

# Kirstin Lobato Is Fortunate The Nevada Supreme Court Is Taking Its Time Reviewing Her Case

By Hans Sherrer<sup>1</sup>

The Nevada Supreme Court's ruling in Kirstin Blaise Lobato's case has been awaited for more than a year since oral arguments on September 9, 2014. The Court is considering Ms. Lobato's appeal of former Clark County District Court Judge Valorie Vega's denial of her habeas corpus petition. As explained below, the length of time she has been waiting for a decision can be beneficial for her.

Ms. Lobato was convicted in October 2006 of charges related to the death of homeless Duran Bailey in a Las Vegas banks' trash enclosure on July 8, 2001. She was sentenced to serve 13 to 35 years in prison. Ms. Lobato asserts she is actually innocent and was at her home 165 miles from Las Vegas when Bailey died.

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) enacted in 1996 increased the requirements for the granting of a federal post-conviction appeal by a state prisoner challenging his or her conviction and/or sentence. The AEDPA's restrictive provisions include: a one-year time limit for the filing of a timely federal habeas petition; a federal court must grant deference to the state court's ruling on the merits of an issue; and to grant relief a federal court must rely on "clearly established Federal law, as determined by the Supreme Court."

The effect of the AEDPA was so profound that by 2010, when Ms. Lobato filed her habeas petition, only about 1 out of 400 federal habeas petitions were granted that were filed by a state prisoner not on death row. Consequently, it was known that if Ms. Lobato's habeas petition wasn't granted in state court, the odds were overwhelmingly against her if she should have to continue to federal court.

A cursory reading of her [habeas petition filed](#) on May 5, 2010 illustrates that it includes a bevy of alleged constitutional violations that she asserts warrant a new trial, or the outright dismissal of her charges.

After her petition was denied by Judge Vega, Ms. Lobato appealed to the Nevada Supreme Court on August 2, 2011. More than four years later her case is still pending before the Supreme Court, which has indicated it is giv-



Kirstin Lobato after her release on bail while awaiting her retrial.

ing her case a degree of attention normally only given to a death penalty case. As an appellate court the Supreme Court is only reviewing alleged errors of law by Judge Vega, and there are many legal issues involved in Ms. Lobato's appeal. Several of those relate to whether Judge Vega applied the proper law in denying Ms. Lobato's [habeas Claim 23](#) that new evidence not heard by her jury proves her factual innocence.

The briefing by Ms. Lobato and the Clark County DA's Office (as the State of Nevada's legal representative) of the issues in her appeal was a protracted process that wasn't completed until December 27, 2012.

Ms. Lobato subsequently filed two Notices of Supplemental Authorities (State and federal cases with new rulings that she asserted were favorable to issues raised in her habeas appeal.). The [first Notice](#) filed in February 2014 concerned her habeas grounds 1 to 23, and 78. The [second Notice](#) filed in March 2014 concerned her habeas grounds 38, 40 and 77. The Court responded by taking the extraordinary step of ordering supplemental briefing on how those new cases affected legal issues in her habeas petition. Neither Ms. Lobato nor the State had requested supplemental briefing.

The Court also took the initiative of ordering that her case be decided *en banc* (by all seven justices) and not the three-judge panel that had been assigned in 2011. In April 2014 the Court also ordered oral arguments. The Court took those actions even though *neither* Ms. Lobato nor the State of Nevada had requested either oral arguments, *or* that her case be decided *en banc*. The oral arguments were held in Carson City on September 9, 2014.

On September 28, 2015 Ms. Lobato filed a [Third Notice](#) of Supplemental Authorities concerning the State's reliance on inadmissible "expert" testimony by four officers of the law detailed in her habeas ground 43, and one police officer detailed in ground 47.

The 50 months that have passed since Ms.



Nevada Supreme Court

Lobato filed her appeal is unusually long in Nevada. In August and September 2015 the Nevada Supreme Court disposed of five non-death penalty case appeals in an average of 19 months -- with the shortest 13 months and the longest 28 months. [2]

The attention that the Court has devoted to Ms. Lobato's case gives no indication of how the Court may eventually rule, but its actions have clearly shown it is giving very serious consideration to her appeal.

Ms. Lobato's best hope is an order by the Nevada Supreme Court for a new trial (or dismissal of her charges), particularly compared to the alternative of proceeding to federal court.

In the five years since she filed her petition, the U.S. Supreme Court has issued a number of decisions interpreting the AEDPA that further restrict the ability of a federal court to grant a state prisoner's federal habeas petition -- even when the federal court may believe the state court violated the prisoner's constitutional rights. The odds are likely better that a blindfolded quarterback will throw a Hail Mary pass for a touchdown than they are that a state prisoner not on death row will prevail in a federal habeas petition.

Several federal judges are so disturbed about the effect of the AEDPA and the Supreme Court's rulings that they are speaking out about the inexorable trend that federal courts are being transformed into a rubber-stamp for unjust -- and even unconstitutional -- rulings by state courts.

U.S. Ninth Circuit Court of Appeals Judge Stephen Reinhardt [wrote wrote in an article](#) published in May 2015:

"The collapse of habeas corpus as a remedy for even the most glaring of constitutional violations ranks among the greater wrongs of our legal era. Once hailed as the Great Writ, and still feted with all the standard rhetorical flourishes, habeas corpus has been transformed over the past two decades from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution.

