

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

KIRSTIN BLAISE LOBATO,

Petitioner,

vs.

STATE OF NEVADA,

Respondents.

Case No.: 58913

Electronically Filed
Oct 16 2012 11:56 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE REPLY BRIEF
WITH EXCESSIVE PAGES**

COMES NOW, TRAVIS N. BARRICK, pro bono counsel for the Petitioner, Kirstin Blaise Lobato, and submits her Reply in Support of her Motion for leave to file a Reply Brief with Excessive Pages. This motion is based upon the papers and pleadings on file herein and the Points and Authorities below.

Dated this 16th day of October, 2012.

By: 

Travis N. Barrick, SBN 9257

Gallian Wilcox Welker
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540 E St. Louis Avenue
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Pro Bono Attorney for Petitioner

POINTS AND AUTHORITIES

Ms. Lobato respectfully requests that this Court grant her “Motion for Leave to File Reply Brief in Excess of Page Limits” (“Motion”), over the State’s “Opposition To Motion For Leave To File Reply Brief In Excess Of Page Limits” (“Opposition”) for the following reasons:

I. 28 U.S.C. § 2254 Mandates What Must Be Presented To This Court.

The State’s general argument for “brevity and conciseness” is fatally deficient because it fails to address or take into consideration any of the reasons supporting Ms. Lobato’s Motion, as detailed in her counsel’s Affidavit, including that “Ms. Lobato is compelled by case law and statute to raise and defend every issue in state court in order to preserve those issues for federal court review.”

The State’s Answering Brief puts Ms. Lobato in the position of needing to defend her federal constitutional claims against its assertions and arguments – whether supported by the record or not – because 28 U.S.C. § 2254(b)(1)(A) dictates Ms. Lobato must exhaust her claims in state court (i) before she can raise them in a federal habeas corpus petition if necessary, Vang v. Nevada, 329 F.3d 1069, 1075 (9th Cir 2003), (ii) she cannot rely on “general appeals” that her federal rights were violated, Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.1999), and (iii) she must argue to this Court the same operative facts and legal theory upon

which, if necessary, her federal habeas claims will be based. Bland v. California Dept. Of Corrections, 20 F.3d 1469, 1473 (9th Cir. 1994).

Thus, by urging this Court to impose an inadequate and unreasonable page or word limit on Ms. Lobato's Reply Brief, the State is setting up its argument in federal court — if necessary — to argue for dismissal of grounds in Ms. Lobato's federal habeas corpus petition on the basis she didn't fully develop her arguments in this Court, just as the State argued in Dunlap v. Palmer, No. 3:07- cv-00019-RCJ-WGC (DC NV, 2011).

The State is aware that, to avoid dismissal by presenting unexhausted claims in federal court, Ms. Lobato would be required to return to this Court. *Vang*, 329 F. 3d at 1076. Consequently, the State's argument that limiting her Reply Brief is "necessary for this Court to function efficiently" is disingenuous because it could unnecessarily waste this Court's resources by causing it to consider Ms. Lobato's habeas corpus grounds over several proceedings as it traversed between federal court and this Court. Ms. Lobato argues that, contrary to the State's assertion, the efficient functioning of this Court and the interests of justice are best served by fully reviewing her appeal in one proceeding by granting her Motion.

II. *Hernandez* Has No Relevance To Ms. Lobato's Motion.

The State's reliance on Hernandez v. State, 117 Nev. 463, 24 P.3d 767 (2001) is inapposite because *Hernandez* involved a motion for excess pages in a

direct appeal — not a post-conviction appeal. Consequently, this Court’s rationale for its ruling in *Hernandez* has no application to Ms. Lobato’s post-conviction appeal of issues raised for collateral review for two reasons.

First, while this Court noted in *Hernandez*, at 769, the federal Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) had no application to Mr. Hernandez’ direct appeal, it is the governing federal statute for collateral review of Ms. Lobato’s post-conviction appeal.

Second, the two cases relied on by this Court in *Hernandez* — Jones v. Barnes, 463 U.S. 745, 753 (1983) and Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) — are inapposite because they involved direct appeal briefs, not a post-conviction appeal brief, and they pre-date the AEDPA, which mandates what Ms. Lobato must comply with at the State level.

This Court has recognized collateral review is different from direct review, Snow v. State, 105 Nev. 521, 523, 779 P.2d 96, 97 (1989), and the U. S. Supreme Court has made it crystal clear, “The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. ... In keeping with this distinction, 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 US 619, 633 (1993). See, Wall v. Kohli,

131 S. Ct. 1278, 1284, 562 US ___, 179 (2011) (“our cases make it clear that habeas corpus is a form of collateral review.”)

The U.S. Supreme Court stated in Kuhlmann v. Wilson, 477 U. S. 436, 447 (1986) “habeas corpus has traditionally been regarded as governed by equitable principles.”, and “...a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.” *Id.* at 452. This is precisely the argument that Ms. Lobato has raised throughout the proceedings.

III. Counsel’s Affidavit Satisfies NRAP 32(a)(7)(D)(i) and (ii).

The State’s Opposition materially confuses what is required in Ms. Lobato’s Motion under NRAP 32(a)(7)(D)(i) with the requirement under NRAP 32(a)(7)(D)(ii) that the accompanying declaration must “detail the reasons for the motion.” The State disregards that is exactly what the sworn Affidavit (declaration) of Ms. Lobato’s counsel does in stating the “diligence” of counsel “In order to fully rebut the State’s errors and omissions,” and the “good cause” of counsel because “it has been necessary to write a 168-page brief that cites 131 state and federal cases.” Counsel’s Affidavit also details the additional reasons (“diligence” and “good cause”) that the “State’s Answering Brief ... (iv) mischaracterized the District Court Order and (v) contains extensive erroneous assertions of fact and misapplication of the law” and that, “Ms. Lobato is compelled by case law and

statute to raise and defend every issue in state court in order to preserve those issue for federal court review.” Counsel’s Affidavit efficiently meets the minimal requirements of NRAP 32(a)(7)(D)(i) and (ii) without resorting to verbose and excessive language to do so.

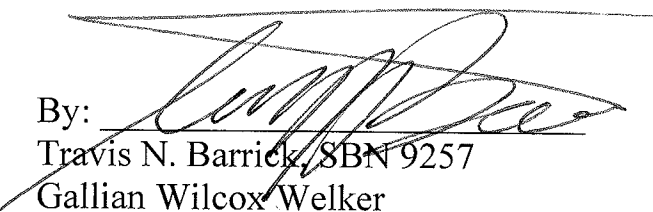
IV. Ms. Lobato Incorrectly Cited NRAP 27(d)(2).

The State correctly points out Ms. Lobato cited NRAP 27(d)(2), and the correct rule is NRAP 32(a)(7). However, the State’s Opposition makes it plain that was inconsequential and had no effect on the plain meaning and substance of Ms. Lobato’s Motion or the Opposition’s arguments under NRAP 32(a)(7).

V. CONCLUSION.

Therefore, for all the reasons set forth above Ms. Lobato respectfully requests that this Court grant her Motion over the State’s Opposition.

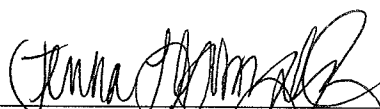
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By: 
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Pro Bono Attorney for Petitioner

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16th day of October, 2012, this document was filed electronically with the Nevada Supreme Court and thereby electronically served upon the following:

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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Jenna Gonzalez, An Employee of
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