DISTRICT COURT
CLARK COUNTY, NEVADA

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STATE OF NEVADA, Plaintiff, v. KIRSTIN BLAISE LOBATO Defendant.	CASE NO.: C177394 DEPARTMENT XXIII **DECISION & ORDER**

I. INTRODUCTION

This matter was last before the Court from October 9, 2017 to October 13, 2017 for an evidentiary hearing pursuant to Defendant's post-conviction Petition for Writ of Habeas Corpus and the State's Response thereto. Defendant was represented by David Chesnoff, Esq., Robert Z. Demarco, Esq., Vanessa Potkin, Esq., Adnan Sultan, Esq., and Jane Pucher, Esq. The State was represented by Deputy District Attorney Sandra DiGiacomo, Esq.

Defendant's original petition set forth several claims of ineffective assistance of counsel. These claims included allegations that due to Defendant's strong alibi evidence, Defendant's counsel was deficient for failing to narrow Duran Bailey's ("Decedent") time of death. On November 23, 2016, the Nevada Supreme Court remanded Defendant's petition and concluded that Defendant "made specific factual allegations that are not belied by the record and that, if true, suggest a reasonable probability that had counsel investigated and presented expert evidence that narrowed the time of death, the jury would have had a reasonable doubt as to [Defendant's] guilt." *Supreme Court of*

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Nevada's Order Affirming in Part, Reversing in Part and Remanding (Supreme Court Remand), Case No. 177394, at 7, Filed Dec. 23, 2017.

II. PROCEDURAL BACKGROUND

On August 9, 2001, the State filed an Information charging Defendant with Murder with Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165) and Sexual Penetration of a Dead Human Body (Felony - NRS 201.450). A jury found Defendant guilty of First Degree Murder With Use of a Deadly Weapon and Sexual Penetration of a Dead Human body. The Nevada Supreme Court subsequently reversed Defendant's conviction and remanded the case for a new trial. Remittitur was issued on September 29, 2004.

On October 6, 2006, after a second trial, the jury found Defendant guilty of Voluntary Manslaughter with Use of a Deadly Weapon and Sexual Penetration of a Dead Human Body. On February 14, 2007, the Judgment of Conviction was filed.

On March 12, 2007, Defendant filed a Notice of Appeal. On February 5, 2009, the Nevada Supreme Court affirmed the Judgment of Conviction, and denied Defendant's motions for rehearing and En Banc consideration. The United States Supreme Court denied Defendant's Petition for Writ of Certiorari. Remittitur was issued on October 14, 2009.

On May 5, 2010, Defendant filed a Petition for Writ of Habeas Corpus alleging 79 grounds for relief. On August 20, 2010, the State filed its Response to Defendant's Petition. On October 2, 2010, Defendant filed a Reply. On March 1, 2011, following argument from counsel, the Court denied, without an evidentiary hearing, Defendant's Petition. On June 16, 2011, the Findings of Fact, Conclusions of Law and Order Denying Defendant's Petition was filed. On August 1, 2011, Defendant filed a Notice of

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Appeal. On November 23, 2016, the Nevada Supreme Court issued its Order Affirming in Part, Reversing in Part and Remanding the case back to the Court for an evidentiary hearing on grounds 38 and 40 and for "further proceedings" for the Court to sufficiently consider whether Defendant's claims of actual innocence (1-24 and 78) are cognizable. Remittitur was issued on December 20, 2016.

From October 9, 2017 to October 13, 2017, an evidentiary hearing ("Hearing") was held pursuant to Defendant's post-conviction Petition for Writ of Habeas Corpus, to address the alleged ineffective assistance of Defendant's trial counsel.

III. TESTIMONY

At the Hearing, the Defense presented testimony from David Schieck, Esq, Dr. Andrew Baker, Dr. Jeffrey Tomberlin, Dr. Robert Kimsey, and Dr. Gail Anderson. The State presented testimony from Dr. Rexene Worrell and Dr. Jeffrey Wells. This testimony is as follows.

1. Defense Witnesses

A. David Schieck, Esq.

Mr. Schieck testified that at the time of Defendant's trial, he was working as the Special Public Defender (SPD) in Clark County. (Day 1 at 8)[1]. Mr. Schieck testified that Tony Serra, an experienced criminal defense lawyer, had originally been retained to represent the Defendant. However, because of Serra's own legal obligations, he was unable to complete the work on the case. *Id.* at 15. As a result, Mr. Schieck, along with Shari Greenberg and Sara Zalkin, two less-experienced associates from Tony Serra's firm took over as Defendant's trial counsel. *Id.* at 13.

[1] "Day 1" represents day 1 of the Hearing, which took place on October 9, 2017.

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Mr. Schieck testified at the time of Defendant's trial that he had worked on many homicide cases, both in private practice and at the Special Public Defenders' Office. *Id.* at 9. Mr. Schieck also testified that he had significant experience consulting with and preparing experts to testify at trial. *Id.* at 54. Based on that experience, Mr. Schieck testified that he knew it was important to provide comprehensive materials to experts in order to receive accurate and complete consultation. *Id.* Mr. Schieck also testified that although he had never consulted with or called a forensic entomologist to testify in any of his cases, he was familiar with how forensic entomologists can be used to estimate time of death. *Id.* at 59-61. Mr. Schieck testified that he was familiar with the Spitz & Fisher treatise written by Dr. Neil Haskell, discussing use of forensic entomology in determining time of death. *Id.* Although Mr. Schieck had far more criminal trial experience than Ms. Greenberg or Ms. Zalkin, he took a secondary role, both in the preparation and the presentation of the case to the jury.

In regard to retaining an expert witness for trial, Mr. Schieck testified that Ms. Greenberg and Ms. Zalkin reached out to Dr. Wetli, a forensic pathologist in order to obtain a time of death estimation. *Id.* at 36. Mr. Schieck testified that Dr. Wetli wrote a two-page letter to Ms. Greenberg prior to trial describing his conclusion and the basis of that conclusion. *Id.* at 36-37. Mr. Schieck testified that although he could not remember why, they did not end up calling Dr. Wetli at trial. *Id.* at 38.

Mr. Schieck ultimately testified that in hindsight, he should have been more involved in working with the forensic experts given the other attorneys' lesser experience. *Id.* at 17. Mr. Schieck also made clear that any evidence that could have narrowed Bailey's time of death to the late morning, afternoon or evening of July 8, 2001 would have been critical to Defendant's alibi defense. *Id.*

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B. Dr. Andrew Baker

Dr. Andrew Baker ("Dr. Baker") testified that he is a forensic pathologist and medical examiner. *Id.* at 75, 95. Dr. Baker testified that a forensic pathologist specializes in determining how and why a person died. *Id.* at 75. Since 2004, he has been the chief medical examiner of Hennepin, Scott, and Dakota counties, all of which are in Minnesota. *Id.* Dr. Baker testified that in his official capacity, he regularly performs autopsies and reviews autopsies conducted by other examiners. *Id.* at 76. From 1998 to 2002, he served as a medical examiner with the Department of Defense *Id.* at 77. Dr. Baker also testified that he has served with the Federal Disaster Mortuary Operational Response Team (DMORT), which sends medical examiners and pathologists into national disaster areas. *Id.* at 89. Dr. Baker testified that in total, he has personally performed approximately three thousand autopsies. *Id.*

Dr. Baker testified that he is also an Assistant Professor at the University of Minnesota where he teaches pathology and forensic pathology to medical students. *Id.* at 93. Dr. Baker further testified that he received his medical degree from the University of Iowa College of Medicine in 1992. *Id.* at 81. Dr. Baker testified that after he received his medical degree he was a resident in University of Iowa hospitals from 1992 to 1997, completing his training in anatomic and clinical pathology. *Id.* Dr. Baker then testified that he completed a one-year fellowship in forensic pathology. *Id.*

Dr. Baker further testified that he is licensed to practice medicine and he is board certified in forensic pathology by the American Board of Pathology. *Id.* at 81. Dr. Baker testified that Board certification means, in addition to graduation from an accredited medical school and residency completion, that Dr. Baker passed a board certification examination created by the American Board of Pathology. *Id.* at 81-82. Dr. Baker

testified that he later served on the American Board of Pathology Test Development and Advisory Committee, which was a committee responsible for creating the board examination for prospective medical examiners. *Id.* at 92.

Dr. Baker testified that he is currently a member and leader within several organizations responsible for setting standards for medical examiners, and for furthering pathological science. *Id.* at 82-84. Dr. Baker testified that he was the past President and current Chair of the Standards Committee for the National Association of Medical Examiners (NAME). *Id.* at 83, 84. Dr. Baker testified that NAME is a professional organization that represents medical examiners, coroners, and medical examiner investigators and helps to set industry standards and best practices. *Id.* Dr. Baker testified that the Standards Committee is responsible for reviewing proposed changes to autopsy performance standards. *Id.* at 83. In addition to NAME, Dr. Baker testified that he is a member of the College of American Pathologists as well as the American Academy of Forensic Sciences (AAFS). *Id.* at 85. Dr. Baker testified that AAFS is divided into eleven different sections of which Dr. Baker is a member of the Pathology/Biology section. *Id.* Dr. Baker testified that while most members of this section are pathologists like Dr. Baker, there is a group of forensic entomologists that also work in the Pathology/Biology section. *Id.* Dr. Baker testified that he is familiar with forensic entomologists Dr. Gail Anderson and Dr. Jeffery Tomberlin (both which testified at the Hearing) through their mutual work at AAFS. *Id.* at 110. Dr. Baker testified that he also served on the medical-legal death investigations subcommittee for the National Institute of Standards and Technology (NIST), a federal organization designed to set standards in all areas of science and technology. *Id.* at 88.

Dr. Baker testified that he is regularly invited to conduct trainings for other

medical examiner offices, including in other states and countries. *Id.* at 90. Dr. Baker testified that he also trains law enforcement and the FBI. *Id.* Dr. Baker also testified that he has conducted trainings for the judiciary as well as for the National District Attorney's Association. *Id.* at 91. Dr. Baker testified that he has published upwards of twenty-five articles on forensic pathology in peer-reviewed journals. *Id.* at 94.

Dr. Baker testified that he has been asked to consult on many cases by attorneys. Dr. Baker testified that when consulting, he is typically asked to review an autopsy conducted by another examiner and determine if the correct conclusions were drawn. *Id.* at 79. Dr. Baker testified that in doing so, he will review autopsy reports; autopsy photographs; X-rays; if any were prepared, and sometimes police reports. *Id.*

In regard to how a forensic pathologist works to estimate a decedent's time of death, Dr. Barker testified that there are four main biological clues a pathologist must consider: (i) cooling of the body or algor mortis; (ii) pooling of the blood or livor mortis; (iii) stiffening or locking of muscles or rigor mortis; and, while less often used (iv), contents of the decedent's stomach. *Id.* at 97-98.

Dr. Baker then testified regarding rigor mortis and its role in estimating time of death. *Id.* at 99. Dr. Baker testified that rigor mortis occurs because acid builds up in the muscles after death when the energy that once allowed living muscles to move is depleted. *Id.* Dr. Baker explained that it takes hours for rigor mortis to fully develop. *Id.* Once fully developed, rigor mortis will stay in place for a number of hours, and then will take a number of hours to break down. *Id.* Dr. Baker further explained that temperature affects how quickly rigor mortis develops and dissipates. *Id.* at 100.

