IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON, JR.,	)	NO. ~~75932~~
	)	
Appellant,	)	**E-File**
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW, Deputy Public Defender WILLIAM M. WATERS, on behalf of the Appellant, VERNON NEWSON, JR., petitions this court for rehearing, pursuant to NRAP 40, in the above-referenced case.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 28 day of October, 2019.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
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POINTS AND AUTHORITIES

NRAP 40(c)(2)(A)(B) permits this Court to consider rehearing, "[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, 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." See also Am. Cas. Co. of Reading, Pa. v. Hotel & Rest. Employees & Bartenders Int'l Union Welfare Fund, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997) (rehearing granted when court overlooked issue in prior opinion). This Court has noted that "rehearings are not granted to review matters that are of no practical consequence" and this Court will consider rehearing only when "necessary to promote substantial justice." Gordon v. Eighth Judicial Dist. Court, 114 Nev. 744, 745, 961 P.2d 142 (1998).

I. This Court Overlooked, Misapplied, and Misapprehended a Material Question of Law in Affirming Newson's Child Abuse, Neglect or Endangerment Convictions.

Newson made two arguments on appeal regarding his Child Abuse, Neglect or Endangerment convictions. First, Newson argued the Information charging two counts of Child Abuse, Neglect, or Endangerment failed to provide sufficient notice as to what "type" of

Child Abuse, Neglect, or Endangerment the State alleged Newson committed so he could defend against the allegation. See Appellant's Opening Brief ("AOB") 36-44. In this Court's published Opinion Reversing in Part, Affirming in Part, and Remanding, the Court declined to analyze the issue because Newson raised the issue for the first time on appeal. See Newson v. State, 135 Nev. Adv. Op. 50, *12 (Oct. 10, 2019). Nevertheless, in footnote 3, this Court rejected Newson's argument claiming:

> The record belies Newson's first argument. The Complaint and information charged Newson with child abuse, neglect or endangerment under NRS 200.508(1) by placing each of the two children 'in a situation where the child **may suffer** physical pain or mental suffering as the result of abuse or neglect' by shooting their mother, Anshanette, in close proximity to them."
>
> Id. at *12 n. 3 (emphasis added).

Problematically however, and as will be explained in more detail *infra*, this conclusion does address the precise problem Newson raised. Essentially, the footnote does not resolve the question of what "type" of abuse or neglect (nonaccidental physical injury, nonaccidental mental injury, or negligent treatment or maltreatment) the State alleged Newson committed. More importantly, the Court's footnote

undermines the Court's analysis as to Newson's second argument – that under any "type" of child abuse or neglect the State failed to present sufficient evidence to support Newson's convictions.

A. If this Court applies the correct legal standard then it cannot find that the State presented sufficient evidence to support Newson's two convictions for Child Abuse, Neglect or Endangerment.

This Court's conclusion that sufficient evidence supported Newson's two convictions for Child Abuse, Neglect or Endangerment is based upon a fundamental misinterpretation or misunderstanding of this Court's precedent in Clay v. Eighth Judicial Dist. Court, 129 Nev. 445 (2013). In Clay, the State secured an Indictment charging the defendant with placing the victim in a situation where she **may suffer** physical pain or mental suffering as the result of child abuse or neglect by committing **nonaccidental physical injury** "type" of abuse or neglect. Id. at 448. After indictment, the defendant filed a pre-trial petition for habeas corpus arguing the State failed to present sufficient evidence at the grand jury that the alleged victim actually suffered physical injury or mental injury as a result of the abuse or neglect and therefore, the State did not establish that abuse or neglect occurred. Id. at 449. In opposition the State argued "the showing of physical or

mental injury is not a requirement of the child-abuse-and-neglect statute; rather, **the mere possibility of physical or mental injury** is sufficient." Id. (emphasis added). The district court agreed with the State and denied the petition. Id.

