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KIRSTIN BLAISE LOBATO v. STATE OF NEVADA, NO. 58913

NEVADA SUPREME COURT EN BANC ORAL ARGUMENT

CARSON CITY, WASHOE COUNTY, NEVADA

TUESDAY, SEPTEMBER 9, 2014 AT 11:30 A.M.

PROCEEDINGS

(Justices and counsel present)

(Justices are not identified by name in the audio recording so they are indicated by "JUSTICE ?".)

JUSTICE ?: Please be seated, everyone.

Call our next case, which is case number 58913, Kirstin Lobato vs. State of Nevada. I'll ask each counsel to introduce themselves when they come up and present, so is the Appellant ready to proceed?

Okay, counsel, if you would please come forward and please introduce yourself. Let me know if you would like any time for rebuttal, as well.

MR. AFOH-MANIN: Yes, Your Honor. My name is J.B. Afoh-Manin, and I represent Miss Blaise Lobato. I am joined by co-counsel Phung Jefferson. I will be presenting the entire argument today, Your Honor. I would ask to reserve 4 minutes for rebuttal.

JUSTICE ?: Thank you very much. We will do so. You may proceed.

MR. AFOH-MANIN: Yes, Your Honor.

Good morning. If it may please the Court, this is a proper person appeal from a District Court order denying a post-conviction petition for a writ of *habeas corpus*. The three issues that are in front of the Court this morning are –

1. Whether the District Court should have admitted and considered Lobato's proffered evidence of actual innocence.
2. Whether the District Court erred in denying Lobato's *Brady* claims without an evidentiary hearing.
3. Whether the District Court erred in denying Lobato's ineffective assistance of counsel claim without an evidentiary hearing.

I will proceed with point number 1.

The first question before this Court is whether the District Court should have admitted and considered Ms. Lobato's proffered evidence of actual innocence.

Ground 23 in Ms. Lobato's original and timely *habeas* petition includes unrebutted new evidence not presented to her jury proving her actual and factual innocence by more than two dozen expert alibi and fact witnesses. Ms. Lobato is entitled to collateral review of her new evidence under this Court's nearly half-century-old precedent in State ex rel. Orsborn v. Fogliani, 82 Nev. 300, 417 P.2d 148 (1966). This Court ruled a single item of new evidence proving Orsborn did not commit his convicted crime warranted the extraordinary remedy of *habeas* relief and his release from custody.

The District Court, we believe, prejudicially erred, summarily denying Ground 23 by disregarding it was a timely post-conviction *habeas* petition and inexplicably treated it as a procedurally barred untimely post-verdict motion for a new trial.

The Court relied on *Orsborn* to rule in Snow v. State, 105 Nev. 521, 523, 779 P.2d 96 97 (1989), that new evidence can be collaterally reviewed in a *habeas corpus* petition after the filing deadline for direct review of a new motion has passed. Snow was on death row, but this Court applied Snow's holding to a non-death-row prisoner in D'Agostino v. State, 112 Nev 417, 421 915 P.2d. 264 (1996).

Orsborn is consistent with other states' rulings, as well. Most recently a 2014 case, People v Hamilton, 115 A.D.3d 12**,** 979 N.Y.S.2d 97**,** 2014, held an actual innocence claim based on new evidence can be filed under New York's post-conviction statute. Why? Because an innocent person's conviction and imprisonment violate their Constitutional rights to due process and prohibiting cruel and unusual punishment, which Ms. Lobato asserts in her opening brief.

Ms. Lobato's compelling; once again, unrebutted new evidence disregarded by the District Court includes the following: New forensic evidence proving it is impossible she committed Duran Bailey's homicide because he died in Las Vegas after 8 pm. The time of death is crucial in this case. On July 8, 2001, a time when the State conceded at trial during closing arguments that Ms. Lobato was 3 hours away in the town of Panaca, a town that has been verified to be approximately 165 miles from Las Vegas—and it is also stated in trial by State's witness that the time it would take to travel at a normal rate of speed would be approximately 3 hours; if you're going excessively fast, possibly 2 hours.

