IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS PIMENTEL III, Appellant, v. THE STATE OF NEVADA, Respondent.	)	Case No. 68710

REPLY TO OPPOSITION TO MOTION TO STRIKE AND OPPOSIITON TO COUNTER MOTION TO STRIKE

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and files this Reply to Opposition to Motion to Strike and Opposition to Counter Motion to Strike. This motion is filed pursuant to NRAP Rule 27 and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 19th day of August, 2016.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
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ARGUMENT[1]

Appellant's claims that he merely noted the existence of unpublished authority and speculated about possible facts outside the record are belied by the text of his Reply Brief. Further, the counter motion must fail because Respondent's assertions were premised upon facts actually in the record.

Citation to Unpublished Authority

Appellant does not dispute that citation to unpublished order from 2012 is inappropriate under the current and prior version of the rule. (Appellant's Opposition to Respondent's Motion to Strike and Counter-Motion to Strike Portions of Respondent's Answering Brief (Opposition), p. 2-4). Appellant concedes that he did mention an unpublished order but believes he falls within a

[1] Counsel for Appellant complains that Counsel for Respondent engaged in unprofessional name calling. (Appellant's Opposition to Respondent's Motion to Strike and Counter-Motion to Strike Portions of Respondent's Answering Brief, p. 2, footnote 1). Counsel for Respondent does not believe he engaged in unprofessional name calling and that was not the intent animating the request to strike. Asking this Court to strike portions of Appellant's Reply Brief because Counsel for Appellant did something wrong is no different than Appellant asking for reversal of his conviction because he believes the trial judge and prosecutor did things wrong. Indeed, Appellant's prosecutorial misconduct arguments could be taken as nothing more substantive than an unprofessional attack upon the integrity of the trial prosecutor. Regardless, attorneys are expected to have thick skins about such allegations. Counsel for Respondent stands by the criticism of Appellant's Reply Brief. However, to be clear, the motion to strike was offered not as a personal attack upon defense counsel. Counsel for Respondent was motivated only by a desire to protect the State's interest in litigating this appeal based upon authoritative precedent and on the facts as they exist in the record instead of the facts Appellant wishes were in the record.

safe harbor because he disclaimed any reliance upon it as authority. Id. at 4. Appellant denies that his reference to an unpublished order was aimed at bolstering his argument and instead dubiously contends that he "mentioned an unpublished decision as proof that there is no precedent in Nevada addressing Appellant's precise issue." Id. Such blatant sophistry cannot seriously persuade this Court that Appellant was doing anything other than citing unpublished authority in hopes of supporting his argument for reversal.

Initially, Appellant's belief that he needs to cite authority to establish a negative proposition—that there is no authority in Nevada supporting his argument—is questionable in the extreme. More importantly, the contention is belied by the text of his Reply Brief. Appellant did not cite to the unpublished order for the proposition that there was no controlling precedent in Nevada. Indeed, he conceded that point without citing authority. (Appellant's Reply Brief (ARB), p. 3). Instead, Appellant softened the blow of his admission that there was no Nevada law on point by quoting from the unpublished order for the proposition that Miranda warnings were deficient "when the defendant was not specifically advised that he had the right to consult with an attorney prior to questioning." (ARB, p. 3-4 (quotation marks and citation omitted)). Appellant's own words belie his weak rationalization.

Facts Outside the Record

Appellant attempts to justify his suggestion that facts outside the record support his arguments by alleging that he was merely speculating upon facts that are in the record. (Opposition, p. 5-6, 7). However, Appellant went far beyond inferences from facts and instead made arguments that were dependent upon facts outside the record.

Appellant asked this Court to assume that the exclusionary rule had been invoked prior to going on record: "it is likely the court addressed the issue before it went on record." (ARP, p. 15). Appellant offers the distinction without a difference that this statement was made as a "commonsense pronouncement" and not "**as fact**." (Opposition, p. 5, 6 (emphasis in original)). Claiming that a court engaged in a particular action is an assertion of fact.

Appellant does even less to defend his assertion that "during the [unrecorded] bench conference Appellant objected based upon NRS 50.155." (ARB, p. 16). According to Appellant this statement "was not an assertion of fact outside the record" but was instead "a commentary meant to simply express confidence in Appellate Counsel's colleague who participated in trial." (Opposition, p. 7). Appellant's vapid rationalization is not supported by his Reply Brief, which does not mention any expression of confidence and instead only offers a statement of fact.

Counter Motion to Strike

Ultimately, Appellant attempts to deflect this Court's attention from his conduct by arguing that Respondent's behavior was just as bad. Unfortunately, for Appellant the record belies this assertion as well.

Respondent countered Appellant's exclusionary rule argument by contending that "[t]he State was merely referring to the exclusionary rule's purpose as the basis for the objection." (Respondent's Answering Brief (RAB), p. 34). This argument is fundamentally different than that offered by Appellant because it does not rest upon a fact that is not in the record. The fact in the record is the prosecutor's statement and this Court can either accept or reject the State's inference from that fact. The key distinction is that this Court can make a decision without reference to any facts outside the record. The prosecutor's words and the surrounding text of the transcript are all the State has asked this Court to consider. What distinguishes this argument from Appellant's is that Appellant asked this Court to assume that "it is likely the court addressed the issue before it went on record" and that "during the [unrecorded] bench conference Appellant objected based upon NRS 50.155." (ARB, p. 15, 16). Respondent offered inferences from facts undisputedly in the record whereas Appellant demands that this Court rely upon facts outside the record. One is appropriate while the other is not.

CONCLUSION

This Court has warned that rules exist for a reason and that they cannot be ignored when it is convenient for a litigant to do so:

In the words of Justice Cardozo,

> Every system of laws has within it artificial devices which are deemed to promote … forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigants affected, there would be no sense in making them.

Benjamin N. Cardozo, *The Paradoxes of Legal Science* 68 (1928).

Scott E. v. State, 113 Nev. 234, 239, 931 P.2d 1370, 1373 (1997).

WHEREFORE, the State respectfully requests this Court deny the counter motion to strike and strike citation to the unpublished authority found at pages 3-4 of Appellant's Reply Brief as well as reference to alleged facts outside the record relating to the invocation of the exclusionary rule and an objection at an unrecorded bench conference found at pages 15 and 16 of Appellant's Reply Brief.

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Dated this 19th day of August, 2016.

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 August 19, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

WILLIAM M. WATERS
Deputy Public Defender

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

JEV//ed