

Nevada Supreme Court Asked To Reconsider Denial Of An Amicus Brief In Kirstin Blaise Lobato's Case

The Justice Institute has filed a Motion For Reconsideration of the Nevada Supreme Court's refusal to allow the filing of an *amicus curiae* brief in support of Kirstin Blaise Lobato's habeas corpus appeal now pending before that Court.

The Justice Institute is the parent organization of Justice Denied. Two other organizations, Proving Innocence based in Detroit, Michigan, and the Worldwide Kakogawa City, Japan, have joined in support of the *amicus* brief.

Ms. Lobato was convicted in October 2006 of charges related to the murder of 44-year-old homeless man Duran Bailey in a trash area outside a Las Vegas bank on July 8, 2001. After her conviction was affirmed by the Nevada Supreme Court in October 2009, she filed a *habeas corpus* petition in May 2010. Her [habeas petition](#) includes 24 claims based on new evidence of her actual innocence and 51 claims based on ineffective assistance of counsel.

Under the Fifth Amendment to the U.S. Constitution a conviction must be overturned if the prosecution failed to *introduce* evidence sufficient to prove *every* essential element of a defendant's charged crimes beyond a reasonable doubt (See, *Jackson v. Virginia*, 443 US 307 (1979)), and their retrial is barred by double jeopardy (See, *Burks v. United States*, 437 U.S. 1 (1978)). Under the Sixth Amendment it is required that a conviction must be overturned if a defendant's trial or appellate lawyer(s) provided representation that fell below professional norms and there is a reasonable probability the lawyer's deficient conduct undermines confidence in the outcome. (See, *Strickland v. Washington*, 466 U.S. 668 (1984)).

Four essential elements the prosecution had to present evidence proving beyond a reasonable doubt were that Ms. Lobato was in Las Vegas on July 8, 2001; that she was at the scene of the crime at the time of Mr. Bailey's murder; that she murdered Mr. Bailey; and, that she inflicted a wound to Mr. Bailey's rectum after his death.

Yet, the prosecution failed to introduce evi-

dence proving *any* of those four essential elements beyond a reasonable doubt. In fact, the prosecution didn't introduce any direct or circumstantial evidence she was in Las Vegas at any time on the day of Mr. Bailey's murder (July 8). Her prosecutors only *speculated* during their opening statement and then during their closing argument that she was in Las Vegas and at the crime scene.

The Justice Institute's *amicus* brief focuses on the failure of Ms. Lobato's lawyers to submit jury instructions, make motions to her judge, or argue to the jury that she was required to be acquitted due to the lack of evidence against her. The brief also argues Ms. Lobato's appeal lawyers failed to adequately raise the issue in her direct appeal that the prosecution failed to introduce evidence sufficient to prove *any* of those four essential elements, which required her acquittal and the dismissal of the charges.

Since the prosecution failed to introduce the required evidence of Ms. Lobato's guilt, the *amicus* brief argues there is no question her lawyer's conduct was deficient and that it undermines confidence in the outcome of both her trial and her appeal. Consequently, the brief argues U.S. Supreme Court precedents require the Nevada Supreme Court to grant her habeas petition and either order her immediate release from custody or order a new trial.

The State opposed the filing of the *amicus* brief and the Nevada Supreme Court denied the Justice Institute's motion for the court clerk to file it. The Justice Institute filed a Motion For Reconsideration on May 16, 2012 that detailed the Court's denial has no legal basis because it ignored the only two factors relevant to approving the filing of an *amicus* brief in Nevada. First, that it is filed by a party that has an "interest" in the case. Second, that the brief is "desirable" to assist the court in understanding legal issues in the brief. Neither the State in its opposition nor the Court in its denial disputes that the Justice Institute, Proving Innocence and the WWCJN have an "interest" in Ms. Lobato's appeal. Likewise, neither the State in its opposition nor the Court disputes that the Justice Institute, Proving Innocence and the WWCJN exceed the threshold for determining a brief is "desirable." Since the Court overlooked and did not apply the correct legal standards under NRAP 29, it should modify its order and direct the court clerk to file the *amicus* brief.

The Motion for Reconsideration, that includes the *amicus* brief as Exhibit 1 begin-

Kirstin Blaise Lobato Files 129-Page Opening Brief In Nevada Supreme Court

Attorney Philip Mause [has written](#) that "The all time, all weight division, all region champ in wrongful convictions is Kirstin Lobato." In 2006 Ms. Lobato was convicted of crimes related to the July 2001 murder of a man in Las Vegas, even though the prosecution doesn't deny it has no evidence she was within 170 miles of Las Vegas on the day of the crime. In addition, no physical, forensic, eyewitness or confession evidence links the then 18-year-old Ms. Lobato to the murder, and there is no evidence she knew the murder victim or that she had ever been to the crime scene.

Ms. Lobato's conviction was based on the prosecution's closing argument that it is "possible" she somehow committed the crime, and therefore she is guilty.

In May 2011 Ms. Lobato's filed a state *habeas corpus* petition that includes new scientific evidence the murder occurred at a time when the prosecution admitted at trial credible telephone and alibi witness evidence conclusively establishes she was at her home 170-miles from Las Vegas. Clark County District Court Judge Valorie Vega's Order denying the petition was filed on August 2, 2011.

Ms. Lobato appealed to the Nevada Supreme Court, and on March 5, 2012 she filed her opening brief. Her 129-page brief that the NSC authorized her to file is believed to be the largest opening brief in a non-capital habeas case in the Nevada Supreme Court's 143-year history.

Ms. Lobato's Opening Brief can be read at, http://www.justicedenied.org/kl/lobato_nsc_opening_brief_no-58913_3-5-2012.pdf

ning on page 16, can be read at, http://justicedenied.org/motionforreconsideration_amicus.html.

This article was originally published on Justice Denied's website on May 29, 2012. It is online at, <http://justicedenied.org/wordpress/archives/1831>