IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 58913

Electronically Filed
Sep 28 2015 03:17 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPELLANT'S THIRD 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 THIRD 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 28th day of September, 2015.

Respectfully submitted,

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

By: *<u>/s/ Phung H. Jefferson</u>*
PHUNG H. JEFFERSON
Pro bono attorney for Appellant
Nevada Bar Number 7761

MEMORANDUM OF POINTS AND AUTHORITIES

The Appellant, Kirstin Blaise Lobato, respectively submits the APPELLANT'S THIRD 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. Collins v. State of Mississippi, No. 2013-CT-00761-SCT (2015) (en banc) provides pertinent and significant new authority supporting Ms. Lobato's habeas grounds 43 and 47 that her trial counsel provided constitutionally ineffective assistance of counsel for failing to object to expert testimony by witnesses for the State without notice under NRS 174.234(2) and qualification under NRS 50.275.

A. After briefing was concluded in this case, and after Ms. Lobato filed her NOTICE OF SUPPLEMENTAL AUTHORITIES on February 21, 2014, and her SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES on March 25, 2014, the Supreme Court Of The State Of Mississippi issued its final decision on August 20, 2015 in Collins v. State of Mississippi, No. 2013-CT-00761-SCT (2015) (en banc) (Available at, https://courts.ms.gov/Images/Opinions/CO105225.pdf). In *Collins* the Court ruled in support of the proposition that it is reversible error for a

lay to give expert testimony without being noticed and qualified as an expert in the subject matter of that testimony as required by statute, and that it is particularly harmful to a defendant for an officer of the law to be allowed to provide inadmissible expert testimony. [*Collins*, Slip op. at 22-23] As a direct appeal, the relevant officer testimony in *Collins* was reviewed under the clear abuse of discretion standard [*Collins* at 21] – which imposes a significantly higher threshold for relief than the deficient performance and prejudice standard under Strickland v. Washington, 466 U.S. 668, 687 (1984), that is applicable to ineffective assistance of counsel grounds 43 and 47.

B. Mississippi Rule of Evidence 701, just as NRS 50.265, substantively tracks Federal Rule of Evidence 701, in identifying admissible opinion testimony by a lay witness.[1] See, Rossana v. State, 113 Nev. 375, 934 P. 2d 1045, 1048

[1] NRS 50.265 subsections (1) and (2) exactly track the language of MRE 701(a) and (b), and FRE(a) and (b): "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are: (a) rationally based on the perception of the witness; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue."

MRE 701(c) tracks FRE 701(c), which has not yet been incorporated into NRS 50.265: "(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Subsection (c) doesn't alter the admission standard for lay testimony under FRE 701(a) and (b) and MRE 701(a) and (b), which are identical to NRS 50.265(1) and (2): "Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." [FRE 701 (Committee Notes on Rules—2000 Amendment). Available at, https://www.law.cornell.edu/rules/fre/rule_701] (underlining added)

(1997) ("The relevant Nevada rule mirrors Federal Rule of Evidence (FRE) 701.") MRE 702, just as NRS 50.275, substantively tracks FRE 702, in identifying admissible opinion testimony by an expert witness. See, Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646, 650 (2008) (NRS 50.275 tracks FRE 702.).

C. *Collins* is a particularly pertinent and significant authority because Ms. Lobato is unaware of a case in which the Nevada Supreme Court has granted a new trial either on direct appeal or post-conviction based on inadmissible expert testimony introduced under the guise of lay testimony – and particularly by law enforcement officers.

D. In *Collins* the Court stated regarding lay and expert opinion testimony:

> "This Court has held that "where, in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a M.R.E. 702 [expert] opinion and not a 701 [lay] opinion." [Citation omitted] The distinction is important because "[l]ay and expert witnesses are treated differently in discovery" and the opposite party is entitled to "notice and opportunity to prepare rebuttal" regarding expert testimony. *Id.* "A lay witness's unique qualifications have no bearing on the witness's ability give [sic] a lay opinion." [Citation omitted] The Court found that Rule 701 "prohibits lay opinions that are based on special training and knowledge. *Id.*[2]" [*Collins*, Slip op. at 22 (underlining added]

The Court also stated:

> "Furthermore, this Court has held that because "the public hold police officers in great trust, the potential harm to the objecting party requires reversal where a police officer gives expert testimony without

[2] Referencing, Heflin v. Merrill, 154 So. 3d 857, 863 (Miss. 2014).

