IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE BOWSER, Petitioner, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Mar 09 2018 04:36 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 71516

ANSWER TO PETITION FOR REVIEW

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, CHARLES W. THOMAN, and answers the Petition for Review 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 9th day of March, 2018.

Respecfully submitted,

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

BY */s/ Charles W. Thoman*
CHARLES W. THOMAN
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STATEMENT OF THE CASE

On April 29, 2005, Appellant Terrence Karyan Bowser was charged by way of Indictment with: 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).

On October 3, 2007, a jury trial commenced and on October 11, 2007, the jury found Appellant guilty on all counts. On October 16, 2007, the jurors returned a verdict of 40 years to Life on Count 2. On December 5, 2007, Bowser was sentenced to the Nevada Department of Corrections ("NDC") as follows: Count 1 – 24 – 120 months; Count 2 – 20 years to Life, plus a consecutive term of 20 to Life; Count 3 – 365 days with credit for time served; Count 4 – 12 – 60 months, to run concurrent with Counts 1 and 2; Count 5 – 365 days with credit for time served; and Count 6 – 12 – 60 months, to run concurrent with Counts 1 through 5. Bowser received 1,038

days credit for time served. The Judgment of Conviction was filed on December 13, 2007.

On January 2, 2008, Bowser filed a Notice of Appeal. On February 26, 2010, the Nevada Supreme Court issued an Order of Reversal and Remand. Remittitur issued March 27, 2010.

On May 18, 2015, Bowser's retrial commenced and lasted six days. 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.

On August 19, 2015, Bowser was sentenced to NDC as follows: Count 2 – 48 – 120 months, plus a consecutive term of 48 – 120 months for use of a Deadly Weapon; Count 4 – 48 – 120 months, to run consecutive to Count 2; and Count 6 – 28 – 72 months, to run concurrent with Count 4. Bowser received 3,852 days credit for time served. The Judgment of Conviction was filed on August 31, 2015.

On October 13, 2016, Bowser filed a Notice of Appeal. On February 8, 2017, Bowser filed his Opening Brief. On May 1, 2017, the State filed its Answering Brief. On May 9, 2017, Bowser filed his Reply Brief. On June 14, 2017, Bowser filed a Motion for Leave to File Supplemental Opening Brief. On July 6, 2017, the Nevada

Court of Appeals granted Bowser's Motion. On July 19, 2017, Bowser filed his Supplemental Brief. On July 26, 2017, the State filed its Supplemental Answering Brief. On July 28, 2017, Bowser filed his Supplemental Reply Brief.

On December 15, 2017, in an unpublished Order, the Nevada Court of Appeals affirmed Bowser's Judgment of Conviction. On December 22, 2017, Bowser petitioned this Court for review. On February 23, 2018, this Court filed an Order directing the State to answer the petition within 15 days.

ARGUMENT

I. The Petition for Review Should be Denied

Supreme Court review is not a matter of right but of judicial discretion. NRAP 40B. Nevada Rule of Appellate Procedure 40B provides a list of 3 factors that will be considered in the exercise of that discretion: (1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance. Id. Here, Supreme Court review is unwarranted and the Petition should be denied.

A. The Court of Appeals Correctly Affirmed the Conviction

Bowser argues that the sentence imposed after his retrial violated Double

Jeopardy because the district court failed to specify its reasons for the increased sentences for Counts 4 and 6. Now, Bowser contends that the Court of Appeals erred by shifting the district court's "duty to rebut the presumption of vindictiveness to Bowser." Pet. at 1. However, Bowser's reliance on Wilson v. State, 123 Nev. 587, 170 P.3d 975 (2007), Dolby v. State, 106. Nev. 63, 787 P.2d 388 (1990), and Holbrook v. State, 90 Nev. 95, 518 P.2d 1242 (1974), is misplaced. Bowser fails to recognize that these 3 cases are not the entire universe of caselaw on this issue. The Court of Appeals correctly found that the "sentence did not violate the double jeopardy clause" and affirmed the Judgment of Conviction." Bowser v. State, Order of Affirmance, Dec. 15, 2017 at 19.

The majority opinion in the Order of Affirmance did not delve deeply into this issue, finding that Bowser failed to provide the Court with an adequate appellate record. Order at 8. The Court found that it could not determine whether the reasons for an increased sentence affirmatively appear on the record, because Bowser failed to provide an adequate appellate record. Id. Thus, the Court "assume[d] the missing portions of the record support[ed] the district court's decision, and [did] not reverse on this basis." Id. The Court of Appeals relied on Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (The burden to make a proper appellate record rests on appellant.); De Santiago-Ortiz v. State, No. 67424, 2016 WL 699867; and Cuzze v.

Univ. & Cmty. College Sys., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.). Thus, the Court of Appeals did not err and Supreme Court review is unwarranted. NRAP 40B.

Nevada's Double Jeopardy Clause provides that "[n]o person shall be subject to be twice put in jeopardy fir the same offense." Nev. Const. art. 1 § 8(1). The Nevada Supreme Court refers to United States Supreme Court precedent interpreting the Fifth Amendment as controlling aurhority on how Nevada's clause should be interpreted. Holbrook, 90 Nev. at 98, 518 P.2d at 1244 (citing North Carolina v. Pearce, 395 U.S. 711, 725, 89 S. Ct. 2072, 2080 (1969)). "Once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." Sattazahn v. Pennsylvania, 537 U.S. 101, 106, 123 S. Ct. 732, 736 (2003).

