IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON, JR., Appellant, vs. THE STATE OF NEVADA, Respondent.	)	Case No. 75932

PETITION FOR *EN BANC* RECONSIDERATION

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VERNON NEWSON, JR.,	)	
	)	
Appellant,	)	
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vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

PETITION FOR *EN BANC* RECONSIDERATION

COMES NOW Deputy Public Defender WILLIAM M. WATERS, on behalf of the appellant, VERNON NEWSON, JR., and pursuant to **NRAP 40A**, petitions this court for *en banc* reconsideration of the panel decision 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, including Appellant's Appendix.

Dated this 2 day of December, 2019.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

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

JURISDICTION

A Petition for *En Banc* Reconsideration is timely filed within ten (14) days after written entry of a Supreme Court panel decision denying rehearing. NRAP 40A(b). In this case, the panel's Order Denying Rehearing was filed on November 20, 2019, and Appellant files the instant Petition for *En Banc* Reconsideration within the fourteen-day period. This Court may consider a Petition for *En Banc* Reconsideration of a panel decision when "(1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a).

PERTINENT FACTS & PROCEDURAL HISTORY

On December 13, 2015, Newson shot his girlfriend Anshanette McNeil in their rental vehicle as the two entered the I-15 on-ramp near Lamb Blvd. in Las Vegas, Nevada. AA IV 717-718. McNeil's two children were present in the car at the time. After shooting McNeil in the vehicle, Newson stopped the car and either pulled McNeil from the vehicle or she exited the vehicle herself and Newson shot her additional times. Id. Afterwards, Newson reentered the vehicle and speed away. Id. at 719.

Bystanders called police who responded along with paramedics. Id. at 731-34. McNeil later died *en route* to the hospital. Id. at 745.

Earlier that evening Zaharia Marshall ("Marshall") received a phone call from McNeil requesting Marshall babysit McNeil's two (2) year-old son Brandon and McNeil and Newson's eight (8) month-old son Major. Id. at 757-59. Marshall agreed and eventually went outside to await McNeil's arrival. Id. at 761. However, only Newson arrived at Marshall's house with both Brandon and Major. Id. at 760-61. Marshall noticed Newson was "frantic," irritated, amped up, and hurried. Id. at 779. When Marshall asked Newson what happened, Newson replied, "motherfucker's pushed me too far to where I can't take it anymore." Id. at 766. Newson eventually left. Id.

On December 22, 2015, Newson was arrested in Claremont, CA. AA V 882-83. That same day, the State filed a criminal complaint charging Newson with one count of Murder with Use of a Deadly Weapon and one count of Possession of Firearm by Prohibited Person. AA I 1. Later, the State filed an amended complaint adding two counts of Child Endangerment. Id. at 13-15. After the preliminary hearing, the State filed an Information in the district court on the same charges filed in the criminal complaint. Id. at 97. Newson pleaded not guilty at his arraignment and waived his right to a speedy trial. AA II 319.

Newson's trial began on February 22, 2018 and ended on February 28, 2018. Id. at 330-36. At the trial's conclusion the jury found Newson guilty of all charges. Id. at 294, 311-12. On April 19, 2018, the court sentenced Newson. Id. at 313-14. Newson timely filed his Notice of Appeal on May 21, 2018. Id. at 315.

The parties completed the appellate briefing on January 28, 2019. On October 12, 2019, a panel of this Court issued a published decision reversing Newson's murder conviction but affirming his Child Abuse, Neglect or Endangerment convictions. See Newson v. State, 135 Nev. Adv. Op. 50 (Nev. Sup. Ct. 2019).

On October 28, 2019, both Newson and the State filed Petitions for Rehearing of the Panel's decision. The State's petition focused on the panel's decision to reverse Newson's Murder conviction while Newson's petition focused on the panel's decision to affirm his Child Abuse, Neglect or Endangerment convictions. On November 20, 2019, the panel filed an Order denying both Newson's and the State's respective Petitions. On November 27, 2019, the State filed a Petition for En Banc Reconsideration. Newson now also files a Petition for En Banc Reconsideration.

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ARGUMENT

I. En Banc Reconsideration of the Panel's Decision to Affirm Newson's Child Abuse, Neglect or Endangerment Convictions is Necessary to Maintain Uniformity of Decisions of the Nevada Supreme Court.

For context, Newson made two arguments on direct 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. The panel declined to address this argument 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, the panel claimed:

> 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, this conclusion ultimately undermines the panel's resolution of 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. In finding sufficient evidence to support Newson's two Child Abuse, Neglect or Endangerment convictions, the Panel's interpreted NRS 200.508 directly contrary to this Court's controlling precedent.

