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

9 KIRSTIN BLAISE LOBATO

Docket No. 49087

Appellant,

v.

STATE OF NEVADA,

Respondent.

11 **PETITION FOR RECONSIDERATION EN BANC**

12 Comes now Appellant Kirstin Blaise Lobato, by and through her counsel JoNell  
13 Thomas, and respectfully requests reconsideration en banc, pursuant to NRAP 40A, of the  
14 Panel's Order of Affirmance, entered on February 5, 2009. A petition for rehearing to the  
15 Panel was denied on March 27, 2009. Lobato was convicted of one count each of voluntary  
16 manslaughter with the use of a deadly weapon and sexual penetration of a dead human body.  
17 Following briefing and oral argument, the Panel entered an Order of Affirmance in which  
18 it addressed two issues raised and summarily rejected seven other issues in a footnote.  
19 Lobato respectfully submits that reconsideration by the full court is necessary to secure and  
20 maintain uniformity of its decisions and that reconsideration en banc is warranted because  
21 of the substantial precedential, constitutional and public policy issues presented.

22 **The Panel Failed To Recognize The Constitutional Violation Created By The**  
23 **Conviction Of A Person Without Sufficient Evidence To Support The Conviction and**  
24 **In Finding Harmless Error Based Upon "Overwhelming Evidence of Guilt."**

25 In footnote 1 of the Order of Affirmance, the Panel summarily rejects Lobato's  
26 contention that there was sufficient evidence to support her conviction. Later, in addressing  
the erroneous admission of hearsay evidence, the Panel found that any error was harmless  
beyond a reasonable doubt cause "based on Lobato's admission, there was substantial  
evidence that she committed the murder." Order at page 4. Lobato respectfully submits that  
the Panel was wrong 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). As  
6 set forth at length in the briefs, there was absolutely no physical evidence tying Lobato to  
7 either Bailey or the crime scene: none of her DNA, no fingerprints or shoe prints, no tire  
8 tracks that matched her car, no pieces of hair or clothing, none of Bailey's blood was found  
9 on her clothing or in her car, nor any other evidence suggesting that she was ever at that  
10 location. 7 App. 1169, 1170; 8 App. 1540. In contrast, physical evidence was found at the  
11 scene which may have belonged to the perpetrator, but Lobato was excluded as a source of  
12 that evidence: bloody shoe prints were found leading from the dumpster area but they did not  
13 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 implicating Lobato, there is also no eyewitness  
28 who placed Lobato or her distinctive car in the parking lot where Bailey's body was found.

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

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

13 The State failed to prove beyond a reasonable doubt that Lobato killed Bailey and that  
14 she was the person responsible for injuries to his rectum. Accordingly, there is insufficient  
15 evidence to support the convictions. Lobato's conviction is unconstitutional and public  
16 policy is violated by her incarceration for an offense she did not commit. Reconsideration  
17 en banc should be granted on this basis.

18 **The Panel's Rejection Of Lobato's Claim Concerning a Detective's Opinion As To Her**  
19 **Truthfulness Ignores The Constitutional Violation Caused By This Testimony**

20 In the briefs and argument, Lobato presented substantial facts and legal authority  
21 concerning the improper opinion testimony by Detective Thowsen as to his beliefs about the  
22 reasons why Lobato's statement to the detective was inconsistent with the physical evidence  
23 concerning Bailey's death. Although this was one of the primary issues raised by Lobato and  
24 the issue was preserved at trial, the Panel summarily rejects the issue in a footnote without  
25 any explanation. Lobato respectfully submits that her constitutional rights were violated by  
26 the admission of this testimony and that reconsideration en banc is warranted to maintain the  
27 uniformity of this Court's decisions on this issue.

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’s function. Winiarz  
10 v. 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 (8<sup>th</sup> 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 amount to “profile” evidence and was inadmissible. U.S. v. Hernandez-  
20 Cuartas, 717 F.2d 552, 555 (11<sup>th</sup> Cir. 1983); U.S. v. Beltron-Rios, 878 F.2d 1208, 1210 (9<sup>th</sup>  
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).

24 Lobato was extremely prejudiced by Thowsen’s testimony. He usurped the jury’s  
25 function by giving his belief as to the believability of Lobato’s statement and the reasons for  
26 the substantial inconsistencies which existed between the incident described by Lobato and  
27 the facts of Bailey’s killing. This testimony was also emphasized during closing arguments.  
28 9 App. 1725-26. There were substantial differences between the physical evidence and

1 circumstances concerning Bailey's death and the attack described by Lobato in her statement.  
2 Thowsen was allowed to summarily gloss over these substantial differences by simply  
3 claiming that they were merely the product of minimizing and jumbling. Reconsideration  
4 en banc should be granted to correct this injustice in compliance with the constitution and  
5 public policy.

