IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN TURNER, Appellant, vs THE STATE OF NEVADA, Respondent,	Electronically Filed Jan 21 2020 02:31 p.m. Elizabeth A. Brown Clerk of Supreme Court Case No. 76465

ANSWER TO PETITION FOR REVIEW

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, JOHN NIMAN, and submits this Answer to Petition for Review in obedience to this Court's order filed January 7, 2020, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 21st day of January, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 01565

BY */s/ John Niman*
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney

ARGUMENT

"Supreme Court review is not a matter of right but of judicial discretion." NRAP 40B(a). Pursuant to that statute, the Supreme Court considers certain factors when determining whether to review a Court of Appeals decision, including, "(1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance." NRAP 40B(a). Appellants bear the burden of "succinctly stat[ing] the precise basis on which [they] seek[] review by the Supreme Court." NRAP 40B(d).

Appellant raises two claims in support of Supreme Court review. First, Appellant argues that the Court of Appeals ("COA") erred in affirming Appellant's convictions, alleging improper evidence under Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968). Petition for Review ("Petition") at 4. Second, Appellant argues that the COA incorrectly interpreted NRS 174.234(2)(a). Id. at 17.

I. APPELLANT FAILS TO MEET ANY OF THIS COURT'S USUAL GUIDELINES FOR CONSIDERATION

While the NRAP 40(B)(a) factors are "neither controlling nor fully measure[] the Supreme Court's discretion" in determining whether to review a COA decision, Appellant's claims fail to meet any of those usual guidelines for

consideration. Appellant merely asserts, but fails to argue how, this case presents an issue of statewide public importance. Petition at 3. The district court's decision, and the COA affirmance thereof, do not conflict with any Nevada Supreme Court or United States Supreme Court precedent; instead, they were a direct result of the COA's consideration of applicable cases. Furthermore, claims regarding sufficiency of expert notice are far from issues of first impression in either the Court of Appeals or this Court.

A review of Appellant's arguments demonstrates that Appellant simply disagrees with the COA's analysis of Appellant's claims. Rather than argue why his claims merit review, Appellant simply attempts to relitigate the same issues, under the guise of a petition for review.

Because Appellant fails to demonstrate that his Petition meets the usual guidelines for review by this Court, the State submits Appellant's Petition should be denied in its entirety.

II. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD IN AFFIRMING APPELLANT'S CONVICTION

Appellant first argues at length that the COA ruled in conflict with Bruton. Petition at 4-17. In so arguing, however, Appellant overlooks the correct standard of review for his appeal, and which properly formed the basis for the COA's decision.

Appellant seems to recognize that the proper standard for the COA's review was "plain error," however, Appellant goes on to argue that the COA conflicts with Nevada and United States Supreme Court cases that do not deal with plain error. See, Petition at 9.

Appellant relies on Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968) to argue that the COA erred in affirming Appellant's conviction because the district court erred in allowing Appellant's co-defendant's statement to be used against Appellant at trial. Petition at 9. However, the COA did not rely on the Bruton standard in reaching its conclusion. Affirmance at 4 ("During trial, Turner failed to object to the State's use of Hudson's statement. Consequently, *we review those matters only for plain error*." (Emphasis added)). Using that standard, the COA concluded that Appellant "did not suffer prejudice during his joint trial, and thus *no plain error occurred*." Id. at 5 (emphasis added). Furthermore, a review of the context of the COA's reference to Bruton reveals that it is only comparative dicta. While evaluating Appellant's several arguments, the COA opined, "[b]ecause the prosecutor never implied that Hudson specifically named Turner, *the argument did not violate Bruton*. Moreover, even if anything else in the prosecutor's statements could be construed as improper, *any error would be harmless*." Id. The COA went on to explain how one other argument failed to demonstrate prejudice against Appellant. Id. at 5-6. It is clear from the context that

the COA was merely opining that not only did Appellant's arguments fail to demonstrate plain error (the standard that was clearly applied), but that those arguments would have failed the more favorable Bruton standard, as well.

