

INNOCENCE PROJECT

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March 26, 2012

District Attorney Steven B. Wolfson
Office of the District Attorney
Clark County Government Center
500 S. Grand Central Pkwy.
Las Vegas, NV 89155-1111

Re: Nevada v. Kirstin Blaise Lobato, Case No.: 01C177394-1

Dear District Attorney Wolfson:

I am writing to ask you to reconsider your office's opposition to Kirstin Blaise Lobato's request for post-conviction DNA testing. As you may know, Ms. Lobato was convicted of the 2001 murder of Duran Bailey. In the years since, Ms. Lobato's case has taken a long and contentious path through the courts. There is no better way to end the questions and conclusively prove her innocence or guilt than to submit the evidence to modern DNA analysis.

Ms. Lobato was first convicted in 2002, but the Nevada Supreme Court vacated her conviction in 2004. She was convicted a second time in 2006. Since the time of her first conviction, she has sought to prove her innocence through DNA testing. Unfortunately, to date, your office has opposed testing, resulting in long and drawn-out litigation that continues to this day.

I'm not writing to rehash the legal arguments that each side has outlined in court proceedings. Rather, I'm writing to see if we can reach common ground and agree that testing should be done without having to embark on another round of potentially costly and time-consuming litigation in state or federal court. Indeed, the Innocence Project will cover the costs of testing at an agreed upon and fully accredited private laboratory.

My question is simple: what do you have to lose by consenting to testing? If the results confirm Ms. Lobato's involvement in the murder, then that would effectively end the case, and



Ms. Lobato's conviction would stand. If the DNA testing did not produce any interpretable results beyond what was developed pre-trial, then nothing would change and the conviction would stand. But if the testing identified someone other than Ms. Lobato as the murderer, then that result could not only serve as compelling evidence of Ms. Lobato's innocence but also bring the true perpetrator to justice.

To be certain, I am not arguing that I know that Ms. Lobato is innocent. I've learned in many years of handling post-conviction DNA cases that it is nearly impossible to predict what result will come to pass in a case. But even in its opposition to Ms. Lobato's post-conviction petition, your office conceded that Ms. Lobato "presented ample evidence that Bailey was killed by someone other than her" and that Ms. Lobato presented "ample evidence and arguments" to the jury that "no physical evidence was presented [by the State] which connected her to the scene." While there's no way of knowing what the DNA testing will show at this point, we do know that DNA testing can give us a more complete answer as to what happened to Mr. Bailey. I am certain that if the physical evidence is not subjected to modern DNA testing, there is absolutely no chance to know conclusively what happened to Mr. Bailey.

Thank you for your careful consideration of this matter. I've attached a letter and memo that we sent to the Honorable Judge Valorie J. Vega in September 2010, outlining the potential avenues for testing in this case. I hope to have the opportunity to speak to you about this case. I can be reached at 212-364-5982, or by email, at jkreag@innocenceproject.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Kreag". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jason Kreag
Staff Attorney

cc: Travis N. Barrick, *Counsel for Ms. Lobato*

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September 15, 2010

Honorable Judge Valorie J. Vega
Clark County Criminal District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

Re: Nevada v. Kirstin Blaise Lobato, Case No.: 01C177394-1

Dear Judge Vega:

I am writing with respect to Ms. Lobato's October 2006 conviction for the death of Duran Bailey. Based on my review of the crime and Ms. Lobato's conviction, it seems that there is compelling evidence that she might be innocent. More importantly, while I recognize that some DNA testing was performed before Ms. Lobato's second trial, there appears to be additional DNA testing that can be performed that could conclusively identify the actual perpetrator and confirm Ms. Lobato's long-held contention that she is innocent.

Ms. Lobato first sought the assistance of the Innocence Project after her initial conviction in 2002. However, her case was taken out of our queue after the Nevada Supreme Court vacated her conviction in 2004. Ms. Lobato again sought assistance after she was convicted a second time in 2006.

