IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN DALE FARMER, Appellant, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Jan 23 2018 07:49 a.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 65935

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and Answers the Petition for Rehearing in the above-captioned appeal.

This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 22nd day of January, 2018.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
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MEMORANDUM
POINTS AND AUTHORITIES

On November 16, 2017, in a published opinion, this Court, en banc, affirmed a judgment of conviction pursuant to a jury verdict of four counts of sexual assault, eight counts of open or gross lewdness, and one count of indecent exposure. Farmer was sentenced to three consecutive terms of life imprisonment with the possibility of parole after ten years, as well as several other concurrent sentences. On November 30, 2017, Farmer petitioned this Court for rehearing. On December 6, 2017, this Court filed an Order directing the State to answer the petition within 15 days. The State requested an enlargement of time of 30 days to respond, which the Court granted.

The Court may consider rehearings in the following circumstances: (A) when the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) when the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. NRAP 40(c)(2). Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing. NRAP 40(c)(1). In his Petition, Farmer claims he is entitled to reversal because this Court (1) misapplied the law of joinder in overruling in part the "common scheme or plan"

analysis set out in Weber v. State, 121 Nev. 554 (2005), and (2) misapplied the law to find that Farmer was not unduly prejudiced by the joinder. Farmer adds that the case should be remanded to the district court to conduct a cross-admissibility analysis.

First, NRS 173.115(1)(b) provides two theories under which offenses may be joined under one indictment: when the felonies are "based on two or more acts or transactions connected together or constituting a common scheme or plan." (Emphasis added). This Court found that the District Court properly joined the charges based on either the "connected together" theory, or the "common scheme or plan" theory. Order at 10 n.7, 8-12. Since the charges against Farmer were found to have been properly joined under the "connected together" theory, reversal of Farmer's judgment of conviction is unwarranted, despite his claim to the contrary.

Second, the Court did not "misapply" the law of joinder; instead, it held that, although under the facts of the case, Weber was rightly decided, the Court had too narrowly defined the term "common scheme or plan." The majority here did not overrule Weber, but instead corrected the mistake it made in finding the words 'scheme' or 'plan' to be synonymous, which, "arguably [left] little room for the broader similarity analysis that we have historically employed in joinder cases."

Order at 8. The Court thus merely returned to its pre-Weber analysis of "common scheme or plan."

Moreover, even had this Court excplicitly overruled Weber, *stare decisis* does not bar this court from doing so. While "*stare decisis* is the preferred course . . . when governing decisions are unworkable or are badly reasoned, [a court is not] constrained to follow precedent. *Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision." Payne v. Tennessee, 501 U.S. 808, 827-28, 111 S. Ct. 2597, 2610 (1991) (citation omitted); State v. Lloyd, 129 Nev. __, 312 P.3d 467, 474 (2013) (overruling precedent because of the confusing and inconsistent application of the doctrine of laches). Here, the Court examined its precedent, including Weber and the line of cases predating 2005, and rejected the analysis it set out in Weber as being too narrow and inconsistent with its prior joinder jurisprudence. Since "nothing in Weber (or the prior-bad-acts line of cases upon which [Farmer] also relies) indicated an intent to overrule decades of this Court's joinder jurisprudence," the Court properly returned to its pre-Weber similarity analysis.

Farmer claims Weber was correct in interpreting "scheme" and "plan" as synonyms under the canons of statutory construction. Petition at 6. The Weber court read each of the words "scheme" and "plan" to include an overarching "purposeful

design," rendering the two terms synonymous. See Weber, 121 Nev. at 572, 119 P.3d at 119-20. By doing so, the Weber court improperly made one or the other of the terms redundant. An elementary canon of statutory construction is that a statute should not be interpreted in a manner that renders one part of the statute inoperative or redundant. "If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred." BRYAN A. GARNER & J. ANTONIN SCALIA, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176 (2012); United States v. Butler, 297 U.S. 1, 65 (1936) ("words cannot be meaningless, else they would not have been used"). The majority, here, remedied this narrowed reading of "common scheme or plan" by returning to its pre-Weber similarity analysis, which "derives from [NRS 173.115(1)(b)'s] language that offenses may be joined when they are committed as parts of a common scheme." Order at 9.

