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3 **IN THE COURT OF APPEALS OF THE STATE OF NEVADA**

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8 GARY LAMAR CHAMBERS

COA No. 73446

9 Appellant,

10 vs.

D.C. No. C292987-1

11 THE STATE OF NEVADA,

12 Respondent.

13 **APPELLANT'S PETITION FOR REHEARING**

14 JEAN J. SCHWARTZER, ESQ.
15 Nevada Bar No. 11223
16 Law Office of Jean J. Schwartzer
17 10620 Southern Highlands Pkwy
18 Suite 110-473
19 Las Vegas, Nevada 89141
(702) 979-9941
Attorney for Appellant

ALEXANDER CHEN, ESQ.
Nevada Bar No. 10539
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2500
Attorney for Respondent

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1 **IN THE COURT OF APPEALS OF THE STATE OF NEVADA**

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3 **GARY LAMAR CHAMBERS**

4 Appellant,

5 vs.

6 **THE STATE OF NEVADA,**

7 Respondent.

COA No. 73446

D.C. No. C292987-1

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11 **ARGUMENT**

12 **I. THE NEVADA RULES OF APPELLATE PROCEDURE PROVIDE**
13 **FOR REHEARING OF A COURT OF APPEALS ORDER WHEN**
14 **THE COURT HAS OVERLOOKED OR MISAPPREHENDED**
15 **MATERIAL FACTS OR LEGAL AUTHORITY**

16 Rule 40 of the Nevada Rules of Appellate Procedure provides that a party in
17 an appellate case before the Court of Appeals may move for rehearing if the Court
18 has overlooked or misapprehended a material fact or matter of law. In the
19 discussion that follows, Chambers argues the Court has misapprehended both
20 matters of fact and questions of law. Chambers submits that these
21 misapprehensions are material, and that a correction of the factual and legal errors
22 that follow compels a reversal of all the convictions in this case.

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1 **II. THE COURT MISAPPREHENDED A MATERIAL FACT AND**
2 **MATTER OF LAW WHEN IT CONCLUDED THAT CHAMBERS**
3 **WAS GIVEN THE OPPORTNUNITY TO EFFECTIVELY CROSS-**
4 **EXAMINE GRAHAM**

5 The Court misapprehended a material fact and matter of law when it
6 concluded that Chambers was able to effectively cross-examine Graham at the
7 preliminary hearing despite not being put on notice of her prior conviction for petit
8 larceny because a) Chambers did not ask Graham if she had any prior convictions;
9 b) the most he could have done was ask her about it but not prove it up with
10 extrinsic evidence if she denied it; and c) Graham's admission that she was
11 "coming down" from methamphetamine at the time of the incident is arguably
12 more damaging to her credibility than a conviction for petit larceny. **Order of**
13 **Affirmance "OA" 10, fn. 4.**

14 **First**, Chambers did not ask her about prior convictions because he did not
15 know she had any given the fact that the State did not provide full discovery in
16 violation of United States v. Giglio, 405 U.S. 150 (1972) and Brady v. Maryland,
17 373 U.S. 83 (1963). **Appellant's Opening Brief ("AOB") 26; 13 Appellant's**
18 **Appendix ("AA") 1234.** Respectfully, to find that it is incumbent upon Chambers
19 to correct the State's failure to disclose exculpatory evidence and/or discovery is
20 shifting the duty under Giglio and Brady from the State to defense and is a
21 misapprehension of a material fact and matter of law.

1 **Second**, had Chambers been apprised of Graham’s prior conviction for petit
2 larceny and asked her at the preliminary hearing about said conviction, she could
3 have said, “yes.” AOB 26-28. This would then be a factor the jury could have
4 considered at trial regarding her credibility. *Id.* However, if Graham decided to
5 commit perjury and say “no,” Chambers would not simply be stuck with her first
6 answer. As argued in his Opening Brief, he would have been permitted to impeach
7 Graham if she had said “no.” **AOB 26-28.** Impeachment does not just involve
8 asking one question. If Graham had lied and said no, at that point, the petit larceny
9 conviction could “be inquired into on cross-examination” and Chambers could
10 have attempted to either refresh her recollection or impeach her. Nev. Rev. Stat. §
11 50.085(3); *Butler v. State*, 102 P.3d 71, 120 Nev. 879 (2004) *quoting* *Collman v.*
12 *State*, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000). **AOB 26-28.**

