

1 THE SUPREME COURT OF NEVADA

2 KIRSTIN BLAISE LOBATO,  
3  
4 Appellant,  
5 v.  
6 THE STATE OF NEVADA,  
7 Respondent.

CASE NO.: 58913

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Tracie K. Lindeman  
Clerk of Supreme Court

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9 APPELLANT'S NOTICE OF SUPPLEMENTAL AUTHORITIES

10 COMES NOW, J. BEDIAKU AFOH-MANIN, pro bono counsel for the Appellant, Kirstin  
11 Blaise Lobato, and respectively submits the APPELLANT'S NOTICE OF SUPPLEMENTAL  
12 AUTHORITIES. This Notice is made pursuant to and based upon all pleadings and papers on  
13 file herein, NRAP 31(e), the interests of justice, and the following Memorandum of Points and  
14 Authorities.  
15

16 Dated this 20<sup>th</sup> day of February, 2014.

17 Respectfully submitted,

18 By: /s/ J. Bediaku Afoh-Manin  
19 J. BEDIAKU AFOH-MANIN  
20 Pro bono attorney for Appellant  
Associate Counsel per NSC Order

21 By: /s/ Phung H. Jefferson  
22 PHUNG H. JEFFERSON  
23 Pro bono attorney for Appellant  
Nevada Bar Number 7761  
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## MEMORANDUM OF POINTS AND AUTHORITIES

The Appellant, Kirstin Blaise Lobato, respectively submits the APPELLANT’S NOTICE OF SUPPLEMENTAL AUTHORITIES for this Court’s consideration based on the following:

**I. NRAP 31(e) states in pertinent part:**

“When pertinent and significant authorities come to a party’s attention after the party’s brief has been filed, but before a decision, a party may promptly advise the Supreme Court by filing and serving a notice of supplemental authorities, setting forth the citations. The notice shall provide references to the page(s) of the brief that is being supplemented. The notice shall further state concisely and without argument the legal proposition for which each supplemental authority is cited. The notice may not raise any new points or issues. ...”

**II. McQuiggin v. Perkins, 569 US \_\_\_, 133 S. Ct. 1924 (2013) provides pertinent and significant new authority that Ms. Lobato’s new evidence claims supporting her actual innocence can rely on affidavits.**

A. After briefing was concluded in this case the United States Supreme Court issued its ruling on May 28, 2013 in McQuiggin v. Perkins, 569 US \_\_\_, 133 S. Ct. 1924 (2013) (Available at, [http://www.supremecourt.gov/opinions/12pdf/12-126\\_lkgn.pdf](http://www.supremecourt.gov/opinions/12pdf/12-126_lkgn.pdf)). In McQuiggin a habeas petitioner relied on three affidavits with what he asserted was new evidence showing his actual innocence for purposes of satisfying 28 United States Code § 2244(d)(1)(D). McQuiggin, 133 S. Ct. at 1929-30. The Supreme Court recited material aspects of the petitioner’s three affidavits, and ruled the petitioner’s actual innocence under the statute was to be appraised based on the “credibility of evidence proffered to show actual innocence.” [*Id.*, 1929-30, quote at 1936]

McQuiggin supplements Ms. Lobato’s Opening Brief (AOB) on the following pages related to her new evidence in the form of affidavits:

I. “Ms. Lobato’s Petition includes more than 20 grounds based on new evidence not presented at trial of her actual innocence by (i) twelve experts (eleven working *pro bono* on her case), (ii) thirteen alibi witnesses, (iii) three alternate suspect witnesses and (iv) seven fact witnesses, which are detailed in more than 40 professional reports, affidavits, statements, and documents incorporated in her Petition as exhibits.” [AOB 35] (Underlining added to original.)

