IN THE SUPREME COURT OF THE STATE OF NEVADA

KRISTIN BLAISE LOBATO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

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

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ARGUMENT

I

HINTON DOES NOT SUPPORT LOBATO'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BECAUSE COUNSEL'S REASONABLE STRATEGIC DECISIONS WERE NOT BASED ON A MISTAKE OF LAW AND BECAUSE THE DISTRICT COURT RULED THAT LOBATO FAILED TO SHOW PREJUDICE UNDER STRICKLAND.

Hinton v. Alabama, 571 U.S. ___, 134 S.Ct. 1081 (2014), does not support Grounds 38, 40, 77, and 79 as raised in Lobato's post-conviction Petition. Hinton involved a "straightforward application" of the Strickland ineffective assistance of counsel standard. Id. at 1087. Specifically, the Court ruled that Hinton's attorney was deficient because he made an "inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused

counsel to employ an expert that *he himself* deemed inadequate." Id. at 1089 (emphasis in original).

Hinton's attorney recognized that the core of the prosecution's case rested on the anticipated expert testimony that bullets recovered from three crime scenes matched the revolver recovered from Hinton's mother's house. Id. at 1084, 1088. Accordingly, Hinton's attorney acknowledged the need for a defense expert to rebut the state's evidence. Id. at 1088. However, Hinton's attorney mistakenly believed that reimbursement for expert fees was statutorily capped at $1,000 despite the fact that the trial court invited counsel to seek additional funds if necessary and that the relevant Alabama statute was amended to expressly provide for reimbursement of "any expenses reasonably incurred" if approved in advance by the trial court. Id. at 1084-85. Mistakenly operating under the limits of an old statute, Hinton's attorney hired the only expert willing to do the work for $1,000, an expert who was not sufficiently qualified in firearms and toolmark identification, which counsel recognized, and who was badly discredited during cross-examination. Id. at 1085-86, 1088. In fact, the state's cross-examination revealed that the defense witness' expertise was in military ordinances, not firearms and toolmark identification, he needed the state expert's assistance to operate the microscope and view the bullets, and his vision was poor because he only had one eye. Id. at 1086. Therefore, the Court ruled that the "attorney's failure to request additional funding in order to

replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." Id. at 1088.

The United States Supreme Court expressly limited its ruling to the fact that Hinton's attorney made an "inexcusable mistake of law" because he allowed an outdated statute to limit his ability to hire an adequate defense expert. Id. at 1089. Indeed, the Court ruled as follows:

> The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." Strickland, 466 U.S., at 690, 104 S.Ct. 2052. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. *The only inadequate assistance of counsel here was the inexcusable mistake of law*—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that *he himself* deemed inadequate.

Id. (emphasis added). Thus, Hinton did not alter the well-established rule that trial counsel has broad discretion in making strategic decisions such as what witnesses to call and what defenses to develop. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Rather, Hinton simply explained that counsel's otherwise "virtually unchallengeable" strategic decision is not objectively reasonable when counsel bases that decision on a fundamental misunderstanding of relevant law.

Here, in contrast to Hinton, nothing in the record indicates that counsel's strategic decisions regarding expert witnesses were based on a mistake of law. Nevertheless, in purported support of her claims that counsel should have called various additional expert witnesses at trial, Lobato claims that her out-of-state, pro bono counsel "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." ASOB 2. Thus, according to Lobato, counsel's decisions regarding experts were solely based on lack of funds and so counsel should have moved for expert fees under NRS 7.135. ASOB 2. Lobato goes so far as to note that nothing in record demonstrates that counsel was even aware of NRS 7.135. ASOB 2. Lobato's argument is flawed for several reasons discussed in turn below.

First, Strickland analysis begins with the "strong presumption" that counsel's performance was effective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 35, 32 (2004). Therefore, counsel is presumed to be aware of any relevant statutes and Lobato's claim that the record does not demonstrate counsel was aware of NRS 7.135 is an empty statement in the Strickland context.

Second, NRS 7.135 does not apply to a public defender. NRS 7.135 provides for reimbursement of expenses "in addition to the fee provided by NRS 7.125," and NRS 7.125 governs fees for appointed attorneys "other than a public defender."

