IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW WASHINGTON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	CASE NO: 65998

PETITION FOR REHEARING

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COMES NOW Chief Deputy Public Defender SHARON G. DICKINSON, on behalf of appellant, MATTHEW WASHINGTON and pursuant to NRAP 40, petitions for rehearing of Order issued on 08/12/16. Washington timely filed this Petition - 18 days after filing of Order. NRAP 40(a)(1). Washington bases this Petition on following points and authorities and all papers and pleadings on file herein.

Dated this 30th day of August, 2016.

Respectfully submitted,

PHILIP J. KOHN,
CLARK COUNTY PUBLIC DEFENDER
By: ___*/s/ Sharon G. Dickinson*
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POINTS AND AUTHORITIES

I. JURISDICTION

Court may consider a Petition for Rehearing when "the court has overlooked or misapprehended" a material question of law or a material fact in the record or if the court "overlooked, misapplied or failed to consider controlling authority." NRAP 40(c).

II. ARGUMENT

ISSUE III: Insufficient evidence for murder and attempted murder.

Murder and attempt murder are specific intent crimes. The specific intent or *mens rea* for the crimes of murder and attempt murder are: wrongfulness, willfulness, specific intent to kill, premeditation, deliberation, and malice aforethought. NRS 200.010; NRS 200.030; NRS 193.330. Due process mandates the State "prove the *mens rea*, or intent, of a crime beyond a reasonable doubt." *Finger v. State*, 117 Nev. 548, 551, 27 P.3d 66 (2001) *cert. denied* 534 U.S. 1127 (2002) *citing to Leland v. Oregon*, 343 U.S. 790, 799 (1952).

In Opinion, Court found express malice, intent to kill, deliberation, and premeditation for first degree murder and attempt murder,

acknowledging State's theory in this case did not rely on implied malice. Opinion:9-11.

Court's conclusion of sufficient evidence for first degree murder and attempted murders misunderstood the controlling authority of *Keys v. State*, 104 Nev. 736, 740–41 (1988) and evidenced a misunderstanding of the facts.

Prior to discussing murder, it is important to point out that unknown persons using two different firearms discharged the weapons into the living room area of one apartment (dark and with curtains drawn) during the early morning hours. The persons are unknown because not one witness at trial identified the shooters as being Washington or Moten.

Washington's connection to the crime is that he was stopped after the incident in a car near the scene and witnesses identified the car he was driving as leaving the area after they heard gun shots. These witnesses did not see who was inside the car and did not identify Washington or Moten. Thus, no one identified them as being at the apartment complex at the time of the shooting.

Police later found firearms inside the car Washington was driving and ballistics connected the firearms to the shooting.

At trial, State admitted there was no motive for the shooting, Washington and Moten did not know the victims, and the victims did not know them. Court agreed, finding no provocation. Opinion:3-4;10-11.

Under these facts, Court found sufficient evidence of first degree murder and three counts of attempted murder.

When finding sufficiency for first degree murder, Court concluded:

> … Intent to kill can be inferred from the circumstances surrounding the killing. Due to the nature of the structure, a residential building in a populated area of town, and the time of day, 4:35 a.m., the jury could infer that **Washington knew or reasonably should have known** that the apartment was occupied. We conclude that firing multiple bullets into an occupied structure demonstrates intent to kill such that any rational juror could reasonably infer that Washington acted with express malice and that his actions were willful. Opinion:9-10. (emphasis added)

Court's conclusion that "Washington knew or reasonably should have known" the single apartment was occupied actually establishes that Court believed the shooters acted "recklessly, not with intent to promote or assist the murders" of the victims - not with specific intent to kill. *Colella v. State*, 860 S.W.2d 618, 622 (Tex. App. 1993). Thus, Court's conclusion that these facts proved specific intent to kill was flawed.

Most of the facts Court relied on for specific intent are not actions of the defendant: nature of the structure, population, and time of day. Court

did not realize that at that time of day most people would not in the living room where shots entered.

The only act Court attributed to Washington was "firing multiple bullets into an occupied structure." Opinon:10. But these acts are a violation of NRS 202.285(1) and NRS 202.285 is not listed as one of the felonies in the felony-murder rule which allows State to bypass proving specific intent. NRS 202.030(1)(c).

When relying on the act of discharge a weapon to prove specific intent, Court must look at the type of weapon, how it was used and the circumstances of the incident. *Dearman v. State*, 93 Nev. 364, 367 (1977). Discharging a firearm at close range directly at a person may be sufficient to prove specific intent to kill or cause great bodily harm. *See State v. Apodaca*, 50,113 (La. App. 2 Cir. 9/30/15). In *Dearman*, the victim was shot at close range. Here, the apartment was dark and the defendants and victims did not know each other thus making the act of discharging a weapon into the living room of one darkened apartment insufficient to establish specific intent for murder or attempted murder.

Court's finding that the shooting occurred "without provocation" also shows a lack of proof of specific intent.

Also, the words "knew or reasonably should have known" *imply malice* rather than express malice. An example of implied malice is shooting through a window without knowing and caring if anyone is behind it. *People v. Taylor*, 32 Cal. 4th 863, 867 (2004).

Keys Court found implied malice to support a *second degree murder* conviction when concluding that even though there was no evidence of an express intent to kill, the defendant intentionally "use[d] a deadly weapon in a deadly and dangerous manner" (*Moser v. State*, 91 Nev. 809, 812 (1975)) and acted reckless, disregarding 'others lives and safety…" *Keys at* 737-38 (other cite omitted). In *Keys*, the defendant pointed the gun at a man, ordered him to drive away, and when the man refused he shot him twice in the chest.

