IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW YOUNG, Appellant, vs. STATE OF NEVADA, Respondent.	)	Case No. 83243

ANSWER TO PETITION FOR REVIEW

COMES NOW, Respondent, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JOHN AFSHAR, and submits this Answer to Petition for Review in obedience to this Court's Order Directing Answer to Petition for Review filed October 17, 2023, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 24th day of October,2023.

Respectfully submitted,

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

BY */s/ John Afshar*
JOHN AFSHAR
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ARGUMENT

I. PETITIONER'S COMPLAINTS DO NOT WARRANT REVIEW

Petitioner's complaints do not warrant review by this Court. A judgment of the Court of Appeals is a final decision that may not be examined by this Court except on a petition for review. NRAP 40(B)(a). "Supreme Court review is not a matter of right but of judicial discretion." NRAP 40(B)(a). Under that rule, 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).

Here, Petitioner's complaints do not warrant review by this court because this is not a matter of first impression, the Court of Appeals' decision does not conflict with a prior decision by the Court of Appeals or a higher court, and the Petition does not properly present any issues of statewide importance. Petitioner claims that review is warranted for "elaboration on when inferred juror bias starts and gives way to actionable relief." Petition for Review ("PFR") at 19. However, Petitioner's

claims were not presented below, nor adequately on appeal, and are not argued adequately here. Even on direct review, Petitioner's claims would not (and, in some instances, did not) warrant review. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3,6 (1987) (explaining that issues not adequately briefed by the Appellant with relevant authority and cogent argument need not be addressed by this court). This is particularly true here, where this Court's review is entirely discretionary. Petitioner has failed to demonstrate that review by this Court is warranted, and his Petition for Review should be denied.

II. PETITIONER FAILS TO ADEQUATELY ARGUE ANY ERROR BY THE COURT OF APPEALS

Petitioner fails to identify any controlling law which the Court of Appeals failed to consider or apply and fails to distinguish or otherwise refute any of the law the Court of Appeals cited in support of its decision. The only case which Petitioner even attempts to distinguish, Hernandez v. State, 118 Nev. 513, 50 P.3d 110 (2002), was, itself, distinguished by the Court of Appeals. Petitioner claims the Court of Appeals "cite[d] and rel[ied] on [Hernandez] to deny Young relief," but it did not. PFR at 19. Rather, the Court of Appeals noted that the State and the district court below relied on Hernandez, but that Hernandez, while factually similar, was "not controlling" because "Hernandez dealt solely with the issue of juror misconduct and possible prejudice resulting therefrom … as opposed to the failure to remove a biased juror." Young v. State, 139 Nev. Adv. Op. 20, 534 P.3d 158, 174 (Nev. App. 2023).

Aside from the factual and procedural background, Petitioner's brief consists almost entirely of block quotes and speculation with no legal analysis or cogent argument demonstrating the Court of Appeals erred. See PFR 19-26. Given Petitioner's failure to identify any error on the part of the Court of Appeals, this Court should not review the Court of Appeals reasoned opinion.

III. EVEN IF CONSIDERED, THE COURT OF APPEALS CORRECTLY DENIED THE CLAIM

The Court of Appeals reviews the denial of a motion for a mistrial for abuse of discretion. Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) (citing Smith v. State, 110 Nev. 1094, 1102-03, 881 P.2d 649, 654 (1994)). Likewise, the decision to retain or remove a juror is reviewed for abuse of discretion. See Blake v. State, 121 Nev. 779, 795-96, 121 P.3d 567, 578 (2005) (reviewing a for-cause challenge against a prospective juror for an abuse of discretion). Whether a juror is biased is determined by the district court acting within its discretion. Sayedzada v. State, 134 Nev. 283, 291, 419 P.3d 184, 192 (Ct. App. 2018). Traditionally, juror bias was either actual or implied. See United States v. Wood, 299 U.S. 123, 133 (1936). Actual bias, or bias in fact, is the existence of "a state of mind that prevents the juror from being impartial." Sayedzada, 134 Nev. at 289, 419 P.3d at 191 (citing United Slates v. Torres, 128 F.3d 38. 43-44 (2d Cir. 1997)). By contrast, implied bias, or presumed bias, is "bias conclusively presumed as matter of law," generally due to the juror's prior knowledge or relationship to the case or parties. Wood, 299

U.S. at 133. A third type of bias, inferable bias, is determined when a judge exercises "discretion to infer bias from the facts elicited during voir dire where those facts show an average person in the juror's situation would be unable to decide the matter objectively." Sayedzada at 291, 419 P.3d at 192. Importantly, inferable bias has only been found in limited circumstances, namely where the juror has engaged in activities similar to those activities at issue in the case being tried such that a reasonable person in the juror's position could not compartmentalize their past experiences to objectively judge the case. Id. This can occur, for example, when the juror was a victim of the same type of crime charged against the defendant. See, e.g., id. at 292, 419 P.3d at 193 (stating that bias could be inferred where prospective juror was the victim of the same type of crime charged and stated that these experiences made her "angry" and that she "could be biased" against the defendant).