Dr. Baker then referred to page five of his report, which depicted two bell curves. *Id.* Dr. Baker testified that the impact of temperature on the onset and dissipation of rigor

mortis: if a body is found in temperatures in the 80's or 90's Fahrenheit (F), as opposed to a body found in average room temperature, around 68°F heat, the body will go into rigor mortis much more quickly, will then stay in rigor mortis for a shorter period of time, and will come out of rigor mortis much more quickly. *Id.* Dr. Baker then referred to the medical treatise Spitz & Fisher, which Dr. Baker described as a reliable authority on issues regarding time of death. *Id.* at 105. Dr. Baker testified that in that treatise, the authors estimate that at room temperature, it takes about thirty-six hours for the entire rigor mortis cycle: twelve hours for onset; twelve hours that the body remains in rigor; and twelve hours for dissipation. *Id.* at 101. Dr. Baker testified that Spitz & Fisher also states that in warmer climates, the entire process of going in and out of rigor mortis may take only nine or ten hours. *Id.* at 102.

Dr. Baker further explained that forensic entomology can be used in estimating time of death, and that it is one of the few forensic disciplines, aside from pathology, that can be used to inform time of death. *Id.* at 106, 108. Dr. Baker testified that in fact, Spitz & Fisher has an entire chapter discussing the role of forensic entomology in time of death assessments. *Id.* at 108. Dr. Baker testified that while it is not a regular occurrence for Dr. Baker to consult with a forensic entomologist, he has sought entomological consultation in certain cases, and there is a forensic entomologist on-call for his medical examiner's office. *Id.* at 109. Dr. Baker explained that the reason he does not need to more regularly consult with a forensic entomologist is that, in most cases, he is not asked to opine as to the decedent's time of death, since the majority of cases he handles are natural deaths, or other non-homicidal casualties, where time of death is not at issue. *Id.* at 109; Day 2 at 43[2].

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[2] "Day 2" represents day 2 of the Hearing, which took place on October 10, 2017.

Dr. Baker testified that a time of death estimate from a forensic pathologist will always necessarily involve a range of hours. Thus, Dr. Baker testified that if narrowing time of death is an important in a case, it is crucial that an attorney look at other forensic disciplines, like forensic entomology, to determine if that estimate can be narrowed further. Day 2 at 81-82.

Dr. Baker explained that he regularly consults with both prosecutors and defense attorneys in preparation for their respective trials. *Id.* at 87. Dr. Baker testified that in certain cases, if a defense attorney came to Dr. Baker's office and asked if there were any other forensic disciplines that could be used to potentially narrow the time of death, Dr. Baker would likely refer that attorney to a forensic entomologist. *Id.* at 90.

Dr. Baker also testified about his own experience as a medical examiner identifying insect eggs and insect activity on dead bodies. Dr. Baker testified that he has seen fly eggs on dead bodies both at crime scenes as well as in the autopsy room. Dr. Baker further testified that he could not think of a time that he observed a body outdoors at a scene, in temperatures of at least 80° F, that did not have blowfly eggs on it upon their arrival. *Id.* at 22. Dr. Baker testified that in addition to viewing blowfly eggs at the scene, Dr. Baker has also observed fly eggs in photographs as part of postmortem examinations. Day 1 at 111. Dr. Baker testified that he has also observed maggots on dead bodies many times. *Id.* at 112.

Further, Dr. Baker explained that, in his role as a medical examiner, he has gone out to crime scenes and observed bodies "teeming with flies shortly after death," in cases in which it was known that the decedent had died shortly before his arrival. *Id.* at 117.

Thereafter, after Mr. Baker looked at two images taken from Spitz & Fisher, Dr. Baker identified two decedents with masses of fly eggs on their bodies: one decedent

showed egg colonization in both eyes and the right nostril, as well as the entire mouth, and Dr. Baker circled these masses for the record. *Id.* at 115. Dr. Baker testified that he would expect a competent pathologist to recognize fly eggs during an autopsy, as well as from photographs, assuming the photographs were of good enough quality. *Id.* Dr. Baker testified that he would expect any competent pathologist to record the presence of fly eggs in his or her report, as well as to document the presence of said eggs with photographs. *Id.* at 116.

Dr. Baker further testified that he was contacted by the Innocence Project in December 2016. Dr. Baker testified that he was asked for his opinion as to the time of Decedent's death, as well as his opinion as to how entomological evidence, or the absence of entomological evidence, affects a time of death assessment. *Id.* at 118. Dr. Baker testified he was provided the autopsy and coroner's reports, as well as high-resolution autopsy photographs and crime scene photographs. *Id.* Dr. Baker testified that he also reviewed weather data for Las Vegas, Nevada, on July 8, 2001. Dr. Baker also testified that his work on Defendant's case is Pro Bono.

Dr. Baker testified that after formulating his initial opinion, he reviewed the reports of two other forensic entomologists, a two-page report from another pathologist, Dr. Charles Wetli, and the trial testimony of Dr. Larry Simms, the State's Medical Examiner. *Id.*

Ultimately, based on Dr. Baker's review of all of these materials, his expert opinion was that the decedent died approximately eight hours before the coroner's investigator examined his body at 3:50 a.m. on July 9, 2001. *Id.* at 125. Dr. Baker explained how he reached this conclusion: the coroner's investigator recorded that at approximately 4 a.m. on July 9, 2001 (3:50 a.m.), the Decedent's body was in full body

rigor mortis. Dr. Baker further explained that eight hours later on July 9, 2001, when Dr. Simms began his autopsy, Dr. Simms reported that rigor mortis was absent from the body. *Id.* at 126. Dr. Baker testified that these two data points strongly supported the opinion that rigor mortis in the Decedent was greatly accelerated by the heat: the fact that Decedent's body went from full rigor mortis to no rigor mortis in eight hours is consistent with the accelerated orange curve featured in Dr. Baker's report. *Id.*

Dr. Baker explained that this means Decedent's body underwent a chemical process that takes, under normal, room temperature conditions, twelve to twenty-four hours, in just eight hours. *Id.* at 129. Dr. Baker further explained that the amount of time it took the Decedent's body to go from death, with no rigor present, to full rigor mortis, should mirror the amount of time it took for the body to go from full rigor mortis to no rigor mortis, which was eight hours for Decedent. *Id.* at 130.

Dr. Baker testified that these times should be the same because the same environmental factors that cause a body to go into rigor mortis, namely the air temperature, are the same factors that lead to its dissipation. Day 2 at 39. Dr. Baker testified that this means it took approximately sixteen hours between Decedent's death and the pronouncement of no rigor mortis on July 9, 2001 at 12 p.m. by Dr. Simms. Day 1 at 130.

Dr. Baker further testified that this would mean that the most likely time of death was approximately 8 p.m. on July 8, 2001, with a margin of error of, at most, five or six hours in either direction. *Id.* at 131, 135. Dr. Baker testified that there is nothing in any of the materials he reviewed to suggest the decedent died during the early morning hours of July 8, 2001. Day 2 at 90.

Dr. Baker further testified to the eight hours between the time rigor was observed

and the time it dissipated, could in fact be shorter based on the fact that the Decedent was put into presumably cooler temperatures once at the morgue. *Id.* 79-80. Cooler temperatures can slow the dissipation of rigor. Dr. Baker testified that this would mean that the time between death and full rigor mortis would have also been even shorter than eight hours. Dr. Baker testified that despite this potential further narrowing of the curve, Dr. Baker stayed with his time of death estimation at 8 p.m. in order to give the most liberal interpretation and broadest window for time of death, given the rigor mortis data related to Decedent. *Id.* at 78.

Dr. Baker further explained that it was not only the hot air temperature the night of July 8, 2001 that lead to accelerated rigor mortis: the Decedent was also struggling prior to his death, which meant his body temperature was elevated, and that elevated body temperature likely also contributed to the accelerated onset and dissipation of rigor mortis. Day 1 at 104, 13. Dr. Baker explained that he believed Decedent was struggling because of the defensive wounds he had on his forearms and hands, as well as the numerous brutal injuries to his body, against which he would have resisted forcefully. *Id.* at 132.

Additionally, Dr. Baker testified that the fact that the Decedent was partially covered with garbage means the Decedent's body could have retained even more heat, further accelerating the onset, and progression, of rigor mortis. Day 2 at 28.

Dr. Baker also explained how his time of death estimation differed from that offered by the State through Dr. Simms at trial. Dr. Baker testified that Dr. Simms changed his time of death estimate each time he testified. Day 1 at 133. Dr. Baker testified that although Dr. Simms testified at the preliminary hearing that the likely time of death was within twelve hours of when the Decedent was found, this timeframe was

later expanded to between twelve and eighteen hours and eventually upwards of twenty-four hours before the coroner investigator's discovery of the body at 3:50 a.m. on July 9, 2001. *Id.* Dr. Baker testified that a time of death at twenty-four hours prior to discovery puts the Decedent's death at 4 a.m.; eighteen hours prior to discovery puts the Decedent's death at 10 a.m. on July 8th; whereas Dr. Baker's opinion, based on the onset and dissipation of rigor, is that the Decedent died at 8 p.m., eight hours prior to discovery. *Id.* at 134.

Dr. Baker then testified regarding other cues that confirm his opinion that the Decedent died in the evening, around 8 p.m., on July 8, 2001. First, Dr. Baker described the Decedent's stomach contents: as noted in the autopsy report, the Decedent had digesting meat and vegetables in his stomach at the time of autopsy. Dr. Baker testified that, while it is not a particularly strong indicator, the fact that the Decedent was digesting meat and vegetables at the time of his death suggests that the Decedent died after eating a dinner meal. *Id.* Dr. Baker testified that stomach contents are only a "soft" cue here, as he did not know the Decedent's eating habits. *Id.* at 138.

Second, Dr. Baker explained that the lack of forensic entomological evidence in this case was a very strong indicator that the Decedent died close in time to when his body was found. *Id.* at 146. Dr. Baker testified that he knew that there was no entomological evidence present on the Decedent from his review of the materials: he explained that there was no mention of blowfly eggs on the Decedent's body in the autopsy report, and that he would expect to see a record of eggs had they been present. *Id.* at 147.

Dr. Baker testified that he similarly would have expected to see blowfly eggs in the many high-resolution photographs he reviewed from both the autopsy and crime scene.

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Mr. Baker further testified that he observed no blowfly eggs anywhere. *Id.* Dr. Baker testified that he paid particular attention in his review of the photographs to the head orifices and bloody wounds, since he knows from professional experience that these are areas to which blowflies are attracted. Day 2 at 14. Dr. Baker testified that he looked specifically for other signs of insect activity, including evidence of actual insects themselves or evidence of insect bites. Dr. Baker testified that he saw no signs of any insect activity. *Id.* at 15.

Dr. Baker testified specifically about a few of the hundreds of photographs he reviewed. In regard to a photo he reviewed regarding the depiction of the Decedent on the autopsy table with one of his eyes pried open and another that depicted the Decedent's mouth being held open, Dr. Baker explained that these pictures confirm no eggs were present on the Decedent. Day 1 at 149. Dr. Baker testified that these pictures are powerful evidence that Dr. Simms did not miss blowfly eggs on the Decedent's body because none were present. *Id.* at 149, 150.

