IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CHELSEA NGIRAKESIIL,
Respondent-Appellant,
v.
REPUBLIC OF PALAU,
Petitioner-Appellee.

Cite as: 2021 Palau 24
Criminal Appeal No. 20-001
Appeal from Criminal Case No. 19-070

Decided: August 17, 2021

Counsel for Petitioner-Appellee ..... Kathleen M. Burch, Assistant Attorney General, Rebecca Sullivan, Assistant Attorney General[1]

Counsel for Respondent-Appellant ..... Yukiwo P. Dengokl

BEFORE: JOHN K. RECHUCHER, Associate Justice
GREGORY DOLIN, Associate Justice
DANIEL R. FOLEY, Associate Justice

Appeal from the Trial Division, the Honorable Justice Kathleen M. Salii, Presiding Justice, presiding.

[1] The Petition was signed by Assistant Attorney General Burch. Assistant Attorney General Sullivan signed the Rule 28(g) Letter which was submitted together with the Petition.

OPINION[2] AND ORDER ON PETITION FOR REHEARING[3]

RECHUCHER, DOLIN, and FOLEY, Associate Justices delivered a joint opinion:

[¶ 1] Before the Court is the Republic's Petition for Rehearing *En Banc*. From the cover page to the signature page, the Petition is suffused with disrespect for the Court's rules and procedures, as well as the Justices themselves. It contains irrelevant information for no apparent purpose other than to inflame. It seeks relief unavailable under our rules. It rehashes arguments already considered and rejected by the Court and does so without citing to any relevant supporting case law. We **DENY** the petition.

BACKGROUND

[¶ 2] The facts giving rise to this Petition and the underlying appeal are set forth at length in our original opinion. *See Ngirakesiil v. ROP*, 2021 Palau 23. We will not repeat them here. On August 10, 2021, within the timeframe set forth by ROP R. App. P. 40, the Republic filed a petition for rehearing. Although titled as "Petition for a Rehearing *En Banc*" (presumably before all, including part-time, Justices assigned to the Appellate Division), the relief sought by the Petition is the disqualification of all the Justices on the present panel and assignment of a new panel to hear the case. At the same time, despite only seeking recusal and re-argument, the Petition raises issues pertinent not just to recusal, but also to the merits of the appeal itself. Thus, the Petition's cover page, prayer for relief, and argument section do not match one another. Nevertheless, we read the Petition charitably and construe its arguments and prayer for relief in the light most favorable to the Republic.

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[2] Pursuant to the October 15, 2020, Memorandum from the Chief Justice governing "Publications of Opinions, Decisions, and Orders," normally, the Appellate Division will "not publish any order denying a petition for rehearing or motion for reconsideration . . . unless the Chief Justice directs otherwise." In this matter, the Chief Justice is recused and has delegated his authority to decide whether to publish the present order to the undersigned Panel. The Panel, being of the view that the present opinion contains substantive analysis that will be a helpful guide to the lower courts and future panels of this Court, has decided to publish the opinion.

[3] The Republic has requested oral argument. However, Rule 40 is clear that when it comes to petitions for rehearing, "[o]ral argument is not permitted." ROP R. App. P. 40. Accordingly, we decide this matter without oral argument.

STANDARD OF REVIEW

[¶ 3] "Petitions for rehearing shall be granted exceedingly sparingly, and only where the Court's original decision 'obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal.'" *Kebekol v. KSPLA*, 22 ROP 74, 74 (2015) (quoting *Rengiil v. ROP*, 20 ROP 257, 258 (2013)). Such petitions "are highly disfavored and are not a vehicle 'for affording parties a second opportunity to present their cases.'" *Toribiong v. Tmetbab Clan*, 22 ROP 116, 117 (2015) (quoting *Sadang v. Ongesii*, 10 ROP 100, 102–03 (2003)).

DISCUSSION

[¶ 4] As an initial matter, we note that neither the Constitution, nor the Palau National Code, nor the Rules of Appellate Procedure authorize rehearings *en banc*. *Compare* ROP R. App. P. 40 *with* Fed. R. App. P. 35 (authorizing determination of cases *en banc*). Accordingly, this form of relief must be denied as being outside the scope of our rules. Nevertheless, we construe the Petition as requesting panel rehearing and proceed with adjudicating it on that basis. [4]

I.

