

MEMORANDUM OF POINTS AND AUTHORITIES

The State mistakenly believes that circularly citing its own pleadings somehow brings its new defenses and factually false new assertions into the record, as set forth below.

I. ARGUMENT.

A. It is in the interests of justice for Ms. Lobato to present evidence rebutting the State's new defenses outside the record and assertions outside or unsupported by the record, or in the alternative that this Court should strike the State's new defenses and assertions outside the record.

The State's Answering Brief ("Answer" or "RAB") doesn't comply with NRAP 28(e)(1) by raising six new defenses ("New Defenses") not asserted in the District Court and which are outside the record for review by this Court. [NRAP 10(a); Motion 2-10] The State's new defenses are based on factually false new assertions ("New Assertions") and are unsupported by the general and irrelevant citations in the State's Answer.¹ [Motion 2-10] The State's Answer makes its New Assertions in its Statement Of The Facts that misleadingly omits the factual context of what are in fact exculpatory statements by Ms. Lobato supporting her actual innocence. [Motion 10-11]

The State fails to address that since habeas corpus is governed by equitable principles, Kuhlmann v. Wilson, 477 U. S. 436, 447 (1986) ("habeas corpus has

¹ The Opposition expands on its Answering Brief's citations, however the State's new general citations don't support its Answer's new defenses and assertions that are irrelevant to Ms. Lobato's Motion. [Opposition 3-4]

traditionally been regarded as governed by equitable principles.”), the equitable remedy in the interests of justice pursuant to NRAP 28(c) under which Ms. Lobato may “answer[] any new matter set forth in the opposing brief,” is for Ms. Lobato to be allowed by way of her Reply Exhibits 1-7 to rebut the State’s New Defenses and New Assertions. [Motion 2-11]

Alternatively, the State ‘s New Defenses and New Assertions should be stricken pursuant to NRAP 28(e)(1) and (j). [Motion 3] Compliance with NRAP 28(e)(1) is mandatory. In Rivero v. Rivero, 125 Nev. 410, 216 P.3d 213, 233 n.10, 235 (2009), this Court affirmed a District Court’s ruling that because the Appellant “provides no citations to the record” **supporting** the Appellant’s claim, the District Court abused its discretion. *Id.* The State defeats its own Opposition by citing this Court’s rules and precedents limiting this Court to considering the District Court record, because those citations support granting Ms. Lobato’s alternate relief of striking the State’s New Defenses and New Assertions. [Opposition 2-4; Motion 3] See also, Gibbons v. State, 97 Nev. 520, 634 P. 2d 1214, 1216 (1981) (“This conclusion is harmonious with our policy of declining to review factual issues that have neither been raised nor determined before a district judge.”) NRAP 28(j) states in pertinent part: “Briefs that are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, ...”

B. The State’s Answering Brief asserts six New Defenses and factually false New Assertions that are outside or unsupported by the record.

1. Ground 20 – The State’s new defense is outside the record.

The State’s New Defense to Ground 20 that there is a “substantial basis for bias” by John Albert Kraft is outside the record, because the State did not assert bias as a defense in the District Court and there was no factual finding by the District Court of bias by Mr. Kraft or that he is related to Ms. Lobato. [11 App. 2268-69; 9 App. 1951; Respondent’s Answering Brief. (“RAB”) RAB 32-33; Motion 3]; *Gibbons*, 634 P. 2d at 1216.

The State’s New Defense of bias by Mr. Kraft is based on its **factually false** New Assertion that he “is” related to Ms. Lobato, which was false at the time of the District Court’s ruling, and is unsupported by the State’s citations to the record. [Motion 3; RAB 32 n.7; Opposition 3]

2. Ground 20 – The State’s New Defense is outside the record.

The State’s New Defense to Ground 20 that there is “inherent bias in any statement” by Hans Sherrer is outside the record, because the State did not assert bias as a defense in the District Court and there was no factual finding by the District Court of bias by Mr. Sherrer. [11 App. 2268-69; 9 App. 1951; RAB 32-33; Motion 4-5]; *Gibbons*, 634 P. 2d at 1216.

The State’s New Defense of bias by Mr. Sherrer is based on its **factually false** New Assertion that he and the Justice Institute, have “been actively engaged

in raising money for [Ms. Lobato's] defense and post-conviction proceedings," which is unsupported by the State's irrelevant citations to the record. [Motion 4-5; RAB 32 n.8; Opposition 3]

3. Ground 25 – The State's New Defense is outside the record.

The State's New Defense to Ground 25 that Mr. Sherrer's affidavit is "inherently biased and skewed" is outside the record, because the State did not assert bias as a defense in the District Court, and there was no factual finding by the District Court of bias by Mr. Sherrer. [11 App. 2268-2270; 9 App. 1953; RAB, 37-39; Motion 5-6]; *Gibbons*, 634 P. 2d at 1216.

The State's New Defense of bias by Mr. Sherrer that is based on its **factually false** New Assertion that he has a "personal interest" in this case, is unsupported by the State's irrelevant citations to the record. [Motion 5-6; RAB 32 n.8; Opposition 3]

4. Grounds 25 and 28 – The State's New Defenses are outside the record.

The State's New Defenses to Grounds 25 and 28 that two items with the police officer's "phone number" were not found in Duran Bailey's pockets is outside the record, because the State did not assert that defense in the District Court and that Court did not make a factual finding the officer's telephone number was not written on two items recovered from Mr. Bailey's pants pockets. [11 App. 2270; 9 App. 1953-56; RAB 37-9, 48-9; Motion 6-7]; *Gibbons*, 634 P. 2d at 1216.

