IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON J. BOLDEN, A/K/A JASON JEROME BOLEN, Appellant, v. THE STATE OF NEVADA Respondent.	Electronically Filed Aug 11 2021 10:38 a.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 79715

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy District Attorney, JOHN NIMAN, and files this Answer to Petition for Rehearing pursuant to this Court's Order Directing Answer to Petition for Rehearing, filed on August 2, 2021.

This Answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 11th day of August, 2021.

Respectfully submitted,

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

BY */s/ John T. Niman*
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 24, 2019, JASON J. BOLDEN (hereinafter, "Appellant") noticed his appeal from his Judgment of Conviction, which was filed on August 27, 2019. That Notice was filed with this Court on October 1, 2019.

On July 8, 2021, after briefing from the parties, this Court filed its Opinion, affirming Appellant's Judgment of Conviction (this Court's "Affirmance").

On July 21, 2021, Appellant filed the instant Petition for Rehearing (his instant "Petition"). Thereafter, on August 2, 2021, this Court filed an Order Directing Answer to Appellant's instant Petition.

ARGUMENT

I. APPELLANT FAILS TO MEET THE BURDEN FOR REHEARING UNDER NRAP 40

NRAP 40(c)(2) sets forth two (2) specific circumstances in which the Nevada Supreme Court *may* consider rehearing:

> (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.

Appellant bears the burden of stating "briefly and with particularity the points of law or fact that the petitioner believes the court has overlooked or misapprehended."

NRAP 40(a)(2). However, "[m]atters 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." NRAP 40(c)(1). A review of the instant Petition reveals that Appellant has failed to meet his burden. Specifically, to the extent that Appellant argues a "misapplication" of legal precedent pursuant to NRAP 40(c)(2)(B), Appellant overlooks the applicable standard of review. Further, the precedent upon which Appellant relies contradicts Appellant's proposed application thereof. Therefore, pursuant to NRAP 40(c)(2), this Court should decline to consider rehearing.

II. APPELLANT'S APPEAL WAS SUBJECT ONLY TO "PLAIN ERROR" REVIEW

Throughout his Petition, Appellant makes multiple claims that the Court applied the incorrect standard of review in affirming Appellant's Judgment of Conviction. See, e.g., Petition at 9. However, Appellant fails to recognize that his failure to object before the district court rendered his appellate claims subject only to "plain error" review. Therefore, Appellant fails to demonstrate how the Court's Affirmance incorrectly applied that standard, pursuant to NRAP 40(c)(2).

In order to raise a perceived error on appeal, a criminal defendant must first preserve that issue by objecting or raising it at the trial level. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465 (2008); Garner v. State, 116 Nev. 770, 783, 6 P.3d

1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); see also Dermody v. City of Reno, 113 Nev. 207, 210, 931 P.2d 1354 , 1357 (1997) ("Parties may not raise a new theory for the first time on appeal." (internal citation omitted)). Failure to preserve an issue for appeal results in a waiver of that issue, and this Court will only review that issue for plain error. Nelson v. State, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007); Maestas v. State, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012) ("[Defendant] failed to raise his First Amendment claim below. That failure leaves us to consider the claim in the context of plain error."); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992) (failure to present a specific argument at trial precludes consideration of that argument on appeal). This Court has explained:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. 332, 338, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan v. State, 131 Nev. 43, 49, 343 P.3d 590, 594 (2015). Under Green, this Court reviews for plain error by "examin[ing] whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's

substantial rights." 119 Nev. at 545, 80 P.3d at 95. "Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice." Id.

Regarding trial court motion practice, the Nevada Supreme Court has explained that a defendant who does not oppose a motion is deemed to have consented to the same. Bower v. Harrah's Laughlin, Inc., 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (modified on other grounds by Garcia v. Prudential Ins. Co. of Am., 129 Nev. 15, 293 P.3d 869 (2013)). A point not urged before the trial court will not be considered on appeal unless it goes to the court's jurisdiction. Id. Further, EDCR 2.20(e) states that a failure to file a written opposition may be treated as an admission that the motion is meritorious.

