IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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APPELLANT'S REPLY BRIEF AND MOTION TO SUPPLEMENT THE RECORD

ARGUMENT

I. RESPONDENT'S ANSWERING BRIEF IS REPLETE WITH FACTUAL ERRORS AND DEMONSTRATES A COMPLETE MISAPPREHENSION OF THE LEGAL ISSUES IN THIS CASE, THE DUTIES OF A CRIMINAL DEFENSE ATTORNEY, AND REQUIREMENTS OF THE UNITED STATES CONSTITUTION

In his Opening Brief, Collins argued that the District Court violated his Fifth, Sixth and Fourteenth Amendment rights by denying his motion to continue trial. In response, the State argued that Collins and his attorneys had plenty of time to prepare, the case was simple, there were no complicated legal issues, and that "the record unquestionably demonstrates" that Collins was personally responsible for his attorneys being unprepared for trial. *See* Respondent's Answering Brief (RAB) at 18.

In its response, the State completely fails to address several key issues, including the most important of all: was the defense sufficiently prepared for trial? Whether or not the defense attorneys "should" have been prepared is a side-issue at best; the fact is, they were not prepared, and the district court simply did not care.

A. The State's claim that defense counsel "frittered away eight months" is inaccurate and insulting.

Had the State demonstrated even a *passing* concern for the Sixth Amendment and Due Process, this case would have been continued and this issue would not exist on appeal. However, the State was far more interested in pressuring the court to trial so the arson conviction could be used in Collins' still-pending murder trial. And now, the State has mischaracterized the record in an attempt to distract the real issues in this case.

Defense counsel certainly did not "fritter away eight months." RAB at 21. First, let's examine the State's math. The State's "eight month" figure was calculated as the time between the **October 28, 2009** calendar call and the date the "grand jury proceeding commenced in this case," **February 24, 2009**. RAB at 16. So, the State believes that Collins' defense attorneys should have started preparing for trial the day the grand jury "commenced," *before* and indictment was handed down. Of course, the State fails to explain how this would have been *possible*,

given that defense attorneys are not allowed to participate in grand jury proceedings and Nostradamus is not employed at the Public Defender's Office.

The Grand Jury transcript was not filed until **April 16, 2009** and Collins was not arraigned in district court until **May 6, 2009**. (AA 215). Thus, the "eight month" figure the State uses throughout its brief is nonsense.

Now let us examine what the State has termed, "frittering." According to court minutes and records on file, the defense took the following actions prior to the October 28, 2009 calendar call:

5/12/09	Defense files Petition for Writ of Habeas Corpus challenging the indictment. (AA 62-122). • Oral argument is scheduled for **6/1/09**. • The State files its Return on **5/29/09**, and oral argument is moved to **6/10/09**. (AA 238-244).
6/10/09	Hearing on Writ of Habeas Corpus; Collins' Writ is denied.
7/8/09	Defense files a Motion to Compel Disclosure of Exculpatory Evidence. (AA 141-149).
7/22/09	Hearing on defense Motion to Compel; motion granted. (AA 216).
9/4/09	Defense files Motion to Preclude Testimony of Minor Child.
9/16/09	Hearing on Motion to Preclude Testimony of Minor Child; motion denied. (AA 217).

This is what the District Attorney refers to as "frittering." Of course, this record only reflects motions and hearings; it does not reflect the hours of legal research, investigation, client interviews and other preparation performed behind the scenes. More importantly, the minutes also fail to reflect the massive caseload

carried by every track attorney at the Clark County Public Defender's Office. Since the issuance of **ADKT 411**, public defender *salaries* have been cut, but the caseloads have not.

The State neither knows, nor cares, what it takes to competently defend a criminal case. This lack of understanding is evidenced by comments like, "there were only 15 pages of discovery" and "[the case] did not deal with overly complex legal issues." RAB at 11, 17. To a prosecutor 15 pages of police reports might be the entire universe of the case, but it is the job of a competent defense attorney to go *outside* the police packet and investigate the facts and legal issues the State left out. This is not a moot court competition; professional defense attorneys do not deal in "closed universes."

Furthermore, while the case did not appear from the prosecutor's perspective to have any "complex legal issues," from Mr. Collins' perspective there were many. The most complex of these issues was Mr. Collins' **pending murder charge**. In order to competently defend Collins in the instant case, his attorneys had to consult frequently with lawyers from the Special Public Defender's Office, lest an action taken in the instant case prejudice the murder case.

The murder case impacted every major decision made in this case; including Mr. Collins' ultimate decision not to take the stand in his own defense. The

pending murder case complicated the instant appeal as well, forcing several continuances and a separate district court motion. *See, e.g.,* (AA 840). The State's opinion as to the "simplicity" of this case is naïve, self-serving and has no basis in reality.