As well, new evidence by 9 alibi witnesses and a psychological expert that Ms. Lobato's police statement describes attempted rape at an East Side Budget Suites hotel weeks before Bailey's homicide on the other side of town. I should state that approximately 6 weeks before the alleged murder. The murder took place on July 1 [*sic*], 2008 [*sic*]. We say the statement Ms. Lobato gave to the police officers was a description of an incident that took place in May of that same year, 2001, and that was approximately 6 weeks prior to the murder of Mr. Bailey.

New forensic evidence that the shoeprints of Bailey's assailant imprinted in blood don't match with Ms. Lobato.

New forensic evidence that Bailey's groin was not skinned by Ms. Lobato's pocket knife, and by a person with special skills she didn't have.

New forensic evidence Bailey was alive when his rectum was injured, proving Ms. Lobato

was convicted of a nonexistent violation of NRS 201.450, which is count 2, which obviously states that a person to be sexually assaulted has to be dead at the time for that crime to be committed. We argue that he was actually alive, and we have new evidence that proves that fact, as well.

And, new evidence implicating Diann Parker's Latino friends in Bailey's homicide should have been further investigated, which they were not done at the time of the interaction.

And, much more new evidence, all of which is unrebutted, l once again, by the State.

George Schiro's forensic evidence—forensic science evidence—is new that Bailey's assailant made the shoe prints imprinted in blood. At the time of trial, there was only testimony that the shoe prints didn't match the size or tread of Ms. Lobato's shoes. Schiro's new evidence undermines the State's closing argument that a random person could have entered the trash enclosure and made the shoe prints prior to Richard Shott calling 9-1-1 to report finding Bailey's body.

The District Court did not find that the affiants providing evidence for actual innocence, Ground 23, are not reliable, trustworthy, or credible or find that the evidence on which these grounds are based is not reliable, trustworthy, or credible. Ms. Lobato's new evidence supporting her actual innocence is consistent with the State's failure to present any physical, forensic, eyewitness, or confessional evidence at trial linking her or her car to Bailey's homicide or that she was even in Las Vegas on the day of the crime in question. The Metro PD crime lab's DNA tests of Ms. Lobato's car seat and cover and driver's side door panel exclude the presence of any blood. It should further be stated *habeas* Exhibit 85 details 40 material differences between Ms. Lobato's statement and details of Mr. Bailey's homicide, and her statement doesn't include any essential elements of Bailey's homicide, count 1, when it occurred, where occurred, or his death from a head injury; or count 2, when it occurred, where occurred, or, excuse my language, his anal opening was sexually assaulted.

For this Court to decide Ms. Lobato's claim on its merit de novo, there are 3 issues of first impression that weren't addressed in *Orsborn* because the State agreed Orsborn was wrongfully imprisoned. Ms. Lobato argues the proper standard of evidence is "all new reliable evidence that wasn't presented at trial." The proper standard of proof is clear and convincing evidence that undermines confidence and the correctness of the judgment, and if her claim is granted, her case should be dismissed. Ms. Lobato argues the District Court erred, and based on those standards, this Court should grant Ground 23 and order her immediate release from prison, just as in *Orsborn*, so that justice may finally be served in her case. It should be noted that the Appellant in that case was released at the close of oral arguments, before there was, like I said, time for the justices to deliberate on the actual guilt or innocence. They felt that there was not enough evidence to even hold him in custody beyond the time period of the oral arguments before the Court, this Court in question.

The second question before this Court is whether the District Court erred in denying Ms. Lobato's *Brady* claims without an evidentiary hearing. The District Court erred because Ms. Lobato's *Brady* grounds 25 and 26 are supported "with specific factual allegations not belied by the record that, if true, would entitle him or her to relief" as required by this Court's ruling in Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001). In the District Court the State didn't deny nondisclosure of the evidence, and the District Court didn't cite any legal authority for denying an evidentiary hearing.

