IN THE SUPREME COURT FOR THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,
v.

THE STATE OF NEVADA,
Respondent.

No. 64757

APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

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APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

Deangelo Carroll petitions this Court to reconsider en banc the panel's opinion of April 7, 2016 under the authority of NRAP 40A. In this opinion, the panel concluded that Carroll's confession, which was obtained in violation of his constitutional rights and admitted at trial to prove his guilt, should have been suppressed. *April 7, 2016 Opinion* at 2, 20, 21, 22. Despite this conclusion, however, the panel did not reverse because it determined that the "error was harmless beyond a reasonable doubt" because there was other "powerful" evidence of Carroll's guilt. *Id* at 2, 22.

Beyond being demonstrably incorrect, the panel arrived at its conclusion by using the wrong legal standard. When a defendant's constitutional rights have been violated, any resulting conviction is invalid—*unless* it is clear beyond a reasonable doubt that the violation did not contribute to the conviction. By purportedly looking only to the quality of the other evidence against Carroll, the panel's opinion broke with state and federal case law. On its own, this departure from precedent is enough to justify en banc reconsideration to prevent any other court from copying that error. *See* NRAP 40A(a), (c).

The second problem with the panel's decision is that it rests on an argument that was never advanced or suggested *until* the panel raised it *sua sponte* during the State's portion of the oral argument. Because the State was "the beneficiary of constitutional error," the State had the burden "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *See Chapman v. California*, 386 U.S. 18, 24 (1967). But because the State did not raise harmlessness in its briefing, the argument should be considered waived according to this Court's prior decisions. But the panel ignored that too in reaching its conclusion on harmlessness. Again, that is grounds for en banc reconsideration. *See* NRAP 40A(a), (c).

To the extent this Court can consider harmlessness *sua sponte*, though, this was not an appropriate case to do it. There may be some instances in which the question of harmlessness is so straightforward and uncontroversial that public policy justifies ignoring the State's waiver. But outside those few cases, public policy tilts soundly away from *sua sponte* consideration.

For these reasons, the panel's resolution of Carroll's appeal should be reconsidered en banc.

A. The panel used the wrong legal standard to determine the erroneous admission of Carroll's confession was harmless beyond a reasonable doubt and, by so doing, ignored state and federal precedent

The panel's harmless-beyond-a-reasonable-doubt analysis consists of only one perfunctory paragraph. It first declares that "the State has shown that the error" of admitting Carroll's statement "was harmless." *April 7, 2016 Opinion* at 22. It then states that "harmless error analysis" can be applied "to a statement admitted at trial in violation of *Miranda*." *Ibid.* (citing *Boehm v. State*, 113 Nev. 910, 916, 944 P.2d 269, 273 (1997)). The paragraph then asserts that aside from Carroll's confession, "the district court properly admitted other powerful evidence of his guilt." *Ibid.* What that other evidence is, and why it was so powerful, is left unsaid.

The problem, however, is that the panel considered only the weight of the other evidence to render its decision. This is incorrect and contrary to U.S. Supreme Court and Nevada Supreme Court precedent. When constitutional error has occurred, the test to determine harmlessness is not whether there remains sufficient, even powerful, evidence to convict the defendant absent the error. If it were so, even a

directed verdict in the State's favor could be upheld if the reviewing court decided that the evidence against the appellant was overwhelming. *Cf. Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

The question to be asked—and the State is supposed to answer—is "whether there is a reasonable possibility that the evidence complained of [i.e., the constitutional error] might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967); *accord e.g.*, *Diomampo v. State*, 124 Nev. 414, 428, 185 P.3d 1031, 1040 (2008). To answer that question and save Carroll's conviction from reversal, the State was obligated to show *beyond a reasonable doubt* that the erroneous admission of Carroll's confession "did not contribute" to his conviction. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The panel ignored this standard for its own when it ruled the confession's admission harmless because there was other evidence to support Carroll's conviction.

Under the correct standard, it's impossible to say that admission of Carroll's confession was harmless beyond a reasonable doubt. The problem starts with the nature of confessions generally:

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Fulminante, 499 U.S. at 296 (internal quotation omitted). A confession is such compelling evidence that the jury may be tempted to rely upon it alone in reaching its decision. *Ibid*. Thus, a reviewing court must "exercise extreme caution" before determining that the admission of a confession at trial is harmless. *Ibid*.