6 **The Panel Failed To Recognize the Constitutional Violation Caused By The District**  
7 **Court's Prohibition on Testimony by Defense Witnesses**

8 Lobato attempted to present testimony from three witnesses about conversations they  
9 had with Lobato prior to July 8<sup>th</sup> (the day Bailey was killed) in which she confided that she  
10 had been attacked and cut a man's penis. The district court prohibited these witnesses from  
11 testifying, even though their testimony was admissible. Reconsideration en banc should be  
12 granted because of the constitutional violation caused by the district court's ruling and to  
13 maintain uniformity of this Court's decisions.

14 The central issue at trial concerned whether Lobato was describing Bailey or a different  
15 person when she made a statement to the police in which she described being attacked and  
16 then cutting her attacker's penis. A key point at dispute concerned whether Lobato was  
17 attacked on July 8<sup>th</sup> or whether she was attacked on an earlier date. Lobato repeatedly tried  
18 to introduce testimony from witnesses in whom she confided in prior to July 8<sup>th</sup>, about the  
19 attack on her and her response of cutting her attacker's penis. The district court, however,  
20 ruled that this testimony was inadmissible and prohibited Lobato's witnesses from presenting  
21 this testimony. See Trans. 9/18/06 at 27 (sustaining objection to proposed testimony of  
22 Pyszkowski); 8 App. 1529-31 (prohibiting McBride from testifying that she saw Lobato prior  
23 to July 4<sup>th</sup>, and that Lobato told her at that time that she had been sexually assaulted and had  
24 cut a man's penis). The district court's rulings were erroneous and violated Lobato's state  
25 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, 138 P.3d 462, 476 (Nev. 2006) (recognizing that  
5 an evidentiary rule which renders non-collateral, highly relevant evidence inadmissible must  
6 yield to a defendant’s constitutional right to present a full defense). Lobato was entitled to  
7 present this testimony and the district court violated Lobato’s constitutional right to present  
8 a defense by prohibiting this testimony. The testimony was also admissible under NRS  
9 51.025 as the proposed testimony here was not offered to prove the truth of Lobato’s  
10 statement that she was attacked and cut her attacker’s penis, but was offered to prove that she  
11 made these statements prior to Bailey’s death, thus establishing that Lobato was making a  
12 statement about a different person. Testimony such as this is admissible as nonhearsay.  
13 Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

14 Reconsideration en banc should be granted so that this Court may address the merits  
15 of this issue, recognize the constitutional violation that occurred and address the decisions  
16 addressing this issue which are at odds with the Panel’s decision.

17 **Reconsideration En Banc Should Be Granted Because The Panel Failed To Address the**  
18 **Important Claim Concerning Admission of Prejudicial Evidence**

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

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

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

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

18 **Reconsideration En Banc Is Warranted On Lobato's Claim Concerning The**  
19 **Destruction And Failure To Preserve Exculpatory Evidence.**

20 Lobato presented a substantial issue concerning the State's failure to preserve evidence  
21 and its destruction of evidence that had been collected. She asked that the charges be  
22 dismissed because of the State's actions. The district court denied the motion and as a result  
23 violated Lobato's state and federal constitutional rights to due process of law and to a fair  
24 trial, her right to present a defense, and her right to confront the State's evidence.  
25 Reconsideration en banc is warranted to address the constitutional violation caused by the  
26 State's failure to preserve this evidence and to address the public policy issues presented.

27 The district court abused its discretion in denying Lobato's motion to dismiss based on  
28 the State's failure to preserve and collect potentially exculpatory evidence. As noted above,

1 there was no physical evidence which implicated Lobato in the commission of Bailey's  
2 homicide. Several items of potentially exculpatory evidence, however, were present on or  
3 with the body at the crime scene that were either not collected or were thrown away after they  
4 were collected. These items included: paper towels that were partially stuffed into the  
5 opening where Bailey's penis once was and paper towels that were over Bailey's abdomen,  
6 8 App. 1487-88, 1490-91; 6 App. 1021; 7 App. 1282, 1285, 1304; extensive evidence from  
7 the crime scene that was not documented prior to its destruction, 7 App. 1252, 1262, 1277,  
8 1283, 1302, 8 App. 1390; and reports of investigation that were not made following  
9 interviews of potential witnesses and other investigative actions, 8 App. 1398-1404.

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



1 Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692-93 (1996).

