

Kirstin Blaise Lobato Files Petition For DNA Testing

By Hans Sherrer

Kirstin Blaise Lobato filed a petition on Friday, February 25, 2011 in the Clark County, Nevada District Court seeking an order for post-conviction DNA testing of evidence recovered from the scene of Duran Bailey's murder in Las Vegas on July 8, 2001. Mr. Bailey was murdered in a west Las Vegas bank's trash enclosure.

Mr. Bailey's autopsy determined he died from a head injury, but he also had been beaten, stabbed in his face, neck, hands, abdomen, his rectal area was injured, and his penis was amputated.

Ms. Lobato was convicted by a jury on October 6, 2006 of voluntary manslaughter and sexual penetration of a dead body (Mr. Bailey's rectal area injury).

Ms. Lobato's alibi defense was that on the entire day of Mr. Bailey's murder she was 170 miles north of Las Vegas in the Lincoln County town of Panaca where she lived with her parents. No physical, forensic, eyewitness or confession evidence was introduced during Ms. Lobato's trial that she was at the crime scene, or *anywhere* other than Panaca on the entire day of the murder.

Ms. Lobato's prosecution and conviction were based on her conversations with many people describing that she fought off an attempted rape in the parking lot of a Budget Suites Hotel in east Las Vegas by trying to cut her attacker's penis. When the detectives investigating Mr. Bailey's murder learned of that rape attempt they drove to Panaca and interrogated Ms. Lobato. She repeated her account of the attempted rape that she described as occurring weeks prior to the date of Mr. Bailey's murder. Since Mr. Bailey's penis had been amputated the detectives arrested Ms. Lobato for Mr. Bailey's murder. The prosecution was able to convince the jury that the attempted rape Ms. Lobato described as occurring at the Budget Suites Hotel and Mr. Bailey's brutal murder at the Las Vegas bank were the same event.

The Nevada Supreme Court affirmed Ms. Lobato's convictions in February 2009 solely on the basis of her "admission" to using her knife to try to cut her attacker's penis when she defended herself from the rape attempt which the Court assumed, just as the prosecution and jury did, was Mr. Bailey's murder.

Ms. Lobato filed a 770-page petition for a writ of *habeas corpus* on May 5, 2010 in the Clark County District Court that includes 79 grounds supporting the granting of a new trial. Included is new medical and scientific evidence that Mr. Bailey died on the evening of July 8. Ms. Lobato contends the new evidence proves it is physically impossible she murdered Mr. Bailey because the prosecution conceded in their arguments to the jury that credible alibi witnesses establish she was in Panaca from at least 11:30 am on the morning of the 8th until after Mr. Bailey's body was found about 10 p.m. that night.

Ms. Lobato's petition seeks the DNA testing of more than 13 items of evidence recovered from the crime scene.

Although all DNA testing of crime scene evidence conducted prior to Ms. Lobato's trial excluded her, there was evidence that wasn't tested and more sensitive DNA testing techniques have been developed since her conviction that can detect the DNA of skin cells from items that a person has touched. Crime scene evidence that Mr. Bailey's killer(s) would have handled include the plastic sheeting wrapped around his torso, cigarette butts and a match found on his body underneath the plastic sheeting, and his pants that were pulled down to his knees. There was also semen recovered from Mr. Bailey's rectum that has not been DNA tested.

Ms. Lobato petition requested DNA testing that could identify Mr. Bailey was murdered by Diann Parker and possibly her Hispanic male friends who lived less than 100 yards from the murder scene. Prior to Mr. Bailey's murder Ms. Parker reported to the Las Vegas Metro PD that Mr. Bailey beat and raped her on July 1 – a week before his murder. Ms. Lobato presented the third-party culprit defense at trial that Mr. Bailey was murdered in retaliation for his assault on Ms. Parker that occurred only hours after her Hispanic male friends warned him to stay away from Ms. Parker. Ms. Lobato argued at trial that Ms. Parker's Hispanic friends had the motive, means and opportunity to murder Mr. Bailey that she didn't have. Ms. Lobato's *habeas corpus* petition includes the new evidence that Ms. Parker admitted to the detectives investigating Mr. Bailey's murder that the morning after his murder she had a bloody shirt and bloody pants – however, the detectives didn't follow up on that information.

