

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 A.J)
3 Petitioner.) Supreme Court No. 70119
4 vs.) Electronically Filed
5 EIGHTH JUDICIAL DISTRICT COURT) Jun 30 2017 08:10 a.m.
6 JUDGE OF THE STATE OF NEVADA,) Elizabeth A. Brown
7 IN AND FOR THE COUNTY OF CLARK ;) Clerk of Supreme Court
8 AND THE HONORABLE WILLIAM O.)
9 VOY, DISTRICT JUDGE,)
10 Respondent,)
11 and)
12 THE STATE OF NEVADA,)
13 Real Party in interest)

14 **PETITION FOR REHEARING**

15 COMES NOW the Clark County District Attorney STEVEN B.
16 WOLFSON, through Director District Attorney Brigid Duffy, on behalf of
17 the State of Nevada and submits this Petition for Rehearing of the published
18 opinion issued by a Panel of this Honorable Court. This Petition is based on
19 the following memorandum and all papers and pleadings on file herein.

20 DATED this 29th day of June, 2017.

21 Respectfully submitted,

22 STEVEN B. WOLFSON
23 Clark County District Attorney
24 Nevada Bar #001565

25 BY Brigid Duffy
26 BRIGID J. DUFFY
27 Director District Attorney
28 Juvenile Division
Nevada Bar #006961

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**¹

3 Petitioner sought extraordinary relief in this Court on April 11, 2016.
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5 This Court directed Respondents to file an Answer within fifteen (15) days
6 of the Order. On June 9, 2016, Respondent filed its Answer to the Petition.
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8 On January 27, 2017, this honorable Court filed an Order Submitting for
9 Decision without Oral Argument. June 1, 2017, the Opinion was filed
10 granting Petitioner's writ.

11 This Petition for Rehearing follows.

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13 **LEGAL ARGUMENT**²

14 This Court may consider rehearing “[w]hen the court has overlooked
15 or misapprehended a material fact in the record or a material question of
16 law’ or ‘has overlooked, misapplied or failed to consider a statute,
17 procedural rule, regulation or decision directly controlling a dispositive issue
18 in the case.”³

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21 Here, the Panel misapplied controlling case law and in a published
22 decision the Panel went against all other Nevada and United States Supreme
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26 ¹ The Statement of the Case and Statement of Facts are substantially the same as those in Respondent's
27 Answering Brief; the Statement of the Case is updated here. The Statement of Facts in the brief is
28 incorporated here by reference.

² The State incorporates by reference all arguments raised in the prior Petition and Reply.

³ McConnell v. State, 121 Nev. 25, 26, 107 P.3d 1287, 1288 (2005) (quoting Nevada Rules of Appellate
 Procedure Rule 40(c)(2)).

1 Court precedence regarding statutory construction. For the sake of
2 uniformity of decisions, the State respectfully requests a rehearing.
3 Furthermore, the court misapprehended a material fact when it continually
4 referred to a "fictitious charge" filed by the District Attorney's Office.
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6 **I. The Panel misapplied controlling case law regarding statutory**
7 **construction and created new precedence in the State of**
8 **Nevada.**

9 In its decision the panel ignored both the United States Supreme Court
10 and this Court's precedence of how statutes are to be interpreted. The court
11 must first look at the statute's plain language. If the plain language is
12 unambiguous, it does not look beyond the plain meaning to determine its
13 meaning.
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15 In the Petition for Writ of Mandamus or Prohibition the petitioner did
16 not indicate where the ambiguity in the language occurs. This Court, despite
17 not finding any ambiguity in the language of the statute, decided to use
18 extrinsic interpretive aides, namely legislative history, to determine that the
19 Nevada State Legislature intended an interpretation outside the plain
20 meaning of the statute. This Court did not find that it was an absurd result
21 that the State was given explicit discretion, but found instead that it was
22 contrary to public policy. This is an overreach of judicial power and sets
23 dangerous precedent in a published decision. The United States Supreme
24 Court makes clear that courts should begin with the statutory text, because
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1 the text of the statute is what is voted on and enacted, as such, it is the
2 clearest evidence of legislative intent. *Sebelius v. Cloer*, 133 S. Ct. 1886,
3 1893 (2013) (“As in any statutory construction case, ‘[w]e start, of course
4 with the statutory text,’ and proceed from the understanding that ‘[u]nless
5 otherwise defined; statutory terms are generally interpreted in accordance
6 with their meaning.’” (quoting *BP America Production Co. v. Burton*, 549
7 U.S. 84, 91 (2006))); *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas
8 J., concurring) (“Congress’ intent is found in the words it has chosen to use.
9 Even if the proper interpretation of a statute upholds a ‘very bad policy,’ it
10 ‘is not within our province to second-guess’ the ‘wisdom of Congress’
11 action’ by picking and choosing our preferred interpretation. .”) (quoting
12 *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003)); Nevada case law accords
13 with the US Supreme Court, it directs courts to begin its interpretation with
14 the plain text. *Sheriff, Pershing Cty. v. Andrews*, 128 Nev. Adv. Op. 51, 286
15 P.3d 262, 263 (2012); *In re Nevada State Eng’r Ruling No. 5823*, 128 Nev.
16 Adv. Op. 22, 277 P.3d 449, 453 (2012). A majority of the cases that this
17 Court cited to support the assertion that ambiguity is not always a
18 prerequisite are not binding on this Court and is setting new precedence for
19 Nevada.⁴

