Bailey's murder.

(v) Ground twenty-two. 126
New evidence of police and prosecutor misconduct in maliciously and negligently prosecuting the Petitioner when they had evidence the Petitioner did not murder Duran Bailey or cut his rectum after death.

(w) Ground twenty-three. 133
New 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.

(x) Ground twenty-four. 147
New evidence the Petitioner's conviction was based on false evidence.

(y) Ground twenty-five. 159
The prosecution failed to disclose to Petitioner in violation of *Brady v. Maryland*, et al. the relationship between Duran Bailey and law enforcement.

(z) Ground twenty-six. 160
The prosecution failed to disclose to Petitioner in violation of *Brady v. Maryland*, et al. that there is no such person as Daniel Martinez with Social Security Number 3**-0*-0***, and Detective Thomas Thowsen perjuriously testified he ran a criminal background check on that non-existent person and he had a clean criminal record.

(aa) Ground twenty-seven. 163
Petitioner's counsel prejudicially failed to investigate Diann Parker's Mexican friends at the Grand View Apartments as Duran Bailey's killers.

(bb) Ground twenty-eight. 167
Petitioner's counsel prejudicially failed to investigate seven unique handwritten telephone numbers that were found in Duran Bailey's pant's pockets that could have resulted in discovery of Bailey's killer, exculpatory witnesses or other exculpatory evidence.

(cc) Ground twenty-nine. 169
Petitioner's counsel prejudicially failed to subpoena Duran Bailey's Nevada State Bank checking account records for July 2001, including one check processed on July 12, 2001, and two checks processed on July 13, 2001, that were likely negotiated by Bailey's killer.

(dd) Ground thirty. 172
Petitioner's counsel failed to obtain a court order for testing of Diann Parker's DNA to support the Petitioner's third-party culprit defense that her Mexican friends murdered Bailey.

(ee) Ground thirty-one 174
Petitioner's counsel prejudicially failed to investigate and subpoena or obtain a court order for records of groin area or penis cutting wounds treated at all Las Vegas area medical care facilities during May and June 2001, all reports filed under NRS 629.041 for non-accidental knife wounds of a person's groin area or penis treated at Las Vegas area medical care facilities during May and June 2001, and all Las Vegas area police reports involving a cutting wound to a person's groin area or penis during May and June 2001.

(ff) Ground thirty-two 176
Petitioner's counsel prejudicially failed to depose and subpoena LVMPD Detective James LaRochelle to impeach Detective Thomas Thowsen's testimony regarding four investigations he testified he conducted to try and verify the assault described in the Petitioner's Statement of July 20, 2001, and other matters Thowsen testified about.

(gg) Ground thirty-three. 178
Petitioner's counsel prejudicially failed to depose and subpoena LVMPD Detective Thomas Thowsen's secretary to impeach Detective Thomas Thowsen's regarding a search of NRS 629.041 reports filed in May, June and July 2001 that he testified he directed her to perform.

(hh) Ground thirty-four. 179
Petitioner's counsel prejudicially failed to subpoena the LVMPD manuals, protocols, memorandums, and/or regulations homicide detectives are required to follow when conducting a homicide investigation, to impeach Detective Thomas Thowsen's testimony regarding four investigations he testified he conducted to try and verify the assault described in the Petitioner's Statement of July 20, 2001, and other matters Thowsen testified about.

(ii) Ground thirty-five. 181
Petitioner's counsel prejudicially failed to file motion *in limine* to exclude all testimony about Petitioner's methamphetamine use which ended more than a week prior to Duran Bailey's murder, and to bar conflating Petitioner's previous methamphetamine use and Bailey's ongoing crack cocaine use under the umbrella of "drugs" and "drug use" because it was irrelevant, prejudicial and had no probative value.

(jj) Ground thirty-six. 183
Petitioner's counsel prejudicially failed to file discovery request for all discoverable materials.

(kk) Ground thirty-seven. 185
Petitioner's counsel prejudicially failed to file Motion to Dismiss the NRS 201.450 (sexual penetration of a dead body) charge prior to trial on the basis it alleged a non-existent violation of the necrophilia law by the Petitioner.

(ll) Ground thirty-eight. 190
Petitioner's counsel prejudicially failed to retain a forensic entomologist and introduce expert entomology testimony about Duran Bailey's time of death, which was after sunset on July 8, 2001, in Las Vegas, when it is known the Petitioner was 170 miles away in Panaca.

(mm) Ground thirty-nine. 195
Petitioner's counsel prejudicially failed to retain a psychologist and introduce expert testimony the Petitioner's Statement is not a confession to Bailey's murder, and that it describes a rape assault at a Budget Suites Hotel in east Las Vegas weeks before his murder.

(nn) Ground forty. 199
Petitioner's counsel prejudicially failed to retain a forensic pathologist and introduce exculpatory expert forensic pathology testimony about all facets of the medical evidence related to Duran Bailey's murder to counter the testimony of prosecution expert Medical Examiner Lary Simms.

(oo) Ground forty-one. 209
Petitioner's counsel prejudicially failed to retain forensic scientist and blood pattern expert George Schiro, and present his exculpatory testimony about multiple aspects of Duran Bailey's murder.

(pp) Ground forty-two. 216
Petitioner's counsel prejudicially failed to cross-examine ME Lary Simms about his time of death for Duran Bailey that was irreconcilably inconsistent with his preliminary hearing testimony that he died within 12 hours of his body's discovery, which was a period of time when the prosecution concedes the Petitioner was not in Las Vegas; and about Simms' preliminary hearing testimony that Bailey's rectum wound was ante-mortem which was irreconcilably inconsistent with his trial testimony that it was post-mortem.

(qq) Ground forty-three. 219
Petitioner's counsel prejudicially failed to object that the prosecution did not comply with the required statutory notice of expert testimony under NRS 174.234(2) for expert testimony by Louise Renhard, Daniel Ford, Thomas Wahl and Kristina Paulette about luminol and/or phenolphthalein testing in general, and in particular luminol and/or phenolphthalein testing of Petitioner's personal items and her car.

(rr) Ground forty-four. 223
Petitioner's counsel prejudicially failed to introduce into evidence Petitioner's exculpatory black high-heeled platform shoes she was wearing when assaulted at the Budget Suites Hotel that did not have any of Duran Bailey's blood on them.

(ss) Ground forty-five. 227
Petitioner's counsel prejudicially insisted the prosecution introduce into evidence a butterfly knife provided by Detective Thomas Thowsen that had no connection to the Petitioner, Duran Bailey, or the crime.

(tt) Ground forty-six. 230
Petitioner's counsel prejudicially failed to properly argue the Petitioner's alibi witness evidence that the attack described in her Statement of July 20, 2001, occurred prior to July 8, 2001, is trustworthy and admissible under state and federal hearsay exceptions.

(uu) Ground forty-seven. 234
Petitioner's counsel prejudicially failed to object that the prosecution did not comply with the required statutory notice of expert testimony under NRS 174.234(2) for expert psychology opinion testimony by Detective Thomas Thowsen that the Petitioner "jumbled" details of Bailey's murder to "minimize" her involvement in the crime.

(vv) Ground forty-eight. 239
Petitioner's counsel prejudicially failed to make a motion for a mistrial after Detective Thomas Thowsen's declared in response to a juror's question about what he did at the Budget Suites Hotel – "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." – when Thowsen's declaration was not fact but his personal opinion that the Petitioner was a liar in her Statement and guilty of Bailey's murder, and no curative instruction could undo Thowsen's irreparable prejudice to Petitioner's right to an unbiased and impartial jury, due process of law, and a fair trial.

(ww) Ground forty-nine. 244
Petitioner's counsel prejudicially failed to make a motion for a mistrial when during Detective Thomas Thowsen's direct testimony ADA William Kephart committed egregious prosecutorial misconduct by making as a statement of fact the Petitioner gave Thowsen "her confession" to Bailey's murder, when there was no testimony that she did, and Kephart's prosecutorial misconduct so gravely prejudiced the Petitioner's rights to an impartial and unbiased jury, due process, and a fair trial that no curative instruction could undo the prejudicial effect of Kephart's false statement, and the appropriate sanction was dismissal of the charges with prejudice.

(xx) Ground fifty. 246
Petitioner's counsel prejudicially failed to use available information to impeach Detective Thomas Thowsen's testimony about his alleged investigations of the Petitioner's Statement by allegedly contacting Las Vegas urologists and hospitals, searching for NRS 629.041 reports, and going to the Budget Suites Hotel on Boulder Highway.

(yy) Ground fifty-one. 250
Petitioner's counsel prejudicially failed to object on confrontation grounds to Detective Thomas Thowsen's testimony about what he said his secretary told him she did and learned from searching for NRS 629.041 reports about a cutting injury to a groin or penis in May, June and July 2001, and what he said Las Vegas urologists and hospital personal told him they did or did not do or learned regarding a cut or severed penis in May, June and July 2001.

(zz) Ground fifty-two. 253
Petitioner's counsel prejudicially failed to object and make a motion for a mistrial and a motion for dismissal with prejudice based on: ADA William Kephart's egregious prosecutorial misconduct of suborning perjury from Detective Thomas Thowsen about searches of NRS 629.041 reports he did not conduct; perpetrating egregious fraud on the court by misrepresenting to Judge Valorie Vega what Thowsen's direct testimony about the NRS 629.041 reports would be, and then committing further fraud on the court by misrepresenting to Judge Vega what Thowsen's direct testimony was to avoid her striking his testimony as hearsay; and ADA Sandra DiGiacomo's prosecutorial misconduct of aiding and abetting Kephart in executing his multiple frauds on the court, and if the motion for a mistrial was not granted, the failure to object waived the claim on direct appeal.

(aaa) Ground fifty-three. 260
Petitioner's counsel prejudicially failed to use available information during cross-examination of Detective Thomas Thowsen to impeach his testimony about what he said the Petitioner said about the holding cell she was held in after her arrest.

(bbb) Ground fifty-four. 267
Petitioner's counsel prejudicially failed to question Detective Thomas Thowsen during cross-examination about the information about the Petitioner's sexual assaults as a child that he used in a torture like tactic to extract the Petitioner's waiver of her Miranda rights, to determine if he legally obtained the childhood information he used against the Petitioner, and if not, the admissibility of the Petitioner's Statement could have been challenged.

(ccc) Ground fifty-five. 269
Petitioner's counsel prejudicially failed to use available information to impeach Laura Johnson's credibility during her cross-examination.

(ddd) Ground fifty-six. 272
Petitioner's counsel prejudicially failed to investigate or have witnesses testify about the area of Las Vegas where methamphetamine was readily bought on the street in June and July 2001, and it didn't include the Nevada State Bank on West Flamingo Road where Duran Bailey was murdered.

(eee) Ground fifty-seven. 274
Petitioner's counsel prejudicially failed to object on confrontation grounds to Zachory Robinson's hearsay testimony about the Budget Suites Hotel during May, June and July 2001.

(fff) Ground fifty-eight. 275
Petitioner's counsel prejudicially failed to file a pre-trial motion for the disclosure of Detective Thomas Thowsen history of giving false and/or perjurious testimony, his disciplinary record for dishonest and/or unethical conduct during his law enforcement career, and his history of mental health issues.

(ggg) Ground fifty-nine. 278
Petitioner's counsel prejudicially failed to make a NRS 175.381(1) motion for Judge Vega to advise the jury to acquit the defendant of all charges at the close of the State's case, at the close of the defense's case, and after at the State's rebuttal, on the basis the prosecution did not introduce evidence proving beyond a reasonable doubt the essential element that on July 8, 2001, the Petitioner was "within Clark County" and at the Nevada State Bank and inside the trash enclosure in its parking lot at the exact time Duran Bailey was murdered, so she could not have committed her accused crimes, and there was insufficient evidence for the jury to find her guilty.

(hhh) Ground sixty. 280
Petitioner's counsel prejudicially failed to object to jury instructions 26 and 33 that empowered the jury to determine the Petitioner's "guilt or innocence," and thus eliminated the Petitioner's "presumption of innocence," and eliminated the State's burden of proof by shifting the burden to the Petitioner to prove she was innocent.

(iii) Ground sixty-one. 282
Petitioner's counsel prejudicially failed to object to jury instruction 31's "the more weighty affairs of life" reasonable doubt standard that allowed the jury to find her guilty by calculating odds like the jurors would do if they were playing a game of craps, or poker or blackjack in a Las Vegas casino, and the prejudice of instruction 31 was compounded by jury instructions 26 and 33 that empowered the jury to determine the Petitioner's "guilt or innocence," and thus eliminated the Petitioner's "presumption of innocence," and eliminated the State's burden of proof by shifting the burden to the Petitioner to prove she was innocent.

(jjj) Ground sixty-two. 285
Petitioner's counsel prejudicially failed to submit NRS 201.450 ("sexual penetration of a dead body") jury instruction that properly stated the law.

(kkk) Ground sixty-three. 291
Petitioner's counsel prejudicially failed to object to NRS 201.450 ("sexual penetration of a dead body") jury instruction that did not properly state the law and permitted the jury to convict the Petitioner of a non-existent violation of the necrophilia law.

(lll) Ground sixty-four. 297
Petitioner's counsel prejudicially failed to explain to the jury that the prosecution had not proved each essential element of each charge, because evidence beyond a reasonable doubt was not introduced that the Petitioner was anywhere within Clark County at any time on July 8, 2001, the day Duran Bailey was murdered in Las Vegas, and therefore they must acquit her.

(mmm) Ground sixty-five. 299
Petitioner's counsel prejudicially failed to object during the prosecution's opening statement to a multitude of false claims of what would be proven by witnesses that Petitioner's counsel knew would not be proved during the trial.

(nnn) Ground sixty-six. 300
Petitioner's counsel prejudicially failed to object to prosecution's closing and rebuttal arguments that Duran Bailey's skull was fractured at the same time as his external injuries, when ME Lary Simms testified it was contemporaneous with Bailey's brain swelling that began at least two hours before death, which meant Bailey was subjected to two separate attacks in the last hours of his life.

(ooo) Ground sixty-seven. 303
Petitioner's counsel prejudicially failed to object and make a motion for a mistrial when during ADA William Kephart's rebuttal argument he committed egregious and irreparable prosecutorial misconduct by telling the jury he personally believes the Petitioner is guilty and the jurors should follow his lead and mark their ballots to convict her as he did: "it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body.", and if the motion for a mistrial was not granted, the failure to object waived the claim on direct appeal.

(ppp) Ground sixty-eight. 304
Petitioner's counsel prejudicially failed to object during the prosecution's closing and rebuttal arguments that prejudicially smeared and disparaged the credibility and truthfulness of defense alibi witnesses John Kraft, Larry Lobato, and Ashley Lobato because they had not been called to testify by the Petitioner's counsel during her first trial.

(qqq) Ground sixty-nine. 306
Petitioner's counsel prejudicially failed to object and make a motion for a mistrial when ADA Sandra DiGiacomo and ADA William Kephart committed egregious and irreparable prosecutorial misconduct during closing and rebuttal arguments, respectively, by declaring the Petitioner said she had blood on her, her clothes were bloody and that she got in her car bloody, when there was no evidence introduced at trial supporting those fatally prejudicial claims, and if the motion for a mistrial was not granted, the failure to object waived the claim on direct appeal.

(rrr) Ground seventy. 309
Petitioner's counsel prejudicially failed to object and make a motion for a mistrial based on the egregious and irreparable egregious prosecutorial misconduct of more than 250 false, fabricated, and/or improper prosecution statements during closing and rebuttal arguments that were used as a substitute for evidence of the Petitioner's guilty the prosecution did not introduce during the trial, and if the motion for a mistrial was not granted, the failure to object waived claims on direct appeal based on the prosecution's closing and rebuttal arguments – including gross prejudicial prosecutorial misconduct, and if the motion for a mistrial was not granted, the failure to object waived the claim on direct appeal.

(sss) Ground seventy-one. 319
Petitioner's counsel prejudicially failed to retain a dental expert and introduce exculpatory expert dental testimony that Bailey's teeth were not knocked out by a baseball bat.

(ttt) Ground seventy-two. 322
Petitioner's counsel prejudicially failed to make a NRS 175.381(2) motion for a judgment of acquittal within 7 days after the jury's verdict on the basis the prosecution did not introduce evidence proving beyond a reasonable doubt the essential element that the Petitioner was "within Clark County" and at the Nevada State Bank and inside the trash enclosure in its parking lot at the exact time Bailey was murdered, so she could not have committed her accused crimes, and there was insufficient evidence for the jury to find her guilty.

(uuu) Ground seventy-three. 324
Petitioner's counsel prejudicially failed to file a post-verdict motion for DNA testing of crime scene evidence, including Duran Bailey's penis and rectum swabs, by new DNA testing techniques developed after the Petitioner's conviction and prior to the Nevada Supreme Court's ruling on her direct appeal, and those tests could scientifically identify Bailey's killer and provide invaluable new exculpatory evidence supporting vacating the Petitioner's convictions.

(vvv) Ground seventy-four. 329
Petitioner's counsel prejudicially failed to brief and argue in her Nevada Supreme Court direct appeal "insufficiency of the evidence" claim that her conviction was based on an inverted pyramid of speculation by the prosecution, and from that point speculative inferences were piled on speculative inferences upon which additional speculative inferences were piled, and that was used by the prosecution as a substitute for actual evidence the Petitioner was in Clark County on July 8, 2001, and that she murdered Bailey.

(www) Ground seventy-five 340
Petitioner's counsel prejudicially failed to brief and argue in her Nevada Supreme Court direct appeal claim that the Petitioner's "statements to detectives on July 20, 2001, were not voluntary and should have been suppressed from use as evidence," that Judge Vega abused her discretion by misapplying the "law of the case" doctrine in admitting the Petitioner's Statements.

(xxx) Ground seventy-six. 346
Petitioner's counsel prejudicially failed to include as argument in the "Petition For Rehearing" and the "Petition For Reconsideration En Banc" that the NSC's ruling was based on two false assumptions, when the truth is there is no evidence the Petitioner's Statement is an admission of guilt to Duran Bailey's murder and the post-mortem cutting of his rectum, and there were no positive luminol or phenolphthalein tests for blood in the Petitioner's car.

(yyy) Ground seventy-seven. 353
Cumulative prejudicial errors by Petitioner's trial and appellate counsel supports vacating the Petitioner's conviction and dismissal of the charges with prejudice or a new trial.

(zzz) Ground seventy-eight. 353
Cumulative new exculpatory evidence supports vacating the Petitioner's conviction and dismissal of the charges with prejudice or a new trial.

(aaaa) Ground seventy-nine. 354
Petitioner's counsel prejudicially failed to diligently represent her prior to, during, or after trial.

(a) Ground one.

New forensic entomology evidence of Duran Bailey's time of death conclusively establishes the Petitioner could not have been in Las Vegas at the time Mr. Bailey was murdered, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Duran Bailey's body was discovered by Richard Shott "around 10 pm" in a 10' x14' trash enclosure at the northwest corner of the Nevada State Bank's parking lot at 4240 West Flamingo Road in Las Vegas on the evening of July 8, 2001. (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) Emergency 911 received Shott's call at 10:36 pm. The prosecution argued to the jury Petitioner murdered Duran Bailey in the early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans, XIX 121 (10-5-06)) Based on the prosecution's argument Bailey's body laid in the trash enclosure from prior to sunup, during all the daylight hours, until it was discovered that night. The prosecution also argued to the jury that credible alibi witnesses placed Petitioner on July 8, 2001, at her parents' home in Panaca, Nevada from "11:30 a.m. through that night," and that a telephone call from the Lobato home to the cell phone of Petitioner's step-mother Rebecca Lobato at "10 a.m." was probably made by the Petitioner in Panaca. (9 App. 1726; Trans. XIX-130 (10-5-06)) There was trial testimony by Nevada Department of Transportation supervisor Phil Boucher that he had traveled the roads from Las Vegas to Panaca many times and it normally took him about three hours when travelling at an average of 72 mph on the open road. On cross-examination by the prosecution, Boucher agreed it was "possible" traveling at a very high speed to drive from Las Vegas to Panaca in two hours. So given the latest period of time the prosecution conceded to the jury Petitioner was in Panaca (11:30 am) and Boucher's testimony about the fastest "possible" time to travel from Las Vegas to Panaca (2 hours), the latest that Petitioner could have been in Las Vegas on the morning of July 8 was 9:30 am. Given the earliest period of time the prosecution conceded to the jury Petitioner was in Panaca (10 am) and Boucher's testimony about the normal driving time from Las Vegas to Panaca (3

hours), the earliest that Petitioner could have been in Las Vegas on the morning of July 8 was 7 am. (These times are based on the prosecution's arguments, the Petitioner's alibi defense, which she reiterates, is she was not anywhere in Clark County at anytime on July 8, 2001.)

The full color photographs of Duran Bailey's body at the crime scene and prior to his autopsy show a man who has minimal decomposition and no signs visible to the naked eye of insect activity or predatory bites on his body.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a forensic entomologist willing to review the entomology evidence in the Petitioner's case on a *pro bono* basis to determine Bailey's time of death. Three of North America's preeminent forensic entomologists agreed to review the entomology evidence.

Dr. Gail S. Anderson is a professor in the School of Criminology at Simon Fraser University in Burnaby, British Columbia, Canada. Dr. Anderson is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology, and her C.V. is 73 pages long. (C.V. is available at, http://justicedenied.org/kl/gail_anderson_cv.pdf) Dr. Anderson examined the entomology evidence in Petitioner's case and wrote the "Report of Dr. Gail S. Anderson," December 17, 2009. Dr. Anderson's Report states in part:

> "Blow flies are attracted to human remains, and any other carrion or meat product, in order to lay their eggs. Eggs are laid within minutes of the remains being located by blow flies, meaning that they are laid within a very short time after death, usually minutes. …
>
> …
>
> Insects are attracted to wounds first as the first instar or first stage larvae or maggots which hatch from these eggs in a few hours need to feed on a liquid protein source. Therefore, a bloody wound is extremely attractive to female blow flies and they would be expected to lay large numbers of egg masses on the body.
>
> Insect activity can be limited by a number of parameters. Blow flies are **diurnal** animals, meaning they are **only active during daylight hours**. …
>
> Therefore, if remains are found after dark and show no evidence of insect activity, yet all other conditions are appropriate for insect flight, then it is concluded that the victim died after dark. …
>
> ….
>
> I have reviewed the photographs in order to see whether or not insects had located the remains and laid eggs. Although the remains would have been extremely attractive to insects due to the extensive wounds and blood present at the scene, I do not see any evidence of insect activity. In this case, the weather conditions and

season were optimal for insect activity, and nothing that can be observed that would have prevented the insects from accessing the body.

…

In this case the extensive wounds, accessibility, season and temperature would have made these remains extremely attractive to insects immediately after death if they had been present during the daylight hours. The lack of insect activity and lack of insect eggs show that the remains could not have been present at the scene during the daylight hours of 8 July 2001. …

In consideration of the above, it is my opinion as a forensic entomologist, … that to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm). I do not believe that it is possible that the remains were present during the entire daylight hours of 8 July 2001."

(See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009, 3-5.)

Based on Dr. Anderson's Report, the earliest time of Bailey's death to a "reasonable scientific certainty" was after 8:01pm, which was 10-1/2 hours AFTER the LATEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am. Based on Dr. Anderson's Report Bailey "most probably" died after 9:08 pm, which was more than 11-1/2 hours AFTER the LATEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am. Based on Dr. Anderson's Report, the earliest time of Bailey's death to a "reasonable scientific certainty" was after 8:01pm, which was 13 hours AFTER the EARLIEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 7 am. Based on Dr. Anderson's Report Bailey "most probably" died after 9:08 pm, which was more than 14 hours AFTER the EARLIEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 7 am. Dr. Anderson specifically rejects the possibility Bailey's body could have lain in the trash enclosure during the entire daylight hours of July 8 – which was implicit in the prosecution's argument to the jury that Bailey died in the trash enclosure "sometime before sunup" and he lay there all day until discovery of his body after dark that night.

Dr. Linda-Lou O'Connor is a professor in the Department of Entomology at the University of Kentucky in Lexington, Kentucky. Dr. O'Connor is the treasurer of the North American Forensic Entomology Association. Dr. O'Connor examined the entomology evidence in Petitioner's case and wrote the "Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor)," February 11, 2010. Dr. O'Connor's Report states in part:

Insect Behavior and Development

Dipteran (flies) in the family Calliphoridae are usually the first insects to arrive after death. This can occur within minutes or hours after death (5). The presence as well as absence of these species can assist in determining the postmortem interval (PMI) estimate. Flies in the families Calliphoridae and Sarcophagidae (flesh flies also known to be attracted to remains shortly after death) begin their activity after daybreak (late morning) are most active in the afternoon with activity declining sharply at or just before sunset (6-10). Nocturnal oviposition/larviposition (egg/larval laying) is an unlikely event for these flies (6, 11-15).

Analysis

Based on the photographic evidence, there was no visual verification of fly activity. The lack of adult flies and eggs indicates that colonization had not yet taken place at the time of discovery. It is possible that a few eggs are undetectable from the images provided; however, the accumulation of adults and egg deposits on remains that originate during diurnal activity are not present. This supports a PMI estimate after sunset, which was at 8:01 pm on July 8, 2001.

(See Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010, 3-4)

Dr. O'Conner writes in her Report about her Conclusion: "Based on the lack of colonization of blow flies and/or flesh flies, estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001." (1)

Based on Dr. O'Connor's Report about the entomology evidence, the earliest time of Bailey's death "is after sunset, which was at 8:01 pm on July 8, 2001." That was 10-1/2 hours AFTER the LATEST time the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am. Based on Dr. O'Connor's Report the earliest time of Bailey's death "is after sunset, which was at 8:01 pm on July 8, 2001." That was 13 hours AFTER the EARLIEST time the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 7 am.

Dr. M. Lee Goff is a professor and director of the Chaminade University Forensic Sciences program in Honolulu, Hawaii. Dr. Goff is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. He has conducted training courses at the FBI Academy, he is a consultant for the television crime dramas *CSI* and *CSI: Miami*, and he is the author of *A Fly For The Prosecution: how insect evidence helps solve crimes* (Harvard University Press, 2000). Dr. Goff examined the entomology evidence in Petitioner's case, and he reported on March 12, 2010, that he concurs with Dr. Anderson's finding that "to a reasonable scientific certainty Mr.

BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.)

Based on the new forensic entomology evidence in Petitioner's case documented in the separate and independent findings by Dr. Anderson, Dr. O'Connor, and Dr. Goff, it is a scientific and physical impossibility that the Petitioner committed her convicted crimes. The egg laying behavior of flies is scientifically documented. It is not a matter of opinion or conjecture. The new forensic entomology evidence is the functional equivalent of Duran Bailey providing eyewitness evidence from his grave that the Petitioner did not murder him. The prosecution conceded to the jury that the Petitioner was 170 miles from Las Vegas in Panaca at the time when the new forensic entomology evidence conclusively establishes Bailey was murdered, and the jury was unaware of this new exculpatory evidence.

This new forensic entomology evidence is complemented by and consistent with other new evidence concerning Bailey's time of death, including new forensic pathology evidence by Dr. Glenn Larkin that Duran Bailey died "more likely than not within two hours before discovery." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D. 5 January 2010, p. 8.) (For additional details see Ground two.) Richard Shott testified he discovered Bailey's body "around 10 pm.", so Bailey's earliest time of death is around 8 pm based on Dr. Larkin's new forensic pathology evidence. (Richard Shott's testimony at Trans. IV-54 (09-14-2006))

Exhibit 101 is a timeline comparing the new evidence Bailey's time of death was after 8 pm with the prosecution's concession the Petitioner could not have been in Las Vegas later than 9:30 am on July 8, 2001. (See Exhibit 101, Timeline of new time of death evidence And Kirstin Blaise Lobato's alibi.) Exhibit 101 also illustrates how misled the jury was by Medical Examiner Lary Simms' uncontested trial testimony that it is "possible" Bailey could have died as early as 3:50 am, and lain in the trash enclosure for more than 18 hours before being discovered.

If at trial the jury had known this new exculpatory forensic entomology evidence that conclusively proves the Petitioner was not in Las Vegas at the time of Bailey's murder and mutilation, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(b) Ground two.

New forensic pathology evidence of Duran Bailey's time of death conclusively establishes the Petitioner could not have been in Las Vegas at the time Mr. Bailey was murdered, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Duran Bailey's body was discovered by Richard Shott "around 10 pm" in a 10' x14' trash enclosure at the northwest corner of the Nevada State Bank's parking lot at 4240 West Flamingo Road in Las Vegas on July 8, 2001. (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) Emergency 911 received Shott's call at 10:36 pm. The prosecution argued to the jury Petitioner murdered Duran Bailey in the early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans, XIX 121 (10-5-06)) It was dark until nautical sunrise at 4:24 am on July 8. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) Based on the prosecution's argument Bailey's body laid in the trash enclosure for more than 17-1/2 hours (from before 4:24 am until 10 pm (approx.)) – which included all daylight hours – until it was discovered several hours after sunset which was at 8:01 pm. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) The prosecution also argued to the jury that credible alibi witnesses placed Petitioner on July 8, 2001, at her parents' home in Panaca, Nevada from "11:30 a.m. through that night," and that a telephone call from the Lobato home to the cell phone of Petitioner's step-mother Rebecca Lobato at "10 a.m." was probably made by the Petitioner in Panaca. (9 App. 1726; Trans, XIX 130 (10-5-06)) There was trial testimony by Nevada Department of Transportation supervisor Phil Boucher that he had traveled the roads from Las Vegas to Panaca many times and it normally took him about three hours when travelling at an average of 72 mph on the open road. On cross-examination by the prosecution, Boucher agreed it was "possible" traveling at a very high speed to drive from Las Vegas to Panaca in two hours. So given the latest period of time the prosecution conceded to the jury Petitioner was in Panaca (11:30 am) and Boucher's testimony about the fastest "possible" time to travel from Las Vegas to Panaca (2 hours), the latest that Petitioner could have been in Las Vegas on the morning of July 8 was 9:30 am. Given the earliest period of time the prosecution conceded to the jury Petitioner was in Panaca (10

am) and Boucher's testimony about the normal driving time from Las Vegas to Panaca (3 hours), the earliest that Petitioner could have been in Las Vegas on the morning of July 8 was 7 am. (These times are based on the prosecution's arguments, the Petitioner's alibi defense, which she reiterates, is she was not anywhere in Clark County at anytime on July 8, 2001.)

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a forensic pathologist willing to do a complete review of the medical evidence in the Petitioner's case on a *pro bono* basis to determine among other things, Bailey's time of death. Forensic pathologist Dr. Glenn M. Larkin agreed to review the medical evidence in the Petitioner's case.

Dr. Glenn M. Larkin is a forensic pathologist with 46 years experience. Dr. Larkin is a leading forensic pathologist on the subject of determining time of death. Dr. Larkin authored the chapter "Time of Death" in *The Forensic Sciences* (1997), edited by Dr. Cyrus H. Wecht. Dr. Larkin examined the forensic pathology evidence in Petitioner's case and wrote the "Affidavit of Glenn M. Larkin, M.D.," January 5, 2010. Dr. Larkin states, "It is my opinion to a reasonable medical and scientific certainty that Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk. The lack of blow fly infestation suggests an even shorter time between [when] Bailey died and was discovered." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 8.) Shott discovered Bailey's body "around 10pm", so based on Dr. Larkin's determination, the earliest time of Bailey's death was about 8 pm. That was 10-1/2 hours AFTER the LATEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am. Also based on Dr. Larkin's determination, the earliest time of Bailey's death at about 8 pm was more than 13 hours AFTER the EARLIEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 7 am. Dr. Larkin specifically observes that Bailey likely died closer to the time his body was discovered than his two hour maximum, and he allows for Bailey to have died within minutes of his bodies discovery "around 10pm," which was more than 12 hours AFTER the LATEST time the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am.

Based on the new forensic pathology evidence in Petitioner's case it is a medical and physical

impossibility that the Petitioner committed her convicted crimes. The new forensic pathology evidence is the functional equivalent of Duran Bailey providing eyewitness evidence from his grave that the Petitioner did not murder him. The prosecution conceded to the jury that the Petitioner was 170 miles from Las Vegas in Panaca at the time when the new forensic pathology evidence conclusively establishes Bailey was murdered, and the jury was unaware of this new exculpatory evidence.

This new forensic pathology evidence is complemented by and consistent with other new evidence concerning Bailey's time of death, including new forensic entomology evidence by Dr. Gail Anderson, Dr. Linda-Lou O'Connor and Dr. M. Lee Goff in their respective independent findings. Forensic entomologist Dr. Anderson determined that "to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01 pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 1, "Report of Dr. Gail S. Anderson," 17 Dec 2009, 5.) Forensic entomologist Dr. O'Connor determined that "Based on the lack of colonization of blow flies and/or flesh flies, estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001." (See Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010, 1.) Forensic entomologist Dr. M. Lee Goff concurs with Dr. Anderson's finding that "to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.) (For additional details see Ground one.)

Exhibit 101 is a timeline comparing the new evidence Bailey's time of death was after 8 pm with the prosecution's concession the Petitioner could not have been in Las Vegas later than 9:30 am on July 8, 2001. (See Exhibit 101, Timeline of new time of death evidence And Kirstin Blaise Lobato's alibi.) Exhibit 101 also illustrates how misled the jury was by Medical Examiner Lary Simms' uncontested trial testimony that it is "possible" Bailey could have died as early as 3:50 am, and lain in the trash enclosure for more than 18 hours before being discovered.

If at trial the jury had known this new exculpatory forensic pathology evidence no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(c) Ground three.

New entomology and forensic pathology evidence establishes that Duran Bailey's body was not lying in the trash enclosure where it was found long enough for predatory flesh eaters, that include cockroaches which are known to have been in the trash enclosure, to descend on Bailey and begin feeding on his body, and if the jury had known of this new exculpatory evidence, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Duran Bailey's body was discovered by Richard Shott "around 10 pm" in a 10' x14' trash enclosure at the northwest corner of the Nevada State Bank's parking lot at 4240 West Flamingo Road in Las Vegas on July 8, 2001. (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) Emergency 911 received Shott's call at 10:36 pm.

The prosecution argued to the jury Petitioner murdered Duran Bailey in the early morning hours "sometime before sunup" on July 8, 2001, while it was still dark. (9 App. 1723; Trans, XIX 121 (10-5-06)) It was dark until nautical sunrise at 4:24 am on July 8. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) Based on the prosecution's argument Bailey's body was lying in the trash enclosure for more than 17-1/2 hours (from before 4:24 am until 10 pm (approx.)) – which included all daylight hours – until it was discovered several hours after sunset which was at 8:01 pm. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) The prosecution also argued to the jury that credible alibi witnesses placed Petitioner on July 8, 2001, at her parents' home in Panaca, Nevada from "11:30 a.m. through that night," and that a telephone call from the Lobato home to the cell phone of Petitioner's step-mother Rebecca Lobato at "10 a.m." was probably made by the Petitioner in Panaca. (9 App. 1726; Trans, XIX 130 (10-5-06)) There was trial testimony by Nevada Department of Transportation supervisor Phil Boucher that he had traveled the roads from Las Vegas to Panaca many times and it normally took him about three hours when travelling at an average of 72 mph on the open road. On cross-examination by the prosecution, Boucher agreed it was "possible" traveling at a very high speed to drive from Las Vegas to Panaca in two hours. So given the latest period of time the prosecution conceded to the jury Petitioner was in Panaca (11:30 am) and Boucher's testimony about the fastest "possible" time to travel from Las Vegas to Panaca

(2 hours), the latest that Petitioner could have been in Las Vegas on the morning of July 8 was 9:30 am. Given the earliest period of time the prosecution conceded to the jury Petitioner was in Panaca (10 am) and Boucher's testimony about the normal driving time from Las Vegas to Panaca (3 hours), the earliest that Petitioner could have been in Las Vegas on the morning of July 8 was 7 am. (These times are based on the prosecution's arguments, the Petitioner's alibi defense, which she reiterates, is she was not anywhere in Clark County at anytime on July 8, 2001.)

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a forensic entomologist willing to review the entomology evidence in the Petitioner's case on a *pro bono* basis to determine Bailey's time of death. Three of North America's preeminent forensic entomologists agreed to review the entomology evidence.

Dr. Gail S. Anderson is a professor in the School of Criminology at Simon Fraser University in Burnaby, British Columbia, Canada. Dr. Anderson is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology, and her C.V. is 73 pages long. (C.V. is available at, http://justicedenied.org/kl/gail_anderson_cv.pdf) Dr. Anderson examined the entomology evidence in Petitioner's case and wrote the "Report of Dr. Gail S. Anderson," December 17, 2009. Dr. Anderson's Report states in part:

> Also, notes by Las Vegas Metropolitan Police Department Crime Scene Analyst Louise Renhard state: "Beer can partially filled – cockroach infested". This suggests that cockroaches were common in the area, which is to be expected in a garbage area. Cockroach feeding on fresh remains often cause distinctive marks on the body (Benecke 2001; Haskell *et al.* 1997). No such marks were observed in the photographs I reviewed. (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009, 4-5)

Dr. Linda-Lou O'Connor is a professor in the Department of Entomology at the University of Kentucky in Lexington, Kentucky. Dr. O'Connor is the treasurer of the North American Forensic Entomology Association. Dr. O'Connor examined the entomology evidence in Petitioner's case and wrote the "Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor)," February 11, 2010. Dr. O'Connor's Report states in part:

> **Insect Behavior and Development**
>
> Cockroaches, insects in the order Blattaria, are scavengers that exhibit aggregate behavior. They are mainly nocturnal and will disperse when exposed to light. In

> general, they are omnivorous with opportunistic feeding habits (1). Opportunistic feeding can occur on living as well as deceased persons (2). Skin lesions caused by cockroaches are well-circumscribed, irregular lesions of the epidermis (3). These lesions can have a reddish-brown appearance to a pale appearance depending on the time after death that the feeding occurred (4).
> …
> **Analysis**
> According to courtroom testimony from Louise Renhard, there were 15-18 cockroaches found inside a beer can at the scene. There is no photographic evidence that indicates the cockroaches were on or immediately around the decedent. It is possible they dispersed before the scene was photographed because cockroaches tend to scatter when exposed to light or sudden movement. This would have been observed at the crime scene particularly when the debris covering the decedent was removed. Upon close examination of the scene and autopsy photographs provided, there was no clear indication that cockroaches fed on the decedent.
> (See Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010, 3-4.)

Dr. M. Lee Goff is a professor and director of the Chaminade University Forensic Sciences program in Honolulu, Hawaii. Dr. Goff is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. Dr. Goff examined the entomology evidence in Petitioner's case and wrote in his Report on March 12, 2010, "I did not see any indication of cockroach activity on the body in the images." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.)

Dr. Glenn M. Larkin is a forensic pathologist with 46 years experience. Dr. Larkin examined the forensic pathology evidence in Petitioner's case and wrote the "Affidavit of Glenn M. Larkin, M.D.," January 5, 2010. Dr. Larkin's Affidavit states in part:

> "No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 2.)

Dr. Anderson and Dr. O'Connor specifically identify in their respective Reports that cockroaches feed on dead bodies and that there was an absence of cockroach bites on the body of Duran Bailey. Dr. Goff reported "I did not see any indication of cockroach activity on the body in the images." Dr. Larkin reported that on Bailey's body there "was the absence of predatory animal bites" by any flesh eater – which includes cockroaches and rats that are common in Las Vegas. The

feeding of cockroaches on human bodies is documented with photographs of their bites in the peer-reviewed article, "Cockroach: The Omnivorous Scavenger: Potential Misinterpretation of Postmortem Injuries," *The American Journal of Forensic Medicine and Pathology*, June 1997. (See Exhibit 6, Cockroach: The Omnivorous Scavenger.)

Garbage was strewn about and piled around and on top of Bailey in the trash enclosure where his body was found. It is known that cockroaches were in the trash enclosure with Bailey's body because LVMPD Crime Scene Analyst Louise Renhard mentions them in her case notes ("Beer can partially filled – cockroach infested." (See Exhibit 7, Louise Renhard crime scene notes of Duran Bailey murder.); and in her testimony during Petitioner's first trial on May 13, 2002: "I do remember a beer can." … "No, it was – had like, I believe, 15 or 18 cockroaches in it." (Trans. IV-95 (05-13-02))

The absence of predatory bites is significant because Bailey's body could not have lain for any significant length of time in the dark garbage strewn trash enclosure without being descended on by predatory flesh eaters such as cockroaches and rats. The absence of fly eggs on Bailey's body scientifically establishes that he died sometime after sunset (at 8:01 pm) (See Ground one), while the absence of cockroach bites scientifically establishes that Bailey could not have lain in the dark trash enclosure for any length of time without being feed on by the cockroaches (and other flesh eating predators such as rats.).

The new forensic pathology and forensic entomology evidence that Bailey's body could not have lain in the trash enclosure for any significant length of time after dark without being feed on by cockroaches, which are nocturnal, fatally undermines the prosecution's argument to the jury that Bailey died "sometime before sunup" on July 8, 2001, and he laid in the trash enclosure for more than 17-1/2 hours – from before 4:24 am until he was found "around 10 pm." This new evidence is the functional equivalent of Duran Bailey providing eyewitness evidence from his grave that the Petitioner did not murder him. If at trial the jury had known this new evidence that the absence of predator bites meant he died soon before the discovery of his body, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(d) Ground four.

New expert psychology evidence establishes that Petitioner did not confess to Duran Bailey's murder and mutilation in her Statement of July 20, 2001, and that Petitioner related in her Statement a rape attempt against her that occurred in Las Vegas many weeks before Bailey's murder, and if the jury had known of this new exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution stated during direct examination of LVMPD homicide Detective Thomas Thowsen that Petitioner confessed to Duran Bailey's murder in her Statement of July 20, 2001, ("the defendant; who gave you her confession" (8 App. 1385; Trans. XIII-59-60 (09-27-06)) and argued to the jury that Petitioner confessed to his murder. (See, 9 App. 1726; Trans. XIX-130 (10-05-06); and, 9 App. 1727; Trans. XIX-136 (10-05-06)) Clark County Assistant District Attorney William Kephart argued to the jury during rebuttal that Petitioner's confession was sufficient to find her guilty in the absence of any "direct" physical, forensic, medical or eyewitness evidence linking the Petitioner to the crime scene, and that her confession was solely why she was being prosecuted:

> "But we have her words, ladies and gentlemen, her words. We're here -- they said why are we here? We're here because of her mouth, because of what she said."
> (9 App. 1740; Trans. XIX-186 (10-05-06))

Neither the prosecution nor Petitioner's counsel provided notice in accordance with Nevada state law that they would present expert psychology testimony of a professional with education and training in analyzing a statement to determine if it constitutes a confession, a false confession, or no confession to the crime(s) a defendant is charged with committing. However, even absent the required notice, the Court allowed Detective Thowsen to testify as a psychology expert. Thowsen testified that based on his on-the-job experience as a homicide detective he has the ability to detect when a suspect is "jumbling" details to "minimize" their involvement in a crime. Thus Thowsen has the ability to feel in his "gut" when a suspect has confessed to a crime even though there is no confession to the crime in their statement. Based on his on-the-job experience the Court allowed

Thowsen to testify as a psychology expert that he believed the Petitioner "jumbled" details of Bailey's murder in her Statement to "minimize" her involvement, and that is why her Statement doesn't match the details of Bailey's murder. Thus Thowsen's testimony transformed Petitioner's Statement that has no identifiable details related to where or how Bailey was murdered, into a confession to causing his multitude of wounds that were inflicted before and after he died. Thowsen's rationale was the Petitioner's Statement is a confession to Bailey's murder precisely because it doesn't have any details of Bailey's murder. The prosecution relied on Thowsen's testimony about the Petitioner's Statement for its arguments to the jury that secured the Petitioner's convictions.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a qualified psychologist willing to review the Petitioner's Statement and associated materials on a *pro bono* basis to determine if the Petitioner's Statement could be considered a confession, a false confession, or no confession to Bailey's murder and the post-mortem cutting of his rectum. Psychologist Dr. Allison D. Redlich agreed to review the information in the Petitioner's case.

Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001, including the audio and transcript of the Statement. Dr. Redlich's report of February 10, 2010 states in part:

From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.

Although I do not consider Ms. Lobato's case a typical false confession case because she did not confess to the crime in which she was charged and convicted of, her case does share many hallmarks of proven false confession cases. Most notable are the inconsistencies between Ms. Lobato's version of events and the objective facts of Mr. Bailey's death. These inconsistencies have been documented by yourself and others, so I will not go into detail, but they include the date of the crimes, the location and time of the crimes, the supposed murder weapon, the shoe print left at Mr. Bailey's crime scene (and lack of a match with Ms. Lobato's shoes), and numerous others.

In addition, in proven false confession cases, there is often no other evidence linking the suspect to the crime except the false confession statement. Similarly, in some of these cases, there is an absence of evidence that is consistent with the commission of the crime and/or the confession statements. To my knowledge, there is no physical evidence linking Ms. Lobato to Mr. Bailey's murder, as well as a lack of corroborating evidence given the manner of the murder.

Another commonality found in proven false confession cases is that the confession statements are not generative in they do not lead to new evidence and/or tell the police details that are not already known. To my understanding, Ms. Lobato's statements did not provide any new evidence or information concerning the Bailey murder.

Finally, I comment on Detective's Thowsen's claim that suspects often minimize their involvement with crimes. It is likely that some guilty suspects do minimize their involvement, in large part because police interrogators are trained to induce suspects to minimize. Specifically, the Reid Interrogation method (i.e., the most commonly used and well known method, see Inbau, Reid, Buckely, & Jayne, 2001) trains interrogators to utilize minimizing themes and scenarios (Step 2); that is, scenarios that make it easier for the suspect to admit to wrongdoing. However, I stress that almost all, if not all, proven false confessions also contain minimization. For example, in the well-established proven false confession case of the five teens involved in the Central Park Jogger crime, the teens minimized their involvement by claiming actions such as holding the victim's legs but not committing the rape itself. Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her.

(See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

Dr. Redlich provides new evidence and provides the expert psychological assessment that was not presented at trial for the jury to rely on in evaluating how and why the Petitioner's Statement

is not a confession to the murder of Duran Bailey. Dr. Redlich explains that Petitioner's Statement is concerned with an unrelated event in which Petitioner was the victim, and she defended herself "by attempting to cut the penis of a man who was allegedly sexually assaulting her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010, 2.) Just as important as identifying that Petitioner's Statement is not a confession to Bailey's murder, is Dr. Redlich's conclusion that Detective Thowsen's testimony was inaccurate that the Petitioner "jumbled" and "minimized" about Bailey's murder in her Statement. Completely contrary to Det. Thowsen's testimony that Petitioner was deceptive, Dr. Redlich specifically observes "that Ms. Lobato believed she was cooperating with a police investigation." And, "Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010, 2.) If at trial the jury had heard Dr. Redlich's expert psychology testimony that Petitioner's Statement is not a confession to Bailey's murder and she did not "minimize" or "jumble" details of Bailey's murder in her Statement, the jury could have been expected to reject Detective Thowsen's characterization and the prosecutor's arguments that Petitioner's Statement is a confession to Bailey's murder, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Consistent with Dr. Redlich's determination that Petitioner did not confess to Bailey's murder in her Statement of July 20, 2001, is the new evidence of polygraph examiner Ron Slay: "I am certain Ms. Lobato is innocent of Mr. Bailey's murder." (See Exhibit 9, Affidavit Of Ron Slay.) Slay is Nevada state licensed polygraph examiner who has performed over 27,000 examinations. Slay is a member of the American Polygraph Association, the National Polygraph Association, and other professional organizations. He is the owner of Western Security Consultants in Las Vegas, Nevada. Slay has "performed many polygraph examinations for the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office." (See Exhibit 9, Affidavit Of Ron Slay.) Slay was retained by Petitioner's previous counsel to perform a polygraph examination of Petitioner, which was conducted on December 3, 2001. As a result of Petitioner's truthfulness in answering the relevant questions during that examination, Slay is "certain Ms. Lobato is innocent of Mr. Bailey's murder." (See Exhibit 9, Affidavit Of Ron Slay.) Slay

conducted a polygraph examination of Rebecca Lobato on November 27, 2001, and he found "Mrs. Lobato truthfully answered that Ms. Lobato was in Panaca on July 8, 2001, and she further truthfully answered that she had not made a false alibi for Ms. Lobato." (See Exhibit 9, Affidavit Of Ron Slay.) The truthfulness of Rebecca Lobato's alibi testimony is additional confirmation of the Petitioner's truthfulness that she did not murder Bailey. The Clark County DA's Office recognizes Slay as a neutral examiner whom they have relied on to determine the truthfulness of suspects and witnesses. Slay swears in his "Affidavit of Ron Slay," dated February 12, 2010, "I am as certain today that Ms. Lobato is innocent of any involvement in Mr. Bailey's murder, as I was on December 3, 2001, after conducting Ms. Lobato's polygraph examination." (See Exhibit 9, Affidavit Of Ron Slay.)

Also consistent with Dr. Redlich's determination is the new evidence that Doug Twining told Detectives Thowsen and LaRochelle on August 2, 2001, that in "May, she said someone attacked her and she cut, cut his penis." Twining also said the Petitioner told him the attack happened "near the end of May." Twining mentioned the May attack on the Petitioner four times to the detectives. The detectives told Twining details of the Petitioner's Statement of July 20, 2001, and Twining told them that what the Petitioner "confessed" to in her Statement was the attack against her in May. (See Exhibit 10, Voluntary Statement of Douglas Howell Twining.)

It is also consistent with Dr. Redlich's determination that is there is no description in the Petitioner's Statement of the many distinctive features of the trash enclosure where Bailey was murdered. Seven of those details are the wire mesh ceiling, the block walls, the dumpster, the concrete curb along the sides, the concrete footing along the block wall, the steel doors at the entrance, and, that a person had to sidle beside the dumpster to get into the back of the trash enclosure. And there is no mention in her Statement of closing the trash enclosure's door the way it was found by Richard Shott.

If the jurors had known of the new exculpatory evidence that the Petitioner's Statement is not a confession to Bailey's murder and the cutting of his rectum after he was dead, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(e) Ground five.

New alibi witness evidence establishes Petitioner was credible and truthful in her Statement of July 20, 2001, that "over a month ago" she repelled a rape attempt in the parking lot of a Budget Suites Hotel in east Las Vegas by trying once to cut her attacker's penis, and it rebuts and undermines the credibility of LVMPD Detective Thomas Thowsen's testimony that the rape attempt "didn't happen there" and that the Petitioner "jumbled" and "minimized" details in her Statement about when, where and what type of attack occurred, and if the jury had known of this admissible and exculpatory new evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Petitioner was convicted of crimes related to the murder of Duran Bailey and the alleged cutting of his rectum after death on July 8, 2001, based on the prosecution's theory and explicit argument to the jury that the absence of any incriminating or inculpatory physical, forensic, medical or eyewitness evidence was trumped by Petitioner's alleged incriminating admission to cutting a man's penis during a sexual assault, in her audio taped Statement on July 20, 2001, to LVMPD Detectives Thomas Thowsen and James LaRochelle. The prosecution played for the jury the audio of the Petitioner's entire Statement during the direct testimony of Detective Thowsen. During Petitioner's Statement she clearly and unequivocally identifies that the Las Vegas attempted rape assault described in her Statement occurred prior to a conversation with a woman who may have been assaulted by the same black man, and that conversation occurred "over a month ago" from the date of her Statement. The following exchange occurred during Petitioner's Statement when Detective Thowsen asked her when the conversation with the woman took place:

Q. And how soon was it that you talked to her before you were attacked?
A. It was afterwards already.
Q. After you'd been attacked?
A. Yeah this has already been over a month ago.
(LVMPD Statement of Kirstin Blaise Lobato, July 20, 2001, at about 25 minute mark.)

On direct examination Detective Thowsen testified that the reason details of the assault described by the Petitioner in her Statement do not match Duran Bailey's murder is because she was "jumbling" and "minimizing" them. During Det. Thowsen's cross-examination the following

exchange took place:

> Q (By Mr. Schieck) And then later on at the end of the interview she's talking about more than a month ago?
> A (By Thowsen) Yes.
> Q Those are her words?
> A Those are her words.
> Q And that's minimizing also?
> A Actually, it is. Yes, it is.
> Q So she -- by telling you a different place, a different time, a different description, a different location she's minimizing what she's telling you she did?
> A Yes. (8 App. 1397, Trans. XIII-108 (09-27-06))

Thowsen also testified that he didn't look for any witnesses at the Budget Suites Hotel where Petitioner describes that the assault took place, because "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (8 App. 1410; Trans. XIII-159 (9-27-2006))

During rebuttal argument Clark County Assistant District Attorney William Kephart argued to the jury, "We're here because of her mouth, because of what she said." (9 App. 1740; Trans. XIX-186 (10-05-06)) So the prosecution's case against the Petitioner rested on the credibility of Detective Thowsen's assertion that Petitioner was not credible or truthful in her Statement. The Petitioner's Statement specifically identifies that the rape attempt Petitioner describes, occurred on a date PRIOR to the conversation with the woman that occurred PRIOR to June 20, 2001, (a month before July 20, 2001). That means the rape assault Petitioner describes in her Statement occurred on a day PRIOR to June 20, 2001 – which was weeks before Bailey's murder. Neither Detective Thowsen nor Detective LaRochelle followed up by asking Petitioner for a more precise date of when the rape assault occurred, so from the Petitioner's Statement it is only directly identifiable as occurring PRIOR to June 20, 2001. Detective Thowsen casually explained away the multitude of details in Petitioner's Statement that did not match Bailey's death, including when she was assaulted, by testifying that Petitioner "jumbled" and "minimized" those details. (8 App. 1387-1388; Trans. XIII-69-71 (09-27-06)) However, references in Petitioner's Statement and new Affiant evidence enables the date the rape assault occurred to be more precisely pinpointed as occurring in the last part of May or the first part of June 2001. Petitioner's Statement describes that

after the assault she drove her car to where her friend Jeremy Davis lived, and she then went to a nearby Catholic church. She left her car where Davis lived, and after getting her car back, she discovered the inside had been trashed and there was vomit in it.

Detectives Thowsen and LaRochelle were specifically and unequivocally told by Steven Pyszkowski on July 23, 2001, that they had arrested the wrong person. Pyszkowski told the detectives that beginning in late May or the first of June until she left for Panaca on July 2, 2001, Petitioner told him and other people that she had fought off a sexual assault at the Budget Suites Hotel on Boulder Hwy on Las Vegas' east side by cutting her black attacker's penis. Pyszkowski swears the Petitioner first told him about being assaulted about a week before he paid a tow truck driver on June 6, 2001, to release her car. (See Exhibit 11, Affidavit of Stephen William Pyszkowski.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Cathy Reininger on August 2, 2001, that Petitioner told her around the end of May 2001 that a man tried to rape her at the Budget Suites on Boulder Highway, and that while fighting him off she cut his penis. She then fled in her car and later that morning went to a Catholic Church. Reininger swears the Petitioner told her about being assaulted prior to June 6, 2001, when her son flew to Las Vegas to visit her. (See Exhibit 19, Affidavit of Catherine Ann Reininger.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Michele Austria on July 26, 2001, that before the 4th of July, Petitioner told her that weeks earlier she had been sexually assaulted in a parking lot in Las Vegas, and she fought off her attacker by slashing at his penis with her pocket butterfly knife. (See Exhibit 12, Affidavit of Michele Dawn Austria.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Heather McBride that before July 8, 2001, Petitioner told her she had defended herself against a man who assaulted her in Las Vegas and she got away by stabbing him in the abdomen with her pocket butterfly knife. (See Exhibit 13, Affidavit of Heather Michelle McBride.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Dixie Tienken on July 26, 2001, that Petitioner had told her in detail about being sexually assaulted in

Las Vegas and fighting off her assailant by slashing one time at his exposed penis, and "that she specifically said he was standing when she escaped from him." Tienken identifies that conversation as taking place "at least two to three weeks before July 20, 2001." A conversation between Petitioner and Tienken "at least two to three weeks before July 20, 2001" would have been at least several days before Duran Bailey's murder and possibly sometime in June. Confirming this, Tienken states, "This conversation could even have taken place during the latter part of June 2001." (See Exhibit 14, Affidavit of Dixie A. Tienken.) Tienken testified that Petitioner talked with her about the attack on a Wednesday, because afterwards Tienken went to Pioche to teach her weekly Wednesday class at the Lincoln County Jail. Tienken also unequivocally testified that the conversation occurred on a Wednesday at least a week before she talked with Laura Johnson on July 18. (Trans. V-16 (9-15-06)) However, it is known that Tienken could not have talked with Petitioner on July 11, because the unrebutted and undisputed testimony at trial was Petitioner was in Las Vegas from the early morning of July 9 until the afternoon of July 13. It is also known that Tienken could not have talked with Petitioner on July 4 because it was a holiday and she did not teach a class that day. So the earliest that Tienken could have talked with the Petitioner was Wednesday, June 27. Their conversation could have occurred on June 20, because the next day, Thursday June 21, Petitioner and Kimberlee Isom (Grindstaff) drove from Panaca to Cedar City, Utah for the opening of the Utah Shakespearean Festival (USF). It was during that trip Petitioner told Isom (Grindstaff) about the attack in Las Vegas, so it is reasonable that the day before (Wednesday the 20th) she could have talked with Tienken about the attack. (See Exhibit 15, Affidavit of Kimberlee Isom Grindstaff; and Exhibit 16, 2001 USF Brochure and Calendar.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Doug Twining on August 2, 2001, that in "May, she said someone attacked her and she cut, cut his penis." Twining narrowed it down by saying that Petitioner told him the attack happened "near the end of May." Twining mentioned the May attack on the Petitioner four times to the detectives. He also described Petitioner's cut of her attacker as a "slash." (See Exhibit 10, Voluntary Statement of Douglas Howell Twining.)

At the end of May or first of June 2001 Daniel Lisoni heard Petitioner describe using her knife to defend herself against a man who attacked her, and Petitioner did not say she killed the man. Lisoni was never interviewed by Petitioner's counsel or Detectives Thowsen and LaRochelle. (See Exhibit 17, Affidavit of Daniel Lewis (Louis) Lisoni.)

Kimberlee Grindstaff was told by Petitioner on or about June 21, 2001, that toward the end of May 2001 a large black man attempted to rape Petitioner in the parking lot of the Budget Suites Hotel on Boulder Highway, and that Petitioner defended herself by stabbing her attacker around the area of his penis. Grindstaff is able to identify exactly when this conversation took place, because it occurred when she and the Petitioner were driving to the opening night of the Utah Shakespearean Festival in Cedar City, Utah, which in 2001 was on June 21. Grindstaff was not interviewed by Detectives Thowsen and LaRochelle. (See Exhibit 15, Affidavit of Kimberlee Isom Grindstaff; and Exhibit 16, 2001 USF Brochure and Calendar.)

All these witnesses have personal knowledge that Petitioner told them on dates prior to July 8, 2001, that she had been sexually assaulted in Las Vegas and she had fought off her attacker by cutting or trying to cut his penis. Several of these witnesses provide information identifying that the assault Petitioner told them about occurred prior to June 20, 2001 – which was "over a month" before Petitioner's Statement of July 20, 2001. Several of the witnesses identify the assault as taking place in late May 2001. That the assault Petitioner describes in her Statement on July 20, 2001, is the same one referred to by the witnesses is verified by some of the witnesses describing specific details that Petitioner identified as happening on the day of the assault and on days following it. None of the witnesses are related to Petitioner, they have not kept in contact with Petitioner, and several now live in such diverse places as Hawaii and New Mexico. If just one of these non-relative witnesses is deemed credible that Petitioner told them about the Budget Suites assault prior to July 8, 2001, then Thowsen's opinion testimony the jury relied on to convict the petitioner is not credible and dead wrong, and the prosecution's argument that her Statement refers to Duran Bailey's murder fails and the Petitioner is absolved of any guilt of her convicted crimes.

Additionally is the statement of Christopher Collier to Petitioner's counsel that prior to July 4, 2001, Petitioner told him that she was attacked by "a black guy," "and that the attack occurred

one month prior" to their conversation. (See Exhibit 18, Statement of Christopher Collier and Declaration of Shari White.)

The new evidence provided by Pyszkowski and McBride is particularly important because they are specifically identified in Petitioner's direct appeal opening brief to the Nevada Supreme Court as alibi witnesses who were not allowed by the court to testify about their knowledge of Petitioner being assaulted prior to July 8, 2001. (See Exhibit 66, Appellant's Opening Brief, 1, 24-25.)

All of the new alibi witnesses can provide testimony:

> 1. That the Petitioner is **credible** in describing a rape attempt in her statement that happened prior to July 8, 2001.
> 2. **Rebutting** Thowsen's opinion testimony the Petitioner was not credible and had not been truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
> 3. **Rebutting** Thowsen's opinion testimony as not credible, by establishing the Petitioner was in fact credible and truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
> 4. **Rebutting** the foundation of the prosecution's case and argument to the jury that the Petitioner's Statement was a *de facto* confession because she was not credible and had not been truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.

The above nine witnesses provide new reliable, trustworthy and credible alibi evidence not presented at Petitioner's trial that is admissible by state and federal hearsay exceptions. Contrary to Detective Thowsen's opinion testimony the prosecution relied on in its closing and rebuttal arguments, and which the jury relied on to convict the Petitioner, she was credible and truthful in her Statement of July 20, 2001, that "over a month ago" she repelled a sexual assault at the Budget Suites Hotel in east Las Vegas by attempting once to cut at her attacker's penis. Thus unbeknownst to Petitioner's jurors, her Statement has nothing whatsoever to do with the murder and mutilation of Duran Bailey. If Petitioner's jury had known this new exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(f) Ground six.

New alibi witness evidence the Petitioner was in Panaca on July 6, July 7, and July 8, and that she wasn't under the influence of methamphetamine on those days, undermines the prosecution's argument to the jury that there was no non-relative alibi evidence that Petitioner was in Panaca on July 6 and 7 and she was under the influence of methamphetamine on those days, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that Petitioner was not in Panaca from at least the afternoon of Friday July 6, 2001, until at least 10 am on Sunday July 8, 2001. (Trans. XIX-120 (10-5-06), and XIX-130 (10-5-06)) The prosecution's argument precluded the petitioner from being in Panaca at any time on Saturday July 7. The prosecution argued: "Keep in mind that the only people that really see Blaise between July 5th and July 8th are related to her. You have her mother, you have her father, you have her sister who basically tells you I don't remember not seeing her, but none of them can specifically tell you until the 8th." (9 App. 1727; Trans. XIX-137 (10-5-06)) The prosecution also argued that Petitioner had been in Las Vegas without sleep for three consecutive days (July 6-8) under the influence of methamphetamine when she murdered Bailey "sometime before sunup" on July 8. (9 App. 1723; Trans. XIX 121 (10-5-06))

Marilyn Parker Anderson unequivocally swears in her "Affidavit Of Marilyn Parker Anderson" dated February 15, 2010, that in 2001 she saw and talked with the Petitioner at the 4th of July barbeque at the house of the Petitioner's parents in Panaca; that she saw Petitioner on the night of July 6 when she brought a shirt over for Petitioner's father; that she talked with the Petitioner late on the afternoon of Saturday, July 7, about coming by Petitioner's house that night to visit with her; and at about 10 am on Sunday July 8 she called the Petitioner at her parents' house to apologize for not making it over to visit her the night before. Furthermore, Anderson states that she was not subpoenaed to testify at either of Petitioner's trials and that the prosecution knew she had contact with the Petitioner in Panaca on July 4, 6, 7 and 8, because she told it to two people from the District Attorney's office prior to the Petitioner's trial in May 2002. (See Exhibit

20, Affidavit of Marilyn Parker Anderson.) Parker's new evidence establishes the Petitioner was in Panaca on the evening of July 6, the afternoon of July 7, and at 10 a.m. on July 8, 2001, and she makes no mention that the Petitioner did not act or sound normal on those three days.

Kimberlee Isom Grindstaff unequivocally swears in her "Affidavit Of Kimberlee Isom Grindstaff" dated December 8, 2009, that in 2001 she saw and talked with Petitioner at her parents' house during a 4th of July barbeque, and she saw Petitioner at her parents' house on the evening of Saturday July 7, 2001. Grindstaff also states, "She did not appear to me to be under the influence of any drug at that time." (See Exhibit 15, Affidavit Of Kimberlee Isom Grindstaff, December 8, 2009.) Grindstaff's new evidence establishes the Petitioner was in Panaca on the evening of July 7, and that she wasn't visibly "under the influence of any drug at that time."

Kendre Thunstrom unequivocally swears in her "Affidavit Of Kendre Pope Thunstrom," dated March 4, 2010, that on the afternoon of July 8, 2001, her boyfriend's truck broke down near the house of Petitioner's parents, and she talked for some time with Petitioner. Thunstrom states that as a "recovering drug addict" she is "well aware of the behaviors of drug use." Thunstrom states, "that in my opinion, Blaise was not under the influence of any drugs, and specifically not under the influence of methamphetamine. I would have known immediately if she were under the influence of methamphetamine." Thunstrom also states, "I did not observe any unusual behaviors from Blaise at all. She was not nervous or anxious." As a "recovering drug addict" Thunstrom also states that from her personal knowledge and experience she does not think the Petitioner "had been using methamphetamine during the early morning of July 8, 12 to 15 hours before I saw her that afternoon." (See Exhibit 21, Affidavit Of Kendre Pope Thunstrom.) Thunstrom's new evidence undermines the prosecution's claim that on the morning of July 8 Petitioner was crazed on methamphetamine after being up for three consecutive days, and while in that state she murdered Bailey. Thunstrom testified at Petitioner's trial about seeing and talking with her on the afternoon of July 8, but she was asked no questions about Petitioner's behavior.

Jose Lobato is the Petitioner's grandfather. Mr. Lobato served 21 years in the United States Air Force, and he then worked for 21 years in the federal immigration service. While serving in the United States and foreign locations Mr. Lobato worked with the FBI and other federal law

enforcement agencies. Mr. Lobato's birthday is on July 7. In his "Affidavit of Jose Lobato," dated March 5, 2010, he swears:

> 7. On July 7, 2001, Blaise called me at my home in El Paso, Texas and wished me a happy birthday. I believe she was in Panaca where she lived with my son and his wife. I believe that Blaise sounded and acted normal during our conversation, because it would stand out in my mind if she didn't.
> 8. I am able to remember the telephone conversation with Blaise on July 7, 2001, because she was arrested a couple of weeks after the call for murder.
> (See Exhibit 22, Affidavit of Jose Abraham Lobato.)

On July 7, 2001, two calls were made from Becky Lobato's cell phone to Jose Lobato's El Paso, Texas telephone numbers. Becky Lobato testified about the telephone records of those calls at Petitioner's trial. (Trans. XVIII-115, 117 (10-04-06))

There is also the new evidence of polygraph examiner Ron Slay that Becky Lobato was truthful in testifying she saw the Petitioner in Panaca on July 8, 2001, and that she did not make a false alibi, as the prosecution argued to the jury during closing by ADA Sandra DiGiacomo ("July 21, this is when Becky starts creating this alibi." (9 App. 1727; Trans. XIX 136 (10-5-06)), and during rebuttal argument by ADA William Kephart ("So what happens? An alibi starts getting created about the 21st by her mom." (9 App. 1743; Trans. XIX-199 (10-5-06)) Slay is a Nevada state licensed polygraph examiner who has performed over 27,000 examinations. Slay is a member of the American Polygraph Association, the National Polygraph Association, and other professional organizations. He is the owner of Western Security Consultants in Las Vegas, Nevada. Slay has "performed many polygraph examinations for the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office." (See Exhibit 9, Affidavit Of Ron Slay.) Slay was retained by Petitioner's previous counsel to perform a polygraph examination of Petitioner, which was conducted on December 3, 2001. As a result of Petitioner's truthfulness in answering the relevant questions during that examination, Slay states "I am certain Ms. Lobato is innocent of Mr. Bailey's murder." (See Exhibit 9, Affidavit Of Ron Slay.) Slay conducted a polygraph examination of Rebecca Lobato on November 27, 2001, and he found "Mrs. Lobato truthfully answered that Ms. Lobato was in Panaca on July 8, 2001, and she further truthfully answered that she had not made a false alibi for Ms. Lobato." (See Exhibit 9,

Affidavit of Ron Slay.) The truthfulness of Rebecca Lobato's alibi testimony is additional confirmation of the Petitioner's truthfulness that she did not murder Bailey. The Clark County DA's Office recognizes Slay as a neutral examiner whom they have relied on to determine the truthfulness of suspects and witnesses. Slay swears in his "Affidavit of Ron Slay," dated February 12, 2010, "I am as certain today that Ms. Lobato is innocent of any involvement in Mr. Bailey's murder, as I was on December 3, 2001, after conducting Ms. Lobato's polygraph examination." (See Exhibit 9, Affidavit of Ron Slay.)

The new alibi evidence of Anderson, Grindstaff, Thunstrom and Jose Lobato – three of whom did not testify at Petitioner's trial, and three of whom are not related to the Petitioner, and the fourth served in the federal government for 42 years – is consistent with the fact that the prosecution presented no physical, forensic or eyewitness evidence that Petitioner was anywhere but in and around Panaca the entire days of July 6, 7, and 8, 2001. The new evidence by Ron Slay that Becky Lobato provided truthful alibi testimony is significant because the prosecution argued during both their closing and rebuttal arguments that she is a liar and the jury shouldn't believe her.

The new alibi evidence is also consistent with the fact that contrary to the prosecution's argument to the jury, prosecution witness Chris Carrington testified he saw Petitioner in Panaca on July 6, and Carrington and Michele Austria testified they saw Petitioner in Panaca on July 7. Carrington's grandmother, Diane Allen, testified he was at the Lobato's house to see the Petitioner on the late afternoon of July 6 and she believed he was there the late morning of July 7. (Trans. VIII-155, 157 (9-20-06)) None of those prosecution witnesses is related to the Petitioner.

The new alibi evidence of Anderson, Grindstaff, Thunstrom and Jose Lobato undermines, the credibility of the prosecution's argument to the jury that Petitioner was not in Panaca the entire days of July 6, 7, and 8, or that she was under the influence of methamphetamine on those days, and particularly the morning of July 8. Consequently, no reasonable juror would have found there was proof beyond a reasonable doubt that the Petitioner was guilty, and acquitted her.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(g) Ground seven.

New forensic pathology evidence that more than one person was involved in Duran Bailey's murder and that the person who mutilated Bailey's groin area was skilled either with medical knowledge or animal husbandry, establishes the prosecution's theory of the crime argued to the jury that the Petitioner alone committed the crimes is impossible, and if the jury had known of this exculpatory evidence, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that Petitioner acted alone in murdering Duran Bailey in the early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans, XIX 121, 10-5-06.) However, the prosecution presented no physical, forensic medical, eyewitness or confession evidence in support of their argument that a lone person murdered Bailey. Thus in convicting the Petitioner the jury relied on the prosecution's argument that Bailey was murdered by her alone during the dark pre-dawn hours of July 8. A Las Vegas Metropolitan Police Department photo shows that without artificial light by a flashlight or some other means, the interior of the trash enclosure was almost pitch black during the very early morning hours when the prosecution argued to the jury that Bailey was murdered. (See Exhibit 68, Trash enclosure without lights.)

In contrast with the absence of evidence supporting the prosecution's claim of a lone assailant, there is new forensic pathology evidence that at least two people were involved in Duran Bailey's murder and mutilation.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a forensic pathologist willing to do a complete review of the medical evidence in the Petitioner's case on a *pro bono* basis. Forensic pathologist Dr. Glenn M. Larkin agreed to review the medical evidence in the Petitioner's case.

Dr. Glenn M. Larkin is a forensic pathologist with 46 years experience. Dr. Larkin examined the forensic pathology evidence in Petitioner's case and wrote the "Affidavit of Glenn M. Larkin, M.D.," January 5, 2010. (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010.) Dr. Glenn Larkin states: "to a reasonable medical and scientific certainty … There is a good

probability that more than one person was involved in this attack and murder." (See Exhibit 4, 8.) Dr. Larkin's determination is in part based on the fact that, "Given the poor lighting, it suggests that a third hand was involved to supply light." (See Exhibit 4, 5.) Dr. Larkin allows for the possibility that one person could have attacked Bailey provided "the perpetrator(s) has a head lamp." (See Exhibit 4, 5.) But there was neither any evidence at trial, nor did the prosecution argue to the jury that Petitioner wore a "head lamp," or that she even had a flashlight to see in the dark trash enclosure. Furthermore no flashlight or "head lamp" was found by the LVMPD during their search of the Petitioner's personal property or her car on July 20, 2001.

That multiple perpetrators were involved is consistent with Dr. Larkin's determination that "The amount of skin — covered by dense hair — attached to the cut end of the penis — "surgical margin" — is much smaller than the defect seen on the distal abdominal wall. This suggests two separate acts of mutilation." (See Exhibit 4, 5.) Dr. Larkin also identified, "At least one perpetrator was skilled either with medical knowledge or animal husbandry to effect the mutilation of Bailey's groin area." (See Exhibit 4, 8.) As Dr. Larkin notes, the skill involved in the "amputation" of Bailey's penis and then the careful "skinning" of his groin area could not have been accomplished by a lone person groping in the dark trash enclosure. (See Exhibit 34, Bailey's groin.)

No evidence was introduced at trial that Petitioner "was skilled either with medical knowledge or animal husbandry." (See Exhibit 4, 8.) The testimony at trial was Petitioner was a female 18-year-old high school graduate, she was not a college graduate enrolled in medical school. Furthermore, the prosecution argued to the jury the Petitioner inflicted Bailey's wounds while she was in a methamphetamine fueled rage – not while she was in a calm state of mind and acting carefully and thoughtfully.

That Petitioner did not have the specialized skill or knowledge to inflict Bailey's crafted groin area wounds is consistent with the fact that all the bloody shoeprint, DNA, fingerprint and tire track evidence in the case excludes Petitioner and her car from the crime scene, while all the eyewitness testimony places her in Panaca throughout the early morning, morning, afternoon and evening of July 8, 2001 – the day of Bailey's murder. If the jury had heard Dr. Larkin's expert testimony that more than one perpetrator was involved in Bailey's murder and mutilation, and the person who inflicted his

groin area injuries "was skilled either with medical knowledge or animal husbandry," the jury could have been expected to reject the prosecution's argument that Petitioner murdered and mutilated Bailey, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(h) Ground eight.

New forensic pathology and crime scene evidence establishes Duran Bailey was alive when his rectum was wounded, while NRS 201.450 requires that an alleged victim of "sexual penetration" must be dead, and if the jury had known of this exculpatory evidence no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450 under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Petitioner was charged with one count of violating NRS 201.450(1) – Sexual penetration of a dead body – which states: "A person who commits a sexual penetration on the dead body of a human being is guilty of a category A felony… " A person cannot under any circumstances be legitimately convicted of violating NRS 201.450 unless the alleged violation of the statute was committed with a "dead body." The prosecution presented opinion testimony by Clark County Medical Examiner Lary Simms that the cut to Duran Bailey's rectum was a post-mortem wound. Petitioner's counsel did not present any forensic pathology evidence, so ME Simms' opinion testimony stood unchallenged. The prosecution relied on ME Simms' testimony in arguing to the jury that Duran Bailey's rectum wound was a sexual penetration of his dead body, and the jury relied on that argument to convict Petitioner of violating NRS 201.450.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a forensic pathologist willing to do a complete review of the medical evidence in the Petitioner's case on a *pro bono* basis. Forensic pathologist Dr. Glenn M. Larkin agreed to review the medical evidence in the Petitioner's case.

Dr. Glenn M. Larkin is a forensic pathologist with 46 years experience. Dr. Larkin examined the forensic pathology evidence in Petitioner's case and wrote the "Affidavit of Glenn

M. Larkin, M.D.," 5 January 2010.) (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010.) Dr. Larkin states, "It is my opinion to a reasonable medical and scientific certainty that Bailey survived either conscious or not, a short time after being attacked. (8)

ME Simms' two-page "Neuropathology Examination" dated September 10, 2001, was not turned over to Petitioner by her trial counsel until February 4, 2010. A copy was provided to Dr. Larkin, who did not have this document when he wrote his "Affidavit of Glenn M. Larkin, M.D." Simms notes in his "Neuropathology Examination": "Serial sectioning demonstrates **compression** of the lateral **ventricles**. The central contents demonstrate a **right to left shift."** (Emphasis added). Dr. Larkin responded to this finding: "These structural changes do not take place quickly, supporting the idea that Bailey died a while after his assault." (Dr. Glenn M. Larkin Note on neuropathological report by Larry Simms DO, March 5, 2010.)

Dr. Larkin's analysis of the forensic pathology evidence in Petitioner's case that Duran Bailey was alive "after being attacked," presents an alternate scenario to the time the cut to Duran Bailey's rectum was inflicted. Dr. Larkin's analysis that is based on his almost half a century of experience, credibly establishes Duran Bailey's rectum wound was inflicted while he was alive, and therefore whoever caused it could not have violated NRS 201.450.

Dr. Larkin's analysis that Bailey lived for a period of time after his attack although bleeding from his wounds is supported by the recent national news story of a shark attack off the coast in southern Florida that killed wind-surfer Stephen Schafer. Mr. Schafer was severely bitten on his buttocks and his leg by a shark and like Mr. Bailey lost about half his blood. Although bleeding profusely from his multiple wounds, Schafer survived and was conscious for more than forty minutes unattended as a life guard paddled a 1/4 mile out from shore to get him and bring him back to shore. Schafer died later in a hospital due to his blood loss. (See Exhibit 56, Shark attack victim died from massive blood loss, *The Washington Post*, February 5, 2010.)

Consistent with Dr. Larkin's analysis is ME Simms' testimony during Petitioner's preliminary hearing on August 7, 2001, that Bailey's rectum wound was "ante-mortem":

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

> A. Not every one of **the stab wounds, for instance, in the rectum was ante-mortem**, several were ante-mortem. The ones I saw on the abdomen, were post mortem stab wounds.
> (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 32. Emphasis added to original.)

During Petitioner's trial ME Simms testified as a prosecution witness that Bailey's rectum wound was post-mortem. However, he did not testify there is any new medical evidence that caused him to reverse 180° his preliminary hearing testimony, and he wasn't cross-examined by Petitioner's counsel as to why he did so.

Dr. Larkin's determination that Bailey survived for a period of time after he was attacked, and thus alive when his rectum was stabbed, is much more reasonable than it may seem at first glance. Particularly considering known cases such as that of Schafer, and Simms' preliminary hearing testimony that Bailey was alive when his rectum was stabbed. The new evidence of Dr. Larkin's analysis can be considered more medically reasonable than Dr. Simms' trial testimony, or at the very least is just as reasonable.

There is also new physical evidence in the form of crime scene photographs that provide visual proof Bailey was alive when his rectum was cut. The LVMPD took many pictures of the crime scene. One of those pictures was of Bailey's body after the cardboard covering his torso was removed. Another photo was taken from almost the same angle after Bailey's body was moved from the scene by the Clark County Coroner's Office and the debris was moved from the trash enclosure's southwest corner to expose the blood evidence. Exhibit 50 shows the blood evidence photo superimposed over the photo of Bailey's body. (See Exhibit 50, Bailey superimposed over blood.) This superimposed image clearly shows that Bailey had significant blood loss from both his carotid artery wound and his rectum wound when he was turned over onto his back, after his rectum wound was inflicted. This new photographic evidence establishes Bailey was alive and his heart was continuing to pump blood after his rectum was cut, and he was turned onto his back for the amputation of his penis and the skinning of his groin area.

The new medical and physical (photographic) evidence provides compelling evidence that Bailey was alive when he experienced his rectum wound. NRS 201.450 only applies to a deceased

person. If the jury had known the new evidence supporting that Bailey was alive when his rectum was injured, the jury could have been expected to reject the prosecution's argument that Petitioner inflicted that wound after he was dead, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

> **(i) Ground nine.**
> New evidence that Duran Bailey experienced two attacks on July 8, 2001, that were likely separated by a meal, and new third-party evidence supported by that evidence fatally undermines the prosecution's argument to the jury that the Petitioner was present at the crime scene and inflicted all of Bailey's wounds, and if the jury had known this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

During the prosecution's argument to the jury it did not put a specific length of time the incident in the Nevada State Bank's trash enclosure from beginning to end – but their scenario of the crime was that the events followed in quick succession – Bailey was attacked, he died, his postmortem wounds were inflicted, and his killer left. Bailey had a skull fracture to the back of his head that Clark County Medical Examiner Lary Simms testified did not bleed externally. The prosecution argued that Bailey's "skull fracture occurs when he falls" after being "punched" in the mouth. (XIX-123-4, 10-5-06) However, Clark County Medical Examiner Lary Simms testified during cross-examination that Bailey's skull fracture was consistent with being contemporaneous with his brain swelling that began two hours before he died:

> Q. (Mr. Schieck) But the fracture could've been two hours old also?
> A. (Mr. Simms) Yes, because it was – that area was on the same side as the fracture, and if it was on the different side then I'd have a different opinion, but because that area is on the same side as the fracture, it could've been that that was contemporaneous with the fracture. (7 App. 1175; Trans. VIII-36-37 (9-20-06))

The fracture to Bailey's head and the resultant brain swelling that occurred two hours prior to his death directly point to Bailey being subjected to two separate attacks on July 8, 2001. The first

attack resulted in the fracture to his skull that resulted in the swelling of his brain that according to Simms would have killed Bailey even if he had not been subjected to the second attack that resulted in his facial, stabbing and cutting wounds. In fact, Simms ruled as a Cause of Death that "Bailey died as a result of BLUNT HEAD TRAUMA." (Autopsy Report of Duran[d] Bailey, Clark County Coroner's Office, July 9, 2001.) Bailey's head injury was inflicted during the first attack on him two hours before the assault in the Nevada State Bank's trash enclosure where his body was found.

It is known that after the first attack during which Bailey suffered his head fracture that he may have felt well enough to eat a meal because he had "digesting meat and vegetable food particles" in his stomach at autopsy. (Autopsy Report of Duran[d] Bailey, Clark County Coroner's Office, July 9, 2001, 8.) Vegetables can take 30 to 50 minutes to digest, so the undigested vegetables in Bailey's stomach supports that he ate a meal shortly before the second attack which occurred in the trash enclosure. (See Exhibit 27, Digestion times of foods.) No evidence was introduced at trial that Bailey had undigested "meat and vegetable" in his stomach, but their presence means he could have eaten a meal less than an hour before his death.

Dr. Simms' testimony established that Bailey would have died from the swelling of his brain caused by the first attack's "blunt head trauma," even if the second attack had never occurred. So while the many visible beating, cutting and stabbing wounds Bailey experienced in the second attack that took place at the trash enclosure mar Bailey's physical appearance, based on Simms' Autopsy Report they were superfluous to him dying.

Actress Natasha Richardson's March 2009 death is a recent well-publicized case that a person can function normally for a period of time after experiencing their ultimately fatal head injury. (See Exhibit 28, Natasha Richardson, 45, Stage and Film Star, Dies, New York Times, March 19, 2009.)

During their argument the prosecution falsely and misleadingly conflated into one event the two distinct time periods that Simms testified Bailey experienced injuries. The prosecution focused on the second event that resulted in Bailey's numerous graphic bleeding and cutting wounds, while ignoring the first event that occurred two hours earlier and resulted in the "Blunt Head Trauma" that was Bailey's primary cause of death. Petitioner's counsel likewise did not mention during closing arguments that Simms' testimony supports that Bailey was subjected to two separate injury

causing incidents. The jury was also unaware of the new evidence supporting that Bailey ate a meal of meat and vegetables between those two events.

Steven King provides new evidence in his "Affidavit of Steven King" dated February 17, 2010, that based on his personal knowledge Diann Parker's Mexican friends killed Bailey, is consistent with the medical evidence that on July 8 Bailey was subjected to two attacks and the new evidence that he could have had a meal in between them. King states:

> 22. I absolutely believe Diann's male Hispanic friends killed "St Louis" in retaliation for mistreating and raping Diann, and mistreating other women they knew.
> 23. Because "St Louis" was murdered at the Nevada State Bank where he did not "live," my belief is he was lured there by some kind of bait and ambushed by Diann's male Hispanic friends.
> (See Exhibit 8, Affidavit of Steven King.)

