IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON, JR.,	)	NO. 75932
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
_____	)	

APPELLANT'S REPLY TO STATE'S ANSWER TO APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

REPLY ARGUMENT

The issue in Newson's Petition for *En Banc* Reconsideration is whether the Panel's affirmance of Newson's Child Abuse, Neglect or Endangerment convictions *via* published decision is contrary to this Court's published decision in Clay v. Eighth Judicial Dist. Ct., 129 Nev. 445 (2013). If Newson's decision is contrary to Clay, then *en banc* reconsideration is necessary to resolve a substantial precedential issue.

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I. This Court Should Not "Clarify" Its Decision in Clay.

On direct appeal Newson relied upon Clay to argue the State failed to present sufficient evidence to support Newson's two Child Abuse, Neglect or Endangerment convictions. See AOB 44-46, 49-50; ARB 14-19, 22-26. In response the State did not argue Clay was incorrectly decided. However, in its Answer to Newson's *en banc* petition the State now requests this Court "clarify Clay" and find that a person not responsible for a child's welfare can nevertheless be liable for Child Abuse, Neglect or Endangerment via negligent or maltreatment. Answer 8-9. This Court should reject the State's request as the State is improperly arguing a new point for the first time during *en banc* reconsideration. See NRAP 40A(c).

A. Clay does not require the State to prove a child actually suffered physical pain or mental suffering for all types of abuse or neglect except negligent treatment or maltreatment.

If this Court chooses to consider the State's argument, it should still decline the State's invitation to "clarify" Clay. The State claims that Clay held when the State alleges child abuse or neglect *via* nonaccidental physical injury it must prove a child actually suffered physical pain even if the State alleged the defendant merely placed a

child in a situation where the child "may suffer" unjustifiable physical pain. Answer 3 (citing Clay, 129 Nev. at 452-53). Based upon this interpretation, the State argues if it lacks evidence that a child suffered physical pain it can only allege abuse or neglect *via* negligent treatment or maltreatment because this "type" of abuse or neglect only requires the State to prove the child "may suffer" physical pain. Answer 3-4. The State's interpretation of Clay is incorrect.

In Clay the State alleged the defendant placed the victim in a situation where she **may suffer** physical pain or mental suffering **resulting** from **nonaccidental physical injury**. Id. at 448. However, the State did not instruct the grand jury on the definition for "physical injury" per NRS 200.508(4)(d). Id. at 449. On mandamus the defendant argued the State's failure to instruct the grand jury undermined its integrity.[1] Id. The State argued because it alleged the defendant placed the victim in a situation where she **may suffer** physical pain or mental suffering it needed only present evidence the defendant's actions theoretically could have produced physical pain **and not that the defendant physically injured the victim**. Id.

[1] The defendant also argued that the district court erred in finding slight or marginal evidence of nonaccidental physical injury. Id. at 448. However, the Court declined to consider that argument. Id. at 450 n. 2.

In rejecting the State's argument, the Court explained that NRS 200.508(1) sets forth two alternate "theories" for Child Abuse, Neglect or Endangerment. First, the defendant willfully caused a child under 18 **to suffer** physical pain or mental suffering **resulting from abuse or neglect** or, the defendant willfully caused a child under 18 to be placed in a situation where she **may suffer** physical pain or mental suffering **resulting from abuse or neglect**. Id. at 451-52 (emphasis added). The Court further explained there are five "types" of abuse or neglect a defendant can commit under either theory (**suffer** or **may suffer**) and those "types" are defined in NRS 200.508(4)(a) as: (1) nonaccidental physical injury; (2) nonaccidental mental injury; (3) sexual abuse; (4) sexual exploitation; or (5) negligent treatment or maltreatment. Id. at 452. Most importantly, the Court concluded that under either "theory" – did suffer or may suffer – based upon the "resulting from" language in NRS 200.508(1) the State **has to prove abuse or neglect 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**.") (emphasis added).

