

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \*

KIRSTIN BLAISE LOBATO,

Petitioner,

vs.

STATE OF NEVADA,

Respondents.

Case No.: 58913

Electronically Filed  
Feb 06 2012 11:45 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE OPENING  
BRIEF IN EXCESS OF PAGE LIMITS RULES**

COMES NOW, TRAVIS N. BARRICK, pro bono counsel for the Petitioner, Kirsten Blaise Lobato, and submits her Reply in Support of her Motion for Leave to File an Opening Brief in Excess of Page Limit Rules in NRAP Rule 32(a)(7)(A)(i). This Reply is based upon the papers and pleading on file herein and the Memorandum below.

Dated this 6<sup>th</sup> day of February, 2012.

By: 

Travis N. Barrick, SBN 9257  
Gallian Wilcox Welker  
Olson & Beckstrom, LC  
540 E St. Louis Avenue  
Las Vegas, Nevada 89104  
Attorney for Petitioner

**MEMORANDUM**

1  
2 Ms. Lobato respectfully submits that this Court grant her Motion for Leave  
3 to File Opening Brief in Excess of Page Limits (“Motion”), over the State’s  
4 objections for the following reasons:  
5

6 **A. Ms. Lobato Incorrectly Cited NRAP 27(d)(2).**

7 The State correctly points out that Ms. Lobato cited the incorrect rule in the  
8 body of its Motion for excess pages – NRAP 27(d)(2). However, by way of its  
9 Opposition the State makes it plain that such an error was inconsequential and had  
10 no effect on the plain meaning and substance of Ms. Lobato’s Motion or the  
11 State’s arguments in Opposition.  
12  
13

14 **B. The Affidavit In Support Of Ms. Lobato’s Motion Satisfies NRAP**  
15 **32(a)(7)(D)(i) and (ii).**

16 The State’s Opposition confuses what is required in the Motion under  
17 NRAP 32(a)(7)(D)(i) with the requirement under NRAP 32(a)(7)(D)(ii) that it’s  
18 accompanying *declaration* will “detail the reasons for the motion.” Which is  
19 exactly what the Affidavit (declaration) of Ms. Lobato’s counsel does and which  
20 the State ignores.  
21  
22

23 The Affidavit of counsel accompanying Ms. Lobato’s Motion states: “In  
24 order to fully develop the extensive claims raised in Ms. Lobato’s Petition in the  
25 District Court below, it has been necessary to write a 98-page opening brief.”  
26 Counsel’s Affidavit clearly states the “diligence” of counsel “In order to fully  
27 develop...” Ms. Lobato’s claims, and the “good cause” of counsel for “the  
28

1 extensive claims raised in Ms. Lobato's Petition in the District Court," that  
2 resulted in submission of "a 98-page opening brief." The Affidavit efficiently  
3 meets the minimal requirements of NRAP 32(a)(7)(D)(i) and (ii) without resorting  
4 to verbose and excessive language to do so.  
5

6 The District Court stated after hearing arguments from Ms. Lobato's  
7 counsel on March 1, 2011 regarding her Petition for a Writ of Habeas Corpus  
8 ("Petition"):  
9

10  
11 "As you mentioned, this is not a death penalty case, however, **there**  
12 **are 79 grounds in this petition and it is the most extensive petition**  
13 **that I have ever reviewed in a non-death penalty case."** 11 App.  
14 2243. (Ms. Lobato's Appendix to her Opening Brief to this Court.)

15 Ms. Lobato's original and timely Petition of 770 pages presented 79  
16 grounds for collateral review which are supported by new evidence not presented  
17 at trial by at least 35 expert, alibi, third-party guilt, and fact witnesses and 101  
18 exhibits that include professional reports and numerous affidavits.

19  
20 Ms. Lobato's Answer to the State's Response was 205-pages and included 5  
21 additional exhibits. The District Court considered "extensive" as an apt  
22 description of Ms. Lobato's 79 grounds requesting relief based on claimed federal  
23 constitutional violations that may also be state constitutional violations. It was the  
24 District Court's description of Ms. Lobato's Petition as "extensive" that was relied  
25 on by counsel in the Affidavit in support of the instant Motion.  
26  
27

28 The State, just like the District Court, knows the extensiveness of Ms.  
Lobato's Petition, and the State's Opposition doesn't even allege that any of Ms.

