

IN THE SUPREME COURT OF THE STATE OF NEVADA

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JORGE MENDOZA,  
Appellant,

v.

THE STATE OF NEVADA,  
Respondent.

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Electronically Filed  
Apr 02 2018 09:25 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 72056

**MOTION TO STRIKE ARGUMENTS FROM REPLY BRIEF**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and files this Motion to Strike Arguments from Reply Brief. This motion is filed pursuant to NRAP Rule 27 and Rule 28(c) and is based on the following memorandum and all papers and pleadings on file herein.

Dated this 2<sup>nd</sup> day of April, 2018.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*

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JONATHAN E. VANBOSKERCK  
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## ARGUMENT

This Court should reject Appellant's attempt to short circuit the adversarial process and decline to consider Appellant's new allegations, raised for the first time in his Reply Brief, that the NRS 174.234 is unconstitutional and that the lower court should have held an evidentiary hearing regarding whether prosecutors acted in good faith with NRS 174.234.

A reply brief "must be limited to answering any new matters set forth in the opposing brief." Nevada Rules of Appellate Procedure (NRAP) Rule 28(c). Indeed, "[i]ssues not raised in an appellant's opening brief are deemed waived." Powell v. Liberty Mutual Fire Insurance Company, 127 Nev. 14, \_\_\_, footnote 3, 252 P.3d 668, 672, footnote 3, rehearing denied, rehearing en banc denied (2011) (citing, Bongiovoni v. Sullivan, 122 Nev. 556, 557, footnote 5, 138 P.3d 443, 444, footnote 5 (2006)). This Court has held firm and fast to this rule even where an appellant was facing multiple death sentences. Thomas v. State, 122 Nev. 1361, 1372-73, 148 P.3d 727, 735 (2006), cert. denied, 552 U.S. 1140, 128 S.Ct. 1061 (2008).

Appellant's reply brief argues that "the trial court erred by refusing to hold an evidentiary hearing where Summer, Summer's defense counsel, and the prosecutor testified about the factual events that led to the timing of the guilty plea agreement and corresponding witness notice." (Appellant's Reply Brief, filed

March 20, 2018, p. 4). Appellant's Opening Brief never challenged the alleged failure to hold an evidentiary hearing on the NRS 174.234 issue. As such, the State never had an opportunity to address this claim. Appellant's decision to raise this new issue in his Reply Brief is fundamentally unfair since it subverts the adversarial process.

Appellant also engages in the skullduggery of waiting until his Reply Brief to argue that his constitutional rights were violated *despite* compliance with NRS 174.234. (Appellant's Reply Brief, filed March 20, 2018, p. 5-6). To be sure, Appellant argued in his Opening Brief that the lower court's conclusion that the State complied with NRS 174.234 prejudiced him on the basis of his constitutional right to cross-examination. (Appellant's Opening Brief, filed November 2, 2017, p. 13-14). However, the important distinction is that in the Opening Brief Appellant's argument was that the lower court erred in applying NRS 174.234 while the Reply Brief argues that his constitutional right to effective cross-examination was violated even if the statute was appropriately applied. Compare, Appellant's Opening Brief, filed November 2, 2017, p. 13 ("The court's error prejudiced Appellant and denied him the right to effectively cross-examine Larsen"); Appellant's Reply Brief, filed March 20, 2018, p. 5 ("Even assuming that the prosecutor complied with Nevada's statutory scheme regarding notice of

witnesses, the late disclosure that Summer would testify ... violated Mendoza's Constitutional rights to confront witnesses, present a defense, and to a fair trial")).

The importance of the distinction between these two arguments was not lost on Appellant. The Reply Brief argues that "Respondent fails to respond to Appellant's argument that the timing of the witness notice prevented him from investigating and preparing to effectively cross-examine Summer." (Appellant's Reply Brief, filed March 20, 2018, p. 5). This is because in responding to Appellant's original argument, that the Court erred in applying NRS 174.234, Respondent demonstrated that the State did not act in bad faith and that prejudice to Appellant was irrelevant since the statutory standard was bad faith not prejudice. (Respondent's Answering Brief, filed January 16, 2018, p. 10-13). Obviously, if the question was compliance with the statute, allegations of prejudice are irrelevant since there was no bad faith and the State complied with NRS 174.234. Appellant is trying to side-step this contention by changing his Reply Brief argument to a stand-alone constitutional violation. Indeed, Appellant's failure to argue error pursuant to Polk v. State, 126 Nev. \_\_\_, \_\_\_, 233 P.3d 357, 360-61 (2010), amounts to an admission that he has changed his argument in the Reply Brief.

Both of these additional Reply Brief arguments subvert the adversarial process by denying this Court the benefit of any argument from Respondent. As such, this Court should strike the arguments related to the alleged failure to hold an

evidentiary hearing from Appellant's Reply Brief. (Appellant's Reply Brief, filed March 20, 2018, p. 4, lines 17-28). This Court should also strike Appellant's stand-alone constitutional arguments for the same reason. (Appellant's Reply Brief, filed March 20, 2018, p. 3-6). Alternatively, the State should be allowed to respond to these new arguments in a supplemental answering brief.

### **CONCLUSION**

This Court has warned that rules exist for a reason and violating them comes with a price:

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 that this Court strike the new argument from page 4, line 17-28 and pages 3-6 of Appellant's Reply Brief or the State should be permitted to file a supplemental answering brief.

Dated this 2<sup>nd</sup> day of April, 2018.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*

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## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 2, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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BY /s/ E.Davis  
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JEV//ed