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

REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION

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COME NOW Deputy Public Defenders KATHLEEN HAMERS and SHANA BROUWERS, on behalf of the Respondent (Real Party In Interest) BRANDON ALEXANDER MCGUIRE, and hereby answers the State's Petition for Writ of Mandamus Or In the Alternative, Prohibition filed in the above-captioned proceeding.

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This answer to the Petition for Writ of Mandamus Or In the Alternative, Prohibition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 11th day of August, 2021.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: *Kathleen M. Hamers*
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MCGUIRE

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of Facts and Procedural History

Brandon McGuire is charged with two counts of sexual assault with use of a deadly weapon alleged to have occurred in March of 2004. (Petitioner's Appendix to Emergency Petition, hereinafter "Pet. App." 1-3). The Indictment was filed on December 1, 2016. Mr. McGuire's trial in this case was originally scheduled for December 11, 2017; however, the Defense moved for a continuance due to the fact that lead counsel for the Defense would be on leave during that time. (Appendix to Opposition, hereinafter "App." 28-30). The Court granted that Motion and reset the trial for September 10, 2018. (App. 31).

On the PreTrial Conference date of July 30, 2018, the Defense noted that the State had not yet provided the SANE report or Wendy's video surveillance that had been requested, and the Court ordered the State to comply with its discovery obligations. (App. 32).

The Defense was forced to move for a continuance at the September 5, 2018 Calendar Call due to the fact that neither the SANE report nor the Wendy's video surveillance had yet been provided. (App. 33-35). The Court granted that continuance and reset the trial for May 6, 2019. (App. 36).

Nonetheless, at the April 3, 2019 PreTrial Conference, the Defense again noted that neither the SANE report or video surveillance had been provided, and the Court vacated the May trial date. (App. 37). At the August 26, 2019 status check, the Defense acknowledged receipt of the SANE, but the State also believed there were additional missing photos from the SANE. (App. 38). The Court reset the trial for a fourth time for April 20, 2020. (Id).

At the April 13, 2020 Calendar Call, the Court granted the Defendant's Motion to Compel Compliance with NRS 174.234 and reset the trial date based on Administrative Order 20-01 and the COVID-19 pandemic to July 6, 2020. (App. 39). The ongoing Covid-19 pandemic and related halting of jury trials resulted in the trial being rescheduled to December 7, 2020, (App. 40)., then, March 8, 2021 (App. 41), then this latest and eighth trial setting of July 26, 2021, (App. 42).

Petitioner initially filed a witness notice that did not provide address information for two witnesses, the alleged victim and another individual by the name of Gina Garcia. On March 26, 2020, the Defense filed a motion asking the Court to compel the State to comply with N.R.S. 174.234, or, in the alternative, to strike those witnesses. (Pet. App. 4-8).

Petitioner opposed Defense motion to comply with the statute. "[T]he State intends to comply with the above statue and will provide notice to the Defendant not less than 5 days before trial, at the latest." (Pet. App. 11). Petitioner asked the Court to deny the motion and provided that it "is fully aware of its obligations" under N.R.S. 174.234. (Pet. App. 11) (App. 17-18).

Calendar Call took place in the instant case on July 19, 2021. Both the Petitioner and the Defense announced ready. On July 21, 2021, the case was heard in "central calendar call" for purposes of jury scheduling. The case was scheduled to proceed on July 27, 2021. On July 21, 2021, the Defense filed a Motion to Strike Witnesses for Failure to Comply with N.R.S. 174.234 and Motion to Dismiss. (Pet. App. 20). That motion asked the Court to strike the witnesses that still 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 on the same day. (Pet. App. 25). In that Opposition, the claim was that "[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 that 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 that address was incomplete in that it did not have an apartment number attached. (Pet. App. at 32). The Affidavit stated that the investigator did not have a *complete* address for the alleged victim, not that the State did not have an address for her at all. Neither that Opposition nor the Affidavit attached claimed that the alleged victim did not have an address or was homeless. Petitioner then offered to arrange a meeting with the witness under the arrangement of the District Attorney. (Pet. App. 28).