Therefore, considering Lobato's lead counsel was the Clark County Special Public Defender, NRS 7.135 did not apply in this case. See also CCC 2.16.170 (requiring County to pay all expenses of public defender, subject to budgetary approval).

Third, Lobato's argument rests on the flawed premise that counsel's strategic decisions regarding expert witnesses were strictly financial in nature. Lobato claims that associate counsel advised lead counsel to utilize additional experts, but lead counsel "disregarded [the advice] by claiming budget constraints." ASOB 2. However, Lobato's purported support within the record for that allegation is nothing but one-way communication from associate counsel to lead counsel that refers to prior budget concerns regarding experts and expenses. VII AA 1503, 1509. Nothing in the record shows that lead counsel "disregarded" associate counsel's recommendations for financial reasons. Notably, lead counsel elected to call as witnesses at trial two of the four experts that associated counsel recommended. 3-4 AA 613-45, 709-33 (Dr. Michael Laufer); 4 AA 811-54, 862-80 (Brent Turvey). Moreover, the communications to which Lobato refers show that her attorneys dutifully investigated a range of experts to potentially utilize in Lobato's defense, which shows that counsel made informed strategic decisions. Lobato provides no authority that permits piecemeal Strickland analysis upon each defense-team attorney in isolation from his or her co-counsels' performance.

Lastly, the district court denied Lobato's claims in Grounds 38, 40, 77, and 79 of her post-conviction Petition, in part, because Lobato failed to demonstrate prejudice under Strickland. XI AA 2271-72. Hinton concerned only the deficiency prong under Strickland, and because no court below had yet considered the prejudice prong, the case was remanded to determine whether Hinton could satisfy his burden to show prejudice. Hinton, 134 S.Ct. at 1089-90. Thus, even if relevant under the facts of this case, Hinton would be of no consequence here because the district court has already ruled the Lobato failed to demonstrate prejudice and Strickland requires Lobato to demonstrate both deficiency *and* prejudice. The State incorporates here by reference the arguments within Respondent's Answering Brief that demonstrate the district court properly ruled that Lobato failed to demonstrate prejudice.

Therefore, Hinton does not support Lobato's claims as raised in Grounds 38, 40, 77, and 79 of her post-conviction Petition because Lobato fails to demonstrate that counsel's strategic decisions regarding expert witnesses were based on a mistake of law and because the district court properly ruled that Lobato failed to demonstrate prejudice regarding each of those claims.

II
HAMILTON DOES NOT SUPPORT LOBATO'S GROUND 23 CLAIM BECAUSE FREESTANDING ACTUAL INNOCENCE CLAIMS ARE NOT COGNIZALBE IN POST-CONVICTION HABEAS PETITIONS IN NEVADA.

People v. Hamilton, 115 A.D.3d 12, 979 N.Y.S.2d 97 (2014), does not support Lobato's Ground 23 claim as raised in her Petition because Nevada has never

recognized freestanding claims of actual innocence in post-conviction habeas petitions. In fact, in order to argue that Hamilton is even relevant as supplemental authority here, Lobato incorrectly assumes the validity of her own prior arguments that she may raise freestanding actual innocence claims in a post-conviction habeas proceeding. ASOB 6. NRS 34.724(1) only permits habeas claims that challenge a conviction or sentence based on a constitutional violation, and thus Nevada only recognizes "gateway" claims of actual innocence that strictly operate to overcome procedural bars to habeas review of the underlying constitutional claims. Lobato continues to ignore the dramatic difference between "gateway" and "freestanding" claims of actual innocence, a distinction that is dispositive of her Ground 23 claim. The State incorporates here by reference the arguments within Respondent's Answering Brief that demonstrate Lobato's incorrect application of Nevada law regarding actual innocence claims.