1 Lobato's 79 grounds are frivolous or that Ms. Lobato doesn't need 98 pages to  
2 "fully brief" this Court in accordance with the NRAP. See, Lobato v. State, No.  
3 58913, Order Granting Motion for Full Briefing, September 1, 2011.  
4

5 Ms. Lobato has gone to extraordinary lengths to compress the 770 pages of  
6 her Petition and the 205 pages in her Answer into her Opening Brief without  
7 impairing either this Court's review or preservation of the record for appeal for  
8 each of her 79 grounds, if necessary, to federal court via a federal *habeas corpus*  
9 petition under 28 USC § 2254. Ms. Lobato also presents at least three legal issues  
10 of first impression for this Court's consideration in her Opening Brief.  
11  
12

13 The State's Opposition is ill-founded because it isn't based on the facts of  
14 the instant case, and it is disingenuous because the State did not object to a  
15 substantively indistinguishable Affidavit submitted by Ms. Lobato's counsel in  
16 support of a motion for excess pages in her direct appeal Opening Brief that  
17 stated: "That in order to fully develop the facts and issues in this case, it has been  
18 necessary to write a fifty- three age opening brief." Lobato v. State, No. 49087,  
19 MOTION FOR LEAVE TO FILE FIFTY- THREE PAGE APPELLANT'S  
20 OPENING BRIEF, December 4, 2007. (See attached Exhibit 1.) This Court  
21 granted that motion.  
22  
23  
24  
25

26 The excess pages exception exists as a safety valve to allow this Court to  
27 fairly review the issues in an appeal that cannot be accomplished within the 30-  
28 page or the 14,000 word limit. NRAP (a)(7)(D) allows this Court to decide on a

1 case-by-case basis that additional pages are necessary, and Ms. Lobato argues hers  
2 is one of those cases.

3  
4 **C. 28 U.S.C. § 2254 And Federal Court Precedents Require This Court To  
5 Be “Fairly Presented” With Ms. Lobato’s Issues For Collateral Relief.**

6 The State’s general argument for “brevity” in its Opposition completely  
7 ignores that 28 U.S.C. § 2254 is looming over Ms. Lobato’s appeal to this Court.  
8 28 U.S.C. § 2254 dictates what Ms. Lobato is mandated to preserve in the record  
9 of her Opening Brief to this Court in order to protect her “appeal” rights via a  
10 federal *habeas corpus* petition. 28 U.S.C. § 2254 states in relevant part:  
11

12 (b)(1) An application for a writ of habeas corpus on behalf of a  
13 person in custody pursuant to the judgment of a State court shall not  
14 be granted unless it appears that -

15 (A) the applicant has exhausted the remedies available in the courts  
16 of the State;

17 The Ninth Circuit Court of Appeals explained the mandatory “exhaustion”  
18 requirement of 28 U.S.C. § 2254 (b)(1)(A) in Vang v. Nevada, 329 F. 3d 1069,  
19 1075 (9th Cir 2003):  
20

21 “A habeas petitioner must give the state courts the first opportunity to  
22 review any claim of federal constitutional error before seeking federal  
23 habeas review of that claim.” Hiiivala v. Wood, 195 F.3d 1098, 1106  
24 (9th Cir.1999) (per curiam). A habeas petitioner satisfies the  
25 “exhaustion” requirement only if the petitioner “fairly presented” the  
26 claim to the highest state court available. Roettgen, 33 F.3d at 38. To  
27 “fairly present” a claim, a habeas petitioner must have “alert[ed] the  
28 state courts to the fact that he was asserting a claim under the United  
States Constitution.” Hiiivala, 195 F.3d at 1106 (citation omitted).

1 A claim is not exhausted unless the petitioner has presented to the state  
2 court the same operative facts and legal theory upon which his federal habeas  
3 claim is based. Bland v. California Dept. Of Corrections, 20 F.3d 1469, 1473 (9th  
4 Cir. 1994). The United States District Court for Nevada clearly stated the  
5 exhaustion principle in its September 2011 ruling in Dunlap v. Palmer, No. 3:07-  
6 cv-00019-RCJ-WGC (DC NV, 2011):  
7  
8

