

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

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**APPELLANT'S SECOND NOTICE OF SUPPLEMENTAL  
AUTHORITIES**

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

Dated this 24<sup>th</sup> day of March, 2014.

Respectfully submitted,

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

By: /s/ Phung H. Jefferson  
PHUNG H. JEFFERSON  
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## MEMORANDUM OF POINTS AND AUTHORITIES

The Appellant, Kirstin Blaise Lobato, respectfully submits the APPELLANT'S SECOND 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. Hinton v. Alabama, 571 U.S. \_\_\_\_ (2014) provides pertinent and significant new authority supporting Ms. Lobato's habeas Grounds 38, 40, and 77 that her trial counsel provided constitutionally ineffective assistance of counsel for failing to investigate and present expert forensic evidence to rebut the State's expert testimony regarding Duran Bailey's time of death.**

A. After briefing was concluded in this case, and after Ms. Lobato filed her NOTICE OF SUPPLEMENTAL AUTHORITIES on February 21, 2014, the United States Supreme Court issued its *per curiam* decision on February 24, 2014 in Hinton v. Alabama, 571 U.S. \_\_\_\_ (2014) (Available at, [http://www.supremecourt.gov/opinions/13pdf/13-6440\\_m7ie.pdf](http://www.supremecourt.gov/opinions/13pdf/13-6440_m7ie.pdf)) The Court ruled that Hinton's trial attorney provided constitutionally deficient assistance of counsel related to his failure to investigate and present competent expert forensic evidence to rebut the State's expert testimony. [*Hinton*, Slip op., at 12]

B. In *Hinton* a habeas petitioner whose assertion of innocence was supported by alibi evidence, relied on new post-conviction evidence by three forensic experts to claim his trial attorney was constitutionally ineffective under the two-prong deficient representation and prejudice test set forth in Strickland v. Washington, 466 U.S. 668, 688, 693-94 (1984). The police found “no incriminating evidence at Hinton’s home or in his car.” [*Hinton*, Slip op., at 2] To undermine Hinton’s alibi defense and link him to the crimes, the State relied on expert forensic testimony matching “bullets recovered from those crime scenes to the Hinton revolver.” [*Id.*, at 2-3] Hinton’s attorney presented one witness whose “expertise was in military ordnance, not firearms and toolmark identification,” and his testimony was “badly discredited” on cross-examination. [*Id.*, at 6] Hinton’s attorney failed to retain a more qualified expert because he erroneously thought Ala. Code §15–12–21(d) (1984) capped total payment at \$500 per case. [*Id.*, at 5] Hinton filed an Alabama state post-conviction petition that claimed his trial attorney was ineffective for presenting the testimony of an “incompetent and unqualified” expert. [*Id.*, at 7] In his petition “Hinton produced three new experts on toolmark evidence” who rebutted the State’s expert trial testimony. [*Id.*] “The State did not submit rebuttal evidence.” [*Id.*]

C. In *Hinton* the U.S. Supreme Court began its legal analysis by stating: “This case calls for a straightforward application of our ineffective-assistance-of-

counsel precedents, beginning with *Strickland v. Washington*, 466 U. S. 668.”

[*Hinton*, Slip op., at 10] The Court cited *Harrington v. Richter*, 562 U.S. \_\_\_, 131 S.Ct. 770, 788 (2011) that, “Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.” [*Id.*, at 10] The Court recognized:

“Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts... This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution’s expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law” [*Id.*, 13-14]

The Court also cited *Williams v. Taylor*, 529 U.S. 362, 395 (2000) and *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) in ruling *Hinton*’s counsel’s was constitutionally deficient under *Strickland* requirement that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S., at 690–691.” [*Id.*, at 11-12] The Supreme Court didn’t rule on *Strickland*’s prejudice prong “Because no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case.” [*Id.*, at 14]

