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



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| JAQUEZ DEJUAN BARBER,<br>Appellant,<br>v.<br>THE STATE OF NEVADA,<br>Respondent. | CASE NO: 62649 |

**OPPOSITION TO APPELLANT'S MOTION SUPPLEMENTING THE AUTHORITY PRESENTED IN HIS MOTION TO RECONSIDER THE DENIAL OF HIS MOTION TO FILE JUVENILE COURT DOCUMENTS UNDER SEAL IN THE APPENDIX**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and files this Opposition to Appellant's Motion Supplementing the Authority Presented in his Motion to Reconsider the Denial of his Motion to File Juvenile Court Documents Under Seal in the Appendix. This motion is filed pursuant to NRAP Rule 27 and is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 4th day of December, 2013.

Respectfully submitted,

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Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*

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## ARGUMENT

The opinion in Clay v. Eighth Judicial District Court, 129 Nev. Adv. Op. 91 (November 27, 2013), is inapplicable since Clay did not address this Court's authority over records filed in this Court and did not involve a waiver of jurisdiction by the Juvenile Division of the Eighth Judicial District Court (Juvenile Court). Moreover, Clay was wrongly decided by a panel of this Court and is the subject of a Petition for Rehearing.

The question of whether documents in Appellant's Appendix should be sealed has already been decided. This Court has determined that statutes regulating access to Juvenile Court records do not control records filed with this Court and that such statutes are inapplicable since Appellant was certified to stand trial in the criminal system. (Order, filed October 29, 2013). Appellant sought reconsideration and this Court generously provided the State an opportunity to respond. (Order, filed November 12, 2013, p. 3). Respondent did not take that opportunity because Appellant's request for reconsideration primarily recycled arguments that had been previously presented to and rejected by this Court. However, Appellant's reliance upon Clay is new and must be addressed.

As a preliminary matter, there is no authority allowing for reconsideration of a motion denied by this Court. Appellant admits that his request for reconsideration was brought by way of Nevada Rules of Appellate Procedure

(NRAP) Rule 27. (Appellant's Opposition to State's Motion to Strike Portions of Appellant's Motion to Reconsider Denial of Motion to File Juvenile Court Documents Under Seal in his Appendix, filed October 31, 2013, p. 6). NRAP Rule 40 is inapplicable to this issue. (Order, filed November 12, 2013, p. 2-3). While NRAP Rule 27 is worded broadly, reconsideration of a decided issue is not favored. Whitehead v. Nevada Com'n. on Judicial Discipline, 110 Nev. 380, 388, 873 P.2d 946, 951-52 (1994) ("it has been the law of Nevada for 125 years that a party will not be allowed to file successive petitions for rehearing ... The obvious reason for this rule is that successive motions for rehearing tend to unduly prolong litigation"). As such, this Court should deny reconsideration.

Nor is there authority allowing a party to supplement with the type of additional argument offered by Appellant. The rules of this Court severely restrict the ability of a party to supplement previous filings. A party may file supplemental authorities only where such authority is pertinent and significant. NRAP Rule 31(e). A notice of supplemental authorities is limited to "setting forth the citations … [and] provid[ing] references to the page(s) of the brief that is being supplemented." Id. Such a notice "shall state concisely and *without argument* the legal proposition for which each supplemental authority is cited … [and] *may not raise any new points or issues*. Id. (emphasis added).

Further, Clay is inapplicable. Clay was animated by the belief that "[t]he plain language of NRS 62H.170(2)(c) does not address whether the State may inspect a defendant's sealed juvenile records for the purpose of using them against the defendant in later criminal proceedings." Clay, 129 Nev. Adv. Op. 91, p. 7. Clay dealt with the authority of Juvenile Court to allow inspection of records. Clay did not speak to the obligation of this Court related to records arising out of a criminal proceeding. Indeed, this Court has already distinguished Clay by concluding that NRS 62H.030 "does not expressly address the confidentiality of documents and records filed with this court." (Order, filed October 29, 2013, p. 1).