Prior to Ms. Lobato's convictions, several items of evidence were analyzed and subjected to DNA testing, yet none of the DNA testing connected Ms. Lobato to the crime. Her DNA was not found at the crime scene. And despite the bloody nature of the crime, the victim's DNA was not found on any of Ms. Lobato's possessions, including her car, her shoes, or a baseball bat Ms. Lobato kept in her car for protection. Unfortunately, the 2006 testing also did not conclusively identify the actual perpetrator. However, modern DNA testing techniques, including techniques not available before Ms. Lobato's trials, could yield more probative results and possibly identify the actual perpetrator. Equally important, additional DNA testing could conclusively confirm Ms. Lobato's guilt and put an end to any questions about her involvement in the crime.

Based on my review of the case, it appears that there are several items of evidence that

should be retested using modern DNA testing methods or should be tested for the first time. The evidence suitable for DNA testing using modern methods includes, among other things, penile and rectal swabs from the victim that tested positive for semen in prior analysis, the victim's fingernail clippings, foreign hair, and several items of evidence that the perpetrator likely touched, including the victim's clothing, a used condom wrapper found at the scene, cigarettes, and a match. A more detailed explanation of the evidence suitable for DNA testing is outlined below.

The additional DNA testing is particularly important in Ms. Lobato's case because of the wealth of exculpatory evidence she presented at trial and the additional exculpatory evidence she has outlined in her *pro se* post-conviction petition seeking relief. Indeed, in its opposition to Ms. Lobato's post-conviction petition, the State conceded that Ms. Lobato "presented ample evidence that Bailey was killed by someone other than her." (State's Response at 18.) The State also conceded that Ms. Lobato presented "ample evidence and arguments" to the jury that "no physical evidence was presented [by the State] which connected her to the scene." (State's Response at 23.) Furthermore, the Nevada Supreme Court, in overruling Ms. Lobato's initial conviction, recognized that the "issue[] of guilt [was] close" in Ms. Lobato's case. *Lobato v. State*, 120 Nev. 512, 522 (2004). The Nevada Supreme Court also recognized that aside from the snitch testimony against Ms. Lobato, which it later found to be unreliable, the rest of the State's evidence was "equivocal and circumstantial." *Id.*

In addition to evidence presented at trial supporting Ms. Lobato's claim of innocence, additional information also supports the conclusion that someone other than Ms. Lobato murdered Mr. Bailey. This includes the fact that Ms. Lobato and her mother each passed polygraph examinations.

Doubts about Ms. Lobato's guilt also arise from the lack of reliability of the jailhouse snitch. Specifically, the Nevada Supreme Court overturned Ms. Lobato's initial conviction based on the fact that the trial court prevented Ms. Lobato from challenging the snitch's motive to testify against her with evidence that the snitch had attempted to suborn perjury in another case to gain her release. *Id.*

In addition, alternate suspects who had a motive to kill Bailey were not fully explored as potential perpetrators. Specifically, Las Vegas police were aware of the fact that Bailey raped Dianne Parker one week before Bailey was killed. They were also aware that after Bailey raped Ms. Parker, he continued to come to her residence and threaten her. The police also knew that several of Parker's friends had warned Bailey to stay away from her. Despite the fact that Bailey's injuries could be consistent with Ms. Parker's friends seeking revenge on him for raping Ms. Parker days earlier, Ms. Parker's friends were not fully investigated. In fact, it is not even clear if Las Vegas police sought to compare the foreign fingerprints at the crime scene to Ms. Parker's friends after Ms. Lobato was excluded as a source of the prints. Put simply, this is not a case in which the State's evidence of guilt is close to overwhelming.

Given the ample evidence supporting Ms. Lobato's claim of innocence and the items of evidence that can be subjected to DNA testing using modern methods, The Innocence Project is




prepared to assist Ms. Lobato in securing the testing, including pursuing testing through Nevada's post-conviction DNA statute, N.R.S. 176.0918, if the State does not consent to testing without litigation.

I recognize that Ms. Lobato's post-conviction petition is set for a hearing before you at 10:30 a.m. on September 30, 2010. However, The Innocence Project is not capable of representing Ms. Lobato in the full realm of her post-conviction non-DNA litigation. As such, I hope that you will give careful consideration to Ms. Lobato's request for appointment of counsel for her post-conviction proceedings. If counsel is appointed, The Innocence Project is prepared to provide whatever assistance needed to secure the appropriate DNA testing to conclusively identify the perpetrator.

