IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON, JR.,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 75932

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER CHEN, and answers to Appellant's Petition for En Banc Reconsideration in the above-captioned appeal. This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 22nd day of January, 2020.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM
POINTS AND AUTHORITIES

On October 10, 2019, a panel of this Court issued an Order in this case reversing Appellant Vernon Newson's conviction of First-Degree Murder and affirming his conviction of Child Abuse, Neglect or Endangerment. Newson v. State, 135 Nev. Adv. Op. 50 (Nev. Sup. Ct. 2019). On October 28, 2019, both Appellant and Respondent filed Petitions for Rehearing. Appellant's Petition for Rehearing requested a rehearing on the Child Abuse, Neglect or Endangerment convictions, while Respondent's Petition requested a rehearing on the First-Degree Murder reversal. On November 20, 2019, a panel of this Court denied both Appellant and Respondent's Petitions.

On November 27, 2019, Respondent filed a Petition for En Banc Reconsideration for the Court reversing Appellant's First-Degree Murder conviction. On December 2, 2019, Appellant filed a Petition for En Banc Reconsideration, requesting en banc reconsideration on the Child Abuse, Neglect, or Endangerment convictions. On January 8, 2020, this Court filed an Order denying Respondent's Petition for En Banc Reconsideration and directing Respondent to Answer to Appellant's Petition for En Banc Reconsideration. This Court requests Respondent to answer to Appellant's Petition to resolve the issues presented. The issue raised is whether this Court has misinterpreted Clay v. Eighth Judicial Dist. Court, 129 Nev. 445, 305 P.3d 898 (2013), when applying Clay to the facts of the

instant case.

As Appellant explains, this Court in Clay clarified the two alternate "means" or "theories" for committing the offense of Child Abuse, Neglect or Endangerment pursuant to NRS 200.508(1). The first requires the State to prove that: "(1) a person willfully caused (2) a child who is less than 18 years of age (3) to suffer unjustifiable physical pain or mental suffering (4) as a result of abuse or neglect." Clay, 129 Nev. at 451-452, 305 P.3d at 902-203. The second requires the State to prove that: "(1) a person willfully caused (2) a child who is less than 18 years of age (3) to be placed in a situation where the child may suffer physical pain or mental suffering (4) as the result of abuse or neglect." Id.

The Court in Clay then explains that, because the fourth element of each requires "abuse or neglect," there are five different kinds of abuse or neglect listed in NRS 200.508(4)(1). Id. at 452, 305 P.3d at 902-903. The five kinds of abuse or neglect are: "(1) nonaccidental physical injury, (2) nonaccidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment." Id. at 452, 305 P.3d at 903. Because of the abuse or neglect, the Court held that the State is required to prove that abuse or neglect occurred, regardless of which theory an offense is prosecuted. Id.

In Clay, the State proceeded under the second theory, where a person willfully caused a child under 18 to be placed in a situation where the child **may suffer**

physical pain or mental suffering from abuse or neglect. Id. at 452-453, 305 P.3d at 903-904 (emphasis added). Through the second theory, the State also alleged abuse or neglect based on the first kind of abuse or neglect: nonaccidental physical injury. Id. However, while the second theory only requires that the person **may suffer** physical harm or mental suffering, the Court still held that the State must present evidence of actual physical pain. Id. (emphasis added). The Court dismissed the State's explanation that this interpretation of the statute renders the second provision surplusage. Id.; See Speer v. State, 116 Nev. 677, 679, 5 P.3d 1063, 1064 (2000) (an example of where statutory provisions may be deemed inappropriate and thus "surplusage" is where the inclusion of the language would lead to absurd or unreasonable results).

If the State were always required to present evidence of **actual** physical pain or mental injury, even while alleging the second "may suffer" theory which only requires that the person **may suffer** physical harm or mental suffering, the entire second theory would become mere surplusage. The Court in Clay explains that this would not render it surplusage, because the State can still proceed under the fifth kind of abuse, negligent treatment or maltreatment of a child. Id. at 453-454, 305 P.3d at 904. Based on the Clay Court's interpretation, out of the five kinds of abuse or neglect, this would be the only "kind" that the State would be able to allege under the second "may suffer" theory.

The fifth kind of abuse or neglect, negligent treatment or maltreatment of a child is "without proper care, control and supervision." NRS 432B.140, listed in NRS 200.508(4)(a). The Court in Clay explains, "But criminal liability will still attach in that scenario under the second theory in subsection 1 if the defendant placed the child in a situation where the child *may* suffer physical pain or mental suffering as the result of the negligent treatment or mistreatment." Id. at 454, 305 P.3d at 904. Thus, for the State to prove Child Abuse, Neglect or Endangerment under these two theories, with five different kinds of abuse or neglect, under the first theory, the State can allege all five kinds of abuse or neglect. But, for the second "may suffer" theory, the **only** kind of abuse or neglect that the State would be able to prove is negligent treatment or mistreatment.

The Court in Clay uses an "intoxicated driver" scenario to further explain how the second "may suffer" theory is not surplusage, because the State can allege the negligent treatment or maltreatment of a child kind of abuse or neglect. Id. The Court explains that when an intoxicated driver places his child in a car and then drives without accident, the State can still proceed with child abuse because, clearly, the child's health or welfare is threatened. Id. The Court found its interpretation of the statute valid because it allows the State to proceed with the second "may suffer" theory despite being able to present evidence of actual physical pain or injury. Id. However, the Clay Court gravely overlooks that this is the one and only theory the

State would be able to proceed on under the second "may suffer" theory, because all other theories require actual physical evidence of harm.

