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9 EIGHTH JUDICIAL DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 KIRSTIN BLAISE LOBATO,)
12)
13) Petitioner,)
14) CASE NO. C177394
15)
16) vs.)
17) DEPT. NO. II
18)
19) WARDEN OF FMWCC,)
20)
21) and THE STATE OF NEVADA,)
22)
23) Respondents.)
24)
25)
26)
27)
28)

29 **PETITIONER LOBATO’S NOTICE OF MOTION AND MOTION FOR RECUSAL**
30 **OF JUDGE VALORIE VEGA**

31 Date of Hearing: _____

32 Time of Hearing: _____

33 COMES NOW Petitioner Kirstin Blaise Lobato, in Pro Per, and hereby moves this Court
34 for recusal of Clark County District Court Judge Valorie Vega in the above-entitled writ of *habeas*
35 *corpus* case.

36 The Petitioner’s writ of *habeas corpus* filed on May 5, 2010, is a civil lawsuit separate from the
37 criminal case that resulted in her writ of *habeas corpus* that is based on her unlawful and
38 unconstitutional imprisonment by the warden of FMWCC and the Nevada attorney general. Judge
39 Valorie Vega presided over the Petitioner’s criminal case. Judge Vega is a material witness in that
40 petition’s Grounds fifty-two; she has a conflict-of-interest and pre-judgment in Grounds forty-six, sixty,
41 sixty-one and seventy-five; during the hearing she conducted on July 15, 2010, she demonstrated
42 manifest bias against the Petitioner and a complete lack of impartiality and fairness required of a judge,
43 and she has publicly expressed her opinion the Petitioner is guilty of murdering Duran Bailey.

1 **JUDGE VEGA IS A MATERIAL WITNESS FOR GROUND FIFTY-TWO (52)**

2 Judge Vegas is a key material witness and she has personal knowledge of facts directly related
3 to Ground fifty-two that concerns multiple egregious frauds on the court, subornation of perjury, and
4 gross prosecutorial misconduct by Clark County Assistant District Attorney William Kephart, and
5 ADA Sandra DiGiacomo’s gross prosecutorial misconduct of aiding and abetting Kephart’s frauds on
6 the court and subornation of perjury. (Ground fifty-two is attached hereto as Exhibit 1.)

7 Ground fifty-two documents that Kephart misrepresented the truth (i.e., he lied) to Judge
8 Vega on multiple occasions with the assistance of DiGiacomo to dupe Judge Vega into first
9 admitting, and then not striking hearsay and double hearsay testimony by Detective Thomas
10 Thowsen which was indispensable to the prosecution’s case. It is in the record that Kephart
11 misrepresented the truth to Judge Vega during a bench conference that Detective Thowsen’s direct
12 testimony about NRS 629.041 reports by Las Vegas medical service providers regarding treatment of
13 non-accidental knife wounds in May, June and July 2001 would not be hearsay. Kephart further
14 misrepresented the truth to Judge Vega after it was disclosed during cross-examination of Thowsen
15 that his direct testimony about the NRS 629.041 reports had in fact been hearsay. (The recorded
16 portion of these events, during which the bench conference is described, is at 8 App. 1414-15; Trans.
17 XIII-176-180, 9-27-06.) As documented in the writ of *habeas corpus* Ground twenty-one, Thowsen’s
18 hearsay testimony was also fabricated and perjurious, and Kephart suborned Thowsen’s perjurious
19 direct testimony.

20 The Petitioner Statement of July 20, 2001, describes in detail the attempted rape of her at a
21 Budget Suites Hotel in east Las Vegas “over a month ago” – which was prior to June 20, 2001, and
22 more than 18 days prior to Duran Bailey’s murder on July 8, 2001. Thowsen’s hearsay testimony
23 was intended to undermine the Petitioner’s credibility and truthfulness, and convince the jury her
24 Statement is actually about Bailey’s murder in the trash enclosure for a west Las Vegas bank.
25 Thowsen’s hearsay testimony was indispensable to the prosecution because if the jury accepted at
26 face value the Petitioner’s Statement describing her attempted rape in east Las Vegas a number of
27 weeks before Bailey’s murder in west Las Vegas, there is an overwhelming probability she would
28 have been acquitted since the prosecution did not introduce physical, forensic, eyewitness,

1 surveillance, documentary or confession evidence the Petitioner had been anywhere in Clark
2 County at anytime on July 8, 2001 – the day of Bailey’s murder.

3 Judge Vega is not only a key material witness to the events related to Kephart and
4 DiGiacomo in which she was directly involved, and about which she will have to testify, but her
5 trial notes that she refers to in the record are key physical evidence in Ground fifty-two and can be
6 subpoenaed. (“I want to go back to my notes.” at 8 App. 1414; XIII-177, 9-27-06.) Judge Vega will
7 have to authenticate and testify about the content of her notes.

8 As a key material witness in Ground fifty-two that directly involves her statements, notes
9 and actions, and courtroom events about which she has personal knowledge, Judge Vega cannot
10 preside over the Petitioner’s writ of *habeas corpus* civil action and must be recused. It will violate
11 the Petitioner’s state and federal constitutional right to due process and her right to a fair, impartial,
12 and disinterested judge if a judge involved as a material witness in the proceedings presides over
13 the Petitioner’s writ of *habeas corpus* and makes any ruling related to the petition.

14 Additionally, Judge Vega is ethically and legally required to be recused from the
15 Petitioner’s writ of *habeas corpus* by the Revised Nevada Code of Judicial Conduct that became
16 effective January 19, 2010. Rule 2.11 states in part:

17 Rule 2.11. Disqualification.

18 (A) A judge shall disqualify himself or herself in any proceeding in which the
19 judge’s impartiality might reasonably be questioned, including but not limited to the
20 following circumstances:

21 (1) The judge has a personal bias or prejudice concerning a party or a party’s
22 lawyer, or personal knowledge of facts that are in dispute in the proceeding.
(emphasis added to original)

23 Judge Vega is a material witness who has personal knowledge of the events and conduct of
24 Kephart, DiGiacomo, and Thowsen described in Ground fifty-two, and she will be subpoenaed by
25 the Petitioner as a material witness. Furthermore, Judge Vega will have to testify about her notes
26 that will be subpoenaed as material evidence in Ground fifty-two.

27 Additionally, Judge Vega must be recused because she is ethically and legally required to
28 report the dishonest, unethical and possibly criminal conduct by Kephart and DiGiacomo in her
courtroom described in Ground fifty-two to the appropriate oversight and law enforcement

1 authorities, and she will be a material witness in any proceedings initiated by those authorities.

2 Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 2.15(B) and (D) state:

3 Rule 2.15. Responding to Judicial and Lawyer Misconduct.

4 (B) A judge having knowledge that a lawyer has committed a violation of the
5 Nevada Rules of Professional Conduct that raises a substantial question regarding
6 the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall
7 inform the appropriate authority. (emphasis added to original)

8 ...

9 (D) A judge who receives information indicating a substantial likelihood that a
10 lawyer has committed a violation of the Nevada Rules of Professional Conduct shall
11 take appropriate action.

12 Ground fifty-two documents extensive dishonest, illicit, and possibly criminal conduct by
13 Kephart and DiGiacomo in Judge Vega's courtroom that goes far beyond "a substantial likelihood"
14 they committed violations of the Nevada Rules of Professional Conduct. Consequently, Judge
15 Vega is mandated by Nevada State law that she "shall inform the appropriate authority," and she
16 will be a witness in subsequent proceedings.

17 **JUDGE VEGA WOULD BE ACTING AS A JUDGE IN HER OWN CAUSE IN**
18 **GROUNDS FORTY-SIX, SIXTY, SIXTY-ONE AND SEVENTY-FIVE**

19 The Petitioner's writ of *habeas corpus* Ground forty-six concerns her counsel's
20 prejudicially ineffective assistance of counsel for failing to make the correct legal arguments for
21 admission of her alibi witness testimony that Judge Vega ruled was inadmissible. (Ground forty-six
22 (46) is attached hereto as Exhibit 2.)

23 The Petitioner's petition Ground sixty concerns her counsel's prejudicially ineffective
24 assistance of counsel for failing to object to jury instructions 26 and 33 that Judge Vega approved
25 and read to the jury. (Ground sixty (60) is attached hereto as Exhibit 3.)

26 The Petitioner's petition Ground sixty-one concerns her counsel's prejudicially ineffective
27 assistance of counsel for failing to object to jury instruction 31 that Judge Vega approved and read
28 to the jury. (Ground sixty-one (61) is attached hereto as Exhibit 4.)

The Petitioner's petition Ground seventy-five concerns her counsel's prejudicially
ineffective assistance of counsel for failing to argue on direct appeal to the Nevada Supreme Court
that Judge Vega "abused her discretion" in misapplying the "law of the case" doctrine to her ruling

1 that the Petitioner’s Statement of July 20, 2001, was admissible. (Ground seventy-five (75) is
2 attached hereto as Exhibit 5.)

3 Grounds forty-six, sixty, sixty-one and seventy-five all implicate the Petitioner’s state and
4 federal constitutional due process rights. Those ineffective assistance of counsel grounds are based
5 on the failure of Petitioner’s counsel to object to, or otherwise challenge rulings Judge Vega made,
6 and for the Petitioner to prevail on those grounds she must establish prejudice. The prejudice
7 alleged in those ineffective assistance of counsel grounds is Judge Vega’s rulings deprived the
8 Petitioner of one or more constitutional rights.

9 The trial related issues in Grounds forty-six, sixty, sixty-one and seventy-five have not been
10 adjudicated. Consequently, Judge Vega would be acting as an “appellate” reviewer of her own
11 rulings if she were to preside over the Petitioner’s writ of *habeas corpus*. It is a state and federal
12 constitutionally impermissible conflict of interest for Judge Vega to be in a position to affirm her
13 own trial court rulings that have never been reviewed by any other court. It violates fundamental
14 principles of due process and fairness for Judge Vega to act as a judge in her own cause in the
15 Petitioner’s writ of *habeas corpus*, and determine if her trial court rulings prejudiced the Petitioner.

16 Furthermore, Judge Vega has a pre-judgment about the issues underlying Grounds forty-
17 six, sixty, sixty-one and seventy-five because they involve her trial rulings.

18 It will violate the Petitioner’s state and federal constitutional right to due process and her
19 right to a fair, impartial, and disinterested judge if a judge with a conflict of interest and/or pre-
20 judgment in the proceedings presides over the Petitioner’s writ of *habeas corpus* and makes any
21 ruling related to the writ.

22 Furthermore, Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 2.11 (A) states
23 in part: “A judge shall disqualify himself or herself in any proceeding in which the judge’s
24 impartiality might reasonably be questioned ...”