King's Affidavit raises a number of possible scenarios, but it is reasonable that after Bailey was subjected to the attack during which he sustained his head fracture, that the person the Mexicans used as bait had dinner with him at a nearby eatery such as the Gold Coast Casino that Bailey was known to frequent, and that person then "lured" him to the nearby Nevada State Bank's trash enclosure where he was "ambushed" by the Mexicans.

If the jury had known that in the last two hours of Bailey's life he experienced two grave injury causing events that could have been separated by his last meal, and that there are reasonable alternate scenarios of Bailey's death supported by evidence that excludes the Petitioner, the jury would have had a factual basis to reject the prosecution argument, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

> **(j) Ground ten.**
> New forensic pathology evidence related to the circumstances of Duran Bailey's death establishes the Petitioner did not commit her convicted crimes, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Duran Bailey's body was discovered by Richard Shott "around 10 pm" in a 10' x14' trash enclosure at the northwest corner of the Nevada State Bank's parking lot at 4240 West Flamingo Road in Las Vegas on July 8, 2001. (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) Emergency 911 received Shott's call at 10:36 pm. The prosecution argued to the jury Petitioner murdered Duran Bailey in the early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans. XIX 121 (10-5-06)) It was dark until nautical sunrise at 4:24 am on July 8. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) Based on the prosecution's argument Bailey's body laid in the trash enclosure for more than 17-1/2 hours (from before 4:24 am until 10 pm (approx.)) – which included all daylight hours – until it was discovered several hours after sunset which was at 8:01 pm. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) Bailey's autopsy was performed at noon on July 9, 2001, by Clark County Medical Examiner Lary Simms, and he produced a ten page report of his autopsy findings.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a forensic pathologist willing to do a complete review of the medical evidence in the Petitioner's case on a pro bono basis. Forensic pathologist Dr. Glenn M. Larkin agreed to review the medical evidence in the Petitioner's case.

Dr. Glenn M. Larkin is a forensic pathologist with 46 years experience. Dr. Larkin is a leading forensic pathologist on the subject of determining time of death. Dr. Larkin authored the chapter "Time of Death" in The Forensic Sciences (1997), edited by Dr. Cyrus H. Wecht. After reviewing medical documents, photographs, and testimony in the Petitioner's case, Dr. Larkin wrote the "Affidavit of Glenn M. Larkin, M.D.," 5 January 2010. Dr. Larkin's observes among other things (with page number indicated):

- "No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites." (2)
- "Dr Simms lists the proximate cause of death as "cranio-cerebral injuries". He does not describe or even mention any cortical contusion, contusion hemorrhage or contusion necrosis, nor does he describe any cerebellar-tonsillar or other herniation, expected with severe head injury." (3-4)
- "The severed (common) carotid artery is given minimal mention." (4)

- Dr. Simms identified Bailey's liver as on the left side of his body, but "The liver is NOT on the left side of the abdomen, unless Mr. Bailey has a *situs inversus*, not mentioned in the autopsy protocol." (4)
- "The description of any injury follows Mallory's dicta — SIZE, SHAPE, COLOR, and CONSISTENCY. Every injury that is visible has at least two measurable dimensions, height, width, and occasionally depth. Dr Simms fails to supply all parameters." (4)
- "The penectomy (amputation of the penis) is casually described; No mention of any pathology in the glans, foreskin or shaft is mentioned Nor was the characteristic of the amputation line described." (5)
- "The amount of skin — covered by dense hair — attached to the cut end of the penis — "surgical margin" — is much smaller than the defect seen on the distal abdominal wall. This suggests two separate acts of mutilation." (5)
- "Removal of the penis at its base could be accomplished with one hand holding the weapon, the second hand stretching the skin — the second mutilation, similar to skinning an animal — required one hand to stretch the skin, and the other hand to cut through the sub cutis on the stretch." (5)
- "The perpetrator either had some medical knowledge, or experience skinning an animal." (5)
- "Given the poor lighting, it suggests that a third hand was involved to supply light, or that the perpetrator(s) has a head lamp." (5)
- "The ano-rectal mutilation is not well described nor photographed; the incision depth is not mentioned, nor if any sphincters were cut." (5)
- "Based on the autopsy descriptions, there is no apparent documented cause of death." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 5.)

Dr. Larkin summarized his key findings, "It is my opinion to a reasonable medical and scientific certainty that:

1. Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk. The lack of blow fly infestation suggests an even shorter time between when Bailey died and was discovered. This opinion has to be tentative because of a paucity of data. Bailey was not doused in gasoline to prevent blow-fly attack.
2. There is a good probability that more than one person was involved in this attack and murder. At least one perpetrator was skilled either with medical knowledge or animal husbandry to effect the mutilation of Bailey's groin area.
3. Bailey put up a spirited defense against his attackers, judging from the defense wounds on his fingers.
4. Because no brain sections were made, the timing of the head wounds with respect to the other wounds cannot be determined. [On February 4, 2010, Petitioner's trial counsel turned over to the Petitioner Simms' "Neuropathology Examination" dated September 10, 2001. This new information was forwarded to Dr. Larkin who reported it did not alter the findings of his Affidavit of January 5, 2010.]

5. A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds; there are no choil or tang impressions on the skin.
6. Bailey survived either conscious or not, a short time after being attacked
7. Because of the disparity of size, and Lobato's squeamishness to blood, it is unlikely that she could have defended herself against a streetwise Bailey.
8. There is absolutely no evidence to suggest that Bailey was doused in gasoline during or after the attack." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.)

The following explain how key findings and observations of Dr. Larkin apply to the Petitioner's case:

- "There is a good probability that more than one person was involved in this attack and murder," (8) and "Given the poor lighting, it suggests that a third hand was involved to supply light, or that the perpetrator(s) has a head lamp." (5) (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, page numbers as indicated.) The following explains how Dr. Larkin's findings apply to the case:

The prosecution argued to the jury that Petitioner alone was responsible for Duran Bailey's murder and his numerous wounds inflicted prior to and after his death, and that it was dark "sometime before sunup" when she committed the crimes. Consequently, Dr. Larkin's finding that there were probably more than one person involved in attacking and murdering Bailey is highly significant. Dr. Larkin identifies as a specific reason for his conclusion that multiple people were probably involved, is that the amputation of Bailey's penis and wound to his groin area required two hands, and because of the poor lighting in the trash enclosure artificial light provided by a "third hand" would be required. A Las Vegas Metropolitan Police Department photo shows that without artificial light by a flashlight or some other means, the interior of the trash enclosure was almost pitch black during the very early morning hours when the prosecution argued to the jury Bailey was murdered. (See Exhibit 68, Trash enclosure without lights.) The darkness at the crime scene at the time the prosecution argued Bailey was murdered was compounded because it was partly cloudy – and so there was minimal or no starlight. (See Exhibit 30, Las Vegas weather, July 8, 2001.) The crime scene conditions thus support Dr. Larkin's finding that with the necessity of artificial light two perpetrators were

"probably" involved. Dr. Larkin did provide the caveat that one perpetrator wearing "a head lamp" could have inflicted the wounds. However, since the day of Petitioner's arrest on July 20, 2001, the prosecution has not alleged that she wore "a head lamp," and there was no testimony at trial that a "head lamp" or that ANY type of artificial light was used during the attack and murder of Bailey. In addition, the prosecution argued to the jury that the Petitioner acted in a fit of spontaneous methamphetamine-fueled rage. Use of "a head lamp" not only doesn't fit the prosecution's argument the crime was spontaneous, but use of such a device would be far beyond the planning and sophistication that could be expected of the Petitioner as an 18-year-old female high school graduate with no criminal record. Furthermore, neither a "head lamp" nor a flashlight was found during the LVMPD's search of the Petitioner's personal belongings and her car.

- "The perpetrator either had some medical knowledge, or experience skinning an animal." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 5.) The following explains how Dr. Larkin's findings apply to the case:

> There was no testimony, and the prosecution did not argue to the jury that Petitioner either had medical knowledge or experience skinning an animal. That lack of testimony is to be expected because the Petitioner was an 18-year-old female high school graduate, not a medical college student, and there was testimony the Petitioner did not like hunting and was squeamish around blood.

- "The amount of skin — covered by dense hair — attached to the cut end of the penis — "surgical margin" — is much smaller than the defect seen on the distal abdominal wall. This suggests two separate acts of mutilation." (5); "Removal of the penis at its base could be accomplished with one hand holding the weapon, the second hand stretching the skin — the second mutilation, similar to skinning an animal — required one hand to stretch the skin, and the other hand to cut through the sub cutis on the stretch." (5); and, "There is a good probability that more than one person was involved in this attack and murder. At least one perpetrator was skilled either with medical knowledge or animal husbandry to effect the mutilation of Bailey's groin area." (See

Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how Dr. Larkin's findings apply to the case:

> The prosecution argued to the jury that the removal of Bailey's penis caused the wound to Bailey's groin area, based on the testimony of Clark County Medical Examiner Lary Simms. Among Dr. Larkin's reasons for determining Bailey's murderer was skilful in "medical knowledge" and "animal husbandry" was the penis amputation, and then in a separate mutilation the "skinning" of the area around where his penis had been. In the dark trash enclosure where it was difficult for a person to see their hand in front of their face, artificial lighting was necessary for the precise multiple acts of carving on Bailey's body shown by the photos. (See Exhibit 34, Bailey's groin; and, Exhibit 31, Bailey's penis.) Yet, the prosecution did not argue, and there was no evidence at trial, that Petitioner had any "medical knowledge" or skill at "animal husbandry," or that Petitioner had either a "head lamp" or a flashlight, and neither was found in the LVMPD's search of Petitioner's car or her personal belongings. Contrary to Dr. Larkin's analysis, the prosecution conflated the two skillfully performed acts of mutilation on Bailey, his penis amputation and then his "skinning," into a single act by an 18-year-old female with no medical knowledge or animal husbandry experience who the prosecution argued was acting under the influence of methamphetamine. Ironically, ADA William Kephart's rebuttal argument supports Dr. Larkin's analysis that at least one of Bailey's murderers had medical knowledge: "That there is your premeditation, your deliberation. It went to a point where **there was a directed wound to the carotid artery**. There was a blunt force trauma to the head that knocks him down. **Directed wound to the liver area**." (Trans. XIX-210 (10-5-06)) There was no testimony that the Petitioner had any medical knowledge so that she could make a "directed wound" to Bailey's "carotid artery" and to his "liver."

- "A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how Dr. Larkin's findings apply to the case:

> The prosecution argued to the jury that Petitioner used her pocket butterfly knife with a 3-1/2"-4" blade to inflict Bailey's stabbing and cutting wounds. Dr. Larkin's determined that a range

of knife types that all had much different blades than the Petitioner's knife caused Bailey's wounds.

- "Bailey survived either conscious or not, a short time after being attacked." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how Dr. Larkin's findings apply to the case:

> The prosecution argued to the jury, based on Dr. Simms' testimony, that stab wounds to Bailey's abdomen, his penis amputation, and the cut to his rectum were inflicted after Bailey was dead. But Dr. Larkin determined "to a reasonable medical and scientific certainty that" that those wounds were inflicted while Bailey was still alive, but possibly immobilized and unconscious from the shock of blood loss. Dr. Larkin's analysis also means Bailey was buried alive under trash and cardboard by his attackers. Dr. Larkin's analysis that Bailey lived for a period of time after his attack although bleeding from his wounds, is consistent with the recent national news story of a shark attack off the coast in southern Florida. Wind-surfer Stephen Schafer was severely bitten on his buttocks and his leg by a shark, and like Bailey lost about half his blood. Although bleeding profusely from his multiple wounds, Schafer survived and was conscious for more than forty minutes unattended as a life guard paddled 1/4 mile out from shore to get him and bring him back to shore. Schafer died later in a hospital due to his blood loss. (See Exhibit 56, Shark attack victim died from massive blood loss, *The Washington Post*, February 5, 2010.) Dr. Larkin's determination that Bailey was alive after being attacked is particularly important, because Petitioner was convicted of one count of violating NRS 201.450, which requires that the alleged victim of a "sexual penetration" must be dead. With Bailey being alive at the time of his rectum wound, Bailey's assailant could not have violated NRS 201.450 (See Ground eight for a complete explanation of the consequences to the Petitioner about Bailey being alive for a period of time after he was attacked.)

- "Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how Dr. Larkin's findings apply to the case:

> Duran Bailey's body was discovered by Richard Shott "around 10 pm" in a 10' x14' trash enclosure at the northwest corner of the Nevada State Bank's parking lot at 4240 West Flamingo

Road in Las Vegas on July 8, 2001. (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) Emergency 911 received Shott's call at 10:36 pm. The prosecution argued to the jury Petitioner murdered Duran Bailey in the early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans. XIX-121 (10-5-06)) It was dark until nautical sunrise at 4:24 am on July 8. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) Based on the prosecution's argument Bailey's body laid in the trash enclosure for more than 17-1/2 hours (from before 4:24 am until 10 pm (approx.)). The prosecution also argued to the jury that credible alibi witnesses placed Petitioner on July 8, 2001, at her parents' home in Panaca, Nevada from "11:30 a.m. through that night," and that a telephone call from the Lobato home to the cell phone of Petitioner's step-mother Rebecca Lobato at "10 a.m." was probably made by the Petitioner in Panaca. (9 App. 1726; Trans. XIX-130 (10-5-06)) There was trial testimony by Nevada Department of Transportation supervisor Phil Boucher that he had traveled the roads from Las Vegas to Panaca many times and it normally took him about three hours when travelling at an average of 72 mph on the open road. On cross-examination by the prosecution, Boucher agreed it was "possible" traveling at a very high speed to drive from Las Vegas to Panaca in two hours. So given the latest period of time the prosecution conceded to the jury Petitioner was in Panaca (11:30 am) and Boucher's testimony about the fastest "possible" time to travel from Las Vegas to Panaca (2 hours), the latest that Petitioner could have been in Las Vegas on the morning of July 8 was 9:30 am. That means based on the prosecution's case, Petitioner was in Panaca a minimum of 10-1/2 hours BEFORE the EARLIEST time that Dr. Larkin determined Bailey was killed. For a more complete explanation of this see Ground two and Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010.

- "No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 2.) The following explains how Dr. Larkin's findings apply to the case:

Dr. Larkin determined "No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites." (2) Dr. Larkin followed that with, "The lack of blow fly infestation suggests an even shorter time between when Bailey died and was discovered." (8) Dr. Larkin's determination regarding

the absence of blow fly eggs and their significance to establishing Duran Bailey's time of death as sometime after 8.p.m. is corroborated by the post-conviction examination of the evidence in Petitioner's case by several forensic entomologists.

Forensic entomologist Dr. Gail Anderson is a professor at Simon Fraser University in Burnaby, British Columbia, Canada. Dr. Anderson is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. Dr. Anderson reviewed the photographs of Bailey's body in November and December 2009, weather records for July 8, 2001, and various documents related to Petitioner's case. Dr. Anderson's Report of December 17, 2009 about the Petitioner's case states in part: "to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009, 5. C.V. attached.)

Forensic entomologist Dr. Linda-Lou O'Connor is a professor in the Department of Entomology at the University of Kentucky in Lexington, Kentucky. Dr. O'Connor is the treasurer of the North American Forensic Entomology Association. Dr. O'Connor examined the entomology evidence in Petitioner's case and wrote the "Forensic Entomology Investigation Report," February 11, 2010, that states: "Based on the lack of colonization of blow flies and/or flesh flies, estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001." (See Exhibit 2, Forensic Entomology Investigation Report of Dr. Linda-Lou O'Connor, February 11, 2010, 1.)

Forensic entomologist Dr. M. Lee Goff is a professor and director of the Chaminade University Forensic Sciences program in Honolulu, Hawaii. Dr. Goff is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. He has conducted training courses at the FBI Academy, he is a consultant for the television crime dramas *CSI* and CSI: Miami, and he is the author of *A Fly For The Prosecution: how insect evidence helps solve crimes* (Harvard University Press, 2000). Dr. Goff examined the entomology evidence in Petitioner's case and wrote the "Report of Dr. M. Lee Goff," March 12, 2010. Dr. Goff concurs with Dr. Anderson's finding that "to a reasonable scientific certainty Mr.

BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.)

Dr. Larkin's determination regarding the absence of "predatory animal bites" is corroborated by Dr. Anderson in her Report, "Cockroach feeding on fresh remains often cause distinctive marks on the body (Benecke 2001; Haskell *et al.* 1997). No such marks were observed in the photographs I reviewed." (See Exhibit 1, 4-5). It is also corroborated by Dr. O'Connor in her Report: "Upon close examination of the scene and autopsy photographs provided, there was no clear indication that cockroaches fed on the decedent." (See Exhibit 2, 3-4.) And it is also corroborated by Dr. Goff in his Report, "I did not see any indications of cockroach activity on the body in the images." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.)

The absence of any predatory bites on Bailey's body is significant because he could not have lain for any significant length of time in the dark trash enclosure with garbage strewn about and on him without him being descended on by predatory flesh eaters such as cockroaches and rats. We know there were cockroaches in the trash enclosure near Bailey's body because Las Vegas Metropolitan Police Crime Scene Analyst Louise Renhard wrote in her crime investigation notes that they were in a beer can that was several feet from Bailey's body. (See Exhibit 7, Louise Renhard crime scene notes) and, (See Exhibit 32, Crime Scene Evidence with diagram of location found.). Renhard testified during Petitioner's trial on May 13, 2002: "I do remember a beer can." … "No, it was – had like, I believe, 15 or 18 cockroaches in it." (Trans. IV-95 (05-13-02)) The importance of the new evidence provided by Dr. Anderson, Dr. O'Connor and Dr. Goff that there were no cockroach bites on Bailey's body is emphasized by peer reviewed articles documenting that cockroaches feed on the flesh of dead humans. (See Exhibit 6, *Cockroach - The Omnivorous Scavenger*.)

The absence of fly eggs on Bailey's body scientifically establishes he died sometime after sunset (at 8:01 pm), while the absence of cockroach bites scientifically establishes that he could not have lain in the dark trash enclosure for any length of time without being feed on by the cockroaches (and other flesh eating predators.). As has been explained in detail, the prosecution conceded during its argument to the jury that the latest the Petitioner could have

been in Las Vegas on July 8 was 9:30 a.m. – which was 10-1/2 hours before sunset at 8:01 p.m., when it is known the Petitioner was in Panaca.

- "Because no brain sections were made, the timing of the head wounds with respect to the other wounds cannot be determined." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how Dr. Larkin's findings apply to the case:

> In the prosecution's argument to the jury only a period of minutes elapsed from when Petitioner arrived at the trash enclosure to when Bailey died. The prosecution argued Bailey's head fracture was inflicted when he fell backwards after being hit in the mouth with a baseball bat and hit his head on the concrete curb. The prosecution's argument presupposes that Bailey died almost immediately after his carotid artery cut. That argument, however, directly contradicts the testimony of ME Lary Simms that swelling in Bailey's brain establishes he experienced a serious head injury two hours before he died. Bailey had a skull fracture on the same side of his head as the swelling. During cross-examination Simms testified that Bailey's brain swelling could have been caused by the fracture of his skull two hours before he died. Simms testified:
>
> > Q. (Mr. Schieck) But the fracture could've been two hours old also?
> > A. (Mr. Simms) Yes, because it was – that area was on the same side as the fracture, and if it was on the different side then I'd have a different opinion, but because that area is on the same side as the fracture, it could've been that that was contemporaneous with the fracture. (7 App. 1175; Trans. VIII-36 (9-20-06))

Dr. Larkin does not contradict Dr. Simms testimony; he simply observes that there was insufficient evidence in the Autopsy Report for him to make an independent determination. Consequently, ME Simms' determination that Bailey's head fracture could have occurred two hours prior to his death stands, and that directly undermines the prosecution's argument that the skull fracture was caused by the Petitioner immediately prior to his death. Dr. Larkin's conclusion supports that Bailey's head fracture was incurred during some kind of an altercation several hours prior to his death. That altercation could have been somewhere other than the trash enclosure and it possibly could have involved the same person(s) who later attacked and mutilated him in the trash enclosure.

Dr. Larkin's new forensic pathology evidence undermines at least eight key aspects of the prosecution's case against the Petitioner. If at trial the jurors had known this exculpatory evidence

the jury could have been expected to reject the prosecution's argument the Petitioner murdered and mutilated Bailey. If at trial the jury had known this exculpatory forensic pathology evidence no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(k) Ground eleven.

New expert evidence establishes that Petitioner's black high-heeled open-toed platform shoes that she was wearing at the time of the assault described in her Statement of July 20, 2001, and that the prosecution did not contest she was wearing when they argued she murdered Duran Bailey, could not have been worn during Bailey's murder and mutilation, and if the jury had known of this new exculpatory evidence, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued that Petitioner stabbed Duran Bailey's scrotum, hit his mouth with a bat, punched his face with her fists, and used her knife to cut his carotid artery and stab his face and abdomen multiple times. Medical Examiner Lary Simms testified Bailey bled profusely from his wounds. Photos were introduced at trial showed the large amount of blood on Bailey and on cardboard, concrete and many items at the crime scene. (See Exhibit 33, Blood at crime scene; and Exhibit 92, Bailey as found.) The prosecution also argued that after Bailey's death Petitioner repeatedly stabbed Bailey's abdomen, amputated his penis, and slashed his rectum. The prosecution also argued Bailey's murder was the same event Petitioner describes in her Statement of July 20, 2001, that was audio recorded by LVMPD homicide Detectives Thomas Thowsen and James LaRochelle. Petitioner described being "bum rushed" in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas as she was getting in her car to go out around, or after midnight. The man attempted to rape her, but Petitioner fought him off by trying one time to cut his exposed penis. Petitioner described in her Statement wearing a skirt and black high-heeled shoes, and she told the detectives interrogating her that she had the shoes she was wearing that night. She identified them as black open-toed platform shoes that have 4" to 5" heels, and those shoes were seized as evidence

at the time she was arrested on July 20, 2001. (See Exhibit 35, LVMPD Vehicle Report, July 20, 2001.) Petitioner's black high-heeled shoes were tested on August 6, 2001, by the Las Vegas Metropolitan Police Department's Forensic Laboratory. The following is the finding of the tests:

> CONCLUSIONS:
>
> 1. A human bloodstain was detected in the big toe area (stain A) of the right high heel sandal (TAW5 item 01). Duran Bailey is excluded as the source of this blood. Kirstin Lobato cannot be excluded as the source of this blood."
>
> …
>
> Petitioner's shoes were returned to the evidence vault in a "Sealed paper bag" (package #4032-01). (See Exhibit 36, LVMPD Forensic Lab Report, August 6, 2001. Emphasis added to original.)

In addition to not having any of Bailey's blood on Petitioner's black high-heeled shoes, they do not have any damage or scuff marks from a prolonged, violent and bloody struggle with a man, or damage from climbing into the dumpster to throw out the trash that was piled around and on top of Bailey. Attached as Exhibits are four LVMPD photos of Petitioner's black high-heeled open-toed platform shoes that were seized as evidence. (See Exhibit 37, Black High Heeled Shoes 1; Exhibit 38, Black High Heeled Shoes 2; Exhibit 39, Black High Heeled Shoes 3; and Exhibit 40, Black High Heeled Shoes 4.) On October 3, 2001, Petitioner's black high-heeled shoes were excluded by the Las Vegas Metropolitan Police Department Crime Lab as being the source of the shoeprints imprinted in blood on the cardboard covering Bailey's torso, or the shoeprints imprinted in blood on concrete at the crime scene. (See testimony of LVMPD footwear examiner Joel Geller, Trans. XI-114 (9-25-2006)) The prosecution did not contest at trial that Petitioner was wearing her black high-heeled shoes during the assault she described in her Statement, which the prosecution argued was actually Bailey's murder. There was no testimony at trial that the Petitioner wore the shoes after she was assaulted or that they had been cleaned after the assault, and the prosecution did not even suggest during their argument that they had been worn or cleaned after the assault. So the Petitioner's two high-heeled shoes are perfectly preserved physical witnesses to the assault described in her Statement.

Given the immense amount of blood on Bailey and all over the crime scene, and the fact that no shoeprints imprinted in blood matching Petitioner's shoe size were found at the crime scene on the concrete floor leading out of the trash enclosure or on a piece of cardboard covering

Bailey's torso, it is not reasonable that Petitioner could have committed Bailey's murder wearing her high heel shoes that the prosecution does not contest she was wearing. (See Exhibit 33, Blood at crime scene; and, Exhibit 58, Plywood against north wall.) Given the intensity of the attack on Bailey and the lack of damage to her high-heeled shoes, that Petitioner could have murdered Bailey while wearing them is even less reasonable, particularly since the shoes are very far removed from highly maneuverable athletic footwear.

Petitioner's shoes are the one item of clothing she had that she positively identified in her Statement as wearing at the time she was sexually assaulted at the Budget Suites Hotel. There is no evidence on Petitioner's black high-heeled shoes that she was present at the bloody and violent scene of Bailey's murder, which would be expected if she had in fact been there. Petitioner's shoes are not only a witness that she did not murder Bailey, but introduction of her black high heel shoes into evidence would have allowed the jury to hold and closely examine her shoes and see the lack of blood or damage to them. The jury could then have made an informed judgment about the remote probability, or the utter impossibility that Petitioner could have beaten Bailey and inflicted all the bloody wounds on him, "dragged" his body several feet after his death, and climbed into the dumpster and thrown out the trash that was piled around and on top of him without getting a single drop of his blood on her high-heeled open-toed shoes or even scuffing them. And if the prosecution was to be believed, she did all of that without leaving a single shoeprint imprinted in blood on the concrete or one of the many pieces of cardboard at the scene. The near pristine condition of Petitioner's shoes don't just speak, but scream volumes that the Petitioner was the victim of the very short altercation described in her Statement of July 20, 2001 – and that she had nothing to do with the prolonged, bloody, physical and violent event that was Bailey's murder and mutilation that occurred weeks after the incident Petitioner described in her Statement.

The absence of foreign blood on Petitioner's high-heeled shoes is consistent with the fact that during the Petitioner's 26-minute Statement of July 26, 2001, she does not a single time mention the words blood or bloody, or that either she or her attacker bled. The absence of any foreign blood on Petitioner's shoes are corroboration the rape attempt she describes in her Statement that happened at a Budget Suites Hotel in east Las Vegas "over a month" prior to her Statement on July 20, 2001.

The evidentiary importance of Petitioner's black high-heeled shoes is supported by the post-conviction expert analysis of forensic scientist George Schiro. George Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison. He has also consulted on cases in 23 states, for the United States Army, and in the United Kingdom. Schiro has testified as an expert for both the prosecution and defense over 145 times in eight states, federal court, and two Louisiana city courts. Schiro is a fellow of the American Academy of Forensic Sciences, a member of the Association for Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

Schiro is familiar with Petitioner's case, having testified on May 16, 2002 as a defense witness at Petitioner's first trial. Schiro's testimony was limited because of improper noticing by Petitioner's counsel. Schiro was not retained by Petitioner's new counsel for her retrial. After Petitioner's direct appeal was exhausted in October 2009, Schiro agreed to assist the Petitioner by providing his expertise as a forensic scientist *pro bono*. On February 6, 2010 Schiro was provided four full-color photographs of Petitioner's black platform shoes with 4" to 5" heels that were taken into evidence by the LVMPD on July 20, 2001. (See Exhibits 37, 38, 39, and 40, four LVMPD photos of Petitioner's black high-heeled open-toed platform shoes.) Schiro had been provided numerous crime scene photos prior to his testimony during Petitioner's 2002 trial. After analyzing the photographs of Petitioner's black open-toed platform shoes that have 4" to 5" heels, Schiro executed the "3rd Affidavit of George J. Schiro, Jr.," dated February 15, 2010, in which he states in part:

> 18. This is the first time that I had seen these photographs.
> 19. It is my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then it is highly likely that she would have left at the scene bloody shoeprints corresponding to the sole patterns of the black high heeled shoes.
> 20. No bloody shoeprints corresponding to the sole patterns of the black high heeled shoes were identified or documented at the scene of Mr. Bailey's murder.

> 21. It is also my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then Mr. Bailey's blood would have been present on the black high heeled shoes.
> 22. None of Mr. Bailey's blood was found on the black high heeled shoes.
> 23. There is no physical evidence associating Kirstin Lobato with Duran Bailey or the crime scene. Ms. Lobato is also excluded as the source of key physical evidence found at the crime scene.
> (See Exhibit 42, 3rd Affidavit of George J. Schiro, Jr., February 15, 2010.)

The new evidence provided by Schiro's analysis is that if Petitioner had been wearing her black high heeled platform shoes at the scene of Bailey's murder, "it is highly likely that she would have left at the scene bloody shoeprints," and, "It is also my opinion that … blood would have been present on the black high heeled shoes." Petitioner's bloody shoeprints were not at Bailey's crime scene, and none of his blood was on her shoes. Consequently, her black high heeled shoes are invaluable exculpatory evidence. If the jury had heard Schiro's expert testimony at trial it could have been expected to reject that Petitioner murdered and mutilated Bailey while wearing her black high heeled platform shoes, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

> **(l) Ground twelve.**
> New evidence establishes the shoeprints imprinted in blood leading out of the trash enclosure were made by a person involved in Duran Bailey's murder and those shoeprints were made by the same model of shoe as the shoeprints imprinted in blood on the cardboard covering Bailey's body, thus linking both sources of shoeprints imprinted in blood to Bailey's murderer(s), and there is also a shoeprint impression on the cardboard made by the same model shoe prior to Bailey bleeding, and the Petitioner has been excluded as the source of all crime scene bloody and non-bloody shoeprint impressions, and if the jury had known of this exculpatory evidence, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that the shoeprints imprinted in blood on the trash enclosure's concrete floor were there coincidentally and were unrelated to Bailey's murder. Forensic scientist Brent Turvey was the Petitioner's evidence expert, but he testified that he was

not an impressions expert. During cross-examination Turvey testified about the bloody shoeprints leading out of the crime scene:

> Q (By Ms. DiGiacomo) Okay. But it's possible they're not connected to the crime scene?
> A (By Mr. Turvey) That is a possibility.
> Q Okay. And it's also possible that whoever left the footwear impression is not the killer?
> A And, again, the police were diligent enough to collect these items of evidence. So that means in their minds it was very important at the time. So I'm willing to -- I'm willing to go along with that and go with what they collected.
> Q Okay. But my question was, sir, it's possible that whoever left the bloody footwear impressions is not connected to the killing?
> A Again, it's possible but I'm embarrassed to mention the possibility.
> Q But it's possible?
> A It's possible.
> (Trans. XVI-196-197 (10-02-06))

As a consequence of Turvey's responses, the prosecution was able to argue to the jury that the shoeprints imprinted in blood leading out of the trash enclosure were not related to Bailey's murder, which the prosecution had to do because Petitioner's shoe size was eliminated as matching any of the identifiable shoeprints imprinted in blood at the crime scene. The Petitioner was excluded as the source of the two shoeprints on the concrete floor imprinted in blood and two shoeprints on a piece of cardboard covering Bailey's torso that were imprinted in blood. (See testimony of LVMPD footwear examiner Joel Geller, 7 App. 1309; Trans. XI-114 (9-25-2006)) The shoeprints imprinted on the cardboard were ignored during the trial except for Geller's brief reference to them on direct examination.

George Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison. He has also consulted on cases in 23 states, for the United States Army, and in the United Kingdom. Schiro has testified as an expert for both the prosecution and defense over 145 times in eight states, federal court, and two Louisiana city courts. Schiro is a fellow of the American Academy of Forensic Sciences, a member of the Association for

Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

Schiro is familiar with Petitioner's case, having testified on May 16, 2002 as a defense witness at Petitioner's first trial. Schiro's expert testimony was limited because of improper noticing by Petitioner's counsel. Schiro was not retained by Petitioner's counsel for her second trial. After Petitioner's direct appeal was exhausted in October 2009, Schiro agreed to assist Petitioner by providing his expertise as a forensic scientist *pro bono*. The "Affidavit of George J. Schiro Jr.," dated November 24, 2009, states in part:

> 19. Bloody shoeprints were photographed and documented at the crime scene. These bloody shoeprints could have only been left by the person concealing Mr. Bailey's body because all of the blood was covered by the trash concealing his body. The cardboard was first used to cover his body, then the trash was used to further conceal his body and the blood. While the body and blood were being concealed with trash, the source of the shoeprints stepped in blood and tracked them out upon exiting the enclosure.
> 20. William J. Bodziak's report dated March 27, 2002 states that these shoeprints "...most closely correspond to a U.S. men's size 9 athletic shoe of this type. The American women's size equivalent would be approximately size 10." His report further states "...the length of the LOBATO right foot equates to U.S. men's sizes between 6 to 6 1/2. The American women's size equivalent would be approximately size 7 1/2. The right foot size of KIRSTIN LOBATO would therefore be at least 2 1/2 sizes smaller than the estimated crime scene shoe size."
> 21. The Las Vegas Metropolitan Police Department (LVMPD) Crime Scene Report dated 07-20-01 by Crime Scene Analyst II, Jenny Carr states that "...a pair of black and white "Nike Air" size 7.5 tennis shoes were recovered, by myself, from the hands of Kirstin Lobato and impounded into evidence." These shoes are the same size of shoes that Mr. Bodziak states Ms. Lobato would normally wear.
> 22. I determined that based upon the shoe size of the impressions and the size of the shoes received from Ms. Lobato, Ms. Lobato is excluded as the source of the bloody shoeprints found at the crime scene. There is no indication that any shoes in Ms. Lobato's possession were size 10 or that they matched the bloody shoeprint found at the scene.
> (See Exhibit 43, Affidavit of George J. Schiro Jr., November 24, 2009.)

On January 20, 2010 Schiro was provided photographs of the shoeprints imprinted in blood on the cardboard covering Bailey's torso. The photographs of these shoeprints were not introduced into evidence during Petitioner's trial. Schiro writes in his "Affidavit of George J. Schiro Jr., February 4, 2010.):

26. This was the first time that I saw the photographs of the cardboard and its associated shoeprints.
27. An examination of the cardboard photographs revealed two distinct bloody shoeprints.
28. I determined that the two bloody shoeprints on the cardboard have the same sole pattern as the two bloody shoeprints photographed on the concrete.
29. I determined that both sets of patterns are from a right shoe.
30. On January 31, 2010, I submitted photographs of the two bloody shoeprints on the concrete and the two bloody shoeprints on the cardboard to Foster + Freeman's shoeprint database at https://secure.crimeshoe.com/horne,php. [Note: this link can only be accessed from within the Foster + Freeman website at, http://www.fosterfreeman.com]
31. On February 1, 2010, I received a report from Foster + Freeman, indicating that the sole pattern is from a "Spitfire" model right shoe manufactured for WalMart by Athletic Works.
…
33. I determined that, given the information provided by Mr. Bodziak, the bloody shoeprints on the concrete are from a men's U.S. size 9 or women's U.S. size 10 "Spitfire" model right shoe manufactured for WalMart by Athletic Works.
34. There is no indication that any shoes in Ms. Lobato's possession were size 10 or that they matched the bloody shoeprints found at the crime scene.
35. Further examination of **the cardboard photographs revealed a patent non-bloody partial right heel pattern that has the same heel pattern as the "Spitfire" model right shoe**.
36. I determined that on top of part of this patent heel print is a transfer pattern of blood indicating that **the heel print came before the transfer of blood and before the right shoe stepped in blood creating the bloody shoeprints found on the concrete**.
37. This suggests that **the person wearing the shoe was present before and after blood was shed at the scene and the wearer of the shoe concealed Mr. Bailey's body with trash**.
(See Exhibit 44, 2nd Affidavit of George J. Schiro Jr., February 4, 2010, 3-4 (emphasis added to original)) (Affidavit numbers 19-20 refer to Exhibit 89, Concrete Bloody Shoeprint; Affidavit numbers 26-34 refer to Exhibit 90, Cardboard Bloody Shoeprints; and Affidavit numbers 35, 36. and 37 refer to Exhibit 91, Cardboard non-bloody shoe imprint.)

William J. Bodziak worked with the FBI for 26 years and is a leading shoeprint, fingerprint, and tire track expert. Bodziak was retained by Petitioner's counsel prior to her first trial to examine the photographs of the shoeprints imprinted in blood on trash enclosure's concrete floor. Bodziak's "Footwear Examination Report" of March 27, 2002, states in part:

> The two inked impressions and tracings of the right foot of KIRSTIN LOBATO were measured. Using a standard Brannock foot-measuring device, the length of the LOBATO right foot equates to U.S. men's sizes between 6 to 6-1/2. The American

> women's size equivalent would be approximately size 7-1/2. The right foot size of KIRSTIN LOBATO would therefore be at least 2-1/2 sizes smaller than the estimated crime scene shoe size.
>
> Further, superimposition of the foot impression of LOBATO over the QI-Q2 crime scene right shoe impressions revealed LOBATO's foot size to be significantly smaller than the impressions.
>
> (See Exhibit 47, Footwear Examination Report (William J. Bodziak), March 27, 2002.)

After Petitioner's direct appeal was exhausted in October 2009, Bodziak agreed to assist Petitioner by providing his expertise as an impressions expert *pro bono*. Bodziak was provided the same photographs of the shoeprints imprinted on the cardboard that Schiro was provided with. He had not previously seen the photographs. On April 7, 2010, Bodziak reported that he determined the shoeprint impressions on the cardboard were made by a shoe with the same pattern as the shoeprint impressions in blood on the concrete that he examined in 2002: "The Walmart shoe (crimeshoe .com) corresponds with the design of both the older impression submitted by Aleman and the new impressions on cardboard."

Consequently, contrary to the prosecution's argument at trial that the jury relied on to convict Petitioner, there is new expert forensic evidence establishing that the shoeprints imprinted in blood on the concrete and the cardboard were made by Bailey's killer(s), the non-bloody shoeprint on the cardboard imprinted prior to the infliction of Bailey's bleeding wounds matches the shoeprint pattern imprinted in blood, and it is scientifically known the Petitioner wears a shoe 2-1/2 sizes smaller than the shoeprints imprinted in blood at the crime scene. Furthermore, both Schiro and Bodziak have determined the same shoeprint pattern is imprinted on the cardboard and the concrete. If the jurors had known this exculpatory evidence the jury could have been expected to reject the prosecution's argument that Petitioner murdered and mutilated Bailey, and found that there was not proof beyond a reasonable doubt that the Petitioner was guilty and acquitted her.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(m) Ground thirteen.

New forensic science evidence and crime scene analysis and reconstruction excludes Petitioner and her car from the crime scene, and undermines the prosecution's arguments the jury relied on to convict the Petitioner, and if the jury had known of this exculpatory evidence, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Duran Bailey's body was discovered by Richard Shott "around 10 pm" in a 10' x14' trash enclosure at the northwest corner of the Nevada State Bank's parking lot at 4240 West Flamingo Road in Las Vegas on July 8, 2001. (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) Emergency 911 received Shott's call at 10:36 pm. The prosecution argued to the jury Petitioner murdered Duran Bailey in the dark early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans, XIX-121, 10-5-06.) .) It was dark until nautical sunrise at 4:24 am on July 8. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.)

George Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison. He has also consulted on cases in 23 states, for the United States Army, and in the United Kingdom. Schiro has testified as an expert for both the prosecution and defense over 145 times in eight states, federal court, and two Louisiana city courts. Schiro is a fellow of the American Academy of Forensic Sciences, a member of the Association for Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

Schiro is familiar with Petitioner's case, having testified on May 16, 2002 as a defense witness at Petitioner's first trial. Schiro's testimony was limited because of improper noticing by Petitioner's counsel. Schiro was not retained by Petitioner's new counsel for her retrial. After Petitioner's direct appeal was exhausted in October 2009, Schiro agreed to assist Petitioner by

providing his expertise as a forensic scientist *pro bono*. Schiro's Forensic Science Resources Report dated March 8, 2010, states eight areas of new evidence (Page number is in parenthesis.):

- "Based upon a review of the photographs taken in the area where the gum was found and Mr. Wahl's statement that the gum was stained with apparent blood, it is likely the gum was deposited prior to or at the same time the blood was deposited." (3)
- "These areas are all bony areas and indicate that the beating and stabbing were carried out forcefully. As a result of striking these bony areas with a knife, the killer's hand might have been cut from slipping onto the knife blade as the knife handle accumulated more blood. The killer's hand could have been bruised from the knife or the forceful nature of the beating. I further determined that the surfaces surrounding the crime scene were abrasive and could have also caused abrasions on the killer's hands. **No cuts, abrasions, broken fingernails, or healing bruises can be seen in the photographs of Ms. Lobato's hands**." (3) (Emphasis in original.)
- "Photographs of Ms. Lobato taken approximately 12 days after the discovery of Mr. Bailey's body show that Ms. Lobato had bleached blonde hair. Her hair had lines of demarcation at the root ends of the hair shafts indicating that it had been several weeks since her last bleach treatment. During a beating and stabbing homicide, the killer can lose hair at the scene either by having it forcibly removed or through the natural hair shedding process. Bleached Caucasian hairs found at the crime scene or associated with Mr. Bailey's body would have been significant. **There is no information indicating that any bleached blonde hairs were observed or collected from the crime scene or Mr. Bailey's body**." (3-4) (Emphasis in original.)
- "The photographs demonstrate numerous blood spatter patterns. There is no documentation of blood spatter above a height of 15 inches on any of the surrounding crime scene surfaces. **This indicates Mr. Bailey received his bleeding injuries while lying on the ground**. The photographs of his pants also do not indicate the presence of any vertically dripped blood. **This indicates that he did not receive any bleeding injuries while in a standing position**." (4) (Emphasis in original.)
- "When a person is bleeding and repeatedly beaten with a long object, such as a baseball bat or a tire iron, or is repeatedly stabbed using an arcing motion, then cast-off blood spatters corresponding to the arc of the swing are produced. There is no documentation of any cast-off blood spatters on the surrounding surfaces. This indicates that arcing motions were not used in the homicide of Mr. Bailey. **The confined space of the crime scene enclosure and the lack of cast-off indicate a baseball bat was not used to beat Mr. Bailey**. I further determined that the beating was more likely due to a pounding or punching type motion." (4) (Emphasis in original.)
- "Mr. Wahl's August 6, 2001 report states "Examination of the vehicle slip cover (TAWS item 5) and the interior left door panel (TAWS) yielded weak positive presumptive tests for the presence of blood in one area of each item. Human blood could not be confirmed from either item. Human DNA was not detected in extracts prepared from swabbings collected from both items."

  The luminol reaction and the phenolphthalein reaction are both catalytic tests. …The categories of substances that will produce false positives are the same for both tests, but luminol probably reacts to lesser amounts of these substances than

phenolphthalein. …Both tests can cause reactions with the enzymes catalase and peroxidase, cytochromes, strong oxidizing agents, and metallic salts.

Some of the false reactions include:

Chemical oxidants and catalysts, such as copper and nickel salts, rust, fornialin (used for preserving tissues), potassium permanganate (found in some dyes), potassium dichromate, bleaches, iodine, and lead oxides. Some of these items could be found anywhere, including tap water, dirt, and blue jeans. Phenolphthalein gives positive results with copper, potassium ferricyanide, nickel and cobalt nitrates, and some sulfocyanates. Luminol reacts with copper compounds, cobalt, iron, potassium permanganate, and bleach (source: Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the FBI Academy in Quantico, VA, phenolphthalein has been shown to react with iodine, potassium permanganate, and copper nitrate.

Plant sources: Vegetable peroxidases. Phenolphthalein might react with apple, apricot, bean, blackberry, Jerusalem artichoke, horseradish, potato, turnip, cabbage, onion, and dandelion root (source Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the FBI Academy in Quantico, VA, phenolphthalein has been shown to react with cabbage, carrot, cucumbers, celery, corn, and horseradish.

Animal origin: pus, bone marrow leukocytes, brain tissues, spinal fluid, intestine, lung, saliva, and mucous (source Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the FBI Academy in Quantico, VA, phenolphthalein has been shown to react with saliva. Bacteria can also cause false positive reactions.

The HemaTrace test used to confirm human blood is more sensitive than the phenolphthalein test. As a result, had the phenolphthalein been reacting to human blood, then the HemaTrace test should have also given a positive result for human hemoglobin. In validation studies conducted at the Louisiana State Police Crime Lab, phenolphthalein could detect a 1/1,000,000 dilution of blood and the HemaTrace card could detect a 1/100,000,000 dilution of blood. This makes the HemaTrace card 100 times more sensitive than the phenolphthalein test.

Based on the results of the phenolphthalein, luminol, human hemoglobin, and human DNA quantification analyses, the substance detected in Ms. Lobato's vehicle is not human blood." (5-6) (Emphasis in original.)

- "Ms. Renhard's 07-22-01 Crime Scene Report states "...latent prints were recovered from the left door threshold., the interior and exterior left door window, the interior right door window, the exterior of the trunk and front hood." Her report indicates that a minimum of six latent lifts were recovered from the vehicle. The report does not indicate the number of smudges, partial prints, overlaid prints, etc. that were not collected.

When dusting for prints, the powder on the brush adheres to the moisture contained in the print. The main factors in determining if a person will leave behind a print are the person's individual physiology and habits, the surface, and the environment. Any one or more of these factors can contribute to the lack of fingerprints. People with, drier skin will not leave prints as readily as a person with oily or sweaty skin. Rough surfaces are not conducive to recovering dusted prints

because of the surface texture. Moisture and oils in fingerprints will evaporate more rapidly in hot, arid environments than in cooler, more humid environments. **The lack of Ms. Lobato's prints in her own vehicle would not be considered unusual and it is not necessarily a sign that her vehicle was cleaned**." (6-7) (Emphasis in original.)

- Crime scene reconstruction:

1. The killer enters the enclosure.
2. Mr. Bailey is lying on the ground, possibly sleeping.
3. (These events cannot be sequenced. They all happened at some point, but not necessarily in the order listed. His pants could have been down prior to the stabbing or they could have come down sometime during the stabbing but prior to the scrotum wound. He might have been masturbating prior to getting killed. This could explain the presence of the adult magazines at the crime scene. He may also have fallen asleep with his pants down.) The killer stabs the victim in the face, head, scrotum, and possibly the abdomen. At some point, Mr. Bailey's pants come down. Mr. Bailey manages to use his hands and arms in an effort to defend himself. His left carotid artery is cut while he is on the ground. Mr. Bailey is also beaten forcefully about the head with a blunt object most likely using a pounding or punching type motion or his head is slammed forcefully against the surrounding concrete.
4. Mr. Bailey's anus was then lacerated.
5. Mr. Bailey's body was turned over.
6. The killer stabs Mr. Bailey in the abdomen and severs his penis.
7. Mr. Bailey is covered with the cardboard.
8. Trash is deposited on Mr. Bailey and the blood.
9. The killer exits the enclosure. (6-7)

(See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010.) (Emphasis in original.)

The "2nd Affidavit of George J. Schiro Jr.," dated February 4, 2010, states two areas of new evidence:

- 25. On January 20, 2010, [I was] provided me with four photographs of possible shoeprints on cardboard recovered from Mr. Bailey's homicide scene.'

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

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

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

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

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

37. This suggests that the person wearing the shoe was present before and after blood was shed at the scene and the wearer of the shoe concealed Mr. Bailey's body with trash.
(See Exhibit 44, 2nd Affidavit of George J. Schiro Jr., February 4, 2010.)

The "3rd Affidavit of George J. Schiro Jr.," dated February 15, 2010, states two areas of new evidence:

- 19. It is my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then it is highly likely that she would have left at the scene bloody shoeprints corresponding to the sole patterns of the black high heeled shoes.

20. No bloody shoeprints corresponding to the sole patterns of the black high heeled shoes were identified or documented at the scene of Mr. Bailey's murder.

- 21. It is also my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then Mr. Bailey's blood would have been present on the black high heeled shoes.

22. None of Mr. Bailey's blood was found on the black high heeled shoes.
(See Exhibit 42, 3rd Affidavit of George J. Schiro, Jr., February 15, 2010.)

The above twelve areas dealt with in Schiro's three new documents provide new evidence that can be summarized as:

- The gum found at the crime scene could "likely" have been deposited by someone involved in the crime. (Petitioner was excluded as the source of DNA recovered from the gum.)

- The person who stabbed and beat Bailey could have cut, bruised or gotten abrasions on their hands. (Petitioner had no cuts, bruises or abrasions on her hands when she was arrested.)

- Petitioner had very distinctive bleached blond hair, and during a struggle one could be shed naturally, through vigorous action or by forcible removal. (None of Petitioner's hairs were found at the crime scene.)

- All of Bailey's bleeding injuries were inflicted while he was lying on the ground. (The prosecution argued that Bailey was stabbed in his scrotum while standing up, but he would have bled profusely from that wound, and there was no evidence of vertical bleeding from any of Bailey's wounds.)

- A baseball bat was not used to beat Bailey, who was more likely beaten by "a pounding or punching type motion." (Although Petitioner's bat with a porous rubber handle was excluded as having any blood on it, the prosecution argued she used it to strike Bailey in the mouth.)

● Schiro greatly expanded on the number of natural and artificial substances, and manufactured products that were testified to at trial as able to cause a positive luminol or phenolphthalein reaction. Blood is only one of those many substances. Schiro also provides the important new information that the HemaTrace test that was negative for blood in the Petitioner's car is 10,000% (100 times) more sensitive at detecting blood than a phenolphthalein test.

● It is not unusual that Petitioner's fingerprints were not found in her car, and it does not provide any evidence her car was cleaned.

● The shoeprints imprinted in blood on the cardboard covering Bailey's torso and on the concrete floor have the same sole pattern. There is also a shoeprint on the cardboard with that same sole pattern that was not imprinted in blood. (The Petitioner's shoe size and pattern were excluded as making any crime scene shoeprint.)

● Blood was transferred to the shoeprint that was not imprinted in blood on the cardboard after it was made, which suggests "the person wearing the shoe was present before and after blood was shed at the scene and the wearer of the shoe concealed Mr. Bailey's body with trash." (The Petitioner's shoe size and pattern were excluded as making any crime scene shoeprint.)

● It is "highly likely" the black open-toed high-heeled platform shoes the Petitioner was wearing during the assault described in her Statement of July 20, 2001, would have left shoeprints imprinted in blood if she had been present during "the murder, mutilation and concealment of Duran Bailey." (No shoeprints corresponding to the Petitioner's shoes were at the crime scene.)

● Bailey's blood would have been present on the Petitioner's black open-toed high-heeled platform shoes if she had been present during "the murder, mutilation and concealment of Duran Bailey." (None of Bailey's blood was on the Petitioner's platform shoes.)

● Schiro's crime scene reconstruction that is based on the crime scene evidence and blood splatter has Bailey lying down when he was attacked. Schiro also has Bailey's upper body being rolled toward the front of the trash enclosure onto his stomach for the cutting of his rectum, and then being rolled on his back where his abdomen was stabbed repeatedly, his penis amputated, and his groin skinned. That is where his body was found with his upper body angled

away from the southwest corner of the enclosure where his blood was concentrated. (The prosecution argued that Bailey was standing in the northwest corner when attacked, and that after a bat blow to his mouth knocked him onto his back he was beaten and stabbed, and after he died he was "dragged" to the position where his body was found.)

Consequently, Schiro's new evidence excludes Petitioner from being present and/or involved in Bailey's murder because: The chewing gum found on the cardboard covering Bailey's torso was likely deposited by a person involved in the crime, and Petitioner's DNA was not on the gum; Petitioner had no cuts, bruises or abrasions on her hands that would be expected of Bailey's attacker; None of Petitioner's bleached blond hair was found at the crime scene; All of Bailey's bleeding injuries were inflicted when he was lying down; Bailey was not struck with a baseball bat; A multitude of natural and artificial substances, and manufactured products can cause a positive luminol or phenolphthalein reaction, only one of which is blood, and the DNA tests excluding blood from being in the Petitioner's car is 10,000% more precise than a phenolphthalein test; It was not unusual that Petitioner's fingerprints were not recovered from her car; The same shoeprint pattern was imprinted in blood on the cardboard and concrete, the same shoeprint pattern was imprinted on the cardboard without blood, and Petitioner's shoeprint is excluded as a source; Blood was transferred to the shoeprint not imprinted in blood on the cardboard after it was made, suggesting the shoe's wearer was present before and after Bailey bled and was covered with trash, and Petitioner's shoeprint is excluded as a source; Petitioner's platform (and other) shoes are excluded as a source of the crime scene shoeprints; If Petitioner's platform shoes had been worn at the scene of Bailey's murder, mutilation and concealment, Bailey's blood would have been present on her shoes; and, Bailey was lying down when attacked and his body was rolled to where it was found, and thus he wasn't standing when attacked and his body dragged after he died to where it was found as the prosecution argued to the jury.

Schiro's new evidence that Bailey was attacked while lying down is consistent with, and supported by the new evidence of a scale diagram of the trash enclosure and the location of Bailey, and his teeth and penis. (See Exhibit 57, Bailey in trash enclosure - diagram.) The diagram is based on LVMPD crime scene photos.

The prosecution argued to the jury that the Petitioner was kneeling in front of Bailey when she stabbed him in the scrotum, and she then went and got her bat and "smacked him in the mouth with the bat where his teeth busted out, he fell back and he hit his head on that curb, and that's consistent with busting his skull." (Trans. XIX-198 (10-5-06) There was no testimony during the Petitioner's trial about the trash enclosure's interior dimensions or a dental expert and the prosecution's argument of the scenario of Bailey's attack was speculation by the prosecutors.

The trash enclosure scale diagram confirms Schiro's analysis that "**The confined space of the crime scene enclosure and the lack of cast-off indicate a baseball bat was not used to beat Mr. Bailey**." (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 4. (Emphasis in original.)) The diagram also shows that Bailey could not have been knocked over by a blow from a bat because as a man 5'-10" tall, he would have had to be standing near the concrete curb running parallel with the trash enclosure's north wall for him to have fallen backwards and hit his head on the curb running parallel with the south wall. (See Exhibit 57, Bailey in trash enclosure - diagram.) The outside of the curb is 15" from the north wall, but crime scene photos show a piece of plywood was resting on top of the curb leaning against the wall, so the area between the curb and wall was blocked off. (See Exhibit 58, Plywood leaning against north wall.) So any person kneeling in front of Bailey as the prosecution argued to the jury the Petitioner was, would have to have been on the outside of the north side curb, and Bailey would have been standing at least several feet from that curb. If the 5'-10" Bailey was knocked over from where he would have been standing, his head would have hit the south wall, not the curb. It is significant that Bailey's head would have hit the south wall even if he did not stagger backwards (towards the south wall) as he would be expected to do from a bat blow to his face/mouth. There is no evidence Bailey's head hit the south wall and the prosecution did not argue that he did.

The plywood leaning against the north wall also reduced the room to swing a bat, which provides additional support for Schiro's analysis that "a baseball bat was not used to beat Mr. Bailey." The scale diagram also shows that Bailey's teeth were concentrated in the southwest corner, which is contrary to the prosecution's argument that Bailey's teeth were "busted out" in the northwest corner, where he would have to have been standing to have fallen backward to hit his head on the curb in the

southwest corner. Also, if Bailey's scrotum had been stabbed while he was standing in the northwest corner there would have been a concentration of blood in that corner and there would have been blood on the inside of his pants – especially since the prosecution argued that after stabbing his scrotum the Petitioner took the time to go to her car, get her bat, and return to hit him in the mouth. Yet there was no concentration of Bailey's blood on the inside of his pants or in the northwest corner. (See Exhibit 58, Plywood leaning against north wall.) The concentration of blood in the southwest corner supports Schiro's crime scene reconstruction he was lying down when attacked, and Bailey's teeth being found intact (six were intact and one was fragmented) only inches from the left side of his head supports Schiro's determination that Bailey was hit in the mouth by "a pounding or punching type motion."

Also, new expert dental evidence supports Schiro's analysis and fatally undermines the prosecution's argument that Bailey's teeth were knocked out with a bat. After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a dental expert willing to review the evidence related to Duran Bailey's teeth on a *pro bono* basis to determine if a bat could have been used to remove them from his mouth. Doctor of Dental Surgery Mark Lewis agreed to review the evidence in the Petitioner's case. Dr. Lewis states in the "Affidavit of Mark Lewis DDS" dated April 26, 2010:

> 3. I was asked to give my opinion of whether a baseball bat could have been used to knock out the teeth of Duran Bailey.
> 4. I reviewed photographs of the crime scene and autopsy, the autopsy report and trial testimony regarding the condition of the teeth and the location the teeth were found.
> 5. In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat.
> (See Exhibit 100, Affidavit of Mark Lewis DDS, April 26, 2010.)

Dr. Lewis' new evidence is the first time since the Petitioner's arrest in July 2002 that a dental expert examined the evidence related to Bailey's teeth. The prosecution's argument that Bailey's teeth were knocked out by a bat was speculative, and there was no blood from anyone on the petitioner's bat, so the prosecution's argument that her bat was used was also pure speculation. Dr. Lewis' analysis reveals the prosecution's argument that the jury relied on to convict the Petitioner was not just speculative – but it was dead wrong. So Dr. Lewis' new dental evidence supports Schiro's new expert crime scene blood splatter analysis that Bailey wasn't hit by a baseball bat. (See Exhibit 45, 4.)

Schiro's new evidence about the crime supports the Petitioner's exclusion from involvement in Bailey's murder and mutilation. Schiro's new evidence undermines at least twelve key aspects of the prosecution case against the Petitioner and the prosecution's arguments the jury relied on to convict the Petitioner. If the jurors had known this exculpatory evidence the jury could have been expected to reject the prosecution's argument that Petitioner murdered and mutilated Bailey, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(n) Ground fourteen.

New evidence Duran Bailey did not live in the trash enclosure where he was murdered establishes the Petitioner could not have gone there in the early morning of July 8 "sometime before sunup" to find Bailey because he did not live there, and if the jury had known this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that Duran Bailey was a methamphetamine connection in Las Vega for the Petitioner, and that in the early morning of July 8, 2001, prior to "sunup" she knew to find him where he lived in the Nevada State Bank's trash enclosure.

Steven King was Diann Parker's domestic partner in 2001, and he personally knew Bailey (who he refers to in his "Affidavit of Steven King" by his nickname of "St Louis"). King states twice in his "Affidavit of Steven King" dated February 17, 2010, that Bailey ("St Louis") "did not live at the Nevada State Bank." King also states that he believes Bailey was ambushed at the trash enclosure by the Hispanic friends of Diann Parker after he was lured their by some kind of bait. (See Exhibit 8, Affidavit of Steven King.)

King's new evidence that Bailey did not live in the trash enclosure is consistent with Richard Shott's testimony. Shott was the homeless man who found Bailey's body. Shott was very familiar with the area around the Nevada State Bank. Shott also knew the homeless people in the area and where they hung out. Shott testified at Petitioner's first trial that he had seen Bailey in the area and at

the Gold Coast Casino, which is about 100 yards east of the Nevada State Bank. (Shott's testimony was read into the record at Petitioner's second trial because he could not be found.) On the evening of July 8 Shott found Bailey's body while dumpster diving in the trash enclosure. He testified:

> Q. (By Mr. Kephart) How is it that you got into the dumpster area?
> A. (By Mr. Shott) I noticed that the gate was unlocked and open a little bit, and usually it's locked.
> Q. Okay. And on this particular night that it was open?
> A. I checked it out.
> (Trans. IV-58 (9-14-06))

Shott, who had seen Bailey around the area, knew the trash enclosure was normally locked, and he did not testify that Bailey or anyone else lived there. Confirming Shott's knowledge about the dumpster normally being locked, is part of a cut padlock was found around the trash enclosure. The cut padlock also provides confirmation for King's new evidence that Bailey was lured to the trash enclosure where he was ambushed in a pre-planned attack by Parker's Mexican friends.

King's new evidence is also consistent with Diann Parker's statement on July 5, 2001, that she gave to Detective J. Scott after she called the LVMPD to report that she was beaten and raped on July 1, 2001, by a man she knew as "St Louis." She later learned that "St Louis'" name was Duran Bailey. Her statement was three days before Bailey's murder. Parker was desperate for Bailey to be arrested, because she told Det. Scott that if he wasn't arrested he would murder her for reporting the rape. Parker had reason to be afraid for her life because Bailey had not only threatened to kill her, but he told her that he had been imprisoned in Missouri for murder. Parker also offered to help Det. Scott find Bailey by riding with him around the area until they spotted him. But Parker never mentioned that Bailey lived in the Nevada State Bank's trash enclosure, or that the bank or the immediate area around it was a place Det. Scott should even look to find him. What Parker did tell Scott was:

> Q. (J. Scott) Okay, Uh, what else has he told you about himself, like in the past?
> A. (Ms. Parker) He's pretty much been a street person all his life. He's out of St. Louis, Missouri. He's got a home there that he gets money from from uh...
> Q. That's why he goes by St. Louis.
> A. And his bank. His bank is right there, Nevada Bank, right there on Flamingo.
> Q. And where does he actually stay though? Is... is there a certain area he stays in?
> A. <u>The last time he told me was over there behind the Palms</u>. I sorta come and saw the place.
> Q. Is it kinda like a desert area?

A. No, it's... it's a house. No. Where he was gonna go to.
(Diann Parker LVMPD Voluntary Statement of July 5, 2001, 43-44.) (Emphasis added to original.)

So Parker knew Bailey lived behind the Palms Casino, which was then under construction on the south side of West Flamingo Road. Parker's statement to Det. Scott corroborates King's new evidence that Bailey did not live at the Nevada State Bank where he was murdered.

However, at Petitioner's first trial, after talking with Detectives Thowsen and LaRochelle, Parker's testimony was inaccurate about where she told Det. Scott that Bailey lived. (Parker's testimony was read into the record at Petitioner's second trial because she died in January 2005.) Parker testified:

Q. (Ms. Zalkin) When the cops came to take your statement, did you tell them where they could find Duran?
A. (Ms. Parker) I told there whereabouts that he hung around.
Q. And where was that?
A. He usually stayed behind the bank on the back side of Terrible's.
Q. When you say the bank, what are you -- which bank are you talking about?
A. Nevada State Bank.
(Trans. XIV-24 (9-28-06))

It is known from both King Affidavit and Shott's testimony that Parker's July 5, 2001, statement that Bailey lived somewhere other than the Nevada State Bank's trash enclosure was accurate, and that her trial testimony was not accurate. Parker expressed desperation in her statement of July 5 to have Bailey promptly arrested so he would not kill her. Parker's statement ended at 11:47 pm. When asked by Det. Scott where Bailey stayed she didn't say, "Oh yeah Detective Scott – my rapist lives 100 yards south of my apartment in the Nevada State Bank's trash enclosure, so you can go there right now and arrest him because he is probably asleep." It is not known why Parker gave inaccurate testimony about where Bailey lived, other than it is possible Detectives Thowsen and LaRochelle may have pressured her as other witnesses have said they were pressured by the detectives to not tell the truth. But it is positively known her testimony was inaccurate, and it couldn't be corrected at Petitioner's trial because Parker died in January 2005.

If the jury had known that Bailey did not live in the Nevada State Bank's trash enclosure and that there is no basis in reality for the prosecution's argument that the Petitioner went there in

the early morning of July 8, 2001, to buy methamphetamine from him, the jury would have known the prosecution's scenario of the crime was false, and they would have had a factual basis to have a reasonable doubt the Petitioner was involved in Bailey's death, and under those circumstances no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(o) Ground fifteen.

New evidence that in July 2001 methamphetamine was readily available in Panaca within walking distance of the home of Petitioner's parents fatally undermines the prosecution's argument to the jury that the Petitioner drove the 340 mile round-trip to Las Vegas for the specific purpose of obtaining methamphetamine, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

A pillar of the prosecution's argument to the jury was that the Petitioner drove her car the round-trip from Panaca to Las Vegas on the weekend of July 6 to 8, 2001, for the specific purpose of obtaining methamphetamine. Clark County Assistant District Attorney William Kephart stated during his rebuttal argument that the Petitioner "can't control her methamphetamine, wants to get it any time she can." (Trans. XIX-191 (10-5-06)) The prosecution's argument presupposed that methamphetamine was not available in Panaca, or the nearby Lincoln County towns of Caliente or Pioche, or Alamo. Methamphetamine can be made in a bathroom, kitchen or trailer, so its manufacture is not limited by geography but by demand. It would be expected that methamphetamine was available in Lincoln County in July 2001.

Kendre Thunstrom lived in Panaca in July 2001, and she states in her "Affidavit Of Kendre Pope Thunstrom," dated March 4, 2010:

> "I was then, and I still am a recovering drug addict. … In July 2001 methamphetamine was available in Panaca within walking distance of the Lobato's home, and other places in Lincoln County."
> (See Exhibit 21, Affidavit Of Kendre Pope Thunstrom.)

Thunstrom's Affidavit provides new evidence that if Petitioner had wanted methamphetamine it was available within walking distance of her parents' house. And if for some reason sources in Panaca were temporarily out, the Petitioner could have driven a few miles to Caliente or the county seat of Pioche. Cedar City, Utah has a population of almost 30,000 and it is only 82 miles from Panaca – less than half the 170 miles to Las Vegas – and with a large population of young college students methamphetamine is likely readily available. Likewise, St George, Utah has 72,000 people and it is only 94 miles from Panaca – a little more than half the 170 miles to Las Vegas – and it is likely that methamphetamine is also readily available there. So there is no question that if Petitioner or anyone else in Panaca wanted to obtain methamphetamine in July 2001 they had a number of options, with traveling to Las Vegas at the bottom of the list.

Furthermore, not a single person living in Las Vegas who the Petitioner knew or had stayed with, and who she had done methamphetamine with before she returned to Panaca on July 2, 2001, testified that the Petitioner even called them on July 6, 7 or 8 and said, "Heh, I'm in Vegas. Can I hang out at our place for a few days?" Or, "Heh, I'm in town, let's do some meth!" It isn't even conceivable that a gregarious person like the Petitioner could have been in Las Vegas for two to three days – the weekend of July 6 to 8 – without calling a single one of her friends in town, particularly if she was looking for a place to hang out or she wanted to do meth.

Additionally, not a single person who lived in Panaca or knew the Petitioner testified that she told them beforehand that she was going to drive the round trip to Las Vegas on the weekend of July 6-8, and no one testified that she told them afterwards that she had done so.

No physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial supporting the prosecution's speculative argument that Petitioner drove the 340-mile round-trip from Panaca to Las Vegas on the weekend of July 6 to 8, 2001, to obtain methamphetamine. Likewise, no evidence was introduced at trial the Petitioner was in Clark County at any time on July 6, 7 or 8. If the jury had heard Thunstrom's evidence about the ready availability of methamphetamine in Panaca and other nearby towns in Lincoln County in July 2001, and they had known Cedar City and St George, Utah are much closer options to obtain methamphetamine than Las Vegas, any reasonable juror would be expected to have rejected the

prosecution's speculation the Petitioner drove the 340-mile round-trip to Las Vegas on the weekend of July 6 to 8 to obtain methamphetamine, particularly without contacting a single person she knew in Las Vegas, or telling a single person in Panaca where she was going, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(p) Ground sixteen.

New third-party culprit evidence supports that the Mexicans watching out for Diann Parker murdered Duran Bailey, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The Petitioner offered a third-party culprit defense that the Mexican males who lived near Diann Parker in the Grand View Apartments had the motive, means and opportunity to murder Duran Bailey. Parker's testimony was the basis for the Petitioner's third-party culprit defense. Parker died in January 2005, so her testimony from the Petitioner's May 2002 trial was read into the record. The prosecution countered Petitioner's claim by arguing to the jury that Parker barely knew the Mexicans who lived in unit 822 near her apartment, so they had no reason to want to harm Bailey. (Trans. XIX-126 (10-5-06)) At trial there was testimony the Petitioner used methamphetamine when she was in Las Vegas. The prosecution also argued Bailey lived at the Nevada State Bank's trash enclosure, that Petitioner obtained methamphetamine ("drugs") from Bailey, and that she drove to the Nevada State Bank in the early morning hours "sometime before sunup" on July 8, 2001, to obtain methamphetamine from him.

In late spring 2001 Parker had socialized with Bailey (who she knew as "St Louis") and did crack cocaine with him. On several occasions she exchanged sex for crack from Bailey. Among other things Bailey told Parker he had been in prison for murder. In mid-June Parker told Bailey she didn't want anything more to do with him. On the morning of July 1, 2001, Parker was drinking a beer in the apartment of some Mexican men who lived in an apartment in a building across from her

apartment. (See Exhibit 48, Diann Parker's apartment (with satellite dish) and Mexicans apartment (with plant).) Bailey came in and yelled at her for hanging out with Mexicans and hit her in the face. Bailey left the apartment, but one of the Mexicans followed him outside and told him to leave Parker alone. When Parker left a couple of the Mexicans "were watching to make sure" she got back to her apartment OK. (Trans. XIV-12 (9-28-06)) Later that night Bailey forced his way into Parker's apartment and over four or more hours he beat and raped her. Bailey also threatened to kill Parker because she could identify him as her rapist. After she tricked Bailey into leaving her apartment by suggesting they go get some crack, she did not call the police for fear he would kill her. Parker was home around midnight on July 4 when Bailey began beating on her exterior door and window. He eventually left and the next day she reported the rape. On July 5 LVMPD sexual assault Detective J. Scott audio recorded Parker's statement about the rape, and a medical exam was conducted at the University Medical Center. Parker was eager to have Bailey arrested and she told Scott that Bailey was homeless and lived across Flamingo Road behind the Palms Hotel that was then under construction. Parker was very reluctant to provide Scott with information about the Mexicans who she said were witnesses to Bailey's behavior. She told Scott she didn't know their names, but she did provide their apartment number 822. No investigation was conducted by the LVMPD into Parker's rape complaint, and no effort was made to arrest or even question Bailey.

However, on the morning of July 9, 2001, Parker was recognized at the scene of Bailey's murder by one of the officers who saw her several days earlier when she reported the rape. She told the officer she heard a man had been murdered there and she wanted to see if it was her rapist. She was unable to do so because the body had already been removed. Later that morning LVMPD homicide Detectives Thomas Thowsen and James LaRochelle interviewed Parker at her apartment, which was located on the north side of the same block as the Nevada State Bank where Bailey was murdered. The man she identified as her male roommate, Steven King, was also present. The officers looked at their shoes and asked a few questions and left.

On July 23, 2001, three days after the Petitioner was arrested, Detectives Thowsen and LaRochelle returned to Parker's apartment and audio recorded an eight-minute Statement. Parker

was shown a photo of Bailey, and she identified him as "St Louis" who raped her. King was also present but the detectives did not ask him any questions.

Thowsen testified at Petitioner's trial that after talking with Parker, he talked with the apartment manager on July 9, 2001, who provided him with the names, Social Security numbers, and vehicle information of the Mexicans who rented Apartment 822. Thowsen testified the manager said the Mexicans didn't cause any trouble, but he may have been covering for them because if he knew or even suspected they were in the country illegally, he wouldn't want the word getting out to his Mexican tenants that he ratted them out to the police. Thowsen testified that he ran Scopes (criminal background checks) on the Mexicans and they had clean records, so he didn't think questioning them about Bailey's murder was necessary. When asked on cross-examination if he recorded anything regarding his investigation of the Mexicans Det. Thowsen replied, "I do remember running them. I don't have a permanent record of that." (8 App. 1404; Trans. XIII-136 (09-27-06))

When Parker testified she downplayed how well she knew the Mexicans, not even saying that she knew their names or had talked with them before or after the events of July 1 when Bailey came into their apartment and yelled at her and hit her. It was that testimony that the prosecution relied on to argue to the jury that the Mexicans wouldn't kill Bailey because he hit a woman in their apartment they barely knew, and who later raped by the man.

Parker was not asked, and she did not disclose in her Statement to Detective Scott, or when later interviewed by Detectives Thowsen and LaRochelle, or when she testified at Petitioner's trial, that her male roommate, Steven King was actually her domestic partner. King executed the "Affidavit of Steven King" on February 17, 2010. King is the only person available who had personal contact with Duran Bailey ("St Louis"), Diann Parker, and the Mexicans living in apartment 822. King's Affidavit provides the following new evidence (page numbers are in parenthesis):

- King was Parker's "domestic partner for about five years until her death in January 2005 from natural causes." (1)
- Bailey ("St Louis") "street smart, tough." (1)

- Parker "could speak Spanish," and "she socialized regularly with the seven to nine Hispanic males who lived in" the apartment where Bailey ("St Louis") hit her. (1)
- The Mexicans "could not speak English very well and they were in the country illegally." (1)
- King encouraged Parker to report Bailey's ("St Louis") rape of her the morning after it happened. (1)
- Parker believed that Bailey ("St Louis") could carry out his threat to kill her because she believed he had been in prison for murder in Missouri. (1)
- About the time that Bailey ("St Louis") raped Parker, he also attacked a girlfriend of one of the Mexicans.
- Bailey "did not "live" at the Nevada State Bank."
- Detectives Thowsen and LaRochelle only spent "a few minutes" at Parker and King's apartment on July 9, 2001, and left after looking at their "shoes." (2)
- "A few weeks after the murder at the Nevada State Bank" the Mexicans "vanished," which would have been about the time Detectives Thowsen and LaRochelle took Parker's Statement on July 23, 2001. (2)

King concludes his Affidavit by providing additional new information:

20. After testifying, Diann told me she had never seen the young woman before, and it was not possible that she could have murdered "St Louis."
21. Diann and I learned from the news that the young woman was convicted of murdering "St Louis."
22. "Before Diann died in Louisville, Kentucky we discussed the murder of "St Louis" on a number of occasions. I absolutely believe Diann's male Hispanic friends killed "St Louis" in retaliation for mistreating and raping Diann, and mistreating other women they knew.
23. Because "St Louis" was murdered at the Nevada State Bank where he did not "live," my belief is he was lured there by some kind of bait and ambushed by Diann's male Hispanic friends.
24. I know that Kirstin Blaise Lobato is the young woman convicted of murdering "St Louis," and that his real name is Duran Bailey.
25. Based on what Diann told me, what I personally know about "St Louis," the anger the Hispanics had toward "St Louis," and the injuries inflicted on "St Louis," I am absolutely certain that Kirstin Blaise Lobato did not murder "St Louis."

26. I believe that Kirstin Blaise Lobato is innocent and her conviction is a miscarriage of justice.
(See Exhibit 8, Affidavit of Steven King, 2.)

King's Affidavit undermines the prosecution's arguments and theory of the crime upon which the jury convicted Petitioner in the following ways:

- Bailey was street smart, tough and mean.
- Parker was good friends with the Mexicans, she regularly socialized with them, and she undoubtedly knew their names.
- Bailey used crack cocaine, not methamphetamine.
- There were seven to nine Mexican males living in apartment 822, and they were possibly all in the United States illegally.
- The Mexicans were very upset with Bailey when he hit Parker in their apartment and they told him to leave.
- Parker had reason to fear Bailey as long as he was on the street because she believed he had been convicted and imprisoned for murder in Missouri.
- Bailey did not live at the Nevada State Bank where he was murdered.
- The Mexicans in apartment 822 "vanished" a few weeks after Bailey's murder.
- Parker had never seen Petitioner prior to testifying at her trial in May 2002.
- Parker knew Bailey very well, and she thought "it was not possible that [Petitioner] could have murdered" him.
- Because Bailey was murdered at the Nevada State Bank where he did not "live," he had to have been lured there by some kind of bait and ambushed in a well-planned attack involving a number of people.
- King knew Bailey who didn't like Mexicans, and he knew the Mexicans who didn't like the violent way Bailey treated women, and he is "absolutely certain that Kirstin Blaise Lobato did not murder "St Louis"" (Bailey) and that she is innocent.
- Bailey disregarded the Mexicans' warning on July 1, 2001, to leave Parker along by beating and raping her later that same day, and about the same time he attacked one of

the Mexicans' girlfriends. Bailey's mistreatment of those women was consistent with his criminal history of repeatedly abusing woman that includes eight different arrests in Las Vegas for Battery/Domestic Violence between July 1999 to June 2001, and he pled guilty to at least one of those charges. (See Exhibit 62, Duran Bailey LVMPD Criminal History.)

Since it is known Parker and the Mexicans were friends who regularly socialized, it is reasonable to believe that Parker would have told the Mexicans that she believed Bailey was a murderer who had been imprisoned, particularly during conversations after Bailey raped her on July 1, 2001. That would have added to the Mexicans' motive. As illegal aliens they could not rely on the police, so they had to deal with Bailey off the books for his assault and battery and rape of Parker, and his assault of one of their girlfriends. If that woman was an illegal like the Mexican men, Bailey's attack against her was not likely to have been reported to the police. Photos of the Grand View Apartments show that Parker and King's unit 816 was directly across from the Mexicans' unit 822. They could carry on a short conversation from outside their front doors. (See Exhibit 49, Mexicans' unit 822 looking at Parker's unit 816; and, Exhibit 48, Parkers unit and Mexicans' unit (Parker's 2nd floor unit was the one with the satellite dishes on the front porch and Mexicans' unit was the 2nd floor unit with plant on the porch.))

There was no testimony at trial about Machismo, and the influence it would have on Parker's Mexican friends, especially as illegal aliens born in Mexico and steeped in its cultural norms. Machismo and the role it played in the Mexicans behavior and Bailey's murder is analyzed in a post on the Injustice Central blog:

> Now, there are a few things that I am going to mention about Hispanic culture. I am Hispanic myself, and so when I generalize it is not to stereotype in any way, but to report my observations. I've had plenty of interaction with Hispanic culture, in Florida and California, and during my marriage. So, let's just be clear here. I know what it is I'm talking about.
>
> So, first, Hispanics living in close proximity to one another talk a lot amongst themselves (and it appears there were a number of Hispanics living around Dianne Parker), and more freely than they do to others, especially when they are from the same country. So, given the evidence and testimony provided by the court transcripts I have read, and knowing what I know of Hispanic culture, I would stake my reputation on the following two statements: (1) Almost every adult Hispanic

living in the area of the same national origin (probably Mexico...it is Nevada, after all) knew about what happened to Dianne Parker soon after the rape and (2) she wouldn't have had to say a word to them for this information to spread like wildfire.

The other thing I have to say is about Hispanic men in particular. It involves machismo, which is being macho. Because there are some subtle differences that are rooted in Hispanic culture, and to make this easier, I will be referring to Hispanic macho as "machismo" and Western macho as simply "macho" even though linguistically they don't make much of a difference. But whereas your typical macho is more allied with Darwinian natural selection...proving oneself the most manly man for women to select from...machismo is more proactive and slightly territorial. It has more to do with the domination of women than it does the superiority of their manhood (or rather, their superiority over other men). So while largely the same as a typical macho behavior pattern, it is tilted differently nevertheless.

A fairly famous example would be Antonio Banderas. If you've ever seen one of his movies, you may have noticed an aura of "male superiority" in his demeanor in pretty much every scene with a woman he has ever done. In part, this is because he is typecast to culture so often (and machismo is a big part of many Hispanic cultures), but he acts that way so naturally that it is hard for me to believe it is not natural to him - and I have no reason to believe it isn't. Now, he does have charm, and so his machismo comes off as being more chivalrous and less apparently domineering, but you can still see the slightly condescending air and cool I-could-take-you-whenever-I-chose-to-do-so confidence that is representative of the superiority complex so often portrayed by machismo.

Macho and machismo do share many traits: an exaggeration of traditional masculine roles for the purpose of affecting women mentally or emotionally, a need to prove one's superiority, and perhaps most important of all in this case, reputation. I said before that machismo is a little more territorial than your standard macho demeanor. **Their motivation does not need to be sexual in nature,** but rather a drive to prove male domination over all women in one's territory. And in this role, males tend to see themselves as protectors of a woman's interests, no matter what kind of macho you're talking about. Of course, it is what they see as being in a woman's interests, and has nothing to do with whether she herself sees it that way, but that's kind of beside the point.

So, it is not very hard for me to imagine that a Hispanic male who had just warned Bailey to leave Dianne Parker alone would take the news quite badly when he found out later Bailey had raped her. While it would be ridiculous to say all Hispanic men possess a strong attitude like machismo, it remains likely that he could perceive it as a direct assault on his manhood, his ability to protect, and given the widespread communication in a localized Hispanic community, his reputation. Because, just as I believe the local Hispanic community knew about the rape, I am also certain they knew about the slap, and the Hispanic man's reaction afterwards. Also, Dianne Parker stated that she wanted to protect the identities of Hispanic men in the area because she thought they would have illegal immigration issues. If this was true, then we're not talking about people with Americanized culture, but rather people who have been born and raised in an area where machismo is more common and acceptable.

> For a Hispanic male with a strong sense of machismo, such a violation of a woman is completely unacceptable. And when I say unacceptable, I mean that in a very, very severe way. Possibly murderous. And even if the man who spoke to Bailey about slapping Parker had nothing to do with Bailey's death, there is a very strong likelihood that someone else in the area felt that it was their duty as a male show Bailey what being a man is all about, especially since they all seemed protective of her...which is something I would not be surprised to see with as many Hispanics in the area as there were.
>
> My supposition is that Duran Bailey was killed as a response to his rape of Dianne Parker. I don't think she did it herself, and I am inclined to think she didn't even ask for it to happen. But Bailey didn't kill and mutilate himself, and the people close to that area would have had motives that Kirstin Lobato did not, as well as a lot more opportunity. Either way, the police should have investigated further.
>
> (See Exhibit 54, Injustice Central, 9-26-2003.) (Emphasis in original.)

The foregoing provides valuable new evidence of the Mexicans motive to kill Bailey – his beating and rape of their friend Diann Parker after they told him to leave her alone was not just an insult to them, but it was a direct attack on their manhood under their cultural norm of Machismo. That insult and attack on the Mexican men in the Grand View Apartments was compounded when Bailey also assaulted one of their girlfriends. That is all the motive the Mexican men needed to personally deal with Bailey in a way that would restore their standing in the Mexican community and demonstrate the price to be paid for dishonoring them.

King's statement that "St. Louis" (Bailey) didn't live in the trash enclosure is supported by the fact that no crack cocaine, crack pipe, or any drug paraphernalia was found in Bailey's clothing or in the trash enclosure where he was murdered. Cocaine was found in Bailey's body by the toxicology report, so the medical evidence directly supports he used crack cocaine somewhere other than the trash enclosure where he was murdered. That also supports King's new evidence that Bailey was lured there by some kind of bait to be killed. King's new evidence is corroborated by Parker's Statement of July 5, 2001, to LVMPD Detective J. Scott about her rape by Bailey. Parker was desperate for Bailey to be arrested, because she told Det. Scott that if he wasn't arrested he would murder her for reporting the rape. Parker had reason to be afraid for her life because Bailey had not only threatened to kill her, but he told her that he had been imprisoned in Missouri for murder. Parker also offered to help Det. Scott find Bailey by riding with him around the area until they spotted him. But Parker never mentioned that Bailey lived in the Nevada State Bank's trash

enclosure only 100 yards south of her apartment. What Parker did tell Scott was that Bailey lived behind the Palms Casino, which was then under construction on the south side of West Flamingo Road. Parker's statement to Det. Scott corroborates King's new evidence that Bailey did not live at the Nevada State Bank where he was murdered. (See, Diann Parker LVMPD Voluntary Statement of July 5, 2001, 43-44.)

Also, Bailey had partially digested meat and vegetables in his stomach at autopsy. Vegetables can take 30 to 50 minutes to pass out of the stomach. (See Exhibit 27, Digestion times of foods.) So it is known that only minutes before Bailey was murdered he could have eaten a meal, possibly with the "bait" the Mexicans used to lure him to what King believes was their ambush at the Nevada State Bank. It is known from a match book found in Bailey's pocket and the testimony of Richard Shott that Bailey spent time at the Gold Coast Casino that is about 100 yards east of where Bailey was murdered. The Gold Coast Casino is also only about 100 yards south of the Mexicans' apartment at the Grand View Apartment. That would be a likely place where Bailey had his last meal. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.)

On July 18, 2001, the Grand View Apartments' manager provided Detectives Thowsen and LaRochelle with the names, Social Security numbers and vehicle information for the two Mexicans renting apartment 822. (See Exhibit 52, Mexicans at Grand View Apartments, July 18, 2001.) One of the Mexicans was Daniel Martinez, who listed his Social Security Number as 3**-0*-0***. Thowsen testified that when he ran Martinez's Scope he came up with a clean record, and the manager said they didn't cause trouble so he didn't investigate further. However, there is new evidence that there is no such person as Daniel Martinez with SSN 3**-0*-0***. Social Security Number 3**-0*-0*** was assigned to Clarence R. Hartung, who died on September 28, 1987 in Oakland, Michigan at the age of 80. (See Exhibit 26, Affidavit of Martin Yant, January 22, 2010.) So Thowsen not only knew that Daniel Martinez was committing the federal crime of being in the country illegally (Diann Parker said in her July 5 Statement that Thowsen read, that the "Mexicans" had "immigration problems," which is code word for "illegal aliens."), but he also knew Martinez was committing the federal crime of using another person's Social Security

number. So Thowsen's testimony suggesting Martinez – who is a prime suspect in Bailey's murder because he may have been the Mexican who had words with Bailey after he hit Parker on July 1 – was law abiding was a lie by Thowsen to the jury.