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28 ⁴ *Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648 (9th Cir. 1988); *U.S. v. U.S. Steel Corp.*, 482 F.2d 439, 444 (7th Cir. 1973); *C.I.R. v. Mercantile Nat. Bank at Dallas*, 276 F.2d 58 (5th Cir.

1 Since NRS 62C.240's plain language is facially clear, and this Court
2 has not stated otherwise, the Court should not have gone beyond its plain
3 language. However; this Court began its analysis of NRS 62C.240 by
4 looking at legislative history. In order to take this step, the Court quoted
5 *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196 (2010): "[T]his
6 court determines the Legislature's intent by evaluating the legislative history
7 and construing the statute in a manner that conforms to reason and public
8 policy." ⁵However, two sentences prior, the *Great Basin* Court states, "To
9 determine legislative intent, this court will not go beyond a statute's plain
10 language if the statute is facially clear." *Great Basin Water Network*, 126
11 Nev. at 196.

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13 If this case is permitted to continue as published precedence in
14 Nevada it removes from the prosecutor the ability to make charging
15 decisions and cases would be determined by the original arrest charge of the

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21 1960); *U.S. v. Korpan*, 237 F.2d 676 (7th Cir. 1956); *Nippon Kogaku (USA), Inc. v. U. S.*, 673 F.2d 380
22 (C.C.P.A. 1982); *Rota v. Brotherhood of Ry., Airline and S. S. Clerks*, 338 F. Supp. 1176 (E.D. Pa. 1972);
23 *Burlesque Artists Ass'n v. American Guild of Variety Artists*, 187 F. Supp. 393 (S.D. N.Y. 1958); *Area G*
24 *Home and Landowners Organization, Inc. (HALO) v. Anchorage*, 927 P.2d 728 (Alaska 1996); *Friends of*
25 *Makakilo v. D.R. Horton-Schuler Homes, LLC*, 134 Haw. 135, 338 P.3d 516 (2014); *State v. Ui*, 66 Haw.
26 366, 663 P.2d 630 (1983); *Biggiam v. Board of Trustees of Community College Dist. No. 516*, 154 Ill.
27 App. 3d 627 (2d Dist. 1987); *People on Complaint of Hughes v. Ziegler*, 29 Misc. 2d 429, 214 N.Y.S.2d
28 177 (Magis. Ct. 1961); *Pennsylvania Ass'n of State Mental Hospital Physicians, Inc. v. State Employees*
Retirement Bd., 484 Pa. 313 (1979); Broida, A Guide to Merit Systems Protection Board Law & Practice,
Ch. 17(I)(C)(6) (2006); Lamonica and Jones, 20 Louisiana Civil Law Treatise Series: Legislative Law and
Procedure Handbook § 7:10 (2005); Carroll, Whose Statute is it Anyway?: Why and How Courts Should
Use Presidential Signing Statements When Interpreting Federal Statutes, 46 Cath. U. L. Rev. 475 (1997);
Claiborne, The Perils of the Capper-Volstead Act and Its Judicial Treatment: Agricultural Cooperation and
Integrated Farming Operations, 38 Willamette L. Rev. 263 (2002).

⁵ Opinion at page 8

1 police, even if the prosecutor chose not to file the specific charge. For
2 example; police routinely arrest 16 year olds on an allegation of attempt
3 murder, which by statute is an allegation outside the jurisdiction of the
4 juvenile court⁶. However; if upon review of the police submission the
5 prosecutor files a lesser charge like assault with a deadly weapon, the 16
6 year old would remain in the juvenile system. However; the logic of this
7 Court's decision opens the argument that the child is outside the juvenile
8 courts jurisdiction because the arrest was for attempt murder. Put in the
9 words of the Petitioner's Statement of Issue it would read as follows;
10 "Whether NRS 62B.330(3) applies to juveniles, ages 16 and above, who are
11 arrested for attempt murder, demonstrated clearly by the referral charge,
12 underlying facts of the arrest, or other persuasive evidence, even when the
13 District Attorney leaves the words "attempt murder" off of the delinquency
14 petition that is filed as a result of the core operative facts". An incredibly
15 dangerous precedent set by this Court's decision. If this Court continues to
16 ignore Nevada precedence and proceed to review the legislative history to
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25 ⁶ NRS 62B.330(3) For the purposes of this section, each of the following acts shall be deemed
26 not to be a delinquent act, and the juvenile court does not have jurisdiction over a person who is
27 charged with committing such an act: (a) Murder or attempted murder and any other related
28 offense arising out of the same facts as the murder or attempted murder, regardless of the nature
of the related offense, if the person was 16 years of age or older when the murder or attempted
murder was committed. (Added to NRS by 2003, 1029; A 2009, 50; 2013, 713, 1527, 2901)

1 determine the intent of NRS 62C.240; this Court should ensure to consider
2 the legislative history in its entirety.