Ms. Lobato is represented *pro bono* by Travis Barrick, a prominent Las Vegas attorney. The Innocence Project in New York has agreed to pay for the DNA testing if Ms. Lobato's petition is granted.

Nevada Supreme Court Rules Judge Vega's Denial Of Post-conviction DNA Testing Can't Be Appealed

The Nevada Supreme Court ruled on January 12, 2012 that a district court's denial of post-conviction DNA testing cannot be appealed.

In 2009 Nevada amended its post-conviction DNA testing law NRS §176.0918 to include persons who were not sentenced to death.

Kirstin Blaise Lobato was convicted in October 2006 of charges related to the July 2001 murder of a homeless man in Las Vegas. The State didn't introduce any physical, forensic, eyewitness, informant or confession evidence linking Ms. Lobato to the crime, and her alibi defense supported by telephone records and a dozen witnesses is that on the entire day of the murder she was 170 miles from Las Vegas at her home in Panaca, Nevada. Ms. Lobato was 18 in 2001, and her conviction was based on the prosecution's contention that in spite of the lack of evidence it is possible she committed the crime. [A book about her case](#) is subtitled, *Possibility Of Guilt Replaces Proof Beyond A Reasonable Doubt*. She was sentenced to 13-to-35 years in prison.

After Ms. Lobato's convictions were affirmed on direct appeal she filed a state habeas corpus petition in May 2010 that is pending.

DNA appeal cont. on p. 19

The DNA petition is: *In Re: Kirstin Blaise Lobato*, Petition Requesting Post-Conviction DNA Testing Pursuant to NRS §176.0918, District Court, Clark County, Nevada. The Petition can be read at, http://justicedenied.org/kl/lobato_dna_petition_11252011.pdf

Ms. Lobato is believed to be the first prisoner convicted of a non-capital crime to file a petition for post-conviction DNA testing in Nevada under a revised state statute that went into effect in October 2009. Prior to the 2009 change in the state law only death row prisoners were authorized to seek post-conviction DNA testing in Nevada.

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Kirstin Blaise Lobato Petition On Change.org

A Change.org petition in support of Kirstin Blaise Lobato requests that Clark County District Attorney Steven Wolfson not oppose Kirstin's *habeas corpus* appeal now before the Nevada Supreme Court. Lobato is appealing the denial of her *habeas corpus* petition by Clark County District Court Judge Valorie Vega on June 16, 2011.

Kirstin was convicted in October 2006 of charges related to the murder of 44-year-old homeless man Duran Bailey, whose body was found about 10 p.m. in a trash area outside the Nevada State Bank at 4240 W. Flamingo Road in Las Vegas on July 8, 2001.

Assistant District Attorneys William Kephart and Sandra DiGiacomo did not introduce any direct physical, forensic, eyewitness, confession or CCTV evidence during Kirstin's trial that she committed the crime or that she was in Las Vegas on the day of the crime. ADA DiGiacomo asserted during closing arguments that Bailey was murdered "sometime before sunup," and conceded witness testimony and telephone

records established the 18-year-old Kirstin was in Panaca where she lived – 170 miles north of Las Vegas – from at least 11:30 a.m. through the night of July 8. Kirstin was sentenced to 13 to 35 years in prison.

After the Nevada Supreme Court denied Kirstin's appeal in 2009, she filed a 770-page *habeas corpus* petition on May 5, 2010 that includes new evidence supporting her factual innocence by 10 experts and 12 alibi witnesses.

The experts include three forensic entomologists with new evidence establishing to a scientific certainty Bailey died after sunset, which was at 8:01 p.m. on July 8, 2001. Dr. Gail S. Anderson explains in her report dated December 17, 2009 that flies begin laying eggs within minutes after death on an exposed body and they stop laying eggs after sunset. There were no fly eggs in any of Bailey's many open wounds or his orifices, so the three experts independently determined he died after sunset. The forensic entomologists are Dr. Anderson, a professor at the School of Criminology at Simon Fraser University in Burnaby, British Columbia; Dr. M. Lee Goff is the director of the Chaminade University Forensic Sciences program in Honolulu, Hawaii, and the entomology advisor

for the *CSI* and *CSI: Miami* television shows; and, Dr. Linda-Lou O'Connor was formerly with the Department of Entomology at the University of Kentucky and is an independent consultant at forensic entomology.