Before the district court, Appellant failed to respond to the State's Motion for Leave to Amend Information by Affidavit by the time it came on for hearing. See Respondent's Appendix ("RA") at 001. The district court even continued the hearing on the State's Motion to give Appellant an opportunity to respond. Id. However, Appellant ***never*** opposed the State's Motion. Id. at 002. Due to Appellant's failure to respond, the district court granted the State's Motion as unopposed. Id. Indeed, the only record of any issue with the State's Motion came by way of Appellant's ***oral request*** to preserve Appellant's right to move to dismiss, made over a month after the district court granted the State's Motion. Id. at 003. However, no motion to

dismiss was ever filed, and Appellant has failed to demonstrate that any *actual objection* to the State's Motion was ever raised. Id. at 004.

Because Appellant failed to oppose the State's Motion – whether orally or in writing – the Court correctly deemed Appellant's claim waived, and subject only to plain error review. See Affirmance at 4-5. Therefore, on appeal, Appellant was required to show that the district court committed *plain error* by granting the State's Motion. Nelson, 123 Nev. at 543, 170 P.3d at 524. Appellant did not make *any* such argument; instead, Appellant requested review presumably for an abuse of discretion, arguing only that the State did not meet its burden for a motion under NRS 173.035. See AOB at 6. Therefore, Appellant failed to make any showing under which the Court could grant him relief.

Notably, Appellant does not now argue that the Court "overlooked" or "misapplied" *anything* in conducting its *plain error* analysis. See generally Petition. Instead, Appellant appears to commingle "egregious error" review and "plain error" review in the context of a *district court*'s review of a justice court's decision. See, e.g., id. at 9 (citing the definition of "egregious error" regarding a justice of the peace). Because Appellant does not *specifically argue* that the Court "overlooked…misapprehended…[or] misapplied" *anything* in conducting its plain error review, the Affirmance is not suitable for rehearing pursuant to NRAP 40(c)(2). See NRAP 40(a)(2) (appellants' burden to plead grounds for rehearing with

specificity). To the extent that Appellant adds new argument regarding substantive review of the district court's decision, that argument clearly does not deal with plain error, and is therefore irrelevant for the pertinent rehearing analysis under NRAP 40(c)(2). See also NRAP 40(c)(1) (excluding arguments raised for the first time in a petition for rehearing).

Ultimately, Appellant points to nothing in the record that would allow for the Court to conclude that the district court erred. See generally AOB; see also Petition. Pursuant to EDCR 2.20(e), Appellant's failure to take action below amounted to a concession of merit regarding the State's Motion. Therefore, it would be nonsensical to allow Appellant to remain silent throughout the district court proceedings, yet obtain relief on arguments that were both *available* and *should have been raised* before the district court. Bower, 125 Nev. at 479, 215 P.3d at 717.

Because Appellant fails to show that, under NRAP 40(c)(2), the Court's plain error analysis was the product of oversight, misapprehension or misapplication of applicable law or precedent, Appellant's Petition for Rehearing should be denied.

III. THE COURT CORRECTLY INTERPRETED AND APPLIED WRENN

In arguing "egregious error" in AOB, Appellant relied entirely on Wrenn v. Sheriff, 87 Nev. 85, 482 P.2d 289 (1971). See Appellant's Opening Brief ("AOB") at 5-6 (asserting that "the State did not establish that the justice court egregiously erred by finding the witnesses to be incredible, as weighing the credibility of

witnesses is one of the core functions of a magistrate at preliminary hearing." (Citing Wrenn, 87 Nev. at 87, 482 P.2d at 290)). However, a review of Wrenn, and of the Affirmance, shows that the Affirmance correctly interpreted and applied Wrenn to Appellant's case.

The Wrenn Court explained:

> When the evidence is in conflict at the preliminary examination it is the function of the magistrate to determine the weight to be accorded to the testimony of the witnesses, and if an inference of criminal agency can be drawn from the evidence it is proper for the magistrate to draw it, *thereby leaving to the jury at the trial the ultimate determination of which of the witnesses are more credible*.