1 2. “The District Court prejudicially misapplied *Herrera* because the majority ruled a  
2 habeas petitioner’s affidavits are “testimony,” *Id.* at 418, and “Had this sort of testimony  
3 been offered at trial, it could have been weighed by the jury, along with the evidence  
4 offered by the State and petitioner, in deliberating upon its verdict. Since the statements  
5 in the affidavits contradict the evidence received at trial, the jury would have had to  
6 decide important issues of credibility.” ... the emphasis on ‘actual innocence’ allows the  
7 reviewing tribunal also to consider the probative force of relevant evidence.” [AOB 49-  
8 50] (Underlining added to original.)

9 3. “The District Court prejudicially misapplied *Herrera* for two reasons: First, the  
10 Supreme Court ruled in *Herrera* that a habeas petitioner’s affidavits are “testimony,” *Id.*  
11 at 418, and neither the District Court nor the State raise a specific objection that her  
12 affiants are not reliable, trustworthy, or credible witnesses.” [AOB 84] (Underlining  
13 added to original.)

14 4. “The State’s argument misapplies *Herrera* because the majority ruled a habeas  
15 petitioner’s affidavits are “testimony,” *Id.* at 418, and “Had this sort of testimony been  
16 offered at trial, it could have been weighed by the jury, along with the evidence offered  
17 by the State and petitioner, in deliberating upon its verdict. Since the statements in the  
18 affidavits contradict the evidence received at trial, the jury would have had to decide  
19 important issues of credibility.” *Id.*” [AOB 92] (Underlining added to original.)

20 5. “The District Court prejudicially misapplied *Herrera* because the majority ruled a  
21 habeas petitioner’s affidavits are “testimony,” *Id.* at 418, and “Had this sort of testimony  
22 been offered at trial, it could have been weighed by the jury, along with the evidence  
23 offered by the State and petitioner, in deliberating upon its verdict. Since the statements  
24 in the affidavits contradict the evidence received at trial, the jury would have had to  
25 decide important issues of credibility.” *Id.* [AOB 99-100] (Underlining added to original.)

26 McQuiggin supplements Ms. Lobato’s Reply Brief (ARB) on the following pages related  
27 to her new evidence in the form of affidavits:

28 1. “The State doesn’t address the U. S. Supreme Court bases its habeas rulings on  
witness evidence in the form of Affidavits, statements, expert reports, etc., as does this  
Court.” [ARB 11] (Underlining added to original.)

2. “The State misapplies *Herrera* in newly asserting the District Court’s blanket  
rejection of Lobato’s new witness evidence in Grounds 37-48, 50, 53, 62, 63, 71, 73 and  
77 was consistent with the Supreme Court’s decision *Herrera*’s affidavits weren’t  
sufficient to prove his actual innocence.” [ARB 34] (Underlining in original.)

**III. People v Hamilton, (2014 NY Slip Op 00238) (1-15-14) provides pertinent and  
significant new authority supporting Ms. Lobato’s actual innocence habeas claims.**

A. After briefing was concluded in this case the Supreme Court Of The State Of New

1 York, Appellate Division: Second Judicial Department issued its ruling on January 15, 2014 in  
2 People v Hamilton, (2014 NY Slip Op 00238) (1-15-14) (Available at,  
3 [http://www.nycourts.gov/reporter/3dseries/2014/2014\\_00238.htm](http://www.nycourts.gov/reporter/3dseries/2014/2014_00238.htm)). In *Hamilton* a habeas  
4 petitioner asserted his new alibi witness evidence proved his actual innocence, and the Court  
5 established the precedent: “If the defendant establishes his actual innocence by clear and  
6 convincing evidence, the indictment should be [\*8]dismissed pursuant to CPL 440.10(4), which  
7 authorizes that disposition where appropriate.” *Hamilton*, 2014 NY Slip Op 238, at 7-8.