Dr. Baker further explained how the expert opinions of the consulting forensic entomologists factored into his own time of death estimation. First, Dr. Baker explained that he formulated his opinion regarding likely time of death, using the data points concerning rigor mortis and air temperature discussed supra, before reviewing the reports or opinions of any entomologist. *Id.* at 152. Dr. Baker testified that only then did he review the written opinions of Dr. Linda Lou O'Connor and Dr. Gail Anderson, as well as the verbal opinion of Dr. Jeffery Tomberlin.

Second, Dr. Baker testified that the opinions of these forensic entomologists "align perfectly" and are "entirely congruent" with Dr. Baker's time of death estimation: the independent opinion that Dr. Baker reached as to time of death at approximately 8 p.m.

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on July 8, 2001, based on timed rigor observations and temperature, is consistent with these forensic entomologists' opinions that death occurred after sunset at approximately 8:01 p.m. on July 8, 2001. *Id.* at 153; Day 2 at 18.

C. Dr. Jeffrey Tomberlin

Dr. Jeffery Tomberlin ("Dr. Tomberlin") testified that he received his PhD in Entomology from the University of Georgia in 2001. Day 2, at 102, 104. Dr. Tomberlin also testified that he received a Master of Science from Clemson University in 1996, and a Bachelor of Science from University of Georgia in 1993. *Id.* Dr. Tomberlin testified that he is currently employed as an Associate Professor and AgriLife research fellow in the Department of Entomology at Texas A&M University, where he directs FLIES (Forensic Laboratory for Investigative Entomological Sciences), which is funded by the National Institute of Justice and which conducts forensic entomological research. *Id.* Dr. Tomberlin testified that he also directs the Forensic Investigative Science Program at Texas A&M. *Id.* at. 99. Dr. Tomberlin testified that he has published widely in the field of forensic entomology *Id.* at 106.

Dr. Tomberlin explained that forensic entomology is the study of insects and their relatives in their application within forensic sciences. *Id.* at 115. Dr. Tomberlin explained that forensic entomology is a well-established scientific field: forensic entomology has been used since the 13th Century. *Id.* Dr. Tomberlin testified that nationally, there are approximately thirty departments of entomology at undergraduate schools *Id.* at 107. Dr. Tomberlin also testified that there are a number of professional organizations related to forensic entomology, including the North American Forensic Entomology Association, of which Dr. Tomberlin was a past President; the Entomological Society of America; and the American Board of Forensic Entomology, of

which Dr. Tomberlin was the Chair. *Id.* at 110.

Dr. Tomberlin explained that it is a regular part of his job as a forensic entomologist to consult on legal cases, and that these cases include both civil and criminal matters. Dr. Tomberlin testified that he has consulted with law enforcement, prosecutors, and defense attorneys on over one hundred cases in ten different states, including Nevada. *Id.* at 108. Dr. Tomberlin testified that forensic entomology has many applications in criminal cases. Forensic entomology can be used to determine how long a person has been dead. The science can also sometimes be used to determine whether a body has been moved from one location to another. Additionally, Dr. Tomberlin testified that the science can be used, either through DNA testing or toxicology, to determine what the insects in question have been feeding on. *Id.* at 116. Dr. Tomberlin testified that he has consulted on cases in which the question posed to him by the inquiring attorney is what the absence of entomological evidence signifies. *Id.* at 142.

When estimating time of death, Dr. Tomberlin explained that blowflies are primary consumers of carrion or decomposing remains, and that in appropriate conditions, blowflies are attracted to decomposing remains within minutes. *Id.* at 118. Dr. Tomberlin testified that blowflies are "extremely good at locating dead bodies and colonizing [them]" because their ability to procreate, and thus survive, depends on it. *Id.* at 171. Dr. Tomberlin testified that blowflies will colonize, meaning lay eggs, quickly on a dead body, within an hour or hours of death at most. *Id.* at 180. Dr. Tomberlin testified that the fact that blowflies are attracted to and colonize carrion quickly is a "global concept" based on "700 years of research." *Id.* at 184.

Dr. Tomberlin explained that blowflies are most active in certain conditions. Dr. Tomberlin testified that blowflies, as ectotherms, are active only in warmer

temperatures, with an ideal temperature range for blowfly activity being between 75° and 95° Fahrenheit. *Id.* at 121. Dr. Tomberlin testified that blowflies are most active when there is little wind and little to no precipitation. *Id.* at 120. Dr. Tomberlin testified that blowflies are diurnal, meaning that they are generally only active, or flying to decomposing remains, during daylight hours. *Id.* at 122. Dr. Tomberlin testified that he knows blowflies are immediate colonizers in these appropriate conditions both from his own field studies and research in the area, and from his review of the literature on succession studies, meaning studies about when different insects colonize decomposing remains. *Id.* at 119. Dr. Tomberlin further explained how adept blowflies are at colonizing dead bodies. Dr. Tomberlin testified that blowflies can travel long distances to reach decomposing carrion, to which the insects are attracted by the volatile gases released by carrion. *Id.* at 118, 120. Dr. Tomberlin testified that blowflies can access decomposing remains, even if those remains are covered. *Id.* at 122. Dr. Tomberlin also explained that blowflies are ubiquitous: they are found in all parts of the United States, and almost all parts of the world. Dr. Tomberlin testified that while he has not personally studied blow fly colonization in Las Vegas, he has reviewed professional studies of blowfly activity from the Southwest region, which found that blowflies colonize similarly, meaning rapidly, in the Southwest as they do in other climates. *Id.* at 129. Dr. Tomberlin also explained that blowflies are synanthropic, meaning they adapt to human populations, and as such are found in robust populations in urban areas. *Id.* at 144.

Dr. Tomberlin testified that once a blowfly reaches a decomposing body, it will typically colonize the head orifices, especially the nose, mouth, and eyes, as well as the urogenital region. *Id.* at 123. Dr. Tomberlin testified that a blowfly will typically lay hundreds of eggs at a time, and will lay these eggs in clumps of yellow-white individual

eggs, which resemble grains of rice. *Id.* Dr. Tomberlin testified that blowflies are first colonizers of decomposing bodies: they need to lay their eggs, or oviposit, on fresh remains, not dried out or mummified remains; later colonizers, like beetles, will succeed and colonize after blowflies after the soft tissue has been consumed. *Id.* at 148, 150.

Concerning his involvement in this case, Dr. Tomberlin testified that he was asked to evaluate the entomological evidence and give his opinion, without any prior knowledge of the case, and without reviewing the opinions of any other entomologists, or forensic pathologists. *Id.* at 124-126. To render his expert opinion, Dr. Tomberlin testified that he reviewed high-resolution crime scene and autopsy photographs; the autopsy report; the coroner's investigative report; and, the weather data from July 8, 2001. *Id.* at 127. Dr. Tomberlin testified that the temperature on July 8, 2001 ranged from approximately 73.9° F up to 95° F, and that this temperature range was optimal for blowfly activity. *Id.* at 133.

Dr. Tomberlin testified that in his experience consulting as a forensic entomological expert, he would expect to see both a clump of blowfly eggs as well as any individual eggs, if said eggs were present in a photograph. *Id.* at 130.

Dr. Tomberlin then testified specifically about some of the hundreds of photographs he reviewed in this case. After looking at a photograph of the Decedent's body underneath trash at the crime scene, Dr. Tomberlin testified that the trash present on the Decedent's body would not impede blowfly colonization. Rather, Dr. Tomberlin testified that he would expect the presence of garbage to enhance blowfly colonization, as the garbage provides additional shelter for the blowfly as it oviposits. *Id.* at 134. Dr. Tomberling testified that since blowflies are dependent upon decomposing bodies as locations to oviposit, blowflies are aggressive in their quest to reach egg-laying sites, and

will thus crawl under barriers in order to access the decomposing body. *Id.*

After looking at a close-up photograph of Decedent's eye, and oral and nasal areas, and a wider view of the Decedent's head and neck wounds, Dr. Tomberlin testified that he observed no blowfly colonization. *Id.* at 136-37. Dr. Tomberlin also testified that the bodily locations featured in the photographs —the eyes, nose, and mouth, as well as the bloodied, open head and neck wounds — were "extremely attractive" to blowflies as locations to colonize. *Id.* at 137. Dr. Tomberlin further testified that in all the high-resolution crime scene and autopsy photographs he reviewed, there was no evidence of blowfly eggs anywhere on Decedent's body. *Id.* at 138. Additionally, Dr. Tomberlin testified that neither the autopsy report nor the coroner's investigative report mentions the presence of any blowfly eggs, or insects at all. Dr. Tomberlin further testified that he would expect to see a notation concerning the presence of blowfly eggs, had eggs been present. *Id.*

Based on Dr. Tomberlin's expert opinion as a forensic entomologist, that the weather conditions were ideal for blowfly colonization, along with the condition of the decedent's body being ideal for emitting volatile compounds and providing key locations for blowflies to colonize, that the absence of any blowfly eggs on Decedent means that Decedent likely died after sunset, which occurred at 8:59 pm on July 8, 2001. *Id.* 140, 158.

D. Dr. Robert Kimsey

Dr. Robert Kimsey ("Dr. Kimsey") testified that in 1984 that he received his PhD in Entomology from the University of California, Davis ("U.C. Davis"). Dr. Kimsey also testified that he is an Associate Adjunct Professor and Lecturer in the Department of

Entomology at U.C. Davis, a position he has held for nearly thirty years. Day 3 at 16[3]. Dr. Kimsey emphasized that forensic entomology has been an established field, used in both criminal and civil cases, for hundreds of years. *Id.* at 8. Dr. Kimsey testified that U.C. Davis has had an Entomology Department since the 1940's with its own museum, the Bohart Museum, dedicated to insect taxonomy, including over six million specimens, established in the mid-1950's. *Id.* at 9. Dr. Kimsey testified that at the Bohart Museum, Dr. Kimsey is able to study the species of insects recovered in different parts of the world by referring to the museum's vast taxonomy collection, which includes those species of blowflies found in Las Vegas. *Id.*

Dr. Kimsey testified that as a forensic entomologist, he regularly conducts research, both at U.C. Davis as well as at a variety of locations and climates around California and the Southwest, including within the Mojave Desert Range, the range that includes Las Vegas. *Id.* at 10-11. Dr. Kimsey testified that his research focuses particularly on blowfly orientation and behavior. *Id.* Dr. Kimsey testified that he has also conducted extensive research on how temperature impacts blowfly activity, and much of this research has been conducted in desert climates. *Id.* at 82. Dr. Kimsey also testified that he publishes in the field of forensic entomology, specifically on the topic of blowfly behavior, within peer-reviewed journals. *Id.* at 12. Dr. Kimsey also testified that he has served as a peer-reviewer, as well as a grant reviewer for forensic entomology research grant proposals with the National Institute of Justice. *Id.* at 13.

Dr. Kimsey testified that he is a member, and past president, of the North American Forensic Entomology Association (NAFEA). *Id.* at 13. Dr. Kimsey testified that NAFEA was formed in 2003 and its inaugural meeting, which Dr. Kimsey attended,

[3] "Day 3" represents day 3 of the Hearing, which took place on October 11, 2017.

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was in Las Vegas. *Id.* at 14. Dr. Kimsey testified that he has also attended subsequent NAFEA meetings in Las Vegas. Dr. Kimsey testified that he served as an entomology advisor to both forensic scientific bodies and law enforcement agencies. *Id.* at 14.