In cases of actual bias, if the district court "sufficiently questions the juror and determines the juror can set aside any bias and be impartial, [appellate courts] will generally defer to the trial court's decision." Sanders v. Sears-Page, 131 Nev. 500, 508, 354 P.3d 201, 206. The district court has "broad discretion" to determine whether a juror's answers demonstrate actual bias and is in the best position to evaluate juror demeanor and credibility. Sayedzada, 134 Nev. at 290, 419 P.3d at 191; Patton v. Yount, 467 U.S. 1025, 1038 n.14 (1984) ("Demeanor plays a

fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying.").

At trial, Petitioner requested a mistrial when a juror sent the court a note asking whether, after the trial concluded, the juror could give $2,000 to the several victims of theft to help them with their losses. 6 AA 1039-1042, 1115-1130. Outside the presence of the rest of the jury, the district court questioned the juror as to his motivations for the request, and whether the juror had formed an opinion as to the guilt or innocence of Petitioner. 6 AA 1115-1130. The juror explained that his desire to give the victims money had "nothing to do with this case," and "nothing to do with [Petitioner.]" Id. at 1116. The juror did not discuss his request with any of the other jurors. Id. When questioned by Petitioner's counsel, the juror explained that he did not believe he would ever see the victims again, so he had sent a note to the judge, through the bailiff, asking if he could give them the money after they left. Id. at 1117-1119. The record reflects that, by that point in the trial, several videos had been shown to the jury of the victims' property being taken, and the only real question at issue was whether Petitioner was the person who took their things. Id. at 1120. The juror agreed with the district court's summary and explained that his desire had nothing to do with Petitioner, but rather with the fact that he often helped people who were struggling and that he wanted to help these people who were going through hard times through the loss of their money and documents during a

pandemic. Id. No less than six times the juror reiterated that his desire to help the victims had nothing to do with Petitioner and/or the case. Id. at 1115-1121. The juror was then excused for the parties to make their arguments. Id. at 1121.

Petitioner moved for a mistrial "based on various constitutional violations I could just cite to Fourth, the Fifth, the Sixth, the Eighth" without explanation or analysis of how those amendments were relevant. Id. Petitioner specifically requested a mistrial, and grudgingly agreed that perhaps removal could be a possible remedy while not requesting the juror be removed directly. Id. at 1121-1122. Petitioner only generally averred that the juror was biased, not that there was actual, inferred, or implied bias. Petitioner's argument was entirely based on the note the juror sent to the district court and the implications of that request.

The State explained that nothing the juror had said indicated that he could not be fair and impartial and, to the contrary, the juror had repeatedly explained that his request had nothing to do with Petitioner. Id. at 1122-1125. The district court explained that, by that point in the trial, it was plainly obvious that a crime had been committed because multiple videos and other evidence had shown as much, but that the only real dispute was whether Petitioner had committed the crimes. Id. at 1125-1130. The district court left the issue open for supplemental briefing if Petitioner wanted to research the issue and file something distinguishing Hernandez, but Petitioner never re-raised the issue or filed a supplemental brief. Id. at 1129-1130.

Accordingly, the district court, having personally questioned the juror and found credible his explanation and that his proposed gift was unrelated to the trial or Petitioner specifically, and that the juror was not biased, did not issue a mistrial.

On appeal, Petitioner's argument differed from that presented to the district court. Petitioner distinguished actual, implied, and inferred bias, and argued that the mere desire to provide a gift to the victims amounted to inferred bias. Appellant's Amended Opening Brief at 38-42.