There is also new evidence that on November 16, 2004, a Daniel Martinez identified as 0001-D1 pled guilty in Clark County District Court to Assault with use of a Deadly Weapon, and was sentenced to 13 to 60 months in prison. (See Exhibit 51, Daniel Martinez, November 16, 2004.) There was an INS detainer on Martinez so he would be turned over to federal authorities for deportation after completing his sentence. Martinez's judge was Valorie Vega, same as the Petitioner. So before the Petitioner's trial one of Bailey's murderers could have been standing in front of Judge Vega and she didn't know it. (See Exhibit 51, Daniel Martinez, November 16, 2004.)

The brutality and extent of Bailey's external injuries is understandable by the special circumstances of Bailey's beating and rape of Parker after the Mexicans specifically told him to leave her alone, and that around the same time he assaulted one of their girlfriends. Bailey moved to St Louis, so he didn't understand Mexican culture, and Machismo, and that when the Mexicans told him to leave Parker alone it wasn't a suggestion – but a command. Normally a person told by the Mexicans to leave a woman alone would know enough to heed the warning – and not rub it in their faces by beating and raping the woman later that same day, and going far beyond that by assaulting one of their girlfriends. Which is what Bailey did, and the Mexicans had to respond. Bailey gave them no choice and his injuries reflect the Mexicans' payback:

- Bailey smacked Parker in the mouth in their apartment. Bailey was smacked hard enough in the mouth to knock out six teeth and fracture a seventh.
- Bailey rubbed a kitchen knife against Parker's carotid artery in her neck and left red marks, Bailey was stabbed in his carotid artery.
- Bailey raped Parker's vagina. Bailey's penis was amputated.
- Bailey attempted to rape Parker's anus. Bailey's anus was slashed.
- Bailey gave Parker black eyes. Bailey was given black eyes.
- Bailey caused bruising in Parker's chest. Bailey's chest had multiple stab wounds.

- Bailey's prized possession was a red hat he wore everywhere, including when he beat and raped Parker. Bailey's red hat was not at the crime scene, so his attackers must have taken his hat. Only someone who knew Bailey would know how much he prized his hat.

It is also significant that based on King's personal knowledge of Bailey, the Mexicans and Parker, he is "absolutely certain that Kirstin Blaise Lobato did not murder 'St Louis.'" Also, based on his personal knowledge, King "believe[s] that Kirstin Blaise Lobato is innocent and her conviction is a miscarriage of justice." (See Exhibit 8, Affidavit of Steven King, 2.)

If Petitioner's jury had had known the foregoing new evidence that lays out how and why Parker's Mexican friends had the motive, means and opportunity to set up a trap and ambush Bailey at the Nevada State Bank, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of murdering and mutilating Duran Bailey.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(q) Ground seventeen.

New third-party culprit evidence that three checks drawn from Duran Bailey's Nevada State Bank account were processed four and five days after July 8, 2001, the date of Duran Bailey's murder, and they were likely cashed between one and three days after his death, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

There was testimony that Duran Bailey had a bank account at the Nevada State Bank. Duran Bailey's personal identification and information about his Nevada State Bank account were not found in his clothing or at the crime scene. Bailey's final Nevada State Bank statement is dated July 26, 2001. (See Exhibit 55, Bailey's final Nevada State Bank statement.) The statement shows that seven checks processed from June 29 to July 6, 2001. The statement also shows that on July 12, 2001, one check and on July 13, 2001, two checks drawn from Duran Bailey's Nevada State Bank account were processed. Those dates are four and five days after Bailey's murder on July 8, 2001.

On February 12, 2010 Steven Trupp, Financial Service Supervisor with the Nevada State Bank at 4240 West Flamingo Road in Las Vegas, provided information about the bank's practices in 2001. Mr. Trupp's information is documented in the "Affidavit of Daniel Smades," dated March 11, 2010, which states in part:

> 5. Mr. Trupp said that in 2001 the processing time for a check drawn on a Nevada State Bank checking account that was cashed at a Nevada State Bank branch was two to three business days, and that would likely apply to a check drawn on a Nevada State Bank account that was cashed at another bank in Las Vegas.
> 6. Mr. Trupp said that in 2001 the processing time for a check drawn on a Nevada State Bank checking account that was cashed at a business that deposits their checks with the Nevada State Bank or another bank in Las Vegas was typically two to three business days.
> 7. Mr. Trupp said that in 2001 the processing time for a check drawn on a Nevada State Bank checking account that was cashed at a business that deposits their checks with a bank outside Las Vegas could be four to five business days.
> 8. Mr. Trupp said that a check cashing businesses, including those that cater to Hispanics, likely deposit their checks with a bank in Las Vegas for convenience and speed of being credited with their funds.
> …
> 13. Mr. Trupp looked at the statement for Duran Lamore Bailey's Nevada State Bank account number 260011457 that is dated July 26, 2001. That statement shows all activity on that account from June 29, 2001 until the account was closed on July 17, 2001.
> 14. Mr. Trupp commented on three checks listed as "Checks Processed" on Mr. Bailey's July 26, 2001, statement, one check that was processed on July 12, 2001, and two checks that were processed on July 13, 2001.
> 15. Mr. Trupp stated that because the three checks were cashed within a day of each other, they were different checks, and that they were absolutely not cashed by any branch of Nevada State Bank, but by a business or another bank, because on July 12 and July 13, 2001, there was insufficient funds in Mr. Bailey's account to cover the checks, and no Nevada State Bank branch would have cashed the checks.
> 16. Mr. Trupp made a phone call to find out if copies of the three checks processed on July 12 and 13, 2001, could be obtained, but he said he was told the records had been destroyed after seven years. Based on what Mr. Trupp said, the Nevada State Bank's record of the three checks was destroyed sometime after July 13, 2008.
> (See Exhibit 25, Affidavit of Daniel Smades.)

Based on the information provided by Trupp the check processed on July 12 was likely cashed at a Las Vegas bank or business on July 9 or 10, and the two checks processed on July 13 were likely cashed on July 10 or 11. Bailey died on July 8, so there is a strong presumption the three checks were cashed between one and three days after Bailey died.

The only reasonable explanation is the three checks processed four and five days after Bailey's death were cashed by a person or persons who were involved in Bailey's murder. During the Las Vegas Metropolitan Police Department's search of Petitioner's personal belongings and her car nothing related to Bailey was found, and his fingerprints and DNA were not found on any of Petitioner's personal property or car. There is no basis to believe the Petitioner was the person who cashed the three checks between one and three days after Bailey's murder.

If Petitioner's jury had had known the new evidence that checks were drawn on Bailey's Nevada State Bank after his death, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of murdering and mutilating Duran Bailey.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(r) Ground eighteen.

New forensic science, dental and crime scene evidence the prosecution's theory of the crime is physically impossible because: the trash enclosure's interior dimensions are insufficient for Bailey to have been hit in the mouth by a bat in the northwest corner and fallen backwards and hit his head on the southwest curb; his teeth were not knocked out by a bat; and, neither his blood nor his teeth were found in the northwest corner where they would have been based on the prosecution's argument upon which the jury convicted the Petitioner, and if the jury had known of this new exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that the Petitioner was kneeling in front of Bailey when she stabbed him in the scrotum, and she then went and got her bat and "smacked him in the mouth with the bat where his teeth busted out, he fell back and he hit his head on that curb, and that's consistent with busting his skull." (Trans. XIX-198 (10-5-06)) There was no testimony during the Petitioner's trial about the trash enclosure's interior dimensions and the prosecution's argument of the scenario of Bailey's attack was pure speculation by the prosecutors.

The new evidence of a scale diagram of the trash enclosure shows it is physically impossible that the Petitioner (or anyone else) "smacked him in the mouth with the bat where his teeth busted

out, he fell back and he hit his head on that curb …" as the prosecution argued to the jury. (Trans. XIX-198 (10-5-06) Bailey could not have been knocked over by a blow from a bat because as a man 5'-10" tall, he would have had to be standing near the concrete curb running parallel with the trash enclosure's north wall for him to have fallen backwards and hit his head on the curb running parallel with the south wall. (See Exhibit 57, Bailey in trash enclosure - diagram.) The outside of the curb is 15" from the north wall, but crime scene photos show a piece of plywood was resting on top of the curb leaning against the wall, so the area between the curb and wall was blocked off. (See Exhibit 58, Plywood leaning against north wall.) So any person kneeling in front of Bailey as the prosecution argued to the jury the Petitioner was, would have to have been on the outside of the north side curb, and Bailey would have been standing at least several feet from that curb. If the 5'-10" Bailey was knocked over from where he would have been standing, his head would have hit the south wall, not the curb. It is significant that Bailey's head would have hit the south wall even if he did not stagger backwards (towards the south wall) as he would be expected to do from a bat blow to his face/mouth. There is no evidence Bailey's head hit the south wall and the prosecution did not argue that he did.

The scale diagram also shows that Bailey's teeth were concentrated in the southwest corner, which is contrary to the prosecution's argument that Bailey's teeth were "busted out" in the northwest corner, where he would have to have been standing to have fallen backward to hit his head on the curb in the southwest corner. Also, if Bailey's scrotum had been stabbed while he was standing in the northwest corner there would have been a concentration of blood in that corner and there would have been blood on the inside of his pants – especially since the prosecution argued that after stabbing his scrotum the Petitioner took the time to go to her car, get her bat, and return to hit him in the mouth. Yet there was no concentration of Bailey's blood on the inside of his pants or in the northwest corner. (See Exhibit 58, Plywood leaning against north wall.) The prosecution speculated during its argument to the jury that the Petitioner's motive for Bailey's murder was that she might have been kneeling in front of Bailey to give him fellatio and she didn't like the way he smelled, so she went into a methamphetamine fueled murderous rage because she had been sexually mistreated as a child and teenager. That entire argument was pure speculation. There was no testimony at trial that the Petitioner had ever been to the Nevada State Bank's trash enclosure –

much less at the time of his murder; there was no testimony that anyone had been kneeling in front of Bailey immediately prior to his death; there was no testimony that anyone had attempted to give Bailey fellatio immediately prior to his murder; and there was no testimony at trial that the Petitioner had ever expressed anger at someone for the way they smelled. Furthermore, there was no expert psychology testimony at trial supporting the prosecution's speculation that the Petitioner's alleged state of mind would have motivated her to react murderously to a smelly person … and not just leave.

George Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison. He has also consulted on cases in 23 states, for the United States Army, and in the United Kingdom. Schiro has testified as an expert for both the prosecution and defense over 145 times in eight states, federal court, and two Louisiana city courts. Schiro is a fellow of the American Academy of Forensic Sciences, a member of the Association for Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

Schiro is familiar with Petitioner's case, having testified on May 16, 2002 as a defense witness at Petitioner's first trial. Schiro's expert testimony was limited because Petitioner's counsel did not properly provide notice to the prosecution. Schiro was not retained by Petitioner's new counsel for her retrial. After Petitioner's direct appeal was exhausted in October 2009, Schiro agreed to assist the Petitioner by providing his expertise as a forensic scientist *pro bono*. Schiro's Forensic Science Resources Report dated March 8, 2010, states in part:

> "The photographs demonstrate numerous blood spatter patterns. There is no documentation of blood spatter above a height of 15 inches on any of the surrounding crime scene surfaces. **This indicates Mr. Bailey received his bleeding injuries while lying on the ground**. The photographs of his pants also do not indicate the presence of any vertically dripped blood. **This indicates that he did not receive any bleeding injuries while in a standing position**."

> "When a person is bleeding and repeatedly beaten with a long object, such as a baseball bat or a tire iron, or is repeatedly stabbed using an arcing motion, then cast-off blood spatters corresponding to the arc of the swing are produced. There is no documentation of any cast-off blood spatters on the surrounding surfaces. This indicates that arcing motions were not used in the homicide of Mr. Bailey. **The confined space of the crime scene enclosure and the lack of cast-off indicate a baseball bat was not used to beat Mr. Bailey**. I further determined that the beating was more likely due to a pounding or punching type motion." (4) (Emphasis in original.) (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 4.)

The key aspects of Schiro's expert analysis is that "**a baseball bat was not used to beat Mr. Bailey**."; he did not "**receive any bleeding injuries while in a standing position**."; and, "**Mr. Bailey received his bleeding injuries while lying on the ground**." (See Exhibit 45, 4)

The new evidence of Schiro's expert analysis is consistent with the plywood leaning against the north wall that reduced the room to swing a bat in the enclosure. Schiro's analysis is also supported by the concentration of Bailey's teeth in the trash enclosure's southwest corner, which is contrary to the prosecution's argument that Bailey's teeth were "busted out" in the northwest corner, which is where he had to have been standing to fall backward and hit his head on the curb in the southwest corner. (See Exhibit 57, Bailey in trash enclosure - diagram.) Schiro's new analysis is also supported by the fact that if Bailey's scrotum had been stabbed while he was standing in the northwest corner there would have been a concentration of blood in that corner and there would have been blood on the inside of his pants – especially since the prosecution argued that after stabbing his scrotum the Petitioner took the time to go to her car, get her bat, and return to hit him in the mouth. Yet there was no concentration of blood on the inside of Bailey's pants or on the floor in the northwest corner. (See Exhibit 58, Plywood leaning against north wall.) The concentration of blood in the southwest corner supports Schiro's crime scene reconstruction that Bailey was lying down when attacked and his carotid artery cut, and his teeth being found intact (six were intact and one was fragmented) only inches from the left side of his head supports Schiro's determination that "the beating was more likely due to a pounding or punching type motion." (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 4.)

Consequently, the scale diagram provides new evidence supporting the new evidence of Schiro's expert crime scene analysis that the prosecution's theory of the crime upon which the jury

convicted the Petitioner is physically impossible. Bailey was not stabbed in the scrotum (or anywhere else that would bleed) and hit in the mouth hard enough to knock out his teeth while he was standing in the trash enclosure's northwest corner. And he did not hit his head on the concrete curb after being knocked backwards onto his back from where he was standing. The concentration of Bailey's blood and his teeth in the southwest corner shows he only could only have been stabbed and his mouth hit and teeth knocked out while he was in the southwest corner, and as Schiro analyzes, those injuries were inflicted while he was lying down. That strongly suggests that whoever attacked Bailey had a motive to cause Bailey serious harm when they went there to see or meet him. The prosecution did not even allege that the Petitioner had any prepared plan to harm Bailey, so the location of evidence and the circumstances of his death exclude her.

There is also new expert dental evidence that fatally undermines the prosecution's argument Bailey's teeth were knocked out with a bat. After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a dental expert willing on a *pro bono* basis to review the evidence related to Duran Bailey's teeth to determine if a bat could have been used to remove them from his mouth. Doctor of Dental Surgery Mark Lewis agreed to review the evidence in the Petitioner's case. Dr. Lewis states in the "Affidavit of Mark Lewis DDS" dated April 26, 2010:

> 3. I was asked to give my opinion of whether a baseball bat could have been used to knock out the teeth of Duran Bailey.
> 4. I reviewed photographs of the crime scene and autopsy, the autopsy report and trial testimony regarding the condition of the teeth and the location the teeth were found.
> 5. In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat.
> (See Exhibit 100, Affidavit of Mark Lewis DDS, April 26, 2010.)

Dr. Lewis' new evidence is the first time since the Petitioner's arrest in July 2002 that a dental expert examined the evidence related to Bailey's teeth. Six of Bailey's teeth were found intact clustered together in the trash enclosure's southwest corner, but Dr. Lewis determined his teeth would have shattered ("been fragmented") if knocked out with a baseball bat. Dr. Lewis' new dental evidence that Bailey's teeth were not knocked out by a baseball bat supports Schiro's new expert crime scene blood splatter evidence that Bailey wasn't hit by a baseball bat, and the new trash enclosure diagram evidence

that there wasn't enough room for Bailey to have been hit in the mouth by a bat in the northwest corner and fallen backwards and hit his head on the concrete curb parallel with the south wall.

The prosecution's argument that Bailey's teeth were knocked out by a baseball bat was purely speculative, and there was no blood on the Petitioner's bat, so the prosecution's argument that her bat was used was also pure speculation. The new dental evidence of Dr. Lewis, Schiro's new blood splatter evidence, and the new trash enclosure diagram evidence reveals the prosecution's argument that the jury relied on to convict the Petitioner was not just speculative – but it was dead wrong. With the Petitioner's bat excluded as a weapon used on Bailey, and with no bruises or injuries to her hands, there is simply no way the Petitioner could have inflicted Bailey's internal and external beating injuries.

The new evidence a baseball bat wasn't used to hit Bailey in the mouth, bust his teeth out, or knock him over, is consistent with the fact that no evidence was introduced at trial the Petitioner's saliva was on Bailey's penis or that her hand had grasped his penis – which would be expected if the prosecution's argument was based in reality. To the contrary, the SEMEN of an unidentified male was the only evidence recovered from Bailey's penis. Likewise, the SEMEN of an unidentified male was recovered from Bailey's rectum. The Petitioner is absolutely excluded as the source of the semen on Bailey's penis and in his rectum – which came from a man. So it is positively known that Bailey was involved in some sort of homosexual activity around or at the time of his death. That is consistent with the testimony of ME Simms and Petitioner's crime scene analyst expert Brent Turvey that Bailey's murder appeared to have homosexual overtones.

The new evidence completely undercuts the foundation of the prosecution's argument intended to answer "the elephant in the room" of the Petitioner's prosecution – what possible motive would an 18-year-old female with no criminal record who lived in Panaca have to not just murder … but to slaughter a homeless man 170 miles away in Las Vegas? The new evidence answers that question: the motive that the prosecution conjured out of thin air and argued to the jury has no basis in reality: It is physically impossible and completely contrary to the crime scene evidence that anyone could have been kneeling in front of Bailey in the northwest corner and stabbed him in the scrotum where he would have been standing, and then that person busted out his teeth and knocked him over

by hitting him with a baseball bat so that he hit his head on the concrete curb along the south wall. The new evidence establishes it couldn't happen, it didn't happen, it is impossible.

The prosecution's arguments during closing and rebuttal arguments of how and why the Petitioner could have attacked Bailey were pure speculation fabricated out of whole cloth. The jury was prejudicially misled by the prosecution's false arguments, and if Petitioner's jury had known of the new evidence about the trash enclosure, Schiro's expert analysis of the evidence and crime scene, and Dr. Lewis' new dental evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of murdering Duran Bailey and cutting his rectum after he was dead.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(s) Ground nineteen.

New legislative evidence establishes Petitioner was prosecuted and convicted of a non-existent violation of Nevada's necrophilia law – NRS 201.450 – because the Nevada Legislature specifically enacted that statute to only apply to a sexual assault on a dead body that would be considered a sexual assault on a live person, the prosecution did not allege that the Petitioner engaged in any sexual relations involving Duran Bailey's rectum, the slashing of Duran Bailey's rectum would not be considered a sexual assault on a live person, and if the jury had known of this exculpatory evidence no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that the Petitioner slashed Duran Bailey's rectum with her pocket butterfly knife in an act of spontaneous methamphetamine-fueled rage. The prosecution based Petitioner's charge of violating Nevada's necrophilia law – NRS 201.450 – based on the prosecution's allegation that Duran Bailey's rectum was slashed after he died. The prosecution did not argue that Petitioner had sexual relations with Bailey's rectum after his death, and no testimony was provided at trial that Petitioner had done so. NRS 201.450 is known as Nevada's necrophilia law, and the legislative history of the statute makes clear that it only criminalizes sexual activity with a corpse that would be considered a sexual assault on a live person. The prosecution did not allege, or argue that Petitioner engaged in an act of necrophilia with Bailey, and the jury did not

convict the Petitioner on the basis she engaged in sexual relations with Bailey's rectum after his death. The necrophilia law's origin, legislative history, and intended scope all support that the Petitioner was convicted of a non-existent violation of NRS 201.450, and that the prosecution did not even allege a valid violation of the necrophilia law.

In 1982 a seven-year-old girl's corpse was stolen from a mortuary in Nevada's Washoe County (Reno). After the thief had sex with the corpse, he deposited it in a garbage can. After the alleged perpetrator's arrest, prosecutors discovered there was no necrophilia (sex with a corpse) law in Nevada, and that the state's sexual assault law only applies to a living "person," so it was inapplicable to sexual intercourse (rape) with the dead girl's body. The Washoe County District Attorney responded by drafting a bill criminalizing necrophilia. The Nevada District Attorney Association co-sponsored the bill. Designated A.B. 287, the bill was introduced in the Nevada Assembly on March 2, 1983, and it was summarized as "Prohibits necrophilia." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly History, Sixty-second Session, March 2, 1983, p. 107.))

Ed Basl represented the Washoe County District Attorney's Office, and in his testimony on March 16, 1983 before the Assembly Judiciary Committee, he made it clear that the purpose of the bill was to criminalize the rape of a corpse. Basl specifically stated that the drafter of the bill and its sponsors wanted "to have the penalty the same as a sexual assault [of a live person]." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly Judiciary Committee, March 16, 1983, 988.)) The proposed law was predicated on the assumption that since a dead person (regardless of age) can't provide consent, then any sexual activity with a corpse is non-consensual, and thus the equivalent of raping a live person. Rape is defined as, "Nonconsensual sexual penetration of an individual, obtained by force or threat, or in cases in which the victim is not capable of consent." (*Dorland's Illustrated Medical Dictionary, 31st Edition*, (Philadelphia: Saunders/Elsevier (2004)), 1617.))

On March 30, 1983 the Nevada Assembly passed the bill.

Basl reiterated during his testimony before the Senate Judiciary Committee on April 5, 1983, that the sole purpose of the bill was to criminalize sexual relations with a corpse: "Mr. Basl went on to say that he does not believe the bill needs to be amended by adding a series of other felony and/or other offenses: that part of the problem as far as the way dead bodies are handled, is covered already by

existing legislation, but the one area that is completely void of mention is the area of sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788 (Underlining added to original.)) Basl testified before the Senate committee, as he had before the Assembly committee, that the sponsors seeking to criminalize necrophilia wanted "to make the penalty conform to those for sexual assault [of a live person]." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 789.))

The Nevada Senate passed the necrophilia bill (A.B. 287) on April 13, 1983. The governor signed the bill on April 20, and it became effective on July 1, 1983 as NRS 201.450. The statute states in part: "sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living." NRS 201.450(2).

The only testimony before the House and Senate Judiciary Committees was by Basl. His explanation of the law's intent is unquestionable because he was the official representative of the necrophilia law's drafter and co-sponsor – the Washoe County District Attorney's Office. There was no testimony whatsoever that the law has any application to any situation other than a person engaging in sexual activity with a corpse that would be considered sexual activity if committed with a live person, which is why it is known as Nevada's necrophilia law. The limited scope of the law's applicability is explained by Basl's testimony before the Senate committee that the law was intended to fill the absence of a law prohibiting "sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788.)

Basl's testimony of the law's intended purpose is consistent with the sex act that inspired the necrophilia law – sexual intercourse with a dead young girl's body.

That the necrophilia law was intended to criminalize sex acts with a corpse that would be illegal if performed on a nonconsenting (or underage) living person is not only made clear from Basl's testimony before both the Assembly and Senate Judiciary Committees, and the facts of the corpse rape that inspired the law, but from the language of the law itself. It criminalizes "sexual penetration" of a dead body, and it states that "means cunnilingus, fellatio or any intrusion,

however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living." NRS 201.450(2) Thus insertion of a penis or a dildo into a corpse's anus or vagina would be as punishable as the equivalent of doing the same in an illegal manner with a non-consenting (or underage) live person.

The intent of the necrophilia law to criminalize the sexual assault of a dead body is further supported by the fact that the definition of "sexual penetration" is almost identical for both the Nevada laws criminalizing "Sexual Assault and Seduction" of a living person and the necrophilia law. The only difference between the definition of "sexual penetration" of a living "person" (in NRS 200.364) and of a corpse in the necrophilia law, is that the latter includes the two words "without limitation," preceding "sexual intercourse in its ordinary meaning if practiced upon the living." The legislative history of the necrophilia law doesn't state what the two additional words mean, however, since they are immediately followed by "sexual intercourse," it is reasonable to assume they directly relate to sexual intercourse "without limitation." That assumption is consistent with the Assembly and Senate committee testimony that the purpose and intent of the necrophilia law to criminalize the same sex acts committed with a corpse as with a living person.

The necrophilia bill's intent to only apply to sex acts with a corpse – as understood from its plain language, Basl's testimony, the circumstances of sexual intercourse with the dead Washoe County girl that inspired the law, and the legislature's definition of "sexual penetration" – is consistent with the *Oxford English Dictionary's* definition of necrophilia: "Fascination with death and dead bodies; esp. sexual attraction to, or intercourse with, dead bodies." The *Oxford English Dictionary* is the world's most authoritative English dictionary.

At the time the Clark County District Attorney's Office filed the necrophilia charge against Blaise on July 31, 2001, the only evidence of Bailey's injuries was ME Simms' Autopsy Report that did not state Bailey was sexually assaulted before or after his death. During Blaise's preliminary hearing on August 7, 2001, the DA's Office did not present any eyewitness or expert testimony that Bailey experienced any postmortem anal sexual activity. During Petitioner's preliminary hearing Clark County Medical Examiner Lary Simms' testified about his autopsy findings:

> Q. (By Mr. Jorgensen) Now, what were the – what did you find on external examination?
> A. (By Mr. Simms) Well, there was dozens of injuries. Do you want me to go into each individually or sum them up?
> Q. Would you sum them up?
> A. There was a number of blunt force injuries all over the head and face. And there was a number of sharp force injuries including slash wounds and stab wounds that involved the neck, face; there were defensive wounds on the hands; there was a stab wound in the abdomen; and there was some sexual mutilation, the penis was amputated; *there was a large slash wound in the rectal area*."
> (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 19. (underlining added to original.)

Simms testified about the "slash wound" to Bailey's rectal area during an additional five exchanges with the assistant district attorney. There was no testimony by Simms that a person had sexual relations with Bailey rectum after his death.

Thus Petitioner was charged with violating the necrophilia law, and then ordered to stand trial after her preliminary hearing, without any evidence offered by the Clark County DA supporting the allegation that she – or anyone else – had any form of sexual relations with Bailey's rectum after his death.

As Basl made clear in his testimony, the purpose of the necrophilia law was to criminalize the same sexual activity conducted with a corpse that constitutes sexual assault of a live person. Inflicting multiple stabbing and slicing injuries on a living person, including slashing his or her rectum, is a form of causing bodily harm, not sexual assault. The same is true of slashing a corpse's rectum.

So the Clark County District Attorney's Office effectively created an entirely new law never contemplated or enacted by the Nevada Legislature when it applied the necrophilia law to the allegation that Bailey's rectum was slashed after he died. Application of the necrophilia law doesn't conform to the letter, spirit, or legislative intent of NRS 201.450. The prosecution did not even allege in charging Blaise with violating the necrophilia law that Bailey's corpse had been raped. Nor did the prosecution allege during Blaise's preliminary hearing or her two trials that Bailey's dead body had been raped/sexually assaulted.

The prosecution wasn't even on completely solid ground in alleging that Bailey's rectum injury was due to slashing by a sharp object. During Blaise's retrial defense medical expert Dr.

Michael Laufer testified that in his years as a hospital emergency room physician he had seen many people with rectum injuries similar to Bailey's that were caused by the seam of their pants when they were kicked. Thus, in his opinion a sharp object may not have been involved. In spite of their different opinions about the possible cause of Bailey's rectum injury, the common denominator of Simms and Laufer's testimony was that neither opined his injury was caused by a person engaging in sex with Bailey's corpse. Likewise, neither opined that anyone had sex with Bailey after his death. Consequently, regardless of how Bailey's rectum injury occurred – through a kick to the seam of his pants or slashing by a sharp object – no evidence was presented that the person or persons who murdered Bailey had sex with his corpse, so they did not violate the necrophilia law (NRS 201.450).

Even though the prosecution presented no evidence Bailey was sexually assaulted after his death, the prosecution could be expected to benefit from charging Blaise with violating the necrophilia law. For one thing it transformed her case into being a combination murder and lurid sex crime case, which could psychologically influence the jurors to view the absence of evidence less favorably for her than they otherwise would. The necrophilia charge also provided a means of enhancing Blaise's sentence if she were convicted, by increasing her prison time and requiring her to register as a sex offender upon her release.

The new evidence of the origin, legislative history, and the intended scope of Nevada's necrophilia law – NRS 201.450 – and the facts of the Petitioner's case proves the Petitioner was prosecuted and convicted of a non-existent violation of that law.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(t) Ground twenty.

New evidence of juror misconduct that at least four of Petitioner's jurors discussed the merits of Petitioner's case prior to the close of evidence and at least one juror expressed her opinion the Petitioner was guilty prior to the introduction of Petitioner's evidence, and the Petitioner was prejudiced by the juror's misconduct and she was not found guilty beyond a reasonable doubt of each and every essential element of each charge based on all evidence presented prior to the close of evidence, and due to juror misconduct the Petitioner was denied her state and federal constitutional fifth and sixth amendment rights to due process of law, an impartial jury, and a fair trial.

Facts:

After Petitioner's jurors' were empanelled they were specifically instructed by the Court prior to every adjournment for lunch, a "stretch break," or after the day's proceedings:

> "During this recess you're admonished not to converse among yourselves or with anyone else on any subject connected with this trial. You're not to read, watch or listen to any reporter or commentary on the trial or any person connected with the trial by any medium of information, including, without limitation, newspaper, television, radio and Internet, You're not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you."

During an adjournment on or about September 29, 2006 shortly after the defense began presenting its case, John Kraft overheard two of Petitioner's female jurors discussing the merits of Petitioner's case in the outside area on the same floor as Petitioner's courtroom. During their conversation Mr. Kraft "heard one of the jurors ask, "Do you think she's guilty?", and the other juror clearly answered "Yes" by nodding her head up and down." (See Exhibit 24, Affidavit of John Albert Kraft.) Kraft writes in his Affidavit dated February 24, 2010: "I was alarmed that Blaise's jurors were talking about the trial, and that at least one of them had made up her mind that Blaise was guilty before the defense had presented its case. I told Blaise's male lawyer what I witnessed, but he didn't seem concerned. To my knowledge Blaise's lawyer did not take any action after being informed about the juror's conversation I overheard." (See Exhibit 24, Affidavit of John Albert Kraft.)

Petitioner's lead counsel David Schieck was also informed in an Affidavit by Hans Sherrer dated November 9, 2006, that the same afternoon the defense began presenting its case, he overheard two of Petitioner's male jurors discussing the case in the public men's room on the same floor as Petitioner's courtroom. One of the men referred to "differences of opinion" about the case among the jurors, and the other man responded, "Yes (or Ya), deliberations are going to take a long time." (See Exhibit 72, Affidavit of Hans Sherrer, March 5, 2010.)

So it is known that prior to the close of evidence, and before the Petitioner had presented her case, at least four of Petitioner's jurors were talking amongst themselves (and possibly others) to some degree about the merits of Petitioner's case, and at least one expressed certainty the Petitioner was guilty. Since it is known that Petitioner's jurors did not follow the Court's

instructions about not discussing the case during the trial, there is no reason whatsoever to believe that during their deliberations the jurors followed the Court's instructions concerning the Petitioner's "presumption of innocence," the prosecution's "burden of proof," and that they must be convinced of Petitioner's guilt of each and every element of the charges against her beyond a "reasonable doubt" or they must acquit her. And it is known to the prejudice of the petitioner's right to due process and an impartial jury that at least one juror, and possibly three more, clearly violated the Court's specific admonishment, "You're not to form or express any opinion on any subject connected with the trial until the case is finally submitted to you."

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(u) Ground twenty-one.

New evidence that Las Vegas Metropolitan Police Department homicide Detective Thomas Thowsen committed perjury multiple times during Petitioner's trial, including when he testified regarding the search of reports filed under NRS 629.041 for a groin area or penis wound in May, June and July 2001 in Las Vegas; when he testified about contacting hospitals and urologists in Las Vegas; when he testified about going to the Budget Suites Hotel on Boulder Highway to investigate the Petitioner's Statement that she was sexually assaulted there "over a month" prior to her July 20, 2001, Statement; and when he testified about what he learned when he ran a criminal background check of the Mexicans who watched out for Diann Parker after she was assaulted by Duran Bailey in their apartment on July 1, 2001, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution's key law enforcement witness during Petitioner's trial was Las Vegas Metropolitan Police Department homicide Detective Thomas Thowsen. Det. Thowsen was the lead homicide detective in the Petitioner's case, and his partner was Detective James LaRochelle. Thowsen and LaRochelle signed the LVMPD Officer's Report on August 22, 2001. The Officer's Report meticulously details the name and address of every individual and organization contacted in the course of the detective's investigation of Duran Bailey's murder. It also records the date and

time of when people were talked with by Thowsen and LaRochelle. Nowhere in that report does it mention:

- That Detective Thowsen or his secretary searched for reports filed with the LVMPD under NRS 629.041 for groin area or penis wounds in May, June and July 2001.
- That Detective Thowsen contacted hospitals concerning treatment of an injured or severed penis in May, June and July 2001.
- That Detective Thowsen contacted urologists concerning repair of a severed penis in May, June and July 2001.
- That Detective Thowsen went to the Budget Suites Hotel on Boulder Highway in east Las Vegas to investigate the Petitioner's Statement that she was assaulted there "over a month" prior to July 20, 2001 (which was weeks before Bailey's murder).

Detective Thowsen testified to the following on May 10, 2002 during Petitioner's trial:

> THE COURT: The record shall reflect that when he said in here somewhere he referred to a black binder that's to his right, which contains numerous documents, is about five inches thick.
> Q (By Mr. Kohn) I believe that's his **homicide book**, is that correct detective?
> A (By Mr. Thowsen) That's correct.
> Q **And that has everything you did in the case; everything that was done in the case; is that correct?**
> A **Yes**.
> (3 App. 734-735; Trans. III-99-100 (5-10-02)) (Emphasis added to original.)

Detective Thowsen was not asked questions about the completeness of his "homicide book" during Petitioner's second trial.

In her Statement on July 20, 2001, audio recorded by Detectives Thowsen and LaRochelle, Petitioner described being sexually assaulted "over a month ago" in the parking lot of the Budget Suites Hotel near Sam's Town (Casino) on Boulder Highway in east Las Vegas around or after midnight, and that she escaped from her assailant after attempting once to cut his exposed penis.

During Petitioner's trial Thowsen testified on direct examination that to try and verify Petitioner's account he searched for reports filed with the LVMPD by Las Vegas medical care providers in May, June and July 2001 for knife wounds to the groin area or penis, and that he found no reports. The reports are required by NRS 629.041 to be filed for the treatment of non-accidental

gunshot and knife wounds. On cross-examination Detective Thowsen changed his testimony 180 degrees. He testified he didn't search for any reports, but he delegated the search to his secretary, and she told him she found no reports. When asked on cross-examination if he recorded anything regarding the search for the NRS 629.041 reports, Thowsen responded, "It's not in a specific document, no." (8 App. 1399; Trans. XIII-114 (9-27-2006))

Consequently, Det. Thowsen's hearsay testimony that he had no record of the investigation for reports filed under NRS 629.041 was irreconcilably contrary with his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." (4 App. 734-735; Trans. III-99-100 (5-10-02)) Furthermore, there is no mention in the Officer's Report dated August 22, 2001, that either Thowsen or his secretary searched for any reports filed under NRS 629.041.

Thowsen was not asked the name of his secretary and she did not testify, and it is unknown if Thowsen even had a secretary. However, it is positively known that Thowsen's testimony was perjurious, and not just because it was contrary to the filed reports in the case and his prior testimony, but because of the LVMPD's response to a public records request for all "copies of all records and reports mandated by NRS 629.041 that were filed with any bureau of the Las Vegas Metropolitan Police Department in the months of May, June and July 2001, that involved a knife wound." (See Exhibit 64, LVMPD Public Records Request, November 2, 2009.) LVMPD General Counsel Liesl Freedman responded to that public records request on December 4, 2009, "The Las Vegas Metropolitan Police Department does not have a method to search its records by knife wounds reported pursuant to NRS 629.041." (See Exhibit 63, LVMPD General Counsel Liesl Freedman's letter, December 4, 2009.) With all the technological advancements that took place between July 2001 and December 2009, the LVMPD had not yet developed a system to search NRS 629.041 reports for knife wounds. Thowsen testified first that he, and then that his secretary performed a search that it is impossible for him, his secretary, or the LVMPD's General Counsel to perform. As of May 3, 2010, the LVMPD has not responded to a December 14, 2009 Public Records request for all reports filed under NRS 629.041 for May, June and July 2001. (See Exhibit 65, LVMPD Public Records Request, December 14, 2009.)

Also during Petitioner's trial Detective Thowsen testified on cross-examination that to try and verify Petitioner's account, "I personally telephoned hospitals." (Trans. XIII-113 (09-27-06)), and, "Well, I also spoke with urologists in the Valley since a urologist would be involved in having to repair and/or replace an individual's penis had they actually survived, and determined that nobody had reported any severed penises that they had reconstructed." (8 App. 1399; Trans. XIII-114 (9-27-2006)) Thowsen testified that all his inquires were negative for a slashed or severed penis in May, June and July 2001. Petitioner's counsel asked Thowsen during cross-examination:

> Q. Okay. And did you prepare a report on the results of this investigation?
> A. I did not. (Trans. XIII-114 (09-27-06))

Again, when later asked by Petitioner's counsel if he recorded anything regarding his contact with hospital personnel and urologists, Det. Thowsen replied, "It's not in a specific document, no." (8 App. 1399; Trans. XIII-117 (9-27-2006)) Consequently, Det. Thowsen's testimony that he had no record of his investigation of hospitals and urologists was irreconcilably contrary with his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." (3 App. 734-735; Trans. III-99-100 (5-10-02)), and there are reasons to determine it was in fact perjurious. Furthermore, there is no mention in the Officer's Report dated August 22, 2001, that Detective Thowsen contacted any hospital or urologists to investigate the assault described in Petitioner's Statement that happened at the Budget Suites Hotel. The Officer's Report meticulously details the name and address of every individual and organization contacted in the course of Detective Thowsen's investigation of Duran Bailey's murder. It also records the date and time of when people were talked with. But there is nary a single word about Thowsen contacting a single hospital or a single urologist – or even attempting to do so.

Clark County Assistant District Attorney William Kephart also provides evidence that Thowsen perjured himself on cross-examination when he testified that he called hospitals requesting information about injured or severed penises in May, June and July 2001. During a discussion about the admissibility of Thowsen's direct testimony about what he said his secretary told him, Judge Valorie Vega stated:

> THE COURT: -- objection at sidebar was as to hearsay and we had discussion at sidebar that -- cause my initial impression was that Detective Thowsen himself had called the hospitals and was going to rely what the hospital personnel had told him and Mr. Kephart said, no, that that was not the case.
> (8 App. 1414; XIII-177, 9-27-06) (Emphasis added to original.)

So it is known that Thowsen did not personally contact any hospitals, and committed perjury when he testified on cross-examination that he did so. (Trans. XIII-113 (09-27-06))

Also during Petitioner's trial, Detective Thowsen testified on cross-examination that to try and verify Petitioner's account he went to the Budget Suites Hotel on Boulder Highway in east Las Vegas "within a few days" of her arrest. During Det. Thowsen's cross-examination the following exchange took place:

> Q (By Mr. Schieck) Did you go out to the Budget Suites on the Boulder Highway?
> A (By Mr. Thowsen) Yes, I did. (8 App. 1392; Trans. XIII-88 (09-27-06))
> And,
> Q (By Mr. Schieck) And you didn't look for a crime scene. You talked to the manager and that was it?
> A (By Mr. Thowsen) That's correct. (8 App. 1411, Trans. XIII-165 (09-27-06))
> And,
> Q Did you prepare a report on that?
> A No, I did not. (8 App. 1412, Trans. XIII-166 (09-27-06))

Consequently, Det. Thowsen's testimony that he had no record of his investigation at the Budget Suites Hotel was irreconcilably contrary with his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." (3 App. 734-735; Trans. III 99-100 (5-10-02)) Furthermore, there is no mention in the LVMPD's Officer's Report dated August 22, 2001, that Detective Thowsen personally went to the Budget Suites Hotel or that at any time he talked on the telephone with any person associated with the Budget Suites Hotel, to investigate the assault described in Petitioner's Statement that happened there. The Officer's Report meticulously details the name and address of every individual and organization contacted in the course of the detective's investigation of Duran Bailey's murder. It also records the date and time of when people were talked with. The Officer's Report was prepared 33 days after the Petitioner's arrest and 15 days after Thowsen testified at her preliminary hearing, so if Thowsen went to the Budget Suites Hotel "within a few days" of her arrest, as he testified, it would have been in the Officer's Report.

There is no record anywhere that Thowsen conducted any of the above four "investigations" related to the assault described in the Petitioner's Statement. Thowsen's testimony about those "investigations" is directly contrary to the fact that there is nothing about them in the Officer's Report dated August 22, 2001, or in his black "homicide book" that he agreed in his previous testimony has "everything that was done in the case." (3 App. 734-735; Trans. III-99-100 (5-10-02)) What is known is that the prosecution's case depended on undermining the Petitioner's description of fighting off a rape attempt at the Budget Suites Hotel on Boulder Highway in east Las Vegas "over a month" before her July 20, 2001, Statement, by trying one time to cut her attacker's penis. And all four of Thowsen's phantom investigations were directly related to trying to undermine the truthfulness of the Petitioner's Statement and when and where she was attacked, and what happened.

The absence of any proof of any kind that Thowsen or his secretary conducted a search for NRS 629.041 reports, that he contacted hospital personnel, that he contacted urologists, or that he went to the Budget Suites Hotel, is consistent with his testimony that he didn't look for any witnesses at the Budget Suites Hotel, because "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (8 App. 1410; Trans. XIII-159 (9-27-2006)) Why would Thowsen do <u>any</u> investigation of any kind into something "we know didn't happen there."? The new evidence shows he did none of the four investigations and he fabricated his testimony.

In addition, there was also a fifth suspect "investigation" by Thowsen. During Petitioner's trial Detective Thowsen testified on cross-examination that the day after Bailey's murder (July 9, 2001) he went to the apartment of Diann Parker, who was seen at the crime scene that morning. Diann Parker lived in the Grand View Apartments that were in the same block as the Nevada State Bank where Bailey was murdered. Parker had filed a rape report on July 5, 2001, against a homeless acquaintance she knew as "St Louis." When Parker was questioned by Thowsen and his partner James LaRochelle she told them that she went to the bank that morning to see if her rapist was the murdered man. Parker's testimony from Petitioner's first trial was read into the record because she died in January 2005. Parker described an altercation she had with "St Louis" the

morning of July 1 in the apartment of Mexicans who lived in a neighboring apartment. When Parker left the Mexican men were "watching out" for her to make sure she made it to her apartment OK. Thowsen didn't have a picture of the murdered man, but Parker's description of her rapist generally fit that of the murdered man (Bailey). After leaving Parker's apartment Thowsen testified he talked to the apartment manager about the Mexican men who had been identified by Parker. Thowsen testified the manager said they didn't cause trouble, and after Thowsen ran a Scope (criminal background check) on the Mexicans and he found they had no criminal history, he didn't think questioning them about the murder was necessary. When asked on cross-examination if he recorded anything regarding his investigation of the Mexicans Det. Thowsen replied, "I do remember running them. I don't have a permanent record of that." (8 App. 1404; Trans. XIII-136 (09-27-06)) Consequently, Det. Thowsen's testimony that he had no record of his investigation of the Mexicans was irreconcilably contrary with his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." (3 App. 734-735; Trans. III-99-100 (5-10-02)) Furthermore, there is no mention in the Officer's Report dated August 22, 2001, that Detective Thowsen (and LaRochelle) investigated the Mexicans. The Officer's Report meticulously details the name and address of every individual and organization contacted in the course of the detective's investigation of Duran Bailey's murder. It also records the date and time of when people were talked with.

In fact, it is now known that Det. Thowsen's account about finding out information about the Mexicans on July 9, 2001, and that they were law abiding was completely contrived and fabricated. Diann Parker did not tell Det. Thowsen about the Mexican men on July 9, 2001, as he testified. Detectives Thowsen and LaRochelle didn't learn about the Mexicans and the apartment where they lived until July 17, 2001, when they obtained the file about Parker's July 1, 2001, rape complaint that included her Statement of July 5, 2001, and other documents. Included in those documents was the apartment number 822 of the Mexican men who "watched out" for Parker. (See Exhibit 53, Mexicans' apartment unit 822.) During Petitioner's first trial Thowsen truthfully testified during cross-examination about Parker's rape file, "I had it probably -- I received it on the 17th from Detective Scott." (3 App. 734-735; Trans. III-99-100 (5-10-02)) How did he know?

Because he testified it is recorded in his black "homicide book," that he agreed has "everything that was done in the case." We also know Detective Thowsen's testimony about July 17, 2001, was truthful because the next day, July 18, is when Thowsen and LaRochelle went to the Grand View Apartments where Diann Parker lived, and obtained from the manager the names, Social Security numbers, and vehicle information about the two Mexicans renting the apartment, and who were "watching out" for Parker. They detectives also obtained information about several other people Parker identified as witnesses.

However, Thowsen's lies about the Mexicans during his testimony at Petitioner's second trial didn't stop with when he learned about the Mexicans, but they extend to what he learned after he ran their Scopes. One of the Mexicans, Daniel Martinez listed his Social Security Number as 3**-0*-0***. When Thowsen ran Martinez's Scope he couldn't have come up with a clean record, because there is no such person as Daniel Martinez with SSN 3**-0*-0***. Social Security number 3**-0*-0*** was assigned to Clarence R. Hartung, who died on September 28, 1987 in Oakland, Michigan at the age of 80. (See Exhibit 26, Affidavit of Martin Yant, January 22, 2010.) So Thowsen not only knew Daniel Martinez was committing the federal crime of being in the country illegally (Diann Parker said in her July 5 Statement that Thowsen read, that the Mexicans had "immigration problems," which is code word for "illegal aliens," and she did call them "Mexicans" and not Mexican-Americans or Hispanics.), but he also knew Martinez was committing the federal crime of using a dead person's Social Security number. So Thowsen's testimony that Martinez had a clean record is an absolute lie and perjurious. If Thowsen had been doing his job as a law enforcement officer he would have called the FBI and reported the man known as Daniel Martinez. But why would Thowsen deliberately lie about the Mexicans during Petitioner's trial? The most reasonable explanation is that it undermined the Petitioner's "third-party culprit defense." If Petitioner's jurors had known that the Mexican men should have been investigated thoroughly by Thowsen and LaRochelle but they didn't do their job, it would have been favorable to the Petitioner. Detective Thowsen had his black homicide book with him on the witness stand during Petitioner's second trial, as he did when he testified during Petitioner's first trial. The information

about the Mexicans is in that book, so there is no question that Thowsen committed perjury when he blatantly lied under oath about the Mexicans.

It is also known that Thowsen was a party to Kephart lying to Judge Valorie Vega to induce her to admit his direct testimony about searching for NRS 629.041 reports for non-accidental groin area wounds filed in May, June and July 2001 by Las Vegas medical care providers. Kephart represented to Judge Vega during a bench conference that Thowsen had personally conducted the search for the NRS 629.041 reports, and that is how he testified on direct examination. Then during cross-examination Thowsen admitted that he didn't conduct any search for the reports, but that his secretary told him that she had done so, and she told him she had not found any reports. When Petitioner's counsel objected that Thowsen's direct testimony should be stricken as hearsay, Judge Vega denied the motion. (8 App. 1414; XIII-180 (9-27-06)) During the oral arguments in the Nevada Supreme Court for Petitioner's direct appeal, Petitioner's counsel David Schieck described the scenario that Thowsen's perjurious testimony on direct examination was a pre-rehearsed plan between Kephart and Thowsen.

Detective Thowsen's perjurious testimony about the non-existent search for NRS 629.041 reports, contacting hospitals, contacting urologists, going to the Budget Suites Hotel to investigate the Petitioner's Statement, and his scenario about the Mexican men and what he learned about them, transformed the courtroom from a forum for the search of the truth into a den of lies.

Thowsen asked Petitioner's friend Doug Twining during his interview on August 2, 2001:

> Q: If when the DNA is done being processed on Blaze's car and that DNA comes back to the man behind the dumpster, what do you say at that point?
> A: I'd say (pause) that still based on, uh, well then it would have to have been planted up there. 'Cause based on what I know her car was up there since the 2nd and she was up there since the 2nd. That I'd have to say that, you know, there's something funky going on even worse than now." (LVMPD Voluntary Statement of Douglas Howell Twining, August 2, 2001, 33-34.)

All DNA, fingerprint, shoeprint and tire track evidence excludes the Petitioner and her car from Bailey's murder, and it is known that <u>at least</u> six witnesses told Thowsen (and LaRochelle) in the days after Petitioner's arrest that prior to July 8, 2001, Petitioner told them she fended off an attacker in Las Vegas by trying to cut or cutting his exposed penis. It is also known that when his tape recorder was off, Thowsen made concerted efforts to get witnesses to change when the

Petitioner told them she was attacked, and in some cases Thowsen simply wouldn't record what they wanted to say, or he limited the recording of information that the Petitioner had been attacked prior to July 8. Several of those witnesses identified the attack against the Petitioner as happening in late May 2001. (See (v) Ground twenty-two for elaboration on what the six witnesses told Thowsen.)

So it is known that Thowsen is the person who planted false evidence against the Petitioner by his perjurious trial testimony and his efforts to limit the exculpatory evidence that witnesses provided in their statements. Under the principle of *falsus in uno, falsus in omnibus* ("false in one thing, false in everything") everything that Thowsen testified to that is not corroborated by independent evidence should be disregarded as inherently untrustworthy.

If the jury had known that Thowsen's testimony about his four investigations was contrived and that the Mexicans were not law abiding, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of murdering and mutilating Duran Bailey.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(v) Ground twenty-two.

New evidence of police and prosecutorial misconduct establishes the homicide detectives and prosecutors involved in Petitioner's case maliciously prosecuted Petitioner because they knew prior to trial and during trial that Petitioner was 100% truthful in her Statement of July 20, 2001, that the incident she describes of repelling a rape attempt at the Budget Suites Hotel by trying one-time to cut her attacker's penis occurred "over a month ago," and contrary to the not credible opinion testimony of Detective Thomas Thowsen, Petitioner was truthful and she did not "jumble" or "minimize" when, where or what type of assault occurred, and the homicide detectives and prosecutors maliciously and negligently proceeded with her prosecution and secured her conviction in violation of Petitioner's state and federal constitutional rights to due process of law and a fair trial.

Facts:

Petitioner was convicted of crimes related to the murder of Duran Bailey and the cutting of his rectum after death on July 8, 2001, based on the prosecution's theory and explicit argument to the jury that the absence of physical, forensic, medical or eyewitness evidence was trumped by Petitioner's alleged incriminating admission to cutting a man's penis during a sexual assault, in her audio taped Statement on July 20, 2001, to LVMPD Detectives Thomas Thowsen and James

LaRochelle. Clark County Assistant District Attorney William Kephart stated during direct examination of Detective Thowsen that Petitioner confessed to Duran Bailey's murder in her Statement of July 20, 2001 ("the defendant; who gave you her confession," 8 App. 1385; Trans. XIII-59-60 (09-27-06)), and argued to the jury that Petitioner confessed to his murder. (See, 9 App. 1726; Trans. XIX-130 (10-05-06); and, 9 App. 1727; Trans. XIX-136 (10-05-06)) During rebuttal argument Clark County Assistant District Attorney William Kephart argued to the jury, "We're here because of her mouth, because of what she said." (9 App. 1740; Trans. XIX-186 (10-05-06))

During Detective Thowsen's direct testimony the prosecution played for the jury the audio of Petitioner's entire Statement. The Petitioner clearly and unequivocally describes being assaulted in the parking lot of a Budget Suites Hotel in east Las Vegas, and she identified the hotel's outside fountain, Boulder Highway as the major street, the shopping center directly across Boulder Highway, and Sam's Town Casino to the south. Petitioner did not describe a single identifiable landmark around the Nevada State Bank, even though the high-rise Palms Hotel and Casino was under construction directly across the street, and just east is the Gold Coast Casino and the high-rise Rio Hotel and Casino. There was no shopping center or fountain or Sam's Town Casino within eyesight of Bailey's murder scene. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.) There are also at least 40 specific details of Bailey's murder that are different than details in the Petitioner's Statement. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) The Petitioner also stated the assault occurred prior to a conversation with a woman who may have been assaulted by the same black man. The following exchange occurred during Petitioner's Statement when Detective Thowsen asked her when the conversation with the woman took place:

> Q. And how soon was it that you talked to her before you were attacked?
> A. It was afterwards already.
> Q. After you'd been attacked?
> A. Yeah this has already been over a month ago. (LVMPD Statement of Kirstin Blaise Lobato, July 20, 2001, at about 25 minute mark.)

Thus the Petitioner's Statement identifies that the rape attempt Petitioner describes, occurred on a date PRIOR to the conversation with the woman that occurred PRIOR to June 20,

2001 (a month before July 20, 2001). That means the rape assault Petitioner describes in her Statement occurred on a day PRIOR to June 20, 2001. Neither Detective Thowsen nor Detective LaRochelle followed up by asking Petitioner for a more precise date of when the rape assault she describes in her Statement occurred, so from the Petitioner's Statement it is only directly identifiable as occurring PRIOR to June 20, 2001. Detective Thowsen casually explained away the multitude of details in Petitioner's Statement that did not match Bailey's death, including where and when she was assaulted, by testifying that Petitioner "jumbled" and "minimized" those many details. (8 App. 1387-1388; Trans. XIII-69-71 (09-27-06))

However, references in Petitioner's Statement and new Affiant evidence enables the date the rape assault occurred to be more precisely pinpointed as occurring in the last part of May. Petitioner's Statement describes that after the assault she drove her car to where her friend Jeremy Davis lived, and she then went to a nearby Catholic church. She left her car where Davis lived. When she got her car back she discovered the inside had been trashed and there was vomit in it. She then parked it at an apartment complex. When Steve Pyszkowski saw it being towed on June 6, 2001, he paid the tow truck driver to release Petitioner's car.

Three days after Petitioner's arrest, detectives Thowsen and LaRochelle were specifically and unequivocally told by Steven Pyszkowski on July 23, 2001, that they had arrested the wrong person. Pyszkowski told the detectives that beginning in late May or the first of June until Petitioner left for Panaca on July 2, 2001, Petitioner told him and other people that she had fought off a sexual assault at a Budget Suites Hotel on Boulder Hwy on Las Vegas' east side by cutting her black attacker's penis. (See Exhibit 11, Affidavit of Stephen William Pyszkowski.) Pyszkowski also told the detectives that after Petitioner got her car from Davis' house the inside was messed up and there was vomit in it. He also happened to be driving by as Petitioner's car was being towed on June 6, 2001, from the apartment complex where she had parked it. Pyszkowski kept the receipt for tax purposes and he showed it to the detectives. Pyszkowski was subpoenaed as a prosecution witness for Petitioner's first trial. When interviewed by Clark County Assistant District Attorneys William Kephart and Sandra DiGiacomo a week before he testified in May 2002, Pyszkowski told them that Petitioner did not commit the murder she was being prosecuted for, "because she told a number of people in late May and June about being

attacked by a man who she stopped from raping her by using her knife to cut or try to cut his penis." (See Exhibit 11, Affidavit of Stephen William Pyszkowski.) In response to Pyszkowski's statement that Petitioner was being prosecuted for crimes he knew she did not commit, ADA Kephart told him, "We are going to show you how to legally lie on the stand." (See Exhibit 11, Affidavit of Stephen William Pyszkowski.) Pyszkowski swears that ADA Kephart also told him, ""You'll be found in contempt of court" (This is a quote) if I insisted on telling the truth of what I knew about Blaise fighting off a rapist in late May 2001 by cutting or trying to cut his penis." (See Exhibit 11, Affidavit of Stephen William Pyszkowski.) Pyszkowski states in his Affidavit of January 25, 2010, that during his meeting prior to Petitioner's first trial: "From the things I heard during that meeting, I believe that ADA William Kephart and the woman who I believe was ADA Sandra DiGiacomo, know Blaise is innocent and did not commit the murder committed on July 8, 2001, that they were prosecuting her for committing. They had the attitude that Blaise's conviction of the crime would clear the case off the books." (See Exhibit 11, Affidavit of Stephen William Pyszkowski.) Pyszkowski writes in his Affidavit that "I felt coerced and intimidated to follow their directions." (See Exhibit 11, Affidavit of Stephen William Pyszkowski.) Pyszkowski was again subpoenaed as a prosecution witness for Petitioner's second trial. Pyszkowski was again interviewed by Clark County Assistant District Attorneys William Kephart and Sandra DiGiacomo prior to testifying. Pyszkowski writes in his Affidavit that the DAs:

- Reminded me, and showed me my testimony from the first trial, and they told me they wanted me to say the same things again.
- I told them it was not correct or honest to try to make it look like I thought Blaise had committed a crime she did not commit.
- I told them Blaise was innocent of the murder committed in July because she told a number of people in late May and June about being attacked by a man and stopping him from raping her by using her knife to cut or try to cut his penis, so the murder in July and the attempted rape of Blaise in May were different events.
- They told me they didn't care if Blaise was innocent, they just wanted me to testify about certain things.
- ADA Kephart used the same intimidating and threatening manner with me that he did during the meeting before Blaise's first trial.
- Although I was not on probation, ADA Kephart and his colleague told me that I could end up back in prison if I didn't say what they wanted when I was on the stand testifying.

(See Exhibit 11, Affidavit of Stephen William Pyszkowski, 3.)

Pyszkowski also writes in his Affidavit:

> 31. From the things I heard during that meeting, I believe that ADA Kephart and the woman who I believe was ADA DiGiacomo, know Blaise is innocent and did not commit the murder committed on July 8, 2001, that they were prosecuting her for committing."
> 32. I know that Blaise told a number of people in late May and June that she had cut or tried to cut a man's penis while he was trying to rape her, so I am positively certain that the crime Blaise was convicted of committing on July 8, 2001, was a different incident and committed by a person or persons unknown to me. (See Exhibit 11, Affidavit of Stephen William Pyszkowski, 3-4.)

ADAs Kephart and DiGiacomo worked as a team on Petitioner's case since prior to Petitioner's first trial, so Pyszkowski is referring to DiGiacomo as the woman who was present with Kephart.

So it is known that Pyszkowski positively and without equivocation repeatedly told Detectives Thowsen and LaRochelle, and ADAs Kephart and DiGiacomo that he and many other people knew that Blaise did not commit the murder she was being prosecuted for committing, because the incident when she tried to cut a black man's penis to stop him from raping her happened "in late May or the first of June 2001." (See Exhibit 11, Affidavit of Stephen William Pyszkowski.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Cathy Reininger on August 2, 2001, that Petitioner told her around the end of May 2001 that a man tried to rape her at the Budget Suites on Boulder Highway, and that while fighting him off she cut his penis. She then fled in her car and later that morning went to a Catholic Church. (See Exhibit 19, Affidavit of Catherine Ann Reininger.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Michele Austria on July 26, 2001, that before the 4th of July Petitioner told her that weeks earlier she had been sexually assaulted in a parking lot in Las Vegas, and she fought off her attacker by slashing at his penis with her pocket butterfly knife. (See Exhibit 12, Affidavit of Michele Dawn Austria.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Heather McBride on July 26, 2001, that before the weekend of July 7-8, Petitioner told her she had defended herself against a man who assaulted her in Las Vegas and she got away by stabbing him in the

abdomen with her pocket butterfly knife. (See Exhibit 13, Affidavit of Heather Michelle McBride.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Doug Twining that on August 2, 2001, that in "May, she said someone attacked her and she cut, cut his penis." Twining also said the Petitioner told him the attack happened "near the end of May." Twining mentioned the May attack on the Petitioner four times to the detectives. He also described Petitioner's cut of her attacker as a "slash." The detectives told Twining details of the Petitioner's Statement of July 20, 2001, and Twining them that what the Petitioner confessed to in her Statement was the sexual assault of her in May, not a murder in July committed by someone else. (See Exhibit 10, Voluntary Statement of Douglas Howell Twining.)

Detectives Thowsen and LaRochelle were also specifically and unequivocally told by Dixie Tienken on July 26, 2001, that "at least two to three weeks before July 20, 2001," Petitioner told her in detail about "an attempted rape of her in Las Vegas" by a "very large, tall, and smelly black man," and that she was able to escape after she "slashed one time" at "his exposed penis." (See Exhibit 14, Affidavit of Dixie A. Tienken.) Tienken told the detectives about the attack at "the end of June or the first part of July 2001," which was between several days and more than a week before Bailey's murder. (See Exhibit 14, Affidavit of Dixie A. Tienken.) Tienken writes in her Affidavit of February 13, 2010:

> 11. On July 26, 2001, Las Vegas Metro Police Detective Tom Thowsen with two other people interviewed me at my home in Panaca. The detective talked with me for a long time before he turned on his tape recorder. He tried to feed me answers as he tried to get me to say what he wanted me to say that Blaise told me and not what she actually said. Even after he turned on the tape recorder he repeatedly stopped it to interject and attempt to influence me about what to say, and then restart it. The detective did that a number of times during the recording. I told the detective several times during the interview that Blaise did not tell me she killed the man, and that she specifically said he was standing when she escaped from him. I also told them that from what I had been told I thought the man may not have been hurt as seriously as Blaise believed, and maybe he never ever sought medical assistance. Blaise often colored her adventures to get more attention but I believe Thowsen had made up his mind that Blaise was guilty of the murder he was investigating and he didn't want to hear the truth or anything that might cast a doubt. … (See Exhibit 14, Affidavit of Dixie A. Tienken, 2.)

So it is known that Tienken positively and without equivocation repeatedly told Detectives Thowsen and LaRochelle information supporting that Petitioner did not commit the murder she was

arrested for committing, and that Tienken informed them she thought the man who assaulted the Petitioner may not have been injured seriously enough to have "ever sought medical assistance." (See Exhibit 14, Affidavit of Dixie A. Tienken, 2.) In addition, after meeting with Kephart and DiGiacomo and refusing to agree to lie and testify the way they wanted her to, she was put for several hours in a room that she thought had a locked door and she couldn't go to the bathroom, and she felt like she was being kidnapped as punishment for not supporting the prosecution's case.

Additionally is the statement of Christopher Collier that when interviewed on July 26, 2001, by Detectives Thowsen and LaRochelle he specifically and unequivocally told them that Petitioner told him before the 4th of July that she was attacked by a black guy in Las Vegas, she defended herself against him with her knife, and the attack occurred one month before the conversation. Collier also said the detectives talked with him for an extended period of time trying to get him to change when Petitioner told him about being attacked, and they were "unduly suggestive with regard to the dates he advised them his conversation with [Petitioner] occurred." The detectives only taped 10 minutes on the interview. (See Exhibit 18, Statement of Christopher Collier and Declaration of Shari White.)

All these witnesses have personal knowledge that Petitioner told them on dates prior to July 8, 2001, that she had been sexually assaulted in Las Vegas and she had fought off her attacker by cutting or trying to cut his penis. Several of these witnesses provide information identifying that the attack Petitioner told them about occurred prior to June 20, 2001 – which was "over a month" before Petitioner's Statement of July 20, 2001. That the attack Petitioner describes in her July 20, 2001, Statement is the same one referred to by the witnesses is verified by some of the witnesses describing specific details that Petitioner identified as happening on the day of the attack and on days following the attack. None of the witnesses are related to Petitioner, they have not kept in contact with Petitioner, and several now live in such diverse places as Hawaii and New Mexico.

Furthermore, Marilyn Parker Anderson unequivocally told two people from the Clark County District Attorney's office prior to the Petitioner's trial in May 2002 that she saw and talked with the Petitioner at a 4th of July barbeque at her parents' Panaca house, she saw Petitioner on the night of July 6 at Petitioner's parents' house, late on the afternoon of Saturday July 7 she talked

with Petitioner who was at her parents' house, and at about 10 am on Sunday July 8 she talked with Petitioner who was at her Parents' house. (See Exhibit 20, Affidavit Of Marilyn Parker Anderson, February 15, 2010.) Consequently, Petitioner's prosecutors knew that Anderson was a valuable alibi witness who placed Petitioner in Panaca on Friday night, late Saturday afternoon and Sunday morning. However, the prosecution did not disclose this exculpatory evidence to Petitioner's counsel, nor did the prosecution subpoena Anderson to testify at either of Petitioner's trials to provide important evidence for the jury to consider in their deliberations. (See Exhibit 20, Affidavit of Marilyn Parker Anderson, February 15, 2010.)

The new evidence establishes that the police and prosecutors in Petitioner's case jointly engaged in the malicious and negligent prosecution of the Petitioner for crimes they had knowledge from at least the above eight witnesses the Petitioner did not commit. That evidence is consistent with the police and prosecutor's knowledge prior to trial that there is no physical, forensic, eyewitness, documentary, surveillance or confession evidence the Petitioner was anywhere in Clark County, Nevada at any time on July 8, 2001, and that there is exculpatory crime scene DNA, fingerprint, bloody shoeprint and tire track evidence.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(w) Ground twenty-three.

New 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, and if the jury had known of this exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Duran Bailey's body was discovered by Richard Shott "around 10 pm" in a 10' x14' trash enclosure at the northwest corner of the Nevada State Bank's parking lot at 4240 West Flamingo Road in Las Vegas on July 8, 2001. (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) Emergency 911 received Shott's call at 10:36 pm. The prosecution argued to the jury

Petitioner murdered Duran Bailey in the dark early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans, XIX 121 (10-5-06)) It was dark until nautical sunrise at 4:24 am on July 8. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.)

At trial the prosecution did not introduce any physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001 the Petitioner was anywhere in Clark County, Nevada. Consequently, the Petitioner could not have been in Las Vegas, or at the Nevada State Bank, or inside the bank's trash enclosure where Bailey was murdered, at the time he was murdered. Petitioner's new evidence cumulatively establishes that it is not within the realm of possibility that Petitioner committed Bailey's murder, and the reason there is no evidence she was in Clark County on the day of Bailey's murder is that she was not at the Nevada State Bank and did not commit the crime. That new evidence includes forensic entomology, forensic pathology, forensic science, crime scene reconstruction, psychology, alibi witnesses, dental, third-party culprit, police perjury, and prosecution and police misconduct evidence. The following is a summary of each one of those types of new evidence.

- New forensic entomology evidence establishes that the earliest Bailey could have died was after 8:01 p.m. on July 8, 2001, which was 10-1/2 hours AFTER the LATEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am.

Forensic entomologist Dr. Gail Anderson states in her "Report of Dr. Gail S. Anderson," "that to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm). I do not believe that it is possible that the remains were present during the entire daylight hours of 8 July 2001." (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009, 5.)

Forensic entomologist Dr. Linda-Lou O'Connor states in her "Forensic Entomology Investigation Report," "Based on the lack of colonization of blow flies and/or flesh flies, estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001." (See Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010, 1.)

Forensic entomologist Dr. M. Lee Goff concurs in his report of March 12, 2010 with Dr. Gail Anderson's determination, "that to a reasonable scientific certainty Mr. BAILEY's death

occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm). I do not believe that it is possible that the remains were present during the entire daylight hours of 8 July 2001." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.)

- New forensic pathology evidence establishes that the earliest Bailey could have died was around 8 p.m. on July 8, 2001, which was 10-1/2 hours AFTER the LATEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am.

Forensic pathologist Dr. Glenn Larkin states in his "Affidavit of Glenn M. Larkin, M.D," "It is my opinion to a reasonable medical and scientific certainty that Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk. The lack of blow fly infestation suggests an even shorter time between [when] Bailey died and was discovered." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., p. 8.)

- New forensic science evidence excludes the Petitioner and her car from being present at the trash enclosure and/or involved in Bailey's murder

George Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison. Schiro analyzed the evidence in Petitioner's case and provides new forensic science evidence in twelve areas that can be summarized as:

- The gum found at the crime scene could "likely" have been deposited by someone involved in the crime. (Petitioner was excluded as the source of DNA recovered from the gum.)
- The person who stabbed and beat Bailey could have cut, bruised or gotten abrasions on their hands. (Petitioner had no cuts, bruises or abrasions on her hands when she was arrested.)
- Petitioner had very distinctive bleached blond hair, and during a struggle one could be shed naturally, through vigorous action or by forcible removal. (None of Petitioner's hairs were found at the crime scene.)
- All of Bailey's bleeding injuries were inflicted while he was lying on the ground. (The prosecution argued that Bailey was stabbed in his scrotum while standing up, but he would

have bled profusely from that wound, and there was no evidence of vertical bleeding from any of Bailey's wounds.)

● A baseball bat was not used to beat Bailey, who was more likely beaten by "a pounding or punching type motion." (Although Petitioner's bat with a porous rubber handle was excluded as having any blood on it, the prosecution argued she used it to strike Bailey in the mouth.)

● Schiro greatly expanded on the number of natural and artificial substances, and manufactured products that were testified to at trial as able to cause a positive luminol or phenolphthalein reaction. Blood is only one of those many substances. Schiro also provides the important new information that the HemaTrace test that was negative for blood in the Petitioner's car is 10,000% (100 times) more sensitive at detecting blood than a phenolphthalein test.

● It is not unusual that Petitioner's fingerprints were not found in her car, and it does not provide any evidence her car was cleaned.

● The shoeprints imprinted in blood on the cardboard covering Bailey's torso and on the concrete floor have the same sole pattern. There is also a shoeprint on the cardboard with that same sole pattern that was not imprinted in blood. (The Petitioner's shoe size and pattern were excluded as making any crime scene shoeprint.)

● Blood was transferred to the shoeprint that was not imprinted in blood on the cardboard after it was made, which suggests "the person wearing the shoe was present before and after blood was shed at the scene and the wearer of the shoe concealed Mr. Bailey's body with trash." (The Petitioner's shoe size and pattern were excluded as making any crime scene shoeprint.)

● It is "highly likely" the black open-toed high-heeled platform shoes the Petitioner was wearing during the assault described in her Statement of July 20, 2001, would have left shoeprints imprinted in blood if she had been present during "the murder, mutilation and concealment of Duran Bailey." (No shoeprints corresponding to the Petitioner's platform shoes were at the crime scene.)

● Bailey's blood would have been present on the Petitioner's black open-toed high-heeled platform shoes if she had been present during "the murder, mutilation and concealment of Duran Bailey." (None of Bailey's blood was on the Petitioner's high-heeled platform shoes.)

● Schiro's crime scene reconstruction that is based on the crime scene evidence and blood splatter has Bailey lying down when he was attacked. Schiro also has Bailey's upper body being rolled toward the front of the trash enclosure onto his stomach for the cutting of his rectum, and then being rolled on his back where his abdomen was stabbed repeatedly, his penis amputated, and his groin skinned. That is where his body was found with his upper body angled away from the southwest corner of the enclosure where his blood was concentrated. (The prosecution argued that Bailey was standing in the northwest corner when attacked, and that after a bat blow to his mouth knocked him onto his back he was beaten and stabbed, and after he died he was "dragged" to the position where his body was found.)

Schiro's twelve areas of new forensic science evidence exclude the Petitioner and her car from being present and/or involved in Bailey's murder are in Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010; Exhibit 44, 2nd Affidavit of George J. Schiro Jr., February 4, 2010; and, Exhibit 42, 3rd Affidavit of George J. Schiro, Jr., February 15, 2010.

● New evidence the prosecution's theory of the crime is impossible.

The prosecution argued to the jury that the Petitioner was kneeling in front of Bailey when she stabbed him in the scrotum, and then went and got her bat and "smacked him in the mouth with the bat where his teeth busted out, he fell back and he hit his head on that curb, and that's consistent with busting his skull." (Trans. XIX-198 (10-5-06)) There was no testimony during the Petitioner's trial about the trash enclosure's interior dimensions. The new evidence of a scale diagram of the trash enclosure shows that Bailey could not have been knocked over by a bat because as a man 5'-10" tall, he would have had to be standing near the concrete curb running parallel with the trash enclosure's north wall for him to have fallen backwards and hit his head on the curb running parallel with the south wall. (See Exhibit 57, Bailey in trash enclosure - diagram.) The curb is 15" from the north wall, but a piece of plywood was resting on the curb leaning against the wall, so that area was blocked off. (See Exhibit 58, Plywood leaning against north wall.) So if the Petitioner had been kneeling in front of Bailey as the prosecution argued to the jury, he would have to have been at least several feet from the curb. If he was knocked over from there as the prosecution argued he was, his head would have hit the south wall, not the curb. There is no evidence Bailey's head hit the south wall and the

prosecution did not argue that he did. The plywood leaning against the north wall also reduced the room to swing a bat, which provides additional support for Schiro's analysis that "**The confined space of the crime scene enclosure and the lack of cast-off indicate a baseball bat was not used to beat Mr. Bailey**." (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 4. (Emphasis in original.))

The scale diagram also shows that Bailey's teeth were concentrated in the trash enclosure's southwest corner, which is contrary to the prosecution's argument that Bailey's teeth were "busted out" in the northwest corner, where he would have to have been standing to have fallen backward to hit his head on the curb in the southwest corner. Also, if Bailey's scrotum had been stabbed while he was standing in the northwest corner there would have been a concentration of blood in that corner and there would have been blood on the inside of his pants – especially since the prosecution argued that after stabbing his scrotum the Petitioner took the time to go to her car, get her bat, and return to hit him in the mouth. Yet there was no concentration of Bailey's blood on the inside of his pants or in the northwest corner. (For the lack of blood in the northwest corner see Exhibit 58, Plywood leaning against north wall.) The concentration of blood in the southwest corner supports Schiro's crime scene reconstruction he was lying down when attacked, and Bailey's teeth being found intact (six were intact and one was fragmented) only inches from the left side of his head supports Schiro's determination that "the beating was more likely due to a pounding or punching type motion." (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 4.)

The new dental evidence of Mark Lewis, DDS is consistent with the new trash enclosure diagram evidence and Schiro's crime scene reconstruction. Dr. Lewis writes in his Affidavit dated April 26, 2010:

> 3. I was asked to give my opinion of whether a baseball bat could have been used to knock out the teeth of Duran Bailey.
> 4. I reviewed photographs of the crime scene and autopsy, the autopsy report and trial testimony regarding the condition of the teeth and the location the teeth were found.
> 5. In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat.
> (See Exhibit 100, Affidavit of Mark Lewis DDS, April 26, 2010.)

Consequently, the new evidence proves the prosecution's theory of the crime upon which the jury convicted the Petitioner is physically impossible – Bailey was not stabbed and hit in the mouth with a bat while he was standing in the northwest corner of the trash enclosure. The concentration of Bailey's blood and his teeth in the southwest corner proves he only could only have been stabbed and his teeth knocked out when his mouth was hit possibly by a fist while he was in the southwest corner, and as Schiro analyzes, while he was lying down.

- New expert psychology evidence establishes that Petitioner's Statement of July 20, 2001 is not a confession to Duran Bailey's murder and mutilation, and she did not "jumble" details to "minimize" her involvement in the crime. The new evidence also establishes the Petitioner is credible and truthful in her Statement that describes a sexual assault against her in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas, and that the assault occurred weeks before Bailey's murder.

Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is in Developmental Psychology, with a focus on psychology and law. She has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. Dr. Redlich states in her "Report of Dr. Allison D. Redlich":

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.
>
> …
>
> Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her."
>
> " (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

- New alibi evidence by nine witnesses establishes the sexual assault described in the Petitioner's Statement of July 20, 2001, occurred weeks prior to the July 8, 2001 murder of Duran

Bailey. Several of those witnesses provide evidence the attack occurred in late May 2001 at a Budget Suites Hotel on Boulder Highway in east Las Vegas. Those witnesses, in conjunction with the trial testimony of Jeremy Davis, pinpoint the assault as occurring on or about May 25, 2001. The prosecution argued to the jury the Petitioner was not credible and not truthful in her Statement based on Detective Thowsen's opinion testimony that she "jumbled" details to "minimize" her involvement in Bailey's murder. The new alibi witnesses establish that the Petitioner is credible and truthful in her Statement about where and when the attack occurred and she made a single knife slash at her attacker's penis before escaping. Those alibi witnesses are Steve Pyszkowski (Exhibit 11, Affidavit of Stephen William Pyszkowski.); Heather McBride (Exhibit 13, Affidavit of Heather Michelle McBride.); Cathy Reininger (Exhibit 19, Affidavit of Catherine Ann Reininger.); Michele Austria (Exhibit 12, Affidavit of Michele Dawn Austria.); Dixie Tienken (Exhibit 14, Affidavit of Dixie Tienken.); Daniel Lisoni (Exhibit 17, Affidavit of Daniel Lewis (Louis) Lisoni.); Kimberlee Grindstaff (See Exhibit 15, Affidavit of Kimberlee Isom Grindstaff; and Exhibit 16, 2001 USF Calendar.); Chris Collier (See Exhibit 18, Statement of Christopher Collier and Declaration of Shari White.); and Doug Twining (See Exhibit 10, Voluntary Statement of Douglas Howell Twining.) The evidence of these witnesses is consistent with the new evidence by psychologist Dr. Allison Redlich that Petitioner's Statement is not a confession to Bailey's murder and she did not "jumble" details of that crime to "minimize" her involvement.

- New alibi evidence by four witnesses establishes the Petitioner was in Panaca on July 6, 7 and 8, and that she did not act or behave like she was under the influence of, or had recently taken any methamphetamine. The prosecution argued to the jury that no non-relatives saw or talked with Petitioner in Panaca between the afternoon of July 5 and the morning of July 8, and that the Petitioner was continuously high on meth during that period of time. The four alibi witnesses establish that the Petitioner is credible and truthful in her Statement. Those four alibi witnesses are Marilyn Parker Anderson (Exhibit 20, Affidavit Of Marilyn Parker Anderson.); Kimberlee Isom Grindstaff (Exhibit 15, Affidavit Of Kimberlee Isom Grindstaff.); Kendre Pope Thunstrom (Exhibit 21, Affidavit Of Kendre Pope Thunstrom.); Jose Lobato (Exhibit 22, Affidavit of Jose Abraham Lobato.). Jose Lobato, who is the Petitioner's grandfather, was in the U.S. Air Force for

21 years, and he was then in the federal immigration service for another 21 years, during which time he worked with the FBI and other federal law enforcement agencies.

- New third-party culprit evidence establishes there is a credible likelihood Diann Parker's Mexican friends murdered Bailey.

Steven King was Diann Parker's domestic partner from 2000 until her death in January 2005. King is the only person known to have been personally acquainted with Bailey, Parker, and the Mexicans who on July 1, 2001, warned Bailey to stay away from Parker. In his "Affidavit of Steven King," dated February 17, 2010, King states in part (King knew Bailey by his nickname of "St Louis" and that is how he refers to him in his Affidavit):

> 22. Before Diann died in Louisville, Kentucky we discussed the murder of "St Louis" on a number of occasions. I absolutely believe Diann's male Hispanic friends killed "St Louis" in retaliation for mistreating and raping Diann, and mistreating other women they knew.
>
> 23. Because "St Louis" was murdered at the Nevada State Bank where he did not "live," my belief is he was lured there by some kind of bait and ambushed by Diann's male Hispanic friends.
>
> 24. I know that Kirstin Blaise Lobato is the young woman convicted of murdering "St Louis," and that his real name is Duran Bailey.
>
> 25. Based on what Diann told me, what I personally know about "St Louis," the anger the Hispanics had toward "St Louis," and the injuries inflicted on "St Louis," I am absolutely certain that Kirstin Blaise Lobato did not murder "St Louis."
>
> 26. I believe that Kirstin Blaise Lobato is innocent and her conviction is a miscarriage of justice. (See Exhibit 8, Affidavit of Steven King.)

- New third-party culprit evidence establishes that after Bailey's murder three checks drawn on his Nevada State Bank account were likely cashed between one and three days after his death.

There was testimony that Duran Bailey had a bank account at the Nevada State Bank. Duran Bailey's personal identification and information about his Nevada State Bank account were not found in his clothing or at the crime scene. Bailey's final Nevada State Bank statement is dated July 26, 2001. (See Exhibit 55, Bailey's final Nevada State Bank statement.) The statement shows that on July 12, 2001 one check and on July 13, 2001, two checks drawn from Bailey's Nevada State Bank account were processed. Those dates are four and five days after Bailey's murder on July 8, 2001.

On February 12, 2010, Steven Trupp, Financial Service Supervisor with the Nevada State Bank at 4240 West Flamingo Road in Las Vegas, provided information about the bank's practices in 2001. Mr. Trupp's information is documented in the "Affidavit of Daniel Smades," dated March 11, 2010, which states in part:

> 5. Mr. Trupp said that in 2001 the processing time for a check drawn on a Nevada State Bank checking account that was cashed at a Nevada State Bank branch was two to three business days, and that would likely apply to a check drawn on a Nevada State Bank account that was cashed at another bank in Las Vegas.
>
> 6. Mr. Trupp said that in 2001 the processing time for a check drawn on a Nevada State Bank checking account that was cashed at a business that deposits their checks with the Nevada State Bank or another bank in Las Vegas was typically two to three business days.
>
> 8. Mr. Trupp said that check cashing businesses, including those that cater to Hispanics, likely deposit their checks with a bank in Las Vegas for convenience and speed of being credited with their funds.
>
> 13. Mr. Trupp looked at the statement for Duran Lamore Bailey's Nevada State Bank account number 260011457 that is dated July 26, 2001. That statement shows all activity on that account from June 29, 2001, until the account was closed on July 17, 2001.
>
> 14. Mr. Trupp commented on three checks listed as "Checks Processed" on Mr. Bailey's July 26, 2001, statement, one check that was processed on July 12, 2001, and two checks that were processed on July 13, 2001.
>
> 15. Mr. Trupp stated that because the three checks were cashed within a day of each other, they were different checks, and that they were absolutely not cashed by any branch of Nevada State Bank, but by a business or another bank, because on July 12 and July 13, 2001, there were insufficient funds in Mr. Bailey's account to cover the checks, and no Nevada State Bank branch would have cashed the checks.
>
> 16. Mr. Trupp made a phone call to find out if copies of the three checks processed on July 12 and 13, 2001, could be obtained, but he said he was told the records had been destroyed after seven years. Based on what Mr. Trupp said, the Nevada State Bank's record of the three checks was destroyed sometime after July 13, 2008.
>
> (See Exhibit 25, Affidavit of Daniel Smades.)

Based on the information provided by Trupp the check processed on July 12 was likely cashed at a Las Vegas bank or business on July 9 or 10, and the two checks processed on July 13 were likely cashed on July 10 or 11. Bailey died on July 8, so there is a strong presumption the three checks were cashed between one and three days after Bailey died.

The only reasonable explanation is the three checks processed four and five days after Bailey's death were cashed by a person or persons who were involved in Bailey's murder. During

the Las Vegas Metropolitan Police Department's search of Petitioner's personal belongings and her car nothing related to Bailey was found, and his fingerprints and DNA were not found on any of Petitioner's personal property or car. There is no basis to believe the Petitioner was the person who cashed the three checks between one and three days after Bailey's murder.

- New dental evidence establishes Bailey's teeth were not knocked out by a baseball bat as the prosecution argued to the jury. That argument was a key part of the prosecution's case because the Petitioner had no injuries or bruises to her hands. Doctor of Dental Surgery Mark Lewis reviewed the evidence in the Petitioner's case. Dr. Lewis states in the "Affidavit of Mark Lewis DDS" dated April 26, 2010:

> 3. I was asked to give my opinion of whether a baseball bat could have been used to knock out the teeth of Duran Bailey.
> 4. I reviewed photographs of the crime scene and autopsy, the autopsy report and trial testimony regarding the condition of the teeth and the location the teeth were found.
> 5. In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat.
> (See Exhibit 100, Affidavit of Mark Lewis DDS, April 26, 2010.)