Finally, in its attempt to place blame on defense counsel and Mr. Collins[1], the State has missed the most important point: Collins was not allowed to present his theory of the case because defense counsel was not ready. Mr. Collins' attorneys made every effort to adequately prepare for this trial. When their efforts failed, they informed the court that they would be "ineffective" if forced to proceed to trial. **The court did not analyze this claim**. All efforts went to assigning *blame*, rather than considering the undeniable fact that the defense could not competently proceed. This key issue was never fairly considered by the district courts, and it was certainly not addressed by the State on appeal.

Given defense counsel's detailed proffer, the district court's decision to deny a continuance requires reversal.

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[1] Whether or not Collins was fully cooperating with his attorneys, there are numerous items listed in defense counsel's "offer of proof" that were completely out of Lesean Collins' control. *See* (AA 195-198). There is a limit to how much assistance an under-educated, indigent defendant can offer from inside the Clark County Detention Center, and a "sunny disposition" is not a pre-requisite for due process.

B. The decision to allow the video deposition of Vivian Furlow was an error that effectively reversed an earlier judge's ruling and robbed Collins of his rights of confrontation and cross-examination.

The State clearly failed to communicate with its witness, Vivian Furlow, before announcing "ready" in this case. This failure of due diligence ultimately prejudiced Collins' rights of confrontation and cross-examination.

The State concedes that Judge Barker 1) credited defense counsels' claim that they were not ready for trial on November 2nd, and 2) pushed the start-date back two days as a necessary **accommodation**. *See* RAB at 10, 19. However, when the State moved to take Vivian Furlow's deposition on November 2nd and present it in lieu of live testimony, Judge Leavitt effectively *reversed* Judge Barker's ruling without even referencing his factual finding. This action directly violated the procedural rules of **NRS 174.175** and **EDCR 3.60**.

The State argues on appeal that, "Ms. Furlow had detrimentally relied upon the previous subpoena that was sent to her, and made vacation plans around the November 2, 2009 trial date." *Id.* at 19. Thus, it is somehow the *defendant's* fault that the video deposition was necessary. There are several problems with this argument.

First, it seems extremely unlikely that the State's subpoena secured Ms. Furlow for **just one day**. Trial schedules are necessarily fluid, as anyone who has ever done a trial knows. One cannot always predict what will happen or how long

it will take. Thus, the typical subpoena lists a period of *several days* during which the subject witness may be called to testify.

Mr. Collins does not appear to have a copy of the State's subpoena of Vivian Furlow, and therefore requests permission to file a supplement to the record once the subpoena is obtained. Obviously, if the subpoena required Ms. Furlow to be present for several days (as most subpoenas do), then the State's argument is patently false. This request is made in direct response to the State's Answering Brief. *See* RAB at 19.

Second, even if the subpoena lists November 2nd as the *only* day Ms. Furlow would be required to attend court, it was still irresponsible for the State to announce "ready" without properly vetting its own witness. After all, as the State pointed out, there were only a "handful of witnesses" to contact. RAB at 17. The State should have known that one of their "key witnesses" was taking a 10-day, out-of-state vacation on the first scheduled day of trial.

Finally, there was absolutely no *necessity* to push this trial forward at the expense of Mr. Collins' rights of confrontation and cross examination, especially given 1) Judge Barker's earlier ruling; 2) defense counsel's motion to continue and detailed proffer, and 3) the fact that the Motion for Video Deposition did not comply with **NRS 174.175** and **EDCR 3.60**. The State failed to cite to a **single legal authority** that would permit the suspension of these rules. This was an

untimely motion; the court should not even have *considered* it, much less granted it.

The court had a reasonable option here. Vivian Furlow was set to return in just 10 days. A two-week continuance would likely have eliminated this entire issue. Instead, the court bowed to the State's unreasonable demands. This decision violated the aforementioned statutes and prejudiced Collins' 5th, 6th and 14th Amendment rights.[2]

C. The State failed to cite to any applicable law that would justify the court's decision to disregard NRS 174.234 and allow Arson Investigator Jeffrey Lomprey to offer expert testimony.

Arson investigators are not lay-witnesses. Anyone can say, "I went to the house and it was all black and charred, so I concluded there was a fire." That is *not* what Jeffrey Lomprey did; it is not what any "arson investigator" does. Jeffrey Lomprey made observations and then used his specialized education and training

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[2] The State also claims that Collins was not "prejudiced" by the court's ruling and that he "fail[ed] to devote a single word to explain what would have been discovered on those phone records." RAB at 20. Collins disagrees with this contention and incorporates, by reference, the arguments made in his Opening Brief. Additionally, it is disingenuous for the State to decry a lack of hard evidence when the defense was **denied permission** to conduct its investigation on the **State's motion**. The defense believed that the phone records would have directly refuted Vivian Furlow's testimony about the call she allegedly made to Collins' phone. Unfortunately, the records were never obtained because the court denied the continuance. The relevant issue on appeal is that Collins was wrongfully precluded from fully investigating his case, cross-examining the witnesses against him, providing his own witnesses, and preparing his theory of defense. That is prejudice in and of itself. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 316-17 (1974).

to draw **factual, scientific, and *legal* conclusions**. Lomprey testified to the ultimate issue in the case: whether this fire was *arson*.

