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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KIRSTIN BLAISE LOBATO,
#1691351

Defendant.

CASE NO: 01C177394-1

DEPT NO: II

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: 09-30-10
TIME OF HEARING: 10:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through WILLIAM D. KEPHART, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On August 9, 2001, Kirstin Blaise Lobato, hereinafter "Defendant," was charged by way of Information with Murder With Use of a Deadly Weapon (Open Murder) and Sexual Penetration of a Dead Human Body. Defendant's jury trial began on May 7, 2002. On May 18, 2002, Defendant was found guilty of First Degree Murder With Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. On August 27, 2002, Defendant was sentenced as follows: Count 1 - First Degree Murder With Use of a Deadly Weapon, to a maximum of fifty (50) years and a minimum parole eligibility of twenty (20) years plus and equal and consecutive term for use of a deadly weapon; Count 2 – Sexual Penetration of a Dead Human Body, to a maximum of fifteen (15) years and a minimum parole eligibility of five (5) years, to run concurrently with Count 1; further, a Special Sentence of Lifetime Supervision imposed to commence upon release of any term of probation, parole, or imprisonment; two hundred thirty-three (233) days credit for time served. A Judgment of Conviction (Jury Trial) was filed September 16, 2002.

Defendant filed a Notice of Appeal on October 15, 2002. On September 3, 2004, the Nevada Supreme Court reversed Defendant's conviction and remanded for a new trial. Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Remittitur issued on September 24, 2004.

Defendant's second trial began on September 11, 2006. On October 6, 2006, Defendant was found guilty of Voluntary Manslaughter With Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. On February 2, 2007, Defendant was sentenced as follows: Count 1 – Voluntary Manslaughter With Use of a Deadly Weapon, to a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months, plus and equal and consecutive term for the use of a deadly weapon; Count 2 – Sexual Penetration of a Dead Human Body, to a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months, Count 2 to run consecutive to Count 1, with one thousand five hundred forty-four (1,544) days credit for

time served. It was further ordered that a special sentence of lifetime supervision be imposed upon release from any term of imprisonment, probation, or parole. Additionally, Defendant was ordered to register as a sex offender upon any release from custody.

Defendant filed a Notice of Appeal on March 12, 2007. On February 5, 2009, the Nevada Supreme Court affirmed Defendant's conviction. Defendant filed a petition for rehearing which was denied on March 27, 2009. Defendant filed a petition for en ban reconsideration which was denied on May 19, 2009. Remittitur issued on October 14, 2009. Defendant filed the instant petition on May 5, 2010.

ARGUMENT

I
DEFENDANT'S CLAIMS OF NEWLY DISCOVERED EVIDENCE DO NOT WARRANT RELIEF (GROUNDS 1-21 & 23)

Defendant presents twenty-one (21) separate claims of new evidence. In each separate claim, Defendant infers that she is entitled to a new trial. Defendant also alleges, in Ground 23, this evidence shows she is "actually innocent." As discussed below, Defendant's claims are without merit.

A. Defendant must raise new evidence within two years of verdict.

In so far as Defendant is requesting a new trial based upon newly discovered evidence, such evidence must be raised within two years of verdict. NRS 176.515(3). The verdict in this case was rendered on October 6, 2006. The instant petition was filed on May 5, 2010, over three years later. As such, Defendant's request for a new trial is untimely. While NRS 176.515(3) pertains to motions for a new trial based upon newly discovered evidence, it has been applied by the Nevada Supreme Court to habeas petitions in so much as they request a new trial. See Browning v. State, 120 Nev. 347, 91 P.3d 39 (2004).

Moreover, "to merit a new trial, newly-discovered evidence must be evidence that could not have been discovered through reasonable diligence either before or during trial." D'Agostino v. State, 112 Nev. 417, 423, 915 P.2d 264, 267 (1996) (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991)). The evidence must not be cumulative and

be such that it would render a different result at trial probable. Pacheco v. State, 81 Nev. 639, 408 P.2d 715 (1965). All "new evidence" Defendant has provided in grounds 1-22 could have clearly been discovered through reasonable diligence and raised in a timely manner and/or is cumulative.

B. Defendant has not satisfied the actual innocence standard.

Actual innocence is an extraordinary claim in which the defendant has presented new evidence "that constitutional error has caused the conviction of an innocent person." Schlup v. Delo, 513 U.S. 298, 324, 115 S.Ct. 851, 865 (1995). In Calderon v. Thompson, 523 U.S. 538, 560, 118 S.Ct. 1489, 1503 (1998), the U.S. Supreme Court held that in order for a defendant to obtain a reversal of his conviction based on a claim of actual innocence, he must prove that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence presented in habeas proceedings." (Quoting Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

The United States Supreme Court has further noted that "actual innocence" means factual innocence and not mere legal insufficiency. See Bousley v. United States, 523 U.S. 614, 623-624 (1998). To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324). True claims of actual innocence are "extremely rare" and found only in the most "extraordinary cases." Schulp v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995).

In its Order of Affirmance, the Nevada Supreme Court determined that there was sufficient evidence to support Defendant's conviction. Order of Affirmance 2/5/09 p. 2. As such, Defendant must present new evidence which would undermine the jury's verdict. As discussed below, Defendant has not made colorable showing of actual innocence.

1. New entomology evidence (Grounds 1-3).

Dr. Simms testified that rigor mortis, a stiffening of the muscles, begins a few hours after death and at twenty-four hours, the body is completely stiff. Then in the next 8 to 12 hours after the body is completely stiff, it will start to become flaccid again. The coroner's

investigator declared the victim, Duran Bailey ("Bailey"), dead at 3:50 a.m. on July 9, 2001. Dr. Simms examined the body 8 hours later. During his examination, there was a complete absence of rigor mortis. Based upon the amount of rigor mortis that was present at the scene and the amount of decomposition, Bailey died within 8 to 24 hours from the time he was examined at the scene. 9/19/06 TT 144-145.

Defendant claims that due to an alleged lack of insect eggs or bites on Bailey's body, he absolutely had to have died after sundown on July 8, 2001. However, these experts are basing their opinions on an examination of photos several years after the fact. Dr. Simms based his opinion on an actual examination of Bailey's body and medical science, as opposed to entomology. Rigor mortis is a biological fact. Bailey's body was completely flaccid during the autopsy, and it takes approximately twenty-four hours for the body to become stiff. Thus, if Bailey had died between 8 p.m. and 10 p.m. on July 8th rigor mortis would have been setting in for 14-16 hours. Bailey's body could not have been completely flaccid by noon on July 9th. Defendant makes no attempt to contradict Dr. Simms' testimony concerning rigor mortis nor does she claim it is inaccurate. She has simply provided expert opinions based upon an examination of photographs years later. This does not undermine the jury's findings.

Furthermore, Defendant's entire argument relies on the State's alleged concession during closing arguments that Defendant was not in Las Vegas by 11:30 a.m. on July 8, 2001. This is the fatal flaw in Defendant's claims. Closing arguments are not evidence. Jury instruction no. 41 states:

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, **whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be...**

It is the jury's duty to make the ultimate determination as to what the evidence shows and to judge the credibility of witnesses. Just because the State presents an inference of the evidence does not mean the jury agreed. The State's argument assumed the jury found

Defendant's alibi witnesses which placed her in Panaca at that time credible, which it may not have. Moreover, the State went on to argue that Defendant was back in Las Vegas later that evening (10/5/06 TT 130-131), which is the time frame Defendant claims Bailey was killed.

