IN THE SUPREME COURT OF THE STATE OF NEVADA

LESEAN TARUS COLLINS, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 55716

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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LESEAN TARUS COLLINS,	)	NO. 55716
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes

Misc. Citations

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JURISDICTIONAL STATEMENT

A. Statute which grants jurisdiction to review the judgment: NRS 177.015.
B. Judgment of Conviction filed 03/04/10; Notice of Appeal filed 03/29/10.
C. This appeal is from a final judgment entered 03/04/10.

ISSUES PRESENTED FOR REVIEW

I. THE COURT VIOLATED COLLINS' FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL BY DENYING HIS MOTION TO CONTINUE TRIAL.

II. THE COURT VIOLATED **NRS 174.234(2)** AND DUE PROCESS BY ALLOWING ARSON INVESTIGATOR, JEFFREY LOMPREY, TO OFFER EXPERT TESTIMONY WITHOUT FIRST BEING NOTICED AS AN EXPERT WITNESS.

PROCEDURAL HISTORY

Appellant Lesean Collins (Collins) was charged by way of indictment with Count I: First Degree Arson, Count II: Burglary, and Count III: Malicious Injury to a Vehicle. (AA 53-54). He was arraigned in the Eighth Judicial District Court on May 6, 2009. (AA 215). Collins pled not guilty and waived his right to a trial within 60 days. *Id.* Calendar call was set for August 12, 2009 and a jury trial for August 17, 2009. *Id.*

Calendar call was heard by Judge Smith in Department 8. (AA 217). The defense announced "not ready" and moved for a continuance. (AA 249). The State did not oppose the defense motion. (AA250). Judge Smith granted the motion, setting calendar call for October 28, 2009 and trial for November 2, 2009. Judge Smith said, "This will be the second setting. We would be going forward on the next one. We do firm settings here." (AA 249).

On October 28th, 2009, the defense requested a second continuance. Attorney Jones informed Judge Smith that both she and her co-counsel were **currently in trial in another case.** (AA 257). She also said that she needed to conduct additional investigation and that she had been having difficulty getting information from Mr. Collins. *Id.*

Judge Smith **summarily** denied the continuance and sent the case to Judge Barker's overflow calendar in Department 18. (AA 257-258). The defense renewed the continuance motion in front of Judge Barker. Unlike Judge Smith, Judge Barker allowed defense counsel to explain the basis for the continuance in detail. (AA 263-264). However, Judge Barker did not decide the motion on its merits either. Instead, he explained that his function as overflow judge was primarily administrative and that he had to comply with Judge Smith's earlier ruling. (AA 265).

Though he felt obligated to deny the defense motion, Judge Barker recognized its merit and set the trial in Department 12 for **Wednesday, November 4, 2009,** in order to give the defense an extra two days of preparation. (AA 267). The State **agreed** to the Wednesday start date. (AA 266).

The parties appeared in front of Judge Leavitt in Department 12 on Monday, November 2, 2009. On that day, the State filed a Notice of Motion and Motion to

Conduct Videotaped Deposition of witness, Vivian Furlow. (AA 165-170).[1] The motion, which was filed in open court, indicated that Ms. Furlow was leaving for a "cruise to Mexico" later that night and would be out of the jurisdiction until November 12, 2009, a total of **10 days**. (AA 169, 271). The State had apparently learned Ms. Furlow was going out of town following the October 29th calendar call. The State did **not** confirm Furlow's availability before agreeing to the November 4th trial date. (AA 271).

Defense counsel objected to the motion because it was untimely, the State failed to file a motion for an order shortening time, and the defense was given no opportunity to file a response. (AA 276). The defense further noted that the court lacked the authority to "shorten time" to hear the motion with less than one judicial day of notice. *Id.* Attorney Jones also renewed her earlier continuance motion, informing the court that she was not prepared to cross-examine Vivian Furlow two days *earlier* than the date scheduled by Judge Barker. [2]

Judge Leavitt denied the defense motion because she incorrectly assumed that Judge Smith and Judge Barker had already analyzed the grounds for the defense continuance and denied the motion on its merits. *See* (AA 275, 290, 840). She offered no analysis as to whether the continuance was **necessary** to safeguard Collins' constitutional rights to effective assistance of counsel, to present a defense, or confront the witnesses against him.