When a conviction is successfully appealed and reversed, jeopardy is not considered to terminate because the first trial and the appeal, and the second trial required by the appeal, are the same prosecution. Id. However, an exception to this is the principle that a sentencing court cannot impose a harsher sentence after a successful appeal "with the purpose of punishing a successful appeal." Pearce, 395 U.S. at 723 – 25, 89 S. Ct. at 2079 – 80. The United States Supreme Court stated

that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Id. Pearce held that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" to ensure the absence of vindictiveness. Id. at 726, 670. Thus, Pearce held that in some circumstances vindictiveness may be presumed. Id.

Bowser argues that the trial court had a duty to overcome the presumption of vindictiveness by affirmatively stating its reasons for the harsher sentence. Pet. at 5. Here, Bowser claims that the Court of Appeals erred by shifting the trial court's duty to rebut the presumption of vindictiveness. Pet. at 1. However, the Court of Appeals did not err and Supreme Court review is unwarranted. The majority opinion found that the merits of this issue need not (and could not) be reached, due to Bowser's failure to provide an adequate record. Order at 8. Judge Tao wrote a concurring opinion to "explore the nuances of Bowser's double jeopardy argument." Id. at 9.

Judge Tao found that the vindictiveness exception to double jeopardy is not broad. Id. at 14. In 1989, the United States Supreme Court explicitly narrowed the presumption of vindictiveness announced in Pearce. "While the Pearce opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness 'do[es] not apply in every

case where a convicted defendant receives a higher sentence on retrial.'" Ala. v. Smith, 490 U.S. 794, 799, 109 S. Ct. 2201, 2204 (1989) (citing Texas *v.* McCullough, 475 U.S. 134, 138, 106 S. Ct. 976, 978-979 (1986)). In McCullough, the United States Supreme Court stated:

> The Pearce requirements thus do not apply in every case where a convicted defendant receives a higher sentence on retrial. Like other "judicially created means of effectuating the rights secured by the [Constitution]," Stone *v.* Powell, 428 U.S. 465, 482 (1976), we have restricted application of Pearce to areas where its "objectives are thought most efficaciously served," 428 U.S., at 487. Accordingly, in each case, we look to the need, under the circumstances, to "guard against vindictiveness in the resentencing process." Chaffin *v.* Stynchcombe, 412 U.S. 17, 25 (1973) (emphasis omitted).

475 U.S. at 138, 106 S. Ct. at 978-979. Thus, the United States Supreme Court has limited the Pearce presumption of vindictiveness to circumstances in which "there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, *the burden remains upon the defendant to prove actual vindictiveness*." Smith, 490 U.S. at 799-800, 109 S. Ct. at 2205 (emphasis added) (internal citations omitted).

Judge Tao utilized the correct standard, stating:

> The critical question is whether the second, harsher sentence was imposed solely due to vindictiveness rather than other legitimate sentencing considerations such as newly discovered information since the first sentence, more detailed information about things already

> known before the first sentence, or simply a "fresh determination of guilt" by a new jury or new tribunal.

Order at 14 – 15. Judge Tao agreed with the majorioty opinion that since Bowser failed to provide an adequate appellate record, there was no way for the court to "'presume' that the 2015 sentencing judge must have acted out of vindictiveness toward Bowser and nothing else." Id. at 15 (citing United States v. Lincoln, 581 F.2d 200, 201 (9th Cir. 1978)). However, Judge Tao also chose to "go a step further and conclude that, even if copies of the reports had been provided, and even if they proved to contain identical information, this isn't the kind of case where vindictiveness would be presumed." Id. at 15 – 16. Judge Tao notes that a different judge presided over the 2015 and 2007 sentencings, the prosecutors in the two trials and sentencings were different, at least one of Bowser's defense attorneys differed. Id. Moreover, the way the case was tried and the arguments presented by the State and the defense differed. Id. The second jury convicted Bowser of different crimes that carried different sentencing ranges. Id. Further, Judge Tao found that "the 2015 sentencing judge did not impose the maximum sentence for which Bowser was eligible; one would think that a judge operating from pure vindictiveness would have done precisely that." Id. Based on those factors, Judge Tao concluded "that there is simply no reason to presume that the second (notably shorter) sentence must have been the product of judicial vindictiveness rather than simply a reflection of so mch

about the case being so different on re-trial." Id.

Accordingly, the Court of Appeals utilized the correct standard, followed applicable caselaw, and ultimately found the correct result (albeit the majority and concurring opinions did not come to the conclusion in the same way). Supreme Court review is unwarranted. The question presented is not one of first impression of general statewide significance. The decision of the Court of Appeals does not conflict with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court. In fact, the Court of Appeals followed applicable Nevada Supreme Court and United States Supreme Court caselaw in both the majority and concurring opinions. Finally, the case does not involve fundamental issues of statewide public importance.

CONCLUSION

Based on the forgoing, the State respectfully requests that this Court deny Bowser's Petition for Review.

Dated this 9h day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review 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, 40A and 40B because it is proportionately spaced, has a typeface of 14 points and contains 2,104 words.

Dated this 9th day of March, 2018.

Respecfully 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 March 9, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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