The State's repeated use of Carroll's confession highlight its centrality in its case. A quick review of the record shows that the State described and played portions of the confession during its opening statement, *see* 6 AA 1169–73; it played the whole confession while discussing it with one of the detectives involved during the trial, *see* 7 AA 1425–35; the State also sought to admit a transcript of Carroll's confession, *see* 7 AA 1425, 12 AA 2463–577; and the State replayed (at

least) portions during its closing argument and further discussed it, *see* 9 AA 1840–43, 1851–54, 1860–62.

In sum, Carroll's confession was central to the State's case. On that basis alone, it cannot be said, especially beyond a reasonable doubt, that its admission did not contribute to Carroll's conviction. *Fulminante*, 499 U.S. at 296.

This conclusion remains solid even in light of the State's other evidence. Far from being overwhelming, it can't stand on its own. In fact, the State had to use Carroll's confession to bolster it.

Other than the confession, the other significant evidence the State offered against Carroll were recordings he made for the police while wearing a wire and the testimony of Rontae Zone. Zone's testimony is dispatched readily enough. His testimony was only available through a promise of immunity. *See* 6 AA 1311–13. Indeed, Zone readily admitted that he was only testifying, and would say pretty much anything, as long as he didn't end up charged. *See* 6 AA 1378–80. He admitted to lying when it suited him. 6 AA 1314–16. He even admitted that he had smoked pot the morning of the day he testified. *See* 6 AA 1327. It's hard to believe that the jury could give this testimony any real weight.

Apparently the State had similar thoughts: during its closing argument, the State repeatedly claimed Carroll's confession corroborated what Zone said. *See* 9 AA 1851–55. Without Carroll's confession, Zone's admittedly self-serving testimony was nothing.

As for the recordings Carroll made for the police, "neither the State nor defense argued that [Carroll's] statements were true, in fact, both explained that his statements were instead designed to produce inculpatory statements" from the codefendants in this case. *State's Brief* at 46–47. At least that was the State's tune on appeal. At trial, the State took a different tack. It argued that Carroll intended to elicit inculpatory statements, but the State *also* argued that Carroll's own comments proved his guilt. However, to make that argument, the State repeatedly cited back to Carroll's confession:

> No, ladies and gentlemen, because on May 20th, days before the recording's [*sic*] even happened, Deangelo, telling the police what actually happened, says that. It's not a script. It's not made up. It's not been fed to him by the police. You know that from listening to it from his own statement before the recordings even occur.
>
> (Audio played)

> *This is how you know that the recordings are accurate.* This is how you know that when, on the recording Deangelo speaks to them and they say that, it's, in fact, what they said because he's telling this to the police before the recordings even occur. So don't fall into the trap of thinking that everything that's incriminating that comes out of those recordings was just spoon fed through Deangelo by the cops. It is actually what happened.

9 AA 1861 (emphasis added).

In light of the State's emphasis and repeated reliance on Carroll's confession to prove its case, even with all the other evidence that was introduced, it simply cannot be said that the admission of Carroll's confession had no effect on the verdict. *Cf. Chapman*, 386 U.S. at 23–24.

A comparison to *Arizona v. Fulminante* drives this point home. In *Fulminante*, a defendant gave two confessions. The first, to a government's informant, was determined to be involuntary, while the second, to the informant's wife, was without legal flaw. *See* 499 U.S. at 284 & n.1, 287–88, 297. Both were introduced at trial, and the defendant Fulminante was convicted and sentenced to death. *Id.* at 284. Even though the second, unsullied confession gave more details of the crime, *see id.* at 312 (dissent), the Supreme Court nevertheless determined that the use of the first, involuntary confession was not

harmless beyond a reasonable doubt. *Id.* at 295–302. And two striking comparisons can be made between Carroll's prosecution and the *Fulminante* decision. Like in this case, the prosecutors in *Fulminante* relied heavily on *all* of the defendant's statements to achieve a conviction. *Id.* at 297–98. And like in this case, the prosecutors relied on an invalid confession to prove the reliability of other statements. *Id.* at 298–300. Based on these similarities, the admission of Carroll's confession cannot be ruled harmless beyond a reasonable doubt.

In sum, the panel ignored state and federal precedent in reaching its conclusion that the erroneous admission of Carroll's confession was harmless beyond a reasonable doubt. It devised its own standard of simply looking at the weight of other evidence. Under the correct standard, its conclusion is untenable.