The State was unable to produce a case where an arson investigator was labeled a non-expert because the entire notion is illogical and absurd. Arson investigators have always been considered "experts." It is not even a question; it is common parlance:

> **Experts** retained by the state opined that the fire was **caused by arson** with the use of an **accelerant** such as a flammable liquid. The experts' **opinions** were based on the **burn patterns** in the mobile home, the definite **demarcation** between burned and unburned material, the unusual burning of the floor boards, and the **travel and spread of the fire**. The burn patterns within the mobile home also suggested that the fire had **three points of origin**.

Sheriff v. Warner, 112 Nev. 1234, 1237 (1996)(emphasis added).[3]

Arson investigators have always been classified as "experts." One *must* be an expert to *opine* after the fact about whether a fire was intentionally set, whether an accelerant was used, burn patterns, lines of demarcation, points of origin, and the travel and spread of a fire. It was true in Sheriff v. Warner, and it is true here. Arson Investigator Jeffrey Lomprey was an expert witness; he should have been properly noticed pursuant to **NRS 174.234(2).**

[3] Fire investigators are also referred to as "experts" in the Ninth Circuit case of U.S. v. Candoli, 870 F.2d 496 (9th Cir. 1989).

The State cannot be permitted to violate statutes whenever it is convenient—and again, this was not a case of necessity, it was purely a case of **convenience**. The proper remedy here would have been giving the defense the brief continuance it so desperately needed. A continuance would have given the defense time to prepare and the State time to comply with **NRS 174.234**. It also would have allowed the State to present the testimony of Vivian Furlow *without* violating **NRS 174.175**, **EDCR 3.60** and the Sixth Amendment.

But the State did not *want* to be reasonable. The prosecutors had an agenda, and they felt that agenda was best served by ignoring the statutes, violating due process, and pressuring the court to move forward. This was the State's choice, and now the State must face the consequences: a new trial.

B. The prosecutor acted in bad faith when he asked Lomprey opinion questions after telling the court, "Make no mistake about it, he's not testifying as an expert. I'm not going to ask him any opinion type questions."

In its Answer, the State writes, "Defendant also makes the blanket accusation that the State committed bad faith, simply because Lomprey was not noticed as an expert witness." (RAB at 25). This is a misstatement. Collins made a very *specific* accusation of bad faith, and **the State completely failed to address it.**

The District Attorney flatly and unambiguously told the court, "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). After making this proclamation, and convincing the court of his earnestness, the District Attorney proceeded to ask a series of pre-planned, **opinion-type questions** that **only an expert could answer.** *See, e.g.,* (AA 674-684).

The District Attorney knew exactly what he was planning to ask Lomprey, and that his questions would call for an expert opinion. This was blatant **bad faith**, and it had a profound impact on the trial beyond the violation of the expert notice statute.

The District Attorney's dubious argument also caused the court to deny Collins' request for an expert witness jury instruction. *See* (AA 742-743, 861). Had Lomprey been properly noticed as an expert, like *every other arson case*, there is no question the defense would have received some version of the typical "expert witness" instruction.[4] In this case, Collins' proffered instruction was denied because the court believed the prosecution's assurances that Lomprey was a percipient witness and **not** an expert.[5]

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[4] Regardless of the State's representations, Collins had right to his proffered instruction under **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).

[5] The State contends that Jury Instruction 17 compensates for the missing expert witness instruction. This is not true. Jury instruction 17 is the standard "witness credibility" instruction, and it is only useful for evaluating the perceived credibility of a witness who has made factual assertions. An **expert** witness instruction informs the jury that a testifying witness has offered an **opinion** and that the opinion is **not binding**, simply because it comes from an "expert." *See* (AA 861).

Thus, the prosecutor enjoyed the best of both worlds: his unnoticed expert witness was allowed to offer expert testimony, which was then treated as **fact** by the court, rather than **opinion**. *See* (AA 861). This tactic constituted prosecutorial misconduct and violated Collins' 5th, 6th and 14th Amendment rights. The State's bad faith cannot be rewarded with an affirmance.

CONCLUSION

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

Respectfully submitted,

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This instruction is indispensible because it helps overcome a jury's inherent authority bias and review the testimony for what it is. Instruction 17 has no such effect.

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 5th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 5th day of December, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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