Dr. Kimsey testified that as a forensic entomologist, he regularly presents to law enforcement on various topics in forensic entomology, including to coroners and their staff. Dr. Kimsey also testified that he has trained sheriff's offices, criminalists and coroner's offices on how to identify, collect, and retain forensic entomological evidence, including where to find entomological evidence on a decedent, how to document said evidence in reports, and how to recognize the significance of said evidence. *Id.* at 16-18.

Dr. Kimsey testified that in addition to training law enforcement in forensic entomology, Dr. Kimsey consults as a forensic entomologist with both law enforcement and attorneys. *Id.* at 18. Dr. Kimsey testified that his first attorney consultation was with a defense lawyer in Sacramento in the early 1990's, and he has additionally consulted several times with prosecutors. *Id.* at 19. Dr. Kimsey testified that he has consulted with attorneys on both criminal and civil cases. *Id.* at 20. Dr. Kimsey testified that routinely in his consultations, he reviews photographic evidence to assess the presence or absence of entomological evidence. *Id.* Dr. Kimsey testified that he has been qualified as an expert in forensic entomology in both California and Nevada. *Id.*

Dr. Kimsey explained that there is a "diversity of things" forensic entomologists can evaluate in a criminal case. For instance, Dr. Kimsey explained that forensic entomologists can help determine how long a person has been deceased by being able to assess the minimum "PMI" or post-mortem interval, predicated on the period of time for which the body has been infected by insects. *Id.* at 23. Dr. Kimsey testified that this could be done by looking at development rates for different insects in a region, at

different temperatures, and calculating based on that growth rate how long it would have taken that insect to reach the point of observed development. *Id.* Dr. Kimsey testified that a post-mortem interval can also be determined by looking at insect succession. *Id.* at 23-24.

Dr. Kimsey explained that blowflies play a critical role in forensic entomology: blowflies are "outfitted biologically to locate decomposing proteins, carrion, decedents. . . [a]nd for the purposes of their own life history, blowflies lay their eggs on and their larvae grow up on decomposing carrion." *Id.* at 24-25. Dr. Kimsey testified that a blowfly's life cycle begins through oviposition, or egg lying, on a dead body. *Id.* at 27. Dr. Kimsey testified that blowflies locate dead animals or humans using olfaction, or sense of smell: their antennae are covered with sensitive sensilla that allow them to detect decomposing proteins, also known as volatile compounds. *Id.* at 30. Dr. Kimsey also testified that blowflies are "ubiquitous": they are found in all climates in the United States, and there are approximately thirty species of blowflies in the U.S. *Id.* at 24, 26. Dr. Kimsey testified that blowflies are able to detect these volatile odors from great distances. *Id.* at 35. Dr. Kimsey testified that blowflies are first colonizers because: "they are outfitted in the most staggeringly elegant way to be able to locate rotting meat... [and are] exceedingly fast and very agile fliers." *Id.* at 37.

Dr. Kimsey testified that in Las Vegas, there are five different species of blowflies: Calliphora latifrons; Calliphora terraenovae; Calliphora coloradensis; Lucilia sericata; and Phormia regina. *Id.* at 26. Dr. Kimsey testified that all five of these species behave similarly to other blowfly species in their quick detection and colonization of decomposing beings. *Id.* at 26-27.

Dr. Kimsey explained that blowflies are most active in warmer temperatures, and

provided an optimal temperature range for blowfly activity as between the mid-80's and 98° F. *Id.* at 34. Dr. Kimsey explained that it is temperature, and not geographical region, that is critical in determining whether blowflies will be active. *Id.* at 85. Dr. Kimsey further explained that blowflies also are impacted by the time of day: blowflies become active in the middle of the morning, increasing their activity through the middle of the day, and then diminishing in activity as sunset approaches. *Id.* at 38-39. Dr. Kimsey testified that at nautical sunset, which is when the sun drops from six degrees to twelve degrees below the horizon line, blowflies are no longer active, meaning they are no longer flying to deposit eggs. *Id.*

In terms of how quickly blowflies are attracted to dead beings, Dr. Kimsey explained that if a decedent is outdoors, unrestricted, in warm temperatures, blowflies will arrive at the body within minutes, and will begin ovipositing shortly thereafter. *Id.* at 30. Dr. Kimsey then discussed some of the field work he has done that demonstrated the speed with which blowflies will colonize in optimal conditions. *Id.* at 31. For example, Dr. Kimsey testified that he consulted with the coroner's office for San Luis Obispo County on a case in which a decedent, known to have been alive three hours earlier, was found with a clump of blowfly eggs already in his mouth. *Id.* Dr. Kimsey then described another case in San Luis Obispo County in which a decedent, killed by a gunshot wound, already had blowfly colonization in her eyes within two hours of death. *Id.* at 31-32. Dr. Kimsey described another case in which he was called by a defense attorney to evaluate entomological evidence, using photographs, to determine the meaning of present blowfly eggs in relation to the likely time of death. *Id.* Dr. Kimsey testified that this decedent was found indoors, but with all the windows of the home open, in a hot and dry desert climate in Southern California comparable to the climate of the Mojave Desert, during

the summer months. *Id.* Dr. Kimsey described a photograph capturing this decedent and the blowfly masses found within the decedent's mouth and left nostril. *Id.* Dr. Kimsey explained how in both photographs, the blowfly masses, which are easily observable from the photographs, are the typical appearance of blowfly egg masses within a few hours of a decedent's death. *Id.*

Dr. Kimsey testified that he has conducted many decomposition projects in the field with dead pigs, mostly in the U.C. Davis, California region, where the summer climate is very dry and temperatures range from 95-100 F during the daytime and drops to the low 70's in the evening. *Id.* at 32. Dr. Kimsey testified that in that climate, he has seen blowfly colonization within minutes on a freshly dead animal. *Id.* Dr. Kimsey testified that he also specifically consulted on a case in the Mojave Desert Range where he was asked to determine the age of blowfly maggots found on a decedent. *Id.* at 34.

Dr. Kimsey then testified that blowflies will lay between 150 and 300 eggs in one sitting; a blowfly will lay numerous batches of eggs of that size over its lifetime. *Id.* at 36-37. Dr. Kimsey testified that blowflies take just minutes to lay eggs in these batches. *Id.* at 73. Dr. Kimsey testified that blowfly eggs resemble long grain rice, and are about 1.2-2 mm long. *Id.* at 41. Dr. Kimsey testified that individual eggs are visible to the naked eye. *Id.* Dr. Kimsey testified that egg masses or batches are also visible to the naked eye, and are conspicuous. *Id.* at 42. Dr. Kimsey testified that blowflies will lay their eggs in the head region, typically on or near the mouth, nose, ears and eyes. *Id.* at 41-42. Dr. Kimsey testified that these areas provide access to nutrients for their larvae once they hatch, as well as shelter for the eggs. *Id.* at 41. Dr. Kimsey testified that in this way, blowfly colonization is "top down": starts in the head, works through the pleural cavity, then the abdominal cavity, and then out towards the extremities. *Id.* at 40. Dr.

Kimsey testified that blowflies are also attracted to and will lay eggs in open wounds, particularly those with obvious bleeding. *Id.* Dr. Kimsey also explained that blowflies are very adept at accessing carrion: loose coverings like clothing or garbage will not provide any impediment to a blowfly trying to access a location to oviposit. *Id.* at 57.

In preparing to give his expert opinion in Defendant's case, Dr. Kimsey testified that he reviewed hundreds of high-resolution crime scene and autopsy photographs, as well as the autopsy report and coroner's report related to the Decedent. *Id.* In addition to providing information about the condition of the body and how it was found, Dr. Kimsey would expect to see notations of insect activity in both the autopsy report and coroner's report, had insects or eggs been present. *Id.* at 58. Dr. Kimsey testified that for each picture that depicted the Decedent at the scene, or the Decedent's body at the autopsy, Dr. Kimsey reviewed each picture on a computer screen with the highest magnification he could use, searching each photograph from right to left in bands. Dr. Kimsey testified that in doing so, Dr. Kimsey was searching for any signs of insect activity, including eggs, instar larvae, dead flies, living flies, as well as any evidence of flesh fly larvae. Dr. Kimsey testified that he conducted this searching process on each photograph, multiple times. *Id.* at 36, 60.

Additionally, Dr. Kimsey testified that he reviewed weather data from Las Vegas for July 8, 2001, as well as weather data for the days preceding and following July 8, 2001 *Id.* at 60. Dr. Kimsey testified that the temperature average was about 84 degrees, with a high around 94-95 degrees. *Id.* at 61. Dr. Kimsey then described these temperatures as providing optimal conditions for blowfly activity. *Id.* Dr. Kimsey also testified that he reviewed data for the times of civil and nautical twilight on July 8, 2001: civil sunset was at 8:30 p.m. and nautical sunset was at 9:07 p.m. *Id.* Dr. Kimsey

testified that he did not review the opinions of any other forensic entomologists related to Ms. Lobato's case before giving his opinion. *Id.* at 62.

Dr. Kimsey then testified specifically about a number of the hundreds of photographs he reviewed. In regards to a photograph of the Decedent's face and head, Dr. Kimsey testified that this location provides "almost the perfect scenario for a blowfly to lay eggs." For instance, Dr. Kimsey explained that from the drying proteins, the copious blood on the face, and the presence of the head orifices and open, bloodied wounds on the head, Dr. Kimsey would expect to see colonization in this picture, if anywhere. *Id.* at 63. Dr. Kimsey testified that nonetheless, there were no blowfly eggs anywhere in this picture, nor is there evidence of any kind of insect activity in this picture. *Id.*

In a similar photograph featuring the Decedent's pelvic region, including a large wound where the penis had been removed, Dr. Kimsey testified that this region would also be prime for blowfly colonization, given the large wound providing an ample food source. *Id.* at 64. Dr. Kimsey testified that he did not see any blowfly eggs, or any insect activity, in this photograph. *Id.* Dr. Kimsey testified that in another similar photograph that captured the Decedent's left ear, left neck area, and a gaping wound on the neck artery, this picture would "strongly favor" colonization. *Id.* at 66. More specifically, Dr. Kimsey testified that the underside of the neck can already provide a sheltered location for colonization, and given the large, bloodied wound on the neck, Dr. Kimsey would expect to see blowfly colonization in this picture, if anywhere. *Id.* Dr. Kimsey testified that nonetheless, there were no blowfly eggs or insect activity anywhere in this picture. *Id.* Additionally, in another photograph which featured the Decedent's right eye pulled apart so the conjunctive lid and conjunctive of the eyeball were visible, Dr. Kimsey

testified that there were no blowfly eggs anywhere, even on the inside of the bloodied orifice. *Id.* at 67.

Dr. Kimsey testified that in the more than 600 photographs he reviewed of the crime scene and autopsy, including close up pictures of the Decedent's body from many different angles and photographs of the garbage that surrounded the decedent, Dr. Kimsey observed no evidence of blowfly eggs, or of any insect activity. *Id.* at 68. Dr. Kimsey also testified that there was no mention, in either the coroner's report or the autopsy report, of the presence of any blowfly eggs, or of any insect activity, on the Decedent's body. *Id.* at 70.

In conclusion, Dr. Kimsey opined that it is not possible and at best highly unlikely, that the Decedent could have been killed the morning of July 8, 2001, given the temperature conditions and the conditions in which the Decedent's body was found, and having no blowfly eggs on him when found after sunset on July 8, 2001. *Id.* at 70. Further, Dr. Kimsey testified that the absence of blowfly eggs on the Decedent's body means that the Decedent likely died either immediately before or after nautical sunset on July 8, 2001, at 9:07 p.m. *Id.* at 70, 72.