Judge Leavitt further prejudiced Collins by granting the State's motion to conduct a videotaped deposition of Vivian Furlow, even though the motion was untimely, the

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[1] The State informed defense counsel of its intent to file the motion for video deposition Thursday afternoon (just prior to the "Nevada Day" holiday weekend). However, the defense did not receive the written motion until November 2nd, shortly before it was filed in open court.

[2] The defense also filed an offer of proof with the court following the motion argument. (AA 195-198).

defense was not prepared for cross-examination, and Judge Barker had specifically set a Wednesday start so the defense could have more time to prepare. The videotaped deposition of Vivian Furlow was conducted on November 2, 2009, just a few hours after the State filed its motion. (AA 268-327).

Trial commenced on November 4, 2009. (AA 328-809). Following the State's opening argument, Collins conceded Count III, Malicious Injury to a Vehicle. (AA 544-551). Trial concluded on November 6, 2009. The jury returned guilty verdicts on the two remaining charges, Count I: First Degree Arson, and Count II: Burglary. (AA 193-194). On February 18, 2010, Collins was sentenced pursuant to the habitual criminal statute to life in prison with the possibility of parole after 10 years. (AA 208-209). Notice of appeal was filed on March 25, 2010.

STATEMENT OF THE FACTS

In 2008, Lesean Collins, Shalana Eddins and their four children lived together at 1519 Laguna Palms, North Las Vegas, NV. (AA 557-558). Collins and Shalana had been together for over ten years. *Id.* Their relationship was "okay" in July of 2008, but by August, Shalana felt that "[t]hings had just changed." (AA 558). Collins had become "possessive" and "controlling." Shalana testified that she, "pretty much feared for [her] life." *Id.*

In mid-August, Shalana told Collins she wanted to end their relationship, but she wanted him to continue to "play his part as a father" to their children. (AA 559). Shalana was pregnant with the couple's fifth child at the time. (AA 576). Shalana said Collins "wasn't happy" with the situation because he wanted to keep the family together. *Id.*

Shalana no longer felt comfortable sleeping in the Laguna Palms residence, so she and the children began sleeping at a friend's house. (AA 559). However, Shalana kept most of the family's possessions in the Laguna Palms home and the children continued to

spend time with Collins at the house after school. (AA 560). Collins picked the children up from school most days and stayed with them at the house until Shalana returned from work. (AA 560, 593). Collins had a remote control which allowed him to enter the house through the garage door. (AA 560-561).

On September 29, 2008, Shalana decided to spend the night at the Laguna Palms residence because she wanted to "clean up the house and get laundry done." (AA 561). She unplugged the garage door opener so Collins would not be able to enter the house with his remote. *Id.*

Collins came over to the house later that night. He was angry when he discovered that Shalana had disabled the garage door. Collins called her on the phone and told her to let him in. He also banged on the front door. (AA 563). Shalana initially refused to let Collins inside, but she eventually relented. *Id.*

Collins entered the house and began looking around. (AA 564). He eventually located his son's backpack and removed a house key from it. *Id.* He then walked out the front door with Shalana following behind him. When she got outside, Shalana noticed that two of the tires on her Ford Expedition were flat. *Id.* Shalana became enraged and threw a rock at Collins' vehicle, smashing his window as he drove away. (AA 588-589).

The next day, September 30, 2008, Shalana dropped her children off at school and went to the courthouse to get a Temporary Protective Order.[3] (AA 567). Collins called Shalana several times that morning. During one of the calls, Collins left a voicemail message demanding that Shalana return his, "mother fucking shit."[4]

Collins showed up at Shalana's workplace later that day. At approximately 4:15 p.m., Shalana left her desk to go to the copy room. When she returned, her mobile phone

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[3] The defense requested a continuance in part to obtain and review a copy of the TPO narrative, but the motion was denied. (AA 196).

[4] Shalana speculated that when Collins said, "mother fucking shit," he was referring to a gun that he kept at the residence. However, Collins also had clothing, blankets and other possessions at the house as well. (AA 568-569).

was missing. (AA 570). She went to the parking lot to check her vehicle and found all four tires slashed. *Id.* She then went back to her office call her children. Shalana asked the kids whether Collins was at the Laguna Palms house with them. They said, "No; daddy left." *Id.* Shalana ordered the children to go to her neighbor, Darlene Heers' house. (AA 570-571).

