IN THE SUPREME COURT OF THE STATE OF NEVADA

LACY L. THOMAS, Petitioner-Defendant, vs. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for Clark County; THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE, DEPT. 17, Respondents, and THE STATE OF NEVADA, Real Party in Interest.	)	CASE NO. 69074 District Court Case Number: C241569 **OPPOSITION TO PETITION FOR REHEARING**

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INTRODUCTION

For the last ten years, Lacy Thomas has been subjected to the overreaching by the State. Now the State seeks to redo the litigation and subject him to further harm. The State's Petition for Rehearing restates the arguments which it made in its Answer to the Petition for extraordinary relief. Some new authority is added and some theories are drawn from the dissenting opinion but the Petition must be denied.

A.

Rehearing

This court has been clear that a Petition for Rehearing will only be considered in extraordinary circumstances: When "[t]he court has overlooked or misapprehended a material fact in the record or a material question of law in the case." NRAP 40(c)(2)(A) or "[w]hen 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)(B). Further, "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 re Hermann, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). See also, Gordon v. District Court, 114 Nev. 744, 745, 961 P.2d 143, 143 (1998).

The State argues that rehearing is appropriate because: 1) this court incorrectly applied the clearly erroneous standard to the review of the findings in this case; 2) this court is not permitted to utilize any inferences in assessing whether the findings were clearly erroneous; 3) the dissent is correct and the majority acted on a whim in adopting a double jeopardy standard under the Nevada constitution which is not as narrow as the federal standard.

The first and third grounds are rearguments of issues squarely presented in the pleadings, argued twice in oral argument and obviously considered and debated by this court in its lengthy majority opinion and dissent. Accordingly, those grounds cannot properly be the subject of rehearing. The second ground, while technically a new argument, is one that should aditionally be rejected on the ground that this court not only has the authority to utilize inferences in its assessment of whether findings by a trial court are clearly erroneous, but it has done so on a number of occasions, as have other appellate courts and the Supreme Court of the United States.

B.

Application of the Standard of Review

In its Answer to the petition for extraordinary relief, the State argued that the trial court's findings were not clearly erroneous at pp. 20-27. That argument is

made again here.This court carefully considered the transcript of the proceedings and despite a vigorous dissent on this point, the majority opinion rejected the conclusion of the lower court. The State's reargument of this issue must be rejected under the rules governing rehearing. Clearly this court did not overlook the matter in its lengthy opinion and the State points to no misapprehension of the law on the standard. It is apparent that the majority reached the definite and firm conviction that a mistake was committed when the trial court concluded that the failure to disclose the exculpatory evidence which caused the mistrial was not intentional.

The State argues again, as it did in its Answer, that DDA Mitchell had given an explanation at the time of the declaration of mistrial and argues that this court ignored that explanation in its analysis. The same problem exists with that argument as it did when this issue was originally briefed. Detective Ford testified at the evidentiary hearing under oath that he provided the materials, and discussed the exculpatory nature of those materials with DDA Scott Mitchell on more than one occasion. The trial court judge obviously did not believe Mitchell when he asserted that the materials were not provided to the District Attorney's office because the trial court found that "'the 'binder' was given to the District Attorney's Office by the police.'" PA 427. The State does not contest that finding.

The only real issue left for resolution was whether Mitchell knew or intended his conduct, as measured by objective factors.

The State does not argue that this court overlooked any particular facts, it simply reargues that the result reached by this court is wrong. Reargument of the issues already briefed and argued will not be considered by this court on rehearing.

C.

In Deciding the Question Presented, this Court Can Properly Utilize Appropriate Inferences

Much of the State's briefing is devoted to a discussion of the law on negative inferences. At page 17 of the Opinion, this court held that, "under these unique circumstances, a negative inference arises from Mitchell's failure to testify." First, the State argues that appellate courts may never utilize inferences–only the trial court can do that. "[W]hether or not a negative inference may be drawn from a particular witness's failure to testify is within the sole discretion of the fact finder below, not this Court in its appellate review." Petition for Rehearing (PFR), p. 4. Second, the State argues that only a party not bearing the burden of proof may be allowed the benefit of a negative inference. The State is simply wrong on both points. Appellate courts can, and do, draw inferences when deciding questions before them. Any party may seek an inference regardless

of which party bears the burden of proof.