... any participant in our habeas regime would have to agree that it resembles a twisted labyrinth of deliberately crafted legal obstacles that make it as difficult for habeas petitioners to succeed in pursuing the Writ as it would be for a Supreme Court Justice to strike out Babe Ruth, Joe DiMaggio, and Mickey Mantle

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## High Fence Foodie Cookbook Now Available !!!

**H**igh Fence Foodie is [a new cookbook](#) by Texas prisoner Celeste Johnson that was recently published by The Justice Institute.

High Fence Foodie has more than two hundred easy to prepare recipes for meals, soups, snacks, desserts, and beverages. These recipes can be made from basic items a prisoner can purchase from their unit's commissary, or people on the outside can purchase from a convenience or grocery store. They are written by Celeste Johnson, a woman imprisoned in Texas who loves to cook and try out new combinations of the simple food ingredients available to her.

High Fence Foodie's all new recipes are a follow-up to the more than 200 recipes in *From The Big House To Your House* that was written by Celeste Johnson and five fellow prisoners at the Mountain View Unit, a woman's prison in Gatesville, Texas.

*From The Big House To Your House* received rave reviews on Amazon.com, with

75% of reviewers giving it 4 or 5 stars! Some of the comments are:

"A lot of the recipes are very imaginative, and fun to make. Well worth the money." J.C.

"I loved the food and was inspired by the can-do attitude of the ladies involved with this project." Dan

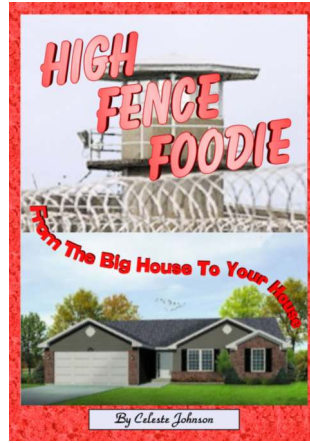
"My daughter got this for her husband for father's day. He loves using it!!" J.H.

"I am a college student making a limited income and these recipes are great and fulfilling for people like me who don't have a ton of \$ to spend on groceries." Alicia

"I sent this to my daughter. She absolutely loves this little cookbook!" D. G.

High Fence Foodie continues the high standard of *From The Big House To Your House*!

Celeste hopes her recipes will ignite a reader's taste buds as well as spark their imagination to explore unlimited creations of



their own! She encourages substitutions to a reader's individual tastes or availability of ingredients. She is confident users of her recipes will enjoy creating a home-felt comfort whether behind the High Fence, or at Your House!

Celeste Johnson does not financially profit from sales of *High Fence Foodie*. All profits from the book's sale are donated to [The Justice Institute](#) Justice Denied to

contribute to its work on behalf of wrongly convicted persons.

[Click here for more information](#) about the book's contents and to [order it from Justice Denied](#) with no shipping charge.

[Click here to buy High Fence Foodie from Amazon.com.](#)

[Order with a check or money order by using the form on page 19.](#)

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in succession—even with the Chief Justice calling balls and strikes." (1219-20)

U.S. Ninth Circuit Court of Appeals Judge Alex Kozinski [wrote wrote in an article](#) published in June 2015:

"The federal court safety-value was abruptly dismantled in 1996 when Congress passed and President Clinton signed the Antiterrorism and Effective Death Penalty Act. ...

We now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted.

AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering." (xli-xlii)

Judges Reinhardt and Kozinski make it all too clear that today federal habeas relief is more a dream than reality for all but a handful of state prisoners — and those are typically on death row.

Consequently, the heightened level of scrutiny the Nevada Supreme Court is giving to

Ms. Lobato's appeal is to be welcomed as the best shot she has of prevailing in her effort to be granted a new trial, and her ultimate acquittal or dismissal of the charges against her.

[Click here to read](#) Judge Stephen Reinhardt's article, "The demise of habeas corpus and the rise of qualified immunity," 113 *Mich. Law Rev.* 1219 (2015).

[Click here to read](#) Judge Alex Kozinski's article, "Criminal Law 2.0," 44 *Geo. L.J. Ann. Rev. Crim. Proc.* (2015), Preface.

Endnotes:

1. Hans Sherrer is President of the Justice Institute based in Seattle, Wash. that conducted a post-conviction investigation of Ms. Lobato's case. Its website is, [www.justicedenied.org](#).
2. The cases are *Cassinelli (Dominic) vs. State*, 1-28-2014 to 8-27-2015, 19 months; *State vs. Smith (Terrance)*, 7-21-2014 to 9-3-2015, 13 months; *Stevenson (Joseph) vs. State*, 04/09/2013 to 8-13-2015, 28 months; *State vs. Harris (Mariann)*, 1-31-2014 to 7-30 2015, (en banc), 18 months; *Merlino (Carrie) vs. State*, 3-25-2014 to 9-10-2015, 17 months. Total of 95 months / 5 = 19 months average.

Source:

[Ms. Lobato's Reply Brief](#) filed in the Nevada Supreme Court.

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[www.forejustice.org/search\\_idb.htm](http://www.forejustice.org/search_idb.htm)

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