2 Lobato was prejudiced by the loss of this material evidence because she was unable to  
3 have her own experts examine the paper towels found directly on Bailey's body and the other  
4 evidence found near his body. Had she been allowed to examine this evidence there is a  
5 reasonable probability that evidence of the actual perpetrator could have been recovered.  
6 Likewise, had Thowsen made a record of his investigation concerning reports by healthcare  
7 facilities on cut penises and his investigation of the Hispanic men who were potential other  
8 suspects, Lobato could have conducted further investigation for the purpose of verifying  
9 Thowsen's allegations, identifying the other suspects, and comparing fingerprint and DNA  
10 samples of those men. Lobato was also prejudiced by the loss of this evidence because the  
11 State was allowed to suggest through cross-examination of a defense expert that Lobato's  
12 DNA could have been present at the crime scene but was not discovered because evidence  
13 was not collected and preserved. 8 App. 1560. This point was also emphasized repeatedly  
14 during closing arguments. 9 App. 1729-30, 1740, 1743. The facts of this case reveal that  
15 investigating officers acted with bad faith and gross negligence in failing to preserve  
16 potential exculpatory evidence. Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435  
17 (2001). Reconsideration en banc should be granted to address this issue.

18 **The Panel's Rejection Of Lobato's Double Jeopardy Claim Is Directly Contrary To**  
19 **This Court's Recent Decision In Wilson v. State.**

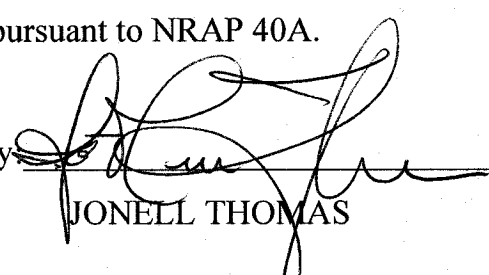
20 Following the first trial, Lobato was sentenced to two consecutive 20 to 50 year  
21 sentences for first-degree murder with use of a deadly weapon and a *concurrent term* 5 to  
22 15 year sentence for sexual penetration of a dead body. 1 App. 11. On appeal, this Court  
23 reversed the judgment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

1 for the two offenses. 9 App. 1759-60. The district court noted that the sentence imposed for  
2 Count One was "significantly" greater in the original judgment than the sentence that count  
3 be imposed pursuant to the jury's finding of voluntary manslaughter in the second trial. 9  
4 App. 1760. The court then ordered that Lobato be sentenced to two consecutive terms of 48  
5 months to 120 months for voluntary manslaughter with use of a deadly weapon and a  
6 *consecutive term* of 60 months to 180 months for use of a deadly weapon. 9 App. 1762.  
7 Pursuant to this Court's recent decision in Wilson v. State, 170 P.3d 975 (Nev. 2007), the  
8 district court violated Lobato's right against double jeopardy by restructuring the sentences  
9 to require that she serve her sentences consecutively, rather than concurrently, as originally  
10 ordered by the court. In Wilson, this Court provided an extensive analysis of the Nevada's  
11 double jeopardy jurisprudence concluded that a district court violated Nevada's double  
12 jeopardy protections by increasing the defendant's sentence after his conviction had been  
13 partially vacated on appeal. Id. at 980. Of critical importance is this Court's conclusion in  
14 Wilson: "Even though the resentencing did not lead to a harsher result than Wilson's original  
15 sentence, the district court individually increased the minimum terms on each of the  
16 remaining possession counts and *restructured the relationship* between the possession  
17 counts and the lone production count. We conclude that Dolby forbids this sentencing  
18 procedure." Id. Here the district court did that which was expressly found improper in  
19 Wilson. The district court restructured the relationship between Count I and Count II by  
20 ordering that the sentences be served consecutively rather than concurrently. Lobato  
21 respectfully submits that Wilson is directly on point and that reconsideration en banc should  
22 be granted based upon the Panel's failure to apply this controlling authority.

23 **Conclusion**

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

26 Dated this 31st day of March, 2009.

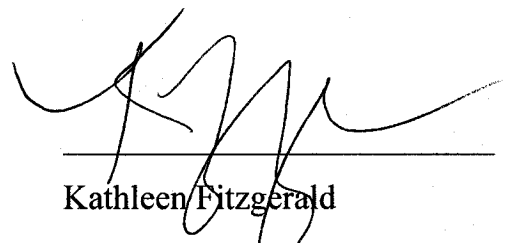
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28 JONELL THOMAS

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**CERTIFICATE OF MAILING**

I hereby certify that on the 31 day of March, 2009, I duly deposited in the District Attorney's bin at the Regional Justice Center, at Las Vegas, Nevada, a true and correct copy of the above and foregoing **PETITION FOR RECONSIDERATION EN BANC** addressed to the following:

David Roger  
Clark County District Attorney  
200 Lewis  
Las Vegas, NV 89155



Kathleen Fitzgerald  
An employee of the Clark County Special Public Defender