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Appellant,

VS.

Respondent.

REPLY TO STATE’S RESPONSE
TO BARBER’S MOTION TO SUPPLEMENT

Comes Now Appellant JAQUEZ DEJUAN BARBER, by and through Deputy Public Defender SHARON G. DICKINSON, and replies to the State's Opposition filed on 12/04/13.

DATED this 10th day of December, 2013.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
Deputy Public Defender

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1 The Order filed on 11/12/13 came about because the prosecutor
2 refused to respond to the Defense Motion to Reconsider, claiming he was
3 confused; and, rather than addressing the motion, he filed his own Motion to
4 Strike an unpublished decision listed within the motion. The State's Motion
5 to Strike was filed on 10/30/13. Based on the State's alleged confusion, the
6 Defense filed an Amended Motion to Reconsider on 10/31/13. The Court
7 granted the State's Motion to Strike an unpublished decision within the
8 motion but otherwise allowed the Defense motion to stand. Thus, this issue
9 was decided and the State never filed a motion asking this Court to
10 reconsider.
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15 **2. Barber's filing of supplemental authorities based on a newly**
16 **published decision.**

17 The State also argues that there is no authority within NRAP that
18 allows for the filing of supplemental authorities (even if the supplement is
19 based on a newly published case), suggesting that NRAP 31 only allows the
20 Defense to reference the name of a case without argument. (Opp. p. 4).
21 However, NRAP 31 refers to BRIEFS and not to motions. Barber filed his
22 supplement to the motion as a motion under NRAP 27.
23

24
25 Oddly, the State never objected to the filing of supplemental points
26 and authorities before, when Barber filed them on 10/29/13 for a different
27 motion. Clearly, the State does not want this Court to look at the newly
28

1 decided case because it is controlling and similar to the unpublished decision
2 the Court struck from Barber's first motion.

3
4 **3. The Court should ignore the State's arguments opposing the**
5 **Motion and Amended Motion to reconsider and the supplemental**
6 **authorities.**

7 The State's arguments opposing the Defense Motion or Amended
8 Motion to Reconsider filed on 10/30/13 and 10/31/13 and the supplemental
9 motion should be ignored based on *Polk v. State*, 126 Nev. Adv. Op. No.
10 19, 233 P.3d 357, 360-61 (2010).
11

12 Under NRAP 27, the State had 7 days to respond to the Defense
13 Motion to Reconsider filed on 10/30/13 or the Amended filed on 10/31/13.
14 NRAP 27 (a)(3)(a). The State chose not to file an Opposition. But, this
15 Court gave the State a second opportunity to file an Opposition when it gave
16 the State 3 days to respond in an Order filed on 11/12/13. Again, the State
17 decided not to oppose the motion.
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20 The State's failure to oppose the Defense Motion for Reconsideration
21 after being given 2 opportunities to respond, is a concession that the motion
22 is meritorious. *See Polk v. State*, 126 Nev. Adv. Op. No. 19, 233 P.3d 357,
23 360-61 (2010). In *Polk*, the State failed to address an issue of constitutional
24 importance raised in the Defendant's Opening Brief. The Defense wrote 4
25 pages addressing the issue within the Opening Brief and mentioned the
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1 State's omission in the Reply. When the State failed to supplement its
2 Answering Brief and instead argued the issue during oral argument, this
3 Court granted the Defense oral motion to disregard the State's argument.
4

5 Likewise, in the case at bar, the State was given numerous chances to
6 respond and chose not to do so until today. Thus, based on *Polk*, the
7 Defendant asks this Court to disregard the State's arguments.
8

9 **4. Motion/Amended Motion to Reconsider contains arguments**
10 **not addressed in previous motion to seal documents.**

11 The State claims that it did not file an Opposition to Barber's Motion
12 (Amended Motion) to Reconsider because it "primarily recycled arguments"
13 previously rejected by this Court. Opp. P. 3 (No lines on paper to cite to).
14 But, the State misleads this Court by making this inaccurate statement.
15
16

17 The Motion (Amended Motion) asking for reconsideration was filed
18 after Defense Counsel learned that Barber was already over the age of 21
19 years at the time he sought to seal his juvenile court documents in the
20 Nevada Supreme Court. While the original motion to seal documents relied
21 on NRS 62H.030, the motions to reconsider the denial of the motion to seal
22 added the following statutes: NRS 62H.140, NRS 62H.170, and NRS
23 239.010 coupled with the fact that Barber was over the age of 21 years and
24 under the applicable statutes all of his records were required to be
25 automatically sealed.
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1 Based on *Polk*, the State should be precluded from making any
2 arguments based on NRS 62H.030, NRS 62H.140, NRS 62H.170, and NRS
3 239.010.
4

5 **5. Clay v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. No. 91**
6 **(11/27/13).**

7 The Clay decision mirrors the unpublished decision this Court struck
8 from Barber's Motion/Amended Motion to reconsider. Yet, the State
9 contends that Clay "was wrongly decided" and notes that it is currently
10 subject of a Petition for Rehearing. Opp. P. 3.
11

12
13 ***a. No authority for a Petition for Rehearing.***

14 As a preliminary matter, there is no authority allowing the State to file
15 a Petition for Rehearing under NRAP 40 when this Court decides a Writ. A
16 party may file a Petition for Rehearing from a "filing of the court's decision
17 under Rule 36." NRAP 40 (a)(1). NRAP 36 only allows for the filing of a
18 Petition for Rehearing when: "The filing of the court's decision or order
19 constitutes entry of the judgment."
20
21