Defendant then filed a Petition for Wirt of Mandamus in this Court. Id. In the mandamus proceeding, this Court summarized the issues and arguments advanced by both the defendant and the State. Specifically:

> Clay asserts that NRS 200.508(1) requires the State to prove that "abuse or neglect" occurred regardless of which alternative ["may suffer" or did suffer] is charged; thus, in this case, the State had to prove "physical injury." Relying on the second means of violating NRS 200.508(1), the State argues that it only had to prove that Clay caused the victim to be placed in a situation where she may suffer physical pain or mental suffering, and therefore, it did not have to prove that "physical injury" occurred.
>
> Id. at 452.

The Court ultimately rejected the State's argument. In doing so, the Court first clarified that NRS 200.508(1) sets forth two alternate theories for committing Child Abuse, Neglect or Endangerment. The first theory is that the defendant willfully caused a child under 18 **to suffer** physical pain or mental suffering resulting from **abuse or**

neglect. The second theory is that the defendant willfully caused a child under 18 to be placed in a situation where the child **may suffer** physical pain or mental suffering resulting from **abuse or neglect**. Clay, 129 Nev. at 451-52 (emphasis added). The Court noted the element "abuse or neglect" under either theory (**suffer** or **may suffer**) is defined in NRS 200.508(4)(a) as either: (1) nonaccidental physical injury; (2) nonaccidental mental injury; (3) sexual abuse; (4) sexual exploitation; or (5) negligent treatment or maltreatment. Clay, 129 Nev. at 452. Thus, there are five "types" of abuse or neglect a defendant can commit.

For the first "type" of abuse or neglect – nonaccidental physical injury – physical injury is defined in NRS 200.508(4)(d) as "[p]ermanent or temporary disfigurement" or "[i]mpairment of any bodily function or organ of the body." For the second "type" of abuse or neglect, mental injury is defined in NRS 432B.070 as "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior." For the third "type of abuse or neglect, sexual abuse is defined in NRS 432B.100 as either incest, lewdness

with a child, sado-masochistic abuse, sexual assault, statutory sexual seduction, or open and gross lewdness. For the fourth "type" of abuse, sexual exploitation is defined in NRS 432B.110 as allowing or encouraging a child to engage in prostitution, or view or read pornographic films or literature, or engage in a lewd exhibition of the child's genitals either on film or during a live performance. Finally, the fifth "type" or abuse, negligent treatment or maltreatment, is defined in NRS 432B.140, as occurring when "(1) a child has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic, (2) has been abandoned, (3) is without proper care, control or supervision or (4) lacks the subsistence, education, shelter, medical care or other care necessary for the well-being of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so." A person responsible for the child's welfare is defined in NRS 432B.130 as, "the child's parent, guardian, a stepparent with whom the child lives, an adult person continually or regularly found in the same household as the child, a public or private home, institution or facility where the child actually resides or is receiving care outside of the home for all or a portion of the day, or a

person directly responsible or serving as a volunteer for or employed by such a home, institution or facility."

In Clay, as noted, the State alleged nonaccidental physical injury as the "type" of abuse or neglect. Clay, 129 Nev. at 452. This Court then held irrespective of whether the State alleges that physical pain or mental suffering actually resulted from the abuse or neglect or could possibly have resulted from the abuse or neglect, when the State charged nonaccidental physical injury as the "type" of abuse or neglect it had to prove physical injury **actually occurred**. Id. ("A plain reading of NRS 200.508(1) leads to the conclusion that the State must prove that 'abuse or neglect' **occurred under both means of violating the statute**."). Essentially, by alleging nonaccidental physical injury as the "type" of abuse and neglect, 'physical injury' became "an element of the offense[,]" and "the State **must prove** that the victim actually suffered '[p]ermanent or temporary disfigurement' or '[i]mpairment of any bodily function or organ of the body.'" Id. at 453-54.

