IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 73048

HELEN NATKO,

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Appellant, Helen Natko ("Helen"), withdrew funds from her joint bank account with Mr. Delford Mencarelli ("Del") on July 5, 2013. AA00193. Helen redeposited all of the funds twenty-six (26) days later into the same joint bank account on July 31, 2013. AA00193. The State charged Helen with two class B felonies of Exploitation of a Vulnerable Person and Theft based solely and entirely on the July 5, 2013 withdrawal from the Joint Account. AA00001 – 00003. No charges were filed against Helen that related in any way to Del's and Helen's creation of the joint bank account on July 23, 2012, one year prior to the withdrawal. The result in the District Court was a jury verdict of guilty against Helen on both criminal charges. AA00166 – 00168.

The Court of Appeals reversed and remanded holding that the Trial Court erred by giving Jury Instruction No. 18 "because it was not a correct statement of the law" and it "was inconsistent with NRS 100.085 because it broadly stated that a person's status as a joint account holder did not give her the authority to use another's assets within the joint account for her own benefit." The Court of Appeals further held that the instruction "did not accurately reflect the reasoning and conclusions in *Walch*." See the Appellate Court's Conclusion on page 9 of its Opinion.

II. STATEMENT OF THE FACTS

Helen is currently 81 years old. Helen and Del began an exclusive

romantic relationship in Pennsylvania on July 5, 1982 that lasted for thirty-three (33) years until Del's death on July 3, 2015. AA00033 and AA00038.

On July 19, 2012, Del and Helen both executed durable powers of attorney for health care purposes, naming each other as their respective Power of Attorney. AA00196 – 00199 and AA00200 – 00204. Four days later, on July 23, 2012, Del added Helen as a joint owner of his bank account at the IBEW Plus Credit Union ("the Credit Union"). AA00169 – 00194 and AA00195. The account numbered XXXX4389 is hereinafter referred to as "the Joint Account." A copy of the Credit Union's signature page/contract executed by Del and Helen was admitted at trial as both State's Exhibit 10 and Helen's Exhibit "A". AA00195. The Credit Union's signature page/contract specifically states:

> **"[t]he Joint owners of this account hereby agree with each other and with the Credit union that all sums, now, heretofore, or hereafter paid in on shares by any or all said joint owners and shall be owned by them jointly, and be subject to the withdrawal or receipt of any of them."** (emphasis added) AA00195

One year after Del made Helen a joint owner of the Joint Account, on July 5, 2013, Helen withdrew $195,000 from the Joint Account and deposited the $195,000 into her own account. A00193. Twenty-six days later, on July 31, 2013, Helen re-deposited the $195,000 into the Joint Account without having spent any of the funds during the twenty-six-day time period. AA00193.

The Trial Court, over Helen's counsel's objections, gave contrary and inconsistent Jury Instructions regarding the ownership rights of the Joint

Account. AA00097 – 00100, AA00083 - 00086. On the one hand, the Trial Court instructed the jury (Instructions 16 and 17) that each joint owner of a joint bank account owned all the money in a joint account. AA00098 and AA00099. On the other hand, the Trial Court instructed the jury (Instruction 18) that despite joint ownership of all the money in a joint account, a joint owner of a joint account did not necessarily own the money in the joint account. AA00100. Jury Instruction 18 was an out of context quote from this Court's decision in *Walch v. State*, 112 Nev. 25, 909 P.2d 1184 (1996) that deceptively presented an erroneous analysis and conclusion of that case.[1]

The Court of Appeals held that the Trial Court erred by giving Jury Instruction No. 18 "because it was not a correct statement of the law" and it "was inconsistent with NRS 100.085 because it broadly stated that a person's status as a joint account holder did not give her the authority to use another's assets within the joint account for her own benefit." The Court of Appeals further held that the instruction "did not accurately reflect the reasoning and conclusions in Walch." See the Appellate Court's Conclusion on page 9 of its Opinion.

[1] Jury Instruction Number 16 stated "When a deposit has been made in the name of the depositor and one or more other persons, and in a form intended to be paid or delivered to any one of them, or the survivor or survivors of them, the deposit is the property of the persons as joint tenants." AA00098.

Jury Instruction Number 18 stated "A person's status as a joint account holder does not by itself provide lawful authority to use or transfer another's assets for their own benefit." AA00100.

