

1 **IN THE SUPREME COURT FOR THE STATE OF NEVADA**

2
3 ADAM ANTHONY BERNARD,

4 Appellant,

5 vs.

6 STATE OF NEVADA,

7 Respondent.

 Electronically Filed
No. 83323 Jun 29 2022 04:30 p.m.
 Elizabeth A. Brown
 Clerk of Supreme Court

8
9
10
11 **REPLY BRIEF**

12
13
14
15
16
17
18
19
20 MARIA PENCE
21 Attorney for Appellant
22 Bar ID No. 9890
23 1662 U.S. Highway 395, Suite 203
24 Minden, NV 89423
25 (775) 392-4084
26
27
28

1 **IN THE SUPREME COURT FOR THE STATE OF NEVADA**

2
3 ADAM ANTHONY BERNARD,

4 Appellant,

5 vs.

6 STATE OF NEVADA,

7 Respondent.

No. 83323

8
9 **1. NRAP 26.1 DISCLOSURE**

10
11 The undersigned counsel of record certifies that there are no persons or
12 entities as described in NRAP 26.1 to be disclosed.
13

14 Attorney of record for Adam Anthony Bernard, Appellant,
15

16
17 

18 _____
 Maria Pence, Esq.

3. TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Betterman v. Montana</i> , 578 U.S. 437 (2016)	8
<i>Parodi v. Washoe Med. Ctr.</i> , 111 Nev. 365 (1995)	9
<i>Weiler v. United States</i> , 323 U.S. 606, 608 (1945)	9

4. REPLY TO RESPONDENT'S ANSWERING BRIEF

Factual Issues:

In the Statement of the Case section, on page 1 of the State's answering brief, the State describes the incident in this case as follows: "On July 9, 2017, the defendant got in to a physical altercation with his victim Brian Cook." Answering Brief, hereafter, AB, 1.

In the Statement of the Facts section, on page 3, the State describes this incident as follows: "On July 9, 2017, Brian and the defendant got into a fight after arguing earlier in the day." AB, 3.

This description misrepresents the facts in this case and does not take into account the evidence the State has in its possession. Douglas County Deputy Ignatius Kyeremeh's report documents that both Adam and Kevin Tholl informed him that Adam and Brian were together earlier in the evening and that after Adam had left Brian's residence, Brian called Kevin, wanting to come to Kevin's house to "kick [Adam's] ass and blind [Adam] in his other eye." JA 00317. Brian then drove to Kevin's house to fight Adam. JA 00317-318.

These details are echoed in Sgt. Rick Koontz's report, where he documents that Sgt. Ron Miller confirmed the statements made by Adam and Kevin Tholl. JA 00342. Separately, each told deputies on scene the same story, that they had been drinking at Brian's house. After leaving Adam and Kevin left Brian's house,

1 Brian called Kevin and told him “he wanted to fight Adam and make him blind in
2 his one eye.” JA 00342. Kevin hung up the phone and Brian pulled up to Kevin’s
3 house. JA 00343. The State continues to minimize Brian Cook’s behavior. His
4 behavior, as discussed in the next paragraph was relevant to the resolution of this
5 case and should not be overlooked.
6

7
8 The State’s description of the incident is also inconsistent with the to-wit
9 language in the Amended Information. JA 00259. That document governs the
10 crime and the facts involved in Adam’s plea. That language reads:
11

12 “The defendant, on or about July 9, 2017, and before the filing of this
13 Amended Information, at or within the County of Douglas, State of Nevada,
14

15 upon a sudden heat of passion, **caused by a provocation**
16 **apparently sufficient to make the passion irresistible to a**
17 **reasonable person, or an attempt by Brian Cook to commit a**
18 **serious personal injury on the defendant,** did willfully and
19 voluntarily kill Cook by repeatedly punching and kicking Cook in the
20 head while Cook was lying on the ground, all of which occurred at or
near 1294 Manhattan Way in the County of Douglas, State of Nevada.”
(Emphasis added.) JA 00259.

21 Repeatedly, the State has omitted or misrepresented the facts leading to the
22 death of Brian Cook. No where in its brief does it include the information that the
23 victim in this case pursued Adam because he wanted to fight him and blind him
24 in his one seeing eye or otherwise “commit a serious personal injury” on him. See
25 Amended Information, JA 00259.
26
27
28

1 Much of the State's Answering brief consists of repeating how brutal the
2 beating was and recounting punches and kicks. On page 6, the word "brutal" is
3 used four times in one paragraph. The State has also described the video of the
4 fight that occurred when Brian drove to Kevin's house to fight Adam, "a video of
5 a man being beaten to death in the street." (Reply to Opposition to Motion to
6 Transmit Exhibit). The State is playing to the emotions of the Court. The
7 emotional impact and perspective of the video changes drastically when it is
8 retitled, "a video of a man fighting for his life and his sight," or "the body's
9 autonomic response to survive threat of death or blindness."
10
11
12

13 The video is brutal, but it depicts, as stated in the Amended Information, a
14 man, Adam, *who upon the sudden heat of passion, caused by a provocation*
15 *apparently sufficient to make the passion irresistible to a reasonable person, or*
16 *an attempt by Brian Cook to commit serious personal injury on Adam* did willfully
17 and voluntarily kill Cook. JA 00259.
18
19