87 Nev. at 87, 482 P.2d at 290 (emphasis added).

The Court, in its Affirmance, determined that Appellant's assertion that credibility was within the purview of the justice court was an "overread[ing]" of Wrenn, citing to the portion of Wrenn recited above. Affirmance at 11. As such, the Court explained that Wrenn "implicitly recognizes the slight-or-marginal-evidence standard and *does not license the justice court to dismiss charges based on conflicting evidence* where the evidence permits the finder of fact to draw 'an inference of criminal agency.'" Id. (citing Wrenn, 87 Nev. at 87, 482 P.2d at 290) (emphasis added). In so explaining, the Court also cited Bryant v. Sheriff, 86 Nev. 622, 624, 472 P.2d 345, 346 (1970), in which the Nevada Supreme Court held "that, in the face of conflicting evidence, the justice of the peace *should draw an inference of criminal agency if the evidence supports it*." Id. at 11-12 (emphasis added). The

Court then proceeded to recite the evidence supporting an inference of criminal agency. Id. at 12. Because the evidence supporting a finding of criminal agency, the Court determined that the justice court had, in fact, committed egregious error. Id.

Appellant does not include any argument under Wrenn to demonstrate the Court's oversight or misapplication of that case. See generally Petition; see also NRAP 40(c)(2). Instead, Appellant now argues that Wrenn was decided "under a different standard" – viewing "the evidence in the light most favorable to the prosecution." Petition at 10-11. However, it was *Appellant* who invoked Wrenn singularly to support his claim in his Opening Brief. See AOB at 6. Moreover, the text of Wrenn is completely devoid of any reference to viewing the evidence in *any light*, much less in that most favorable to the prosecution. See Wrenn, 87 Nev. 85, 482 P.2d 289. It is disingenuous at best for Appellant to rely upon Wrenn for his appeal, then to challenge the Court's analysis thereof simply because the Court did not adopt Appellant's misguided reading thereof. Moreover, because Appellant fails to provide any legal citation for his argument against the Court's interpretation of Wrenn, Appellant fails to demonstrate that rehearing is warranted pursuant to NRAP 40(c)(2). See NRAP 40(a)(2) (necessitating particular support for claims for rehearing).

To the extent that Appellant now seeks to introduce additional law and arguments regarding the State's burden, and the justice court's purview, at

preliminary hearing, the raising of such points for the first time in the instant Petition is specifically precluded by NRAP 40(c)(1). Compare AOB at 5-6 with Petition at 4-14. Therefore, this Court should decline to consider the same. Indeed, Appellant's citations belie Appellant's argument. See Petition at 7 (quoting Sheriff v. Potter, 99 Nev. 389, 391, 663 P.2d 350, 352 (1983) ("[w]hen the evidence is in conflict at the preliminary hearing it is the function of the magistrate to determine the weight to be accorded to the testimony of the witnesses…")). The *complete* excerpt from Potter includes the subsequent clause, "and if an inference of criminal agency can be drawn from the evidence it is proper for the magistrate to draw it." 99 Nev. at 391, 663 P.2d at 352. That is precisely what the Court here explained – if there is *some* evidence presented supporting an inference of criminal agency, even if challenged or conflicting, the justice court *must* draw the inference of criminality in the State's favor because it is ultimately the jury who will determine the weight to give the evidence. See Affirmance at 11-12. Appellant's citation to State v. Von Bricken, 86 Nev. 769, 476 P.2d 733 (1970) equally undermines Appellant's argument, as it similarly demonstrates that, where some evidence is presented – even if it conflicts with other evidence – the proper course is to require the accused to stand trial. See Petition at 8. Therefore, Appellant's additional law and argument doesn't demonstrate *any* misapplication – it supports the Court's determination.

Because the Court's interpretation of Wrenn is supported by a literal reading thereof, and because Appellant fails to provide any support for his "different standard" challenge to the application of that case, Appellant's Petition for Rehearing should be denied.

CONCLUSION

Appellant fails to make any cognizable arguments pursuant to NRAP 40(c)(2) that demonstrate the need for this Court to consider rehearing of his Appeal. Instead, Appellant relies on extraneous arguments, including newly-raised arguments that are statutorily precluded from petitions for rehearing, all the while failing to recognize the applicable standard of review for his appeal. The State respectfully requests, therefore, that this Court DENY Appellant's Petition for Rehearing.

Dated this 11th day of August, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 page and type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points or more, contains 2,333 words and 11 pages.

Dated this 11th day of August, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 11, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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