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 Respondent, and BRANDON ALEXANDER MCGUIRE, Real Party in Interest.	Electronically Filed Aug 05 2021 08:52 a.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 83269 D.C. NO: C-16-319756-1

REPLY TO REAL PARTY IN INTEREST'S OPPOSITION TO EMERGENCY MOTION FOR STAY OF PROCEEDINGS

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER CHEN, and files this Reply to Real Party In Interest's Opposition to Emergency Motion for Stay of Proceedings pursuant to NRAP 27 and is based on the following argument and all papers and pleadings on file herein.

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Dated this 5th day of August, 2021.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
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ARGUMENT

Real Party in Interest Brandon McGuire (hereinafter "Defendant") argues that the district court was within its discretion to prohibit the victim's testimony, but he provides no reason why preclusion of the victim from testifying is an appropriate remedy. Despite Defendant's contention that the State's application of Dossey which supports a continuance over exclusion of a witness's testimony is wrong, the facts and law from that case support the State's position. Dossey dealt with a trial court permitting the testimony of a specific lab technician where the State generically identified her as "Sierra Nevada Laboratories: lab technician." 114 Nev. 904, 907, 964 P.2d 782, 783 (1998). The defendant argued that the endorsement was insufficient, but this Court still affirmed the trial court's decision to allow that witness to testify, despite any defects with the endorsement. This Court reasoned that the witness should be permitted to testify because the witness was "one of two

or three technicians at the facility qualified to analyze blood alcohol content, and with only minimal and reasonable efforts, Dossey could have found out Walrath's name if that information was imperative." Id., at 907, 964 P.2d at 784.

The same logic followed in Dossey should apply here. Defendant does not argue that he was unaware of the identity of the victim in this case. The victim was clearly referenced in discovery, and the same victim testified at a grand jury hearing. In that lone regard, this case differs from Dossey. However, Dossey reasoned that the defendant could have procured the information it needed with only minimal and reasonable efforts. Other than the filing of a Motion to Compel, where Defendant asked the district court to order that the State follow NRS 174.234, there is no indication any effort was made to locate or contact this victim. Yet despite no efforts to locate the victim, Defendant now argues it was an appropriate sanction to disallow the victim from testifying simply because the State did not, or could not, provide an address pursuant to the statute.

Defendant further argues that by filing the motion to compel, and by having the district court order compliance with the statute, then the sanction imposed was appropriate. The district court noted in its decision that this was a 2016 case, so trying to facilitate a meeting now would be insufficient. Pet. Supp. App. 2. However, other than filing a motion citing the language of NRS 174.234, Defendant never requested information to contact the victim or to have the State to facilitate a

meeting. He never expressed that such information could aid him in his investigation.

The district court specifically found that the State's argument to facilitate a meeting was insufficient as a remedy because the case dates back to 2016 and the offer was being made on the eve of trial. For the sake of argument, if the State had filed a definitive address 5 days prior to this trial, the fact that this is a 2016 case would be completely irrelevant because the State would have satisfied its statutory obligation. Even though Defendant may have needed or wanted more time to investigate, the State would have met its duty even though the case originated in 2016.

Moreover, if hypothetically the State, not having a complete address but 5 days prior to trial, had simply noticed the various associated addresses listed in its investigator's affidavit, that information alone would not have provided any further assurances that Defendant's counsel would have been able to contact the victim. Under both scenarios, the State would likely have satisfied its statutory obligations, but it would make it no more likely or beneficial for the Defendant if the true and main objective was to interview the victim in preparation of trial. For this reason, the offer made by the State to facilitate a meeting between Defendant's counsel and the victim was the appropriate remedy over prohibiting the victim's testimony.

Again, in this case the issue is a known and identified victim. Defendant

attempts to distinguish Jones v. State by arguing that the district court's decision to deny the victim's testimony was not abuse of discretion, but factually this is a difficult argument to make. 113 Nev. 454, 937 P.2d 55 (1997). In Jones, an unendorsed witness was permitted to testify as a state witness. In upholding the conviction, this Court held "Nevada case law establishes that failure to endorse a witness constitutes reversible error only where the defendant had been prejudiced by the omission." Id., at 473, 937 F.2d at 67. Although this Court acknowledged in Jones that the State committed procedural error in not noticing the witness, it explained that the error did not prejudice the defendant because defendant was already familiar with and knew about the witness. Id.

Similar to the holding in Jones, in Dalby v. State, this Court also permitted the late disclosure of a name and address of an unendorsed witness. 81 Nev. 517, 406 P.2d 916 (1965). This Court agreed that the district court's affording the defendant an opportunity to interview the witness during a recess was even sufficient. Id., at 529, 406 P.2d 916 (1965).

