

ORIGINAL

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8 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

9 KIRSTIN BLAISE LOBATO

Docket No. 49087

FILED

Appellant,

v.

FEB 12 2009

STATE OF NEVADA,

Respondent.

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

11 **PETITION FOR REHEARING**

12 Comes now Appellant Kirstin Blaise Lobato, by and through her counsel JoNell
13 Thomas, and respectfully requests rehearing, pursuant to NRAP 40, of this Court's Order
14 of Affirmance, entered on February 5, 2009.

15 Lobato was convicted, pursuant to a jury verdict, of one count of voluntary
16 manslaughter with the use of a deadly weapon and one count of sexual penetration of a dead
17 human body. Following full briefing and oral argument, this Court entered an Order of
18 Affirmance in which it addressed two of the issues raised by Lobato and summarily rejected
19 seven other issues in a footnote. Lobato respectfully submits that this Court misapprehended
20 the facts and overlooked controlling legal authority and that rehearing should be granted.

21 **This Court Misapprehended The Facts In Finding That There Was Sufficient Evidence**
22 **To Support The Conviction and In Finding Harmless Error Based Upon**
23 **"Overwhelming Evidence of Guilt."**

24 In footnote 1 of the Order of Affirmance, this Court summarily rejects Lobato's
25 contention that there was insufficient evidence to support her conviction. Later, in
26 addressing the erroneous admission of hearsay evidence, this Court found that any error was
27 harmless beyond a reasonable doubt: "based on Lobato's admission, there was substantial
28 evidence that she committed the murder." Order at page 4. Lobato respectfully submits that
29 this Court misapprehended the facts in reaching this conclusion.

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1 There was insufficient evidence for the jury to convict Lobato on the charges of
2 voluntary manslaughter with use of a deadly weapon and sexual penetration of a dead human
3 body. No rational trier of fact could have found beyond a reasonable doubt that Lobato was
4 present when Bailey was killed or that she was in any other way responsible for his injuries.
5 See Jackson v. Virginia, 443 U.S. 307, 319 (1979); In re Winship, 397 U.S. 358 (1970).

6 As set forth at length in the briefs, there was absolutely no physical evidence tying
7 Lobato to either Bailey or the crime scene: none of her DNA, no fingerprints or shoe prints,
8 no tire tracks that matched her car, no pieces of hair or clothing, none of Bailey's blood was
9 found on her clothing or in her car, nor any other evidence suggesting that she was ever at
10 that location. 7 App. 1169, 1170; 8 App. 1540. In contrast, physical evidence was found at
11 the scene which may have belonged to the perpetrator, but Lobato was excluded as a source
12 of that evidence: bloody shoe prints were found leading from the dumpster area but they did
13 not match Lobato's shoe size or the shoes of the first responders; fresh tire marks were made
14 over a planter median, but the tire marks did not match Lobato's car; a piece of chewing gum
15 was covered in blood which belonged to Bailey but also contained the DNA of an unknown
16 person who was not Lobato; a pubic hair that was found in Bailey's sexual assault kit had a
17 DNA mixture which included Bailey's DNA and the DNA of an unknown person, who was
18 not Lobato; two cigarette butts were collected from Bailey's body, one contained DNA from
19 an unknown male and the other contained a DNA mixture, the major profile of which was
20 consistent with Bailey and the minor profile of which was from an unknown person who was
21 not Lobato; fingerprints were recovered from the door of the dumpster enclosure, a box and
22 a beer can, but they did not belong to Lobato; 6 App. 1022, 1023, 1062; 7 App. 1228, 1229,
23 1234, 1240, 1252, 1260, 1264, 1266, 1308, 1309, 1317, 1328; 8 App. 1521, 1541-44. Both
24 the State's medical examiner and the defense expert agreed that Bailey's injuries were typical
25 of a male on male case and were inconsistent with the kind of injuries normally inflicted by
26 a female. 7 App. 1168; 8 App. 1540, 1549.

27 Just as there is no physical evidence supporting this conviction, there is also no
28 eyewitness who placed Lobato or her distinctive car in the bank parking lot where Bailey's

1 body was found. No eyewitness placed Lobato or her distinctive car in Las Vegas or on the
2 road between Las Vegas and Panaca at the relevant time. 7 App. 1172. Not a single person
3 testified that Lobato's car was moved from the front of her parent's home between July 2nd
4 until July 20th, when it was seized by the police. 7 App. 1200; 8 App. 1513, 1516.
5 Critically, numerous people from Panaca testified that Lobato was in Panaca on the day that
6 Bailey was killed. 6 App. 1105, 115; 7 App. 1190-91; 8 App. 1473, 1493, 1501-02; 9 App.
7 1600, 1606, 1610-11, 1623-25, 1650, 1701.