Ms. Lobato's case is not unlike many of the over 250 DNA exonerations that The Innocence Project has been involved with in the past several years. The prosecution is convinced that it convicted the right perpetrator. And Ms. Lobato, trumpeting the testimony from her alibi witnesses, the fact that no physical evidence connected her to the crime, and the fact that she passed a polygraph, remains convinced of her innocence, and she is doing everything in her ability to bring attention to her case to prove her innocence. These two seemingly irreconcilable positions can be resolved with DNA testing and a careful review of Ms. Lobato's post-conviction claims. As such, I hope that you will consider her request to appoint counsel and our offer to assist counsel *pro bono* on the DNA aspects of the case.

Thank you for your careful consideration of this matter. If you have any questions I can be reached by email at bcsinnocence@gmail.com or through my assistant Liz Vaca at 212-364-5393.

Sincerely,


Barry Scheck
Co-Director


Jason Kreag
Staff Attorney

cc: Kirstin Lobato, *Petitioner*
David Roger, *Clark County District Attorney*
William D. Kephart, *Clark County Chief Deputy District Attorney*
Sean MacDonald, *Advocate for Ms. Lobato, Association in Defence of the Wrongly Convicted -- Canada*
Win Wahrer, *Advocate for Ms. Lobato, Association in Defence of the Wrongly Convicted*

Evidence Suitable for Additional DNA Testing

Among others, the following items of evidence should be subjected to DNA testing:

1. **Victim's Penile Swabs and Smears from These Swabs** – It appears that DNA testing was not performed on these items. I believe the justification was that while semen was identified, sperm were not detected. In several Innocence Project cases, including in the exoneration of Ronald Taylor in 2008, initial testing failed to document the presence of sperm. However, when additional testing was performed, sperm were identified and complete DNA profiles were obtained. More importantly, a male DNA profile can be obtained even in the absence of sperm. Of course, such a profile might only identify one of the victim's consensual sexual partners. However, it might also yield a CODIS hit to the actual perpetrator. The latter possibility is not implausible in this case, particularly given the evidence Ms. Lobato has presented that friends of Dianne Parker may have assaulted Mr. Bailey in retaliation for Bailey's sexual assault of Parker one week before Bailey was found dead with a severed penis.
2. **Victim's Rectal Swabs and Smears from These Swabs** – Like the penile swabs, prior analysis reportedly identified semen, but not sperm. The same analysis for testing the semen from the penile swabs applies to the rectal swabs.
3. **Victim's Clothing (including his tan pants)** – The victim's pants have not been subjected to DNA testing. However, techniques for obtaining DNA profiles from contact DNA that were not used in 2006 now make testing the pants appropriate. Here, the victim's pants were found around his knees. It is possible that the perpetrator pulled the victim's pants down. If so, testing could yield the perpetrator's DNA. Similar testing was used in the Jon Benet Ramsey case in Colorado to clear Jon Benet's parents of her murder.
4. **Foreign Fingerprints** – At least four fingerprints suitable for comparison were obtained from the crime scene by the police. Ms. Lobato was excluded as a source of these prints. Depending on how these prints were lifted, it might be possible to obtain the DNA profile of the person who left the prints at the scene. (Note: the prints should be compared to the fingerprint database before DNA testing, as the DNA testing would compromise the prints.)
5. **Torn Condom Wrapper and Kleenex** – Las Vegas Police collected a torn condom wrapper and piece of Kleenex from the scene during the investigation. These items have not been tested. Modern DNA testing techniques for obtaining DNA profiles from contact DNA now make it appropriate to test these items, particularly because we know that semen was identified in the victim's penile and rectal swabs. Without testing these items, they cannot be linked definitively to the victim's murder. However, if the same DNA profile is found on these items and several other items of evidence from the crime scene, and if Ms. Lobato is excluded from that profile, that would be compelling evidence of Ms. Lobato's innocence.