We submit this Court should go beyond granting an evidentiary hearing and reverse Ms. Lobato's conviction on 2 legal grounds: First, the State confesses error under Polk v. State, 126 Nev. Op.No.19, 233 P.3d 357-361 (2010). Failure of the State's Answering Brief to address a significant issue in *habeas* Petitioner's Opening Brief is a confession of error by the District Court. As well, by failing to address it, the District Court prejudicially erred, denying the *Brady* grounds

as procedurally defaulted under NRS 34.810. Procedural default doesn't apply to the *Brady* claims in Ms. Lobato's original encounter petition, under the Court's ruling in Mazzan v. Warden, 116 Nev. 48,67,993 P.2d 25 (2000) (procedural default only applies to a successive petition where Petitioner must establish cause and prejudice for not raising the issue in the first petition).

Second, the State fails to address the District Court prejudicially erred, arbitrarily denying the due process *Brady* grounds without conducting Brady's 3-part test to determine 1) nondisclosure, 2) materiality, and 3) prejudice. The District Court cited no valid legal basis for denial of the *Brady* grounds, which the State fails to address, and on that basis this Court should reverse Ms. Lobato's conviction and order a new trial.

JUSTICE ?: Could you address something, while you have a few minutes left, on the ineffective assistance of counsel claims.

MR. AFOH-MANIN: Yes, Your Honor.

JUSTICE ?: The claims regarding, I believe they are 38 and 40, that counsel was ineffective in not retaining and calling the forensic pathologist. Can you address that claim for me, please?

MR. AFOH-MANIN: Yes, Your Honor. Just one moment.

It is our argument that the pathologist could have helped to determine the time of death in regards to Mr. Bailey.

JUSTICE ?: I understand all that, but the error that the District Court made is, your claim is not holding an evidentiary hearing regarding a lot of these ineffective assistance of counsel claims, and that was one of the claims that struck me, and I was looking for your thoughts.

MR. AFOH-MANIN: Yes, beyond the details of why.

JUSTICE ?: Yes.

MR. AFOH-MANIN: Okay, because if I heard your question correctly, it is my

understanding that our client, Ms. Lobato, was not given the opportunity to present evidence, either there at the trial or new evidence at an evidentiary hearing, that would give credence and—how can I say it, understanding—to the pathologist's position. We feel that but for her given that time to state the position of the pathologist, we are not allowing all that evidence to come into play, and that if we want to allow a person to be convicted without having full disclosure of all possible evidence at hand, we run the risk of actually putting someone who could be innocent in custody and, beyond that, found guilty for something they didn't do. We feel that there has to be full explanation and full disclosure of all possible evidence for a client to receive a fair trial.

JUSTICE ?: Thank you.

JUSTICE ?: Counsel, I know we had some questions here, and I know you used the 15 minutes, but I'll give you 2 minutes in rebuttal because we have to take the rebuttal time off the 15 minutes. We will give you 2 additional minutes…

MR. AFOH-MANIN: Thank you, Your Honor.

JUSTICE ?: …in rebuttal, and we will add 2 minutes to Mr. Owens' time, as well, so… Mr. Owens, if you would like to proceed on behalf of the State.

MR. OWENS: Thank you. If it may please the Court, I am Steve Owens of the District Attorney's Office here on behalf of the Respondent, State of Nevada.

Duran Bailey, a homeless, smelly old black man, was brutally slaughtered on July 8, 2001, next to a garbage dumpster on West Flamingo in Las Vegas, Nevada. He had suffered multiple stab wounds. His carotid artery and neck had been slashed, multiple blunt force trauma to his head, and, significantly, his penis had been severed. That unusual fact was, significantly, withheld from the media. That was an act of brilliance by the police—an investigative tool. Shortly thereafter, Kirstin Lobato in Panaca, Nevada, started talking about a severed penis, something that no one else was supposed to know about. She says today that she is actually innocent. She was convicted by

her own words at the trial, and her own words belie the argument that she is actually innocent. In 12 days the police received word that Kirstin Lobato was talking about the severed penis, that she had confided in a high-school teacher, an adult education teacher, "I did something bad; I need to talk to you." She said she had stabbed a man and cut off his penis and threw it, that this had happened on West Flamingo or West Tropicana, and that the victim was old and smelly, that she ran to her car and then showered at a friend's house because she had ick all over her, that she was hiding out in Panaca, and that her parents were hiding her vehicle and were going to get it sold or painted after cleaning it because she was afraid someone had seen her distinctive vehicle at the crime scene.

