

IN THE SUPREME COURT OF THE STATE OF NEVADA

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KIRSTIN BLAISE LOBATO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

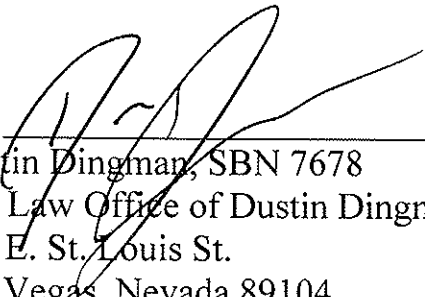
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Apr 05 2012 11:13 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**MOTION FOR LEAVE TO ADD AMICUS CURIAE**

COMES NOW, DUSTIN DINGMAN, counsel for the Amicus Curiae, the Justice Institute, Proving Innocence, and the Worldwide Women’s Criminal Justice Network, and moves this Honorable Court for leave for Proving Innocence and the Worldwide Women’s Criminal Justice Network to be added as Amicus Curiae in support of the MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF (“*Amicus Motion*”), and the BRIEF OF AMICUS CURIAE THE JUSTICE INSTITUTE IN SUPPORT OF APPELLANT KIRSTIN BLAISE LOBATO AND REVERSAL OF THE DISTRICT COURT’S JUDGMENT (“*Amicus Brief*”). This Motion is made pursuant to and based upon all pleadings and papers on file herein, NRAP Rule 29, and the following Memorandum of Points and Authorities.

Dated this 4th day of April 2012.

By:   
Dustin Dingman, SBN 7678  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

The amicus curiae, the Justice Institute, Proving Innocence, and the Worldwide Women's Criminal Justice Network, respectively request that this Court grant the MOTION FOR LEAVE TO ADD AMICUS CURIAE for the following reasons.

### **A. The Amicus Curiae Have An Interest In The Instant Case**

The amicus curiae, the Justice Institute, Proving Innocence, and the WCJN are non-profit public interest organizations that are specifically interested in post-conviction cases involving an Appellant claiming actual innocence. Proving Innocence's "Statement of Interest in Kirstin Blaise Lobato v. State of Nevada, No. 58913, Nevada Supreme Court," is attached hereto as Exhibit 1. The "Statement of Interest of the Worldwide Women's Criminal Justice Network in *Kirstin Blaise*

*Lobato v. State of Nevada*, No. 58913, Nevada Supreme Court,” is attached hereto as Exhibit 2.<sup>1</sup>

The Appellant’s (“Lobato”) Opening Brief includes arguments that the district court prejudicially erred by denying her claims based on new evidence not presented at trial of her actual innocence, and that the district court prejudicially erred by denying Lobato’s ineffective assistance of counsel claims related to the State’s failure to present evidence proving beyond a reasonable doubt each and every essential elements of Lobato’s charged crimes. *Lobato v. State*, No. 58913, Appellant’s Opening Brief, at 55-129. (“*Opening Brief*”)

The United States Supreme Court has recognized that “the central purpose of any system of criminal justice is to convict the guilty and free the innocent.” *Herrera v Collins*, 506 US 390, 398 (1993). If this Court determines Lobato is actually innocent then she is “wrongfully imprisoned” and warrants immediate release from custody. *State ex rel. Orsborn v. Fogliani*, 82 Nev. 300, 417 P.2d 148, 150 (1966). If this Court determines Lobato was prejudiced by her trial or appellate counsel’s constitutionally deficient representation, then at a minimum she is entitled to a new trial. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

The conviction of an actually innocent person can be wholly or in part due to

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<sup>1</sup> The Justice Institute’s Statement of Interest is on page 1 of the BRIEF OF AMICUS CURIAE THE JUSTICE INSTITUTE IN SUPPORT OF APPELLANT KIRSTIN BLAISE LOBATO AND REVERSAL OF THE DISTRICT COURT’S JUDGMENT, submitted to this Court.

prejudicially deficient assistance of counsel under *Strickland*. Consequently, this Court’s understanding of issues in Lobato’s *Opening Brief* and its correct application of law to those issues is of paramount “interest” to each of the amicus curiae. See NRAP 29(c)(1). Furthermore, the amicus curiae have the same general interest in the instant case as this Court – to try and ensure “that justice may be done,” by “suggest[ing] the interpretation and status of the law, and giv[ing] information concerning it.” *Miller-Wohl Co. v. Commissioner*, 694 F.2d 203, 204 (9th Cir.1982).

