

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON DUVAL MCCARTY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Jul 02 2014 04:14 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

CASE NO: 58101

**MOTION FOR LEAVE TO FILE SUPPLEMENT IN RESPONSE TO NEW
CLAIM RAISED IN REPLY BRIEF AND AT ORAL ARGUMENT**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, RYAN J. MACDONALD, and moves this Court for leave to file a Supplemental Response. This motion is based on the following memorandum and all papers and pleadings on file herein.

Dated this 2nd day of July, 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
Attorney for Respondent

MOTION

This is a direct appeal from a Judgment of Conviction in a death penalty case. This case was submitted for decision on November 11, 2013, after Appellant Jason McCarty filed a Reply Brief. In Appellant's Reply Brief, McCarty claimed—for the first time—that he was deprived of his right to a 48-hour probable cause determination before a magistrate, citing *Powell v. Nevada*, 511 U.S. 79 (1994). In support of raising this new claim, McCarty averred that he “is concerned that the issue is being lost amongst the numerous subportions of McCarty's request for suppression [of his various statements].” ARB 2. While such a concern is justified given the welter of contentions presented on the issue in section I of McCarty's Opening Brief, this precise claim was not addressed there and *Powell* was not cited. Accordingly, the State did not rebut the issue as it was inappropriately raised in McCarty's traverse pleading. *See* NRAP 28(c); NRAP 28(e)(2); NRAP 28(j); *see also Elvik v. State*, 114 Nev. 883, 888, 965 P.2d 281, 284 (1998) (explaining that arguments made for the first time in a reply brief prevent the respondent from responding to appellant's contentions with specificity); *Ex parte Kramer*, 61 Nev. 174, 122 P.2d 862, 864 (1942); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Burns v. Lafler*, 328 F.Supp.2d 711, 724 (E.D. Mich. 2004).

Then, on June 3, 2014, this Court held oral argument on the case. This issue was the subject of some lengthy discussion during argument. Two days later, this

Court directed McCarty to request transcripts for the dates relevant to the various probable-cause-determination proceedings (May 27, 2006; May 30, 2006; and June 7, 2006). On June 16, 2014, McCarty responded to the court's order and affirmed that no transcripts of any proceedings held on these dates existed. Because of the Court's interest in the issue, and the State's lack of opportunity to brief it given its procedural posture, the State accordingly moves this Court direct the clerk to file the short supplemental response submitted contemporaneously with this motion. NRAP 27(a).

Dated this 2nd day of July, 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
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 2, 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

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

RJM//ed