She told other friends in Panaca that she had slashed a man's penis in Las Vegas with her butterfly knife and that she was seeing a doctor because her conscience was bothering her. She was suffering from depression and suicide [*sic*] because she was afraid that she had killed a man. When confronted by police, she said, "I didn't think anyone would miss him." She hung her head and cried. She told her parents, "Mom, I did it. Now I have to do what I have to do." "I'm sorry, Daddy. I told you I did something awful."

In the formal statement to police, she said that she had been out of her mind on drugs, specifically methamphetamine, and had stayed up for 3 days, that everything went black, and she didn't remember a lot, but she was attacked by an older black man who smelled like alcohol and dirty diapers. She had been sexually victimized before and was upset that nothing was done about it, so this time she took her butterfly knife and cut off his penis. She might have also hit him with a baseball bat that she kept in the car. She drove off and didn't think anybody would miss somebody like that. She got rid of her clothes and the knife. She only remembers bits and pieces and flashes in and out of her memory of this incident, and she said she could be mistaken about the location and dates.

These are not the words of an innocent woman. Certainly there were a myriad of other facts and inconsistencies and differences, multiple versions of statements from witnesses, things that didn't add up, things that were unexplained. That's why we have jury trials.

The jury resolved those facts in the State's favor, and they did it not once but twice. Kirstin Lobato was the beneficiary of 2 juries, both of whom said that she had committed this crime. The jury knew that nothing forensically tied Lobato to the crime scene; in fact, some forensic evidence actually pointed away from her, to alternative suspects; they knew that. The jury did not believe that Lobato's confession pertained to some other nonexistent incident at the Budget Suites, and no other victim missing a penis has ever been found, let alone a black old smelly one next to a garbage dumpster with a missing penis.

The jury did not believe Lobato's alibi witnesses—upwards of 10 to 14 witnesses came in and alibied Kirstin Lobato. The jury could not have convicted her if they believed those alibi witnesses. I can't get inside the jury's head. I didn't listen to the trial—I wasn't there for it—but just reading the cold transcripts, you can see where at least one of these witnesses is openly hostile to the State, changes her testimony at every opportunity she can to favor Kirstin Lobato. Other witnesses—we have evidence of at least 2 who were out trying to change other people's testimonies, persuade other people that they were wrong, convincing them that July 8 was the date that they needed to apply the alibi for. Some of these witnesses say she was out ATVing on July 8. Someone else said no, ATVing happened after, July 13, because she had the scratches. There are all kinds of reasons why the jury may not have believed these alibi witnesses, but in short, they discredited those, and the jury believed that this admission of Kirstin Lobato pertained to the one and only penis sever case I have ever heard of here in Las Vegas, and so they convicted her. It's against…..

JUSTICE ?: Let me interrupt you for just a second, considering the alibi evidence and the

import of that. Doesn't that make it more important that there be a forensic pathologist that could narrow the time frame in this particular instance, and this goes to the ineffective assistance of counsel claims.

MR. OWENS: I disagree. Opposing counsel says that the time of death was critical. I say no. Dr. Simms gave a broad range of possible time within which this death could have occurred. As I understand, their experts today—they've got a pathologist, Len [*sic*] Larkin, who said that it could have been within 2 hours of discovery of the body, perhaps at dusk. But let's look at what he also says in his report. He says there are not enough data to form an estimate of the time of Mr. Bailey's death, and estimated time of death of Duran Bailey is tenuous, at best, because of the lack of data with which to work, tenuous. Is that what we're going to say is evidence of actual innocence, that we're going to cause a new trial, now, because of some tenuous estimation based on some entomology experts who come in and, based on the bugs, insects, on the body, the lack thereof, that the death had to have occurred after sunset, which was at 8:01? Well, Dr. Simms, one of his ranges was up to 7:50 pm as a possible range of the death occurring, so we're off by maybe 10 minutes. They alibi her for that entire time frame. There's no alibi for that 10 minutes that didn't already exist at trial and wasn't already testified to and rejected by the jury.

JUSTICE ?: Mr. Owens…

MR. OWENS: Yes.

JUSTICE ?: Is this actual innocence claim a free-standing or gateway claim, and should this Court consider a free-standing gateway—excuse me, a free-standing innocence claim on post conviction?