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17 Chambers could have first attempted to refresh her recollection by showing
18 her documentation of the conviction (or a transcript of the proceedings wherein she
19 either entered a plea of guilty and/or was sentenced for the crime) and as he did so,
20 state, “would it refresh your recollection if I showed you documentation of your
21 conviction of petit larceny?” or “would it refresh your recollection if I showed you
22 a transcript or you entering a plea of guilty to the crime of petit larceny?” while
23 holding the actual document(s). This would have added more pressure to Graham
24 to tell the truth about her conviction.
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1 If Graham still insisted on committing perjury, she could have been
2 impeached by asking her additional questions about the conviction such as, “isn’t it
3 true that on [date] you appeared in court and entered a plea of guilty to petit
4 larceny?” or “isn’t it true that on [date] you were sentenced for the crime of petit
5 larceny?” or questions about the specifics of the actual crime. Again, this would
6 have added more pressure to Graham to tell the truth about her conviction.
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9 These lines of questioning do not constitute proving up the conviction with
10 extrinsic evidence. Rather, they constitute impeaching (or attempting to impeach) a
11 witness lying under oath about a conviction for petit larceny, which is permissible
12 under NRS 50.085(3). **AOB 27.** Therefore, in response to the question regarding
13 her prior conviction, Chambers could have been left with her answer of “yes,”
14 which would have impacted Graham’s credibility. Had the answer been “no,”
15 Chambers would not have simply been left with her answer and could have
16 attempted through various means to impeach her, which would have most likely
17 resulted in her admitting that she had, in fact, been convicted of petit larceny. This
18 is especially so considering she is not an attorney and would have no clue that the
19 document being presented to her to refresh her recollection or impeach her could
20 not be admitted into evidence as “extrinsic evidence” through another witness.
21 Respectfully, to find that Chambers would have simply been stuck with whatever
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1 initial answer Graham gave him and that this was not prejudicial to Chambers is a
2 misapprehension of a material fact and matter of law.
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4 **Third**, the finding that Graham “coming down” from methamphetamine is
5 more damaging to her credibility than a conviction for petit larceny is
6 contradictory to Nevada law specifically with respect to petit larceny. Larceny is a
7 crime that involves dishonesty and therefore is relevant to Graham’s truthfulness as
8 a witness pursuant to Yates v. State, 596 P.2d 239, 241, 95 Nev. 446, 449 (1979).
9

10 **AOB 28.** There is no such case law regarding “coming down” from
11 methamphetamine. **AOB generally.**
12

13 The discovery needed to be equipped to effectively cross-examine Graham
14 and if necessary, impeach her, was not available to Chambers at the preliminary
15 hearing because the State failed to disclose full discovery. Had Chambers
16 possessed the full discovery he would have been able to ask Graham about her
17 conviction for larceny and then attempt to refresh her recollection and/or impeach
18 her if necessary. **AOB 29.** This would have given him the opportunity to
19 effectively cross-examine Graham, a right guaranteed by the Sixth Amendment of
20 United States Constitution. Crawford v. Washington, 541 U.S. 36, 42 124 S.Ct.
21 1354, 1359 (2004); Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006);
22 Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674
23 (1986); and Chavez v. State, 213 P.3d 476, 483 (Nev. 2009). **AOB 26-29.**
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1 Therefore, this Court's determination that Chambers was given an opportunity to
2 cross-examine Graham was based upon misapprehensions of material facts and
3 matters of law, discussed *supra*.
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6 **III. THE COURT MISAPPREHENDED A MATERIAL FACT AND**
7 **MATTER OF LAW WHEN IT CONCLUDED THAT CHAMBERS**
8 **WAS PROPERLY ADJUDICATED AND SENTENCED AS A**
9 **HABITUAL CRIMINAL**

10 The Court concluded that the 2007 version of NRS 207.016 applied to
11 Chambers sentence as a habitual criminal and therefore, the State had to provide
12 notice at some point prior to sentencing as opposed to two days prior to the start of
13 trial, which is what is required as of the 2013 amendment of NRS 207.016. OA 13.
14 Chambers does not take issue with the timeliness aspect of this ruling in the instant
15 Petition. However, if the 2007 version of NRS 207.016 applies, it does so in its
16 entirety as does the 2007 version of 207.012. **AOB 39-44.**
17

18 The 2007 version of 207.016 does not allow the State to simply give notice
19 to a defendant that it intends to seek habitual criminal treatment and it in no way
20 overrides or renders moot the requirements set forth in NRS 207.012(2). **AOB 42-**
21 **43.** What is required by the State is clearly outlined in the 2007 version of 207.012
22 (2), which states:
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25 "The district attorney **shall** include a count under this
26 section **in any information** or shall file a notice of
27 habitual felon if an indictment is found....[...]"
28 Nev. Rev. Stat. § 207.012(2)(emphasis added). **AOB 39-40.**

1 This is not simply a notice issue, it is a *jurisdictional issue*. **AOB 40-41; 44;**
2 **47.** Respectfully, this jurisdictional issue is not addressed in the Order of
3 Affirmance.
4