20 The facts relied upon by this Court need to be accurate and complete.
21

22 Legal issues:

23 The State's first contention is that the defendant's failure to object at
24 sentencing waived any issues on appeal. The State urges this Court not to exercise
25 its discretion to review Adam's claims for plain error. AB 9. The State then cites
26 multiple out-of-state decisions to support its request. This Court has addressed
27
28

1 this issue previously and its holdings are at odds with the cases cited by the State.
2 Specifically, this Court has *not* held that plain error will not be found based on a
3 tactical decision by counsel. To the contrary, this Court's reasoning in *Parodi v.*
4 *State*, included an analysis of counsel's dilemma to object to court conduct that
5 could prejudice a client, and held that errant conduct is reviewable under the plain
6 error doctrine even when counsel has failed to adequately object at the time of the
7 conduct. 111 Nev. 365, 368 (1995).
8

9
10 The State's next argument is that once Adam entered his guilty plea
11 pursuant to *Alford*, he waived this theories of self-defense and lack of causation
12 for the death of his victim. AB 12. Adam is not offering the information regarding
13 these issues as a defense, but rather as factual information that should have been
14 considered by the court at sentencing. In its brief, the State offers that Dr.
15 McEllistrem's testimony, which explained "in psychological terms why the
16 defendant acted in the manner he did when he killed Brian Cook," was one of the
17 reasons the State "was willing to enter in to a plea agreement for the lesser charge
18 of voluntary manslaughter." AB 12. The State then argues that it was not error
19 "for the court to give little or no weight to arguments that are contrary to the
20 convicted offense."
21

22 Dr. McEllistrem's testimony and counsel's argument about the body's
23 autonomic response when threatened is not "contrary to the convicted offense."
24
25
26
27
28

1 This information is, in fact, very much a part of the convicted offense. Adam was
2 convicted of voluntary manslaughter, which requires that a defendant be “*upon*
3 *the sudden heat of passion, caused by a provocation apparently sufficient to make*
4 *the passion irresistible to a reasonable person*” when taking the life of another;
5 otherwise, the charge would have been murder. Dr. McEllistrem’s testimony and
6 much of arguments made in court were extremely relevant to sentencing, as his
7 testimony explained the physiological and psychological response that occurs in
8 the body when a threat of death or serious bodily harm is perceived. Adam was
9 entitled to a fair sentencing hearing, regardless of the fact that he entered a guilty
10 plea, *Alford* or otherwise. The court’s discretion at sentencing must still comply
11 with due process concerns. *Betterman v. Montana*, 578 U.S. 437 (2016).

16 Finally, the State argues that the defendant failed to appreciate the
17 distinction between the quantity of evidence and the quality of evidence. AB 15.
18 The State offered that “The touchstone is always credibility; the ultimate measure
19 of testimonial worth is quality and not quantity. Triers of fact in our fact-finding
20 tribunals are, with rare exception, free in the exercise of their honest judgment, to
21 prefer the testimony of a single witness to that of many.” *Weiler v. United States*,
22 323 U.S. 606, 608 (1945). It is for that very reason that the sentencing
23 memorandum included the actual reports from Brian Cook’s medical history; the
24 police reports documenting Brian’s pursuit of Adam; and the doctor’s notes from
25
26
27
28

1 the hospital after this altercation. It is also why counsel called an expert witness,
2 Dr. McEllistrem, to testify in court on Adam's behalf at sentencing. All of this
3 evidence should have been considered by the court. But, as noted previously, the
4 court considered only the video and nothing more, and without context, the
5 content of that video is easily misconstrued.

6
7
8 The court abused its discretion in sentencing Adam to the maximum
9 sentence and failed to provide a fair sentencing hearing in violation of his due
10 process rights. Accordingly, Adam's sentence should be vacated and the case
11 remanded for resentencing before a different district court judge.


12 13 **5. CERTIFICATE OF COMPLIANCE**

14
15 I hereby certify that this brief complies with the formatting requirements of
16 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
17 requirements of NRAP 32(a)(6) because: [X] This brief has been prepared in
18 a proportionally spaced typeface using Word processing program in 14 point font
19 size and Times New Roman type style.

20
21
22 This brief does comply with the page- or typevolume limitations of NRAP
23 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C),
24 it is proportionately spaced, has a typeface of 14 points or more, and has a total of
25 1985 words.

1 Finally, I hereby certify that I have read this reply brief, and to the best of
2 my knowledge, information, and belief, it is not frivolous or interposed for any
3 improper purpose. I further certify that this brief complies with all applicable
4 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which
5 requires every assertion in the brief regarding matters in the record to be supported
6 by a reference to the page and volume number, if any, of the transcript or appendix
7 where the matter relied on is to be found. I understand that I may be subject to
8 sanctions in the event that the accompanying brief is not in conformity with the
9 requirements of the Nevada Rules of Appellate Procedure.
10
11
12
13
14

15 Dated this 27 day of June, 2022,

16 
17 _____
18 Maria Pence, Esq.
19 Nevada Bar No. 9890
20 Pence & Associates
21 1662 US Hwy 395, Ste. 203
22 Minden, Nevada 89423
23 (775) 392-4084
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that I am an employee of PENCE & ASSOCIATES and that on this date, I served a true and correct copy of the Reply Brief to the following address:

Erik Levin, Chief Criminal Deputy District Attorney
District Attorney's Office
1038 Buckeye Road
Minden, NV 89423

Dated this 27th day of June, 2022.



MARIA PENCE, ESQ.