The panel's conclusion that sufficient evidence supported Newson's two convictions for Child Abuse, Neglect or Endangerment was based upon a fundamental misinterpretation or misunderstanding of this Court's precedent in Clay v. Eighth Judicial Dist. Court, 129 Nev. 445 (2013). Therefore, to maintain uniformity with this Court's prior decisions, *en banc* reconsideration is warranted in Newson's case.

In Clay, the State secured an Indictment charging the defendant with Child Abuse, Neglect or Endangerment by placing the victim in a situation where she **may suffer** physical pain or mental suffering as the result of child abuse or neglect by battering her. 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. The State countered that "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 filed a Petition for Wirt of Mandamus in this Court. Id. In the mandamus proceeding this Court concisely summarized the arguments advanced by both the defendant and the State thusly:

> 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.

This Court rejected the State's argument. This 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).

Next, this Court clarified that there are five "types" of abuse or neglect a defendant can under either theory (**suffer** or **may suffer**) and these types of abuse or neglect are 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. The nonaccidental physical injury "type" of abuse or neglect 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." Because in Clay's case the State alleged nonaccidental physical injury as the "type" of abuse or neglect, this Court then held irrespective of whether the State alleges physical pain or mental suffering actually resulted from the abuse or neglect or merely may result from the abuse or neglect, the State 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 "type" of abuse and

neglect, 'physical injury' became "an element of the offense[,]" and therefore, "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, this Court addressed the State's concern that requiring it to prove permanent or temporary disfigurement or impairment of any bodily function or organ of the body any time it alleges nonaccidental physical injury as the "type" of abuse or neglect, would render NRS 200.508(1)'s "may suffer physical pain or mental suffering" language mere surplusage. Id. This Court disagreed however, noting "[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. For example, 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. Clay, 129 Nev. at 454.

With Clay in mind, here, Newson argued the State failed to present sufficient evidence to support his Child Abuse, Neglect or Endangerment convictions under **any** "type" of abuse or neglect. See AOB 44-46; Appellant's Reply Brief ("ARB") 14-18. For obvious reasons Newson did not explicitly 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 may have suffered physical pain or mental suffered based upon the sexual abuse or sexual exploitation "type" of abuse or neglect. Nevertheless, given the charging document's insufficiency Newson did address whether the facts presented at trial could have established the other "types" of abuse or neglect - nonaccidental physical injury, nonaccidental mental injury, or negligent treatment or maltreatment. Id.

Notably, although Newson discussed whether the State presented sufficient evidence to support a possible negligent treatment or maltreatment type of abuse or neglect allegation, when the panel 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. Essentially, 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 per NRS 432B.130. However, as noted in more detail in his appellate briefing, Newson does satisfy the categories of persons defined in NRS 432B.130.

Nevertheless, the panel ultimately rejected Newson's sufficiency of the evidence claim noting:

> 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 this conclusion failed to explicitly state which "type" of abuse or neglect the State alleged, the panel nevertheless cited NRS 200.508**(4)(d)** to support its conclusion. NRS 200.508(4)(d) defines the "physical injury" type of abuse or neglect. Therefore, by deduction, the panel concluded that the State proved Newson committed Child Abuse, Neglect or Endangerment under a theory that he placed the children in a situation where each **may have suffered** physical pain or mental suffering as a result of **nonaccidental physical injury** "type" abuse or neglect when he shot at Anshanette in close proximity to the children.

As addressed *supra* however, per Clay when the State alleged Newson committed nonaccidental physical injury "type" abuse or neglect, 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. See Id.; AOB 44-46; ARB 14-16. Rather, the State also **had to prove the defendant actually caused the children physical injury**, i.e., a permanent or temporary disfigurement; or impairment of any bodily function or organ of the body. Clay, 129 Nev. at 453. Yet here, not a single witness testified – and the State presented no

other evidence – that either Brandon or Major suffered a permanent or temporary disfigurement or an impairment of any bodily function or organ of the body. Thus, by affirming Newson's convictions, the panel's conclusion is directly contradictory to this Court's mandatory precedent established in Clay. Accordingly, *en banc* reconsideration is warranted.

CONCLUSION

Based upon the foregoing arguments, en banc reconsideration of the panel's decision is necessary to secure and maintain uniformity of the decisions of the Supreme Court. The panel's conclusion that although the State alleged Newson committed abuse or neglect via nonaccidental physical injury, it was nevertheless not required to prove Newson caused either child permanent or temporary disfigurement or an impairment of any bodily function or organ of the body is contrary to this Court's decision in Clay. Therefore, this Court should grant *en banc* reconsideration in the instant case.

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 en banc reconsideration 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 2,592 words which does not exceed the 4,667 word limit.

DATED this 2 day of December, 2019.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

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

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2 day of December, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
ALEXANDER CHEN

WILLIAM M. WATERS
HOWARD S. BROOKS

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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BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office