8 The State's only evidence against Lobato was her statement to the detectives, which
9 was similar in most respects to her statements to friends from Panaca, that she had cut a black
10 man's penis after he tried to attack her. Exhibit 125A at 6. As set forth in detail in the
11 Opening Brief there were numerous and substantial inconsistencies between Lobato's
12 statement and the actual facts concerning Bailey's death. Lobato's cryptic statements alone
13 are insufficient to establish guilt beyond a reasonable doubt.

14 The State failed to prove beyond a reasonable doubt that Lobato killed Bailey and that
15 she was the person responsible for injuries to his rectum. Accordingly, there is insufficient
16 evidence to support the convictions. Lobato respectfully submits that this Court
17 misapprehended the facts in finding sufficient evidence and in finding overwhelming
18 evidence of guilt and that rehearing should be granted on this basis.

19 **This Court Misapprehended The Facts And Overlooked Controlling Authority in**
20 **Rejecting Lobato's Claim Concerning a Detective's Opinion Testimony**

21 In the briefs and argument, Lobato presented substantial facts and legal authority
22 concerning the improper opinion testimony by Detective Thowsen as to his beliefs as the
23 reasons why her statement to the detective was inconsistent with the physical evidence
24 concerning Bailey's death. Although this was one of the primary issues raised by Lobato and
25 the issue was preserved at trial, this Court summarily rejects the issue in a footnote without
26 any explanation. Lobato respectfully submits that this Court overlooked material facts and
27 a material question of law in reaching this decision.

28 Over objection, Thowsen testified about his experience in homicide cases and his belief

1 that it is very common for people to minimize their involvement in an offense when they give
2 a statement. 8 App. 1387. He further explained, over objection, his experience with suspects
3 who were under the influence of methamphetamine at the time of the offense and his belief
4 that such suspects “jumble things together,” forget details, and remember things strangely.
5 8 App. 1388. He gave his opinion about his belief as to the knowledge someone would have
6 if they had blacked out and noted details of Lobato’s statement in which she stated she could
7 not remember certain things. 8 App. 1388.

8 Lobato contended that admission of this testimony was error as a witness is not entitled
9 to give an opinion as to the guilt of the defendant as it usurps the jury function. Winiarz v.
10 State, 104 Nev. 43, 50-51, 752 P.2d 761, 766 (1988). Likewise, it is improper for a lay
11 witness to give an opinion as to the truthfulness of a defendant’s statement to the police.
12 Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000); U.S. v. Espinosa, 827 F.2d
13 604, 612 (9th Cir. 1987); Maurer v. Dept. of Corrections, 32 F.3d 1286, 1287 (8th Cir. 1994).
14 “Police officers, by virtue of their positions, rightfully bring with their testimony an air of
15 authority and legitimacy. A jury is inclined to give great weight to their opinions as officers
16 of the law.” Bowles v. State, 381 So.2d 326, 328 (Fla. 5th DCA 1980). In addition,
17 Thowsen’s testimony as to his belief that Lobato’s statements were consistent with other
18 suspects who were involved with methamphetamine and who minimized their involvement
19 in an offense amounts to “profile” evidence and was inadmissible. See U.S. v. Hernandez-
20 Cuartas, 717 F.2d 552, 555 (11th Cir. 1983); U.S. v. Beltron-Rios, 878 F.2d 1208, 1210 (9th
21 Cir. 1989). The introduction of unreliable evidence violated Lobato’s state and federal
22 constitutional rights to due process, confrontation and cross-examination. See Windham v.
23 Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998); Reiger v. Christensen, 789 F.2d 1425, 1430
24 (9th Cir. 1986).

25 Lobato was extremely prejudiced by Thowsen’s testimony. He usurped the jury’s
26 function by giving his belief as to the believability of Lobato’s statement and the reasons for
27 the substantial inconsistencies which existed between the incident described by Lobato and
28 the facts of Bailey’s killing. Moreover, this testimony was emphasized during closing

1 arguments. 9 App. 1725-26. There were substantial differences between the physical
2 evidence and circumstances concerning Bailey's death and the attack described by Lobato
3 in her statement. Thowsen was allowed to summarily gloss over these substantial differences
4 by simply claiming that they were merely the product of minimizing and jumbling.
5 Rehearing should be granted based upon this Court's misapprehension of the facts and law
6 as Lobato is entitled to a reversal of her conviction on these grounds.