Although not essential to the Court's conclusion, the Court considered the State's claim that the Court's interpretation would render the "may suffer" theory mere surplusage because in the State's estimation, it would always have to prove physical pain or mental suffering in child abuse cases where it alleged nonaccidental physical injury. Clay, 129 Nev. at 453. The Court disagreed noting some "types" of abuse or neglect "…in some cases will result in the State presenting evidence that shows actual physical pain or mental suffering **even though it is proceeding under the second theory [may suffer] in NRS 200.508(1).**" Id. at 454 (emphasis added). Moreover, the Court explained where the State lacks evidence of physical pain or mental suffering it can nevertheless proceed under the second theory – "may suffer." Id. To elucidate this point, the Court used negligent treatment or maltreatment as an example. Id. However, the Court never claimed the State could **only** allege negligent treatment or maltreatment if the State lacked evidence the alleged victim suffered physical pain or mental suffering.

Here, the State misreads Clay. Per Clay, irrespective of whether the State alleged Newson caused Brandon and Major to suffer or placed them in a situation where they may have suffered physical pain

or mental suffering the State had to prove the type of abuse or neglect it alleged actually occurred. Newson asserts the State alleged – and the Panel believed – Newson was charged with nonaccidental physical injury type of abuse or neglect.

B. The Panel erroneously concluded the State presented sufficient evidence of nonaccidental physical injury.

Newson argued on appeal that the State alleged nonaccidental physical injury as the "type" or abuse or neglect yet failed to present sufficient evidence to support its allegations. AOB 44-46. Out of an abundance of caution Newson also argued if the State somehow alleged negligent treatment or maltreatment then the State failed to present sufficient evidence of child abuse involving Brandon because the State offered no evidence Newson was a person responsible for Brandon's welfare. Id. at 46-47; 49-50. The Panel rejected Newson's sufficiency claims finding:

> 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, 129 Nev. at 451-52 (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.
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> Newson v. State, 449 P.3d 1247, 1254 (Nev. 2019) (emphasis added).

Based upon this conclusion, Newson argued in his *en banc* Petition that the Panel "**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 that the children may suffer physical pain or mental suffering." Pet. 11 (emphasis added). The State asserts that Newson is incorrect and instead, the Panel "clearly found the State properly alleged negligent treatment or maltreatment[.]'" Answer 6. (citing Newson, 449 P.3d at 1253).

As noted in Newson's *en banc* petition, although the Panel's conclusion regarding the evidentiary sufficiency does not explicitly specify which "type" of abuse or neglect it believed the State alleged

and proved,[2] the Panel nevertheless cited NRS 200.508(4)(d), which is the definition of "physical injury." Newson, 449 P.3d at 1253. Additionally, the Panel claimed, "Newson placed the children in a situation where they may have suffered a **physical injury**." Id. The Panel's decision to cite NRS 200.508(4)(d) and to use the phrase "physical injury" in rejecting Newson's sufficiency claim essentially proves the Panel believed the State alleged nonaccidental physical injury. Accordingly, Newson stands by his claim that the Panel "clearly" rejected any notion the State alleged negligent treatment or maltreatment as the 'type' of abuse or neglect."

As further proof, by affirming **both** Newson's convictions, and because the State concedes it did not prove Newson is a person responsible for Brandon's welfare, the Panel could not have found the State presented sufficient evidence for **two counts** of Child Abuse,

[2] On appeal Newson also argued the Information failed to provide adequate notice as to what "type" of abuse or neglect the State alleged Newson committed. AOB 36-44. The panel declined to address this argument because Newson raised this argument for the first time on appeal but also noted, without explaining how, "the record belies Newson's first argument." Newson, 449 P.3d at 1252 n.3, 53. Nevertheless, the Panel could not refuse to address Newson's sufficiency argument. See Chism v. State, 114 Nev. 229, 231 (1998). Therefore, because the notice issue and the sufficiency issue were closely related, the Panel could have avoided confusion regarding its sufficiency conclusion by choosing to substantively address Newson's notice claim.

Neglect or Endangerment based upon negligent treatment or maltreatment type of abuse or neglect.