Appellant goes on to reference Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987), arguing, "the State violated both Bruton and Richardson when it asked the jury to consider Hudson's statement as evidence…" Petition at 10 (emphasis in original). However, the Richardson Court held "that the confrontation clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction, when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." 481 U.S. at 211, 107 S.Ct. at 1709. That Court "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." Id.

The Nevada Supreme Court clarified Richardson's holding. Lisle v. State, 113 Nev. 679, 693, 941 P.2d 459, 468 (1997) (citing Richardson, 481 U.S. at 211, 107 S.Ct. at 1709) (concluding that a redacted version of such a statement may be admitted). In Lisle, the Court upheld a conviction when the incriminating co-defendant testimony replaced Lisle's name with "the other guy." Id. at 692-93, 941 P.2d at 468. That Court concluded that the statements presented minimal prejudice,

if any, to Lisle, because of the overwhelming evidence against him. Id. at 693, 941 P.2d at 468.

Appellant also references Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998), arguing that the redactions in the instant case insufficiently protected Appellant's Confrontation Clause rights. Petition at 11. The Nevada Supreme Court has recognized the reasoning in Gray,[1] but also recognized a distinction between the that reasoning and the reasoning in Lisle, based on the type and quantity of evidence. Ducksworth v. State, 114 Nev. 951, 954-55, 966 P.2d 165, 166-67 (1998). The distinction, according to the Ducksworth Court, came down to whether the evidence was circumstantial and/or very convincing. Id. at 955, 966 P.2d at 167. In Ducksworth, the Court denied the State's petition for rehearing "because '[t]he evidence against [defendant] was largely circumstantial and was much less convincing' than that against [the co-defendant]" and therefore, was more like Gray than Lisle. Id. (citing Ducksworth v. State, 113 Nev. 780, 794, 942 P.2d 157, 166 (1997)). By the Nevada Supreme Court's own reasoning, there is a clear distinction between that case and Lisle. 114 Nev. at 955, 966 P.2d at 167.

[1] See, Ducksworth v. State, 114 Nev. 951, 954 n.1, 966 P.2d 165, 166 n.1 (1998) (recognizing the same conclusions in both Gray and Stevens v. State, 97 Nev. 443, 634 P.2d 662 (1981)).

Here, the COA acknowledged both Ducksworth and Lisle, recognizing the standard for challenges under Bruton. Affirmance at 4. The COA went on to determine that this case bore more similarities with Lisle, explaining:

> …there was [] considerable direct evidence of Turner's guilt. For example, Turner confessed to large portions of the crime, and suffered a gunshot wound that medical evidence connected to the shootout following the burglary. Thus, the State did not rely only, or even primarily, upon Hudson's statement to prove Turner's guilt.

Id. at 5. Therefore, because the Nevada Supreme Court has recognized a distinction between Lisle and Ducksworth, and because the COA determined that the instant case was more similar to one than the other, the COA did not contradict Nevada precedent.

Appellant further cites to foreign cases in support of his Bruton argument. See, Petition at 15-16 (citing Vasquez v. Wilson, 550 F.3d 270 (3d Cir. 2008) and Rueda-Denvers v. Baker, 359 F.Supp.3d 973 (D. Nev. 2019)). However, Appellant fails to allege or show that these foreign cases have been adopted or applied in Nevada.

Because the COA considered the applicable Nevada precedent for Appellant's claims, and applied the same in affirming Appellant's conviction, further review by this Court is unnecessary.

/ / /

/ / /

III. THE COURT OF APPEALS CORRECTLY INTERPRETED NRS 174.234(2)(a)

Appellant next claims that the State insufficiently noticed its firearms expert, Anya Lester ("Lester") under NRS 174.234(2)(a). Petition at 17. However, Appellant fails to account for the district court's limiting of Lester's testimony, and has failed to provide any case law suggesting that special disclosure is required in these circumstances.

NRS 174.234(2) requires that initial expert disclosures, including the "subject matter on which the expert is expected to testify," "the substance of the testimony," and the expert's CV and any of their reports, must be provided "not less than 21 days before trial." The standard of review on appeal for a district court's decision regarding expert testimony is abuse of discretion. Mulder v. State, 116 Nev. 1, 12–13, 992 P.2d 845, 852 (2000); see also Brown v. Capanna, 105 Nev. 665, 671, 7782 P.2d 1299, 1303 (1989).

