IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

GUSTAVO RAMOS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 79781

APPELLANT'S REPLY BRIEF

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Appeal from Judgment of Conviction

Eighth Judicial District Court, Clark County

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ATTORNEY FOR APPELLANT

RESCH LAW, PLLC d/b/a
Conviction Solutions
Jamie J. Resch
Nevada Bar Number 7154
2620 Regatta Dr., Suite 102
Las Vegas, Nevada, 89128
(702) 483-7360

ATTORNEYS FOR RESPONDENT

CLARK COUNTY DISTRICT ATTY.
Steven B. Wolfson
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

NEVADA ATTORNEY GENERAL
Aaron Ford
100 N. Carson St.
Carson City, Nevada 89701
(775) 684-1265

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I. ARGUMENT

While Ramos's opening brief presents several issues, any one of which can entitle him to relief on appeal, this reply focuses on certain key issues. The sexual assault charge against Ramos is particularly weak and should be dismissed for at least one of three presented reasons. But the other arguments raised by Ramos, including lack of evidence and other claims, justify a new trial or new sentencing as well.

A. The sexual assault charge should be dismissed for any or all of the reasons set out in the opening brief.

In the Answering Brief, the State reaches as far as it can to justify the infirm sexual assault conviction. The Opening Brief explained that the charge was improperly bound over, untimely, and unsupported by sufficient evidence. The sexual assault charge in this case simply does not hold up factually or legally and should be dismissed.

With regard to the bindover, the State simply contends that there was probable cause presented at the preliminary hearing and that the Justice of the Peace must have held the State to an improper standard. Answering

Brief, p. 20. While the Justice of the Peace, a very experienced Justice at that, did use the phrase "substantial evidence," he also plainly applied the correct legal standard. That is, the Justice of the Peace also found that there was "no evidence other than guessing" and "no proof of any type of sexual assault penetration." 1 AA 75. In context, the Justice of the Peace used the correct legal standard: "no" evidence does not meet the preliminary hearing standard of "some" evidence.

The State also contends that the verdict after trial cured any error in filing the indictment by affidavit. There are several problems with this notion, not the least of which is, as the State acknowledges, Ramos did try to seek relief on this issue by way of an extraordinary petition and was told by this Court that he had an available remedy by way of appeal after conviction. See Docket #71462. Moreover, in that proceeding the State urged this Court to reject the extraordinary petition on grounds that Ramos had an adequate remedy in the form of appeal after conviction. See Docket #71462, Response dated December 6, 2016, p. 7. The State cannot be heard to change its tune in this proceeding regarding the appropriate

remedy simply because it is now more convenient if Ramos has no remedy at all.

Also, the State's remedy argument relies on cases that generally hold errors before a grand jury are cured following conviction at trial. Answering Brief, pp. 21-22. But the issue here isn't really "errors before the grand jury" or even error at the preliminary hearing. The error is that the District Court granted leave to file an indictment by affidavit after a failed bindover attempt. This error, committed by the District Court Judge, is well within the broad category of trial error this Court can and should consider on direct review.

The Justice of the Peace heard the State's sexual assault evidence and repeatedly found it to be no evidence at all. As a result, the sexual assault charge was properly dismissed at the preliminary hearing. That was the correct result, and therefore not error, certainly not egregious error, which would have justified the District Court's decision.

The State's presumptuous position that it "simply would have secured an indictment" should be rejected as well. If that were so, it could have

presented the case to a grand jury at the time. It didn't. At least one reasonable mind, the very experienced Justice of the Peace, found the State's evidence wholly lacking. There is no assurance at all as to what a grand jury would have found.

For that matter, the evidence of sexual assault was so weak that it cannot even satisfy the reasonable doubt standard. The State refers to the trial evidence, much of it the exact same evidence the Justice of the Peace rejected, in its argument that sexual assault was a proven fact. Answering Brief, p. 29.

What the evidence really came down to was a single old photograph. The State's expert was not the person who performed the autopsy, and in fact never examined Helen's body. This wasn't a case of battling experts. The State's own expert said it all – (1) it was impossible to tell if Helen was sexually assaulted just from a photograph, (2) only a microscopic examination of the anal area would have provided that information, and (3) no microscopic examination was ever performed by anyone. 7 AA 1134.

