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her car bloody, when there was no evidence introduced at trial supporting those fatally prejudicial claims.” [11] [Ground 69]

- Kephart made at least 130 “false, fabricated, and/or improper prosecution statements during [] rebuttal arguments that were used as a substitute for evidence of [Ms. Lobato’s] guilt the prosecution did not introduce during the trial ...” [12] [Ground 70]
- DiGiacomo made at least 123 “false, fabricated, and/or improper prosecution statements during [] closing arguments that were used as a substitute for evidence of [Ms. Lobato’s] guilt the prosecution did not introduce during the trial ...” [13] [Ground 70]

The sheer magnitude of the gross misconduct by Kephart and DiGiacomo detailed in Ms. Lobato’s petition can be considered shocking -- and particularly so when it is considered her lawyers were so asleep at the wheel during her trial that they failed to make a single objection to any of that misconduct.

The U.S. Supreme Court’s ruling in *Strickland v. Washington*, 466 U.S. 668 (1984) governs the Nevada Supreme Court’s consideration of Ms. Lobato’s grounds 49, 52, 65, 66, 67, 68, 69 and 70 that document Kephart and DiGiacomo’s misconduct. Under *Strickland* Ms. Lobato needs to establish that her “counsel’s performance was deficient and that the deficient performance prejudiced the defense.” [*Strickland*, at 687.] Under *Strickland’s* “reasonable probability” standard of prejudice Ms. Lobato “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” [*Strickland*, at 693.] Ms. Lobato’s habeas petition and her briefs filed in the Nevada Supreme Court explain in detail why the failure of her trial lawyers to object to the avalanche of misconduct by Kephart and DiGiacomo was objectively unreasonable behavior by her lawyers, and there is a reasonable probability their failure to act rendered the jury’s verdict unreliable. [14] Thus granting her petition and overturning her convictions is warranted by the ineffective assistance of her trial lawyers.

Two sentences in the *Zisa* ruling are totally applicable to Ms. Lobato’s case: “Considering the State’s lack of proofs and the weaknesses of its case, it is surprising this case was prosecuted to begin with. Looking to the trial itself, it is equally surprising a mistrial was not ordered at any point.” [15] As

Ms. Lobato’s petition details, the prosecution’s case against her was so weak that they didn’t even introduce any evidence she was in Las Vegas at any time on the day of Bailey’s homicide. Consequently, it is physically impossible she committed her convicted crimes. However, Ms. Lobato’s lawyers didn’t even give her judge the opportunity to consider a motion for a mistrial, and to dismiss the charges as the appropriate response to the tsunami of prosecutor misconduct detailed above (and in her petition).

Typically the Nevada Supreme Court issues a ruling within six months after oral arguments, so the two years that have passed since the arguments in Ms. Lobato’s case is unusual. It can be expected the reason the Nevada Supreme Court has not issued its ruling is because it is carefully evaluating the plethora of legal issues raised in her habeas. Although it isn’t as “sexy” as some of the other issues raised in her petition, the pervasive serial misconduct of Kephart and DiGiacomo is enough by itself to justify the granting of her petition by the Nevada Supreme Court, and the dismissal of the charges against her.

While Ms. Lobato has languished in prison, her prosecutors, William Kephart and Sandra DiGiacomo have continued as highly paid Clark County employees. Kephart left the District Attorney’s Office when he was elected in 2010 to be a Justice of the Peace, and in 2014 he was elected an Eighth Judicial (Clark County) District Court Judge. DiGiacomo is still an ADA with the District Attorney’s Office. From 2007 to 2015 Kephart’s total pay and benefits was \$1,932,006.98 -- an average of \$214,667.44 per year. From 2007 to 2015 DiGiacomo’s total pay and benefits was \$1,536,143.61 -- an average of \$170,682.62 per year. [16]

Endnotes:

Author note: Hans Sherrer is President of the Justice Institute based in Seattle, Washington, that promotes awareness of wrongful convictions and conducted a post-conviction investigation of Ms. Lobato’s case. Its website is, www.justicedenied.org.

