SUPREME COURT OF THE STATE OF NEVADA

DANIEL JAMES RODRIGUEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

No. 71920

Appeal From the Second Judicial District Court

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page #

Appellant DANIEL RODRIGUEZ, through his undersigned counsel, files this Reply to Respondent's Answering Brief.

The prosecution's opposition to Mr. Rodriguez's appeal is an "answering" brief in name only. That is because the prosecution fails to answer nearly all of the arguments in Appellant's Opening Brief.

FUNDERBURK **IS INAPPLICABLE TO THIS APPEAL**

The prosecution "answer" relies almost entirely on Funderburk v. State, 125 Nev. 260, 212 P.3d 337 (2009), but fails to respond to any of the numerous factors identified by Mr. Rodriguez that distinguish that opinion from the issues in this appeal.

First, the prosecution fails to respond to Mr. Rodriguez's assertion that Funderburk was argued and decided on whether NRS 193.165(4) excludes that statute's deadly weapon definitions from being applied to an element of an offense. Instead, the opinion never addressed the explicit limitation in that statute's subsection (6), which is clear and unambiguous authority to exclude that statute's deadly weapon definitions from applying to an element of an offense (see, Opening Brief, pages 13-15). Mr. Rodriguez's analysis was that Funderburk decided that the enhancement statute's subsection (4) did not exclude its subsection (6) deadly weapon definitions from applying to an element of an offense. That opinion was correct, because

subsection (4) only excluded the operation of subsections (1)-(3) from an element of an offense, and subsections (1)-(3) only concern punishment. Thus, subsection (4) did not exclude the definitions in subsection (6) from applying to an element of an offense.

However, Mr. Rodriguez's argument – unchallenged by the prosecution opposition – was that Funderburk does not address the specific language in subsection (6) that limits the application of those deadly weapon definitions: "**As used in this section**, 'deadly weapon' means . . ." (see, Opening Brief, pages 13-15). Funderburk never addressed that subsection (6) limiting language. The prosecution never challenges Mr. Rodriguez's assertion that Funderburk's holding would have been different had it addressed the limiting language in subsection (6) rather than address only subsection (4).

What could be more clear and unambiguous than subsection (6)'s statement that its deadly weapon definitions apply **only to issues arising under that section** – the sentence enhancement statute, NRS 193.165 – but do not apply to any other statute, including an element of the battery or burglary statute? Nevada law is clear: this Court must give such a clear and unambiguous statute, "its ordinary meaning and not go beyond it." Benegas v. State Indus. Ins. Sys., 117 Nev. 222, 225, 19 P.3d 245, 247 (2001). Applying that rule of statutory construction invalidates a central support

for Funderburk's use of the sentence enhancement statute's deadly weapon definitions: the subsection (6) definitions are to be used only in determining punishments under NRS 193.165, but not in determining the existence of an element of a statutory battery or burglary offense.

Second, the prosecution fails to argue that there is any support in Funderburk for applying the functional test. Thus, even if the subsection (6) definitions could apply to the elements of a burglary offense, that decision did not involve applying the functional test versus the inherently dangerous test. Although the opinion said that the definitions in NRS 193.165(6) were "instructive", it was actually addressing only subsection (6)(c), and not the inherently dangerous test in subsection (6)(a) or the functional test in subsection (6)(c). The only jury instruction it discussed was the definition of "firearm", which relates to subsection (6)(c)'s reference to the firearm definition statute: "'deadly' weapon means: . . . (c) A dangerous or deadly weapon specifically described in . . . NRS 202.265", whose subsection (5)(b) definition of "firearm" clearly covers a BB gun. Although the decision discussed the functional test, that test was never applied to the BB gun; the relevant legal issue was whether the subsection (6)(c) deadly weapon definition's reference to NRS 202.265 should be applied. Thus, the case's discussion of the functional test was *dicta*, only, with no direct relevance to the issue in that appeal.

Third, the prosecution also fails to address the clear importance of chronology to the Funderburk holding – that the deadly weapon element was added to the burglary statute one year after Clem v. State, 104 Nev. 351, 760 P.2d 103 (1988) and one year before Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990). Funderburk's *dicta* -- that the burglary statute amendment adopted the functional test -- was based on that chronology. Mr. Rodriguez argued that this chronology, which was the central support for the legislative history analysis in Funderburk, at 263-265, had no relevance to the battery statute's undefined element of use of a deadly weapon, (see Opening Brief, page 16-17): if the burglary statute's amendment had occurred after, instead of before Zgombic, then the *dicta* would have been that the inherently dangerous test would apply to the burglary offense, not Clem's functional test; and, Funderburk's *dicta* approving Clem's functional test is irrelevant to a battery offense whose deadly weapon element was enacted long before Clem ever existed.

Unlike in Funderburk, the prosecution's Answering Brief does not present any legislative history to support its claim that the functional test should apply to the screwdriver in this appeal.

Fourth, the prosecution fails to respond to another distinguishing feature in Funderburk: that the burglary statute – unlike the battery offense in this appeal – is not limited only to the use of a deadly weapon as an element of a higher-level offense.

