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.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 79715

ANSWER TO PETITION FOR EN BANC RECONSIDERATION

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 En Banc Reconsideration pursuant to this Court's Order Directing Answer to Petition for En Banc Reconsideration, filed on November 2, 2021.

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

Dated this 16th day of November, 2021.

Respectfully submitted,

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

BY */s/ John Niman*
JOHN NIMAN
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Office of the Clark County District Attorney

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 a Petition for Rehearing ("PFR"). Thereafter, on August 2, 2021, this Court filed an Order Directing Answer to Appellant's Petition for Rehearing. The State filed its Answer on August 11, 2021. This Court denied rehearing on September 23, 2021 and issued a limited revision of its prior opinion. ("Amended Affirmance")

On October 21, 2021, Appellant filed a Petition for En Banc Reconsideration (his instant "Petition"). Amici Curiae filed a motion requesting permission to file a brief in support of Appellant's position on October 28, 2021. On November 2, 2021, this Court ordered the State to respond to Appellant's Petition. The State filed an opposition to Amici Curiae's request to file a brief in this matter. Amici filed a reply on November 8, 2021.

The State's Answer to Appellant's Petition follows.

ARGUMENT

I. APPELLANT'S PETITION DOES NOT SATISFY NRAP 40A

NRAP 40A(a) sets forth two specific circumstances in which the Nevada Supreme Court *may* consider en banc reconsideration:

> (1) When reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals; or
>
> (2) When the proceeding involves a substantial precedential, constitutional, or public policy issue.

As with a petition for rehearing, 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 40A(c); NRAP 40(c)(1). Appellant's petition is an attempt, in its entirety, to reargue the same matters presented in both the opening brief and the petition for rehearing and should be denied.

Appellant sought rehearing by the Panel based on an alleged "misapplication" of legal precedent – i.e. that the Panel's decision conflicted with State v. von Bricken, 86 Nev. 769, 476 P.2d 733 (1970), and that the Panel incorrectly applied the "sufficiency of the evidence" standard from Wrenn v. Sheriff, 87 Nev. 85, 482 P.2d 289 (1971), Miner v. Lamb, 86 Nev. 54, 464 P.2d 451 (1970), and Bryant v. Sheriff, 86 Nev. 622, 472 P.2d 678 (1970). *See generally* PFR. Appellant argued in the PFR that the Panel's decision failed to promote uniformity because it conflicted

with von Bricken. PFR at 5-8. The instant Petition asserts the same, with portions of the argument seemingly ripped directly from the PFR. Petition at 6-11. Accordingly, Appellant's argument was presented in a previous brief, and is not permitted in a petition for en banc reconsideration. NRAP 40A(c). This is particularly egregious because Appellant did not argue that von Bricken was even *relevant until* his PFR. In his Opening Brief, Appellant challenged whether the *district court* erred in granting the State leave to file an information by affidavit. Appellant's Opening Brief ("AOB") at 4-6. Appellant, therefore, improperly raised a new issue in his PFR, and now improperly attempts to reargue the same new issue in the instant Petition. NRAP 40(c)(1); NRAP 40A(c).

In his Opening Brief, Appellant argued that the district court erred in granting the State leave to file an information by affidavit under Wrenn. AOB 4-6. Neither Miner nor Bryant were referenced at all. Id. Wrenn was reargued in Appellant's PFR, and Miner and Bryant were improperly raised for the first time in that PFR. PFR at 7-11. NRAP 40(c)(1). Those same points are improperly reargued in this Petition. Petition at 12-14.

Finding yet more new arguments, Appellant raises for the first time in this Petition the argument that Murphy v. State, 110 Nev. 194, 871 P.2d 916 (1994), Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (1995), and Feole v. State,. 113 Nev. 628, 939 P.2d 1061 (1997) are in any way relevant – neither the AOB nor PFR

referenced any of these prior decisions in so much as a string cite, despite Appellant's attempt to raise the general point that the Panel's decision conflicted with existing precedent and misapplied the standard of review in the PFR. These new arguments are impermissible in a petition for en banc reconsideration and should not be considered. NRAP 40A(c).

Appellant's public policy argument was not raised in the Opening Brief, but was generally complained about (though not directly addressed) in his PFR. *See, e.g.* PFR 3; Petition; Petition at 18-20. Accordingly, the argument is improperly raised in the Petition, though in varying degrees as either a new argument or a rehashed argument previously presented in briefing. NRAP 40(c)(1); NRAP 40A(c). The argument should, therefore, not be considered.

II. APPELLANT'S CLAIMS ARE MERITLESS

A. The Panel's Holding Merely Restated Existing Precedent

Even if Appellant's claims are permissibly presented for the first time during the *third* round of appellate briefing, his claims are meritless and are based on a deceptive framing of the issues on appeal. Appellant initially, properly, argued that the *district court* erred when it allowed the State to file an information by affidavit. AOB 4-6. However, Appellant never objected to the district court's decision below, even after being given additional time to file an opposition and/or motion to dismiss and he therefore waived the issue on appeal. Respondent's Answering Brief

("RAB") 9-14, Respondent's Appendix ("RA") 1-2. Although the Panel could have deemed Appellant's argument waived entirely, it reviewed the decision *of the district court* for plain error. Amended Affirmance at 4-5, 10-12.