**D.** Ms. Lobato’s post-conviction habeas petition mirrors *Hinton* with her claims her trial counsel was constitutionally ineffective under *Strickland* for failing to present expert forensic evidence to rebut the State’s expert testimony – in her

case claims 38, 40 and 77 related to Duran Bailey's time of death. [6 Appellant's Appendix (App.) 1339, 1348; 7 App. 1502] Ms Lobato's case factually mirrors *Hinton* in that her assertion of innocence is supported by alibi evidence, and the police found no incriminating evidence in her home or car. [6 App. 1201, 1292, 1339-40] Also factually mirroring *Hinton* the State relied on expert testimony to try and undermine her alibi defense and link her to the crime. [2 App. 443, 457; 6 App. 1339, 1348] *Hinton* factually deviates from Ms. Lobato's case in that unlike Hinton's attorney, her counsel didn't attempt to secure any funding for expert forensic evidence to rebut the State's expert testimony regarding Mr. Bailey's time of death [6 App. 1339, 1348] An undisputed fact of Ms. Lobato's case is her chief counsel was specifically warned by her co-counsel:

"I am concerned specifically with preventing an ineffective assistance of counsel claim in this case, a third retrial, as well as a second wrongful conviction of Blaise, based on a failure to present all relevant expert testimony on our part. ... I know the budget on this case in terms of experts fees has been raised as an issue." [7 App. 1503] (Underlining added to original.)

Ms. Lobato's co-counsel again alerted her chief counsel less than a month before trial:

"You previously have voiced concern about budget constraints at your office regarding the expenses in this case. ... We are very concerned about the utilization of the appropriate experts in Ms. Lobato's defense ..." [7 App. 1509] (Underlining added to original.)

Factually mirroring Hinton's trial attorney's lack of knowledge he could

seek payment of adequate expert witness fees – which in *Hinton* the U.S. Supreme Court specifically found violated *Strickland's* deficient representation prong – is there is no evidence in the record Ms. Lobato's trial attorneys knew reimbursement of expert witness fees was available under NRS 7.135 (Reimbursement for expenses; employment of investigative, expert or other services.), that substantively tracks the relevant language of Ala. Code §15–12–21(d) (1984) at the time of Hinton's trial. [*Hinton*, Slip op., at 4, 12]

Also factually mirroring *Hinton* is Ms. Lobato's ineffective assistance of counsel claims 38, 40, and 77 are supported by new expert forensic evidence. [6 App. 1339, 1348; 7 App. 1502] In her case a total of four forensic pathology (1) and forensic entomology (3) experts provide new post-conviction evidence rebutting the testimony of the State's single trial expert, who placed Mr. Bailey's possible time of death in Las Vegas outside the time frame of her uncontested alibi evidence of when she was 165 miles away in Panaca. [6 App. 1339-44, 1348-49, 1353-57; 7 App. 1502; 2 App. 443, 457] Ms. Lobato's case also factually mirrors *Hinton* in that the State did not submit rebuttal evidence. [10 App. 2077-78]

E. As set-forth above, *Hinton* supplements Ms. Lobato's Opening Brief (AOB) on the following pages:

1. “In *Richter v. Hickman*, 578 F.3d 944, 952-53 (9th Cir. 2009), the Ninth Circuit found ineffective assistance of counsel where counsel failed to investigate and present at trial critical expert testimony about blood evidence, ruling, “This is indeed precisely what *Strickland* requires.” *Id.* See

also, Lunbery v. Hornbeak, 605 F.3d 754, 763-64 (9th Cir. 2010) (concurrency discussing the prejudice to the defendant by counsel's failure to present at trial critical expert psychology testimony); Sanborn v. State, 107 Nev. 399, 812 P. 2d 1279, 1283-84 (1991) (finding ineffective assistance of counsel in part based on counsel's failure to conduct pretrial investigation of muzzle blast evidence that undermined the prosecution's case and "that counsel's failures were so severe that they rendered the jury's verdict unreliable."); and Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986) (finding ineffective assistance of counsel for failure to conduct adequate pretrial investigation)." [AOB 87]

2. "Ground 38. [6 App. 1339] Ms. Lobato's counsel prejudicially failed to retain a forensic entomologist and introduce expert entomology testimony about Mr. Bailey's time of death." [AOB 112]