25 It will violate the Revised Nevada Code of Judicial Conduct for Judge Vega to preside over
26 the Petitioner’s civil writ of *habeas corpus* lawsuit because her “impartiality might reasonably be
27 questioned” in considering Grounds forty-six, sixty, sixty-one and seventy-five about which she
28 has a conflict of interest and a pre-judgment.

1 **JUDGE VEGA’S LACK OF IMPARTIALITY AND FAIRNESS, AND MANIFEST**
2 **BIAS AGAINST PETITIONER IS EVIDENT FROM THE HEARING ON JULY 15, 2010**

3 Judge Vega conducted a hearing on July 15, 2010, regarding a motion by the Respondents.
4 The Petitioner was not provided notice of the hearing, she was not served with a copy of the
5 motion, she had no knowledge of the motion’s contents, she did not have the opportunity to file or
6 argue any possible objections to the motion, Judge Vega took it upon herself to waive the
7 Petitioner’s right to be present even though she is *pro per* and thus she was not present or legally
8 represented at the hearing, only the Respondents were legally represented at the hearing, and Judge
9 Vega only considered the Respondents’ position on their motion before granting it.

10 Consequently, Judge Vega conducted an *ex parte* hearing on July 15, 2010.

11 Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 2.9(A) states in part:

12 Rule 2.9. Ex Parte Communications.

13 (A) A judge shall not initiate, permit, or consider ex parte communications, or
14 consider other communications made to the judge outside the presence of the parties
15 or their lawyers, concerning a pending or impending matter, except as follows:
(emphasis added to original)

16 Judge Vega did not just “initiate, permit, or consider ex parte communications” on July 15,
17 2010, she conducted the entire hearing *ex parte*. The Petitioner was not provided notice of the
18 hearing, she was not served with a copy of the motion, she had no knowledge of the motion’s
19 contents, she did not have the opportunity to file or argue any possible objections to the motion,
20 Judge Vega took it upon herself to waive the Petitioner’s right to be present even though she is *pro*
21 *per* and thus she was not present or legally represented at the hearing, only the Respondents were
22 legally represented at the hearing, and Judge Vega only considered the Respondents’ position on
23 their motion before granting it.

24 The Petitioner is *pro per* and she has not waived her state and federal constitutional rights
25 to be present during any hearing or other proceeding related to her writ of *habeas corpus*, and she
26 has not agreed to permit any *ex parte* communication of any kind between Judge Vega and the
27 Respondents. Consequently, Judge Vega conducted the *ex parte* hearing on July 15, 2010, in
28 violation of the Revised Nevada Code of Judicial Conduct she is required to abide by.

1 Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 2.6.(A) states:

2 Rule 2.6. Ensuring the Right to Be Heard.

3 (A) A judge shall accord to every person who has a legal interest in a
4 proceeding, or that person's lawyer, the right to be heard according to law.
(emphasis added to original)

5 Judge Vega did not just deny the Petitioner her “right to be heard according to law” during
6 the hearing of July 15, 2010, but since she is a *pro per* Petitioner, Judge Vega did not allow any
7 person “to be heard” representing the Petitioner’s “legal interest.” Furthermore, Judge Vega took it
8 upon herself to waive the right of the Petitioner to be present at the hearing, so it was impossible
9 for the Petitioner to be heard, since she is suing the Respondents *pro per* and her motion for
10 appointment of counsel is pending. Only the Respondents were legally represented at the hearing,
11 and Judge Vega only considered the Respondents’ position on their motion before granting it.
12 Consequently, Judge Vega violated the Nevada Code of Judicial Conduct’s mandate that the
13 Petitioner “shall” be accorded “the right to be heard” during the hearing on July 15, 2010.

14 Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 2.2. states:

15 Rule 2.2. Impartiality and Fairness. A judge shall uphold and apply the law, and
16 shall perform all duties of judicial office fairly and impartially. (emphasis added to
original)

17 Judge Vega conducted an *ex parte* hearing on July 15, 2010, during which she took it upon
18 herself to waive the right of the Petitioner to be present, she failed to provide the opportunity for the
19 *pro per* Petitioner to be heard and legally represented during the hearing, she allowed only the
20 Respondents to be legally represented at the hearing, and she only considered the Respondents’
21 position on their motion before granting it. Consequently, during the hearing on July 15, 2010, Judge
22 Vega did not “uphold and apply the law,” nor did she perform the duties of her “judicial office fairly
23 and impartially” as mandated without exception by the Nevada Code of Judicial Conduct.

24 Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 2.3. (A) and (B) states:

25 Rule 2.3. Bias, Prejudice, and Harassment.

26 (A) A judge shall perform the duties of judicial office, including administrative
duties, without bias or prejudice.

27 (B) A judge shall not, in the performance of judicial duties, by words or conduct
28 manifest bias or prejudice. (emphasis added to original)

1 By conducting an *ex parte* hearing on July 15, 2010, taking it upon herself to waive the
2 right of the Petitioner to be present, failing to provide the opportunity for the *pro per* Petitioner to
3 be heard and legally represented during the hearing, allowing only the Respondents to be legally
4 represented at the hearing, and only considering the Respondents' position on their motion before
5 granting it, Judge Vega exhibited "by words or conduct manifest bias or prejudice" against the
6 Petitioner and favoring the Respondents. Consequently, Judge Vega violated the Nevada Code of
7 Judicial Conduct's mandate without exception that she act without "bias or prejudice."

8 Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 2.4. (B) and (C) state:

9 Rule 2.4. External Influences on Judicial Conduct.

10 (B) A judge shall not permit family, social, political, financial, or other interests
11 or relationships to influence the judge's judicial conduct or judgment.

12 (C) A judge shall not convey or permit others to convey the impression that any
13 person or organization is in a position to influence the judge. (emphasis added to
14 original)

15 Judge Vega conducted an *ex parte* hearing on July 15, 2010, during which she took it upon
16 herself to waive the right of the Petitioner to be present, she failed to provide the opportunity for the
17 *pro per* Petitioner to be heard and legally represented during the hearing, she allowed only the
18 Respondents to be legally represented at the hearing, and she only considered the Respondents'
19 position on their motion before granting it. Consequently, Judge Vega's Respondent favoring
20 conduct during the hearing of July 15, 2010, directly conveyed the impression that she is influenced
21 by the Respondents and/or the Clark County District Attorney's Office which represented the
22 Respondents during the hearing. Judge Vega's conduct during the July 15, 2010 hearing is barred
23 without exception by the Nevada Code of Judicial Conduct's mandate that "A judge shall not permit
24 family, social, political, financial, or other interests or relationships to influence the judge's judicial
25 conduct or judgment." (Rule 2.4. (B)) and, "A judge shall not convey or permit others to convey the
26 impression that any person or organization is in a position to influence the judge." Rule 2.4. (C)).

27 Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 1.2. states:

28 Rule 1.2. Promoting Confidence in the Judiciary. A judge shall act at all times in a
manner that promotes public confidence in the independence, integrity, and
impartiality of the judiciary and shall avoid impropriety and the appearance of
impropriety. (emphasis added to original)

1 Judge Vega conducted an *ex parte* hearing on July 15, 2010, during which she took it upon
2 herself to waive the right of the Petitioner to be present, she failed to provide the opportunity for
3 the *pro per* Petitioner to be heard and legally represented during the hearing, she allowed only the
4 Respondents to be legally represented at the hearing, and she only considered the Respondents'
5 position on their motion before granting it. Consequently, during the hearing on July 15, 2010,
6 Judge Vega did not act "in a manner that promotes public confidence in the independence,
7 integrity, and impartiality of the judiciary," and her conduct did not "avoid impropriety and the
8 appearance of impropriety" as mandated by the Revised Nevada Code of Judicial Conduct.

9 Revised Nevada Code of Judicial Conduct (ADKT 427) Rule 2.11 (A) states in part:

10 Rule 2.11. Disqualification.

11 (A) A judge shall disqualify himself or herself in any proceeding in which the
12 judge's impartiality might reasonably be questioned, including but not limited to the
13 following circumstances:

14 (1) The judge has a personal bias or prejudice concerning a party or a party's
15 lawyer, or personal knowledge of facts that are in dispute in the proceeding.
(emphasis added to original)

16 By conducting an *ex parte* hearing on July 15, 2010, taking it upon herself to waive the right
17 of the Petitioner to be present, failing to provide the opportunity for the *pro per* Petitioner to be heard
18 and legally represented during the hearing, allowing only the Respondents to be legally represented at
19 the hearing, and only considering the Respondents' position on their motion before granting it, Judge
20 Vega's "impartiality might reasonably be questioned" by conducting a hearing that lacked
21 "impartiality and fairness" towards the Petitioner, and that exhibited "actual bias" favoring the
22 Respondents and against the Petitioner. Consequently, under the mandate of the Revised Nevada
23 Code of Judicial Conduct Judge Vega "shall disqualify ... herself" from the Petitioner's writ of
habeas corpus civil proceeding because her "impartiality might reasonably be questioned."

24 Furthermore, the Petitioner's state and federal due process rights were violated by Judge
25 Vega's conduct of the hearing on July 15, 2010. Due process fundamentally requires notice of a
26 proceeding, the opportunity to be heard during the proceeding, and an impartial decision maker
27 presiding over the proceeding. The Petitioner was not provided notice of the July 15, 2010,
28 hearing, she was not provided the opportunity to be heard during the hearing because she was not

1 present, and as explained above, Judge Vega acted with partiality favoring the Respondents.
2 Consequently, Judge Vega's recusal is required from the Petitioner's writ of *habeas corpus* case.

3 **JUDGE VEGA'S LACK OF IMPARTIALITY AND FAIRNESS, AND MANIFEST**
4 **BIAS AGAINST PETITIONER IS EVIDENT FROM HER PUBLIC STATEMENTS THAT**
5 **SHE BELIEVES THE PETITIONER IS GUILTY**

6 Judge Vega's conduct of the hearing on July 15, 2010, was consistent with the fact that she
7 has publicly stated she believes the Petitioner is guilty of the murder of Duran Bailey. One instance
8 of this was on February 2, 2007, when Judge Vega stated:

9 "Your history may elicit sympathy but it does not excuse the taking of a life and it
10 does not excuse the mutilation and the degrading of the corpse of Duran Bailey, a
11 fellow human being." *Nevada v. Kirstin Blaise Lobato*, C-177394, Hearing,
February 2, 2007, 30.

12 Due process fundamentally requires an impartial decision maker, and Judge Vega has made
13 it known in the public record that she believes the Petitioner is guilty. Judge Vega's lack of
14 impartiality and manifest bias against the Petitioner will make it impossible for the Petitioner to
15 have a fair consideration of her writ of *habeas corpus* that among its grounds sets forth that the
16 Petitioner is actually innocent of Mr. Bailey's murder because she was in Panaca, Nevada 170
17 miles north of Las Vegas at the time of his murder. Thus the Petitioner's writ of *habeas corpus* is
18 completely at odds with Judge Vega's publicly expressed opinion the Petitioner is guilty.
19 Consequently, the Petitioner's state and federal due process rights mandate Judge Vega's recusal
20 from the Petitioner's writ of *habeas corpus* case.