The facts of the intoxicated driver scenario in Clay are extremely similar to the facts of the instant case. A panel of this Court explained that, "[Appellant] and Anshanette McNeil were driving in a rented SUV on a freeway on-ramp when [Appellant] turned and shot Anshannette, who was seated in the backseat next to the couple's infant son and Anshanette's toddler." Newson, 135 Nev. Adv. Op. at 2. It does not need to be explained to this Court how utterly dangerous it was for Appellant to turn around, while driving, and shoot his girlfriend with the two kids, Major and Brandon, in the backseat immediately next to her. And if this shooting occurred how Appellant contends it did, in the heat of passion with adequate provocation, it simply furthers just how dangerous Appellant's actions truly were for those two children.

In the instant case, as a panel of this Court summarized, Appellant's actions were sufficient to prove Child Abuse, Neglect or Endangerment:

> 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 physical injury** … Based on the evidence presented, a rational juror could reasonably conclude that 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.

Id. at 13 (emphasis added). A panel of this Court recognized that this is clearly Child Abuse, Neglect or Endangerment because of the harm that Appellant exposed the children to by acting so dangerously discharging a firearm, while driving, into the backseat of the vehicle. Just how close the children were to Anshanette is further evidenced by the fact "[Major] had blood on his pants and that there [was] blood on the car seat as well." Id. at 4.

While applying this to Clay, without showing actual physical evidence or actual mental harm, the State can now only allege the negligent treatment or maltreatment as the kind of abuse or neglect. Without actual evidence the children were physically harmed, the State cannot allege the first kind, nonaccidental physical injury. Further, without actual evidence of the mental harm the children suffered, or will likely suffer in the future, the State cannot allege the second kind of abuse or neglect, nonaccidental mental injury. And in the instant case, the kinds of abuse or neglect based on sexual abuse and sexual exploitation do not apply. Thus, under the "may suffer" theory, the only kind of abuse or neglect the State can allege is negligent treatment or maltreatment.

Appellant argues that a panel of this Court "clearly rejected any contention that the State alleged negligent treatment or maltreatment of abuse or neglect" without explaining how the Court *clearly* did so. Appellant's Petition for En Banc Reconsideration "Appellant's Petition," at 11. In fact, it seems the Court *clearly*

found that the State properly alleged negligent treatment or maltreatment when it found that, "Newson placed the children in a situation where they may have suffered physical injury." Newson, 135 Nev. Adv. Op. at 13. It is unclear why, or how, a panel of this Court "clearly" found that the State did not allege negligent treatment or maltreatment under the "may suffer" theory.

Appellant's argument to support this contention is, "for liability under the negligent treatment '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." Appellant's Petition, at 11. Under NRS 432.130:

> A person is responsible for a child's welfare under the provisions of this chapter if the person is 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.

Appellant is obviously responsible for Major's welfare because Major is his own biological son with Anshanette. Because a person is responsible for a child's welfare if the person is the child's parent, Appellant was thus responsible for Major's welfare. NRS 432B.130.

Further, Appellant argues that, while he may have been responsible for Major's welfare, he was not responsible for Brandon's. See Appellant's Petition, at 11; Appellant's Opening Brief "AOB," at 56-57. Appellant is not Brandon's parent,

stepparent, or guardian. AOB, at 57. Moreover, it is unclear whether Anshanette and Appellant lived together, or in the same house as Brandon, or that Appellant was regularly in Brandon's same institution or facility where he resides. AOB, at 56-57. As such, pursuant to NRS 432B.130, Appellant would not be a person responsible for Brandon's welfare. Thus, the State cannot properly allege one count of Child Abuse, Neglect, or Endangerment for Appellant's actions against Brandon.

The State's concern is that by applying Clay to the underlying facts of the instant case, Appellant would only be guilty for one count of Child Abuse, Neglect or Endangerment for his own son, Major. If this Court follows the Clay Court's reasoning, Appellant would not be guilty for the one count of Child Abuse for Anshanette's two-year-old son, Brandon. It seems to lead to an absurd result for Appellant to be guilty of only the abuse he caused his own son, despite placing both children in the exact same dangerous situation. Both Major and Brandon were immediately next to Anshanette in the backseat of the car when Appellant turned around and started shooting her. These two children could have equally been physically harmed by Appellant's actions, and equally mentally harmed by watching Appellant shoot their mother right in front of their own eyes. Yet, under Clay, the State can only allege one count of child abuse for Major, but cannot allege the second count for Brandon.

In sum, the State respectfully asks this Court to clarify the Clay decision as it

applies to this case. Pursuant to Clay, the State can only allege one count of Child Abuse, Neglect or Endangerment under the "may suffer" theory and by the fifth means of negligent treatment or maltreatment for Appellant's son, Major. However, because of Clay, the State cannot allege the second count of Child Abuse, Neglect or Endangerment for Anshanette's son, Brandon. Common sense supports charging Appellant with two counts of Child Abuse for placing both children in the same dangerous situation with the same risk of being struck by a flying bullet. However, the Clay decision leads to an absurd, one count of Child Abuse, result. Despite Appellant placing both Major and Brandon in a situation where they may suffer physical pain or mental suffering as a result of abuse or neglect, by negligent treatment or maltreatment, the State can only allege one count of Child Abuse, Neglect, or Endangerment.

WHEREFORE, the State respectfully requests that Appellant's Petition for En Banc Reconsideration be DENIED.

Dated this 22nd day of January, 2020.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #10539
Office of the Clark County District Attorney

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 2,212 words and 188 lines of text.

Dated this 22nd day of January, 2020.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2570

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 22, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

WILLIAM M. WATERS
Deputy Public Defender

ALEXANDER CHEN
Chief Deputy District Attorney

BY */s/ E.Davis*
Employee, District Attorney's Office

AC/Briana Stutz/ed