Primarily, it appears that the Panel even considered the unpreserved claim at all to address Appellant's claim, raised for the first time on appeal, that a transcript of the preliminary hearing was insufficient to support the filing of an information by affidavit and that the district court, therefore, erred in granting the motion in that regard. Order of Affirmance at 4-10. Appellant was appealing from a decision of the district court, not the justice court, though even if reviewed *de novo* a determination that the justice court substantially erred in dismissing charges based on conflicting testimony would have been proper. The Panel noted that the justice court *had* "committed egregious error," but only in the context of holding that "the district court correctly granted the State's motion for leave to proceed by information filed in district court." Amended Affirmance at 12. Appellant does not challenge the Panel's holding that a transcript of a preliminary hearing is sufficient to support an information by affidavit, but rather challenges the Panel's holding that a justice court should not weigh witness credibility.

Appellant asserts the Panel created a "new rule," but it did no such thing. Petition at 7. The Panel, explicitly, noted that Wrenn held that "if an inference of criminal agency can be drawn from the evidence it is proper for the [justice of the

peace] to draw it, thereby leaving to the jury at the trial the ultimate determination of which of the witnesses are more credible." Amended Affirmance at 11 (*citing* Wrenn, 87 Nev. at 87, 482 P.2d at 290.) The Panel also cited Bryant v. Sheriff, 86 Nev. 622, 624, 472 P.2d 345, 346 (1970), in which this 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 rule that a justice of the peace ought to leave for the trier of fact the matter of weighing conflicting testimony and assessing credibility of witnesses is not new, and none of Appellant's purported authority called that clear-cut rule into question. von Bricken said nothing about evaluating witness credibility, but instead analyzed whether a reasonable inference had been drawn under the facts as presented, none of which included conflicting testimony. von Brincken, 86 Nev. at 774, 476 P.2d at 735. No doubt it would have been mentioned somewhere in the opinion had the **very same Court** which decided in Bryant mere months before that a justice of the peace must draw an inference of criminal agency if the evidence supports it and must leave for the jury the issue of which witnesses are more credible suddenly reversed course in von Bricken. Bryant, 86 Nev. at 624, 472 P.2d at 346. Thirteen years after Bryant, though Appellant suggests otherwise, the Court again reaffirmed that a justice of the peace **must** draw an inference of criminal agency in the face of conflicting testimony, and in fact the Potter Court found that the district court had committed

"substantial error" in dismissing the case where the defendant filed a pretrial habeas petition arguing that the conflicting testimony did not provide probable cause. Potter, 99 Nev. at 392, 663 P.2d at 352; Petition at 3, 10. This case is exactly the kind of "challenge by the State" Appellant complains wasn't present in the Panel's citation to Wrenn, Miner, and Bryant. Petition at 5. Accordingly, this Court has both affirmed the decision of a justice of the peace to credit conflicting testimony in favor of the State when the defendant appealed **and** held that a district court substantially erred when dismissing a case based on conflicting testimony when the State appealed. This is because the uniform rule "[f]or over fifty years" has been that a justice of the peace **must** draw an inference of criminal agency in the face of conflicting testimony, leaving determinations of credibility to the trier of fact, and this Court's decisions, including the Panel's recent affirmance in this case, consistently require exactly that.[1] Petition at 3.

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[1] Several of Appellant's citations are wholly irrelevant, and the State does not address them. For instance, Appellant cites State v. Sargent, 122 Nev. 210, 213, 128 P.3d 1052, 1054 (2006) for the notion that justices of the peace are to weigh witness credibility, but nowhere in that opinion is "credibility" even mentioned, and the case was about whether a justice court can force a defendant to be present at preliminary hearing. Petition at 10. At the same place, Appellant cites to Grace v. Eighth Jud. Dist. Ct., 132 Nev. 511, 375 P.3d 1017, 1018 (2016), which is likewise utterly irrelevant and analyzes whether a justice of the peace may suppress evidence obtained in contravention of the Fourth Amendment.

B. The Panel's Standard of Review Was Correct

Appellant asserts that the Panel used the wrong standard of review in "evaluating whether the justice court engaged in plain or 'egregious error." Petition at 12-14. That's not what the Panel considered. The Panel considered whether the *district court* committed *plain error* in granting an *unopposed motion.* Amended Affirmance at 4.

As noted *supra*, Appellant's citations to Murphy, Cipriano, and Feole are new and should not be considered. Murphy held that an information by affidavit could not be filed where the State "utterly failed to produce evidence" at preliminary hearing not where the State presented conflicting testimony, some of which supported the charges. Murphy, 110 Nev. at 198, 871 P.2d at 918 (1994), overruled on other grounds by State v. Sixth Jud. Dist. Ct. In & For Cty. of Humboldt, 114 Nev. 739, 964 P.2d 48 (1998). Cipriano merely restates Murphy and says nothing about weighing conflicting testimony (nor whether the appellant in that case had preserved the error, as Appellant here failed to do.) From the brief citation of facts, it appears that the State may have not presented any evidence of penetration, as required by an attempt sexual assault charge, rather than conflicting testimony about *whether* penetration occurred. Feole is virtually identical. There is no question that where *no* evidence is presented a justice of the peace is permitted to dismiss charges, as these three cases indicated.