21 **POINTS AND AUTHORITIES**

22 In 2009 the U.S. Supreme Court reaffirmed the fundamental principle regarding recusal of a
23 judge that 'justice must satisfy the appearance of justice,' and that for the legal system to maintain its
24 legitimacy and protect a litigant's constitutional rights "the Due Process Clause has been
25 implemented by objective standards that do not require proof of actual bias." *Caperton et al v. A. T.*
26 *Massey Coal Co.*, 556 US. ___, No 08-22 (06-08-2009), at 13. The *Caperton* decision cited the
27 Supreme Court case of *In re Murchison*, in which the Court ruled regarding recusal of a judge, "...
28

1 our system of law has always endeavored to prevent even the probability of unfairness.” *In re*
2 *Murchison*, 349 U.S. 133, 136 (1955).

3 Rule 2.11 of the Revised Nevada Code of Judicial Conduct that became effective January
4 19, 2010, states in part:

5 Rule 2.11. Disqualification.

6 (A) A judge shall disqualify himself or herself in any proceeding in which the
7 judge’s impartiality might reasonably be questioned, including but not limited to the
8 following circumstances:

9 (1) The judge has a personal bias or prejudice concerning a party or a party’s
10 lawyer, or personal knowledge of facts that are in dispute in the proceeding.
11 (emphasis added to original)

12 Any one of the Petitioner’s writ of *habeas corpus* grounds in which Judge Vega is a
13 material witness or has a conflict of interest and or pre-judgment is sufficient to mandate her
14 disqualification and recusal from presiding over the Petitioner’s writ of *habeas corpus* civil lawsuit
15 on either state and federal due process grounds or under the Nevada Code of Judicial Conduct, but
16 considered together they make it imperative that in the interests of justice she be recused from the
17 Petitioner’s case.

18 Furthermore, the U.S. Constitution has long recognized that due process fundamentally
19 requires notice of a proceeding and the opportunity to be heard during the proceeding. See e.g.,
20 *Goldberg v. Kelly*, 397 U. S. 254 (1970) (due process requires notice and opportunity to be heard)
21 Contrary to her constitutional due process rights, the Petitioner was not provided notice of the
22 hearing of July 15, 2010, and she was not afforded an opportunity to be heard – or even be present
23 and legally represented. Judge Vega not only did nothing to ensure protection of the Petitioner’s
24 constitutional due process rights, but she actively undermined them by taking it upon herself to
25 waive the Petitioner’s right to be present and legally represented at the hearing.

26 Judge Vega’s conduct of the hearing of July 15, 2010, demonstrated her “manifest bias or
27 prejudice” against the Petitioner, and that she lacks the “impartiality and fairness” to preside over the
28 Petitioner’s writ of *habeas corpus* lawsuit that is required by the Nevada and federal Constitution’s
due process clause and Revised Nevada Code of Judicial Conduct Rules 2.3(B) and Rule 2.2
respectively. Judge Vega’s conduct failed to satisfy the most minimal standard of behavior that can

1 be deemed to promote “confidence in the independence, integrity, and impartiality of the judiciary.”
2 (Rule 1.2) Consequently, Judge Vega’s disqualification and recusal under both state and federal due
3 process grounds and the mandates of Revised Nevada Code of Judicial Conduct Rule 2.11.

4 In addition, although the U.S. Supreme Court has ruled that “the Due Process Clause has
5 been implemented by objective standards that do not require proof of actual bias.” *Caperton* at 13,
6 Judge Vega has provided proof of her actual bias by publicly expressing her opinion the Petitioner is
7 guilty, and therefore Judge Vega’s “actual bias” against the Petitioner immeasurably exceeds the
8 “probability of unfairness” that would be sufficient to mandate her recusal. Consequently, Judge
9 Vega has demonstrated her “manifest bias or prejudice” against the Petitioner, and that she lacks the
10 “impartiality and fairness” to preside over the Petitioner’s writ of *habeas corpus* lawsuit that is
11 required by the Nevada and federal Constitution’s due process clause and Revised Nevada Code of
12 Judicial Conduct Rules 2.3(B) and Rule 2.2 respectively.

13 CONCLUSION

14 Ground fifty-two of the Petitioner’s writ of *habeas corpus* involves Judge Vega as a
15 material witness, and therefore she is barred by the Revised Nevada Code of Judicial Conduct from
16 presiding over the Petitioner’s writ of *habeas corpus*.

17 Grounds forty-six, sixty, sixty-one and seventy-five of the Petitioner’s writ of *habeas*
18 *corpus* involve a conflict of interest by Judge Vega and/or her pre-judgment of the issues
19 underlying those grounds, and therefore she is barred by the Revised Nevada Code of Judicial
20 Conduct from presiding over the Petitioner’s writ of *habeas corpus*.

21 Judge Vega conducted a hearing on July 15, 2010, regarding a motion by the Respondents. The
22 Petitioner was not provided notice of the hearing, she was not served with a copy of the motion, she had
23 no knowledge of the motion’s contents, she did not have the opportunity to file any possible objections
24 to the motion, Judge Vega took it upon herself to waive the *pro per* Petitioner’s right to be present so
25 she was not heard or legally represented, only the Respondents were legally represented at the hearing,
26 and Judge Vega only considered the Respondents’ position on their motion before granting it. Judge
27 Vega’s conduct during the hearing was contrary to at least eight separate rules of the Nevada Code of
28 Judicial Conduct, and it violated the Petitioner’s state and federal due process rights.

1 Judge Vega has publicly expressed her belief in the Petitioner's guilt.

2 Judge Vega is manifestly biased and prejudiced against the Petitioner, and she is
3 predisposed to deny the Petitioner's writ of *habeas corpus* without weighty consideration of the
4 evidence and substantive issues in each of that petition's seventy-nine grounds. Those seventy-nine
5 grounds that require unbiased and careful consideration include compelling new forensic
6 entomology and forensic pathology evidence that Duran Bailey was murdered after 8pm on the
7 evening of July 8, 2001, when the State conceded at trial the then 18-year-old Petitioner was 170
8 miles north of Las Vegas at her parent's house in Panaca, Nevada; compelling new forensic science
9 evidence the murderer was a much larger person than the Petitioner; compelling new evidence Mr.
10 Bailey's death was an honor or revenge killing by friends of Diann Parker; and compelling new
11 evidence that the Respondent State of Nevada prosecuted the Petitioner knowing she is innocent of
12 any involvement in Duran Bailey's murder.

13 Considering the evidence in the Petitioner's writ of *habeas corpus* that she is being illegally
14 and unconstitutionally held in custody by the Respondents, and that she is actually and factually
15 innocent of her convicted crimes, it is particularly important that there be no taint or suggestion
16 that the presiding judge has her feet on the scales of justice for the Respondent's benefit and to the
17 detriment of the Petitioner.

18 It will obliterate any appearance of justice, deprive the Petitioner of due process, and violate
19 the Revised Nevada Code of Judicial Conduct for Judge Vega to preside over the Petitioner's civil
20 writ of *habeas corpus* case. Consequently, Judge Vega must be recused from the Petitioner's writ
21 of *habeas corpus* case.

22 Dated this _____ day of September 2010.

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Kirstin Blaise Lobato 95558
FMWCC
Petitioner Pro Per
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EXHIBIT

1

1 **(zz) Ground fifty-two.**

2 Petitioner was denied effective assistance of counsel in violation of the Nevada
3 Constitution and the U.S. Constitution, and prejudiced by counsel's objectively
4 unreasonable failure to object and make a motion for a mistrial because ADA William
5 Kephart committed egregious fraud on the court by deliberately misrepresenting to
6 Judge Valorie Vega that Detective Thomas Thowsen was not going to provide hearsay
7 testimony about NRS 629.041 reports filed in May, June and July 2001, and after
8 Thowsen's direct testimony was exposed as hearsay during cross-examination, Kephart
9 committed additional egregious fraud on the court by misrepresenting to Judge Vega
10 that Thowsen had not provided hearsay testimony, and as a result of Kephart's
11 egregious prosecutorial misconduct Thowsen also provided hearsay testimony about
12 what he was allegedly told by hospital personnel and urologists, and ADA Sandra
13 DiGiacomo aided and abetted Kephart's frauds on the court, and furthermore Kephart
14 suborned perjury from Thowsen on direct examination about his non-exist search for
15 NRS 629.041 reports, and because of Kephart and DiGiacomo's egregious
16 prosecutorial misconduct of deliberately trying to sabotage the fair administration of
17 justice and deprive the Petitioner of her state and federal constitutional rights to due
18 process of law and a fair trial, the curative action was dismissal of the charges against
19 the Petitioner with prejudice, but the Petitioner's counsel made no motion for dismissal,
20 and the Petitioner was further prejudiced because by not objecting to Kephart's frauds
21 on the court, DiGiacomo's aiding and abetting, and Kephart's subornation of perjury,
22 those issues were not preserved for appeal to the Nevada Supreme Court.

23 Facts:

24 In the Petitioner's Statement on July 20, 2001, audio recorded by lead homicide Detective
25 Thomas Thowsen and his partner Detective James LaRochelle, she described being sexually
26 assaulted "over a month ago" in the parking lot of the Budget Suites Hotel on Boulder Highway in
27 east Las Vegas around or after midnight, and that she escaped from her assailant after trying once
28 to cut his exposed penis.

The prosecution's case depended on discrediting the Petitioner's description of when,
where and what type of attack occurred, because they had to convince the jury that what she was
talking about in her Statement was Bailey's murder and the post-mortem cutting of his rectum at
the Nevada State Bank's trash enclosure 12 days before her interrogation. Key to that strategy was
having Detective Thowsen testify that he could find no evidence that another man in Las Vegas
experienced a cut or severed penis in May, June and July 2001.