MR. OWENS: I struggled with this quite a bit because I wasn't sure what kind of claim that they were making. I would say that their free-standing actual innocence claim in *habeas* is not cognizable in Nevada. I think that's where they're going with this. I don't think that it's a gateway

claim because their petition is not procedurally barred, but yet they rely on many cases that come up with the standard of review for gateway innocence claims. We also have our statute for motions for new trial based on newly discovered evidence that must be brought within 2 years. To me it appears they don't want to go into that statute because then they're limited by that 2-year time bar that they missed, but it seems as though this is nothing more than an untimely motion for a new trial. All of this evidence could have been discovered by them or was actually known to them within that 2-year time frame, so we have to balance….

JUSTICE ?: Mr. Owens, if the Court were to view this as a free-standing actual innocence claim, why shouldn't we—or what evaluation should the Court give to consideration of free-standing actual innocence claims, or not?

MR. OWENS: This Court should take its lead from the US Supreme Court, in which the *Herrera* case said that hypothetically there might be some sort of Constitutional free-standing innocence claim, but historically, *habeas* is to correct errors of law, not errors of fact, and in fact, that's what this Court said in the *Orsborn* case in 1966 that opposing counsel relied upon. I don't know anyone here in Nevada that has tried to cite *Orsborn* as some sort of free-standing actual innocence recognition by this Court. The US Supreme Court said, "We don't know what the standard is." It's going to be extraordinarily high. All we know is that this defendant hasn't met it, nor has any other case that has ever come before the US Supreme Court. They've stayed away from that. They've left it hypothetically open. I suggest that's a good answer for this Court. Potentially it might be available. The type of evidence—you know, I think you'd have to use not the *Schlup* standard. You'd have to use a combination of the *Sawyer* standard—clear and convincing evidence. You'd have to take the 7 or 8 factors that we have for motions for a new trial—it has to be newly discovered, not merely impeachment evidence, has to be material for the defense. There are 7 or 8 of those. You have to take and combine those, along with something

else, because otherwise a motion for a new trial based on newly discovered evidence will simply go away. Who would want to go under a stricter statutory standard when they have a looser, easier Constitutional standard?

JUSTICE ?: If we rejected a free-standing actual innocence claim, would that preclude review of say, for example, DNA evidence that exculpates a defendant from a crime, brought on an even—well, just let's stick with a timely filed post-conviction petition?

MR. OWENS: No. The Legislature has already looked at this. This is across the country, states are taking an interest in this, and this is where I think the solution or remedy lies, with the Legislature. They cited the *Hamilton* New York case. They claimed that was a *habeas*. In my notes from reading it, there's a lot of material here. In my notes I wrote down that was not a *habeas* case; that was a statutory remedy in *Hamilton*.

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, and the other is a motion for DNA testing, which has an exception that waives that 2-year bar for motions for new trial.

The Legislature is looking at this. If they want to create some extra remedy, that's where it lies. I don't think in *habeas* it is appropriate to go opening up something. What is the standard going to be? The day this Court creates a free-standing or recognizes a free-standing innocence claim is the day every single inmate in prison lines up and files another petition, trying to meet that amorphous standard—and we have trouble applying the gateway innocence standard. Knowing what exactly what is enough for the gateway claim. Certainly free-standing innocence has to be something higher than that.

JUSTICE ?: Well, my understanding of the actual innocence actually goes to death penalty cases where you have invalid aggravating circumstances, and then it's actual innocence of death. That's where I've seen it, so this is new to me as far as far as a free-standing claim of actual

innocence. There are other ways; I think the DNA example is one of newly discovered evidence to get somebody out. I mean that's the way I'd do it if I were a defense attorney. And then the DA usually agrees. If the DNA is suspect as to a different defendant, they've been pretty cooperative throughout the country that I know of. I've even been to a seminar where a guy had 22 years in prison in Maryland, and the only one who would believe him was his mother until the DNA cleared him, and the State went along with it, so that is my feeling that…

