

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 ABBI
SILVER, DISTRICT JUDGE,
Respondents,
and
JUDY STEVENS, A/K/A TUDY
STEVENS; AND RICK SHAWN,
Real Parties in Interest.

No. 55549

FILED

MAR 03 2010

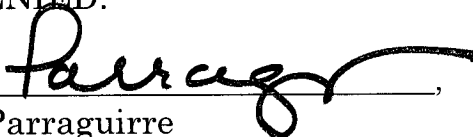
TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
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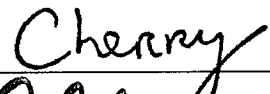
ORDER DENYING PETITION


This is an original petition for a writ of mandamus or prohibition challenging a district court decision regarding the use of deposition testimony under NRS 174.215. At this court's direction, the real parties in interest have answered the petition. Having considered the petition and answers, we conclude that petitioner has not demonstrated that the district court exceeded its jurisdiction or exercised its discretion in an arbitrary or capricious manner. See NRS 34.320 (standard for writ of prohibition); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus is available to control arbitrary or capricious exercise of discretion). The district court's determinations appear to be consistent with the applicable statutes and local rules regarding pretrial motions, NRS 174.125; EDCR 3.20(a); EDCR 3.28, and with the procedural safeguards established in Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1130-35 (2008), when the State seeks to use a

witness's prior testimony because the witness is unavailable.¹
Accordingly, we

ORDER the petition DENIED.²


_____, C.J.
Parraguirre


_____, J.
Cherry


_____, J.
Gibbons

cc: Hon. Abbi Silver, District Judge
Attorney General/Carson City
Clark County District Attorney
Bush & Levy, LLC
Clark County Public Defender
Eighth District Court Clerk

¹The petition does not address the statutes and rules regarding pretrial motions or this court's decision in Hernandez, and we have not granted permission for petitioner to file a reply. Although Hernandez specifically dealt with the use of a witness's preliminary hearing testimony under NRS 171.198 and NRS 51.325, we see no basis to distinguish the decision. The essential legal issue—unavailability of the witness—and the trial right at stake—to confront and cross-examine witnesses—are the same. See NRS 174.215(1) (indicating that deposition taken pursuant to NRS 174.175 may be used "so far as otherwise admissible under the rules of evidence" if the witness is unavailable). We express no opinion as to whether the State can demonstrate good cause for filing an untimely motion or make a sufficient showing that the witnesses are unavailable. See Hernandez, 124 Nev. at ___, 188 P.3d at 1130-35.

²We deny the State's motion to file transcript as moot. Real party in interest Judy Stevens filed the transcript as an exhibit to her answer.

