IN THE SUPREME COURT OF THE STATE OF NEVADA

***

KIRSTIN BLAISE LOBATO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal From Denial of Post Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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I. ARGUMENT.

The Appellant Kirstin Blaise Lobato ("Lobato") respectfully makes the following arguments related to her supplemental authorities: Hinton v. Alabama, 571 U.S. ___ (2014); McQuiggin v. Perkins, 569 U.S. ___, 133 S.Ct. 1924 (2013); and, People v Hamilton, 2014 N.Y. Slip Op. 238 (2014).

A. *Hinton v. Alabama*, 571 U.S. ___ (2014) supports Lobato's trial counsel was constitutionally deficient as set forth in Grounds 38, 40, 77 and 79.

Lobato's alibi defense that she was at her home in Panaca, Nevada the entire day of July 8, 2001 – the day of Duran Bailey's homicide 165 miles away in Las Vegas – was supported by prosecution and defense witnesses and telephone records. [AOB 11-14] With evidence of a three-hour travel time from Las Vegas, the State only disputed the defense alibi testimony establishing Lobato's presence in Panaca on July 8 from midnight to 7 a.m.[1] [4 App. 761; 5 App. 1008-09, 1023]

Consequently, presenting evidence Bailey could have died prior to 7 a.m. was essential for the State to obtain a conviction. With no eyewitness or circumstantial evidence of Bailey's time of death, the State relied on the expert testimony of Dr. Lary Simms who opined there was a 5% probability he died as early as 3:50 a.m. on July 8. [2 App. 457] It was critical for Lobato's trial counsel to rebut Dr. Simms' testimony. Yet, no defense rebuttal forensic expert time of

[1] The State's closing argument conceded reliable evidence established Lobato was in Panaca from at least "11:30 a.m. through the night," and she was probably there at "10 a.m." [5 App. 1008] 10 a.m. in Panaca – 3 hrs. travel = 7 a.m. in Las Vegas.

death testimony was presented. The State relied on Dr. Simms' unrebutted testimony to argue Bailey was killed in the early morning hours "sometime before sunup," and the jury convicted Lobato. [5 App. 1005]

Prior to trial Lobato's *pro bono* associate counsel from out-of-state repeatedly emphasized to lead counsel – the Clark County Special Public Defender – the importance of presenting relevant expert testimony, which lead counsel disregarded by claiming budget constraints. [7 App. 1503, 1509] Associate counsel warned, "I am concerned specifically with preventing an ineffective assistance of counsel claim in this case." [7 App. 1503] Lobato's counsel did not file a motion for expert witness fees under NRS 7.135, and there is nothing in the record they were aware of the statute.[2]

Post-conviction Lobato obtained new evidence by three expert forensic entomologists that to a "reasonable scientific certainty" Bailey died on July 8, 2001 after sunset at 8:01 p.m., and one expert forensic pathologist that to a "reasonable medical and scientific certainty" Bailey died after 8 p.m. (within two hours of his body's discovery). [6 App. 1173-1180] Forensic entomologist Dr. Gail S. Anderson swore under penalty of perjury in her report: "I do not believe that it is possible that the remains were present during the entire daylight hours of 8 July 2001." [6 App. 1175] Lobato's new expert evidence convincingly rebuts the

[2] NRS 7.135 is titled: Reimbursement for expenses; employment of investigative, expert or other services.

credibility of Dr. Simms' time of death testimony, which did not take into account the key factors there were neither any fly eggs nor insect or rodent bites on Bailey's body that was found lying in a trash enclosure next to a dumpster.[3] [2 App. 442-43] Based on Lobato's new forensic evidence Bailey died after 8 p.m. it is physically impossible she committed her convicted crimes, because it is an undisputed fact she was in Panaca on July 8, 2001 from at least 11:30 a.m. until after Bailey's body was found that night about 10 p.m. [2 App. 267; 5 App. 1008]