[¶ 5] After reciting a litany of facts (many of which are entirely irrelevant not only to the resolution of the present motion, but to any portion of the case), the Republic reiterates that the panel members must be disqualified. As the basis for this argument the Republic relies on 4 PNC § 304 and ROP Code of Judicial Conduct, Canon 2.5.2, both of which prohibit a person from sitting as a judge on a matter where the person has previously served as an attorney for one of the parties. It is of course undisputed that none of the Justices on this panel previously represented Ms. Ngirakesiil in this or any other case. The Republic does not argue otherwise. Instead, the Republic claims that the Justices involved

> acted as judge and as counsel for Appellant when they, without legal authority, ordered the Appellant released; raised and then decided issues that were waived by Appellant; failed to apply the plain error

[4] Pursuant to our precedent, "a motion to recuse directed at an appellate judge is decided by that judge." *Isechal v. Umerang Clan*, 18 ROP 194, 196 (2011).

> standard of review and applied a more lenient standard of review in favor of Appellant; and then ignored the facts and inferences that favored the Republic, conducted their own factual research, and substituted their conclusions for that of the Trial Court.

Pet. at 8. This litany of unjustified complaints is little more than sour grapes from an unsatisfied litigant. Even assuming that every single statement on that list were correct, that would merely mean that the panel made legal errors rather than "acted as counsel for Appellant."

[¶ 6] As we have explained in our original opinion, it is a universal rule that even erroneous rulings do not serve as grounds for recusal. *See Ngirakesiil*, 2021 Palau 23 ¶ 14 (collecting cases). The Republic attempts to get around this clear rule by arguing that none of the cases we relied on presented an identical fact-pattern. We are incredulous that seasoned attorneys would make such a specious argument. The entire system of common law is based on reasoning by analogy and applying an established rule of law to new circumstances.

> [T]he duty of the courts, upon the advent of new conditions, is to assimilate the ancient principles of the common law to the new conditions by the process of reasoning called "analogy;" applying old principles, governing previously established relations of a similar character, to the determination of rights arising under the new conditions.

Butner v. W. Union Tel. Co., 37 P. 1087, 1089 (Okla. 1894). The fact that the cases we cited dealt with erroneous evidentiary rulings or decisions on a motion to dismiss, whereas our case dealt with an allegedly erroneous ruling releasing the defendant, is irrelevant. What is relevant is the basic rule that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Ngirakesiil*, 2021 Palau 23 ¶ 14 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

[¶ 7] The Republic faults the Court for citing "no opinion where a judge who acted without authority and refused to vacate the illegal order once brought to the court's attention continued to preside over the case." Pet. at 9. It is of course not our duty nor responsibility to explain why we continue to exercise the functions of the office which was entrusted to us pursuant to the Constitution and the laws of this Republic. *See United States v. Sidener*, 876

F.2d 1334, 1336 (7th Cir. 1989) ("A judge is *presumed* to be impartial.") (emphasis added). Rather, it is the Republic's duty, as a party seeking relief, to marshal arguments as to why the relief is warranted. *See Pope v. Fed. Exp. Corp.*, 974 F.2d 982, 985 (8th Cir. 1992) ("A party introducing a motion to recuse carries a heavy burden of proof; a judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving otherwise."). As the party seeking recusal of the members of this panel, it is the Republic that bears a substantial and heavy burden to show, with citations to appropriate authority, that such relief is warranted. *See id.*; ROP R. App. P. 27(a) ("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it."). When a party fails to carry its burden, the appropriate judicial response is not going out to search for best ripostes to arguments never made, but to simply deny the relief sought. *See Ngerbachesis Klobak v. Ueki*, 2020 Palau 22 ¶ 8.