These experts' declarations do nothing more than rebut the expert testimony of Dr. Simms as to when Bailey died. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Furthermore, they simply reinforce Defendant's theory of the case and testimony that was already presented at trial that she was not in Las Vegas when the murder occurred. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

2. Dr. Redlich's opinion on Defendant's "false confession" (Ground 4).

Dr. Redlich's opinion that Defendant's statement to the police was not a confession is irrelevant, inadmissible testimony. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring).

First, Dr. Redlich simply peruses over the evidence already adduced at trial and relays her subjective opinion that Defendant was "[confessing] to an assault in which she was the alleged victim and in which she defended herself by attempting to cut the penis off of a man who was allegedly sexually assaulting her...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." Dr. Redlich's statement is nothing more than a redundant, subjective opinion which points out the differences between Defendant's statement and the facts of Bailey's murder, which was already done at trial. Clearly, it does not take an expert

witness to perform this function. As such, this is not new evidence, just the same evidence presented in a different form.

Second, as even Dr. Redlich admits[1], Defendant's theory of the case was that her statement pertained to a separate event and was not a "confession." "[C]laiming that one's statements have been misconstrued is not the same as claiming that one made a false statement. Expert testimony about false confessions is only relevant when a party claims that he confessed to something he did not do." In re Detention of Law, 146 Wash.App. 28, 41, 204 P.3d 230, 236 (Wash.App. Div. 1,2008). Defendant does not claim that she confessed to something she did not do; rather that she was discussing a separate event. As such, Dr. Redlich's opinion is irrelevant and clearly does not meet the Calderon standard.

Defendant also attempts to rely on polygraph examinations administered to her and her mother, Rebecca Lobato, in 2001. It is for the jury to determine witness credibility and ultimate issues of fact, i.e. Ms. Lobato's guilt, and not a polygraph examiner. Moreover, polygraph results are inadmissible at trial unless there is a written stipulation signed by the prosecuting attorney, the defendant, and defense counsel. Jackson v. State, 116 Nev. 334, 997 P.2d 121 (2000). Finally, Doug Twinning's voluntary statement is also insufficient to meet the Calderon standard.

3. Cumulative alibi witness evidence (Ground 5).

Defendant has provided several voluntary statements of witnesses who claim that she confided in them about cutting a man's penis prior to Bailey's death. Defendant attempted to have several of the same witnesses testify at trial to this exact issue, and it was precluded by the district court as inadmissible. Defendant challenged this issue on direct appeal and stated that it violated her constitutional rights. Appellant's Opening Brief, p. 24-26. The Nevada Supreme Court rejected this argument and affirmed the district court. Order of Affirmance 2/5/09, p. 2 fn. 1.

[1] Dr. Redlich states, "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..." (Pet. Ex. 5, p. 2)

The Nevada Supreme Court's ruling on this issue constitutes the law of the case. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). As this evidence is clearly inadmissible it cannot satisfy the Calderon standard. While Defendant has provided affidavits from additional witnesses, this is merely cumulative and inadmissible evidence.

4. Cumulative alibi witness evidence (Ground 6).

At trial, Defendant presented a multitude of alibi witnesses, several unrelated to her, who testified that that she and her vehicle were in Panaca on July 6, 7, and 8th. 9/15/06 TT 86; 9/20/06 TT 97; 9/29/06 TT 8, 85-95, 125; 10/2/06 TT 8, 23, 58; 10/3/06 TT 89-93, 113, 129-133, 196; 10/4/06 TT 79-125. Additional alibi witnesses which are merely cumulative do not show she is actually innocent of the offense. The fact that these witnesses are not related to Defendant does not make their testimony unimpeachable or unbiased. Moreover, post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Defendant again discusses the results of a polygraph exam in this claim. As discussed above, this is without merit.

5. Evidence that Bailey was allegedly murdered by more than one assailant and who were skilled with medical knowledge or animal husbandry (Ground 7).

Defendant has provided an affidavit from Dr. Larkin which declares his opinion that the murder was committed by more than one perpetrator, and at least one was skilled with medical knowledge or animal husbandry. Post-trial affidavits are "obtained without the

benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Defendant again confuses evidence which rebuts the State's theory with evidence of actual innocence. An expert's opinion that the murder was committed by more than one person because of "poor lighting" is, quite frankly, absurd. This is not based upon any sort of medical opinion and not in the purview of expert medical testimony. Moreover, even if there were two separate acts of mutilation, this does not preclude a single perpetrator, and multiple perpetrators does not preclude Defendant from being one of those perpetrators.

Dr. Larkin's opinion that the perpetrator had medical knowledge was also alluded to by Dr. Laufer. Dr. Laufer testified that it was his opinion that the injuries were calculated. This was based on the fact that one of the major vessels in Bailey's neck, the carotid artery, was cut through. He stated, "it certainly appears that it was either a very lucky one or someone knew what they were cutting." In other words, the perpetrator had knowledge of anatomy. As such, the jury was already presented with this type of evidence. To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324).

Dr. Larkin's declaration does nothing more than rebut the expert testimony of Dr. Simms as to when and how Bailey's wounds were inflicted. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

6. Evidence that Bailey was allegedly alive when anally penetrated with the knife.

Dr. Simms testified at trial that Bailey's wounds to his anus were inflicted post-mortem. 9/19/06 TT 86. Defendant has presented an affidavit from Dr. Larkin which disagrees with that conclusion. Post-trial affidavits are "obtained without the benefit of

cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Dr. Simms' testimony was based on the fact that Bailey's rectal wound did not have any significant bleeding associated with it. 9/19/06 TT 86. This was based on an actual physical examination of Bailey's body. Dr. Larkin's opinion is based upon an examination of reports and photographs.

Moreover, Dr. Larkin's declaration does nothing more than rebut the expert testimony of Dr. Simms as to when and how Bailey's wounds were inflicted. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. In fact, Defendant's own expert at trial, Dr. Laufer, testified that he believed Bailey's pants were up when he was killed making it impossible for the wound to Bailey's anus to be inflicted while he was alive. 9/26/06 TT 78. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

7. Possibility of two separate attacks (Ground 9).

Defendant's argument concerning the "possibility" that Bailey was subjected to two separate attacks is insufficient to meet the Calderon standard. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. First, Defendant fails to explain how or why this amounts to her actual innocence of the crime. Defendant merely states that "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 to Bailey's death supported by evidence that excludes the petitioner, the jury would have had a factual basis to reject the prosecutions argument." Alternate and possible scenarios are insufficient to show actual innocence. Defendant's arguments are merely an attempt to rebut the State's theory and are based upon speculation. "Actual innocence" means factual

innocence and not mere legal insufficiency. See Bousley v. United States, 523 U.S. 614, 623-624 (1998).

8. Dr. Larkin's affidavit does not establish a claim of actual innocence (Ground 10).

Defendant summarizes Dr. Larkin's affidavit in Ground 10. Many of his conclusions have already been discussed above. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Defendant again confuses evidence which rebuts the State's theory with evidence of actual innocence. Furthermore, many of Dr. Larkin's opinions are not based upon medical science, i.e. one perpetrator held a light while another killed Bailey or Defendant could not have defended herself against the "streetwise" Bailey. As such, this court should view Dr. Larkin's affidavit with an even greater amount of skepticism.