7 **This Court Misapprehended the Facts and Overlooked Controlling Law in Rejecting**
8 **Lobato's Claim That The District Court Erred In Refusing Testimony by Witnesses**

9 Lobato attempted to present testimony from three witnesses about conversations they
10 had with Lobato prior to July 8th (the day Bailey was killed) in which she confided that she
11 had been attacked and cut a man's penis. The district court refused to allow these witnesses
12 to testify, even though their testimony was admissible. Rehearing should be granted based
13 upon this Court's misapprehension of the facts and law in summarily rejecting this issue.

14 The central issue in this case concerned whether Lobato was describing Bailey or a
15 different person when she made a statement to the police in which she described being
16 attacked and then cutting her attacker's penis. A key point at dispute concerned whether
17 Lobato was attacked on July 8th or whether she was attacked on an earlier date. Lobato
18 repeatedly tried to introduce testimony from witnesses in whom she confided in prior to July
19 8, 2001, about her attack and her response of cutting her attacker's penis. The district court,
20 however, ruled that this testimony was inadmissible and prohibited Lobato's witnesses from
21 presenting this testimony. See Trans. 9/18/06 at 27 (sustaining objection to proposed
22 testimony of Pyszkowski); 8 App. 1529-31 (prohibiting McBride from testifying that she saw
23 Lobato prior to July 4th, and that Lobato told her at that time that she had been sexually
24 assaulted and had cut a man's penis). The district court's rulings were erroneous and
25 violated Lobato's state and federal constitutional rights to present a defense.

26 "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or
27 in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the
28 Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete

1 defense.” Crane v. Kentucky, 476 U.S. 683, 689-90 (1986). This right is abridged by
2 evidence rules that “infring[e] upon a weighty interest of the accused” and are “‘arbitrary’
3 or ‘disproportionate’ to the purposes they are designed to serve.” U.S. v. Scheffer, 523 U.S.
4 303, 308 (1998). See also Abbott v. State, 122 Nev. ___, 138 P.3d 462, 476 (2006)
5 (recognizing that an evidentiary rule which renders non-collateral, highly relevant evidence
6 inadmissible must yield to a defendant’s constitutional right to present a full defense).
7 Lobato was entitled to present this testimony and the district court violated Lobato’s
8 constitutional right to present a defense by prohibiting this testimony. The testimony was
9 also admissible under NRS 51.025 as the proposed testimony here was not offered to prove
10 the truth of Lobato’s statement that she was attacked and cut her attacker’s penis, but was
11 offered to prove that she made these statements prior to Bailey’s death, thus establishing that
12 Lobato was making a statement about a different person. Testimony such as this is
13 admissible as nonhearsay. Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

14 Rehearing should be granted so that this Court may address the merits of this issue as
15 it misapprehended the facts and overlooked controlling authority in rejecting this issue.

16 **Rehearing Should Be Granted Because This Court Misapprehended The Facts and**
17 **Controlling Authority In Rejecting A Claim About Admission of Prejudicial Evidence**

18 The district court allowed the State introduced evidence that Lobato had a personalized
19 license plate of “4NIK8ER” or “FORNICATOR” even though that evidence was irrelevant
20 and highly prejudicial. Rehearing should be granted based upon this Court’s summary
21 rejection of this issue.

22 Over repeated defense objections, and an offer to stipulate that Lobato’s car had a
23 distinctive license plate, the district court ruled that evidence concerning the license plate was
24 admissible, even though not a single witness claimed to have seen Lobato, her car, or the
25 license plate anywhere in the vicinity of the location where Bailey was killed. 1 App. 21-33.
26 2 App. 374-78, 4 App. 918-23. This evidence was admitted solely to inflame the jury as the
27 State presented extensive testimony about the personalized license plate. See 6 App. 1095
28 (photograph of the Fiero with the license plate was shown to the jury, the license plate was

1 zoomed in upon, and a picture of the car was circulated); 6 App. 1118 (testimony of Paul
2 Brown); 6 App. 1121 (testimony of Jeremy Davis); 8 App. 1496 (testimony of Shayne Kraft);
3 9 App. 1636 (State asks Lobato's father about the license plate and how it was that Lobato
4 came up with that name).