Dr. Lewis' new evidence is the first time since the Petitioner's arrest in July 2002 that a dental expert examined the evidence related to Bailey's teeth. The prosecution's argument that Bailey's teeth were knocked out by a bat was speculative, and there was no blood from anyone on the petitioner's bat, so the prosecution's argument that her bat was used was also pure speculation. Dr. Lewis' analysis reveals the prosecution's argument that the jury relied on to convict the Petitioner was not just speculative – but it was dead wrong. Dr. Lewis' new dental evidence is consistent with Schiro's new expert crime scene blood splatter analysis that Bailey wasn't hit by a baseball bat. (See Exhibit 45, 4.)

- New evidence the prosecutors and police homicide detectives in Petitioner's case acted maliciously and negligently by disregarding exculpatory evidence they knew prior to trial that Petitioner was credible and truthful in her Statement of July 20, 2001, and that the incident she describes in her Statement occurred in a different part of Las Vegas weeks before Bailey's murder.

The prosecutors and homicide detectives involved in the Petitioner's case knew prior to trial there were at least eight alibi witnesses that the Petitioner had told prior to July 8, 2001 that

she had been sexually assaulted in Las Vegas, and that she defended herself by cutting or trying to cut her attacker's penis. The alibi witnesses are Steve Pyszkowski (Exhibit 11, Affidavit of Stephen William Pyszkowski.); Heather McBride (Exhibit 13, Affidavit of Heather Michelle McBride.); Cathy Reininger (Exhibit 19, Affidavit of Catherine Ann Reininger.); Michele Austria (Exhibit 12, Affidavit of Michele Dawn Austria.); Dixie Tienken (Exhibit 14, Affidavit of Dixie Tienken.); Marilyn Parker Anderson (See Exhibit 20, Affidavit Of Marilyn Parker Anderson); Chris Collier (Exhibit 18, Statement of Christopher Collier and Declaration of Shari White.); and Doug Twining (Exhibit 10, Voluntary Statement of Douglas Howell Twining.). None of these alibi witnesses are related to the Petitioner. All these alibi witnesses are consistent in describing that the Petitioner escaped a male attacker after attempting one time to cut his exposed penis, and none reported that her attacker died. There is also new evidence the prosecutors and detectives threatened, or attempted to intimidate, cajole or manipulate some of these witnesses into changing their statement and/or their testimony of what the Petitioner had told them. There is also new evidence from Steve Pyszkowski that Clark County Assistant District Attorneys William Kephart and Sandra DiGiacomo knew prior to trial the Petitioner is innocent of any involvement in Duran Bailey's murder. (Exhibit 11, Affidavit of Stephen William Pyszkowski.)

- New evidence the prosecution failed to disclose exculpatory evidence that the Mexicans who warned Bailey to leave Parker alone seven days before his murder were not law abiding citizens as Detective Thowsen testified. The Mexicans were violating federal law by being in the United States illegally, and at least one of them was using the Social Security number of a man with a different name who died in Michigan in 1987. (See Exhibit 26, Affidavit of Martin Yant, January 22, 2010; and, Exhibit 8, Affidavit of Steven King.) The Petitioner's third-party culprit defense identified those Mexicans as Bailey's likely killers. Steven King identifies them as Bailey's killers in his "Affidavit of Steven King."

> 22. I absolutely believe Diann's male Hispanic friends killed "St Louis" in retaliation for mistreating and raping Diann, and mistreating other women they knew.
>
> 23. Because "St Louis" was murdered at the Nevada State Bank where he did not "live," my belief is he was lured there by some kind of bait and ambushed by Diann's male Hispanic friends. (See Exhibit 8, Affidavit of Steven King.)

- New evidence Detective Thowsen committed perjury multiple times during his testimony concerning his alleged investigation of the Petitioner's Statement. There is new evidence that Thowsen perjured himself when he testified that he had his secretary searched for reports filed with the LVMPD under NRS 629.041 concerning non-accidental groin area or penis wounds treated by medical care providers in May, June and July 2001. There is new evidence that Detective Thowsen perjured himself when he testified that he personally called hospitals to learn if a penis injury had been treated in May, June and July 2001. There is new evidence that Detective Thowsen perjured himself when he testified that he personally called urologists to learn if a penis injury had been treated in May, June and July 2001. There is new evidence that Detective Thowsen perjured himself when he testified that he personally went to the Budget Suites Hotel at 4855 East Boulder Highway to investigate the attack that Petitioner describes in her Statement that occurred there "over a month ago" from when she gave her July 20, 2001, Statement. And there is also new evidence Detective Thowsen perjured himself when he testified the "Mexicans" who were watching out for Diann Parker on July 1, 2001, were law-abiding citizens, and new evidence they were in the country illegally and at least one of them was illegally using the Social Security number of a man who died in Michigan in 1987. (See Exhibit 26, Affidavit of Martin Yant, January 22, 2010.)

- New evidence of polygraph examiner Ron Slay is consistent with Dr. Redlich's determination the Petitioner did not confess to Bailey's murder in her Statement of July 20, 2001. Slay is a Nevada state licensed polygraph examiner who has performed over 27,000 examinations. Slay is a member of the American Polygraph Association, the National Polygraph Association, and other professional organizations. He is the owner of Western Security Consultants in Las Vegas, Nevada. Slay has "performed many polygraph examinations for the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office." (See Exhibit 9, Affidavit Of Ron Slay.) Slay was retained by Petitioner's previous counsel to perform a polygraph examination of Petitioner, which was conducted on December 3, 2001. As a result of Petitioner's truthfulness in answering the relevant questions during that examination, Slay states "I am certain Ms. Lobato is innocent of Mr. Bailey's murder."

(See Exhibit 9, Affidavit Of Ron Slay.) Slay conducted a polygraph examination of Rebecca Lobato on November 27, 2001, and he found "Mrs. Lobato truthfully answered that Ms. Lobato was in Panaca on July 8, 2001, and she further truthfully answered that she had not made a false alibi for Ms. Lobato." (See Exhibit 9, Affidavit Of Ron Slay.) The truthfulness of Rebecca Lobato's alibi testimony is additional confirmation of the Petitioner's truthfulness that she did not murder Bailey. The Clark County DA's Office recognizes Slay as a neutral examiner whom they have relied on to determine the truthfulness of suspects and witnesses. Slay swears in his "Affidavit of Ron Slay," dated February 12, 2010, "I am as certain today that Ms. Lobato is innocent of any involvement in Mr. Bailey's murder, as I was on December 3, 2001, after conducting Ms. Lobato's polygraph examination." (See Exhibit 9, Affidavit Of Ron Slay.)

- The Association in the Defence of the Wrongly Convicted (AIDWYC) is based in Toronto, Canada, and it is a leading international organization dedicated to exonerating persons innocent of their convicted crimes. The new evidence the Petitioner is actually and factually innocent is one of the reasons AIDWYC endorsed the Petitioner's case as a miscarriage of justice on March 24, 2010. AIDWYC's letter to the Petitioner states in part:

> "I am pleased to inform you that on March 24, 2010 the Review Board unanimously endorsed your case based on the facts of your case and the newly discovered evidence.
>
> AIDWYC will assist and support the furtherance of your case in your quest to obtain your exoneration and freedom. "
>
> (See Exhibit 67, AIDWYC's letter of endorsement.)

AIDWYC's endorsement is significant because they only endorse a case where there is evidence of factual innocence, and they have assisted in overturning the convictions of twenty persons.

If Petitioner's jury had had known the foregoing new evidence establishing her actual and factual innocence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of murdering and mutilating Duran Bailey.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(x) Ground twenty-four.
New evidence the Petitioner's conviction was based on false evidence, and the Petitioner was prejudiced because without this false evidence no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury the Petitioner was guilty because her admission in her Statement on July 20, 2001, that she made one attempt to cut the exposed penis of a man who was attempting to rape her constituted a *de facto* confession to her accused crimes of murdering Duran Bailey and the post-mortem cutting of his rectum.

New evidence establishes the prosecution relied on false evidence about key aspects of their case. The jury relied on the prosecution's false evidence and inaccurate inferences they may have drawn from it to convict the Petitioner. The following is key prosecution false evidence relied on by the jury.

1. Key to the prosecution's case was false evidence that Duran Bailey lived in the trash enclosure where he was murdered, because the prosecution argued that he was a source of methamphetamine ("drugs") for the Petitioner and she went there during the early morning pre-dawn hours of July 8, 2001, to obtain methamphetamine from him.

Steven King was Diann Parker's domestic partner in June and July 2001 and he knew Duran Bailey (by his nickname of "St Louis"). King provides new evidence Bailey did not live in the trash enclosure, which means neither the Petitioner nor anyone else would have gone there to see Bailey. (See Exhibit 8, Affidavit of Steven King.) There is also the new evidence that in Diann Parker's Statement of July 5, 2001, she identified that Bailey ("St Louis") lived across Flamingo Road behind the Palms (Hotel and Casino) that was then under construction. Parker was desperate to have Bailey arrested because she repeatedly expressed fear to the detective taking her Statement that he was dangerous and would murder her if he wasn't arrested. Parker made no mention Bailey lived at the Nevada State Bank's trash enclosure and the officers could simply walk 100 yards south of her

apartment and arrest him. (See Exhibit 69, Voluntary Statement of Diann Parker, July 5, 2001 (excerpts)) There is also new evidence by private investigator Skye Campbell that in June and July 2001 the area around the Nevada State Bank was not known as a place to obtain methamphetamine – which was the drug that the Petitioner was known to use when she was in Las Vegas. Campbell states, "And to my knowledge during that period of time methamphetamine was not readily available by going to the Nevada State Bank's exterior trash enclosure." (See Exhibit 23, Affidavit of Skye Idris Campbell.)

2. Key to the prosecution's undermining of the Petitioner's third-party culprit defense that Bailey was murdered by the Mexicans who warned Bailey on July 1, 2001, to stay away from Parker, was false evidence that Parker and "the Mexicans" were mere acquaintances so they had no motive to kill Bailey, and that they were law abiding citizens.

Steven King was Diann Parker's domestic partner in June and July 2001 and he knew the Mexicans and Duran Bailey (by his nickname of "St Louis"). King provides new evidence Parker spoke Spanish and she was good friends with the Mexicans. He states that Parker "socialized regularly with the seven to nine Hispanic males who lived in" the apartment where Bailey hit Parker on July 1, 2001. (See Exhibit 8, Affidavit of Steven King.) King also provides new evidence in his Affidavit that the Mexicans were not law abiding, but were violating federal law by being in the United States illegally.

Other new evidence the Mexicans were not law abiding is that Daniel Martinez, who was one of the Mexicans watching on July 1, 2001, to protect Diann Parker from Duran Bailey, was violating federal law by using the Social Security number of a man with a different name who died in Oakland, Michigan in 1987. (See Exhibit 26, Affidavit of Martin Yant, January 22, 2010.) Detective Thowsen testified that he obtained information from the manager of the Grand View Apartments about the Mexicans who rented the apartment where Bailey hit Parker on July 1, and who "watched out" for Bailey when she returned to her apartment. Thowsen testified he ran the Mexicans' names and Social Security numbers through Scope, and they came up with clean criminal records. Thowsen testified he didn't investigate further because the Mexicans were law abiding, and the

manager said they didn't cause trouble. Contrary to Thowsen's testimony the jury relied on, Martinez was violating multiple federal laws. There is also new evidence that on November 16, 2004, a Daniel Martinez pled guilty in Clark County District Court to Assault with use of a Deadly Weapon, and was sentenced to 13 to 60 months in prison. (See Exhibit 51, Daniel Martinez, November 16, 2004.) There was an INS detainer on Martinez so he would be turned over to federal authorities for deportation after completing his sentence.

3. Key to the prosecution's case was presenting false evidence that the Petitioner was not truthful and not credible in her Statement of July 20, 2001, in which she described fighting off a would be rapist "over a month ago" in the parking lot of a Budget Suites Hotel in east Las Vegas, by attempting one time to cut his exposed penis. The prosecution presented false evidence that the attack at the Budget Suites never happened. During Thowsen's direct examination he testified he didn't look for any witnesses at the Budget Suites Hotel, because "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (8 App. 1410; Trans. XIII-159 (9-27-2006))

The Petitioner told many friends and acquaintances prior to July 8, 2001, that she had defended herself against a rape attempt in Las Vegas by trying once to cut her attacker's exposed penis. She told some of these people the attack took place in late May 2001, and that it occurred at the Budget Suites Hotel in east Las Vegas. She was consistent in telling all of them that she made one attempt to cut her attacker's exposed penis, and she did not tell anyone that he was not alive when she escaped from him. Nine of those alibi witnesses are Steve Pyszkowski (Exhibit 11, Affidavit of Stephen William Pyszkowski.); Heather McBride (Exhibit 13, Affidavit of Heather Michelle McBride.); Cathy Reininger (Exhibit 19, Affidavit of Catherine Ann Reininger.); Michele Austria (Exhibit 12, Affidavit of Michele Dawn Austria.); Dixie Tienken (Exhibit 14, Affidavit of Dixie Tienken.); Daniel Lisoni (Exhibit 17, Affidavit of Daniel Lewis (Louis) Lisoni.); Kimberlee Grindstaff (Exhibit 15, Affidavit of Kimberlee Isom Grindstaff.); Doug Twining (Exhibit 10, Voluntary Statement of Douglas Howell Twining.); and, Chris Collier (Exhibit 18, Statement of Christopher Collier and Declaration of Shari White.).

Also supporting the Petitioner's account is the expert psychological analysis of Dr. Allison D. Redlich. Dr. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001. Dr. Redlich provides new expert psychology evidence in her report of February 10, 2010, states in part:

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.) (Emphasis added to original.)

4. Key to the prosecution's case was presenting false evidence that the Petitioner wasn't truthful and not credible in her Statement of July 20, 2001, by Thowsen's direct opinion testimony that she "jumbled" details in her Statements to "minimize" her involvement in Bailey's murder.

Dr. Allison D. Redlich provides new expert psychology evidence disproving that the Petitioner "jumbled" details to "minimize" involvement in Bailey's murder and mutilation. Dr. Redlich's report of February 10, 2010 states in part:

> "[I]n my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

5. Key to the prosecution case was presenting false evidence that the Petitioner's Statement of July 20, 2001, constitutes a confession to Bailey's murder and post-mortem cutting of his rectum. Thowsen's opinion testimony about the Petitioner "jumbling" and "minimizing" details in her Statement was given in the context of him being questioned about a suspect confessing to a crime,

and he expressed his opinion that the Petitioner's Statement was a confession when he stated during Thowsen's direct examination he testified he didn't look for any witnesses at the Budget Suites Hotel, because "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (8 App. 1410; Trans. XIII-159 (9-27-2006)) Thowsen's testimony was reinforced when during his questioning by ADA William Kephart, Kephart specifically referred to the Petitioner's Statement as a "confession":

> "Q. (By Mr. Kephart) Okay. And in respect to that, you had indicated that you had done other investigations with regards to speaking to Dixie and Michelle and Laura; other individuals in this case; the defendant; *who gave you her confession*, …" (8 App. 1385; Trans. XIII-59 (9-27-06)) (Emphasis added to original.)

Dr. Allison D. Redlich provides new expert psychology evidence disproving the Petitioner confessed to Bailey's murder and post-mortem cutting of his rectum in her Statement. Dr. Redlich's report of February 10, 2010 states in part:

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

6. Key to the prosecution's case was presenting false evidence that Bailey died prior to dawn on July 8, 2001. One aspect of the Petitioner's Statement that the prosecution conceded was true was she was involved in an altercation after midnight when it was dark. So to link her Statement to Bailey's murder the prosecution needed to present false evidence that Bailey died prior to dawn on July 8, 2001. This was done through Clark County Medical Examiner Lary Simms testimony that Bailey could have died as early as 3:50 a.m. on July 8. It didn't begin to get light on July 8 until 4:24 a.m., so Simms' testimony provided for a 34 minute window of when Bailey could have been murdered while it was dark from 3:50 a.m. to 4:24 a.m. The prosecution also conceded that credible non-relative alibi witnesses established the Petitioner was in Panaca no later than 11:30 a.m., and that the absolute fastest the trip can be made from Las Vegas to Panaca is 2 hours, so she

could not have been in Las Vegas after 9:30 a.m.

There is new evidence by three forensic entomologists that Bailey died after 8:01 p.m. on July 8, which was sunset occurred. That is more than 16 hours after ME Simms testified Bailey could have died, and the jury relied on his testimony that Bailey could have died prior to dawn on the morning of July 8.

Dr. Gail Anderson is a professor at Simon Fraser University in Burnaby, British Columbia, Canada. Dr. Anderson is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. Dr. Anderson reviewed the photographs of Bailey's body in November and December 2009, weather records for July 8, 2001, and various documents related to Petitioner's case. Dr. Anderson's Report of December 17, 2009 about the Petitioner's case states in part: "to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009, 5.)

Dr. Linda-Lou O'Connor is a professor in the Department of Entomology at the University of Kentucky in Lexington, Kentucky. Dr. O'Connor is the treasurer of the North American Forensic Entomology Association. Dr. O'Connor examined the entomology evidence in Petitioner's case and wrote the "Forensic Entomology Investigation Report," February 11, 2010, that states: "Based on the lack of colonization of blow flies and/or flesh flies, estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001." (See Exhibit 2, Forensic Entomology Investigation Report of Dr. Linda-Lou O'Connor, February 11, 2010, 1.)

Dr. M. Lee Goff is a professor and director of the Chaminade University Forensic Sciences program in Honolulu, Hawaii. Dr. Goff is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. He has conducted training courses at the FBI Academy, he is a consultant for the television crime dramas *CSI* and CSI: Miami, and he is the author of *A Fly For The Prosecution: how insect evidence helps solve crimes* (Harvard University Press, 2000). Dr. Goff examined the

entomology evidence in Petitioner's case and wrote the "Report of Dr. M. Lee Goff," March 12, 2010. Dr. Goff concurs with Dr. Anderson's finding that "to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.)

Dr. Glenn M. Larkin is a forensic pathologist with 46 years experience. Dr. Larkin is a leading forensic pathologist on the subject of determining time of death. Dr. Larkin authored the chapter "Time of Death" in *The Forensic Sciences* (1997), edited by Dr. Cyrus H. Wecht. Dr. Larkin examined the forensic pathology evidence in Petitioner's case and wrote the "Affidavit of Glenn M. Larkin, M.D.," January 5, 2010. Dr. Glenn M. Larkin provides new forensic pathology evidence that, "It is my opinion to a reasonable medical and scientific certainty that Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk. The lack of blow fly infestation suggests an even shorter time between [when] Bailey died and was discovered." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, p. 8.) Bailey's body was found "around 10 p.m." on July 8, 2001, by Richard Shott. Two hours before Bailey's body was discovered was around 8 p.m., and sunset on July 8 was 8:01 pm.

So by different processes Dr. Larkin and the three forensic entomologists came to the same conclusion that Bailey died sometime after 8:01 pm. That Bailey died close to the time his body was discovered is supported by the new evidence by Drs. Anderson, O'Conner, Goff and Larkin that Bailey's body had no cockroach bits. It is known that cockroaches are carnivores who feed on human bodies, and it is known from the crime scene notes and testimony of CSA Louise Renhard that there were 15 to 18 cockroaches in a beer can several feet from Bailey's body.

7. Key to the prosecution's case was presenting false evidence that one perpetrator, the Petitioner, was involved in Bailey's murder.

Dr. Glenn M. Larkin examined the forensic pathology evidence in Petitioner's case and wrote the "Affidavit of Glenn M. Larkin, M.D.," January 5, 2010. He provides new

forensic pathology evidence that: "to a reasonable medical and scientific certainty … There is a good probability that more than one person was involved in this attack and murder." (Id. 8) Dr. Larkin's determination is in part based on the fact that, "Given the poor lighting, it suggests that a third hand was involved to supply light." (*Id,* 5) Dr. Larkin allows for the possibility that one person could have attacked Bailey provided "the perpetrator(s) has a head lamp." (*Id,* 5) But there was neither any evidence at trial, nor did the prosecution argue to the jury that Petitioner wore a "head lamp," or that she even had a flashlight to see in the dark trash enclosure. Furthermore no flashlight or "head lamp" was found by the LVMPD during their search of the Petitioner's personal property or her car on July 20, 2001.

Dr. Glenn M. Larkin also provides the new forensic pathology evidence that "There is a good probability that more than one person was involved in this attack and murder. At least one perpetrator was skilled either with medical knowledge or animal husbandry to effect the mutilation of Bailey's groin area." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 5 and 8.) No evidence was introduced at trial the Petitioner is skilled either with medical knowledge or animal husbandry.

8. The prosecution presented false evidence that there was one act of mutilation to Bailey's groin area – the amputation of his penis. ME Lary Simms testified hat Bailey's penis was amputated, but neither he nor anyone else testified there was a second wound to Bailey's groin.

Dr. Glenn M. Larkin provides new forensic pathology evidence that Bailey's penis was amputated, and then in a second act his groin area was "skinned." Dr. Larkin states in his "Affidavit of Glenn M. Larkin:

> "The amount of skin — covered by dense hair — attached to the cut end of the penis — "surgical margin" — is much smaller than the defect seen on the distal abdominal wall. This suggests two separate acts of mutilation." (5) And, "Removal of the penis at its base could be accomplished with one hand holding the weapon, the second hand stretching the skin — the second mutilation, similar to skinning an animal — required one hand to stretch the skin, and the other hand to cut through the sub cutis on the stretch." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 5.)

Dr. Larkin's new evidence that Bailey's penis was amputated and he was then skinned is confirmed by visual inspection of Bailey's amputated penis, and the gapping

wound to Bailey's groin that is many times larger than the penis wound. (See Exhibit 31, Bailey's penis; and, Exhibit 34, Bailey's groin.)

9. The prosecution presented false evidence that Bailey was dead when his rectum was cut. ME Lary Simms testified that Bailey's rectum wound was post-mortem.

Dr. Glenn M. Larkin provides new forensic pathology evidence that, "Bailey survived either conscious or not, a short time after being attacked." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) That means Bailey was alive when his rectum was cut. The "sexual penetration of a dead body" charge against Petitioner was predicated on Bailey being dead when his rectum was cut, so there is no legal basis for that charge.

Dr. Larkin's determination is consistent with Simms' preliminary hearing testimony that Bailey's rectum wound was ante-mortem. During Petitioner's preliminary hearing Simms testified:

> Q. But it's clear to you every one of the stab post mortem; is that right?
> A. (By Dr. Simms) Not every one of **the stab wounds, for instance, in the rectum was ante-mortem**, several were ante-mortem. The ones I saw on the abdomen, were post mortem stab wounds.
> (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 32. Emphasis added to original.)

There is also new physical evidence in the form of crime scene photographs that provide visual proof Bailey was alive when his rectum was cut. The LVMPD took many pictures of the crime scene. One of those pictures was of Bailey's body after the cardboard covering his torso was removed. Another photo was taken from almost the same angle after Bailey's body was moved from the scene by the Clark County Coroner's Office and the debris was moved from the trash enclosure's southwest corner to expose the blood evidence. Exhibit 50 shows the blood evidence photo superimposed over the photo of Bailey's body. This superimposed image clearly shows that Bailey had significant blood loss from both his carotid artery wound and his rectum wound when he was turned over onto his back, after his rectum wound was inflicted. This new photographic evidence establishes Bailey was alive

and his heart was continuing to pump blood after his rectum was cut, and he was turned onto his back for the amputation of his penis and the skinning of his groin area.

10. The prosecution presented false evidence that Bailey was killed by the Petitioner's pocket butterfly knife with a 3-1/2" to 4" blade.

Dr. Glenn M. Larkin provides new forensic pathology evidence that a large fixed blade knife was used to kill and butcher Bailey. He states in his "Affidavit of Glenn M. Larkin:

> "A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds; there are no choil or tang impressions on the skin. "(See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.)

11. The prosecution presented false evidence that Dixie Tienken told Laura Johnson the Petitioner was "hiding her car" at her parents' house. The prosecution relied on Johnson's double hearsay to argue the Petitioner had a guilty mind based on Johnson's allegation she and her parents took action to conceal her car from being identified.

Dixie Tienken provides new evidence that "At no time did … I say she was hiding herself or her car. In fact Blaise's car was parked on the public street in front of her Dad's house as several neighbors have verified." (See Exhibit 14, Affidavit of Dixie A. Tienken.) Tienken's evidence is consistent with the fact that there was no testimony the Petitioner or her parents made any effort to have her car painted, or to sell it, or that they even washed it after she parked it in plain view on the public street in front of her parents' house in Panaca on July 2, 2001. When inspected by the LVMPD crime lab the interior of the car was dusty and there was dirt and vomit on the floor, so it is known the car had not been thoroughly cleaned recently.

12. The prosecution presented false evidence that preliminary (presumptive) luminol and phenolphthalein tests can determine blood was present in Petitioner's car.

George Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison.

He has also consulted on cases in 23 states, for the United States Army, and in the United Kingdom. Schiro has testified as an expert for both the prosecution and defense over 145 times in eight states, federal court, and two Louisiana city courts. Schiro is a fellow of the American Academy of Forensic Sciences, a member of the Association for Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

Schiro examined the forensic science evidence in the Petitioner's case, and he provides new evidence that the presumptive tests of Petitioner's car did not detect the presence of any blood. Schiro's "Forensic Science Resources Report" dated March 8, 2010, states in part:

> Mr. Wahl's August 6, 2001, report states "Examination of the vehicle slip cover (TAWS item 5) and the interior left door panel (TAWS) yielded weak positive presumptive tests for the presence of blood in one area of each item. Human blood could not be confirmed from either item. Human DNA was not detected in extracts prepared from swabbings collected from both items."
>
> The luminol reaction and the phenolphthalein reaction are both catalytic tests. …The categories of substances that will produce false positives are the same for both tests, but luminol probably reacts to lesser amounts of these substances than phenolphthalein. …Both tests can cause reactions with the enzymes catalase and peroxidase, cytochromes, strong oxidizing agents, and metallic salts.
>
> Some of the false reactions include:
>
> Chemical oxidants and catalysts, such as copper and nickel salts, rust, fornialin (used for preserving tissues), potassium permanganate (found in some dyes), potassium dichromate, bleaches, iodine, and lead oxides. Some of these items could be found anywhere, including tap water, dirt, and blue jeans. Phenolphthalein gives positive results with copper, potassium ferricyanide, nickel and cobalt nitrates, and some sulfocyanates. Luminol reacts with copper compounds, cobalt, iron, potassium permanganate, and bleach (source: Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the FBI Academy in Quantico, VA, phenolphthalein has been shown to react with iodine, potassium permanganate, and copper nitrate.
>
> Plant sources: Vegetable peroxidases. Phenolphthalein might react with apple, apricot, bean, blackberry, Jerusalem artichoke, horseradish, potato, turnip, cabbage, onion, and dandelion root (source Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the FBI Academy in Quantico, VA, phenolphthalein has been shown to react with cabbage, carrot, cucumbers, celery, corn, and horseradish.
>
> Animal origin: pus, bone marrow leukocytes, brain tissues, spinal fluid, intestine, lung, saliva, and mucous (source Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the

> FBI Academy in Quantico, VA, phenolphthalein has been shown to react with saliva. Bacteria can also cause false positive reactions.
>
> The HemaTrace test used to confirm human blood is more sensitive than the phenolphthalein test. As a result, had the phenolphthalein been reacting to human blood, then the HemaTrace test should have also given a positive result for human hemoglobin. In validation studies conducted at the Louisiana State Police Crime Lab, phenolphthalein could detect a 1/1,000,000 dilution of blood and the HemaTrace card could detect a 1/100,000,000 dilution of blood. This makes the HemaTrace card 100 times more sensitive than the phenolphthalein test.
>
> **Based on the results of the phenolphthalein, luminol, human hemoglobin, and human DNA quantification analyses, the substance detected in Ms. Lobato's vehicle is not human blood**.
>
> (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 5-6 (Emphasis in original.))

13. The prosecution presented false evidence that the person who made the shoeprints imprinted in blood on the concrete could have had nothing to do with concealing Bailey's body. During Brent Turvey's cross-examination he testified it is possible the person who made the shoeprints imprinted in blood on the concrete leading out of the trash enclosure had nothing to do with Bailey's murder.

George Schiro provides new evidence that the shoeprints imprinted in blood were left by the person who concealed Bailey's body:

> Bloody and non-bloody patent shoeprints with the same tread pattern were photographed and documented at the crime scene. …
>
> The bloody shoeprints could have only been left by the person concealing Mr. Bailey's body because all of the blood was covered by the trash concealing his body. Cardboard was first used to cover his body, then the trash was used to further conceal his body and the blood. While the body and blood were being concealed with trash, the source of the shoeprints stepped in blood and tracked them out upon exiting the enclosure.
>
> (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 1.)

The foregoing false evidence was all prejudicial to the Petitioner, because it constituted the meat of the prosecution's case and its arguments to the jury that the jury relied on to convict the Petitioner.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(y) Ground twenty-five.

The prosecution failed to disclose to Petitioner in violation of *Brady v. Maryland*, et al. the relationship between Duran Bailey and a law enforcement officer, and the Petitioner was prejudiced because the relationship could have provided a motive for a multitude of persons in Las Vegas with the means and opportunity to have murdered and mutilated Duran Bailey, and that officer may be a material witness in Duran Bailey's murder by having unique and exculpatory third-party culprit evidence and information of assistance to identifying Duran Bailey's murder(ers), and if the jury had known of this exculpatory third-party culprit evidence no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

On November 4, 2010 Petitioner's trial counsel David Schieck turned over to Petitioner some of the documents related to her prosecution. Among the documents were scans of police photographs of seven unique telephone numbers handwritten on pieces of paper and a Gold Coast Casino matchbook that were found in the pockets of the pant's Bailey was wearing when he was murdered. All the telephone numbers are prefixes in area code 702 that includes Las Vegas. Three of those seven telephone numbers were handwritten twice on separate pieces of paper. One of the three telephone numbers handwritten twice had the capitalized letter "D" by it.

On or about November 13, 2009 it was discovered that the telephone number written twice with the identifying letter "D" beside it is the telephone number of a law enforcement officer. (See Exhibit 73, Affidavit of Hans Sherrer, March 8, 2010.)

There was no testimony at trial, and there is no document in the discovery provided by the prosecution that Bailey had a relationship with a law enforcement officer in Las Vegas. The letter "D" beside the officer's telephone number could be an abbreviation for "Detective." As a person with his ear to the street scene, it is reasonable that Bailey was a source of information to law enforcement.

Bailey's undisclosed ties to law enforcement changes the complexion of the Petitioner's case, because any number of known and unknown persons with the means an opportunity could have had a motive to take care of Bailey by killing him if they had found out he was providing information to the police. Bailey's status as an informant can explain why the LVMPD took no

interest in doing anything to investigate Diann Parker's rape complaint of July 5, 2001, against "St Louis," who the LVMPD would have known from his description and location was Bailey. It can also explain why Bailey's extensive criminal history in Las Vegas includes only one conviction. His record includes several incidents of domestic battery prior to his alleged beating and rape of Diann Parker on July 1, 2001. (Exhibit 62, Duran Bailey LVMPD Criminal History.)

Although it is unknown if Bailey was an informant prior to coming to Las Vegas, in a letter dated April 7, 2010, the Federal Bureau of Investigation responded to a Freedom of Information Act Request for Bailey's FBI file by reporting that his FBI file was "destroyed August 1, 1995." (See Exhibit 98, FBI FOIA response that Bailey's records were destroyed on August 1, 1995.) In 1995 Bailey was 38 years old, and both Diann Parker and her domestic partner Steven King believed that Bailey had been imprisoned in Missouri for murder. (See Exhibit 8, Affidavit of Steven King.)

The undisclosed officer could be a material witness in Bailey's murder and have valuable and unique information of assistance in identifying the person or persons who murdered Bailey.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(z) Ground twenty-six.

The prosecution failed to disclose to Petitioner in violation of *Brady v. Maryland*, et al. that there is no such person as Daniel Martinez assigned the Social Security Number 3**-0*-0***, that LVMPD Detectives Thomas Thowsen and James LaRochelle knew that person was one of the Mexicans who argued with Duran Bailey on July 1, 2001, and was "watching out" so Diann Parker wouldn't be accosted by Duran Bailey, and after running a criminal background check on the man known as Daniel Martinez with SSN 3**-0*-0*** the detectives knew there was no such person, and if the jury had known of this evidence supporting the Petitioner's third-party culprit defense, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Diann Parker lived in unit 816 at the Grand View Apartments, which were on the north side of the same block as the Nevada State Bank where Duran Bailey was murdered. Some Mexicans lived in unit 822 in the building next to Parker's apartment building. (See Exhibit 48, Parkers unit

and Mexican's unit.) Parker testified that on the morning of July 1, 2001, she was talking with the Mexicans in their apartment when Bailey came into the apartment and hit her. Bailey and Parker knew each other casually, and on occasion they had done crack cocaine and had sex together. Several weeks before Bailey hit Parker she told him she didn't want anything more to do with him.

Bailey left the apartment after hitting Parker, but one of the Mexicans followed him out the door and warned him to leave Parker alone. The Mexicans watched out to make sure Parker got back to her apartment OK after she left. Later that night Bailey barged into Parker's apartment and beat and raped her. He also threatened to kill her, and she had reason to believe him because he had told her he had been in prison for murder. Afraid of retaliation by Bailey, she did not report the rape until July 5 after Bailey returned to her apartment and beat on her front door and window.

Petitioner's third-party culprit defense was that Bailey was murdered by the Mexicans who warned Bailey on the morning of July 1, 2001, to stay away from Parker, and watched out for her.

On the morning of July 9, 2001, Parker was recognized at the scene of Bailey's murder by one of the officers who saw her several days earlier when she reported the rape. She said she had heard a man had been murdered there and she wanted to see if it was Bailey. She was unable to do so because the body had already been removed. Later that morning LVMPD homicide Detectives Thomas Thowsen and James LaRochelle interviewed Parker at her apartment, which was located on the north side of the same block as the Nevada State Bank where Bailey was murdered. The man she identified as her male roommate, Steven King, was also present. The officers looked at their shoes and asked a few questions and left.

Thowsen testified at Petitioner's trial that after talking with Parker, he talked with the Grand View Apartments' manager on July 9, 2001, who told him the names and Social Security numbers of the Mexicans who rented Apartment 822, and that they didn't cause any trouble. Thowsen testified that he ran Scopes (criminal background checks) on the Mexicans and they had clean records, so he didn't think questioning them about Bailey's murder was necessary. When asked on cross-examination if he recorded anything regarding his investigation of the Mexicans Det. Thowsen replied, "I do remember running them. I don't have a permanent record of that." (8 App. 1404; Trans. XIII-136 (09-27-06))

New evidence establishes Thowsen did not testify truthfully about the Mexicans, and that the prosecution failed to disclose exculpatory evidence the Mexicans were not the law abiding citizens that Thowsen portrayed in his testimony. Parker provided information that was known to Thowsen, that the Mexicans were in the United States illegally, and thus he knew they were violating federal law immigration laws. Daniel Martinez was one of the two Mexicans renting apartment 822, and Thowsen obtained his information from the manager. Martinez listed his Social Security Number as 3**-0*-0***. When Thowsen ran Martinez's Scope he couldn't have come up with a clean record, because there is no such person as Daniel Martinez with SSN 3**-0*-0***. Social Security number 3**-0*-0*** was assigned to Clarence R. Hartung, who died on September 28, 1987 in Oakland, Michigan at the age of 80. (See Exhibit 26, Affidavit of Martin Yant, January 22, 2010.) So Thowsen not only knew that Daniel Martinez was committing the federal crime of being in the country illegally, but he also knew Martinez was committing the federal crime of using another person's Social Security number. It is reasonable to believe that as one of the apartments' renters, Martinez was one of the Mexicans who watched out to make sure Parker got home safely after leaving their apartment on July 1.

Bailey provided a motive for the Mexicans to murder Bailey when he did not just beat and rape Parker after they warned him to stay away from her, but there is new evidence by Parker's domestic partner, Steven King, that about the same time he assaulted the girlfriend of one of the Mexicans. (See Exhibit 8, Affidavit of Steven King.) As illegal aliens the Mexicans did not have the option to rely on the police to take care of Bailey.

The Petitioner was prejudiced by the prosecution's failure to disclose all the information about Daniel Martinez. If Petitioner's jury had known that the Mexicans were in the county illegally, and that Martinez was illegally using the SSN of a dead American, it could be expected to influence their consideration that the Mexicans murdered and mutilated Bailey as retaliation for what he did to Parker and one of their girlfriends in the week or so preceding his death. Knowing there was a factual basis for the Petitioner's third-party culprit defense, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt and acquitted her.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(aa) Ground twenty-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to investigate as suspects in Duran Bailey's murder the Mexicans who are known to have watched out for Diann Parker after she was assaulted in their apartment by Bailey seven days before his murder, and as a result of that investigation evidence would have been discovered that the Mexicans were in the country illegally, that at least one was illegally using the Social Security Number of a man who died in 1987, that about the time Bailey beat and raped Parker on July 1, 2001, he also assaulted the girlfriend of one of the Mexicans, and if the jury had known of this exculpatory evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Petitioner's third-party culprit defense was based on the circumstances of Diann Parker's report to the LVMPD that she was raped on July 1, 2001, by an acquaintance she knew as "St Louis" who was later identified as Duran Bailey. The reported rape was seven days before Bailey's murder. Petitioner's third-party culprit defense focused on the Mexican men Parker described as neighbors of hers at the Grand View Apartments, who had the motive, means and opportunity to murder Bailey. The Grand View Apartments are about 100 yards north of the Nevada State Bank where Bailey was murdered.

In late spring 2001 Diann Parker had socialized with Duran Bailey (who she knew as "St Louis") and did crack cocaine with him. On several occasions she had exchanged sex for crack from Bailey. Among other things Bailey told Parker that he had been in prison for murder. In mid-June Parker told Bailey that she didn't want anything more to do with him. On the morning of July 1, 2001, Parker was drinking a beer in the apartment of some Mexican men who lived in an apartment in a building across from her apartment. (See Exhibit 48, Diann Parker's apartment (with satellite dish) and Mexicans' apartment (with plant); and, Exhibit 49, Mexicans' unit 822 looking at Parker's unit 816.) Bailey came into the apartment and yelled at her for hanging out with Mexicans, and he hit her in the face. Bailey left the apartment, but one of the Mexicans followed him outside and told him to leave Parker alone. When Parker left a couple of the Mexicans "were watching to make sure" she got back to her apartment OK. (Trans. XIV-12 (9-28-06)) Later that

night Bailey forced his way into Parker's apartment and over four or more hours he beat and raped her. Bailey repeatedly threatened to kill Parker. After he left she did not call the police for fear that he would kill her.

Parker was home when about midnight on July 4 Bailey began beating on her exterior door and window. She didn't let him in and she reported the rape the next day. LVMPD sexual assault Detective J. Scott audio recorded Parker's July 5, 2001, statement about the rape and a medical exam was conducted at the University Medical Center. Parker told Scott that Bailey was homeless and lived across Flamingo Road behind the Palms Hotel and Casino (that was then under construction). Parker was very reluctant to provide Scott with information about the Mexicans who she said were witnesses to Bailey's behavior. She told Scott she didn't know their names, but she did provide their apartment number 822. No investigation was conducted by the LVMPD into Parker's rape complaint, and no effort was made to arrest or even question Bailey.

However, on the morning of July 9, 2001, Parker was recognized at the scene of Bailey's murder by one of the officers who saw her several days earlier when she reported the rape. Parker said she had heard a man had been murdered there and she wanted to see if it was Bailey. She was unable to do so because the body had already been removed. Later that morning LVMPD homicide Detectives Thomas Thowsen and James LaRochelle interviewed Parker at her apartment, which was located on the north side of the same block as the Nevada State Bank where Bailey was murdered. The man she identified as her male roommate, Steven King, was also present. The officers looked at their shoes and asked a few questions and left.

On July 23, 2001, three days after the Petitioner was arrested, Detectives Thowsen and LaRochelle returned to Parker's apartment and audio recorded an eight-minute Statement. Parker was shown a photo of Bailey, and she identified him as "St Louis" who raped her. King was also present but the detectives did not ask him any questions.

Thowsen testified at Petitioner's first trial that after talking with Parker he talked with the apartment manager who told him the names and Social Security number of the Mexicans who rented apartment 822, and that they didn't cause any trouble. Thowsen testified that he ran Scopes

(criminal background checks) on the Mexicans and they had clean records, so he didn't think questioning them about Bailey's murder was necessary.

Parker testified at Petitioner's first trial. She downplayed how well she knew the Mexicans, not even saying that she knew their names or had talked with them before or after the events of July 1 when Bailey hit her in their apartment. It was that testimony the prosecution relied on to argue to the jury the Mexicans wouldn't kill Bailey because he hit a woman in their apartment they barely knew, and who was later raped by the man.

Petitioner's counsel did not investigate the Mexicans to find evidence supporting her third-party culprit defense, but instead relied on Parker's Statement and her testimony during the Petitioner's first trial. If the Petitioner's counsel had conducted an investigation they would have learned, and could have presented to the jury the following evidence:

- The Mexicans were not law abiding as Thowsen testified, but they were violating federal law by being in the United States illegally and they could not speak English very well. (See Exhibit 8, Affidavit of Steven King.)
- One of the Mexicans, Daniel Martinez, was also violating federal law by using the Social Security Number of a man with a different name who died in Michigan in 1987. (See Exhibit 26, Affidavit of Martin Yant, January 22, 2010.)
- There were not two, but seven to nine Mexican males living in Apartment 822 where Bailey yelled at Parker and hit her in front of the Mexicans. (See Exhibit 8, Affidavit of Steven King.)
- Parker spoke Spanish and she was good friends with the Mexicans living in Apartment 822 who she regularly socialized with. (See Exhibit 8, Affidavit of Steven King.)
- About the time Bailey raped Parker he also assaulted a girlfriend of one of the Mexicans. (See Exhibit 8, Affidavit of Steven King.)
- Bailey did not live at the Nevada State Bank where he was murdered. (See Exhibit 8, Affidavit of Steven King.)
- The Mexicans "vanished" a few weeks after Bailey's murder, which was about the time that Thowsen and LaRochelle went to the Grand View Apartments on July 18, 2001, and talked

with the manager to get information about the Mexicans. (See Exhibit 8, Affidavit of Steven King.)

- That after testifying at the Petitioner's first trial Parker told Steven King that "she had never seen the young woman before, and it was not possible that she could have murdered "St Louis." [Bailey)." (See Exhibit 8, Affidavit of Steven King.)

Parker was not asked, and she did not disclose in her Statement to Detective Scott, or when later interviewed by Detectives Thowsen and LaRochelle, or when she testified at Petitioner's trial, that her male roommate, Steven King was actually her domestic partner. King executed an Affidavit dated February 17, 2010. (See Exhibit 8, Affidavit of Steven King.) King is the only person available who had personal contact with Duran Bailey ("St Louis"), Diann Parker, and the Mexicans living in apartment 822. In addition to the above information about the Mexicans and Parker that the Petitioner's counsel could have learned if they had investigated, King states in his Affidavit:

> 22. "Before Diann died in Louisville, Kentucky we discussed the murder of "St Louis" on a number of occasions. I absolutely believe Diann's male Hispanic friends killed "St Louis" in retaliation for mistreating and raping Diann, and mistreating other women they knew.
> 23. Because "St Louis" was murdered at the Nevada State Bank where he did not "live," my belief is he was lured there by some kind of bait and ambushed by Diann's male Hispanic friends.
> 24. I know that Kirstin Blaise Lobato is the young woman convicted of murdering "St Louis," and that his real name is Duran Bailey.
> 25. Based on what Diann told me, what I personally know about "St Louis," the anger the Hispanics had toward "St Louis," and the injuries inflicted on "St Louis," I am absolutely certain that Kirstin Blaise Lobato did not murder "St Louis."
> 26. I believe that Kirstin Blaise Lobato is innocent and her conviction is a miscarriage of justice.
> (See Exhibit 8, Affidavit of Steven King, 2.)

If Petitioner's counsel had investigated the possible connection of the Mexicans to Bailey's murder, all of the foregoing evidence could have been introduced at trial, in support of her third-party culprit defense.

If Petitioner's counsel's had investigated the jury would have heard testimony that before Bailey beat and raped Parker the Mexicans warned him to leave her alone because she was their

good friend, that around the same time he raped Parker he assaulted one of their girlfriends, that Bailey didn't live in the trash enclosure where he was murdered, that the Mexicans vanished after Detectives Thowsen and LaRochelle went to the Grand View Apartments and asked the manager questions about them, and much other evidence that would have supported Petitioner's third-party culprit defense. The Petitioner was gravely prejudiced by her counsel's failure to investigate the Mexicans as Parker's murderers because the evidence the investigation would have discovered supporting that the Mexicans murdered Parker would have provided the jurors with a factual basis to determine the Petitioner's third-party culprit defense was not just valid, but no reasonable juror could have found the prosecution had presented evidence of her guilt beyond a reasonable doubt and acquitted her.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(bb) Ground twenty-eight.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to investigate the persons who had the seven unique handwritten telephone numbers that were found in Bailey's pants pockets, because those were people known to Bailey, and one or more of those people could have seen or talked with Bailey on July 8, 2001, or they may have known a person who did, or provided further investigative leads that could have led to Bailey's murderer or narrowed his time of death, and consequently counsel's failure to investigate the phone numbers, individually or cumulatively with other evidence prejudiced the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Petitioner's counsel was provided the discovery evidence of police photographs of seven unique telephone numbers handwritten on pieces of paper and a Gold Coast Casino matchbook that were found in pockets of the pants Bailey was wearing when he was murdered. All the telephone numbers are prefixes in area code 702. Three of those seven telephone numbers were handwritten twice.

It is reasonable to believe Bailey personally knew the persons whose telephone numbers he carried on his person, and that one or more of those people could have either seen or talked with him

one or more times on July 8, 2001, the day of his murder. That information would have aided in determining his time of death. Those people also could have provided information about someone else who knew Bailey who may have seen Bailey on the day of his murder, and knew whom he was with.

The seven telephone numbers obviously had some significance to Bailey, and none of the telephone numbers matched the phone numbers used by Petitioner (her stepmother Becky's cell phone and the Lobato's house landline telephone), or Doug Twining's telephone numbers (cell phone and land line) introduced into evidence.

If even one of the people discovered through investigating the seven telephone numbers saw or talked with Bailey after 9:30 am on Sunday July 8 it would have been significant new exculpatory evidence. The prosecution argued to the jury that credible alibi witnesses placed Petitioner on July 8, 2001, at her parents' home in Panaca, Nevada from "11:30 a.m. through that night," and that a telephone call from the Lobato home to the cell phone of Petitioner's step-mother Rebecca Lobato at "10 a.m." was probably made by the Petitioner in Panaca. (9 App. 1726; Trans, XIX 130 (10-5-06)) There was trial testimony by Nevada Department of Transportation supervisor Phil Boucher that he had traveled the roads from Las Vegas to Panaca many times and it normally took him about three hours when travelling at an average of 72 mph on the open road. On cross-examination by the prosecution, Boucher agreed it was "possible" traveling at a very high speed to drive from Las Vegas to Panaca in two hours. So given the latest period of time the prosecution conceded to the jury Petitioner was in Panaca (11:30 am) and Boucher's testimony about the fastest "possible" time to travel from Las Vegas to Panaca (2 hours), the latest that Petitioner could have been in Las Vegas on the morning of July 8 was 9:30 am. (These times are based on the prosecution's arguments, the Petitioner's alibi defense, which she reiterates, is she was not anywhere in Clark County at anytime on July 8, 2001.)

In spite of the exculpatory evidence that could be expected to result from contacting the people who had the seven handwritten telephone numbers found on Bailey, and in particular the three numbers handwritten twice, Petitioner's counsel made no effort to contact those people. The potential value of those telephone numbers was discovered on November 13, 2009, when information was found out about one of the three telephone numbers handwritten twice that had the

capitalized letter "D" by it. It was discovered that is the telephone number of a law enforcement officer. (See Exhibit 73, Affidavit of Hans Sherrer, March 8, 2010.) Petitioner's counsel could have discovered that information prior to trial if they had made the effort to do so. The Petitioner was prejudiced by her counsel's failure to investigate Bailey's telephone numbers because if her jury had known Bailey could have been a police informant, then any number of people in Las Vegas with the means and opportunity to murder him had a motive to do so, and make an example of him. In conjunction with the absence of evidence the Petitioner was in Clark County at any time on July 8, 2001, the jury could have relied on the evidence derived from Bailey's telephone numbers to determine the prosecution had not presented evidence sufficient to prove the Petitioner's guilt, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(cc) Ground twenty-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to investigate and subpoena the Nevada State Bank checking account records of Duran Bailey, because his final statement dated July 26, 2001, shows three checks were processed from his account days after he died on July 8, 2001, one on July 12 and two on July 13, and determination that the checks were written by someone other than Bailey would support Petitioner's third-party culprit defense, and individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Duran Bailey was murdered on July 8, 2001, in the trash enclosure for the Nevada State Bank at 4240 West Flamingo Road in Las Vegas. There was testimony that Duran Bailey had a bank account at the Nevada State Bank. Duran Bailey's personal identification and information about his Nevada State Bank account were not found in his clothing or at the crime scene. Bailey's final Nevada State Bank statement is dated July 26, 2001. (See Exhibit 55, Bailey's final Nevada State Bank statement.) The statement shows that seven checks were processed from June 29 to July 6, 2001. The statement also shows that one check on July 12 and two checks on July 13 were

processed from Bailey's Nevada State Bank account. Those dates are four and five days after Bailey's murder on July 8, 2001.

On February 12, 2010 Steven Trupp, Financial Service Supervisor with the Nevada State Bank at 4240 West Flamingo Road in Las Vegas, provided information about the bank's practices in 2001. Mr. Trupp worked for the Nevada State Bank in 2001 so he has personal knowledge of the bank's practices at that time. Mr. Trupp's information is documented in the "Affidavit of Daniel Smades," dated March 11, 2010, which states in part:

> 5. Mr. Trupp said that in 2001 the processing time for a check drawn on a Nevada State Bank checking account that was cashed at a Nevada State Bank branch was two to three business days, and that would likely apply to a check drawn on a Nevada State Bank account that was cashed at another bank in Las Vegas.
> 6. Mr. Trupp said that in 2001 the processing time for a check drawn on a Nevada State Bank checking account that was cashed at a business that deposits their checks with the Nevada State Bank or another bank in Las Vegas was typically two to three business days.
> 7. Mr. Trupp said that in 2001 the processing time for a check drawn on a Nevada State Bank checking account that was cashed at a business that deposits their checks with a bank outside Las Vegas could be four to five business days.
> 8. Mr. Trupp said that a check cashing businesses, including those that cater to Hispanics, likely deposit their checks with a bank in Las Vegas for convenience and speed of being credited with their funds.
> …
> 13. Mr. Trupp looked at the statement for Duran Lamore Bailey's Nevada State Bank account number 260011457 that is dated July 26, 2001. That statement shows all activity on that account from June 29, 2001, until the account was closed on July 17, 2001.
> 14. Mr. Trupp commented on three checks listed as "Checks Processed" on Mr. Bailey's July 26, 2001, statement, one check that was processed on July 12, 2001, and two checks that were processed on July 13, 2001.
> 15. Mr. Trupp stated that because the three checks were cashed within a day of each other, they were different checks, and that they were absolutely not cashed by any branch of Nevada State Bank, but by a business or another bank, because on July 12 and July 13, 2001, there was insufficient funds in Mr. Bailey's account to cover the checks, and no Nevada State Bank branch would have cashed the checks.
> 16. Mr. Trupp made a phone call to find out if copies of the three checks processed on July 12 and 13, 2001, could be obtained, but he said he was told the records had been destroyed after seven years. Based on what Mr. Trupp said, the Nevada State Bank's record of the three checks was destroyed sometime after July 13, 2008.
> (See Exhibit 25, Affidavit of Daniel Smades.)

Based on the information provided by Trupp the check processed on July 12 was likely cashed at a Las Vegas bank or business on July 9 or 10, and the two checks processed on July 13 were likely cashed on July 10 or 11. Bailey died on July 8. So there is a strong presumption the three checks were cashed between one and three days after Bailey died.

The only reasonable explanation is the three checks processed four and five days after Bailey's death were negotiated by a person or persons who were involved in Bailey's murder. During the Las Vegas Metropolitan Police Department's search of Petitioner's personal belongings and her car nothing related to Bailey was found, and his fingerprints and DNA were not found on any of Petitioner's personal property or car. There is no basis to believe the Petitioner was the person who cashed the three checks between one and three days after Bailey's murder.

David Schieck, with the Clark County Special Public Defender's Office, became Petitioner's counsel in October 2004. Petitioner's second trial began in September 2006. During the intervening 23 months Petitioner's counsel made no effort to subpoena the Nevada State Bank to produce the three checks drawn on Bailey's Nevada State Bank account that were processed on July 12 and 13, 2001. Those checks were available to be obtained until sometime after July 13, 2008, when they were destroyed. That was 21 months after the Petitioner's convictions, and Schieck was acting as Petitioner's co-appellate counsel.

If cashed after Bailey's death as the available evidence supports, the writing and signature on the three checks could have been compared with the Petitioner's handwriting and signature, and provided additional and compelling exculpatory evidence. However, due to the inaction of Petitioner's counsel, the valuable exculpatory evidence of the three checks drawn on Bailey's bank account that were processed four and five days after his death was lost forever. If the Petitioner's jury had known that she did not cash the three checks negotiated after Bailey's murder, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(dd) Ground thirty.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to motion the court prior to trial for the LVMPD to produce Diann Parker's DNA sample if available, or in the alternative for an order for the University Medical Center in Las Vegas to produce Diann Parker's blood sample taken at the time of her rape examination on July 5, 2001, so her DNA could be compared with the DNA profiles identified from evidence collected at Duran Bailey's murder scene, and also for her fingerprints on file with the LVMPD to be compared with those recovered from the crime scene, because Parker was a key person in Petitioner's third-party culprit defense that her Mexican friends murdered Bailey, and Petitioner was prejudiced by her counsel's inaction because if Parker's DNA and/or fingerprints matched crime scene DNA and/or fingerprints, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Petitioner's third-party culprit defense was based on the circumstances of Diann Parker's report to the LVMPD that she was raped on July 1, 2001, by a man who was later identified as Duran Bailey. The LVMPD taped Parker's Statement about the rape on July 5, 2001. Petitioner's third-party culprit defense focused on the Mexican men Parker described as neighbors of hers at the Grand View Apartments. The Mexicans warned Bailey to leave Parker alone after he hit her while she was talking with them and drinking a beer in their apartment on the morning of July 1, 2001. When Parker left the Mexicans watched out to make sure she got back to her apartment OK. Later that night Bailey forced his way into Parker's apartment and beat and raped her. Bailey threatened to kill Parker because she could identify him as her rapist. After she tricked Bailey into leaving her apartment by suggesting they go get some crack, she did not call the police for fear he would kill her. Parker was home around midnight on July 4 when Bailey began beating on her exterior door and window. He eventually left and the next day she reported the rape. On July 5 LVMPD sexual assault Detective J. Scott audio recorded Parker's statement about the rape, and a medical exam was conducted at the University Medical Center.

About 6 am on the morning of July 9, 2001, as the police were mopping up the scene of Bailey's murder, one of the officers involved in taking Parker's rape Statement on July 5 noticed her

milling about at the scene. She told the officer she wanted to see if the murdered man was Bailey. Her contact information was provided to homicide Detectives Thomas Thowsen and James LaRochelle who were assigned the Bailey murder case. Later on the morning of the 9th they went to Parker's apartment and looked at her shoes and those of her male roommate. They also observed their clothes. The detectives didn't see any obvious blood so they dismissed them as suspects in Baileys' murder.

When the detectives returned to Parker's apartment on July 23 to obtain a Statement from her after the Petitioner was arrested, the following exchange took place between Parker and Thowsen:

> A: (Parker) Yes. Well I, okay, after y'all left, okay, I had my pants and shirt to where I had, I still had the blood on there.
> Q: (Thowsen) From when you were beaten up?
> A: But I forgot to show you, yeah. I forgot that. But it was my blood.
> Q: Okay.
> (Voluntary Statement of Diann Merrill Parker, Las Vegas Metropolitan Police Department, July 23, 2001, 7.)

The oddity of Parker's admission of having bloody "pants and shirt" hours after Bailey was murdered, and not telling the detectives about them when they were in her apartment on the morning of July 9, 2001, is that in her 46-page Statement of July 5, 2001, about Bailey's rape of her; in the August 23, 2001, notes of an interview by Petitioner's investigator; and in her trial testimony of May 14, 2002, Parker never once mentions the word blood, or bleeding, or that during Bailey's rape of her she suffered any wound or injury that bled, and there are no obvious bleeding injuries in the pictures taken when she was examined on July 5, 2001, at the University Medical Center for injuries.

Consequently, the most reasonable explanation for Parker having bloody "pants and shirt" hours after Bailey's murder, is she was at the scene of Bailey's murder. There is no reason to believe she participated in killing Bailey, because Thowsen and LaRochelle didn't notice any bruising or injuries to her hands on the morning of July 9. She would only have been an observer or she may have arrived after he was killed, and accidentally got his blood on her clothes. But if Parker was there then most certainly her Mexican friends were there, and it would have been they who murdered Bailey.

Since the available evidence is the Mexicans were illegals, DNA and fingerprints are not known to be on file for the two who rented the unit near Parker's at the Grand View Apartments. However, one way to link them to the crime is if Parker's DNA or fingerprints are identified as

being at the scene. If she was there, they were certainly there.

Parker died in January 2005 and there is no reasonable expectation to recover her "pants and shirt." However, DNA profiles have been identified from crime scene evidence, and fingerprints were recovered from the trash enclosure and evidence collected. Parker had a criminal history in Las Vegas and her fingerprints are on file with the LVMPD, and they are probably also in the FBI's fingerprint database. Parker's DNA may have been collected by the LVMPD, but if not, a sample of her blood or other biological matter would have been taken at the UNC on July 5, 2001, during her rape exam as part of her rape kit.

Yet Petitioner's counsel made no effort to obtain a court order for the DNA testing of Parker's biological evidence to compare with the DNA profiles obtained from the crime scene evidence, or to have her fingerprints compared with fingerprints recovered from the crime scene. If Parker's DNA or fingerprints match any of the DNA or fingerprint evidence associated with Bailey's murder, it would be extraordinary evidence in support of Petitioner's third-party culprit defense that the Mexicans killed Bailey, and if the jury had known of that evidence no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ee) Ground thirty-one

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to investigate and subpoena or obtain a court order for records of wounds of a person's groin area or penis treated at all Las Vegas area medical care facilities during May and June 2001, all reports filed under NRS 629.041 for non-accidental knife wounds of a person's groin area treated at Las Vegas area medical care facilities during May and June 2001, and all Las Vegas area police reports involving a wound to a person's groin area during May and June 2001, and counsel's failure to investigate and obtain these reports and records, individually or cumulatively with other evidence, prejudiced the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The Petitioner provided an audio taped Statement on July 20, 2001, to LVMPD Detectives Thomas Thowsen and James LaRochelle. Petitioner described being sexually assaulted at a Budget

Suites Hotel on Boulder Highway in east Las Vegas "over a month ago," which would have been prior to June 20, 2001. Petitioner also described cutting at her attacker's exposed penis in an effort to get away from him, which she was able to do. Petitioner's attacker was alive and staggering to his feet as Petitioner drove away in her car, so she did not know what injury she may have inflicted on him.

It is unknown if Petitioner's attacker sought medical attention. However, even if he did and claimed his wound was accidental, the medical care facility would have a record of it. Consequently, a key aspect of Petitioner's defense would be for her counsel to obtain records for all treated cutting wounds for the relevant period of time. A number of people have identified the Petitioner told them she was attacked in late May. (See Ground five and the Affidavits in support of that Ground.) So a subpoena or court order for the records for all knife cutting wounds treated at all medical care facilities in the Las Vegas area during May and June 2001 ("over a month" prior to July 20) could possibly result in identification of the man described in Petitioner's Statement as her attacker. In addition, if a medical care provider considered Petitioner's attacker to have a non-accidental knife wounds and they did not call the police, they would be required to file a report under NRS 629.041 with the local police agency. Consequently, a key aspect of Petitioner's defense would be to obtain all reports filed in the Las Vegas metro area under NRS 629.041 for knife wounds treated during the relevant period of time. That could be done by Petitioner's counsel obtaining a subpoena or court order for the Las Vegas Metropolitan Police Department, the Henderson Police Department, and the North Las Vegas Police Department to produce all reports filed under NRS 629.041 for non-accidental knife wounds treated in May and June 2001. Also, if the medical care provider thought Petitioner's attacker had a wound that was the result of a crime, or if the wounded man told them it wasn't accidental, the police would have been called. That would have resulted in the generation of a police report of the incident. Consequently, a key aspect of Petitioner's defense would be for her counsel to subpoena or obtain a court order for the Las Vegas Metropolitan Police Department, the Henderson Police Department, and the North Las Vegas Police Department to produce all police reports filed that involved a knife wound inflicted in May and June 2001. The importance of obtaining police reports of knife wounds is established by a Public Records request that was made to the North Las Vegas Police Department for all reports of knife wounds filed under NRS 629.041 in

May, June and July 2001. The request was modified to the months of May and June 2001, and although there were no 629.041 reports filed with the North Las Vegas Police Department during those months for knife wounds, they reported on January 27, 2010, that seven police reports of knife wounds were filed. (See Exhibit 83, North Las Vegas Public Record Request Response.)

A subpoena or court order for medical care facility records, NRS 629.041 reports and police reports related to a groin area knife wound inflicted in May and June 2001 could possibly result in identification of the man described in Petitioner's Statement as her attacker. However, Petitioner's counsel did not make any effort to subpoena or obtain a court order for production of these records. The Petitioner was prejudiced by her counsel's inaction because if a record from any of those sources was reasonably identifiable as involving the man who assaulted the her at the Budget Suites Hotel, the jury would have had a factual basis to determine the Petitioner's Statement truthfully describes a sexual assault at the Budget Suites weeks before Bailey's murder, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ff) Ground thirty-two.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to depose and subpoena LVMPD Detective Thomas Thowsen's partner James LaRochelle to testify as a defense and rebuttal witness, because LaRochelle wrote Petitioner's Arrest Report and he was present during Petitioner's Statement of July 20, 2001, the interviews of Diann Parker, Laura Johnson, Dixie Tienken, Steve Pyszkowski and many other witnesses at Petitioner's trial, and LaRochelle could have been questioned about everything Thowsen testified about that LaRochelle had personal knowledge of, and exposed the inconsistencies and outright falsehoods in Thowsen's testimony, and the failure to subpoena Det. LaRochelle prejudiced the Petitioner because with Thowsen's credibility undermined, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

LVMPD homicide Detective James LaRochelle was the partner of Detective Thomas Thowsen in the investigation of Duran Bailey's murder. Thowsen was the lead detective. Det.

LaRochelle was present when Petitioner was interrogated on July 20, 2001, and gave her Statement, and when most other witnesses in the case were interviewed, including Diann Parker, Laura Johnson, Dixie Tienken, and Steve Pyszkowski. Det. LaRochelle also wrote Petitioner's Arrest Report that conspicuously does not state the Petitioner confessed to Bailey's murder.

Det. LaRochelle could have provided testimony about everything Thowsen testified about that LaRochelle had personal knowledge of, and exposed inconsistencies and outright falsehoods in Thowsen's testimony about issues that include the circumstances of Petitioner's arrest on July 20, 2001, and the interviews of Diann Parker, Laura Johnson, Dixie Tienken, Steve Pyszkowski, Cathy Reininger, Heather McBride, Michele Austria, Paul "Rusty" Brown, and others.

New evidence establishes that Detective Thowsen's testimony at Petitioner's trial that he or his secretary searched for reports filed with the LVMPD under NRS 629.041 for groin area wounds was false; that Thowsen's testimony he contacted urologists concerning the repair of a severed penis in May, June and July 2001 was false; that Thowsen's testimony he contacted hospitals concerning an injured or severed penis in May, June and July 2001 was false; and that Detective Thowsen's testimony that he went to the Budget Suites Hotel on Boulder Highway in east Las Vegas to investigate Petitioner's Statement of July 20, 2001, was false. It is also known that Det. Thowsen's testimony concerning when he learned about the names of the Mexican men who were friends of Diann Parker, when he talked with the manager at the Grand View Apartments about the Mexicans, and what he learned when he ran Scope checks on two of the Mexicans was false. (See Ground twenty-one for specific details about Detective Thowsen's false and perjurious testimony.)

Detective LaRochelle's testimony at trial as a defense and rebuttal witness could have exposed the magnitude of Thowsen's false testimony for the jury to consider, and based on that testimony no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(gg) Ground thirty-three.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to depose and subpoena as a rebuttal witness Detective Thomas Thowsen secretary, along with all of her reports, notes, phone logs, letters, emails, and other information generated by her during the investigation of Petitioner to establish among other things, that Thowsen's cross-examination hearsay testimony was false that his secretary searched for NRS 629.041 reports of groin area injuries in Las Vegas for the months of May, June and July 2001, and if the jury had known of this evidence, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

During Petitioner's trial Detective Thomas Thowsen testified on direct examination that he made an effort to try and verify Petitioner's account in her July 20, 2001, Statement that the attack she described happened "over a month" before her Statement. He testified he did that by searching for reports of non-accidental knife wounds to a man's groin area or penis that were filed in May, June and July 2001 by medical care providers with the LVMPD as required by NRS 629.041. He also testified he found no reports. On cross-examination Thowsen changed his testimony that he delegated the search to his secretary, and she told him she found no reports. When asked on cross-examination if he recorded anything regarding the search for the NRS 629.041 reports, Thowsen replied, "It's not in a specific document, no." (8 App. 1399; Trans. XIII-117 (9-27-2006))

Thowsen's unknown and unnamed secretary did not testify, so all the jury heard was Thowsen's hearsay testimony about what he said his secretary told him that she did, and his double hearsay testimony of what he said she learned from her investigation.

Detective Thowsen testified to the following on May 10, 2002 during Petitioner's trial:

> THE COURT: The record shall reflect that when he said in here somewhere he referred to a black binder that's to his right, which contains numerous documents, is about five inches thick.
> Q (By Mr. Kohn) I believe that's his **homicide book**, is that correct detective?
> A (By Mr. Thowsen) That's correct.
> Q **And that has everything you did in the case; everything that was done in the case; is that correct?**
> A **Yes**. (3 App. 734-735; Trans. III 99-100 (5-10-02)) (Emphasis added to original.)

Detective Thowsen was not asked questions about the completeness of his "homicide book" at Petitioner's second trial. So Thowsen's testimony during Petitioner's trial that he had no record of his secretary's investigation of NRS 629.041 reports was not just inconsistent, but it was 180 degrees opposite of his testimony during Petitioner's first trial that he agreed "everything that was done in the case" is in his black "homicide book."

If Petitioner's counsel had deposed and subpoenaed Thowsen's secretary as a rebuttal witness, along with all of her reports, notes, phone logs, letters, emails, and other information generated by her during the investigation of Petitioner, it could have been proven that Thowsen's cross-examination hearsay testimony was false that his secretary searched for NRS 629.041 reports of groin area injuries in Las Vegas for the months of May, June and July 2001. That testimony would have supported the Petitioner's truthfulness and credibility in her Statement, Thowsen's dishonesty and lack of credibility.

The secretary's testimony at trial could have exposed the magnitude of Thowsen's false testimony for the jury to consider, and based on that testimony no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(hh) Ground thirty-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to subpoena the Las Vegas Metropolitan Police Department's manuals, protocols, memorandums, and/or regulations homicide detectives are required to follow when conducting a homicide investigation, to impeach Detective Thomas Thowsen testimony that he kept no records whatsoever of his investigations to verify the Petitioner's claim in her Statement of July 20, 2001, that "over a month ago" she was sexually assaulted in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas, and these manuals and other documents could have provided valuable information to elicit testimony during Thowsen's cross-examination that he would have recorded his alleged investigations if he had actually conducted them, and if the jury had known Thowsen would have records if he conducted investigations of the Petitioner's Statement, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Detective Thomas Thowsen testified that he extensively investigated the Petitioner's claim in her Statement of July 20, 2001, that she fought off a sexual assault in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas by cutting or trying to cut her attacker's exposed penis. She stated the assault occurred "over a month" prior to her Statement, which means it occurred in mid-June at the earliest. Thowsen testified:

- That at his direction his secretary searched for reports filed with the LVMPD under NRS 629.041 for groin area or penis wounds in May, June and July 2001.
- That he personally contacted hospitals concerning treatment of an injured or severed penis in May, June and July 2001.
- That he personally contacted urologists concerning repair of a severed penis in May, June and July 2001.
- That he personally went to the Budget Suites Hotel on Boulder Highway in east Las Vegas to investigate the Petitioner's Statement that is where she was assaulted.

Thowsen testified during cross-examination that he did not prepare a report on any of these investigations, even though he testified to the following during Petitioner's first trial:

> THE COURT: The record shall reflect that when he said in here somewhere he referred to a black binder that's to his right, which contains numerous documents, is about five inches thick.
> Q (By Mr. Kohn) I believe that's his **homicide book**, is that correct detective?
> A (By Mr. Thowsen) That's correct.
> Q **And that has everything you did in the case; everything that was done in the case; is that correct?**
> A **Yes**. (3 App. 734-735; Trans. III-99-100 (5-10-02)) (Emphasis added to original.)

So Thowsen's testimony during Petitioner's first trial was that he kept a record of <u>everything</u> he did in her case, and it is reasonable that a homicide detective would keep a complete record of what they did during a homicide investigation. But then during Petitioner's second trial he testified that he kept no record whatsoever of the critical investigation of the Petitioner's Statement. (See, Trans. XIII-114 (09-27-06), Trans. XIII-117 (9-27-2006), and, Trans. XIII-166 (09-27-06))

Thowsen's testimony that he couldn't substantiate the Petitioner's claims of having been attacked at the Budget Suites Hotel or that a man's penis was injured or severed in May, June or July 2001 was very unfavorable to the Petitioner – because it strongly suggested to the jury that the attack didn't happen the way she described. Petitioner's counsel needed to impeach Thowsen's testimony that he conducted an investigation of her Statement without keeping a single record of the name of anyone he talked to, when they talked, and what was specifically said. An effective way for the Petitioner's counsel to impeach Thowsen's testimony was to subpoena all Las Vegas Metropolitan Police Department's manuals, protocols, memorandums, and/or regulations that homicide detectives are required to follow when conducting a homicide investigation. Those documents would be expected to establish that Thowsen's testimony during Petitioner's first trial that he kept a record of everything he did during her case was accurate, and his testimony that he had no record of doing anything to investigate the Petitioner's Statement was because he did not do anything that he testified he did.

The Petitioner was extremely prejudiced by her counsel's failure to subpoena the LVMPD documents, because they would have established that Thowsen's testimony about investigating Petitioner's Statement was false and contrived, and it would have cast doubt on the veracity of all his testimony as the lead homicide detective in the Petitioner's case under the principle of *falsus in uno, falsus in omnibus* ('false in one thing, false in everything') Thowsen provided key testimony for the prosecution, and with his credibility tarnished or destroyed it would have provided a factual basis for the jury to have determined the prosecution did not introduce sufficient evidence proving she committed her accused crimes, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ii) Ground thirty-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to file a motion *in limine* to exclude all testimony about Petitioner's methamphetamine use that ended more than a week prior to Duran Bailey's murder and that had no relevance to Duran Bailey's murder since he used crack cocaine and not methamphetamine, and any testimony

conflating Petitioner's previous methamphetamine use with Bailey's completely different crack cocaine use at the time of his death under the umbrella of "drugs,", had an extremely prejudicial effect on the jurors and outweighed any possible probative value, or in the alternative counsel should have filed a motion *in limine* to bar the prosecution from using the misleading general word "drugs" and the phrase "drug use" that prejudicially linked different types of drugs and their users under a common umbrella, and that motion *in limine* should have required the prosecution to refer to Petitioner's previous "methamphetamine" use, and Duran Bailey's "crack cocaine" use, and counsel's failure to seek to exclude the testimony, or in the alternative to limit the prejudicial testimony, individually and cumulatively prejudiced the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The toxicology tests conducted after Duran Bailey's autopsy found there was cocaine in his system when he died on July 8, 2001. That was consistent with trial testimony by Diann Parker that he was a crack cocaine user. There was testimony that he "hung out" with crack cocaine users, which included Diann Parker. There was no testimony that Bailey used methamphetamine at any time.

All testimony about the Petitioner was that in May and June 2001 she used methamphetamine in Las Vegas. There was no testimony Petitioner used <u>any</u> methamphetamine in July 2001. The laboratory tests of Petitioner's blood collected on July 5, 2001, and her urine collected on July 7, 2001, did not detect any methamphetamine (or cocaine) in her system. There was no testimony that Petitioner used crack cocaine at any time. There was no testimony that Petitioner "hung out" with anyone who used crack cocaine in Las Vegas or anywhere else.

By referring to methamphetamine as "drugs," and Petitioner's use of methamphetamine as "drug use," the prosecution was able to conflate that with crack cocaine also referred to as "drugs," and Bailey's use of crack cocaine was also described as "drug use." The prosecution misleadingly referred to the Petitioner and Bailey as drug users without elaborating that they used completely different drugs and Petitioner didn't spend time with people who the drug Bailey used, and vice versa. The prosecution's tactic of conflating the Petitioner's use of methamphetamine and Bailey's use of crack cocaine as "drug use" was just as misleading as referring to a smoker of cigars and a smoker of marijuana as both smokers – without making a distinction that what they smoke is completely different and they can be expected to associate with different people. Petitioner's use of

methamphetamine in Las Vegas prior to returning to Panaca on July 2, 2001, had no connection whatsoever to Bailey's use of crack cocaine up to the time of his death.

The Petitioner was gravely prejudiced by the failure of her counsel to file a motion *in limine* to exclude references to Petitioner's methamphetamine use that is known to have preceded Bailey's murder, or in the alternative to compel the prosecution to correctively refer to methamphetamine and crack cocaine, and be barred from using the misleading non-descriptive terms "drugs" or "drug use." Counsel's failure to limit the misleading testimony enabled the prosecution to prejudicially mislead the jurors about her "drug use" without any restraint whatsoever by conflating it with Bailey's use of a completely different drug. If Petitioner's counsel had limited the prejudicial and non-probative testimony about "drugs" and "drug users," the jury would have had no basis to think the Petitioner and Bailey had any reason whatsoever to have ever crossed paths – and there is no evidence they ever did – and under that circumstance no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(jj) Ground thirty-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to file a formal Discovery Motion for the prosecution's disclosure of all potentially exculpatory notes, reports, photographs, summaries, and the like produced by any and all government agencies, and retained organizations and individuals, involved in the investigation, collection or analysis of information and evidence in the prosecution of Petitioner, particularly Detectives Thomas Thowsen and James LaRochelle, as that duty is imposed on the prosecution by the U.S. Constitution's due process clause, the Nevada constitution, and statutorily by NRS 174.235, but because Petitioner's counsel filed no discovery motion Petitioner due process rights have been prejudiced by the exculpatory evidence that was not disclosed to Petitioner.

Facts:

Petitioner's counsel did not file a Discovery Motion for the prosecution's disclosure of all potentially exculpatory notes, reports, photographs, summaries, and the like produced by any and all government agencies, and retained organizations and individuals, involved in the investigation,

collection or analysis of information and evidence in the prosecution of Petitioner. Although the prosecution has a duty to disclose that information under the U.S. Constitution's due process clause, the Nevada constitution, and statutorily by NRS 174.235, it is unknown to date all the information that the prosecution would have disclosed to Petitioner's counsel if the prosecution had been ordered by the court to comply with their disclosure requirements instead of the Petitioner's counsel simply relying on the prosecution to determine the degree to which they were going to comply with their legal disclosure requirements. Among the documents not provided to Petitioner's counsel by the prosecution are potentially exculpatory case notes, phone logs, travel records, telephone messages, emails, internal reports, and any other paperwork generated by Detectives Thomas Thowsen and James LaRochelle and their secretaries during the detectives investigations to verify the Petitioner's account of being attacked at the Budget Suites Hotel "over a month" prior to her July 20, 2001, Statement. Those and other non-disclosed documents could be in Detective Thowsen's 5" thick "homicide book" in a black binder that he agreed during his testimony at Petitioner's first trial has, "everything that was done in the case." (3 App. 734-735; Trans. III-99-100 (5-10-02))

The Petitioner was prejudiced by the failure of her counsel to file a discovery motion because if this exculpatory evidence had been disclosed to the Petitioner, it could have among other things, been used to impeached the testimony of Thowsen about what investigations he conducted to verify the Petitioner's Statement, and that he didn't truthfully testify regarding the Petitioner's account of being sexually assaulted at the Budget Suites Hotel, because "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (8 App. 1410; Trans. XIII-159 (9-27-2006)) If Thowsen's testimony regarding the Petitioner's Statement had been impeached, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(kk) Ground thirty-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to file a pre-trial motion to dismiss Petitioner's charge of violating NRS 201.450, because the Nevada Legislature specifically enacted that statute to only apply to sexual relations with a dead body that would be considered a sexual assault on a live person, the prosecution did not allege the Petitioner engaged in any sexual relations whatsoever with Duran Bailey's dead body, and counsel's failure to file a motion to dismiss individually and cumulatively prejudiced the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution charged Petitioner with violating NRS 201.450 based on the supposition her alleged slashing of Duran Bailey's rectum with her pocket butterfly knife in an act of spontaneous methamphetamine-fueled rage after he died, constitutes a violation of the statute. The prosecution did not allege the Petitioner and Bailey engaged in any sexual activity involving Bailey's rectum that would be considered sexual activity with a live person – such as insertion of a rubber penis – and the prosecution did not inform Petitioner's counsel that there was any proposed trial testimony alleging the Petitioner had done so.

NRS 201.450 is known as Nevada's necrophilia law, and the legislative history of the statute makes clear that it only criminalizes sexual activity with a corpse that would be considered a sexual assault on a live person. The prosecution did not charge Petitioner based on an alleged act of necrophilia with Bailey's rectum – but with mutilating his rectum by slashing it – which is not violation of NRS 201.450. The necrophilia law's origin, legislative history, and intended scope all support that the Petitioner was charged with a non-existent violation of NRS 201.450, and that the prosecution did not even allege a valid violation of the necrophilia law.

In 1982 a seven-year-old girl's corpse was stolen from a mortuary in Nevada's Washoe County (Reno). After the thief had sex with the corpse, he deposited it in a garbage can. After the alleged perpetrator's arrest, prosecutors discovered there was no necrophilia (sex with a corpse) law in Nevada, and that the state's sexual assault law only applies to a living "person," so it was inapplicable to sexual intercourse (rape) with the dead girl's body. The Washoe County District Attorney responded by

drafting a bill criminalizing necrophilia. The Nevada District Attorney Association co-sponsored the bill. Designated A.B. 287, the bill was introduced in the Nevada Assembly on March 2, 1983, and it was summarized as "Prohibits necrophilia." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly History, Sixty-second Session, March 2, 1983, p. 107.))

Ed Basl represented the Washoe County District Attorney's Office, and in his testimony on March 16, 1983 before the Assembly Judiciary Committee, he made it clear that the purpose of the bill was to criminalize the rape of a corpse. Basl specifically stated that the drafter of the bill and its sponsors wanted "to have the penalty the same as a sexual assault [of a live person]." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly Judiciary Committee, March 16, 1983, 988.)) The proposed law was predicated on the assumption that since a dead person (regardless of age) can't provide consent, then any sexual activity with a corpse is non-consensual, and thus the equivalent of raping a live person. Rape is defined as, "Nonconsensual sexual penetration of an individual, obtained by force or threat, or in cases in which the victim is not capable of consent." (*Dorland's Illustrated Medical Dictionary, 31st Edition*, (Philadelphia: Saunders/Elsevier (2004)), 1617.))

On March 30, 1983 the Nevada Assembly passed the bill.

Basl reiterated during his testimony before the Senate Judiciary Committee on April 5, 1983, that the sole purpose of the bill was to criminalize sexual relations with a corpse: "Mr. Basl went on to say that he does not believe the bill needs to be amended by adding a series of other felony and/or other offenses: that part of the problem as far as the way dead bodies are handled, is covered already by existing legislation, but the one area that is completely void of mention is the area of sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788 (Underlining added to original.)) Basl testified before the Senate committee, as he had before the Assembly committee, that the sponsors seeking to criminalize necrophilia wanted "to make the penalty conform to those for sexual assault [of a live person]." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 789.))

The Nevada Senate passed the necrophilia bill (A.B. 287) on April 13, 1983. The governor signed the bill on April 20, and it became effective on July 1, 1983 as NRS 201.450. The statute states in part: "sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living." NRS 201.450(2).

The only testimony before the House and Senate Judiciary Committees was by Basl. His explanation of the law's intent is unquestionable because he was the official representative of the necrophilia law's drafter and co-sponsor – the Washoe County District Attorney's Office. There was no testimony whatsoever that the law has any application to any situation other than a person engaging in sexual activity with a corpse that would be considered sexual activity if committed with a live person, which is why it is known as Nevada's necrophilia law. The limited scope of the law's applicability is explained by Basl's testimony before the Senate committee that the law was intended to fill the absence of a law prohibiting "sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788.)

Basl's testimony of the law's intended purpose is consistent with the sex act that inspired the necrophilia law – sexual intercourse with a dead young girl's body.

That the necrophilia law was intended to criminalize sex acts with a corpse that would be illegal if performed on a nonconsenting (or underage) living person is not only made clear from Basl's testimony before both the Assembly and Senate Judiciary Committees, and the facts of the corpse rape that inspired the law, but from the language of the law itself. It criminalizes "sexual penetration" of a dead body, and it states that "means cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living." NRS 201.450(2) Thus insertion of a penis or a dildo into a corpse's anus or vagina would be as punishable as the equivalent of doing the same in an illegal manner with a non-consenting live person.

The intent of the necrophilia law to criminalize the sexual assault of a dead body is further supported by the fact that the definition of "sexual penetration" is almost identical for both the Nevada laws criminalizing "Sexual Assault and Seduction" of a living person and the necrophilia law. The only difference between the definition of "sexual penetration" of a living "person" (in NRS 200.364) and of a corpse in the necrophilia law, is that the latter includes the two words "without limitation," preceding "sexual intercourse in its ordinary meaning if practiced upon the living." The legislative history of the necrophilia law doesn't state what the two additional words mean, however, since they are immediately followed by "sexual intercourse," it is reasonable to assume they directly relate to sexual intercourse "without limitation." That assumption is consistent with the Assembly and Senate committee testimony that the purpose and intent of the necrophilia law to criminalize the same sex acts committed with a corpse as with a living person.

The necrophilia bill's intent to only apply to sex acts with a corpse – as understood from its plain language, Basl's testimony, the circumstances of sexual intercourse with the dead Washoe County girl that inspired the law, and the legislature's definition of "sexual penetration" – is consistent with the *Oxford English Dictionary's* definition of necrophilia: "Fascination with death and dead bodies; esp. sexual attraction to, or intercourse with, dead bodies." The *Oxford English Dictionary* is the world's most authoritative English dictionary.

At the time the Clark County District Attorney's Office filed the necrophilia charge against Blaise on July 31, 2001, the only evidence of Bailey's injuries was ME Simms' Autopsy Report that did not state Bailey was sexually assaulted before or after his death. During Blaise's preliminary hearing on August 7, 2001, the DA's Office did not present any eyewitness or expert testimony that Bailey experienced any postmortem anal sexual activity. During Petitioner's preliminary hearing Clark County Medical Examiner Lary Simms' testified about his autopsy findings:

> Q. (By Mr. Jorgensen) Now, what were the – what did you find on external examination?
> A. (By Mr. Simms) Well, there was dozens of injuries. Do you want me to go into each individually or sum them up?
> Q. Would you sum them up?
> A. There was a number of blunt force injuries all over the head and face. And there were a number of sharp force injuries including slash wounds and stab wounds that

> involved the neck, face; there were defensive wounds on the hands; there was a stab wound in the abdomen; and there was some sexual mutilation, the penis was amputated; *there was a large slash wound in the rectal area*."
> (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 19. (underlining added to original.)

Simms testified about the "slash wound" to Bailey's rectal area during an additional five exchanges with the assistant district attorney. There was no testimony by Simms that a person had sexual relations with Bailey rectum after his death.