[¶ 8] The Republic next argues that even though adverse judicial rulings are usually not a proper ground for a recusal, recusal is warranted when a ruling goes "'beyond what is normal or acceptable' or shows a 'clear inability to render a fair judgment.'" Pet. at 10 (quoting *Liteky*, 510 U.S. at 551-52). We have no quarrel with that proposition as a general matter. The issue is whether our issuance of a release order goes "beyond what is normal or acceptable." Needless to say, we disagree that the release order meets this standard. To the contrary, as then Judge, and future Justice, Kennedy wrote in *Arizona v. Manypenny*, "[e]xercise of judicial power by entry of orders not expressly sanctioned by rule or statute in order to correct the legal process or avert its misfunction has been approved in varied circumstances." 672 F.2d 761, 765 (9th Cir. 1982) (collecting cases). The Palau National Code expressly grants to "[e]ach court of the Republic . . . [the] power to issue all writs and other process, make rules and orders, and do all acts, not inconsistent with law and with the rules established by the Chief Justice, as may be necessary for due administration of justice." 4 PNC § 101. This power expressly includes the authority to "grant bail." *Id.*

[¶ 9] While reviewing the record in preparation for oral argument, it became evident to us that the legal process "misfunctioned" — there was no evidence in the record that the Republic had proven an essential element of the crime charged — and that corrective action was necessary for the due administration of justice. At that point, we could have dispensed with oral argument and simply issued an opinion and judgment reversing the conviction

(which of course would have the effect of releasing Ms. Ngirakesiil without bail). *See Ngirakesiil*, 2021 Palau 23 ¶ 15 (explaining that no party is entitled to oral argument). Instead, we took the lesser step of granting release pending appeal and deferring our ultimate decision until after oral argument. The greater power of reversing the conviction altogether (which the Court ultimately exercised) undoubtedly includes this lesser power of granting interim relief. And if reversing the conviction is acceptable, we are at a loss for how taking a more restrained approach by granting release pending appeal and giving the Republic a chance to explain the evidentiary deficiency could possibly be "beyond what is normal or acceptable" or show a "clear inability to render a fair judgment." Pet. at 10 (quoting *Liteky*, 510 U.S. at 551-52).

[¶ 10] Finally, the Republic contends that in light of all of the alleged errors made by the Court, "a reasonable Palauan knowing all of the actions taken by the Panel would believe that the Panel was incapable of acting impartially." Pet. at 9. It is true that recusals are governed by an objective standard, which takes into account "how [a judge's] participation in a given case looks to the average person on the street." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). Disqualification is required "if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Id.* "[T]he test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts.*" *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (emphasis in original). As the Eighth Circuit explained,

> [i]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing . . . warrant[s] the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial.

Ouachita Nat. Bank v. Tosco Corp., 686 F.2d 1291, 1300 (8th Cir. 1982) (quoting *Blizard v. Fielding*, 454 F. Supp. 318, 320-21 (D.Mass. 1978), *aff'd sub nom. Blizard v. Frechette*, 601 F.2d 1217 (1st Cir. 1979)). The question therefore is whether the Republic's disqualification motion has a "reasonable basis." In order to answer that question, we must review the facts that a

reasonable person would consider in reaching his own conclusion as to our impartiality.

[¶ 11] In this case, among the facts that a reasonable person would have to know is the fact that briefing in the matter was complete, that oral argument is not required for the Court to render a decision,[5] that the Justices of this Court had reviewed all of the merits briefs and the record below, and that the Court had the power to render a final judgment on the appeal at the time that it entered its interim order. We do not believe that a reasonable person, knowing all of the facts and understanding the various strengths and weaknesses of each party's case, would conclude that the issuance of the interim release order evidenced bias on the part of the panel. A reasonable person would also be further assuaged of the Court's impartiality upon reading our July 23, 2021, order, which we issued upon learning that not all of the conditions of the release order had been complied with and which ordered Ms. Ngirakesiil's immediate remand to custody. It may be that the attorneys who signed the Petition are not mollified, but the law requires us to look at the perception of an *objective* and *reasonable* person.