During Thowsen's direct examination Clark County Assistant District Attorney William
Kephart asked Thowsen several questions about NRS 629.041, which requires medical care

1 providers to file a report with local law enforcement authorities about their treatment of what they
2 believe are non-accidental gunshot and knife wounds. Petitioner's counsel requested a bench
3 conference to clarify where Kephart was going with Thowsen's testimony. Kephart represented to
4 Judge Vega that Thowsen was going to provide testimony based on his personal knowledge of
5 reviewing the NRS 629.041 reports. Judge Vega ruled that Kephart could question Thowsen about
6 his search for the NRS 629.041 reports. (8 App. 1414-15; XIII-176-180 (9-27-06))

7 Thowsen testified on direct examination that to try and verify Petitioner's account in her
8 Statement he searched for reports filed with the LVMPD under NRS 629.041 in May, June and
9 July 2001 for knife wounds to the groin area or the penis, and that he found no reports. On cross-
10 examination Thowsen changed his testimony. He testified that he didn't personally search for the
11 reports. He delegated the search to his secretary, and he said she told him that she searched the
12 NRS 629.041 reports for May, June and July 2001 and found none about a knife wound to a man's
13 groin area or penis. During a continuation of the cross-examination that elicited Thowsen's
14 admission that he testified falsely on direct examination about the reports, Thowsen provided
15 hearsay testimony about what he said he was told by hospital personnel and urologists. Thowsen's
16 hearsay testimony was that that all his inquires were negative for a slashed or severed penis. When
17 asked on cross-examination if he recorded his investigation, Thowsen replied, "It's not in a specific
18 document, no." (8 App. 1399; Trans. XIII-117 (09-27-2006))

19 Petitioner's counsel made a motion to strike Thowsen's hearsay direct testimony about his
20 secretary's search for NRS 629.041 reports, and to strike his hearsay testimony on cross-
21 examination about what he said he was told by hospital personnel and urologists. At the end of the
22 day when Judge Valorie Vega considered the motions, Petitioner's counsel David Schieck stated:
23 "We'd object that it's hearsay and the Court allowed him to testify. We want to renew that motion
24 and make a motion to strike his testimony in that regard ..." (8 App. 1414; XIII-176, 9-27-06)) The
25 purpose of cross-examination is to test the veracity of a witness' testimony on direct examination,
26 and Thowsen's cross-examination is a classic example of how it can expose a witness' direct
27 testimony was false and contrived.

1 ADA Sandra DiGiacomo attempted to divert the court's attention away from the issue of
2 Thowsen's hearsay direct testimony by saying the prosecution could subpoena records from ten
3 hospitals to show there were no injured penises. Judge Vega then said:

4 "THE COURT: -- objection at sidebar was as to hearsay and we had discussion at
5 sidebar that -- cause my initial impression was that Detective Thowsen himself had
6 called the hospitals and was going to rely what the hospital personnel had told him
7 and Mr. Kephart said, no, that that was not the case. That he had internally reviewed
8 reports from Metro that were negative. And that is what Detective Thowsen initially
9 testified to so I want to go back to my notes." (App. 8, 1414; XIII-177, 9-27-06)
(Underlining added to original.)

10 DiGiacomo again attempted to divert the court's attention away from the issue of
11 Thowsen's hearsay direct testimony by pointing out to Judge Vega that Thowsen's testimony about
12 what he was told by hospital personnel was elicited during cross-examination.

13 At that point Vega had made it clear that Kephart had specifically told her during the bench
14 conference that Thowsen's direct testimony was going to be that "he had internally reviewed
15 reports from Metro." Kephart did elicit that testimony from Thowsen on direct examination, but on
16 cross-examination Thowsen admitted his testimony was not true. He did not search for any NRS
17 629.041 reports: he testified his secretary told him that she had done so.

18 During the discussion after Thowsen testified, Kephart made additional misrepresentations
19 to Judge Vega about Thowsen's direct testimony that he searched the NRS 629.041 reports, which
20 he admitted on cross-examination he knew nothing about personally, but his secretary told him she
21 had searched the reports:

22 "MR. KEPHART: As I recall specifically in that area because I knew what Mr.
23 Schieck was objecting to. His testimony on direct was he searched for reports and
24 that and found -- and within the department and nothing had been reported and it
25 was left at that. ... but he testified on direct that he found no reports. And my
26 specific direct was aimed as to the statute as to whether or not there was any reports
27 made resulting in information about a person being stabbed or cut with a knife and
28 we talked here specifically about in the groin area slashed with a knife or whatever
and he said nothing was reported like that. And now Mr. Schieck said, well, what,
did you talk to -- you know, he went on beyond reports based on cross-
examination." (8 App. 1415; XIII-179, 9-27-06)

Kephart obfuscated the issue that he elicited Thowsen's hearsay testimony on direct

1 examination after lying to Judge Vega that Thowsen had personal knowledge about the reports; by
2 again lying to Judge Vega that Thowsen didn't provide any information during his direct
3 examination that suggested his testimony was hearsay. And Kephart further lied to Judge Vega
4 about the issue of Thowsen's hearsay on direct examination by telling Vega that Petitioner's
5 counsel was objecting to information elicited from Thowsen during cross-examination.

6 Petitioner's counsel did not bring to Judge Vega's attention the fraud on the court Kephart
7 was perpetrating by his repeated lying to Judge Vega about what Thowsen's testimony was going
8 to be, and then what his testimony actually was on direct examination about his secretary and the
9 NRS 629.041 reports. Neither did Petitioner's counsel bring to Judge Vega's attention that Kephart
10 suborned perjury from Thowsen on direct examination about his non-existent search for NRS 629.041
11 reports.

12 Petitioner's counsel also did not bring to Judge Vegas attention that Kephart was
13 misleading her because Thowsen's hearsay and double hearsay testimony on direct examination
14 about the reports could not be exposed until the defense had an opportunity to cross-examine
15 Thowsen. It was discovered during cross-examination that Thowsen lied during his direct
16 testimony, and that he in fact provided hearsay and double testimony about what he said his
17 secretary told him about the NRS 629.041 reports. Petitioner's counsel did not clarify the issue that
18 Thowsen's testimony about contacting hospital personnel and urologists was a direct consequence
19 and continuation of his cross-examination that exposed Thowsen had fabricated his direct
20 testimony about personally searching for the NRS 629.041 reports. If Kephart had not successfully
21 duped Judge Vega into allowing Thowsen to lie during his direct examination about personally
22 searching for the NRS 629.041 reports, then he never would have asked the questions during cross-
23 examination that resulted in his hearsay and double hearsay testimony about what he said he was
24 told by hospital personnel and urologists in Las Vegas.

25 Since Petitioner's counsel did not bring to Judge Vega's attention Kephart's multiple frauds
26 on the court, Thowsen's perjury, and DiGiacomo's attempts to divert Judge Vega's attention from
27 what they had done to ensure the jury would hear and be allowed to consider Thowsen's hearsay
28 and double hearsay testimony about the NRS 629.041 reports that he had no personal knowledge

1 of, Vega rewarded the blatant dishonesty of Kephart, Thowsen and DiGiacomo by ruling: “The
2 motion to strike is denied. The State limited either examination to avoid the hearsay.” Crime does
3 pay. At least when it is two Clark County Assistant District Attorneys and a Las Vegas
4 Metropolitan Police Department homicide detective pulling off the crime in a Las Vegas courtroom
5 right under the nose of the judge.

6 If Kephart had not lied to Judge Vega that Thowsen’s direct testimony would be based on his
7 personal knowledge– she would not have been duped into allowing Thowsen’s hearsay testimony
8 about the absence any NRS 629.041 reports about an injured penis in May, June and July 2001.

9 If Kephart had not lied to Judge Vega after Thowsen testified that his direct testimony
10 about the absence of NRS 629.041 reports and an injured penis was not hearsay – she would have
11 stricken Thowsen’s hearsay testimony from the record.

12 And if Kephart had not lied to Judge Vega after Thowsen testified that his hearsay
13 testimony on cross-examination about what he said he was told by hospital personnel and
14 urologists was not a continuation of his hearsay testimony on direct examination about the search
15 of NRS 629.041 reports, Judge Vega would have stricken that testimony from the record. Judge
16 Vega’s ruling was the direct result of the multiple frauds on the court that Kephart perpetrated by
17 his lies to deceive Judge Vega about Thowsen’s hearsay testimony, both before and after he
18 testified. And Kephart was aided by DiGiacomo’s subterfuge of running interference for Kephart.

19 However, Petitioner’s counsel did not object to Kephart’s egregious prosecutorial
20 misconduct of repeatedly lying to Judge Vega to perpetrate a fraud on the court, or his subornation
21 of Thowsen’s perjury on direct examination. Neither did Petitioner’s counsel make a full record of
22 how Thowsen’s cross-examination hearsay testimony about what the hospital personnel and
23 urologists told him was intertwined with and a continuation of his direct hearsay testimony about
24 the NRS 629.041 reports that he said his secretary told him about.

25 Consequently, Kephart and DiGiacomo were rewarded by Judge Vega for their egregious
26 prosecutorial misconduct and Kephart’s repeated lying to Judge Vega on the record, when she
27 denied the objection by Petitioner’s counsel to Thowsen’s hearsay testimony and the motion to
28 strike his testimony.

1 Petitioner’s counsel raised the issue of Thowsen’s hearsay testimony on direct and cross-
2 examination in her direct appeal to the Nevada Supreme Court. Petitioner’s Appeal Brief argued
3 Judge Vega abused her discretion by not sustaining the Petitioner’s objection to Thowsen’s hearsay
4 testimony on direct and cross-examination about what he said his secretary told him about her
5 search of NRS 629.041 reports, and what he said hospital personnel and urologists told him.

6 During oral arguments Petitioner’s counsel David Schieck argued that Thowsen’s hearsay
7 and double hearsay testimony should have been stricken by Judge Vega. During his argument
8 Schieck outlined Kephart’s subterfuge in duping Judge Vega to admit Thowsen’s hearsay
9 testimony. Schieck did everything but use the word conspiracy to describe the coordinated effort
10 between Kephart, DiGiacomo and Thowsen to deceive and confuse Judge Vega into allowing
11 Thowsen to knowingly contaminate the jury with his hearsay and double hearsay testimony on
12 direct and cross-examination. The following is an excerpt of Schieck’s oral argument:

13 Mr. Schieck: ... They had pre-trialed him, he had told them what he had done, they
14 were fully aware of it. When we approached the bench, they told the Court that he
15 had done it when, in fact, he hadn’t done it, and that’s what created the problem
when we continued to ask him questions. The State....

16 Court: As to this issue, could you clarify the issue as to what you’re talking about
17 and the offer by the State to bring forth the custodians of record from the various
18 hospitals, as to this issue?

19 Mr. Schieck: They did -- when I renewed my objection after it was clear that it was
20 hearsay and it was improper, and I asked that his testimony be stricken, they said,
21 “Oh, we’ve already got under subpoena the hospitals in order to prove that.” That’s
22 because they must have known that his testimony was hearsay and if we objected,
23 they were going to have to do that. They made no offer of proof as to what
24 hospitals, they had every opportunity to bring that in and didn’t bring it in. ...

25 ...
26 Mr. Schieck: if you read the sequence of how this questioning went and how we
27 got to the point we were at, you will see that there was, there was this information
28 given to the Court when the initial ruling was made, and it started to peel away, peel
away, peel away till we get to the point where they don’t want to bring in those
health care providers; they prefer to have Detective Thowsen summarize what
happened with every health care provider in Clark County.