But the harm caused by the panel's opinion doesn't end with Carroll's case. The panel has put this Court's imprimatur on a standard inconsistent with that set by the U.S. Supreme Court. By directing courts in future cases to merely look at the remaining evidence, and not asking whether the constitutional error had no effect on the conviction, the panel's opinion has ensured further blunders down the road. This

mistake should be nipped in the bud, not allowed to bloom and spread the seeds of error. For these reasons, this Court should grant en banc reconsideration.

B. The panel ignored this Court's precedent on waiver to even consider harmlessness

Throughout the rules of appellate procedure, there is an emphasis on briefing as the primary conduit for presenting arguments to this Court. For example, under NRAP 40, a party that seeks rehearing is supposed to cite its briefs for the point of law it argues that this Court overlooked. NRAP 40(a)(2). Similarly, when a party argues that this Court has overlooked a material fact, a similar citation is required. *Id.*

Other rules show the same point. NRAP 28(a)(10) requires an appellant to put forth his "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." NRAP 28(b) requires the same of the respondent. NRAP 28(e)(1) requires citations to the record for every factual assertion made in a brief. A failure to meet the requirement of either rule has regularly resulted in this Court refusing to even consider the issue raised. *See, e.g.*, *Las Vegas Metro. Police Dep't v. Coregis Ins. Co.*,

127 Nev. ___, 256 P.3d 958, 961 n.2 (2011); *Rivero v. Rivero*, 125 Nev. 410, 439 n.10, 216 P.3d 213, 233 n.10 (2009); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). This holds true even when the respondent in an appeal commits the error. *See, e.g.*, *State, Nevada Employment Sec. Dep't v. Weber*, 100 Nev. 121, 123, 676 P.2d 1318, 1319 (1984).

And yet, despite this tradition and authority, Carroll is now stuck fixing an error based in an argument that was not raised at all in the State's brief. In fact, the State did not even raise the argument itself during oral argument. The panel raised the possibility of harmlessness in oral argument halfway through the State's response.

The problems this raises are serious. First, the State's belated argument is both factually and legally untenable. The State's case below was so inextricably intertwined with the illegal confession that it is impossible to say that it had no effect on the verdict. Just counting the number of times during closing argument that the State asked, "What did Deangelo say to police?" or something similar proves the point. *See, e.g.*, 9 AA 1852, 1854, 1860–61.

Had Carroll known that the State would be allowed to argue harmlessness at oral argument, he could have prepared to rebut the argument and show how the case the State presented at trial made an argument for harmlessness futile. By soliciting that argument from the State, the panel overlooked this Court's decision in *Polk v. State*, which determined that this sort of sandbagging is prejudicial to the appellant. *See* 126 Nev. 180, 186, 233 P.3d 357, 360 (2010). Moreover, relying on arguments first presented during oral argument is detrimental to the orderly disposition of justice. Deciding an appeal on a late-formed, unbriefed argument magnifies the risks of an erroneous decision—as it did in this case. Such error must then be addressed in subsequent petitions for rehearing and for en banc reconsideration, further burdening this Court's workload.

Like any other litigant, the State's failure to raise an argument should result in a waiver of that argument. Allowing the State to raise new arguments after the rules prohibit it gives the State an unfair advantage over every other litigant.

Under *Polk*, as well as the rules of appellate procedure generally, it was prejudicial to Carroll and procedurally improper to consider any

argument from the State that its reliance on Carroll's confession was harmless beyond a reasonable doubt. Beyond the more serious issue of the correct standard of review for constitutional harmlessness analysis, this was more precedent the panel ignored in reaching its decision. En banc reconsideration is necessary for this Court to affirm Nevada's waiver standard and correct the panel's error.

C. Consideration of harmlessness *sua sponte* should be limited to clear-cut cases

If this Court is going to abandon its strict waiver jurisprudence for arguments not raised in briefs, this is not the case to do it in.

The federal courts of appeals have considered this same question, and there is consensus that reviewing courts *can* consider whether an error is harmless *sua sponte*—but only in very narrow circumstances. The question was before the Ninth Circuit in *United States v. Gonzales-Flores*, 418 F.3d 1093 (9th Cir. 2005). There the court determined that certain evidence was improperly admitted under the Federal Rules of Evidence. *See id.* at 1097–99. However, the government (like the State here) had offered no argument for why the admission was harmless. *Id.* at 1100. That left the court asking whether it should consider the

harmlessness of the error when the government had failed to argue it. *Id.*

The Ninth Circuit, looking at the decisions from other circuit courts, determined that, in some instances, it was reasonable to decide the harmlessness of an error *sua sponte*. But the circumstances for doing so are very narrow. In deciding whether to consider harmlessness *sua sponte,* a court should look at the size and complexity of the record, whether harmlessness is certain or debatable, and whether future litigation after reversal would be futile. *Id.* at 1101–02. But the primary consideration should be the certainty of harmlessness: "sua sponte recognition of an error's harmlessness is appropriate only where the harmlessness of the error is not reasonably debatable." *Id.* at 1101.

