

# Kirstin Lobato Has Waited Two Years For The Nevada Supreme Court's Habeas Ruling

By Hans Sherrer  
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Two years ago the Nevada Supreme Court heard oral arguments in Kirstin Blaise Lobato's habeas corpus case on September 9, 2014. The Court is considering Ms. Lobato's appeal of the denial of her habeas corpus petition by former Clark County District Court Judge Valorie Vega. [1] The Court's ruling is being awaited.

Ms. Lobato was convicted in October 2006 of charges related to the death of homeless Duran Bailey in a Las Vegas bank's trash enclosure on July 8, 2001. She was sentenced to serve 13 to 35 years in prison.

Ms. Lobato presented an alibi defense during her trial that she was at her home 165 miles from Las Vegas when Bailey died. That defense is consistent with the fact that during her trial the prosecution didn't present any evidence she was in Las Vegas on the day of Bailey's death. [2] New evidence by more than two dozen witnesses supporting her alibi defense is in her habeas corpus petition filed in May 2010.

Ms. Lobato's [habeas petition](#) has 79 grounds for overturning her convictions. Included in her petition is evidence her prosecutors committed *at least 293 acts of gross misconduct* that affected the outcome of her trial. Her prosecutor's misconduct was intentional because they kept doing it over, and over, and over, from the beginning to the end of her trial. Ms. Lobato argues her trial lawyers were ineffective for failing to object to her prosecutor's gross misconduct, and for failing to make at least eight motions for a mistrial and dismissal of her charges.

The pervasive prosecutor misconduct that resulted in the dismissal of criminal charges two weeks ago in a New Jersey case emphasizes the Nevada Supreme Court can grant Ms. Lobato's petition based on her prosecutor's extensive misconduct -- without even considering any of her other legal issues. The Court can also bar her retrial by ordering the dismissal of her charges.

In [New Jersey v. Zisa](#), No. 10-10-01812-i (Superior Ct. Bergen County, 8-23-2016)) the charges were dismissed with prejudice



Kirstin Lobato

based on the prosecutor's *five* acts of misconduct that included false allegations during his opening argument, the failure to present evidence during the trial alluded to in his opening statement, and the eliciting of false testimony from a prosecution witness. The New Jersey [court ruled](#) that because of the "pervasive" prosecutor misconduct Charles Zisa's retrial would violate his right against double jeopardy:

"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.

...  
"The bedrock principle is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual, thus compelling him to live in a continuing state of anxiety and insecurity." [] The prosecutor had a full opportunity to try this case without injecting any prejudice into the trial. Yet, that is not what happened here. ... Given the "substantial factual evidence of intent" in the record before the court, the court finds a retrial to be an insufficient remedy as it would violate the defendant's right against double jeopardy. [] Accordingly, the remaining count of the indictment is dismissed with prejudice." [*New Jersey v. Zisa*, at 105-106.]

The prosecutor misconduct in Zisa's case was similar in some respects to that in Ms. Lobato's case, but it was dramatically less serious in scope than the misconduct committed by Ms. Lobato's prosecutors -- Clark County Assistant District Attorneys William Kephart and Sandra DiGiacomo. [3] Instead of the five instances of prosecutor misconduct in the Zisa case that was described as "pervasive" and resulted in the dismissal of the charges, there are at least *293 instances of gross misconduct* by Kephart or DiGiacomo during Ms. Lobato's trial documented in her habeas petition. That misconduct was:

- Kephart fabricated his false assertion during his direct examination of Las Vegas Metro Police Department Detective Thomas Thowsen that Ms. Lobato gave "her confession" to him -- when she has never given any statement to even being in Las Vegas on the day of

Mr. Bailey's homicide, much less ever implicating herself in his death. [4] [Ground 49]

- Kephart suborned perjury from Las Vegas Metro Police Dept. Detective Thomas Thowsen during his direct examination of Thowsen regarding his investigation of Ms. Lobato's case. [5] [Ground 52]
- Kephart committed fraud on the court by misrepresenting to Judge Vega that Thowsen's testimony regarding an alleged search for NRS 629.014 reports was not hearsay in order to prevent her from striking it as inadmissible, and that DiGiacomo aided and abetted Kephart's fraud. [6] [Ground 52]
- Kephart made at least twenty-nine references to non-existent evidence during his opening statement that Kephart claimed would be presented by the prosecution to prove Ms. Lobato's guilt -- and none of that phantom evidence was presented during her trial. [7] [Ground 65]
- Kephart and DiGiacomo during their rebuttal and closing arguments, respectively, lied to the jury "that the fracture to the back of Bailey's head was inflicted at the same time as his other wounds, because Medical Examiner Lary Simms' testified that Bailey's brain swelling that began at least two hours prior to death was "contemporaneous with the fracture" and it was his primary cause of death..." Kephart and DiGiacomo's lying was an attempt to conceal from the jury that Simms' testimony established Bailey's fatal head fracture occurred *at least two hours prior* to when his injuries occurred that they alleged Ms. Lobato inflicted. [8] [Ground 66]
- Kephart improperly inserted himself as a 13th juror when he told the jurors during his rebuttal argument, that "he personally believes [Ms. Lobato] is guilty and the jurors should follow his lead and mark their ballots to convict her as he did." [9] [Ground 67]
- Kephart and DiGiacomo during their rebuttal and closing arguments, respectively, smeared and disparaged three of Ms. Lobato's alibi witnesses solely because they had not been called to testify by her lawyer during her first trial in 2002. [10] [Ground 68]
- Kephart and DiGiacomo fabricated the assertion during their rebuttal and closing arguments, respectively, that Ms. Lobato "said she had blood on her, her clothes were bloody and that she got in

**Lobato cont. on page 17**

## Lobato cont. from page 16

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](http://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](http://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 brief’s 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](http://transparentnevada.com).



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