Dr. Kimsey further testified that if Defendant's trial counsel had contacted him prior to Defendant's trial and provided him with these same materials, that he would have given counsel this same opinion. Dr. Kimsey testified that his one expressed caveat was that the literature on whether blowflies colonize at night has become more firmly established since 2006. However, Dr. Kimsey testified that given the established fact that blowflies colonize quickly, and that these were prime weather and location conditions for blowfly colonization during the daytime, Dr. Kimsey would have provided the same opinion to counsel in 2006: that the Decedent had to have been killed close in time to

when his body was found and when these photographs were taken. *Id.* at 71- 72; 94-95.

E. Dr. Gail Anderson

Dr. Gail Anderson ("Dr. Anderson") testified that she received her PhD in Medical and Veterinary Entomology from Simon Fraser University in 1992. Day 4 at 1-5.[4] Dr. Anderson testified that she is a Professor in the School of Criminology at Simon Fraser University, a position she has held since 2008. *Id.* Dr. Anderson testified that in that capacity, she has taught numerous courses in forensic entomology. *Id.* Dr. Anderson testified that prior to 2008, she had been an Associate Professor at Simon Fraser University, first in the Department of Biological Sciences, and then in the School of Criminology. *Id.* Dr. Anderson testified that she is a current member and past president of the North American Forensic Entomology Association and a Fellow within the American Academy of Forensic Sciences ("AAFS"). *Id.* Dr. Anderson testified that in 2017, she received the Award for Achievement in Life Sciences from AAFS. *Id.*

Dr. Anderson testified that as a forensic entomologist she studies the relationship between insects and dead bodies. *Id.* at 6. Dr. Anderson testified that she has worked as a forensic entomologist since 1988. *Id.* Dr. Anderson testified that forensic entomology has been used in criminal cases for hundreds of years. *Id.* at 7.

Dr. Anderson testified that as a forensic entomologist she commonly conducts research on blowflies. *Id.* at 10. Dr. Anderson testified that she has received a wide array of grants in order to further her research in this area, including grants from each of the following entities: AAFS; the Canadian Police Research Center; the World Wildlife Fund; and the Provincial Government of British Columbia. *Id.* at 14. Dr. Anderson testified that she has also published widely in the field of forensic entomology, and many of those

[4] "Day 4" represents day 4 of the Hearing, which took place on October 12, 2017.

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publications have been focused on blowfly colonization *Id.* at 11. Dr. Anderson testified that her publications have been in peer-reviewed journals, and she herself has served as a peer-reviewer on many occasions *Id.* at 12.

Dr. Anderson testified that as a forensic entomologist, she has been asked to present on her work to both prosecutors and defense attorneys. *Id.* at 15. Dr. Anderson also testified that she frequently presents to law enforcement, generally on how forensic entomology can aid in a police investigation. *Id.* Dr. Anderson explained that she does this by explaining how to recognize and collect entomological evidence, and how a forensic entomologist can then interpret that evidence, particularly as it relates to time of death. *Id.*

Dr. Anderson testified that she has also consulted hundreds of times with law enforcement and coroner's offices regarding insect evidence. *Id.* Dr. Anderson testified that she has also consulted with attorneys and has been brought to court to testify about her consultation on thirty-one occasions, and in thirty of those cases, she has testified for the prosecution. *Id.* at 16. Dr. Anderson testified that in most cases on which attorneys seek her consultation, the question posed to her concerns time of death. *Id.* Dr. Anderson testified that law enforcement, coroner's offices and defense attorneys have asked for Dr. Anderson's expert opinion in cases regarding what the lack of entomological evidence means. *Id.* at 17.

Dr. Anderson explained that blowflies are found "everywhere. From the — both poles to the equator. Everywhere." *Id.* at 21. Dr. Anderson testified that blowflies are usually the first to witness a crime because they arrive immediately after death in order to lay their eggs. *Id.* Dr. Anderson testified that this is true in urban environments as well because humans provide ample food waste that is attractive to blowflies. *Id.* at 40.

Dr. Anderson testified that blowflies will lay their eggs in both the body's natural

orifices as well as wounds. *Id.* at 22. Dr. Anderson testified that blowflies lay their eggs in these sites because they are sources of liquid protein, and because the tissues in the orifices are very soft and accessible. *Id.* Dr. Anderson testified that these locations also give off a greater amount of volatile organic compounds, further attracting blowflies. *Id.* at 36-37. Dr. Anderson explained that blowflies have adapted to find these hospitable oviposition sites quickly, because once the eggs are laid, the mother blowfly leaves and provides no more care either to the eggs, or the eventual larvae. *Id.* Dr. Anderson testified that blowflies are attracted to dead beings because immediately upon death, tissues in the body begin to break down in a process called autolysis, which releases volatile organic compounds that blowflies sense, even from far distances. *Id.* at 22-23. Dr. Anderson testified that once blowflies reach a dead body, they walk on the body, sensing with their feet for an appropriate protein source. *Id.* at 23.

Dr. Anderson testified that blowflies arrive at a dead body within minutes of death and start laying their eggs shortly thereafter, and that this phenomenon has been documented in studies for decades, including some of her own studies. *Id.* at 26. Dr. Anderson testified that she has personally studied this rapid blowfly attraction and colonization throughout British Columbia and has also reviewed the literature associated with similar studies from around the world. *Id.* at 27. Dr. Anderson then described one study where she conducted in British Columbia, when temperatures ranged in the 70's-80's F, in which pigs were euthanized on scene, and she observed blowflies arriving almost immediately, with eggs being laid within the hour. *Id.* at 27-28. Dr. Anderson explained that pig carcasses are very comparable to human beings in terms of their attractiveness to blowflies: the biological makeup of pigs and humans is very similar; both are omnivores with similar intestinal bacteria, both give off similar volatile organic compounds, and both

are relatively hairless and have similar skin composition. *Id.* at 39, 64.

Dr. Anderson further testified that several blowfly species are found in Las Vegas, including Calliphora latifrons, Calliphora vicina, Calliphora coloradensis, as well as Phormia regina, Lucilia sericata, Chrysomya megacephala, and Chrysomya rufifacies. *Id.* at 28. Dr. Anderson testified that these species behave similarly to other blowfly species in their quick colonization of dead beings, and leave large egg masses when they colonize. *Id.* at 29, 70. Dr. Anderson testified that she has personally observed blowfly larvae on carrion wounds and in carrion orifices during wildlife conservation work she conducted in Laughlin, Nevada, which is also part of the Mojave Desert Range. *Id.* at 30.

Dr. Anderson further explained that temperature impacts blowfly activity because blowflies are most active in warm temperatures, the ideal range being in the 80's and 90's F. *Id.* at at 32. Dr. Anderson also testified that for purposes of determining how quickly blowflies will be attracted to carrion, it is temperature, and not geographical location, that is critical to analyze. *Id.* at 72-73. Dr. Anderson testified that blowflies are attracted to carrion through olfaction from long distances. *Id.* at 32. Dr. Anderson explained that most research suggests that an average range is somewhere between three and fifteen miles. *Id.*

Dr. Anderson also testified that blowflies are diurnal insects: they are active from morning through dusk, with a preference for activity mid-day, and they cease activity after sunset. *Id.* at 33. Dr. Anderson testified that the fact that blowflies are diurnal and do not fly and lay eggs at night is well supported by ample published research. *Id.* at 33-34. Dr. Anderson testified that this research showing that blowflies colonize almost exclusively during daylight hours was established as of 2006, and has been advanced since 2006 with further studies in wider geographical areas. *Id.* at 34-35.

Dr. Anderson explained that blowfly eggs are approximately 2mm long, with a

curved shape and creamy white color. *Id.* at 36. Dr. Anderson testified that these eggs are laid in clumps as it is rare to see a single blowfly egg because it is unlikely for a single larvae, once it hatches, to survive on its own, as multiple larvae are needed to breakdown the carrion tissues in order to feed. *Id.* However, Dr. Anderson testified that single blowflies, when present, are visible to the naked eye, and blowfly clumps are highly visible to the naked eye. *Id.* at 37. Dr. Anderson further testified that blowfly's will lay a couple hundred eggs in one sitting. *Id.* at 39. Dr. Anderson testified that regularly, she reviews photographs for entomological evidence, including the presence or absence of blowfly eggs, as part of her consulting work. *Id.* at 38.

Dr. Anderson then testified that blowflies are able to access carrion even if covered, and that only very tight wrapping or sealing would delay colonization. *Id.* Dr. Anderson testified that she has observed, in her fieldwork, blowfly colonization on body parts inside a garbage bag that had been tied and knotted. *Id.*

Dr. Anderson testified that she first consulted on Defendant's case in 2009, and that she issued a report at that time based on a number of materials provided to her. *Id.* at 39-42. In preparation for that report, Dr. Anderson testified that she did not review the opinions of any other forensic entomologists or pathologists related to Defendant's case. *Id.* In her consultation with The Innocence Project, Dr. Anderson testified that she reviewed the autopsy report; coroner's report; a myriad of high-resolution crime scene and autopsy photographs; and weather data related to July 8, 2001. *Id.* at 42. Dr. Anderson testified that she reviewed the autopsy and coroner's reports because she would expect to see a description of any eggs or insects in that report, if any were present on the body, as she has seen those descriptions in other cases in which insects or insect eggs were present. *Id.* at 43. Dr. Anderson also testified that she reviewed the

times for civil and nautical twilight on July 8, 2001.

In detailing her process for reviewing the photographic evidence, Dr. Anderson testified that she looked at all photographs of the decedent's body very carefully, looking not only for larger clumps of eggs, which are readily seen, but for any white specks which, if enlarged, would show whether or not that speck was a blowfly egg. *Id.* at 47. Dr. Anderson testified that since 2009, she has reviewed many more photographs at a higher resolution, from many different angles, and she was convinced that the one photograph she had believed might feature a blowfly egg, features merely a light reflection from the camera. *Id.*

Dr. Anderson testified specifically about a few of the photographs she reviewed. In regards to one photo of the Decedent, Dr. Anderson described: "I see a decedent with a great deal of blood all over them. Lots of cuts. There's gaping wounds. There's blood under and around the body. I see no sign of insect activity." *Id.* at 48. Dr. Anderson further explained that, in this image which focuses on the Decedent's head, she would expect to see colonization in the eyes, nostrils, mouth, in the open cut on the chin, and in the bloodied areas, to which blowflies are attracted. *Id.* at 48-49. As to a photograph that captures the Decedent under loose garbage at the scene, Dr. Anderson testified that blowflies would be attracted to this area because of the heavy bloodshed, and that these insects would have no problem access the Decedent's head, which is sticking out from under a piece of cardboard. *Id.* at 50. Dr. Anderson further explained that she had reviewed many pictures in which the Decedent's eyes, nose, and mouth are being held open, and has seen no evidence of blowfly eggs. *Id.* at 51.