Dr. Larkin's declaration does nothing more than rebut the expert testimony of Dr. Simms as to when and how Bailey's wounds were inflicted. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. This is further demonstrated by the fact that Dr. Larkin states that he believes Bailey's wounds were inflicted with a knife where Defendant's own expert at trial, Dr. Laufer, testified that he believed scissors caused Bailey's injuries. 9/26/06 TT 54-137; 9/28/06 TT 65-149. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

9. Forensic Shoe evidence (Grounds 11-12).

Defendant argues that George Schiro's conclusions concerning the footwear impression evidence establish her claim of actual innocence. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Defendant's expert at trial, Brent Turvey,

testified as follows:

> Q: Mr. Turvey, why is or why are the bloody footwear impression so significant in your opinion?
>
> A: Because they are strongly associated with the crime and the actual area of the crime scene.
>
> Q: And are you aware of whether or not those footwear impressions were linked to Ms. Lobato?
>
> A: They were not. They - - there's a report by a former FBI footwear print examiner, and he was very clear in the fact that the footwear patters were much too large to have been let by her and they weren't associated with any of the footwear that was seized from Ms. Lobato. So that's no match for the footwear to the footwear patters found at the scene.

10/2/06 TT 123-124. Mr. Turvey also testified that he was "embarrassed to mention the possibility" that the impressions could have been left by someone other than the person who killed Bailey. 10/2/06 TT 196-197. A new expert testifying to the same ultimate conclusions or opinions is not new evidence. To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324). Even though Mr. Turvey did not specialize in footwear impressions he was still qualified as an expert in forensics, and he specifically mentioned Mr. Schiro's report in his testimony. Despite being presented with this evidence, the jury still found Defendant guilty beyond a reasonable doubt, and the Nevada Supreme Court rejected Defendant's insufficiency of the evidence claim on direct appeal.

10. Neither George Schiro's nor Dr. Lewis's affidavits support a claim of actual innocence (Grounds 13 and 18).

Defendant summarizes Mr. Schiro's affidavit which is nothing more than cumulative evidence that was already presented at trial and rejected by the jury. Every single point summarized by Mr. Schiro is that there was no physical evidence found linking Defendant or her vehicle to the crime scene. Mr. Turvey provided extensive testimony to this effect at trial. 10/2/06 TT 86-191. Dr. Lewis's opinion that he believes more damage would have been caused to victim's mouth and teeth if a bat had been used in the attack is also cumulative as Dr. Laufer provided the same testimony at trial. 9/28/06 TT 127. To be

credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324). Different experts providing substantially the same testimony is not new evidence.

Moreover, Mr. Schiro's scenario of how he believes the crime occurred is not evidence of who committed the crime but how it was committed and does nothing more than rebut testimony provided by Dr. Simms which indicated the evidence was consistent with Bailey standing or kneeling when he received the injury to his scrotum. 9/19/06 TT 127-128. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Defendant also, again, attempts to rely on the State's theory presented during closing argument. This is the fatal flaw in Defendant's claims as closing arguments are not evidence. Defendant has not shown that she is actually innocent of the offense, but rather that there are experts who may disagree with the conclusions reached by other experts at trial. It is clear that Defendant has failed to show that it is more likely than not that no reasonable juror would have convicted her in light of this evidence.

11. Evidence that Bailey did not live in the trash enclosure (Ground 14).

Defendant's claim that Bailey did not live in the trash enclosure does not establish a claim of actual innocence. The State did not argue that Bailey lived in the trash enclosure and that was how Defendant knew where to find him. In reality, the State argued that "She's down there and somehow she comes into contact with Duran Bailey. And somehow they end up back at his place, the trash dumpster where he would stay sometimes on the weekends." 10/5/06 TT 122. Moreover, Defendant's "new evidence" is an affidavit from an individual named Steven King which is nothing more than his belief as to what happened to Duran Bailey, even though he was not a witness to the crime and his entire affidavit is speculative at best. To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Calderon, 523 U.S. at 559 (quoting Shulp, 513 U.S. at 324). Post-trial

affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Even if Bailey did not live in the trash enclosure, substantial evidence was presented which showed he frequently spent time there. 9/14/06 TT 61, 68; 9/28/06 TT 24. Moreover, Defendant fails to present a cogent argument as to how or why the possibility that Bailey did not actually live in the trash enclosure presents a colorable claim of actual innocence. Defendant simply alleges that the jury would have a factual basis to have a reasonable doubt. This is an argument of legal insufficiency and not actual innocence. As such, Defendant's claim must fail.

12. The availability of methamphetamine in Panaca (Ground 15).

Whether or not methamphetamine is available in Panaca is not new evidence which would undermine the jury's verdict. It is highly likely that the jury was already aware that illegal narcotics are available in Lincoln County, Nevada. Defendant's argument merely attacks the State's theory of the case and is tenuous at best. As such, this is an argument of legal insufficiency and Defendant has failed to satisfy the Calderon standard.

13. New third party culprit evidence (Grounds 16-17).

Defendant presented evidence at trial in an attempt to implicate several Hispanic individuals as those responsible for Bailey's murder. 9/28/06 TT 7-62. Defendant's new evidence is the affidavit of Steven King in which he declares his belief that the Hispanic males were responsible for Bailey's murder and that Defendant is innocent. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring).

Moreover, even if Mr. King had testified at trial, his belief as to what occurred would be irrelevant, speculative, and inadmissible evidence. He was not a witness to Bailey's murder and the ultimate conclusions laid out in his affidavit are based on hearsay. Mr. King's testimony is also cumulative and simply repeats much of the testimony of Diann Parker. Defendant also presents a scenario of what "could have happened," as she does throughout her petition. This does not support a claim of actual innocence. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Defendant has also provided an excerpt from an "injustice blog" which outlines an anonymous individual's belief as to how Duran Bailey was murdered and provides a borderline racist essay of Hispanic culture. Obviously, this is irrelevant, inadmissible, and speculative evidence which does not support a claim of actual innocence. Defendant has also provided an affidavit of a Mr. Martin Yant in support of her arguments. Mr. Yant alleges he has access to an online database which allows him to look up any individual's social security number. This is also irrelevant evidence which does not present a claim of actual innocence.

Finally, Defendant claims that evidence which shows that checks which were written from Bailey's bank account were cashed after his death proves her innocence. However, there is no evidence presented which shows who cashed those particular checks, who they were written to, or when they were written. The argument that it must have been the perpetrator of the crime is speculative and tenuous at best.

14. NRS 201.450 (Ground 19).

In Defendant's direct appeal after her first trial she challenged NRS 201.450 as overly broad, void for vagueness as applied and/or should be narrowly construed. Defendant has done nothing more than rehashed her arguments from her previous direct appeal. The Nevada Supreme Court found these arguments to be without merit. Lobato, 120 Nev. at 522, 96 P.3d at 772. The Nevada Supreme Court's ruling on this issue constitutes the law of the

case per Hall and it may not be revisited. Moreover, Defendant's "new evidence" is not evidence of factual innocence but an allegation of legal insufficiency. As such, it does not satisfy the Calderon standard.

