IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN MAURICE DEAN,

Appellant,

NO. 81209

vs.

THE STATE OF NEVADA,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

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The State of Nevada, by and through the Elko County District Attorney, petitions this Court, pursuant to NRAP 40, to reconsider its opinion on the grounds that the Court misapprehended or overlooked material issues of fact in its substantive evaluation of the parties' arguments and in conducting the harmless error analysis and failed to address controlling issues of law raised by the State.

The harmless error analysis, because it requires a quantitative assessment of all the evidence, *Arizona v. Fulmanante*, 499 U.S. 279, 307 (1991), requires review not only of the briefs, but of the entire record.

Rehearing is warranted when the Court fails to consider controlling authority under NRAP 40. When the Supreme Court neglects to decide a material issue presented in the briefs, and when rehearing will promote substantial justice, a rehearing should be granted, *American Casualty v. Union Welfare Fund*, 113 Nev. at page 776 (1997).

In this case, the State respectfully submits that this court either misapprehended or overlooked two issues or arguments raised in the record: (1) whether there was any prejudice that resulted based upon the evidence in the case, and (2) that there was evidence that there was no prejudice that resulted from the comments because of the prospective juror that rebuked the claims raised by Woodbury. However, this petition should not be construed as excusing or condoning Woodbury's racial comments during *voir dire*. (*emphasis added*). The State agrees that Woodbury's comments were reprehensible, but the State respectfully submits that Dean would have been convicted of the offenses irrespective of the comments.

I. THE PREJUDICE PRONG OF THE *STRICKLAND* ANALYSIS

First, and most importantly, the State respectfully submits that this Court overlooked the strength of the evidence in this case in its finding that prejudice resulted from Woodbury's comments.

In order to make a showing of prejudice, the petitioner must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. In discussing the prejudice requirement, the Court further explained that in order to make a showing of prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (citations omitted).

The Court emphasized that a petitioner must make both showings: "Unless a defendant makes both showings, it cannot be said that the conviction…resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Court also emphasized that a district court reviewing an IAC claim may address the prejudice prong and the deficiency prong in any order; in other words, if a district court concludes that a petitioner has suffered no prejudice, the court can dispose of a habeas petition without ever even addressing the deficiency prong. The Court explained:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, 466 U.S. 668, 697 (1984).

In this matter, the evidence that was introduced at trial was overwhelming. Dean's interview with Detective Nielson would have placed any trial counsel at a distinct disadvantage at trial. By telling Nielson an implausible story about Bert and Denise stabbing each other, rather than simply claiming self-defense, Dean locked his defense attorney into an untenable, implausible defense. (See Respondent's Answering Brief, 31-32).

Additionally, the physical evidence (e.g., the stab wounds to the victims) and the eye-witness testimony, specifically the testimony of Bert Minter, Denise Minter, Joseph Schenk, and Christina Hodges, when combined with Dean's interview with Detective Nielson, overwhelmingly prove that Dean committed the crimes he was convicted of. In the face of that evidence against Dean, the alleged errors in judgment made by any trial counsel, had no bearing on the outcome of the case.

Therefore, Dean suffered no actual prejudice that resulted from Woodbury's comments during *voir dire*. There was substantial evidence to support the conviction, which was correctly noted by the district judge in its order denying habeas relief. (AA, Vol. 2, 221). Accordingly, Dean was not entitled to habeas relief because the result would have been the same even without Woodbury's racial comments. The analysis should have ended based upon a review of the evidence adduced at trial alone. See *Strickland*, 466 U.S. at 697.

II. EVIDENCE SHOWN BY THE PROSPECTIVE JUROR

Second, the State respectfully submits that this Court overlooked certain answers during the conversation with the prospective juror in its analysis of the prejudice prong. As noted in its Opinion, this Court acknowledged that one outspoken juror rejected the claims raised by

Woodbury. Specifically, Woodbury in engaged in the following conversation with the prospective juror:

> Q. **And you realize that that would be in accordance with the Nevada justice system? Fundamental part of justice is everybody gets gauged on their own personal state, not something like color?**
> A. Yes, that's correct. I agree. It shouldn't be based on where you come from, what color are your [sic].
> Q. **Conversely, you also agree that not everybody can do that, talk about it the same way you are?**
>
> A. I wish everybody could, but I agree that everybody can't.
> Q. **So then is it fair for us to ask that any assumptions that any juror makes regarding Mr. Dean based on his skin color is unfair?**
> A. Yes.

(AA, Vol. 1, p. 39).

The above conversation is evidence of the tone of the conversation, and is evidence that Dean suffered no prejudice by the questioning. Not only did the outspoken juror reject the claims raised by Woodbury, but he also further explained that the justice system should be fair, regardless of the defendant's race. As noted by the State during evidentiary hearing, the fact that the juror was offended shows that the jury rejected the racial stereotypes, and further shows that Woodbury did not suddenly inject discriminatory racial beliefs into the minds of the jurors. Additionally, the fact that the prospective juror was offended and rejected the claims raised by

Woodbury, put the trial judge in a position where interjection would be unnecessary because the district court could conclude that the jury impartial. Thus, the record does not show that Woodbury's comments were prejudicial in any way.

Therefore, the State is respectfully requesting that this Court reconsider the Opinion rendered by the Court in this matter. The evidence against Dean was overwhelming, and a jury would have convicted Dean regardless of the comments. Finally, the comments made by the outspoken juror shows that the jury was not affected by Woodbury's comments.

RESPECTFULLY SUBMITTED this 31st day of January, 2022.

TYLER J. INGRAM
Elko County District Attorney

By: _____

Justin M. Barainca
Deputy District Attorney
State Bar Number: 14163

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's 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). This Respondent's Petition for Rehearing has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this petition complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Respondent's Petition for Rehearing exempted by NRAP32(a)(7)(C), because it contains 1,247 words.

I hereby certify that I have read the Respondent's Petition for Rehearing, 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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

///

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 31st day of January, 2022.

TYLER J. INGRAM
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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 31st day of January, 2022. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

and

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