3. "Ground 40. [6 App. 1348] Ms. Lobato's counsel prejudicially failed to retain a forensic pathologist and introduce exculpatory expert forensic pathology testimony about the medical evidence related to Mr. Bailey's murder." [AOB 112]

4. "Ground 77. [7 App. 1502] Cumulative prejudicial errors by Ms. Lobato's trial and appellate counsel in Grounds 27-76 and 79 supports vacating Ms. Lobato's conviction and dismissal of the charges or a new trial. ... Second, the extreme quantity and prejudicial character of error by Ms. Lobato's trial and appellate counsel detailed in her 51 claims are supported by scientific reports, alibi and fact witness evidence, and the trial and appellate record." [AOB 123-24] (Underling added to original.)

F. As set-forth above, *Hinton* supplements Ms. Lobato's Reply Brief (ARB)

on the following pages:

1. "Ground 38. The State doesn't address Lobato's counsel was deficient as set forth above for failing to conduct any investigation regarding the unrebutted new exculpatory expert forensic entomology evidence about which there was no evidence at trial, that scientifically proves Bailey died after sunset at 8:01 p.m. on July 8, 2001, when the State concedes Lobato was in Panaca, which "establishes it is a scientific and physical impossibility the Petitioner committed her convicted crimes." [6 App. 1339-44; AOB 9 10]" [ARB 39-40] (Underlining added to original.)

2. “Ground 40. The State doesn’t address Lobato’s counsel was deficient as set forth above for failing to conduct any investigation regarding the un rebutted new exculpatory expert forensic pathology evidence about which there was no evidence at trial—including that Bailey died after 8 p.m. on July 8—which undermines “key aspects of the prosecution’s case.” [6 App. 1348-57]” [ARB 40-41] (Underlining in original.)

3. “The State materially omits the statement in Harrington v. Richter, 562 U.S. \_\_\_\_, 131 S.Ct. 770, 789 (2011): “It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts...” [ARB 28] (Underlining in original.)

4. “The State falsely asserts the ruling in *Richter* that Richter’s counsel provided ineffective assistance of counsel under *Strickland* was “expressly overruled by the United States Supreme Court in Harrington v. Richter.” [RAB 44] *Harrington*, 131 S.Ct. at 790, **specifically let stand** the Ninth Circuit ruling in *Richter*, 578 F.3d at 961, “counsel’s deficient performance was prejudicial” under *Strickland*. *Harrington* **only** overturned the Ninth Circuit’s ruling regarding 28 U.S.C. §2254(d) – which **only** applies to federal courts – and the Supreme Court **specifically warned** courts against confusing *Strickland* with 28 U.S.C. §2254(d). *Harrington*, 131 S.Ct. at 788.” [ARB 29-30] (Underlining and bold in original.)

5. “Consequently, the Ninth Circuit’s ruling Richter’s counsel was prejudicially ineffective under Strickland for failing to investigate, consult with, or call a blood spatter expert at trial is precedential for this Court. *Richter*, 578 F.3d at 961. *Richter* is directly on point because Lobato’s *Strickland* claims based on new expert evidence support her defense and “refuted the prosecution’s explanation” for aspects of her case. *Id.* at 962. This Court should disregard the State’s Answer from page 44 line 17 through page 45 line 21 that are based on federal 28 U.S.C. §2254(d) review.” [ARB 30] (Underlining in original.)

6. “The State confesses error under *Polk et al.* by failing to address Lobato’s counsel was deficient for failing to conduct any investigation regarding the new post-conviction exculpatory expert evidence detailed in Grounds 38-41, 44, 71 and 79, thus her counsel failed to base a strategy on the informed decision required by *Strickland, et al.*” [ARB 32-33] (Underlining in original.)



### III. Conclusion.

As set-forth herein *Hinton* provides pertinent and significant new authority supplementing Ms. Lobato's briefs as required by NRAP 31(e).

Dated this 24 day of March, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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