In this case, the district court reviewed Lester's experience under Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008) and concluded that Lester was qualified to discuss stippling in a limited fashion. Appellant's Appendix, Volume IX ("9AA") at 1886. In its determination, the district court specified what would be allowable under Lester's disclosed expertise, but explained that it would not allow Lester to testify regarding any opinions that were not contained in Lester's expert report. Id. Upon voir dire of Lester outside the presence of the jury, the district

court found that stippling can be classified as a form of gunshot residue, and thus, is included in the types of training firearms experts – like Lester – receive. Id. at 1878, 1882, 1886, 1899-1900, 1903-06. In sum, the district court limited Lester's testimony to foundational testimony regarding what stippling is, and the general distances at which stippling can be seen. Id. at 1885-86, 1899-1900, 1903-06. A review of Lester's testimony before the jury demonstrates that her testimony was, indeed, thus limited. Id. at 1910.

The COA reviewed the district court's determination and concluded, "the district court did not abuse its discretion in allowing [Lester's] testimony because the decision was supported by substantial evidence." Affirmance at 7. The COA further determined that the expert notice was sufficient under NRS 174.234(2), "because stippling is a subcategory of firearms analysis and specifically relates to gunshot residue," therefore, "Lester's notice was sufficient to include testimony regarding stippling." Id. Because both the district court and the COA utilized the proper statutory analyses in ruling on Lester's stippling testimony, there was no abuse of discretion, and Appellant cannot demonstrate that Supreme Court review is necessary.

Appellant cites to a single case in support of his argument that Supreme Court review is necessary in this case. Petition at 19 (citing Perez v. State, 129 Nev. 850, 313 P.3d 862 (2013)). However, Perez is easily distinguishable from the

instant case. Additionally, Appellant's argument is belied by the record and, therefore, does not entitle Appellant to Supreme Court review.

The Perez Court treated a doctor's extensive opinion regarding "grooming" of child victims. 129 Nev. at 854, 313 P.3d at 865. The description of the doctor's testimony in Perez appears to include significant opinion and analysis of the facts of that case. There is no record in Perez that the district court limited the doctor's testimony in any way. In contrast, in the instant case, the district court expressly limited Lester's testimony. 9AA at 1886. Indeed, the district court explicitly precluded any opinion testimony. Id. Because Lester's testimony was significantly limited by the district court in this case, the State submits that the reasoning in Perez, regarding the doctor's extensive testimony, does not completely apply.[2]

Appellant argues that, pursuant to Perez, he alleged bad faith and prejudice resulting from insufficient notice of Lester's testimony. Id. However, at trial, when the State sought to clarify whether Appellant was arguing bad faith, Appellant's counsel repeatedly denied any allegations of bad faith. 9AA at 1888, 1890. Furthermore, the COA addressed Appellant's argument, concluding, "because neither the expert nor lay witness testimony was improper…any bad faith argument fails." Affirmance at 8, n.3.

[2] Appellant appears to rely on a dissenting opinion to further his argument. Petition at 19-20. As dissenting opinions bear no precedential value, the State has not specifically addressed this argument.

Because both the district court and the COA addressed the sufficiency of notice under NRS 174.234(2), the State respectfully submits that Supreme Court review of this argument is unnecessary.

CONCLUSION

Based upon the foregoing and the record before this Court, the State respectfully submits that Appellant's Petition for Review should be denied.

Dated this 21st day of January, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ John Niman*
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this answer to petition for review complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition is proportionately spaced, has a typeface of 14 points, contains 2,089 words and is 13 pages.

Dated this 21st day of January, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ John Niman*
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2750

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 21, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

DEBORAH L. WESTBROOK
Chief Deputy Public Defender

JOHN NIMAN
Deputy District Attorney

BY */s/ E. Davis*
Employee, District Attorney's Office

JN/Joshua Judd/ed