Thus Petitioner was charged with violating the necrophilia law, and then ordered to stand trial after her preliminary hearing, without any evidence offered by the Clark County DA supporting the allegation that she – or anyone else – had any form of sexual relations with Bailey's rectum after his death.

The prosecution justified the necrophilia charge against the Petitioner based on Simms' testimony that after Bailey died his rectum was slashed by a sharp object. While Simms' testimony may support an accusation of corpse mutilation, it doesn't even support the suggestion, much less a substantive allegation, that Bailey was raped after his death. As Basl made clear in his testimony, the purpose of the necrophilia law was to criminalize the same sexual activity conducted with a corpse that constitutes sexual assault of a live person. Inflicting multiple stabbing and slicing injuries on a living person, including slashing his or her rectum, is a form of causing bodily harm. The same is true of slashing a corpse's rectum.

So the Clark County District Attorney's Office effectively created an entirely new law never contemplated or enacted by the Nevada Legislature when it applied the necrophilia law to the allegation that Bailey's rectum was slashed after he died. Application of the necrophilia law doesn't conform to the letter, spirit, or legislative intent of NRS 201.450. The prosecution did not even allege in charging Blaise with violating the necrophilia law that Bailey's corpse had been raped. Nor did the prosecution allege during Blaise's preliminary hearing or her two trials that Bailey's dead body had been raped/sexually assaulted.

The prosecution wasn't even on completely solid ground in alleging that Bailey's rectum injury was due to slashing by a sharp object. During Blaise's retrial defense medical expert Dr.

Michael Laufer testified that in his years as a hospital emergency room physician he had seen many people with rectum injuries similar to Bailey's that were caused by the seam of their pants when they were kicked. Thus, in his opinion a sharp object may not have been involved. In spite of their different opinions about the possible cause of Bailey's rectum injury, the common denominator of Simms and Laufer's testimony was that neither opined his injury was caused by a person engaging in sex with Bailey's corpse. Likewise, neither opined that anyone had sex with Bailey after his death. Consequently, regardless of how Bailey's rectum injury occurred – through a kick to the seam of his pants or slashing by a sharp object – no evidence was presented that the person or persons who murdered Bailey had sex with his corpse, so they did not violate the necrophilia law (NRS 201.450).

The facts clearly show that Petitioner was charged with and prosecuted for a non-existent violation of Nevada's necrophilia law – NRS 201.450. The Petitioner was prejudiced by her counsel's failure to represent her interests by filing a motion to dismiss the charge against her of allegedly violating NRS 201.450.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ll) Ground thirty-eight.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to retain one or more forensic entomologists to investigate and analyze the case evidence to determine Duran Bailey's time of death, report their findings, and testify to those findings during Petitioner's trial, and counsel's failure prejudiced the Petitioner because after considering the entomology evidence of Bailey's time of death, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

No expert forensic entomology evidence was introduced at trial by the prosecution or Petitioner's counsel. The prosecution argued to the jury that credible alibi witnesses placed Petitioner on July 8, 2001, 170 miles north of Las Vegas at her parents' home in Panaca, Nevada from "11:30 a.m. through that night," and that a telephone call from the Lobato home to the cell phone of

Petitioner's step-mother Rebecca Lobato at "10 a.m." was probably made by the Petitioner in Panaca. (9 App. 1726; Trans, XIX 130 (10-5-06)) Assuming the latest time it is known Petitioner was seen in Panaca (11:30 a.m.) and the fastest travel time testified to at trial – two hours – that means the latest Petitioner could be in Las Vegas was 9:30 a.m. on the morning of July 8, 2001. The Petitioner was convicted on the basis of the prosecution's argument to the jury that Duran Bailey died "sometime before sunup" while it was still dark. (9 App. 1723; Trans, XIX 121 (10-5-06)) Bailey was found "around 10 pm." (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) It was dark until nautical sunrise at 4:24 am on July 8. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) Based on the prosecution's argument Bailey's body laid in the trash enclosure for more than 17-1/2 hours (from before 4:24 am until 10 pm (approx.)) – which included all daylight hours – until it was discovered several hours after sunset which was at 8:01 pm. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) (These times are based on the prosecution's arguments, the Petitioner reiterates her alibi defense that she was not anywhere in Clark County at anytime on July 8, 2001.)

The full color photographs of Duran Bailey's body at the crime scene and prior to his autopsy show a man who has minimal decomposition and no signs visible to the naked eye of insect activity or predatory bites on his body.

Dr. Gail S. Anderson is a professor in the School of Criminology at Simon Fraser University in Burnaby, British Columbia, Canada. Dr. Anderson is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology, and her C.V. is 73 pages long. Dr. Anderson examined the entomology evidence in Petitioner's case and wrote the "Report of Dr. Gail S. Anderson," December 17, 2009. (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009. C.V. summary attached.) Dr. Anderson's Report states in part:

> "Blow flies are attracted to human remains, and any other carrion or meat product, in order to lay their eggs. Eggs are laid within minutes of the remains being located by blow flies, meaning that they are laid within a very short time after death, usually minutes. …
>
> …
>
> Insects are attracted to wounds first as the first instar or first stage larvae or maggots which hatch from these eggs in a few hours need to feed on a liquid protein source. Therefore, a bloody wound is extremely attractive to female blow flies and they would be expected to lay large numbers of egg masses on the body.

> Insect activity can be limited by a number of parameters. Blow flies are **diurnal** animals, meaning they are **only active during daylight hours**. …
>
> Therefore, if remains are found after dark and show no evidence of insect activity, yet all other conditions are appropriate for insect flight, then it is concluded that the victim died after dark. …
>
> ….
>
> I have reviewed the photographs in order to see whether or not insects had located the remains and laid eggs. Although the remains would have been extremely attractive to insects due to the extensive wounds and blood present at the scene, I do not see any evidence of insect activity. In this case, the weather conditions and season were optimal for insect activity, and nothing that can be observed that would have prevented the insects from accessing the body.
>
> …
>
> In this case the extensive wounds, accessibility, season and temperature would have made these remains extremely attractive to insects immediately after death if they had been present during the daylight hours. The lack of insect activity and lack of insect eggs show that the remains could not have been present at the scene during the daylight hours of 8 July 2001. …
>
> In consideration of the above, it is my opinion as a forensic entomologist, … that to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm). I do not believe that it is possible that the remains were present during the entire daylight hours of 8 July 2001."
>
> (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009, 3-5.)

Based on Dr. Anderson's Report, the earliest time of Bailey's death to a "reasonable scientific certainty" was after 8:01pm, which was 10-1/2 hours AFTER the LATEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am. Based on Dr. Anderson's Report Bailey "most probably" died after 9:08 pm, which was more than 11-1/2 hours AFTER the LATEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am. Based on Dr. Anderson's Report about the entomology evidence, the earliest time of Bailey's death to a "reasonable scientific certainty" was after 8:01pm, which was 13 hours AFTER the EARLIEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 7 am. Based on Dr. Anderson's Report Bailey "most probably" died after 9:08 pm, which was more than 14 hours AFTER the EARLIEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 7 am. Dr. Anderson specifically rejects the possibility that Bailey's body could have lain in the trash enclosure during the entire daylight hours of July 8 – which was implicit in

the prosecution's argument to the jury that Bailey died in the trash enclosure "sometime before sunup" and laid there all day until discovery of his body after dark that night.

Dr. Linda-Lou O'Connor is a professor in the Department of Entomology at the University of Kentucky in Lexington, Kentucky. Dr. O'Connor is the treasurer of the North American Forensic Entomology Association. Dr. O'Connor examined the entomology evidence in Petitioner's case and wrote the "Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor)," February 11, 2010. (See Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010.) Dr. O'Connor's Report states in part:

> **Insect Behavior and Development**
>
> Dipteran (flies) in the family Calliphoridae are usually the first insects to arrive after death. This can occur within minutes or hours after death (5). The presence as well as absence of these species can assist in determining the postmortem interval (PMI) estimate. Flies in the families Calliphoridae and Sarcophagidae (flesh flies also known to be attracted to remains shortly after death) begin their activity after daybreak (late morning) are most active in the afternoon with activity declining sharply at or just before sunset (6-10). Nocturnal oviposition/larviposition (egg/larval laying) is an unlikely event for these flies (6, 11-15).
>
> **Analysis**
>
> Based on the photographic evidence, there was no visual verification of fly activity. The lack of adult flies and eggs indicates that colonization had not yet taken place at the time of discovery. It is possible that a few eggs are undetectable from the images provided; however, the accumulation of adults and egg deposits on remains that originate during diurnal activity are not present. This supports a PMI estimate after sunset, which was at 8:01 pm on July 8, 2001.
>
> (See Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010, 3-4)

Dr. O'Conner writes in her Report about her Conclusion: "Based on the lack of colonization of blow flies and/or flesh flies, estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001." (1)

Based on Dr. O'Connor's Report about the entomology evidence, the earliest time of Bailey's death "is after sunset, which was at 8:01 pm on July 8, 2001." That was 10-1/2 hours AFTER the LATEST time that the prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 9:30 am. Based on Dr. O'Connor's Report the earliest time of Bailey's death "is after sunset, which was at 8:01 pm on July 8, 2001." That was 13 hours AFTER the EARLIEST time that the

prosecution conceded to the jury the Petitioner could have been in Las Vegas on July 8 – 7 am. Dr. O'Connor's conclusion is inconsistent with the prosecution's argument to the jury that Bailey died in the trash enclosure prior to sunup and laid there until discovery of his body after dark that night.

Dr. M. Lee Goff is a professor and director of the Chaminade University Forensic Sciences program in Honolulu, Hawaii. Dr. Goff is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. He has conducted training courses at the FBI Academy, he is a consultant for the television crime dramas *CSI* and *CSI: Miami*, and he is the author of *A Fly For The Prosecution: how insect evidence helps solve crimes* (Harvard University Press, 2000). Dr. Goff examined the entomology evidence in Petitioner's case and wrote in his Report on March 12, 2010. (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.) Dr. Goff concurs with Dr. Anderson's finding that "to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.) Dr. Goff's conclusions are inconsistent with the prosecution's argument to the jury that Bailey died in the trash enclosure prior to "sunup" and that he laid there until discovery of his body after dark that night.

Based on the forensic entomology evidence in Petitioner's case documented in the separate and independent findings by Dr. Anderson, Dr. O'Connor, and Dr. Goff, it is a scientific and physical impossibility that the Petitioner committed her convicted crimes. The egg laying behavior of flies is scientifically documented. It is not a matter of opinion or conjecture. The forensic entomology evidence is the functional equivalent of Duran Bailey providing eyewitness evidence from his grave that the Petitioner did not murder him. The prosecution conceded to the jury that the Petitioner was 170 miles from Las Vegas in Panaca at the time when the new forensic entomology evidence conclusively establishes Bailey was murdered, and the jury was unaware of this exculpatory evidence.

Exhibit 101 is a timeline of what the forensic entomology testimony would have been about Bailey's time of death after 8 pm compared with the prosecution's concession the Petitioner could not have been in Las Vegas later than 9:30 am on July 8, 2001, and ME Lary Simms uncontested time of death testimony it is "possible" Bailey died as early as 3:50 am and then laid in the trash

enclosure for 18 hours before discovery. (See Exhibit 101, Timeline of new time of death evidence And Kirstin Blaise Lobato's alibi.)

The forensic entomology evidence in Petitioner's case conclusively establishes it is a scientific and physical impossibility the Petitioner committed her convicted crimes. However, Petitioner's counsel did not retain any forensic entomologists to examine the evidence prior to trial, or present expert forensic entomology evidence at trial. Consequently, the jury was unaware of the exculpatory forensic entomology evidence that would have established the prosecution could not prove beyond a reasonable doubt the Petitioner was in Las Vegas at the time of Bailey's murder. The Petitioner was gravely prejudiced because if the jury had known this forensic entomology evidence of Bailey's time of death, evidence no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(mm) Ground thirty-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to introduce the testimony of a psychologist expert in the analysis of a suspect's statement to provide Petitioner's jurors with the information they needed to understand that Petitioner's Statement of July 20, 2001, is not a confession to Duran Bailey's murder and post-mortem cutting of his rectum, and that there is no educated or objective basis for Detective Thomas Thowsen's testimony the Petitioner "jumbled" details in her Statement to "minimize" her involvement in Bailey's murder and that the attack of her at the Budget Suites "didn't happen," and if the jury had been presented with this exculpatory expert evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

No expert psychology evidence by a qualified psychologist was introduced at trial by the prosecution or Petitioner's counsel concerning the process of evaluating whether a suspect's statement is a confession, a false confession, or is not a confession to a crime. In particular, there was no expert psychology testimony regarding the Petitioner's Statement of July 20, 2001, that describes her being sexually assaulted at a Budget Suites Hotel in east Las Vegas "over a month"

prior to the date of her Statement, and which does not have any specific details matching the details of Petitioner's accused crimes of Duran Bailey's murder and post-mortem cutting of his rectum.

The prosecution elicited testimony from LVMPD homicide Detective Thomas Thowsen that based on a few on-the-job experiences with methamphetamine users it is his opinion that the reason Petitioner's Statement does not match Bailey's murder is because she "jumbled" the details to "minimize" her involvement. Although the prosecution did not provide notice prior to trial in accordance with state law that Detective Thowsen would be providing expert psychology opinion testimony, his "expert" opinion testimony was not objected to by Petitioner's counsel, and it stood unchallenged because no expert testimony by a qualified psychologist was offered by Petitioner's counsel. Prior to trial Petitioner's co-counsel Shari Greenberger contacted Dr. Richard Leo, one of the world's leading experts in the field of analyzing confessions/false confessions. Dr. Leo agreed to be an expert for the Petitioner's defense at a reduced rate from his normal fee and he agreed to consider a cap on his fee. However, concerns over the expense by Petitioner's lead counsel, Clark County Special Public Defender David Schieck resulted in the failure to retain Dr. Leo.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a qualified psychologist willing to review the Petitioner's Statement and associated materials on a *pro bono* basis to determine if the Petitioner's Statement could be considered a confession, a false confession, or no confession to Bailey's murder and the post-mortem cutting of his rectum. Psychologist Dr. Allison D. Redlich agreed to review the information in the Petitioner's case.

Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law

Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001. Dr. Redlich's report of February 10, 2010, states in part:

> From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.
>
> Although I do not consider Ms. Lobato's case a typical false confession case because she did not confess to the crime in which she was charged and convicted of, her case does share many hallmarks of proven false confession cases. Most notable are the inconsistencies between Ms. Lobato's version of events and the objective facts of Mr. Bailey's death. These inconsistencies have been documented by yourself and others, so I will not go into detail, but they include the date of the crimes, the location and time of the crimes, the supposed murder weapon, the shoe print left at Mr. Bailey's crime scene (and lack of a match with Ms. Lobato's shoes), and numerous others.
>
> In addition, in proven false confession cases, there is often no other evidence linking the suspect to the crime except the false confession statement. Similarly, in some of these cases, there is an absence of evidence that is consistent with the commission of the crime and/or the confession statements. To my knowledge, there is no physical evidence linking Ms. Lobato to Mr. Bailey's murder, as well as a lack of corroborating evidence given the manner of the murder.
>
> Another commonality found in proven false confession cases is that the confession statements are not generative in they do not lead to new evidence and/or tell the police details that are not already known. To my understanding, Ms. Lobato's statements did not provide any new evidence or information concerning the Bailey murder.
>
> Finally, I comment on Detective's Thowsen's claim that suspects often minimize their involvement with crimes. It is likely that some guilty suspects do minimize their involvement, in large part because police interrogators are trained to induce suspects to minimize. Specifically, the Reid Interrogation method (i.e., the most commonly used and well known method, see Inbau, Reid, Buckely, & Jayne, 2001) trains interrogators to utilize minimizing themes and scenarios (Step 2); that is, scenarios that make it easier for the suspect to admit to wrongdoing. However, I stress that almost all, if not all, proven false confessions also contain minimization. For example, in the well-established proven false confession case of the five teens involved in the Central Park Jogger crime, the teens minimized their involvement by claiming actions such as holding the victim's legs but not committing the rape itself. Thus, in my opinion, Ms. Lobato's version of events should not be construed as

> minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her.
> (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

Dr. Redlich provides the expert assessment that was not presented at trial for the jury to rely on in evaluating how and why the Petitioner's Statement is not a confession to the murder of Duran Bailey. Dr. Redlich explains that Petitioner's Statement is concerned with an unrelated event in which Petitioner was the victim, and she defended herself "by attempting to cut the penis of a man who was allegedly sexually assaulting her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010, 2.) Just as important as identifying the Petitioner's Statement is not a confession to Bailey's murder, is Dr. Redlich's conclusion that Detective Thowsen's testimony was inaccurate that Petitioner "jumbled" and minimized" about Bailey's murder in her Statement. Completely contrary to Det. Thowsen's testimony that Petitioner was deceptive, Dr. Redlich specifically observes "that Ms. Lobato believed she was cooperating with a police investigation." And, "Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010, 2.)

Dr. Redlich's expert psychological analysis conclusively establishes Petitioner's Statement is not a confession to Bailey's murder and she did not "minimize" or "jumble" details of his murder in her Statement. The Petitioner was prejudiced because her counsel did not retain Dr. Redlich or an equally qualified psychology expert whose testimony would have been expected to provide the jury with evidence they could rely on to reject Detective Thowsen's characterization and the prosecutor's arguments that Petitioner's Statement is a confession to Bailey's murder. Based on that expert psychology testimony no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(nn) Ground forty.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to retain a forensic pathologist to independently investigate and analyze the case evidence and testify about Duran Bailey's injuries and the cause and time of his death, and counsel's failure prejudiced the Petitioner because after considering the forensic pathologist's exculpatory evidence including Bailey's time of death, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

No expert forensic pathology evidence was introduced at trial by Petitioner's counsel. Consequently, the jury had to solely rely on the testimony of Clark County Medical Examiner Lary Simms.

Petitioner's counsel could have presented significant exculpatory testimony at trial if a forensic pathologist had been retained to review and report on the medical evidence in the case. That is evidenced by the findings of Dr. Glenn M. Larkin, who conducted a post-conviction review of the same medical documents and photographs that he or another forensic pathologist could have reviewed prior to the Petitioner's trial.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a forensic pathologist willing to do a complete review of the medical evidence in the Petitioner's case on a *pro bono* basis to determine among other things, Bailey's time of death. Forensic pathologist Dr. Glenn M. Larkin agreed to review the medical evidence in the Petitioner's case.

Dr. Glenn M. Larkin is a forensic pathologist with 46 years experience. Dr. Larkin is a leading forensic pathologist on the subject of determining time of death. Dr. Larkin authored the chapter "Time of Death" in *The Forensic Sciences* (1997), edited by Dr. Cyrus H. Wecht. Based on his review of the evidence, Dr. Larkin wrote the "Affidavit of Glenn M. Larkin, M.D., 5 January 2010. (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010.) The following explain how key findings and observations of Dr. Larkin's review apply to Petitioner's case (with page number indicated):

- "No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites." (2)

- "Dr Simms lists the proximate cause of death as "cranio-cerebral injuries". He does not describe or even mention any cortical contusion, contusion hemorrhage or contusion necrosis, nor does he describe any cerebellar-tonsillar or other herniation, expected with severe head injury." (3-4)
- "The severed (common) carotid artery is given minimal mention." (4)
- Dr. Simms identified Bailey's liver as on the left side of his body, but "The liver is NOT on the left side of the abdomen, unless Mr. Bailey has a *situs inversus*, not mentioned in the autopsy protocol." (4)
- "The description of any injury follows Mallory's dicta — SIZE, SHAPE, COLOR, and CONSISTENCY. Every injury that is visible has at least two measurable dimensions, height, width, and occasionally depth. Dr Simms fails to supply all parameters." (4)
- "The penectomy (amputation of the penis) is casually described; No mention of any pathology in the glans, foreskin or shaft is mentioned Nor was the characteristic of the amputation line described." (5)
- "The amount of skin — covered by dense hair — attached to the cut end of the penis — "surgical margin" — is much smaller than the defect seen on the distal abdominal wall. This suggests two separate acts of mutilation." (5)
- "Removal of the penis at its base could be accomplished with one hand holding the weapon, the second hand stretching the skin — the second mutilation, similar to skinning an animal — required one hand to stretch the skin, and the other hand to cut through the sub cutis on the stretch." (5)
- "The perpetrator either had some medical knowledge, or experience skinning an animal." (5)
- "Given the poor lighting, it suggests that a third hand was involved to supply light, or that the perpetrator(s) has a head lamp." (5)
- "The ano-rectal mutilation is not well described nor photographed; the incision depth is not mentioned, nor if any sphincters were cut." (5)
- "Based on the autopsy descriptions, there is no apparent documented cause of death." (5) (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010.)

Dr. Larkin summarized his key findings, "It is my opinion to a reasonable medical and scientific certainty that":

1. Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk. The lack of blow fly infestation suggests an even shorter time between when Bailey died and was discovered. This opinion has to be tentative because of a paucity of data. Bailey was not doused in gasoline to prevent blow-fly attack.
2. There is a good probability that more than one person was involved in this attack and murder. At least one perpetrator was skilled either with medical knowledge or animal husbandry to effect the mutilation of Bailey's groin area.
3. Bailey put up a spirited defense against his attackers, judging from the defense wounds on his fingers.
4. Because no brain sections were made, the timing of the head wounds with respect to the other wounds cannot be determined. [On February 4, 2010, Petitioner's trial

counsel turned over to the Petitioner Simms' "Neuropathology Examination" dated September 10, 2001. This new information was forwarded to Dr. Larkin who reported it did not alter the findings of his Affidavit of January 5, 2010.]
5. A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds; there are no choil or tang impressions on the skin.
6. Bailey survived either conscious or not, a short time after being attacked
7. Because of the disparity of size, and Lobato's squeamishness to blood, it is unlikely that she could have defended herself against a streetwise Bailey.
8. There is absolutely no evidence to suggest that Bailey was doused in gasoline during or after the attack." (8)
(See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010.)

The following explain how key findings and observations of Dr. Larkin's report apply to Petitioner's case:

- "There is a good probability that more than one person was involved in this attack and murder," (8) and "Given the poor lighting, it suggests that a third hand was involved to supply light, or that the perpetrator(s) has a head lamp." (5) (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, page numbers as indicated.) The following explains how those findings apply to Petitioner's case:

The prosecution argued to the jury that Petitioner alone was responsible for Duran Bailey's murder and his numerous wounds inflicted prior to and after his death, and that it was dark "sometime before sunup" when she committed the crimes. Consequently, Dr. Larkin's finding that there were probably more than one person involved in attacking and murdering Bailey is highly significant. Dr. Larkin identifies as a specific reason for his conclusion that multiple people were probably involved, is that the amputation of Bailey's penis and wound to his groin area required two hands, and because of the poor lighting in the trash enclosure artificial light provided by a "third hand" would be required. A Las Vegas Metropolitan Police Department photo shows that without artificial light by a flashlight or some other means, the interior of the trash enclosure was almost pitch black during the very early morning hours when the prosecution argued to the jury Bailey was murdered. (See Exhibit 68, Trash enclosure without lights.) The darkness at the crime scene at the time the prosecution argued Bailey was murdered was compounded because it was partly cloudy – and so there was minimal or no

starlight. (See Exhibit 30, Las Vegas weather, July 8, 2001.) The crime scene conditions thus support Dr. Larkin's finding that with the necessity of artificial light two perpetrators were "probably" involved. Dr. Larkin did provide the caveat that one perpetrator wearing "a head lamp" could have inflicted the wounds. However, since the day of Petitioner's arrest on July 20, 2001, the prosecution has not alleged that she wore "a head lamp," and there was no testimony at trial that a "head lamp" or that ANY type of artificial light was used during the attack and murder of Bailey. In addition, the prosecution argued to the jury that the Petitioner acted in a fit of spontaneous methamphetamine-fueled rage. Use of "a head lamp" not only doesn't fit the prosecution's argument the crime was spontaneous, but use of such a device would be far beyond the planning and sophistication that could be expected of the Petitioner as an 18-year-old female high school graduate with no criminal record. Furthermore, neither a "head lamp" nor a flashlight was found during the LVMPD's search of the Petitioner's personal belongings and her car.

- "The perpetrator either had some medical knowledge, or experience skinning an animal." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 5.) The following explains how those findings apply to Petitioner's case:

There was no testimony, and the prosecution did not argue to the jury that Petitioner either had medical knowledge or experience skinning an animal. That lack of testimony is to be expected because the Petitioner was an 18-year-old female high school graduate, not a medical college student, and there was testimony the Petitioner did not like hunting and was squeamish around blood.

- "The amount of skin — covered by dense hair — attached to the cut end of the penis — "surgical margin" — is much smaller than the defect seen on the distal abdominal wall. This suggests two separate acts of mutilation." (5); "Removal of the penis at its base could be accomplished with one hand holding the weapon, the second hand stretching the skin — the second mutilation, similar to skinning an animal — required one hand to stretch the skin, and the other hand to cut through the sub cutis on the stretch." (5); and, "There is a good probability that more than one person was involved in this attack and murder. At least one perpetrator was skilled either

with medical knowledge or animal husbandry to effect the mutilation of Bailey's groin area." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how those findings apply to Petitioner's case:

> The prosecution argued to the jury that the removal of Bailey's penis caused the wound to Bailey's groin area, based on the testimony of Clark County Medical Examiner Lary Simms. Among Dr. Larkin's reasons for determining Bailey's murderer was skilful in "medical knowledge" and "animal husbandry" was the penis amputation, and then in a separate mutilation the "skinning" of the area around where his penis had been. In the dark trash enclosure where it was difficult for a person to see their hand in front of their face, artificial lighting was necessary for the precise multiple acts of carving on Bailey's body shown by the photos. (See Exhibit 34, Bailey's groin area; and, Exhibit 31, Bailey's penis.) Yet, the prosecution did not argue, and there was no evidence at trial, that Petitioner had any "medical knowledge" or skill at "animal husbandry," or that Petitioner had either a "head lamp" or a flashlight, and neither was found in the LVMPD's search of Petitioner's car or her personal belongings. Contrary to Dr. Larkin's analysis, the prosecution conflated the two skillfully performed acts of mutilation on Bailey, his penis amputation and then his "skinning," into a single act by an 18-year-old female with no medical knowledge or animal husbandry experience who the prosecution argued was acting under the influence of methamphetamine. Ironically, ADA William Kephart's rebuttal argument supports Dr. Larkin's analysis that at least one of Bailey's murderers had medical knowledge: "That there is your premeditation, your deliberation. It went to a point where **there was a directed wound to the carotid artery**. There was a blunt force trauma to the head that knocks him down. **Directed wound to the liver area**." (Trans. XIX-210 (10-5-06)) There was no testimony that the Petitioner had any medical knowledge so that she could make a "directed wound" to Bailey's "carotid artery" and to his "liver."

- "A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how those findings apply to Petitioner's case:

The prosecution argued to the jury that Petitioner used her pocket butterfly knife with a 3-1/2"-4" blade to inflict Bailey's stabbing and cutting wounds. Dr. Larkin's determined that a range of knife types that all had much different blades than the Petitioner's knife caused Bailey's wounds.

- "Bailey survived either conscious or not, a short time after being attacked." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how those findings apply to Petitioner's case:

The prosecution argued to the jury, based on Dr. Simms' testimony, that stab wounds to Bailey's abdomen, his penis amputation, and the cut to his rectum were inflicted after Bailey was dead. But Dr. Larkin determined "to a reasonable medical and scientific certainty that" that those wounds were inflicted while Bailey was still alive, but possibly immobilized and unconscious from the shock of blood loss. Dr. Larkin's analysis also means Bailey was buried alive under trash and cardboard by his attackers. Dr. Larkin's analysis that Bailey lived for a period of time after his attack although bleeding from his wounds, is consistent with the recent national news story of a shark attack off the coast in southern Florida. Wind-surfer Stephen Schafer was severely bitten on his buttocks and his leg by a shark, and like Bailey lost about half his blood. Although bleeding profusely from his multiple wounds, Schafer survived and was conscious for more than forty minutes unattended as a life guard paddled 1/4 mile out from shore to get him and bring him back to shore. Schafer died later in a hospital due to his blood loss. (See Exhibit 56, Shark attack victim died from massive blood loss, *The Washington Post*, February 5, 2010.) Dr. Larkin's determination that Bailey was alive after being attacked is particularly important because Petitioner was convicted of one count of violating NRS 201.450, which requires that the alleged victim of a "sexual penetration" must be dead. With Bailey being alive at the time of his rectum wound, Bailey's assailant could not have violated NRS 201.450 (See Ground eight for a complete explanation of the consequences to the Petitioner about Bailey being alive for a period of time after he was attacked.)

- "Bailey was killed in the evening, a few hours at most before he was discovered, more likely than not within two hours before discovery, perhaps at dusk." (See Exhibit 4, Affidavit of

Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how those findings apply to Petitioner's case:

Duran Bailey's body was discovered by Richard Shott "around 10 pm" in a 10' x14' trash enclosure at the northwest corner of the Nevada State Bank's parking lot at 4240 West Flamingo Road in Las Vegas on July 8, 2001. (Richard Shott testimony, 6 App. 1000; Trans. IV-54 (09-14-2006)) Emergency 911 received Shott's call at 10:36 pm. The prosecution argued to the jury Petitioner murdered Duran Bailey in the early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans, XIX 121 (10-5-06)) It was dark until nautical sunrise at 4:24 am on July 8. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) Based on the prosecution's argument Bailey's body laid in the trash enclosure for more than 17-1/2 hours (from before 4:24 am until 10 pm (approx.)). The prosecution also argued to the jury that credible alibi witnesses placed Petitioner on July 8, 2001, at her parents' home in Panaca, Nevada from "11:30 a.m. through that night," and that a telephone call from the Lobato home to the cell phone of Petitioner's step-mother Rebecca Lobato at "10 a.m." was probably made by the Petitioner in Panaca. (9 App. 1726; Trans, XIX 130 (10-5-06)) There was trial testimony by Nevada Department of Transportation supervisor Phil Boucher that he had traveled the roads from Las Vegas to Panaca many times and it normally took him about three hours when travelling at an average of 72 mph on the open road. On cross-examination by the prosecution, Boucher agreed it was "possible" traveling at a very high speed to drive from Las Vegas to Panaca in two hours. So given the latest period of time the prosecution conceded to the jury Petitioner was in Panaca (11:30 am) and Boucher's testimony about the fastest "possible" time to travel from Las Vegas to Panaca (2 hours), the latest that Petitioner could have been in Las Vegas on the morning of July 8 was 9:30 am. That means based on the prosecution's case, Petitioner was in Panaca a minimum of 10-1/2 hours BEFORE the EARLIEST time that Dr. Larkin determined Bailey was killed. For a more complete explanation of this see Ground two and Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010.

- "No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 2.) The following explains how those findings apply to Petitioner's case:

Dr. Larkin determined "No identifiable odors were detected, and blow flies (Diptera, Saliforidae) were significant by their absence, as was the absence of predatory animal bites." (2) Dr. Larkin followed that with, "The lack of blow fly infestation suggests an even shorter time between Bailey died and was discovered." (8) Although Petitioner's counsel did not retain a forensic entomologist to review the evidence in Petitioner's case, Dr. Larkin's determination regarding the absence of blow fly eggs and their significance to establishing Duran Bailey's time of death as sometime after 8.p.m. is corroborated by the post-conviction examination of the evidence in Petitioner's case by several forensic entomologists.

Forensic entomologist Dr. Gail Anderson is a professor at Simon Fraser University in Burnaby, British Columbia, Canada. Dr. Anderson is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. Dr. Anderson reviewed the photographs of Bailey's body in November and December 2009, weather records for July 8, 2001, and various documents related to Petitioner's case. Dr. Anderson's Report of December 17, 2009 about the Petitioner's case states in part: "to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009, 5.)

Forensic entomologist Dr. Linda-Lou O'Connor is a professor in the Department of Entomology at the University of Kentucky in Lexington, Kentucky. Dr. O'Connor is the treasurer of the North American Forensic Entomology Association. Dr. O'Connor examined the entomology evidence in Petitioner's case and wrote the "Forensic Entomology Investigation Report," February 11, 2010, that states: "Based on the lack of colonization of blow flies and/or flesh flies, estimated postmortem interval is after sunset, which was at 8:01 pm on July 8, 2001." (See Exhibit 2, Forensic Entomology Investigation Report of Dr. Linda-Lou O'Connor, February 11, 2010, 1.)

Forensic entomologist Dr. M. Lee Goff is a professor and director of the Chaminade University Forensic Sciences program in Honolulu, Hawaii. Dr. Goff is one of only fifteen forensic entomologists in North America certified by the American Board of Forensic Entomology. He has conducted training courses at the FBI Academy, he is a consultant for the television crime dramas *CSI* and CSI: Miami, and he is the author of *A Fly For The Prosecution: how insect evidence helps*

solve crimes (Harvard University Press, 2000). Dr. Goff examined the entomology evidence in Petitioner's case and wrote the "Report of Dr. M. Lee Goff," March 12, 2010. Dr. Goff concurs with Dr. Anderson's finding that "to a reasonable scientific certainty Mr. BAILEY's death occurred after sunset on 8 July 2001 20:01 h (8:01pm), and most probably after full dark at 21:08 h (9:08 pm)." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.)

Dr. Larkin's determination regarding the absence of "predatory animal bites" is corroborated by Dr. Anderson in her Report, "Cockroach feeding on fresh remains often cause distinctive marks on the body Benecke 2001; Haskell *et al.* 1997). No such marks were observed in the photographs I reviewed." (See Exhibit 1, 4-5). It is also corroborated by Dr. O'Connor in her Report: "Upon close examination of the scene and autopsy photographs provided, there was no clear indication that cockroaches fed on the decedent." (See Exhibit 2, 3-4.) And it is also corroborated by Dr. Goff in his Report, "I did not see any indications of cockroach activity on the body in the images." (See Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010.)

The absence of any predatory bites on Bailey's body is significant because he could not have lain for any significant length of time in the dark trash enclosure with garbage strewn about and on him without him being descended on by predatory flesh eaters such as cockroaches and rats. We know there were cockroaches in the trash enclosure near Bailey's body because Las Vegas Metropolitan Police Crime Scene Analyst Louise Renhard wrote in her crime investigation notes that they were in a beer can that was several feet from Bailey's body. (See Exhibit 7, Louise Renhard Bailey crime scene notes) and, (See Exhibit 32, Crime Scene Evidence with diagram of location found.). Renhard testified during Petitioner's trial on May 13, 2002: "I do remember a beer can." … "No, it was – had like, I believe, 15 or 18 cockroaches in it." (Trans. IV-95 (05-13-02)) The importance of the new evidence provided by Dr. Anderson, Dr. O'Connor and Dr. Goff that there were no cockroach bites on Bailey's body is emphasized by peer reviewed articles documenting that cockroaches feed on the flesh of dead humans. (See Exhibit 6, *Cockroach: The Omnivorous Scavenger*.)

The absence of fly eggs on Bailey's body scientifically establishes he died sometime after sunset (at 8:01 pm), while the absence of cockroach bites scientifically establishes that he

could not have lain in the dark trash enclosure for any length of time without being feed on by the cockroaches (and other flesh eating predators.).

Exhibit 101 is a timeline of what the forensic pathology (and entomology) testimony would have been about Bailey's time of death after 8 pm compared with the prosecution's concession the Petitioner could not have been in Las Vegas later than 9:30 am on July 8, 2001. (See Exhibit 101, Timeline of new time of death evidence And Kirstin Blaise Lobato's alibi.) Exhibit 101 also illustrates how misled the jury was by Medical Examiner Lary Simms' uncontested trial testimony that it is "possible" Bailey could have died as early as 3:50 am, and lain in the trash enclosure for more than 18 hours before being discovered.

- "Because no brain sections were made, the timing of the head wounds with respect to the other wounds cannot be determined." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) The following explains how those findings apply to Petitioner's case:

In the prosecution's argument to the jury only a period of minutes elapsed from when Petitioner arrived at the trash enclosure to when Bailey died. The prosecution argued Bailey's head fracture was inflicted when he fell backwards after being hit in the mouth with a baseball bat and hit his head on the concrete curb. The prosecution's argument presupposes that Bailey died almost immediately after his carotid artery cut. That argument, however, directly contradicts the testimony of ME Lary Simms that swelling in Bailey's brain establishes he experienced a serious head injury two hours before he died. Bailey had a skull fracture on the same side of his head as the swelling. During cross-examination Simms testified that Bailey's brain swelling could have been caused by the fracture of his skull two hours before he died. Simms testified:

> Q. (Mr. Schieck) But the fracture could've been two hours old also?
> A. (Mr. Simms) Yes, because it was – that area was on the same side as the fracture, and if it was on the different side then I'd have a different opinion, but because that area is on the same side as the fracture, it could've been that that was contemporaneous with the fracture. (7 App. 1175; Trans. VIII-36 (9-20-06))

Dr. Larkin does not contradict Dr. Simms testimony; he simply observes that there was insufficient evidence in the Autopsy Report for him to make an independent determination. Consequently, ME Simms' determination Bailey's head fracture could have occurred two hours

prior to his death stands, and that directly undermines the prosecution's argument the skull fracture was caused by the Petitioner immediately prior to his death. Dr. Larkin's conclusion supports that Bailey's head fracture was incurred during some kind of an altercation several hours prior to his death. That altercation could have been somewhere other than the trash enclosure and it possibly could have involved the same person(s) who later attacked and mutilated him in the trash enclosure.

Dr. Larkin's forensic pathology analysis of the Petitioner's case undermines at least eight key aspects of the prosecution's case against Petitioner. However, Petitioner's counsel did not retain Dr. Larkin or another forensic pathologist of comparable expertise and experience. The failure of Petitioner's counsel to retain a capable forensic pathologist to do a full case analysis prejudiced the Petitioner because based on the exculpatory evidence discovered by Dr. Larkin, a forensic pathologist would have provided the jury with a range of exculpatory testimony that would have undermined key aspects of the prosecution's case. After considering the exculpatory evidence that Dr. Larkin or another qualified forensic pathologist would have provided, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(oo) Ground forty-one.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to have George Schiro testify as a defense expert forensic scientist skilled in crime scene reconstruction, blood stain pattern and blood transfer analysis, and who would have provided unique exculpatory testimony, and if the jury had known of this evidence, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

One of the most distinctive features of the scene of Duran Bailey's murder is the significant amount of blood, and the type of blood evidence available for analysis. (See Exhibit 33, Blood at crime scene.) There was blood on the trash enclosure's concrete floor, the curbing around it, the block walls, cardboard, and there were shoeprints imprinted on concrete and cardboard. Yet, the

forensic scientist retained by the Petitioner's counsel, Brent Turvey, was not a bloodstain pattern and blood transfer expert.

George Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison. He has also consulted on cases in 23 states, for the United States Army, and in the United Kingdom. Schiro has testified as an expert for both the prosecution and defense over 145 times in eight states, federal court, and two Louisiana city courts. Schiro is a fellow of the American Academy of Forensic Sciences, a member of the Association for Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

Schiro is familiar with Petitioner's case, having testified on May 16, 2002 as a defense witness at Petitioner's first trial. Schiro's testimony was limited because of improper noticing by Petitioner's counsel. Schiro was not retained by Petitioner's new counsel for her retrial. After Petitioner's direct appeal was exhausted in October 2009, Schiro agreed to assist the Petitioner by providing his expertise as a forensic scientist *pro bono*. Schiro produced a Report dated May 31, 2002 detailing his expert analysis of Petitioner's case. The report primary detailed the evidence he was not allowed to testify about. The following are ten key aspects covered in Schiro's Report:

> ● Bloody shoeprints were photographed and documented at the crime scene. These bloody shoeprints could have only been left by the person concealing Mr. Bailey's body because all of the blood was covered by the trash concealing his body. The cardboard was first used to cover his body, then the trash was used to further conceal his body and the blood. While the body and blood were being concealed with trash, the source of the shoeprints stepped in blood and tracked them out upon exiting the enclosure. (1)
>
> ● William J. Bodziak's report dated March 27, 2002 states that these shoeprints "...most closely correspond to a U.S. men's size 9 athletic shoe of this type. The American women's size equivalent would be approximately size 10." His report further states "...the length of the LOBATO right foot equates to U.S. men's sizes between 6 to 6 1/2. The American women's size equivalent would be approximately size 7 1/2. The right foot size of KIRSTIN LOBATO would therefore be at least 2 1/2 sizes smaller than the estimated crime scene shoe size." The Las

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

Physical evidence can either include or exclude a person as the source of the evidence. Inconclusive results can also be obtained from physical evidence. **Based upon the shoe size of the impressions and the size of the shoes received from Ms. Lobato, Ms. Lobato is excluded as the source of the shoeprints found at the crime scene.** (1) (Emphasis in original.)

● According to the August 6, 2001, LVMPD Forensic Laboratory Report of Examination by Criminalist Thomas A. Wahl a "...wad of chewing gum on cardboard with apparent blood recovered from scene" was submitted to him for DNA analysis. The condition of this gum and its location at the crime scene could also provide investigative information as to the source of the gum. None of the reviewed photographs had a close-up view of the gum and the examined reports do not refer to the condition of the gum; however, it was significant enough for the Crime Scene Analysts to collect it and submit it for DNA analysis.

If the gum was deposited on the cardboard after the blood was deposited, then it does not provide any significant information because it could have fallen out of the trash onto the cardboard. If the gum was deposited on the cardboard prior to or at the same time as the blood being deposited on the gum, then the gum could have originated from the mouth of Mr. Bailey's killer. The likelihood of it originating from the killer's mouth would also be increased if the gum was still pliable when recovered. It would be less likely to have originated from the killer's mouth if it was hardened or if it had debris attached to it.

Mr. Wahl's report further states "The chewing gum appeared to have been chewed. It was also stained with apparent blood." And "A DNA mixture was indicated. Duran Bailey cannot be excluded as the major DNA component of the mixture. Kirsten Lobato is **excluded** as the minor DNA component of the mixture." **Based upon this information, Ms. Lobato is excluded as the source of the chewing gum found at the crime scene**. (2) (Emphasis in original.)

● Two photographs of Ms. Lobato's hands were taken approximately 12 days after the discovery of Mr. Baileys body. The reason investigators photograph suspect's hands is to document any evidence of injuries to the hands that can occur during beating and stabbing homicides.

According to the July 9, 2001, Autopsy Report by Lary Simms, Mr. Bailey had "...an apparent fracture on the left side of the head...", an "...apparent rib fracture/incised wound at the left costal margin...", "On the left side of the face and head is a confluent area of multiple abrasions and contusions...", " On the right side of the face and head is a confluent area of multiple abrasions and contusions...", "Located on the anterolateral right forehead is a stab wound...", "Located on the left chin is a stab wound...", "Located above the right eye is an incised wound...", "The anterior maxillary and mandibular dental arches demonstrate multiple fractures and avulsions of the teeth.", "Located on the chin is an incised wound...", and "Located on the back of the right hand is a incised wound group...". These areas are all bony

areas and indicate that the beating and stabbing were carried out forcefully. As a result of striking these bony areas with a knife, the killer's hand might have been cut from slipping onto the knife blade as the knife handle accumulated more blood. The killer's hand could have been bruised from the knife or the forceful nature of the beating. The surfaces surrounding the crime scene were abrasive and could have also caused abrasions on the killer's hands. **No cuts, abrasions, broken fingernails, or healing bruises can be seen in the photographs of Ms. Lobato's hands.** (2-3) (Emphasis in original.)

● Photographs of Ms. Lobato taken approximately 12 days after the discovery of Mr. Bailey's body show that Ms. Lobato had bleached blonde hair. Her hair had lines of demarcation at the root ends of the hair shafts indicating that it had been several weeks since her last bleach treatment. During a beating and stabbing homicide, the killer can lose hair at the scene either by having it forcibly removed or through the natural hair shedding process. Bleached Caucasian hairs found at the crime scene or associated with Mr. Bailey's body would have been significant. **There is no information indicating that any bleached blonde hairs were observed or collected from the crime scene or Mr. Bailey's body**. (3) (Emphasis in original.)

● The photographs demonstrate numerous blood spatter patterns. There is no documentation of blood spatter above a height of 12 inches on any of the surrounding crime scene surfaces. **This indicates that Mr. Bailey received his bleeding injuries while lying on the ground. The** photographs of his pants also do not indicate the presence of any vertically dripped blood. **This indicates that he did not receive any bleeding injuries while in a standing position**. (3) (Emphasis in original.)

● When a person is bleeding and repeatedly beaten with a long object, such as a baseball bat or a tire iron, or is repeatedly stabbed using an arcing motion, then cast-off blood spatters corresponding to the arc of the swing are produced. There is no documentation of any cast-off blood spatters on the surrounding surfaces. This indicates that arcing motions were not used in the homicide of Mr. Bailey. **The confined space of the crime scene enclosure and the lack of cast-off indicate that a baseball bat was not used to beat Mr. Bailey.** The beating was more likely due to a pounding or punching type motion. (3) (Emphasis in original.)

● Crime scene reconstruction:

1. The killer enters the enclosure.
2. Mr. Bailey is lying on the ground, possibly sleeping.
3. (These events cannot be sequenced. They all happened at some point, but not necessarily in the order listed. His pants could have been down prior to the stabbing or they could have come down sometime during the stabbing but prior to the scrotum wound. He might have been masturbating prior to getting killed. This could explain the presence of the adult magazines at the crime scene. He may also have fallen asleep with his pants down.) The killer stabs the victim in the face, head, scrotum, and possibly the abdomen. At some point, Mr. Bailey's pants come down. Mr. Bailey manages to use his hands and arms in an effort to defend himself. His left carotid artery is cut while he is on the ground. Mr. Bailey is also beaten forcefully about the head with a blunt object most likely using a pounding or punching type motion or his head is slammed forcefully against the surrounding concrete.

4. Mr. Bailey's anus was then lacerated.
5. Mr. Bailey's body was turned over.
6. The killer stabs Mr. Bailey in the abdomen and severs his penis.
7. Mr. Bailey is covered with the cardboard.
8. Trash is deposited on Mr. Bailey and the blood.
9. The killer exits the enclosure. (3-4)

● Louise D. Renhard's Crime Scene Report dated 07-22-01 states "Luminol, a presumptive test for the presence of blood, was applied and a positive reaction occurred and was photographed on the left front seat slip cover, the left front seat and floor, and the left interior door panel. A Phenolphthalein presumptive test for the presence of blood was conducted for the shoes in the trunk, the baseball bat, the multi tool, and the keys with negative results on all." Mr. Wahl's August 6, 2001, report states "Examination of the vehicle slip cover (TAWS item 5) and the interior left door panel (TAW9) yielded weak positive presumptive tests for the presence of blood in one area of each item. Human blood could not be confirmed from either item. Human DNA was not detected in extracts prepared from swabbings collected from both items."

The luminol reaction and the phenolphthalein reaction are both catalytic tests. Their reactions are essentially the same for blood, except one produces a pink color (phenolphthalein) and the other luminesces (luminol). Luminol is the more sensitive test, but it also produces more false positives. Phenolphthalein is less sensitive, but it has fewer false positives. The categories of substances that will produce false positives are the same for both tests, but luminol probably reacts to lesser amounts of these substances than phenolphthalein. The tests can be designed to reduce the number of false positives, but not totally eliminate them. Both tests can cause reactions with the enzymes catalase and peroxidase, cytochromes, strong oxidizing agents, and metallic salts.

Some of the false reactions include:

Chemical oxidants and catalysts: Copper and nickel salts, rust, fonnalin (used for preserving tissues), potassium permanganate (found in some dyes), potassium dichromate, bleaches, iodine, and lead oxides. Some of these items could be found anywhere, including tap water, dirt, and blue jeans. Phenolphthalein gives positive results with copper, potassium ferricyanide, nickel and cobalt nitrates, and some sulfocyanates. Luminol reacts with copper compounds, cobalt, iron, potassium permanganate, and bleach (source Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the FBI Academy in Quantico, VA, phenolphthalein has been shown to react with iodine, potassium permanganate, and copper nitrate.

Plant sources: Vegetable peroxidases. Phenolphthalein might react with apple, apricot, bean, blackberry, Jerusalem artichoke, horseradish, potato, turnip, cabbage, onion, and dandelion root (source Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the FBI Academy in Quantico, VA, phenolphthalein has been shown to react with cabbage, carrot, cucumbers, celery, corn, and horseradish.

Animal origin: pus, bone marrow leukocytes, brain tissues, spinal fluid, intestine, lung ,saliva, and mucous (source Forensic Science Handbook, edited by Richard Saferstein, page 275). In tests done at the FBI Basic Serology course at the

FBI Academy in Quantico, VA, phenolphthalein has been shown to react with saliva. Bacteria can also cause false positive reactions.

The HemaTrace test used to confirm human blood is more sensitive than the phenolphthalein test. As a result, had the phenolphthalein been reacting to human blood, then the HemaTrace test should have also given a positive result for human hemoglobin. In validation studies conducted at the Louisiana State Police Crime Lab, phenolphthalein could detect a 1/1,000,000 dilution of blood and the HemaTrace card could detect a 1/100,000,000 dilution of blood. This makes the HemaTrace card 100 times more sensitive than the phenolphthalein test.

The test to quantify human DNA is also very sensitive. The QuantiBlot kit using Chromogen:TMB can detect as little as 160 picograms of human DNA. Some human DNA quantification systems can detect down to 20 picograms of human DNA. **Based on the results of the phenolphthalein, luminal, human hemoglobin, and human DNA quantification analyses, the substance detected in Ms. Lobato's vehicle is not human blood**. (4-5)

● Ms. Renhard's 07-22-01 Crime Scene Report states "...latent prints were recovered from the left door threshold, the interior and exterior left door window, the interior right door window, the exterior of the trunk and front hood." Her report indicates that a minimum of six latent lifts were recovered from the vehicle. The report does not indicate the number of smudges, partial prints, overlaid prints, etc. that were not collected

When dusting for prints, the powder on the brush adheres to the moisture contained in the print. The main factors in determining if a person will leave behind a print are the person's individual physiology and habits, the surface, and the environment. Any one or more of these factors can contribute to the lack of fingerprints. People with drier skin will not leave prints as readily as a person with oily or sweaty skin. Rough surfaces are not conducive to recovering dusted prints because of the surface texture. Moisture and oils in fingerprints will evaporate more rapidly in hot, arid environments than in cooler, more humid environments. **The lack of Ms. Lobato's prints in her own vehicle would not be considered unusual and it is not necessarily a sign that her vehicle was cleaned**. (5-6)
(See Exhibit 46, Forensic Science Resources (George J. Schiro Jr.) Report, May 31, 2002.) (Emphasis in original.)

The above ten areas dealt with in Schiro's Report of May 31, 2002, and how they relate to the Petitioner's case can be summarized in the following way:

● Petitioner's shoe size was excluded as the source of shoeprints imprinted in blood found at the crime scene.

● The bloody shoeprints could have only been left by the person concealing Mr. Bailey's body because all of the blood was covered by the trash concealing his body. (Petitioner was excluded as the source of DNA recovered from the gum.)

● The gum found at the crime scene could have been deposited by someone involved in the crime. (Petitioner was excluded as the source of DNA recovered from the gum.)

● The person who stabbed and beat Bailey could have cut, bruised or gotten abrasions on their hands. (Petitioner had no cuts, bruises or abrasions on her hands when she was arrested.)

● Petitioner had very distinctive bleached blond hair at the time of Bailey's murder, and during a struggle one could be shed naturally, through vigorous action or by forcible removal. (None of the Petitioner's hairs were found at the crime scene.)

● All of Bailey's bleeding injuries were inflicted while he was lying on the ground. (The prosecution argued that Bailey was stabbed in his scrotum while standing up, but he would have bled profusely from that wound, and there was not evidence of vertical bleeding from any of Bailey's wounds.)

● A baseball bat was not used to beat Bailey in the trash enclosure's confined space, and he was more likely beaten by "a pounding or punching." (Although the Petitioner's bat with a porous rubber handle was excluded as having any blood on it, the prosecution argued she used it to strike Bailey in the mouth.)

● Schiro greatly expanded on the number of natural and artificial substances, and manufactured products testified to at trial that can cause a positive luminol or phenolphthalein reaction. Blood is only one of those many substances. Schiro also provides the important new information that the HemaTrace test that was negative for blood in the Petitioner's car is 10,000% (100 times) more sensitive at detecting blood than a phenolphthalein test.

● It is not unusual that Petitioner's fingerprints were not found in her car, and it does not provide any evidence her car was cleaned. (None of the Petitioner's fingerprints were found at the crime scene.)

● Schiro's crime scene reconstruction that is based on the crime scene evidence and blood splatter has Bailey lying down when he was attacked. Schiro also has Bailey's upper body being rolled toward the front of the trash enclosure onto his stomach for the cutting of his rectum, and then being rolled on his back where his abdomen was stabbed repeatedly, his penis amputated, and his groin skinned. That is where his body was found with his upper body angled

away from the southwest corner of the enclosure where his blood was concentrated. (The prosecution argued that Bailey was standing in the northwest corner when attacked, and that after a bat blow to his mouth knocked him onto his back he was beaten and stabbed, and after he died he was "dragged" to the position where his body was found.)

The forensic expert the Petitioner retained did not testify, at least specifically, about nine of the above areas covered in Schiro's Report and about which Schiro would have testified, and he may not have testified as confidently or expertly as Schiro could have about the other area – that individual fingerprints of the Petitioner weren't recovered from her car. The failure of Petitioner's counsel to retain George Schiro prejudiced the Petitioner because based on his Report of May 31, 2002, it is known he would have provided exculpatory testimony about a range forensic evidence that would have undermined key aspects of the prosecution's case and provided the jury with a factual basis so that no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt,

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(pp) Ground forty-two.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to cross-examine ME Lary Simms about his testimony regarding Bailey's time of death and his rectum wound that was irreconcilably inconsistent with his exculpatory testimony during Petitioner's preliminary hearing on August 7, 2001, even though Simms did not testify at trial there were any new confounding factors that warranted revising his preliminary hearing testimony that Bailey died within 12 hours of his body's discovery around 10 p.m. and that Bailey's rectum wound was inflicted while he was alive, and if the jury had known of Simms' exculpatory preliminary hearing testimony, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury Petitioner murdered Duran Bailey in the early morning hours "sometime before sunup" on July 8, 2001. (9 App. 1723; Trans, XIX 121, 10-5-06.) The jury relied on that argument in convicting Petitioner. The prosecution's argument depended on the trial testimony of Clark County Medical Examiner Lary Simms that it is possible Bailey died between 8

and 24 hours prior to his body's examination at 3:50 a.m. on July 9 by Clark County Coroner's Investigator Shelley Pierce-Stauffer. The earliest Simms' testimony allowed for Bailey's death was 3:50 a.m. on July 8. That was 34 minutes before it began to become light at 4:24 a.m. (See Exhibit 29, Las Vegas Sunrise/Sunset, July 8, 2001.) ME Simms performed Bailey's autopsy on July 9, 2001, but he does not opine a time of death in the Autopsy Report.

The prosecution argued to the jury during their closing that credible alibi witnesses placed Petitioner on July 8, 2001, at her parents' home in Panaca, Nevada from 11:30 am through that night, and that a telephone call from the Lobato home to the cell phone of Petitioner's stepmother Rebecca Lobato at 10 am was probably made by the Petitioner in Panaca. There was trial testimony by Nevada Department of Transportation supervisor Phil Boucher that he had traveled the roads from Las Vegas to Panaca many times and it normally took him about three hours when travelling at an average of 72 mph on the open road. On cross-examination by the prosecution, Boucher agreed it was "possible" traveling at a very high speed to drive from Las Vegas to Panaca in two hours. So given the latest period of time the prosecution conceded to the jury Petitioner was in Panaca (11:30 am) and Boucher's testimony about the fastest "possible" time to travel from Las Vegas to Panaca (2 hours), the latest that Petitioner could have been in Las Vegas on the morning of July 8 was 9:30 am. Given the earliest period of time the prosecution conceded to the jury Petitioner was in Panaca (10 am) and Boucher's testimony about the normal driving time from Las Vegas to Panaca (3 hours), the earliest that Petitioner could have been in Las Vegas on the morning of July 8 was 7 am. (These times are based on the prosecution's arguments, the Petitioner's alibi defense, which she reiterates, is she was not anywhere in Clark County at anytime on July 8, 2001.)

During Petitioner's preliminary hearing on August 7, 2001, Simms testified:

> "The body wasn't manifesting any significant degree of decomposition, so **I would say he had died a lot closer to the time he was discovered than not**. ... **And probably more likely than not some time within 12 hours of when he was discovered**." (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 32-33. Emphasis added to original.) (See Exhibit 70, Preliminary hearing testimony – TOD and ante-mortem rectum wound.)

Richard Shott testified he discovered Bailey's body "around 10 pm" on July 8. (6 App. 1000; Trans. IV-54 (09-14-2006)) So Simms' preliminary hearing testimony allowed for Bailey to have died anytime from minutes before discovery of his body to 12 hours earlier around 10 am on July 8. The prosecution conceded at trial the latest Petitioner could have been in Las Vegas was 30 minutes before that at 9:30 a.m. So based on Simms' preliminary hearing testimony of when Bailey died and the prosecution's admission of when the Petitioner was not in Las Vegas, it is not physically possible for Petitioner to have murdered Duran Bailey.

During cross-examination Petitioner's counsel did not question Simms about why his direct testimony about Bailey's time of death was radically different than his preliminary hearing testimony. After the Petitioner's preliminary hearing there was no new medical evidence, but the prosecution did become aware that the Petitioner had alibi evidence for being in Panaca on July 8, 2001.

Additionally, the prosecution argued to the jury that Petitioner inflicted Bailey's rectum wound after he died, and therefore she was guilty of "sexual penetration of a dead body." The prosecution's argument depended on Simms' trial testimony that Bailey rectum wound was post-mortem. However, Simms testified during the Petitioner's preliminary hearing on August 7, 2001:

> Q. But it's clear to you every one of the stab post mortem; is that right?
> A. Not every one of **the stab wounds, for instance, in the rectum was ante-mortem**, several were ante-mortem. The ones I saw on the abdomen, were post mortem stab wounds.
> (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 32. Emphasis added to original.)

Simms clearly identified Bailey's rectum wound was "ante-mortem." So based on Simms' preliminary hearing testimony Bailey was alive when he experienced his rectum wound, which means that whoever inflicted that injury can not be guilty of "sexual penetration of a dead body."

However, Simms testified during trial that Bailey's rectum wound was post-mortem. Petitioner's counsel did not question Simms during cross-examination about why he reversed 180 degrees his preliminary hearing testimony that Bailey's rectum wound was ante-mortem.

The Petitioner was prejudiced by her counsel's failure to cross-examine Simms about his exculpatory preliminary hearing testimony, because if counsel had done so her jurors would have known

about Simms' preliminary hearing testimony that Bailey died sometime after 10 a.m. on July 8 – when the prosecution conceded Petitioner was not in Las Vegas, and that his rectum wound was inflicted while he was alive – so his dead body couldn't have been sexually penetrated. If publicly confronted during cross-examination, Simms might have agreed there is no basis for him to alter his August 2001 preliminary hearing testimony about Bailey's time of death and that his rectum wound was ante-mortem. If Petitioner's counsel had confronted Simms with his previous testimony, he might have been willing during cross-examination to revise his trial testimony to conform to his preliminary hearing testimony. Even if Simms did not revise his trial testimony to conform with his preliminary hearing testimony, the jury would have had a factual basis and compelling reason to question the truthfulness of his trial testimony that conveniently expanded Bailey's time of death to include time outside of the Petitioner's alibi, and that conveniently provided a basis for the "sexual penetration of a dead body" charge. If the jury had known about Simms' preliminary hearing testimony, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of murdering Bailey and cutting his rectum after he was dead.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(qq) Ground forty-three.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to Thomas Wahl, Daniel Ford, Louise Renhard and Kristina Paulette's expert testimony about luminol and/or phenolphthalein testing in general, and the luminol and/or phenolphthalein testing conducted in Petitioner's case in particular, because the prosecution acted in bad faith by failing to conform with the expert witness notice requirements of NRS 174.234 (2), and Petitioner was also prejudiced because Petitioner's counsel failed to object to hearsay testimony by Wahl, and if the jury had had not been allowed to consider Wahl, Ford, Renhard and Paulette's testimony, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

No physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence was introduced at trial placing the Petitioner in Clark County at any time on July 8, 2001,

the day of Duran Bailey's murder. Consequently, no evidence was introduced establishing the Petitioner was anywhere in Las Vegas, much less the Nevada State Bank at the time of his murder.

Luminol and phenolphthalein are very non-specific presumptive (i.e., preliminary) tests that react positively to a multitude of natural substances and man-made products. For example, blue jeans can cause a positive luminol reaction. (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 5-6.) Blood is one of the many substances that can cause a positive luminol or phenolphthalein reaction. Thus, a confirmatory scientific test must be performed to determine if a positive reaction is caused by blood or something else. For example, the HemaTrace confirmatory test is 100 times more sensitive to detecting blood than a phenolphthalein test. (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 6.)

The LVMPD crime lab examined Petitioner's 17-year-old 1984 Pontiac Fiero after her arrest on July 20, 2001. Several presumptive phenolphthalein tests of locations in the front of her car had weak positive test reactions. Presumptive luminol tests of several spots in her car indicated a positive reaction. Confirmatory DNA tests were negative for the presence of blood in the areas of Petitioner's car that had positive luminol and phenolphthalein reactions, so it is known to a scientific certainty that the positive luminol reactions were to one or more of the many natural and artificial substances other than blood that can cause a positive reaction. (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 5-6.) It is not a matter of conjecture or speculation, but it is known to a scientific certainty that no animal or human blood of any kind was found in the Petitioner's car, much less Bailey's blood.

During Petitioner's trial the prosecution did not offer expert testimony about luminol or phenolphthalein testing in general, or the Petitioner's case in particular, by any person who had been noticed to the defense in accordance with NRS 174.234 (2), and approved by the court to provide expert testimony.

With no physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence linking the Petitioner to Bailey's murder, the prosecution had to try an create the appearance to the jury that blood might have possibly been found in Petitioner's car, in spite of the fact that because of the negative confirmatory test results it is known to a scientific certainty that

blood was not found in her car. Key to the prosecution's strategy was providing the testimony of LVMPD crime scene analysts Daniel Ford and Louise Renhard, and crime lab DNA technician Thomas Wahl, about luminol and phenolphthalein testing, and the testing of Petitioner's car, in an effort to make it appear to the jury that maybe, possibly, somehow, blood could have been in the Petitioner's car, even though the confirmatory testing disproved the presence of blood. DNA technician Kristina Paulette provided extensive testimony about phenolphthalein testing, and at one point made the preposterous suggestion that phenolphthalein testing could be more accurate than DNA testing at detecting blood. (Trans. XI-168 (9-25-06)) She made that testimony without objection by Petitioner's counsel and it had to have a significant prejudicial impact on the jury.

The statutory filter ensuring that expert testimony about specialized subjects and tests is reliable is NRS 174.234 (2). The statute requires that for all expert testimony 21 days notice is required prior to trial, a C.V. detailing the expert witness' expertise is required, any reports prepared by the expert about the case must be provided to the opposing party, and a brief statement regarding the subject matter and the substance of the expert's expected testimony is required. The prosecution acted in bad faith because they had two years to prepare for the Petitioner's retrial, yet they did not comply with the statute regarding the expert testimony by Renhard, Ford, Wahl and Paulette about specialized luminol and phenolphthalein testing in general, and the testing in the Petitioner's case in particular. Exclusion of the testimony is the statutory remedy for the prosecution's bad faith compliance with Nevada's expert witness noticing requirement.

NRS 174.234 (2) is not a self-executing statute – vigilance by the Petitioner's counsel was required for its enforcement. Yet Petitioner's counsel did not make a single objection to the prosecution's introduction of the expert testimony by Wahl, Ford, Renhard, or Paulette about luminol and/or phenolphthalein testing.

Since the State didn't even attempt to present Renhard and Ford as qualified luminol and phenolphthalein experts, there was no basis for the jury to believe the testing on the Petitioner's car was reliable and conducted in accordance with the manufacturer's specifications and industry protocols. Without evidence Renhard, Ford, Wahl, or Paulette were qualified experts to conduct, evaluate, or even comment on luminol and/or phenolphthalein tests, there was no basis for

admittance of any testimony during the Petitioner's trial about luminol and phenolphthalein testing in general, or the tests conducted on the Petitioner's car specifically. For all that is known the luminol and phenolphthalein test reactions in the Petitioner's car were false positives caused by improper testing procedures.

Wahl was properly noticed and approved by the court as a DNA expert, and he conducted and testified about the DNA tests of the swabs from the Petitioner's car that were negative for blood. But Wahl was not noticed as an expert in luminol and phenolphthalein testing, and Petitioner's counsel should have objected to any testimony by him about luminol and phenolphthalein testing in general, or the testing in Petitioner's case in particular. Wahl had no personal knowledge of the luminol and phenolphthalein testing in the Petitioner's case, and Petitioner's counsel failed to object to his testimony on the additional ground that it was hearsay.

The Petitioner was gravely prejudiced by her counsel's failure to object to the testimony of Renhard, Ford, Wahl and Paulette about luminol and phenolphthalein testing that none had been properly noticed or qualified by the court to provide. If the jury had not heard their testimony about preliminary luminol and phenolphthalein testing in general, and the preliminary luminol and phenolphthalein testing in the Petitioner's case in particular that there is no assurance was conducted in a reliable manner, the jury would have had no basis whatsoever to even imagine there was any blood was in the Petitioner's car. There is no mention of blood in the Petitioner's Statement and not a single witness testified the Petitioner told them she had any blood on her after she was assaulted at the Budget Suites Hotel, yet the single most noticeable aspect of Bailey's murder is the immense amount of blood at the crime scene and on items at the crime scene. If the Petitioner's counsel had objected to any testimony by Renhard, Ford, Wahl and Paulette about luminol and/or phenolphthalein testing and the court had enforced the statute by barring their testimony, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt. If the court did not enforce the expert witness notice statute and allowed their expert testimony without the proper noticing, her counsel's objection would have preserved the issue for her direct appeal, which they did not do.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(rr) Ground forty-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to introduce Petitioner's black high-heeled open-toed platform shoes into evidence that the prosecution did not contest she was wearing when they argued she murdered Duran Bailey, and the Petitioner was highly prejudiced because if that exculpatory evidence had been available to the jury, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued that Petitioner stabbed Duran Bailey's scrotum, hit his mouth with a bat, punched his face with her fists, and used her knife to cut his carotid artery and stab his face and abdomen multiple times. Medical Examiner Lary Simms testified Bailey bled profusely from his wounds. Photos introduced at trial showed a large amount of blood on Bailey, cardboard, concrete and many items at the crime scene. (See Exhibit 33, Blood at crime scene; and Exhibit 92, Bailey as found.) The prosecution also argued that after Bailey's death Petitioner repeatedly stabbed his abdomen, amputated his penis, and slashed his rectum. The prosecution also argued Bailey's murder was the same event Petitioner describes in her Statement of July 20, 2001, that was audio recorded by homicide Detectives Thomas Thowsen and James LaRochelle. Petitioner described being "bum rushed" in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas as she was getting in her car to go out around, or after midnight. The man attempted to rape her, but Petitioner described fighting him off by trying one time to cut his exposed penis. Petitioner described in her Statement wearing a skirt and black high-heeled shoes, and she told the detectives interrogating her that she had the shoes she was wearing that night. She identified them as black open-toed platform shoes that have 4" to 5" heels, and those shoes were seized as evidence at the time she was arrested on July 20, 2001. (See Exhibit 35, LVMPD Vehicle Report, July 20, 2001.) Petitioner's black high-heeled shoes were tested on August 6, 2001, by the Las Vegas Metropolitan Police Department's Forensic Laboratory. The following is the finding of the tests:

CONCLUSIONS:

1. A human bloodstain was detected in the big toe area (stain A) of the right high

> heel sandal (TAW5 item 01). Duran Bailey is excluded as the source of this blood. Kirstin Lobato cannot be excluded as the source of this blood."
> …
> Petitioner's shoes were returned to the evidence vault in a "Sealed paper bag" (package #4032-01). (See Exhibit 36, LVMPD Forensic Lab Report, August 6, 2001. Underlining added to original.)

In addition to not having any of Bailey's blood on Petitioner's black high-heeled shoes, they do not have any damage or scuff marks from a prolonged, violent and bloody struggle with a man, or damage from climbing into the dumpster to throw out the trash that was piled around and on top of Bailey. Attached as Exhibits are four LVMPD photos of Petitioner's black high-heeled open-toed platform shoes that were seized as evidence. (See Exhibit 37, Black high-heeled shoe 1; Exhibit 38, Black high-heeled shoe 2; Exhibit 39, Black high-heeled shoe 3; and Exhibit 40, Black high-heeled shoe 4.) On October 3, 2001, Petitioner's black high-heeled shoes were excluded by the Las Vegas Metropolitan Police Department Crime Lab as being the source of the shoeprints imprinted in blood on the cardboard covering Bailey's torso, or the shoeprints imprinted in blood on concrete at the crime scene. (See testimony of LVMPD footwear examiner Joel Geller, Trans. XI-114 (9-25-2006)) The prosecution did not contest at trial that Petitioner was wearing her black high-heeled shoes during the assault she described in her Statement, which the prosecution argued was actually Bailey's murder. There was no testimony at trial that the Petitioner wore the shoes after she was assaulted or that they had been cleaned after the assault, and the prosecution did not even suggest during their argument that they had been worn or cleaned after the assault. So the Petitioner's two high-heeled shoes are perfectly preserved physical witnesses to the assault described in her Statement.

Given the immense amount of blood on Bailey and all over the crime scene, and the fact that no shoeprints imprinted in blood matching Petitioner's shoe size were found at the crime scene on the concrete floor leading out of the trash enclosure or on a piece of cardboard covering Bailey's torso, it is not reasonable that Petitioner could have committed Bailey's murder wearing her high heel shoes that the prosecution does not contest she was wearing. (See Exhibit 33, Blood at crime scene; and, Exhibit 58, Plywood leaning against north wall.) Given the intensity of the

attack on Bailey and the lack of damage to her high-heeled shoes, that Petitioner could have murdered Bailey while wearing them is even less reasonable, particularly since the shoes are very far removed from highly maneuverable athletic footwear.

Petitioner's shoes are the one item of clothing she had when arrested that she positively identified in her Statement as wearing at the time she was sexually assaulted at the Budget Suites Hotel. Since the day of her arrest, the prosecution has not contested that she was wearing her high-heeled platform shoes during the assault described in her Statement. There is no evidence on Petitioner's black high-heeled shoes that she was present at the bloody and violent scene of Bailey's murder which would be expected if she had in fact been there. Petitioner's shoes are not only a witness that she did not murder Bailey, but introduction of her black high heel shoes into evidence would have allowed the jury to hold and closely examine the lack of blood or damage to the shoes, and to make an informed judgment about the probability, or the utter impossibility that Petitioner could have beaten Bailey and inflicted all the bloody wounds on him, "dragged" his body several feet after his death, and climbed into the dumpster and thrown out the trash that was piled around and on top of him without getting a single drop of his blood on her high-heeled open-toed shoes or even scuffing them. And also without leaving a single shoeprint imprinted in blood. A LVMPD crime scene photo of Bailey as found shows what the prosecution alleged the Petitioner accomplished in her high-heeled platform shoes. All the garbage was piled in the corner after Bailey was immobilized or dead from his injuries. (See Exhibit 92, Bailey as found.)

The near pristine condition of Petitioner's shoes don't just speak, but scream volumes that the Petitioner was the victim of the very short altercation described in her Statement of July 20, 2001 – and that she had nothing to do with the prolonged, bloody, physical and violent event that was Bailey's murder and mutilation that occurred weeks after the incident the Petitioner described in her Statement.

Consequently, the single most important item of exculpatory physical evidence Petitioner's counsel should have introduced into evidence was her black open-toed platform shoes with a 4" to 5" heel.

The absence of Bailey's blood on Petitioner's high-heeled shoes is consistent with the fact that during the Petitioner's 26-minute Statement of July 26, 2001, she does not a single time mention the words blood or bloody, or that either she or her attacker bled. The single most noticeable feature of Bailey's murder was the great amount of blood on him and the surrounding area. That there was not a single drop of his blood on her shoes supports that her Statement is exactly what it appears to be, a description of unsuccessful rape attempt in the parking lot of a Budget Suites Hotel in east Las Vegas "over a month" before her Statement on July 20, 2001.

The evidentiary importance of Petitioner's black high-heeled shoes is supported by the post-conviction expert analysis of forensic scientist George Schiro. Schiro has over 25 years of experience as a forensic scientist and crime scene investigator. Schiro has worked over 2900 cases and has been court qualified as an expert in latent fingerprint development, serology, crime scene investigation, forensic science, trajectory reconstruction, shoeprint identification, crime scene reconstruction, bloodstain pattern analysis, DNA analysis, fracture match analysis, and hair comparison. He has also consulted on cases in 23 states, for the United States Army, and in the United Kingdom. Schiro has testified as an expert for both the prosecution and defense over 145 times in eight states, federal court, and two Louisiana city courts. Schiro is a fellow of the American Academy of Forensic Sciences, a member of the Association for Crime Scene Reconstruction, a full member of the International Association of Bloodstain Pattern Analysts, and a member of the Louisiana Association of Scientific Crime Investigators.

Schiro is familiar with Petitioner's case, having testified on May 16, 2002 as a defense witness at Petitioner's first trial. After Petitioner's direct appeal was exhausted in October 2009, Schiro agreed to assist the Petitioner by providing his expertise as a forensic scientist *pro bono*. On February 6, 2010 Schiro was provided four full-color photographs of Petitioner's black high-heeled platform shoes that were taken into evidence by the LVMPD on July 20, 2001. (See Exhibits 37, 38, 39, and 40, four LVMPD photos of Petitioner's black high-heeled open-toed platform shoes.) After analyzing the photographs Schiro executed the "3rd Affidavit of George J. Schiro, Jr.," dated February 15, 2010, in which he states in part:

19. It is my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then it is highly likely that she would have left at the scene bloody shoeprints corresponding to the sole patterns of the black high heeled shoes.
20. No bloody shoeprints corresponding to the sole patterns of the black high heeled shoes were identified or documented at the scene of Mr. Bailey's murder.
21. It is also my opinion that had Ms. Lobato been wearing these shoes during the murder, mutilation, and concealment of Duran Bailey, then Mr. Bailey's blood would have been present on the black high heeled shoes.
22. None of Mr. Bailey's blood was found on the black high heeled shoes.
23. There is no physical evidence associating Kirstin Lobato with Duran Bailey or the crime scene. Ms. Lobato is also excluded as the source of key physical evidence found at the crime scene. (See Exhibit 42, 3rd Affidavit of George J. Schiro, Jr., February 15, 2010.)

Schiro's analysis is that if Petitioner had been wearing her black high heeled platform shoes at the scene of Bailey's murder, "it is highly likely that she would have left at the scene bloody shoeprints," and, "It is also my opinion that Bailey's blood would have been present on the black high heeled shoes." The Petitioner's shoeprints were not at Bailey's crime scene, and none of his blood was on her shoes. Consequently, her black high heeled shoes are invaluable exculpatory evidence. Yet Petitioner's counsel neither sought to introduce the shoes into evidence, nor have an expert such as Schiro analyze the shoes in relation to the crime scene and the crime scene evidence, and testify as a defense expert. The Petitioner was gravely prejudiced by her counsel's failure to introduce her black high heeled shoes into evidence, because if the jurors had been able to see and examine them, combined with argument by counsel, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ss) Ground forty-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to a butterfly knife demonstration by LVMPD Detective Thomas Thowsen, for failing to object to Detective Thowsen's expert testimony about butterfly knives without meeting the pretrial requirements of NRS 174.234(2) and qualification by the court, and for suggesting and insisting that the prosecution introduce into evidence a butterfly knife that was not the Petitioner's knife and that the Petitioner had never seen or

touched, and that did not have any connection whatsoever to the Petitioner or to the crime she was charged with, and in fact the knife had been provided by LVMPD Detective Thomas Thowsen, and if Petitioner's counsel had objected and prevented the knife from being introduced into evidence and prevented the jury from being exposed to Detective Thowsen's butterfly knife testimony and demonstration, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that Petitioner used her pocket butterfly knife to inflict all of Bailey's stabbing and cutting wounds. There was no evidence linking Petitioner's butterfly knife to the crime and it was not introduced into evidence. Consequently, the jurors had to imagine what Petitioner's butterfly knife looked like, and imagine if they thought it could have caused Bailey's wounds.

LVMPD homicide Detective Thomas Thowsen obtained a butterfly knife that was not the Petitioner's knife, that the Petitioner had never seen or touched, that the Petitioner did not identify as being similar to her butterfly knife, and that had no connection whatsoever to the Petitioner or to the crime she was charged with. When the prosecution attempted to have Detective Thowsen demonstrate the use of the butterfly knife he provided, Petitioner's counsel insisted that knife be introduced into evidence before it could be used for a demonstration by Detective Thowsen. Clark County Assistant District Attorney William Kephart seemed to be taken aback by the insistence of Petitioner's counsel to introduce the knife into evidence, because as Kephart plainly stated, "it's not evidence." (8 App. 1386; Trans. XIII-65 (9-27-06)) Acceding to the demand of Petitioner's counsel, the prosecution introduced the butterfly knife into evidence as State's Exhibit 262.

In addition to insisting on introduction of Thowsen's butterfly knife, Petitioner's counsel did not object to Thowsen providing expert testimony about butterfly knives and their use without the prosecution having provided in accordance with NRS 174.234(2) 21 days notice prior to trial: Thowsen's C.V. detailing his expertise as a knife expert; any reports he prepared for the case about butterfly knives; and a brief statement regarding the subject matter and the substance of his expected testimony about butterfly knives. Furthermore, Petitioner's counsel did not object to the

Court allowing Thowsen's expert knife testimony without the Court conducting an inquiry into Thowsen's expert knowledge and skill with butterfly knives. The failure of Petitioner's counsel to object to Thowsen's expert testimony and enforce NRS 174.234(2) was unquestionably prejudicial to Petitioner because Thowsen acknowledged in his testimony that he was a novice with a butterfly knife, and thus he could not have qualified to testify as an expert about butterfly knives even if the prosecution had made an effort to comply with NRS 174.234(2). (See, 8 App. 1386; Trans. XIII-65 (9-27-06))

By insisting on introduction of Detective Thowsen's butterfly knife into evidence and allowing Detective Thowsen's testimony and butterfly knife demonstration, Petitioner's counsel enabled the jurors to touch and feel and play with a real butterfly knife that the prosecution had effectively presented as a surrogate for what they argued was the knife used to inflict Duran Bailey's stabbing and cutting wounds, amputate his penis, and cut his rectum. To at least some of the jurors, the knife Petitioner's counsel insisted on introducing into evidence could have been considered the equivalent of the murder weapon. Consequently, Petitioner's counsel aided the prosecution in deceiving the jury that Bailey was killed with a butterfly knife when there is no evidence that is true, and that speculation is directly contradicted by the new post-conviction determination of forensic pathologist Dr. Glenn Larkin that, "A single edged knife, either a non serrated kitchen knife, a butcher knife or hunting knife was used to inflict the knife wounds; there are no choil or tang impressions on the skin." (See Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010, 8.) If Detective Thowsen's butterfly knife had not been introduced into evidence at the insistence of Petitioner's counsel, and if Detective Thowsen's testimony about butterfly knives had been barred by the objection of Petitioner's counsel, the jury would have had no evidence at trial to connect the Petitioner's butterfly knife to Bailey's murder, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(tt) Ground forty-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to argue the Petitioner's alibi witness testimony was trustworthy and admissible in the interests of justice under state and federal exceptions to the hearsay rule and that Detective Thomas Thowsen opened the door to its admittance when he cast doubt on the Petitioner's credibility and truthfulness by his opinion testimony that she "minimized" and "jumbled" details in her July 20, 2001, Statement by describing that "over a month ago" she fought off a sexual assault at the Budget Suites Hotel by attempting once to cut her attacker's penis, and Thowsen *de facto* called her a liar and guilty when he testified it "didn't happen there", and the alibi testimony rebuts Thowsen's opinion testimony as not being credible, or in the alternative, the alibi testimony was admissible in the interests of justice under state and federal exceptions to the hearsay rule because the foundation of the prosecution's case and argument to the jury was the assumption the Petitioner was not credible and not truthful in her Statement about when, where, and what type of attack occurred, and the Petitioner's alibi testimony establishes the Petitioner was credible and truthful in her Statement, and if the jury had heard Petitioner's alibi testimony, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Las Vegas Metropolitan Police homicide Detectives Thomas Thowsen and James LaRochelle audio recorded the Petitioner's Statement on July 20, 2001. The Petitioner described being sexually assaulted "over a month ago" around or after midnight in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas, and she escaped from her assailant after attempting once to cut his exposed penis. That means the assault described in the Petitioner's Statement occurred prior to June 20, 2001, which was weeks before Duran Bailey's murder.

There are at least 40 specific details in the Petitioner's Statement that don't match the details of Bailey's murder. (See Exhibit 85, 40 differences between Petitioner's Statement and Bailey's murder.) Likewise, her Statement doesn't identify a single landmark at or around the scene of Bailey's murder. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.) The information in Exhibits 84 and 85 was only partially introduced at trial. Thowsen explained away all the details in Petitioner's Statement that did not match Bailey's murder, including when, where and what occurred during her assault, and her description of her assailant who she said was alive when she

escaped, by testifying the Petitioner "jumbled" the attacks many details to "minimize" her involvement, and thus she was not truthful in her Statement. (8 App. 1387-1388; Trans. XIII–69-71 (9-27-06)), and Thowsen also testified that he didn't look for any witnesses at the Budget Suites Hotel where Petitioner describes the assault took place, because "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." (8 App., 1410; Trans. XIII-159 (9-27-2006)) Thowsen's opinion testimony de facto branded the Petitioner as a liar and guilty.

Thowsen's testimony was the foundation of the prosecution's case and argument that the Petitioner was not truthful or credible in her Statement's description of the incident, and that it was actually about Duran Bailey's murder and post-mortem cutting of his rectum at the Nevada State Bank's trash enclosure in west Las Vegas.

When Petitioner's counsel sought to have prosecution witness Stephen Pyszkowski testify on cross-examination about his knowledge that Petitioner repelled a sexual assault by trying to cut her attacker's penis more than month before Bailey's murder, the prosecution's hearsay objection was sustained. (6 App. 1089; Trans. VI-27 (9-18-06)) When Petitioner's counsel sought to have defense witness Heather McBride testify that prior to July 4, 2001, Petitioner told her about fighting off a sexual assault in Las Vegas by cutting her attacker's penis, the prosecution's hearsay objection was sustained. (8 App. 1525-26, 1528-29; Trans. XVI-60, 62, 64, 73 (10-2-06))

Petitioner's counsel did not argue that Thowsen's testimony opened the door to admission of the alibi witness testimony in the interests of justice under both state and federal hearsay exceptions based on one or more of the following:

> 1. The alibi witnesses would have been testifying about Petitioner's **credibility** in describing a rape attempt in her statement that happened prior to July 8, 2001.
> 2. To **rebut** Thowsen's opinion testimony the Petitioner was not credible and had not been truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
> 3. To **rebut** Thowsen's opinion testimony as not credible, by establishing the Petitioner was in fact credible and truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.

Neither did Petitioner's counsel argue that the alibi witness testimony was admissible in the interests of justice under both state and federal hearsay exceptions because the foundation of the prosecution's case is the assumption the Petitioner was not credible and not truthful in her

Statement about when and where the assault occurred and what happened during it, and that it is a *de facto* confession to Bailey's murder and mutilation. The Petitioner's alibi testimony rebuts the prosecution's claim and establishes the Petitioner is credible and truthful in her Statement describing that the assault occurred prior to July 8, 2001, and other details, and that there is no rational basis on which to believe her Statement is a confession to Bailey's murder.

The alibi witness testimony the prosecution objected to and that the jury was barred from hearing was trustworthy and credible testimony corroborating the Petitioner's account in her Statement of fighting off a sexual assault prior to July 8, 2001. Consequently, the Petitioner's testimony would have done nothing to ensure the accuracy or trustworthiness of the alibi witness testimony because it was consistent with the Petitioner's audio taped Statement that was entered into evidence by the prosecution and played in open court for the jury to hear.

