IN THE SUPREME COURT OF THE STATE OF NEVADA

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TERRENCE BOWSER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 71516

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals because it is an appeal from a judgment of conviction, pursuant to a jury trial, of a Category B Felony.

STATEMENT OF THE ISSUES

Whether the sentences imposed for Counts 4 and 6 after Appellant's retrial violated the Double Jeopardy Clause.

STATEMENT OF THE CASE

On April 29, 2005, TERRENCE KARYIAN BOWSER (hereinafter "Appellant") was charged by way of Indictment with the following: Count 1 –

Conspiracy to Commit Murder (Felony - NRS 200.010, 200.030, 199.480); Count 2 – Murder with Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165); Count 3 – Conspiracy to Discharge Firearm Out of a Motor Vehicle (Gross Misdemeanor - NRS 202.287, 199.480); Count 4 – Discharging Firearm Out of Motor Vehicle (Felony - NRS 202.287); Count 5 – Conspiracy to Discharge Firearm at or into Structure, Vehicle, Aircraft, or Watercraft (Gross Misdemeanor - NRS 202.285, 199.480); and Count 6 – Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft (Felony - NRS 202.285). 1 Appellant's Appendix ("AA") 1-7.

On October 3, 2007, a jury trial convened and on October 11, 2007, the jury found Appellant guilty as charged on all counts. 1 AA 109-110. On October 16, 2007, the jurors returned a verdict of 40 years to Life on Count 2. 1 AA 111. On December 5, 2007, Appellant was sentenced to the Nevada Department of Corrections ("NDOC") as follows: as to Count 1 – a maximum of 120 months with a minimum parole eligibility of 24 months; as to Count 2 – Life with a minimum parole eligibility of 20 years, plus an equal and consecutive term of Life with 20 years minimum parole eligibility; as to Count 3 – 365 days with credit for time served; as to Count 4 – a maximum of 60 months with a minimum parole eligibility of 12 months, to run concurrent with Counts 1 and 2; as to Count 5 – 365 days with credit for time served; and as to Count 6 – to a maximum of 60 months with a

minimum parole eligibility of 12 months, to run concurrent with Counts 1 through 5. 1 AA 112-114. Appellant received 1,038 days credit for time served. A Judgment of Conviction ("JOC") was filed on December 13, 2007. Id.

On January 2, 2008, Appellant filed a Notice of Appeal. 1 AA 115-117. On February 26, 2010, the Nevada Supreme Court issued an Order of Reversal and Remand. 1 AA 118-127. Remittitur issued March 27, 2010. Id.

On May 18, 2015, Appellant's re-trial convened and lasted six days. 2 AA 173 - 5 AA 1133. On May 26, 2015, the jury found Appellant guilty of Count 2 – Voluntary Manslaughter with Use of a Deadly Weapon, Count 4 – Discharging Firearm Out of a Motor Vehicle, and Count 6 – Discharging Firearm at or into Structure, Vehicle, Aircraft, Watercraft. 6 AA 1200-1201. However, the jury found Appellant not guilty of Counts 1, 3, and 5. Id.

On August 19, 2015, Appellant was sentenced to the NDOC as follows: as to Count 2 – to a maximum of 120 months with a minimum parole eligibility of 48 months, plus an equal and consecutive term of 120 months with a minimum parole eligibility of 48 months for use of a Deadly Weapon; as to Count 4 – to a maximum of 120 months with a minimum parole eligibility of 48 months, to run consecutive to Count 2; and as to Count 6 – to a maximum of 72 months with a minimum parole eligibility of 28 months, to run concurrent with Count 4. 6 AA 1236-1238.

Appellant received 3,852 days credit for time served. Id. A Judgment of Conviction was filed on August 31, 2015. Id.

On May 20, 2016, Appellant filed a Post-Conviction Petition for Writ of Habeas Corpus. 6 AA 1243-1267. On August 15, 2016, this Court granted Appellant's Post-Conviction Petition for Writ of Habeas Corpus. 6 AA 1268-1275.

On October 13, 2016, Appellant filed a Notice of Appeal. 6 AA 1276-1277. On February 8, 2017, Appellant filed his Opening Brief. On May 1, 2017, the State filed its Answering Brief. On May 9, 2017, Appellant filed his Reply Brief.

On June 14, 2017, Appellant filed a Motion for Leave to File Supplemental Opening Brief. On July 6, 2017, this Court granted Appellant's Motion. On July 19, 2017, Appellant filed the instant Supplemental Brief ("Supp. Brief"). The State responds as follows.

STATEMENT OF THE FACTS

On January 31, 2005, Las Vegas Metropolitan Police Department ("Metro") officers were dispatched to a local area regarding a shooting. 4 AA 667. Officers learned that a male, later identified as John McCoy ("McCoy"), had been shot and crashed into the property wall of a local residence. 4 AA 669. Upon arrival, McCoy told officers that the shooter was in a brown Lincoln and that there were two black males inside the car. 4 AA 680-681.

A short time later, a North Las Vegas Police Department ("NLVPD") officer in a nearby area observed a Lincoln Continental, without front or rear license plates, traveling with its headlights turned off. 4 AA 705, 719-720. The vehicle then turned its headlights on and as it passed the officer's vehicle, the officer observed that the two male occupants were wearing dark hoods that were pulled up over their heads. 4 AA 706. The officer made a U-turn and began to follow the vehicle. Id. The officer also activated his lights and sirens, but the driver of the vehicle attempted to evade the officer. 4 AA 706-708. The driver made several turns and finally pulled into a driveway. 4 AA 709-710. The driver attempted to back the vehicle out of the driveway, but the officer drew his weapon and commanded the driver to stop the vehicle. Id. Both occupants were taken into custody. 4 AA 712. The driver was identified as the Appellant, Terrence Karyian Bowser, and the passenger was identified as the co-defendant, Jamar R. Green ("Green"). 4 AA 712-713.