Forensic pathologist Dr. Glen Larkin's new medical evidence that Bailey died within the two hours between 8 p.m. and his body's discovery at 10 p.m. corroborates the new entomology evidence about Bailey's time of death.

The new scientific and medical evidence Bailey died after 8 p.m. on July 8 in Las Vegas is proof it is physically impossible Kirstin murdered Bailey, because even her prosecutors acknowledged during her trial she was in Panaca the entire afternoon and night of July 8. The expert evidence also include:

- Drs. Anderson, Goff, O'Connor, and Jason Byrd with new evidence Bailey's body had no insect or rodent bites so he likely died close to the time he was discovered in the trash enclosure.
- The new scientific and medical evidence Bailey died after 8 p.m. on July 8 in

Change.org cont. on p. 20

DNA appeal cont. from p. 18

All DNA tests of crime scene evidence conducted prior to Ms. Lobato's conviction excluded her from the crime. However, after her conviction three DNA testing techniques were developed that were unavailable at the time of her conviction. One of those is touch DNA testing that has the ability to determine the DNA profile of a person who "touched" something and left identifiable skin cells, oils or perspiration. Touch DNA testing was used to discover new evidence that exonerated Timothy Masters of a 1987 murder, and it cleared John and Patsy Ramsey of involvement in the 1996 murder of their daughter JonBenet. A second development were refinements in the ability of a DNA test to detect a DNA profile from degraded, impure or minute evidence, including spermless semen. The third development is the ability of a DNA test to identify the individual DNA profiles from evidence that contains mixed DNA of two males.

Those new testing techniques are all relevant to the testing of evidence recovered from the crime scene in Ms. Lobato's case. If performed they could be expected to result in additional exculpatory evidence and the DNA profile of the killer, that could then be uploaded to the Nevada and FBI's DNA databases to search for a match.

In February 2011 Ms. Lobato filed a Petition Requesting Post-Conviction DNA Testing Pursuant To NRS §176.0918. Ms. Lobato was the first person in Nevada known to have filed a post-conviction DNA testing petition under NRS §176.0918.

Under the statute a DNA testing petition must be assigned to the district court (trial) judge if possible, so her petition was assigned to her trial judge, Valorie Vega. The State opposed the petition, and during a hearing on June 7, 2011 Judge Vega denied the petition. Her written Order denying the petition was filed on July 27 and Ms. Lobato filed a Motion For Reconsideration. That motion was denied on September 1, 2011 and Ms. Lobato filed a Notice of Appeal that same day.

Nevada has a single-tier appeals system, and on October 3, 2011 the Nevada Supreme Court issued an Order To Show Cause why Ms. Lobato's appeal should not be dismissed for lack of jurisdiction. The Order stated two reasons the Court was considering dismissal: First, the notice of appeal was filed 34 days after the Order denying the petition was filed, and by statute there is only 30 days to appeal a "final order." The second reason was that NRS §176.0918 doesn't provide for the appeal of a denial of a DNA testing petition.

After briefing on the Order To Show Cause

by Ms. Lobato and the State, on January 12, 2012 the Nevada Supreme Court issued its Order Dismissing Appeal. The Court ruled that in Nevada the appeal of an Order is only conferred by statute, and since NRS §176.0918 doesn't include a provision to appeal the denial of a DNA testing petition, Ms. Lobato's appeal must be dismissed. Based on the Court's rationale a district court judge's denial of post-conviction DNA testing is not appealable in Nevada.

The Nevada Supreme Court also ruled that even if the statute provided for an appeal, Ms. Lobato's appeal would be dismissed as untimely because it was filed after the 30-day deadline for filing a notice of appeal. The Court ignored that the reason Ms. Lobato's appeal was filed 34 days after Judge Vega's Order was filed, was because she was waiting for Judge Vega to make a ruling on her Motion For Reconsideration — and she filed her notice of appeal the same day that Motion was denied.

The Nevada Supreme Court's January 12, 2012 [ruling is](#) *Kirstin Blaise Lobato v The State of Nevada*, No. 59147 (Nev. 1-12-12).

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