III. ARGUMENT

A. THE STATE DOES NOT AND CANNOT POINT TO ANY POINT OF LAW OR FACT THAT THE APPELLATE COURT OVERLOOKED, MISAPPREHENDED, OR MISAPPLIED.

The State erroneously provides that its Motion for Rehearing is brought under NRCP Rule 40. The rule is NRAP Rule 40 and the State's err is obviously a typo. But, NRAP Rule 40 (c)(1) and (2), specifically provide as follows:

> (c) (1) Matters presented in the briefs and oral arguments **may not be reargued in the petition for rehearing**, **and no point may be raised for the first time on rehearing**. (emphasis added)
>
> (2) The court may consider rehearings in the following circumstances:
>
> (A) **When the court has overlooked or misapprehended a material fact** in the record **or a material question of law** in the case, or
>
> (B) When the court **has overlooked, misapplied or failed to consider a statute,** procedural rule, regulation or decision directly controlling a dispositive issue in the case.

In the case at bar, the State does not even attempt to meet its burden for a rehearing as evidenced by the fact that the State fails to point out any facts or law that the Appellate Court overlooked, misapplied, or misapprehended. The words "misapplied" and "misapprehended" are not found in the State's Petition for Rehearing and the word "overlooked" is found just once on page 3 of the Petition where the State claims the Court of Appeals "overlooked" the State's argument that NRS 100.085 was solely for the benefit of bank depositories. The State does not argue that the Court of Appeals overlooked NRS 100.085, it simply states

that the Court of Appeals did not agree with the State's argument that the NRS 100.085 was enacted solely for the benefit of bank depositories. Not agreeing with or accepting a legal argument is not the same as overlooking a material fact or question of law.

NRAP Rule 40(a)(2) specifically provides as follows:

> The petition (for rehearing) **shall state briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended** and shall contain such argument in support of the petition as the petitioner desires to present. Any claim that the court has overlooked or misapprehended a material fact **shall be supported by a reference to the page of the transcript, appendix or record where the matter is to be found;** any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner has raised the issue.

Again, the State has completely failed to even attempt to comply with NRAP Rule 40(a)(2). The State does not cite to the Record a single time in its Petition. Helen and this Court are left on their own to determine "the points of law or fact that the petitioner believes the court has overlooked or misapprehended" and left on their own to find where in the Record the overlooked matters can be found.

Based on the State's complete failure to comply with NRAP 40(a) and (c), this Petition for Rehearing should be denied.

B. THE STATE ADDRESSED THE ARGUMENT REGARDING NRS 100.085 IN ITS ANSWERING BRIEF AND THE APPELLATE COURT SPECIFICALLY ADDRESSED THE STATE'S ARGUMENT IN ITS DECISION.

The State fully briefed this exact point on page 11 of its Answering Brief on Appeal wherein it stated twice in its argument, "NRS 100.085(1)'s purpose is to protect the depository." As set forth more fully below, and as even set forth in the State's Petition for Review on page 7, the legislative history of the 1995 amendment to NRS 100.085 specifically provides that the amendment "was meant to resolve grave problems for the state's banking institutions, **as well as account holders** who *believe* their joint account will automatically pass to the surviving party." (emphasis added) Minutes, Senate Committee on Judiciary (May 5, 1995) (statement of John P. Sande, Nevada Bankers Association) at 2232 (emphasis added).

Accordingly, the State, at best, is simply rearguing the same point it argued in its Answering Brief which is prohibited under NRAP Rule (c)(1) "Matters presented in the briefs and oral arguments **may not be reargued in the petition for rehearing."** Moreover, the Court of Appeals specifically addressed the State's argument and the above quoted testimony of Mr. John P. Sande which recognized the Amendment's protections afforded to the citizens of Nevada and not just the banks. See page 5 footnote 4 of the Appellate Court's decision.

Accordingly, not only did the Court of Appeals NOT overlook the State's argument, it specifically referenced the same in its Decision.

C. THE STATE IS RAISING THE ISSUE OF REAL PROPERTY JOINT TENANCY FOR THE FIRST TIME IN THIS PETITION FOR REHEARING.

The State did not argue anything with respect to the laws of joint tenancy of real property or potential harm at the trial court level or in its Answering Brief on Appeal. This argument arose solely in the dissent of Judge Tao. As set forth in NRAP Rule 40(c)(1) "**no point may be raised for the first time on rehearing**." (emphasis added). Accordingly, the Appellant was never provided an opportunity to brief this issue and the Appellate Court was not provided an opportunity to address this issue.

