

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ALEXANDER SEVIER,  
Appellant,

v.

THE STATE OF NEVADA  
Respondent.

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Elizabeth A. Brown  
Clerk of Supreme Court

CASE NO: 74542

**PETITION FOR REHEARING**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and submits this Petition for Rehearing pursuant to Rule 40 of the Nevada Rules of Appellate Procedure (NRAP). This pleading is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 20<sup>th</sup> day of March 2019.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK  
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## **ARGUMENT IN SUPPORT OF PETITION FOR REHEARING**

This Court's Order of Reversal and Remand (Order), filed March 15, 2019, overlooks or misapprehends a material fact or question of law. What this Court found to be misconduct is arguably so. The prosecutor did not lie to jurors, but instead was trying to get them to make an inference from expert testimony. Regardless, referral to the Bar is particularly inappropriate where the primary reason for such a referral is the belief that the prosecutor engaged in this type of conduct in two cases without reference to the timing of the decision in the earlier case.

Pursuant to NRAP Rule 40(c)(2) this Court considers rehearing when it has overlooked or misapprehended a material fact or question of law. Bahena v. Goodyear Tire & Rubber Co., 126 Nev. \_\_\_, \_\_\_, 245 P.3d 1182, 1184 (Nev. 2010). Accord, McConnell v. State, 121 Nev. 25, 26, 107 P.3d 1287, 1288 (2005). Additionally, rehearing is warranted where the Court has overlooked, misapplied, or failed to consider directly controlling legal authority. Bahena, 126 Nev. at \_\_\_, 245 P.3d at 1184.

The Order castigates a prosecutor for making the following statement during the heat of trial:

I've prepared a demonstrative aid that I'm going to use which combines the mixture profiles of the scarf – the striped scarf and the maroon scarf next to the defendant's known profile. He is not excluded from these mixtures because all of the numbers present in

his known profile are contained within that mixture. The defendant's DNA was on all three of those items[.]

Order, p. 2 (brackets in original). The Order goes on to indicate that “[t]he State continued its argument and again misrepresented that the DNA expert testified that Sevier was ‘not excluded as a contributor to these DNA samples.’” Id.

This argument was consistent with the DNA expert's testimony. As to the red, pink and white scarf, the expert testified that the DNA profile was an admixture of at least four individuals. 4 Appellant's Appendix (AA) 626-30. Similarly, the maroon scarf contained a “mixture DNA profile that was consistent with originating from at least four contributors and with at least one of those contributors being male[.]” 4 AA 631. However, “because of the complexity of that data” she “wasn't able to make any additional conclusions.” Id.

The very prosecutor this Court believes was trying to mislead jurors clarified this answer to make it crystal clear:

Q So you couldn't say that a specific person's DNA was there or wasn't there?

A Correct. There was too much information to make a conclusion.

4 AA 631-32.

However, in an example of good lawyering, this prosecutor laid the ground work for an argument that just because the expert could not conclusively *include* Appellant's DNA, the jury was free to infer that it was *not excluded*. Specifically,

the prosecution introduced State's Exhibit 82, which was "the allele table pertaining to the scarf -- both scarves, the skirt and then a major profile that ... [was] extracted from ... the skirt[.]" 4 AA 628. The expert witness then testified about the meaning of this chart in detail and how the information on this chart related to the case. 4 AA 628-35. The major profile associated with the skirt was identified as Appellant's DNA. 4 AA 634-35. As to the striped scarf, it was explained that the numbers representing the DNA profiles fell "below one of our thresholds that we report, and so they're just left out of the allele table[.]" 4 AA 630. The same was true for the other scarf. 4 AA 631.

The prosecutor continued to educate the jury regarding the reason the expert could not *include* Appellant's DNA while showing why the door was open for jurors to infer that it was *not excluded*:

Q And then going back to State's Exhibit 82, the mixture profiles, specifically one the two scarves, when you have a mixture profile of at least four and possibly more, why is it that it becomes more difficult for you to make conclusions about whose DNA that actually is?