Finally, the Court addressed the State's claim that by requiring the State to prove permanent or temporary disfigurement or impairment of any bodily function or organ of the body any time the

State alleges nonaccidental physical injury as the "type" of abuse or neglect would essentially render the **may suffer** physical pain or mental suffering theory under NRS 200.508(1) mere surplusage. Id. This Court disagreed and held, "[t]he second theory retains significance because, in contrast to 'abuse or neglect' based on physical injury, other types of 'abuse or neglect' under NRS 200.508(4)(a) do not necessarily result in actual physical pain or mental suffering." Id. Therefore, the State can proceed under a "may suffer" theory if it alleges one of these other "types" of abuse or neglect. Id. As an example, the Court explained that the negligent treatment or maltreatment "type" of abuse or neglect encompasses conduct "that does not necessarily result in actual physical pain or mental suffering." Id. at 454. Thus, if "there is no physical pain or mental suffering as a result of the negligent treatment or maltreatment, then the defendant cannot be charged under the first **theory** of liability in NRS 200.508(1)" – the theory that the child actually suffered physical pain or mental suffering. Id. However, the State could proceed under the second **theory** – that the defendant placed the child in a situation where the child **may suffer** physical pain or mental suffering. Id.

1. The State failed to present any evidence whatsoever that Newson's actions caused either Brandon or Major to suffer permanent or temporary disfigurement or impairment of any bodily function or organ of the body.

As noted *supra*, in rejecting Newson's claim regarding the charging document's sufficiency, this Court claimed that indictment sufficiently noticed Newson that he was charged "with child abuse, neglect or endangerment under NRS 200.508(1) by placing each of the two children 'in a situation where the child **may suffer** physical pain or mental suffering as the result of abuse or neglect' by shooting their mother, Anshanette, in close proximity to them." Newson, 135 Nev. Adv. Op. at *12 n. 3 (emphasis added). However, this conclusion, in a footnote, does not resolve what "type" of abuse or neglect, i.e., nonaccidental physical injury, nonaccidental mental injury, sexual abuse, sexual exploitation, or negligent treatment or maltreatment, the State alleged Newson committed.[1] Nevertheless, after declining to resolve the charging document's sufficiency, this Court somehow rejected Newson's sufficiency of the evidence claim by noting:

[1] The Court's inability to clearly articulate what "type" of abuse or neglect Newson allegedly committed is a testament to Newson first and original argument that the State failed to provide sufficient notice as to what type of abuse or neglect the State alleged Newson committed so he could defend against the allegation.

> Under NRS 200.508(1)(4)(a), and **(4)(d)**, the State could satisfy its burden of proof by showing that Newson placed the children in a situation where they **may have suffered a physical injury**. See Clay v. Eighth Judicial Dist. Court, 129 Nev. 445, 451-52, 305 P.3d 898, 902-03 (2013) (explaining that the State may prove its case by demonstrating the defendant cause the child "to be placed in a situation where the child may suffer physical pain or mental suffering"). Based on the evidence presented, a rational juror could reasonably conclude **Newson exposed the children to physical danger** by discharging a firearm several times in a vehicle with the children present and, in the infant's case, seated immediately adjacent to the victim. Accordingly, the evidence overwhelming supports this verdict.
>
> Newson, 135 Nev. Adv. Op. at * 13 (emphasis added).

While the Court's conclusion failed to explicitly specify which "type" of abuse or neglect the State alleged, the Court nevertheless cited NRS 200.508**(4)(d)** to support its conclusion. NRS 200.508(4)(d) defines "physical injury." Therefore, by deduction, it appears this Court concluded that the State alleged and proved that Newson placed the children in a situation where each **may suffer** physical pain or mental suffering resulting from the **nonaccidental physical injury** "type" of abuse or neglect by shooting at Anshanette in close proximity to the children. Unfortunately, this Court's

conclusion does not resolve Newson's claim that per Clay, as discussed *supra* and which is controlling on the dispositive issue of whether the State presented sufficient evidence to support Newson's child abuse or neglect convictions, the State failed to prove physical injury, i.e. permanent or temporary disfigurement or impairment of any bodily function or organ of the body actually occurred.