Farmer, after claiming that "plan" or "scheme" should retain the narrowed meaning set out by the Weber court, then also argues that the term "common plan or scheme" is a "legal term of art" which supports reading the two terms synonymously,

relying on one non-binding New York Supreme Court[1] case, People v. Ruiz, 130 Misc. 2d 191, 195 (N.Y. App. Div. 1985). Petition at 8, 10. In fact, the New York Court of Appeals – the highest Court in the State of New York – has held that a "common scheme or plan" is not equivalent to a "single criminal venture." People v. Duggins, 3 N.Y. 3d 522, 531, 821 N.E.2d 942, 947 (2004). The Second Circuit has also held that, "the term 'single common scheme or plan' is not synonymous with 'same course of counduct.'" United States v. Butler, 970 F.2d 1017, 1024 (2d Cir. 1992). Other than Ruiz, no case law exists that supports Farmer's assertion that "common scheme or plan" is a "legal term of art" that should be construed as one phrase with one meaning.

To the extent Farmer also argues that this Court erred in citing to Commonwealth v. Scott[2] to support its definition of a "common scheme" as separate from a "common plan," his argument is without merit. This Court may use persuasive authority from other jurisdictions, as well as prior decisions, to rule on an issue. See Zahavi v. State, 131 Nev. __, __, 343 P.3d 595, 603 (2015). Moreover, the complete quote cited by Farmer, that, when crimes share idiosyncratic features,

[1] As a clarifying note, the New York Court of Appeals is the highest court in the State of New York. The New York Supreme Court is the first appellate court, which may be overruled by the New York Court of Appeals.
[2] 651 S.E.2d 630, 635 (Va. 2007).

an inference may be made "that each individual offense was committed by the same person or persons as part of a pattern of criminal activity involving certain identified crimes," does not, despite Farmer's claim, prove that the Scott court read "common scheme" to mean *modus operandi*. Petition at 12. Farmer cites to nothing to support this bald allegation, and this argument does not warrant a rehearing.

The majority therefore did not misapply the law in holding that the Weber improperly narrowed the meaning of "common scheme or plan," and in holding that the term "common scheme" supported the Court's return to the pre-Weber similarity analysis in joinder cases. The Court, in ruling the charges against Farmer were part of a "common scheme or plan," examined judicial precedent, including Tabish v. State,[3] Mitchell v. State,[4] or Griego v. State,[5] to rule that in Farmer's case, the Court "[had] little difficulty concluding that Farmer's offenses were adequately shown to have been part of a common scheme." Order at 11. Here, both parties have already extensively briefed the issue of the charges being properly joined under a common scheme or plan similarity analysis, and we will not therefore readdress this issue, as this Court has already held the charges to have been properly joined under the "common scheme" similarity analysis. Order at 11-12.

[3] 119 Nev. 293, 303, 72 P.3d 584, 591 (2003).
[4] 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).
[5] 111 Nev. 444, 449, 893 P.2d 995, 999 (1995).

Third, Farmer argues that legislative intent demonstrates the intent of the Legislature to exclude a similarity analysis from joinder cases. However, "[w]hen the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." Nelson v. Heer, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007). Legislative intent only becomes the controlling factor for statutory construction if the statute is ambiguous. Id. Here, the language of the statute is clear, and this Court has decades of jurisprudence interpreting and clarifying NRS 173.115. The Court need not therefore look beyond the language of the statute.