Lobato nevertheless argues that this Court should adopt the "all reliable evidence" standard of evidence that New York adopted in Hamilton, a clear-and-convincing burden of proof, and dismissal of charges upon succeeding on an actual innocence claim. ASOB 8. Of course, New York expressly recognized freestanding actual innocence claims in Hamilton and thus those standards were relevant there. Hamilton, 115 A.D.3d 12, 979 N.Y.S.2d at 99. In stark contrast, Nevada does not recognize freestanding actual innocence claims in post-conviction habeas petitions

and thus Hamilton has no relevance to Lobato's Ground 23 claim. Notably, apart from Hamilton, Lobato's purported authority for her requested evidentiary standard are cases that address gateway and not freestanding actual innocence claims, i.e., Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995), House v. Bell, 547 U.S. 518, 126 S.Ct. 2064 (2006), and Griffin v. Johnson, 350 F.3d 956 (9th Cir. 2003). ASOB 7. Moreover, Hamilton's "all reliable evidence" standard, at least to the extent Lobato attempts to claim that the standard would allow consideration of evidence that could have been presented at trial with reasonable diligence, would lead to ridiculous results. Nevada has long valued the finality of convictions and protecting against abuse of the post-conviction process. See Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989). Yet, under Lobato's proposal, a defendant who was convicted by a unanimous jury and had his conviction affirmed on appeal could simply identify one item of "new" evidence, perhaps an expert that would disagree with expert testimony presented a trial, and proceed on an actual innocence claim that amounts to essentially a bench trial. Nevada should decline Lobato's invitation to follow such a ridiculous course. Additionally, in light of NRS 34.724(1), such a dramatic shift in public policy is a question properly addressed to the Legislature and not this Court. See State v. Eighth Judicial District Court (Logan D.), 129 Nev. Adv. Op. 52, __, 306 P.3d 369, 390 (2013) (approving of amendments to juvenile sex offender statutes despite voicing policy concerns); Anthony v. State, 94 Nev. 338, 341, 580

P.2d 939, 941 (1978) (stating judiciary will not declare a law void because it disagrees with the wisdom of the Legislature).

III
MCQUIGGIN DOES NOT SUPPORT LOBATO'S CLAIMS BECAUSE THE DISTRICT COURT DID NOT SUMMARILY DISREGARD AFFIDAVITS IN RULING ON LOBATO'S PETITION.

McQuiggin v. Perkins, 133 S.Ct. 1924, 1928, 185 L.Ed.2d 1019 (2013), does not demonstrate that the district court erred in rejecting Lobato's freestanding actual innocence claims raised in her Petition as Grounds 4, 7-9, 11-14, 16-20, 22-24, and 78. McQuiggin held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup and House, or, as in this case, expiration of the statute of limitations." Id. McQuiggin also clarified that undue delay in raising a gateway actual innocence claim is not an absolute barrier to review of the underlying constitutional claim, but is a factor that courts may consider in reviewing the threshold claim of actual innocence. Id. Thus, McQuiggin simply extended the rule that gateway actual innocence claims may provide a means to overcome procedurally barred post-conviction constitutional claims to similarly reach claims that are barred by a statute of limitations.

Lobato seemingly offers McQuiggin as supplemental authority to demonstrate that courts may consider affidavits when reviewing a claim of actual innocence. ASOB 9. Lobato's apparent need to so demonstrate, however, stems from her

misunderstanding of the district court's ruling on her actual innocence claims. Lobato states that "the District Court cited Herrera as authority not to consider Lobato's new evidence presented in affidavits (or other written form)." ASOB 9. Yet, the District Court appropriately considered the affidavits Lobato presented and simply ruled that, depending on the individual ground, the affidavits were not "newly discovered" evidence, were speculative and not based on fact or evidence, merely contained alternative opinions of evidence, or a combination thereof, and thus did not establish Lobato's actual innocence. XI AA 2265-69. Moreover, the district court appropriately cited Herrera v. Collins, 506 U.S. 390, 417, 423, 113 S.Ct. 853 (1993), as support for the position that affidavits should be considered for what they are, sworn statements untested by cross-examination and potentially supplied by persons biased in favor of the defendant. XI AA 2281. Nothing in the record indicates that the district court disregarded the affidavits simply because they were affidavits. Therefore, McQuiggin offers nothing to advance Lobato's claims.

CONCLUSION

Based on the foregoing, Lobato's supplemental authorities are neither controlling nor persuasive under the facts of this case and do not demonstrate that the district court improperly denied Lobato's post-conviction Petition. The State respectfully requests that this Court affirm the district court's order denying Lobato's Petition for post-conviction relief.

Dated this 21st day of April, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 2,228 words and is 10 pages.
3. **Finally, I hereby certify** that I have read this appellate 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.

Dated this 21st day of April, 2014.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 21st 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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