Shalana called the police to report the tire slashing incident. She also called her father, Robert Eddins, to help her with the vehicle. (AA 572). At some point, Shalana reviewed an office security video that showed Collins rummaging through her desk and taking her phone. *Id.*[5]

The children arrived at Darlene Heers' house at approximately 5:00 p.m.. (AA 613-614). Ms. Heers testified that, "around 6:30-6:45 somewhere," one of the children saw Collins in a car that was parked outside of the Laguna Palms house. (AA 613, 617). Heers went outside to ask Collins "what he was doing there." (AA 618).

According to Heers, Collins said he was "waiting for his wife to get home from work." Heers asked, "How is she supposed to come home when you've slashed her tires at work?" Collins said it was "none of her business," that he had a gun, and that when his wife came home, he planned to kill her. (AA 619). Heers told Collins to, "get the hell outta there," and she returned to her house. (AA 619-620). Heers never saw Collins enter or exit the residence, nor did she see him with a gun. (AA 626, 628).

Heers watched Collins drive away. (AA 628). She then called 9-11 to report the incident. (AA 629). Heers testified that the house was not on fire when Collins drove away. (AA 630).

Vivian Furlow testified via pre-recorded deposition. According to Furlow, Shalana's father, Robert Eddins, called at approximately 6:40 p.m. to ask if she would pick up the children from Darlene Heers' house. (AA 311). It took Furlow about 15

[5] The defense was never given an opportunity to review the security video and the State did not produce it at trial. (AA 196).

minutes to drive Shalana's neighborhood. (AA 304). As she neared her destination, Furlow saw Collins driving away from Shalana's house. (AA 315). She also saw Ms. Heers standing outside her house talking on the telephone. (AA 305). The police had not yet arrived on the scene and Furlow saw no indication that Shalana's house was on fire. (AA 312).

Furlow said she was at Heers' house for "maybe 30, 40 minutes" before the police arrived. (AA 313). Furlow had planned to enter Shalana's house to gather some clothes for the children, but she could smell smoke. (AA 307). The police told her to wait while they checked the residence. (AA 308). The police informed Furlow that the door was warm, and that she could not enter the house. Shortly thereafter, Furlow could see smoke coming out of the house. *Id.*

Furlow attempted to call Collins on the phone at approximately 8:00 p.m., "after the fire department was there putting out the fire." (AA 316). Furlow did not know Collins' phone number personally; someone named, "Anitra" gave her the number.[6] Furlow dialed the number and, in place of a standard ring, she heard an audio "ringtone" on the line. (AA 310). The recording allegedly featured a man's voice singing the words, "If you can't take the heat, stay out of the kitchen or you'll burn like my baby's mama's house." *Id.* Furlow thought the voice sounded like Collins. (AA 309). The recording was not produced at trial.[7]

Officer Vital testified that he was dispatched to the Eddins residence at 6:52 p.m. (AA 665). He was sent to investigate Ms. Heers' 9-11 call; there had been no report of a house fire. *Id.* Officer Vital became aware of the fire at 7:05 p.m. (AA 667). He did not see Collins in the neighborhood or leaving the scene. (AA 668).

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[6] Collins wanted to locate and interview "Anitra," but he was not afforded sufficient time. (AA 196).

[7] Had their continuance been granted, defense counsel would have subpoenaed the phone records of Vivian Furlow, Shalana Eddins, Robert Eddins and Shalana's workplace. (AA 196).

Captain Jeffrey Lomprey of the City of North Las Vegas Arson Investigation Unit investigated the cause of the fire. (AA 668-669). He determined that the fire was intentionally set and that it had three separate points of origin. (AA 672-676). Captain Lomprey also participated in the arrest and interrogation of Collins on October 2, 2008. (AA 689). Collins admitted to slashing Shalana's tires as "revenge," but he did not admit to setting a fire. (AA 691).

Trisha Brewer testified that she was with Collins on September 30, 2008 when he received a phone call informing him Shalana's house was on fire. Brewer said Collins reacted with concern that his children might be in danger. (AA 710).