[¶ 12] At the end of the day, "[a]t issue in th[e recusal] motion is whether the previous rulings by this Court cited by plaintiffs have produced the bent of mind necessary to warrant recusal in this related case." *Joint Council 73 v. Int'l Bhd. of Teamsters, Warehousemen & Helpers of Am.*, 734 F. Supp. 626, 627 (S.D.N.Y. 1990). As we have already stated several times, "to be sufficient for disqualification the alleged bias or prejudice must be from an extrajudicial source" and not from "what the judge has . . . done in the proceedings before him . . . ." *King v. United States*, 576 F.2d 432, 437 (2d Cir. 1978).

[¶ 13] Neither the Republic's original motion nor the present Petition convinces us that a reasonable person, apprised of all the facts and the governing legal principles, would harbor doubts about the impartiality of the members of this panel. And our exercise of normal judicial function, even if such exercise was in error, does not convert us into "counsel" for the defense. We decline to disturb our earlier conclusion on this point.

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[5] The Court routinely issues opinions on the briefs, in both civil and criminal cases, even where parties have requested argument. *See, e.g.*, *Khair v. ROP*, 2019 Palau 18 (vacating conviction without oral argument); *see also Ngerdelolk Hamlet v. Peleliu State Pub. Lands Auth.*, 2021 Palau 15 (affirming without oral argument); *Anastacio v. Palau Pub. Utils. Corp.*, 17 ROP 75 (2010) (reversing without oral argument).

II.

[¶ 14] The Republic next complains that the Court "scoured the record for errors, and then raised and addressed those errors." Pet. at 11. Specifically, the Republic argues that Ms. Ngirakesiil failed to raise the issues of duty and causation in her appellate brief and has therefore waived them. *Id.*

[¶ 15] As an initial matter, we are baffled as to why the Republic complains about the Court raising and addressing the issue of Defendant's duty in this case. After all, the Republic prevailed on this issue. We explicitly held that Ms. Ngirakesiil had a duty to her husband, at least once she removed him from the environment where others could have rendered aid. *Ngirakesiil*, 2021 Palau 23 ¶ 24. Yet, the Republic seems unable to take "yes" for an answer and has filed the present Petition while presumably hoping to achieve the same outcome on this issue as it has already achieved. That is not the purpose of petitions for rehearing, which should be filed and will be granted only where the Court's decision "obviously and demonstrably contains an error of fact or law *that draws into question the result of the appeal*." *Rengiil*, 20 ROP at 258 (emphasis added). Since the Republic prevailed on the issue of duty, any error that the Court may have committed in examining this specific question does not "draw[] into question the result of the appeal." *Id.*

[¶ 16] The Court's resolution of the causation question, on the other hand, did affect the outcome of the appeal. The Republic contends that the issue was not properly before the Court because it was never raised in Ms. Ngirakesiil's brief. The Republic's contention is incorrect both as a matter of law and a matter of fact. As the Republic recognizes, Ms. Ngirakesiil's opening brief argued that the Republic failed to prove beyond a reasonable doubt that "Appellant was aware of and consciously disregarded the risk that her conduct would *result in* [her husband's] death." Pet. at 11 (quoting Appellant's Op. Br. at 1) (alterations in original, emphasis added). Admittedly, this opening brief was neither comprehensive nor a model of clarity. Nevertheless, it did challenge (albeit obliquely) sufficiency of proof on the question of causation. Specifically, the brief stated that "Dr. Lala who examined [the victim] after he was brought [to the hospital] found no signs of injuries or trauma, no bleeding around the head, no bruises or scrapes around the head or facial area." Appellant's Op. Br. at 18 (citing to Tr. at 128, ll. 21-28; 129, ll. 1-27). Though a better brief would have developed the argument further, the implication that can be drawn from this submission and surrounding statements is that even

upon arrival at the hospital the victim was neither timely diagnosed nor immediately treated for the injuries sustained. Ms. Ngirakesiil specifically argued that "the prosecution failed to prove beyond a reasonable doubt that Appellant recklessly *caused* [the victim's] death." *Id.* (emphasis added).

[¶ 17] In any event, the Republic's complaints fundamentally misunderstand the duties and powers of this Court. "[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (internal citations omitted).

> In reviewing a challenge to the sufficiency of the evidence under the due process clause . . . , we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.