Moreover, Appellant's reliance upon Clay is misplaced as Clay did not involve a waiver of jurisdiction by Juvenile Court. Clay aged out of the juvenile system and the State sought his juvenile records in order to prosecute charges that arose when he was an adult. Clay, 129 Nev. Adv. Op. 91, p. 2). Even assuming that Clay is a correct statement of the general rule, it is silent as to how the general rule is impacted by certification. The Legislature has vested jurisdiction over certified juveniles with the court to which they are certified: "If a child has been certified for criminal proceedings as an adult ... [t]he court to which the child's case has been transferred has original jurisdiction over the child." NRS 62B.390(5)(a). As such, "[t]he order of the juvenile court transferring a child to the adult court is the final order of the juvenile court in the civil proceedings

pending before it." Castillo v. State, 106 Nev. 349, 351, 792 P.2d 1133, 1134 (1990) (emphasis added). Transfer not only includes jurisdiction over the person of the certified juvenile and his offenses but imparts authority over documents related to both. Thomas v. State, 88 Nev. 382, 385, 498 P.2d 1314, 1316 (1972).

This Court was aware of the general policy "severely restrict[ing] access to official information concerning a minor's involvement in the juvenile justice system in order to protect the child," when it denied Appellant's request to seal. (Order, filed October 29, 2013, p. 2) (quotation marks and citation omitted, brackets added). This Court specifically found that Appellant's certification and the unique procedural posture of this case made the general rule inapplicable:

> But, here, Appellant was certified for criminal proceedings as an adult and was convicted of two felonies as an adult. This appeal is from the judgment of conviction, not the order certifying appellant for criminal proceedings as an adult. Having decided to raise issues that may have been waived by his failure to appeal that order, appellant wants this court to file under seal documents that are part of the record in the juvenile court on which he was certified. The policy giving raise to NRS 62H.030(2) is not implicated in this situation. In particular, the incident giving rise to the case brought in juvenile court is part of the public record by virtue of the criminal proceedings. Cf. Stamps v. State, 107 Nev. 372, 812 P.2d 351 (1991) (explaining that interest in preserving confidentiality of juvenile offender's records was not served by excluding testimony about victim's juvenile records where incident was made public by the trial).

(Order, filed October 29, 2013, p. 2-3).

Further, this Court should not rely upon Clay since the State has filed a Petition for Rehearing.[1] Several arguments offered in the Petition for Rehearing are reproduced here to demonstrate that Clay is not relevant and that reliance upon Clay prior to en banc reconsideration would be unwise.

The Panel should never have decided the issue of whether Juvenile Court had authority to allow the State to inspect Clay's juvenile records. Clay conceded before Juvenile Court that it could release his records to the State and instead only debated the timing of the State's access. Clay, 129 Nev. Adv. Op. 91, p. 2-3. The Panel ignored this Court's precedents declining to address abandoned issues. See, Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 14, 252 P.3d 668 (2011) (issues not raised in an appellant's opening brief are deemed waived and abandoned); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (this Court will not consider an issue on appeal when an appellant fails to raise it before the lower court); Buck v. Greyhound Lines, Inc., 105 Nev. 756, 766, 783 P.2d 437, 443 (1989) (this Court will not consider an issue that is initially raised but then abandoned at argument before the lower court).

The Panel also ignored the rules of statutory interpretation. Where the plain language of a statute is clear there is no basis for interpretation:

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[1] A Petition for Rehearing pursuant to NRAP Rule 40 was filed on December 3, 2013, in the Clay matter under this Court's Case Number 62770.

> It is well established that when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.

State, Dept. of Business and Industry, Office of Labor Com'r v. Granite Construction Company, 118 Nev. 83, 87, 40 P.3d 423, 426 (2002). Accord, Koller v. State, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006); Potter v. Potter, 121 Nev. 613, 616, 119 P.3d 1246, 1248 (2005); State Dept. of Human Resources, Welfare Div. v. Estate of Ulmer, 120 Nev. 108, 113, 87 P.3d 1045, 1049 (2004); Beazer Homes Nevada, Inc. v. Eighth Judicial District Court, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004); State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004); Diamond v. Swick, 117 Nev. 671, 675, 28 P.3d 1087, 1089 (2001); City Council of City of Reno v. Reno Newspapers, Inc., 105 Nev. 886, 893, 784 P.2d 974, 977 (1989).