The Petitioner was prejudiced by her counsel's failure to argue that Thowsen's testimony opened the door to admissibility of the alibi witness testimony on multiple grounds, or in the alternative that the prosecution basing its case on the assumption the Petitioner was not truthful and not credible in her Statement created the special circumstance that in the interests of justice her alibi witness testimony was admissible to establish that the Petitioner was truthful and credible in her Statement. The magnitude of that prejudice is demonstrated by the fact the Petitioner knows of at least nine alibi witnesses who have personal knowledge the Petitioner told them prior to July 8, 2001, that she fought off a sexual assault in east Las Vegas by trying one time to cut her attacker's penis. Those nine witnesses are Steve Pyszkowski (Exhibit 11, Affidavit of Stephen William Pyszkowski.); Heather McBride (Exhibit 13, Affidavit of Heather Michelle McBride.); Cathy Reininger (Exhibit 19, Affidavit of Catherine Ann Reininger.); Michele Austria (Exhibit 12, Affidavit of Michele Dawn Austria.); Dixie Tienken (Exhibit 14, Affidavit of Dixie Tienken.); Daniel Lisoni (Exhibit 17, Affidavit of Daniel Lewis (Louis) Lisoni.); Kimberlee Grindstaff (Exhibit 15, Affidavit of Kimberlee Isom Grindstaff.); Chris Collier (Exhibit 18, Statement of Chris Collier and Declaration of Shari White.); and Doug Twining (See Exhibit 10, Voluntary Statement of Douglas Howell Twining.).

None of these alibi witnesses are related to the Petitioner, they have not kept in contact with Petitioner, and several now live in such diverse places as Hawaii and New Mexico. Some of the alibi

witnesses lived in Panaca and some in Las Vegas in June and July 2001, and some of them don't know each other. The only common denominator between the alibi witnesses is that prior to July 8, 2001, the Petitioner told each of them she fought off a sexual assault in Las Vegas by trying to cut her assailant's penis. It stretches credulity to not believe that such a large number of witnesses who are non-relatives and who have been out of contact with the Petitioner for many years are not being truthful, in providing evidence consistent with what the testimony of Pyszkowski and McBride would have been at trial if Petitioner's counsel had successfully countered the prosecution's objections to their testimony. And all these alibi witnesses provide new alibi evidence that is consistent with the Petitioner's Statement of July 20, 2001, and what the alibi testimony of Pyszkowski and McBride would have been at trial. The purpose of the hearsay rule is to filter out unreliable testimony. There is no basis to believe the new alibi witness testimony is unreliable.

The prosecution wanted their cake and to eat it too by presenting Detective Thowsen's opinion testimony that the Petitioner was not credible and not truthful in her July 20, 2001, Statement due to "minimizing" and "jumbling" when she described fighting off a sexual assault at the Budget Suites Hotel "over a month ago," and that it "didn't happen there," and then objecting to the Petitioner presenting alibi witnesses to rebut the credibility of Thowsen's claim, and to further establish that she was credible and truthful in her Statement. The prosecution also wanted their cake and to eat it to by basing their case on the assumption the Petitioner's Statement is a *de facto* confession to Bailey's murder and mutilation, and then objecting to the Petitioner presenting alibi witnesses to rebut the prosecution's claim and establish that she was credible and truthful in her Statement that the assault she describes in it occurred weeks prior to Bailey's murder.

The Petitioner's counsel allowed the prosecution to have their cake and eat it too by failing to argue for the admissibility of Petitioner's alibi testimony on the proper grounds. The Petitioner was grievously prejudiced because if the jury had heard the alibi witness testimony they would have had a factual basis to believe Thowsen's testimony was not credible, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(uu) Ground forty-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution, Nevada Statutes, and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to Detective Thomas Thowsen's expert psychology testimony regarding the Petitioner's psyche, on the ground the prosecution acted in bad faith by failing to conform with NRS 174.234(2), that requires the prosecution to provide 21 days advance notice of Thowsen's expert testimony, a C.V. detailing Thowsen's psychology degree and his advanced educational background qualifying him to analyze and offer expert psychology testimony about the Petitioner, as well as providing specific information about Thowsen proposed testimony as an expert psychology witness, and Petitioner was gravely prejudiced by her counsel's failure to object to Thowsen's expert psychology testimony that would have triggered the Court to perform its gatekeeper function to exclude non-expert testimony, and if Petitioner's counsel had objected and Thowsen's "expert" testimony had been barred, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The Petitioner's Statement of July 20, 2001, was audio recorded by LVMPD Detectives Thomas Thowsen and James LaRochelle. She describes being "bum rushed" by a black man in the parking lot of a Budget Suites Hotel on Boulder Highway in east Las Vegas as she was getting in her car that around, or after midnight. The man attempted to rape her, but she fought him off by trying one time to cut his exposed penis. She also told the detectives that the attack happened "over a month ago," which would have been prior to June 20, 2001 – more than two weeks before Bailey's murder.

There is not a single specific detail in the Petitioner's Statement of when, where, and the type of attack that occurred that matches the specific details of Duran Bailey's murder and the post-mortem cutting of his rectum, and neither does her description of her attacker as "huge" match Bailey who was 5'10" and weighed less than 140 pounds (133 pounds at autopsy). The Petitioner is 5'6", so Bailey was not a giant compared to her. There are at least 40 specific details in the Petitioner's Statement that don't match the details of Bailey's murder. (See Exhibit 85, Forty differences between Petitioner's Statement and Bailey's murder.) Likewise, the Petitioner's Statement doesn't identify a single landmark at or around the scene of Bailey's murder. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.)

At trial the prosecution did not present any physical, forensic, eyewitness, documentary, surveillance or confession evidence the Petitioner was anywhere in Clark County, Nevada at any time on July 8, 2001 – the day of Bailey's murder. Consequently, the prosecution needed some way to tie the Petitioner to Bailey's murder. It did that by Detective Thowsen's expert psychological opinion testimony that the Petitioner *de facto* confessed/admitted to Bailey's murder in her Statement precisely because it doesn't have details matching Bailey's murder and the crime scene.

Nevada state law requires that the opposing party must be notified about all prospective expert testimony. Petitioner's counsel was not provided notice that Detective Thowsen would provide expert testimony about anything. However, on direct testimony Thowsen explained away the lack of specific details in the Petitioner's Statement that matched Bailey's murder or the crime scene by testifying that was to be expected because based on a few on-the-job experiences, methamphetamine users such as the Petitioner "jumble" details to "minimize" their involvement in a crime. (8 App. 1387-1388; Trans. XIII 69-71 (09-27-06)) The essence of Thowsen's testimony is the Petitioner, who was an 18-year-old high school graduate with no criminal record, consciously used sophisticated techniques of misdirection to try and fool Thowsen and his partner James LaRochelle. Although Thowsen opinion testimony was about the Petitioner's psychological motivations or reasons underlying why her Statement doesn't match Bailey's death or crime scene, Petitioner's counsel did not object and move the court to strike Thowsen's testimony as improper expert psychology opinion testimony.

The prosecution acted in bad faith because they had more than two years to prepare for Petitioner's retrial, yet they did not provide the defense with the required statutory notice of Thowsen's prospective expert psychology testimony about the Petitioner. Furthermore, Thowsen could not have qualified as an expert psychology witness if the prosecution had attempted to do so, because there was no evidence presented at trial Thowsen possessed the advanced psychology academic degrees and years of specialized formal training necessary to even begin to attempt an expert analysis of the Petitioner's psyche to explain her reasons and motivations for anything she did or said about anything – much less to expertly analyze her psychology to explain what was or was not in her Statement and why.

Thowsen's opinion testimony did not posses any reliability or credibility as expert psychology evidence that would assist the jury to understand the inner working of the Petitioner's psyche or why

she did or didn't say anything to anyone about anything. Thowsen's testimony is precisely the sort of non-expert mumbo-jumbo psycho-babble testimony masquerading as expert testimony that NRS 174.234(2) is intended to prevent a jury from being contaminated and misled by hearing. Being a police officer no more makes a person a formally trained expert in psychology qualified to analyze and provide expert testimony about the inner workings of a person's mind and motivations than being a pilot makes a person a formally trained expert in aeronautical engineering. Knowing how to fly an airplane doesn't make one an expert in the how and why of the technicalities of an airplane's intricate operations. Thowsen's psycho-babble testimony about what he called the Petitioner's "jumbling" and "minimizing" was appropriate for casual conversation after a few beers with buddies in a bar, but it had no place in a court of law where the truth is considered important. NRS 174.234 (2) is not a self-executing statute – vigilance by the Petitioner's counsel was required for its enforcement. Yet, Petitioner's counsel made no objection and a motion to strike Thowsen's "expert" psychological testimony on the basis the prosecution acted in bad faith by failing to comply with the statutory requirements to provide 21 days notice of Thowsen's "expert" psychology testimony; a summary of his proposed expert testimony; his C.V. documenting his formal psychology education, advanced degrees, specialized training, and articles and papers he has written related to psychologically analyzing criminal suspects; and any reports related to the Petitioner he has written as a psychology expert.

Petitioner was extremely prejudiced by her counsel's failure to object and to move to have Thowsen's improper psychology opinion testimony stricken, because it served as the basis for the prosecution to claim her Statement constitutes a confession to Bailey's murder. During ADA William Kephart's direct examination of Thowsen he even referred to the Petitioner's Statement as a confession – "the defendant; who gave you her confession" (8 App. 1385, XIII-59-60 (09-27-06) During the prosecution's closing and rebuttal arguments Thowsen's improper psychology "expert" opinion testimony was relied on to describe the Petitioner's Statement as an admission of her guilt to murdering Bailey and cutting his rectum after he was dead.

Although Petitioner's counsel did not retain a psychology expert to analyze the Petitioner's Statement and provide expert testimony about it, new post-conviction expert psychology evidence

proves the magnitude of the prejudice to the Petitioner by her counsel's failure to object to Thowsen's improper psychology "expert" opinion testimony.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a qualified psychologist willing to review the Petitioner's Statement and associated materials on a *pro bono* basis to determine if the Petitioner's Statement could be considered a confession, a false confession, or no confession to Bailey's murder and the post-mortem cutting of his rectum. Psychologist Dr. Allison D. Redlich agreed to review the information in the Petitioner's case.

Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001. Dr. Redlich's report of February 10, 2010, states in part:

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.
>
> Although I do not consider Ms. Lobato's case a typical false confession case because she did not confess to the crime in which she was charged and convicted of, her case does share many hallmarks of proven false confession cases. Most notable are the inconsistencies between Ms. Lobato's version of events and the objective facts of Mr. Bailey's death. These inconsistencies have been documented by yourself and others, so

> I will not go into detail, but they include the date of the crimes, the location and time of the crimes, the supposed murder weapon, the shoe print left at Mr. Bailey's crime scene (and lack of a match with Ms. Lobato's shoes), and numerous others.
>
> In addition, in proven false confession cases, there is often no other evidence linking the suspect to the crime except the false confession statement. Similarly, in some of these cases, there is an absence of evidence that is consistent with the commission of the crime and/or the confession statements. To my knowledge, there is no physical evidence linking Ms. Lobato to Mr. Bailey's murder, as well as a lack of corroborating evidence given the manner of the murder.
>
> Another commonality found in proven false confession cases is that the confession statements are not generative in they do not lead to new evidence and/or tell the police details that are not already known. To my understanding, Ms. Lobato's statements did not provide any new evidence or information concerning the Bailey murder.
>
> Finally, I comment on Detective's Thowsen's claim that suspects often minimize their involvement with crimes. It is likely that some guilty suspects do minimize their involvement, in large part because police interrogators are trained to induce suspects to minimize. Specifically, the Reid Interrogation method (i.e., the most commonly used and well known method, see Inbau, Reid, Buckely, & Jayne, 2001) trains interrogators to utilize minimizing themes and scenarios (Step 2); that is, scenarios that make it easier for the suspect to admit to wrongdoing. However, I stress that almost all, if not all, proven false confessions also contain minimization. For example, in the well-established proven false confession case of the five teens involved in the Central Park Jogger crime, the teens minimized their involvement by claiming actions such as holding the victim's legs but not committing the rape itself. Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her."
>
> (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

The Petitioner was extremely prejudiced by the failure of her counsel to object to Thowsen's improper "expert" psychology opinion testimony, because during the Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that she was anywhere in Clark County on the day of Bailey's murder. So when the jury began its deliberations the only testimony linking her to Bailey's murder was Thowsen's improper psychology "expert" opinion testimony that her Statement didn't have details about Bailey's murder because she "jumbled" all the details to "minimize" her involvement. If Thowsen's testimony had been objected to and stricken as evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(vv) Ground forty-eight.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object and make a motion for a mistrial based on irreparable contamination of the jury by Detective Thomas Thowsen's testimony in response to a juror's question about whether he investigated around the Budget Suites Hotel on Boulder Highway for a witness to the sexual assault Petitioner describes in her Statement of July 20, 2001 – "there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." – which was not just an opinion of Detective Thowsen's unequivocally stated as a fact, but his statement was that of an experienced homicide detective directly and unquestionably branding the Petitioner as a liar and "guilty" of Bailey's murder, and Thowsen's declaration was so prejudicial that no curative instruction could undo or correct its prejudice to the Petitioner's state and federal constitutional rights to and unbiased and impartial jury, due process of law and a fair trial, yet Petitioner's counsel made no objection and motion for a mistrial, and the Petitioner was further prejudiced by her counsel because by not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Facts:

LVMPD Detective Thomas Thowsen was the lead homicide investigator in Petitioner's case. After Petitioner's counsel concluded cross-examining Thowsen, one of the jurors submitted a question and the following exchange took place:

> Question by a juror.
> THE COURT: Court's Number 59. Did you search the area near the Budget Suites for possible witnesses and did you ever locate where Blaise was living?
> THE WITNESS: I contacted the Budget Suites and because Blaise did not use her name to register there and she could not give us a name other than I believe it was Michelle as a first name, we had no information. It's a huge place. They had no information on somebody described like Blaise. They had no reports of incidents in their area. **So there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo.** (8. App. 1410; Trans. XIII-159 (9-27-2006) Emphasis added to original.)

Petitioner's counsel did not object and make a motion for a mistrial based on irreparable contamination of the jury by Detective Thowsen's testimony that was tantamount to a direct and unequivocal statement of fact that the Petitioner is a liar and guilty of Bailey's murder. There was nothing for the jury to interpret about Thowsen's statement: "**So there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo**."

Detective Thowsen's testimony was nothing less than his declarative statement that Thowsen and others ("we") "know" Petitioner is guilty of murdering Bailey, because "we know" the incident described in her Statement did not happen at the Budget Suites Hotel, but in the trash enclosure at the Nevada State Bank on West Flamingo where Duran Bailey was murdered. Det. Thowsen's statement of fact that Petitioner is guilty of murdering Bailey was supported by his improper testimony that Petitioner "jumbled" details of the crime in her Statement to "minimize" her involvement. (Trans. XIII–69-71 (9-27-06)) (See (uu) Ground forty-seven, for a detailed explanation of the prejudice to Petitioner by Thowsen's "jumbled" and "minimization" testimony.)

No evidence was provided during Petitioner's trial to support Det. Thowsen's testimony that Petitioner's Statement was a *de facto* confession except for Det. Thowsen's own self-serving testimony that "We know it happened on West Flamingo.", and that Petitioner "jumbled" details to "minimize" her involvement. Detective Thowsen's opinion expressed as a statement of fact – "So there's no sense looking for a witness to something that we know didn't happen there. We know it happened on West Flamingo." – was a response by an experienced homicide detective directly and unequivocally branding the Petitioner as a liar and "guilty" of Bailey's murder because he believed her Statement as about Bailey's murder.

As an authority figure entrusted to help keep the public safe from "bad people," Thowsen's branding of the Petitioner as a liar for the claims she made in her Statement about being assaulted at the Budget Suites Hotel, and that she was guilty was fatally prejudicial and had a profound effect on the jury's decision.

And there was a cascade effect from Detective Thowsen's testimony. If the jurors believed Thowsen then they also had to believe the Petitioner lied about where she was assaulted, when she was assaulted, and what happened. So the direct consequence of Thowsen's testimony was to fatally prejudice the Petitioner by branding everything she said in her Statement as a possible lie. For all practical purposes, the Petitioner's trial was over after Thowsen's testimony because nothing presented in her defense could be expected to overcome the fatal prejudice of Thowsen's testimony, i.e., she "jumbled" and "minimized" the details. That at least some of the jurors made up their mind about the Petitioner's guilt after Thowsen's testimony is likely why a juror was heard

to state before the Petitioner presented her defense that she had determined the Petitioner was guilty. (See Exhibit 24, Affidavit of John Kraft.)

In addition to doing nothing in response to Det. Thowsen's testimony branding Petitioner as a liar and that she was guilty because her Statement was a *de facto* confession to Bailey's murder, Petitioner's counsel did not counter Detective Thowsen's testimony by presenting testimony by a psychology expert. The magnitude of harm caused by counsel's failure to make any effort to counter Det. Thowsen's testimony branding Petitioner as a liar in her Statement and that she is guilty of Bailey's murder, is proven by Dr. Allison D. Redlich's post-conviction analysis of Petitioner's Statement.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a qualified psychologist willing to review the Petitioner's Statement and associated materials on a *pro bono* basis to determine if the Petitioner's Statement could be considered a confession, a false confession, or no confession to Bailey's murder and the post-mortem cutting of his rectum. Psychologist Dr. Allison D. Redlich agreed to review the information in the Petitioner's case.

Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001, including the audio and transcript of the Statement. Dr. Redlich's report of February 10, 2010, states in part:

From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.

Although I do not consider Ms. Lobato's case a typical false confession case because she did not confess to the crime in which she was charged and convicted of, her case does share many hallmarks of proven false confession cases. Most notable are the inconsistencies between Ms. Lobato's version of events and the objective facts of Mr. Bailey's death. These inconsistencies have been documented by yourself and others, so I will not go into detail, but they include the date of the crimes, the location and time of the crimes, the supposed murder weapon, the shoe print left at Mr. Bailey's crime scene (and lack of a match with Ms. Lobato's shoes), and numerous others.

In addition, in proven false confession cases, there is often no other evidence linking the suspect to the crime except the false confession statement. Similarly, in some of these cases, there is an absence of evidence that is consistent with the commission of the crime and/or the confession statements. To my knowledge, there is no physical evidence linking Ms. Lobato to Mr. Bailey's murder, as well as a lack of corroborating evidence given the manner of the murder.

Another commonality found in proven false confession cases is that the confession statements are not generative in they do not lead to new evidence and/or tell the police details that are not already known. To my understanding, Ms. Lobato's statements did not provide any new evidence or information concerning the Bailey murder.

Finally, I comment on Detective's Thowsen's claim that suspects often minimize their involvement with crimes. It is likely that some guilty suspects do minimize their involvement, in large part because police interrogators are trained to induce suspects to minimize. Specifically, the Reid Interrogation method (i.e., the most commonly used and well known method, see Inbau, Reid, Buckely, & Jayne, 2001) trains interrogators to utilize minimizing themes and scenarios (Step 2); that is, scenarios that make it easier for the suspect to admit to wrongdoing. However, I stress that almost all, if not all, proven false confessions also contain minimization. For example, in the well-established proven false confession case of the five teens involved in the Central Park Jogger crime, the teens minimized their involvement by claiming actions such as holding the victim's legs but not committing the rape itself. Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her.

(See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

Dr. Redlich provides new evidence and provides the expert assessment that was not presented at trial for the jury to rely on in evaluating how and why the Petitioner was credible and

truthful in her Statement, why it is not a confession to the murder of Duran Bailey, and why Thowsen's testimony was the baseless "shoot-from-the-hip" opinion of a person uneducated and with no formal training in psychologically analyzing a suspect's Statement.

Dr. Redlich explains that Petitioner's Statement is concerned with an unrelated event in which Petitioner was the victim, and she defended herself "by attempting to cut the penis of a man who was allegedly sexually assaulting her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010, 2.) Just as important as identifying that Petitioner's Statement is not a confession to Bailey's murder, is Dr. Redlich's conclusion that Detective Thowsen's testimony was inaccurate that Petitioner "jumbled" and minimized" about Bailey's murder in her Statement. Completely contrary to Det. Thowsen's testimony that Petitioner was deceptive, Dr. Redlich specifically observes "that Ms. Lobato believed she was cooperating with a police investigation." And, "Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her." (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010, 2.)

If Petitioner's counsel had retained Dr. Redlich or another qualified psychology expert (such as Dr. Richard Leo) who had testified the Petitioner did not "minimize" or "jumble" details of Bailey's murder in her Statement and it is not a confession to Bailey's murder, the jury could have been expected to identify that Detective Thowsen's testimony about the Petitioner's Statement completely lacked credibility. Consequently the jury would have rejected the prosecutor's arguments and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

The Petitioner was gravely prejudiced by her counsel's failure to object and move for a mistrial after Thowsen's *de facto* declaration the Petitioner was a liar in her Statement and guilty of Bailey's murder, because "We know it happened on West Flamingo.", and no curative instruction could overcome the jury's fatal infection with the prejudice of Thowsen's declaration to the Petitioner's right to an impartial and unbiased jury, due process, and a fair trial. The Prejudice to the Petitioner by Thowsen's declaration was compounded by her counsel's failure to introduce expert psychology testimony that Petitioner's Statement is not a confession to Bailey's murder. If

the motion for mistrial had not been granted, the Petitioner was further prejudiced because by her counsel not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ww) Ground forty-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object and make a motion for a mistrial and dismissal of the charges with prejudice when Clark County Assistant District Attorney William Kephart's committed egregious prosecutorial misconduct during his direct examination of Detective Thomas Thowsen by stating the Petitioner gave him "her confession," when there was no testimony the Petitioner "confessed" to Bailey's murder, and Kephart's statement fatally contaminated the jury so that no curative instruction could undo the prejudicial effect of Kephart's deliberate false statement to the jury that prejudiced the Petitioner's right to an impartial and unbiased jury, due process and a fair trial, and the failure of Petitioner's counsel to object and make a motion for a mistrial and dismissal of the charges with prejudice, prejudicially denied the Petitioner's state and federal rights to effective assistance of counsel, and the Petitioner was further prejudiced by her counsel because by not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Facts:

The Petitioner was charged with murdering Duran Bailey on July 8, 2001, and cutting his rectum after his death (aka sexual penetration of a dead body). No evidence was introduced at trial the Petitioner confessed to murdering Bailey or cutting his rectum after his death in her Statement or during any conversation with homicide Detectives Thomas Thowsen and James LaRochelle or any other person. No physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence was introduced at trial the Petitioner was anywhere in Clark County at any time on July 8, 2001, the day of Duran Bailey's murder. With no evidence the Petitioner was within 170 miles of Las Vegas on July 8, the prosecution had to somehow make the jury believe the Petitioner had confessed to murdering Duran Bailey.

During the direct examination of LVMPD homicide Detective Thomas Thowsen, Clark County Assistant District Attorney William Kephart the following exchange took place:

> Q. Okay. And in respect to that, you had indicated that you had done other investigations with regards to speaking to Dixie and Michelle and Laura; other

> individuals in this case; the defendant; who gave you **her confession**, and you -- did you do anything to determine whether or not there was any other report of an injury involving a knife wound to a man's penis?
> A. Yes, I did. (8 App. 1385); Trans. XIII–59-60 (9-27-06))

Petitioner's counsel did not object and make a motion for a mistrial based on Kephart's egregious prosecutorial misconduct, even though Kephart clearly and unequivocally stated the Petitioner gave Thowsen "her confession" – which only could have been in her Statement or during unrecorded conversations with Detectives Thomas Thowsen and James LaRochelle when she was arrested on July 20, 2001. Yet, there is no confession to Bailey's murder in Petitioner's Statement and there is no record that either Thowsen or LaRochelle claimed the Petitioner confessed to his murder. The Petitioner's Arrest Report doesn't claim the Petitioner confessed in her Statement or during any conversation with the Detectives, nor does the LVMPD Officer's Report of August 22, 2001, claim the Petitioner confessed.

So there is evidence in any document introduced at trail or referenced during the trial by any witness that the Petitioner confessed to Bailey's murder. Kephart fabricated his statement "the defendant, who gave you her confession" out of thin air, because it has no basis in reality or the evidence introduced at trial. Even though Kephart fabricated his statement, as the public's representative the jury would be expected to take it at face value.

Although Petitioner's counsel did not object, a motion for a mistrial was the only reasonable correction to Kephart's statement, because no curative instruction could have undone the damage to Petitioner's due process right, her right to a fair trial, and her right to an impartial and unbiased jury, because they could have reasonably assumed Kephart's statement as true and the Petitioner did confess, and that her counsel's objection was a legal stratagem to keep that information from the jury.

On the other hand, since Petitioner's counsel did not object to Kephart's gross prosecutorial misconduct of declaring the Petitioner gave "her confession" to Thowsen, the jurors could be expected to have believed the Petitioner did "confess," when no evidence was presented during Petitioner's almost four week trial that she did so. Kephart's unchallenged and false declaration the Petitioner gave "her confession" to Thowsen for accused crimes can be expected to have had a significant and

prejudicial impact on the jury's deliberations and finding that the Petitioner was guilty.

The Petitioner was extremely prejudiced by her counsel's failure to object and make a motion for a mistrial when Kephart falsely stated the Petitioner gave Thowsen "her confession." And because Kephart deliberately and falsely stated the Petitioner gave "her confession" to Thowsen to prejudice the Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process and a fair trial, the Petitioner was further prejudiced by her counsel's failure to object and make a motion for dismissal of the charges with prejudice based on Kephart and the prosecution's extreme prosecutorial misconduct that was intended to interfere with the fair administration of justice. The bell of Kephart's fabricated statement and its effect on the jurors could not be unrung by a curative instruction, so Kephart's statement about the Petitioner's non-existent confession was fatally prejudicial to the Petitioner's rights. Consequently the only cure was a mistrial, and the appropriate sanction for Kephart's egregious prosecutorial misconduct was dismissal of the charges with prejudice. If the motion for mistrial had not been granted, the Petitioner was further prejudiced because by her counsel not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Petitioner incorporates by reference the facts in the supporting documents. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(xx) Ground fifty.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to use available evidence to expose during cross-examination of Detective Thomas Thowsen that his testimony was not credible that he contacted hospital personnel and urologists in Las Vegas regarding a slashed or severed penis in May, June and July 2001; that he had his secretary search for reports filed by medical providers pursuant to NRS 629.041 related to a groin area or penis injury in May, June and July 2001 in Las Vegas; and that he went to the Budget Suites Hotel on Boulder Highway to investigate the Petitioner's Statement on July 20, 2001, that "over a month ago" she fought off a rape attempt by cutting once at her assailant's penis, and if the jury had known Thowsen's testimony wasn't credible, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution's key law enforcement witness during Petitioner's trial was LVMPD Detective Thomas Thowsen. Det. Thowsen was the lead homicide detective in Petitioner's case, and his partner was Detective James LaRochelle. The Las Vegas Metropolitan Police Department Officer's Report dated August 22, 2001, meticulously details what Thowsen and LaRochelle did during their investigation of Duran Bailey's murder. The Officer's Report includes the name and address of every individual and organization the detectives contacted, and it also records the date and time of when those contacts were made. Nowhere in the Officer's Report is it mentioned:

- That Detective Thowsen or his secretary searched for reports filed with the LVMPD under NRS 629.041 for groin area or penis wounds in May, June and July 2001.
- That Detective Thowsen contacted hospitals concerning treatment of an injured or severed penis in May, June and July 2001.
- That Detective Thowsen contacted urologists concerning repair of a severed penis in May, June and July 2001.
- That Detective Thowsen went to the Budget Suites Hotel on Boulder Highway in east Las Vegas to investigate the Petitioner's Statement that she was assaulted there "over a month" prior to July 20, 2001 (which was weeks before Bailey's murder).

Thowsen testified to the following on May 10, 2002, during Petitioner's trial:

> THE COURT: The record shall reflect that when he said in here somewhere he referred to a black binder that's to his right, which contains numerous documents, is about five inches thick.
> Q (By Mr. Kohn) I believe that's his **homicide book**, is that correct detective?
> A (By Mr. Thowsen) That's correct.
> Q **And that has everything you did in the case; everything that was done in the case; is that correct?**
> A **Yes**. (3 App. 734-735; Trans. III-99-100 (5-10-02)) (Emphasis added to original.)

Petitioner's counsel did not question Thowsen about the completeness of his "homicide book" at Petitioner's second trial.

In her Statement on July 20, 2001, audio recorded by Detectives Thowsen and LaRochelle, Petitioner described being sexually assaulted "over a month ago" in the parking lot of the Budget

Suites Hotel near Sam's Town (Casino) on Boulder Highway in east Las Vegas around or after midnight, and that she escaped from her assailant after attempting once to cut his exposed penis.

During Petitioner's trial Thowsen testified on direct examination that to try and verify Petitioner's account he searched for reports filed with the LVMPD by Las Vegas medical care providers in May, June and July 2001 for knife wounds to the groin area or penis, and that he found no reports. The reports are required by NRS 629.041 to be filed for the treatment of non-accidental gunshot and knife wounds. On cross-examination Detective Thowsen changed his testimony. He testified that he delegated the search to his secretary, and that she found no reports. When asked on cross-examination if he recorded anything regarding the search for the NRS 629.041 reports, Thowsen responded, "It's not in a specific document, no." (8 App. 1399; Trans. XIII-114 (9-27-2006))

Petitioner's counsel did not follow up by questioning Thowsen that his testimony he had no record of the investigation for reports filed under NRS 629.041 was contrary to his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." Neither did Petitioner's counsel question Thowsen about why the Officer's Report does not include any mention of a search by any person for any reports filed under NRS 629.041.

Thowsen also testified on cross-examination that to investigate if a man's penis had been cut or severed in May, June and July 2001, "I personally telephoned hospitals." (Trans. XIII-113 (09-27-06)), and, "Well, I also spoke with urologists in the Valley." (8 App. 1399; Trans. XIII-114 (9-27-2006)) Thowsen testified that all his inquires were negative for a slashed or severed penis. Petitioner's counsel asked Thowsen during cross-examination:

> Q. Okay. And did you prepare a report on the results of this investigation?
> A. I did not. (Trans. XIII-114 (09-27-06))

Petitioner's counsel did not follow up by questioning Thowsen that his testimony he did not make a report of his contacts with hospital personnel and urologists was contrary to his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." Neither did Petitioner's counsel question Thowsen about why the Officer's Report does not include any mention of him contacting hospital personnel and urologists.

Thowsen also testified on cross-examination that to try and verify Petitioner's account he went to the Budget Suites Hotel at 4855 Boulder Highway "within a few days" of her arrest. During Thowsen's cross-examination the following exchange took place:

> Q (By Mr. Schieck) Did you go out to the Budget Suites on the Boulder Highway?
> A (By Mr. Thowsen) Yes, I did. (8 App. 1392; Trans. XIII-88 (09-27-06))
> And,
> Q (By Mr. Schieck) And you didn't look for a crime scene. You talked to the manager and that was it?
> A (By Mr. Thowsen) That's correct. (8 App. 1411, Trans. XIII-165 (09-27-06))
>
> And,
>
> Q Did you prepare a report on that?
> A No, I did not. (App. 8, 1412, Trans. XIII-166 (09-27-06))

Petitioner's counsel did not follow up by questioning Thowsen that his testimony he had no record of his investigation at the Budget Suites Hotel was contrary to his prior testimony that "everything that was done in the case" was in his 5" thick black "homicide book." Neither did Petitioner's counsel question Thowsen about why the Officer's Report does not include any mention of him investigating at the Budget Suites Hotel.

There is no record anywhere that Thowsen conducted any of the four "investigations" that he testified he conducted to verify the assault described in the Petitioner's Statement. Yet, the Petitioner's counsel did not question Thowsen about why there is nothing about any of those investigations in the Officer's Report, or in his black "homicide book" that he agreed in his previous testimony has "everything that was done in the case."

The prosecution's case depended on undermining the Petitioner's description in her Statement that "over a month ago" at the Budget Suites Hotel she fought off a sexual assault by trying once to cut her assailant's penis. The prosecution relied on the negative results of Thowsen's four alleged investigations to undermine the Petitioner's credibility and the truthfulness of her Statement's description of when and where she was attacked, and what happened. Consequently, the Petitioner was gravely prejudiced by her counsel's failure to even attempt to cross-examine Thowsen to expose that there was no rational basis for the jurors to believe he conducted any of the four alleged investigations – because if he had done so he would have kept a record of them in his

black "homicide book" and they would have been documented in the Officers Report, particularly because the negative results of the four investigations support the allegation the Petitioner committed her accused crimes. If Petitioner's counsel had cross-examined Thowsen about the four alleged investigations it would have provided a factual basis for the jury to have determined his testimony about the investigations was not credible and untruthful, and with no basis to doubt the Petitioner's account in her Statement of being assaulted, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(yy) Ground fifty-one.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object on confrontation grounds to the hearsay testimony of LVMPD Detective Thomas Thowsen about what he said his secretary told him she had learned from searching for reports by Las Vegas medical care providers filed under NRS 629.041 for May, June and July 2001, and his hearsay testimony about what he said Las Vegas hospital personal and urologists told him regarding the treatment of an injured or severed penis during May, June and July 2001, and if Petitioner's counsel had objected on confrontation grounds Thowsen's hearsay testimony would have been stricken under *Crawford v. Washington*, 541 US 36 (2004) *et al*, and if the jury had not been allowed to consider Thowsen's hearsay testimony undermining the Petitioner's credibility and truthfulness in her Statement of July 20, 2001, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to confront witnesses against her, due process of law and a fair trial.

Facts:

The pillar of the prosecution's case was their contention the Petitioner was not credible and not truthful in her Statement of July 20, 2001, in which she described "over a month ago" being sexually assaulted at the Budget Suites Hotel on Boulder Highway in east Las Vegas, and that she defended herself by trying once to cut her "huge" attacker's penis with her pocket butterfly knife. The prosecution had to undermine Petitioner's credibility and truthfulness because if the incident occurred when, where and how the Petitioner described it, then her Statement and comments to many people about the attack had nothing to do with Duran Bailey's murder and the post-mortem cutting of

his rectum. With no physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001, the Petitioner was in Clark County, or Las Vegas, or at the Nevada State Bank, or inside the bank's trash enclosure where Bailey was murdered, the prosecution had to rely on somehow characterizing her Statement as a confession of guilt.

Consequently, a prosecution tactic to establish the Petitioner was not credible and not truthful in her Statement's description of when, where and how she was attacked, was to present Detective Thowsen's direct testimony that he personally conducted a search of NRS 629.041 reports by Las Vegas medical care providers filed in May, June and July 2001 for treatment of a non-accidental "slashed or severed penis." (Trans. XIII-62 (09-27-06)) (See Exhibit 74, NRS 629.041) Thowsen testified, "I found no slashed or severed penis." (Trans. XIII-62 (09-27-06)) On cross-examination Thowsen changed his testimony. He did not conduct a search of NRS 629.041 reports, but his secretary did, and she told him the results of her efforts. (Trans. XIII-112-4 (09-27-06)) The continuation during cross-examination of Thowsen's direct testimony about the NRS 629.041 reports led to him testify, "I personally telephoned hospitals." (Trans. XIII-113 (09-27-06)), and "I also spoke with urologists in the Valley." (Trans. XIII-114 (09-27-06)) Thowsen testified that all his inquires were negative for a slashed or severed penis. Petitioner's counsel asked Thowsen during cross-examination:

> Q. Okay. And did you prepare a report on the results of this investigation?
> A. I did not. (Trans. XIII-114 (09-27-06))

So Thowsen provided direct hearsay and double hearsay testimony as to what his unnamed secretary told him about her search for reports, and hearsay and double hearsay testimony on cross-examination about what unnamed persons from unidentified hospitals and unnamed urologists from unnamed clinics told him about the contents of reports or that they did not treat a slashed or severed penis in May, June or July 2001. Furthermore, Thowsen testified he did not memorialize in writing anything that was reported to him by those many unnamed people, making the direct testimony of his secretary, the hospital personnel and urologists, and the opportunity of Petitioner's counsel to cross-examine them, even more important.

Thowsen's testimony was not only hearsay and double hearsay, but it created the situation that all the medical care providers who prepared the NRS 629.041 reports he said his secretary told

him she searched for, and the hospital personnel and urologists that Thowsen's said he talked with were *de facto* witnesses testifying in absentia against the Petitioner via Thowsen without her having any opportunity to cross-examine them and elicit testimony consistent with her Statement, and that undermined the truthfulness of Thowsen's testimony. Thowsen testified he gathered the information from his secretary, the hospital personnel and the urologists as part of his investigation and the prosecution's preparation for the Petitioner's trial, which renders the reporting of that information to him testimonial in nature. And that information formed a key part of Thowsen's trial testimony and the prosecution's argument to the jury for the Petitioner's conviction. However, Petitioner's counsel did not object to Thowsen's hearsay testimony on the basis it violated the Petitioner's state and federal constitutional right to confront the witnesses against her.

Petitioner was extremely prejudiced by counsel's failure to object to any of Thowsen's multiple acts of hearsay and double hearsay testimony on confrontation grounds, because the prosecution relied on Thowsen's hearsay testimony to argue to the jury that there is no record of a slashed or severed penises in Las Vegas in May, June and July 2001. Consequently, the prosecution was able to attack Petitioner's credibility and truthfulness by characterizing her Statement as a *de facto* confession to Duran Bailey's murder and the cutting of his rectum, and that her Statement does not describe her defending herself against a sexual assault at the Budget Suites Hotel on Boulder Highway that occurred weeks prior to Bailey's murder. If Thowsen's hearsay testimony had been stricken and the jury admonished to disregard it, the jury would have had no evidence upon which to determine the Petitioner was not truthful in her Statement, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(zz) Ground fifty-two.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object and make a motion for a mistrial because ADA William Kephart committed egregious fraud on the court by deliberately misrepresenting to Judge Valorie Vega that Detective Thomas Thowsen was not going to provide hearsay testimony about NRS 629.041 reports filed in May, June and July 2001, and after Thowsen's direct testimony was exposed as hearsay during cross-examination, Kephart committed additional egregious fraud on the court by misrepresenting to Judge Vega that Thowsen had not provided hearsay testimony, and as a result of Kephart's egregious prosecutorial misconduct Thowsen also provided hearsay testimony about what he was allegedly told by hospital personnel and urologists, and ADA Sandra DiGiacomo aided and abetted Kephart's frauds on the court, and furthermore Kephart suborned perjury from Thowsen on direct examination about his non-exist search for NRS 629.041 reports, and because of Kephart and DiGiacomo's egregious prosecutorial misconduct of deliberately trying to sabotage the fair administration of justice and deprive the Petitioner of her state and federal constitutional rights to due process of law and a fair trial, the curative action was dismissal of the charges against the Petitioner with prejudice, but the Petitioner's counsel made no motion for dismissal, and the Petitioner was further prejudiced because by not objecting to Kephart's frauds on the court, DiGiacomo's aiding and abetting, and Kephart's subornation of perjury, those issues were not preserved for appeal to the Nevada Supreme Court.

Facts:

In the Petitioner's Statement on July 20, 2001, audio recorded by lead homicide Detective Thomas Thowsen and his partner Detective James LaRochelle, she described being sexually assaulted "over a month ago" in the parking lot of the Budget Suites Hotel on Boulder Highway in east Las Vegas around or after midnight, and that she escaped from her assailant after trying once to cut his exposed penis.

The prosecution's case depended on discrediting the Petitioner's description of when, where and what type of attack occurred, because they had to convince the jury that what she was talking about in her Statement was Bailey's murder and the post-mortem cutting of his rectum at the Nevada State Bank's trash enclosure 12 days before her interrogation. Key to that strategy was having Detective Thowsen testify that he could find no evidence that another man in Las Vegas experienced a cut or severed penis in May, June and July 2001.

During Thowsen's direct examination Clark County Assistant District Attorney William Kephart asked Thowsen several questions about NRS 629.041, which requires medical care

providers to file a report with local law enforcement authorities about their treatment of what they believe are non-accidental gunshot and knife wounds. Petitioner's counsel requested a bench conference to clarify where Kephart was going with Thowsen's testimony. Kephart represented to Judge Vega that Thowsen was going to provide testimony based on his personal knowledge of reviewing the NRS 629.041 reports. Judge Vega ruled that Kephart could question Thowsen about his search for the NRS 629.041 reports. (8 App. 1414-15; XIII-176-180 (9-27-06))

Thowsen testified on direct examination that to try and verify Petitioner's account in her Statement he searched for reports filed with the LVMPD under NRS 629.041 in May, June and July 2001 for knife wounds to the groin area or the penis, and that he found no reports. On cross-examination Thowsen changed his testimony. He testified that he didn't personally search for the reports. He delegated the search to his secretary, and he said she told him that she searched the NRS 629.041 reports for May, June and July 2001 and found none about a knife wound to a man's groin area or penis. During a continuation of the cross-examination that elicited Thowsen's admission that he testified falsely on direct examination about the reports, Thowsen provided hearsay testimony about what he said he was told by hospital personnel and urologists. Thowsen's hearsay testimony was that that all his inquires were negative for a slashed or severed penis. When asked on cross-examination if he recorded his investigation, Thowsen replied, "It's not in a specific document, no." (8 App. 1399; Trans. XIII-117 (09-27-2006))

Petitioner's counsel made a motion to strike Thowsen's hearsay direct testimony about his secretary's search for NRS 629.041 reports, and to strike his hearsay testimony on cross-examination about what he said he was told by hospital personnel and urologists. At the end of the day when Judge Valorie Vega considered the motions, Petitioner's counsel David Schieck stated: "We'd object that it's hearsay and the Court allowed him to testify. We want to renew that motion and make a motion to strike his testimony in that regard …" (8 App. 1414; XIII-176, 9-27-06)) The purpose of cross-examination is to test the veracity of a witness' testimony on direct examination, and Thowsen's cross-examination is a classic example of how it can expose a witness' direct testimony was false and contrived.

ADA Sandra DiGiacomo attempted to divert the court's attention away from the issue of Thowsen's hearsay direct testimony by saying the prosecution could subpoena records from ten hospitals to show there were no injured penises. Judge Vega then said:

> "THE COURT: -- objection at sidebar was as to hearsay and we had discussion at sidebar that -- cause my initial impression was that Detective Thowsen himself had called the hospitals and was going to rely what the hospital personnel had told him and Mr. Kephart said, no, that that was not the case. That he had internally reviewed reports from Metro that were negative. And that is what Detective Thowsen initially testified to so I want to go back to my notes." (App. 8, 1414; XIII-177, 9-27-06) (Underlining added to original.)

DiGiacomo again attempted to divert the court's attention away from the issue of Thowsen's hearsay direct testimony by pointing out to Judge Vega that Thowsen's testimony about what he was told by hospital personnel was elicited during cross-examination.

At that point Vega had made it clear that Kephart had specifically told her during the bench conference that Thowsen's direct testimony was going to be that "he had internally reviewed reports from Metro." Kephart did elicit that testimony from Thowsen on direct examination, but on cross-examination Thowsen admitted his testimony was not true. He did not search for any NRS 629.041 reports: he testified his secretary told him that she had done so.

During the discussion after Thowsen testified, Kephart made additional misrepresentations to Judge Vega about Thowsen's direct testimony that he searched the NRS 629.041 reports, which he admitted on cross-examination he knew nothing about personally, but his secretary told him she had searched the reports:

> "MR. KEPHART: As I recall specifically in that area because I knew what Mr. Schieck was objecting to. His testimony on direct was he searched for reports and that and found -- and within the department and nothing had been reported and it was left at that. … but he testified on direct that he found no reports. And my specific direct was aimed as to the statute as to whether or not there was any reports made resulting in information about a person being stabbed or cut with a knife and we talked here specifically about in the groin area slashed with a knife or whatever and he said nothing was reported like that. And now Mr. Schieck said, well, what, did you talk to -- you know, he went on beyond reports based on cross-examination." (8 App. 1415; XIII-179, 9-27-06)

Kephart obfuscated the issue that he elicited Thowsen's hearsay testimony on direct

examination after lying to Judge Vega that Thowsen had personal knowledge about the reports; by again lying to Judge Vega that Thowsen didn't provide any information during his direct examination that suggested his testimony was hearsay. And Kephart further lied to Judge Vega about the issue of Thowsen's hearsay on direct examination by telling Vega that Petitioner's counsel was objecting to information elicited from Thowsen during cross-examination.

Petitioner's counsel did not bring to Judge Vega's attention the fraud on the court Kephart was perpetrating by his repeated lying to Judge Vega about what Thowsen's testimony was going to be, and then what his testimony actually was on direct examination about his secretary and the NRS 629.041 reports. Neither did Petitioner's counsel bring to Judge Vega's attention that Kephart suborned perjury from Thowsen on direct examination about his non-exist search for NRS 629.041 reports.

Petitioner's counsel also did not bring to Judge Vegas attention that Kephart was misleading her because Thowsen's hearsay and double hearsay testimony on direct examination about the reports could not be exposed until the defense had an opportunity to cross-examine Thowsen. It was discovered during cross-examination that Thowsen lied during his direct testimony, and that he in fact provided hearsay and double testimony about what he said his secretary told him about the NRS 629.041 reports. Petitioner's counsel did not clarify the issue that Thowsen's testimony about contacting hospital personnel and urologists was a direct consequence and continuation of his cross-examination that exposed Thowsen had fabricated his direct testimony about personally searching for the NRS 629.041 reports. If Kephart had not successfully duped Judge Vega into allowing Thowsen to lie during his direct examination about personally searching for the NRS 629.041 reports, then he never would have asked the questions during cross-examination that resulted in his hearsay and double hearsay testimony about what he said he was told by hospital personnel and urologists in Las Vegas.

Since Petitioner's counsel did not bring to Judge Vega's attention Kephart's multiple frauds on the court, Thowsen's perjury, and DiGiacomo's attempts to divert Judge Vega's attention from what they had done to ensure the jury would hear and be allowed to consider Thowsen's hearsay and double hearsay testimony about the NRS 629.041 reports that he had no personal knowledge

of, Vega rewarded the blatant dishonesty of Kephart, Thowsen and DiGiacomo by ruling: "The motion to strike is denied. The State limited either examination to avoid the hearsay." Crime does pay. At least when it is two Clark County Assistant District Attorneys and a Las Vegas Metropolitan Police Department homicide detective pulling off the crime in a Las Vegas courtroom right under the nose of the judge.

If Kephart had not lied to Judge Vega that Thowsen's direct testimony would be based on his personal knowledge– she would not have been duped into allowing Thowsen's hearsay testimony about the absence any NRS 629.041 reports about an injured penis in May, June and July 2001.

If Kephart had not lied to Judge Vega after Thowsen testified that his direct testimony about the absence of NRS 629.041 reports and an injured penis was not hearsay – she would have stricken Thowsen's hearsay testimony from the record.

And if Kephart had not lied to Judge Vega after Thowsen testified that his hearsay testimony on cross-examination about what he said he was told by hospital personnel and urologists was not a continuation of his hearsay testimony on direct examination about the search of NRS 629.041 reports, Judge Vega would have stricken that testimony from the record. Judge Vega's ruling was the direct result of the multiple frauds on the court that Kephart perpetrated by his lies to deceive Judge Vega about Thowsen's hearsay testimony, both before and after he testified. And Kephart was aided by DiGiacomo's subterfuge of running interference for Kephart.

However, Petitioner's counsel did not object to Kephart's egregious prosecutorial misconduct of repeatedly lying to Judge Vega to perpetrate a fraud on the court, or his subornation of Thowsen's perjury on direct examination. Neither did Petitioner's counsel make a full record of how Thowsen's cross-examination hearsay testimony about what the hospital personnel and urologists told him was intertwined with and a continuation of his direct hearsay testimony about the NRS 629.041 reports that he said his secretary told him about.

Consequently, Kephart and DiGiacomo were rewarded by Judge Vega for their egregious prosecutorial misconduct and Kephart's repeated lying to Judge Vega on the record, when she denied the objection by Petitioner's counsel to Thowsen's hearsay testimony and the motion to strike his testimony.

Petitioner's counsel raised the issue of Thowsen's hearsay testimony on direct and cross-examination in her direct appeal to the Nevada Supreme Court. Petitioner's Appeal Brief argued Judge Vega abused her discretion by not sustaining the Petitioner's objection to Thowsen's hearsay testimony on direct and cross-examination about what he said his secretary told him about her search of NRS 629.041 reports, and what he said hospital personnel and urologists told him.

During oral arguments Petitioner's counsel David Schieck argued that Thowsen's hearsay and double hearsay testimony should have been stricken by Judge Vega. During his argument Schieck outlined Kephart's subterfuge in duping Judge Vega to admit Thowsen's hearsay testimony. Schieck did everything but use the word conspiracy to describe the coordinated effort between Kephart, DiGiacomo and Thowsen to deceive and confuse Judge Vega into allowing Thowsen to knowingly contaminate the jury with his hearsay and double hearsay testimony on direct and cross-examination. The following is an excerpt of Schieck's oral argument:

> Mr. Schieck: … They had pre-trialed him, he had told them what he had done, they were fully aware of it. When we approached the bench, they told the Court that he had done it when, in fact, he hadn't done it, and that's what created the problem when we continued to ask him questions. The State....
> Court: As to this issue, could you clarify the issue as to what you're talking about and the offer by the State to bring forth the custodians of record from the various hospitals, as to this issue?
> Mr. Schieck: They did -- when I renewed my objection after it was clear that it was hearsay and it was improper, and I asked that his testimony be stricken, they said, "Oh, we've already got under subpoena the hospitals in order to prove that." That's because they must have known that his testimony was hearsay and if we objected, they were going to have to do that. They made no offer of proof as to what hospitals, they had every opportunity to bring that in and didn't bring it in. …
> …
> Mr. Schieck: …. if you read the sequence of how this questioning went and how we got to the point we were at, you will see that there was, there was this information given to the Court when the initial ruling was made, and it started to peel away, peel away, peel away till we get to the point where they don't want to bring in those health care providers; they prefer to have Detective Thowsen summarize what happened with every health care provider in Clark County.
> (Nevada Supreme Court oral argument in *State of Nevada vs. Kirstin Blaise Lobato*, No. 49087, on October 17, 2008. Emphasis added to original.) (Audio of Nevada Supreme Court oral arguments available at, www.justicedenied.org/kl/lobato_NSC_arguments_10-7-08.mp3)

Schieck did not argue, and it was not included in the Petitioner's appeal to the Nevada Supreme Court, that Kephart and DiGiacomo's deceptions constitute egregious frauds on the court that prejudiced the Petitioner and affected the jury's verdict. Thowsen's hearsay and double-hearsay testimony about what the NRS 629.041 reports and what he said he was told by hospital personnel and urologists was indispensible to the prosecution. It was the only evidence that could be characterized as providing a link between the Petitioner's Statement and Bailey's murder: If no penis injuries were reported in Las Vegas in May, June and July 2001 – then her Statement must be about Bailey's murder. Or so the prosecution argued.

The NSC ruled that Thowsen's direct testimony was hearsay, but possibly due to the incomplete record because Judge Vega cut the hearing short, it ruled Thowsen's cross-examination hearsay testimony was invited error by Petitioner's counsel. (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance) Also possibly due to the incomplete record, the NSC ruled Thowsen's hearsay testimony was harmless error. The NSC was not cognizant when it made it ruling of the magnitude of what had transpired in Judge Vega's courtroom related to the frauds on the court perpetrated by Kephart and DiGiacomo in deceiving Judge Vega into first allowing, and then declining to strike Thowsen's hearsay and double hearsay testimony on direct and cross-examination.

The egregious prosecutorial misconduct of ADA Kephart and DiGiacomo's frauds on the court was waived as an appealable issue by the failure of Petitioner's counsel to object that Kephart lied repeatedly on the record to Judge Vega so she would rule favorably for the prosecution regarding Thowsen's hearsay testimony. Likewise, Petitioner's counsel did not object to Kephart's egregious prosecutorial misconduct of suborning perjury from Thowsen on direct examination about his non-existent search for NRS 629.041 reports.

The Petitioner was prejudiced because if her counsel had properly objected to Kephart and DiGiacomo's fraud on the court, and Kephart's subornation of perjury, those issues could have been raised in her direct appeal. If they had been raised as an issue the NSC would almost surely have ruled that all of Thowsen's hearsay testimony was prejudicial error and reversed the Petitioner's conviction. For the NSC to have done otherwise would have rewarded the prosecution for Kephart and DiGiacomo's fraudulent misrepresentations to Judge Vega to win favorable rulings

about Thowsen's hearsay and double hearsay testimony on direct and cross-examination. And it would have left Kephart subornation of Thowsen's perjury about personally conducting the NRS 629.041 searches unpunished and emboldened him to continue freely subverting the administration of justice with the sanction of the Court.

The circumstances of ADA Kephart and DiGiacomo's frauds on the court demand a full evidentiary hearing during which all the relevant parties and material witnesses testify. In particular testimony must be obtained from ADA Kephart and Judge Vega about whether and how their relationship while colleagues in the Clark County District Attorney's Office influenced her to tolerate and condone Kephart's multiple lies to her about Thowsen's hearsay testimony, and the influence that relationship had on her decision to deny the motion of Petitioner's counsel to strike Thowsen's hearsay testimony. The testimony of Kephart, DiGiacomo, and Vega as material witnesses, and her court personnel, will also reveal what unrecorded *ex parte* communications occurred between them during Petitioner's trial concerning Thowsen's hearsay testimony.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(aaa) Ground fifty-three.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to use available information to cross-examine LVMPD Detective Thomas Thowsen about his false and possibly perjurious testimony about comments he alleged the Petitioner made about the holding cell she was in at the Clark County Detention Center after her arrest on July 20, 2001, and to object to the prosecution's false statements about Thowsen's testimony during closing and rebuttal arguments, and if the jury had known Thowsen's testimony was false and possibly perjurious, and the prosecution's arguments were false statements about Thowsen's testimony, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

To try and tie the Petitioner to Bailey's murder the prosecution argued to the jury that while the Petitioner was in a Clark County Detention Center cell after her arrest on July 20, 2001, she

described the trash enclosure where Bailey was murdered to LVMPD Detective Thomas Thowsen (and his partner James LaRochelle, who did not testify). Detective Thowsen testified at trial:

> Q. What did she tell you?
> A. While she was standing in this room getting photographed she looked around at it and she made the comment that this looked similar to the structured area where the attack had occurred and made the comment that she could look up and see the covered parking from the parking lot from the position.
> (Trans. XIII - 50-51 (9-27-06) Underlining added to original.)

During cross-examination Petitioner's counsel did not question Thowsen to expose inconsistencies between his trial testimony about the holding cell and the Arrest Report written the day of her arrest, his preliminary hearing testimony 18 days after her arrest, the LVMPD Officer's Report written by Thowsen and his partner James LaRochelle 15 days after the preliminary hearing, and Thowsen's testimony during the Petitioner's first trial. The Arrest Report states:

> "While at CCDC, Lobato told Detective Thowsen and I that the incident occurred in an enclosed area similar to the jail cell, but smaller." (Arrest Report, ID/Event No. 1691351, Lobato, Kirstin Blaise, July 20, 2001, LVMPD. Underlining added to original.)

Contrary to Thowsen's trial testimony, the Arrest Report has the Petitioner saying that the "area" in which she was attacked was smaller than the holding cell. The trash enclosure where Bailey was murdered is twice or more larger than the holding cell, so the Petitioner could not have been referring to the trash enclosure. Also contrary to Thowsen's trial testimony, the Arrest Report does not have the Petitioner saying anything about what she could or couldn't see when looking up. The single most distinctive feature of the trash enclosure is the unmistakable wire mesh fencing material that is only inches above one's head, yet Thowsen doesn't even claim in his testimony the Petitioner said anything about the wire mesh ceiling. Furthermore, a police photo taken the morning after Bailey's murder doesn't show "the covered parking" that Thowsen claimed in his testimony. What you could clearly see from inside the trash enclosure is lots of trash on top of the wire mesh, but Thowsen did not claim in his testimony that the Petitioner made any comment about the very visible trash. (See Exhibit 61, Trash Enclosure Wire Mesh.) So Thowsen claimed in his trial testimony that the Petitioner commented on what is not visible in the photo – "the covered

parking" – while he makes no mention of her saying anything about what can be clearly seen – the wire mesh directly above the head of a person standing in the trash enclosure, and the trash heaped on top of the wire mesh ceiling. Furthermore, the Arrest Report makes no mention the Petitioner said she was attacked in a "structured area" similar to the holding cell.

During Petitioner's preliminary hearing that was 18 days after her arrest, Thowsen testified:

> "she was in a small holding cell and indicated that the place was similar to a small area like this." (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 61. Underlining added to original.)

That testimony was similar to the Arrest Report in describing that where the Petitioner said she was attacked was in an area half or less the size of the trash enclosure where Bailey was murdered, so the Petitioner could not have been referring to the trash enclosure. And Thowsen's preliminary hearing testimony was also consistent with the Arrest Report that makes no mention the Petitioner made any comment while in the holding cell about what she could or could not see when looking up. The single most distinctive feature of the trash enclosure is the unmistakable wire mesh fencing material that is only inches above one's head, yet Thowsen doesn't even claim in his testimony the Petitioner said anything about the wire mesh ceiling. Furthermore, a police photo taken the morning after Bailey's murder doesn't show "the covered parking" that Thowsen claimed in his testimony. What you could clearly see from inside the trash enclosure is lots of trash on top of the wire mesh, but Thowsen did not claim in his testimony that the Petitioner made any comment about the very visible trash. (See Exhibit 61, Trash Enclosure Wire Mesh.) Furthermore, Thowsen's makes no mention in his preliminary hearing testimony the Petitioner said she was attacked in a "structured area" similar to the holding cell.

During Petitioner's first trial Thowsen testified:

> Q. What did she say?
> A. She commented that the room looked similar to the area she was in during the attack, however, it seemed a little bit smaller in that when she looked up she could see the awning of a parking structure I believe is the way she explained it.
> (4 App. 705; Trans. III-70 (05-10-02) Underlining added to original.)

That testimony was similar to the Arrest Report in that he testified the Petitioner said the "area" in which she was attacked was "smaller" than the holding cell, and his preliminary hearing testimony that she was attacked in a "small area like this." The trash enclosure where Bailey was

murdered is twice or more larger than the holding cell, so the Petitioner could not have been referring to the trash enclosure. Furthermore, Thowsen's makes no mention in his first trial testimony the Petitioner said she was attacked in a "structured area" similar to the holding cell. What is new in his testimony that wasn't in the Arrest Report and his preliminary hearing testimony (which was under oath) is that "when she looked up she could see the awning of a parking structure …" However, it is known from Thowsen's testimony the Petitioner could not have been referring to the trash enclosure where Bailey was murdered, because the single most distinctive feature of the trash enclosure is the unmistakable wire mesh fencing material that is only inches above one's head, yet Thowsen doesn't even claim in his testimony the Petitioner said anything about the wire mesh ceiling. Furthermore, a police photo taken the morning after Bailey's murder doesn't show "a parking structure" that Thowsen claimed in his testimony. What you could clearly see from inside the trash enclosure is lots of trash on top of the wire mesh, but Thowsen did not claim in his testimony the Petitioner made any comment about the very visible trash. (See Exhibit 61, Trash Enclosure Wire Mesh.)

The first place where there is any mention of the "covering" is in the Officer's Report dated August 22, 2001 – which was 15 days after the preliminary hearing, and 33 days after Petitioner's arrest. The Officer's Report was signed by Thowsen and his partner LaRochelle. It states:

> "Lobato was photographed in cell Z-4. Lobato said that the cell enclosure reminded her of the location in which she had been attacked; she also added that the location of the attack did not have covering and that he could she the metal covering of a carport area." (LVMPD Officer's Report, August 22, 2001. Underlining added to original.)

The account in the Officer's Report of what the Petitioner said is even more dissimilar from the trash enclosure where Bailey was murdered than the accounts in the Arrest Report, and Thowsen's preliminary hearing and first trial testimony, in that she only said the cell "reminded her of the location in which she had been attacked." A person can see a red Toyota Camry and say it "reminded" them of a yellow Honda Accord they owned ten years ago. It is common that a person is "reminded" of something by something else that is quite different. An even greater dissimilarity between the account in the Officer's Report and the trash enclosure is it has the Petitioner saying, "the location of the attack did not have covering." It is known the Petitioner could not have been referring to the trash enclosure where Bailey was murdered because the single most distinctive

feature of that trash enclosure is the unmistakable wire mesh fencing material covering the enclosure that is only inches above one's head, yet the Officer's Report specifically states "the location of the attack did not have covering." Furthermore, a police photo taken the morning after Bailey's murder doesn't show "the covering of a carport" described in the Officer's Report. What you could clearly see from inside the trash enclosure is lots of trash on top of the wire mesh, but the Officer's Report doesn't mention that the Petitioner made any comment about the very visible trash. (See Exhibit 61, Trash Enclosure Wire Mesh.)

Thus Thowsen's trial testimony 5-1/2 years after the Petitioner's arrest was radically contrary and inconsistent with the Arrest Report written the day of her arrest, his preliminary hearing testimony 18 days after her arrest, and the Officer's Report dated 15 days after the preliminary hearing, and his first trial testimony. The former three events are consistent in describing that the Petitioner said she was attacked in an area as small or smaller than the holding cell. The holding cell is dramatically smaller than the trash enclosure where Bailey was murdered, which is twice or more larger than the holding cell, so the Petitioner could not have been referring to the trash enclosure. Furthermore, Thowsen's makes no mention in the Arrest Report, his preliminary hearing testimony, and his first trial testimony that the Petitioner said anything about being attacked in a "structured area" similar to the holding cell. The Officer's Report that Thowsen co-authored 15 days after his preliminary hearing testimony says the Petitioner was "reminded" of where she was attacked when in the cell, which is even vaguer than the "similar" phrase used in the Arrest Report, and Thowsen's preliminary hearing and first trial testimony.

In both the Arrest Report and Thowsen's preliminary hearing testimony there is no mention whatsoever of what the Petitioner could see from where she was assaulted. The description in the Officer's Report signed 15 days after her preliminary hearing and her formal charging that she said she could see "the metal covering of a carport area." (LVMPD Officer's Report, August 22, 2001.), and Thowsen's testimony in her first trial that she said she could see, "the awning of a parking structure" (Trans. III-70 (05-10-02)), clearly identifies that where she was attacked was not the Nevada State Bank's trash enclosure, because directly above one's head is the unmistakable wire mesh fencing material covering the enclosure that is only inches above one's head, and a police

photo taken the morning after Bailey's murder doesn't show "the metal covering of a carport area" described in the Officer's Report. What you could see from inside the trash enclosure is lots of trash on top of the wire mesh. Yet there is no mention of either the wire mesh ceiling directly above one's head covering the trash enclosure or the trash that was on top of it, in any of Thowsen's five accounts of what he says the Petitioner said in the holding cell.

There was nothing in the Arrest Report, or Thowsen's preliminary hearing or first trial testimony, or the Officer's Report, which suggests the Petitioner made any reference in the holding cell that where she was attacked was the trash enclosure where Bailey was murdered. That supports that where she was assaulted is exactly where she said in her Statement – the Budget Suites Hotel.

The review of Thowsen's accounts of what the Petitioner said in the holding cell prior to his testimony during her second trial makes it clear that Thowsen made up out of thin air the incriminating details that were in his trial testimony – "she made the comment that this looked similar to the structured area where the attack had occurred" – and which was not in any of his four previous accounts (two under oath), which suggests he committed perjury. Thowsen tried to force fit the round peg of where the Petitioner was assaulted at the Budget Suites Hotel into the square hole of the trash enclosure where Bailey was murdered. However, Thowsen got away with his fabricated testimony and the jury didn't know it wasn't true, because the Petitioner's counsel did not cross-examine him based on his four previous accounts that did not support his testimony – including the Arrest Report written the day of the Petitioner's arrest 5-1/2 years earlier, and only shortly after the alleged comments by the Petitioner in the holding cell.

The prejudice to the Petitioner by her counsel's failure to effectively cross-examine Thowsen was magnified during the prosecution's closing when ADA Sandra DiGiacomo argued to the jury:

> "And the only person -- and think about too, she knew what the dumpster enclosure looked like. When she got to that jail cell at CCDC when she's being booked in, she's like yeah, it was just like this except for I could see through the roof," (9 App. 1730; Trans. XIX-149 (10-5-06))

And,

> "The only way she was able to describe the place, the body, the injuries, the you know, where it happened, how it looked, the only way she knew that, 'cause she was there." (Trans. XIX-150 (10-5-06))

And during his rebuttal argument ADA Kephart argued to the jury:

> "And when they bring her back to the jail cell and she talks about the inside of the jail cell looking like where this occurred." (Trans. XIX 204 (10-5-06))

Thowsen's trial testimony does not support DiGiacomo and Kephart's arguments. Thowsen did not testify that the Petitioner knew what the "dumpster enclosure looked like," he did not testify that she said anything remotely similar to "it was just like this except for I could see through the roof," he did not testify that "she was able to describe the place" and "how it looked," and he did not testify she said anything about "the jail cell looking like where this occurred." However, just as Petitioner's counsel failed to cross-examine Thowsen about his direct testimony that was inconsistent with the Arrest Report, his preliminary hearing and first trial testimony, and the Officer's Report, Petitioner's counsel failed to object to DiGiacomo and Kephart's arguments that were based on their imagination and not any evidence presented at trial. Consequently the prosecution succeeded in prejudicially misleading the jury that the Petitioner made comments after her arrest suggesting she had knowledge of the trash enclosure, which none of Thowsen's four prior accounts (two under oath) supports. The Petitioner was prejudiced by her counsel's failure to cross-examine Thowsen about his inconsistent and possibly perjurious testimony, and object to the prosecution's improper closing and rebuttal arguments, because making the truth known to the jury would have provided the jurors with a factual basis to reject that the Petitioner had any knowledge of the trash enclosure, which Bailey's killer(s) would have had, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(bbb) Ground fifty-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to either file a pretrial motion, or to cross-examine Detective Thomas Thowsen, to learn the details of how he obtained the information that the Petitioner was serially sexually assaulted when she was five and six years-old, because the admissibility of Petitioner's Statement of July 20, 2001, could have been challenged if it had been learned that Thowsen and his partner James LaRochelle illegally obtained the information about Petitioner's childhood experience they calculatingly used to upset her mentally and put her in a vulnerable emotional state of mind immediately prior to obtaining the Petitioner's waiver of her right to remain silent, to consult with counsel before talking with the detectives, and agreeing to provide a Statement, and without consideration of the Petitioner's Statement that the prosecution characterized as her confession and which was the foundation of their case, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

LVMPD Detectives Thomas Thowsen and James LaRochelle, and Crime Scene Analyst Maria Thomas drove from Las Vegas to Panaca on the afternoon of July 20, 2001, to arrest the Petitioner for the murder of Duran Bailey on July 8, 2001. The decision to arrest the 18-year-old Petitioner was based on a telephone conversation on July 20 between Thowsen and Lincoln County Juvenile Probation Officer Laura Johnson. Johnson told Thowsen she had been told by her friend Dixie Tienken, that Tienken had been told by a former student of hers that she had fought off a rape attempt in Las Vegas by cutting once at her attacker's penis.

After arriving in Lincoln County the detectives obtained Johnson's statement, although they made no effort to contact Tienken to corroborate Johnson's account. They then arranged to have a tow truck transport the Petitioner's car to the LVMPD crime lab in Las Vegas for examination, and a Lincoln County Sheriff's deputy led the detectives and Thomas to where the Petitioner was living at her parents' house.

Immediately after introducing himself, Thowsen told the Petitioner that he knew she had been hurt in the past. (The Petitioner had been repeatedly raped when she was five and six by her mother's boyfriend.) The Petitioner immediately began to cry and became very emotional. While

she was crying and in her emotional state Thowsen had the Petitioner sign a *Miranda* waiver and he proceeded to question her for about 30 minutes in an audio taped Statement, during which the Petitioner remained very emotional. (Det. LaRochelle asked several questions toward the end.) In her Statement the Petitioner described a rape attempt at the Budget Suites Hotel in east Las Vegas near Sam's Town Casino that she fought off by attempting once to cut her attacker's penis. She described her assailant as alive and crying when she was able to escape in her car. Since her Statement was on July 20, 2001, the sexual assault she identified as happening "over a month ago" occurred prior to June 20, which was weeks before Bailey's July 8 murder. When shown a picture of Bailey the Petitioner didn't recognize him.

On August 9, 2001, the Petitioner was charged with Bailey's first degree murder and the sexual penetration of his dead body (cutting his rectum after his death).

During the Petitioner's trial Medical Examiner Lary Simms testified that after Bailey died his penis was amputated. The prosecution then relied on Thowsen's testimony to characterize the Petitioner's Statement as a confession to Bailey's murder, because she described fighting off her would be rapist by trying once to cut his penis. Thowsen admitted on cross-examination that he deliberately used the Petitioner's childhood victimization against her that evoked an immediate emotional response. (Trans. III-12-13 (5-10-2002)) Thowsen's testimony about the Petitioner's Statement and her comment before it was indispensible for the prosecution to secure the Petitioner's conviction, because the prosecution did not introduce any physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001, the Petitioner had been anywhere in Clark County, Nevada – much less that she was at the Las Vegas scene of Bailey's murder at the exact time it occurred.

However, Petitioner's counsel made no effort to file a pretrial motion or to learn if the information Thowsen relied on to psychologically impair the Petitioner and make her emotionally vulnerable was sealed because it involved her childhood sexual trauma, and if it is only legally obtainable by a court order. Furthermore, Petitioner's counsel made no effort to cross-examine Detective Thowsen to ascertain exactly what report he relied on, such as its title, date, who prepared it, and most specifically, if the report had been sealed by the court, and if Thowsen had

illegally obtained the information about the Petitioner's childhood rapes in violation of the law. If Thowsen illegally obtained the report without the requisite court order – then Petitioner's counsel could have challenged the admissibility of Petitioner's Statement because Thowsen relied on the information about the Petitioner's horrific childhood experience with the intention to put the Petitioner into a state of mind where she was emotionally distraught and vulnerable, and was not exercising judgment sufficient to provide a knowing, intelligent and voluntary *Miranda* waiver to her right to remain silent, and her right to consult with a lawyer prior to speaking with the detectives. Thowsen's sadistic torture like psychological tactic that induced an emotional state in the Petitioner could have affected her rational judgment to the point she could not provide a valid waiver of her rights, and her Statement was inadmissible on that basis. The Petitioner was prejudiced because her counsel made no effort to learn by a pretrial motion or during cross-examination the details of how Thowsen obtained the information of her childhood sexual traumas that he used against her to obtain her Miranda waiver.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ccc) Ground fifty-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to impeach Laura Johnson's credibility by cross-examining her about the false statements in her Las Vegas Metropolitan Police Department Statement of July 20, 2001, her testimony about the Petitioner's car, her doubts about the Petitioner's guilt, and the pressure put on her to support the prosecution's case, and the Petitioner was prejudiced, because Johnson was a key prosecution witness and if counsel had impeached her testimony by showing she is not credible, individually or cumulative with other evidence, no reasonable juror would have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

In July 2001 Laura Johnson was the Lincoln County, Nevada Juvenile Probation Officer. Dixie Tienken was a former teacher of the Petitioner's in Panaca, and sometime in late June or early July 2001 the Petitioner went to Tienken's house and during their conversation that lasted for

several hours, the Petitioner told her about being sexually assaulted in Las Vegas. (See Exhibit 14, Affidavit of Dixie Tienken.) Tienken and Johnson were friends, and Tienken taught a class at the Lincoln County Jail in Pioche on Wednesdays. She hadn't seen Johnson for at least three weeks, so on Wednesday July 18, 2001, she went by Johnson's office and they caught up on things. Among other things Tienken told Johnson that the Petitioner had told her about fighting off a rape attempt in Las Vegas. Two days later, on July 20, Johnson called the LVMPD and talked with Detective Thomas Thowsen, who was assigned as the lead detective in Duran Bailey's murder. That telephone call set in motion Thowsen, his partner James LaRochelle, and CSA Maria Thomas driving up to Lincoln County that afternoon to arrest the Petitioner at her parents' house in Panaca for Bailey's murder.

Johnson's testimony as a prosecution witness was important because the court allowed her to provide double hearsay testimony about what she said Dixie Tienken told her the Petitioner told Tienken about her car. Johnson's double hearsay testimony was important because it suggested the Petitioner had a guilty mind. Johnson testified:

> Q. (By Ms. DiGiacomo) Did Dixie ever tell you what the defendant had said about her car?
> A. (By Ms. Johnson) Yes.
> Q. What'd she tell you?
> A. She told me that they were hiding the vehicle out in -- that her parents and her were hiding the vehicle out in Panaca and they were gonna get it painted or possibly sell the vehicle. (Trans. VII-41-42 (9-19-06))

Tienken denied the Petitioner told her those things about her car or that she told them to Johnson. Furthermore, Johnson's double hearsay testimony about the Petitioner's car was contrary to the trial testimony by every witness who had personal knowledge about the Petitioner's car – including Detective Thowsen, who along with his partner James LaRochelle took Johnson's Statement on July 20, 2001. Petitioner's car was not hidden at her parents' house as Johnson testified. All the testimony at trial from relative and non-relative witnesses was her car was parked in front of her parents' house on the public street for weeks without being moved. Petitioner's car was in full view of anyone who drove by her parents' house, just as it was seen by detectives Thowsen and LaRochelle when they went to arrest the Petitioner on July 20, 2001. (See Exhibit 82,

Petitioner's car parked on street.) Likewise, there was no testimony the Petitioner or her parents made any effort to have her car painted or to sell it after she parked it on July 2, 2001. When inspected by the LVMPD crime lab the interior of her car was dusty and there was dirt and vomit on the floor, so it is known the car had not been thoroughly cleaned recently. Yet, Petitioner's counsel made no attempt during cross-examination to expose that Johnson's hearsay testimony about the Petitioner's car was not credible, particularly considering that before the Petitioner's arrest Johnson requested that a Lincoln County Sheriff's deputy drive by and check on the car when it was parked on the public street in front of her parents' house.

A significant falsehood in Johnson's Statement of July 20, 2001, the Petitioner's counsel did not cross-examine Johnson about was that the Petitioner had been a probationer under Johnson's supervision in Lincoln County. At the time of her arrest, the Petitioner had no criminal record and had not been on probation, so Johnson fabricated that assertion in her Statement.

Still another significant inconsistency in Johnson's Statement and her testimony that the Petitioner's counsel did not cross-examine Johnson about was she said Dixie told her the Petitioner was attacked when she came out of a Las Vegas club by a guy whose penis was hanging out of his pants. Contrary to Johnson's third-hand account, Petitioner's Statement and Dixie's statement are consistent in describing Petitioner was attacked at night as she was getting out of her car, and neither of them said her attacker's penis was hanging out of his pants when he knocked her down.

But the jury didn't know about the false and inconsistent aspects of Johnson's Statement and testimony because Petitioner's counsel did not cross-examine her about any of them.

Petitioner's counsel also did not cross-examine Johnson about her significant doubts the Petitioner was guilty. Johnson's doubts were so extreme that she went to the scene of Duran Bailey's murder in Las Vegas to see if it matched the place she recollected that Tienken described to her where the Petitioner said she had been attacked by her would be rapist. Of course, when Johnson went to the crime scene she found out that it didn't resemble what she described in her Statement because Bailey was murdered in a bank's trash enclosure, not outside a club.

Petitioner's counsel also did not cross-examine Johnson about the pressure put on her to support the prosecution's case against the Petitioner, or her fear that there would be repercussions

in her job as the Lincoln County Juvenile Probation Officer if she didn't support the prosecution's case. (See Exhibit 14, Affidavit of Dixie Tienken.) Was Johnson's testimony hers? Or did she testify the way the prosecutors and Thowsen wanted her to testimony?

Depending on Johnson's testimony in response to her cross-examination or the prosecution's objections. Dixie Tienken, Johnson's husband, and other people from Lincoln County area could have testified as rebuttal witnesses.

Under the principle of *falsus in uno, falsus in omnibus* ("false in one thing, false in everything") everything that Johnson testified to that is not corroborated by independent evidence should be disregarded as inherently untrustworthy.

The Petitioner was prejudiced because if her counsel had effectively cross-examined Johnson the jury can be expected to have discounted her testimony as not credible. Without any basis to believe the Petitioner allegedly tried to hide or dispose of her car and that Johnson's testimony did not support she had a guilty mind, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ddd) Ground fifty-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to investigate or present witnesses who could testify about the areas in Las Vegas where methamphetamine was readily available in 2001, and if the jury had known of this evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

"Naked City" is an area of Las Vegas where in June and July 2001 methamphetamine was readily available. "Naked City" is located near the Stratosphere Hotel and Casino on the far north end of The Strip, and in a different part of Las Vegas than the Nevada State Bank where Bailey was murdered. In 2001 "Naked City" was a quasi-lawless area of open and rampant methamphetamine and other drug dealing.

Skye Campbell is a Las Vegas private investigator. Her "Affidavit of Skye Idris Campbell," dated March 12, 2010, states in part:

> 3. I am familiar because of my work, with areas of Las Vegas where methamphetamine was readily available in June and July 2001.
> 4. In June and July 2001 an area of Las Vegas where methamphetamine and other drugs were readily available from street vendors and drug houses is known as "Naked City," which is located near the Stratosphere Hotel and Casino.
> 5. In June and July 2001 the area around the Nevada State Bank at 4240 W. Flamingo Road was not known as a place where methamphetamine was readily available from street vendors and drug houses, and to my knowledge during that period of time methamphetamine was not readily available by going to the Nevada State Bank's exterior trash enclosure.
> (See Exhibit 23, Affidavit of Skye Idris Campbell.)

It is new evidence that the Nevada State Bank's exterior trash enclosure was not a location where a person would have gone to obtain methamphetamine in June and July 2001. During that period of time a person seeking methamphetamine could readily obtain it all hours of the day and night in "Naked City," which is almost five miles from the Nevada State Bank where Bailey was murdered.

However, Petitioner's jury was unaware that "Naked City" is where a person looking for methamphetamine would have gone in June and July 2001, and not the Nevada State Bank's trash enclosure. The Petitioner was prejudiced because her counsel did not present any witness to testify about where methamphetamine was readily available when Bailey was murdered. If Petitioner's jury had known that areas of Las Vegas such as "Naked City" is where the Petitioner would have gone in June and July 2001 to obtain methamphetamine, they would have rejected the prosecution's baseless speculation that she, or anyone else, would have gone to the Nevada State Bank's trash enclosure, and no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(eee) Ground fifty-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to the testimony of Zachory Robinson that was hearsay, irrelevant and/or without foundation because he did not work at the Budget Suites Hotel at 4855 Boulder Highway in May, June and July 2001, and therefore he had no personal knowledge of how it was managed at that time or what happened there, and Petitioner's counsel did not object on confrontation grounds to strike Robinson's testimony about the contents of Hotel records for May, June and July 2001 under *Crawford v. Washington*, 541 US 36 (2004) *et al*, and Petitioner was prejudiced by counsel's failure to object to Robinson's hearsay testimony that there was no record of a sexual assault in the Budget Suites Hotel parking lot in May, June and July 2001, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

Petitioner's Statement of July 20, 2001, describes her being sexually assaulted "over a month ago" at the Budget Suites Hotel at 4855 Boulder Highway in east Las Vegas. That means the assault occurred sometime prior to June 20, 2001. Zachory Robinson testified about matters related to the management and security at the Budget Suites Hotel at 4855 Boulder Highway in May, June and July 2001, and he provided hearsay testimony about the contents of reports about that Hotel. There was no evidence that Robinson worked at the Budget Suites Hotel in May, June and July 2001, so he had no personal knowledge of the security and administrative procedures he testified about that were in effect then, and the persons who prepared the reports Robinson testified about were not subpoenaed by Petitioner's counsel. Among other things Robinson testified without objection by Petitioner's counsel that there was no report of a person having their penis cut at the Hotel in May, June and July 2001.

Robinson's hearsay testimony aided the prosecution's argument that Petitioner was not credible and she was untruthful in her Statement. The Petitioner was prejudiced because her counsel failed to object to Robinson's hearsay testimony on confrontation and other grounds. If the jury had not been allowed to hear Robinson's hearsay it would have undermined the prosecution's case, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner requests an evidentiary hearing, and is indigent and requests appointment of counsel.

(fff) Ground fifty-eight.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to file a pre-trial motion for the prosecution to disclose if Detective Thomas Thowsen was on the Clark County District Attorney Office's "Liar's List" of law enforcement officers known to have given false and/or perjurious testimony or false sworn statements in connection with any case, and further to disclose if Thowsen had been disciplined for any dishonest and/or unethical conduct at any time during his law enforcement career whether with the LVMPD or any other agency, and if Thowsen had any history of mental health issues, and because the prosecution's case hinged on the jury believing that Thowsen was telling the truth, the information was relevant and discoverable, and it was imperative for the Petitioner's counsel to know if Thowsen had a history of falsely testifying under oath and/or dishonest and unethical conduct in other aspects of being a law enforcement officer, or he had mental health issues, and if Petitioner's counsel had been provided with evidence casting doubt on Thowsen's truthfulness and credibility, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

LVMPD Detectives Thomas Thowsen and James LaRochelle, and Crime Scene Analyst Maria Thomas drove from Las Vegas to Panaca on the afternoon of July 20, 2001, to arrest the Petitioner for the murder of homeless Duran Bailey on July 8, 2001, in a west Las Vegas bank's trash enclosure. The decision to arrest the 18-year-old Petitioner was based on a telephone conversation on July 20 between Thowsen and Lincoln County Juvenile Probation Officer Laura Johnson. Johnson told Thowsen she had been told by her friend Dixie Tienken, that Tienken had been told by a former student of hers that she had fought off a rape attempt in Las Vegas by cutting once at her attacker's penis.

After arriving in Lincoln County the detectives obtained Johnson's statement, although they made no effort to contact Tienken to corroborate Johnson's account. They then arranged to have a tow truck transport the Petitioner's car to the LVMPD crime lab in Las Vegas for examination, and a Lincoln County Sheriff's deputy led the detectives and Thomas to where the Petitioner was living at her parents' house.

Immediately after introducing himself, Thowsen told the Petitioner that he knew she had been hurt in the past. (The Petitioner had been repeatedly raped when she was five and six by her

mother's boyfriend.) The Petitioner immediately began to cry and became very emotional. While she was crying and in her emotional state Thowsen had the Petitioner sign a *Miranda* waiver and he proceeded to question her for about 30 minutes in an audio taped Statement, during which the Petitioner remained very emotional. (Det. LaRochelle asked several questions toward the end.) In her Statement the Petitioner described a rape attempt at the Budget Suites Hotel in east Las Vegas near Sam's Town Casino that she fought off by attempting once to cut her attacker's penis. She described her assailant as alive and crying when she was able to escape in her car. Since her Statement was on July 20, 2001, the sexual assault she identified as happening "over a month ago" occurred prior to June 20, which was weeks before Bailey's July 8 murder. When shown a picture of Bailey the Petitioner didn't recognize him.

There is not a single specific detail about the attempted rape described in the Petitioner's Statement that matches the specific details of Bailey's murder in a west Las Vegas bank's trash enclosure. While she says she tried once to cut her live attacker's penis before escaping, Bailey's Autopsy Report lists 31 separate ante-mortem and post-mortem external injuries, and numerous internal injuries, and her description of her attacker as "huge" bears no resemblance to the very skinny Bailey who weighed less than 140 pounds. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) Among the dissimilarities was Bailey's penis was amputated when he was dead, while the man who assaulted the Petitioner was very much alive when she was able to escape from him. Furthermore, the Arrest Report written the day of the Petitioner's arrest does not allege she confessed to Bailey's murder either in her Statement or at any time to the detectives off-tape, and she did not sign any document confessing to the crime.

On August 9, 2001, the Petitioner was formally charged with Bailey's first degree murder and the sexual penetration of his dead body (cutting his rectum after his death).

Consistent with the absence of any apparent link between the Petitioner's Statement and Bailey's murder, there was no physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001, the Petitioner was anywhere in Clark County, and there was no evidence the homeless Bailey and the Petitioner had ever met, or that she had every been to anyplace that Bailey hung out or "lived." Likewise, no forensic tests of the

Petitioner's personal items and car tested positive for Bailey's DNA or blood, and none of her DNA or fingerprints were found on any crime scene evidence. Furthermore, the Petitioner had a number of alibi witnesses establishing her presence in Panaca from shortly after midnight on the day of Bailey's murder until after his body was discovered that night.

