IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MONICA TRUJILLO, DISTRICT JUDGE, Respondents, and BRANDON ALEXANDER MCGUIRE, Real Party In Interest.	)	Case No. 83269

RESPONDENT'S OPPOSITION TO EMERGENCY MOTION FOR STAY OF PROCEEDINGS

BRANDON MCGUIRE opposes the State's Emergency Motion for Stay of the District Court Proceedings because the Petitioner is unlikely to prevail on the merits in the writ Petition.

I. Statement of Facts and Procedural History.

Mr. McGuire is charged with two counts of sexual assault with use of a deadly weapon alleged in March, 2004. (Petitioner's Appendix, hereinafter "Pet. App." 1-3). Indictment filed 12/01/16. Trial originally set 12/11/17; Defense moved for a continuance. (App. to Opp, hereinafter "App." 28-30). Trial reset 09/10/18. (App. 31). PreTrial Conference, 07/30/18, Defense noted the State had not yet provided the SANE report or Wendy's video

surveillance as requested, the Court ordered the State to comply with discovery obligations. (App. 32).

Defense moved to continue 09/05/18 Calendar Call due to the fact that neither the SANE report nor Wendy's video surveillance had been provided. (App. 33-35). Trial reset 05/06/19. (App. 36).

PreTrial Conference, 04/03/19, Defense again noted neither the SANE report or video surveillance had been provided. (App. 37). Status check, 08/26/19, Defense acknowledged receipt of the SANE, but the State believed there were additional missing photos from SANE. (App. 38). The Court reset the trial for a fourth time for 04/20/20. (Id).

Calendar Call, 04/13/20, Court granted the Defendant's Motion to Compel. Trial reset based on Admin. Order 20-01 to 07/06/20. (App. 39). Rescheduled, 12/07/20, (App. 40), then, 03/08/21 (App. 41), and 8th resetting 07/26/21, (App. 42).

Petitioner initially filed a witness notice that did not provide address information for two witnesses, the alleged victim and Gina Garcia. On 03/26/20, the Defense filed a motion to compel the State to comply, or strike those witnesses. (Pet. App. 4-8).

Petitioner opposed Defense motion. (Pet. App. 11) (App. 17-18).

Calendar call, 07/19/21. Petitioner and the Defense announced ready. On 07/21/21, the Defense filed a Motion to Strike Witnesses for Failure to Comply with NRS 174.234 and Motion to Dismiss. (Pet. App. 20). That motion asked the Court to strike witnesses that had not been properly noticed, including witness Evelyn Hicks at issue in this Petition, and to dismiss the case.

Petitioner filed an opposition to that motion the same day. (Pet. App. 25). The Opposition, claimed "[T]he State does not have a residential address for the named victim. . . . Even after meeting with her, the State still does not have a residential address for the victim." (Pet. App. 27). Attached to the Opposition was the Affidavit of investigator Jocelyn Scoggins. (Pet. App. 31-32). According to that Affidavit, the State *did* have an address for the alleged victim, but was incomplete, with no apartment number. (Pet. App. 32). The Affidavit stated the investigator did not have a *complete* address for the alleged victim, not that the State did not have an address. Neither that Opposition nor the Affidavit attached claimed that the alleged victim did not have an address or was homeless. Petitioner offered to arrange a meeting with the witness through the DA. (Pet. App. 28).

The Defendant's Motion to Strike Witnesses was heard on 07/26/21. (App. 21). At that time, Petitioner claimed that they had "very good

contact" with the alleged victim in the case. The Court inquired of the State, "[s]o you've had very good contact with her this whole time in the 2016 case, but haven't been able to get her address?" The State answered, "[t]hat is correct." (App. 23). The Court inquired, "at any point, since you didn't have an address, did the State consider providing an alternate means of communication to the defense?" The State answered "[n]o, Your Honor, because there is no statutory requirement to do so." (App. 23).

Review of pleadings, hearing and arguments, the District Court noted:

> This is an Indictment from 12/01/16. There was no information for the named victim who was listed as a, Jane Doe, at that time, it said in c/o the Clark County District Attorney's office. Garcia was not listed as a witness. Who's the second witness . . [t]hat's the subject of this motion. On 03/13/20, the State's notice of witness and/or experts was filed. The first witness, E.H., presumably the alleged victim, it also listed c/o the Clark County District Attorney's office as SVU/VWAC. Garcia was then added as a witness, address unknown. 03/31/20, State's supplemental notice of witness listed E.H. c/o CCDA SVU/VWAC. Garcia was also listed as a witness address unknown. 07/02/21, the State's second supplemental noticed E.H. and Evelyn Hicks, address unknown and/or c/o CCDA SVU/VWAC. Garcia was listed as a witness, address unknown.
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> And then I just want to address previously the motion to compel was set for hearing on 04/13/20. I read the transcript of that. I've read the motion. State's opposition at that time said: "State intends to comply with the above statute, will provide notice of the defendant not less five days before trial." At that time a trial date was different, but the State's argument primarily rested on. They had not yet violated the statute which is 174.234. Kephart then said I'm ordering the State to comply. Obviously, this trial has been continued many times for different reasons including Covid. But I do want to point out, in the declaration, just for the record, the State said the alleged victim wasn't served a subpoena until 07/202/1, to

> the day after our calendar call and also the day before Central Calendar Call. And according to the investigator, you still don't have a complete address for the alleged victim? [both attorneys for the State verified that was correct]. (App. 28-29).

The Court found that the "State's offer to facilitate a meeting between the Defendant and the named victim on the eve of trial in a 2016 case where the Defendant is facing a significant prison sentence is insufficient." (Pet. Suppl. App., hereinafter "Pet. Supp. App." 2). The Court found the offered remedy was especially insufficient given the State had previously been ordered to comply with the Statute and had acknowledged it would. (Pet. Supp. App. 2). The Court granted Defendant's motion to strike but denied the Defense motion to dismiss because "the State did not indicate it was unable to proceed with trial." (Pet. Supp. App. 2). The Court's ruling was not arbitrary or capricious and was in fact well within the bounds of the law.

For the first time, in Petitioner's Motion and Petition, the State is claiming the victim is homeless or has no address. "The State filed a written response by informing the [D]istrict [C]ourt that it could not provide an address for the victim because it is unaware of any address that exists for the victim." (App. 3). "The [D]istrict [C]ourt's arbitrary exercise of power in striking a witness, who has no stable residence, is an issue of widespread importance." (App. 4). "Certainly the notice requirements of NRS 174.234

were not meant to input [sic] draconian punishments from individuals that lack a physical and stable address." (App. 5).

The State claims in its Petition, its own investigator was still "not sure that the victim has an address or residence" as of 07/21/21. (Pet. App. 31-32). The Affidavit says "not sure that the victim has an address or residence" but that the witness "provided me an incomplete address that did not have an apt# attached" that "[t]o date, I do not have a complete address for the victim." (Pet. App. 32).

Petitioner provided no address, contact information or details regarding the victim's whereabout or availability until 07/21/21. This was after the 5-day timeframe required by NRS 174.234 had passed and the State had already failed to comply.

The information provided since that time has been confusing and inconsistent. The State of Nevada may have an address for the witness but that address is incomplete. The witness may not have an address at all. Or, the witness may have an unstable address. In any event, Petitioner has not complied with the statutory requirements.

II. Points and Authorities.

The State has requested a stay of proceedings pursuant to NRAP 8(a). This Court considers several factors in determining to issue a stay including

whether there is any merit to the appeal. State v. Robles-Nieves, 129 Nev. 537 (2013). In this case, the likelihood of prevailing is a significant factor. If there is no merit to the State's Petition, a stay should not be granted. Here, there is no merit to the State's Petition.

The State claims that this Court must "correct the trial court's arbitrary and capricious decision to strike the victim from testifying in this case." (App. 2). The District Court's ruling to strike a witness not properly noticed by the State is not arbitrary and capricious.

"The admission or exclusion of evidence rests within the district court's sound discretion." State v. District Court (Armstrong). 127 Nev. 927, 931 (2011) (internal citations omitted). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on law or contrary to the evidence or established rules of law." Id 931-932 (internal citations omitted). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of the law or reason." Jackson v. State, 117 Nev. 116, 120 (2001) (internal citations omitted).

Here, the statutory notice required is governed by NRS 174.234. It is the law. The State failed to comply with the statutory notice requirement in order to present a witness at trial. Therefore, the witness was excluded and

prevented from testifying at trial. The facts support that the State failed to comply with the notice; the ruling was consistent with the law that requires the State to comply with the statute to present a witness. The ruling was absolutely supported by the law and in no way an arbitrary or capricious exercise of discretion "exceeding the bounds of the law or reason."