SUMMARY OF THE ARGUMENT

Lesean Collins was denied his right to present a defense, receive a fair trial, and adequately cross-examine the witnesses against him when the district court improperly and summarily denied his motion to continue trial. This abuse of discretion was compounded when the court granted the State's **NRS 174.175** motion to conduct a pre-trial video deposition of Vivian Furlow, despite the fact that 1) the motion was untimely under **EDCR 3.60**, 2) the State failed to file a motion for an order shortening time; 3) the defense was not allowed time to file a response to the motion; 4) Furlow's unavailability would only have necessitated a brief delay, and 5) the defense attorney informed the court that she was not ready to conduct the cross-examination.

Due process was also violated when the State was allowed to present the expert testimony of arson investigator, Jeffrey Lomprey, without first noticing him as an expert witness. Collins was further prejudiced when the Court refused his proposed expert witness instruction, which would have informed the jury how to properly weigh and consider the expert testimony. (AA 861)

ARGUMENT

I. THE COURT VIOLATED COLLINS' FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL BY DENYING HIS MOTION TO CONTINUE.

EDCR 7.30 provides that: "Any party may, for good cause, move the court for an order continuing the day set for trial of any case." While the decision whether to grant a continuance is generally within the sound discretion of the trial court, the erroneous denial of a continuance may violate a defendant's right to counsel, right to present a defense, and his right to due process of law. *See* U.S. Const. Amend V, VI, XIV; *see also*, United States v. Gallo, 763 F.2d 1504 (6th Cir. 1985); Bennett v. Scroggy, 793 F.2d 772 (6th Cir. 1986).

The Supreme Court has long recognized that the right to offer the testimony of witnesses and compel their attendance is constitutionally protected under both the Due Process Clause and the Sixth Amendment. In Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967), the Court determined that:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

This Honorable Court has held the denial of a motion for a reasonable continuance to be an abuse of discretion where, as here, "the purpose of the motion is to procure important witnesses and the delay is not the particular fault of counsel or the parties." Lord v. State, 107 Nev. 28, 42-43 (1991)(citations omitted). Furthermore, an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable

request for delay violates the right to the assistance of counsel." Morris v. Slappy 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616 (1983)(citations omitted).

In the instant case, defense counsel was forced to proceed to trial unprepared due primarily to one judge's "arbitrary insistence upon expeditiousness." This abuse of discretion compromised Collins' right to preset a defense, confront the witnesses against him, his right to due process, and indeed, his right to effective assistance of counsel.

A. Judge Smith's summary denial of the defense motion to continue was ill-considered, arbitrary, and capricious; Judge Smith's decision also made it impossible for Collins to get a fair hearing in subsequent departments.

"This will be the second setting. We would be going forward on the next one. We do firm settings here." (AA 249). Courts *should* strive to be expeditious, but not at the cost of justice, fairness and consideration.

On October 28th, 2009, defense attorneys, Tierra Jones and Abigail Perolise, requested a continuance. Ms. Jones informed Judge Smith that both she and her co-counsel were **currently in trial in another case.** (AA 257). She also stated that she needed to conduct additional investigation and that she had been having difficulty getting information from Mr. Collins. *Id.*

Judge Smith **summarily denied** the continuance motion. He did not address the fact that both defense attorneys were currently *in trial* and that, as a result, they had been unable to prepare Mr. Collins' case. (AA 257). He made no specific inquiries regarding defense counsel's need for further investigation. As for Ms. Jones's difficulty communicating with Mr. Collins, Judge Smith responded, "That's his problem not yours. If he's not going to cooperate, then you get to try the case from the police report." (AA 257).

It was clear that Judge Smith did not consider the 5th, 6th or 14th Amendment implications of denying the defense continuance. He pushed the case forward based on

nothing more than his general policy that second trial settings in his department are "firm settings." (AA 249). This is exactly the type of "unreasoning and arbitrary insistence upon expeditiousness" that the Supreme Court envisioned in Morris, *supra*, 461 U.S. at 11-12.

Given defense counsels' representations,[8] there was no justifiable reason to push the case forward, not even "judicial economy." Judge Smith did not even have room to try the case on his own calendar. Instead, he shuffled Collins off to Judge Barker's overflow calendar to have the case reassigned. (AA 257-258).

The defense renewed the continuance motion in front of Judge Barker. Unlike Judge Smith, Judge Barker allowed defense counsel to explain their request in greater detail. (AA 263-264). Attorney Jones said that her investigator was working with Collins to obtain contact information for his witnesses. (AA 263-264). She explained the logistical impossibility of preparing to try the Collins case while she had been engaged in another trial all week. Ms. Jones had been unable to even *communicate* with her client all week, a possible violation not only of his Sixth Amendment rights, but her own obligations under ADKT 4-11.[9] (AA 264).