The State's peripheral evidence, to include Helen's state of dress, defecation that well may have occurred after death, or the general fact a struggle occurred in her apartment are not evidence, beyond a reasonable doubt or of any degree at all, that she was sexually penetrated before death. The Justice of the Peace found these facts were no evidence at all of sexual assault, and that finding was correct. As a result, Ramos' sexual assault conviction should be reversed for lack of evidence.

Finally, Ramos also contended the State's filing of the sexual assault charge violated the statute of limitations. The State argues that Ramos' interpretation of the statute which allows someone acting on behalf of a victim to file a sexual assault complaint is absurd. Answering Brief, p. 26.

The only absurd result here would be to read, as the State does, additional requirements into the statute which simply do not exist. The plain language of NRS 171.083 as it applies in this case is that it applies to situations where the victim reports, or authorizes someone to report in writing, a sexual assault. These requirements are directly listed in the statute.

The State writes these requirements out of the statute with its legal maneuvering. According to the State, the individuals who discovered Helen's body, who made no written report and/or no report of a sexual assault at all, somehow then passed their nonexistent authorization on to law enforcement officers who then themselves prepared the requisite written report of sexual assault. These linguistics are not provided for in the statute and all Ramos asks is that this Court apply the statute as it is written.

This issue is not likely to come up with any frequency given subsequent and substantial revisions to the statute of limitations for sexual assault. No one will be "taking advantage" of this prior statute during future offenses because the statute of limitation for sexual assault is now twenty years. Answering Brief, p. 26. Or this Court could avoid this particular issue altogether by finding, as the Justice of the Peace did, that the State's evidence of sexual assault was insufficient in the first instance.

For any and all of these reasons, the sexual assault conviction should be reversed.

B. The murder charges should also be reversed or remanded for a new trial.

Ramos also challenged his murder convictions, including on grounds that the charges were not supported by sufficient evidence or that the police acted improperly in refusing to collect evidence from Jack. These issues are interrelated and best considered together.

At a minimum, Ramos contends he was entitled to a presumption that evidence of Jack's involvement in the murders, never collected by police, would have been favorable to him. Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998) and Leonard v. State, 114 Nev. 639, 958 P.2d 1229 (1998). The State goes to almost incredible lengths to minimize the evidence of Jack's involvement in the crimes, contending there was no forensic evidence that inculpated Jack and that any motive Jack had to commit the murders was irrelevant. Answering Brief, p. 35.

But there was ample evidence of Jack's involvement, including forensic evidence in the form of blood found in Wallace's car, which only

Jack drove. 6 AA 790, 6 AA 793. Jack told police there was no reason Wallace's blood would be in that car. 3 AA 339. Yet, blood there was.

While motive is not an element of murder, that certainly does not prevent the State from arguing motive in the vast majority of cases. Further, motive need not be shown as the State argues, but this is so only "…if the other evidence is sufficient." State v. Boudreau, 67 Nev. 36, 52, 214 P.2d 135 (1950). Jack's motivations are fully set forth in the opening brief and do not need repeating here. The evidence against Ramos is not sufficient when compared to the evidence, including motive, against Jack.

Speaking of motive, the State argues that the police officers who refused to collect evidence from Jack could not have acted in bad faith since no suspect had been identified when Jack presented them with the documents. Answering Brief, p. 49. The entire point of Jack's motion to dismiss based on failure to collect evidence, and the related claim in this proceeding, is that the officers were motivated by gross negligence or bad faith in failing to collect this evidence.

Ramos does not believe that an intent to falsely accuse a particular suspect is required under Daniels. Rather, if out of laziness or incompetence officers fail to collect material evidence, the accused can set out a claim that the case should be dismissed or a presumption should attach to the evidence.

Here, the failure to collect Jack's paperwork was at least gross negligence, because if a false bank account was opened in Wallace's name after his death, that would have been substantial evidence that whoever opened the account was involved in the death. Bollenbach v. United States, 326 U.S. 607, 615 (1946). It's not Ramos' fault that the officers who met with Jack couldn't see that connection. For whatever reason, the detectives involved in this case chose to ignore a lot of evidence against Jack from the moment Jack placed the initial 911 call all the way to present.

The State meagerly suggests that Jack's documents were "not likely material." Answering Brief, p. 49. But the value of those materials cannot really be known since they were never collected, and what is known about them suggests that they were material.

There was substantial evidence that Jack committed the offenses and as a result, the murder convictions should be reversed due to insufficient evidence. Coleman v. State, 130 Nev.Adv.Rep. 26, 321 P.3d 901 (2014).