5 Chambers was charged by way of Information. 1 AA 1-4. Therefore, the
6 District Court would only have had jurisdiction to sentence Chambers as a habitual
7 felon under NRS 207.012 had the State filed an amended information including the
8 charge of habitual criminality. **AOB 41.** However, the State did not do so.
9

10 In the language of NRS 207.012(3), the Nevada Legislature enunciates that
11 the District Court only loses discretion to dismiss a count under the habitual felon
12 statute “**that is included in an indictment or information.**” NRS 207.012(3).
13 **AOB 41.** Again, the count **must** be included in the information for this non-
14 discretionary aspect of the statute to apply. NRS 207.012 only becomes mandatory
15 if the habitual felon count is “included in an indictment of information,” neither of
16 which happened. The only document the State filed was a Notice of Intent to Seek
17 Habitual Criminal Treatment (2 AA 170-172), which does not comply with NRS
18 207.012 or NRS 207.016 as they were in 2007. **AOB 39-47.** An amended
19 information including the habitual criminal count was never filed. **AA generally.**
20 Therefore, pursuant to NRS 207.012, NRS 207.016, Grey v. State, 124 Nev. 110,
21 178 P.3d 154 (2008) and Crutcher v. Eighth Judicial Dist. Court, 111 Nev. 1286,
22 1287, 903 P.2d 823, 824 (1995) **the District Court did not have jurisdiction** to
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1 sentence Chambers as a habitual criminal. **AOB 47, 53.** To hold otherwise would
2 be to say that the State does not have to comply with mandatory provisions of a
3 Nevada statute. ¹ **AOB 44-45.** Therefore, the finding that the District Court
4 properly adjudicated Chambers as a habitual criminal is based upon
5 misapprehensions of material facts and matters of law.
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8 **CONCLUSION**

9 Based upon the arguments contained herein, Chamber's respectfully requests
10 that Court rehear Chambers' appeal, reconsider its previous affirmance of
11 Chambers' conviction and thereafter, REVERSE Chambers' conviction and/or
12 sentence.
13

14 Dated this 2nd day of October, 2019.
15

16 Respectfully submitted,
17

18
19 /s/ Jean Schwartzer
20 JEAN J. SCHWARTZER, ESQ
21 Nevada State Bar No. 11223
22 Law Office of Jean J. Schwartzer
23 10620 Southern Highlands Pkwy.
24 Suite 110-473
25 Las Vegas, Nevada 89141
26 (702) 979-9941
27 Jean.schwartzter@gmail.com
28 Counsel for Appellant

1 Pursuant to NRS 0.025(d), the use of the word "shall" in a statute imposes a duty to act. Goudga v. State, 287 P.3d 301, 128 Nev. Adv. Op. 52 (2012). **AOB 44-45**

1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the requirements of NRAP
3 NRAP 32(a)(4)-(6) and NRAP 32(a)(7)(C). because:
4

5 **[X] This brief has been prepared in a proportionally spaced typeface**
6 **using Microsoft Word 2010 Edition in Times New Roman 14 point font; or**
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8 [] This brief has been prepared in a monospaced typeface using [state name
9 and version of word-processing program] with [state number of characters per inch
10 and name of type style].
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12 2. This brief exceeds the with the page- or type-volume limitations of NRAP
13 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C),
14 it is either:
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17 _____ words; or
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20 words or _____ lines of text; or
21

22 **[X] Does not exceed 10 pages.**

23 3. Finally, I hereby certify that I have read this appellate brief, and to the best
24 of my knowledge, information, and belief, it is not frivolous or interposed for any
25 improper purpose. I further certify that this brief complies with all applicable
26 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
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1 every assertion in the brief regarding matters in the record to be supported by a
2 reference to the page and volume number, if any, of the transcript or appendix
3 where the matter relied on is to be found. I understand that I may be subject to
4 sanctions in the event that the accompanying brief is not in conformity with the
5 requirements of the Nevada Rules of Appellate Procedure.
6
7

8 DATED this 2nd day of October, 2019.
9
10

11 /s/ Jean Schwartzer
12 JEAN J. SCHWARTZER, ESQ
13 Nevada State Bar No. 11223
14 Law Office of Jean J. Schwartzer
15 10620 Southern Highlands Pkwy.
16 Suite 110-473
17 Las Vegas, Nevada 89141
18 (702) 979-9941
19 Jean.schwartzter@gmail.com
20 Counsel for Appellant
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ALEXANDER CHEN, ESQ.
AARON FORD, ESQ.

Gary Lamar Chambers
Inmate No: 76089
Ely State Prison
P.O. Box 1989
4569 North State Rt.
Ely, Nevada 89301

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