Unfortunately, Judge Barker did **not** decide the motion on its **merits** either. Instead, he noted that his hands were tied by Judge Smith's earlier decision:

> It's a firm set; Judge Smith has already made some decisions on this. My—you know, I'm basically a resources – my job is to allocate resources, and so I'm gonna support Judge Smith's decision that the case is trial-ready, even though the minutes reflect, again, defense motion to continue.

(AA 265).

Judge Smith's summary denial of the defense continuance caused Judge Barker to act in kind. Despite his own ruling, however; Judge Barker recognized that the defense had demonstrated a legitimate necessity for the continuance and that the defendant,

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[8] Representations which the judge cut off prematurely.
[9] *See* ADKT 4-11, Standard 4, 7, 10.

"should have an opportunity to prepare [his] defense." (AA 265). He therefore set the trial for **Wednesday**, November 4, 2009 in order to give the defense two extra days to prepare. (AA 267). The case was transferred to Department 12.

The two additional days granted by Judge Barker were effectively removed by Judge Leavitt when the parties appeared in Department 12 on Monday, November 2nd. After **agreeing** to the Wednesday start in front of Judge Barker, the State learned that one of its percipient witnesses, Vivian Furlow, was going on vacation and would be unavailable for the Wednesday trial date. (AA 169, 271). Ms. Furlow was scheduled to return in just 10 days, so the *reasonable* decision would have been to grant a short continuance. However, neither the State, nor the court, was interested in being reasonable.

The State filed a motion to conduct a video deposition of Ms. Furlow in open court. Though the State informed opposing counsel of its plans to file the motion a few hours after calendar call, the defense did not receive a copy of the actual motion until Monday morning, and was given no opportunity to review the motion and file a response. The motion called for the deposition to take place that same afternoon, giving the defense just a few short *hours* to prepare a cross-examination. (AA 165-170).

The defense objected to the timing of the motion and pointed out that the State failed to request an order shortening time. (AA 276). Furthermore, even if they had, **EDCR 3.60** states that, "In no event may the notice of the hearing of a motion be shortened to less than one full judicial day."

Collins' attorneys also repeated their motion for a continuance. They noted that, in order to make a complete record, they would have to discuss trial strategy. Judge Leavitt agreed to hold a brief hearing outside the State's presence. (AA 847-860).

During the hearing, Ms. Jones said that she was unprepared to conduct the cross-examination of Vivian Furlow later that day because she first needed to complete her

investigation and speak to some of Mr. Collins' witnesses. (AA 848). Ms. Jones assumed (correctly) that Furlow would testify that she called Collins on the night of the fire, and that she would make representations concerning what she heard on the phone. (AA 849). Ms. Jones intended to rebut Furlow's claims by subpoenaing phone company records, but she could not complete that task in time for this trial setting. *Id.*

The defense motion was again denied, in part because Judge Leavitt assumed Judge Smith and Judge Barker had already analyzed and rejected the motion on its **merits**. *See* (AA 275, 290).[10] Judge Leavitt failed to analyze whether the continuance was **necessary** to safeguard Collins' constitutional rights, instead choosing to focus on who was to *blame* for the continuance. *See, e.g.*, (AA 851-852).

After denying the defense motion, Judge Leavitt granted the State's motion to conduct the videotaped deposition of Vivian Furlow. She ruled that the State was not required to file an order shortening time and wholly ignored defense counsel's other objections. Defense counsel filed an even more detailed offer of proof following the hearing, but there is no indication the court even read it. (AA 195-198).

B. Collins was greatly prejudiced by the court's decision to deny his continuance motion.

The case against Lesean Collins was entirely circumstantial. The State was able to establish that Collins was in the vicinity of the house before the fire, and that he was angry at Shalana Eddins (and she at him). However, the State provided no direct evidence that Collins entered the residence and started the fire. Even the State's expert,

[10] Judge Leavitt revisited the grounds for her decision to deny the defense continuance during a post-trial hearing on June 2, 2011. Judge Leavitt said she denied the continuance because, "[Y]ou don't get a motion to continue after you've been sent to overflow and **told two different judges you're ready to go**." (AA 840)(emphasis added). Judge Leavitt's inaccurate statement calls into question her entire understanding of the defendant's motion argument.