C. Ramos should receive a new sentencing hearing where life without parole is no longer a sentencing option.

Finally, Ramos argued below and presents on appeal a claim that life without parole should not be a sentencing option as he was 18 years old at the time of the offenses. The State presents several arguments in response, including that it could not find a case cited by Ramos and that the case therefore must be unpersuasive. Answering Brief, p. 53.

If the State had looked up the citation actually provided in the Opening Brief, it probably would have found this important and persuasive case. Harris v. Williams, 2019 U.S. Dist. LEXIS 178743 (D. Nev. 2019). The case is very important because it involves a Nevada federal court judge, applying Nevada state law, who found the following:

> The U.S. District Court for the District of Connecticut, in a case Harris cites, recently rejected an argument "that *Miller* drew a bright line at 18 years old, which prevents this court from applying the rule in Miller to an 18-year-

> old." Cruz v. United States, 2018 U.S. Dist. LEXIS 52924, 2018 WL 1541898, at *15 (D. Conn. Mar. 29, 2018). The court determined "that *Miller* applies to 18-year-olds and thus that 'the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole' for offenders who were 18 years old at the time of their crimes." 2018 U.S. Dist. LEXIS 52924, [WL] at *25 (quoting Miller, 567 U.S. at 479). In addition, there is case law supporting an argument that *Miller* is not confined to instances in which the life without possibility of parole sentence was imposed under a mandatory penalty scheme. See, e.g., Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018), cert. granted, 139 S. Ct. 1317, 203 L. Ed. 2d 563 (2019). Thus, this court is not convinced, at this point, that *Miller* relief is not available to Harris merely because the sentencing court retained discretion to impose a sentence less than life without possibility of parole.
>
> This court reserves judgment as to merits of Harris's *Miller* claim. He has, however, alleged facts that point to a real possibility of constitutional error. Accordingly, his petition is not subject to summary dismissal and merits service upon the respondents.

Harris, 2019 U.S. Dist. LEXIS 178743 at 3-4.

Further, there is nothing improper about asking this Court to decide Constitutional issues. The argument here is simply that the Supreme Court's precedents can be read to forbid life without parole sentences for juvenile offenders or offenders who had turned 18 at the time of the

offense. This is so regardless of whether the sentence was mandatory or discretionary. Malvo v. Mathena, 893 F.3d 265, 273 (4th Cir. 2018). The same result can follow regardless of whether the offender had reached the actual age of 18 at the time of the offense. Cruz v. United States, 2018 U.S. Dist. LEXIS 52924 (D. Conn. 2018).

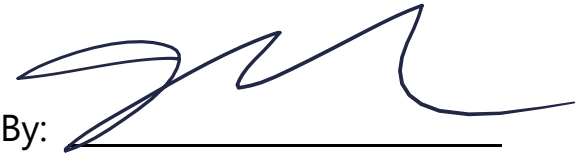
As noted, at least one federal judge is currently considering this exact issue under Nevada law. While federal courts can anticipate how a state would interpret its own laws, this Court is in a much more natural position to do so. For all the reasons set forth in the Opening Brief, Ramos contends the Supreme Court's decision in Miller v. Alabama, 567 U.S. 460 (2012) was violated when Ramos was sentenced to life without the possibility of parole. Ramos should be resentenced without that sentence as an option since he was only 18 years old at the time of the offenses.

II. CONCLUSION

For these reasons, Ramos asks this Court to reverse the lower court's judgment of conviction and grant relief on all claims presented on appeal.

DATED this 12th day of May, 2020.

RESCH LAW, PLLC d/b/a Conviction Solutions



By: _____

JAMIE J. RESCH
Attorney for Appellant
2620 Regatta Dr. #102
Las Vegas, Nevada 89128
(702) 483-7360

RULE 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that I have read this appellate brief, 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, including 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 upon is 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.

2. I further 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 2016 in 14-point font of the Ebrima style.

3. I further certify 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)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 2,372 words.

DATED this 12th day of May 2020.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: 

JAMIE J. RESCH
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 12, 2020, electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Clark County District Attorney
Counsel for Respondent

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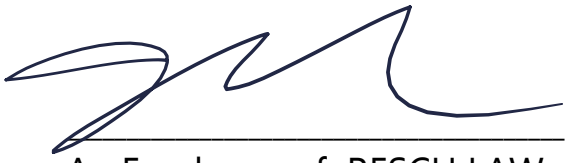

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