9 A habeas petitioner must “present the state courts with the same  
10 claim he urges upon the federal court.” Picard v. Connor, 404 U.S.  
11 270, 276 (1971). The federal constitutional implications of a claim,  
12 not just issues of state law, must have been raised in the state court to  
13 achieve exhaustion....(citations omitted) To achieve exhaustion, the  
14 state court must be “alerted to the fact that the prisoner [is] asserting  
15 claims under the United States Constitution” and given the  
16 opportunity to correct alleged violations of the prisoner’s federal  
17 rights. Duncan v. Henry, 513 U.S. 364, 365 (1995); see Hiiivala v.  
18 Wood, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28  
19 U.S.C. § 2254(b) “provides a simple and clear instruction to potential  
20 litigants: before you bring any claims to federal court, be sure that  
21 you first have taken each one to state court.” Jiminez v. Rice, 276  
22 F.3d 478, 481 (9th Cir. 2001) (quoting Rose v. Lundy, 455 U.S. 509,  
23 520 (1982)). “[G]eneral appeals to broad constitutional principles,  
24 such as due process, equal protection, and the right to a fair trial, are  
25 insufficient to establish exhaustion.” Hiiivala v. Wood, 195 F.3d  
26 1098, 1106 (9th Cir. 1999).  
27

28 Consequently, Ms. Lobato is required without exception to exhaust her state  
remedies by giving this Court the opportunity to fairly review each claim of a  
violation of her federal constitutional rights detailed in her 79 grounds before she  
can, if necessary, raise those issues in a federal *habeas corpus* petition under 28  
U.S.C. § 2254.

1 It is clear from the foregoing that Ms. Lobato can only preserve her right to  
2 raise the claims in her Petitions in a federal *habeas corpus* petition if she provides  
3 this Court with the “first opportunity to rule on each one of her specific alleged  
4 violations of her federal constitutional rights. *Hiivala, supra*. The State knows that  
5 beyond question because Mr. Dunlap was prosecuted in the Eighth Judicial  
6 District the same as Ms. Lobato, and it was the State that argued to the U. S.  
7 District Court that some of Dunlap’s federal *habeas corpus* claims should be  
8 dismissed because this Court had not ruled on them. “Respondents argue that the  
9 following allegations contained in petitioner's amended petition were never  
10 presented to the Nevada Supreme Court.” *Dunlap, supra*.

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15 The State also knows that exhaustion of Ms. Lobato’s grounds is only  
16 accomplished by her making specific claims and not “general appeals” that her  
17 federal rights were violated. *Hiivala, supra*.

18  
19 The United State Supreme Court has ruled that Ms. Lobato must “present  
20 the state courts with the same claim he urges upon the federal court.” Picard v.  
21 Connor, 404 U.S. 270, 276 (1971), and that this Court must be given the  
22 opportunity to correct alleged violations of Ms. Lobato’s federal rights. Duncan v.  
23 Henry, 513 U.S. 364, 365 (1995).

24  
25  
26 Ms. Lobato argues the State is being disingenuous with this Court by way  
27 of its Opposition, because in arguing for denial of Ms. Lobato’s Motion and the  
28 limiting of Ms. Lobato’s Opening Brief this Court would be prevented from being

1 “fairly presented,” *Hiivala, supra*, with Ms. Lobato’s grounds based on alleged  
2 federal constitutional violations as mandated by 28 U.S.C. § 2254(b), *Picard,*  
3 *supra*, and *Duncan, supra*. Thus the State is setting up its argument in federal  
4 court – if necessary – to argue for dismissal of grounds in Ms. Lobato’s federal  
5 *habeas corpus* petition on the basis she didn’t fully develop her federal  
6 constitutional arguments in this Court just as the State argued in *Dunlap, supra*.  
7 So the State is being duplicitous by urging this Court to impose an inadequate and  
8 unreasonable page or word limit on Ms. Lobato’s Opening Brief.  
9

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12 Furthermore, the State knows that Ms. Lobato’s presentation of  
13 unexhausted claims would require the U. S. District Court to allow Ms. Lobato the  
14 opportunity to avoid dismissal by returning to this Court for the necessary  
15 “exhaustion” of those claims. *Vang*, 329 F. 3d at 1976. Consequently, the State’s  
16 argument that limiting Ms. Lobato’s Opening Brief is “necessary for the  
17 functioning of this court” is disingenuous because it would in fact unnecessarily  
18 waste this Court’s resources by causing it to consider Ms. Lobato’s *habeas corpus*  
19 grounds on a piece meal basis over several different proceedings as it ping-ponged  
20 between federal court and this Court to complete exhaustion of her claims.  
21

22  
23  
24 Ms. Lobato argues that the “functioning of this Court” and the interests of  
25 justice are best served by completing a full review of the denied grounds  
26 underlying her Opening Brief in one proceeding.  
27  
28