22 A decision from a Writ does not constitute an entry of judgment as
23 required by NRAP 40 and NRAP 36 because it does not conclude the case
24 and does not result in the issuance of a remittitur. By its very nature, a Writ
25 challenges a procedural order or may be used when the parties have no
26 ability to appeal. The Court will decide a Writ when "the circumstances
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1 establish urgency or strong necessity, or an important issue of law requires
2 clarification and public policy is served by this court's exercise of its
3 original jurisdiction." *Clay* at p. 4 citing *Schulster v. Eighth Judicial Dist.*
4 *Court*, 123 Nev. 187, 190 (2007).
5

6 ~~The *Clay* Court held that his petition was a Writ of Mandamus which~~
7
8 "may issue to compel the performance of an act that the law requires 'as a
9 duty resulting from an office, trust or station' NRS 34.160, or to control an
10 arbitrary or capricious exercise of judgment." *Clay* p. 4, citing *Round Hill*
11 *Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04 (1981). Thus, the
12 *Clay* decision is not an entry of judgment but a decision on a pretrial matter.
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15 . The *Clay* decision also is not an entry of judgment because the
16 Court did not issue a remittitur. Under NRAP 41, the Court will issue a
17 remittitur 25 days after an entry of judgment, unless a party files a Petition
18 for Rehearing or Petition for En Banc Reconsideration. See NRAP 41. But,
19 the Court never issues a remittitur after deciding a Writ. Thus, under the
20 Nevada Supreme Court Rules, a decision entered by this Court based on a
21 Writ is not an entry of judgment, it does not conclude the case, and therefore
22 does not allow the parties to file further Petitions such as a Petition for
23 Rehearing. To find otherwise would result in endless litigation of pre-trial
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1 procedural matters by the parties filing further petitions after a denial of a
2 petition.

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4 The State should know that NRAP 40 does not apply to a pre-trial
5 procedural matter that this Court decides by way of a Writ because this
6 Court explained the difference between NRAP 40 and NRAP 27 in the
7 Order issued in the Barber case on 11/12/13, p. 2, when the State claimed it
8 was confused.
9

10
11 *b. Clay is dispositive.*

12 Although the State claims *Clay* is inapplicable, *Clay* illustrates this
13 Court's decision to maintain the confidentiality of juvenile court records
14 after a child reaches the age of adulthood and prohibits the use of the
15 juvenile court records against the defendant in another case. While *Clay*
16 involved the release of juvenile court documents for inspection and use by
17 the State in another case, here, the juvenile court records are being made
18 public. Here, the issue is more serious because the Court gave the general
19 public access to the juvenile court documents. The *Clay* issue is similar to
20 the Court's decision allowing Barber's past juvenile history to be made
21 available to the public because both issues address the confidentiality of
22 juvenile court records.
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1 Yet, the State argues that all juvenile court documents are available
2 based on the certification waiver. But, the State is not able to recite any
3 portion of the certification waiver where Barber specifically waived the
4 confidentiality of the juvenile court documents and records.
5

6 ~~The State's argument that the adult court has personal jurisdiction~~
7
8 over Barber and thus jurisdiction over the juvenile court documents is a red
9 herring. The certification does not give the adult court authority and access
10 to juvenile court documents and does not waive confidentiality. Moreover,
11 as expressed within Barber's motion, this Court misunderstood the facts
12 when concluding that all the juvenile court records are now part of the adult
13 records.
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16 *c. Clay decision is the correct decision.*
17

18 The State claims Clay was incorrectly decided. But, in doing so, the
19 State argues that the issue was abandoned and therefore should not be
20 decided. Here, and in the incorrectly filed Petition for Rehearing, the State
21 further claims that the *Clay* Court "manufactured ambiguity" and "launched
22 into an erroneously application of the rules of statutory construction" and
23 "does not explain how it reached this conclusion" and contends the Court
24 should not be permitted to rewrite a statute when analyzing NRS 62H.170.
25 (Opp. p. 8, 10; Rehearing, p. 13, 17).
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1 The State is simply incorrect. The *Clay* decision should stand.

2 DATED this 10th day of December, 2013.

3
4 PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

5
6 By /s/ Sharon G. Dickinson
7 SHARON G. DICKINSON, #3710
8 Deputy Public Defender

9
10 **CERTIFICATE OF SERVICE**

11 I hereby certify that this document was filed electronically with
12 the Nevada Supreme Court on the 10th day of December, 2013. Electronic
13 Service of the foregoing document shall be made in accordance with the
14 Master Service List as follows:

15
16 CATHERINE CORTEZ MASTO SHARON G. DICKINSON
17 STEVEN S. OWENS HOWARD S. BROOKS

18 I further certify that I served a copy of this document by
19 mailing a true and correct copy thereof, postage pre-paid, addressed to:
20 JAQUEZ DEJUAN BARBER, NDOC No: 1039024, c/o High Desert State
21 Prison, P.O. Box 650, Indian Springs, NV 89070.
22

23
24 BY /s/ Carrie M. Connolly
25 Employee, Clark County Public
26 Defender's Office
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