Captain Lomprey, admitted there was "no forensic evidence" tying Collins to the fire. (AA 697).

Had the continuance been granted, Collins would have presented a far more compelling case to the jury. Ms. Jones and Ms. Parolise would have used the extra time to develop additional witnesses and do a more effective job of preparing for current witnesses. For example, Collins suffered significant prejudice when defense witness, Trisha Brewer, testified that she met Collins, "the day he got out," an inadvertent reference to Collins' prior incarceration. (AA 712). Even the court agreed that the statement unquestionably "infer[ed] a prior criminal history." (AA 722). The court decided the mistake did not warrant a mistrial, but it was egregious enough that Judge Leavitt "wanted to reach over and smack her..." (AA 721-722). This is *exactly* the kind of mistake that gets made when attorneys are not provided sufficient time to prepare.

In their joint declaration, Ms. Jones and Ms. Parolise indicated they would have subpoenaed the phone records of Vivian Furlow, Robert Eddins, Shalana Eddins and her place of business. They identified at least four different witnesses they would have interviewed and potentially produced at trial. They also would have obtained the security video the State failed to produce, obtained details about Shalana Eddins recent criminal history, and secured a copy of the TPO Shalana mentioned during her testimony. (AA 196, 567). They simply ran out of time.

Defense counsel demonstrated a profound necessity for a continuance. Their motion was denied by Judge Smith with no analysis, in the most summary fashion possible. This initial abuse of discretion made it impossible for Collins to receive fair consideration from either Judge Barker or Judge Leavitt, an unfortunate circumstance that ultimately deprived him of a fair trial and the right to present a defense.

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II. THE COURT VIOLATED NRS 174.234(2) AND DUE PROCESS BY ALLOWING ARSON INVESTIGATOR, JEFFREY LOMPREY, TO OFFER EXPERT TESTIMONY WITHOUT FIRST BEING NOTICED AS AN EXPERT WITNESS.

The State failed to file a Notice of Expert Witness for Arson Investigator, Captain Jeffrey Lomprey, as required by **NRS 174.234(2).** When defense counsel pointed out this failure and objected to Lomprey's testimony at trial, the prosecutor assured the court, "I'm not going to ask him any opinion type questions." (AA 522). The prosecutor followed up this promise by doing *exactly the opposite*.

The State elicited Captain Lomprey's expert opinions regarding 1) the cause of the fire; 2) the locations where the fire originated in the house; 3) the proper scientific methodology employed when investigating the scene of a fire; and 4) the ultimate question of whether the fire was started accidentally or intentionally. (AA 669-697).

NRS 174.234 is neither complicated nor equivocal; Collins had the **right** to expect the district attorney to honor it and the district court to enforce it. The court's decision to allow Captain Lomprey's expert testimony in spite of the lack of notice violated Due Process and prejudiced Collins' Sixth Amendment right to confront the witness against him.

A. Captain Lomprey was an "expert" in every rational sense of the word.

Pursuant to **NRS 50.275**:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

At trial, the State argued that Lomprey was *not* an expert witness because he was not offering "opinion" evidence. Nothing could be further from the truth. Captain

Lomprey's **sole purpose** was to give opinion testimony based on his "special knowledge, skill, experience, training and education." That is his **job**.

Captain Lomprey is a graduate of the United States Fire Academy. (AA 670). He received special certifications through both the International Association of Arson Investigators and the National Association of Fire Investigators. *Id.* And, to top it off, he's also certified explosives investigator too. *Id.* For a non-expert witness, the State sure spent a lot of time establishing his expertise.

Captain Lomprey's job is, in his words, "finding out how the fire started and why." (AA 669). He conducts "origin and cause investigations." *Id.* In doing so, he employs special training and precise, scientific methodologies. At trial, Lomprey explained that he investigates fires from the outside to the inside, from the areas with the least damage to those with the most damage. (AA 673). Then, after explaining his qualifications and his methodology, Lomprey started listing his "expert" opinions.