6. Pieces of Plastic and Silver Paper from the Victim's Rectum – These items of evidence have never been subjected to DNA testing. However, like the semen found in the victim and the condom wrapper found at the scene, these items might be consistent with the possibility that the victim was sexually assaulted by someone other than Ms. Lobato before or after he was killed. Obtaining a DNA profile from these items could provide evidence of Ms. Lobato's innocence.
7. Victim's Fingernail Clippings – Before Ms. Lobato's trials, the victim's fingernail clippings were tested using STR DNA testing. The testing failed to yield a DNA profile other than the victim's. This might mean that the perpetrator's DNA is not under the victim's nails. However, it might also mean that STR testing simply failed to identify a second profile. The DNA report from the prior testing confirms that there is DNA extract remaining from the prior testing. The extract should be tested again using Y-STR testing. Such testing could document if more than one male profile is present, despite the fact that prior testing only identified the victim's DNA. Similar analysis also applies to the swabs from the victim's hands that were tested using STR testing in 2001. They also should be retested using Y-STR testing.
8. Pubic Hair Combing – Combing of the victim's pubic hair yielded several pubic hairs. The Las Vegas Police Department lab determined that one of the pubic hairs was microscopically dissimilar to the victim. However, STR DNA testing of the root on the hair confirmed that it was from the victim. This testing also yielded a second partial DNA profile from someone other than Ms. Lobato. The remaining pubic hairs should be submitted for testing to determine if any are foreign to the victim. Furthermore, particularly because the one hair that was tested yielded a mixture, the shafts of the other hairs should also be examined to determine if sperm or semen is attached to any of the other hairs. If so, material on the shaft of the hairs should be submitted for DNA analysis.
9. Used Match and Matchbook – A used match and matchbook were recovered from the crime scene. According to the lab reports, the used match was recovered from the victim's "right upper left thigh." The evidence also indicates that the match was found underneath the plastic sheeting that was wrapped around the victim. These items have never been subjected to DNA analysis. Modern methods that yield DNA profiles from contact DNA should be used to determine who used the match and matchbook. It is certainly possible that this will only yield the victim's DNA. However, it is also possible that such testing will yield a DNA profile consistent with the other items of evidence. Such a result, if it excluded Ms. Lobato, would be compelling evidence of her innocence.
10. Cigarette Butts and Filter Paper – Two cigarette butts were collected and subjected to DNA testing. The cigarettes were recovered from underneath the plastic sheeting that was wrapped around the victim's body. A brandless cigarette contained a mixture of the victim's DNA and DNA from someone other than Ms. Lobato. A Marlboro cigarette butt contained a single male DNA profile that was inconsistent with the victim and Ms.

Lobato. (The foreign profile from the Marlboro was not consistent with the second profile from the brandless cigarette butt.) The lab reported that insufficient DNA was recovered from the filter paper to obtain a DNA profile. The foreign profile from the Marlboro cigarette should be submitted to the CODIS DNA database. Furthermore, modern DNA testing techniques might yield a more robust second profile from the brandless cigarette butt and a profile from the filter paper.

11. Wad of Chewing Gum Recovered from the Scene – A partially chewed piece of gum was located by the police on top of the blood-soaked cardboard that was placed on the victim's body. The gum was tested prior to Ms. Lobato's first trial, and a mixture of the victim's DNA and DNA from an unknown source was identified. Ms. Lobato was excluded as the source of the unknown profile. The DNA report from the prior testing confirms that there is DNA extract remaining from the prior testing. The extract should be tested again using Y-STR testing or other modern techniques to try to get a more robust second profile from the gum.
12. Plastic Sheeting – The perpetrator wrapped the victim's body in plastic at the crime scene. The plastic has never been subjected to DNA analysis. Modern DNA techniques for contact DNA might yield the perpetrator's DNA profile from the plastic sheeting.
13. Partially Drunk Can of Beer – A partially drunk can of beer was found at the scene. It has never been subjected to DNA testing. Of course, testing might yield only the victim's DNA. However, it might also yield the perpetrator's profile. If a foreign profile from the beer can matches a foreign profile from several other items of evidence, that would be compelling evidence of Ms. Lobato's innocence.