Dr. Anderson further testified that the weather conditions on July 8, 2001 were optimal for blowfly activity, being that the temperature remained between the mid-70's

and mid-90's throughout the day, with no precipitation, which would hinder blowfly flight. *Id.* at 52, 69. Dr. Anderson testified that the conditions of this scene made it ideal for blowfly colonization: the body was outdoors; it was minimally covered; and the body was not dried in any way. *Id.* at 53-54. Dr. Anderson testified that she would expect to see evidence of blowfly eggs in these photographs and saw no evidence of blowfly eggs. Dr. Anderson testified that the significance of this total absence of blowfly colonization is that, because conditions were optimal, the absence of eggs means that the Decedent died shortly before his body was discovered. *Id.* at 54. Dr. Anderson testified that she would expect the Decedent to have died after sunset, based on the total lack of blowfly colonization, particularly in the head orifices, because had this Decedent died during daylight hours when blowflies are active, there would have been apparent colonization. *Id.* at 55. Dr. Anderson testified that had the Decedent's body been out at this scene, in these temperatures, since early morning on July 8, 2001, he would have expected to see a large quantity of egg masses laid, particularly on the head and facial orifices, and on the groin wounds. *Id.*

In sum, Dr. Anderson testified that in her expert opinion, she believes that it is scientifically unrealistic for the Decedent to be present at this scene, in these weather conditions, since the early morning hours of July 8, 2001 and have no blowfly colonization. *Id.* at 56. Dr. Anderson testified that rather, the condition of the Decedent's body strongly suggests that he died after sunset on July 8, 2001. *Id.* Dr. Anderson testified that had Defendant's counsel consulted Dr. Anderson in 2006, at the time of trial, and provided these same materials, Dr. Anderson would have given Defendant's counsel the same expert opinion. *Id.* at 56-57.

On cross-examination, Dr. Anderson was shown particular photographs, and was

asked if white spotting on the back of the Decedent's leg, as captured during the autopsy, could be blowfly eggs. Dr. Anderson responded: "It could be eggs...but I don't think it is. There's a lot of area on this region that I've seen that has a lot of white stuff on it...at first I thought was eggs but when I blew it up, turned out to be — I don't know, paint or chalk." *Id.* at 57-58. Further, Dr. Anderson explained: "I can't rule it out. I doubt it is because why would [the eggs] be there and not with all the bloody areas." *Id.* at 58. Dr. Anderson testified that she would expect to see colonization, if it existed, on the uncovered, heavily bloodied head region, particularly in the head orifices. Finally, Dr. Anderson testified that the fact that there is no colonization in the head leads her even further to believe that the white matter is not eggs. Id. at 79.

2. State Witnesses

A. Dr. Rexene Worrell

Dr. Rexene Worrell ("Dr. Worrell") testified that she was employed by the Clark County Medical Examiner's Office. Dr. Worrell testified that she was retained in this case in mid-September 2017. *Id.* at 177. Dr. Worrell testified that she currently conducts private autopsies and has spent approximately nine to ten hours reviewing this case. *Id.* at 177-178.

Dr. Worrell testified that although she is not Board certified by the American Board of Pathology, she is certified by the American College of Forensic Examiners. *Id.* at 91, 95. Dr. Worrell also testified that she worked briefly at the Clark County Medical Examiner's Office, and was previously the deputy coroner/medical examiner for the Nye County Sheriff's Office. *Id.* at 94, 96.

Dr. Worrell testified that based upon body temperature alone (cold), time of death would be before 5:00 p.m. on July 8, 2001 with an error rate of two (2) hours in either

direction. *Id.* at 115-119, 168-169. Dr. Worrell further testified that based upon the body being cold and in full rigor at the time of examination by the coroner investigator, time of death would be eight (8) to thirty-six (36) hours before the examination, but heat could accelerate the process of rigor. *Id.* at 121, 125. Dr. Worrell testified that at the time of autopsy, the Decedent's vitreous potassium level was 16.7 mEG/L per the toxicology report done as a routine part of the autopsy. *Id.* at 128-129. Dr. Worrell testified that because vitreous potassium levels rise at a steady rate after death, there are formulas that have been developed to determine an estimated time of death for the first one hundred (100) hours after death. *Id.* at 129-130. Dr. Worrell also testified regarding using vitreous potassium levels to determine an estimated time of death from the time of autopsy. *Id.* at 126-129.

Dr. Worrell first testified as to "[t]he Knight formula." *Id.* at 130. Dr. Worrell testified that this formula estimates that Decedent's time of death occurred between twenty-eight (28) and thirty-four (34) hours before the time of autopsy (noon on July 8, 2001) or 2:00 a.m. to 8:00 a.m. on July 8, 2001; this included subtracting the margin of error. *Id.* at 130-132, 189.

Dr. Worrell then testified that she used four (4) of the five (5) formulas listed in a graph found in Spitz and Fisher, Part II. *Id.* at 132-33. Dr. Worrell testified that all of the formulas in Spitz and Fisher had an error rate of twenty (20) hours and Dr. Worrell subtracted the twenty (20) hours after doing the math with each formula. *Id.* at 133. Furthermore, Dr. Worrell testified that Spitz and Fisher states in Part II: "[c]ase studies have indicated that vitreous potassium often provides a better estimate of the PMI than assessing the amount of decomposition, measuring body temperature, and even evaluating rigor mortis." *Id.* at 134.

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Dr. Worrell further testified as to the Munoz formula. *Id.* at 132-133. Dr. Worrell testified that this formula is used in sudden death cases and this formula estimated Decedent's time of death at before 10:00 a.m. on July 8, 2001. *Id.* at 132-133, 189.

Next, Dr. Worrell testified as to the James formula, which estimated the time of death in this case at thirty-three (33) hours, which was before 3:00 a.m. on July 8, 2001. *Id.* at 133-134, 189.

Dr. Worrell then testified to the Madea formula, which estimated the time of death in this case at before 12:00 a.m. on July 8, 2001. *Id.* at 134, 189.

Lastly, Dr. Worrell testified to the Sturner formula, which put time of death in this caseat around eighty (80) hours prior to autopsy. However, Dr. Worrell testified that because this did not appear to be a plausible time of death, Dr. Worrell did not consider this in forming her opinion. *Id.* at 134-135, 189.

In sum, Dr. Worrell testified that based on looking at everything -- body temperature, rigor mortis described by the coroner investigator, the rigor mortis that was described during the autopsy report, evaluation of the post-mortem vitreous potassium, Decedent's time of death occurred somewhere in the early morning to mid-morning hours of July 8, 2001. *Id.* at 137, 162. Dr. Worrell explained that her opinion is based upon the overlapping of all of the different considerations and formulas. *Id.* at 141-142.

B. Dr. Jeffrey Wells

Dr. Jeffrey Wells ("Dr. Wells") testified that he is a professor at the Florida International School in Miami and a forensic entomologist. (Day 5 at 6).[5] Dr. Wells testified that he was asked to consult on this case by the Clark County Prosecutor's Office about two weeks prior to his testimony, and that he was being paid for his

[5] Day 5" represents day 5 of the Hearing, which took place on October 13, 2017.

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testimony and consultation. *Id.* at 58-59. Dr. Wells testified that blowflies are useful in criminal investigations because they are quickly attracted to dead bodies after death. *Id.* at 63. Dr. Wells also testified that blowflies are found everywhere: "I don't think you could pull up a map of the United States and point to any place and say there are no blowflies there." *Id.* at 64. Dr. Wells testified that there are blowflies in Las Vegas, and while he could not name the specific species, he testified that all blowflies that have been studied are attracted by odor to decomposing bodies in the same way. *Id.* at 74-75.

Dr. Wells testified that he knows blowflies are attracted quickly to dead bodies both from his own observations as a forensic entomologist, and his review of the literature. *Id.* at 63. Dr. Wells testified that blowflies must find dead bodies to colonize for their own reproduction; they are aided by the fact that they are fast fliers. *Id.* at 64, 67. Dr. Wells testified that blowflies colonize bodies early, as well, because they are unable to colonize in later phases of decomposition when soft tissues have been depleted. *Id.* at 65. Dr. Wells testified that blowflies are attracted to the volatile compounds released during decomposition, that are emitted out of the head orifices, and that blowflies, can detect these volatile compounds from a distance. *Id.* at 66. Dr. Wells testified that when blowflies arrive at a dead body, they typically lay eggs in the head region first, particularly in the nose, mouth and eyes. *Id.* at 67, 68. Dr. Wells testified that it is common to see blowfly eggs, which individually resemble white grains of rice, in clusters of about 150 to 300 eggs in one location. *Id.* at 68-69). Dr. Wells testified that a female blowfly can lay this amount of eggs in a cluster in just a few minutes. *Id.* at 69. Dr. Wells testified that once one blowfly lays its eggs on a certain site, this attracts other females to also lay eggs in that area, so one would expect to see clusters of eggs from many different females in one location. *Id.* at 69. Dr. Wells also testified that there

are certain conditions that make blowflies more likely to fly and, thus, to oviposit: warmer temperatures; no rain; the location of the bodies outdoors; the presence of wounds on the body; and the presence of decomposing blood on or near a body. *Id.* at 72-73.

Dr. Wells testified that he has consulted in approximately thirty to forty cases, most of them criminal, and that he has consulted on cases in which the question posed to him by counsel concerned the lack of entomological evidence. *Id.* at 18. Dr. Wells testified that in one such case, Dr. Wells found that the lack of insect evidence did not necessarily mean that the decedent had not been dead for a long time, specifically because the temperatures where the decedent was found "had been too cold for fly activity until shortly before the victim was found" and that there can be a "lag time after it's been cold" before flies start to arrive. *Id.*

Dr. Wells ultimately testified that he examined the photographs in this case, and he did not see anything in any of the photographs that he could definitely describe as insect activity. *Id.* at 30. Dr. Wells testified that there were some photographs in which there were features that could have been insect eggs, but he could not see well enough to know. *Id.* at 31. After looking at a photograph that focused on the Decedent's rear thigh area, Dr. Wells testified that there was a feature that could possibly be an egg, but that he "definitely cannot see well enough to be sure." *Id.* at 32. Dr. Wells was also asked to look at a picture that showed the cufflink area of Decedent's right shirt. In regards to this area, Dr. Wells testified that he simply "can't tell" what the white specks on the sleeve were. *Id.* at 33.

Dr. Wells testified that while blowflies will "sometimes" lay their eggs in locations such as the underside of a body, or on clothing, the primary concern that a

blowfly has in finding a location to oviposit is finding a very moist location, to ensure their eggs do not dry out before they hatch. *Id.* at 34. Dr. Well further testified that the head orifices provide prime moist areas for colonization. *Id.* Dr. Wells also testified that with all the bodies he has examined for the presence or absence of blowfly eggs, all of which featured exposed heads or faces, if there were blowfly eggs found on body locations other than the head, there was also blowfly colonization in the head orifices. *Id.* at 35. Dr. Wells testified that while it is possible for blowflies to lay eggs in locations other than the head, blowflies will generally colonize in the moist head openings first, and only then will they colonize in other body locations. *Id.* at 36.

Dr. Wells further testified that before rendering an opinion in this case, he reviewed reports by two other forensic entomologists: Dr. Gail Anderson and Dr. Linda O'Connor, as well as reports by two other forensic pathologists: Dr. Andrew Baker and Dr. Glenn Larkin. *Id.* at 21. However, Dr. Wells testified that normally when he consults on a case, he does not have the reports of other entomologists or other findings before he does his own review.

Id. at 78.

Dr. Wells testified that blowflies will typically lay their eggs in the head orifices of a human corpse, particularly the nose, mouth and eyes. *Id.* at 22. Dr. Wells testified that there are exceptions: blowflies could lay eggs in the genital region or anus "if they are not covered by clothes." Dr. Wells testified that blowflies can also lay eggs in wounds. *Id.* at 22. Dr. Wells also testified that blowflies are aggressive, ubiquitous first colonizers and are "competitively superior" and "by far the most common" first colonizers, compared to all other insects, including flesh flies. *Id.* at 24.

