IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

NORMAN BELCHER,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 72325

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, JOHN NIMAN, and submits this Answer to Petition for Rehearing in obedience to this Court's Order filed on September 11, 2020. This answer is based on the following points and authorities and all papers and pleadings on file herein.

Dated this 24th day of September, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
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Nevada Bar #001565

BY */s/ John Niman*
JOHN NIMAN
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MEMORANDUM
POINTS AND AUTHORITIES

On June 4, 2020, this Court, *en banc*, issued an Order in this case affirming in part and remanding in part Appellant's Judgment of Conviction. Specifically, this Court found that one of the convictions for robbery was not supported by sufficient evidence and was thereby reversed. This Court further found that while the court erred in denying a motion to suppress statements, the error was harmless and therefore did not require a reversal of conviction. This Court affirmed the Judgment of Conviction in all other respects.

On July 13, 2020, Appellant filed a Petition for Rehearing. On September 11, 2020. This Court filed an order Directing Answer to Petition for En Banc Rehearing within fourteen (14) days.

Pursuant to NRAP 40(c)(2), this Court considers rehearing when it has overlooked or misapprehended a material fact or question of law. Additionally, rehearing is warranted where the Court has overlooked, misapplied, or failed to consider directly controlling legal authority. NRAP 40(c)(2)

The Petition should be denied as this Court has not overlooked a material fact, misapprehended a question of law or ignored controlling precedent. Ultimately, Appellant's request for rehearing warrants rejection because his arguments are premised upon erroneous allegations of fact and law. Further, Petitioner's primary contention, that the district court's error in not suppressing statements was not

harmless, is one he already argued at Oral Argument in the instant case. As such, this argument is not appropriately raised in a Petition for Rehearing. NRAP (c)(1) (stating: "Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing").

Had Appellant believed, or this Court determined, that addressing harmlessness at oral argument was insufficient Appellant could have requested, or this Court could have ordered, supplemental briefing on the issue of harmlessness. However, the point is moot in this case, as Appellant has raised any concern he had with the harmless error analysis in the instant Petition, and his position is meritless for the following reasons.

I. THE DISTRICT COURT'S DENIAL OF APPELLANT'S MOTION TO SUPRESS WAS HARMELSS

This Court found that the district court erred in denying Appellant's motion to suppress statements he made during an interview with detectives before his arrest. This Court, as a matter of first impression, determined that it could review an error as harmless sua sponte in "extraordinary cases." This Court stated that the factors to be considered before deciding whether to determine whether an error was harmless sua sponte are: "(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and future litigation." The Court based this holding on its statutory

obligation under NRS 178.598 to disregard error which does not affect substantial rights; as well as holdings from and rationales from other Courts.

In the instant case, this Court decided to consider whether the error was harmless sua sponte, in part, because it was "certain that the error was harmless beyond a reasonable doubt." Oder Affirming in Part and Reversing in Part, at 13. This Court pointed to the extensive evidence the State had admitted of Appellant's guilt at trial including: (1) that Nick identified Appellant as the man who shot him; (2) evidence established the disintegration of William and Appellant's illicit business relationship; (3) that Appellant openly contemplated harming Williams' 15-year-old daughter as revenge; (4) that eyewitness testimony placed a white car at the scene of the shooting, Appellant was pulled over for speeding in a white rental car minutes after the shooting, and two hours later Appellant set the car on fire; and (5) that when Appellant was booked into the jail, he made an unsolicited comment to one of the correctional officers that seemingly acknowledged he killed one of the victims. Id. at 13-14.

Appellant now argues that he is entitled to a rehearing because the Court overlooked and misapprehended material facts in deciding that a rational jury would have found Appellant guilty with or without his statement to the police. Appellant is incorrect.

As this Court correctly held, the State introduced overwhelming evidence of Appellant's guilt. First, an eyewitness and victim of the shooting identified Appellant as the shooter. 20 AA4552-53. This victim identified Appellant as the shooter to multiple individuals without being questioned about it. 20 AA 4599; 21 AA4784. Second, the State admitted evidence showing that Appellant and William (the father of the murdered victim) had been engaged in a drug selling business. 21 AA4797-98, 4805-05. Further, the relationship between the two had become contentious, with Appellant threatening William over text message on multiple occasions. 21 AA4809-12. Third, the State admitted evidence that Appellant had made threats regarding one of the victims, as well as statements that the best way to get rid of evidence was to burn it or bury it. 23 AA5161-62. Fourth, the State introduced evidence that the shooter was driving a white car. 21 AA 4711, 4716-17. Appellant was pulled over in a white car soon after the murder was committed. 22 AA4978-79. Appellant was later caught on video lighting this car on fire. 20 AA 4573-74; 23 AA 5112-20; 24 AA 5498-99. Appellant was the only individual who had a key to this vehicle and stipulated at trial that he burned the vehicle. 20 AA 4472. Fifth, when Appellant was being booked at the correctional facility, he asked Officer Daniel Webb "Sir, are you going to put me in max custody because I killed a kid?" 24 AA 5384, 5387.

