

The State Of Nevada's Lawyer Lied And Lied During Kirstin Lobato's Nevada Supreme Court Arguments

By Hans Sherrer¹

A minimum wage convenience store clerk who lies under oath in court can be convicted of perjury and sentenced to prison. In contrast, a highly paid lawyer can fearlessly lie his or her head off when publicly appearing before the Nevada Supreme Court.

We know that because of what occurred during oral arguments before the full Nevada Supreme Court on September 9, 2014 concerning Kirstin Blaise Lobato's habeas corpus appeal (*Lobato v. State*, No. 58913). The attorney representing the State of Nevada — Clark County Assistant District Attorney Steven S. Owens — repeatedly lied² about issues related to Ms. Lobato's case.³ Lying to a court to achieve a desired result has been described by the Nevada Supreme Court as "fraud on the court."⁴ The Supreme Court's response to Mr. Owens' conduct has thus far been deafening silence. Owens' dishonest assertions to the Nevada Supreme Court include, but aren't limited to the following:

1) Owens lied twice that Ms. Lobato made a "confession" related to Duran Bailey's homicide in Las Vegas on July 8, 2001. (Oral Arguments (OA) at 9, 13. Oral Argument transcript is online at <http://justicedenied.org/kl/lobatoargument992014.pdf>.) The truth is that during Ms. Lobato's trial the State didn't assert during its opening statement, closing argument, or present trial testimony she made a "confession" to Bailey's homicide. It exists only in Owens' imagination. Furthermore, it is an un rebutted fact there are 40 material differences between the attempted rape of her in east Las Vegas before mid-June 2001 detailed in her Statement, and Bailey's homicide weeks later in July 2001 on the other side of town. (6 Appellant's Appendix⁵ (AA) 1276; 9 AA 1875-1879)

2) Owens lied, "She was convicted by her own words at the trial, and her own words belie the argument that she is actually innocent." (OA at 7-8.) The truth is there is nothing incriminating regarding Bailey's homicide in her police Statement or comments attributed to her — none of which even include the date, location, or manner of Bailey's death from a head injury, or that she was even in Clark County on July 8,

2001. Furthermore, Ms. Lobato's habeas petition details her conviction was due to Metro Det. Thomas Thowsen's *extensive false testimony* regarding her Statement and comments, and his alleged investigations (6 AA 1266-75); and *more than 275 un rebutted* instances of prejudicial prosecutor misconduct during her trial that include fabricating non-existent evidence, factual misstatements, and false assertions about the State's evidence — *none* of which were objected to by her lawyer. (7 AA 1393, 1402, 1448, 1452, 1455, 1458)

3) Owens blatantly lied "Shortly thereafter [Bailey's homicide], Kirstin Lobato in Panaca, Nevada, started talking about a severed penis." (OA at 7) The truth is Ms. Lobato mentioned in her Statement that *prior* to June 20, 2001 she had a conversation with a woman about the Budget Suites Hotel rape attempt she fended off with her pocket knife. Also, her habeas petition includes un rebutted new evidence by *nine* alibi witnesses who were informed by her beginning in late May 2001 — and all prior to July 8 — that she used her pocket knife to fend off a would be rapist in Las Vegas. (6 AA 1190-1195) That new alibi evidence's veracity is corroborated by un rebutted new expert psychology evidence, and polygraph expert Ron Slay's new evidence that "I am certain Ms. Lobato is innocent of Mr. Bailey's murder." (6 AA 1185, quote at 1188)

4) Owens lied that Ms. Lobato's comment to her father during a conversation "I did something bad" is evidence of a guilty mind to Bailey's homicide. (OA at 8 (Owens misquoted the testimony at 3 AA 654, so the testimony is quoted.)) The truth is the comment was made during a conversation with her father in June 2001 — *weeks prior* to Bailey's homicide. (Reply Exhibit 2 at 1; 4 AA 912)

5) Owens lied, "She says today that she is actually innocent." (OA at 7) The truth is Ms. Lobato has unwaveringly asserted her innocence for more than 13 years since she was charged in 2001.

6) Owens lied, "But nothing at the crime scene is going to help them because the jury already knew that evidence there pointed away from Kirstin." (OA at 13) The truth is Ms. Lobato's un rebutted new exculpatory expert forensic crime scene evidence not presented at trial establishes among other things: 1) Bailey's killer made *all* the shoeprints imprinted in blood and they don't match Ms. Lobato; 2) Bailey's killer *could not* have worn the high-heeled open-toed platform shoes the State doesn't deny she wore during the attempted rape described in her Statement; 3) Bailey's teeth *were not*

knocked out by a baseball bat, he was *not standing* when attacked, and his knife wounds *were not* inflicted by her double-edged pocket knife but by a single-edged kitchen, butcher, or hunting knife — fatally undermining the State's trial theory Ms. Lobato could be his assailant; and, 4) Bailey *was alive* when his rectum injury occurred — proving she was convicted of a non-existent violation of NRS 201.450. (6 AA 1202-1205, 1210, 1218-26, 1253, 1284-88)