5 This evidence was highly prejudicial and irrelevant to the State's case. It was therefore
6 inadmissible under NRS 48.035. See also Old Chief v. U.S., 519 U.S. 172, 180-81 (1997).
7 This evidence was also inadmissible because it constitutes evidence of prior uncharged
8 misconduct and bad character evidence. Walker v. State, 116 Nev. 442, 445, 997 P.2d 803,
9 806 (2000); Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991); Renderos v. Ryan,
10 469 F.3d 788, 798 (9th Cir. 2006). Lobato was not on trial for the offense of having a
11 personalized license plate that suggests or promotes fornication. Permitting the State to
12 present this highly prejudicial and inflammatory evidence amounted to nothing more than
13 character assassination of Lobato, which was wholly irrelevant and immaterial to the crimes
14 charged. Rehearing should be granted based upon this Court's misapprehension of the facts
15 and the law concerning this issue.

16 **This Court Misapprehended The Law And The Facts In Rejecting Lobato's Claim**
17 **Concerning The Destruction And Failure To Preserve Exculpatory Evidence.**

18 Lobato presented a substantial issue concerning the State's failure to preserve evidence
19 and its destruction of evidence that had been collected. She asked that the charges be
20 dismissed because of the State's actions. The district court denied the motion and as a result
21 violated Lobato's state and federal constitutional rights to due process of law and to a fair
22 trial, her right to present a defense, and her right to confront the State's evidence. This Court
23 misapprehended the facts and the law in rejecting this issue.

24 The district court abused its discretion in denying Lobato's motion to dismiss the case
25 based on the State's failure to preserve and collect potentially exculpatory evidence. As
26 noted above, there was no physical evidence which implicated Lobato in the commission of
27 Bailey's homicide. Several items of potentially exculpatory evidence, however, were present
28 on or with the body at the crime scene that were either not collected or were thrown away

1 after they were collected. These items included: paper towels that were partially stuffed into
2 the opening where Bailey's penis once was and paper towels that were over Bailey's
3 abdomen, 8 App. 1487-88, 1490-91; 6 App. 1021; 7 App. 1282, 1285; 7 App. 1304;
4 extensive evidence from the crime scene that was not documented prior to its destruction, 7
5 App. 1252, 1262, 1277, 1283, 1302, 8 App. 1390; and reports of investigation that were not
6 made following interviews of potential witnesses and other investigative actions, 8 App.
7 1398-99, 1400, 1404.

8 This evidence was material and the failure to collect and preserve this evidence and
9 constituted bad faith, requiring dismissal of the charges, or at the minimum, gross negligence,
10 permitting the inference that the evidence would have been favorable to Lobato. The district
11 court's denial of Lobato's motion to dismiss, and her request for an instruction permitting
12 the inference that the evidence was favorable to her, violated Lobato's state and federal
13 constitutional rights to due process, a fair trial, the right to present a defense, and the right
14 to confront the State's evidence. See U.S. v. Rivera-Relle, 333 F.3d 914, 922 (9th Cir.
15 2003); Gordon v. State, 121 Nev. ___, 117 P.3d 214, 217-218 & n. 9-11 (2005); Daniels v.
16 State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998); Crockett v. State, 95 Nev. 859, 603 P.2d
17 1078 (1979); Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988); Sanborn v. State,
18 107 Nev. 399, 408, 812 P.2d 1279, 1285-86 (1991). Lobato's federal constitutional rights
19 were violated because the State failed to gather critical evidence at the scene, failed to
20 document evidence that was gathered, failed to protect crucial evidence from being
21 destroyed, and then threw away other important evidence. Such flagrant and repeated acts
22 and omissions constituted bad faith and violated Lobato's rights under Arizona v.
23 Youngblood, 488 U.S. 51 (1988). See also Northern Mariana Islands v. Bowie, 243 F.3d
24 1109, 1117 (9th Cir. 2001) (a bad faith failure to collect potentially exculpatory evidence
25 violates the Due Process Clause). The State's suppression of materially exculpatory evidence
26 violates both the Fourteenth Amendment and Nevada law. Brady v. Maryland, 373 U.S. 83,
27 87 (1963); Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692-93 (1996).

28 Lobato was prejudiced by the loss of this material evidence because she was unable to

1 have her own experts examine the paper towels found directly on Bailey's body and the other
2 evidence found near his body. Had she been allowed to examine this evidence there is a
3 reasonable probability that evidence of the actual perpetrator could have been recovered.
4 Likewise, had Thowsen made a record of his investigation concerning reports by healthcare
5 facilities on cut penises and his investigation of the Hispanic men who were potential other
6 suspects, Lobato could have conducted further investigation for the purpose of verifying
7 Thowsen's allegations, identifying the other suspects, and comparing fingerprint and DNA
8 samples of those men. Lobato was also prejudiced by the loss of this evidence because the
9 State was allowed to suggest through cross-examination of a defense expert that Lobato's
10 DNA could have been present at the crime scene but was not discovered because evidence
11 was not collected and preserved. 8 App. 1560. This point was also emphasized repeatedly
12 during closing arguments. 9 App. 1729-30, 1740, 1743.