That's not what this case is about. This case is about whether the district court correctly granted an unopposed motion to file an information by affidavit. But even if this case *were* directly about whether the justice court erred when dismissing charges supported by conflicting testimony, "if an inference of criminal agency can be drawn from the evidence it is proper for the magistrate to draw it." Potter, 99 Nev. at 391, 663 P.2d at 352. That is precisely what the Panel 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 testimony. Amended Affirmance at 11-12.

C. Public Policy Supports Juries Determining Witness Credibility

"It is the exclusive province of the jury to decide what facts are proved by competent evidence; it is their province to judge of the weight of testimony, as tending, in a greater or less degree, to prove the facts relied upon." Ewing's Lessee v. Burnet, 36 U.S. 41, 9 L. Ed. 624 (1837). "Matters of fact, including the credibility of witnesses, are for jury resolution." Graves v. State, 82 Nev. 137, 140, 413 P.2d 503, 505 (1966). "The jury is the sole and exclusive judge of the credibility of the witnesses and the weight to be given the evidence." Cross v. State, 85 Nev. 580, 460 P.2d 151 (1969).

As triers of fact, it is the most basic principle of law that it rests with a jury to determine what weight to give witness testimony. Even *this* Court refuses to independently weigh witness credibility and supplant the sacred duty of the jury with its' own evaluation. Mercado v. State, 100 Nev. 535, 538, 688 P.2d 305, 307 (1984) ("As an appellate court, we do not independently weigh the evidence and the credibility of the witnesses at trial; rather, we scrutinize the record to determine whether there is sufficient evidence from which a rational jury, acting reasonably, could have reached its verdict."); Ward v. State, 95 Nev. 431, 432, 596 P.2d 219, 220 (1979) ("On appeal, we will not invalidate a verdict because of [discrepancies in testimony] since the jury has already resolved them as the fact finder."); Carlson v. McCall, 70 Nev. 437, 442, 271 P.2d 1002, 1004 (1954) ("[T]he duty of the trier of facts is to assess the credibility of witnesses and to determine what weight their testimony should have. It is not for this court to instruct the trier of facts as to which witnesses, and what portions of their testimony, are to be believed.")

In the face of this most bedrock of legal principles, Appellant asserts that it is the province of a *justice court* to tread where district courts, appellate courts, and even the United States Supreme Court may not – to rip the determination of whether a witness is credible from a jury and to make its own singular determination. Petition at 18-20. There is no support for such a proposition, and even if there were this is not the case to address that issue.

No one questions that a justice court may determine *whether* evidence was presented. If no evidence of an element of a crime is presented, a justice court may certainly dismiss the charge. A justice court may even look to evidence presented to determine whether an inference of criminal activity is too far attenuated to support a charge. But what a justice court may *not* do – indeed, what *no* court may do – is dismiss a criminal charge when a witness has testified sufficiently to provide evidence of all the elements of a criminal charge merely because the court *does not believe the witness*. This is neither a new nor novel prospect. Nevertheless, the justice court here dismissed a case merely because it did not believe the testimony of a witness. 1 AA 19-20. The State filed a motion for leave to amend information by affidavit, which the district court granted as unopposed when, after a continuance, Appellant chose not to challenge it or to file a motion to dismiss. 1 AA 33-44; 1 RA 1-4. It was not until appeal from the judgment of conviction, after the jury had already determined that the testimony of the witnesses adduced at trial *was* credible, that Appellant attempted to challenge the initial information by affidavit. And it was not until after the Panel affirmed the judgment of conviction that Appellant spent more than one sentence on the theory that the justice court was permitted to weigh witness credibility. AOB 6.

Public policy requires that juries, not justices of the peace, determine witness credibility in instances where there is conflicting testimony. Public policy requires

defendants to timely challenge and preserve any asserted error, not raise it well after the fact. Public policy requires this Court not to entertain arguments that were never made below, then made briefly on direct appeal, then changed in a petition for rehearing, and then changed further still in a petition for en banc reconsideration. Public policy supports denial of this Petition.

CONCLUSION

Appellant's arguments are impermissible under NRAP 40A(c) because they either rehash previous arguments or add new argument. In either event, this Court should not consider improperly presented argument. Even if this Court were to consider the arguments, however, the Panel's decision upheld existing precedent. Appellant's contentions to the contrary have already been rejected or are supported only by unrelated and inapplicable cases. The State respectfully requests, therefore, that this Court DENY Appellant's Petition for En Banc Reconsideration.

Dated this 16th day of November, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
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Nevada Bar #001565

BY */s/ John Niman*
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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 2,917 words and 239 lines of text.

Dated this 16th day of November, 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 November 16, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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JN//ed