Indeed, on appeal Newson argued the State failed to present sufficient evidence to support his Child Abuse, Neglect or Endangerment convictions under **any** "type" or abuse or neglect. See AOB 44-46; Appellant's Reply Brief ("ARB") 14-18. For obvious reasons Newson did not address sexual abuse or sexual exploitation "types" of abuse or neglect because there is no possible way the State alleged, must less proved, Newson either caused the children to suffer or placed them in a situation where they either did or may have suffered physical pain or mental suffered based upon the sexual abuse or sexual exploitation "type" of abuse or neglect. However, given the charging document's insufficiency, Newson addressed whether the facts presented at trial could have established the only viable "types" of abuse or neglect - nonaccidental physical injury, nonaccidental mental injury, or negligent treatment or maltreatment. Id.

Notably, although Newson discussed whether the State possibly presented sufficient evidence to support a possible negligent treatment or maltreatment type of abuse or neglect allegation, when this Court affirmed both Newson's convictions – one for Brandon and the other for Major – the Court clearly rejected any contention that the State alleged negligent treatment or maltreatment as the "type" of abuse or neglect, even though this "type" would only require the State to present evidence the children **may suffer** physical pain or mental suffering. See Clay, 129 Nev. at 453. Indeed, for liability under the negligent or maltreatment "type" of abuse or neglect Newson would have to be a person responsible for both Major's and **Brandon's** welfare. A person responsible for a child's welfare is defined in NRS 432B.130 as a parent, guardian, stepparent with whom the child lived, or is continually or regularly found in the same household, public or private home, institution or facility, where the child resided, or working in a facility where the child received care outside of the home for all or a portion of the day, or a person directly responsible or serving as a volunteer for or employed by such a home, institution or facility. Thus, because Newson was none of these things to Brandon, the Court's affirmance for **two** child abuse, neglect or endangerment

convictions demonstrates the Court rejected any contention that the State alleged, much less proved, negligent treatment or maltreatment as the "type" of abuse or neglect. See NRS 432B.130, 432B.140.

Regarding nonaccidental physical injury, Newson contended irrespective of whether the State alleged Newson either caused the children to **suffer** physical pain or mental suffering or simply placed each in a situation where they **may have suffered** physical pain or mental suffering, per Clay the State nevertheless had to, but failed to, prove both children actually suffered physical injury, i.e., a permanent or temporary disfigurement; or impairment of any bodily function or organ of the body. AOB 44-46; ARB 14-16; Clay, 129 Nev. at 453. The State could not merely rely upon evidence that the children "may have" suffered physical pain or mental suffering due to Newson's actions and the children's proximity to Anshanette in the car. Id.

Here, not a single witness testified, and the State presented no other evidence, that either Brandon or Major actually suffered a permanent or temporary disfigurement or an impairment of any bodily function or organ of the body. Therefore, the State failed to present sufficient evidence to support Newson's child abuse, neglect or endangerment convictions for allegedly committing nonaccidental

physical injury type of abuse or neglect. Accordingly, when this Court concluded the State presented evidence that merely because the children could possibly have suffered physical pain or mental suffering when Newson created potential danger by shooting Anshanette while the children were present, the Court clearly misapplied Clay. For this reason, rehearing is warranted.

CONCLUSION

This Court has noted that "rehearings are not granted to review matters that are of no practical consequence" and this Court will consider rehearing only when "necessary to promote substantial justice. Gordon, 114 Nev. at 745, 961 P.2d at 142. Here, rehearing in Newson's case has practical consequences. When the State alleged Newson placed the children in a situation where they may have suffered physical pain or mental suffering due to nonaccidental physical injury "type" abuse or neglect, it was nevertheless required to present evidence that the children suffered permanent or temporary disfigurement or impairment of any bodily function or organ of the body. The State failed to do so at trial and this Court compounded that injustice by failing to rectify the error on appeal. Accordingly, rehearing is warranted as it will provide Newson with practical relief

by vacating his two child abuse convictions. Thus, substantial justice requires rehearing on the Court's decision regarding Newson's Child Abuse convictions.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Chief Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP32(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 proportionally spaced typeface using Times New Roman in 14 font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 3,042 words which does not exceed the 4,667 word limit.

DATED this 28 day of October, 2019.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28 day of October, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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