

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,

Case No. 69036

Appellant,

-vs-

FILED

SEP 12 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

THE STATE OF NEVADA

Respondent.

PETITION FOR REHEARING, NRAP 40,
ORDER DENYING MOTIONS AND STRIKING
APPENDIX WHICH MANDATES JUDICIAL
NOTICE OF 3RD TRIAL JURY INSTRUCTIONS
PER "SHALL" IN NRS 47.150(2) AS
DEFINED PAR EXCELLENCE IN GOUDGE V.
STATE, 287 P.3d 301, 304 (NEV. 2012)

COMES NOW, Brian O'Keefe, pro-se, to humbly again request this Court to REHEAR, NRAP 40, considering that the jury instructions particularly were never reviewed by this Court. The continual side-stepping the law of the case violates multiple due process violations depriving federal equal protection of the law on top of violating the Nevada Constitution, article 1 § 8. Even "Judges" are impervious to state statutes, i.e. NRS 47.150 (2) and NRS 0.025 (1)(d), NRAP 1. This Petition is

supported by the following POINTS AND AUTHORITIES.

SEP 28 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

Filed September 6, 2016 pursuant NRS 288.165; Respectfully Submitted
Accord HAINES + KERNER, 404 U.S. 571 28 USC § 1746 Dan K. O'Keefe # 90244

16-28218

• POINTS AND AUTHORITIES

Procedural due process, as the 14th U.S. Amend. prohibits the state from denying a person of liberty equally applied to all others. Here, the liberty interest results from a state statute which is not being consistently applied in a manner to comport with EQUAL PROTECTION.

The state statute NRS 47.150(2) was lifted on petitioners filed Judicial Notice which mandates that when the court is supplied with the documentation, NEVER REVIEWED, that the court "SHALL" take judicial notice.

The jury instructions ("5.1.1.1") which are not only the gravamen of the judicial notice, but are indeed the cornerstone for the law-of-the-trial in any case.

However, this court "misapplied" the "statute" to take judicial notice - cognizance. (NRAP, R. 40(c)(2)(B))

Shall is defined in the Supreme Court Rules, passim. See SCR, R. 2 ("shall" is mandatory and "may" is permissive.")

This creates "an obligation impervious to even judicial discretion." • Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998). This Court's in direct conflict also with • Goudge v. State, 287 P.3d 301, 304 (Nev. 2012), a "decision directly controlling a dispositive issue in the case." (R. 40(c)(2)(B))

"The use of the word "SHALL" in the statute divests courts of discretion." Ibid. (citing Otah Nev. Loc. v. Dist Ct., 260 P.3d 408, 411 (Nev. 2011)) (the word "shall" imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute.) (NRS 0.025(1)(d))

While the clerk is required to include the J.I.'s in the Transmission of Record, NRAP, R. 30 (b)(2)(D), they were misfiled under an erroneous case number, C250360, which is an impediment external to petitioner's control resulting in this Court "overlooking [...] a material fact in the record [...]". Rule 40(c)(2)(A). Surely, these extraordinary circumstances satisfy Good Cause for leave to file.

N.B., the Court's Order denying, (Sept. 1, 2016), says "most" of the exhibits are on file, clearly implying not all of them.

Nevertheless, reading a Good Cause / Leave Standard into NRS 47.150(2) "'do[es] violence to the fair meaning of the words used'", Nat'l Fed. of Indep. Bus'n v. Sebelius, 132 S.Ct. 256, 261 (2012) (joint dissent) (quoting Grenada City Supers v. Brogden, 112 U.S. 261, 269 (1884)), "pervert[es] the purpose of a statute," *ibid.* (quotations omitted), and "judicially rewrite[s] it." *Ibid.* The Court is legislating from the bench violating Nev. Const., article 3, § 1(1).

Moreover, this Court commits another Abuse of Discretion by raising a defense which is required to be raised by the opposing party upon a motion. See Id. Resources Inc. v. Freeport-McMoran Gold Co., 110 Nev. 459, 461 (1994) (it was error for the court to raise a defense nobody pleaded). A judge cannot play in compatible roles of arbiter and adversary. Williams v. Penn, 2016 U.S. LEXIS 3774 (U.S. 2016); Hurles v. Ryan, 650 F.3d 130, 134 (4th Cir. 2014).

Even if J.I.'s could be struck — though statutes supersede court rules, any court rule can be set aside by NRAP, R. 2, to comply with Substantive Justice under NRCivP, R. 8(A), and SCR, R. 5 — NRCivP, R. 12(A), states that the matter must be redundant, immaterial, impertinent, or scandalous, or raise an insufficient defense. A "matter" is an intangible issue, not

a corporeal exhibit, on litigation. Cf. Whittlestone, Inc. v. Hardi-Craft, 618 F.3d 970, 973 (9th Cir. 2010). This Court did not even attempt to apply the R. 12(A) standard, completely "[fai]ling]" to consider the proper analysis of this "procedural rule [.]". R. 40(c)(2)(A). Nothing in the mandatory J.I.'s are redundant, immaterial, impertinent, much less scandalous as defined in German Music v. Universal Songs of Polygram, 275 F.Supp.2d 1288, 1299-1300 (D. Nev. 2003). In a prior Order, this Court reprimanded counsel for failing to provide the J.I.'s, evincing the lack of J.I.'s in the present appeal due to the aforementioned FALSE case number. As such, this Court must strike the prior Judge's order to strike appendix since it is based on an insufficient defense. The other exhibits also provide context for the crux of the Judicial Notice, i.e., the J.I.'s.

What's most puzzling is the Court's bifurcation of the Judicial Notice, extricating the necessary J.I.'s. Without the J.I.'s, this Court will surely "misapprehend[]" a crucial "material question of law in the case," Rule 40(c)(2)(A), as it has in the prior order. This is a "clearly erroneous assessment of the evidence." Cooter & Gell v. Hartman Corp., 496 U.S. 384, 405 (1990).

CONCLUSION

Reconsideration is justly warranted due to blatant disregard for controlling law, Bergman v. Boyce, 109 Nev. 670, 674 (1993); NRS 47.150(2); NRS 0.025(1)(d); NRAP RULE 1; U.S. 14th Constitutional Amendment; Nevada Constitution, ARTICLE 1 § 8; see also Goudge v. State, *supra*.

Pursuant NRS 208.165 DATED Sept. 6, 2016.
28 USC § 1746

Dr. L. O'Kaff
#90244

CERTIFICATE OF SERVICE

I do certify that I mailed a true and correct copy of the foregoing
(check appropriate box)

☐ Opening Brief

☐ Reply Brief

☐ Motion: _____

☒ Petition: Petition for Rehearing ... (Nev. 2012)

☐ Other: _____

to the below address(es) on this 6th day of September, 2016, by
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Clerk of the Court

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☐ and

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_____, Nevada 89_____

Respectfully
Submitted,

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Petitioner

In Pro Se