Instead, the elevating elements of a burglary are that the burglar has possession of "any firearm or deadly weapon", NRS 205.060(4). Mr. Rodriguez's argument (at p. 15-16), also unanswered by the prosecution, was that the burglar's possession of a BB gun met the definition of "firearm". Thus, the burglar was properly convicted of the element of possessing a firearm or deadly weapon without regard to whether the BB gun was a deadly weapon under the functional or inherently dangerous tests.

Fifth, the prosecution fails to argue against another marked difference between Funderburk and the instant appeal: Funderburk concluded that, "Therefore, we determine that the district court did not err by instructing the jury that a BB gun is a deadly weapon as it constitutes a 'firearm' under NRS 202.265(5)(b), a statute referenced in NRS 193.165(6)(c)", *id* at 265. That holding's use of "as" is clearly a substitute for "because" – meaning that it was a deadly weapon **because** it was a "firearm". That holding, that a firearm equals a deadly weapon, supported by the reference to the firearm definition statute in NRS 193.165(6)(c), is unrelated to the instant appeal, which does not involve a "firearm" as an element of the offense and whose definition is not specifically referred to in NRS 193.165.

THE PROSECUTION'S FAILURE TO ANSWER APPELLANT'S ARGUMENTS IS CONFESSION OF ERROR

The prosecution's failure to respond to almost all of Mr. Rodriguez's

arguments is described above, and will be further described below. This Court has made it clear that a respondent has an "obligation to [this] court to provide legal authority and analysis . . . where, as here, the appellant presents a properly briefed and supported claim of error", Polk v. State, 126 Nev. 180, 182 fn. 2, 233 P. 3d 357 (2010). "NRAP 31(d) is a discretionary rule providing that if a respondent fails to file an adequate response to an appeal, this court may preclude that respondent from participating at oral argument and consider the failure to respond as a confession of error." *id,* at 184 (footnote omitted).

Appellant's issues are meritorious and were not raised for the first time on appeal. They were clearly raised, and present significant legal issues that compel a response. As a result, this Court should impose the Rule 31(d) consequences on respondent as it did in Polk, "and consider the State's silence to be a confession of error on the [unanswered] issues", *id* at 186. Appellant's unanswered issues are that the inherently dangerous test should apply, that Funderburk is not controlling authority in this appeal, that the deadly weapon definitions in NRS 193.165(6) do not apply to the elements of a battery offense, and that Zgombic's *dicta* should be disregarded.

***ZGOMBIC*'S *DICTA* IS NEITHER CONTROLLING NOR PERSUASIVE**

The prosecution claims that certain decisions apply the functional test to

deadly weapon use, and attempts to disparage Sheriff v Gillock, 112 Nev. 213, 214, 912 P.2d 274 (1996), which clearly applied the inherently dangerous test.

Mr. Rodriguez suggests a simple interpretation principle in reading the various decisions on whether an item is or is not a deadly weapon: if the item could satisfy the inherently dangerous test **and** the functional test (almost anything can meet the functional test), then the decision cannot be said to apply the functional test but not apply the inherently dangerous test; but, if the item clearly **fails** the inherently dangerous test but meets the functional test, then that decision applied the functional test only.

This interpretation principle is especially important in understanding that Zgombic's two-sentence, one-citation *dicta,* at 574, was incorrect in relying on Loretta v. Sheriff, 93 Nev. 344, 565 P.2d 1008 (1977): the *dicta* was that the functional test was "generally followed in Nevada". The prosecution fails to respond to Mr. Rodriguez's assertion (Opening Brief, p. 11) that Loretta does not support Zgombic's *dicta*. Loretta involved the defendant's use of a pistol as a weapon. The pistol certainly met the functional test, but it also met the inherently dangerous test – designed with the intent to be used for a deadly purpose. Thus, Loretta does not stand for the proposition that the pistol was evaluated only by the functional test, and not by the inherently dangerous test. Applying the interpretation principle above, a

judicial opinion that clearly applied only the functional test would have to be evaluating an item that could not pass the inherently dangerous test; otherwise, it would not be clear that the opinion applied the functional test and excluded the inherently dangerous test. Thus, Loretta is not authority that supports Zgombic's *dicta* that the functional test, but not the inherently dangerous test, was "generally" applied to elements of an offense.

The prosecution similarly fails to answer Mr. Rodriguez's assertion that Zgombic's two-sentence, one-citation *dicta* is of no precedential authority (Opening Brief, 9-11). It is vague and imprecise about the law in the past and in the intended future ("We have no dispute with . . . [T]hat is the interpretation **generally** followed in Nevada"), in addition to it being based on a flawed reading of Loretta, its sole supporting authority.

Note: Appellant apologizes for a misstatement in his Opening Brief (at p. 11): contrary to the brief's assertion that Justice Mowbray's dissent in Zgombic, at 586, cited no cases, two cases were cited in that dissent's footnote 1.

NO CLEAR CASE LAW SUPPORTS THE FUNCTIONAL TEST

The prosecution fails to respond to Mr. Rodriguez's assertion (Opening Brief, p. 9) that, "It is clear that there is no definitive line of Nevada cases holding that the functional test must be applied to [the deadly weapon] element of a battery offense."