The plain language of the statute at issue in Clay indicated that "[t]he juvenile court may order the inspection of records that are sealed if … [a] district attorney … petitions the juvenile court to permit the inspection of the records to obtain information relating to the persons who were involved in the acts detailed in the records." NRS 62H.170(2)(c). The Panel manufactured ambiguity by going beyond the statutory text: "The plain language of NRS 62H.170(2)(c) does not address whether the State may inspect a defendant's sealed juvenile records for the purpose of using them against the defendant in later criminal proceedings." Clay,

129 Nev. Adv. Op. 91, p. 7. This conclusion misses the point of the plain meaning rule. NRS 62H.170(2)(c) gives Juvenile Court the authority to allow a district attorney to inspect records *without regard to whom the records will be used against or the proceeding the information will be used in*.

The heart of the Panel's complaint regarding NRS 62H.170(2)(c) was that the statute does not address "whether the State may inspect a defendant's sealed juvenile records for the purpose of using them against the defendant in later criminal proceedings." Clay, 129 Nev. Adv. Op. 91, p. 7. The Panel never explains how it reaches this conclusion. While the statute does not use "defendant," such a limited reading ignores basic law and this Court's precedents.

In Cote H. v. Eighth Judicial District Court, 124 Nev. 36, 37-38, 175 P.3d 906, 907 (2008), this Court refused to grant an extraordinary writ premised upon the view that "person" means less than it ordinarily does since to give effect to the plain meaning would allow the Lewdness with a Minor statute to capture juveniles who were within the class of individuals protected by the statute. Cote H. applied the plain meaning rule to give "person" its ordinary meaning:

> Courts have generally found … that *when a statute contains broad, inclusive terms, such as "any person"* or "whoever," *it is applicable to all perpetrators*, even minors. We conclude that, by its ordinary meaning, *the term "person" is broad and all-encompassing.*"

Id. at 40, 175 P.3d at 908 (footnote omitted, emphasis added).

The Legislature intended such a broad meaning of "person":

> Except as otherwise expressly provided in a particular statute or required by the context, *"person" means a natural person*, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization. The term does not include a government, governmental agency or political subdivision of a government.

NRS 0.039 (emphasis added). Moreover, the Legislature applied this definition to the NRS as a whole: "This Chapter provides definitions … which apply to the Nevada Revised Statutes as a whole." NRS 0.10.

The Legislatively mandated broad definition of "persons" clearly addresses the Panel's concern regarding whether the scope of NRS 62H.170(2)(c) reached criminal defendants. As such, the Panel clearly misapplied the rules of statutory interpretation by ignoring the plain meaning of the text.

The Panel also premised ambiguity upon a joint reading of NRS 62H.170(2)(c) and NRS 62H.170(3). Clay, 129 Nev. Adv. Op. 91, p. 7. However, this too ignores the plain meaning of the text. NRS 62H.170(2)(c) specifically addresses when a district attorney may inspect sealed juvenile records. NRS 62H.170(3) addresses when a court, upon its own motion, may inspect records. To merely contend that "[t]he mention of one thing implies the exclusion of another" is an overly simplistic analysis that avoids all consideration of context. Clay, 129 Nev. Adv. Op. 91, p. 7 (quoting Sonia F. v. Eighth Judicial District Court, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009). Placing this quote in context makes it

clear that the Sonia F. Court concluded that because the Legislature explicitly applied a rule to one proceeding (rape shield law to criminal prosecution) it did not intend to impose the same rule in a different proceeding where it omitted such application (civil sexual assault trials). Sonia F. turned upon the application of the plain meaning rule. Because the text of the rape shield law limited itself to criminal prosecutions, it did not apply to civil suits. 125 Nev. at 499-500, 215 P.3d at 708. As discussed above, application of the plain meaning rule to NRS 62H.170(2)(c) authorized Juvenile Court to allow access to the records.

The substantial defects in Clay warrant caution in applying it to Appellant's situation. Even if this Court is willing to consider Clay, it is not relevant since it relates only to Juvenile Court's authority over records, does not address this Court's authority over records, does not address the fact that the records become publicly available criminal records upon Appellant's certification and is not relevant due to Appellant's failure to appeal the certification order.

## CONCLUSION

WHEREFORE, the State requests that this Court decline to reconsider its order denying Appellant's demand to seal documents in his appendix.

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Dated this 4th day of December, 2013.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 4, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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