Lomprey concluded that, in his opinion, there were three separate and distinct points of origins to this fire. Lomprey noticed one "area of origin" on the living room couch. (AA 674). He based this opinion on the following data: "One of the cushions was sliced and it had what we call trailers, which means, it was a paper product that was twisted up to give the effect that something would burn along that edge, and the edge of one of the couches that was cut open, was charred." (AA 675). Lomprey found a second area of origin on the bed in the master bedroom, and a third in the closet. *Id.*

Despite having assured the court he was "not going to ask him any type of expert questions," the prosecutor posed general questions about the science and behavior of fire. For example:

> D.A. Tomsheck: Is it fair to say that a fire doesn't start in one area of origin and jump to another?
>
> Captain Lomprey: That—no, that does not happen.

(AA 676).

After thoroughly explaining his training, education, and scientific method, Lomprey did what *every* expert does: he offered the **conclusion** of his analysis. In Captain Lomprey's **opinion**, this was, "Incendiary fire... caused by an open flame set with human hand with the **intent** to destroy property and/or people." (AA 684)(emphasis added).

The State attempted to excuse its failure to obey **NRS 174.234 (2)** by analogizing Captain Lomprey with a typical, police Crime Scene Analyst (CSA). The State's argument was, in essence, "we don't have to provide expert notice for our CSA's, so why should we notice an arson investigator?" (AA 519). This argument is flawed for two reasons. First, CSA's are *not* exempt from the expert notice requirement, especially in cases where they use some scientific process to uncover actual evidence.[11] DNA analysts, fingerprint analysts, blood spatter analysts —all of these crime scene specialists are noticed as expert witnesses.

Second, the State's analogy is flawed. Captain Lomprey is not like a "typical" CSA, snapping pictures and impounding evidence. He is more akin to a Medical Examiner who uses a strict, scientific method to dissect a body and determine the cause of death. In Captain Lomprey's case, the "body" is a building and "cause of death," becomes "cause of fire."

Again, Lomprey's whole job is "finding out how the fire started and why." (AA 669). There is no question that he was an expert witness offering expert testimony. He should have been noticed as such.

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[11] Granted, the State does enjoy slipping "surprise" expert testimony into a trial by having police repeat the time-honored phrase, "in my training and experience," but this tactic is an **abuse** of due process, not a legitimate, legal justification.

B. The Court lacked the authority to admit Captain Lomprey as an undisclosed expert witness because the State's failure to notice him constituted bad faith. Thus, the court's decision to admit his expert testimony violated NRS 174.234(3) and the due process clauses of Fifth and Fourteenth Amendments.

"[U]nder **NRS 174.234(2)**, written notice of expert witnesses must be filed and served upon the opposition at least twenty-one days before trial... the remedy for a violation of the discovery provisions of **NRS 174.234** is that the district court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." Sampson v. State, 121 Nev. 820, 827, (2005)(internal citations omitted).

In Mitchell v. State, this Court discussed a basic framework for evaluating a court's decision to admit the testimony of an undisclosed expert. The Mitchell case is dissimilar to the instant case because Mitchell's attorneys failed to object to the undisclosed experts. *See* Mitchell, 192 P.3d 721, 729 (2008). Here, defense counsel objected and made a long record. (AA 516-517).

The Supreme Court generally reviews a district court's decision whether to allow an unendorsed witness to testify for abuse of discretion. *Id.* However, the court's discretion is removed if the prosecution acted in **bad faith**. *See* **NRS 174.234(3)(b)**. In that situation, "the district court **must not** allow the expert witness to testify and **must** also bar the prosecution from introducing any evidence that the expert would have produced." Mitchell, *supra*, 192 P.3d at 729 (2008)(*citing* **NRS 174.234(3)(b)**(emphasis added)).

This is a case of bad faith. During the argument on Collins' objection, the prosecutor provided a proffer that was factually accurate, but substantively misleading. The prosecutor informed the court that Lomprey would testify about, "the origin of the fire... [t]he methods he goes through in order to find the origin... and ultimately what his

conclusion is." (AA 516). However, the prosecutor crossed the line when he argued that **none** of this proposed testimony called for an expert opinion:

> **Make no mistake about it, he's not testifying as an expert. I'm not going to ask him any opinion type questions.**

(AA 522)(emphasis added).

Well, there must have been some kind of mistake, because the ensuing direct examination was *loaded* with questions expressly calling for an expert opinion.