People v. Cole, 95 P.3d 811, 849 (Cal. 2004). Even where a defendant does not raise the question of the sufficiency of evidence, a reviewing court is both empowered and obligated to reverse a conviction if the evidence is legally insufficient to support said conviction. *See State v. Jones*, 516 N.W.2d 545, 548-49 (Minn. 1994) (reversing convictions for second and third degree assault even though defendant "did not appeal the decision of the court of appeals on the issue of sufficiency of the evidence"); *accord Ex parte Lyles*, 323 S.W.2d 950, 951 (Tex. Crim. App. 1959) ("The sufficiency of the evidence is inquired into upon appeal in every case.");[6] *Turnage v. State*, 782 S.W.2d 755, 761 (Mo. Ct. App. 1989) ("While allegations of error that are not briefed, or not properly briefed on appeal are not ordinarily considered by the appellate court, that rule

[6] The *Lyles* Court suggested that following a reversal of conviction for insufficient evidence, the matter should be remanded to the trial court for a new trial. *Lyles*, 323 S.W.2d at 951. However, nineteen years later, in *Burks v. United States*, the Supreme Court of the United States held that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." 437 U.S. 1, 11 (1978). On this issue, we follow the decision of the U.S. Supreme Court. *See Gideon v. Republic of Palau*, 20 ROP 153, 163-64 (2013) ("Because Palau's double jeopardy clause is similar to the double jeopardy clause in the United States Constitution, courts in Palau look to United States case law as an aid in interpreting the scope of double jeopardy protection.").

of law does not apply to errors in cases respecting the sufficiency of informations or indictments, verdict, judgment or sentence.").[7]

[¶ 18] Our caselaw and rules are equally clear that our review of a criminal conviction is not limited to issues that have been properly preserved. *See Xiao v. ROP*, 2020 Palau 4 ¶ 20. In *Xiao*, the appellant did not challenge her conviction or sentence on one of the counts. *Id.* However, upon a review of the record, it became clear that although the conviction on that count could be sustained, the sentence imposed was unlawful. *Id.* ¶¶ 20-31. We vacated the sentence despite the fact that the "[a]ppellant did not raise, before us or the trial court, the issues we identif[ied] with the conviction and sentence" on that count. *Id.* ¶ 20. As we explained in *Tell v. Rengiil*, there are two exceptions to the waiver rule. 4 ROP Intrm. 224, 226 (1994). "The first permits a reviewing court to address an issue not raised below to prevent the denial of fundamental rights, *especially in criminal cases where the life or liberty of an accused is at stake*." *Id.* (emphasis added). This approach is consistent with ROP R. Crim. P. 52(b) which permits the Court to notice and adjudicate "[p]lain errors or defects affecting substantial rights . . . although they were not brought to the attention of the court."

[¶ 19] It is our *fundamental duty*, in a criminal case like this, to "scour[] the record for errors." That we reviewed the entire record (including issues not raised by Ms. Ngirakesiil) is an indication of our diligence in making sure that the fundamental rights of a criminal defendant are preserved, rather than evidence of some inappropriate "advocacy" on Ms. Ngirakesiil's behalf or "bias" against the Republic. It is disappointing that attorneys representing the Republic, who as "[p]rosecutors have a special duty to seek justice, not merely to convict," *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011), do not appear to share our view that courts must ensure that criminal defendants are not deprived of their fundamental rights to due process.

III.

[¶ 20] Related to the preceding point, the Republic argues that the panel applied the wrong legal standard to issues that Ms. Ngirakesiil failed to preserve for appeal. Pet. at 12-13. The Republic is correct that this Court

[7] The *Turnage* Court reached its conclusions in reliance on Missouri Supreme Court Rule 30.20 which governs "[a]ppellate [p]rocedure in [a]ll [c]riminal [c]ases." Though our Rules of Criminal Procedure are not identical, our Rule 52(b) is in essence equivalent to Missouri Rule 30.20. We therefore find the opinion in *Turnage* to be persuasive authority. *See* 1 PNC § 303.

reviews issues that have not been properly preserved for appeal under the plain error standard. *See Xiao*, 2020 Palau 4 ¶ 20. The Republic is however incorrect that we failed to apply this standard.