A Depending on how that profile looks, for those two, the data was just so complex, and there was way too much information there for me to apply any of deconvolution or unraveling of that profile to see if a major contributor could be there. With these profiles, it's not that measures weren't taken to see if a major contributor couldn't -- could have been obtained. It's just based on our standard operating procedures, those profiles were just too complex to even -- to really do anything else with.

Q Okay. And in looking at this allele chart, specifically the striped scarf column, you can look -- you can see in this allele chart that there are more numbers present in each of the two scarf columns, correct?

A Correct.

Q Than in the mixture profile for the skirt?

A Correct.

Q Meaning more people's DNA or more readable DNA present, correct?

A There's more DNA above our thresholds that would be reported on those allele tables. So as you can see with the skirt, there being fewer numbers and more -- and more of those stars there, that extra data showing the additional contributors *were below our reporting thresholds*. So therefore they're not represented there, and gave it a little bit easier for us in that particular mixture to be able to resolve a major contributor.

4 AA 647-49 (emphasis added).

Indeed, the prosecutor's examination of the expert made the State's theory clear. State's Exhibit 74 was a photograph of Appellant taken from the video surveillance of the robbery of Martinez at the Courtyard Marriott. 3 AA 389. On cross-examination of the Courtyard by Marriott victim she indicated that Appellant covered his face by layering the scarves and the skirt:

Q I'm going to show you what's been marked as State's 74. Is this an accurate --

A Yes.

Q -- picture of what he was wearing that night?

A Yes.

Q Okay. And what does it look like is on top of his head?

A A beanie.

Q A beanie. Okay. And it looks like he's wearing three different layers; is that correct?

A Correct.

Q What's around his neck?

A A scarf.

Q A scarf. How many scarves?

A That night I remember two.

Q Okay. Can you kind of point to where the two scarves are.

A (Unintelligible).

Q Okay. So you marked what looks like a red and pink scarf and a --

A Yes.

Q -- blue --

A And a blue.

Q I don't -- what about the darker item around his neck?

A Another scarf.

Q Okay. So about three scarves?

A Yes.

Q Were they all covering his face?

A I only remember the colorful scarf, the stripe --

Q Okay.

A -- that was covering his face.

3 AA 395-97.

The State specifically had the expert review Exhibit 74 and opine regarding how the location of the blue skirt relative to the scarves could result in DNA being found on the skirt:

Q Showing you State's 74 on the overhead, and looking at this, you can see that the blue scarf is apparently underneath the maroon and red, white and pink, correct?

A Yes.

Q And up near the neck area as well as the facial area?

A It appears to be, yes.

Q Would -- would you expect to find a great deal of DNA left by the person wearing that?

A Based on all of the other factors that come into play, if someone was wearing that around their face for a long period of time, I wouldn't be surprised to find their DNA in some capacity on that item.

4 AA 639.

Defense saw where the State was going and tried to convince jurors to reach a different inference:

Q Okay. I'm going to show you what the State just showed you, State's 74, and you're saying that you wouldn't be surprised if an individual wearing that blue skirt would leave some DNA, correct?

A I wouldn't be surprised, correct.

Q Okay. Now looking at this picture as best as you can, assuming the maroon scarf and the red and white scarf are also touching the skin, would it surprise you that DNA would be left there as well?

A I wouldn't be surprised, correct.

Q Okay. And there was no DNA matching Mr. Sevier on the maroon scarf and the red and white scarf?

A For those –

MS. MERCER: Objection. That mischaracterizes her testimony.

BY MR. MATSUDA:

Q Or no conclusions could be drawn?

A Correct. No conclusions could be made for the profiles that were obtained for those items.

4 AA 640-41.

The State then used this foundation during rebuttal closing argument to ask the jury to conclude that while the expert could not *include* Appellant's DNA that they should not *exclude* that possibility:

I've prepared a demonstrative aid that I'm going to use which combines the mixture profiles of the scarf – the striped scarf and the maroon scarf next to the defendant's known profile. He is not excluded from these mixtures because all of the numbers present in his known profile are contained within that mixture. The defendant's

DNA was on all three of those items, but more importantly his DNA was on --

...