first being qualified as such." *Kirk v. State*, 160 So. 3d 685, 693 (Miss. 2015) In *Kirk*, "[w]hile [the police officer] may have been able to testify regarding his observations, e.g., that [the victim's] neck had red marks on it, his testimony that it appeared [the victim] had been strangled constituted the sort of testimony properly reserved to an expert. *Id.*" [*Id.* At 23] (underlining added)

E. In *Collins* the defendant was charged with murder, and the trial court overruled his counsel's objection to a police officer's testimony as a lay witness to explain "phone records and the mapping he had done" based on those records. [*Collins* at 11] Based on the records and mapping the officer testified to his opinion the defendant was in the area where the victim's body was later found. [*Id.* at 14]

The police officer was not noticed or qualified by the court as an expert in the subject matter of his testimony objected to by defense counsel. [*Id.* at 11, 32] His relevant testimony was not based on knowledge generally known to a lay person and his own perceptions because he testified he was only able to use the phone records with the mapping software because, "I went to a 16-hour course on cellular technology used in law enforcement." [*Id.* at 11.]

The officer's testimony was the State's only evidence placing the defendant and the victim "in the same geographic area at the time of the murder." [*Id.* at 32.] The jury found the defendant guilty of murder. [*Id.* at 11.]

The Court's opinion in *Collins* stated: "This testimony was clearly not based upon Detective Sims's own perceptions. To utilize such testimony, the State was

required to qualify Detective Sims as an expert, and consequently, Collins was entitled to pretrial disclosures regarding expert witnesses. Additionally, Detective Sims, as a police officer, held the public trust, and his giving expert testimony without being qualified as such was particularly harmful to Collins. See *Kirk*, 160 So. 3d at 693. In that vein, allowing this testimony was obviously not harmless error." [*Id.* at 32.]

In its *en banc* ruling the Court unanimously reversed and remanded to the Circuit Court.[3] [*Id.* at 33]

F. Ineffective assistance of counsel grounds 43 and 47 of Ms. Lobato's post-conviction habeas petition assert claims that factually mirror the issue in *Collins* of prejudicial and inadmissible lay testimony introduced under the guise of "expert" testimony without notice by the State (NRS 174.234(2)), and qualification by the trial court (NRS 50.275). [6 Appellant's Appendix (App.) 1368-1371; 7 App. 1383-1387; Appellant's Opening Brief (AOB) 113-114; Appellant's Reply Brief (ARB) 42-44]

Grounds 43 and 47 also factually mirror *Collins* in that the "expert" testimony at issue was by witnesses who based their testimony on their experience and knowledge as law enforcement officers: Ground 43 concerns "expert" testimony by four witnesses employed in law enforcement; and ground 47

[3] The Court also independently reversed on the basis the trial judge manifestly erred in denying the defendant's motion to suppress his police statement. [*Id.* at 32]

concerns "expert" testimony by one law enforcement witness. [6 App. 1370; 7 App. 1383-84]

Grounds 43 and 47 also factually mirror *Collins* in that the "expert" testimony at issue was essential to the State's case because of the dearth of evidence linking Ms. Lobato to the crime scene: "No physical, forensic, medical, eyewitness, documentary, surveillance or confession evidence was introduced at trial placing the Petitioner in Clark County at any time on July 8, 2001, the day of Duran Bailey's murder." [6 App. 1368-69]

Grounds 43 and 47 also factually mirror *Collins* in that the State relied on the "expert" testimony at issue to secure Ms. Lobato's conviction by the jury: Regarding ground 43 the State mentioned the luminol and/or phenolphthalein "expert" testimony by the four witnesses <u>seven times</u> during its closing and rebuttal arguments to argue blood was possibly found in her car.[4] [5 App. 1012, 1022]; and, regarding ground 47 the State mentioned Thowsen's "minimize" and "jumble" "expert" psychology testimony <u>eight times</u> during its closing argument to argue Ms. Lobato wasn't truthful and/or credible in her police Statement on July 20, 2001.[5] [5 App. 1007, 1008, 1012]

Grounds 43 and 47 factually deviate from *Collins* in that Ms. Lobato's trial counsel did not object to the testimony by the law enforcement witnesses who were

---

[4] It was mentioned six times during closing argument and once during rebuttal.
[5] Minimize was mentioned three times, and jumble or jumbling five times.

not noticed by the State or qualified by the district court as experts to provide the testimony at issue. [6 App. 1368-1371; 7 App. 1383-1387] Consequently, unlike *Collins* that was a direct appeal, Ms. Lobato is raising for the first time in her post-conviction habeas petition, the issue in grounds 43 and 47 of a lack of expert witness notice and qualification. [*Id.*]