[¶ 21] "[A]n error is plain if it is clear or obvious and affects the appellant's substantial rights." *Id.* "[N]o right is more 'substantial' than the right to liberty and to be free from unlawful confinement." *Id.* ¶ 30. When "there is no evidence of the defendant's guilt or the evidence on a key element of the offense was so tenuous that a conviction would be shocking," the error is plain, and the Court must act so as to prevent "a manifest miscarriage of justice." *United States v. Villasenor*, 236 F.3d 220, 222 (5th Cir. 2000). Incarceration pursuant to a conviction that is not supported by facts proving each element of the charged offense is the very definition of "unlawful confinement" and "fundamental miscarriage of justice." *See Harris v. Garcia*, 734 F. Supp. 2d 973, 988 (N.D. Cal. 2010) ("The Due Process Clause 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). The only question is whether "the evidence on [causation —] a key element of the offense [—] was so tenuous that a conviction would be shocking." *Villasenor*, 236 F.3d at 222. We will not repeat what we said in our initial opinion, but simply reiterate that the evidence in this case is not merely "tenuous," but that "the record is entirely devoid of . . . evidence" that establishes a causal link between Ms. Ngirakesiil's failure to bring the victim to the hospital and the victim's death from an extensive intracranial hemorrhage causing brain tissue damage." *Ngirakesiil*, 2021 Palau 23 ¶¶ 31-34.

[¶ 22] Even at this late hour, the Republic is unable to point to *any* evidence establishing such a causal link. The Republic argues that, had the victim been brought to the hospital,

> he would have been positioned on his side, he would not have choked on his own vomit, his airway would not have been blocked with his own vomit, he would have continued to breathe on his own, and the medical team at the hospital would have been able to treat the victim's other injuries, including his head injury.

Pet. at 14; *see also* Rule 28(g) Letter at 3 ("Had the victim not been left to drown in his own vomit and taken to the hospital while he was still able to breathe spontaneously, the medical team could have stabilized him."). The

problem is that whether or not the victim choked on his own vomit is entirely irrelevant to whether his intracranial bleed could have been properly treated.[8] The victim did not die of "drown[ing] in his own vomit" or from brain hypoxia caused by blocked airways. He died, according to the prosecution's own witnesses, from an intracranial hemorrhage. *See* Exh. 5 (Autopsy Report) at 3; Tr. at 164-66 (testimony of Dr. Emais Roberts). The Republic's assertions that, had there been no vomitus in the victim's airways, "the medical team at the hospital would have been able to treat the victim's other injuries, including his head injury," Pet. at 14, and that "[h]e could very well have been effectively medevacked," Rule 28(g) Letter at 3, are little more than speculation. Of course, had any of the Republic's witnesses actually testified that this would have been a likely chain of events, and had such testimony been credited by the trial court, we would have little trouble accepting this evidence on appeal. But as things stand, nothing in the record supports the assertions contained in the Petition and the Rule 28(g) Letter, or permits us to draw the inferences that the Republic would have us draw. "[I]nferences must be based on evidence" and the "verdict must be reasonably based on evidence presented at trial." *United States v. Ceballos*, 340 F.3d 115, 125 (2d Cir. 2003). "Assumptions are not a substitute for evidence." *Gomez v. Stop & Shop Supermarket Co.*, 670 F.3d 395, 398 (1st Cir. 2012). "Facts cannot be established by evidence which is so uncertain and speculative as to raise merely a conjecture or possibility," *Stevens v. Indus. Comm'n*, 61 N.E.2d 198, 200 (Ohio 1945), and a criminal "verdict may not rest on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference," *United States v. Pettigrew*, 77 F.3d 1500, 1521 (5th Cir. 1996).