The Defendant's Motion to Strike Witnesses for Failure to Comply with N.R.S. 174.234 and Motion to Dismiss was heard on July 26, 2021. (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 further 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).

After reviewing the pleadings and hearing the arguments of counsel, the District Court noted:

> This is an Indictment from December 1st of 2016. 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 March 13, 2020, 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. March 31st of 2020, State's supplemental notice of witness listed E.H. c/o CCDA SVU/VWAC. Garcia was also listed as a witness address unknown. July 2, 2021, 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.
>
> And then I just want to address previously the motion to compel was set for hearing on April 13, 2020. 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 the State said the alleged victim wasn't served a subpoena until July 20th 2021, 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." (Petitioner's Supplemental Appendix, hereinafter "Pet. Supp. App." 2). The Court found that the offered remedy was especially insufficient given that the State had previously been ordered to comply with the Statute and the State had acknowledged that it would. (Pet. Supp. App. 2). The Court granted Defendant's motion to strike witnesses but denied the Defense motion to dismiss the case 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.

It appears that now, for the first time, in Petitioner's Motion and Petition to this Court, the State of Nevada is claiming that 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 that its own investigator was still "not sure that the victim has an address or residence" as of July 21, 2021. The State cites to the Affidavit of Jocelyn Scroggins, (Pet. App. 31-32). However, what the Affidavit says is not that the investigator is "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" and that "[t]o date, I do not have a complete address for the victim." (Pet. App. 32).

Petitioner provided no address information, contact information, or details regarding the victim's whereabout or availability until July 21, 2021. This was after the five-day timeframe required by N.R.S. 174.234 had passed and the State had already failed to comply with that statute as it said it would, and as the Court had ordered it to do.

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 in that it does not contain an apartment number. 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 that must be satisfied to present a witness at trial.

Brandon McGuire opposes the Emergency Motion for Stay because the Petitioner is unlikely to prevail on the merits of the Petition.

II. Points and Authorities

A. A writ of prohibition is not warranted in this case.

"The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." N.R.S. 34.320. In this case, the District Court ruled on a motion to strike witnesses not properly noticed. The criminal case was properly before the District Court, the Court had jurisdiction over the case and the Defendant, and the motion concerned the trial in that very case. A writ of prohibition "will not issue if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration." Goicoechea v. Fourth Judicial Dist. Court, 96 Nev. 287, 289 (1980). A writ of prohibition should not be issued in this case.

B. A writ of mandamus is not warranted in this case.

A writ of mandamus may be issued to compel an act which the law requires. N.R.S. 34.160. A writ of mandamus may be issued to address a manifest abuse of discretion or an arbitrary or capricious exercise of discretion. Attorney General v. Justice Court of Las Vegas Township, 133 Nev. 78, 80 (2017). The action being compelled must be one already

required by law. Mineral County v. State Dept. of Conservation and Natural Resources, 117 Nev. 235, 242-243 (2001). "Mandamus is an extraordinary remedy which 'will not lie to control discretionary action, unless discretion is manifestly abused or it is exercised arbitrarily or capriciously.'" Id at 243, *quoting* Roundhill General Imp. Dist v. Newman, 97 Nev. 603-604 (1981)).

"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).

Mandamus relief is not available to disturb the judgement of the lower court's discretion unless that discretion is "manifestly abused" or "exercised arbitrarily or capriciously." Washoe County Dist. Atty. v. Second Judicial Dist. Court ex rel. County of Washoe, 116 Nev. 629, 636 (2000) (internal citation omitted). "Mandamus will not serve to control the proper exercise of discretion of [the appellate] court for that of the lower tribunal" unless

"the lower court's action was arbitrary and capricious." Koza v. Eighth Judicial Dis. Court Clark County, 99 Nev. 535, 540 (1983) (internal citations omitted).

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.

i. The law does not require the District Court to allow the State to present a witness not properly noticed.

The State misrepresents existing case law in an attempt to support the assertion that the District Court's ruling was an arbitrary and capricious decision.

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 at 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.

