

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 18 2021 02:17 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 83269

D.C. NO: C-16-319756-1

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

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

KATHLEEN HAMERS
Nevada Bar #009049
SHANA BROUWERS
Nevada Bar #012337
Clark County Public Defender
309 S. Third Street, #226
Las Vegas, Nevada 89155
(702) 455-3375

AARON D. FORD
Nevada Attorney General
Nevada Bar # 007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Petitioner

Counsel for Real Party In Interest

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	2
CONCLUSION	9
NRAP 27(e) CERTIFICATE	10
CERTIFICATE OF COMPLIANCE	11
AFFIDAVIT	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

Cases	<u>Page Number:</u>
<u>Dalby v. State,</u> 81 Nev. 517, 406 P.2d 916 (1965)	5
<u>Dossey v. State,</u> 114 Nev. 904, 907, 964 P.2d 782, 783 (1998)	2
<u>Hart v. State,</u> 125 Nev. 1042 (Unpublished Opinion 2009)	7
<u>Jones v. State</u> 113 Nev. 454, 937 P.2d 55 (1997)	5
<u>Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship,</u> 131 Nev. 686, 356 P.3d 511 (2015)	8
<u>Sampson v. State,</u> 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005)	8
<u>Turner v. State,</u> 136 Nev. Adv. Op. 62, 473 P.3d 438 (Oct. 1, 2020)	7
<u>Statutes</u>	
NRS 174.233	7
NRS 174.234	3, 8
NRS 174.234(3)	8

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

CASE NO: 83269

D.C. NO: C-16-319756-1

Respondent,

And

BRANDON ALEXANDER
MCGUIRE,

Real Party in Interest.

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

COMES NOW, the State of Nevada, Petitioner, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, ALEXANDER CHEN, on behalf of the above-named Petitioner and submits this Reply To Real Party In Interest's Answer To Petition For Writ Of Mandamus Or In The Alternative Prohibition and in obedience to this Court's order filed July 27, 2021, in the above-captioned case. This Reply is based on the following argument and all papers and pleadings on file herein.

///

///

Dated this 18th 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
Nevada Bar #010539
Office of the Clark County District Attorney

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.” Dossey v. State, 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 113 Nev. 454, 937 P.2d 55 (1997) 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. 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 P.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. Dalby v. State, 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 impropriety, 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 18th 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
Nevada Bar #006528
Office of the Clark County District Attorney

NRAP 27(e) CERTIFICATE

1. Counsel for Petitioner: Chief Deputy District Attorney Alexander Chen, Office of the Clark County District Attorney, 200 Lewis Ave., Post Office Box 552212, Las Vegas, Nevada 89155, (702) 671-2750.
2. Counsel for Real-Party-in-Interest: Clark County Public Defenders Kathleen Hamers, 309 S. Third Street, Las Vegas, NV. 89155, (702) 455-3375.
3. Facts showing the existence and nature of the claimed emergency: On July 26, 2021, the Honorable Monica Trujillo granted Defendant McGuire's motion to have the victim stricken from testifying. Following the district court's ruling, the State requested a stay of the trial, but the district court denied the request for stay. The State requests this Court's review.
4. The Honorable Monica Trujillo and all counsel listed in paragraphs 1-2 were notified of this emergency motion and writ petition by electronic service.

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this 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)(9) because this writ has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this writ complies with the page and type-volume limitations of NRAP 21(d) because, excluding the parts of the writ exempted by NRAP 32(c)(2), it is proportionately spaced, has a typeface of 14 points, contains 1,913 words and 152 lines of text.
3. **Finally, I hereby certify** that I have read this appellate 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21, which requires every assertion in the writ 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 18th 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
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

AFFIDAVIT

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information and belief.

Dated this 18th day of August, 2021.

BY */s/ Aleander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 18, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

KATHLEEN HAMERS
SHANA BROUWERS
Deputy Public Defenders

ALEXANDER CHEN
Chief Deputy District Attorney

I further certify that I served a copy of this document by electronic emailing a true and correct copy thereof to:

JUDGE MONICA TRUJILLO
Email: ElliottT@clarkcountycourts.us

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

AC//ed