15. Juror misconduct (Ground 20).

Defendant's allegation of juror misconduct is not evidence of factual innocence but an allegation of legal insufficiency. As such, it does not satisfy the Calderon standard.

16. Witness perjury (Ground 21).

Defendant presents allegations and "new evidence" that Detective Thowsen committed perjury concerning his search for NRS 629.041 reports, contacting hospitals, contacting urologists, investigating the Budget Suites Hotel, and his investigation of the Hispanic men. These are bare allegations which do not entitled Defendant to relief per Hargrove.

Furthermore, Defendant challenged Detective Thowsen's testimony concerning these issues on direct appeal under hearsay grounds. The Nevada Supreme Court agreed with Defendant, however, it also determined that any error was harmless due to her admissions. Order of Affirmance 2/5/09, p. 2-5. The Court's ruling on this issue constitutes the law of the case per Hall. As such, the admission of this testimony was harmless beyond a reasonable doubt no matter what theory Defendant uses to make her argument.

II

DEFENDANT'S ALLEGATIONS IN CLAIMS 22 & 24 ARE WITHOUT MERIT

Defendant claims she is the victim of a conspiracy between the Clark County District Attorney's Office and the Las Vegas Metropolitan Police Department to convict her despite a belief in her innocence and that she was convicted based on false evidence. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Defendant has provided no support for these claims, and they are nothing more than accusations extrapolated from the evidence discussed in

Section I. As such, it is a bare allegation which is also belied by the record.

III
DEFENDANT'S BRADY CLAIMS ARE WITHOUT MERIT (GROUNDS 25 & 26)

In Brady v. Maryland, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1194. The duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392 (1976); and the duty encompasses impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682, 105 S.Ct. 3375; see also Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555 (1995).

Because Brady does not require bad faith on the part of the prosecution for a violation of due process, the rule encompasses evidence "known only to police investigators and not to the prosecutor." Kyles, 514 U.S. at 438, 115 S.Ct. 1555. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Id. at 437, 115 S.Ct. 1555.

The United States Supreme Court uses a three-part test to measure whether a failure to disclose amounts to a Brady violation: (1) the evidence at issue must be "favorable" to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the suppressed evidence must be "material" under state law to the accused's guilt or punishment—e.g., prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999); see also United States v. Cooper, 173 F.3d 1192, 1202 (9th Cir.1999).

First, Defendant provides a convoluted analysis as to her belief that Duran Bailey was a confidential informant. The only support provided for this claim is a telephone number found on Bailey's person with the letter "D" next to it, which may have meant detective, and a an affidavit which states it belongs to a law enforcement officer. This is a bare allegation with no factual basis for support, which is insufficient for relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Moreover, Defendant has failed to demonstrate how such information, if true, would have rendered a more favorable out come at trial. Defendant presented ample evidence which alleged that Bailey was killed by someone other than her, and she was still found guilty beyond a reasonable doubt. Providing the jury with the tenuous possibility that Bailey was killed by someone angry at him for working with law enforcement with no evidence to support such a claim is highly unlikely to have altered the outcome of the trial.

Second, Defendant claims that the State failed to disclose that there was "no such person as Daniel Martinez." The only evidence provided in support of this is Defendant's claims of a private investigator having access to any social security number in the United States and sheer speculation. Moreover, the fact that the Hispanic individuals, now claimed by Defendant to be "the real killers," may or may not have been in this country illegally is irrelevant as to whether or not they were likely to have attacked Bailey. As such, this alleged evidence is neither favorable nor material.

IV

DEFENDANT'S COUNSEL PROVIDED EFFECTIVE ASSISTANCE

In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the Defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432,

683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975), quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

In considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not the defendant has demonstrated by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996), citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978), citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977).

This analysis does not mean that the court "should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the

possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992), citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999), citing Strickland, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., citing Strickland, 466 U.S. at 687-89, 694.

A. Counsel's Failure to Investigate (Grounds 27-31).

A defendant who contends that her attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). Also, "[w]here counsel and the client in a criminal case clearly understands the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. 120 Nev. at 192, 87 P.3d at 538.

Defendant has listed several areas where she claims her counsel should have investigated: 1) the Hispanic individuals Diann Parker testified about, 2) phone numbers found on Bailey's person, 3) Bailey's bank records, 4) Diann Parker's fingerprints and DNA, and 5) reports filed under NRS 629.041. Several of these claims have been discussed in Section I, and Defendant's bare assertions do not show how an investigation into these areas would have

rendered a more favorable outcome or led to any useful information. Defendant's claims are supported by nothing more than speculation and must be rejected.

B. Counsel's Failure to Call Witnesses and Subpoena Records in Order to Impeach Detective Thowsen (Grounds 32-34).

Defendant claims her counsel should have called Detective La Rochelle and Detective Thowsen's secretary and subpoenaed LVMPD documents in order to impeach his testimony. However, it is defense counsel's ultimate responsibility of deciding if and when to object and which witnesses to call, if any. Rhyne, 118 Nev. 1, 9, 38 P.3d 163, 168. Moreover, Defendant has not provided anything which would suggest how either witness would have testified if called. Defendant has also not provided anything which would suggest exactly what records were to be subpoenaed or what information they would have provided. As such, she has failed to show how such an action would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. In so far as Defendant complains of Detective Thowsen's testimony concerning reports of other stabbings or conversations with urologists and medical providers, the Nevada Supreme Court has already determined that this testimony was harmless beyond a reasonable doubt, and this constitutes the law of the case per Hall.

C. Counsels Failure to Object to or Move to Exclude Evidence of Defendant's Drug Use (Ground 35).

Evidence was presented that Bailey was a drug dealer and would often trade narcotics for sexual intercourse. 9/28/06 TT 34. Evidence was also presented that he would be the one to acquire the drugs. Id. As such, he at least knew where to buy drugs, and a reasonable inference can be made that if he knew where to acquire crack cocaine he would also know where to acquire methamphetamine. Defendant's methamphetamine habit was relevant to show why she went back to Las Vegas and the circumstances of her encounter with Bailey. If Bailey was to trade narcotics for sexual intercourse with Defendant, he likely would have traded the specific drugs she used. The specific type of drugs Bailey used was irrelevant. As such, filing any motion to preclude or objection to evidence of Defendant's drug use would

have been futile since that was highly relevant to the State's theory of the case. See NRS 48.025. Counsel cannot be deemed ineffective for failing to make futile objections. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

D. Counsel's Failure to File a Motion for Discovery (Ground 36).

Defendant argues that her trial counsel was ineffective for failing to file a motion for all discoverable materials. However, there was no need to file such a motion. The Clark County District Attorney's Office has an open file policy. As such, defense counsel already had access to all discoverable materials. Thus, this claim is moot.

E. Counsel's Failure to File a Motion to Dismiss Count 2 (Ground 37).

Defendant claims her counsel was ineffective for failing to move to dismiss her charge of violating NRS 201.450 and recycles her previous arguments concerning this issue. As discussed above, the Nevada Supreme Court rejected her claims concerning NRS 201.450 on direct appeal. As such, any such motion would have been futile, and counsel cannot be deemed ineffective per Ennis.