13 The facts of this case reveal that investigating officers acted with bad faith and gross
14 negligence in failing to preserve potential exculpatory evidence. Randolph v. State, 117 Nev.
15 970, 987, 36 P.3d 424, 435 (2001). Rehearing should be granted as this Court misapprehended
16 the facts and failed to apply controlling law in rejecting this issue.

17 **This Court Misapprehended The Facts and The Law In Rejecting The Double**
18 **Jeopardy Claim**

19 Following the first trial, Lobato was sentenced to two consecutive 20 to 50 year
20 sentences for first-degree murder with use of a deadly weapon and a *concurrent term* 5 to
21 15 year sentence for sexual penetration of a dead body. 1 App. 11. On appeal, this Court
22 reversed the judgment after finding that the trial court erred in precluding Lobato from
23 introducing extrinsic evidence to impeach the testimony a witness for the State. 1 App. 6;
24 Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Following the second trial, Lobato was
25 convicted of voluntary manslaughter with use of a deadly weapon and sexual penetration of
26 a dead body. During the sentencing hearing her trial counsel noted that concurrent time had
27 been imposed following the first trial and asked the district court to impose concurrent time
28 for the two offenses. 9 App. 1759-60. The district court noted that the sentence imposed for

1 Count One was "significantly" greater in the original judgment than the sentence that could
2 be imposed pursuant to the jury's finding of voluntary manslaughter in the second trial. 9
3 App. 1760. The court then ordered that Lobato be sentenced to two consecutive terms of 48
4 months to 120 months for voluntary manslaughter with use of a deadly weapon and a
5 *consecutive term* of 60 months to 180 months for use of a deadly weapon. 9 App. 1762.
6 Pursuant to this Court's recent decision in Wilson v. State, 123 Nev. ___, 170 P.3d 975
7 (2007), the district court violated Lobato's right against double jeopardy by restructuring the
8 sentences to require that she serve her sentences consecutively, rather than concurrently, as
9 originally ordered by the court.

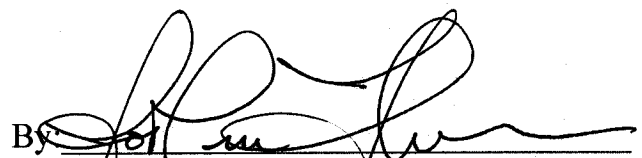
10 In Wilson, this Court provided an extensive analysis of the Nevada's double jeopardy
11 jurisprudence concluded that a district court violated Nevada's double jeopardy protections
12 by increasing the defendant's sentence after his conviction had been partially vacated on
13 appeal. Id. at 980. Of critical importance is this Court's conclusion in Wilson: "Even though
14 the resentencing did not lead to a harsher result than Wilson's original sentence, the district
15 court individually increased the minimum terms on each of the remaining possession counts
16 and *restructured the relationship* between the possession counts and the lone production
17 count. We conclude that Dolby forbids this sentencing procedure." Id.

18 Here the district court did that which was expressly found improper in Wilson. The
19 district court restructured the relationship between Count I and Count II by ordering that the
20 sentences be served consecutively rather than concurrently. Lobato respectfully submits that
21 Wilson is directly on point and that rehearing should be granted based upon this Court's
22 failure to apply this controlling authority.

23 **Conclusion**

24 For each of the reasons set forth herein, Lobato respectfully submits that rehearing
25 should be granted pursuant to NRAP 40.

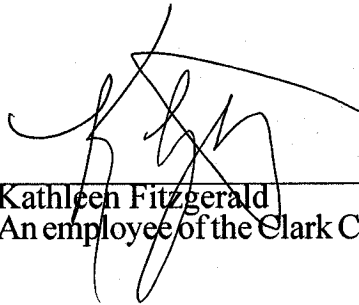
26 Dated this 10th day of February, 2009.

27 By 
28 JONELL THOMAS

1 **CERTIFICATE OF MAILING**

2 I hereby certify that on the 10 day of February, 2009, I duly deposited in the District
3 Attorney's bin at the Regional Justice Center, at Las Vegas, Nevada, a true and correct copy
4 of the above and foregoing **PETITION FOR REHEARING** addressed to the following:

5
6 David Roger
7 Clark County District Attorney
8 200 Lewis
9 Las Vegas, NV 89155



10 Kathleen Fitzgerald
11 An employee of the Clark County Special Public Defender