(Nevada Supreme Court oral argument in *State of Nevada vs. Kirstin Blaise Lobato*,
No. 49087, on October 17, 2008. Emphasis added to original.) (Audio of Nevada
Supreme Court oral arguments available at,
www.justicedenied.org/kl/lobato_NSC_arguments_10-7-08.mp3)

1 Schieck did not argue, and it was not included in the Petitioner's appeal to the Nevada
2 Supreme Court, that Kephart and DiGiacomo's deceptions constitute egregious frauds on the court
3 that prejudiced the Petitioner and affected the jury's verdict. Thowsen's hearsay and double-
4 hearsay testimony about what the NRS 629.041 reports and what he said he was told by hospital
5 personnel and urologists was indispensable to the prosecution. It was the only evidence that could
6 be characterized as providing a link between the Petitioner's Statement and Bailey's murder: If no
7 penis injuries were reported in Las Vegas in May, June and July 2001 – then her Statement must be
8 about Bailey's murder. Or so the prosecution argued.

9 The NSC ruled that Thowsen's direct testimony was hearsay, but possibly due to the
10 incomplete record because Judge Vega cut the hearing short, it ruled Thowsen's cross-examination
11 hearsay testimony was invited error by Petitioner's counsel. (*Lobato vs. Nevada*, No. 49087 (NV
12 Supreme Ct, 02-05-2009), Order of Affirmance) Also possibly due to the incomplete record, the NSC
13 ruled Thowsen's hearsay testimony was harmless error. The NSC was not cognizant when it made it
14 ruling of the magnitude of what had transpired in Judge Vega's courtroom related to the frauds on the
15 court perpetrated by Kephart and DiGiacomo in deceiving Judge Vega into first allowing, and then
16 declining to strike Thowsen's hearsay and double hearsay testimony on direct and cross-examination.

17 The egregious prosecutorial misconduct of ADA Kephart and DiGiacomo's frauds on the
18 court was waived as an appealable issue by the failure of Petitioner's counsel to object that Kephart
19 lied repeatedly on the record to Judge Vega so she would rule favorably for the prosecution
20 regarding Thowsen's hearsay testimony. Likewise, Petitioner's counsel did not object to Kephart's
21 egregious prosecutorial misconduct of suborning perjury from Thowsen on direct examination
22 about his non-existent search for NRS 629.041 reports.

23 The Petitioner was prejudiced because if her counsel had properly objected to Kephart and
24 DiGiacomo's fraud on the court, and Kephart's subornation of perjury, those issues could have
25 been raised in her direct appeal. If they had been raised as an issue the NSC would almost surely
26 have ruled that all of Thowsen's hearsay testimony was prejudicial error and reversed the
27 Petitioner's conviction. For the NSC to have done otherwise would have rewarded the prosecution
28 for Kephart and DiGiacomo's fraudulent misrepresentations to Judge Vega to win favorable rulings

1 about Thowsen's hearsay and double hearsay testimony on direct and cross-examination. And it
2 would have left Kephart subornation of Thowsen's perjury about personally conducting the NRS
3 629.041 searches unpunished and emboldened him to continue freely subverting the administration
4 of justice with the sanction of the Court.

5 The circumstances of ADA Kephart and DiGiacomo's frauds on the court demand a full
6 evidentiary hearing during which all the relevant parties and material witnesses testify. In particular
7 testimony must be obtained from ADA Kephart and Judge Vega about whether and how their
8 relationship while colleagues in the Clark County District Attorney's Office influenced her to
9 tolerate and condone Kephart's multiple lies to her about Thowsen's hearsay testimony, and the
10 influence that relationship had on her decision to deny the motion of Petitioner's counsel to strike
11 Thowsen's hearsay testimony. The testimony of Kephart, DiGiacomo, and Vega as material
12 witnesses, and her court personnel, will also reveal what unrecorded *ex parte* communications
13 occurred between them during Petitioner's trial concerning Thowsen's hearsay testimony.

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

16 **(aaa) Ground fifty-three.**

17 Petitioner was denied effective assistance of counsel in violation of the Nevada
18 Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by
19 counsel's objectively unreasonable failure to use available information to cross-
20 examine LVMPD Detective Thomas Thowsen about his false and possibly
21 perjurious testimony about comments he alleged the Petitioner made about the
22 holding cell she was in at the Clark County Detention Center after her arrest on July
23 20, 2001, and to object to the prosecution's false statements about Thowsen's
24 testimony during closing and rebuttal arguments, and if the jury had known
25 Thowsen's testimony was false and possibly perjurious, and the prosecution's
26 arguments were false statements about Thowsen's testimony, individually or
27 cumulative with other evidence, no reasonable juror could have found the Petitioner
28 guilty beyond a reasonable doubt, under the standards established by the state and
federal constitutional rights of the Petitioner to due process of law and a fair trial.

25 Facts:

26 To try and tie the Petitioner to Bailey's murder the prosecution argued to the jury that while
27 the Petitioner was in a Clark County Detention Center cell after her arrest on July 20, 2001, she
28

EXHIBIT

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1 **(tt) Ground forty-six.**

2 Petitioner was denied effective assistance of counsel in violation of the Nevada
3 Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by
4 counsel's objectively unreasonable failure to argue the Petitioner's alibi witness
5 testimony was trustworthy and admissible in the interests of justice under state and
6 federal exceptions to the hearsay rule and that Detective Thomas Thowsen opened
7 the door to its admittance when he cast doubt on the Petitioner's credibility and
8 truthfulness by his opinion testimony that she "minimized" and "jumbled" details in
9 her July 20, 2001, Statement by describing that "over a month ago" she fought off a
10 sexual assault at the Budget Suites Hotel by attempting once to cut her attacker's
11 penis, and Thowsen *de facto* called her a liar and guilty when he testified it "didn't
12 happen there", and the alibi testimony rebuts Thowsen's opinion testimony as not
13 being credible, or in the alternative, the alibi testimony was admissible in the
14 interests of justice under state and federal exceptions to the hearsay rule because the
15 foundation of the prosecution's case and argument to the jury was the assumption
16 the Petitioner was not credible and not truthful in her Statement about when, where,
17 and what type of attack occurred, and the Petitioner's alibi testimony establishes the
18 Petitioner was credible and truthful in her Statement, and if the jury had heard
19 Petitioner's alibi testimony, individually or cumulative with other evidence, no
20 reasonable juror could have found the Petitioner guilty beyond a reasonable doubt,
21 under the standards established by the state and federal constitutional rights of the
22 Petitioner to due process of law and a fair trial.

23 Facts:

24 Las Vegas Metropolitan Police homicide Detectives Thomas Thowsen and James
25 LaRochelle audio recorded the Petitioner's Statement on July 20, 2001. The Petitioner described
26 being sexually assaulted "over a month ago" around or after midnight in the parking lot of a
27 Budget Suites Hotel on Boulder Highway in east Las Vegas, and she escaped from her assailant
28 after attempting once to cut his exposed penis. That means the assault described in the Petitioner's
Statement occurred prior to June 20, 2001, which was weeks before Duran Bailey's murder.

There are at least 40 specific details in the Petitioner's Statement that don't match the details of
Bailey's murder. (See Exhibit 85, Forty differences between Petitioner's Statement and Bailey's
murder.) Likewise, her Statement doesn't identify a single landmark at or around the scene of Bailey's
murder. (See Exhibit 84, Landmarks around the Budget Suites Hotel and the Nevada State Bank.) The
information in Exhibits 84 and 85 was only partially introduced at trial. Thowsen explained away all
the details in Petitioner's Statement that did not match Bailey's murder, including when, where and
what occurred during her assault, and her description of her assailant who she said was alive when she

1 escaped, by testifying the Petitioner “jumbled” the attacks many details to “minimize” her involvement,
2 and thus she was not truthful in her Statement. (8 App. 1387-1388; Trans. XIII–69-71 (9-27-06)), and
3 Thowsen also testified that he didn’t look for any witnesses at the Budget Suites Hotel where Petitioner
4 describes the assault took place, because “there’s no sense looking for a witness to something that we
5 know didn’t happen there. We know it happened on West Flamingo.” (8 App., 1410; Trans. XIII-159
6 (9-27-2006)) Thowsen’s opinion testimony de facto branded the Petitioner as a liar and guilty.

7 Thowsen’s testimony was the foundation of the prosecution’s case and argument that the
8 Petitioner was not truthful or credible in her Statement’s description of the incident, and that it was
9 actually about Duran Bailey’s murder and post-mortem cutting of his rectum at the Nevada State
10 Bank’s trash enclosure in west Las Vegas.

11 When Petitioner’s counsel sought to have prosecution witness Stephen Pyszkowski testify
12 on cross-examination about his knowledge that Petitioner repelled a sexual assault by trying to cut
13 her attacker’s penis more than month before Bailey’s murder, the prosecution’s hearsay objection
14 was sustained. (6 App. 1089; Trans. VI-27 (9-18-06)) When Petitioner’s counsel sought to have
15 defense witness Heather McBride testify that prior to July 4, 2001, Petitioner told her about
16 fighting off a sexual assault in Las Vegas by cutting her attacker’s penis, the prosecution’s hearsay
17 objection was sustained. (8 App. 1525-26, 1528-29; Trans. XVI-60, 62, 64, 73 (10-2-06))

18 Petitioner’s counsel did not argue that Thowsen’s testimony opened the door to admission
19 of the alibi witness testimony in the interests of justice under both state and federal hearsay
20 exceptions based on one or more of the following:

- 21 1. The alibi witnesses would have been testifying about Petitioner’s **credibility** in
22 describing a rape attempt in her statement that happened prior to July 8, 2001.
- 23 2. To **rebut** Thowsen’s opinion testimony the Petitioner was not credible and had not been
24 truthful in her statement by describing that the rape attempt happened prior to July 8, 2001.
- 25 3. To **rebut** Thowsen’s opinion testimony as not credible, by establishing the Petitioner was
26 in fact credible and truthful in her statement by describing that the rape attempt happened
27 prior to July 8, 2001.

28 Neither did Petitioner’s counsel argue that the alibi witness testimony was admissible in the
interests of justice under both state and federal hearsay exceptions because the foundation of the
prosecution’s case is the assumption the Petitioner was not credible and not truthful in her

1 Statement about when and where the assault occurred and what happened during it, and that it is a
2 *de facto* confession to Bailey's murder and mutilation. The Petitioner's alibi testimony rebuts the
3 prosecution's claim and establishes the Petitioner is credible and truthful in her Statement
4 describing that the assault occurred prior to July 8, 2001, and other details, and that there is no
5 rational basis on which to believe her Statement is a confession to Bailey's murder.