Stanfill v. State, 99 Nev. 499, 665 1146 (1983), is a similar case where the Court remanded the case for a new sentence and the State filed a Petition for Rehearing citing to a new case not cited in its prior briefing. This Court in *Stanfill v. State* denied the Petition for Rehearing holding:

> Respondent has now petitioned for rehearing, contending among other things, that our opinion was incorrect in its analysis of the Equal Protection issue. For the reasons stated below, we deny the petition for rehearing. This court decided the appeal based upon the authorities cited to us by the parties and other authorities which we discovered through independent research. Respondent now contends that this appeal is controlled by the case of *United States v. Batchelder*, 442 U.S. 114, 1979, and that the *Batchelder* case renders our opinion incorrect. Respondent did not cite *Batchelder* in its brief or at oral argument.
>
> **The purpose of briefing and oral argument is to inform this court of all authorities relevant to the issues raised in the appeal. On the other hand, the**

> **primary purpose of a petition for rehearing is to inform this court that we have overlooked an important argument or fact, or that we have misread or misunderstood a statute, case or fact in the record. A party may not raise a new point for the first time on rehearing.** NRAP 40(c)(1); *see McGill v. Lewis*, 61 Nev. 40, 118 P.2d 702 (1941). As the contention that this appeal is controlled by *Batchelder* was not properly made in the first instance, we will not consider it now on rehearing. *Id.* At 500 – 501. (emphasis added)

D. THE APPELLATE COURT'S FINDINGS AND CONCLUSIONS OF ERROR ON THE PART OF THE TRIAL COURT ARE COMPLETELY CORRECT AND PROPER STATEMENTS OF THE LAW UNDER BOTH *WALCH V. STATE* AND NRS 100.085.

1. The State And The Trial Court Both Misinterpreted This Court's Reasoning And Conclusions In *Walch V. State.*

As specifically stated by the Appellate Court in its Conclusion, Jury Instruction No. 18 "did not accurately reflect the reasoning and conclusions in *Walch*." The State has consistently ignored the facts of *Walch v. State* as well as the reasoning and conclusion of this Court. Instead, the State grabs and holds tight to a single, out of context, sentence in the case; "A person's status as a joint account holder does not by itself provide lawful authority to use or transfer another's assets for their own benefit." A complete reading of this Court's opinion in *Walch v. State* reveals that this statement was simply meant to state that a party cannot steal funds and then seek to avoid prosecution by depositing the stolen funds into a joint bank account owned with the victim.

In *Walch v. State*, Ms. Walch stole $11,000 from her ward, Ms. Nell Laird. Ms. Walch deposited $2,000 of the $11,000 into her own account and opened a

joint bank account with herself and Ms. Laird where she deposited the remaining $9,000. Thereafter, Ms. Walch stole another $1,950 from Ms. Laird and opened another joint account where she deposited those funds. Ms. Walch then used of the funds in the joint accounts for her own purposes. Ms. Walch claimed in defense to the charges of theft against her that since the funds she stole ended up in a joint account she became an owner of the funds and could not be held accountable.

The key finding and ruling by this Court was "Walch's felonious intent and actions commenced before such monies reached the two accounts, and her status as a joint legal owner of the account funds would not shield her from culpability for theft of funds subsequently withdrawn and misused." *Id.* at 33. In its Conclusion, this Court stated "Walch's status as joint holder of the two accounts did not preclude the jury from finding that she stole funds which passed through the accounts." *Id.* at 34.

Accordingly, the import of *Walch v. State* with respect to joint bank accounts is that a joint account is not a safe haven for stolen funds.

In the case at bar, there was never an allegation or charge that the Joint Account was improperly established or that Helen stole money from Del and deposited stolen funds into the Joint Account. The charges related solely to Helen's withdrawal from the Joint Account on July 5, 2013. In fact, during oral argument before the trial court when Jury Instruction No. 18 was being objected

to, counsel for the State stated "[w]e're not here to prove about whether she had criminal intent at the time of creation of the account. We're here to prove that on July 5th, she intended to take the money." AA00086 The State's counsel was asked during oral argument before the Court of Appeals why he had not charged Helen for actions associated with the opening of the account and his response was "because we can't necessarily go back to what her intent was a year before." 31:06 – 31:10 of tape recording of oral argument held November 27, 2018.