Additionally, eye-witness Brenda Williams testified she woke up to a sound in the middle of the night on the night of the murder. When she looked outside her window, Brenda saw a male dragging a large item down the street to a small white car that was rounded. Brenda Williams said the male went back and forth between the car and the house twice, while pulling a sheet. 21 AA 4703-4749. When Crime Scene Analysts processed Appellant's apartment after the murder, they found a burgundy bed sheet inside of a bag. The bed sheet inside the bag inside the Appellant's apartment matched the burgundy bedding in Alexus's bedroom that was pulled off the bed and not the white bedding on his bed. 23 AA 5181-5220.

Further, the State would note that none of this evidence was based upon, or even related to, Appellant's admitted statement. While Appellant's statement was certainly in contrast to other evidence presented in this case, every piece of evidence articulated above could and would have been admitted even without Appellant's statement. Given the evidence summarized above, this Court correctly found that no rational jury would fail to convict Appellant of the murder.

II. APPELLANT'S ARGUMENTS TO THE CONTRARY ARE NOT PERSUASIVE

A. Appellant Has Not Shown that This Court Misapprehended or Overlooked a Material Fact

In Section I of his Petition for Rehearing, Appellant makes various arguments regarding how he believes this Court misapprehended material facts in this case.

First, Appellant seems to argue that this Court did not properly weigh the various pieces of evidence when conducting a harmless error analysis. Appellant's argument does not stem from any discrepancy between the evidence admitted at trial and this Court's description of it. Neither does it identify any evidence this Court may have overlooked in conducting its analysis. He merely finds the end result distasteful. Such an argument cannot support a Petition for Rehearing.

In fact, this entire argument is based solely on the State's closing argument. A closing argument is not evidence. By presenting nothing more than an arbitrary dissection of the State's closing arguments, Appellant has failed to show any fact that was misinterpreted or overlooked. A rehearing cannot be granted on such grounds. See Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999) (finding that a defendant was not entitled to a rehearing on the Court's decision regarding harmless error where the defendant failed to state any facts that the Court overlooked or misapprehended).

Further, this argument, even if construed as alleging a misapprehension of fact, is dubious at best. Appellant seems to be arguing that the importance a particular piece of information has at trial is dictated by, and in direct correlation to, the amount of time the State spends discussing it during closing. This is nonsensical on its face. While the State may choose to spend more time talking about a piece of evidence because of its high probative value, so to may the State spend a relatively

large amount of time talking about a piece of evidence because its relation to the case is complex. As a way of analogy, the State can only spend so much time talking about a confession of guilt without sounding like it is beating the proverbial dead horse (a strategy of, at best, questionable merit). However, more time may need to be dedicated to placing into context for the jury the value of an investigation that traces a firearm or vehicle to an individual. Does that increase in time mean that this connection is more probative of guilt than a confession? Of course not. It merely means that the probative value may need to be highlighted in order for the jury to understand in its significance. In this light, a case could be made that the State would often dedicate less time in its closing to discussing particularly strong pieces of evidence, as this evidence often speaks for itself.

Moreover, the State rejects the Appellant's "math" regarding what constitutes "lines" of arguments dedicated to the Appellant's statement during closing arguments. The Appellant admitted to as much in footnote 1 on page 3: "The undersigned has tried to be as accurate as possible with regard to what sections apply to each category of "other evidence". However, counsel would recognize that there may be a small error rate due to likely room for debate between the parties." (Appellant's Petition for Rehearing, Page 3, Footnote 1, Lines 24-28). There is undoubtedly "debate" between the parties over what constitutes argument about the Appellant's statement to police. This "debate" over non-evidence—that being

closing arguments—underscores the very essence of the fact that this petition should be denied as it does not go to the issue of whether, pursuant to NRAP 40(c)(2), this Court overlooked or misapprehended a material fact or question of law. Closing arguments are not facts, let alone material facts, and nothing within those lines pointed to by the Appellant addressed a question of law.