6 The alibi witness testimony the prosecution objected to and that the jury was barred from
7 hearing was trustworthy and credible testimony corroborating the Petitioner's account in her
8 Statement of fighting off a sexual assault prior to July 8, 2001. Consequently, the Petitioner's
9 testimony would have done nothing to ensure the accuracy or trustworthiness of the alibi witness
10 testimony because it was consistent with the Petitioner's audio taped Statement that was entered
11 into evidence by the prosecution and played in open court for the jury to hear.

12 The Petitioner was prejudiced by her counsel's failure to argue that Thowsen's testimony
13 opened the door to admissibility of the alibi witness testimony on multiple grounds, or in the
14 alternative that the prosecution basing its case on the assumption the Petitioner was not truthful and
15 not credible in her Statement created the special circumstance that in the interests of justice her alibi
16 witness testimony was admissible to establish that the Petitioner was truthful and credible in her
17 Statement. The magnitude of that prejudice is demonstrated by the fact the Petitioner knows of at
18 least nine alibi witnesses who have personal knowledge the Petitioner told them prior to July 8, 2001,
19 that she fought off a sexual assault in east Las Vegas by trying one time to cut her attacker's penis.
20 Those nine witnesses are Steve Pyszkowski (Exhibit 11, Affidavit of Stephen William Pyszkowski.);
21 Heather McBride (Exhibit 13, Affidavit of Heather Michelle McBride.); Cathy Reiningger (Exhibit
22 19, Affidavit of Catherine Ann Reiningger.); Michele Austria (Exhibit 12, Affidavit of Michele Dawn
23 Austria.); Dixie Tienken (Exhibit 14, Affidavit of Dixie Tienken.); Daniel Lisoni (Exhibit 17,
24 Affidavit of Daniel Lewis (Louis) Lisoni.); Kimberlee Grindstaff (Exhibit 15, Affidavit of Kimberlee
25 Isom Grindstaff.); Chris Collier (Exhibit 18, Statement of Chris Collier and Declaration of Shari
26 White.); and Doug Twining (See Exhibit 10, Voluntary Statement of Douglas Howell Twining.).

27 None of these alibi witnesses are related to the Petitioner, they have not kept in contact with
28 Petitioner, and several now live in such diverse places as Hawaii and New Mexico. Some of the alibi

1 witnesses lived in Panaca and some in Las Vegas in June and July 2001, and some of them don't
2 know each other. The only common denominator between the alibi witnesses is that prior to July 8,
3 2001, the Petitioner told each of them she fought off a sexual assault in Las Vegas by trying to cut
4 her assailant's penis. It stretches credulity to not believe that such a large number of witnesses who
5 are non-relatives and who have been out of contact with the Petitioner for many years are not being
6 truthful, in providing evidence consistent with what the testimony of Pyszkowski and McBride would
7 have been at trial if Petitioner's counsel had successfully countered the prosecution's objections to
8 their testimony. And all these alibi witnesses provide new alibi evidence that is consistent with the
9 Petitioner's Statement of July 20, 2001, and what the alibi testimony of Pyszkowski and McBride
10 would have been at trial. The purpose of the hearsay rule is to filter out unreliable testimony. There is
11 no basis to believe the new alibi witness testimony is unreliable.

12 The prosecution wanted their cake and to eat it too by presenting Detective Thowsen's
13 opinion testimony that the Petitioner was not credible and not truthful in her July 20, 2001,
14 Statement due to "minimizing" and "jumbling" when she described fighting off a sexual assault at
15 the Budget Suites Hotel "over a month ago," and that it "didn't happen there," and then objecting
16 to the Petitioner presenting alibi witnesses to rebut the credibility of Thowsen's claim, and to
17 further establish that she was credible and truthful in her Statement. The prosecution also wanted
18 their cake and to eat it to by basing their case on the assumption the Petitioner's Statement is a *de*
19 *facto* confession to Bailey's murder and mutilation, and then objecting to the Petitioner presenting
20 alibi witnesses to rebut the prosecution's claim and establish that she was credible and truthful in
21 her Statement that the assault she describes in it occurred weeks prior to Bailey's murder.

22 The Petitioner's counsel allowed the prosecution to have their cake and eat it too by failing
23 to argue for the admissibility of Petitioner's alibi testimony on the proper grounds. The Petitioner
24 was grievously prejudiced because if the jury had heard the alibi witness testimony they would
25 have had a factual basis to believe Thowsen's testimony was not credible, and no reasonable juror
26 could have found the Petitioner guilty beyond a reasonable doubt.

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

EXHIBIT

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1 any time on July 8, the jury could only have relied on the prosecution’s speculation that the
2 Petitioner was at the scene of Bailey’s murder, or that she committed her convicted crimes. An
3 essential element of the Petitioner’s convicted crimes was that she was at the scene of the crime.
4 Since no evidence was presented by the prosecution, only speculation and speculative inferences,
5 that Petitioner was even in Clark County at the time of Duran Bailey’s murder, there is not
6 evidence beyond a reasonable doubt that she committed her convicted crimes.

7 With no substantive evidence the prosecution met its legal burden of proving beyond a
8 reasonable doubt the essential element the Petitioner was in Clark County and present at the scene
9 of Bailey’s Las Vegas murder, Petitioner’s counsel was legally obligated to make a motion to the
10 court under NRS 175.381(1) for the court to advise the jury to acquit the Petitioner at the close of
11 the prosecution’s case in chief, again at the close of the defense’s case in chief, and again after the
12 close of the prosecution’s rebuttal evidence. The failure of Petitioner’s counsel to do so prejudiced
13 her state and federal rights to due process and a fair trial.

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

16 **(hhh) Ground sixty.**

17 Petitioner was denied effective assistance of counsel in violation of the Nevada
18 Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by
19 counsel’s objectively unreasonable failure to object to jury instructions 26 and 33
20 which unconstitutionally alter the prosecution’s burden of proving beyond a
21 reasonable doubt Petitioner’s guilt of every element of each charge beyond a
22 reasonable doubt by empowering the jury to choose between the Petitioner’s “guilt
23 or innocence”, and which unconstitutionally alter the Petitioner’s presumption of
24 innocence by imposing a presumption of guilt that she must rebut by proving her
25 “innocence” to the jury’s satisfaction or be convicted, and determination of the
26 Petitioner’s “guilt or innocence” was left for the jury to decide by a standard of
27 proof of their choosing in jury instruction 26, which could be the civil standard of a
28 preponderance of the evidence, and consequently counsel’s failure to object to jury
instructions 26 and 33 individually and cumulatively prejudiced the Petitioner’s
state and federal constitutional rights to an impartial jury, due process of law and a
fair trial.

26 Facts:

27 The prosecution’s burden under the Nevada Constitution and the Fifth Amendment to the
28

1 U.S. Constitution was to prove the Petitioner’s guilt of every element of each charge beyond a
2 reasonable doubt. The Petitioner has no constitutional obligation to present any evidence, because
3 she is presumed legally innocent of her accused crimes until proven guilty of every element of each
4 charge beyond a reasonable doubt.

5 Jury instructions 33 and 26 alter the relationship between the prosecution’s burden of proof
6 and the Petitioner’s presumption of innocence by placing a burden on the Petitioner to prove her
7 “innocence.” Jury instruction 33 specifically instructs the jury, “You are here to determine the **guilt**
8 **or innocence** of the Defendant from the evidence in the case.” (See Exhibit 80, Jury Instruction
9 33.) Jury instruction 26 instructs the jury, “The flight of a person immediately after the commission
10 of a crime, or after she is accused of a crime, is not sufficient in itself to establish her guilt, but is a
11 fact which, if proved, may be considered by you in light of all other proved facts in deciding the
12 question of her **guilt or innocence.**” (See Exhibit 78, Jury Instruction 26.)

13 Contrary to the specific instruction of the trial court to Petitioner’s jurors in instructions 26
14 and 33, Petitioner’s jurors had no lawful role in deciding the Petitioner’s “innocence.” Jury
15 instructions 26 and 33 emasculated Petitioner’s presumption of innocence and imposed a legal
16 obligation on her to prove her “innocence” to the jury’s satisfaction. Furthermore, Petitioner’s
17 jurors were instructed in instruction 33 to determine the “innocence of the Defendant from the
18 evidence in the case.” If the Petitioner did not present evidence during her defense proving her
19 “innocence” to the satisfaction of the jurors, the jury could weigh that against Petitioner in favor of
20 the prosecution, and rely on that to support their determination of her “guilt.” Under the court’s
21 mandate in instruction 33, the jury was able to consider the Petitioner not testifying as evidence of
22 her guilt – irrespective of any conflicting instruction.

23 Jury instructions 26 and 33 also relieved the prosecution of its burden of proving the
24 Petitioner’s guilt of every essential element of each charge by simply requiring she be found “guilty.”
25 Instruction 26 went beyond that by allowing the jury to determine the Petitioner’s “guilt” by a standard
26 of proof of the jury’s choosing, which could be the civil standard of a preponderance of the evidence, or
27 drawing straws, or reliance on a reading of Tarot cards, or even a coin toss. Jury instruction 26 literally
28 allowed the jury to convict the Petitioner if the prosecution had immediately rested and presented NO

1 evidence, and the Petitioner did not present evidence of her “innocence” sufficient to satisfy the jurors.
2 With the court’s blessing the jurors’ could interpret the mere fact of the charges against Petitioner as
3 sufficient proof to find her guilty based on the adage that “where there is smoke there must be fire.”
4 Consequently jury instructions 26 and 33 fundamentally altered the relationship between the State and
5 the Petitioner by creating a heretofore unknown legal burden on her to establish her innocence, while at
6 the same time lessening or eliminating the State’s burden of proof.

7 The Petitioner was prejudiced by her counsel failure to object to jury instructions 26 and 33.
8 Jury instructions 26 and 33 fundamentally altered the relationship between the State and the Petitioner
9 by creating a heretofore unknown legal burden on her to establish her innocence, while at the same time
10 lessening the State’s burden of proving her guilty beyond a reasonable doubt. Under the theory that all
11 instructions carry equal weight, there is no way to know if the jury applied the juror optional proof
12 standard of instruction 26 or the slightly more demanding standard of instruction 33 to find that the
13 Petitioner had not proven her “innocence” to jury’s satisfaction in voting her guilty. What is known is
14 that under the court’s mandate of instruction 26 and 33 the Petitioner’s “presumption of innocence”
15 was eliminated and it was left for the jury to determine the standard of proof they used to find the
16 Petitioner guilty, and not proof of her guilt beyond a reasonable doubt as required by the Nevada
17 Constitution and the due process clause of the Fifth Amendment to the U.S. Constitution.