Accordingly, *Walch v. State* is completely inapplicable to this case. Unlike Ms. Walch, Helen was never charged or accused with having stolen the funds that went into the Joint Account. Nor was Helen charged or accused of any improper actions relating to Del converting his account to the Joint Account. In fact, Helen did not create the Joint Account, Del did. Helen never sought cover or protection of a prior criminal act. The case at bar is completely dissimilar to *Walch v. State,* and the out of context quote taken from that case to create Jury Instruction No. 18 which directly contradicted Instructions 16 and 17 was a misstatement of law.

Moreover, as set forth above, all the State's arguments set forth in its Petition for Rehearing can be found in its Answering Brief and all arguments were addressed by the Appellate Court. The State's failure to abide by NRAP Rule 40(a)(2) to set forth with specificity what has been overlooked and where it can be found in the record, does not shift the burden to Helen. The fact is that the

State cannot point to anything that was overlooked, otherwise, it would certainly have complied with this Court's rules.

2. Pursuant To The Contract Between Del, Helen And The Credit Union, Helen Owned The Funds In The Joint Account And Had The Right To Withdraw The Funds At Any Time.

The Credit Union's signature page/contract executed by both Del and Helen specifically states:

> "The Joint owners of this account **hereby agree with each other** and with the Credit union **that all sums**, now, heretofore, or hereafter paid in on shares by any or all said joint owners and **shall be owned by them jointly, and be subject to the withdrawal or receipt of any of them**." (emphasis added) AA00195

This language is clear and unambiguous and the State has never proffered an interpretation that differs from the clear language that **all sums shall be owned by them jointly, and be subject to the withdrawal or receipt of any of them**. This is clearly a joint account under the law of NRS 100.085, but it is also a clear and unambiguous contract between a thirty plus year cohabitating committed couple.

Neither the State or the courts can unilaterally modify this contract between Del and the Helen to mean something other than what is clearly and unambiguously set forth in the contract.

E. PURSUANT TO NRS 100.085 THERE IS NO DISPUTE THAT HELEN WAS AN OWNER OF THE FUNDS IN THE JOINT ACCOUNT ON JULY 5, 2013.

NRS 100.085 provides:

> 1. When a deposit has been made in the name of the depositor and one or more other persons, **and in a form intended** to be paid or delivered to any one of them, or the survivor or survivors of them, the deposit is the property of the persons as joint tenants. **If an account is intended to be held in joint tenancy**, **the account or proceeds from the account are owned by the persons named**, **and may be paid or delivered to any of them during the lifetime of all**, or to the survivor or survivors of them after the death of less than all of the tenants, or the last of them to survive, and payment or delivery is a valid and sufficient release and discharge of the depository.
>
> …
>
> 4. For the purposes of this section, unless a depositor specifically provides otherwise**, the use by the depositor of any of the following words or terms** in designating the ownership of an account **indicates the intent** of the depositor that the account be held in joint tenancy:
>
> (a) Joint;
> (b) Joint account;
> (c) Jointly held;
> (d) Joint tenants;
> (e) Joint tenancy; or
> (f) Joint tenants with right of survivorship.
> (emphasis added)

The Joint Account signature page/contract includes the word "joint" 6 different times, including "joint owners," "joint member," and "joint share agreement." AA00195. Helen is specifically listed as the "Joint Member" both on the information block and on Helen's signature block on the Joint Account signature page/contract. AA00195. Accordingly, under NRS 100.085(4), the multiple uses of the word "Joint" "indicates the intent of the depositor (Del) that

the account be held in joint tenancy." Under NRS 100.085(1), "the deposit is the property of the persons as joint tenants," and "the account or proceeds from the account are owned by the persons named, and may be paid or delivered to any of them during the lifetime of all."

Instructions 16 and 17 are quoted language from NRS 100.085(1) and (4) respectively. The State does not offer a different interpretation or application of NRS 100.085 with respect to the Joint Account, the State simply hangs on to the out of context quote from *Walch v. State* and now suddenly prophecies that the law of joint tenancy in real property is hanging by a thread because of the Court of Appeals' reversal.