[¶ 23] Here, the Republic never asked its witnesses what would have been done differently had the victim been timely brought to the hospital or whether had anything been done differently the victim's odds of survival would have improved. Instead, the Republic wishes us to speculate about what might have happened based on nothing more than unsupported assertions. It asks us to

[8] The Republic's assertion the victim died "due to lack of oxygen caused by the vomit blocking his airway," Rule 28(g) Letter at 3, is risible. No one testified to this fact and it appears to have been simply invented *ex nihilo*. Such false representations tread dangerously close to violating attorney's duty of candor to the Court. *See* Model Rules of Prof'l Conduct R. 3.3 (prohibiting attorneys from "mak[ing] a false statement of fact or law to a tribunal"). That the Republic would make such a representation after having been specifically directed to review the record evidences contempt for the Court and the attorney's duties as a prosecutor.

infer that had the victim been brought to the hospital earlier, he would have been successfully stabilized, then pile on top of that inference the inference that his intracranial injury would have been attended to on an expedited basis, then further infer that the timely diagnosis of the injury would have allowed the medical team to properly treat that injury, and finally to top off the already large pile with an inference that such treatment would make an ultimate difference. Apparently, the Republic believes that it is our job to jump through these speculative hoops rather than its job to adduce evidence of such a causal chain at trial. We do not share the Republic's view of our respective spheres of responsibilities and decline to reconsider our reversal of the guilty verdict. Had the prosecution simply done its job, it would not have had to invent facts or create fanciful inferential chains in order to prop-up a problematic conviction. Nothing in the Republic's submission convinces us that our prior decision "obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal." *Rengiil*, 20 ROP at 258. Accordingly, the Republic has failed to meet the standard for the grant of the petition for rehearing.

IV.

[¶ 24] We would be remiss if we did not comment on several misrepresentations and extraneous complaints in the Petition. Though these issues are ultimately irrelevant to the question of whether to grant or deny rehearing, this mischaracterization of the record is beneath the dignity of any attorney, much less one who speaks on behalf of the Republic.

[¶ 25] First, the Republic contends that the Court's issuance of its opinion in the late afternoon of July 27, 2021, deprived it of the opportunity to submit its Rule 28(g) Letter. Pet. at 6-7, 14. As an initial matter, contrary to the Republic's assertion, the panel did not "*ask*[] for the Rule 28(g) letter from the Republic." *Id.* at 4 (emphasis added). Rather, the Republic was given permission to submit such a letter in order to correct its own shortcomings at oral argument. That permission itself was an act of grace on the part of the Court. Rule 28(g) exits to permit a party to bring to Court's attention "pertinent and significant *authorities* [that] come to a party's attention after the party's brief has been filed, or after oral argument but before decision." ROP R. App. P. 28(g) (emphasis added). It is not usually a means of providing citations to the record that the attorney should have been able to provide during the argument itself. An attorney presenting oral argument is expected to be

thoroughly familiar with the record. "Attorneys who tell a judge they do not know something that occurred at trial demonstrate not only incompetent performance but also disrespect for the court . . . To come to court without complete knowledge of the record is to risk insult to the court—and disaster to the client." Thomas J. Donlon, Am. Bar Ass'n, *The Do Nots of Oral Argument*, *available at* https://bit.ly/37yVimg.

[¶ 26] The attorneys in this case came to oral argument without full knowledge of the record and unprepared to answer basic questions about their own theory of the case. We exercised forbearance and offered the Republic an opportunity to cure this defect by form of a letter. Nothing in our invitation indicated that the Court would wait until the Republic submitted the Letter. Contrary to the Republic's characterization, we did not suggest that the Republic had until July 28, 2021,[9] to tender the Letter to the Court. What the Republic's attorneys should have done, once they realized that they flubbed on the causation issue at oral argument, was to immediately return to the office, review the record, and file the Rule 28(g) Letter that very day. The Republic is obviously fully capable of drafting and filing documents on an expedited basis. For example, the Republic's motion to recuse the panel and motion to vacate the release order, as well as briefs accompanying those motions, were all drafted within the span of two days. The Republic's notice advising the Court that Ms. Ngirakesiil was released without fulfilling all of the conditions of our July 20 Order was drafted and submitted immediately following oral argument. We do not understand why the Republic could not act with the same alacrity in responding to the Court's invitation to point out specific facts in the record that would support sustaining the conviction. Nor do we understand why it was possible for this Court to draft, internally circulate, proof-read, and publish a 17-page opinion in this case within four days of oral argument, but impossible for the Republic to submit a four-page letter in the same timeframe. Perhaps the answer lies in the fact that the Republic chose the opportunity that the Court provided not to answer the question posed by the Court, but to complain about the Court's procedures and invent an entirely new theory of