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

20 **(iii) Ground sixty-one.**

21 Petitioner was denied effective assistance of counsel in violation of the Nevada
22 Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by
23 counsel’s objectively unreasonable failure to object to jury instruction 31 that includes
24 “the more weighty affairs of life” as the “reasonable doubt” standard for the jury to
25 follow, which is similar to wording rejected by the Ninth Circuit Court of Appeals,
26 and jury instruction 31 is a combined “reasonable doubt,” “burden of proof” and
27 “presumption of innocence” instruction that is fatally compromised and modified by
28 jury instructions 26 and 33, which eliminate the Petitioner’s presumption of innocence
and also eliminate the prosecution’s burden of proving the Petitioner’s guilt of every
essential element of each charge beyond a reasonable doubt, and consequently
counsel’s failure to object to jury instruction 31, individually and cumulatively with
instructions 26 and 33 prejudiced the state and federal constitutional rights of the
Petitioner to an impartial jury, due process of law and a fair trial.

EXHIBIT

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1 evidence, and the Petitioner did not present evidence of her “innocence” sufficient to satisfy the jurors.
2 With the court’s blessing the jurors’ could interpret the mere fact of the charges against Petitioner as
3 sufficient proof to find her guilty based on the adage that “where there is smoke there must be fire.”
4 Consequently jury instructions 26 and 33 fundamentally altered the relationship between the State and
5 the Petitioner by creating a heretofore unknown legal burden on her to establish her innocence, while at
6 the same time lessening or eliminating the State’s burden of proof.

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13 Petitioner had not proven her “innocence” to jury’s satisfaction in voting her guilty. What is known is
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Facts:

The prosecution’s burden under the Nevada Constitution and the Fifth Amendment to the U.S. Constitution was to prove the Petitioner’s guilt of every element of each charge beyond a reasonable doubt. The Petitioner has no constitutional obligation to present any evidence because she is presumed legally innocent of her accused crimes until proven guilty of every element of each charge beyond a reasonable doubt.

Petitioner’s jury instruction 31 reads in part: “A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life.” (See Exhibit 79, Jury Instruction 31.)

Concerns that the prosecution’s burden of proof was diminished by instructions such as “the more weighty affairs of life” wording in jury instruction 31, led the federal Ninth Circuit Court of Appeals to abandon its similar model jury instruction to find the defendant guilty only if “you find the evidence so convincing that an ordinary person would be willing to make the most important decisions in his or her own life on the basis of such evidence.” (See Exhibit 81, Ninth Circuit 3.5 Reasonable Doubt – Defined.) The rationale for rejecting that instruction is the “most important decisions in life—choosing a spouse, buying a house, borrowing money, and the like—may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases.” (See Exhibit 81, Ninth Circuit 3.5 Reasonable Doubt – Defined.) The Ninth Circuit determined jury instructions with wording such as Petitioner’s jury instruction 31 – “the more weighty affairs of life” – reduce the jury to deciding the Petitioner’s fate by calculating odds like the jurors would do if they were playing a game of craps, or poker or blackjack in a Las Vegas casino, and not by the infinitely higher required legal standard of proof beyond a reasonable doubt.

The jury instructions about the prosecution’s “burden of proof” and the Petitioner’s “presumption of innocence” were included with the “reasonable doubt” instruction in jury instruction 31. The combining of the “reasonable doubt,” “burden of proof” and “presumption of innocence” instructions in jury instruction 31 diminished the individual importance of all three instructions, particularly considering that jury instruction 31 was compromised and modified by jury instructions 26

1 and 33. Jury instructions 26 and 33 alter the relationship between the prosecution’s burden of proof and
2 the Petitioner by placing a burden on the Petitioner to prove her “innocence,” while reducing the
3 prosecution’s burden to merely proving Petitioner’s “guilt,” and instruction 26 authorized the jury to
4 find the Petitioner guilty by a standard of each juror’s choosing, or the jury collectively.

5 Jury instruction 33 specifically informs the jury, “You are here to determine the **guilt or**
6 **innocence** of the Defendant from the evidence in the case.” (See Exhibit 80, Jury Instruction 33.)
7 While Jury Instruction 26 informs the jury, “The flight of a person immediately after the
8 commission of a crime, or after she is accused of a crime, is not sufficient in itself to establish her
9 guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in
10 deciding the question of her **guilt or innocence.**” (See Exhibit 78, Jury Instruction 26.)

11 Contrary to the specific instruction of the trial court to Petitioner’s jurors in instructions 26
12 and 33, Petitioner’s jurors had no lawful role in deciding the Petitioner’s “innocence.” Jury
13 instructions 26 and 33 emasculated Petitioner’s presumption of innocence and imposed a legal
14 obligation on her to prove her “innocence” to the jury’s satisfaction. Furthermore, Petitioner’s
15 jurors were instructed in instruction 33 to determine the “innocence of the Defendant from the
16 evidence in the case.” If the Petitioner did not present evidence during her defense proving her
17 “innocence” to the satisfaction of the jurors, the jury could weigh that against Petitioner in favor of
18 the prosecution and rely on that to support their determination of her “guilt.” Under the court’s
19 mandate in instruction 33 the jury was able to consider the Petitioner not testifying as evidence of
20 her guilt – irrespective of any conflicting instruction.

21 Jury instruction 26 and 33 also relieved the prosecution of its burden of proving the Petitioner’s
22 guilty of every essential element of each charge by simply requiring she be found “guilty.” Instruction
23 26 went beyond that by allowing the jury to determine the Petitioner’s “guilt” by a standard of proof of
24 the jury’s choosing, which could be the civil standard of a preponderance of the evidence, or drawing
25 straws, or reliance on a reading of Tarot cards, or even a coin toss. Jury instruction 26 literally allowed
26 the jury to convict the Petitioner if the prosecution had immediately rested and presented NO evidence,
27 and the Petitioner did not present evidence of her “innocence” sufficient to satisfy the jurors. With the
28 court’s blessing the jurors’ could interpret the mere fact of the charges against Petitioner as sufficient

1 proof to find her guilty based on the adage that “where there is smoke there must be fire.” Consequently
2 jury instructions 26 and 33 fundamentally altered the relationship between the State and the Petitioner,
3 by creating a heretofore unknown legal burden on her to establish her innocence, while at the same time
4 reducing or eliminating the State’s burden of proof.

5 The Petitioner was prejudiced by her counsel failure to object to jury instruction 31. The
6 instruction not only has the deficient “the more weighty affairs of life” reasonable doubt wording, but it
7 combines the instructions for “reasonable doubt,” “burden of proof” and “presumption of innocence.”
8 So the combined instruction 31 has no more weight than any conflicting instruction, and it was up to
9 the jurors to decide which instruction to give more weight in their deliberations. Taken together jury
10 instructions 26, 31 and 33 present a confusing and contradictory maze for the jury to interpret. Under
11 the theory that all instructions carry equal weight, there is no way to know if the jury applied the jury
12 optional proof standard of instruction 26 or the slightly more demanding standard of instruction 33 to
13 find that the Petitioner did not prove her “innocence” to their satisfaction, or if they applied the Vegas
14 crap table “reasonable doubt” standard of instruction 31 to find the Petitioner guilty. What is known is
15 that under the court’s mandate it was left for the jury to determine the standard of proof they used to
16 find the Petitioner guilty, and not proof of her guilt beyond a reasonable doubt as required by the
17 Nevada Constitution and the Fifth Amendment to the U.S. Constitution.

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

20 **(jjj) Ground sixty-two.**

21 Petitioner’s counsel was ineffective under the Nevada Constitution and the Sixth
22 Amendment to the U.S. Constitution for failing to submit a jury instruction that an
23 essential element of Nevada’s necrophilia law, NRS 201.450, is the prosecution had
24 to introduce evidence beyond a reasonable doubt the Petitioner engaged in sexual
25 activity with Duran Bailey’s corpse that would be considered sexual activity with a
26 life person, because according to the Nevada Legislature’s legislative intent in
27 enacting NRS 201.450, a sexual assault under that statute must be considered a
28 sexual assault if committed with a live person, and counsel’s failure to submit a jury
instruction prejudiced the state and federal constitutional rights of the Petitioner to
due process of law and a fair trial, because after consideration of that instruction no
reasonable juror could have found the Petitioner guilty beyond a reasonable doubt of
violating NRS 201.450.

EXHIBIT

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1 against the Petitioner has no basis in fact emphasizes the prejudice to the Petitioner by her counsel's
2 failure to raise the proper argument in her direct appeal to the Nevada Supreme Court that the
3 evidence is insufficient because the Petitioner's case is based on the prosecution's speculative
4 inferences of where she was on July 8, 2001, and what she did, and not actual evidence.

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

7 **(www) Ground seventy-five.**

8 Petitioner was denied effective assistance of counsel in violation of the Nevada
9 Constitution and the Sixth Amendment to the U.S. Constitution, and prejudiced by
10 counsel's objectively unreasonable failure in Argument H-1 of Petitioner's direct
11 appeal to the Nevada Supreme Court to correctly brief and argue to the Court that
12 Judge Valorie Vega abused her discretion by misapplying the "law of the case"
13 doctrine in denying the Petitioner's motion *in limine* to exclude as evidence her
14 Statement on July 20, 2001, and a prior comment, and if Petitioner's counsel had
15 correctly briefed and argued the proper application of "law of the court" to the
16 circumstances of the Petitioner's Statement and her retrial, Petitioner's conviction
17 would have been vacated by the Court and remanded with appropriate instructions.

14 Facts:

15 LVMPD Detectives Thomas Thowsen and James LaRochelle, and Crime Scene Analyst
16 Maria Thomas drove from Las Vegas to Panaca on the afternoon of July 20, 2001, to arrest the
17 Petitioner for the murder of Duran Bailey on July 8, 2001. The decision to arrest the 18-year-old
18 Petitioner was based on a telephone conversation on July 20 between Thowsen and Lincoln County
19 Juvenile Probation Officer Laura Johnson. Johnson told Thowsen she had been told by her friend
20 Dixie Tienken, that Tienken had been told by a former student of hers that she had fought off a
21 rape attempt in Las Vegas by cutting once at her attacker's penis.

22 After arriving in Lincoln County the detectives obtained Johnson's statement, although they
23 made no effort to contact Tienken to corroborate Johnson's account. They then arranged to have a
24 tow truck transport the Petitioner's car to the LVMPD crime lab in Las Vegas for examination, and
25 a Lincoln County Sheriff's deputy led the detectives and Thomas to where the Petitioner was living
26 at her parents' house.