F. Counsel's Failure to Present Expert Witnesses (Grounds 38-41).

Defendant argues her counsel should have called 1) a forensic entomologist, 2) a psychologist, 3) a forensic pathologist, and 4) a forensic scientist. It is defense counsel's ultimate responsibility of deciding if and when to object and which witnesses to call, if any. Rhyne, 118 Nev. 1, 9, 38 P.3d 163, 168. "An attorney representing a criminal defendant has the authority to control the presentation of the defense." Id. (quoting People v. Alcala, 4 Cal.4th 742, 15 Ca.Rptr.2d 432, 842 P.2d 1192, 1232 (1992)).

Furthermore, even if defense counsel fell below an objective standard of reasonableness, Defendant cannot show prejudice. Each claim addressed in grounds 38-41 pertains to the new evidence Defendant raises in the instant petition. As discussed in section I, this evidence is either inadmissible or would not have led to a different outcome at trial.

G. Counsel's Cross-Examination of Dr. Simms (Ground 42).

Defendant claims defense counsel should have cross-examined Dr. Simms concerning his preliminary hearing testimony. First, Dr. Simms testimony at the preliminary hearing was

not substantially different than his testimony during trial. He stated he believed Bailey was likely killed within 12 hours of his discovery, which comports with the 8-24 hour window he testified to at trial. Second, the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. Rhyne, 118 Nev. 1, 38 P.3d 163; Strickland, 466 U.S. 668, 104 S.Ct. 2052.

H. Counsel's Failure to Object to State's Expert Witnesses (Ground 43).

Defendant claims that the State's witnesses Wahl, Ford, Renhard, or Paulette were not properly noticed as experts in luminol and/or phenolphthalein testing. However, this claim is inaccurate. All witnesses were noticed as experts in the field of crime scene analysis which includes luminol and/or phenolphthalein testing. As such, any such objection would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, all reports concerning such testing were provided to the defense through discovery, and these witnesses clearly qualify as experts in this field.

I. Counsel's Failure to Enter Defendant's Shoes into Evidence (Ground 44).

Defendant's allegation that her attorney was ineffective for failing to enter her black shoes into evidence at trial is without merit. The jury was presented evidence concerning these shoes through witness testimony. Moreover, Defendant's arguments concerning this evidence goes towards the issue that no physical evidence was presented which connected her to the scene. Ample evidence and arguments of this fact was already presented at trial, and this would have merely been cumulative. Furthermore, defense counsel has the ultimate authority to control the presentation of defense. Rhyne, 118 Nev. 1, 9, 38 P.3d 163, 168.

J. Counsel's Failure to Object to Butterfly Knife Evidence (Ground 45).

Defense counsel's "insistence" on the entry of the butterfly knife into evidence was a strategic decision per Strickland and unchallengeable. Defendant presented evidence that the murder weapon was scissors instead of a knife. 9/28/06 TT 65-149. Defense counsel was allowing the jury to view the knife in an attempt to lead them to that same determination. Moreover, Defendant's argument that Detective Thowsen should have been noticed as an expert witness is misplaced, as he did not provide expert testimony. As such, any such

objection would have been futile, and counsel cannot be deemed ineffective per Ennis.

K. Defense Counsel's Failure to Vouch for Alibi Witness's Credibility and Failure to Argue for the Admission of Hearsay Testimony (Ground 46).

Defendant's arguments in Ground 46 are clearly without merit. First, Defendant claims her counsel should have argued that her alibi witness was credible. This type of argument would have been improper as counsel may not vouch for the veracity of a witness. See Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002). Moreover, Defendants arguments concerning the preclusion of the offered hearsay evidence were addressed and rejected by the Nevada Supreme Court in her direct appeal. Order of Affirmance 2/5/09, p.2 fn. 1. The Court's ruling on this issue constitutes the law of the case per Hall and may not be revisited. As such, any such objection would have been futile, and counsel cannot be deemed ineffective per Ennis.

L. Defense Counsel's Failure to Object to Detective Thowsen's testimony (Grounds 47-48).

Defendant claims that Detective Thowsen should have been noticed as an expert witness, and that his testimony was improper opinion testimony. First, defense counsel objected to this testimony as outside the scope of the detective's expertise and it was overruled. 9/27/06 TT 70-71. Defendant also raised this issue on Direct Appeal, and it was rejected by the Nevada Supreme Court. Order of Affirmance 2/5/09, p.2 fn. 1. The Nevada Supreme Court's ruling on this issue constitutes the law of the case. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). As such, even if defense counsel

fell below an objective standard of reasonableness Defendant was not prejudiced.

Defendant also claims her counsel was ineffective for failing to object to Detective Thowsen's testimony that he did not do further investigation at the Budget Suites because he knew "it happened on West Flamingo." Defendant fails to provide a basis upon which to object to this answer. Detective Thowsen was simply stating there was no reason to search for a witness to Bailey's murder at the Budget Suites since it was absolutely clear from the evidence that Bailey was killed in the trash enclosure. As such, any such objection or motion for mistrial would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, even if this answer was objectionable, any such error is harmless since the detective's disbelief in Defendant's statement concerning her alleged attack at the Budget Suites was abundantly clear to the jury as Defendant was arrested and charged with Bailey's murder. Defendant's claims regarding Dr. Redlich's affidavit are without merit as discussed above.

M. Failure to Object to Prosecutorial Misconduct (Ground 49).

When questioning Detective Thowsen, the State referred to Defendant's statement as a confession. Defendant argues that this constituted misconduct, however she fails to explain how or why. Moreover, the standard of review for prosecutorial misconduct rests upon Defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)).

A prosecutor's statement alone cannot be a basis for overturning a criminal conviction.

> [A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statement or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.' In addition, should this court determine that improper comments were made by the prosecutor, 'it must be...determined whether the errors were harmless beyond a reasonable doubt. The constitution guarantees a fair trial, not necessarily a perfect trial. It is not enough that the prosecutor's remarks are undesirable. Thus, the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process.

Green v. State, 113 Nev. 157, 169-170, 931 P.2d 54, 62 (1997) (modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 200 (2000) (internal citations omitted)). Defendant must show that the statements violated a clear and unequivocal rule of law, she was denied a substantial right, and as a result, she was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054. In this instance Defendant cannot make the requisite showing.

The prosecutor's reference to Defendant's statement as a "confession" is clearly not improper. Under State v. Green, 81 Nev. 173, 400 P.2d 766 (1965), the prosecutor has the right to comment on testimony, to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows. Id. at 176. The prosecutor was merely asking the jury to draw an inference from the evidence that Defendant's statement was indeed an admission to Bailey's murder, as opposed to a description of a different event. This is not improper, and any objection by defense counsel would have been futile. As such, defense counsel was not ineffective per Ennis.

N. Counsel's Failure to Impeach Detective Thowsen (Ground 50).

Defense counsel cross-examined Detective Thowsen on his investigation pertaining to the Budget Suites and any reports or incidents of injuries to an individual's groin or penis. Defense counsel elicited testimony from the detective concerning the fact that he had no record of those actions. 9/27/06 TT 83-139. Defendant is focusing on one line of testimony in her first trial that "everything that was done in the case" was contained in the detectives "homicide book." Defendant is playing with semantics, and has done nothing more than attempt to turn a general statement into a "gotcha" moment. As such, any such attempt would likely have been unsuccessful. Furthermore, the manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. See Rhyne, 118 Nev. 1, 38 P.3d 163; Strickland, 466 U.S. 668, 104 S.Ct. 2052.