Sheriff v. Gillock, at 214, clearly applied the inherently dangerous test in holding that a water glass used to cause "serious cuts to the face" was not a deadly weapon. The prosecution opposition (at p. 7-9) unsuccessfully tries to dispute that it applied the inherently dangerous test. But there is only one inescapable conclusion: the water glass clearly satisfied the functional test, so Gillock must have applied the inherently dangerous test in holding that it was not a deadly weapon.

The prosecution never addresses Mr. Rodriguez's assertion that Archie v. Sheriff, 95 Nev. 182, 591 P.2d 245 (1979) is the flimsiest imaginable support for the functional test (Opening Brief, p. 7-8).

The prosecution fails to explain how its reliance (at p. 9) on Skiba v. State, 114 Nev. 612, 959 P. 2d 959 (1998) has any relevance to the issue in this appeal. Mr. Rodriguez argued (Opening Brief, p. 8) that the opinion never analyzed or even mentioned whether a beer bottle was a "deadly weapon". The issues in that case were totally unrelated to the definition of a deadly weapon. The two conviction offenses were determined to be redundant, and there was no discussion or explanation about why the Court vacated the substantial bodily harm offense rather than vacate the deadly weapon offense. Thus, the opinion is irrelevant to the definition of deadly weapon, and the definition of deadly weapon was irrelevant to the opinion.

Gillock is certainly strong support for this Court having clearly applied the

inherently dangerous test. It certainly shows that this Court has already disregarded Zgombic's *dicta*: the Gillock court did not "generally" follow the functional test for a deadly weapon as an element of an offense.

Neither Funderburk, Loretta, the Zgombic *dicta*, Archie or Skiba clearly apply to this appeal and clearly apply the functional test. Gillock is unimpeachable authority in support of the inherently dangerous test; it is stronger than all of those opinions together, and it has none of the flaws and ambiguities that beset each of those opinions.

OTHER PROSECUTION FAILURES TO RESPOND

The prosecution fails to respond to any of the following arguments raised by Mr. Rodriguez in pages 18-21 of the Opening Brief:

1. Mr. Rodriguez argued (p. 18-19) that the Legislature intended to **not** apply the functional test to the elements of an offense: this intention was manifested by it enacting the functional test for sentence enhancements in NRS 193.165, but not enacting it for elements of an offense. The prosecution completely fails to address that argument.

2. Mr. Rodriguez asserted (at p. 19) that the strong arguments in Zgombic for overturning Clem and adopting the inherently dangerous test are equally as persuasive for elements of an offense as they are for the sentencing enhancement.

Zgombic's rationale to define the undefined term "deadly weapon" as the inherently dangerous test should be applied to the screwdriver in this appeal. The prosecution completely fails to address that argument.

3. Mr. Rodriguez argued (at p. 19-20) that Zgombic concedes, at 575, that the meaning of "deadly weapon" is "uncertain", and that the rules of statutory construction compel such an ambiguous term to be construed in the manner most favorable to the defendant – by applying the inherently dangerous test. This canon of construction is strongly applied by the Zgombic court, at 575-576. It should be similarly applied by this Court to this appeal. The prosecution completely fails to address that argument.

4. Mr. Rodriguez argued that the negative consequences of applying the functional test to a battery offense are much more severe than applying them to the sentence enhancement statute: elevating a misdemeanor to a felony rather than simply increasing a sentence. This circumstance enhances the justification for applying the defense-favorable inherently dangerous test to this appeal. The prosecution completely fails to address that argument.

5. Mr. Rodriguez argued that other negative consequences of applying the functional test to a battery offense are much more severe than applying them to the sentence enhancement statute: increasing the sentence by twenty times instead of

possibly doubling a sentence. This circumstance enhances the justification for applying the defense-favorable inherently dangerous test to this appeal. The prosecution completely fails to address that argument.

CONCLUSION

Based on the arguments above, this Court should apply the inherently dangerous test to the elements of the battery offense, should hold that the screwdriver was not a deadly weapon, and should reverse Mr. Rodriguez's conviction for felony battery with a deadly weapon.

DATED: June 29, 2017.

/s/ Martin H. Wiener

Attorney for Appellant

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 WordPerfect X6 in proportionally spaced typeface in 14 point Times New Roman.

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 proportionally spaced, or has a typeface of 14 points or more, and does not exceed 15 pages.

Under NRAP 28.2, the undersigned additionally represents that: he is a member of the Nevada Bar; the brief is not frivolous or interposed for any improper purpose; and, the brief complies with all applicable rules of the NRAP, including Rule 28(e).

DATED: June 29, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Law Office of Martin H. Wiener, and that on June 29, 2017, I electronically filed with the Nevada Supreme Court the foregoing document. Electronic Service of the foregoing document was made by email on:

Terrence P. McCarthy, for State of Nevada

Matthew Lee, for State of Nevada

Paul Young, for State of Nevada

/s/ Martin H. Wiener

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