IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW WASHINGTON, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	Case No. 65998

PETITION FOR EN BANC RECONSIDERATION

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PETITION FOR EN BANC RECONSIDERATION

COMES NOW Chief Deputy Public Defender SHARON G. DICKINSON, on behalf of Appellant, MATTHEW WASHINGTON, and pursuant to NRAP 40A, timely petitions this Court for En Banc Reconsideration of the panel decision filed on 09/16/16 in the above-referenced case. NRAP40A(b). This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 26th day of September, 2016.

Respectfully submitted,

PHILIP J. KOHN,
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By: */s/ Sharon G. Dickinson*
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POINTS AND AUTHORITIES
INTRODUCTION

I. JURISDICTION

Court may consider Petition for En Banc Reconsideration of panel decision when "proceeding involves a substantial precedential, constitutional or public police issue" thereby affecting future litigants or "reconsideration is necessary to secure or maintain uniformity of its decision." NRAP 40A(a).

II. ARGUMENT

ISSUE III.

Reconsideration is necessary to secure or maintain uniformity in this Court's prior decisions. Panel's analysis on sufficiency of evidence for express malice as applied to first degree murder and attempt murder conflicts with *Keys v. State*, 104 Nev. 736, 740–41 (1988), *Moser v. State,* 91 Nev. 809, 812 (1975), *McCurdy v. State,* 107 Nev. 275, 278 (1991), and NRS 200.020.

First degree murder and attempt murder are specific intent crimes. The elements for intent include a showing of: wrongfulness, willfulness, specific intent to kill, premeditation, deliberation, and malice aforethought. NRS 200.010; NRSA 200.020; NRS 200.030; NRS 193.330.

Panel agreed there was no motive for the shooting, Washington and Moten did not know victims, and victims did not know them. Opinion:3-4;10-11. Panel acknowledged State's theory did not rely on implied malice. Opinion:9-11.

When finding express malice for specific intent for first degree murder, Panel 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)

As to attempted murder convictions, Panel found specific intent: "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).

In concluding "Washington knew or reasonably should have known" the apartment was occupied when shooting, Panel actually found he acted recklessly.

Acting recklessly is the hallmark for implied malice for second degree murder. Malice for second degree murder may be implied by circumstances

showing recklessness for lives and safety of others. *Earl v. State*, 111 Nev. 1304, 1314 (1995); NRS 200.020.

In *McCurdy v. State,* 107 Nev. 275, 278 (1991), Court found implied malice for *second degree murder* when defendant threatened individuals with a gun and handed the cocked, loaded gun to his co-defendant. Later, co-defendant fired and killed one individual in the group. *McCurdy* Court held: "'Implied malice "signifies general malignant recklessness of others' lives and safety or disregard of social duty.' " *Id. citing Thedford v. Sheriff, Clark County,* 86 Nev. 741, 744 (1970).

In *Keys v. State*, 104 Nev. 736, 740–41 (1988), Court found implied malice to support a *second degree murder* conviction by concluding there was no evidence of specific intent to kill, but found 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 a gun at a man and ordered him to drive away. When the man refused to obey, he directly shot him twice in the chest.

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).

In this case, Panel found express malice without concluding Washington acted with deliberate intent to kill. Instead, Panel used the analysis for implied malice when looking at circumstances and finding an inference that "Washington knew or reasonably should have known" the apartment" was occupied when shooting into the window. Thus, Panel changed the test used in *Keys* for express malice by conflating the meaning of the two different tests.

Here, the facts are less egregious than *Keys* because no one directly pointed a gun at victims, victims were not shot at close range, the victims and defendants did not know each other, and there was no prior altercation before the shooting. In contrast to *Keys*, Washington and his co-defendant were convicted of shooting into a dark apartment with curtains drawn which was occupied by people who were unknown and there was no evidence they knew the victims.

For a finding of express malice, Panel relied in part on the use of the gun.

When relying on the act of discharge a weapon to prove malice and 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). But "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).

Dearman, *Moser*, and *Keys* illustrate that use of a weapon alone is insufficient for proving express malice because other acts must also be present. Because the act of shooting the firearm in violation of NRS 202.285(1) and NRS 202.285 is not an act listed in the felony-murder rule, State could not bypass the need to prove specific intent or malice simply based on a shooting and the use of a weapon. NRS 202.030(1)(c).

Malice is an element for first and second degree murder. The general definition for 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 or when all the circumstances of the killing show an abandoned and malignant heart." IV:724; See Opinion:11 – Panel acknowledged act occurred "without provocation."

An example of implied malice is shooting through a window without knowing and caring if anyone is behind it. *People v. Roberts*, 2 Cal. 4th 271, 317 (1992), *as modified on denial of reh'g* (May 20, 1992); *People v. Taylor*, 32 Cal. 4th 863, 867 (2004).

If Panel had used the correct test for expressed malice as identified in *Keys* then Panel would have found State failed to prove first degree murder beyond a reasonable doubt.

As to the attempted murder convictions, *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).

Because Panel used the test for implied malice when finding express malice as defined in *Keys*, the convictions for attempted murder with a deadly weapon must also be vacated.

III. CONCLUSION

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 Panel concluded. Test Panel used for finding malice conflicts with that used in *Keys* and other cases. Because this is a published decision, En Banc reconsideration is requested.

Thus, Washington asks this Court to grant his Petition for En Banc Reconsideration and reverse his convictions.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
SHARON G. DICKINSON, #3710
Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for en banc reconsideration 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 consists of 9 pages which does not exceed the 10 page limit.

DATED this 26th day of September, 2016.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Sharon G. Dickinson*
SHARON G. DICKINSON, #3710
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of September, 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_*
Employee, Clark County Public
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