

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON DUVAL MCCARTY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 58101

Electronically Filed
Jan 24 2014 02:58 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

**Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County**

CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar #004349
520 South Fourth Street, 2nd Fl.
Las Vegas, Nevada 89101
(702) 384-5563

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
XVIII. NO BURDEN-SHIFTING OCCURRED AT THE PENALTY PHASE	2
CERTIFICATE OF COMPLIANCE	3
CERTIFICATE OF SERVICE	4

TABLE OF AUTHORITIES

Page Number:

Cases

<i>Atkins v. State</i> , 112 Nev. 1122, 923 P.2d 1119 (1996).....	2
<i>Domingues v. State</i> , 112 Nev. 683, 917 P.2d 1364 (1996).....	2
<u><i>Polk v. State</i></u> , 126 Nev. ___, 233 P.3d 357, 360 (2010).....	1
<i>Williams v. State</i> , 113 Nev. 1008, 1023, 945 P.2d 438, 447 (1997).....	2
<i>Witter v. State</i> , 112 Nev. 908, 921 P.2d 886 (1996).....	2

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON DUVAL MCCARTY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 58101

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

INTRODUCTION

In Polk v. State, 126 Nev. ___, 233 P.3d 357, 360 (2010), this Court was critical of the State for waiting until oral argument to directly address a constitutional issue, especially after being notified of its omission in a Reply Brief which asked the Court to find a confession of error. The Polk Court specifically took note that the State could have supplemented its response after the reply brief was filed. Id. Pursuant to NRAP 28(c), “unless the court permits, no other briefs may be filed,” after the filing of the Reply Brief. The State has reviewed its Answering Brief and believes the underlying claim is patently meritless. However, in light of Polk, and in an abundance of caution and for clarity of the record, the State submits the following supplement to the end of issue XVIII on pages 41-42 of the filed brief.

XVIII
NO BURDEN-SHIFTING OCCURRED AT THE PENALTY PHASE

McCarty also argues that the prosecutor's comment regarding the deterrent effect of the death penalty was improper. This Court has repeatedly concluded that deterrence arguments do not constitute misconduct. *See Williams v. State*, 113 Nev. 1008, 1023, 945 P.2d 438, 447 (1997); *Atkins v. State*, 112 Nev. 1122, 923 P.2d 1119 (1996); *Witter v. State*, 112 Nev. 908, 921 P.2d 886 (1996); *Domingues v. State*, 112 Nev. 683, 917 P.2d 1364 (1996). Although McCarty argues that those cases should be overruled prospectively, the prosecutor cannot be faulted for following what this Court has repeatedly endorsed. Accordingly, McCarty should receive no relief on this claim.

Dated this 16th day of January, 2014.

Respectfully submitted,

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

BY /s/ Ryan J. MacDonald

RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points, contains 257 words and does not exceed 30 pages.
3. **Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 16th day of January, 2014.

Respectfully submitted

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

BY */s/ Ryan J. MacDonald*

RYAN J. MACDONALD
Deputy District Attorney
Nevada Bar #012615
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 16th day of January, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

CHRISTOPHER R. ORAM, ESQ.
Counsel for Appellant

RYAN J. MACDONALD
Deputy District Attorney

/s/ eileen davis

Employee, Clark County
District Attorney's Office

RJM//ed