Appellate Courts Are Not Prohibited from Drawing Inferences in Deciding Questions

The State was well aware that DDA Mitchell's knowledge and intent were the only issues to be decided at the evidentiary hearing on the Motion to Dismiss, yet it failed to call its own prosecutor to offer an explanation.

In its Opposition to Defendant's Motion to Dismiss, filed October 17, 2014, the State specifically denies that the prosecutor "purposefully knew about and withheld evidence that was potentially exculpatory in nature." PA, p. 198. Counsel for the State went further, though, and expressed outrage at the suggestion that at an evidentiary hearing "'evidence will be adduced showing that the office of the District Attorney was completely aware of the existence of the documents.'" Id. When the evidentiary hearing was held seven months later, the State decided not to call prosecutor Mitchell to rebut the claim that the evidence was purposefully withheld. This court, in deciding the question presented to it, in addition to a detailed analysis of the testimony of two police officers and attorney Don Campbell, drew a negative inference from the decision of the prosecutor not to call DDA Mitchell.

The only authority relied upon by the State for its proposition that only a trial court may draw inferences is a footnote in Anderson v. City of Bessemer City,

470 U.S. 564, 580, 105 S.Ct. 1504, 1514 , 84 L.Ed.2d 518 (1985). The footnote in Anderson does not support the prohibition suggested by the State. Anderson is a gender discrimination case which was tried to the bench. The trial court applied an inference of bias based on testimony regarding the hiring process. The Fourth Circuit Court of Appeals reversed and suggested that "any inference of bias was dispelled by the fact that each of the male committee members was married to a woman who had worked..." All that the U.S. Supreme Court did in the footnote was to comment that a man's attitude toward his wife's employment is a factor that was for the trial court to consider. The Supreme Court did not set forth a rule which prohibits an appellate court from drawing natural inferences from facts when determining whether a trial court has clearly erred.

In fact, inferences are commonly used at the appellate level when the court is presented with questions which require factual analysis, particularly when intent is at issue.[1]

When the Supreme Court was faced with the question under Batson v. Kentucky, 476 U.S, 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) whether a prosecutor acted with discriminatory intent in the exercise of peremptory jury

[1]As the majority opinion points out, when knowledge and intent must be assessed, "factors which may give rise to an appropriate inference or conclusion" should be considered. Quoting Pool v. Superior Court, *infra*. Opinion, p. 14.

challenges, it utilized inferences throughout its discussion and ultimate finding that the trial court's findings were clearly erroneous. When examining whether the State acted with discriminatory intent in its use of "jury shuffling" during voir dire, the Supreme Court held, "[N]o racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference." Miller-El v. Dretke, 545 U.S. 231, 260, 125 S.Ct. 2317, 2333, 162 L.Ed.2d 196 (2005). Similarly, when examining whether the prosecution's questions of black jurors regarding views of the death penalty were racially motivated, the high court found, "As between the State's ambivalence explanation and Miller-El's racial one, race is much the better, and the reasonable inference is that race was the major consideration when the prosecution chose to follow the graphic script." Id. at 125 S.Ct. 2337. See also, Snyder v. Louisiana, 552 U.S. 472,485, 128 S.Ct. 1203, 1212, 170 L.Ed. 2d 175 (2008)(pretextual explanations by prosecutor give rise to adverse inference of discriminatory intent).

This court has similarly employed adverse inferences in deciding the intent of prosecutors in the exercise of peremptory challenges. In Conner v. State, ____ Nev. ___, 327 P.3d 503, 510-11 (2014), this court found the trial court's findings clearly erroneous and drew an adverse inference of discriminatory intent based on the disparate treatment of similarly situated venire-members. Similar use of

adverse inferences occurred in McCarty v. State, ___Nev. ___, 371 P.3d 1002 (2016).