MR. OWENS: Well, to get back to some of this forensic evidence because it also ties in with these claims of ineffective assistance of counsel. Notably, I found in the record where trial counsel David Schieck and the defense team did have a medical examiner specifically on the issue of time of death. They didn't call the witness, but it was Charles Wetli, a medical examiner; the site, for the Court and opposing counsel, is Vol. 3 of the Appendix at p. 612. In there you will find testimony—not testimony, but it was a statement to the Court, a final statement to the Court, that Charles Wetli's estimation of the time of death was consistent with that of Dr. Simms. It was based on medical examiner at rigor mortis and lividity of the body. Certainly it was not based on the entomology experts that they've got now, but we're talking about a 10-minute window; it simply wouldn't have made a difference. At trial we agreed and said nothing at this crime scene ties Lobato to it forensically, and so additional forensic testimonies trying to exclude her from the crime scene and is never going to amount to an actual innocence claim. Show me another black man with a missing penis, and maybe we'll have something to talk about in terms of maybe this confession was to some other incident. But nothing at the crime scene is going to help them because the jury already knew that evidence there pointed away from Kirstin.

JUSTICE ?: Do you want us to establish some sort of bright line rule on evidentiary hearings for ineffective assistance of counsel because it depends on the discretion of the district judge whether to have an evidentiary hearing.

MR. OWENS: Well we gave a standard; it's facts not belied by the record which would show the defendant is entitled to relief. Not bare claims. The *Brady* claim that they mention is a bare claim. They've got a piece of paper supposedly found in the victim's pocket with 9 phone numbers. They got an affidavit from this Hans Sherrer character whose name appears in here sporadically for doing various types of investigation after the trial, and he says one of those numbers, which has the letter D next to it, is to a police officer. That's a bare claim. It doesn't explain how. He thinks it's the number of a police officer. Why? Did he pick up the phone 8 years after the fact? That's how he got it? Are we sure that the phone number and what it goes to 8 years after the fact is what it went to in 2001? And even if it was a police officer's phone number, how is that exculpatory? They don't make out anything but a bare allegation. They don't develop that claim and explain how or why something was withheld from them. The phone numbers certainly weren't withheld, and they could have called the number at any time. They have done some investigation, and they have no proof that we somehow knew it belonged to a police officer, and I've never seen any evidence that it does belong to a police officer.

JUSTICE ?: But is mere argument enough to credit or discredit claims, a *Brady* claim or a claim of ineffective assistance of counsel claim, without having actual testimony under oath, just an attorney's argument?

MR. OWENS: You've got to give us specific facts, not just bare allegations, to buy themselves an evidentiary hearing. Anyone can just make some bald allegation and say now I get an evidentiary hearing, and then they want to use the evidentiary hearing as a discovery tool to develop their claim. They need to come forward and make their allegation and effect an offer of proof and the facts. That's what our case law holds out. There need to be specific facts not belied by the record showing entitlement to relief, and they haven't done that. They just came up with this bare allegation of a *Brady* claim…

JUSTICE ?: That might be the case, but in this particular case, do you think the judge's findings of fact were sufficient?

MR. OWENS: Absolutely. I saw no need to have another…remember, we got a first trial, we got a second trial, and we got witnesses with three, four versions, we're going to get fifth and sixth versions, and the more time that this goes on, the further we get from the truth, which is why the Legislature said new trial motions need to be brought within 2 years because if we're really going to find something significant that exonerates somebody, it's likely to come sooner rather than later. And so at this stage in the game, can you imagine what a circus an evidentiary hearing would be on this case? How are you going to narrow the issues enough? We're going to have a retrial of this and have so many levels of impeachment and wade through this all again. There are enough facts in the record where we can utilize the presumption of counsel's confidence—and this was David Schieck, Chief of the Special Public Defender's Unit, Sherry Greenberger, who is supposed to have some expertise, who came over from California, expertise in wrongful convictions, and another attorney. There were 3 of them. They called upwards of 12 alibi witnesses, 3 expert witnesses. They had everything from the first trial. They did their best, and the jury—this is a case that comes down to the facts, and the jury listened to this stuff. This new evidence they want to put on is not new. These witnesses have been known. They've been around. It's cumulative to what the jury rejected at trial. What end would we be putting those same facts before a judge and having a judge decide whether the jury was correct in the way it weighed those facts? Our system is dependent upon jury verdicts. Claims of actual innocence, if not narrowly tailored and held to the very high standard that they are supposed to be, seek to undermine that principle of a jury as the one who decides what really happened, what facts are true and what are not….