Lobato's habeas Grounds 38, 40, 77, and 79 allege ineffective assistance by her trial counsel under Strickland v. Washington, 466 U.S. 668, 688, 693-94 (1984), for failing to present expert forensic entomology and forensic pathology evidence that conclusively rebuts Dr. Simms' time of death testimony and fatally undermines the State's theory. [6 App. 1339, 1348; 7 App. 1502-03, 1514]

In Hinton v. Alabama, 571 U.S. ___ (2014) the State overcame the defendant's alibi defense by presenting expert testimony matching "bullets recovered from those crime scenes to the Hinton revolver." Slip op., at 2-3. To counter, Hinton's lawyer presented a witness whose expertise was not in "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

[3] The Coroner's crime scene Report Of Investigation and Dr. Simms' Autopsy Report do not mention the presence of a single fly egg, or insect or rodent bite on Bailey's body, corroborating the examination of crime scene and autopsy photographs by Lobato's post-conviction experts. [6 App. 1173-80; 10 App. 2168]

because he erroneously thought Ala. Code §15–12–21(d) (1984) capped payment at $500 per case. *Id.*, at 5. Hinton was convicted and after his direct appeal was denied, he filed a post-conviction petition that claimed his trial attorney was constitutionally 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 U.S. Supreme Court granted *certiorari* after the Alabama Supreme Court declined review of the state appeals court's denial of relief under *Strickland's* deficient representation and prejudice tests. *Id.*, at 9.

In *Hinton* the Supreme Court recognized that "Prosecution experts, of course, can sometimes make mistakes," Slip op., at 10, and that "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Id.* (Quoting Harrington v. Richter, 562 U.S. ___, 131 S.Ct. 770, 788 (2011)).

Relying on *Strickland's* mandate 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, the Supreme Court ruled the conduct of Hinton's attorney was neither strategic nor reasonable, but was deficient under *Strickland. Hinton*, Slip op., at 11-12. The Court remanded for evaluation of *Strickland's* prejudice prong based on the proper inquiry. *Id.*, at 14.

The conduct of Lobato's counsel was significantly more deficient than in *Hinton* for three reasons. First, no defense expert time of death evidence was presented at trial to rebut Dr. Simms' testimony – while Hinton's counsel simply presented an inadequate expert. Second, Lobato's counsel was apparently unaware payment of expert witness fees was available under NRS 7.135 – while Hinton's counsel was simply unaware he could request additional payment. Third, the Special Public Defender's budget apparently allowed for presentation of the critical expert time of death rebuttal evidence Lobato obtained post-conviction – if Lobato's counsel had bothered to investigate to obtain it.[4] [7 App. 1503, 1509]

Under *Hinton* and the cases cited therein dating from 1984, the District Court clearly erred ruling *Strickland's* deficiency prong was not met by the failure of Lobato's counsel to investigate and present expert forensic evidence rebutting the State's expert evidence concerning Bailey's time of death. [11 App. 2271-72, 2281] This Court can decide under its *de novo* review that the District Court also erred denying Lobato was prejudiced. Browning v. State, 120 Nev. 347, 91 P.3d 39, 45 (2004) ("A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review.") Lobato incorporates herein her Opening and Reply Brief's arguments that based on *Strickland's* less

[4] When the State balked at stipulating to William Bodziak's Footwear Examination Report and exhibits from 2002, Lobato's lead counsel stated: "And if it's gonna be a problem, then we'll get him on a plane and fly him out here." [4 App. 747]

than a preponderance prejudice standard there is a "reasonable probability" the outcome of her trial was unreliable due to her counsel's deficient conduct, whether Grounds 38, 40 and 79 are considered individually, or the cumulative prejudicial effect of her counsel's deficient conduct is considered under Ground 77. 466 U.S. at 693-94; [AOB 112, 123-5, 129; ARB 30-41, 65-67]

B. *People v Hamilton*, 2014 N.Y. Slip Op. 238 (2014) supports Lobato's arguments for review of her freestanding actual innocence Ground 23.