A pistol grip pump action shotgun was found on the gravel next to the driveway of the residence. 4 AA 716, 732. The shotgun was empty; however, a box of shotgun shells was seen in plain view on the front seat of the vehicle. 4 AA 715-716. Inside the vehicle, three spent shotgun cases were observed on the front floorboard. 4 AA 715. Officers were later informed that McCoy died as a result of his injuries. 4 AA 691.

At the Clark County Detention Center ("CCDC"), officers made contact with Appellant and he agreed to answer questions. 1 AA 8-97. Appellant initially stated the shooting was a result of a road rage incident, but later admitted the incident was not the result of road rage. 1 AA 54, 74-76. Appellant stated that he and Green joked about what it would be like to shoot into a vehicle. 1 AA 74-76. Appellant told officers he put the box of shotgun shells in his car before he went to meet Green at his residence. 1 AA 40. Appellant stated he had been drinking Hennessey and was drunk. 1 AA 36. After he had something to eat at Green's house, he and Green decided to go cruising. 1 AA 37-38.

Appellant stated Green had his shotgun on his lap as they drove around. 1 AA 38, 77. Eventually, Appellant and Green drove by McCoy. 1 AA 44. Green then told Appellant that McCoy "was talking shit." Id. Appellant did not actually hear McCoy "talking shit," but just took Green's word that he was. 1 AA 47. In addition to not being able to hear anything coming from McCoy's vehicle, Appellant stated that he could not see into the vehicle as well. 1 AA 68. Appellant and Green then began to follow McCoy. 1 AA 46. Appellant and Green then pull up beside McCoy. 1 AA 49. Appellant stated that he told Green to shoot McCoy. 1 AA 95. Green pointed the shotgun out of the window and Appellant pulled up next to the driver's side of the victim's vehicle. 1 AA 67-69. Appellant stated he heard Green fire at

least two rounds. 1 AA 49-50. As Appellant made a U-turn to drive away, they were spotted by a NLVPD officer who tried to stop them. 1 AA 61-62.

SUMMARY OF THE ARGUMENT

Appellant claims that the sentence imposed on Counts 4 and 6 violated the Double Jeopardy Clause because they were harsher sentences than the original sentences he received on these Counts before the case was reversed and remanded on appeal for a retrial. However, Appellant's claim is without merit as the cases he cites to are inapplicable to the instant matter.

ARGUMENT

THE SENTENCES IMPOSED FOR COUNTS 4 AND 6 AFTER APPELLANT'S RETRIAL DID NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE

The prohibition against double jeopardy "protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." Peck v. State, 116 Nev. 840, 847, 7 P.3d 470, 475 (2000) (citing State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998)); see also Gordon v. District Court, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996). The facts of Appellant's case do not fit within any of the three aforementioned protection categories against double jeopardy.

Appellant alleges that the sentences imposed for Counts 4 and 6 after his retrial violated the Double Jeopardy Clause. Supp. Brief at 1. Specifically, Appellant alleges that "it was error for the trial court to increase the individual sentences imposed on resentencing, even though the aggregate term imposed was not harsher than the original sentence." Id. at 4-5. However, Appellant's claim is without merit as the cases he cites to are inapplicable to the instant matter.

Appellant heavily relies on Dolby v. State, 106 Nev. 63, 787 P.2d 388 (1990), and Wilson v. State, 123 Nev. 587, 170 P.3d 975 (2005), as support for his position. However, Dolby and Wilson are inapplicable to the instant matter because neither of those cases involved an increased sentence after a retrial. Rather, they involved the resentencing of defendants due to original sentences that were unlawful.

Appellant's reliance on Dolby is misplaced as it involved a sentencing correction initiated *sua sponte* by the district court. 106 Nev. at 65, 787 P.2d at 389. In Dolby, the defendant was sentenced to ten years on an attempted murder charge with an enhancement of ten years because of the victim's age, for a total of twenty years. Id. Both parties and the court agreed that the enhancement penalty for the attempted murder charge was unlawful. Id. The court eventually vacated the enhanced penalty and resentenced the defendant on the primary offense of attempted murder. Id.

Appellant's reliance on Wilson is similarly misplaced as it involved a resentencing mandated on appeal after the defendant's conviction was partially vacated. 123 Nev. at 589-590, 170 P.3d at 976. In Wilson, the defendant was convicted of four counts of using a minor in the production of pornography and four counts of possession of a visual presentation depicting sexual conduct of a person under 16 years of age. Id. The defendant was sentenced to four terms of 24 to 72 months on the possession charges to run concurrently with four consecutive terms of 10 years to Life on the production charges. Id. The district court reversed three of the four production convictions because all four convictions arose out of a single criminal act, however, the district court also modified the sentences pertaining to the defendant's remaining lawful convictions. Id.

Although Appellant correctly states that "when a court is forced to vacate an unlawful sentence on one count, the court may not increase a lawful sentence on a separate count," this holding is inapplicable to the instant matter. Supp. Brief at 4; Wilson, 123 Nev. at 594, 170 P.3d at 979 (quoting Dolby, 106 Nev. at 65, 787 P.2d at 389). Here, the entirety of Appellant's sentence was vacated on appeal and was not a resentencing. 1 AA 118-127. As such, the sentence imposed by the District Court after Appellant's retrial was a new sentence and not an increase to an existing lawful sentence. Therefore, the sentences imposed for Counts 4 and 6 after Appellant's retrial did not violate the Double Jeopardy Clause.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court order the District Court's Judgment of Conviction be AFFIRMED.

Dated this 26th day of July, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 2,020 words and 10 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of July, 2017.

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 26th day of July, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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