To decide the question whether there was overwhelming evidence to support a verdict (when cumulative error was at issue), this court drew an inference from the facts that the defendant's state of mind at the time of the killing could have been anger rather than premeditation and deliberation. Valdez v. State, 124 Nev. 1172, 196 P.3d 465, 481 (2008).

Appellate courts are often tasked with reviewing the findings of a lower court and there is simply no rule in the jurisprudence on this issue which prohibits an appellate court from utilizing inferences in the decision-making process.

Negative inferences can be drawn from the failure of either party to adduce certain evidence

It is possible that the State's misunderstanding of the concept of inferences in decision-making by appellate courts results from its reliance on the law which has developed around utilization of a "missing witness" instruction in jury trials. The authority cited by the State in its Petition for Rehearing is based on cases which assess whether such an instruction should be given when a party fails to call a witness or present evidence.

The State suggests to this court that only the party that does not bear the burden of proof may receive the advantage of a negative inference when the party

with the burden fails to present evidence or witnesses. PR, p. 6. That is just not the rule.

First, this is not a "missing witness" instruction case, or even a case examining argument to a jury on adverse inferences. Giving an instruction, or arguing to a lay jury is a far different question than utilization by a court of inferences in the analysis of whether a factual finding is erroneous.

Second, even if the rules governing "missing witness" instructions applied, a negative inference can be drawn from the failure of **either** party to adduce evidence. See NRS 47.250(3), (4). Regrettably, the State has distorted quotes from the majority and dissenting opinions in Glover v. District Court, 125 Nev. 691, 220 P.3d 684 (2010). PR, p. 6. Glover did not hold, as the State suggests, that only the party not bearing the burden of proof may argue a negative inference from the failure of her opponent to adduce evidence.[2]

Certainly there is danger in the prosecution arguing that a negative inference

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[2]At page 6 of the Petition for Rehearing, the State argues, "In a criminal case, the ability to draw a negative inference from the State's failure to call an important witness is permissible '[b]ecause of the State's burden of proving guilt beyond a reasonable doubt.'" The language from the opinion actually reads, "Because of the State's burden of proving guilt beyond a reasonable doubt, 'defense attorneys must be permitted to argue all reasonable inferences from the facts in the record." The State also references language in the dissent addressing particular arguments which would be impermissible because they would shift the burden of proof to the defendant.

should be drawn based on the defendant's failure to adduce evidence as such an argument risks violation of defendant's Fifth Amendment rights—rights which the State does not possess. However, that does not mean that the State (the party with the burden of proof) can never argue or seek a negative inference instruction.

In fact, the rule in Nevada is that,

> [G]enerally, the State may not comment on a defendant's failure to call a witness. We have also recognized an exception to this general rule. In Colley v. State, 98 Nev. 14, 16, 639 P.2d 530, 532 (1982), this court held that it was not improper for the prosecutor to comment on the absence of a witness where the defendant testified concerning an alibi witness and thus opened the door for the prosecution to rebut the testimony with implications concerning the failure of the alibi witness to appear on the defendant's behalf.

Sonner v. State, 112 Nev, 1328, 1343, 930 P.2d 707, 717 (1996).

DDA Mitchell's knowledge and intent have been at issue in these proceedings since the mistrial was declared. The State has repeatedly insisted that Mitchell's conduct was unintentional. Just like the alibi witness in Colley, a negative inference can be drawn from the failure to have Mitchell testify.

Finally, the State argues that Mitchell was equally available to the State and the defendant. In Colley, a negative inference could be argued by the prosecution because the alibi witness was the defendant's fiancee and "it was far more appropriate that she be called by the defense in corroboration than by the state." Colley, Supra. Certainly it is far more appropriate that its own prosecutor be called

by the State.

The State could cite no authority to support its argument that the rules which have developed around arguments and instructions to a jury should apply to the decision-making of an appellate court. There likely is none since inferences are a natural part of the calculus employed by a court in assessing whether the lower court clearly erred.

D.