1           **D. Hernandez v. State Has No Relevance To Ms. Lobato’s Motion.**

2           The State’s reliance on Hernandez v. State, 117 Nev. 463, 24 P.3d 767  
3 (2001) is inapposite because *Hernandez* involved a motion for excess pages in a  
4 direct appeal – not a post-conviction appeal of issues raised for collateral review  
5 such as the instant case. Consequently, this Court’s rationale for its ruling related  
6 to Mr. Hernandez’s direct appeal has no application to Ms. Lobato’s post-  
7 conviction appeal for two reasons.  
8

9  
10           First, while this Court noted the federal Antiterrorism and Effective Death  
11 Penalty Act of 1996 had no application to Mr. Hernandez’s a direct appeal, *Id.* at  
12 769, it is the governing federal statute in the collateral review of Ms. Lobato’s  
13 post-conviction claims for relief.  
14

15  
16           Second, the two cases relied on by this Court in *Hernandez – Jones v.*  
17 *Barnes*, 463 U.S. 745, 753 (1983) and *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th  
18 Cir. 1989) – have no relevance to Ms. Lobato’s Opening Brief because the  
19 underlying issue in those cases were briefs filed in direct appeals – not post-  
20 conviction proceedings.  
21

22  
23           The U. S. Supreme Court has made it crystal clear that “The principle that  
24 collateral review is different from direct review resounds throughout our habeas  
25 jurisprudence. ... In keeping with this distinction, the writ of habeas corpus has  
26 historically been regarded as an extraordinary remedy, ‘a bulwark against  
27  
28

1 convictions that violate ‘fundamental fairness.’” Brecht v. Abrahamson, 507 US  
2 619, 633 (1993).

3  
4 In Kuhlmann v. Wilson, 477 U. S. 436 (1986) the Supreme Court  
5 recognized that “‘habeas corpus has traditionally been regarded as governed by  
6 equitable principles.” *Id.* at 447, and, “...a prisoner retains a powerful and  
7 legitimate interest in obtaining his release from custody if he is innocent of the  
8 charge for which he was incarcerated.” *Id.* at 452.

9  
10 Ms. Lobato argues that application of *Hernandez, supra*, to her appeal not  
11 only is contrary to this Court’s holding, but it is contrary to the Supreme Court’  
12 holdings that “collateral review is different from direct review,” *Brecht, supra*,  
13 and it would violate equitable principles that Ms. Lobato’s “powerful and  
14 legitimate interest in obtaining [her] release from custody,” *Kuhlmann, supra*, on  
15 her federal and state claims of actual innocence would be unconstitutionally  
16 interfered with by denial of her Motion.  
17  
18  
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20 **E. Ms. Lobato’s Opening Brief Word Count Is Significantly Less Than**  
21 **The Capital Case Limit.**

22 The State’s Opposition notes Ms. Lobato’s Opening Brief exceeds 80  
23 pages, but critically ignores that it’s word volume of 29,024 is significantly less  
24 than the 37,000 words allowed under NRAP 32(a)(7)(B)(ii) for a Capital Case  
25 Opening Brief.  
26  
27

28 Consequently, by granting Ms. Lobato’s Motion this Court will not  
establish a precedent that a Noncapital Opening Brief can exceed the word count

1 of a Capital Case even under the extraordinary circumstances of Ms. Lobato's  
2 post-conviction *habeas corpus* appeal.

3  
4 **CONCLUSION**

5 The State does not make any argument that contradicts any of the foregoing  
6 of why Ms. Lobato needs excess pages in her Opening Brief "In order to fully  
7 develop the extensive claims raised in [her] Petition" exactly as her counsel states  
8 in his Affidavit in support of her Motion.

9  
10 The State doesn't allege Ms. Lobato doesn't need 98-pages, but instead  
11 encourages this Court to ignore the circumstances of the instant case, ignore the  
12 governing federal law of 28 U.S.C. § 2254 and applicable federal case law, and to  
13 ignore that the purpose of NRAP (a)(7)(D) is to allow for extraordinary  
14 circumstances.

15  
16 Ms. Lobato submits that this Court's full review of the 79 grounds for relief  
17 involved in her appeal requires that this Court have a meaningful awareness of the  
18 issues in her appeal, and that preservation of her federal "appeal" rights requires it.

19  
20 Therefore, Ms. Lobato respectfully requests that this Court grant her Motion.

21  
22 Dated this 6<sup>th</sup> day of February, 2012.