The State would also note that any notion that the amount of time spent discussing a piece of evidence at closing is directly correlated to its probative value makes the assumption that there is only one legitimate way to present evidence and/or arguments at trial. However, this Court has previously recognized (in ineffective assistance of counsel claims) that questions of trial strategy and tactics vary greatly between attorneys. See Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984) (stating: "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.") As such, the implicit assumption on which Appellant's argument rests not only lacks common sense, but is antithetical to the law.

Appellant also asserts that he "was never given an opportunity to address harmless error." Petition, at 9. This is patently false. During oral argument on this issue, Appellant thoroughly argued that any error resulting from the admission of the statement was not harmless. See Oral Argument, at 1:08-5:20, 8:15-11:00; 11:42-

12:20. Appellant further argued that the State waived harmless error at oral argument. Oral Argument at 11:01-11:41. Further, Appellant's counsel represented during oral argument that he had previously noted that the State had not addressed this argument in their Answering Brief. Despite this knowledge, Appellant still chose not to address harmless error, or its potential waiver in his Reply Brief.

Had Appellant instead addressed harmless error in his Reply Brief, the State could have requested to address the issue in supplemental briefing consistent with the procedure this Court laid out in Polk v. State, 126 Nev. 180, 186, 233 P.3d 357, 360 (2010). Instead, Appellant elected to wait for Oral Argument to argue that any error was not harmless. It is unclear whether this was a tactical decision or whether Appellant inadvertently missed the harmless error analysis until after he filed his Reply Brief. Regardless, as this Court articulated in its Opinion, this Court has a statutory duty to consider whether an error is harmless. Given this duty, Appellant neglected his own responsibility to articulate why this Court should disregard its statutory duty in the instant case. However, such a consideration is largely irrelevant in the instant case, where both parties were able to present their arguments regarding whether the error was harmless at Oral Argument. As such, Appellant's current argument that he was (1) never given an opportunity to address harmless error, and (2) that he never addressed why any error was not harmless, is belied by the record.

Appellant also argues that what this Court listed as overwhelming evidence actually points to evidence that was, as Appellant states, "at best, anemic." Petition at 9. Appellant is incorrect. Appellant first raises issues with Nicholas' identification of Appellant as the shooter. Petition at 9-11. However, this Court already entertained this exact argument at Oral Arguments on this issue. See Oral Argument, at 2:10 – 3:40. Given that Appellant has raised nothing new in his Petition for Rehearing, Appellant has not actually alleged that the Court misapprehended or overlooked a material fact. Appellant merely does not like the outcome this Court reached.

Appellant also raises issue with the credibility of Bridget Chaplin. Petition at 11. Appellant claims that because Chaplin testified after entering into a proffer agreement with the State, her entire testimony, and therefore the evidence that Appellant had openly contemplated killing one of the victims, was not credible. But credibility is a question for the fact-finder. Ward v. State, 95 Nev. 431, 432, 596 P.2d 219, 220 (1979). Further, Petitioner has not identified any other evidence that would cast doubt on Chaplin's testimony. The jury, and this Court, were fully aware that Chaplin had entered into a proffer agreement prior to testifying. 23 AA5163-69, see also Respondent's Answering Brief, at 16. In addition, the benefit of entering into a proffer with the State was that Chaplin's sentence was reduced from a minimum of five (5) and maximum of fifteen (15) years incarceration, to a minimum of three and a half (3.5) and a maximum of ten (10) years incarceration. 23 AA5167.

Chaplin further testified that she was not making up her testimony in exchange for the proffer agreement. 23 AA5168. As such, this argument is unpersuasive.

As such, Appellant has not demonstrated a single instance where this Court misapprehended or overlooked a fact. These arguments are therefore unpersuasive, and do not support Appellant's Request for a Rehearing.

B. This Court Did Not Overlook, Misapprehend, or Fail to Consider Relevant Legal Authority

In Section II, Appellant alleges that this Court failed to consider controlling precedent by not considering Day v. McDonough, 547 U.S 198, 126 S. Ct 1675, 164 L. Ed 2d 376 (2006). Petition at 13-15.