The Court of Appeals, in denying the claim, held that the juror's statements were more akin to statements triggering actual bias rather than inferred bias. Young, 594 P.3d at 171-174. The Court of Appeals recognized that inferable bias was a term of art which had been recognized in only limited circumstances. Id. at 172-173. That is, "inferable bias" is not, as it might be considered colloquially, bias which can be inferred from a juror's statements, but rather is present "where the juror has engaged in activities similar to those activities at issue in the case being tried such that a reasonable person in the juror's position could not compartmentalize their past experiences to objectively judge the case." Id. at 172. Nothing in the juror's answers to the district court suggested that, and Petitioner never argued that, the juror's desire to help the victims stemmed from his having been placed in similar situations to the

victims in the past.[1] Rather, he desired to assist people who had clearly been the victims of crime (even if it were not yet then determined that Petitioner had *committed* those crimes) out of compassion and good will. Because the juror's statements did not suggest inferred bias, the Court of Appeals instead reviewed whether the district court erred in finding that there was not actual bias.

Actual bias "is the existence of 'a state of mind that prevents the juror from being impartial.'" Id. at 172. Though not using the term "actual bias" below (or distinguishing types of bias at all,) this was the thrust of Petitioner's argument below, and the type of bias the district court considered. Petitioner had argued that the mere offer alone suggested that the juror could not be impartial and questioned the juror about his impartiality. 6 AA 1115-1130. Actual bias is subject to rehabilitation. The Court of Appeals held that the district court had not abused its discretion in denying the request for a mistrial for at least two reasons.

First, the district court was in the best position to evaluate the juror's credibility and to determine whether the juror could remain fair and impartial. The district court's determination was supported by the record and the canvass, and the

[1] Briefly, Petitioner argues that some of the juror's voir dire answers suggest inferred bias. PFR at 24. The cited sections do not reflect that the juror was the subject of larcenies from his person, trial counsel did not move to excuse the juror because of these answers, and the argument was not made either before the district court or the Court of Appeals. It should not be considered now.

district court did not, therefore, abuse its discretion in finding the juror could be impartial. Young, 534 P.3d at 172.

Second, Petitioner failed to make any argument asserting actual bias on appeal, which was the basis for his objection below, and instead shifted his claim to inferred bias. Accordingly, Petitioner waived the claim. Id. Nor did Petitioner challenge the district court's canvass or determination that the juror was actually impartial. Id. Finally, the jurors were instructed that "[a] verdict may never be influenced by sympathy, prejudice or public opinion" and because jurors are presumed to follow their instructions it was presumed that the juror's verdict was not influenced by sympathy. Id.

Petitioner's request that this Court elaborate on "when inferred bias starts and gives way to actionable relief" reflects a fundamental misunderstanding of inferred and actual bias. PFR at 19. Actual bias does not *become* inferred bias, nor does a sufficient amount of inferred bias *become* actual bias – they are two separate types of bias. Actual bias may become "actionable" if the juror's statements suggest bias and the juror cannot be rehabilitated such that the district court is satisfied that the juror can be fair and impartial. Inferred bias, on the other hand, arises from a similarity between the juror's history and the crimes at issue in the trial in which the juror is sitting, and cannot be rehabilitated. That is, it is "actionable" when discovered. Rather than needing this Court to clarify these distinctions, the Court of

Appeals provided the very elaboration Petitioner now requests. The problem, as the Court of Appeals noted, is that nothing in juror's canvass suggested (and Petitioner did not argue before the district court) inferred bias, and Petitioner did not argue actual bias before the Court of Appeals or sufficiently challenge the district court's canvass or determination that the juror's answers rehabilitated him.

Petitioner's fundamental misunderstanding of the types of bias likewise refutes his claim that "the Court of Appeals appears to hold that if there is actual bias then that precludes a finding of inferred bias." PFR at 19. Nothing in the Court of Appeal's opinion suggests that. Actual bias is distinct from inferred bias and has different triggering mechanisms. Nor does the opinion preclude the possibility that a juror might have both inferred bias *and* actual bias if, for instance, a juror had been a victim of the same type of crimes for which they were potentially going to sit as a juror (giving rise to inferred bias) and stated during voir dire that they would have difficulty being fair and impartial for that reason or any other (implicating actual bias.) Actual and inferred bias are distinct, but not mutually exclusive, concepts.

The district court did not abuse its discretion in finding that there was not actual bias because the juror could remain fair and impartial, and the Court of Appeals did not err in recognizing that. This Court should not exercise its discretion to entertain the petition for review.

/ / /

CONCLUSION

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

Dated this 24th day of October, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer 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 complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points, contains 2,632 words and 207 lines of text.

Dated this 24th day of October, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 24, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Employee, District Attorney's Office

JA//ed