O. Counsel's Failure to Object to Detective Thowsen's Hearsay Testimony (Ground 51).

Defendant challenged Detective Thowsen's testimony pertaining to his investigation of other reports of incidents of a severed or slashed penis on direct appeal. The Nevada

Supreme Court agreed. However, it concluded that any such error in admitting the testimony was harmless and/or invited error. Order of Affirmance 2/5/09 p. 3-5. The Court's ruling on this issue constitutes the law of the case per Hall and it may not be revisited. As such, even if defense counsel's failure to object fell below an objective standard of reasonableness Defendant cannot show prejudice.

P. Counsel's Failure to Object and Move for a Mistrial (Ground 52).

Defendant basically charges Deputy District Attorney William Kephart, Deputy District Attorney Sandra DiGiacomo, Detective Thowsen, and the Honorable Valorie J. Vega, District Court Judge, of engaging in a conspiracy to suborn perjury. These are nothing more than bare, unfounded, and false allegations which are insufficient for relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Any such motion for a mistrial would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, Detective Thowsen's testimony concerning the "629.041 searches" was deemed harmless by the Nevada Supreme Court on direct appeal. Order of Affirmance 2/5/09 p. 3-5. The Court's ruling on this issue constitutes the law of the case per Hall and it may not be revisited. As such, even if defense counsel's failure to object fell below an objective standard of reasonableness Defendant cannot show prejudice.

Q. Counsel's Failure to Impeach Detective Thowsen (Ground 53).

Defendant provides a lengthy and incomprehensible analysis as to her belief that, again, Detective Thowsen committed perjury and that her attorney was ineffective in impeaching him. First, Defendant fails to explain how counsel was to have impeached Detective Thowsen. See Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). She again plays with semantics and apparently believes that testimony which relays the same information as prior testimony must use identical words, otherwise it is evidence of perjury. Moreover, Defendant's discussion of the differences between the trash enclosure and the holding cell is inconsequential and irrelevant. The jury was provided with photographs of both and could make its own determination of the evidence.

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R. Counsel's Failure to File a Pre-Trial Motion or Cross-Examine Detective Thowsen to Learn of How He Became Aware of Defendant's Prior Sexual Abuse (Ground 54).

Defendant argues that her counsel was ineffective for failing to make efforts to determine the source of his information concerning her prior sexual abuse. Defendant further claims this would have somehow rendered her waiver of her *Miranda* rights involuntary. The manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. See Rhyne, 118 Nev. 1, 38 P.3d 163; Strickland, 466 U.S. 668, 104 S.Ct. 2052. Defendant also states that the records **may** have been sealed, and Detective Thowsen **may** have obtained the information illegally. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Defendant also fails to present a cogent argument as to how the manner in which Detective Thowsen acquired the information makes her *Miranda* waiver involuntary.

Moreover, Defendant challenged the admission of her statement as involuntary based upon this exact same argument that the psychological tactic rendered her statement involuntary, and it was rejected by the Nevada Supreme Court. Lobato, 120 Nev. at 522, 96 P.3d at 772. The Court's ruling on this issue constitutes the law of the case per Hall, and it may not be revisited. Any attempt by defense counsel to preclude her statement would have been futile. As such, defense counsel was not ineffective per Ennis, and defendant cannot show prejudice.

S. Defense Counsel's Failure to Impeach Laura Johnson's Credibility (Ground 55).

Defendant claims her counsel should have cross-examined Laura Johnson on the inconsistencies between her statement/testimony and the statements of Dixie Tienken and Defendant. The manner of cross-examination is for defense counsel to determine and is an unchallengeable strategic decision. See Rhyne, 118 Nev. 1, 38 P.3d 163; Strickland, 466 U.S. 668, 104 S.Ct. 2052. Moreover, the jury was made aware of any such inconsistencies in

witness testimony through direct examination of each witness and the admission of Defendant's statement into evidence. Defendant also claims that her counsel should have inquired as to Johnson's disbelief in her guilt. Johnson's opinion was irrelevant, and would have been improper testimony, thus any motion to elicit such testimony would have been futile, and counsel cannot be deemed ineffective per Ennis.

T. Counsel's Failure to Investigate the Availability of Methamphetamine in Las Vegas (Ground 56).

A defendant who contends that her attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). Defendant has failed to show how a better investigation by her attorney as to where methamphetamine was available in Las Vegas would have rendered a more favorable outcome at trial. The supposition that methamphetamine was only available in "Naked City" and that anyone attempting to acquire the drug would always acquire it in that particular location is absurd. Moreover, the fact that methamphetamine was available in other areas of Las Vegas is an obvious fact and is unlikely to have rendered a more favorable outcome reasonably probable.

U. Counsel's Failure to Object to Zachary Robinson's Testimony (Ground 57).

Zachary Robinson testified that after reviewing the security records of the Budget Suites Hotel there was an absence of any reports of an occurrence similar to Bailey's murder. 9/28/06 TT 159-203. Defendant claims her counsel should have objected on hearsay grounds. However, this testimony was clearly admissible under NRS 51.135 and NRS 51.145. As such, any such objection would have been futile, and counsel cannot be deemed ineffective per Ennis.

V. Counsel's Failure to Obtain the State's "Liar's List" (Ground 58).

Defendant presents a bare allegation that the State keeps records pertaining to the veracity of police officers, which she dubs a "liar's list," and all documents pertaining to any disciplinary actions or mental health issues he may have had. Claims asserted in a petition

for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. As such, Defendant is not entitled to relief.

W. Counsel's Failure to Move for a Directed Acquittal per NRS 175.381 (Ground 59).

Any motion for a directed acquittal per NRS 175.381 would have clearly been futile. Moreover, Defendant challenged her conviction on the basis of insufficient evidence on direct appeal which was rejected by the Nevada Supreme Court. Order of Affirmance 2/5/09 p. 2 fn. 1. As such, defense counsel cannot be cannot be deemed ineffective per Ennis.

X. Counsel's Failure to Object to Jury Instructions 26 and 33 (Ground 60).

Defendant claims counsel should have objected to jury instruction no. 26 because it shifted the burden of proof. The instruction reads as follows:

> 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. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

Pet. Ex. 78. Identical instructions have been upheld by the Nevada Supreme Court. See Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005); see also Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997). As such, any such objection would have been futile, and defense counsel cannot be deemed ineffective per Ennis.

Defendant also alleges her counsel should have objected to instruction no. 33 for the same reasons. The instruction reads as follows:

> You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

Pet. Ex. 80. Identical instructions have been upheld by the Nevada Supreme Court. See Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992). As such, any such objection would have been futile, and defense counsel cannot be deemed ineffective per Ennis. Moreover, even if defense counsel was ineffective for failing to object to these instructions Defendant was not prejudiced since the jury was given proper instructions on reasonable doubt and the State's burden. Pet. Ex. 79.

Y. Defense Counsel's Failure to Object to Instruction No. 31 (Ground 61).

Defendant provides a convoluted analysis as to her belief that jury instruction no. 31 was deficient and her counsel was ineffective for failing to object to it. Instruction no. 31 reads as follows:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense. 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. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation. If you have a reasonable doubt as to the guilt of the Defendant, she is entitled to a verdict of not guilty.