[9] Similarly, the Republic's complaint that "[t]he Panel issued its opinion before the requested briefing on the Motion to Vacate had been submitted," Pet. at 6, is without merit. Since our disposition of the underlying appeal mooted the motion to vacate the release order, we had no need to complete briefing on that matter, nor address the motion by a separate order. *See Ngirakesiil*, 2021 Palau 23 ¶ 36 n. 13.

the victim's demise.[10] Whatever the reason may be, the Republic has no one to blame but itself for failing to submit the Letter in sufficient time for the Court to consider its contents. In any event, given that the Letter does not actually point to any evidence or testimony which would identify a causal link between Ms. Ngirakesiil's reckless conduct and the victim's death, its submission would have made no difference to the Court's decision-making then and does not make a difference now.

[¶ 27] Next, the Republic asserts that "[t]he Panel . . . conducted its own factual research regarding the likelihood that the victim would have survived if brought to the hospital earlier." Pet. at 14 (citing *Ngirakesiil*, 2021 Palau 23 ¶ 34 n. 11). The Republic simply misreads the footnote. The Court did not reference the study cited in the footnote in support of a finding that the victim was or was not likely to survive. Rather, the Court used the study to explain why it is unable to take judicial notice of the Republic's assurances that emergency trepanation could have been performed and that, had it been performed, it would have saved the victim's life. All the Court said is that such assertions are not so beyond dispute as would be required for this Court to take judicial notice of them. *See* ROP R. Evid. 201(b).

[¶ 28] Finally, the Republic lists several irrelevant and impertinent facts in their brief that have nothing to do with the matter at hand. *See* Pet. at 5. It appears that the only purpose that these recitations serve is to attempt to, through innuendo and insinuation, portray the Court in the negative light. Such behavior treads exceedingly close to the contempt line and potentially invites sanctions. Though we will not go down that route, we hope not to see such filings in the future.

CONCLUSION

[¶ 29] This is a simple matter. The Republic lost the appeal because the prosecution made mistakes during trial by either neglecting to put forth

[10] Not only does the Letter advances a new theory of the cause of death — a theory squarely contradicted by the testimony of the Republic's own witnesses — it also misstates the testimony that the witnesses provided. For example, the Letter asserts that Dr. Roberts testified "that brain bleeds progress slowly." Rule 28(g) Letter at 3. But that is not what Dr. Roberts testified to. Rather, Dr. Roberts stated that "bleeding *can* start small and the patient will do fine and it can take a day... and the bleeding gets, slowly starts getting bigger and start compressing the head and eventually you can die from that." Tr. at 168, ll. 10-28. That is a crucial distinction and the omission of the word "can" from the Republic's argument is evidence of either carelessness or bad faith.

evidence of causation or by bringing charges despite never having such evidence in the first place. In and of itself, that is unremarkable. Mistakes happen, and almost all lawyers make serious mistakes in the course of their careers. *See In re Baird II*, 2021 Palau 17 ¶ 23 ("Lawyers, of course, are human, and as any human, lawyers make mistakes."). The professional response to such errors is to pause, take stock of the situation, and learn from the mistake in hopes that it will not be repeated. Instead of taking that route, the Republic has chosen to bring this unfounded Petition which lacks legal or factual support and instead assigns blame for losing the case to everyone other than the prosecution itself. Such unprofessional behavior reflects poorly on the attorneys, does not serve the interests of the Republic, is prejudicial to the orderly administration of justice, and ultimately has no purchase with the Court.

[¶ 30] Because the Republic has failed to establish that our "original decision 'obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal,'" *Kebekol*, 22 ROP at 74 (quoting *Rengiil*, 20 ROP at 258), the Petition for Rehearing is **DENIED IN ITS ENTIRETY.**