9 *Hamilton* supplements Ms. Lobato’s Reply Brief on the following pages:

10 1. “As set forth above the State materially misstates *Herrera* in stating it established  
11 an “unquestionably” innocent standard of proof for Ground 23, when a consensus of State  
12 courts is the “clear and convincing” standard applies while Illinois applies the  
preponderance standard.” [ARB 22]

13 2. “The State fails to address that if Ground 23 is granted Lobato’s charges should be  
14 dismissed.” [ARB 22]

15 B. The Court in *Hamilton* further ruled a petitioner’s actual innocence claim should be  
16 evaluated based on “all reliable evidence.” *Hamilton*, 2014 NY Slip Op 238, at 7, ¶5.

17 *Hamilton* supplements Ms. Lobato’s Opening Brief on the following pages:

18 1. “Ms. Lobato argues the correct evidence standard to evaluate her grounds based on  
19 new evidence of her actual innocence is that it is “new reliable evidence—whether it be  
20 exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical  
21 evidence—that was not presented at trial.”” [AOB 38]

22 2. “Consistent with the Ninth Circuit’s interpretation, many state courts have adopted  
23 a new evidence standard for actual innocence habeas claims consistent with the *Schlup*  
standard:” [AOB 39]

24 *Hamilton* supplements Ms. Lobato’s Reply Brief on the following pages:

25 1. “The State doesn’t address the significant issue new evidence in Lobato’s Petition  
26 is evidence not presented at trial and it is irrelevant when that evidence became known to  
27 her.” [ARB 6]

28 C. The Court in *Hamilton* explained the restrictive new evidence standard applying to a

1 motion for a new trial, was distinctly different from the expansive new evidence habeas standard  
2 “where the defendant asserts a claim of actual innocence.” *Hamilton*, 2014 NY Slip Op 238, at 6,

3 ¶4.

4 *Hamilton* supplements Ms. Lobato’s Opening Brief on the following pages:

5  
6 1. “Likewise, in *Snow* and *D’Agostino*, this Court specifically ruled the Appellants  
7 could pursue collateral review of their new evidence claims in an original habeas petition  
8 regardless of restrictions imposed on direct review of “new evidence” by NRS 176.515.  
9 *Snow*, 105 Nev. at 523; *D’Agostino*, 112 Nev. at 421.” [AOB 40]

10 2. “By way of its Response to Ms. Lobato’s grounds based on new evidence, the State  
11 makes the errant argument that the law applicable to direct review of a motion for a new  
12 trial under NRS 176.515 applies to collateral review of her new evidence claims in her  
13 original and timely habeas corpus petition, which argument is directly contrary to this  
14 Court’s precedents in *Orsborn*, 82 Nev. at 301; *Snow*, 105 Nev. at 523; and, *D’Agostino*,  
15 112 Nev. at 421.” [AOB 40-41]

16 *Hamilton* supplements Ms. Lobato’s Reply Brief on the following pages:

17 1. “The State doesn’t address only collateral review applies to Lobato’s Petition’s  
18 new evidence grounds under NRS 34.360, while spending five pages irrelevantly  
19 discussing direct review of a new trial motion under NRS 176.515(3).” [ARB 6]

20 2. “Lobato filed a timely Petition under NRS 34.360, yet the State falsely asserts:  
21 “Appellant must still meet the criteria for an untimely motion for new trial pursuant to  
22 NRS 176.515(3) and *Hennie v. State*, 114 Nev. 1285, 1290, 968 P.2d 761 (1998).” [RAB-  
23 10] The State only cites cases involving an NRS 176.515 motion which includes *Hennie*,  
24 and disregards NRS 176.515(3) doesn’t apply to an untimely motion or habeas petition.”  
25 [ARB 8]

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1 **IV. Conclusion.**

2 As set-forth herein *McQuiggin* and *Hamilton* provide pertinent and significant new authority  
3 supplementing Ms. Lobato's briefs as required by NRAP 31(e).

4 Dated this 20<sup>th</sup> day of February, 2014.

5 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that the APPELLANT’S NOTICE OF SUPPLEMENTAL  
AUTHORITIES was filed electronically with the Nevada Supreme Court on 20<sup>th</sup> day of  
February, 2014. Electronic Service of the foregoing document shall be made in accordance with  
the Master Service List as follows:

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