### **B. An Amicus Curiae Brief Is Desirable In The Instant Case**

Collateral review of a conviction in “the writ of habeas corpus has historically been regarded as an extraordinary remedy, “a bulwark against convictions that violate ‘fundamental fairness.’” *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). This Court’s accurate determination of issues in Lobato’s habeas corpus appeal are not just important to her, but to ensure the criminal justice system’s fundamental fairness as a public institution.

In *Miller-Wohl* the Ninth Circuit set-forth three relevant factors for this Court to consider in determining that the *Amicus Brief* can help to ensure “that justice may be done ... by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.” *Miller-Wohl, supra*, at 204. (underlining added)

First, Lobato’s is “a case of general public interest,” *Id.*, that involves claims

she is actually innocent because she was 165 miles from Las Vegas at the time of the crime and she was not the perpetrator, and that she was convicted in violation of her federal and state constitutional rights by: her counsel's prejudicial failure to provide effective assistance of counsel; prejudicial jury misconduct; prejudicial prosecutor and police misconduct; and the State's prejudicial failure to disclose material exculpatory and impeachment evidence. *Opening Brief*, at 55-129. Lobato's case has attracted the interest of the media,<sup>2</sup> and national organizations that include the Justice Institute, Proving Innocence, and The Innocence Project in New York, 10 App. 1982; and international organizations that include the Worldwide Women's Criminal Justice Network, and the Association in the Defence of the Wrongly Convicted. 6 App. 1295. If Lobato's claims are vindicated then she will have been wrongfully imprisoned for many years, and that will also be a matter of general public interest that can be expected to attract significant local and national media attention and public comment.

Second, the *Amicus Brief* "supplement[s] the efforts of counsel," *Miller-Wohl, supra* at 204, for at least three reasons. First, Lobato's *pro bono* counsel is a civil lawyer who is representing a post-conviction litigant for the first time. Second, the *Brief* materially "supplements the efforts of counsel" by offering more

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<sup>2</sup> For example, KLAS-TV channel 8 in Las Vegas has stories on its website about Lobato's post-conviction case dated December 15, 2010; January 10, 2011; January 13, 2011; March 1, 2011; March 8, 2012; and March 28, 2012. See, [www.8newsnow.com](http://www.8newsnow.com).

extensive arguments and relevant case law that are not in Lobato's *Opening Brief*. See, *Funbus Systems, Inc. v. California Pub. Util. Comm'n*, 801 F. 2d 1120, 1125 (9th Cir. 1986) ("These amici ... take a legal position and present legal arguments in support of it, a perfectly permissible role for an amicus."). Third, the length of Lobato's *Opening Brief* is irrelevant to the *Amicus Brief* meeting *Miller-Wohl's* standard of "supplementing the efforts of counsel." *Miller-Wohl, supra*, at 204.

Third, the *Amicus' Brief* "draw[s] the court's attention to law that escaped consideration." *Id.* The *Amicus Brief* raises law "that escaped consideration" in Lobato's *Opening Brief* and which the State cannot be expected to raise because it would expose the constitutional infirmity of Lobato's convictions under *Strickland*, 466 U.S. at 694; *In re Winship*, 397 U.S. 358 (1970); and *Jackson v. Virginia*, 443 U.S. 307, 319, 324 (1979). It can be safely stated there are issues of federal and state constitutional law in the *Amicus Brief* that will escape consideration by this Court if the *Amicus Motion* is not granted.

The *Amicus Brief* thus satisfies the Ninth Circuit's criteria under *Miller-Wohl* for its consideration by this Court in evaluating legal issues presented in Lobato's *Opening Brief*.

"An amicus brief should normally be allowed ... when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Community Ass'n for Restor. v.*

*Deruyter Bros. Dairy*, 54 F.Supp.2d 974, 975 (E.D.Wa. 1999). The amicus curiae's are among the relatively few independent organizations that specialize in cases involving the conviction of a person claiming innocence and the prejudicial violation of their constitutional rights. Lobato's *Opening Brief* argues that the district court prejudicially erred in denying more than twenty claims related to new evidence not presented at trial of her actual innocence, and more than fifty issues related to claims that under *Brady v. Maryland*, 373 U.S. 83 (1963), or *Strickland* she was unconstitutionally convicted. *Opening Brief*, at 55-129. Consequently, "an amicus brief is desirable," NRAP 29(c)(2), in the instant case due to the amicus curiae's special interest in the issues presented in the instant case, and they plainly have "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Community, supra*, at 975.