Impact of Ruling

At pages 27-31 of the State's Answer, the State argues that this court should not look to the treatment of this issue by the states that have expanded the rule in Oregon v. Kennedy under their state constitutions. In the Petition for Rehearing, the State reargues that position but takes it more seriously and adds some authority which it did not include in its original brief. Rehearing should be denied on the ground that the State's arguments violate NRAP 40(c)(1).

In its new argument, not made in the original briefs, the State argues that the court's majority opinion (which it characterizes as the "whim of the majority currently in power," PR, p. 12) will be "disastrous." and will result in years of "bad law and inconsistent results." PR, p. 14, 15. Yet, Arizona has had no trouble in applying the test which was adopted in the majority opinion in this case.

Pool v. Superior Court, 677 P.2d 261, 271 (Ariz. 1984) was decided 33 years ago and Arizona's courts have had numerous occasions to apply its principles. The Arizona Supreme Court, and now this court, determined that the three prong test relying on objective factors, will provide more clarity, not less.

The danger which concerned the dissenting Justice in this case, that "winning" could be found to be an improper purpose and therefore "it will be the rare case where 'indifference to a significant resulting danger of mistrial or reversal' cannot be claimed, litigated, and found." Dissenting Opinion, at page 18, is simply not borne out by Arizona's experience.

Following is a small sample of cases which have applied the test in Pool:

- State v. Detrich, 873 P.2d 1302 (Ariz. 1994)(Test applied, double jeopardy argument rejected)
- Miller v. Superior Court, 938 P.2d 1128 (Ariz. App.1997)(Test applied, double jeopardy argument rejected)
- State v. Jorgenson, 10 P. 3d 1177 (Ariz. 2000)(Test applied, case dismissed)
- State v. Minnitt, 55 P.3d 774 (Ariz. 2002)(Test applied, retrial barred)
- State v. Phillips, 2009 WL 294686 (Ariz. App. 2009)(Test applied, double jeopardy argument rejected)
- State v. Weeks, 2009 WL 189169 (Ariz. App. 2009)(Test applied, double

jeopardy argument rejected)

- State v. Bromley, 2013 WL 1908724 (Ariz. App. 2013)(Test applied, double jeopardy argument rejected)
- State v. Hollingsworth, 2016 WL 853077 (Ariz. App. 2016)(Test applied, double jeopardy argument rejected)
- State v. Marsh, 2017 WL 1458769 (Ariz. App. 2017)(test applied, double jeopardy argument rejected)

CONCLUSION

Lacy Thomas has been waiting for a resolution of his case for ten years; years that would have been his most productive.

The State has treated the defendant's protection against double jeopardy in an unconscionable and cavalier manner. This may be the result of the lack of consequences for this conduct. The opinion in this case provides a remedy, and a consequence.

> [R]egardless of the prosecutorial motive, the defendant suffers severe deprivation of his rights. Constitutional rights are to be protected irrespective of the motive or intent of the actor whose conduct has occasioned an infringement of them.

Ponsoldt, James F., *When Guilt Should be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause After Oregon v. Kennedy*, 69 Cornell L.Rev. 76, 98 (1983).

At oral argument in this case, when the prosecutor was asked why DDA

Mitchell was not called, he responded, "We just didn't call him." Audiotape of oral argument, at 25:00. The prosecutor then told the court, "in retrospect, I would have called him." at 26:17.

Seven years after the declaration of mistrial, the State insists that it is entitled to a do-over.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby [1] subjecting him to embarrassment, expense and ordeal and [2] compelling him to live in a continuing state of anxiety and insecurity, as well as [3] enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 335 U.S. 184, 187-88 (1957).

The Petition for Rehearing should be denied.

Dated this 14th day of December, 2017.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this opposition to petition for rehearing 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 Word Perfect Office X4 in 14 point font of the Times New Roman style.

2. I further certify that this opposition complies with the type-volume limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6), because it is proportionately spaced, has a typeface of 14 points, contains 3,556 words and 401 lines of text.

Dated this 14th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was electronically filed with the Nevada Supreme Court on December 14, 2017. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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