Dr. Wells concluded that based on insect analysis, he believes the possibility

cannot be excluded that the Decedent was present at the scene during daylight hours before he was on found on the evening of July 8, 2001. *Id.* at 37. Dr. Wells further testified that he could not reject the hypothesis that Decedent could have been present during the day without colonization because he did not have local data from Las Vegas specifically to be able to calculate an actual probability as to how long it takes for blowfly colonization to occur. *Id.* at 37-38. Dr. Wells also testified that since there is no reference data showing succession patterns of carrion insects in urban areas in Southern Nevada, he would not be able to opine, with statistical certainty, as to how long blowflies would take to colonize a dead body in Las Vegas. *Id.* at 42.

IV. DISCUSSION

In determining whether Defendant's counsel was ineffective for failing to provide evidence that narrowed Decedent's time of death, the Court must first make a preliminary finding as to the strength of Defendant's alibi.

Then, after assessing the weight of Defendant's alibi, the Court will determine the importance of narrowing Decedent's time of death and whether Defendant has a valid claim for ineffective assistance of counsel.

A. Defendant's Alibi Testimony

The State contends that Defendant was in Las Vegas and had the opportunity to kill Decedent some time on July 8, 2001. Defendant contends that from the late morning through the night of July 8, 2001, Defendant was in Panaca. In support of Defendant's position, several alibi witnesses testified at trial on Defendant's behalf. In closing, the State also conceded the evidence indicated Defendant was in Panaca in the late morning on July 8, 2001. (TT XIX-130)

Defendant's first witness was Jo Wuori, Defendant's next door neighbor in Panaca.

Ms. Wuori testified that on July 8, 2001, between 11 a.m. and 1 p.m., she looked out her window while she was doing the dishes and saw Defendant on a four-wheeler doing donuts. (TT XV-8-10)[6]. Ms. Wuori testified that she saw Defendant with another tall skinny blond haired teen and described Defendant wearing a black tank top women's shirt and Levi's shorts. (TT XV 10-11).

Ms. Wuori testified that she knew it was between 11 a.m. and 1p.m. because that was the time her daughter napped and when she did her chores. (TT XV-22). Ms. Wuori further testified that she also recalled the date she saw Defendant because it was the same day as her friend Dale Towery's birthday and she recalled wishing Dale happy birthday around the time she saw Defendant. (TT XV 12).

Clint Hohman, a resident of Panaca who is not related to Defendant, also testified that he saw Defendant riding a four-wheeler on July 8 at around 11:30 a.m. with Michelle Austria. (TT XVII-89-90). According to his testimony, Defendant and Ms. Austria were on the same four-wheeler. (TT XVII-91). Mr. Hohman testified that he knew that it was July 8 because it was the day before his younger brother's birthday. (TT XVII-90). Additionally, Mr. Hohman testified that he knew that it was around 11:30 a.m. that day because he had gone to church at 9 a.m. and went horseback riding right after church, which is when he saw Ms. Defendant. *Id.* Mr. Hohman testified that Defendant was wearing a girl's darker shirt, shorts, and no helmet. (TT XVII-1O1-102).

Ms. Austria testified that she did in fact go four-wheeling a couple of times with Defendant, including on July 8, 2001. (TT VI-86-87).

Larry Lobato, Defendant's father, testified that he saw Defendant before he left for work at the Hideaway Club in Caliente at 4 p.m. on July 8, 2001. Mr. Lobato testified

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[6] Trial Transcript is cited "TT" followed by the volume and page number.

that Defendant told him she was going to go four-wheeling. Mr. Lobato further testified that when he saw Defendant, she looked windblown and appeared as though she had been out all day. (TT XVII- 193).

Ashley Lobato, Defendant's younger step-sister, testified that she saw Defendant at home in Panaca around 3-4 p.m. on July 8 in Defendant's garage with Chris Carrington. (TT XVII-129). Ashley Lobato testified that Mr. Carrington was using the bowflex machine in the garage and Defendant was sitting on a chair. (TT XVII-130).

Becky Lobato, Defendant's stepmother, testified about the phone records from their home landline. Becky Lobato testified that the records showed a call from the home landline to the cellphone of Doug Twinning, one of Defendant's friends, at 11:57 a.m. on July 8th and that Defendant would have been the only person at the house who would have called Doug Twinning. (TT XVIII- 117). Becky Lobato also testified that there were two other phone calls to Doug Twinning from the home landline at 5:06 p.m. and 6:38 p.m. that only Defendant would have made. (TT XVIII-117). When Becky Lobato returned home from work around 4 p.m., she also saw Defendant with Chris Carrington in their garage. (TT XVIII- 104).

Chris Carrington testified and confirmed that he was at Defendant's parents' house on July 8, 2001 and worked out on the bowflex machine in the garage as he had done previously in their house. (TT VIII-111-113). Mr. Carrington testified that he left at some point to mow his grandmother's lawn, but returned to Defendant's parents house later in the day. *Id.*

Kendre Thunstrom, whose children Defendant babysat, testified that she saw Defendant around sunset (which she approximated to be 5 or 6 p.m. on July 8, 2001) when her ex-boyfriend's truck broke down in front of Defendant's parents' home. (TT

XVII-113). Ms. Thunstrom testified that her, her ex-boyfriend, and her son were driving around Panaca that night when their truck broke down. *Id.* Ms. Thunstrom testified that her ex-boyfriend went back to their house to get gas while she stayed at Defendant parents' house and spoke to Defendant for about 30-45 minutes. (TT XVII-115-116). Ms. Thunstrom testified that she knew it was after July 4, 2001 and that they had been fixing the truck that weekend, which is how she knew it was Sunday July 8, 2001. *Id.* Ms. Thunstrom also testified that she recalled that she had to go home and get dinner ready for her ex-boyfriend so he could go to work and that he works Monday through Friday. *Id.*

Shayne Kraft, Defendant's step-cousin, testified that she recalled seeing Defendant at her parents' home at approximately 6 or 6:30 p.m. on July 8, 2001 when she went to Defendant's parents' house to get some tiger balm for her husband's neck and to borrow an electric skillet because she was making chicken fried steak for dinner that night. (TT XV-87-88). Ms. Kraft testified that she saw Defendant, Becky Lobato, Ashley Lobato, and likely Chris Carrington at Defendant's parents' house. (TT XV-89). Ms. Kraft testified that she knew it was July 8, 2001 because she took her husband to the hospital the next day, July 9, 2001, for his neck issues. (TT XV-93). Ms. Kraft testified that her husband came to the Defendant's parents' house around 8 o'clock, which is why she left, and Ashley Lobato went home with her for dinner. (TT XV-90, 92). Ms. Kraft testified that when she dropped Ashley Lobato back off at Defendant's parents' house after dinner, she saw Defendant's red Fiero parked in front of the house. (TT XV-107). Ms. Kraft, Ashley Lobato and Chris Carrington all testified to being at Defendant's parents' house at this time and seeing Defendant there. (TT XV-121); (TT XVII-130); (TT VIII-133).

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Larry Lobato further testified that he saw Defendant when he returned home around 12:30 a.m. on July 9, 2001. (TT XVII-194). Mr. Lobato testified that Defendant was in the garage waiting for Doug Twinning to pick her up to go back to Las Vegas. *Id.* Mr. Lobato testified that Defendant had all her luggage packed. (TT XVII- 195). Mr. Lobato testified that Becky Lobato was with her. *Id.* Mr. Lobato testified that he helped Defendant load Doug's car at around 1 a.m. on the 9th when Doug arrived. *Id.*

Doug Twinning testified that he saw Defendant late on July 8, 2001 and early on July 9, 2001 when he helped load up some of her bags and drove his white Mustang convertible from Panaca to Las Vegas. (TT XIX 35).

Additionally, the State conceded that a telephone call from Defendant's home to Defendant's stepmother, Rebecca Lobato's, cell phone at "10 a.m." on July 8, 2001 was probably made by Defendant while she was in Panaca. (TT XIX-130) Furthermore, the State acknowledged at trial that Defendant was in Panaca as of 11:30 on the morning of July 8th and she remained in Panaca until after the Decedent was found that night. *Id.* As such, the State concedes that on July 8, 2001, from as early as 10:00 a.m. to as late as 11:30 a.m., Defendant was already in Panaca.

Furthermore, at trial, Defendant's counsel called Phillip Boucher, a Supervisor for the Nevada Department of Transportation, who described the route between Panaca and Las Vegas. Mr. Boucher testified that it is 165 miles between Panaca and Las Vegas. (TT XV-48). Accordingly, it takes anywhere from two to two and a half hours to drive from Las Vegas to Panaca. Therefore, using the later 11:30 a.m. time frame, the latest Defendant could of left Las Vegas on the morning of July 8, 2001 was at 9:30 a.m.

COURT FINDS, the defense's alibi witnesses, who were not just family members, were reliable, consistent and provided strong alibi evidence for Defendant.

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Accordingly, COURT FINDS, on July 8, 2001, Defendant has strong alibi evidence putting her in Panaca from as late as 11:30 a.m. until she returned to Las Vegas later that night.

B. Ineffective Assistance of Counsel

A criminal defendant has a Sixth Amendment right to effective representation at trial. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). The United States Supreme Court established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). In order for Defendant to be successful in her ineffective assistance of counsel claim, Defendant must prove that her (1) counsel's performance was deficient, (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. at 687, 694 (1984); *see also State v. Love*, 865 P.2d 322, 323 (1996) (applying the two-prong Strickland test in Nevada).

1. Deficient Performance

To meet the deficient performance prong, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688.

a. Defendant's Counsel Failed To Provide Any Evidence Regarding Decedent's Time Of Death.

The State argues that when looking at the investigation as a whole, the conduct of Defendant's counsel did not fall below an objectively reasonable standard. Defendant argues that her counsel was deficient for failing to provide any evidence regarding Decedent's time of death.

Defendant's alibi evidence illustrates that on July 8, 2001, from 11:30 am at the

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latest until later that night, Defendant was in Panaca. Early in the morning on July 9, 2001, Decedent's body was found in Las Vegas. The State contends that in the early morning of July 8, 2001, Defendant killed Decedent just before she left for Panaca. In contrast, Defendant contends that she could not have killed Decedent because Decedent was killed after 11:30 am on July 8, 2001, when Defendant's alibi evidence places her in Panaca.

COURT FINDS, Defendant's alibi defense made Decedent's time of death a crucial aspect of Defendant's case.

Furthermore, given Defendant's strong alibi evidence, Defendant's counsel needed to narrow the time of Decedent's death as much as possible. Nonetheless, the only evidence presented at Defendant's trial regarding Decedent's time of death was the State's medical examiner's testimony, which evolved in the State's favor between the preliminary hearing and trial.

Accordingly, COURT FINDS, Defendant's counsel was deficient for failing to introduce any evidence regarding Decedent's time of death.

b. Defendant's Counsel Failed To Meaningfully Consult With A Forensic Pathologist.

The State argues that Defendant's counsel was not ineffective for failing to hire a forensic pathologist. More specifically, the State argues that the decision not to call a forensic pathologist at trial was a strategic decision that should not be challenged. In support of this, the State points to the fact that Defendant's counsel did in fact retain and notice Dr. Wetli as an expert. The State argues that this illustrates that Defendant's counsel was actively investigating the case and that the ultimate decision not to call Dr. Wetli at trial was purely strategic.