F. THE APPELLATE COURT'S DECISION DOES NOT IN ANY WAY THREATEN, OR EVEN CONFLICT WITH, THE LAWS OF JOINT TENANCY WITH RESPECT TO REAL PROPERTY UNDER NRS 111.

Again, the State never previously argued anything with respect to the laws of joint tenancy of real property or potential harm. This all arose in the dissent of Judge Tao.

More importantly, the joint tenancy statute quoted by the State and Judge Tao, NRS 111.065 completely supports the Appellate Court's reversal and remand.

NRS 111.065(2) provides "[a] joint tenancy in personal property may be created by a written transfer, agreement or instrument." Again, Del and Helen

created the Joint Account by a written agreement between themselves and the Credit Union.

> "The Joint owners of this account **hereby agree with each other** and with the Credit union **that all sums**, now, heretofore, or hereafter paid in on shares by any or all said joint owners and **shall be owned by them jointly, and be subject to the withdrawal or receipt of any of them**." (emphasis added) AA00195

Pursuant to NRS 111.065, this is an agreement to create a joint tenancy in personal property. The Agreement goes even further than just creating a joint tenancy, as it specifically states the parties understanding **that all sums are owned by them jointly and are subject to the withdrawal by either of them.**

This is the typical language found in all joint bank accounts. Spouses, parents and children, and others create joint bank accounts every day in order to allow each of the joint owners to withdraw funds at will and to provide for the transfer of funds on death in order to avoid probate. Joint bank accounts are different from jointly held real property and accordingly there are different statutes that apply to each.

The only danger that could come out of this argument is if this Court decided that joint bank accounts had to be treated identically to joint tenancies in real property and therefore the statutes all had to be amended.

The State's argument that the Appellate Court's ruling means that mere possession of personal property creates ownership is a red herring. First, NRS 100.085 provides or creates no such thing. Possession is not mentioned in NRS

100.085. Contractual language between the parties is the determinative factor. Second, as set forth above, Helen was not just holding a bank book in her possession. Helen and Del executed a valid, clear and unambiguous contract between themselves that is not subject to any different interpretation other than **all sums** paid into the Joint Account before or after the date the Joint Account was created are **owned by them jointly and are subject to the withdrawal by either of them.**

G. NRS 21 HAS NO APPLICATION TO THE CASE AT BAR.

The State cites this Court to NRS 21. et seq. and cases decided relating to that Statute that involve third parties attempting to collect judgments from joint accounts. First, NRS 21 has never been cited before in this case. Moreover, NRS 21 and those cases have no application whatsoever to the Joint Account in this case. First, there are no judgment collection proceedings herein and second, there is no third party claiming an interest in the Joint Account. There is no connection between NRS 21 and NRS 110.085 or Helen's and Del's Joint Account contract which could possibly invalidate the Joint Account.

IV. CONCLUSION

This Petition for Rehearing is procedurally flawed as set forth above and should be summarily denied. Otherwise, Helen simply withdrew funds from her own Joint Account, which she was lawfully entitled to do under NRS 100.085 and the Credit Union's signature page/contract executed by Del and Helen. The

unambiguous language of NRS 100.085 and Appellate Court's decision regarding the same, have no damning effect whatsoever on the status of joint tenancy law in the State of Nevada.

DATED this 13th day of March 2019.

FOLEY & OAKES, PC

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CERTIFICATE OF COMPLIANCE

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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14pt font and using Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more and contains 4,350 words.

Finally, I hereby certify that I have read this Response to Petition for Review and to the best of my knowledge, information, and belief, it is not

frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or 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 13th day of March 2019.

FOLEY & OAKES, PC
/s/ Daniel T. Foley
Daniel T. Foley, Esq.

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26, I hereby certify that I am an employee of Foley & Oakes, PC, and that on the 13th day of March, 2019, I served the following document(s): Response to Petition for Review.

I served the above-named document(s) by the following means to the person s as listed below: By Electronic Transmission through the ECF System:

ADAM PAUL LAXALT
Nevada Attorney General

CHARLES W. THOMAN
Chief Deputy District Attorney

I declare under the penalty of perjury that the foregoing is true and correct.

/s/ Liz Gould
An employee of FOLEY & OAKES, PC