In Day, the Supreme Court stated, "Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." Day, 547 U.S. at 210, 126 S. Ct. at 1684. In Day, the Supreme Court found that where the district court sua sponte raised the issue of whether a Petition for Writ of Habeas Corpus was timely, despite the State not arguing in its response that the Petition was untimely, the Court must give fair notice and an opportunity for the defendant to present his position. Id. at 203, 210, 126 S. Ct. at 1680-81, 1684. The Supreme Court found that since the district court had ordered Day to show cause why his Petition was not untimely, and no court proceedings or action had occurred in the interim, that the district court did not err in denying the Petition. Id. at 211, 126 S. Ct. at 1684.

The instant case is similar. This Court specifically requested that Appellant address error argument during his oral argument. Appellant did so. See Oral Argument, at 1:08-5:20, 8:15-11:00; 11:42-12:20. At no point during oral argument did Appellant request to supplement the briefing, nor did he allege that he did not believe his argument was being fairly heard. Further, Appellant stated during oral argument that he had noticed prior to the oral argument that the State had not briefed harmless error. Appellant chose not to supplement the briefing. As such, Day is not inapposite to the result reached in the instant case. Much like the Court in Day, this Court gave Appellant fair notice and an opportunity to present his position. That Appellant failed to persuade this Court is not grounds for a rehearing.

Appellant also seems to argue that this Court did not properly consider the size of the record prior to determining to address the harmless error issue sua sponte. Petition at 13-14. However, this Court specifically stated the following:

> But whether unbriefed harmlessness review unduly burdens this court does not directly correlate to the overall size of the record. In fact, most of the record is irrelevant to the harmless-error review at issue. In particular, we do not need to consider the lengthy parts of the record devoted to charging proceedings, pretrial motion practice, and discovery to determine whether the admission of Belcher's statement was harmless. Nor do we need to consider the whole of the trial transcript. For example, the transcripts of jury selection and the penalty phase proceedings offer no insight into whether the admission of Belcher's statement was harmless to the guilt phase verdict. When the record is narrowed down to the relevant parts of the guilt phase transcripts, sua sponte review for harmlessness is much less burdensome. And because we

> are already obligated to afford "extra resources and heightened scrutiny" to death penalty cases, see Evans v. State, 117 Nev. 609, 642, 28 P.3d 498, 520 (2001) ("SCR 250 and the internal policies of this court ensure that [death penalty] cases receive extra resources and heightened scrutiny."), overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015), the record's size is not a compelling factor in deciding whether to conduct sua sponte harmless-error review in this capital case.

Order Affirming in Part and Reversing in Part, at 13.

While Appellant is entitled to disagree with the Court's analysis, the standard for whether a rehearing is warranted does not turn on Appellant's personal beliefs regarding this Court's reasoned holdings. It turns on whether this Court misapprehended or overlooked some legal precedent. Here, this Court did not. Appellant has failed to identify any legal authority that the Court's reasoning was faulty as a matter of law. Further, Appellant fails to appreciate that what the Court adopted in this holding was a factor test. Under a factor test, differing weights can be given to different factors based on their applicability to the case at hand. Therefore, even if Appellant were correct that the voluminous record was burdensome, this Court was perfectly reasoned in finding that here, where the evidence of guilt was simply overwhelming, that such a consideration was not a compelling factor.

Finally, Appellant points to case law that seemingly implies that because the evidence at issue was a confession, an error to suppress the confession should not be

harmless. But such an argument overlooks that the statement in question was not a confession. Nowhere in this statement does Appellant confess or admit guilt. In fact, this Court has already acknowledged that not only did Appellant not confess during these statements, but that his statements also did not lead detectives to impound evidence implicating him in the crime. Order Affirming in Part and Reversing in Part, at 13. Therefore, these cases are irrelevant to the facts of the instant case.

Appellant has failed to identify any legal authority that this Court overlooked, misapprehended, or failed to consider. As Articulated in Section II(A), Appellant has also failed to show that this Court overlooked or misapprehended a material fact. Appellant is merely rearguing that the error should not be considered harmless. Appellant already thoroughly argued this point during his oral argument in front of this Court. See Oral Argument, at 1:08-5:20, 8:15-11:00; 11:42-12:20. Therefore, a Petition for Rehearing is inappropriate. NRAP (c)(1) (stating: "Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing"). This Petition should be denied.

WHEREFORE, the State respectfully requests that rehearing be denied.

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Dated this 24th day of September, 2020.

Respectfully submitted,

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BY */s/ John Niman*

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration 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 or 40A because it is proportionately spaced, has a typeface of 14 points, contains 3,469 words and 293 lines of text.

Dated this 24th day of September, 2020.

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 September 24, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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