Preparing for Petitioner's trial her counsel knew that in the absence of evidence linking her to the crime the prosecution's case hinged on the jury believing Thowsen's testimony that would try to cast the Petitioner's Statement as a confession to Bailey's murder and mutilation in spite of not having a single specific detail matching the crime.

Consequently, if Thowsen could be shown to have a history of being dishonest or untrustworthy (or even a single recorded instance in his career), or mentally unstable the jury could be expected to reject his testimony – which would almost certainly result in the Petitioner's acquittal.

Some prosecutor's office keep what is sometimes known as a "Liar's List." Which is a list of law enforcement officers known to have given false and/or perjurious testimony or given a false sworn statement in connection with any case, and the details of the instances when they did so. So it was imperative for Petitioner's counsel to file a motion for the prosecution to disclose if Thowsen was on their "Liar's List" and any details it had about him. It was also imperative for Petitioner's counsel in the same motion to seek an order for the prosecution to disclose if Thowsen had been disciplined for any dishonest and/or unethical conduct at any time during his law enforcement career whether with the LVMPD or any other agency, and if Thowsen had any history of mental health issues. All of that material could have been used to impeach Thowsen's truthfulness, credibility and reliability as a witness.

The documents were relevant and discoverable because it was the Prosecution hinging its case on Thowsen's honesty and reliability as a witness, and it was the prosecution that intended to use his testimony to try and convince the jury the Petitioner's Statement was actually a confession and to paint the Petitioner as a liar and guilty of Bailey's murder. If Thowsen was an unreliable and not credible witness then the prosecution's tactic would fail.

Consequently, the Petitioner was gravely prejudiced by her counsel's failure to take affirmative action to obtain all documents available to the prosecution that could impeach Thowsen's testimony. If

the jury had known there was substantial reason to double the truthfulness of Thowsen's testimony, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ggg) Ground fifty-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to make a NRS 175.381(1) motion at the close of the prosecution's case, again at the close of the defense's case, and again at the close of the prosecution's rebuttal evidence, for the judge to advise the jury to acquit Petitioner due to the prosecution's failure to introduce evidence sufficient to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt, and most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes, and the failure of Petitioner's counsel to make the NRS 715.381(1) motions prejudiced the Petitioner's state and federal rights to due process and a fair trial.

Facts:

The Petitioner was charged with personally murdering Duran Bailey and then inserting a knife into and/or cutting his anus on July 8, 2001, within Clark County, Nevada. (See Exhibit 99, *State v. Lobato*, No. C177394, Criminal Information.) Consequently, one of the essential elements the prosecution had to introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" at the crime scene at the time the crimes occurred. If the prosecution did not introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" and at the Nevada State Bank and inside the trash enclosure in its parking lot at the exact time Bailey was murdered, she could not have committed her accused crimes, and there was insufficient evidence for the jury to find her guilty.

The prosecution not only failed during it case in chief to present any substantive evidence that Petitioner was in Clark County at the time of Duran Bailey's murder, but the prosecution failed to present any physical, forensic, medical, eyewitness, surveillance, documentary, or confession evidence the Petitioner and her car had been in Clark County at any time on July 8, 2001 – the day

of Duran Bailey's murder. In fact, every prosecution witness that testified to Petitioner's whereabouts on July 8 testified they saw and/or talked with her in Panaca. Since no evidence was introduced by the prosecution the Petitioner was in Clark County at any time on July 8, 2001, she could not have been in Las Vegas at the Nevada State Bank when Bailey was murdered, and so the Petitioner could not have committed her accused crimes.

During the Petitioner's defense every witness that testified to Petitioner's whereabouts on July 8 testified that they saw and/or talked with her in Panaca. Likewise, every defense and prosecution witness who testified about the Petitioner's car said it was parked on July 8 in front of her parents' house. The testimony of the defense and prosecution witnesses was consistent with telephone records of a number of telephone calls during July 8 from between the Petitioner and a boyfriend in Las Vegas who drove up to Panaca to pick her up on the evening of July 8. During the prosecution rebuttal no evidence was presented rebutting the witness testimony and telephone records that the Petitioner and her car were in Panaca on the entire day of July 8.

At the close of the prosecution's case in chief and again at the close of their rebuttal, the only knowledge the jurors had that the Petitioner and her car had been in Clark County on July 8, 2001, was the prosecution's claim during its opening statement. During the jury's deliberations the jurors had no evidence to consider that the Petitioner was in Clark County at the time of Bailey's murder except for the prosecution's claim during its opening statement, and its closing and rebuttal arguments. The prosecution's speculation during its opening statement, and then during closing and rebuttal arguments that the Petitioner and her car were in Clark County at the time of Bailey's murder was not substantiated by any evidence introduced at trial, much less evidence proving beyond a reasonable doubt the Petitioner was in Clark County, or in Las Vegas, or at the Nevada State Bank at any time on July 8, 2001, much less at the specific time of Bailey's murder.

NRS 175.381(1) states:

> 1. If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.

Since no evidence was presented during Petitioner's trial that she was in Clark County at

any time on July 8, the jury could only have relied on the prosecution's speculation that the Petitioner was at the scene of Bailey's murder, or that she committed her convicted crimes. An essential element of the Petitioner's convicted crimes was that she was at the scene of the crime. Since no evidence was presented by the prosecution, only speculation and speculative inferences, that Petitioner was even in Clark County at the time of Duran Bailey's murder, there is not evidence beyond a reasonable doubt that she committed her convicted crimes.

With no substantive evidence the prosecution met its legal burden of proving beyond a reasonable doubt the essential element the Petitioner was in Clark County and present at the scene of Bailey's Las Vegas murder, Petitioner's counsel was legally obligated to make a motion to the court under NRS 175.381(1) for the court to advise the jury to acquit the Petitioner at the close of the prosecution's case in chief, again at the close of the defense's case in chief, and again after the close of the prosecution's rebuttal evidence. The failure of Petitioner's counsel to do so prejudiced her state and federal rights to due process and a fair trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(hhh) Ground sixty.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to jury instructions 26 and 33 which unconstitutionally alter the prosecution's burden of proving beyond a reasonable doubt Petitioner's guilt of every element of each charge beyond a reasonable doubt by empowering the jury to choose between the Petitioner's "guilt or innocence", and which unconstitutionally alter the Petitioner's presumption of innocence by imposing a presumption of guilt that she must rebut by proving her "innocence" to the jury's satisfaction or be convicted, and determination of the Petitioner's "guilt or innocence" was left for the jury to decide by a standard of proof of their choosing in jury instruction 26, which could be the civil standard of a preponderance of the evidence, and consequently counsel's failure to object to jury instructions 26 and 33 individually and cumulatively prejudiced the Petitioner's state and federal constitutional rights to an impartial jury, due process of law and a fair trial.

Facts:

The prosecution's burden under the Nevada Constitution and the Fifth Amendment to the

U.S. Constitution was to prove the Petitioner's guilt of every element of each charge beyond a reasonable doubt. The Petitioner has no constitutional obligation to present any evidence, because she is presumed legally innocent of her accused crimes until proven guilty of every element of each charge beyond a reasonable doubt.

Jury instructions 33 and 26 alter the relationship between the prosecution's burden of proof and the Petitioner's presumption of innocence by placing a burden on the Petitioner to prove her "innocence." Jury instruction 33 specifically instructs the jury, "You are here to determine the **guilt or innocence** of the Defendant from the evidence in the case." (See Exhibit 80, Jury Instruction 33.) Jury instruction 26 instructs the jury, "The flight of a person immediately after the commission of a crime, or after she is accused of a crime, is not sufficient in itself to establish her guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of her **guilt or innocence**." (See Exhibit 78, Jury Instruction 26.)

Contrary to the specific instruction of the trial court to Petitioner's jurors in instructions 26 and 33, Petitioner's jurors had no lawful role in deciding the Petitioner's "innocence." Jury instructions 26 and 33 emasculated Petitioner's presumption of innocence and imposed a legal obligation on her to prove her "innocence" to the jury's satisfaction. Furthermore, Petitioner's jurors were instructed in instruction 33 to determine the "innocence of the Defendant from the evidence in the case." If the Petitioner did not present evidence during her defense proving her "innocence" to the satisfaction of the jurors, the jury could weigh that against Petitioner in favor of the prosecution, and rely on that to support their determination of her "guilt." Under the court's mandate in instruction 33, the jury was able to consider the Petitioner not testifying as evidence of her guilt – irrespective of any conflicting instruction.

Jury instructions 26 and 33 also relieved the prosecution of its burden of proving the Petitioner's guilt of every essential element of each charge by simply requiring she be found "guilty." Instruction 26 went beyond that by allowing the jury to determine the Petitioner's "guilt" by a standard of proof of the jury's choosing, which could be the civil standard of a preponderance of the evidence, or drawing straws, or reliance on a reading of Tarot cards, or even a coin toss. Jury instruction 26 literally allowed the jury to convict the Petitioner if the prosecution had immediately rested and presented NO

evidence, and the Petitioner did not present evidence of her "innocence" sufficient to satisfy the jurors. With the court's blessing the jurors' could interpret the mere fact of the charges against Petitioner as sufficient proof to find her guilty based on the adage that "where there is smoke there must be fire." Consequently jury instructions 26 and 33 fundamentally altered the relationship between the State and the Petitioner by creating a heretofore unknown legal burden on her to establish her innocence, while at the same time lessening or eliminating the State's burden of proof.

The Petitioner was prejudiced by her counsel failure to object to jury instructions 26 and 33. Jury instructions 26 and 33 fundamentally altered the relationship between the State and the Petitioner by creating a heretofore unknown legal burden on her to establish her innocence, while at the same time lessening the State's burden of proving her guilty beyond a reasonable doubt. Under the theory that all instructions carry equal weight, there is no way to know if the jury applied the juror optional proof standard of instruction 26 or the slightly more demanding standard of instruction 33 to find that the Petitioner had not proven her "innocence" to jury's satisfaction in voting her guilty. What is known is that under the court's mandate of instruction 26 and 33 the Petitioner's "presumption of innocence" was eliminated and it was left for the jury to determine the standard of proof they used to find the Petitioner guilty, and not proof of her guilt beyond a reasonable doubt as required by the Nevada Constitution and the due process clause of the Fifth Amendment to the U.S. Constitution.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(iii) Ground sixty-one.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to jury instruction 31 that includes "the more weighty affairs of life" as the "reasonable doubt" standard for the jury to follow, which is similar to wording rejected by the Ninth Circuit Court of Appeals, and jury instruction 31 is a combined "reasonable doubt," "burden of proof" and "presumption of innocence" instruction that is fatally compromised and modified by jury instructions 26 and 33, which eliminate the Petitioner's presumption of innocence and also eliminate the prosecution's burden of proving the Petitioner's guilt of every essential element of each charge beyond a reasonable doubt, and consequently counsel's failure to object to jury instruction 31, individually and cumulatively with instructions 26 and 33 prejudiced the state and federal constitutional rights of the Petitioner to an impartial jury, due process of law and a fair trial.

Facts:

The prosecution's burden under the Nevada Constitution and the Fifth Amendment to the U.S. Constitution was to prove the Petitioner's guilt of every element of each charge beyond a reasonable doubt. The Petitioner has no constitutional obligation to present any evidence because she is presumed legally innocent of her accused crimes until proven guilty of every element of each charge beyond a reasonable doubt.

Petitioner's jury instruction 31 reads in part: "A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life." (See Exhibit 79, Jury Instruction 31.)

Concerns that the prosecution's burden of proof was diminished by instructions such as "the more weighty affairs of life" wording in jury instruction 31, led the federal Ninth Circuit Court of Appeals to abandon its similar model jury instruction to find the defendant guilty only if "you find the evidence so convincing that an ordinary person would be willing to make the most important decisions in his or her own life on the basis of such evidence." (See Exhibit 81, Ninth Circuit 3.5 Reasonable Doubt – Defined.) The rationale for rejecting that instruction is the "most important decisions in life—choosing a spouse, buying a house, borrowing money, and the like—may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases." (See Exhibit 81, Ninth Circuit 3.5 Reasonable Doubt – Defined.) The Ninth Circuit determined jury instructions with wording such as Petitioner's jury instruction 31 – "the more weighty affairs of life" – reduce the jury to deciding the Petitioner's fate by calculating odds like the jurors would do if they were playing a game of craps, or poker or blackjack in a Las Vegas casino, and not by the infinitely higher required legal standard of proof beyond a reasonable doubt.

The jury instructions about the prosecution's "burden of proof" and the Petitioner's "presumption of innocence" were included with the "reasonable doubt" instruction in jury instruction 31. The combining of the "reasonable doubt," "burden of proof" and "presumption of innocence" instructions in jury instruction 31 diminished the individual importance of all three instructions, particularly considering that jury instruction 31 was compromised and modified by jury instructions 26

and 33. Jury instructions 26 and 33 alter the relationship between the prosecution's burden of proof and the Petitioner by placing a burden on the Petitioner to prove her "innocence," while reducing the prosecution's burden to merely proving Petitioner's "guilt," and instruction 26 authorized the jury to find the Petitioner guilty by a standard of each juror's choosing, or the jury collectively.

Jury instruction 33 specifically informs the jury, "You are here to determine the **guilt or innocence** of the Defendant from the evidence in the case." (See Exhibit 80, Jury Instruction 33.) While Jury Instruction 26 informs the jury, "The flight of a person immediately after the commission of a crime, or after she is accused of a crime, is not sufficient in itself to establish her guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of her **guilt or innocence**." (See Exhibit 78, Jury Instruction 26.)

Contrary to the specific instruction of the trial court to Petitioner's jurors in instructions 26 and 33, Petitioner's jurors had no lawful role in deciding the Petitioner's "innocence." Jury instructions 26 and 33 emasculated Petitioner's presumption of innocence and imposed a legal obligation on her to prove her "innocence" to the jury's satisfaction. Furthermore, Petitioner's jurors were instructed in instruction 33 to determine the "innocence of the Defendant from the evidence in the case." If the Petitioner did not present evidence during her defense proving her "innocence" to the satisfaction of the jurors, the jury could weigh that against Petitioner in favor of the prosecution and rely on that to support their determination of her "guilt." Under the court's mandate in instruction 33 the jury was able to consider the Petitioner not testifying as evidence of her guilt – irrespective of any conflicting instruction.

Jury instruction 26 and 33 also relieved the prosecution of its burden of proving the Petitioner's guilty of every essential element of each charge by simply requiring she be found "guilty." Instruction 26 went beyond that by allowing the jury to determine the Petitioner's "guilt" by a standard of proof of the jury's choosing, which could be the civil standard of a preponderance of the evidence, or drawing straws, or reliance on a reading of Tarot cards, or even a coin toss. Jury instruction 26 literally allowed the jury to convict the Petitioner if the prosecution had immediately rested and presented NO evidence, and the Petitioner did not present evidence of her "innocence" sufficient to satisfy the jurors. With the court's blessing the jurors' could interpret the mere fact of the charges against Petitioner as sufficient

proof to find her guilty based on the adage that "where there is smoke there must be fire." Consequently jury instructions 26 and 33 fundamentally altered the relationship between the State and the Petitioner, by creating a heretofore unknown legal burden on her to establish her innocence, while at the same time reducing or eliminating the State's burden of proof.

The Petitioner was prejudiced by her counsel failure to object to jury instruction 31. The instruction not only has the deficient "the more weighty affairs of life" reasonable doubt wording, but it combines the instructions for "reasonable doubt," "burden of proof" and "presumption of innocence." So the combined instruction 31 has no more weight than any conflicting instruction, and it was up to the jurors to decide which instruction to give more weight in their deliberations. Taken together jury instructions 26, 31 and 33 present a confusing and contradictory maze for the jury to interpret. Under the theory that all instructions carry equal weight, there is no way to know if the jury applied the jury optional proof standard of instruction 26 or the slightly more demanding standard of instruction 33 to find that the Petitioner did not prove her "innocence" to their satisfaction, or if they applied the Vegas crap table "reasonable doubt" standard of instruction 31 to find the Petitioner guilty. What is known is that under the court's mandate it was left for the jury to determine the standard of proof they used to find the Petitioner guilty, and not proof of her guilt beyond a reasonable doubt as required by the Nevada Constitution and the Fifth Amendment to the U.S. Constitution.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(jjj) Ground sixty-two.

Petitioner's counsel was ineffective under the Nevada Constitution and the Sixth Amendment to the U.S. Constitution for failing to submit a jury instruction that an essential element of Nevada's necrophilia law, NRS 201.450, is the prosecution had to introduce evidence beyond a reasonable doubt the Petitioner engaged in sexual activity with Duran Bailey's corpse that would be considered sexual activity with a life person, because according to the Nevada Legislature's legislative intent in enacting NRS 201.450, a sexual assault under that statute must be considered a sexual assault if committed with a live person, and counsel's failure to submit a jury instruction prejudiced the state and federal constitutional rights of the Petitioner to due process of law and a fair trial, because after consideration of that instruction no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450.

Facts:

The prosecution argued to the jury that the Petitioner slashed Duran Bailey's rectum with her pocket butterfly knife in an act of spontaneous methamphetamine-fueled rage. The prosecution based Petitioner's charge of violating Nevada's necrophilia law – NRS 201.450 – based on the prosecution's allegation that Duran Bailey's rectum was slashed after he died. The prosecution did not argue that Petitioner had sexual relations with Bailey's rectum after his death, and no testimony was provided at trial that Petitioner had done so. NRS 201.450 is known as Nevada's necrophilia law, and the legislative history of the statute makes clear that it only criminalizes sexual activity with a corpse that would be considered a sexual assault on a live person. The prosecution did not allege, or argue to the jury that Petitioner engaged in an act of sexual relations with Bailey's rectum after his death. A photo of Bailey's rectum at autopsy clearly shows his attacker inflicted a serious wound. (See Exhibit 93, Bailey's rectum wound.)

In 1982 a seven-year-old girl's corpse was stolen from a mortuary in Nevada's Washoe County (Reno). After the thief had sex with the corpse, he deposited it in a garbage can. After the alleged perpetrator's arrest, prosecutors discovered there was no necrophilia (sex with a corpse) law in Nevada, and that the state's sexual assault law only applies to a living "person," so it was inapplicable to sexual intercourse (rape) with the dead girl's body. The Washoe County District Attorney responded by drafting a bill criminalizing necrophilia. The Nevada District Attorney Association co-sponsored the bill. Designated A.B. 287, the bill was introduced in the Nevada Assembly on March 2, 1983, and it was summarized as "Prohibits necrophilia." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly History, Sixty-second Session, March 2, 1983, p. 107.))

Ed Basl represented the Washoe County District Attorney's Office, and in his testimony on March 16, 1983 before the Assembly Judiciary Committee, he made it clear that the purpose of the bill was to criminalize the rape of a corpse. Basl specifically stated that the drafter of the bill and its sponsors wanted "to have the penalty the same as a sexual assault [of a live person]." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly Judiciary Committee, March 16, 1983, 988.)) The proposed law was predicated on the assumption that since a dead person (regardless of

age) can't provide consent, then any sexual activity with a corpse is non-consensual, and thus the equivalent of raping a live person. Rape is defined as, "Nonconsensual sexual penetration of an individual, obtained by force or threat, or in cases in which the victim is not capable of consent." (*Dorland's Illustrated Medical Dictionary, 31st Edition*, (Philadelphia: Saunders/Elsevier (2004)), 1617.))

On March 30, 1983 the Nevada Assembly passed the bill.

Basl reiterated during his testimony before the Senate Judiciary Committee on April 5, 1983, that the sole purpose of the bill was to criminalize sexual relations with a corpse: "Mr. Basl went on to say that he does not believe the bill needs to be amended by adding a series of other felony and/or other offenses: that part of the problem as far as the way dead bodies are handled, is covered already by existing legislation, but the one area that is completely void of mention is the area of sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788 (Underlining added to original.)) Basl testified before the Senate committee, as he had before the Assembly committee, that the sponsors seeking to criminalize necrophilia wanted "to make the penalty conform to those for sexual assault [of a live person]." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 789.))

The Nevada Senate passed the necrophilia bill (A.B. 287) on April 13, 1983. The governor signed the bill on April 20, and it became effective on July 1, 1983 as NRS 201.450. The statute states in part: "sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living." NRS 201.450(2).

The only testimony before the House and Senate Judiciary Committees was by Basl. His explanation of the law's intent is unquestionable because he was the official representative of the necrophilia law's drafter and co-sponsor – the Washoe County District Attorney's Office. There was no testimony whatsoever that the law has any application to any situation other than a person engaging in sexual activity with a corpse that would be considered sexual activity if committed

with a live person, which is why it is known as Nevada's necrophilia law. The limited scope of the law's applicability is explained by Basl's testimony before the Senate committee that the law was intended to fill the absence of a law prohibiting "sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788.)

Basl's testimony of the law's intended purpose is consistent with the sex act that inspired the necrophilia law – sexual intercourse with a dead young girl's body.

That the necrophilia law was intended to criminalize sex acts with a corpse that would be illegal if performed on a nonconsenting (or underage) living person is not only made clear from Basl's testimony before both the Assembly and Senate Judiciary Committees, and the facts of the corpse rape that inspired the law, but from the language of the law itself. It criminalizes "sexual penetration" of a dead body, and it states that "means cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living." NRS 201.450(2) Thus insertion of a penis or a dildo into a corpse's anus or vagina would be as punishable as the equivalent of doing the same in an illegal manner with a non-consenting live person.

The intent of the necrophilia law to criminalize the sexual assault of a dead body is further supported by the fact that the definition of "sexual penetration" is almost identical for both the Nevada laws criminalizing "Sexual Assault and Seduction" of a living person and the necrophilia law. The only difference between the definition of "sexual penetration" of a living "person" (in NRS 200.364) and of a corpse in the necrophilia law, is that the latter includes the two words "without limitation," preceding "sexual intercourse in its ordinary meaning if practiced upon the living." The legislative history of the necrophilia law doesn't state what the two additional words mean, however, since they are immediately followed by "sexual intercourse," it is reasonable to assume they directly relate to sexual intercourse "without limitation." That assumption is consistent with the Assembly and Senate committee testimony that the purpose and intent of the necrophilia law to criminalize the same sex acts committed with a corpse as with a living person.

The necrophilia bill's intent to only apply to sex acts with a corpse – as understood from its plain language, Basl's testimony, the circumstances of sexual intercourse with the dead Washoe County girl that inspired the law, and the legislature's definition of "sexual penetration" – is consistent with the *Oxford English Dictionary's* definition of necrophilia: "Fascination with death and dead bodies; esp. sexual attraction to, or intercourse with, dead bodies." The *Oxford English Dictionary* is the world's most authoritative English dictionary.

At the time the Clark County District Attorney's Office filed the necrophilia charge against Blaise on July 31, 2001, the only evidence of Bailey's injuries was ME Simms' Autopsy Report that did not state Bailey was sexually assaulted before or after his death. During Petitioner's preliminary hearing on August 7, 2001, the DA's Office did not present any eyewitness or expert testimony that Bailey experienced any postmortem anal sexual activity. During Petitioner's preliminary hearing Clark County Medical Examiner Lary Simms' testified about his autopsy findings:

> Q. (By Mr. Jorgensen) Now, what were the – what did you find on external examination?
> A. (By Mr. Simms) Well, there was dozens of injuries. Do you want me to go into each individually or sum them up?
> Q. Would you sum them up?
> A. There was a number of blunt force injuries all over the head and face. And there were a number of sharp force injuries including slash wounds and stab wounds that involved the neck, face; there were defensive wounds on the hands; there was a stab wound in the abdomen; and there was some sexual mutilation, the penis was amputated; *there was a large slash wound in the rectal area*." (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 19. (underlining added to original.)

Simms testified about the "slash wound" to Bailey's rectal area during an additional five exchanges with the assistant district attorney. There was no testimony by Simms that a person had sexual relations with Bailey rectum after his death.

Thus Petitioner was charged with violating the necrophilia law, and then ordered to stand trial after her preliminary hearing, without any evidence offered by the Clark County DA supporting the allegation that she – or anyone else – had any form of sexual relations with Bailey's rectum after his death.

The prosecution justified the necrophilia charge against the Petitioner based on Simms' testimony that after Bailey died his rectum was slashed by a sharp object. While Simms' testimony may support an accusation of corpse mutilation, it doesn't even support the suggestion, much less a substantive allegation, that Bailey was raped after his death. As Basl made clear in his testimony, the purpose of the necrophilia law was to criminalize the same sexual activity conducted with a corpse that constitutes sexual assault of a live person. Inflicting multiple stabbing and slicing injuries on a living person, including slashing his or her rectum, is a form of causing bodily harm. The same is true of slashing a corpse's rectum.

So the Clark County District Attorney's Office effectively created an entirely new law never contemplated or enacted by the Nevada Legislature when it applied the necrophilia law to the allegation that Bailey's rectum was slashed after he died. Application of the necrophilia law doesn't conform to the letter, spirit, or legislative intent of NRS 201.450. The prosecution did not even allege in charging Blaise with violating the necrophilia law that Bailey's corpse had been raped. Nor did the prosecution allege during Blaise's preliminary hearing or her two trials that Bailey's dead body had been raped/sexually assaulted.

The prosecution wasn't even on completely solid ground in alleging that Bailey's rectum injury was due to slashing by a sharp object. During Blaise's retrial defense medical expert Dr. Michael Laufer testified that in his years as a hospital emergency room physician he had seen many people with rectum injuries similar to Bailey's that were caused by the seam of their pants when they were kicked. Thus, in his opinion a sharp object may not have been involved. In spite of their different opinions about the possible cause of Bailey's rectum injury, the common denominator of Simms and Laufer's testimony was that neither opined his injury was caused by a person engaging in sex with Bailey's corpse. Likewise, neither opined that anyone had sex with Bailey after his death. Consequently, regardless of how Bailey's rectum injury occurred – through a kick to the seam of his pants or slashing by a sharp object – no evidence was presented that the person or persons who murdered Bailey had sexual relations with his corpse, so they did not violate the necrophilia law (NRS 201.450).

The facts presented to the jury clearly show that Petitioner was prosecuted for a non-existent violation of Nevada's necrophilia law – NRS 201.450. Petitioner was prejudiced because her counsel was obligated in representing the Petitioner's interests to submit a jury instruction that an essential element of NRS 201.450 is that the prosecution had to prove beyond a reasonable doubt that the Petitioner engaged in sexual activity with Duran Bailey's corpse that would be considered sexual activity with a live person. If Petitioner's counsel had submitted a jury instruction that correctly described the statute's essential element that the prosecution had to prove beyond a reasonable doubt that the Petitioner engaged in sexual activity with Duran Bailey's corpse that would be considered sexual activity with a life person, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(kkk) Ground sixty-three.

Petitioner's counsel was ineffective under the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, for failing to object to the prosecution's proposed jury instruction of NRS 201.450, because it redefined the statute to a strict liability offense and reduced the prosecution's burden of proof from that imposed by the Nevada Legislature's intent in enacting NRS 201.450 to require an alleged violation to have the same essential elements and impose the same burden of proof on the prosecution as is required for an alleged sexual assault on a live person, and counsel's failure to object, individually or cumulative with other evidence prejudiced the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury the Petitioner slashed Duran Bailey's rectum with her pocket butterfly knife in an act of spontaneous methamphetamine-fueled rage. The prosecution based Petitioner's charge of violating Nevada's necrophilia law – NRS 201.450 – based on the prosecution's allegation that Duran Bailey's rectum was slashed after he died. The prosecution did not argue the Petitioner had sexual relations with Bailey's rectum after his death, and no testimony was provided at trial that Petitioner had done so. NRS 201.450 is known as Nevada's necrophilia law, and the legislative history of the statute makes clear that it only criminalizes sexual activity

with a corpse that would be considered a sexual assault on a live person. The prosecution did not allege, or argue to the jury that Petitioner engaged in an act of sexual relations with Bailey's rectum after his death. A photo of Bailey's rectum at autopsy clearly shows his attacker inflicted a serious wound. (See Exhibit 93, Bailey's rectum wound.)

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Ed Basl represented the Washoe County District Attorney's Office, and in his testimony on March 16, 1983 before the Assembly Judiciary Committee, he made it clear that the purpose of the bill was to criminalize the rape of a corpse. Basl specifically stated that the drafter of the bill and its sponsors wanted "to have the penalty the same as a sexual assault [of a live person]." (See Exhibit 59, A.B. 287 (Necrophilia Law) - Assembly, (Assembly Judiciary Committee, March 16, 1983, 988.)) The proposed law was predicated on the assumption that since a dead person (regardless of age) can't provide consent, then any sexual activity with a corpse is non-consensual, and thus the equivalent of raping a live person. Rape is defined as, "Nonconsensual sexual penetration of an individual, obtained by force or threat, or in cases in which the victim is not capable of consent." (*Dorland's Illustrated Medical Dictionary, 31st Edition*, (Philadelphia: Saunders/Elsevier (2004), 1617.)

On March 30, 1983 the Nevada Assembly passed the bill.

Basl reiterated during his testimony before the Senate Judiciary Committee on April 5, 1983, that the sole purpose of the bill was to criminalize sexual relations with a corpse: "Mr. Basl went on to say that he does not believe the bill needs to be amended by adding a series of other

felony and/or other offenses: that part of the problem as far as the way dead bodies are handled, is covered already by existing legislation, but the one area that is completely void of mention is the area of sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788 (Underlining added to original.)) Basl testified before the Senate committee, as he had before the Assembly committee, that the sponsors seeking to criminalize necrophilia wanted "to make the penalty conform to those for sexual assault [of a live person]." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 789.))

The Nevada Senate passed the necrophilia bill (A.B. 287) on April 13, 1983. The governor signed the bill on April 20, and it became effective on July 1, 1983 as NRS 201.450. The statute states in part: "sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living." NRS 201.450(2).

The only testimony before the House and Senate Judiciary Committees was by Basl. His explanation of the law's intent is unquestionable because he was the official representative of the necrophilia law's drafter and co-sponsor – the Washoe County District Attorney's Office. There was no testimony whatsoever that the law has any application to any situation other than a person engaging in sexual activity with a corpse that would be considered sexual activity if committed with a live person, which is why it is known as Nevada's necrophilia law. The limited scope of the law's applicability is explained by Basl's testimony before the Senate committee that the law was intended to fill the absence of a law prohibiting "sexual assaults being committed on dead bodies." (See Exhibit 60, A.B. 287 (Necrophilia Law) - Senate, (Senate Judiciary Hearing, April 5, 1983, 788.)

Basl's testimony of the law's intended purpose is consistent with the sex act that inspired the necrophilia law – sexual intercourse with a dead young girl's body.

That the necrophilia law was intended to criminalize sex acts with a corpse that would be illegal if performed on a nonconsenting (or underage) living person is not only made clear from Basl's testimony before both the Assembly and Senate Judiciary Committees, and the facts of the

corpse rape that inspired the law, but from the language of the law itself. It criminalizes "sexual penetration" of a dead body, and it states that "means cunnilingus, fellatio or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including, without limitation, sexual intercourse in what would be its ordinary meaning if practiced upon the living." NRS 201.450(2) Thus insertion of a penis or a dildo into a corpse's anus or vagina would be as punishable as the equivalent of doing the same in an illegal manner with a non-consenting live person.

The intent of the necrophilia law to criminalize the sexual assault of a dead body is further supported by the fact that the definition of "sexual penetration" is almost identical for both the Nevada laws criminalizing "Sexual Assault and Seduction" of a living person and the necrophilia law. The only difference between the definition of "sexual penetration" of a living "person" (in NRS 200.364) and of a corpse in the necrophilia law, is that the latter includes the two words "without limitation," preceding "sexual intercourse in its ordinary meaning if practiced upon the living." The legislative history of the necrophilia law doesn't state what the two additional words mean, however, since they are immediately followed by "sexual intercourse," it is reasonable to assume they directly relate to sexual intercourse "without limitation." That assumption is consistent with the Assembly and Senate committee testimony that the purpose and intent of the necrophilia law to criminalize the same sex acts committed with a corpse as with a living person.

The necrophilia bill's intent to only apply to sex acts with a corpse – as understood from its plain language, Basl's testimony, the circumstances of sexual intercourse with the dead Washoe County girl that inspired the law, and the legislature's definition of "sexual penetration" – is consistent with the *Oxford English Dictionary's* definition of necrophilia: "Fascination with death and dead bodies; esp. sexual attraction to, or intercourse with, dead bodies." The *Oxford English Dictionary* is the world's most authoritative English dictionary.

At the time the Clark County District Attorney's Office filed the necrophilia charge against Blaise on July 31, 2001, the only evidence of Bailey's injuries was ME Simms' Autopsy Report that did not state Bailey was sexually assaulted before or after his death. During Petitioner's preliminary hearing on August 7, 2001, the DA's Office did not present any eyewitness or expert

testimony that Bailey experienced any postmortem anal sexual activity. During Petitioner's preliminary hearing Clark County Medical Examiner Lary Simms' testified about his autopsy findings:

> Q. (By Mr. Jorgensen) Now, what were the – what did you find on external examination?
> A. (By Mr. Simms) Well, there was dozens of injuries. Do you want me to go into each individually or sum them up?
> Q. Would you sum them up?
> A. There was a number of blunt force injuries all over the head and face. And there were a number of sharp force injuries including slash wounds and stab wounds that involved the neck, face; there were defensive wounds on the hands; there was a stab wound in the abdomen; and there was some sexual mutilation, the penis was amputated; *there was a large slash wound in the rectal area*." (*State v. Lobato*, Case No. C177394, Reporter's Transcript of Preliminary Hearing, August 7, 2001, 19. (underlining added to original.)

Simms testified about the "slash wound" to Bailey's rectal area during an additional five exchanges with the assistant district attorney. There was no testimony by Simms that a person had sexual relations with Bailey rectum after his death.

Thus Petitioner was charged with violating the necrophilia law, and then ordered to stand trial after her preliminary hearing, without any evidence offered by the Clark County DA supporting the allegation that she – or anyone else – had any form of sexual relations with Bailey's rectum after his death.

The prosecution justified the necrophilia charge against the Petitioner based on Simms' testimony that after Bailey died his rectum was slashed by a sharp object. While Simms' testimony may support an accusation of corpse mutilation, it doesn't even support the suggestion, much less a substantive allegation, that Bailey was raped after his death. As Basl made clear in his testimony, the purpose of the necrophilia law was to criminalize the same sexual activity conducted with a corpse that constitutes sexual assault of a live person. Inflicting multiple stabbing and slicing injuries on a living person, including slashing his or her rectum, is a form of causing bodily harm. The same is true of slashing a corpse's rectum.

So the Clark County District Attorney's Office effectively created an entirely new law never contemplated or enacted by the Nevada Legislature when it applied the necrophilia law to the

allegation that Bailey's rectum was slashed after he died. Application of the necrophilia law doesn't conform to the letter, spirit, or legislative intent of NRS 201.450. The prosecution did not even allege in charging Blaise with violating the necrophilia law that Bailey's corpse had been raped. Nor did the prosecution allege during Blaise's preliminary hearing or her two trials that Bailey's dead body had been raped/sexually assaulted.

The prosecution wasn't even on completely solid ground in alleging that Bailey's rectum injury was due to slashing by a sharp object. During Blaise's retrial defense medical expert Dr. Michael Laufer testified that in his years as a hospital emergency room physician he had seen many people with rectum injuries similar to Bailey's that were caused by the seam of their pants when they were kicked. Thus, in his opinion a sharp object may not have been involved. In spite of their different opinions about the possible cause of Bailey's rectum injury, the common denominator of Simms and Laufer's testimony was that neither opined his injury was caused by a person engaging in sex with Bailey's corpse. Likewise, neither opined that anyone had sex with Bailey after his death. Consequently, regardless of how Bailey's rectum injury occurred – through a kick to the seam of his pants or slashing by a sharp object – no evidence was presented that the person or persons who murdered Bailey had sexual relations with his corpse, so they did not violate the necrophilia law (NRS 201.450).

The facts presented to the jury clearly show that Petitioner was prosecuted of a non-existent violation of Nevada's necrophilia law – NRS 201.450. In spite of that the prosecution submitted without objection by Petitioner's counsel, a jury instruction that was accepted by the Court and read to the jury as Instruction 24:

> "A person who commits a sexual penetration on the dead body of a human being is guilty of Sexual Penetration of a Dead Human Body. "Sexual penetration" is defined as any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another." (See Exhibit 77, Jury Instruction 24.)

Petitioner was prejudiced because her counsel was obligated in representing the Petitioner's interests to object to the prosecution's proposed Jury Instruction 24 that redefined NRS 201.450 into a strict liability offense contrary to the will of the Nevada Legislature and the legislative

history of the statute. An essential element of NRS 201.450 is that the prosecution had to provide evidence beyond a reasonable doubt that the Petitioner engaged in sexual activity with Duran Bailey's corpse that would be considered sexual activity with a life person. Jury Instruction 24 omitted that essential element, and if Petitioner's counsel had objected and the instruction had been either corrected or replaced with the correct instruction submitted by counsel, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of violating NRS 201.450.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(lll) Ground sixty-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to explain to the jury the prosecution had to prove each essential element of each crime the Petitioner was charged with beyond a reasonable doubt, one of those elements is the Petitioner had to be "within Clark County" at the crime scene, and if Petitioner's counsel had explained the prosecution had not met its burden because it did not introduce evidence at trial the Petitioner was anywhere in Clark County at any time on July 8, 2001, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The Petitioner was charged with personally murdering Duran Bailey and then inserting a knife into and/or cutting his anus on July 8, 2001, within Clark County, Nevada. (*State v. Lobato*, No. C177394, Criminal Complaint.) Consequently, one of the essential elements the prosecution had to introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" at the crime scene at the time the crimes occurred. If the prosecution did not introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" and at the Nevada State Bank and inside the trash enclosure in its parking lot at the exact time Bailey was murdered, she could not have committed her accused crimes, and there was insufficient evidence for the jury to find her guilty.

No physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial the Petitioner and her car were anywhere in Clark County's 8,091 square miles at any time on July 8, 2001. To the contrary, the unrebutted evidence of every prosecution and defense witness who testified about talking with the Petitioner or seeing her and/or her car on the weekend of July 7 and 8 was that she and her car were in Panaca, 170 miles north of Las Vegas. That testimony was corroborated by telephone records of conversations she throughout the day with a male friend in Las Vegas, Doug Twining, who drove up to Panaca on the evening of July 8 to pick her up to take her back to Las Vegas.

The only information the jury had to rely on that the Petitioner had been in Clark County on July 8 and at the scene of Bailey's murder was the prosecution's speculative argument to the jury it is "possible" she was there. The prosecution's argument was entirely speculative because no evidence was introduced at trial she had been in Clark County at any time on July 8.

However, Petitioner's counsel failed to explain to the jury during closing arguments that one of the essential elements the prosecution had to introduce evidence proving beyond a reasonable doubt, was the Petitioner was in Las Vegas at the scene of Bailey's murder at the time it occurred. Since the prosecution neither presented any evidence the Petitioner and her car were anywhere in Clark County at the time Bailey's murder occurred, nor rebutted the testimony of the prosecution and defense witnesses and the telephone records that she was in Panaca the entire day of July 8, the prosecution did not meet its burden of proving the essential element she was in the Nevada State Bank's trash enclosure at the time of Bailey's murder, because the unrebutted evidence at trial was she was 170 miles away in Panaca. The failure of Petitioner's counsel to explain to the jury that the prosecution had the burden of proving with competent evidence the essential element that she had been "within Clark County" at the crime scene gravely prejudiced the Petitioner because if the jury had understood the prosecution's burden of presenting evidence proving the Petitioner was at the crime scene at the exact time of Bailey's murder, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(mmm) Ground sixty-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object during the prosecution's opening statement to dozens of false statements of evidence that would be presented or facts proven, and if the jury had not been contaminated with the prosecution's false statements, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to and impartial and unbiased jury, due process of law and a fair trial.

Facts:

The prosecution's opening statement by Clark County Assistant District Attorney William Kephart repeatedly made references to non-existent evidence that Kephart claimed would be presented by the prosecution to prove the Petitioner's guilt. Petitioner's counsel did not make a single objection, even though it was known to her counsel that Kephart's claims were false and prejudicial to the Petitioner. Twenty-nine of those opening statement false claims are documented in Exhibit 75, "Opening Statement Falsehoods." At least ten of Kephart's opening statement falsehoods were about Dixie Tienken, and things it was known she did not say. A number of the prosecution's false claims were about things the Petitioner allegedly said, but there is no evidence she said them to any person, and Petitioner's counsel knew they would not be proved by evidence introduced at trial.

The effect of the tsunami of false claims about what Kephart claimed the prosecution would prove – but couldn't because they were not true – was the jury was conditioned by Kephart's false claims to believe there is evidence of the Petitioner's guilt that in fact does not exist.

During the Petitioner's trial that followed the opening statements, the prosecution did not introduce any physical, forensic, documentary, eyewitness, surveillance or confession evidence the Petitioner had been anywhere in Clark County on July 8, 2001 – which made it impossible for her to have murdered Bailey. Neither did the prosecution introduce any evidence during the trial the Petitioner had ever met Bailey, knew who he was, or that she had ever been to the Nevada State Bank in her life – much less that she was there at the exact time of his murder in its exterior trash enclosure. Since the prosecution did not introduce any evidence the Petitioner had even been in Clark County at any time on the day of Bailey's murder, and thus she could not have murdered

him, the only tactic available to the prosecution to convince the jury of her guilt was to present its closing and rebuttal argument as the "evidence" of her guilt missing from the trial itself. (See Exhibit 76, Prosecution's improper closing and rebuttal arguments that were not objected to.) The prosecution then built their closing and rebuttal arguments around the multitude of false claims in their opening statement – but which had not been proven by evidence presented at trial.

Consequently the Petitioner's state and federal rights to due process and a fair trial were grievously prejudiced by her counsel's failure to object each and every time Kephart made a claim that her counsel should have known the prosecution would not present evidence to prove, because those false claims laid the foundation for the improper and false closing and rebuttal arguments about non-existent evidence that were a continuation of Kephart's numerous false claims during his opening statement about evidence that would be introduced – but which couldn't because it doesn't exist. If Petitioner's counsel had objected to Kephart's false opening statement claims it would have prevented the jury from being conditioned at the start of the trial to believe there is evidence against the Petitioner that in fact doesn't exist. That would have had the effect of influencing the jurors to have taken a more critical view of the closing and rebuttal arguments when the prosecution would have been making what would have been entirely new claims against the Petitioner that wasn't supported by evidence introduced during the trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(nnn) Ground sixty-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to prosecution's extreme misstatement of the facts during its closing and rebuttal arguments to the jury, that the fracture to the back of Bailey's head was inflicted at the same time as his other wounds, because Medical Examiner Lary Simms' testified that Bailey's brain swelling that began at least two hours prior to death was "contemporaneous with the fracture" and it was his primary cause of death, and if Petitioner's counsel had objected and made the jury fully aware that Bailey was subjected to two separate attacks, individually or cumulative with other exculpatory evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution's scenario of the events in the Nevada State Banks' trash enclosure was that the events followed in succession: Bailey was attacked, he died, his postmortem wounds were inflicted, and his killer left.

Bailey had a skull fracture to the back of his head that Clark County Medical Examiner Lary Simms testified did not bleed. The prosecution argued to the jury that Bailey's "skull fracture occurs when he falls" after being "punched" in the mouth. (XIX-123-4, 10-5-06) The prosecution made variations of that argument during their closing and rebuttal arguments, including that his skull fracture was caused by the Petitioner hitting him in the mouth with her bat. Petitioner's counsel failed to object that the prosecution's argument was a misstatement of the evidence. Clark County Medical Examiner Lary Simms testified during cross-examination that Bailey's skull fracture was consistent with being contemporaneous with his brain swelling that began two hours or so before he died:

> Q. (Mr. Schieck) But the fracture could've been two hours old also?
> A. (Mr. Simms) Yes, because it was – that area was on the same side as the fracture, and if it was on the different side then I'd have a different opinion, but because that area is on the same side as the fracture, it could've been that that was contemporaneous with the fracture. (7 App. 1175; Trans. VIII-36-37 (9-20-06))

The fracture to Bailey's head and the resultant brain swelling that occurred two hours prior to his death directly point to Bailey being subjected to two separate attacks on July 8, 2001. The first attack resulted in the fracture to his skull that resulted in the swelling of his brain. In fact, Simms ruled as a Cause of Death that "Bailey died as a result of BLUNT HEAD TRAUMA." (Autopsy Report of Duran[d] Bailey, Clark County Coroner's Office, July 9, 2001.) That head injury was inflicted two hours before the assault in the Nevada State Bank trash enclosure where his body was found. Dr. Simms' testimony established that Bailey would have died from the swelling of his brain caused by the first attack's "blunt head trauma," even if the second attack had never occurred. So while the many visible beating, cutting and stabbing wounds Bailey experienced in the second attack which took place at the trash enclosure mar Bailey's physical appearance, based on Simms' Autopsy Report and testimony they were superfluous to him dying.

Actress Natasha Richardson's March 2009 death is a recent well-publicized case that a person can function normally for a period of time after experiencing their ultimately fatal head injury. (See Exhibit 28, Natasha Richardson, 45, Stage and Film Star, Dies, NY Times, March 19, 2009.)

The Petitioner was prejudiced by her counsel's failure to object to the prosecution's argument that falsely, misleadingly, and contrary to the testimony conflated into one event the two separate attacks on Bailey that were separated by two or more hours. The prosecution focused on the second event that resulted in Bailey's numerous graphic bleeding and cutting wounds, while ignoring the first event that occurred two hours earlier and resulted in the fatal "Blunt Head Trauma" that was Bailey's primary cause of death. The failure of Petitioner's counsel to object left the jury unaware the prosecution's theory of the crime and argument to the jury that Bailey was knocked over and fractured his skull on the concrete curb when the Petitioner either punched him in the mouth or hit his mouth with her bat, was unsupported by the medical evidence and directly contrary to Simm's trial testimony that Bailey experienced his fatal head injury at least two hours before his other injuries. The prejudice to the Petitioner of her counsel's failure to object to the prosecution's arguments that Bailey's skull fracture happened at the same time as his many external injuries was compounded by her counsel's failure to argue during closing that the medical evidence supported Bailey was subjected to two separate and distinct fatal injury causing events in the last hours of his life. If the jury had known that in the last two hours of Bailey's life he experienced two grave injury causing events, and the first was his skull fracture two hours before his many visible injuries, the jury would have known the prosecution's closing and rebuttal arguments that the Petitioner caused Bailey's skull fracture by knocking him over with a punch or bat hit to his mouth was a complete fiction fabricated from whole cloth. With the jury aware that Bailey had either two different people or groups who wanted to cause him harm, or a single person or group determined to kill him, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ooo) Ground sixty-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object and move for a mistrial when Clark County Assistant District Attorney William Kephart expressed his personal opinion to the jury that the Petitioner is guilty, and that they should follow his lead in voting her guilty when he instructed them, "it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body," and as the representative of the public Kephart's exhortation for the jurors to also mark their ballot "guilty" fatally prejudiced the Petitioner so that no curative instruction could remove the taint, and the Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process of law and a fair trial were prejudiced by her counsel failure to object and move for a mistrial, and dismissal of the charges with prejudice because of Kephart's egregious, deliberate, extreme and prejudicial prosecutorial misconduct that interfered with the fair administration of justice, and the Petitioner was further prejudiced by her counsel because by not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Facts:

Toward the end Clark County Assistant District Attorney William Kephart's rebuttal argument he expressed his personal opinion the Petitioner is guilty and the jurors should follow his lead and mark their ballots to convict her as he did: "it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body." (9 App. 1746; Trans. XIX–213 (10-5-06)) As a prosecutor and representative of the public's interests, Kephart has a position of great responsibility. Kephart's personal vote for conviction would be expected to carry particular weight with the other jurors during their deliberations, and have an influence on them far beyond that of any other person with the possible exception of the judge. Kephart's argument created the impression he was a quasi-13th juror hovering in the background of the jury room.

The Petitioner was gravely prejudiced and irreparably harmed by Kephart's personal plea and impassioned exhortation for the jury to join hands with him in marking their ballots guilty "as I did". As the government's representative to enforce the laws and protect the public from bad and harmful people, Kephart's personal statement of his opinion the Petitioner is guilty carried significant weight with the juror's perception of the case, and once Kephart rung the bell of gravely

prejudicing the Petitioner, no curative instruction by the court cold have unrung the bell and caused the jury to disregard the taint of Kephart's comment and to give it no weight during their deliberations.

The failure of Petitioner's counsel to object and move for a mistrial left the jury unaware there was anything improper about Kephart telling the jurors that he wanted to personally lead them to vote guilty in the jury room and convict the Petitioner.

Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process of law and a fair trial were prejudiced by her counsel failure to object and move for a mistrial, and dismissal of the charges with prejudice because of Kephart's egregious, deliberate, extreme and prejudicial prosecutorial misconduct that interfered with the fair administration of justice. If the motion for mistrial had not been granted, the Petitioner was further prejudiced because by her counsel not objecting the issue was not preserved for appeal to the Nevada Supreme Court.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ppp) Ground sixty-eight.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to the prosecution's closing and rebuttal arguments that prejudicially smeared and disparaged the credibility and truthfulness of defense alibi witnesses John Kraft, Larry Lobato, and Ashley Lobato because they had not previously been called as witnesses, and Kraft and Larry Lobato were critical alibi witnesses whose testimony fatally undermined the prosecution's case, so Petitioner was gravely prejudiced by her counsel's failure to object to each improper argument and to request that the court admonish the jury to disregard the prosecution's disparaging arguments, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

During Clark County ADA Sandra DiGiacomo's closing argument and ADA William Kephart's rebuttal argument they both cast aspersions on the credibility of defense alibi witnesses John Kraft, Larry Lobato (father), and Ashley Lobato (sister) by suggesting there was something nefarious about their testimony because they had not been called as witnesses during the

Petitioner's first trial. DiGiacomo argued in her closing: "And then you have John Kraft. John and Ashley and her father are all new. They did not testify previously. The come in here and they say that she was there the morning of July 8 at 7:00 a.m. That's new". (9 App. 1727; Trans. XIX-137 (10-5-06)) Kephart similarly argued in his rebuttal: "And for the first time -- and also we hear from Mr. Lobato. He comes in here and now he tells you that at 7 o'clock in the morning John, who we hear from the first time, came over and woke me up and asked me on that particular day, when he was leaving a week later, to help out with checking with my family when I'm gone, the first time." (9 App. 1741; Trans. XIX-190 (10-5-06)).

Larry Lobato and Kraft were critical alibi witnesses because Larry Lobato testified to seeing the Petitioner on July 8, 2001, sleeping on the futon in the living room of the Lobato's house in Panaca after arriving home from work around 1 am on July 8, 2001, when he went to bed about 2 am, and again at about 7am that morning when she woke him up because Kraft had come over to their house to talk with him. Kraft testified the Petitioner answered the door when he went to the Lobato's house at about 7am on July 8 to talk with Larry Lobato. He also testified the Petitioner appeared sleepy like he had woken her up. Ashley Lobato testified to seeing the Petitioner that day.

If the jury considered Larry Lobato and Kraft credible then they could not find the Petitioner guilty of murdering Bailey. The testimony of the two men established she was in Panaca from shortly after midnight to 7am. It was during that period of time the prosecution argued she murdered Bailey and was in Las Vegas – not 170 miles away sleeping in Panaca. Consequently, it was imperative for the prosecution to disparage and smear Larry Lobato and Kraft as not credible – the Petitioner's conviction depended on it.

There is nothing in the record to suggest Larry Lobato, Kraft, and Ashley Lobato did not testify truthfully and that they were not willing and able to testify during the Petitioner's first trial as they did during the Petitioner's second trial. That they didn't testify during the first trial had nothing to do with them, but it was due to the decision of the Petitioner's counsel and the prosecutors who did not have them testify.

Petitioner's counsel did not object to either DiGiacomo or Kephart's arguments disparaging the integrity of the three defense alibi witnesses. The Petitioner was gravely prejudiced by her

counsel's failure to object in response to the prosecution's disparaging comments branding Larry Lobato, Kraft, and Ashley Lobato as liars, because they placed the Petitioner in Panaca on July 8, 2001, and Kraft and Larry Lobato specifically placed her in Panaca from between shortly after midnight and 7am – which based on the prosecution's argument that Bailey was murdered prior to dawn. That eliminated the Petitioner from any "possibility" of being Bailey's killer, because if she was in Panaca she could not have "possibly" committed the crime – based on the prosecution's own timeline of the crime. If Petitioner's counsel had objected to each improper disparaging comment about the three alibi witnesses the court would have each time admonished the jury each time to disregard the prosecution's disparaging statement, and with there being no reason for the jury to doubt the honesty of the witnesses, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, and acquitted her.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(qqq) Ground sixty-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the US Constitution, and prejudiced by counsel's objectively unreasonable failure to object to each comment during the prosecution's closing and rebuttal arguments that the Petitioner was bloody when she got in her car after the assault described in her Statement of July 20, 2001, and that blood was found in her car, when there was no testimony at trial that the Petitioner had any blood on her, and the scientific tests conducted on her car by the LVMPD Crime Lab did not find any blood in her car, and Petitioner was further prejudiced by her counsel's failure to make a motion for a mistrial and dismissal of the charges with prejudice as the appropriate sanction for the egregious prosecutorial misconduct by ADAs Sandra DiGiacomo and William Kephart of the improper arguments about the non-existent blood evidence that individually and cumulatively fatally contaminated the jury, and if the motion for a mistrial had not been not granted, by failing to object the Petitioner's counsel waived claims on direct appeal based on the prosecution's closing and rebuttal arguments that fatally prejudiced the Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process of law, and a fair trial.

Facts:

During DiGiacomo's closing argument and Kephart's rebuttal argument they both falsely stated that the presumptive luminol and phenolphthalein tests proved there was blood in her car,

even though the confirmatory HemaTrace and DNA tests of her car tested negative for blood. The presumptive tests return positive reactions for a multitude of natural and man-made substances, and blood is only one of those many substances, which is why a confirmatory test is necessary to determine if blood is in fact present. DiGiacomo argued: "You do have physical evidence that links the defendant to that crime scene. You have it with her car. The positive luminol test and the positive phenolphthalein test tell you there was blood in that car." (9 App. 1730; Trans. XIX-147 (10-5-06)); and, "That does give you some physical evidence that links her to the crime, that's blood." (9. App. 1730; Trans. XIX-148 (10-5-06)) Kephart argued: "…even though we had two tests, presumptive tests that said it's blood." (9 App. 1740; Trans. XIX-188 (10-5-06)) Kephart and DiGiacomo falsely claimed in their arguments that the presumptive luminol or phenolphthalein positive reactions were for blood, even though the confirmatory DNA tests scientifically proved that blood did not cause the reactions. Although it was absolutely critical to the Petitioner's defense that the jury understand the truth that no blood was found in her car, Petitioner's counsel did not object to any of DiGiacomo or Kephart's arguments that erroneously led the jury to believe blood was found in the Petitioner's car. The prosecution's arguments about blood in the Petitioner's car were the equivalent of them arguing that it is possible 2+2 equals 7, how do we know it doesn't?, or that it is possible the Earth rotates around the Moon, how do we know it doesn't. The prosecution's false argument that blood was found in the Petitioner's car was the equivalent of DiGiacomo and Kephart elevating Voodoo and Black Magic above scientific truth.

During DiGiacomo's closing she stated about what the Petitioner said in her Statement, "… she got rid of the clothes she was wearing that she said had blood on them." (9 App. 1728; Trans. XIX-139 (10-5-06)) During Kephart's rebuttal he stated three separate times that the Petitioner said in her Statement that she was bloody after she fought off her attacker and got in her car to leave: "I mean she said in her statement she'd gotten her car bloody." (9 App. 1744; XIX-202 (10-5-06)); "She talked about taking her clothes off in the car because they were bloody" (9 App. 1744; XIX-202 (10-5-06)); and, "Said that she was bloody and got in her car, Corroborated." (9 App. 1747; Trans. XIX-214 (10-5-06)). Both DiGiacomo and Kephart's statements have no basis in reality because the Petitioner not only doesn't say anywhere in her Statement that she or her clothes were

bloody, but the words bloody, blood, bled, bleed or bleeding do not appear a single time in her Statement, and no witness testified that she took her clothes off in her car because they were bloody. DiGiacomo and Kephart's statements that the Petitioner said she was bloody were not just false, they were outright deliberate lies, and they had to have known it at the time they made those declarations to the jury. Yet, Petitioner's counsel did not object to any of DiGiacomo or Kephart's arguments that erroneously led the jury to believe the Petitioner said she and her clothes were bloody after the assault that she describes in her Statement.

It is not a mystery why DiGiacomo and Kephart wanted to falsely implant the ideas in the minds of the jurors that Petitioner had said in her Statement that she was bloody when she got in her car, and that blood was found in her car. If she was bloody and there was blood in her car then that suggests she was at the scene of Bailey's bloody murder. Although it is known the presumptive tests did not test positive for blood and the Petitioner did not say a single time in her Statement that she or her clothes were bloody, Petitioner's counsel did not object a single time to DiGiacomo and Kephart's false arguments that were based on their imagination and not the trial testimony.

The Petitioner was greatly prejudiced by her counsel's failure to object to each improper argument about the non-existent blood evidence at trial, all of which could have the effect of prejudicing the jury's judgment. The Petitioner was further gravely prejudiced by her counsel's failure to make a motion for a mistrial and dismissal of the charges with prejudice based on the egregious prosecutorial misconduct of ADAs DiGiacomo and Kephart's improper arguments based on their imagination and not evidence that individually and cumulatively irreparably prejudiced the jury's judgment. The prosecution's case for the Petitioner's conviction wasn't based on the evidence presented during trial, but by the prosecution's improper closing and rebuttal arguments that her counsel failed to object to. The jury was so prejudiced by the baseless arguments that no curative instruction could undo the jury's contamination by the prosecution's repeated arguments that the Petitioner was bloody after the assault described in her Statement and that there was blood in her car, neither of which is supported by the trial testimony. The appropriate sanction for the prosecution's egregious prosecutorial misconduct was a mistrial and dismissal of the charges with

prejudice. Furthermore, if the motion for a mistrial was not granted, by failing to object the Petitioner's counsel waived claims on direct appeal based on the prosecution's closing and rebuttal arguments – including gross prosecutorial misconduct prejudicial to the Petitioner's state and federal constitutional rights to a unbiased and impartial jury, due process of law, and a fair trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(rrr) Ground seventy.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to object to each of more than two hundred and fifty improper and prejudicial closing and rebuttal arguments that were used as a substitute for evidence of the Petitioner's guilt not introduced during trial, including ADA William Kephart expressing his personal opinion that the Petitioner is guilty and exhorting the jurors to mark their ballots "guilty" as he did, and Petitioner's counsel allowed the juries judgment to be contaminated without objection to the hundreds of baseless and speculative arguments, and Petitioner was further prejudiced by her counsel's failure to make a motion for a mistrial and dismissal of the charges with prejudice as the appropriate sanction for the egregious prosecutorial misconduct of the improper arguments that individually and cumulatively irreparable affected the jury, and if the motion for a mistrial had not been not granted, by failing to object the Petitioner's counsel waived claims on direct appeal based on the prosecution's closing and rebuttal arguments that fatally prejudiced the Petitioner's state and federal constitutional rights to an impartial and unbiased jury, due process of law, and a fair trial.

Facts:

The prosecution's opening statement by Clark County Assistant District Attorney William Kephart repeatedly made references to non-existent evidence that Kephart claimed would be presented by the prosecution to prove the Petitioner's guilt of murdering Duran Bailey and the post-mortem cutting of his rectum on July 8, 2001, in the trash enclosure for the Nevada State Bank at 4240 West Flamingo Road in Las Vegas. Petitioner's counsel did not make a single objection during the opening statement, even though it was known to her counsel that Kephart's claims were not true, no evidence would be presented to prove them, and the claims were prejudicial to the Petitioner. Twenty-nine of those opening statement evidence claims are documented in Exhibit 75, "Opening statement false evidence claims."

Petitioner's counsel failed during the prosecution's closing argument by ADA Sandra DiGiacomo and rebuttal argument by ADA Kephart to make more than 250 objections to improper arguments that were based on facts not in evidence, misstatements of evidence, improper opinion argument, disparaging the honesty and credibility of defense witnesses, expressing personal opinions, stating contradictory theories of the crime, misstating the law, conflating and confusing facts in evidence, drawing conclusions from speculative inferences, speculation, improper argument that it is the duty of the jury to find the Petitioner guilty, misstatements of what constitutes reasonable doubt, stating personal opinions about the case as fact, and ADA William Kephart expressing his personal opinion that the Petitioner is guilty and the jurors should follow his lead and mark their ballots "guilty" "as I did." ("it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body.", App. 9, 1746; Trans. XIX–213 (10-5-06)) The more than 250 improper and false prosecution closing and rebuttal arguments that were not objected to by Petitioner's counsel are documented in Exhibit 76, "Prosecution's improper closing and rebuttal arguments that were not objected to." Included are 123 improper closing arguments by DiGiacomo, and 130 improper rebuttal arguments by Kephart.

The prosecution's closing and rebuttal arguments that were not based on evidence introduced during trial, were a continuation of their opening statement claims that were not based on evidence to be presented at trial. The trial sandwiched in between the opening statement, and the closing and rebuttal arguments was superfluous to the core of the state's charges that the Petitioner murdered Duran Bailey and cut his rectum after he was dead. Petitioner's trial was little more than a prop in between the "meat" of the prosecution's case –its opening statement, and its closing and rebuttal arguments. The opening statement and closing and rebuttal arguments actually constituted the prosecution's case in chief that filled in the many critical evidentiary holes that were empty after the prosecution presented its case.

During Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that she or her car was anywhere in Clark County at any time on July 8, 2001 – the day Bailey was murdered. So when the jury began its deliberations all the

jurors had to rely on to decide if the Petitioner and her car had been somewhere in Clark County's 8,091 square miles at sometime on July 8, 2001, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument. Consequently, all the jurors had to rely on to decide if the Petitioner and her car had been in Las Vegas at the specific location of the Nevada State Bank's trash enclosure at the specific time Bailey died was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that she drove her car the 340-mile round-trip from Panaca to Las Vegas on the weekend of July 6 to 8, 2001. To the contrary, the unrebutted testimony by prosecution and defense witnesses and telephone records established the Petitioner was in Panaca on July 6, 7 and during the early morning, the morning, the afternoon, and the evening of July 8, 2001. Likewise, the unrebutted testimony was the Petitioner's car was parked in front of her parents' house all that weekend. So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner and her car had not been in Panaca all weekend of July 6 to 8, and that she had driven her car the round-trip from Panaca to Las Vegas, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that the Petitioner had ever met the homeless Bailey, talked with him in person or on the telephone, knew where he stayed, or that she knew anyone who had ever met Bailey or knew where he stayed. So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner knew Bailey or had ever had any contact with him, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced that the Petitioner had ever been to the Nevada State Bank. So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner had ever been to the Nevada State Bank, much less at the specific time of Bailey's death, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, medical, documentary, eyewitness, surveillance or confession evidence was introduced that somewhere in Las Vegas the Petitioner inflicted the wound that according to the Autopsy Report caused Bailey's death – his head fracture and resultant brain swelling that Medical Examiner Lary Simms' testified occurred two hours prior to his severed carotid artery that contributed to his death in the Nevada State Bank's trash enclosure, or that she had cut his rectum after he died. (App. 7, 1175; Trans. VIII-36-37 (9-20-06)) So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner had inflicted Bailey's head fracture, and then two hours later inflicted his carotid artery wound that contributed to his death, and then cut his rectum after he died, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial there was no testimony that a single specific detail of the Petitioner's Statement of July 20, 2001, matches a single specific detail of Bailey's murder and the post-mortem cutting of his rectum (her accused crimes ("sexual penetration of a dead body")). According to the Autopsy Report, Bailey had 31 separate external wounds plus his skull fracture and its associated brain swelling, plus numerous internal injuries. Not a single one of Bailey's injuries that ME Simms testified were inflicted ante-mortem or post-mortem is described in the Petitioner's Statement, which also describes her being sexually assaulted in an east Las Vegas hotel parking lot, while Bailey was murdered inside a west Las Vegas bank's trash enclosure. So when the jury began its deliberations all the jurors had to rely on to decide if the Petitioner's Statement described Bailey's murder and the cutting of his rectum after death, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

During the Petitioner's trial no physical, forensic, eyewitness or confession evidence was presented linking any personal item of the Petitioner or her car to Bailey's murder and the cutting of his rectum after death, or to the crime scene. So when the jury began its deliberations all the jurors had to rely on to decide if any personal item of the Petitioner or her car was linked to Bailey's death or the crime scene, was that claim during DiGiacomo's closing argument and Kephart's rebuttal argument.

Consequently, based on the evidence introduced at trial it is impossible the Petitioner murdered Bailey and cut his rectum after death, because she was not anywhere in Clark County at anytime on July 8, 2001; she had not driven the round-trip from Panaca to Las Vegas on the weekend of July 6 to 8, 2001; she had never met the homeless Bailey or knew where he stayed; she had never been to the Nevada State Bank; she did not somewhere in Las Vegas inflict the skull fracture that triggered his fatal brain swelling and then two hours later in the trash enclosure stab his carotid artery that contributed to his death, and then after his death cut his rectum; there is no detail in her Statement describing the specific location where Bailey was murdered or his ante-mortem and post-mortem injuries; and no personal item of the Petitioner or her car is linked to Bailey's murder or the crime scene.

Since the prosecution did not introduce any evidence the Petitioner had been anywhere in Clark County at anytime on the day of Bailey's murder, the only tactic available to the prosecutors to convince the jury of her guilt was to present its closing and rebuttal argument as the phantom "evidence" of her guilt missing from the trial itself. The prosecution's closing and rebuttal arguments were based on 'guilty by imagination', not guilt by fact. The following are among the egregiously prejudicial improper prosecution arguments.

- Toward the end of his rebuttal argument Kephart expressed his personal opinion the Petitioner is guilty and the jurors should mark their ballots to convict her as he did: "it's time for you to mark it as I did, guilty of first degree murder with the use of a deadly weapon, and guilty of sexual penetration of a dead human body." (App. 9, 1746; Trans. XIX–213 (10-5-06)) Kephart's argument created the impression he was a quasi-13th juror. As the prosecutor and representative of the public Kephart's vote for conviction would be expected to carry particular weight with the other jurors. Petitioner's counsel did not object.
- During DiGiacomo's closing argument and Kephart's rebuttal argument they both denigrated the credibility of defense alibi witnesses John Kraft, Larry Lobato (Petitioner's father), and Ashley Lobato (Petitioner's sister) by suggesting there was something nefarious about their testimony because they had not been called as witnesses previously. DiGiacomo argued: "And then you have John Kraft. John and Ashley and her father are all new. They did not testify

previously. The come in here and they say that she was there the morning of July 8 at 7:00 a.m. That's new". (App. 9, 1727; Trans. XIX-137 (10-5-06)) Kephart similarly argued: "And for the first time -- and also we hear from Mr. Lobato. He comes in here and now he tells you that at 7 o'clock in the morning John, who we hear from the first time, came over and woke me up and asked me on that particular day, when he was leaving a week later, to help out with checking with my family when I'm gone, the first time". (App. 9, 1741; Trans. XIX-190 (10-5-06)) Kraft and Larry Lobato were very important alibi witnesses because Larry Lobato testified to seeing the Petitioner on July 8, 2001, sleeping on the futon in the living room of the Lobato's house after arriving home from work in the very early morning hours of July 8, 2001, when he went to bed after watching some television, and again at about 7am that morning when she woke him up because Kraft had come over to their house to talk with him. Ashley Lobato testified to seeing the Petitioner that day. If the jury deemed Larry Lobato and Kraft credible they could not find the Petitioner guilty of murdering Bailey, because they established she was not in Las Vegas "sometime before sunup" when the prosecution argued he died. (Trans. XIX-121 (10-5-06)) Contrary to the negative comments by DiGiacomo and Kephart, there is nothing in the record to suggest Ashley Lobato, Larry Lobato and Kraft did not testify truthfully and that they were not willing and able to testify during the Petitioner's first trial as they did during the Petitioner's second trial. That they didn't testify during the first trial had nothing to do with them, but it was due to the decision of the Petitioner's counsel or the prosecutors who did not have them testify. Petitioner's counsel did not object to either DiGiacomo or Kephart's arguments.

- During Kephart's rebuttal he stated that the Petitioner hit Bailey with her baseball bat while he was standing up and that it caused him to fall backwards and he fractured his skull when his head hit the concrete curb at the base of the trash enclosure's wall. Kephart argued: "And she went back and smacked him in the mouth with the bat where his teeth busted out, he fell back and he hit his head on that curb, and that's consistent with busting his skull." (9 App. 1743; Trans. XIX-198 (10-5-06)) Contrary to Kephart's argument Clark County Medical Examiner Lary Simms testified on cross-examination that Bailey's skull fracture was contemporaneous with his brain swelling that began at least two hours prior to his death. So it was impossible that

the Petitioner could have caused his head wound by knocking him over with a baseball bat immediately prior to inflicting his many stabbing, beating and cutting wounds. Bailey's head wound was a preexisting condition prior to him being fatally attacked. Petitioner's counsel did not object to Kephart's argument.

- During DiGiacomo's closing argument and Kephart's rebuttal argument they both falsely stated what the Petitioner said while in a CCDC holding cell after her arrest. DiGiacomo argued: "And the only person -- and think about too, she knew what the dumpster enclosure looked like. When she got to that jail cell at CCDC when she's being booked in, she's like yeah, it was just like this except for I could see through the roof," …." (Trans. XIX-149 (10-5-06)); and, "The only way she was able to describe the place, the body, the injuries, the you know, where it happened, how it looked, the only way she knew that, 'cause she was there." (Trans. XIX-150 (10-5-06)) Kephart argued: "And when they bring her back to the jail cell and she talks about the inside of the jail cell looking like where this occurred." (Trans. XIX-204 (10-5-06)). The only testimony about what the Petitioner said while in the holding cell was by Detective Thomas Thowsen. His testimony doesn't support DiGiacomo and Kephart's arguments. Thowsen did not testify that the Petitioner knew what the "dumpster enclosure looked like," he did not testify that she said anything remotely similar to "it was just like this except for I could see through the roof," he did not testify that "she was able to describe the place" and "how it looked," and he did not testify she said anything about "the jail cell looking like where this occurred." The Petitioner was gravely prejudiced by DiGiacomo and Kephart's arguments that were not based on the evidence, because they falsely projected to the jury that the Petitioner had knowledge of the trash enclosure where Bailey was murdered that she did not have, and which Bailey's killer(s) would have had. Petitioner's counsel did not object to any of DiGiacomo or Kephart's arguments.
- During DiGiacomo's closing argument and Kephart's rebuttal argument they both falsely stated that the presumptive luminol and phenolphthalein reactions proved there was blood in her car, even though the confirmatory HemaTrace and DNA tests of her car were negative for blood. The presumptive tests return positive reactions for a multitude of natural and man-made

substances, and blood is only one of those many substances, which is why a confirmatory test is necessary to determine if blood is in fact present. DiGiacomo argued: "You do have physical evidence that links the defendant to that crime scene. You have it with her car. The positive luminol test and the positive phenolphthalein test tell you there was blood in that car." (9 App. 1730; Trans. XIX-147 (10-5-06)); and, "That does give you some physical evidence that links her to the crime, that's blood." (9 App. 1730; Trans. XIX-148 (10-5-06)). Kephart argued, "…even though we had two tests, presumptive tests that said it's blood". (9 App. 1740; Trans. XIX-188 (10-5-06)) Although it was absolutely critical to the Petitioner's defense that the jury understand the truth that no blood was found in her car, Petitioner's counsel did not object to either DiGiacomo or Kephart's arguments that erroneously led the jury to believe blood was found in the Petitioner's car.

- During DiGiacomo's closing she stated about what the Petitioner said in her Statement, "… she got rid of the clothes she was wearing that she said had blood on them.." (9 App. 1728; Trans. XIX-139 (10-5-06)) During Kephart's rebuttal he stated three separate times that the Petitioner said in her Statement that she was bloody after she fought off her attacker and got in her car to leave: "I mean she said in her statement she'd gotten her car bloody." (9 App. 1744; XIX-202 (10-5-06)); "She talked about taking her clothes off in the car because they were bloody" (9 App. 1744; XIX-202 (10-5-06)); and, "Said that she was bloody and got in her car, Corroborated." (9 App. 1747; Trans. XIX-214 (10-5-06)). Both DiGiacomo and Kephart's statements have no basis in reality because the Petitioner not only doesn't say anywhere in her statement that she or her clothes were bloody, but the words bloody, blood, bled, bleed or bleeding do not appear a single time in her statement, and no witness testified that she said she was bloody and took her clothes off in her car because they were bloody.

It is not a mystery why DiGiacomo and Kephart wanted to falsely implant the ideas in the minds of the jurors that the Petitioner said in her Statement she was bloody when she got in her car, when in fact there is not a single mention of blood in her Statement. It was the same reason DiGiacomo and Kephart wanted to falsely implant the ideas in the minds of the jurors that the preliminary (presumptive) luminol and phenolphthalein positive reactions were for blood, even

though the confirmatory tests scientifically proved blood did not cause the reactions and no blood was found in her car. The single most distinctive feature of Bailey's murder was the amount of blood at the crime scene, so if the jury could be misled to believe the Petitioner said in her Statement she was bloody and misled to believe blood was in her car, then they could conflate that "phantom" blood into somehow being from Bailey's bloody crime scene. Yet, even though it was gravely prejudicial to the Petitioner, her counsel did not object a single time to DiGiacomo and Kephart's fabricated arguments. It was absolutely critical for the Petitioner to counteract every untrue and baseless assertion by the prosecution related to blood that could result in the jurors being mislead by the prosecution to erroneously believe there was evidence of blood in the Petitioner's car or on her, when there was no evidence of that introduced during her trial.

The above arguments only scratch the surface of the more than 250 improper arguments the prosecution relied on to try and convince the jury that the Petitioner murdered and mutilated Bailey in the absence of evidence she did so. If the prosecution had relied on the evidence presented at trial its closing argument could have gone something like:

> "Ladies and gentlemen of the jury, thank you for your patience during the weeks of this trial. We didn't present any evidence the defendant or her car were in Clark County at any time on July 8, 2001. We didn't present any evidence the defendant and her car were not in Panaca the entire weekend of July 6 to July 8. We didn't present any evidence that the defendant had at any time in her life been to the Nevada State Bank, or inside its trash enclosure. We didn't present any evidence the defendant had ever met Duran Bailey, knew who he was, or knew anyone who knew him. We didn't present any evidence the Petitioner inflicted a single one of Bailey's almost three dozen ante-mortem and post-mortem external injuries. We also have to be candid and admit that we prevented you from hearing testimony by alibi witnesses who would have corroborated the defendant's Statement on July 20, 2001, in which she positively stated that she was attacked "over a month ago." That means she was attacked before June 20 – which was weeks before Bailey's murder. However, keep in mind that we have presented evidence that the defendant used methamphetamine when she was in Las Vegas before she returned to Panaca on July 2, and we have presented evidence that she had a knife given to her as a present by her father for self-defense. So we argue to you that we have proven the defendant was an 18-year-old knife toting meth user before she returned to Panaca six days before Bailey's murder. Our case against the Petitioner is thin, but we are nevertheless asking you to find the defendant guilty of first degree murder with a deadly weapon and sexual penetration of a dead body. We apologize for being so brief, but we don't have a whole lot to say based on the evidence we've presented during this trial. Thank you."

That hypothetical argument is not much of an exaggeration if the prosecution had been honest during its closing and rebuttal arguments, which is why DiGiacomo and Kephart each had to rely on more than one hundred improper arguments during their closing and rebuttal arguments respectively, to avoid simply standing in front of the jury slack jawed with almost nothing to say. Yet, they were only able to make extensive false and improper arguments and repeat some fabrications over and over because Petitioner's counsel failed to repeatedly interrupt their arguments with objection after objection after objection.

The Petitioner was gravely prejudiced by her counsel's failure to object to each of the more than 250 improper and false arguments, all of which could have the effect of prejudicing the jury's judgment. The Petitioner was further gravely prejudiced by her counsel's failure to make a motion for a mistrial and dismissal of the charges with prejudice based on the egregious prosecutorial misconduct of ADAs DiGiacomo and Kephart's improper arguments based on their imagination that individually and cumulatively irreparably prejudiced the jury's judgment. The prosecution's case for the Petitioner's conviction wasn't based on the evidence presented during trial, but by the prosecution's improper closing and rebuttal arguments that her counsel failed to object to. The jury was so prejudiced that no curative instruction could undo the jury's contamination by the tsunami of improper and false arguments unsupported by trial testimony. The appropriate sanction for the prosecution's egregious prosecutorial misconduct was a mistrial and dismissal of the charges with prejudice. Furthermore, if the motion for a mistrial was not granted, by failing to object the Petitioner's counsel waived claims on direct appeal based on the prosecution's closing and rebuttal arguments – including gross prosecutorial misconduct prejudicial to the Petitioner's state and federal constitutional rights to a unbiased and impartial jury, due process of law, and a fair trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(sss) Ground seventy-one.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to retain a dental expert to analyze the case evidence and testify about Duran Bailey's six teeth found intact in the trash enclosure and that they were not removed by a blow from a baseball bat, and counsel's failure prejudiced the Petitioner because after considering the dental expert's evidence, individually or cumulative with other evidence, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

The prosecution argued to the jury that the Petitioner was kneeling in front of Duran Bailey when she stabbed him in the scrotum, and she then went and got her bat and "smacked him in the mouth with the bat where his teeth busted out, he fell back and he hit his head on that curb, and that's consistent with busting his skull." (Trans. XIX-198 (10-5-06)

The prosecution's expert Medical Examiner Lary Simms testified on direct examination:

Q. Okay. And is it possible he received a blow to his face, fell back, struck his head on the curb?
A. Definitely possible.
Q. Injuries are consistent with that?
A. Yes.
(6 App. 1160; VII-133 (9-19-2010))

The Petitioner's medical expert Dr. Michael Laufer testified on cross-examination:

Q. Okay. And would you expect,...—at that force hitting him in the mouth would cause not only would his teeth possibly get busted out but it may cause him to go backwards?
A. It's possible. Sure.
(8 App. 1448-9; XIV-129-30 (9-28-06) cross-examination)

So the testimony by both the prosecution and Petitioner's medical expert was Bailey's teeth could have been "busted out" by the blow from a bat. Neither Simms nor Laufer are dental experts, nor were they qualified to testify about dental matters. There was no testimony by a prosecution or defense dental expert about Bailey's teeth. Only a dental expert would be qualified to testify about the condition of Bailey's teeth that were knocked out of his mouth.

In testifying that it is possible Bailey's teeth could have been "busted out" by the blow from a baseball bat no consideration was given by Simms or Laufer to one of the most important aspects of Bailey's facial injuries – his six intact teeth that were found in a small area of the trash enclosure's southwest corner. (See, Autopsy Report of Duran[d] Bailey, Clark County Coroner's Office, July 9, 2001, 1; and, Testimony of CSA Louise Renhard, 7 App. 1225; Trans. IX-37 (9-21-06))

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a dental expert willing to conduct a post-conviction review of the evidence related to Bailey's teeth on a *pro bono* basis to determine if a bat could have been used to remove them from his mouth. Doctor of Dental Surgery Mark Lewis agreed to review the evidence in the Petitioner's case. Dr. Lewis states in the "Affidavit of Mark Lewis DDS" dated April 26, 2010:

> 3. I was asked to give my opinion of whether a baseball bat could have been used to knock out the teeth of Duran Bailey.
> 4. I reviewed photographs of the crime scene and autopsy, the autopsy report and trial testimony regarding the condition of the teeth and the location the teeth were found.
> 5. In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat.
> (See Exhibit 100, Affidavit of Mark Lewis DDS, April 26, 2010.)

Dr. Lewis' analysis and new evidence is the first time since the Petitioner's arrest in July 2002 that a dental expert examined the evidence related to the condition of Bailey's teeth that were knocked out by his assailant(s).

The prosecution's argument that Bailey's teeth were knocked out by a baseball bat was speculative, and there was no blood from anyone on the petitioner's bat, so the prosecution's argument that her bat was used was also pure speculation. The prosecution's speculative argument was critical to their case because the Petitioner's bat was the only personal item introduced into evidence they claimed linked her to the crime. Simms and Laufer's respective testimony that a baseball bat blow could have knocked out Bailey's teeth was also speculation on their part. However, the testimony of Simms and Laufer gave the prosecution's speculative argument a degree of believability, even though they were not qualified to evaluate the crucial evidence that Dr. Lewis and other dental experts are qualified to examine and testify about – the condition of Bailey's teeth that had been knocked out of his mouth.

Dr. Lewis' analysis reveals the prosecution's argument that the jury relied on to convict the Petitioner was not just speculative – but it was dead wrong. Dr. Lewis' new expert dental evidence provides critical evidence the jury did not know – Bailey's six intact teeth are positive physical evidence he was not hit in the mouth with a baseball bat. Which means the Petitioner's bat was not used to hit him in the mouth and knock him down. In convicting the Petitioner the jury relied on the prosecution's imagination based arguments that falsely linked her bat to Bailey's murder.

There were no bruises, scars or injuries to the Petitioner's hands when she was arrested, so it is known that she didn't inflict Bailey's severe beating injuries with her hands. It is invaluable exculpatory evidence that Bailey's facial injuries were not inflicted by the Petitioner' baseball bat because she was convicted by the jury on the basis that she used her bat to do so, and since she had no injuries to her hands the prosecution can not fall back and say she physically beat him.

However, the jury didn't know Bailey wasn't hit in the mouth with a bat because the Petitioner's counsel didn't retain a dental expert to examine the evidence related to Bailey's teeth that were knocked out. There was nothing preventing the Petitioner's counsel from retaining a dental expert, and it was crucial to do so because a centerpiece of the prosecution's case known before the trial was their speculation that Bailey's teeth were knocked out when he was hit in the mouth with the Petitioner's baseball bat, and that blow also caused him to fall backwards. That didn't happen.

Furthermore, the new dental evidence corroborates a key part of the Petitioner's Statement of July 20, 2001, that describes her being sexually assaulted "over a month ago" at a Budget Suites Hotel in east Las Vegas. When asked if she hit her assailant she said "No", but that he slapped her.

The Petitioner was gravely prejudiced by her counsel's failure to retain a dental expert and introduce their expert testimony that Bailey's six intact teeth would have been shattered if he had been hit in the mouth with a bat. If the jurors had known the exculpatory dental evidence that corroborate the Petitioner's Statement that she didn't hit her assailant, no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(ttt) Ground seventy-two.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to make a NRS 175.381(2) motion within seven days of the jury's verdict to set aside the verdict and enter a judgment of acquittal, on the ground the prosecution introduced insufficient evidence to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt, and most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes, and the failure of Petitioner's counsel to make the NRS 715.381(2) motions prejudiced the Petitioner's state and federal rights to due process and a fair trial.

Facts:

The Petitioner was charged with personally murdering Duran Bailey and then inserting a knife into and/or cutting his anus on July 8, 2001, within Clark County, Nevada. (*State v. Lobato*, No. C177394, Criminal Complaint.) Consequently, one of the essential elements the prosecution had to introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" at the crime scene at the time the crimes occurred. If the prosecution did not introduce evidence proving beyond a reasonable doubt the Petitioner was "within Clark County" and at the Nevada State Bank and inside the trash enclosure in its parking lot at the exact time Bailey was murdered, she could not have committed her accused crimes, and there was insufficient evidence for the jury to find her guilty.

The prosecution not only failed during it case in chief to present <u>any</u> substantive evidence that Petitioner was in Clark County at the time of Duran Bailey's murder, but the prosecution failed to present <u>any</u> physical, forensic, medical, eyewitness, surveillance, documentary, or confession evidence the Petitioner and her car had been in Clark County at any time on July 8, 2001 – the day of Duran Bailey's murder. In fact, <u>every</u> prosecution witness that testified to Petitioner's whereabouts on July 8 testified they saw and/or talked with her in Panaca. Since no evidence was introduced by the prosecution the Petitioner was in Clark County at any time on July 8, 2001, she could not have been in Las Vegas at the Nevada State Bank when Bailey was murdered, and so the Petitioner could not have committed her accused crimes.