Pet. Ex. 79. This exact instruction has been repeatedly upheld by the Nevada Supreme Court. See Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995); Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991). Moreover, NRS 175.221 mandates that no other definition of reasonable may be given. As such, any such objection would have been futile, and defense counsel cannot be deemed ineffective per Ennis.

Z. Defense Counsel's Failure to Submit an Alternative Instruction on NRS 201.450 (Grounds 62-63).

Jury instruction no. 24 reads as follows:

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> 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.

Pet. Ex. 77. This instruction comports word for word with NRS 201.450. Defendant's argument that sexual intent is an element of the crime and that the perpetrator must "rape" a dead body crime is erroneous. The Nevada Supreme Court has already held that the plain meaning of NRS 201.450 was to punish the act of sexual penetration of a dead human body regardless of motive.

> We also do not believe that NRS 201.450-which is popularly known as the "necrophilia" statute, although that term appears nowhere in the text of the statute-is intended only to apply to medically classifiable "necrophiles." The plain meaning of the statute is to punish the act of sexual penetration of a dead human body, regardless of motive.

Doyle v. State, 112 Nev. 879, 899 fn. 8, 921 P.2d 901, 914 fn. 8 (1996) (overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).

More importantly, during Defendant's first trial, she proposed jury instructions which added the element of sexual gratification to the offense. The district court rejected the instruction. On direct appeal, the Nevada Supreme Court rejected the same arguments on this issue Defendant has presented in the instant petition. Lobato, 120 Nev. 512, 522, 96 P.3d 765, 772 (citing Doyle, supra). The instruction was proper, and any objection or alternative instruction lodged by defense counsel would have been futile. As such, he cannot be deemed ineffective per Ennis.

AA. Defense Counsel Failed to Argue That the State had not Proven Each Essential Element of the Charge in Closing (Ground 64).

The United States Supreme Court has held that ineffective assistance of counsel claims may be extended to closing arguments. See Bell v. Cone, 535 U.S. 685, 701-702, 122 S.Ct. 1843 (2002). However, "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly

important because of the broad range of legitimate defense strategy at that stage." Yarborough v. Gentry, 540 U.S. 1, 5-6, 124 S.Ct. 1, 4 (2003). As such, "judicial review of a defense attorney's summation is therefore highly deferential." Id. Moreover, defense counsel's decisions as to what to emphasize in his closing argument is a strategic decision per Strickland. See also Rhyne, supra.

Defendant claims her counsel was ineffective for failing to argue that the State had to prove Defendant was at the scene of the murder at the time it occurred. However, this is an obvious fact which is not outside the jury's common sense. Furthermore, defense counsel spent ample time arguing Defendant was not in Las Vegas at the time of the murder due to her alibi witnesses. 10/5/06 TT 150-185. As such, counsel was not ineffective.

BB. Counsel's Failure to Object During State's Opening (Ground 65).

A prosecutor may not make statements in opening arguments which cannot be proved at trial. Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997) (modified on other grounds by Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002)). However, misconduct does not lie unless such a statement is made in bad faith. Id. at 1312-1313, 949 P.2d at 270. Defendant presents a myriad of what she claims are "falsehoods" in Pet. Ex. 79. Many are simply an attempt at playing with semantics, the rest are the State's interpretation of what the evidence will show. The fact that Defendant may have a different interpretation of the evidence and what she believes was proved at trial is immaterial. As such, any objections to the State's opening statement would have been improper per Ennis. Furthermore, it is a sound defense strategy to wait until the end of trial and hold the State to account for proving matters presented in its opening and is unchallengeable per Strickland. Finally, Defendant has failed to show any statements which are even remotely questionable were made in bad faith.

CC. Defense Counsel's Failure to Object to State's Argument Concerning Bailey's Head Wounds During Closing Arguments (Ground 66).

Defendant obviously disagrees with the State's interpretation of the evidence presented at trial. However, this is not grounds for an objection. As such, any such objection

would have been futile per Ennis, and counsel could not be deemed ineffective. Moreover, defense counsel may argue his interpretation of the evidence during his own closing argument, and the resolution of the different interpretations is for the jury.

DD. Defense Counsel's Failure to Object to Alleged Prosecutorial Misconduct (Ground 67).

Defendant claims the prosecutor committed misconduct by expressing his personal opinion and her counsel was ineffective for failing to object. During rebuttal, the prosecutor urged the jury to convict Defendant of First Degree Murder. "Statements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable." Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (Nev.,1996) (citing Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)).

Here, the prosecutor was simply providing his belief in Defendant's guilt as a conclusion from the evidence presented. In fact, immediately following this statement the prosecutor explained how Defendant's confession was corroborated. 10/5/06 TT 213-214. As such, no misconduct occurred, and any such objection by defense counsel would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, even if the court should find that statement constituted misconduct it constitutes harmless error. The fact that the prosecutor had a belief in Defendant's guilt was already apparent to the jury.

EE. Defense Counsel's Failure to Object to Alleged Prosecutorial Misconduct (Ground 68).

During closing arguments, the prosecutor referenced the fact that several alibi witnesses had not testified before. Defendant claims this constituted misconduct and her counsel was ineffective for failing to object. It is improper for a prosecutor to call a witness or the defendant a liar. See Ross v. State, 106 Nev. 924, 927-928, 803 P.2d 1104, 1106 (1990); see also Skiba v. State, 114 Nev. 612, 614, 959 P.2d 959, 960 (1998). However, "when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue

the credibility of the witness-even if this means occasionally stating in argument that a witness is lying." Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002).

This case is a prime example, as Defendant admits in her petition repeatedly, of a case which depends on the credibility of the witnesses. Moreover, the prosecutors did not call Defendant's alibi witnesses liars but merely brought the jury's attention to the fact that their testimony was new. 10/5/06 TT 137, 190. There is nothing wrong with these arguments in the context of arguing the credibility of these witnesses. See Id. As such, no misconduct occurred, and any such objection by defense counsel would have been futile. Defense counsel cannot be deemed ineffective for failing to make futile objections per Ennis.

FF. Defense Counsel's Failure to Object to Alleged Prosecutorial Misconduct (Ground 69).

The State argued in closing that the positive presumptive tests for blood in Defendant's car were physical evidence linking her to the crime scene. Defendant claims that this was a false argument amounting to prosecutorial misconduct and her counsel was ineffective for failing to object. Under State v. Green, 81 Nev. 173, 400 P.2d 766 (1965), the prosecutor has the right to comment on testimony, to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows. Id. at 176. The prosecutor was simply asking the jury to draw the inference that even though the substance which reacted to the presumptive tests could not be confirmed as blood that it was indeed blood. This is not a false argument as testimony was provided that even though the confirmatory test is negative it doesn't necessarily mean the substance is not blood. 9/25/06 TT 167. As such, any objection would have been futile, and counsel cannot be deemed ineffective per Ennis.

GG. Defense Counsel's Failure to Object to Alleged False Arguments Made by the State (Ground 70).

Defendant has provided a series of baseless, bare allegations that the State made over 250 improper or false arguments. Many of these claims have already been discussed above. Claims asserted in a petition for post-conviction relief must be supported with specific

factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. All of Defendant's claims are without merit. As such, defense counsel cannot be deemed ineffective for failing to make futile objections or motions. Ennis v. State, 122 Nev. 694, 137 P.3d 1095 (2006).