In response, Defendant argues that Defendant's counsel was deficient because they did not meaningfully consult with Dr. Wetli or another forensic pathologist. As a result, Defendant argues she was unable to challenge the State's estimate of Decedent's time of death.

According to Mr. Schieck, despite his extensive experience and knowledge with working with forensic experts and homicide cases, Ms. Greenberg and Ms. Zalkin were solely tasked with locating and consulting experts at Defendant's trial. Mr. Schieck made clear that in hindsight, he should have been more involved in working with the forensic experts given the other attorneys' lesser experience.

Ms. Greenberg and Ms. Zalkin did reach out to forensic pathologist Dr. Wetli prior to trial in order to get a time of death estimation. In response, Dr. Wetli wrote a two-page letter to Ms. Greenberg prior to trial opining that Decedent's time of death could have been a few hours before or after 10 a.m. on July 8, 2001. Presumably, for this reason, Ms. Greenberg and Ms. Zalkin chose not to call Dr. Wetli at trial. However, as discussed at the Hearing, there are causes for concern in both Dr. Wetli's ultimate opinion and the information she was provided by Ms. Greenberg and Ms. Zalkin.

In regard to Dr. Wetli's ultimate opinion, Dr. Baker testified at the Hearing regarding its inconsistency and faulty analysis. According to Dr. Baker, Dr. Wetli's report described Decedent's body as being in both full rigor and in dissipating rigor at same point in time, 3:50 a.m. However, Dr. Baker made clear that these are two very different physical states involving two different chemical processes. In addition, Dr. Baker testified that Dr. Wetli's opinion was based on information that was inconsistent with the findings of the coroner's investigator. Therefore, according to Dr. Baker, Dr. Wetli's conclusion was based upon faulty reasoning, incomplete information, or both.

In regard to Dr. Wetli's consultation, Mr. Schieck made clear that it was his normal practice to give experts all relevant documentation during his consultations. However, in the instant case, Defendant's less experienced counsel provided Dr. Wetli with only five out of nearly three hundred photographs of the crime scene and autopsy. Thereby, affecting the thoroughness and accuracy of Dr. Wetli's opinions.

COURT FINDS, Defendant's counsel failed to meaningfully consult with a forensic pathologist.

Furthermore, after an extensive review of Defendant's record, forensic pathologist Dr. Baker rendered his expert opinion in Defendant's case. Dr. Baker stated that Decedent's most likely time of death was approximately 8 p.m. on July 8, 2001, with a margin of error of, at most, five or six hours in either direction. Dr. Baker explained that there is nothing in any of the materials that he reviewed that suggests that Decedent died during the early morning hours of July 8, 2001. Therefore, according to the time of death determination of forensic pathologist Dr. Baker, Defendant has strong alibi evidence placing her in Panaca at the time Decedent was killed.

COURT FINDS, had Defendant's counsel meaningfully consulted with a forensic pathologist, Defendant would have been provided with credible testimony narrowing Decedent's time of death.

Accordingly, COURT FINDS, Defendant's counsel was deficient for failing to consult with a forensic pathologist.

c. Defendant's Counsel Failed To Consult With A Forensic Entomologist.

Defendant argues that her counsel's failure to meaningfully consult with a forensic pathologist led to a failure to consult with a forensic entomologist. Defendant argues that a forensic entomologist would have proven that Decedent died at or near sunset, on July

8, 2001, when Defendant has strong alibi evidence placing her in Panaca.

According to the highly qualified opinion of Dr. Baker, Ms. Greenberg and Ms. Zalkin should have asked Dr. Wetli whether there were any other forensic disciplines that could narrow a time of death estimation for Decedent. In fact, further supporting the ineffective nature of Ms. Greenberg and Ms. Zalkin's questioning, Mr. Schieck testified that he himself would have made such an inquiry. Dr. Baker also made clear that such an inquiry is one he would clearly expect in a case where a time of death estimation was the critical issue. Dr. Baker also stated that if such an inquiry were made to him, he would have recommended consultation with an entomologist.

In regard to testimony from a forensic entomologist, Dr. Tomberlin first explained that forensic entomology is a well-established scientific field and has been used since the 13th Century. In coming to an expert opinion in this case, Dr. Tomberlin emphasized that based on the absence of any blowfly eggs on the Decedent, Decedent could not have been dead at the scene for very long, and likely died after 8:59 p.m. on July 8, 2001. Therefore, according to the time of death determination of both Dr. Baker and Dr. Tomberlin, Defendant has strong alibi evidence placing her in Panaca at the time Decedent was killed.

Next, forensic entomologist Dr. Kimsey testified and confirmed Dr. Tomberlin's testimony regarding the well-established field of forensic entomology. More specifically, according to Dr. Kimsey, forensic entomology has been an established field, used in both criminal and civil cases, for hundreds of years. In coming to an expert opinion in this case, Dr. Kimsey emphasized that given the temperature conditions and the conditions in which Decedent's body was found, and having no blowfly eggs on him when found after sunset on July 8, 2001, it is not possible, and at best highly unlikely,

that the Decedent was killed the morning of July 8, 2001. Rather, Dr. Kimsey made clear that the absence of blowfly eggs on Decedent's body means that the Decedent likely died either immediately before or after nautical sunset on July 8, 2001, at 9:07 p.m. Thus, according to the time of death determinations of Dr. Baker, Dr. Tomberlin and Dr. Kimsey, Defendant has strong alibi evidence placing her in Panaca at the time Decedent was killed.

Lastly, forensic entomologist Dr. Anderson testified and confirmed that forensic entomology has been used in criminal cases for hundreds of years. According to Dr. Anderson's expert opinion on Decedent's time of death, it is scientifically unrealistic for Decedent to have been present at the scene, in those weather conditions, since the early morning hours of July 8, 2001 and have no blowfly colonization. Rather, Dr. Anderson made clear that the condition of Decedent's body strongly suggests that he died after sunset on July 8, 2001. Therefore, according to the highly educated, experienced and credible expert opinions of Dr. Baker, Dr. Tomberlin, Dr. Kimsey, and Dr. Anderson, Defendant has strong alibi evidence placing her in Panaca at the time Decedent was killed.

COURT FINDS, according to Defendant's highly experienced entomologists, as well as the State's entomologist, blowflies are dependent upon laying their eggs in protected, nutrient-rich areas of freshly deceased bodies, which are typically found in the head orifices (eyes; nose; mouth).

COURT FURTHER FINDS, according to Defendant's entomologists, as well as the State's entomologist, blowflies are typically the first colonizers of carrion and it is highly unlikely that Decedent's body could have been lying outdoors, in optimal temperatures (80-to-mid-90's F), in optimal weather conditions (no precipitation or high

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winds) for an entire day, and not have any blowfly colonization.

COURT FURTHER FINDS, all three of Defendant's forensic entomologists, as well as the State's entomologist, testified that had Decedent's body been present at the scene throughout the day on July 8, 2001, they would expect to see heavy blow fly colonization, in the form of visible, large clumps of eggs, starting in the head orifices, and continuing to exposed wounded areas.

COURT FURTHER FINDS, all three of Defendant's entomologists testified that Decedent died at a time that Defendant had strong alibi evidence placing her in Panaca. The testimony of all Defendant's experts were further strengthened by the fact that they: are highly qualified; came to their opinions independently, without review of any other forensic entomologist or forensic pathologist opinion related to the case; made an extensive review of Defendant's record prior to rendering an opinion; testified for Defendant pro bono; and still reached similar, if not identical, conclusions.

Accordingly, COURT FINDS, had Defendant's counsel meaningfully consulted with a forensic entomologist, Defendant would have had credible testimony narrowing Decedent's time of death.

Finally, COURT FINDS, due to the importance of narrowing Decedent's time of death, Defense counsel's failure to consult with a forensic entomologist fell below an objective standard of reasonableness and was deficient.

2. Defendant's Counsel's Performance Prejudiced Defendant

With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. at 691-696. A reasonable probability is a probability sufficient

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to undermine confidence in the outcome. *Id.* A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. *Id.*

Here, the jury received no physical evidence linking Defendant to the Decedent's murder. As such, "it seems likely that Defendant's statements to the detective and others had the greatest influence on the jury's verdict." Supreme Court Remand, at 5.

However, "[i]t is a well-established rule that 'a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused.'" *Adams v. United States*, 501 A.2d 1011, 1022 (D.C. 1986) (*quoting Wong Sun v. United States*, 371 U.S. 471, 488-89, 83 S.Ct.407, 9 L.Ed.2d 441 (1963)). This is because "doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession." *Opper v. United States*, 348 U.S. 84, 89-90, 75 S.Ct. 158, 99 L.Ed. 101 (1954). "'As to the quantum of corroboration that must accompany the admission in order to provide an adequate basis for conviction', . . . the government must "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Adams*, 502 A.3d at 1022-23 (quotations marks omitted).

Therefore, the importance of Defendant's counsel to investigate and present expert evidence was further strengthened.

Nonetheless, as the Court previously discussed, Defendant's counsel failed to meaningfully consult with a forensic pathologist. By failing to meaningfully consult with a forensic pathologist, Defendant's counsel was unable to challenge the State's time of

death window and introduce a time of death when Defendant had strong alibi evidence placing her in Panaca. In addition, Defendant's counsel's failure to meaningfully consult with a forensic pathologist resulted in that pathologist not referring Defendant's counsel to a forensic entomologist. A forensic entomologist, if consulted, would have testified to the absence of blowfly colonization on Decedent's body. Which, according to the testimony elicited from multiple forensic experts, would mean that the Decedent died either shortly before or after sunset on July 8, 2001; a time of which Defendant had strong alibi evidence placing her in Panaca.

COURT FINDS, considering the totality of the evidence, had Defendant's counsel provided evidence that narrowed Decedent's time of death, it would have, within a reasonable probability, made a difference in the outcome of the trial.

Accordingly, COURT FINDS, Defendant's counsel's deficient performance prejudiced the outcome of Defendant's case.

V. ORDER

For the foregoing reasons, COURT ORDERS, Defendant's Petition for Writ of Habeas Corpus is GRANTED.

COURT FURTHER ORDERS, Defendant's request for new trial is GRANTED.

COURT FURTHER ORDERS, as this Court has found a legal basis exists to grant Defendant's Petition for Habeas Corpus and request for a new trial, this Court will not address Defendant's claims for actual innocence/new evidence.

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STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408

COURT FURTHER ORDERS, matter set for Status Check regarding Setting of Trial on January 24, 2018, at 9:30 a.m.

Dated this 19th day of December, 2017.

HONORABLE STEFANY A. MILEY
DISTRICT COURT JUDGE
DEPARTMENT XXIII

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Decision and Order was electronically served and/or placed in the attorney's folders maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows: Sandra DiGiacomo, Esq., David Z. Chesnoff, Esq., Richard A. Schonfeld, Esq., Robert Z. DeMarco, Esq., Vanessa Potkin, Esq., Adnan Sultan, Esq., and Jane Pucher, Esq.

By:
Carmen Alper
Judicial Executive Assistant

STEFANY A. MILEY
DISTRICT JUDGE
DEPARTMENT TWENTY THREE
LAS VEGAS NV 89101-2408