Lobato's freestanding actual and factual innocence Ground 23 states:

> "New forensic entomology, forensic pathology, forensic science, crime scene reconstruction, psychology, alibi witnesses, dental, third-party culprit, police perjury, and prosecution and police misconduct evidence establishes the Petitioner is actually and factually innocent of any involvement with the murder and cutting of Duran Bailey's rectum on July 8, 2001..." [6 App. 1282]

This Court's precedents in State ex rel. Orsborn v. Fogliani, 82 Nev. 300, 417 P.2d 148 (1966); Snow v. State, 105 Nev. 521, 523, 779 P.2d 96, 97 (1989); and D'Agostino v. State, 112 Nev. 417, 421, 915 P.2d 264 (1996) establish Lobato is entitled to collateral review of new evidence in her original and timely habeas petition filed under NRS 34.360. However, there are three issues of first impression for this Court to determine related to Ground 23: (i) the standard of evidence; (ii) the standard of proof; (iii) and, is dismissal of Lobato's charges required if this Court grants relief based on her actual and factual innocence?

Lobato argues the proper standard of evidence is "new reliable evidence—

whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995). Furthermore, "the habeas court must consider 'all the evidence,' old and new." House v. Bell, 547 U.S. 518, 538 (2006) The Ninth Circuit Court of Appeals in Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003), and many states have adopted those evidence standards for actual innocence habeas claims. [AOB 39-40] Most recently, New York adopted the "all reliable evidence" standard in People v Hamilton, 2014 N.Y. Slip Op. 238, at 7 (2014). *Hamilton* specifically held, as Lobato argues, that the restrictive new evidence standard for a new trial motion is inapplicable to a habeas petition "where the defendant asserts a claim of actual innocence." *Id.*, at 6; [AOB 40-41; ARB 4-8]

Lobato argues the proper standard of proof for Ground 23 is the "clear and convincing" standard, because as she also argues, if it is granted her charges should be dismissed.[5] [AOB 80; ARB 7, 22] In *Hamilton*, New York agreed with other states that "If the defendant establishes his actual innocence by clear and convincing evidence, the indictment should be dismissed ..." *Id.*, at 7-8. In

[5] Lobato clarifies that she argues the "more likely than not" proof standard applies to her grounds based on new evidence other than Ground 23, because granting any one of them individually will result in a new trial, not possible dismissal. [AOB 42-44, ARB 6] Regarding Ground 78 Lobato does argue that the cumulative weight of her new evidence grounds other than Ground 23 could result in dismissal, "if this Court finds the State has insufficient evidence in light of her new evidence." [AOB 128. See also AOB 125-129]

Orsborn this Court granted collateral relief under NRS 34.360 and ordered the petitioner's immediate release based on compelling new evidence of his actual and factual innocence. 82 Nev. 301-304.

Lobato reiterates her Opening Brief's arguments the District Court prejudicially erred denying Ground 23 [AOB 79-80]. *Hamilton* supports Ground 23 should be evaluated based on "all reliable evidence," and if it proves her actual innocence by "clear and convincing" evidence her charges should be "dismissed." 2014 NY Slip Op 238, at 6-8. *Orsborn's* facts and this Court's ruling infer those standards apply to Ground 23, and this Court should so hold. 82 Nev. 301-304.

C. *McQuiggin v. Perkins*, 569 U.S. ___ (2013) supports Lobato's actual innocence claims based on new evidence can rely on affidavits.

Numerous affidavits by experts, and alibi, third-party culprit, and fact witnesses provide new evidence not presented at trial supporting Lobato's actual innocence claims. [6 App. 1282-95 (Listing affiants with new evidence)] Under NRS 199.145 Lobato's affiants can be subjected to criminal prosecution the same as testifying in court. Eakins v. Nevada, 219 F.Supp.2d 1113, 1121 (D.Nev. 2002). In Herrera v. Collins, 506 U.S. 390, 418 (1993), the Supreme Court relied on its examination of Herrera's four affidavits detailing his new evidence not presented at trial in evaluating his actual innocence claim. The Court stated:

> "Had this sort of testimony been offered at trial, it could have been weighed by the jury, along with the evidence offered by the State and petitioner, in deliberating upon its verdict. Since the statements in the

affidavits contradict the evidence received at trial, the jury would have had to decide important issues of credibility. *Id.* at 418.