7) Owens lied, "the jury listened to this stuff. This new evidence they want to put on is not new. ... It's cumulative to what the jury rejected at trial." (OA at 15) The truth is Ms. Lobato's petition details her un rebutted new forensic, alibi, and fact evidence by *more than two dozen witnesses* that was not presented to her jury, and the District Court did not make a finding that *any* of her new evidence is "cumulative" to trial evidence. (6 AA 1173-1295; 11 AA 2265-69) Furthermore, two jurors determined after reviewing Ms. Lobato's new evidence that "it could have possibly resulted in either a hung jury or Ms. Lobato's acquittal." (*State v. Lobato*, Case no. C177394 (District Court, Clark County, Nev.), "Supplemental Exhibits To Petitioner's Answer In Support Of Petition For Writ Of Habeas Corpus," 2-24-2011, Exhibits 6 and 7.)

8) Owens lied Bailey's time of death *isn't critical*." (OA at 10) The truth is the State's theory of Ms. Lobato's guilt *depended on* convincing the jury Bailey died *before 7 a.m.* and she was convicted based on the State's argument to the jury he died "*sometime before sunup*." (5 AA 1005)

9) Owens lied the jury "*rejected*" Ms. Lobato's alibi evidence she was in Panaca the evening of July 8 (OA at 10) The truth is the State conceded during its closing argument it is *factually true* she was in Panaca *from at least "11:30 a.m. through the night*." (5 AA 1008)

10) Owens lied about *the foundation of the State's case* in stating, "The jury did not believe Lobato's alibi witnesses ... The jury could not have convicted her if they believed those alibi witnesses." (OA at 9) The truthfulness of the *13 witnesses* whose testimony places Ms. Lobato in Panaca on July 8, 2001 from at least "11:30 a.m. through the night" was *conceded by the State* whose theory the jury relied on by the jury to convict was Bailey died "sometime before sunup." (5 AA 1005, 1008)

11) Owens lied in his assertions Ms. Lobato's un rebutted new expert forensic evidence Bailey died after 8 p.m. *isn't*

Lobato cont. on page 17

Lobato cont. from page 16

important. (OA at 10) The truth is the State conceded at trial she was in Panaca 165 miles from Las Vegas at that time so it is *physically impossible* she committed Bailey's homicide. (5 AA 1008)

12) Owens lied the three internationally known forensic entomologist's un rebutted new expert evidence Bailey died after sunset is a "tenuous estimation" (OA at 10) The truth is entomology is a science *more than 1,000 years old* and Bailey's time of death to a "*reasonable scientific certainty*" after sunset at 8:01 p.m. is the *highest* expert evidence standard. (6 AA 1175, 10 AA 2167)

13) Owens blatantly deceived the Supreme Court about two key cases: *People v Hamilton*, 115 A.D.3d 12, 979 N.Y.S.2d 97, 101 (2014); and, *State ex rel. Orsborn v. Fogliani*, 82 Nev. 300, 417 P.2d 148 (1966). (OA at 11-12) The truth is in *Hamilton* the New York Court of Appeals ruled that new *factual evidence* of actual innocence can be presented in a habeas petition, and in *Orsborn* the Nevada Supreme Court granted a habeas petition that was based on new *factual evidence* the defendant was convicted of a crime he didn't commit.

14) Owens lied, "We have here a couple statutory remedies that Ms. Lobato could avail herself of. One is the motion for new trial based on newly discovered evidence ..." (OA at 12) The truth is that based on Nevada Supreme Court precedents Ms. Lobato's *only* statutory remedy is to present her new evidence in her habeas corpus petition. (OA at 2-3)

15) Owens lied, "We have here a couple statutory remedies that Ms. Lobato could avail herself of. ... and the other is a motion for DNA testing..." (OA at 12) The truth is Ms. Lobato's petition for post-conviction DNA testing of crime scene evidence — *including semen recovered from Bailey's rectum* — was vigorously opposed by the Clark County D.A. and denied by Judge Valorie Vega. The Nevada Supreme Court dismissed her appeal, "Because the order is not appealable." (*Lobato v. Nevada*, NSC No. 59147 ("Order Dismissing Appeal," 1/12/2012), 4.)