During the Petitioner's defense every witness that testified to Petitioner's whereabouts on July 8 testified that they saw and/or talked with her in Panaca. Likewise, every defense and prosecution witness who testified about the Petitioner's car said it was parked on July 8 in front of her parents' house. The testimony of the defense and prosecution witnesses was consistent with telephone records of a number of telephone calls during July 8 from between the Petitioner and a boyfriend in Las Vegas who drove up to Panaca to pick her up on the evening of July 8. During the prosecution rebuttal no evidence was presented rebutting the witness testimony and telephone records that the Petitioner and her car were in Panaca on the entire day of July 8.

At the close of the prosecution's case in chief and again at the close of their rebuttal, the only knowledge the jurors had that the Petitioner and her car had been "within Clark County" on July 8, 2001, was the prosecution's claim during its opening statement. During the jury's deliberations the jurors had no evidence to determine the Petitioner and her car were in Clark County at the time of Bailey's murder except for the prosecution's claim during its opening statement, and its closing and rebuttal arguments. The prosecution's speculation during its opening statement, and then during closing and rebuttal arguments that the Petitioner and her car were in Clark County at the time of Bailey's murder was not substantiated by any evidence introduced at trial, much less evidence proving beyond a reasonable doubt the Petitioner was in Clark County, or in Las Vegas, or at the Nevada State Bank at any time on July 8, 2001, much less at the specific time of Bailey's murder.

NRS 175.381(2) states:

> 2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.

Since no evidence was presented during Petitioner's trial that she was in Clark County at any time on July 8, the jury could only have relied on the prosecution's speculation that the Petitioner was at the scene of Bailey's murder, or that she committed her convicted crimes. An essential element of the Petitioner's convicted crimes was that she was at the scene of the crime.

Since no evidence was presented by the prosecution, only speculation and speculative inferences, that Petitioner was even in Clark County at the time of Duran Bailey's murder, there is not evidence beyond a reasonable doubt that she committed her convicted crimes.

With no substantive evidence the prosecution met its legal burden of proving beyond a reasonable doubt the essential element the Petitioner was "within Clark County" and present at the scene of Bailey's Las Vegas murder, Petitioner's counsel was legally obligated to make a NRS 175.381(2) motion within seven days of the jury's verdict to set aside the verdict and enter a judgment of acquittal, on the ground the prosecution introduced insufficient evidence to prove every essential element of the Petitioner's alleged offenses beyond a reasonable doubt. Most particularly, no physical, forensic, documentary, eyewitness, surveillance or confession evidence was introduced at trial that the Petitioner was anywhere in Clark County at any time on July 8, 2001, and so she could not have been at the Nevada State Bank's trash enclosure at the precise time of Duran Bailey's murder and she could not have committed her accused crimes. The failure of Petitioner's counsel to make the NRS 715.381(2) motions prejudiced the Petitioner's state and federal rights to due process and a fair trial.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(uuu) Ground seventy-three.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure to file a post-verdict motion for DNA testing of crime scene evidence that could not be tested by technology available at the time of Petitioner's trial, but could have been tested by techniques developed prior to the Nevada Supreme Court's ruling in Petitioner's case, and this testing would be expected to produce results that would scientifically exclude Petitioner from her convicted crimes and provide the basis for a new trial motion.

Facts:

Through 2006 when the Petitioner was convicted, 194 people in the United States had their convictions overturned as a result of new evidence discovered by DNA testing. (Source, Innocence Project website, http://www.innocenceproject.org/know/Browse-Profiles.php)

During Petitioner's trial there was testimony that the Petitioner was excluded as the source of DNA recovered from a pubic hair on Bailey's body, gum recovered from a piece of cardboard covering his torso, and two cigarette butts that were lying directly on Bailey's body underneath the plastic sheeting wrapped over his groin area before the cardboard was placed over him.

Former LVMPD crime lab technician Thomas Wahl testified at trial that there were swabs of Bailey's penis and rectum on which semen lacking sperm was detected. Wahl also testified DNA technology at the time was unable to obtain DNA profile from spermless semen. The semen was among several pieces of evidence that could not be tested by DNA technology available at the time of trial.

While Petitioner's case was pending before the Nevada Supreme Court, Petitioner's counsel David Schieck and JoNell Thomas were informed that after Petitioner's trial several DNA techniques were developed that could obtain a DNA profile from the swabs of Bailey's penis and rectum and other evidence in the Petitioner's case that could either directly or in combination with other evidence conclusively establish the Petitioner did not murder and slash Duran Bailey's rectum. The Petitioner's two counsels were informed of the new DNA testing techniques in a letter from Hans Sherrer dated January 19, 2009 that states in part:

> "The purpose of this letter is to inform you that there have been several significant advances in DNA testing since Ms. Lobato's conviction in October 2006. These new techniques enable the testing of evidence in her case to possibly identify the DNA profile of the person or persons responsible for the murder of Mr. Bailey. Negative test results for the presence of Ms. Lobato's DNA will provide valuable new exculpatory evidence for her.
>
> **DNA testing of spermless semen**
>
> One of the developments is the testing of spermless semen to identify the DNA profile of the male it originated from. Previously sperm cells needed to be present for DNA testing. The first reported use of this technology was in the March 7, 2007 issue of *New Scientist* magazine (See Exhibit A.). This was five months after Ms. Lobato's conviction. I have talked with Bode Technology Group, one of the leading DNA laboratories in the United States, and they informed me they first commercially offered this technology in October 2007. This was a year after Ms. Lobato's conviction. Bode Technology Group also has a new technique that can distinguish between the DNA profile of a male's spermless semen intermixed with the DNA of another male, which is the situation of the male who had anal sex with Mr. Bailey.
>
> ….

Touch DNA testing

Another development is the ability to determine the DNA profile of the person who "touched" something and left identifiable skin cells, oils or perspiration. (See Exhibit C) The first reported use of touch DNA testing was in November 2007. (See Exhibit D) This was 13 months after Ms. Lobato's conviction. In January 2008 Timothy Masters became the first person in the United States exonerated by touch DNA testing when he was excluded as the source of DNA recovered from the clothing of the woman he had been convicted in 1999 of murdering. (See Exhibit E)

On July 9, 2008 the District Attorney for Boulder, Colorado announced that members of the John and Patsy Ramsey family had been cleared of involvement in the 1996 murder of their daughter JonBenet. Touch DNA testing of her long johns identified a male DNA profile that matched the male DNA profile previously recovered from biological material on her underwear. That profile excludes members of the Ramsey family. (See Exhibit F)

…

DNA testing of degraded or impure evidence

There have also been additional refinements in the ability of a DNA test to detect a DNA profile from a degraded, impure or minute evidence sample. In February 2007 it was announced that STR MiniFiler PCR Amplification was available to generate a profile from "degraded DNA as well as from samples that are limited by an impurity." (See Exhibit G) This was four months after Ms. Lobato's conviction.

Items in Ms. Lobato's case that can be tested by new DNA techniques

There are a number of items in Ms. Lobato's case that either have not been DNA tested, or which were tested by techniques far inferior to those that became available after her conviction. These items individually, or in concert with other evidence can establish either to a scientific certainty – or at a minimum beyond a reasonable doubt – that Ms. Lobato is not responsible for Mr. Bailey's murder. I will list some of these items with a brief explanation:

The plastic sheeting that covered Mr. Bailey's body can be tested by the touch DNA technique. The killer or killers extensively handled the sheeting, and Bode Technology Group specifically identifies plastic as a surface from which skin cells can be recovered for touch DNA testing. Bode Technology Group performed the touch DNA testing in the Ramsey case. (See Exhibit C)

Testimony during Ms. Lobato's trial established that Mr. Bailey's pants may have been pulled down by his killer, and if so that person's skin cells may be recoverable from the fabric by the touch DNA technique. The Bode Technology Group explains that in a "case in which the victim's clothing had been removed by the perpetrator, areas such as the waistband may contain sufficient cells belonging to the perpetrator to produce a profile." (See Exhibit C) Handling of the victim's clothing is precisely how Timothy Masters was exonerated. (See Exhibit E)

The rectal swab is known to have the semen of a male, and it can be tested by a spermless DNA technique to identify the DNA profile of the male who had anal sex with Mr. Bailey.

Penile swab "1B"is known to have the semen of a male, and it can be tested by a spermless DNA technique to identify the DNA profile of that male. That penile

swab is also testable by the touch DNA technique to possibly identify the DNA profile of the person who removed Mr. Bailey's penis.

"Penile swab "A" (and which may also be known as "1A") did not have detectable semen, but it can be tested by the touch DNA technique to possibly identify the DNA profile of the person who removed Mr. Bailey's penis. (See Exhibit B, V-175)

The three cigarette butts that were recovered from under the plastic sheeting can be tested by the touch DNA technique to obtain the DNA profile of the person or persons who handled those cigarettes and placed them on Mr. Bailey's body. Although DNA testing of biological material recovered from two of the cigarettes has already excluded Ms. Lobato as the source, the more sophisticated DNA techniques now available can more precisely identify who those people are, one of whom has already been identified as a male.

State of the art DNA techniques can be used to test the chewing gum recovered from the crime scene. Although DNA testing of the chewing gum has already excluded Ms. Lobato as the source of the DNA profile detected on it, the more sophisticated testing techniques now available can more precisely identify the DNA profile recoverable from the chewing gum.

State of the art DNA techniques can be used to test the pubic hair recovered from Mr. Bailey's body. Although DNA testing of the pubic hair has already excluded Mr. Bailey and Ms. Lobato as the hair's source, the more sophisticated testing techniques now available can more precisely identify the DNA profile of the person who is the pubic hair's source.

State of the art DNA techniques can be used to test for the presence of blood on the car seat cover and any available car seat fabric preserved as evidence. Although confirmatory tests have excluded the presence of blood on those items, the prosecution still contends the inconclusive presumptive tests conducted in 2001 have evidentiary value. Negative DNA test results would affirm the confirmatory tests and completely undercut any pretense the inconclusive presumptive tests have any evidentiary value, and thus support their inadmissibility.

Mr. Bailey's killer unquestionably handled his penis in the course of removing it. So the single most important DNA test that can be performed is a test to obtain the DNA profile of the person who handled it in the course of removing it. If Ms. Lobato is excluded as that person, that is conclusive scientific proof she is not Mr. Bailey's murderer. As has been mentioned touch DNA testing of the two penile swabs may be able to identify the DNA profile of that person. However, if for some reason the swabs prove insufficient to identify the DNA profile of the person who handled Mr. Bailey's penis, there is another option. It is my understanding that Bailey's penis was buried with his body, so his body can be exhumed to provide samples from his penis for a thorough DNA analysis. There also may be other areas of Mr. Bailey's body that were obviously handled by his killer, and touch DNA testing of those areas could yield a DNA profile of his killer.

DNA testing can provide exculpatory evidence

DNA exclusion of Ms. Lobato as the person who handled Mr. Bailey's penis (or other parts of his body) would constitute irrefutable exculpatory evidence of her actual innocence – particularly since the prosecution's theory from the day of her

> arrest is that he was killed by a lone person. However, exclusionary DNA test results from other tests outlined in this letter would be new scientific evidence refuting involvement by Ms. Lobato in Mr. Bailey's murder. For example, if the DNA profile of the semen recovered from Mr. Bailey's rectum matches DNA recovered from one of the cigarette butts, or possibly other evidence such as the plastic sheeting, then it would stretch rational credulity not to recognize that that male was Mr. Bailey's murderer. It would also give credence to the homosexual scenario suggested during Ms. Lobato's 2006 trial by the testimony of Clark County Chief Medical Examiner Lary Simms and forensic scientist and criminal profiler Brent Turvey. The process of identifying the same person's DNA on several items of JonBenet's clothing is how the Ramsey family was excluded from involvement in her murder. (See Exhibit F)
>
> In summary, since Ms. Lobato's October 2006 conviction at least three types of DNA testing have evolved that can provide compelling exculpatory evidence sufficient to support the filing of a motion to dismiss the indictment against her, or at a minimum support a motion for a new trial based on new evidence of her actual innocence.
>
> (See Exhibit 71, Letter of Hans Sherrer to David Schieck and JoNell Thomas, January 19, 2009.)

Petitioner's counsel did nothing with the new information about how advances in DNA technology could result in irrefutable exculpatory scientific evidence. The extraordinary circumstances of the new DNA testing techniques that could exculpate the Petitioner of her convicted crimes required extraordinary action by Petitioner's counsel. One option is they could have filed for a Stay of Petitioner's Supreme Court appeal in the interests of justice and obtained an order from the court for DNA testing of the evidence. If the evidence singularly or in conjunction with other evidence scientifically excluded the Petitioner from Bailey's murder and rectum slashing, her counsel could have taken appropriate action to vacate her conviction and have the charges dismissed. But instead Petitioner's counsel did nothing on the Petitioner's behalf to represent her interest in having the DNA testing conducted.

Considering that all the DNA testing in the Petitioner's case conducted prior to or during trial excludes the Petitioner, and there is no physical, forensic, documentary, eyewitness, surveillance or confession evidence that Petitioner was anywhere in Clark County on July 8, 2001 – the day of Bailey's murder – there is every reason to believe that the evidence tested by the DNA techniques developed after her trial would also be exculpatory. And if Petitioner's DNA was not detected on Bailey's penis, that would in and of itself constitute almost irrefutable new evidence

that she did not murder Bailey, because there is no question that his murderer grasped his penis to pull it up and amputate it. Consequently the Petitioner was gravely prejudiced by her Petitioner's failure to represent her interests and do everything possible to ensure that the DNA testing was conducted in a timely manner.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(vvv) Ground seventy-four.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure in Argument A. of Petitioner's direct appeal to the Nevada Supreme Court to correctly argue and brief the Court that there is insufficient evidence to support Petitioner's conviction beyond a reasonable doubt because it is based on a series of assumptions, interpretations, inferences, conjectures, and speculations by the prosecution that are themselves based on Detective Thomas Thowsen's speculative assumption that Petitioner *de facto* confessed to murdering Duran Bailey in her Statement of July 20, 2001, and if Petitioner's counsel had correctly argued and briefed the Court on the proper grounds of insufficiency of the evidence, Petitioner's conviction would have been vacated by the Court as violating the state and federal constitutional rights of the Petitioner to due process of law and a fair trial.

Facts:

At trial the prosecution presented evidence that on July 8, 2001, in the exterior trash enclosure for the Nevada State Bank at 4240 West Flamingo Road in Las Vegas, Duran Bailey was beaten about the face, seven teeth were knocked out, he had been stabbed in his face, neck and abdomen multiple times, and after death his penis was amputated, his rectum slashed and his abdomen stabbed multiple more times. He also had a fracture in the back of his skull. At autopsy there was not a determination that Bailey's death had anything to do with him either being the victim or perpetrator of a sexual assault. LVMPD homicide Detectives Thomas Thowsen and James LaRochelle were assigned the case. No arrests had been made when on July 20, 2001, Thowsen received a telephone tip from Lincoln County Juvenile Probation Officer Laura Johnson that she had been told by a teacher friend that a former student told her she had cut the penis of a man who tried to rape her in Las Vegas. Thowsen was told the teacher's former student was 18-

year-old Kirstin Blaise Lobato (Petitioner). Johnson told Thowsen that she had been told Lobato lived with her parents in Panaca, about 170 miles north of Las Vegas.

Thowsen, LaRochelle and LVMPD Crime Scene Analyst Maria Thomas drove up to Lincoln County on the afternoon of July 20, 2001. After interviewing Johnson they followed a Lincoln County Sheriff's deputy to the Lobato's home. They arrived about 5:45 pm, and after Petitioner signed a *Miranda* card at 5:55 p.m., the detectives began a taped interview of her at 6:07 pm. Petitioner was shown a photo of Bailey but she didn't recognize him. Petitioner described defending herself with her pocket butterfly knife by attempting one time to cut the exposed penis of a black man who sexually assaulted her in the parking lot of the Budget Suites Hotel near Sam's Town Casino on Boulder Highway in east Las Vegas. Petitioner described her assailant as very much alive and "crying" when she escaped from him in her car. Petitioner described this incident as happening "over a month ago" from the date of her Statement on July 20, 2001. The Petitioner is 5'-6", and she said her assailant was "huge" compared to her.

Thowsen assumed the Petitioner's admission to trying to cut her assailant's penis was a confession to the murder and post-mortem mutilation of Duran Bailey, and arrested Petitioner. Petitioner was initially charged with the first-degree murder of Bailey, and a few days later she was charged with violating Nevada's necrophilia law for allegedly cutting his rectum after his death ("sexual penetration of a dead body").

The beginning point and foundation of the prosecution's case against the Petitioner is Detective Thowsen's assumption that her admission in her Statement that she made one attempt to cut her would be rapist's penis is a confession to viciously beating and repeatedly cutting Bailey before his death, and then inflicting multiple cutting and stabbing wounds after he died. The prosecution conceded during its rebuttal argument that the Petitioner's admission in her Statement was the foundation of her prosecution:

> "But we have her words, ladies and gentlemen, her words. We're here -- they said why are we here? We're here because of her mouth, because of what she said." (Trans. XIX-186 (10-5-06))

The Nevada Supreme Court also recognized Thowsen's assumption about Petitioner's admission in her Statement is the foundation of her prosecution, when on direct appeal it affirmed Petitioner's conviction by ruling: "based on Lobato's admission, there was substantial evidence that she committed the murder." (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance, 4) Absent Detective Thowsen's assumption that Petitioner's admission in her Statement to making a single attempt to cut her would be rapist's penis was a confession to Bailey's murder and post-mortem mutilation, the Nevada Supreme Court acknowledged there was no basis to uphold her conviction.

However, Thowsen's assumption that Petitioner's description of attempting once to cut her attacker's penis is an admission to Bailey's murder and mutilation is based on his speculative interpretation of a few words of what she said in her 26-minute Statement, while ignoring the rest of her statement that has information excluding her from the crime. Thowsen's assumption the Petitioner confessed was then used to support a chain of speculative inferences that the prosecution argued linked her to the crimes. The following is an abbreviated list of the most important of the prosecution's speculative inferences:

1. Petitioner said in her Statement, and she told a number of friends and acquaintances, that she fended off a rape attempt in Las Vegas by making a single attempt to cut her assailant's penis, so that must be a confession to Bailey's murder and post-mortem mutilation.

2. Petitioner said in her Statement that she was assaulted in the parking lot of an east Las Vegas hotel, so she must have "jumbled" and "minimized" those details and she actually meant she attacked Bailey in the exterior trash enclosure of the west Las Vegas bank where he was murdered and mutilated.

3. Petitioner said in her Statement she was assaulted around midnight or in the early morning hours, and Bailey was murdered on July 8, 2001, so she must have murdered him "sometime before sunup" on July 8.

4. Petitioner said she had been high on methamphetamine for a week before and after the assault, and that she had been up for three consecutive days when it happened, so she must have gone to the trash enclosure to get methamphetamine from Bailey.

5. Bailey was a crack cocaine user who was known to have traded crack cocaine for sex, and since the Petitioner was known to use methamphetamine and she had been repeatedly sexually assaulted by her mother's boyfriend when she was a child, she must have expressed her pent up anger against men by (allegedly) attacking Bailey and beating and stabbing him, and then mutilating his body because he was smelly and wanted to have sex with her.

6. Petitioner was seen by a doctor at the medical clinic in Caliente (about 10 miles from Panaca) at 5:15 pm on July 5, 2001, and tests of her blood detected no methamphetamine, so she must have driven to Las Vegas on July 6 when she started the three consecutive days of being up from using methamphetamine described in her Statement.

7. Petitioner's urine sample collected by her mother on the morning of July 7, 2001, in Panaca and taken to the medical clinic in Caliente, tested negative for methamphetamine, so she must have left her urine sample before she left for Las Vegas on July 6.

8. Non-relative alibi witnesses positively established that on July 8, 2001, Petitioner was in Panaca from 11:30 am through the rest of day, so she must have driven to Panaca from Las Vegas after the murder. The alibi testimony of the Petitioner's father, stepmother and cousin-in-law that she was seen at her parents' home in Panaca from shortly after midnight until after 7am was discounted as unreliable because they were relatives.

Those are all speculative inferences by the prosecution because a regular inference must have a factual basis. Petitioner's prosecutors relied on speculative inferences because none of them is rooted in a factual basis, as the following brief analysis of each point makes clear:

1. Petitioner said in her Statement that she made one attempt to cut her assailant's penis, after which she was able to escape and left in her car while her assailant was alive and "crying." Prosecution and defense witnesses testified that Petitioner had told them about the rape attempt, and every witness was consistent that the Petitioner told them she attempted one time to cut at her assailant's penis, and no witness testified that she made any attempt to strike or hit her assailant. Furthermore, every witness was consistent in that Petitioner did not tell anyone she killed the man who assaulted her. The July 9, 2001, Clark County Coroner's Autopsy Report for Duran Bailey lists 31 separate external injuries that include: multiple trauma to the face—including abrasions,

contusions, and numerous lacerations; missing teeth; laceration to left side of the neck; multiple stab wounds to the abdomen; multiple lacerations to the left hand; a severed penis; laceration to the anus; laceration of his scrotum; and abrasions on his back. In addition, Bailey's body was moved several feet before or after death, and it was covered with trash and cardboard; however, Petitioner made no mention of that in her Statement. Because there is a complete absence of any mention in Petitioner's Statement, or in testimony about any conversation she had with any person about 30 of Bailey's 31 external injuries, the prosecution assumed that Petitioner simply omitted those details, along with omitting any mention of moving and covering his body, or that her assailant died.

2. Petitioner described being assaulted in the parking lot of a Budget Suites Hotel in east Las Vegas, and identified the hotel's outside fountain, Boulder Highway as the major street, the shopping center directly across Boulder Highway, and Sam's Town Casino to the south. Petitioner did not describe a single identifiable landmark around the Nevada State Bank, even though the high-rise Palms Hotel and Casino was under construction directly across the street, and just east is the Gold Coast Casino and the high-rise Rio Hotel and Casino. There was no shopping center or fountain or Sam's Town Casino within eyesight of Bailey's murder scene. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.)

3. Petitioner said she was "bum rushed" as she was getting in her car to go out around midnight or very early in the morning. Medical Examiner Lary Simms testified that it was possible Bailey died 8 to 24 hours after his body was examined at the crime scene by Coroner's Investigator Shelley Pierce-Stauffer at 3:50 a.m. on July 9, 2001. Based on Simms' testimony 3:50 a.m. on July 8 was the absolute latest time Bailey died from when his body was discovered, but that was later in the morning than Petitioner described being assaulted.

4. Petitioner said in her Statement she had been high on methamphetamine for a week before and after she was assaulted and she had been up continuously for the previous three days. Bailey was murdered on July 8, 2001. That means the Petitioner would have been continuously high speeding on methamphetamine from July 1 to July 15, and that she was up from the early morning of July 5 to at least the morning of July 8. However, it is known that isn't true, because not a single prosecution or defense witness who testified seeing the Petitioner from July 1 to July 15 said she exhibited any sign

of being high on methamphetamine. To the contrary, many witnesses testified that Petitioner was lethargic on July 3 and 4, and on July 5 her mother took her to the Caliente Clinic where she saw a doctor at 5 pm – when according to the prosecution she should have been buzzing around high on methamphetamine – but her blood tested negative for methamphetamine. Consistent with that Petitioner's urine sample collected by her mother on the morning of July 7 tested negative for methamphetamine. Furthermore, of the many prosecution and defense witnesses who saw Petitioner on July 8, none described her as exhibiting any signs of being high on methamphetamine or having been up for three consecutive days – from July 5 to July 8. In addition, Doug Twining testified that from July 9 to July 13 he and the Petitioner only smoked some marijuana. There was no testimony the Petitioner used any methamphetamine in July 2001.

5. The only testimony was that Bailey used crack cocaine, and at autopsy his toxicology tests showed he had cocaine in his system. Diann Parker testified she had traded sex for crack cocaine with Bailey on several occasions. There was no testimony Bailey had sold crack cocaine or any other drug. The Petitioner described using methamphetamine in her Statement and that was supported by testimony from other people. There was no testimony she used cocaine or had traded sex for methamphetamine. There was no expert testimony by a qualified psychologist that because she was sexually assaulted as a child the Petitioner had a smoldering homicidal rage against men in general that could be triggered by exposure to a smelly man. There was neither any testimony that the Petitioner had ever met Bailey, knew who he was, knew anyone who knew him, or that she had any idea where he hung out in Las Vegas.

6. There was no testimony by any prosecution or defense witness who saw or talked with the Petitioner that she was anywhere other than Panaca the entire day of July 8. The next door neighbors of Petitioner's parents, Robert and Wanda McCrosky, testified they did not see Petitioner's car moved from where it was parked in front of the Lobato's home. Petitioner said in her Statement she had been high on methamphetamine for a week before and after she was assaulted and she had been up continuously for the previous three days. Bailey was murdered on July 8, 2001. That means the Petitioner would have been continuously high speeding on methamphetamine from July 1 to July 15, and that she was up from the early morning of July 5 to at least the morning of July 8. However, it is

known that isn't true, because not a single prosecution or defense witness who testified seeing the Petitioner from July 1 to July 15 said she exhibited any sign of being high on methamphetamine. To the contrary, many witnesses testified that Petitioner was lethargic on July 3 and 4, and on July 5 her mother took her to the Caliente Clinic where she saw a doctor at 5 pm – when according to the prosecution she should have been buzzing around high on methamphetamine – but her blood tested negative for methamphetamine. Consistent with that Petitioner's urine sample collected by her mother on the morning of July 7 tested negative for methamphetamine. Furthermore, of the many prosecution and defense witnesses who saw Petitioner on July 8, none described her as exhibiting any signs of being high on methamphetamine, or having been up for three consecutive days – from July 5 to July 8. In addition, Doug Twining testified that from July 9 to July 13 he and the Petitioner only smoked some marijuana. There was no testimony the Petitioner used any methamphetamine in July 2001.

7. There was no evidence introduced that Petitioner's urine sample collected by her mother on the morning of July 7 was not for the previous 24-hour period. There was no testimony by any prosecution or defense witness who saw or talked with the Petitioner that she was anywhere other than Panaca or nearby Caliente on July 6 and July 7. The next door neighbors of Petitioner's parents, Robert and Wanda McCrosky, testified they did not see Petitioner's car moved from where it was parked in front of the Lobato's home. Petitioner said in her Statement she had been high on methamphetamine for a week before and after she was assaulted and she had been up continuously for the previous three days. Bailey was murdered on July 8, 2001. That means the Petitioner would have been continuously high speeding on methamphetamine from July 1 to July 15, and that she was up from the early morning of July 5 to at least the morning of July 8. It is known that isn't true, because not a single prosecution or defense witness who testified seeing the Petitioner from July 1 to July 15 said she exhibited any sign of being high on methamphetamine. To the contrary, many witnesses testified that Petitioner was lethargic on July 3 and 4, and on July 5 her mother took her to the Caliente Clinic where she saw a doctor at 5 pm – when according to the prosecution she should have been buzzing around high on methamphetamine – but her blood tested negative for methamphetamine. Consistent with that Petitioner's urine sample collected by her mother on the morning of July 7 tested negative for methamphetamine. Furthermore, of the many prosecution and defense witnesses who saw Petitioner on

July 8, none described her as exhibiting any signs of being high on methamphetamine, or having been up for three consecutive days – from July 5 to July 8. In addition, Doug Twining testified that from July 9 to July 13 he and the Petitioner only smoked some marijuana.

8. There was no testimony by any prosecution or defense witness who saw or talked with the Petitioner that she was anywhere other than Panaca or nearby Caliente from the afternoon of July 2 to the early morning of July 9, 2001. Consistent with that was the testimony of many non-relative witnesses who testified that on Sunday, July 8 they saw and/or talked with the Petitioner in Panaca from 11:30 a.m. through that night. Also, consistent with the evidence by non-relatives that Petitioner was in Panaca is her father Larry Lobato's testimony he saw her sleeping on the living room futon when he got home from work around 1 am and when he went to bed around 2 a.m., and again at about 7 am; the testimony of Petitioner's stepmother that she saw Petitioner sleeping on the living room futon when she got up at 5:45 am and when she left for work at 6:50 a.m.; and Petitioner's cousin-in-law John Kraft saw her when she answered the door at about 7 am when he went to the Lobato's house to talk with Larry.

Likewise, there was no testimony by any prosecution or defense witness that they saw the Petitioner's car anywhere but in front of her parents' house in Panaca from the afternoon of July 2 to the evening of July 20, 2001. (When her car was put on a tow truck and transported to the Las Vegas Metropolitan Police Department crime lab for inspection.)

Consistent with all the non-relative and relative alibi testimony establishing the Petitioner and her car was in Panaca the entire 24-hours of July 8, 2001, is the absence of any physical, forensic, eyewitness, documentary, surveillance or confession evidence introduced by the prosecution at trial that Petitioner or her car was in Las Vegas at any time on July 8, 2001.

So the prosecution's case against the Petitioner was based on a series of speculative inferences that all originated from a single source: Detective Thowsen's assumption that petitioner's admission of trying one time to cut her would be rapist's exposed penis after he "bum rushed" her in the parking lot of a Budget Suites Hotel in east Las Vegas, "must be" a confession to her attacking Bailey in the trash enclosure at the Nevada State Bank in west Las Vegas, and then

beating, stabbing, cutting and murdering him, and then dragging him several feet, mutilating his body and then covering his body with cardboard and piling garbage on and around him.

It is known that Thowsen's assumption that Petitioner "confessed" to Bailey's murder in her Statement is itself pure speculation. That is revealed in the above analysis of key prosecution speculative inferences upon which the Petitioner's prosecution was based, and also because there are known to be at least 40 specific and significant differences between Bailey's murder and Petitioner's Statement. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) Even more important, there is no specific detail of Petitioner's Statement that matches the specific details of Bailey's murder. Thowsen's claim that Petitioner "confessed" by trying to cut or cutting her attacker's penis doesn't remotely match Bailey's murder because the Petitioner specifically identified that her attacker was not only alive but he was kneeling above her when she tried to cut him, and that when she left he was not only alive, but "crying." And that doesn't even take into consideration that her description that her assailant was "huge" compared to her doesn't remotely match Bailey who was only 4" taller and about 30 pounds heavier than her, and that she did not identify Bailey when shown his picture. Petitioner did not confess to murdering her attacker, so it is pure speculation on Detective Thowsen's part without a substantive factual basis that her Statement constitutes a confession to any person's murder, much less Bailey's murder, without even taking into consideration that there is no detail of her Statement that matches the details of Bailey's crime scene and pre and post death injuries.

The prosecution's case can be described as an inverted pyramid, with the balancing point being Thowsen's speculative assumption that the Petitioner confessed to Bailey's murder, and from there the prosecution piled speculative inference upon speculative inference upon speculative inference to argue she committed the crime – when there is no physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that even places her in Clark County at any time on the day of Bailey's murder – much less that establishes she was in Las Vegas at the Nevada State Bank at any time on the day of his murder – much less that puts her there at the time of his murder – much less that establishes she committed the crimes.

The prosecution improperly relied on "speculative inferences" that were not based on facts – but on the prosecution's speculation about what might possibly have happened. For example, the prosecution stated during open and closing arguments that Petitioner was in Las Vegas at the time of the crime – but presented no testimony supporting that speculation. So the jury drew the "inference" that Blaise was in Las Vegas at the time of Bailey's death from the prosecution's speculation that she was there – and not evidence. The prosecution's case rested on the foundation of Thowsen's speculative assumptions about the Petitioner's Statement, and the prosecution's argument to the jury was that all of its speculation about the case amounted to evidence the Petitioner was at the Nevada State Bank's trash enclosure and committed the crimes.

In Petitioner's direct appeal brief to the Nevada Supreme Court her counsel based Argument A. on, "there is insufficient evidence to support Lobato's conviction." (*Kirstin Blaise Lobato vs. The State of Nevada*, No. 49087, Supreme Court of The State of Nevada, Appellant's Opening Brief, December 26, 2007, 14.) Although the key argument of why the evidence was insufficient is that the prosecution's case was a series of unbridled speculative inferences based on Detective Thowsen's speculative assumption that Petitioner confessed to Bailey's murder in her Statement, Petitioner's counsel devoted only one sentence of its argument to inferences: "Additionally, it must be determine whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn." (15)

If Petitioner's counsel had correctly and fully briefed the Nevada Supreme Court on the law and circumstances of her prosecution to show it is based on a "house of unsubstantiated speculative inferences" built on top of Detective Thowsen's speculative assumption that she confessed to Bailey's murder in her Statement, it can be expected that the Court would have been vacated her conviction on the basis of insufficiency of the evidence.

Although Petitioner's counsel did not know it at the time, the magnitude of their failure to properly brief and argue Argument A. (insufficiency of the evidence) is proven by the "Report of Dr. Allison D. Redlich," dated February 10, 2010. Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York. Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental

Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001. Dr. Redlich's report of February 10, 2010 states in part:

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.
>
> …
>
> Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her."
>
> (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

Thus in Dr. Redlich's expert opinion the Petitioner was neither confessing to Bailey's murder and mutilation in her Statement, nor was she "minimizing or jumbling the details of the murder of Mr. Bailey." Her Statement is exactly what it appears to be, the description of a rape assault against her that occurred weeks prior to Bailey's murder.

It is now known that Thowsen's non-expert assumption that Petitioner's Statement is a confession to Bailey's murder is false and his testimony was false because she did not "jumble" or "minimize" details in her Statement. The information available now undermines the entire foundation of the prosecution's case against the Petitioner that rests on a series of unsubstantiated speculative inferences that depend on Thowsen's assumption. That it is now known the prosecution's case

against the Petitioner has no basis in fact emphasizes the prejudice to the Petitioner by her counsel's failure to raise the proper argument in her direct appeal to the Nevada Supreme Court that the evidence is insufficient because the Petitioner's case is based on the prosecution's speculative inferences of where she was on July 8, 2001, and what she did, and not actual evidence.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(www) Ground seventy-five.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by counsel's objectively unreasonable failure in Argument H-1 of Petitioner's direct appeal to the Nevada Supreme Court to correctly brief and argue to the Court that Judge Valorie Vega abused her discretion by misapplying the "law of the case" doctrine in denying the Petitioner's motion *in limine* to exclude as evidence her Statement on July 20, 2001, and a prior comment, and if Petitioner's counsel had correctly briefed and argued the proper application of "law of the court" to the circumstances of the Petitioner's Statement and her retrial, Petitioner's conviction would have been vacated by the Court and remanded with appropriate instructions.

Facts:

LVMPD Detectives Thomas Thowsen and James LaRochelle, and Crime Scene Analyst Maria Thomas drove from Las Vegas to Panaca on the afternoon of July 20, 2001, to arrest the Petitioner for the murder of Duran Bailey on July 8, 2001. The decision to arrest the 18-year-old Petitioner was based on a telephone conversation on July 20 between Thowsen and Lincoln County Juvenile Probation Officer Laura Johnson. Johnson told Thowsen she had been told by her friend Dixie Tienken, that Tienken had been told by a former student of hers that she had fought off a rape attempt in Las Vegas by cutting once at her attacker's penis.

After arriving in Lincoln County the detectives obtained Johnson's statement, although they made no effort to contact Tienken to corroborate Johnson's account. They then arranged to have a tow truck transport the Petitioner's car to the LVMPD crime lab in Las Vegas for examination, and a Lincoln County Sheriff's deputy led the detectives and Thomas to where the Petitioner was living at her parents' house.

Immediately after introducing himself, Thowsen told the Petitioner that he knew she had been hurt in the past. (The Petitioner had been repeatedly raped when she was five and six by her mother's boyfriend.) The Petitioner immediately began to cry and became very emotional. While she was crying and in her emotional state Thowsen had the Petitioner sign a *Miranda* waiver and he proceeded to question her for about 30 minutes in an audio taped Statement, during which the Petitioner remained very emotional. (Det. LaRochelle asked several questions toward the end.) In her Statement the Petitioner described a rape attempt at the Budget Suites Hotel in east Las Vegas near Sam's Town Casino that she fought off by attempting once to cut her attacker's penis. She described her assailant as alive and crying when she was able to escape in her car. Since her Statement was on July 20, 2001, the sexual assault she identified as happening "over a month ago" occurred prior to June 20, which was weeks before Bailey's July 8 murder. When shown a picture of Bailey the Petitioner didn't recognize him.

There is not a single specific detail about the attempted rape described in the Petitioner's Statement that matches the specific details of Bailey's murder in a west Las Vegas bank's trash enclosure. While she says she tried once to cut her live attacker's penis before escaping, Bailey's Autopsy Report lists 31 separate ante-mortem and post-mortem external injuries, and numerous internal injuries, and her description of her attacker as "huge" bears no resemblance to the very skinny Bailey who weighed less than 140 pounds. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) Furthermore, the Arrest Report written the day of the Petitioner's arrest does not allege she confessed to Bailey's murder either in her Statement or at any time to the detectives off-tape, and she did not sign any document confessing to the crime.

On August 9, 2001, the Petitioner was charged with Bailey's first degree murder and the sexual penetration of his dead body (cutting his rectum after his death).

On the third day of the Petitioner's trial in May 2002, the prosecution intended to introduce the Petitioner's Statement into evidence during Thowsen's testimony. The prosecution requested a voluntariness hearing to get a ruling on her Statement's admissibility. The hearing was held outside the presence of the jury.

After Thowsen completed his direct and cross-examination about the circumstances of the Petitioner giving her Statement and making a comment prior to the Statement, Petitioner's then counsel made his argument for their exclusion that was transcribed into about one full page. His argument was based on: "I believe that this statement is the product of overbearing and it is not free and voluntary." (Trans. III-18 (5-10-02)) The prosecution's counter argument was transcribed into less than one page. Neither Petitioner's counsel nor the prosecution filed a brief or cited any case law supporting their respective arguments, or introduced expert psychology testimony about the effect Thowsen's sadistic psychological torture like tactic of using the Petitioner's childhood rapes against her had on her ability to make a knowing, intelligent and voluntary waiver of her Constitutional rights to remain silent, and to consult with an attorney before talking with the detectives. Instead both Petitioners' counsel and the prosecution gave very brief unprepared off-the-cuff arguments.

Judge Valorie Vega immediately and summarily ruled the Petitioner's Statement was admissible. (Trans. III-20 (5-10-02)) If you blinked you practically would have missed the hearing, because only a couple of minutes passed from when the Petitioner's counsel began his argument to when Judge Vegas issued her ruling. And this abbreviated lightning fast hearing was for the most important evidence in the Petitioner's case, and without which there would likely be no prosecution of the Petitioner.

During the Petitioner's trial Medical Examiner Lary Simms testified that after Bailey died his penis was amputated. The prosecution then relied on Thowsen's testimony to characterize the Petitioner's Statement as a confession to Bailey's murder, because she described fighting off her would be rapist by trying once to cut his penis. Thowsen admitted on cross-examination that he deliberately used the Petitioner's childhood victimization against her that immediately evoked a very emotional response. (Trans. III-12-13 (5-10-2002)) Thowsen's testimony about the Petitioner's Statement and her comment before it was indispensible for the prosecution to secure the Petitioner's conviction, because the prosecution did not introduce any physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8,

2001, the Petitioner had been anywhere in Clark County, Nevada – much less that she was at the Las Vegas scene of Bailey's murder at the exact time it occurred.

The Petitioner's conviction was overturned on direct appeal by the Nevada Supreme Court based on evidentiary errors by Judge Vega. (*Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004)) If it had not been overturned and the Petitioner had to file a habeas corpus petition, an important claim of ineffective assistance of counsel would have been her counsel's complete lack of effort to exclude her Statement, which had the consequence that Judge Vega made her ruling admitting the Petitioner's Statement without actually having any case law or legal arguments or expert testimony to base her ruling on. The Petitioner's Statement was the centerpiece of the prosecution's case, but it was literally admitted as evidence by default due to her counsel's ineffective representation or her interests regarding exclusion of her Statement and related comments. In fact, there would have been no hearing about the admissibility of the Petitioner's Statement if the prosecution had not requested it to ensure her conviction wouldn't be overturned on appeal due to the lack of a hearing.

Prior to Petitioner's second trial her new counsel filed a "Motion In Limine To Exclude Statements Made By Ms. Lobato" that was 32-pages long, and extensively cited case law. The Motion stated in part:

> "The defense moves to exclude all evidence relating to the July 20, 2001, interrogation of Ms. Lobato at her home by Detectives Thomas Thowsen, Jim LaRochelle and Sergeant Carey Lee. The information derived from that interrogation fails on three respects.
>
> First, her statements made before a Miranda waiver was obtained was allegedly made are nevertheless a result of interrogation as they are the product of psychological ploy utilized by the detectives.
>
> Second, the alleged Miranda waiver Ms. Lobato was not voluntarily given, as the officer's psychological ploy combined with her existing mental state rendered her incapable to give a voluntary waiver.
>
> Third, any statements made by Ms. Lobato are irrelevant because she was speaking of a different occurrence than the July 8, 2001, death of Duran Bailey."
>
> *State v. Lobato*, No. C177394, District Court, Clark County, Nevada, "Motion In Limine To Exclude Statements Made By Ms. Lobato During The Course Of The July 20, 2001 Interrogation."

During the motions hearing on May 19, 2006, Judge Vega did not consider the merits of the Motion. She summarily denied it ruling, "The prior hearing and ruling is law of the case." *State v. Lobato*, No. C177394, District Court, Clark County, Nevada, "Hearing Of All Pending Motions."

During the Petitioner's retrial Medical Examiner Lary Simms testified that after Bailey died his penis was amputated. The prosecution then relied on Thowsen's testimony to characterize the Petitioner's Statement as a confession to Bailey's murder, because she described fighting off her would be rapist by trying once to cut his penis. Thowsen admitted on cross-examination that he deliberately used the Petitioner's childhood victimization against her that immediately evoked a very emotional response. (Trans. XIII-93-94 (09-27-06)) Thowsen's testimony about the Petitioner's Statement and her comment before it was indispensible for the prosecution to secure the Petitioner's conviction, because the prosecution did not introduce any physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8, 2001, the Petitioner had been anywhere in Clark County, Nevada – much less that she was at the Las Vegas scene of Bailey's murder at the exact time it occurred.

The Petitioner's appellate counsel did make an Argument in her direct appeal that the Petitioner's Statement should have been suppressed as evidence. (*Lobato v. State*, No. 49087, Supreme Court of Nevada, Appellant's Opening Brief, 12-26-2007, (Argument H-1: "Lobato's statements to detectives on July 20, 2001, were not voluntary and should have been suppressed from use as evidence," 42-46.)) However, Argument H-1 did not raise the critical issue that Judge Vega abused her discretion by misapplying the "law of the case" doctrine in denying the Petitioner's "Motion In Limine To Exclude Statements Made By Ms. Lobato", because there had been no briefing of case law, expert testimony, or argument, or any consideration whatsoever of the complex legal, psychological and ethical issues involved in admission of the Petitioner's Statement and a related comment, during the hearing on May 10, 2002, and therefore that ruling was not binding for the Petitioner's retrial. In fact, from Petitioner's counsel beginning his argument to Vega making her ruling only takes up about three transcript pages, and part of that is taken up by questioning of Thowsen by Petitioner's then counsel. (Trans. III-17-20 (5-10-02)) The May 2002 hearing was a lightning fast "slam-bang-thank-you ma'am" proceeding about the single most

important evidentiary issue in the Petitioner's case. And because Judge Vega blindly relied on that hasty ruling as the "law of the case," admission of the Petitioner's Statement was an automatic "gimme" for the prosecution in the Petitioner's second trial without them even having to take a deep breath.

The Petitioner was gravely prejudiced by her appellate counsel's failure to properly brief and argue in Argument H-1 that Judge Vega's May 10, 2002, ruling on the admissibility of the Petitioner's Statement and her comment preceding it was not binding as the "law of the case" for the Petitioner's retrial, and that Judge Vega abused her discretion by misapplying the "law of the case" doctrine. If there has ever been an issue in a criminal case that demands a full evidentiary hearing, it is one to determine the admissibility of the Petitioner's Statement and a comment elicited by Thowsen after his sadistic psychological torture like use of her childhood rapes against her that he relied on to obtain a waiver of her Constitutional rights to remain silent and to consult with an attorney, in order to get her to talk to him.

If Petitioner's counsel had properly briefed and argued Argument H-1, it would have requested that the Court rule Judge Vega's May 10, 2002, ruling was not the "law of the case", and that the Court vacate the Petitioner's conviction and remand with appropriate instructions that if the prosecution sought to use the Petitioner's Statement in a retrial that a full voluntariness evidentiary hearing would have to be conducted.

Without admission of the Petitioner's Statement that the prosecution argued directly and indirectly was a *de facto* confession to Bailey's murder and the post-mortem cutting of his rectum, no reasonable juror could find the Petitioner guilty beyond a reasonable doubt. And beyond that, without admission of the Petitioner's Statement there is a strong likelihood the prosecution would dismiss the charges without a retrial due to a lack of evidence.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(xxx) Ground seventy-six.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and her state and federal right to due process were prejudiced by her counsel's objectively unreasonable failure to include in the "Petition For Rehearing" to the Nevada Supreme Court that its affirmation of the Petitioner's conviction was based on two false assumptions of fact – that "based on Lobato's admission," there was substantial evidence that she committed the murder", and that the State introduced "evidence of positive luminol and phenolphthalein tests for blood." – when neither of those is either factually true or supported by the record, and if Petitioner's counsel had informed the Court about the factual errors the Court could have reversed its decision and vacated the Petitioner's convictions, and if it didn't do so, the issue of the factual errors could have been included in the "Petition For Reconsideration En Banc," but since the factual errors were not brought to the Court's attention, the Petitioner was prejudiced because her counsel did not provide the Court with the opportunity to correct its ruling in the Petitioner's case that is based on factual errors.

Facts:

On February 5, 2009 a panel of three Nevada Supreme Court justices unanimously affirmed the Petitioner's October 2006 convictions of the voluntary manslaughter of 44-year-old homeless Duran Bailey in the trash enclosure for a Nevada State Bank in west Las Vega on July 8, 2001, and the "sexual penetration of his dead body." The latter conviction was based on ME Lary Simms' testimony that a cutting wound to Bailey's anus was post-mortem. The justice's written ruling states, "based on Lobato's admission, there was substantial evidence that she committed the murder." (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance, 4)

Clark County Medical Examiner Lary Simms determined from Bailey's autopsy that his cause of death was: "Blunt head trauma. Significant contributing conditions include multiple stab and incised wounds." One of the incised wounds was a severed carotid artery. Petitioner was interrogated on July 20, 2001, by two LVMPD homicide detectives. Her Statement was audio taped and introduced into evidence, so it is a matter of public record.

Did the Petitioner admit to bludgeoning or otherwise doing anything to cause injury to Bailey's head?

No.

Did she admit to hitting Bailey's mouth with her fists or an object and knocking out many teeth?

No.

Did she admit to pummeling Bailey's face and giving him black eyes?

No.

Did she admit to stabbing Bailey face, neck and abdomen multiple times?

No.

Did she admit to inflicting "incised wounds" that included severing the carotid artery in Bailey's neck?

No.

Did she admit to any involvement in Bailey's death?

No.

Did she admit to having any knowledge of the location or manner of Bailey's death?

No.

Did she admit to knowing Bailey or ever having met him?

No.

Did she admit to ever having been to where Bailey was killed?

No.

Did she admit to being anywhere in Clark County (or Las Vegas) at anytime on the day of Bailey's murder – July 8, 2001?

No.

Furthermore, there was no testimony during Petitioner's trial that she made any admission to Bailey's murder or that she knew any specific details of the crime, including any of the almost three dozen external wounds ME Lary Simms testified were inflicted prior to and after his death. (See Exhibit 85, 40 significant differences between Bailey's murder and Petitioner's Statement.) Neither did she identify a single landmark at the scene of Bailey's murder. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.)

The public record in Petitioner's case is absolutely crystal clear: she did not make any "admission" to any involvement in Bailey's death.

Affirming Petitioner's voluntary manslaughter conviction was a predicate for the three justices to uphold her companion conviction of "sexual penetration of a dead body." The basis of that charge – which is Nevada's corpse rape "necrophilia law" – was a cutting injury to Bailey's anus that ME Simms testified was inflicted after his death. Taking into consideration the Petitioner made no admission to being within 170 miles of Las Vegas at the time of Bailey's death – the following questions are presented to further clarify what Petitioner did not make an "admission" to in her statement.

Did Petitioner admit to cutting Bailey's anus after his death?

No.

Did she admit – since Bailey was found face-up – to turning his body over onto his stomach after he was dead, inflicting an anus wound, and then again turning him over onto his back?

No.

Did she admit to moving his body to where it was found several feet from where his carotid artery and other cutting and beating wounds were inflicted?

No.

The public record is crystal clear: the Petitioner made no "admission" to cutting Bailey's anus after he was dead, or turning his body over or moving him, and there is no physical, forensic, or eyewitness evidence that she did so.

The lack of an "admission" of guilt by the Petitioner to murdering Bailey or slashing his anus after he was dead – the acts underlying her convicted crimes – is consistent with the crime scene DNA evidence that excludes her but implicates one or more men as Bailey's assailant; it is consistent with the crime scene fingerprints that excludes her; it is consistent with the shoeprints imprinted in blood leading away from Bailey's body that are 2-1/2 sizes larger than her shoe size; it is consistent with the fresh tire tracks at the crime scene that don't match her car's tires; it is consistent with the confirmation by scientific tests that none of Bailey's blood was found on any personal item of hers or in her car. The complete absence of an incriminating "admission" by the Petitioner linking her to Bailey's murder is also consistent with the absence of any medical evidence from the infliction of Bailey's wounds that incriminates Petitioner. The lack of any incriminating physical, forensic or medical evidence is consistent with the fact there is no eyewitness, documentary (gas station receipt, etc.), surveillance video, or confession evidence the Petitioner was anywhere in Clark County at anytime on the day of Bailey's death. Likewise, there is mention in the Petitioner's Statement, and there was no testimony that she told anyone she was anywhere in Clark County on July 8, 2001.

Contrasted with that lack of incriminating evidence are the eleven eyewitnesses who saw her at her parents' home in Panaca 170 miles north of Las Vegas from shortly after midnight on the day of Bailey's July 8 death until after his body was found that night. Two other witnesses, next door neighbors, testified they did not see Petitioner's car moved anytime on July 8 or for several days preceding the 8th. Telephone records also verify Petitioner was in Panaca the weekend of July 7 and 8 until after Bailey's body was found.

There is perfect 100% consistency between the absence of an "admission" by Petitioner to any involvement in Bailey's death, the physical and forensic evidence excluding her from involvement in the crime, and the eyewitness and telephone record evidence establishing she was 170 miles from Las Vegas on the day of his death.

The prosecution speculated and argued to the jury the Petitioner alone killed Bailey, and then she alone committed the separate act of cutting his anus. Yet the actual record of facts and evidence in her case supports that she was in Panaca 170 miles north of Las Vegas, while there is no evidence whatsoever she was anywhere in Clark County at anytime on July 8, and therefore she could not have been at the crime scene, or had anything to do with Bailey's death and anything done afterwards with his corpse.

So there is no factual basis whatsoever in the record of the Petitioner's case for the panel of Supreme Court justices to have determined "based on Lobato's admission, there was substantial evidence that she committed the murder." (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance, 4)

Yet, in the "Petition For Rehearing," filed on February 12, 2009, and then in the "Petition For Reconsideration En Banc" filed on April 2, 2009, Petitioner's counsel did not argue and explain there is no incriminating "admission" in the Petitioner's statement, and correction of that factual error in the panel's ruling undercuts the foundation of the Court's affirmation, and requires reversal of her convictions.

Another issue the three justices addressed in affirming the Petitioner's convictions was testimony about luminol and phenolphthalein testing conducted on the Petitioner's car. Luminol and phenolphthalein are imprecise and indiscriminate preliminary (presumptive) "screening" tests conducted to detect the possible presence of blood. The tests are so nonspecific and nonselective that they are known to react positively to a plethora of natural and man-made substances and manufactured products. A positive reaction can be triggered by things that include an iron or copper bearing substance, a cleaning agent, vegetable and animal matter, or even pollen, horseradish, urine and fecal matter, and dozens of other natural and man-made substances – including blue jeans. Luminol and phenolphthalein reactions also cannot distinguish between

animal and human blood. Consequently, if there is a positive luminol or phenolphthalein reaction, a scientifically precise confirmatory test must be conducted to determine if the substance is human blood, one of the other many natural and man-made substances that can cause a positive luminol and phenolphthalein reaction, or if the reaction is a false positive. The HemaTrace confirmatory test is one hundred times more precise than a phenolphthalein test is at identifying blood. (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010, 6.) A DNA test is even more accurate.

The following is an example to illustrate the relationship and difference between a preliminary (presumptive) screening test and a precise confirmatory test. If a photograph taken at a particular location on a particular day shows a person at a distance that to an observer looks like it possibly could be Joe. That is the equivalent of a preliminary test. To determine if the person in the photo is Joe the observer has the picture enlarged many times to show facial details, which unmistakably reveals the person is not Joe. That is the equivalent of a negative confirmatory test. Joe was not in the picture, and so the picture has zero value in proving Joe was at that location on that day. Anyone subsequently shown the original photo by the observer and told that the indistinguishable person might "possibly" be Joe would be misled, because it had been conclusively proven the person in the photo was not Joe. A HemaTrace test for blood is the equivalent of examining a sample at one hundred times the magnification of a phenolphthalein test. A DNA test is even more precise.

After Petitioner's car was impounded no blood was visibly apparent in it. Luminol and phenolphthalein tests were conducted that reacted positively for several spots. Subsequent scientific confirmatory tests were negative for blood. The public record in Petitioner's case is absolutely crystal clear: no blood was found in the Petitioner's car. The positive preliminary reactions were either to one of the many dozens of natural and man-made substances other than blood that can trigger a positive reaction, or they were false positives.

Petitioner's counsel made a pre-trial motion *in limine* to exclude testimony about the preliminary luminol and phenolphthalein tests. They argued the likelihood the Petitioner would be prejudiced by the jury being misled and confused by testimony about the preliminary tests

outweighed their probative value because the conclusive tests determined no blood was found in the Petitioner's car. Judge Valerie Vega denied the motion, so the prosecution was able to introduce unrestricted testimony about the preliminary luminol and phenolphthalein tests that had already been scientifically disproven.

During Petitioner's trial the prosecution ensured during the presentation of its case and during cross-examination of the defense's expert forensic scientist Brent Turvey, that the jury was exposed to more testimony concerning the preliminary tests, than about the subsequent conclusive scientific tests that proved no blood was found in her car. The prosecutors relied on Judge Vega's nonrestrictive ruling to bombard the jurors with testimony about the possible meaning of the positive preliminary tests – even though the confirmatory tests established it is a scientific fact as certain as 2+2=4 that no blood was found in the Petitioner's car.

The Petitioner's counsel argued in her appeal to the Nevada Supreme Court that Judge Vega abused her discretion in admitting testimony about the disproven results of the luminol and phenolphthalein test reactions. (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 12-26-2007), Appellant's Opening Brief, 28.) Petitioner's counsel argued her right to due process and a fair trial was prejudiced by Judge Vega's ruling and the subsequent extensive testimony about the preliminary luminol and phenolphthalein tests. In rejecting that claim the three justices stated in their February 5 ruling, "Lobato argues that the district court abused its discretion when it permitted the State to introduce evidence of positive luminol and phenolphthalein tests for blood when the subsequent confirmatory tests were negative. We disagree." (*Lobato vs. Nevada*, No. 49087 (NV Supreme Ct, 02-05-2009), Order of Affirmance, 2. The justices made a similar statement on page 3.) However, contrary to the justice's statement there were no "positive luminol and phenolphthalein tests for blood." There were positive preliminary test results for several spots that subsequent confirmatory scientific tests proved were not blood. It is a scientific fact the preliminary tests did not test positive for blood: they either detected one of the dozens of natural and man-made substances other than blood that can produce a positive result, or they registered a false positive.

Yet, in the "Petition For Rehearing," filed on February 12, 2009, and then in the "Petition For Reconsideration En Banc" filed on April 2, 2009, Petitioner's counsel did not argue there were

no "positive luminol and phenolphthalein tests for blood" in the Petitioner's car, and correction of that factual error in the panel's ruling undercuts the foundation of the Court's ruling that Judge Vega did not abuse her discretion in allowing the luminol and phenolphthalein testimony, and requires reversal of Petitioner's convictions. Evidence that the testimony misled the jury, just as was argued by Petitioner's lawyers prior to trial, is the fact that the three justices on the Petitioner's panel were completely misled into believing those tests were "positive" for blood, when the scientific truth is the complete opposite.

It is a fact known from the record of the Petitioner's case that she did not make any admission to either murdering Bailey or cutting his rectum after he was dead, and corroborating that lack of any admission is a complete absence of any physical, forensic, medical, eyewitness, documentary, surveillance, or confession evidence the Petitioner was anywhere in Clark County at any time on the day of Bailey's death. Corroborating that evidence are the thirteen eyewitnesses who saw the Petitioner and/or her unmoved parked car in Panaca from shortly after midnight on July 8 until after Bailey's body was found that night. Yet, the Petitioner's counsel did not include in her "Petition For Rehearing" or in her "Petition For Reconsideration En Banc" that the Court factually erred in affirming her conviction by relying on a phantom "admission" by the Petitioner that doesn't exist in the record.

Likewise, it is a fact known from the record of Petitioner's case that there were no "positive luminol and phenolphthalein tests for blood" in her car. The truth is the complete opposite – the confirmatory scientific tests for blood in the Petitioner's car were <u>all negative</u>. Yet, the Petitioner's counsel did not include in her "Petition For Rehearing" or in her "Petition For Reconsideration En Banc" that the Court factually erred by relying on "positive luminol and phenolphthalein tests for blood" in the Petitioner's car that don't exist in the record, to justify finding that Judge Vega did not abuse her discretion in allowing unrestricted testimony about the preliminary luminol and phenolphthalein tests that in fact tested negative for blood.

The Petitioner was gravely prejudiced by her counsel's failure to argue to the Court that correction of the factual errors upon which its ruling affirming the Petitioner's conviction was based – that she made an "admission" of guilt, and there were "positive luminol and

phenolphthalein tests for blood" in her car – would result in a reversal of the ruling of February 5, 2009, and her convictions would be vacated with dismissal of the charges or a new trial would be ordered.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(yyy) Ground seventy-seven.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by her counsels objectively unreasonable prejudicial errors that are included in her habeas corpus petition committed prior to trial, during trial, post-trial, and during Petitioner's appeal, even if the errors considered individually, would not be considered harmful under the standards established by the state and federal constitutional rights of the Petitioner to effective assistance of counsel, due process of law, and a fair trial.

Facts:

All the grounds in Petitioner's habeas corpus petition citing claims of prejudicial error by counsel are incorporated into this ground. These are: (aa) Ground twenty-seven to (www) Ground seventy-five, and Ground (zzz) Ground seventy-eight.

Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(zzz) Ground seventy-eight.

Petitioner has twenty-four (24) grounds of new evidence in her habeas corpus petition that cumulatively establishes no reasonable juror could have found the Petitioner guilty beyond a reasonable doubt, under the standards established by the state and federal constitutional rights of the Petitioner to due process of law and a fair trial, even if the grounds of new evidence considered individually, would not be considered sufficient do so.

Facts:

All the Claims in Petitioner's habeas corpus petition citing new evidence are incorporated into this ground. These are: (a) Ground one to (x) Ground twenty-four .

Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.

(aaaa) Ground seventy-nine.

Petitioner was denied effective assistance of counsel in violation of the Nevada Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by her counsels objectively unreasonable failure to diligently represent the Petitioner or the interests of Petitioner, and individually or cumulative with other evidence, the Petitioner's representation by counsel was fatally deficient under the standards established by the state and federal constitutional rights of the Petitioner to effective assistance of counsel, due process of law and a fair trial.

Facts:

Shari Greenberger and her colleague Sara Zalkin were San Francisco based attorneys who represented the Petitioner *pro bono* as associate counsel with lead counsel, Clark County Special Public Defender David Schieck. Schieck determined how the CCSPD's money was to be spent and what evidence and witnesses were to be introduced at trial.

Beginning at least a year prior to Petitioner's trial and continuing up to the eve of trial, Greenberger expressed grave concern about what she described on August 16, 2006 as Schieck's "attitude of indifference towards this case in general." (See Exhibit 86, Shari Greenberger letter to David Schieck, August 16, 2006.) That was less than four weeks prior to the start of Petitioner's trial. Ten months earlier Greenberger wrote Schieck:

> "I am concerned specifically with preventing an ineffective assistance of counsel claim in this case, a third retrial, as well as a second wrongful conviction of Blaise, based on a failure to present all relevant expert testimony on our part. I do not want the jury to be left with a false impression on any of the evidence, especially when we have experts in our court who can effectively explain that the evidence does not match our client and to prevent Kephart from making false statements in closing unsupported by the evidence. … I know the budget on this case in terms of experts' fees has been raised as an issue."
> (Shari Greenberger email to David Schieck, October 17, 2005.)

Four days before that email, Greenberger emailed impressions expert William Bodziak:

> "Our office is in the unique situation of associating with the special defender's office based on Ms. Lobato's indigency. Previously their office had agreed to authorize all necessary expert witness costs. I am trying to find another source of funds because I desperately believe we need you and they have not agreed to make a final commitment to this." (See Exhibit 87, Shari Greenberger email to William Bodziak, October 13, 2005.)

Bodziak worked with the FBI for 26 years and is a leading shoeprint, fingerprint, and tire track expert. Although Greenberger considered Bodziak's expert testimony critical to the Petitioner's defense, Schieck refused to authorize the money to retain him. Bodziak did not testify about the exclusionary bloody shoeprint, fingerprint, and tire track evidence, and Petitioner was prejudiced by her counsel relying on the same prosecution testimony that was introduced to secure her conviction.

Schieck also refused to authorize the money to retain forensic scientist and blood pattern expert George Schiro, who provided limited expert testimony at Petitioner's May 2002 trial, due to improper noticing by Petitioner's then counsel. (See Exhibit 86, Shari Greenberger letter to David Schieck, August 16, 2006.) Schiro would have provided extensive expert testimony about the crime scene and reconstruction of the crime that was not provided by Brent Turvey, the expert forensic scientist the defense used at trial. Among other expert skills, Schiro is a bloodstain pattern analysis expert, while Turvey is not, and the most distinctive feature of the crime scene is the significant amount of blood and the type of blood evidence available. The prejudice of not having Schiro's testimony available is established by the testimony favorable to petitioner that Schiro would have presented to the jury at trial. What Schiro's expert testimony would have been is documented in his Forensic Science Resources Report dated March 8, 2010 that states eight areas of evidence that wasn't testified to at trial or expands on that testimony. Among other expert evidence, Schiro outlines a scenario of the crime based on the evidence that no one else testified to at trial, and which is at odds on key points with what prosecution argued to the jury and upon which Petitioner's conviction is based. Schiro's crime scene reconstruction has Bailey lying down when he was attacked, which is completely incompatible with the prosecution's scenario that he was standing when stabbed in his scrotum and that he fractured his skull on the concrete curb when he was knocked down by a blow to his mouth from a baseball bat, and that scenario is what the jury relied on to convict the Petitioner:

> Crime scene reconstruction:
> 1. The killer enters the enclosure.
> 2. Mr. Bailey is lying on the ground, possibly sleeping.
> 3. (These events cannot be sequenced. They all happened at some point, but not

> necessarily in the order listed. His pants could have been down prior to the stabbing or they could have come down sometime during the stabbing but prior to the scrotum wound. He might have been masturbating prior to getting killed. This could explain the presence of the adult magazines at the crime scene. He may also have fallen asleep with his pants down.) The killer stabs the victim in the face, head, scrotum, and possibly the abdomen. At some point, Mr. Bailey's pants come down. Mr. Bailey manages to use his hands and arms in an effort to defend himself. His left carotid artery is cut while he is on the ground. Mr. Bailey is also beaten forcefully about the head with a blunt object most likely using a pounding or punching type motion or his head is slammed forcefully against the surrounding concrete.
> 4. Mr. Bailey's anus was then lacerated.
> 5. Mr. Bailey's body was turned over.
> 6. The killer stabs Mr. Bailey in the abdomen and severs his penis.
> 7. Mr. Bailey is covered with the cardboard.
> 8. Trash is deposited on Mr. Bailey and the blood.
> 9. The killer exits the enclosure.
>
> (See Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010. 6-7.)

Schiro's reconstruction has Bailey lying down during the entire attack. This is contrary to the prosecution's argument to the jury that Bailey was standing and was knocked backwards. He also has Bailey's killer turning him over to cut his rectum (not "dragging" him), and his killer covered Bailey and his blood with trash and cardboard. Since Petitioner's shoeprint doesn't match the shoeprints imprinted in blood on the concrete leading away from Bailey's body, Schiro's scenario excludes Petitioner as Bailey's killer – who covered all the blood before leaving.

Schieck also would not authorize retaining Dr. Richard Leo, one of the world's leading experts at analyzing a defendant's statement to determine whether it is a false confession, a confession, or no confession at all. Greenberger wrote Schieck on October 17, 2005 regarding Dr. Leo:

> "Sara and I are hoping to do a conference call with you and Richard Leo as soon as you are available. … What we believe happened in this case is that the police provided Blaise selective information, elicited a statement of her prior attack, and turned this into a confession to murder. They never disclosed the date, time, location, or brutality of Duran[d] Bailey's murder to her, despite the fact they had that key information. By withholding this information, they engaged in improper police tactics. Moreover, had they discussed this information with Blaise, she would have been able to disassociate herself from the crime based on critical facts such as timing, date, location and brutality of the crime. Thereafter the police went to talk to

> witnesses, manipulated and badgered witnesses and selectively disclosed limited information to the defense, to try to make a strong case against Blaise, without properly recording all information and seeking for the truth. This is all information that Mr. Leo can testify to and supports his preliminary findings that this occurred in this case.
>
> He advised me his is giving us a discounted rate and normally does not provide a cap rate but is willing to discuss this with you, that is why I am trying to coordinate a conference call between us." (Shari Greenberger email to David Schieck, October 17, 2005.) (Underlining added to original.)

Although Dr. Leo was willing to reduce his fee and willing to consider capping his charges, he was not retained. Petitioner's counsel did not present any expert testimony concerning her credibility and truthfulness in her Statement of July 20, 2001, or her comments to people that were consistent with her Statement. Consequently, LVMPD homicide Detective Thomas Thowsen's "expert" opinion psychology testimony that based on a few on-the-job experiences he believes methamphetamine users such as the Petitioner "jumble" details to "minimize" their involvement in a crime, was the only so-called "psychology" evidence the jury considered. Yet, Thowsen's testimony stood unchallenged because Petitioner's counsel made no objection to his testimony on the basis that the prosecution did not comply with the statutory requirements to provide 21 days notice of Thowsen's "expert" psychology opinion testimony; a summary of his proposed expert testimony; his C.V. documenting his formal psychology education, advanced degrees, specialized training, and articles and papers he has written related to psychologically analyzing the statements of a criminal suspect; and any reports related to the Petitioner he has written as a psychology expert.

The prejudice to Petitioner caused by Schieck's refusal to retain Leo or another qualified psychology expert to analyze Petitioner's Statement is conclusively proven by the post-conviction "Report of Dr. Allison D. Redlich," dated February 10, 2010. Dr. Allison D. Redlich is an Assistant Professor in the School of Criminal Justice at the University at Albany, State University of New York.

After Petitioner's direct appeal was exhausted in October 2009, the Petitioner sought to find a qualified psychologist willing to review the Petitioner's Statement and associated materials on a *pro bono* basis to determine if the Petitioner's Statement could be considered a confession, a false

confession, or no confession to Bailey's murder and the post-mortem cutting of his rectum. Psychologist Dr. Allison D. Redlich agreed to review the information in the Petitioner's case.

Dr. Redlich's doctoral degree is from the University of California, Davis, in Developmental Psychology, with a focus on psychology and law. For more than a decade she has conducted research on and written extensively about the social psychology of police interrogation and the causes and consequences of police-induced false confessions. She has researched, written and published numerous peer-reviewed articles on interrogation and confession in scientific journals and in scholarly books, as well as giving invited presentations at national conferences. Dr. Redlich is one of six experts who authored a scientific "white paper" on police interrogations and false confessions for the American Psychology Law Society, a Division of the American Psychological Association. To determine if Petitioner's Statement of July 20, 2001, constitutes a confession to Duran Bailey's murder and mutilation on July 8, 2001, Dr. Redlich reviewed trial testimony, and evidence and information related to the Petitioner's Statement of July 20, 2001. Dr. Redlich's report of February 10, 2010 states in part:

> "From reviewing the materials, it is my expert opinion that Ms. Lobato was not confessing to the murder of Mr. Bailey. Rather, she was "confessing" to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis of a man who was allegedly sexually assaulting her. It appears to me that Ms. Lobato believed she was cooperating with a police investigation, not admitting to a murder that occurred on the other side of town some weeks after her alleged assault.
>
> …
>
> Thus, in my opinion, Ms. Lobato's version of events should not be construed as minimizing or jumbling the details of the murder of Mr. Bailey, but rather construed as a description of the alleged assault on her."
>
> (See Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010.)

It is now known from Dr. Redlich's Report the Petitioner's Statement is not a confession to Bailey's murder. It is also known that Thowsen's testimony was false that the Petitioner "jumbled" details to "minimize" her involvement in Bailey's murder. In fact, she was provided details in her Statement to help the detectives investigate her sexual assault at the Budget Suites Hotel. But because Petitioner's counsel did not retain Dr. Leo, Dr. Redlich, or another psychologist qualified to analyze her Statement, the jury did not know it has nothing whatsoever to do with Bailey's murder.

The Petitioner was prejudiced by the failure of her counsel to introduce expert psychology testimony at trial that her Statement is not a confession to Bailey's murder and the post-mortem cutting of his rectum, because it allowed the jury to rely on Thowsen's unchallenged inexpert "psychology" testimony to convict the Petitioner.

Petitioner's counsel Greenberger wrote a detailed letter three weeks prior to Petitioner's trial that documents her wide ranging concerns about the quality of the representation being provided the Petitioner. That letter of August 16, 2006 reads in its entirety:

> Mr. David Schieck
> Special Public Defender
> 333 South 3rd Street, 2nd Floor
> Las Vegas NV 89155
> RE: Lobato
> Dear David,
>
> Please articulate in writing your professional opinion for refusing to file the writ we prepared in this case and submitted to you for filing, along with an explanation describing what harm it would do to file this document.
>
> Moreover, we must make critical decisions regarding division of labor at trial (who will do opening and closing) and overall trial strategy in this case.
>
> At this point we feel it is necessary to memorialize a number of concerns we have about this case up to this point.
>
> 1) You have articulated on many occasions that you are a last minute person, which has not been conducive to my style of the practice of law. For example, I am concerned about filing witness lists at the last minute, as that was the very basis that witnesses were excluded at the last trial.
>
> 2) When our expert Brent Turvey was in Las Vegas, he attempted to contact you numerous times, before and during his stay, to review the evidence, but was never able to reach you to facilitate this review. He was on business on another case in Las Vegas already, consequently this trip would of cost your office nothing. Hence, we will need to fly him out early to facilitate this review.
>
> 3) We are concerned about the lack of your contributions in terms of ongoing legal advice, research and writing, and overall trial strategy. Is that acquiescence on your part to us taking the lead in this case at trial? We are prepared and wish to take that lead, but cannot do so when you reject our trial strategy and defense.
>
> 4) You previously outlawed Mr. Bodziak as an expert witness in this case on shoe print, tire track and footwear examination, on the grounds that we could obtain the same information through the government witness. We do not agree with this strategy and believe the case will be strengthened by our own independent witness.
>
> 5) You previously ruled out Mr. Schiro as expert, and as a consequence we have not made contact with him in months nor lined him up as an expert witness at the trial. We must make a decision on him forthwith or suffer preclusion of him altogether. I am concerned he may not be available if we need him at this late date and time.

6) As indicated above please articulate in writing your professional opinion for refusing to file the writ we prepared in this case and submitted to you for filing, along with an explanation describing what harm it would do to file this document.

7) We still have no definitive answer from you regarding using Dr. Laufer as an expert witness. We believe his expert testimony as an injury reconstructionist, who can exclude Ms. Lobato from this crime, is pivotal to the overall defense of this case, and do not feel comfortable proceeding without him.

8) You previously have voiced concern about budget constraints at your office regarding the expenses in this case. Our office has put hundreds of hours of work into this case for no legal fee whatsoever. We are very concerned about the utilization of the appropriate experts in Ms. Lobato's defense and do not feel equipped to participate in the defense of this case without them.

9) We are concerned about your attitude of indifference towards this case in general, especially in light of the fact that Ms. Lobato is facing the rest of her life in prison.

10) On the trip to San Francisco, where we had arranged a joint defense counsel meeting with you and Ms. Lobato, you never attended.

11) On the multiple trips to Panaca, and defense investigation in Lake Havasu and Arizona, you have never accompanied the defense team or participated.

12) You have suggested not filing the motion we have drafted moving to exclude any subsequent bad acts the State may seek to introduce against Ms. Lobato. We believe that motion should be lodged with the court to preserve the record.

13) You have repeatedly advised us you would clear time in your schedule to meet with us on trips to Las Vegas, but have had little to no time blocked off to meet with us.

14) We must have an investigator who can help with all of the issue outlined in my comprehensive memo I submitted to you two weeks ago. The trial date is rapidly approaching and we have nowhere to turn for investigation.

15) We must allot time to review all of the defense objectives and legal issues outlined in the above-referenced memo.

We are trying to represent Ms. Lobato to the best of our ability and believe it is the safest course of conduct to memorialize these issues, and point them out immediately, prior to proceeding to trial in this case.

Please respond forthwith.

Shari Greenberger

(See Exhibit 86, Shari Greenberger letter to David Schieck, August 16, 2006.)

The grim picture painted in this letter is the same as that portrayed by Greenberger's previous correspondence with lead counsel Schieck: He had a lackadaisical attitude about representing the Petitioner and the quality of his representation of her. Schieck was sitting on his hands waiting for Petitioner's trial date while *pro bono* counsel Greenberger and Zalkin tried to cobble together Petitioner's defense with duct tape and chicken wire.

As of April 21, 2010 Schieck has failed to turn over to Petitioner the "comprehensive memo" Greenberger refers to that was submitted to Schieck "two weeks" prior to her letter of August 16, 2006. But given the context that the "comprehensive memo" was prior to Greenberger's letter of August 16, it likely provides significant additional evidence of Schieck's "attitude of indifference towards this case in general.", and his failure to exercise due diligence in representing the Petitioner.

Greenberger discussed her concerns about Schieck with defense expert forensic scientist Brent Turvey. Turvey responded:

> After our discussion today regarding the discussion you described with David Schieck, it would be remiss of me not to recommend the following:
>
> 1) That you make a declaration or record of some kind so that his sentiments and underlying philosophy be preserved for appeal, based on IAC, should the case against your client be lost. Having senior counsel explain that resources are being unnecessarily burned, and dissuading you from investigating alibis for the client as well as the physical evidence, suggests that something else is at work. What that is may not be known, but preserving this encounter in a permanent fashion for the court is not only reasonable, but perhaps even obligatory. I say perhaps as I am no lawyer.
>
> 2) That you may want to review the ethics code for the Nevada State Bar to make sure that the code of ethics is not in jeopardy.
>
> Something's definitely not quite right. The last time something like this happened on a case I worked, one of the defense attorneys involved was the hunting buddy of the judge, and was also running for his own judgeship in another county. Politics happen. (See Exhibit 88, Brent Turvey email to Shari Greenberger, October 5, 2005.) (Underlining added to original.)

Turvey brings up a number of interesting conflict of interest issues that can only be resolved by a full evidentiary hearing during which all relevant parties and material witnesses testify, including Judge Valorie Vega, ADAs Kephart and DiGiacomo, and possibly DA Rogers.

So it is known that Schieck not only did not assist Greenberger's efforts as *pro bono* counsel to prepare Petitioner's alibi defense, but he tried to interfere with her efforts. Schieck's indifference and lack of effort as lead counsel in Petitioner's case is also demonstrated by the fact that Greenberger and Zalkin prepared all of the pre-trial motions that were filed and argued in Petitioner's case, and he refused to file some motions.

Schieck's lackadaisical attitude, interference with the investigation of alibi witnesses, and lack of interest in trial preparation in the Petitioner's case resulted in many prejudicial consequences. In addition to Dr. Leo, Bodziak and Schiro not testifying, Dr. Laufer, who lives in the San Francisco Bay area and who testified on a *pro bono* basis, was preventing from testifying about the full extent of his medical expertise because proper notice of the scope of his proposed expert medical testimony was not provided to the prosecution. Petitioner was also prejudiced during trial by Schieck's failure to make as lead counsel to object to prosecution witness testimony, at least 29 false claims made during the prosecution's opening statement, and more than 250 improper closing and rebuttal arguments. (See Exhibit 75, Opening statement false evidence statements; and, Exhibit 76, Prosecution's improper closing and rebuttal arguments that were not objected to.)

In addition, Schieck did not initiate investigation of the seven telephone numbers recovered from Bailey's pants pockets for alibi witnesses, and in doing so he would have discovered that Bailey may have been a police informant and innumerable people in Las Vegas had the motive, means, and opportunity to murder him. Schieck also did not retain forensic entomologists to determine Bailey's time of death; he did not retain a forensic pathologist to analyze the murdered evidence to determine the number of assailants, if Bailey was alive when his rectum was cut, the murder weapon, and other things.

Neither did Schieck retain a dental expert to analyze the evidence of Bailey's teeth found at the crime scene. Dr. Mark Lewis examined the teeth evidence post-conviction and determined they were not knocked out by a baseball bat. Dr. Lewis states in his "Affidavit of Mark Lewis, DDS" dated April 26, 2010:

> 5. In my professional opinion, I do not believe that a baseball bat was used to knock out Bailey's teeth because I would expect that the teeth would have been fragmented by the force needed to forcibly remove them with a baseball bat.
> (See Exhibit 100, Affidavit of Mark Lewis DDS, April 26, 2010.)

At trial a dental expert such as Dr. Lewis would have destroyed the prosecution's speculative argument that the Petitioner's bat was used to knock out Bailey's teeth. However, due to Schieck's failure to retain a dental expert and introduce their exculpatory testimony, the jury convicted the Petitioner by relying on the Prosecution's imagination based "bat" argument that was dead wrong.

Based on what is known, if Greenberger and Zalkin had not worked *pro bono* on Petitioner's case, at the close of the prosecution's case Schieck would have rested the defense without presenting any witnesses, and futilely argued during his closing argument for acquittal on the basis that the prosecution had not presented proof beyond a reasonable doubt of the Petitioner's guilt.

Ron Slay is Nevada state licensed polygraph examiner who has performed over 27,000 examinations. Slay is a member of the American Polygraph Association, the National Polygraph Association, and other professional organizations. He is the owner of Western Security Consultants in Las Vegas, Nevada. Slay has "performed many polygraph examinations for the Clark County District Attorney's Office, the Clark County Public Defenders Office, and the Clark County Special Public Defenders Office." (See Exhibit 9, Affidavit Of Ron Slay.) Slay was retained by Petitioner's previous counsel to perform a polygraph examination of Petitioner, which was conducted on December 3, 2001. As a result of Petitioner's truthfulness in answering the relevant questions during that examination, Slay is "certain Ms. Lobato is innocent of Mr. Bailey's murder." Slay conducted a polygraph examination of Rebecca Lobato on November 27, 2001, and he found "Mrs. Lobato truthfully answered that Ms. Lobato was in Panaca on July 8, 2001, and she further truthfully answered that she had not made a false alibi for Ms. Lobato." (See Exhibit 9, Affidavit Of Ron Slay.) Slay discussed Petitioner's case with Schieck after he became Petitioner's counsel in October 2004. Slay told Schieck that he was "certain Ms. Lobato is innocent of Mr. Bailey's murder." (See Exhibit 9, Affidavit Of Ron Slay.) Although DA's Office recognizes Slay as a neutral examiner whom they have relied on to determine the truthfulness of suspects and witnesses, Schieck made no effort prior to Petitioner's trial in 2006 to arrange a meeting with DA Rogers or one of his subordinates so that he and Slay could argue that Slay's findings concretely support that the Petitioner did not murder Duran Bailey, her stepmother is truthful that she saw the Petitioner in Panaca on July 8 and she did not make a false alibi, and that the charges should be dismissed against the Petitioner.

Schieck's "attitude of indifference towards this case in general" even continued after his representation ended when the United States Supreme Court denied Petitioner's direct appeal writ

of certiorari on October 5, 2009. After informal efforts to obtain Petitioner's case files from Schieck failed, on October 27, 2009 Petitioner sent separate letters to David Schieck and JoNell Thomas (Petitioner's appeal lawyers), requesting that they promptly turn over all case files and documents in accordance with Nevada State law. Petitioner explained that her case files and documents were necessary for preparation of her habeas corpus petition. (See Exhibit 94, Petitioner's letter to David Schieck, October 27, 2009; and, Exhibit 95, Petitioner's letter to JoNell Thomas, October 27, 2009.) JoNell Thomas never responded to that letter. On November 4, 2009 Schieck turned over all the materials that he said Greenberger and Zalkin left when they returned to San Francisco after Petitioner's conviction on October 6, 2006. There were nine boxes of material that included six boxes of documents and three boxes of transcripts. After Petitioner discovered that there were many documents missing from the files that Schieck turned over on November 4, 2009, Petitioner mailed him and Thomas separate letters on December 21, 2009 requesting that all case files and documents be promptly turned over to the Petitioner in accordance with Nevada State law. Petitioner explained that her ability to prepare her habeas corpus petitioner was being hampered by not having her case files and documents. (See Exhibit 96, Petitioner's letter to David Schieck, December 21, 2009; and, Exhibit 97, Petitioner's letter to JoNell Thomas, December 21, 2009.) JoNell Thomas never responded to that letter. On February 4, 2010 Schieck turned over what he represented were copies of his complete case files minus the Scopes for several people. There were eight boxes of material that included five boxes of documents and three boxes of transcripts.

Petitioner has subsequently discovered that there are an unknown number of documents missing from the files turned over by Schieck on February 4, 2010. Among the missing documents are letters written by Schieck to anyone related to the Petitioner's case, any emails by Schieck to anyone related to her case, any memos, any appointment calendars, any telephone logs, or notes of telephone conversations or in person conversations that were written by Schieck related to Petitioner's case. And by holding Petitioner's case files hostage he hindered the Petitioner in the preparation and filing of her habeas corpus petition. As mentioned previously, also missing is Greenberger's comprehensive memo expressing her concerns about the quality of the Petitioner's

representation that was sent to Schieck two weeks before Greenberger's letter to Schieck dated August 16, 2006.

From Greenberger's letters it is known that Schieck refused to authorize proper funding for investigation so an unknown number of witnesses were not located and interviewed due to his obstructionist efforts, and several defense witnesses who needed to be flown to Las Vegas were not subpoenaed for trial.

Neither did Schieck retain a forensic entomologist, a forensic pathologist, a psychologist, a dental expert, a forensic scientist expert in blood pattern analysis, and an impressions expert to thoroughly examine the evidence in Petitioner's case to uncover additional defenses. The magnitude of the prejudice to the Petitioner, and that the testimony of these experts would have resulted in the Petitioner's acquittal, is established by the new evidence the experts in those disciplines have discovered post-conviction in the Petitioner's case. (See Exhibit 1, Report of Dr. Gail S. Anderson, 17 December 2009; Exhibit 2, Forensic Entomology Investigation Report (of Dr. Linda-Lou O'Connor), February 11, 2010; Exhibit 3, Report of Dr. M. Lee Goff, March 12, 2010; Exhibit 4, Affidavit of Glenn M. Larkin, M.D., 5 January 2010; Exhibit 5, Report of Dr. Allison D. Redlich, February 10, 2010; Exhibit 45, Forensic Science Resources (George J. Schiro Jr.) Report, March 8, 2010; and, Exhibit 100, Affidavit of Mark Lewis, DDS, April 26, 2010.)

The state and federal constitutional rights of the Petitioner to effective assistance of counsel, due process of law and a fair trial were gravely prejudiced by Clark County Special Public Defender David Schieck's 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.

Petitioner incorporates by reference the facts in the supporting exhibits. Petitioner requests an evidentiary hearing. Petitioner is indigent and requests appointment of counsel.