Furthermore, the issue in Jones was entirely different than the defective notice at issue here. In Jones, the Defendant complained that DNA evidence was admitted at trial because the DNA report had not been available to the Defense prior to a discovery deadline. Jones at 471. Notably, prior to the admission of the evidence "Jones' counsel explicitly told the trial judge that the defense would accept the results of [the witness'] analysis, be they exculpatory or inculpatory." Id. The Court found that under the circumstances of that case, the District Court was within its discretion to allow the witness to testify. Just because the District Court's exercise of discretion in that case was not reversible error, it does not follow that the District Court's sound exercise of discretion in this case, to not allow the witness to testify is an arbitrary and capricious abuse of discretion.

Similarly, though Dalby, a 1965 case, found that it was not an abuse of discretion to allow an unendorsed witness to testify, Dalby v. State, 81 Nev. 517, 519 (1965), this does not mandate that all unendorsed witnesses

must be permitted to testify so long as the State offers to arrange a meeting at some point after the notice deadline has passed.

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) (emphasis added).

The case law establishes that the District Court, aware of the circumstances of the particular case, may exercise its sound discretion as to what remedy may be appropriate. The specific circumstances considered by the District Court in this case, were that (a) the State had failed to properly notice its witness, (b) the Defense filed a motion asking the Court to order the State to comply with the statutory requirements, (c) the Court ordered the State to comply, and (d) the State failed to do so. The Sate presented to the Court that it simply did not have *complete* address information. Under these particular circumstances, the District Court properly exercised its discretion in prohibiting the State from presenting the witness when the State had failed to comply with the law and the Court's prior order.

ii. Requiring the State to follow statutory law on witness notice requirements is not an arbitrary or capricious abuse of discretion.

Here, the statutory notice required is governed by N.R.S. 174.234. It is the law. It is clear that 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."

iii. Ordering a remedy specifically authorized by statute is not an arbitrary or capricious abuse of discretion.

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.

iv. The State requested the exact same remedy when it believed the Defense had violated the statutory notice requirements.

The State of Nevada is now claiming that excluding a witness for deficient notice is an arbitrary and capricious abuse of discretion or outside the bounds of the law. However, the State itself orally moved the District Court for the exact same remedy when it erroneously believed that the Defense had filed a late expert notice in the case. On July 19, 2021, at Calendar Call in the instant case, the State orally objected to the Defense's previously filed Notice of Expert witness. The State claimed that the notice

had been filed one day late. The State was mistaken, as a legal holiday had essentially moved the deadline for that notice. The State requested that **the witness not be allowed to testify because the notice was filed a day late**, the very remedy it now claims is impermissible. (App. 43).[1] Clearly, this is an appropriate consequence for failure to comply with statutory notice requirements.

III. Conclusion

For the foregoing reasons, the District Court's order striking the State's witness for failure to comply with the statutory notice requirements and order of the District Court was within the sound discretion of the District Court and not an arbitrary or capricious abuse of discretion. BRANDON MCGUIRE respectfully requests that this Court deny the State of Nevada's Petition for Writ of Mandamus, or, in the Alternative, Prohibition.

DATED this 11th day of August, 2021.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER
By: */s/ Kathleen M. Hamers*
KATHLEEN M. HAMERS, #9049
SHANA S. BROUWERS, #12337
Attorneys for Real Party In Interest

[1] A transcript of the July 19, 2021, hearing is not yet available at the time of this writing; however, minutes have been provided and a supplemental appendix will be filed when the transcript is available.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer to petition for writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This answer to petition for writ has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this answer to petition for writ complies with the page or type-volume limitations of NRAP 21(d):

Proportionately spaced, has a typeface of 14 points or more and contains 4,033 words which does not exceed the 7,000 word limit.

3. Finally, I hereby certify that I have read this writ, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this writ complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 11th day of August, 2021.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Kathleen M. Hamers*
KATHLEEN M. HAMERS, #9049
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MCGUIRE

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 11th 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
ALEXANDER CHEN
KATHLEEN M. HAMERS
SHANA BROUWERS

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

HONORABLE MONICA TRUJILLO
DISTRICT COURT, DEPARTMENT III
200 Lewis Avenue
Las Vegas, NV 89101

BY */s/ Carrie M. Connolly*
Employee, Clark County Public
Defender's Office