In *Moser,* Court found "malice afterthought" in a *first degree murder* case when defendant argued the killing was an accident. The incident in *Moser* began with a disagreement in a bar and a subsequent killing on the parking lot. State sought a first degree murder conviction based, in whole or part, on a "lying in wait" theory – killer waited on the parking lot for the man to leave. NRS 200.030(1)(a).

Here, State proceeded on the theory of "premeditation and deliberation" and Washington's theory was that he did not shoot anyone. IV:690. No one pointed a gun or shot victims at close range.

Keys and *Moser* illustrate that use of a weapon resulting in death is insufficient for proving express malice and that specific actions showing specific intent to kill must also be present. "Specific intent to kill is not synonymous with malice…and does not relieve the State of the burden of proving some kind of malice to establish murder." *Collman v. State*, 116 Nev. 687, 714–15 (2000).

The *Keys* Court explained the difference between express and implied malice as follows:

> The mens rea requirement denoted by the term ***express malice*** is different from that of ***implied malice***. **Express malice**, called malice in fact, is the deliberate intention to kill; **implied malice**, called malice in law, does not relate to a deliberate, intentional killing but is rather a mens rea inferred in law from the "circumstances of the killing." NRS 200.020. Proving **express malice** means proving a deliberate intention to kill; while proving **implied malice** means proving only the commission of wrongful acts from which, absent any proof of an actual intent to harm, the archaic but essential "abandoned and malignant heart" can be inferred in law.

Keys at 740-41 (emphasis added).

Acts Court relied on for the theory of express malice only involved the *circumstances* of the killing or attempt killing – types of acts used to

prove implied malice. Court acknowledged that neither party knew the other but found that circumstances of firing multiple bullets into one apartment when a person should reasonably have known someone was occupying the apartment was sufficient for express malice.

Malice is an element for first and second degree murder. The general definition for express and implied malice in NRS 193.0175 indicates:

> Malice" and "maliciously" import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

NRS 200.020(2) distinguishes implied malice from express malice. NRS 200.020(2) and Jury Instruction 26 explained implied malice as: "Malice may be implied when no considerable provocation appears (as in this case because none of the parties knew each other) or when all the circumstances of the killing show an abandoned and malignant heart." IV:724; See Opinion:11 – acknowledging act occurred "without provocation."

Shooting multiple shots into the living room of an apartment that is dark, at a time when people are usually in the bedroom, and there is no direct evidence that defendant knew people were inside does not support a finding of specific intent to kill and express malice as Court concluded.

As to the deliberation and premedication elements, Court said;

> With regard to deliberation and premeditation, the State presented circumstantial evidence at trial showing that Washington drove to the apartment complex with a handgun in the vehicle and that the handgun was discharged numerous times into the inhabited apartment without provocation. Based on this evidence, we conclude that he jury could reasonably infer that Washington's actions were deliberate and premeditated. Opinion:10-11.

"Deliberation remains a critical element of the *mens rea* necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting." *Byford v. State*, 116 Nev. 215, 235 (2000); *Valdez v. State*, 124 Nev. 1172, 1196 (2008).

State presented no evidence as to what Washington did prior to the shooting or that he drove to the apartment with the handgun. There was no evidence of weighing choices or consequences. Again, Court relies solely on a violation of NRS 202.285(1).

Premeditation is described as: "a design, a determination to kill, distinctly formed in the mind by the time of the killing. . .it may be as instantaneous as successive thoughts of the mind. . ." IV:725. Evidence of multiple shots into a dark apartment is insufficient to show premeditation because there was no evidence the parties knew each other or that Washington planned to kill. Having a gun is insufficient to prove a person has a plan to kill.

As to the attempted murder convictions, Court found sufficient evidence of attempted murder, saying: "Based on our previous conclusion that the jury could infer that Washington acted with express malice and the fact that Washington fired multiple bullets that failed to kill Hill, Thomas, and Scott…" Opinon:11 (emphasis added).

While claiming it based its decision on the sufficiency of the evidence of express malice, the facts show at best that what Court claimed is express malice is really implied malice as previously addressed in this Petition.

Because Court only found implied malice, the attempt murder charges must be vacated. *Keys* said:

> Attempted murder can be committed only when the accused's acts are accompanied by ***express malice***, malice in fact. One cannot *attempt* to kill another with **implied malice** because there " 'is no such criminal offense as an attempt to achieve an unintended result.' " *Ramos*, 95 Nev. at 253, 592 P.2d at 951 (quoting *People v. Viser*, 62 Ill.2d 568, 343 N.E.2d 903, 910 (1975)). An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "**implied malice**." One cannot be guilty of attempted murder by **implied malice** because **implied malice** does not encompass the essential specific intent to kill. An attempt to kill with **express malice** is, on the other hand, completely consistent with the specific intent requirement of the crime of attempt. **Express malice** is the "deliberate intention unlawfully" to kill a human. NRS 200.020(1).

> Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

Keys at 740–41(emphasis added).

III. CONCLUSION

Based on the foregoing, this Court should grant rehearing in the instant case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP32(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 proportionally spaced typeface using Times New Roman in 14 font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 2,057 words which does not exceed the 4,667 limit.

DATED this 30th day of August, 2016.

Respectfully submitted,

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SHARON G. DICKINSON, #3710
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of August, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS
SHARON G. DICKINSON
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY *__/s/ Carrie M. Connolly__*
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