No lay-witness could competently testify about a fire's "intensity patterns" or identify "areas of origin." (AA 674). A lay witness would *certainly* have been unable to render an opinion as to causation and intent. That is why the prosecutor spent nearly two pages of the transcript discussing Lomprey's expert qualifications. (AA 670-671). This allowed Lomprey to credibly testify that the fire was incendiary, set with an open flame by a "human hand," and kindled with the "intent to destroy property and/or people." (AA 684). These were *exactly* the responses the State's direct examination was designed to elicit.

The prosecutor knew full well what he intended to ask Captain Lomprey and he knew exactly how Lomprey would respond. *See* (AA 516). And yet, he was willing to stand up in court and claim, "[H]e's not testifying as an expert. I'm not going to ask him any opinion type questions." (AA 522). This seems like a situation where the prosecutor made an argument, not because it was correct, but because he felt he could get away with it. That is the definition of bad faith.

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D. Having admitted the expert testimony of Jeffrey Lomprey, the court's decision to deny Collins' proposed "expert witness" jury instruction was an abuse of discretion requiring reversal.

Defense attorneys often find themselves attempting to take legal lemons and make lemonade.[12] Having lost the argument concerning the admissibility of Captain Lomprey's "expert" testimony, the defense submitted the following jury instruction:

> A person who has special knowledge, skill, experience, training, or education in a particular science, profession or occupation may give his or her opinion as an expert as to any matter in which he or she is skilled. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. **You are not bound by such opinion**. Give it the weight, **if any**, to which you deem it entitled.

(A 861)(Emphasis added).

The purpose of this instruction was to inform the jury that the words of Captain Lomprey were *opinion*, and not objective and unassailable fact. The message is extremely important, since Lomprey was permitted to opine on one of the ultimate issues in the case, the subjective **intent** of the person responsible for the fire. (AA 684).

The prosecutor objected to the instruction because, in his opinion, Lomprey "did not testify about anything an expert witness would. He wasn't asked **opinion** questions. He wasn't asked to draw any **conclusions**. He was simply asked what his background is, what his training is, and what he did in this case." (AA 742)(emphasis added). Again, if the prosecutor's sincerity is to be believed, one must also believe all of the following:

1) The testimony: "Incendiary fire... caused by an open flame set with human hand with the **intent** to destroy property and/or people," was neither a conclusion, nor an opinion. (AA 684).

[12] Sometimes the lemons are actually rocks that were painted yellow. Other times, the rocks are not even painted.

2) Determining the "origin and cause" of a fire does not require expertise.

3) The question, "were you able to find one of those areas of origin?" does not call for an opinion. (AA 674).

4) The testimony: "you can clearly see where the heat plume had come up and it rolled off, and that is what it does. It's buoyant so it's going to go up," is not an expert opinion. (AA 675).

5) The question: "Is it fair to say that a fire doesn't start in one area of origin and jump to another?" does not call for a general opinion about the behavior of fire. (AA 676).

6) The discussion of terms-of-art like, "intensity patterns" and "trailers" requires no expertise. (AA 674, 675, 678).

7) Identifying an area of origin by locating the V-shaped "char" pattern on the ceiling does not require expertise, and asking a witness what the char pattern means is not soliciting an opinion. (AA 679).

8) The question, "On the walls of the hallway, it appears as if there's a dark object around the doorway. What are we looking at?" does not call for an opinion or a conclusion. (AA 682).

9) Identifying the "line of demarcation" caused by the heat of a fire as it rolls in and out of an area requires no expertise. (AA 682).

At the request of the prosecutor, Captain Lomprey detailed his entire procedure for developing a conclusion by eliminating potential causes of fire. But we are told to believe that Lomprey was *not* testifying as an **expert**, and the prosecutor was *not* asking for an **opinion**. (AA 683-684). And somehow, this Jedi mind-trick *worked*. The district court denied Collins' proffered instruction solely on the basis of the State's objection. (AA 742-743).

While, the district court has broad discretion to settle jury instructions, an abuse of discretion occurs when the district court's decision is arbitrary or capricious or if it

exceeds the bounds of law or reason. *See* **Crawford v. State**, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005); **Jackson v. State**, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). "Because the District Attorney asked," is not a valid reason to deny a defense instruction. The court's abuse of discretion warrants reversal.

CONCLUSION

For the foregoing reasons, Collins requests that his convictions be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 1st day of August, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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