Petitioner cites to Turner v. State, 136 Nev. Adv. Op. 62, 473 P.3d 438 (Oct. 1, 2020), for the proposition that "[p]recluding a deficiently noticed witness should only be the result of a party acting in bad faith." (App. 8). That's not what Turner says at all. The Turner Court does hold that "courts should exclude an undisclosed witness if the State's failure to notice that witness or the content of the witness's testimony constitutes bad faith." Turner 446-447. It does NOT say that that is the ONLY circumstance where the witness should be excluded as claimed by the Petitioner. In Turner, the Court found that the District Court abused its discretion in *allowing* a firearms expert to testify to an area of expertise not disclosed on the State's notice and not disclosed on the expert's CV, finding that the testimony should have been excluded. Furthermore, the Turner Court's statement that "[t]he law favors allowing even late disclosed witnesses to testify in criminal cases" in Turner, actually comes Samson v. State, 121 Nev. 820 (2005). There, the Court said:

> When addressing discovery violations, the district court must be cognizant that defendants have the constitutional right to discredit their accuser, and this right can be but limitedly circumscribed. **Therefore, to protect this constitutional right, there is a strong presumption to allow the testimony of even late-disclosed witnesses**. Samson at 827 (emphasis added, internal quotations omitted).

Samson is addressing protecting the right to confrontation, it is not applicable to the State's argument that it should be allowed to call its witnesses. Notably, the District Court's decision *not to allow* the improperly noticed testimony was *upheld* in that case, as the testimony was properly excluded.

Petitioner cites to Dossey v. State, 114 Nev. 904 (1998) to claim that "any deficient notice should go to a possible continuance and not exclusion of the witness's testimony." (App. 8). That's not what Dossey says. In Dossey, the notice was found to be *sufficient* not *deficient*. "We conclude that, under the circumstances of this case, endorsing Walrath as "Sierra Nevada Laboratories: lab technician" was a sufficient endorsement because she was only one of two or three technicians." Dossey at 907. Additionally, in that case, the Defense never attempted to obtain the missing information. The case is incomparable to the instant case, where the notice was deficient, the Defense had requested the information, the State claimed it would comply, and the Court ordered it to comply, but it still did not.

The State quotes Jones v. State, 113 Nev. 454 (1997), "[F]ailure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission." Jones at 457, (App. 8). To be clear, the issue here is not whether a different remedy would have been reversible error. At issue here is whether the District Court's ruling was an arbitrary and capricious abuse of discretion. The Jones Court notes "[a] trial court is vested with broad discretion in fashioning a remedy when, during the course of proceedings, a party is made aware that another party has failed to comply fully with a discovery order. This court will not find an abuse of discretion in such circumstances unless there is a showing that the State has acted in bad faith, or that the non-disclosure results in substantial prejudice to appellant." Jones at 471 (internal quotations and citations omitted). Jones does not stand for the proposition that the District Court cannot preclude the testimony of a witness that is not noticed pursuant to N.R.S. 174.234. In fact, Jones instructs that the District Court is empowered to provide a remedy appropriate for the circumstances of the case, within the bounds of the law, just as was done in this case.

This Court, when addressing the prosecution's failure to notice an expert witnesses holds when "a party fails to provide notice of an expert rebuttal witness, the court in its sound discretion may *prohibit the expert*

witness from testifying . . . . or enter such other order as it deems appropriate under the circumstances." Grey v. State, 124 Nev. 110, 119-120 (2008). This Court has upheld the decision to preclude an alibi witness from testifying where that witness was noticed late and without a correct address. Hart v. State, 125 Nev 1042, 5 (Unpublished Opinion 2009).

Finally, **the District Court is specifically authorized by statute to provide the remedy it did.** N.R.S. 174.295(2) provides:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the provisions of N.R.S. 174.234 to 174.295, inclusive, the court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, *or prohibit the party from introducing in evidence the material not disclosed*, or it may enter such other order as it deems just under the circumstances. (emphasis added).

This provision applies to the witness notice requirement in N.R.S. 174.234 (1)(a)(2). In fact, N.R.S. 174.234 (6)(a) provides that the District Court "may upon the request of a party . . . [i]mpose sanctions pursuant to subsection 2 of N.R.S. 174.295 for the failure to comply with the provisions of this section."

While the Court's ruling may not be the remedy preferred by the State of Nevada, it is authorized by statute, consistent with case law, and not arbitrary and capricious, or contrary or beyond the bounds of the law.

/ / /

III. Conclusion.

For the foregoing reasons, the State of Nevada's Petition for Writ of Mandamus, or, in the Alternative, Prohibition does not have merit. Therefore, there is no basis to stay the proceedings. BRANDON MCGUIRE respectfully requests that this Court deny the State's Emergency Motion for Stay of District Court Proceedings.

DATED this 2nd day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of August, 2021. Electronic

Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY____*/s/ Carrie M. Connolly*____
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