MS. MERCER: She was very clear. She said, If a single number within those profiles was different from the defendant's, he would have been excluded. He was not excluded as a contributor to these DNA samples or these DNA profiles.

5 AA 791-92.

The prosecutor did not misled or lie to jurors about the evidence; instead, she attempted to persuade jurors that merely because the DNA was insufficient to get past the threshold cut offs, they should not *exclude* the possibility that the DNA came from Appellant. This argument was not merely based on the opinion of the expert but on the victim's testimony that the skirt and scarves were layered. In this case the layering of the skirt and scarves could clearly explain why sufficient DNA would be on the skirt but not the scarves. Jurors could fairly infer from the layering and the DNA evidence that Appellant could be the source for the DNA on the scarves. Asking jurors to make such an inference from the opinions of experts based on the particular facts of a case is what lawyers do.

However, Respondent recognizes that this Court has the difficult task of subjectively determining whether argument amounts to misconduct under a particular set of facts. The State is not aware of a single case from this Court that pre-dates the argument in this case where this Court found prosecutorial

misconduct under substantially similar circumstances. Put simply, Ms. Mercer had no notice that her conduct went too far. As Justice Stiglach's concurrence correctly points out:

I am not convinced, however, that the prosecutor's misconduct warrants referral to the State Bar at this time. While the prosecutor engaged in the same kind of misconduct in two cases, *that misconduct was not rebuked by the trial court judge in either case and was not directly rebuked by this court until our recent unpublished decision in Richards v. State, Docket No. 70530. ... I see no reason to assume that our strong rebuke and remand for a new trial in this case and Richards will be insufficient to discourage the prosecutor from engaging in similar misconduct in the future.*

Order, p. 7 (emphasis added).

In referring this matter to the Bar, the majority opinion relied heavily upon the allegation that this prosecutor is a repeat offender:

Having concluded that the State committed reversible prosecutorial misconduct, we admonish prosecutor Elizabeth A. Mercer for her egregious and manifestly improper statements to the jury, which were magnified by the visual aid used during closing argument. This is the second case of which we are aware, where Mercer flagrantly misled a jury regarding DNA evidence. *See Richards v. State, Docket No. 70530 (Order of Reversal and Remand, Dec. 4, 2018) (concluding that "the prosecutor committed misconduct during closing argument when it asked the jury to arrive at a different conclusion than the State's expert about DNA evidence")*.

Order, p. 5.

The difficulty with reliance upon Richards is that the conduct here pre-dates the decision in that case. This Court correctly notes that Richards was not reversed until December 4, 2018. The trial in this case happened in 2017. Ms. Mercer did

not have fair warning that her argument was misconduct. As Justice Stiglach's concurrence correctly points out, the trial judges in Richards and this case did not rebuke Ms. Mercer. Undersigned counsel, as an officer of the court, would submit that Ms. Mercer is not the only prosecutor to have made such an argument about DNA evidence. Ultimately, labeling something prosecutorial misconduct is a subjective judgment call and it is simply *unfair* in the extreme to refer Ms. Mercer to the Bar when this Court had never placed her argument out of bounds prior to her making it in 2017.

### **CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court rehear this matter and affirm the decision below. At the very least Respondent requests that the Order be amended to withdraw the Bar referral.

Dated this 20<sup>th</sup> day of March, 2019.

Respectfully submitted,

STEVEN B. WOLFSON  
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BY */s/ Jonathan E. VanBoskerck*

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**CERTIFICATE OF COMPLIANCE**

1. **I hereby certify** that this petition for rehearing 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 it 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 petition complies with the type-volume limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6), because it is proportionately spaced, has a typeface of 14 points, contains 2,221 words and 284 lines of text.

Dated this 20<sup>th</sup> day of March, 2019.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 20, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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JEV//ed