23  
24  
25 By: 

26 Travis N. Barrick, SBN 9257  
27 Gallian Wilcox Welker  
28 Olson & Beckstrom, LC  
540 E St. Louis Avenue  
Las Vegas, Nevada 89104  
Attorney for Petitioner

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 17<sup>th</sup> day of February, 2012, a copy of the foregoing upon each of the parties by hand delivery and depositing a copy of same in a sealed envelope in the U. S. mail, registered, first-class postage fully prepaid, and addressed to those counsel of record:

Steven S. Owens, Esq. District Attorney's Office 200 Lewis Avenue Las Vegas. Nevada 89155	Catherine Cortez-Masto, Esq. Office of the Attorney General 555 E. Washington Avenue, Suite 3900 Las Vegas, NV 89101
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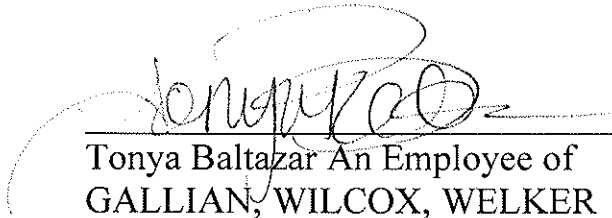
  
\_\_\_\_\_  
Tonya Baltazar An Employee of  
GALLIAN, WILCOX, WELKER  
OLSON & BECKSTROM LC

Exhibit 1

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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KIRSTIN BLAISE LOBATO, )  
Appellant, )  
-vs- )  
THE STATE OF NEVADA, )  
Respondent. )

Case No. 49087

**FILED**

DEC 04 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
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MOTION FOR LEAVE TO FILE  
FIFTY-THREE PAGE APPELLANT'S OPENING BRIEF

COMES NOW, DAVID M. SCHIECK, Special Public Defender, and  
JONELL THOMAS, Deputy Special Public Defender, attorneys for KIRSTIN  
BLAISE LOBATO, above named appellant, and moves for leave to file a  
fifty-three page Appellant's Opening Brief.

This motion is based upon the following Affidavit of  
JoNell Thomas.

DATED this 29th day of November, 2007.

DAVID M. SCHIECK  
CLARK COUNTY SPECIAL PUBLIC DEFENDER

By [Signature]  
JONELL THOMAS  
NEVADA BAR #4771  
DEPUTY SPECIAL PUBLIC DEFENDER

RECEIVED  
DEC 03 2007  
JANETTE M. BLOOM,  
CLERK OF SUPREME COURT  
DEPUTY CLERK

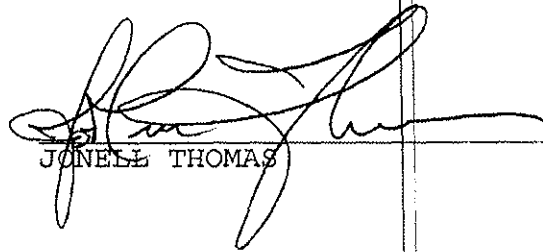
A F F I D A V I T

1 STATE OF NEVADA            )  
  ) ss:  
2 COUNTY OF CLARK            )

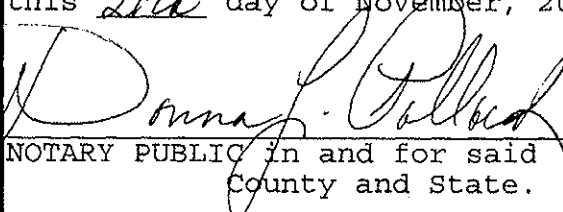
3            JONELL THOMAS, being first duly sworn, deposes and says:

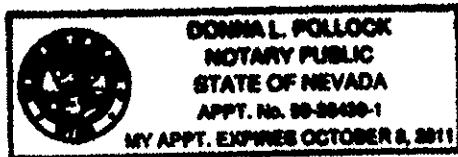
4            1. That she is the Deputy Special Public Defender  
5 responsible for preparing the Appellant's Opening Brief in the above  
6 entitled case;

7            2. That in order to fully develop the facts and issues in  
8 this case, it has been necessary to write a fifty-three page opening  
9 brief.

10  
11   
12 JONELL THOMAS

13  
14 Subscribed and sworn to before me  
15 this 29th day of November, 2007.

16   
17  
18 NOTARY PUBLIC in and for said  
19 County and State.



RECEIPT OF A COPY of the foregoing Motion for Leave to

1 File Fifty-Three Page Appellant's Opening Brief is hereby  
2 acknowledged this 29<sup>th</sup> day of November, 2007.

3  
4 DAVID ROGER  
CLARK COUNTY DISTRICT ATTORNEY

5  
6 By *Adine Mulkey*  
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