Moreover, on direct appeal the State expressly disclaimed it alleged negligent treatment or maltreatment as the type of abuse or neglect. See RAB 32 ("[a]s to proof that [Newson] was responsible for Brandon's welfare, NRS 432B.130 bears no relevance to the charge against [Newson]" because "[Newson] was charged with Child Abuse, Neglect or Endangerment under 200.508(1))."

Finally, the district court gave jury instruction 19 at trial which defined physical injury under NRS 200.508(4)(d). See AA II 280. The district court did not provide any instructions defining negligent treatment or maltreatment pursuant to NRS 432B.140, nor defining a person responsible for a child's welfare pursuant to NRS 432B.130. This indicates both the district court and the Panel believed the State alleged nonaccidental physical injury as the "type" of abuse or neglect. Therefore, irrespective of whether the State proceeded under a "did suffer" or "may suffer" theory, Newson is entitled to have his convictions vacated as the State failed to present sufficient evidence of physical injury, i.e., "permanent or temporary disfigurement or

impairment of any bodily function or organ of the body." See NRS 200.508(4)(d)(1)-(2).

C. Reliance upon Clay does not produce an absurd result in Newson's case.

Based upon its misunderstanding of Clay, the State claims because it lacked evidence that Brandon or Major experienced physical pain or mental suffering it could only charge Newson for abuse and neglect *via* negligent treatment or maltreatment. Answer 8. The State acknowledges it did not present any evidence that Newson was responsible for Brandon's welfare. Id. at 8. Therefore, the State claims here, reliance upon Clay produces an absurd result as Newson could only be liable for Child Abuse, Neglect or Endangerment for Major and not Brandon even though Newson acted dangerously towards both children. Id. at 8-9. Accordingly, the State desires the Court "clarify" Clay to affirm Newson's conviction regarding Brandon. Id. at 9.

Newson disputes that the State alleged child abuse or neglect *via* negligent treatment or maltreatment. Nevertheless, as discussed *supra*, the State misunderstands Clay. The fact that the State lacked evidence that Brandon or Major suffered physical pain or mental

suffering did not mean the State could **only** allege child abuse or neglect *via* negligent treatment or maltreatment. Rather, the fact that the State lacked evidence of physical injury, mental injury, sexual abuse, or sexual exploitation meant the only "type" of abuse or neglect the State could possibly allege was negligent treatment or maltreatment. Unfortunately for the State, for this "type" of abuse or neglect Newson could not be liable regarding Brandon as the State failed to prove Newson was responsible for Brandon's welfare per NRS 432B.130.

Although the State could not convict Newson for Child Abuse, Neglect or Endangerment regarding Brandon under the facts of this case, this is not an "absurd" result. Many statutes in Nevada impose special punishment based upon a victim's status even though the same offense would result in a lesser or no punishment against someone without that special status. See NRS 200.471(2)(a),(c); NRS 200.481(2)(c); NRS 200.366(3); NRS 193.167. Moreover, there are crimes the State could have alleged Newson committed relative to Brandon even though Newson was not responsible for Brandon's welfare. See generally NRS 202.290(2). The fact the State wanted to charge Newson with Child Abuse, Neglect or Endangerment *via*

negligent treatment or maltreatment as to Brandon, rather than some other offense, does not mean its inability to do so produces an "absurd" result.[3]

Finally, if the State desires to expand the class of persons responsible for a child's welfare under NRS 432B.130, and thus liable for child abuse or neglect *via* negligent treatment or maltreatment, it should do so in the legislature and not by asking this Court to "clarify" its' decision in Clay.

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[3] Although the State failed to present any evidence that Newson was a person responsible for Brandon's welfare, that does not mean this evidence may not have existed. Indeed, had the State alleged negligent treatment or maltreatment – as it claims it did – then it would have tried to present evidence that Newson was responsible for Brandon per NRS 432B.130. The State's failure to attempt to present this evidence is further proof that it did not allege negligent treatment or maltreatment.

CONCLUSION

Based upon the foregoing arguments, Newson respectfully requests this Court reverse his Child Abuse, Neglect or Endangerment convictions.

Respectfully submitted,

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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:

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appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13 day of February, 2020.

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