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

> 1. "The District Court prejudicially misapplied *Pelligrini* to the above grounds because the failure of Ms. Lobato's counsel to object to Detective Thowsen's expert psychology testimony regarding Ms. Lobato on the basis the State acted in bad faith by failing to comply with NRS 174.234(2), and that he was allowed to testify without being qualified as a psychology expert by the District Court as required by NRS 50.275, was not argued in *Lobato* (2009) cited by the District Court. [11 App. 2273-74.]" [AOB 102-103]
>
> 2. "Ground 43.[6 App. 1368] Ms. Lobato's counsel prejudicially failed to object that the prosecution did not comply with the required statutory notice of expert luminol and/or phenolphthalein testimony by Louise Renhart, Daniel Fox, Thomas Wahl and Kristina Paulette." [AOB 113]
>
> 3. "Ground 47. [7 App. 1383] Ms. Lobato's counsel prejudicially failed to object that the prosecution did not comply with the required statutory notice of expert psychology opinion testimony by Detective Thowsen." [AOB 114]
>
> 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." [AOB 123]
>
> "First, the issue of Ms. Lobato's innocence or guilt was extremely close at trial because the State introduced no physical, forensic,

eyewitness or confession evidence linking Ms. Lobato to the crime; the jury deliberated over two days before returning a significantly reduced verdict from the first-degree murder with which she was charged; and both the State and Ms. Lobato's counsel where attributed in the press to considering the verdict a juror's compromise." [AOB 124]

"... The quantity and character of the prejudicially deficient conduct by Ms. Lobato's counsel was completely ignored by the District Court's Order." [AOB 124]

...

"Consequently, Ms. Lobato's Ground 77 should be granted on the cumulative weight of her counsel's prejudicially deficient conduct per *Strickland*." [AOB 125]

H. As set-forth above, *Collins* supplements Ms. Lobato's Reply Brief (ARB) on the following pages:

"Ground 43. The State doesn't substantively address Lobato's counsel was deficient for failing to object to the "expert" phenolphthalein and/or luminol testimony by four witnesses because of the State's bad faith failure to comply with NRS 174.234(2) and the trial court's failure to comply with NRS 50.275, and the State relied on that inadmissible "expert" testimony to argue it was "possible" there was blood in Lobato's car, which this Court relied on to affirm in *Lobato* (2009). [6 App. 1368-71; RAB 61-2; 10 App. 2080-84] ...

The record belies the State's factually false assertions the State complied with NRS 174.234(2) regarding the testimony by its four witnesses as phenolphthalein and/or luminol "experts," and the State doesn't address its failure to comply was in bad faith because they had <u>two years</u> to prepare for trial. [*Id.*]

The State doesn't dispute Lobato's counsel failed to object to the trial court's prejudicial failure to qualify the four witnesses as "experts" in luminol and/or phenolphthalein before allowing their testimony as required by NRS 50.275. [*Id.*]" [ARB 42]

"Ground 47. The State doesn't substantively address Lobato's counsel was deficient for failing to object and moving to strike Thowsen's prejudicial "expert" psychology testimony by which he tried to tie Lobato to Bailey's homicide by offering his "expert" opinions of why her Statement doesn't match his homicide. ...

The record belies the State's assertion *Lobato* (2009) ruled on Thowsen's "expert" psychological testimony without the State complying with NRS 174.234(2) or the court qualifying him under NRS 50.275. [*Id.*]" [ARB 44]

"Ground 77. The State disregards their case was so weak that after deliberating for two days the jury convicted on the significantly reduced charge of voluntary manslaughter, and the State doesn't address the slightest degree of cumulative deficient conduct by Lobato's counsel[] detailed in Grounds 27-76 and 79 warrants a new trial because it likely tipped the scale for the jury to convict and not acquit or have a mistrial, ..." [ARB 66]

III. Conclusion.

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

Dated this 28th day of September, 2015.

Respectfully submitted,

By: */s/ J. Bediaku Afoh-Manin*
J. Bediaku Afoh-Manin
2039 South Holt Avenue, Suite 1
Los Angeles, CA 90034
917-270-6321
Pro bono attorney for Appellant
Associate Counsel per NSC Order

By: */s/ Phung H. Jefferson*
PHUNG H. JEFFERSON
1448 E. Charleston Blvd.
Las Vegas, NV 89104
702-382-4061
Pro bono attorney for Appellant
Nevada Bar Number 7761

CERTIFICATE OF SERVICE

I hereby certify and affirm that the APPELLANT'S THIRD NOTICE OF SUPPLEMENTAL AUTHORITIES was filed electronically with the Nevada Supreme Court on the 28th day of September, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

STEVEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155-2212

By: /s/ *Edna Ballesteros*
An employee of Phung H. Jefferson