

IN THE SUPREME COURT OF THE STATE OF NEVADA

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KIRSTIN BLAISE LOBATO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 58913

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**APPELLANT'S SUPPLEMENTAL REPLY 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 in reply to the Respondent’s Supplemental Answering Brief.

### ***A. Hinton v. Alabama, 571 U.S. \_\_\_ (2014) supplements Lobato’s counsel was deficient for failing to investigate expert time of death evidence establishing it is physically impossible she committed her convicted crimes.***

The State fails to address that under Hinton v. Alabama, 571 U.S. \_\_\_, 134 S.Ct. 1081, 1089 (2014) Lobato’s counsel’s “unreasonable failure to understand the resources” available *supplements* her arguments under Strickland v. Washington, 466 U.S. 668 (1984) that her trial counsel was deficient for failing to investigate the un rebutted expert time of death evidence she obtained post-conviction establishing it is physically impossible she committed her convicted crimes: fatally undermining the State’s theory. [ASOB 1-6] The State miscites Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) that was a direct appeal, not collateral review during which *every decision* by counsel can be subject to *Strickland* analysis. [AOB 86-90; RSAB 3]

The State misrepresents the facts concerning the two defense experts at trial and other experts who weren’t retained due to a lack of funding<sup>1</sup> – none of whom was a time of death expert. [7 App. 1504-08; 4 App. 727, 869; RSAB 5]

The record belies the State’s assertions regarding Lobato’s *pro bono* associate counsel, who *repeatedly* warned her public defender lead counsel up to the eve of trial

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<sup>1</sup> In testifying *pro bono* about Bailey’s injuries Dr. Laufer stated, “The first words that I was told with regard to this case is *we don’t have any money.*” [4 App. 727] Forensic scientist Brent Turvey’s payment by the Special P. D.’s Office was *ridiculed by the State as wasteful during its rebuttal argument.* [5 App. 1022; 4 App. 869]

about the consequences of not investigating and presenting relevant expert testimony under the guise of budget considerations. [ASOB 2; RSAB 4-5; 7 App. 1503-10]

The State's assertions disregard NRS 7.135 and other states' comparable statutes are liberally construed because investigation of possible defenses implicates effective assistance of counsel. [RSAB 4-5] In Widdis v. District Court, 114 Nev. 1224, 1228-29, 968 P. 2d 1165, 1168 (1998) this Court cited English v. Missildine, 311 N.W.2d 292 (Iowa 1981) in ruling NRS 7.135 applied to retained counsel:

“Irrespective of the absence of any express statutory authorization ... Once indigency was established, the court concluded that the “defendant [was] constitutionally entitled to those defense services for which he demonstrate[d] a need.” *Widdis*, 114 Nev. at 1228-29.

The State disregards it is unreasonable Lobato's public defender wouldn't know this Court has allowed applying NRS 7.135 to public defenders. See, Sonner v. State, 112 Nev. 1328, 1339-40, 930 P.2d 707 (1996) (The public defender represented petitioner didn't establish need under NRS 7.135 for a fourth psychiatrist.); Gallego v. State, 117 Nev. 348, 369-70, 23 P.3d 227 (2001) (The public defender represented petitioner didn't establish need under NRS 7.135 for brain damage testing.)

The State's advocacy NRS 7.135 wasn't an option for Lobato's public defender is contrary to this Court's rulings, and endorses depriving Lobato of her constitutional rights to effective assistance of counsel, due process, and equal protection: Lobato would have the testimony of necessary experts available at *public expense* if she had a *private attorney* – but not if represented by a *public defender*. See, *English*, 311 N.W.2d at 293-94 (Right to effective counsel includes public payment for

investigative services); State v. Hancock, 164 N.W.2d 330, 333 (Iowa 1969) (Rights to due process and equal protection implicated by failure to provide investigative services.); and, CCC 2.16.140 (Compensation for court-appointed private counsel.)