16) Owens lied *seven times* that Ms. Lobato's *Brady* grounds are "bare" or "bald" claims unsupported by specific factual allegations. (OA at 14) The truth is those grounds specifically detail the State failed to disclose favorable evidence concerning a *police officer* who may have evidence regarding Bailey's homicide, and that a suspect in Bailey's homicide described at trial as law abiding was

committing the federal crime of *using the Social Security number of a man who died in Michigan in 1987*. (6 AA 1309-1311)

Nevada Supreme Court has the inherent power to enforce the administration of justice

As described above Steven S. Owens fabricated material assertions deceived the Nevada Supreme Court by misrepresenting the habeas record, and he grossly misrepresented relevant case law and statutes. Owens is an officer of the court so under the following rules the Supreme Court has the authority to hold him in contempt of court for his dishonest and deceptive conduct, impose sanctions, and refer him to the State Bar of Nevada for investigation and possible disciplinary action.

NSCR 39 sets forth the Supreme Court's inherent power to govern attorneys because they are "court officers and *essential aids in the administration of justice...*"

NSCR 99(2) sets forth "Nothing contained in these rules denies any court the power to maintain control over proceedings conducted before it, *such as the power of contempt...*"

NSCR 101 sets forth "... acts or omissions by an attorney, *including contempt of a hearing panel...* which violate the rules of the supreme court or the Nevada Rules of Professional Conduct *are misconduct* and constitute grounds for discipline."

NRPC 3.3(a) sets forth "A lawyer shall not knowingly: (1) *Make a false statement of fact or law to a tribunal...*"

NRPC 8.4 sets forth in pertinent part: "It is professional misconduct for a lawyer to: (c) *Engage in conduct involving dishonesty, fraud, deceit or misrepresentation*; (d) *Engage in conduct that is prejudicial to the administration of justice;*"

In addition, Owens unconscionable deceptions, misrepresentations, and dishonesty intended to influence the Supreme Court's decision in *Lobato v. State* violated Ms. Lobato's state and federal constitutional rights to due process of law.

NRAP 2 provides that for "good cause" the Supreme Court can "suspend any provision of these Rules in a particular case and order proceedings as it directs." NRAP 34 sets forth the procedure for oral argument. Owens' unrestrained dishonesty that denied Ms. Lobato her right to a fair hearing is "good cause" for the Court to exercise its authority to *sua sponte* strike his arguments from consideration of her appeal. order a

rehearing, or decide the case on the briefs submitted by Ms. Lobato and the State.

Steven S. Owens has a history of lying about Ms. Lobato's case

Owens lengthy history of dishonesty in Ms. Lobato's case includes his false public statements to KLAS-TV (Las Vegas), the Associated Press, and the Las Vegas *Review-Journal*, and in documents filed in the Nevada Supreme Court. Those false statements are documented in a letter sent to Clark County District Attorney Steven Wolfson dated July 3, 2012, which states: "Mr. Owens' pervasive dishonesty is a gravely serious matter." (p. 11) The letter is online at, <http://justicedenied.org/kl/wolfsonletter.pdf>

Conclusion

The foregoing is only a partial litany of Owens' gross dishonesty throughout his argument. However, it is a representative sampling of the extreme lengths he went to in his well-planned and concerted effort to tilt the scale of justice by misleading the Nevada Supreme Court and prejudice the administration of justice in Ms. Lobato's case. If the State had credible evidence Ms. Lobato committed Bailey's homicide Owens wouldn't have had to lie throughout his argument, and in fact, some of Owens' arguments repeated false assertions he made in the State's Reply Brief filed on July 6, 2012, pgs. 3-8.

Steven S. Owens' blatant lying to the Nevada Supreme Court strikes at the very heart of its legitimacy as a deliberative body. Owens may think he got away scot-free with thumbing his nose at the Supreme Court. He will unless the Court exercises the full extent of its authority in holding Owens accountable for his contemptible conduct and take the most extreme actions possible to protect Ms. Lobato's rights, and the integrity of the Court and its deliberation process.

Endnotes:

Note 1. Hans Sherrer is President of the Justice Institute that promotes awareness of wrongful conviction and conducted a post-conviction investigation of Ms. Lobato's case. Its website is www.justicedenied.org. He can be emailed at hsherrer@justicedenied.org.

Note 2. The *Oxford English Dictionary* defines a "lie (and lied), v.2.": as: "To tell a lie or lies; to utter falsehood; to speak falsely." (<http://www.oed.com>) This article details Steven S. Owens uttered numerous falsehoods and spoke falsely to the Nevada Supreme Court on September 9, 2014.

Note 3. This article is based on public documents filed in the Clark County, Nevada District Court and the Nevada Supreme Court, and news articles.

Note 4. Material dishonesty to achieve a desired judicial result was described as "fraud on the court" in *Mosley v. Figliuzzi*, 113 Nev. 51, 930 P. 2d 1110, 1112 n.2 (1997).

Note 5. The Appellant's Appendix was filed by Ms. Lobato in the Nevada Supreme Court and includes her trial transcripts, her *habeas corpus* petition, and other documents relevant to her appeal.