The State's New Defense regarding the police officer's telephone number is based on its **factually false** New Assertion that it was not written on items found in Mr. Bailey's pockets and was on a random post-it note, is unsupported by the State's irrelevant citations to the record. [Motion 6-7; RAB 32 n.8; Opposition 3] The State's New Defense and New Assertion are defeated by CSA Maria Thomas' testimony: "The – three pieces of paper with phone numbers and miscellaneous writing, that was in the right rear pocket, pants pocket again," and she didn't testify any phone numbers were found on a post-it note. [2 App. 486; 3 App. 579; Motion 7]

5. Ground 26 – The State's New Defense is outside the record.

The State's New Defense to Ground 26 that Detective Thowsen did not need or use as a unique personal identifier the Social Security Number ("SSN") of Daniel Martinez (who was a suspect in Mr. Bailey's homicide) to find he had a clean record, is outside the record because the State did not assert that defense in the District Court, and that Court did not make a factual finding that Det. Thowsen did not use or need the SSN Martinez was using to determine he had a clean record. [11 App. 2270; 9 App. 1953; RAB 39-42; Motion 7-9]; *Gibbons*, 634 P.2d at 1216.

The State's New Defense and New Assertion regarding Det. Thowsen's records check are undercut by the fact that **after** he obtained Martinez' name and the SSN he was using, Thowsen testified "upon checking them further, found them

to be without criminal records.” The State’s New Defense and New Assertion are unsupported by its irrelevant citations because Det. Thowsen did not testify he did not use or need the SSN Martinez was using. [3 App. 603; 8 App. 1718; 6 App. 1309-11; Motion 7-9; Opposition 3]

6. Ground 36 – The State’s New Defense is outside the record.

The State’s New Defense to Ground 36 is outside the record, because the State did not assert as a defense in the District Court that Ms. Lobato “cannot show that [a discovery] motion would have led to information that would have been used to impeach Detective Thowsen...” [9 App. 1957; RAB 56; Motion 9-10]; *Gibbons*, 634 P. 2d at 1216.

The State’s New Defense regarding the failure of Ms. Lobato’s counsel to file any discovery motion is based on its factually false New Assertion that she “cannot show” what information the State would have had to disclose by order of the District Court under *Brady v. Maryland*, 373 U.S. 83 (1963), which is unsupported by its citations [Motion 9-10; RAB 56; Opposition 3], and disproven by the un rebutted factual statement in Ms. Lobato’s habeas petition:

“Among the documents not provided to Petitioner’s counsel by the prosecution are potentially exculpatory case notes, phone logs, travel records, telephone messages, emails, internal reports, and any other paperwork generated by Detectives Thomas Thowsen and James LaRochelle and their secretaries during the detectives investigations to verify the Petitioner’s account of being attacked at the Budget Suites Hotel “over a month” prior to her July 20, 2001, Statement.” [6 App. 1333]

C. The State's Statement Of The Facts in its Answer is factually misleading and raises new facts outside the District Court record.

The State's Statement of Facts in its Answer makes a New Assertion regarding Det. Thowsen testimony of what he heard Ms. Lobato tell her father and stepmother when she was arrested. This New Assertion factually misleads this Court, because the State knows her exculpatory statements were related to comments Ms. Lobato made to her father in June 2001 – weeks prior to Duran Bailey's homicide. [5 App. 912; Motion 10-11] The State did not assert Det. Thowsen's testimony as a defense or as a relevant factual issue in the District Court, and the District Court's Order before this Court for review does not rely on or even reference the factual issue of Det. Thowsen's testimony concerning Ms. Lobato's statements. [9 App. 1939-75; 11 App. 2265-81] See *Gibbons*, 634 P.2d at 1216, in which this Court reiterated its "policy of declining to review factual issues that have neither been raised nor determined before a district judge.")

The State waived cross-examination of Lorenzo Lobato's testimony that Ms. Lobato made her statement "in June" 2001. [5 App. 912; Motion 11]

II. CONCLUSION.

The State's Answering Brief asserts: (i) six New Defenses not raised in the District Court and that are not part of that Court's record before this Court for review, and which are based on New Assertions that are either outside or unsupported by the District Court record, and (ii) that the State's New Assertion of

Det. Thowsen's testimony regarding Ms. Lobato's statements to her parents is outside the District Court's record and factually out of context because they are in fact exculpatory statements.

Therefore, Ms. Lobato respectfully requests this Court grant her Motion, and Order the filing of Appellant's Reply Exhibits 1-7. In the alternative, Ms. Lobato requests that pursuant to NRAP 28(e)(1) and (j) this Court strike the State's New Defenses and New Assertions in its Answering Brief that are outside the District Court record, and strike the State's factually misleading New Assertions outside the District Court record in its Statement Of The Facts.

Dated this 7th day of January, 2013.

Respectfully submitted,

By: /s/ Travis N. Barrick
Travis N. Barrick, SBN 9257
Gallian Wilcox Welker
Olson & Beckstrom, LC
540 E St. Louis Avenue
Las Vegas, Nevada 89104
Pro bono attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 7th day of January, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

STEVEN S. OWENS
Clark County Chief Deputy District Attorney
District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

STEVEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212

By: /s/ Jeanette Barrick
An employee of
GALLIAN, WILCOX, WELKER
OLSON & BECKSTROM LC