Since *Herrera* the Supreme Court's rulings in a number of cases have relied on affidavits filed in support of the petitioner's actual innocence claim. See e.g., *Schlup*, 513 U.S. 298, 307-310, 316-17; In Re Troy Anthony Davis, 557 U.S. 952, 130 S.Ct. 1 (2009); and most recently McQuiggin v. Perkins, 569 U.S. ___, 133 S.Ct. 1924, 1929-30, 1936 (2013).

In *McQuiggin* the Supreme Court recited material aspects of the petitioner's three affidavits, and ruled his actual innocence under the statute was to be appraised based on the "credibility of evidence proffered to show actual innocence." 133 S.Ct. at 1929-30, quote at 1936.

The only way a habeas petition can present new evidence is through written documents that include affidavits. As set forth above, U.S. Supreme Court rulings in actual innocence cases have relied on the content of the petitioner's affidavits. Yet, in denying Grounds 4, 7-9, 11-14, 16-20, 22-24 and 78 the District Court cited *Herrera* as authority to not consider Lobato's new evidence presented in affidavits (or other written form). [11 App. 2265-69, 2281, 2287, 2291] In doing so the District Court disregarded the majority ruling in *Herrera* that carefully considered Herrera's affidavits, and the District Court prejudicially misapplied the context of Justice O'Connor's concurrence that in a capital case "when a prisoner's life is at stake," "11th hour" affidavits "are to be treated with a fair degree of skepticism."

506 U.S. at 423; [11 App. 2265-69, 2281] Lobato's case is not a capital case and her affidavits were not presented at the 11th hour, but in her original and timely petition. Justice O'Connor did not suggest that even under the circumstances she described a court should summarily disregard a habeas petitioner's affidavits without carefully analyzing their content. [11 App. 2265-69, 2281]

Under *McQuiggin* and the other U.S. Supreme Court cases cited herein the District Court prejudicially misapplied *Herrera* to blanket disregard Lobato's new affidavit "testimonial" evidence in denying Grounds 4, 7-9, 11-14, 16-20, 22-24 and 78.[6] [11 App. 2265-69, 2281, 2287, 2291] That error is compounded because neither the State nor the District Court raised a specific objection that her affiants are not reliable, trustworthy, or credible witnesses. [*Id.*; 9 App. 1939-1975]

II. CONCLUSION.

As set-forth herein *Hinton, McQuiggin* and *Hamilton* provide supplemental authority the District Court prejudicially erred denying Lobato's Grounds 4, 7-9, 11-14, 16-20, 22-24, 38, 40, 77, 78 and 79. This Court should reverse the District Court's ruling and grant her petition with the relief of ordering dismissal of her

[6] Lobato also argues the District Court prejudicially misapplied *Herrera* to blanket disregard her new affidavit evidence in *Brady* Grounds 25 and 26, and *Strickland* Grounds 37-48, 50, 53, 62, 63, 71, 73 and 77. [AOB 84, 99-100; ARB 25, 34]

charges and her release from custody, or in the alternative ordering a new trial.

Dated this 9th day of April, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Pursuant to NRAP 32(a)(4)-(6), this brief is formatted in Times New Roman, size 14 font, with 1" margins on all sides.

Pursuant to this Court's Order of March 31, 2014 this Supplemental Opening Brief contains no more than 10 pages.

Dated this 9th day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that the APPELLANT'S SUPPLEMENTAL OPENING BRIEF was filed electronically with the Nevada Supreme Court on the 9th day of April, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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