HH. Defense Counsel's Failure to Retain a Dental Expert (Ground 71).

Dr. Simms testified at trial that he would have expected more injures to Bailey's face had he been struck with a bat, however it was conceivable that Bailey was hit with a bat. 9/19/06 TT 132. Defense witness Dr. Laufer testified that he also believed that more damage would have been caused and that "if you happen to hit the person when his mouth is open and his lips are out of the way and you only hit the teeth, the teeth would fracture." 9/28/06 TT 127-128. As such, Dr. Lewis's opinion is cumulative. He simply states it is his opinion that a baseball bat was not used, not that it wasn't possible. Pet. Ex. 100. Post-trial affidavits are "obtained without the benefit of cross-examination." Herrera v. Collins, 506 U.S. 390, 417, 113 S.Ct. 853 (1993). Thus, they should be "treated with a fair degree of skepticism." Id. at 423, 113 S.Ct. at 853 (O'Connor, J., concurring). As such, defense counsel was not ineffective. Moreover, it is defense counsel's ultimate responsibility of deciding which witnesses to call, if any. Rhyne, 118 Nev. 1, 9, 38 P.3d 163, 168.

II. Defense Counsel's Failure to File a Motion for Judgment of Acquittal per NRS 175.381(2) (Ground 72).

Defendant argues that her counsel was ineffective for failing to file a motion for judgment of acquittal per NRS 175.381(2) due to insufficient evidence. However, any such motion would have been futile, and counsel cannot be deemed ineffective per Ennis. Moreover, it should be noted that Defendant raised the issue of insufficiency of the evidence on appeal, and the Nevada Supreme Court rejected that claim. Order of Affirmance 2/5/09 p. 2 fn. 1.

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JJ. Failure to Conduct Post-Trial DNA Testing (Ground 73).

Defendant seems to have alleged that her counsel conducted an inadequate post-trial investigation. Defendant must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 87 P.3d 533, 538 (2004). Also, "[w]here counsel and the client in a criminal case clearly understands the evidence and the permutations of proof and outcome, counsel is not required to unnecessarily exhaust all available public or private resources." Id. 120 Nev. at 192, 87 P.3d at 538. Defendant has failed to show how this investigation would have benefited her. As such, counsel was not ineffective.

KK. Ineffective Assistance of Appellate Counsel (Grounds 74-76).

The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S.Ct. 830, 836-837 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel the defendant must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Further, there is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). Finally, in order to prove that appellate counsel's alleged error was prejudicial; the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

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The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. 753, 103 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

First, Defendant claims that her appellate counsel was ineffective for failing to argue that there was insufficient evidence to support her conviction. However, counsel did indeed raise this claim, and it was rejected by the Nevada Supreme Court. Order of Affirmance 2/5/09 p. 2 fn. 1. As such, this claim is belied by the record.

Second, Defendant claims her appellate counsel was ineffective for failing to argue on appeal that the district court abused its discretion in denying her motion to suppress her statements to police. However, counsel did indeed raise this claim, and it was rejected by the Nevada Supreme Court. Order of Affirmance 2/5/09 p. 2 fn. 1. As such, this claim is belied by the record. Defendant's arguments regarding the law of the case doctrine are nonsensical and must be rejected.

Finally, Defendant claims her appellate counsel was ineffective for failing to argue in her petition for rehearing that the Nevada Supreme Court's ruling was based upon a false assumption of fact. This is a frivolous argument which would not have had a reasonable probability of success.

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V

THERE IS NO CUMULATIVE ERROR AS TO WARRANT RELIEF (GROUND 77)

Defendant argues that the series of alleged errors amounts to reversible error. However, Defendant has failed to make out a valid claim or present any cogent arguments for any of the issues she has raised. Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854 - 855 (2000); see also Big Pond v. State, 101 Nev. 1, 692 P.2d 1288 (1985).

Defendant is unable to satisfy the test laid out in Mulder. She has not shown that any errors actually occurred throughout the adjudication of this case. She has only made bare allegations, and there is no reasonable question of Defendant's guilt. A defendant "is not entitled to a perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), *citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). Here, Defendant received a fair trial, and all errors alleged are without merit. Therefore, her claim of cumulative error must fail.

VI

DEFENDANT'S CLAIMS OF NEW EVIDENCE DO NOT WARRANT RELIEF (GROUND 78)

As discussed in Section I, Defendant's claims of new evidence are untimely per NRS 176.515(3) and insufficient to satisfy the Calderon standard. As such, she is not entitled to relief. Moreover, Defendant is unable to satisfy the test laid out in Mulder. She has not shown that any errors actually occurred throughout the adjudication of this case or that her claims of new evidence entitle her to relief. She has only made bare allegations, and there is no reasonable question of Defendant's guilt. A defendant "is not entitled to a perfect trial, but only a fair trial..." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975), *citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). Here, Defendant received a fair trial, and all errors and claims of new evidence alleged are without merit.

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VII

DEFENDANT'S VAGUE ALLEGATIONS DO NOT WARRANT RELIEF (GROUND 79).

Defendant makes a series of vague and unsupported charges against her counsel, going so far as to infer the possibility of some sort of a conspiracy on the part of her counsel to convict her. Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Moreover, NRS 34.735(6) states:

> You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

Defendant clearly has done nothing more, throughout her entire petition, than provide conclusory statements and allegations. This is insufficient to entitle her to relief, and her petition must be denied.

VIII

THE APPOINTMENT OF COUNSEL IS IN THE DISCRETION OF THE COURT

In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996). The Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution."

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NRS 34.750 provides, in pertinent part:

> "[a] petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery." (emphasis added).

Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel. McKague specifically held that with the exception of cases in which appointment of counsel is mandated by statute[2], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164.

The Nevada Supreme Court has observed that a petitioner "must show that the requested review is not frivolous before he may have an attorney appointed." Peterson v. Warden, Nevada State Prison, 87 Nev. 134, 483 P.2d 204 (1971) (citing former statute NRS 177.345(2)). As such, it is within the discretion of this court to grant or deny Defendant's request for the appointment of counsel.

IX

AN EVIDENTIARY HEARING IS NOT REQUIRED

Defendant's motion for an evidentiary hearing should be denied since Defendant has not proven she is entitled to an evidentiary hearing and no such hearing has been granted. Defendant desires an evidentiary hearing to use as a discovery tool so that she may develop information to support her Petition for Writ of Habeas Corpus (Post-Conviction). However, this is contrary to the purpose of an evidentiary hearing.

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[2] See NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death].

NRS 34.770 provides the manner in which the district court decides a post conviction proceeding:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

As argued above, Defendant has set forth only bare allegations. That does not warrant an evidentiary haring. See Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994). As such, Defendant's request should be denied.

CONCLUSION

Based on the foregoing arguments, Defendant's petition must be denied.

DATED this 20th day of August, 2010.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ William D. Kephart
WILLIAM D. KEPHART
Chief Deputy District Attorney
Nevada Bar #003649

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 20th day of August, 2010, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

KIRSTIN LOBATO, #95558
FMWCC
4370 Smiley Road
N. Las Vegas, NV 89115

BY: /s/ J. Georges
Secretary for the District Attorney's Office