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Elizabeth A. Brown
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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 EN BANC RECONSIDERATION

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6 SEAN MAURICE DEAN,

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10 Respondent.

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12 RESPONDENT’S PETITION FOR EN BANC RECONSIDERATION

13 The State of Nevada, by and through the Elko County District
14 Attorney, petitions this Court, pursuant to NRAP 40A, to reconsider the
15 panel’s opinion en banc.

16 Reconsideration is warranted when (1), necessary to secure or
17 maintain uniformity of decisions of the Supreme Court or Court of Appeals,
18 or (2) the proceeding involves a substantial precedential, constitutional or
19 public policy issue. NRAP 40A(a). As described below, the panel’s opinion
20 involves a substantial precedential and public policy issue. Additionally, the
panel’s decision does not secure or maintain uniformity of decisions of the
Supreme Court of the Court of Appeals. NRAP 40A(a).

1 In this case, the State respectfully requested rehearing under two
2 issues: (1) whether there was any prejudice that resulted based upon the
3 evidence in the case, and (2) that there was evidence that there was no
4 prejudice that resulted from the comments because of the prospective juror
5 that rebuked the claims raised by Woodbury. However, as noted in the
6 State’s petition for rehearing, this petition for en banc reconsideration
7 should not be construed as excusing or condoning Woodbury’s racial
8 comments during *voir dire*. (*emphasis added*).

9 I. EN BANC RECONSIDERATION IS NECESSARY
10 BECAUSE THE PROCEEDING INVOLVES A
11 SUBSTANTIAL PRECEDENTIAL AND OR PUBLIC
12 POLICY ISSUE.

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

1 In this matter, the evidence that was introduced at trial was
2 overwhelming. This assertion was correctly noted by the district judge in its
3 order denying habeas relief. (AA, Vol. 2, 221). Dean's interview with
4 Detective Nielson would have placed any trial counsel at a distinct
5 disadvantage at trial. By telling Nielson an implausible story about Bert and
6 Denise stabbing each other, rather than simply claiming self-defense, Dean
7 locked his defense attorney into an untenable, implausible defense. (See
8 Respondent's Answering Brief, 31-32). Additionally, the physical evidence
9 (e.g., the stab wounds to the victims) and the eye-witness testimony,
10 specifically the testimony of Bert Minter, Denise Minter, Joseph Schenk,
11 and Christina Hodges, when combined with Dean's interview with
12 Detective Nielson, overwhelmingly prove that Dean committed the crimes
13 he was convicted of. In the face of that evidence against Dean, the alleged
14 errors in judgment made by any trial counsel, had no bearing on the
15 outcome of the case.

16 The panel of this Court, by overlooking the strength of the trial
17 evidence and the prejudice prong, has set a strong precedent regarding
18 allegations of ineffective assistance and the ability of the defendant to raise
19 a defense. In its opinion, the panel found prejudice by drawing parallels
20 between Woodbury's comments and Dean's defense. This part of the

1 panel's opinion overlooked the fact that Dean's defense was implausible,
2 with Dean's credibility being highly questionable even without Woodbury's
3 comments, and that there were multiple witnesses who testified that Dean
4 stabbed the victims. Thus, the panel's opinion sets a precedent that
5 petitioners seeking habeas relief merely must allege a racially insensitive
6 comment or question, draw a parallel between the comment and his or her
7 defense, and prejudice would be presumed even if there is overwhelming
8 evidence supporting the conviction. *See Strickland v. Washington*, 466 U.S.
9 668, 687 (1984) ("Unless a defendant makes both showings, it cannot be
10 said that the conviction...resulted from a breakdown in the adversary
11 process that renders the result unreliable.").

12 Therefore, there is a strong precedential and public policy concern
13 regarding whether overwhelming evidence supporting the conviction would
14 still not be enough to overcome any imputation of prejudice based upon the
15 panel's opinion.

16 II. THE PANEL'S OPINION DOES NOT OFFER
17 UNIFORMITY IN APPLICATION BY THE NEVADA
APPELLATE COURTS.

18 Second, the State respectfully submits that panel did not secure or
19 maintain uniformity of decisions of the Supreme Court or Court of Appeals
20 in its opinion. NRAP 40A(a). The panel did not set a standard as to what

1 statements or comments made during *voir dire* would trigger the application
2 of this matter. Whether a statement is offensive can be entirely subjective
3 based upon the thoughts and opinions of the listener, therefore clarification
4 is necessary to determine how offensive a comment must be before an
5 appellate court would find prejudice when there is overwhelming evidence
6 supporting the conviction.¹ Thus, en banc reconsideration is necessary in
7 order to provide uniformity in the application of the panel's opinion.

8 Therefore, the State is respectfully requesting that this Court
9 reconsider the Opinion rendered by the panel in this matter en banc. The
10 panel's opinion raises substantial precedential and public policy concerns.
11 Finally, the panel's opinion does not secure or maintain uniformity of
12 decisions of the appellate courts.

13 RESPECTFULLY SUBMITTED this 28th day of February, 2022.

14 TYLER J. INGRAM
15 Elko County District Attorney

16 By: 

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

20 ¹ The State agrees that a large number of people, and the overwhelming majority of people involved in the court system, would find Woodbury's comments to be offensive. The State has no quarrel with the panel's finding that Woodbury's comments were extreme.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Petition for En Banc Reconsideration 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 En Banc Reconsideration 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 En Banc Reconsideration exempted by NRAP32(a)(7)(C), because it contains 1275 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.

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1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the
3 Nevada Rules of Appellate Procedure.

4 DATED this 28th day of February, 2022.

5 TYLER J. INGRAM
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7 540 Court Street, 2nd Floor
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9 By: 

Justin M. Barainca
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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of February, 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

DAVID B. LOCKIE
Attorney for Appellant

/S/ Amanda Waugh
Amanda Waugh
CASEWORKER

DA#: AP-20-01134