The reasons for limiting *sua sponte* consideration to such narrow circumstances were several. When the record is large, it shifts to the reviewing court the significant burden of sifting through the whole record unguided. *Id.* at 1100. And if done with any regularity, it encourages the government to hold arguments in reserve and gives it several bites at the apple. *Id.* at 1100–01. And when the reviewing court considers harmlessness without input from the defendant, it risks

"miss[ing] an angle that would have shown the error to have been prejudicial." *Id.* at 1101 (quoting *United States v. Pryce*, 938 F.2d 1343, 1347 (D.C. Cir. 1991) (opinion of Williams, J., announcing the judgment of the panel)).

All three of those reasons are present in this case. Without a doubt, the record is large—the trial itself covered nine days. And by raising the argument on the State's behalf, the panel is encouraging the State to hold arguments in reserve. Finally, as discussed above, the panel "missed" an angle that shows the error was prejudicial: the State repeatedly used the illegally confession to prove culpability and to bolster every other aspect of its case. If harmlessness can be considered *sua sponte*, this was not an appropriate case for it.

There is another factor present here that wasn't present in the Ninth Circuit case: in *Gonzales-Flores*, the circuit court was only concerned about the *probability* that the error affected the verdict. *See* 418 F.3d at 1099. In contrast, for Carroll's conviction to be upheld despite the illegal admission of confession, there must be no *possibility* that the admission contributed to his conviction. *See Fulminante*, 499 U.S. at 296 (1991). That places extra emphasis on the question of

whether the harmlessness of the constitutional error is reasonably debatable. *See Gonzales-Flores*, 418 F.3d at 1101. In cases in which federal courts of appeals have contemplated whether *sua sponte* consideration of *Chapman* harmlessness is appropriate, the typical answer is no because of the high burden that must be met. *See, e.g.*, *United States v. Torrez Ortega*, 184 F.3d 1128, 1136–37 (10th Cir. 1999) ("On this record, and in the complete absence of guidance from the government, we are unable to find such certainty of harmlessness beyond a reasonable doubt as to justify our discretionary initiation of full-scale harmless error review."); *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997) (same).

Ideally, this Court will simply affirm its prior precedent enforcing waiver. But if it believes departure from precedent may sometimes be warranted, it cannot be so in this case. As shown above, and consistent with practice in the federal courts of appeals, *sua sponte* consideration of harmlessness (and especially *Chapman* harmlessness) should only occur when harmlessness is not reasonably debatable. Because the harmlessness of the admission of Carroll's confession is *very* debatable,

the panel should not have touched the issue. En banc reconsideration is necessary to make that point clear.

CONCLUSION

When the panel determined that the illegal admission of Carroll's confession was harmless beyond a reasonable doubt, it did so in contravention of federal and state precedent. The test is not, as the panel believed, whether without the erroneously admitted confession there was sufficient evidence of guilt. For constitutional error to be harmless, the State must prove beyond a reasonable doubt that the error "did not contribute" to the conviction. By using the wrong standard, the panel caused this appeal to be decided incorrectly. But the harm won't stop at this appeal, because any court that looks to the panel's opinion when determining harmlessness will itself be destined for error.

The same concern follows issues not raised in briefs. For an issue to be considered on appeal, this Court has held that it must be raised first in briefs. The panel ignored that precedent to consider harmlessness *sua sponte*. Any litigant, but particularly the State, will

take note that waiver is selectively enforced. If this Court's waiver precedent is to be abandoned, then this Court should make clear that harmlessness is to be considered *sua sponte* only when the question of harmlessness is not debatable—and this is not such a case.

To maintain uniformity in this Court's decisions, as well as to address the important public policy considerations the panel's decision raises, this Court should grant this petition for en banc reconsideration.

DATED: August 3, 2016

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DATED: August 3, 2016.

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I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on August 3, 2016. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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