1. *Kirstin Lobato v. State of Nevada*, No. 58913 (Nevada Supreme Court). Appeal of Judge Vega’s ruling filed on August 2, 2011. Case docket online at, www.caseinfo.nvsupremecourt.us/public/caseView.do?csIID=27064.

2. Ms. Lobato’s habeas petition makes the assertion un rebutted by the State that, “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. Consequently, no evidence was introduced establishing the Petitioner was anywhere in Las Vegas, much less the Nevada State Bank at the time of his murder.” Ground 43, 219-220.

3. William Kephart is now an Eighth Judicial District Court (Clark County) judge, and DiGiacomo is still an ADA with the Clark County DA’s Office.

4. The petition asserts Ms. Lobato’s counsel was inef-

fective for failing to object to Kephart’s prejudicial statement, and to make a motion for a mistrial and dismissal of her charges. Ground 49, 244.

5. The petition asserts Ms. Lobato’s counsel was ineffective for failing to object to Kephart’s subornation of perjury, and to make a motion for a mistrial and dismissal of her charges. Ground 52, 253.

6. NRS 629.014 reports are required to be filed by medical facilities regarding the treatment of what are believed to be a non-accidental gunshot or knife wound. The petition asserts Ms. Lobato’s counsel was ineffective for failing to object to Kephart’s fraud on the court, and to make a motion for a mistrial and dismissal of her charges. Ground 52, 253.

7. The petition asserts Ms. Lobato’s trial lawyer was ineffective because he “did not make a single objection, even though it was known to her counsel that Kephart’s claims were false and prejudicial to the Petitioner [Ms. Lobato].” Ground 65, 299. The 29 statements by Kephart [are detailed in](#) Ms. Lobato’s habeas petition Exhibit 75.

8. The petition asserts Ms. Lobato’s counsel was ineffective for failing to object to Kephart and DiGiacomo’s false assertions about the evidence during their rebuttal, and closing argument, respectively. Ground 66, 300.

9. The petition asserts Ms. Lobato’s counsel was ineffective for failing to object to Kephart’s personal plea that relied on his gravitas as a prosecutor to unduly influence the jurors, and to make a motion for a mistrial and dismissal of her charges. Ground 67, 303.

10. The petition asserts Ms. Lobato’s counsel was ineffective for failing to object to Kephart and DiGiacomo’s baseless smearing of her alibi witnesses during their rebuttal, and closing argument, respectively. Ground 68, 304.

11. The petition asserts Ms. Lobato’s counsel was ineffective for failing to object to Kephart and DiGiacomo’s fabricated assertions during their rebuttal, and closing argument, respectively, and to make a motion for a mistrial and dismissal of her charges in response to both of their arguments. Ground 69, 306.

12. The petition asserts Ms. Lobato’s counsel was ineffective for failing to object to a single one of Kephart’s false assertions during his rebuttal argument, and to make a motion for a mistrial and dismissal of her charges. Ground 70, 309. The 130 statements by Kephart [are detailed in](#) Ms. Lobato’s habeas petition Exhibit 76, 11-23.

13. The petition asserts Ms. Lobato’s counsel was ineffective for failing to object to a single one of DiGiacomo’s false assertions during her closing argument, and to make a motion for a mistrial and dismissal of her charges. Ground 70, 309. The 123 statements by DiGiacomo [are detailed in](#) Ms. Lobato’s habeas petition Exhibit 76, 1-11.

14. Ms. Lobato’s petition and briefs are available on the Nevada Supreme Court’s website for, [Kirstin Lobato v. State of Nevada](#), No. 58913 (Nevada Supreme Court).

15. *New Jersey v. Zisa*, No. 10-10-01812-i (Superior Ct. Bergen County, 8-23-2016), Dismissal Order at 105.

16. Clark County, Nevada public employee payment data is online at transparentnevada.com.



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