1 Immediately after introducing himself, Thowsen told the Petitioner that he knew she had
2 been hurt in the past. (The Petitioner had been repeatedly raped when she was five and six by her
3 mother's boyfriend.) The Petitioner immediately began to cry and became very emotional. While
4 she was crying and in her emotional state Thowsen had the Petitioner sign a *Miranda* waiver and
5 he proceeded to question her for about 30 minutes in an audio taped Statement, during which the
6 Petitioner remained very emotional. (Det. LaRoche asked several questions toward the end.) In
7 her Statement the Petitioner described a rape attempt at the Budget Suites Hotel in east Las Vegas
8 near Sam's Town Casino that she fought off by attempting once to cut her attacker's penis. She
9 described her assailant as alive and crying when she was able to escape in her car. Since her
10 Statement was on July 20, 2001, the sexual assault she identified as happening "over a month ago"
11 occurred prior to June 20, which was weeks before Bailey's July 8 murder. When shown a picture
12 of Bailey the Petitioner didn't recognize him.

13 There is not a single specific detail about the attempted rape described in the Petitioner's
14 Statement that matches the specific details of Bailey's murder in a west Las Vegas bank's trash
15 enclosure. While she says she tried once to cut her live attacker's penis before escaping, Bailey's
16 Autopsy Report lists 31 separate ante-mortem and post-mortem external injuries, and numerous
17 internal injuries, and her description of her attacker as "huge" bears no resemblance to the very
18 skinny Bailey who weighed less than 140 pounds. (See Exhibit 85, 40 significant differences
19 between Bailey's murder and Petitioner's Statement.) Furthermore, the Arrest Report written the
20 day of the Petitioner's arrest does not allege she confessed to Bailey's murder either in her
21 Statement or at any time to the detectives off-tape, and she did not sign any document confessing to
22 the crime.

23 On August 9, 2001, the Petitioner was charged with Bailey's first degree murder and the
24 sexual penetration of his dead body (cutting his rectum after his death).

25 On the third day of the Petitioner's trial in May 2002, the prosecution intended to introduce
26 the Petitioner's Statement into evidence during Thowsen's testimony. The prosecution requested a
27 voluntariness hearing to get a ruling on her Statement's admissibility. The hearing was held outside
28 the presence of the jury.

1 After Thowsen completed his direct and cross-examination about the circumstances of the
2 Petitioner giving her Statement and making a comment prior to the Statement, Petitioner's then
3 counsel made his argument for their exclusion that was transcribed into about one full page. His
4 argument was based on: "I believe that this statement is the product of overbearing and it is not free
5 and voluntary." (Trans. III-18 (5-10-02)) The prosecution's counter argument was transcribed into
6 less than one page. Neither Petitioner's counsel nor the prosecution filed a brief or cited any case
7 law supporting their respective arguments, or introduced expert psychology testimony about the
8 effect Thowsen's sadistic psychological torture like tactic of using the Petitioner's childhood rapes
9 against her had on her ability to make a knowing, intelligent and voluntary waiver of her
10 Constitutional rights to remain silent, and to consult with an attorney before talking with the
11 detectives. Instead both Petitioners' counsel and the prosecution gave very brief unprepared off-
12 the-cuff arguments.

13 Judge Valorie Vega immediately and summarily ruled the Petitioner's Statement was
14 admissible. (Trans. III-20 (5-10-02)) If you blinked you practically would have missed the hearing,
15 because only a couple of minutes passed from when the Petitioner's counsel began his argument to
16 when Judge Vegas issued her ruling. And this abbreviated lightning fast hearing was for the most
17 important evidence in the Petitioner's case, and without which there would likely be no prosecution
18 of the Petitioner.

19 During the Petitioner's trial Medical Examiner Lary Simms testified that after Bailey died
20 his penis was amputated. The prosecution then relied on Thowsen's testimony to characterize the
21 Petitioner's Statement as a confession to Bailey's murder, because she described fighting off her
22 would be rapist by trying once to cut his penis. Thowsen admitted on cross-examination that he
23 deliberately used the Petitioner's childhood victimization against her that immediately evoked a
24 very emotional response. (Trans. III-12-13 (5-10-2002)) Thowsen's testimony about the
25 Petitioner's Statement and her comment before it was indispensable for the prosecution to secure
26 the Petitioner's conviction, because the prosecution did not introduce any physical, forensic,
27 medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8,
28

1 2001, the Petitioner had been anywhere in Clark County, Nevada – much less that she was at the
2 Las Vegas scene of Bailey’s murder at the exact time it occurred.

3 The Petitioner’s conviction was overturned on direct appeal by the Nevada Supreme Court
4 based on evidentiary errors by Judge Vega. (*Lobato v. State*, 96 P.3d 765 (Nev. 09/03/2004)) If it
5 had not been overturned and the Petitioner had to file a habeas corpus petition, an important claim
6 of ineffective assistance of counsel would have been her counsel’s complete lack of effort to
7 exclude her Statement, which had the consequence that Judge Vega made her ruling admitting the
8 Petitioner’s Statement without actually having any case law or legal arguments or expert testimony
9 to base her ruling on. The Petitioner’s Statement was the centerpiece of the prosecution’s case, but
10 it was literally admitted as evidence by default due to her counsel’s ineffective representation or
11 her interests regarding exclusion of her Statement and related comments. In fact, there would have
12 been no hearing about the admissibility of the Petitioner’s Statement if the prosecution had not
13 requested it to ensure her conviction wouldn’t be overturned on appeal due to the lack of a hearing.

14 Prior to Petitioner’s second trial her new counsel filed a “Motion In Limine To Exclude
15 Statements Made By Ms. Lobato” that was 32-pages long, and extensively cited case law. The
16 Motion stated in part:

17 “The defense moves to exclude all evidence relating to the July 20, 2001,
18 interrogation of Ms. Lobato at her home by Detectives Thomas Thowsen, Jim
19 LaRochelle and Sergeant Carey Lee. The information derived from that
20 interrogation fails on three respects.

21 First, her statements made before a Miranda waiver was obtained was allegedly
22 made are nevertheless a result of interrogation as they are the product of
23 psychological ploy utilized by the detectives.

24 Second, the alleged Miranda waiver Ms. Lobato was not voluntarily given, as
25 the officer's psychological ploy combined with her existing mental state rendered
26 her incapable to give a voluntary waiver.

27 Third, any statements made by Ms. Lobato are irrelevant because she was
28 speaking of a different occurrence than the July 8, 2001, death of Duran Bailey.”

State v. Lobato, No. C177394, District Court, Clark County, Nevada, “Motion In
Limine To Exclude Statements Made By Ms. Lobato During The Course Of The
July 20, 2001 Interrogation.”

1 During the motions hearing on May 19, 2006, Judge Vega did not consider the merits of the
2 Motion. She summarily denied it ruling, “The prior hearing and ruling is law of the case.” *State v.*
3 *Lobato*, No. C177394, District Court, Clark County, Nevada, “Hearing Of All Pending Motions.”

4 During the Petitioner’s retrial Medical Examiner Lary Simms testified that after Bailey died
5 his penis was amputated. The prosecution then relied on Thowsen’s testimony to characterize the
6 Petitioner’s Statement as a confession to Bailey’s murder, because she described fighting off her
7 would be rapist by trying once to cut his penis. Thowsen admitted on cross-examination that he
8 deliberately used the Petitioner’s childhood victimization against her that immediately evoked a
9 very emotional response. (Trans. XIII-93-94 (09-27-06)) Thowsen’s testimony about the
10 Petitioner’s Statement and her comment before it was indispensable for the prosecution to secure
11 the Petitioner’s conviction, because the prosecution did not introduce any physical, forensic,
12 medical, eyewitness, documentary, surveillance or confession evidence that at any time on July 8,
13 2001, the Petitioner had been anywhere in Clark County, Nevada – much less that she was at the
14 Las Vegas scene of Bailey’s murder at the exact time it occurred.

15 The Petitioner’s appellate counsel did make an Argument in her direct appeal that the
16 Petitioner’s Statement should have been suppressed as evidence. (*Lobato v. State*, No. 49087,
17 Supreme Court of Nevada, Appellant's Opening Brief, 12-26-2007, (Argument H-1: “Lobato’s
18 statements to detectives on July 20, 2001, were not voluntary and should have been suppressed
19 from use as evidence,” 42-46.)) However, Argument H-1 did not raise the critical issue that Judge
20 Vega abused her discretion by misapplying the “law of the case” doctrine in denying the
21 Petitioner’s “Motion In Limine To Exclude Statements Made By Ms. Lobato”, because there had
22 been no briefing of case law, expert testimony, or argument, or any consideration whatsoever of the
23 complex legal, psychological and ethical issues involved in admission of the Petitioner’s Statement
24 and a related comment, during the hearing on May 10, 2002, and therefore that ruling was not
25 binding for the Petitioner’s retrial. In fact, from Petitioner’s counsel beginning his argument to
26 Vega making her ruling only takes up about three transcript pages, and part of that is taken up by
27 questioning of Thowsen by Petitioner’s then counsel. (Trans. III-17-20 (5-10-02)) The May 2002
28 hearing was a lightning fast “slam-bang-thank-you ma’am” proceeding about the single most

1 important evidentiary issue in the Petitioner’s case. And because Judge Vega blindly relied on that
2 hasty ruling as the “law of the case,” admission of the Petitioner’s Statement was an automatic
3 “gimme” for the prosecution in the Petitioner’s second trial without them even having to take a
4 deep breath.

5 The Petitioner was gravely prejudiced by her appellate counsel’s failure to properly brief
6 and argue in Argument H-1 that Judge Vega’s May 10, 2002, ruling on the admissibility of the
7 Petitioner’s Statement and her comment preceding it was not binding as the “law of the case” for
8 the Petitioner’s retrial, and that Judge Vega abused her discretion by misapplying the “law of the
9 case” doctrine. If there has ever been an issue in a criminal case that demands a full evidentiary
10 hearing, it is one to determine the admissibility of the Petitioner’s Statement and a comment
11 elicited by Thowsen after his sadistic psychological torture like use of her childhood rapes against
12 her that he relied on to obtain a waiver of her Constitutional rights to remain silent and to consult
13 with an attorney, in order to get her to talk to him.

14 If Petitioner’s counsel had properly briefed and argued Argument H-1, it would have
15 requested that the Court rule Judge Vega’s May 10, 2002, ruling was not the “law of the case”, and
16 that the Court vacate the Petitioner’s conviction and remand with appropriate instructions that if the
17 prosecution sought to use the Petitioner’s Statement in a retrial that a full voluntariness evidentiary
18 hearing would have to be conducted.

19 Without admission of the Petitioner’s Statement that the prosecution argued directly and
20 indirectly was a *de facto* confession to Bailey’s murder and the post-mortem cutting of his rectum,
21 no reasonable juror could find the Petitioner guilty beyond a reasonable doubt. And beyond that,
22 without admission of the Petitioner’s Statement there is a strong likelihood the prosecution would
23 dismiss the charges without a retrial due to a lack of evidence.

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