Furthermore, "if a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction, or been given a uniform interpretation by inferior courts . . . a later version of that act perpetuating the wording is presumed to carry forward that interpretation." BRYAN A. GARNER & J. ANTONIN SCALIA, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176 (2012). Since this Court has already interpreted "common scheme or plan," it should not now look to legislative intent. The Legislature has had ample opportunity, since this Court started using a similarity analysis to interpret "common scheme or plan," to correct the statute, if it so desired. Moreover, in 2015, as Farmer noted in his Petition, the Legislature did

amend NRS 48.045 to include subsection (3), which allowed for the admission evidence of prior bad acts or crimes that would constitute separate sexual offenses. Petition at 16 n.5; NRS 48.045(3). While this amendment is not applicable to the instant case, it evinces some support for the proposition that the Legislature implicitly recognized prior sexual offenses by a defendant could be used to demonstrate the existence of a common scheme or plan. Finally, neither the Assembly Committee Minutes nor the Senate Committee Minutes demonstrate the 1967 Legislature's intent to purposefully exclude, through the enactment of NRS 173.115, the "same or similar character" analysis present in Federal Rule of Crmiinal Procedure 8(a). Barring evidence to the contrary, the Legislature could have very well determined that this additional language would constitute surplusage, and this Court should not today interpret this silent legislative history.

Fourth, Farmer's argument that the Court's decision would have a "drastic effect" on non-sex assault cases is outside the scope of NRAP 40(c), and should therefore not be considered by this Court. This appeal was argued and heard by the Court *en banc*, and this argument is neither a material fact in the record or a material question of law in the case, not a statute, procedural rule, regulation or decision that directly controls a dispositive issue in the case. See NRAP 40(c).

Fifth and lastly, Farmer alleges that the joinder was unfairly prejudicial because the State accumulated the charges in its closing argument to make a propensity argument. Once charges are properly joined, as both the District Court and this Court found (both under the "connected together" analysis and the "common scheme or plan" analysis), the State may argue the evidence together. Farmer previously made this same propensity argument in his Opening Brief, and again in his Reply Brief. The only difference now is that, in his Petition, he seems to claim that this Court improperly used the "doctrine of chances" to justify the State's alleged propensity argument. Petition at 20. Farmer further claims that since this doctrine has not been recognized in Nevada, this Court should not be using it in the instant case without reversing in order to allow the District Court to conduct a doctrine of chances analysis. The doctrine of chances is based on the combination of similar events. People v. Steele, 27 Cal.4th 1230, 1244-45 (2002) ("the fact that the defendant killed twice under similar circumstances is logically probative of whether the second killing was premeditated").

However, the Court did not actually analyze the District Court's decision under the doctrine of chances – instead, it merely used the doctrine as persuasive support for its holding. In its Order, this Court first determined that the State had not made a propensity argument, but instead "made the logical and appropriate

argument that the number of victims, and similarity of their stories, was evidence *that the offenses actually occurred as the victims claimed*, which was the primary issue in the case." Order at 13. The Court therefore held that the State's arguments were proper, as they served to support the victims' credibility, and not to suggest that Farmer was a sexual predator. The Court did not, in the body of the Order, use the doctrine of chances as the basis for its decision that the District Court properly joined the charges, contrary to what Farmer implies. Farmer's citation to a single non-binding Utah case is not a sufficient basis for this Court to allow for a rehearing on a propensity argument that has already been argued, heard, and decided by this Court.

In conclusion, Farmer fails to show that this Court overlooked or misapprehended a material fact in the record or a material question of law in the instant case case, or overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision that directly controls a dispositive issue in the case. This Court properly considered and analyzed its holding in Weber before reverting to to its pre-Weber similarity analysis. Moreover, Farmer's repetitive propensity argument and irrelevant "drastic effect" argument are not properly brought on rehearing.

WHEREFORE, the State respectfully requests that rehearing be denied.

Dated this 22nd day of January, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration or answer 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 or 40A because it is proportionately spaced, has a typeface of 14 points and contains 2,348 words, 188 lines of text and 11 pages.

Dated this 22nd day of January, 2018.

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 January 22, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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