

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

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Tracie K. Lindeman  
Clerk of Supreme Court

KRISTIN LOBATO, ) Case No. 58913  
Appellant, )  
v. )  
THE STATE OF NEVADA, )  
Respondent. )

**OPPOSITION TO MOTION FOR LEAVE TO FILE REPLY EXHIBITS**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy District Attorney, STEVEN S. OWENS, and respectfully moves for leave to file this Opposition to Motion for Leave to File Reply Exhibits.

Dated this 31<sup>st</sup> day of December, 2012

Respectfully submitted,  
STEVEN B. WOLFSON  
Clark County District Attorney

BY         /s/ Steven S. Owens          
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1 **POINTS AND AUTHORITIES**

2 This is an appeal from the denial of a post-conviction petition after a verdict  
3 for Voluntary Manslaughter with Deadly Weapon and Sexual Penetration of a  
4 Dead Human Body. In connection with the filing of her Reply Brief, Lobato has  
5 moved for leave to file exhibits for consideration in deciding this appeal. The State  
6 now opposes that motion.

7 Lobato acknowledges that the seven exhibits attached to her motion are all  
8 outside the record and were not raised or considered by the district court judge in  
9 deciding the habeas petition below. In fact, most of the exhibits are affidavits of  
10 witnesses recently prepared specifically for use in this appeal. The rules of  
11 appellate practice and the authorities stated below simply do not allow for  
12 expansion of the record in this manner.

13 The record that can be considered by this Court is limited to the relevant  
14 portions of the trial court record. See NRAP 10(b)(1); NRAP 30. Pursuant to  
15 NRAP 10(a), “the trial court record consists of the papers and exhibits filed in the  
16 district court, the transcript of the proceedings, if any, the district court minutes,  
17 and the docket entries made by the district court clerk.” While that record may be  
18 corrected or modified to reflect what truly occurred in the district court, see NRAP  
19 10(c), it cannot be enlarged to include papers that were not filed in the district  
20 court or otherwise part of the trial court record. See also Anderson v. State, 81  
21 Nev. 477, 482, 406 P.2d 532, 534 (1965) (stating that matters outside the record  
22 will not be considered); see also Carson Ready Mix v. First Nat’l Bk., 97 Nev. 474,  
23 476, 635 P.2d 276, 277 (1981).

24 On appeal, a court can only consider those matters that are contained in the  
25 record made by the court below and the necessary inferences that can be drawn  
26 therefrom. Toigo v. Toigo, 109 Nev. 350, 859 P.2d 259 (1993) (citing Lindauer v.  
27 Allen, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969)). This Court has said it will not  
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1 consider on appeal statements made by counsel portraying what purportedly  
2 occurred below. Wichinsky v. Mosa, 109 Nev. 84, 87, 847 P.2d 727, 729 (1993  
3 (citing Lindauer, 85 Nev. at 433, 456 P.2d at 852-53).

4 Facts stated in counsel's brief will not supply a deficiency in the record.  
5 Sparks v. State, 96 Nev. 26, 29, 604 P.2d 802, 804 (1980), citing A Minor v. State,  
6 85 Nev. 323, 454 P.2d 895 (1969). Furthermore, this court does not act as a finder  
7 of fact. State v. Rincon, 122 Nev. 1170, 147 P.3d 233 (2006). This court also has  
8 a policy of declining to review factual issues that have neither been raised nor  
9 determined before a district judge. Gibbons v. State, 97 Nev. 520, 634 P.2d 1214  
10 (1981), citing Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 623 P.2d 981 (1981).

11 To the extent Lobato claims her new exhibits are in rebuttal to the State's  
12 assertion of facts outside the record in its Answering Brief, such claim is belied by  
13 the record. The State's assertion of a "substantial basis for bias" by John Albert  
14 Kraft is supported by a citation to the record at IV AA 778. See Answering Brief,  
15 p. 32, fn. 7. The State's assertion of "inherent bias in any statement" by Hans  
16 Sherrer is supported by numerous citations to the record at IX AA 1791-1795; X  
17 AA 2171, 2173; XI AA 2198; and IX AA 1871-1873. See Answering Brief, p. 32,  
18 fn. 8. The State's assertion that the post-it note with phone numbers was not found  
19 in the victim's pocket but came instead from the trash debris that stuck to the body,  
20 is supported by citations to the record at II AA 481-482; and III AA 578-579. See  
21 Answering Brief, p. 38, lines 2-10. The State's assertion that Detective Thowsen  
22 never testified that he used a social security number when he found no criminal  
23 history for Daniel Martinez, is supported by a citation to the record at III AA 680.  
24 See Answering Brief, p. 40, lines 4-17. The State's assertion that Lobato failed to  
25 demonstrate what exculpatory evidence a proposed discovery motion would have  
26 uncovered, is supported by citation to Lobato's petition at VI AA 1332-33 and the  
27 district court's findings of fact at XI AA 2271. See Answering Brief, p. 56, lines  
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1 4-11. The State's assertion of Lobato's incriminating statements to her mother and  
2 father as she was being arrested and escorted from her home, is supported by  
3 citation to the record at III AA 654. See Answering Brief, p. 7, lines 1-5.

4 Lobato may rebut the State's assertion of facts by citation to additional or  
5 contrary facts found elsewhere in the record, or may argue that the State's  
6 assertions are not supported by the citations given. But what Lobato may not do is  
7 rebut facts in the record by introducing new affidavits and evidence on appeal  
8 which were not considered by the district court below.

9 WHEREFORE, the State respectfully requests that the motion for leave to  
10 file reply exhibits be denied.

11 Dated this 31<sup>st</sup> day of December, 2012.

12 Respectfully submitted,

13  
14 STEVEN B. WOLFSON  
15 Clark County District Attorney  
16 Nevada Bar # 001565

17 BY /s/ Steven S. Owens  
18 STEVEN S. OWENS  
19 Chief Deputy District Attorney  
20 Nevada Bar #004352  
21 Attorney for Respondent  
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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 31, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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*/s/ j. garcia*  
\_\_\_\_\_  
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SSO/jg