The State fails to address reasons one and three why the “conduct of Lobato’s counsel was significantly more deficient than in *Hinton*.” [ASOB 5]

The State fails to address this Court’s *de novo* review can determine Lobato was prejudiced under *Strickland* by her counsel’s failure to investigate the exculpatory expert time of death evidence, and reverse the District Court’s ruling. [ASOB 5-6]

**B. *People v Hamilton*, 979 N.Y.S.2d 97 (2014) supplements Lobato’s arguments for review of her actual innocence Ground 23.**

The State fails to address People v Hamilton, 979 N.Y.S.2d 97, 115 A.D.3d 12 (2014) supplements Nevada’s black letter law for 48 years that Lobato is entitled to *collateral review* of her new evidence not presented at trial in her original and timely habeas petition. [ASOB 6-8]; State ex rel. Orsborn v. Fogliani, 82 Nev. 300, 302, 417 P.2d 148 (1966). That Lobato is apparently the first person to avail herself of *Orsborn* supports there is no basis for the State suggesting negative consequences if this Court considers Ground 23, particularly considering that based on *one item of new evidence* this Court ruled Orsborn “was wrongfully imprisoned” because he committed no crime and ordered “his immediate release.” 82 Nev. at 304; [ASOB 6-8; RSAB 7-8]

The State egregiously miscites Colley v. State, 773 P. 2d 1229, 105 Nev. 235 (1989) (No “good cause” for untimely petition.) to support its suggestion Ground 23 in Lobato’s *timely petition* is an “abuse of the post-conviction process.” [RSAB 8]

Lobato's Ground 23 asserts her conviction violates her "constitutional rights ... to due process of law," so the record belies the State's assertion it doesn't meet the requirement of NRS 34.724(1). See, *Hamilton*, 979 NYS.2d at 104; [6 App. 1282; AOB 37; RSAB 7] NRS 34.770 allows an evidentiary hearing, so considering Ground 23 wouldn't newly authorize a "bench trial." [RSAB 8] Considering Ground 23's constitutional, statutory, and precedential basis, the State's assertion is meritless it raises a "public policy [] question properly addressed to the Legislature." [RSAB 8-9]

The State falsely asserts Lobato doesn't rely on "freestanding actual innocence" cases other than *Hamilton* to support the "all reliable evidence" standard: Lobato states "many states have adopted those evidence standards for actual innocence," in referencing cases from four states. [ASOB 7; AOB 39-40; RSAB 8]

The State's assertions concerning federal cases blatantly disregards Schlup v Delo, 513 U.S. 298, 328 (1995) was cited *as authority* by *Hamilton* for the "all reliable evidence" actual innocence standard. 979 N.Y.S.2d at 109; [RSAB 7-8; ASOB 6-7] *Federal and state courts* apply the "all reliable evidence" standard, exposing the State asserts a phantom distinction between substantive review of "freestanding" and "gateway" actual innocence claims, and *Hamilton* explains their similarities at length. 979 N.Y.S.2d at 104-109; [RSAB 7-8; ASOB 6-8]

The State doesn't address that "clear and convincing" new evidence of Lobato's actual innocence warrants dismissal of her charges. [ASOB 7-8]

***C. McQuiggin v. Perkins*, 569 U.S. \_\_\_ (2013) supplements Lobato’s actual innocence claims based on new evidence can rely on affidavits.**

The State misstates the District Court’s ruling that *did not analyze or cite a single item of new evidence in any* of Lobato’s numerous affidavits, and the State fails to address the District Court limited consideration of “Lobato’s new evidence presented in affidavits” by disregarding the majority statement in Herrera v. Collins, 506 U.S. 390, 418 (1993) a habeas petitioner’s affidavits are “testimony,” and the Supreme Court carefully examined *on the record* Herrera’s new affidavit evidence as it has done in other cases, most recent in McQuiggin v. Perkins, 569 U.S. \_\_\_, 133 S.Ct. 1924, 1929-30, 1936 (2013). [ASOB 8-10; RSAB 9-10; 11 App. 2265-91]

The record belies the State’s assertion, “Nothing in the record indicates that the district court disregarded the affidavits simply because they were affidavits.” [RSAB 10] The District Court dismissively treated Lobato’s new affidavit evidence by relying on *Herrera’s* concurring opinion concerning “11<sup>th</sup> hour” affidavits by a *death row prisoner* – which plainly has no application to Lobato. [11 App. 2281; ASOB 9-10]

The entire first paragraph of the State’s Section III is non-responsive and immaterial to Lobato’s arguments regarding *McQuiggin*. [ASOB 8-10; RSAB 9]

## **II. CONCLUSION.**

The State fails to address how Lobato’s supplemental authorities relate to the specific purpose for which each is presented. Consequently, this Court should reverse the District Court’s ruling and order dismissal of Lobato’s charges and her release from custody, or in the alternative order a new trial.

Dated this 12 day of May, 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 May 8, 2014 this Supplemental Reply Brief contains no more than 5 pages.

Dated this 12 day of May, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that the APPELLANT'S SUPPLEMENTAL  
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12 day of May, 2014. Electronic Service of the foregoing document shall be  
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