JUSTICE ?: Mr. Owens, I think your time's up.

JUSTICE ?: I'd like to ask one question—I understand his time is up. As to the *Brady* allegation that's been raised as to the investigating detective in terms of what he investigated in terms of the other woman in the apartment near the dumpster and the three other individuals, Mexicans, who were also there, and statements about whether he investigated or didn't investigate these people and whether that would undermine his credibility, and should a hearing have been given as to these allegations?

MR. OWENS: Well, he testified at trial about those allegations. He was asked repeatedly about what investigation he did or the lack thereof and the lack of documenting it. They impeached him with his claims that he had investigated these Hispanics and what he had done to try to find out if they had had any connection with this. The jury heard those facts. There's nothing new here that they are offering, just some kind of false Social Security number I think is what they've come up with that they think the detective could have been impeached with. There's no evidence at trial that he used a Social Security number to investigate them, that he may have had a date of birth, a name, or something the record simply doesn't show. They want to suggest that because there was a false Social…. Now there was testimony that these were probably illegal aliens, these Hispanics. It would not be unusual for them to have a false Social. Where does that get us? The jury heard that. What further are we going to establish in terms of ineffectiveness of counsel? They haven't been able to come forward and do anything with that false Social Security number that would have changed the outcome of the trial, so I see no reason for an evidentiary hearing on that point.

JUSTICE ?: Thank you very much.

MR. OWENS: Thank you.

JUSTICE ?: Counsel, you have 2 minutes there in rebuttal.

MR. AFOH-MANIN: Thank you, Your Honor. I especially wanted to respond to the

Justice's question beforehand; I might have misinterpreted it. In regards to the need to have the pathologist's information be heard in front of an evidentiary hearing in regards to the ineffective assistance of counsel claim is that the responsibility of the defense attorney or team of attorneys in this case the crucial piece of the puzzle, which I disagree with the State's argument, is the time of death, and it's not a mere 10 minutes. I'm looking at least about 10 hours. The State's argument from trial, they have placed, they say that Ms. Lobato couldn't have been in Las Vegas any later than 7 am, right? See, our expert witnesses post trial have said that the time of death was approximately 8 pm, right? Approximately almost 12-hour window in regards to 8 pm versus 7 am, and the belief is that the victim here, Mr. Bailey, died between 3:50 am and possibly 7 am. If that is true, which we believe it is, there could not have been a time period for Ms. Lobato to leave Las Vegas and return to Panaca, which she was verifiably stated to be in Panaca by 11:30 am at the latest. This was also State's evidence, as well.

In regards to—I know my time is very short here. In regards to some of the statements that the State has mentioned, it is crucial to point out that DNA—I just wanted to point out that. We have asked that the DNA be tested, on numerous occasions, in this case. The State has refused to test it. We would love to have the DNA be tested. As Your Honor has mentioned, throughout the country there has been a movement to test DNA, and that DNA has exonerated numerous defendants, and there have been DAs throughout the country who have said that we want to make sure that the correct person is behind bars. That's what we want, as well. We believe and trust the scientific evidence. We are willing to put our client's freedom at risk to test it.

JUSTICE ?: Counsel, that's the DNA argument. I mean we have a situation where the State is conceding there was none.

MR. AFOH-MANIN: Was not DNA?

JUSTICE ?: As to Lobato. So. Well, where does that take us, then?

MR. AFOH-MANIN: Well, we are saying the opposite. We are saying there was DNA on the scene that, if tested, could rule out Ms. Lobato's presence at the scene.

JUSTICE ?: So, again, we are pointing to another unnamed assailant.

MR. AFOH-MANIN: Potentially, correct. Absolutely.

JUSTICE ?: Thank you very much, counsel, both counsel, we appreciate your excellent arguments and briefs in this case, and we will take this case under submission.

MR. AFOH-MANIN: I thank you, as well, Your Honor, to move court from July 1 until now.

JUSTICE ?: It is our pleasure to do that.

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COURT ADJOURNED

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