If in both Jones and Dalby the late disclosure of the identity and address of a witness was deemed to be acceptable, then it must be an abuse of discretion to entirely prohibit a known victim from testifying simply because an address was not provided, especially when the evidence points to an address being unavailable.

Despite efforts to obtain the victim's complete address, the State still does not

possess such information. As mentioned in its investigator's affidavit, the only way that she was able to contact the victim was to leave a message at a boat shop in Henderson. PA 31-32. It was only after leaving this message did the investigator then receive a call from a person identifying himself as the victim's boyfriend and asking why she was looking for the victim. Finally, the investigator indicated that she received a text message from an individual identifying herself as the victim. Only through these laborious steps was the investigator finally able to reach the victim. Although the district court included in its Order that the State did not furnish alternative methods for Defendant to reach the victim, it appears clear from the investigator's affidavit that there was no actual contact information to provide. Even though the statute does not require it, there was no phone number, address, residence, or other direct line of communication that the State was able to provide for this victim in the 5 days preceding trial. Thus, the State should not be punished for not furnishing information that is not required by statute and that the State did not have.

The district court abused its discretion to rely upon those factors to prohibit a known and identified victim from testifying. The evidence presented through the investigator's efforts alone at least suggests that her living situation is less than stable. This was not a witness that was clearly identified by a property search and a long-term residence. If this victim did have a stable residence which the State knew about, the State would have complied with the statutory requirement. The problem

is that the State has never been able to identify a residence.

Defendant also cites to Hart v. State, 125 Nev. 1042 (Unpublished Opinion 2009) for the proposition that this Court has precedence to preclude an improperly noticed witness. Pursuant to NRAP 36(3), a party may only cite an unpublished opinion for persuasive value after January 1, 2016. Given that Hart v. State was decided well before 2016, it should not stand as even persuasive authority. However, aside from the procedural improperness, Hart dealt with a defendant's failure to notice an alibi witness pursuant to NRS 174.233. As this Court is aware, an alibi witness must be noticed prior to trial, but in Hart's case the defendant attempted to call a previously unknown alibi witness on the first day of trial.

To maintain a fair playing field, alibi witnesses fall within a specific category of witnesses that would require the parties to be able to investigate the alibi. However, it cannot be emphasized enough that the testimony that has been precluded in this case is a clearly identified victim. Therefore a completely different standard should apply to precluding a previously undisclosed alibi witness at trial versus the lone identified victim in a case.

Finally, the State would point this Court to the holding in Turner v. State, 136 Nev. Adv. Op. 62, 473 P.3d 438 (Oct. 1, 2020). Defendant argues that the State's citation of this case is in error, but the direct language of Turner says, "Although the law favors allowing even late-disclosed witnesses to testify in criminal cases,

Sampson v. State, 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005), 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, NRS 174.234(3)." Id., at 446-447.

Although Turner dealt with expert testimony, this Court recognized that one of the purposes of NRS 174.234 is to prevent "trial by ambush." Id., at 447. "Trial by ambush traditionally occurs where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining and advantage by a surprise attack." Id. *citing* Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship, 131 Nev. 686, 356 P.3d 511 (2015). To try cases by ambushing the opposing party would certainly qualify as bad faith.

In assessing the bad faith requirement, argument was made before the district court on this issue at the July 26, 2021 hearing. RPI App. 23.

> THE COURT: So 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: That is correct, Your Honor. So we didn't have -- we both came on this case recently, but the contacts that we have had with her included coming to the Grand Jury. I don't know what it included beyond that, but we do have information for her is my understanding at this point, just not an address.

Although it appears that all of the words uttered by the State were not transmitted, the general gist explains that the State has not had an address to rely

upon, and that the failure to comply with NRS 174.234 was not due to any bad faith.

Admittedly in Turner this Court held that the State should have properly noticed its witness as an expert which resulted in trial by ambush, but the same cannot be said here. The lack of a specified address was not due to the State's malice or carelessness, as happened in Turner. Instead, this case presents a sworn and filed affidavit that the State is unaware of an address for the victim. This case presents no indicia that the State has tried to hide the victim from Defendant's counsel or has tried to prevent them from speaking with the victim. For these reasons the district court certainly abused its discretion by prohibiting the victim's testimony.

CONCLUSION

Based on the foregoing, the State requests this Court to grant the petition and direct the clerk of this Court to issue a writ of mandamus and/or prohibition vacating the district court from striking the State's witness and allowing the victim to testify at a future jury trial.

Dated this 5th day of August, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

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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 5, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ E. Davis*
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AC//ed