### **C. The Amicus Brief Supports Reversal Of The District Court's Order**

Under NRAP Rule 29(d) an amicus brief cannot be disinterested or feign impartiality in the outcome – because it must publicly "identify the party or parties supported and indicate whether the brief supports affirmance or reversal." Consistent with Rule 29(d) the *Amicus Brief* supports vindication of Lobato's federal and state constitutional rights and reversal of the district court's judgment denying her habeas corpus petition.

Rule 29(d) is in accord with Ninth Circuit precedent that "Amicus did, of

course, have an interest in vindicating federal constitutional rights. There is no rule, however, that amici must be totally disinterested.” *Hoptowit v. Ray*, 682 F. 2d 1237, 1260 (9th Cir. 1982). (underlining added) *Hoptowit* involved a prisoner lawsuit and the district court judge appointed the United States Attorney for the Eastern District of Washington as amicus curiae. The Ninth Circuit ruled, “It appears that the United States Attorney acted exclusively on behalf of the points of view taken by the inmates. ... we are unable to say that the degree of amicus’s participation was error or in any way prejudiced the rights of the State.” *Id.* (underlining added)

Furthermore, in *Funbus* the Ninth Circuit recognized, “the amici’s direct interest in the outcome of this litigation: the preservation of their bureaucratic regulatory power.” *Id.* at 1124. Yet, the Ninth Circuit rejected that the amici’s brief was improperly considered in spite of the amici’s direct interest, because “they take a legal position and present legal arguments in support of it, a perfectly permissible role for an amicus.” *Id.* at 1125. (underlining added)

In accord with *Hoptowit* and *Funbus*, in *Waste Management of Pa. v. City of York*, 910 F.Supp. 1035, 1037 (M.D. Pa. 1995), the Environmental Protection Agency was granted amicus status even though it had a direct interest in the outcome “because it issued the administrative order that was at issue in the case.” *Id.*

The special interest of the amicus curiae in Lobato’s case does not remotely approach the sort of direct interest in the outcome that was considered proper in



*Hoptowit, Funbus, and Waste Management.*

Consequently, the *Amicus Brief's* support for Lobato and reversal of the district court's order is in accord with Rule 29(d) and Ninth Circuit precedent.

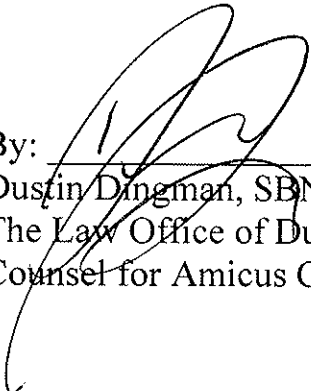
#### **D. Conclusion**

In *Hoptowit* the Ninth Circuit ruled that a “court has broad discretion to appoint amici curiae.” *Id.* at 1260. The proposed amicus curiae submit that they meet the substantive requirements of NRAP 29(c) by having a clear “interest” in the instant case, and that “an amicus brief is desirable” to assist this Court so “that justice may be done.” *Miller-Wohl, supra* at 204.

Therefore it is respectfully requested that this Court grant this Motion and order that Proving Innocence and the Worldwide Women's Criminal Justice Network be added as amicus curiae.

Dated this 4<sup>th</sup> Day of April, 2012.

Respectfully submitted,

By:   
Dustin Dingman, SBN 7678  
The Law Office of Dustin Dingman  
Counsel for Amicus Curiae

**CERTIFICATE OF SERVICE**

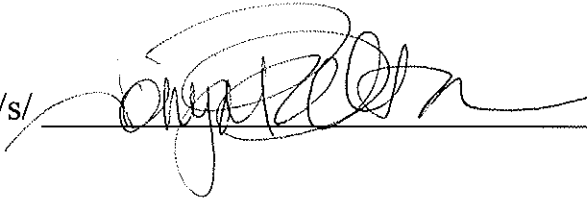
I HEREBY CERTIFY that this document was filed electronically with the Nevada Supreme Court on April <sup>5</sup>~~4~~, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

TRAVIS BARRICK, ESQ.  
Counsel for Appellant

CATHERINE CORTEZ MASTO  
Nevada Attorney General

STEVEN S. OWENS  
Chief Deputy District Attorney

By: /s/

A handwritten signature in black ink, appearing to read "Steven S. Owens", is written over a horizontal line. The signature is cursive and somewhat stylized.