3 Jason Frierson, then Chair of the Interim Committee on Child Welfare
4 and Juvenile Justice was cited as evidence of the intent of the statute. The
5 Court focuses on Speaker Frierson's use of the word "arrest" in his
6 testimony.⁷ This Court however; fails to include this exchange on March 3,
7 2015, in the Assembly Judiciary where Mr. Frierson states: I do not want to
8 speak for the intent of the bill. It was my understanding that the three
9 subsections under section 4 apply only to the charge of soliciting to engage
10 in prostitution, not any other charges. If they were charged with anything
11 else, the intent of the language was to apply specifically to a charge of
12 soliciting. *Hearing on A.B.153 Before the Assembly Judiciary Comm. 78th*
13 *Leg. (Nev., March 3, 2015)*. On that same day in testimony, Professor
14 Berkheiser testified that it is her understanding that this legislation does not
15 exempt an individual from delinquency prosecution for crimes other than
16 solicitation of prostitution. She continues on to say we are only talking
17 about "prostitution related crimes, not other crimes". And she offers to
18 clarify section 4 subsection 2 of the original bill and that "we would be
19 amenable to that". *Id.* Prior to introduction in the Nevada State Senate,
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⁷ Opinion pg. 9

1 Amendment No. 152 was filed. *78th Session of the Nevada State Legislature*
2 *(2015)*The bill sponsor, Assemblyman Araujo, testified before the Senate
3 Judiciary committee that, “we have worked diligently to ensure we had a bill
4 everyone could rally around and would have the support needed to move it
5 forward.” *Hearing on A.B.153 Before the Senate Judiciary Comm. 78th Leg.*
6 *(Nev., April 29, 2015)* Ms. Roske testifies; “this bill has changed quite a bit
7 during the legislative process.” *Id.* “I represent children who have been
8 arrested and prosecuted for engaging in or soliciting acts of prostitution.
9 This is an important first step toward a true safe harbor bill to decriminalize
10 prostitution for children.” *Id.* There is no reference to “prostitution related
11 crimes” in the oral testimony or in the questions of the Senate committee.
12 The only acts discussed were solicitation and prostitution, if the intent was
13 to add any other offenses that intent is not found in any of the testimony
14 during the hearing before Senate Judiciary. The written testimony of
15 Professor Berkheiser discusses other state’s safe harbor laws and indicates
16 that those states grant “immunity from prosecution for prostitution-related
17 offenses”. *Id.* “AB 153 takes a hybrid approach, by providing that a minor
18 who is suspected of engaging in prostitution or the solicitation of
19 prostitution be placed under the supervision of the juvenile court”. *Id.*
20 Professor Berkheiser does not mention “prostitution related charges” as
21 being included in amended AB 153 and she has the knowledge of the other
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1 state's safe harbor laws, if that was her intent then it should have been made
2 clear for the legislature to vote on. If Professor Berkheiser or Ms. Roske had
3 a different intent they should have made that clear to the policy making body
4 of the Nevada State Legislature, instead, they are attempting to use this
5 Honorable Court to insert its intent over the State Legislature's. Ms. Duffy,
6 on behalf of the Juvenile Division of the Clark County District Attorney's
7 Office, testified in support of the bill and specifically acknowledged
8 appreciation for "working with the sponsors to get the language to work with
9 our system." *Id.* It is now not this honorable court's job to act as a super
10 legislature and place the Court's desired policy on what the legislative body
11 was provided testimony on and voted unanimously on.
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16 **II. The Court's Reference to a "Fictitious Charge" by the District**
17 **Attorney Misapprehended Material Facts.**

18 In the Opinion this Panel referred to the charge of Obstructing a
19 Public Officer in A.J.'s initial petition as fictitious.⁸ However, the
20 declaration of arrest clearly sets forth facts establishing the offense of
21 Obstruction⁹. When officers made contact with A.J. she refused to provide
22 both her name and date of birth, thus, she committed the offense of
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26 ⁸ See Opinion pages 8,10. See also Black's Law Dictionary 2nd. Ed definition of Fictitious; founded on a
fiction; having the character of a fiction; false, feigned, or pretended.

27 ⁹ NRS 197.190 **Obstructing Public Officer.** Every person who, after due notice, shall refuse or
28 neglect to make or furnish any statement, report or information lawfully required of the person by any
public officer, or who, in such statement, report or information shall make any willfully untrue, misleading
or exaggerated statement, or who shall willfully hinder, delay or obstruct any public officer in the discharge
of official powers or duties, shall, where no other provision of law applies, be guilty of a misdemeanor.

1 Obstructing a Public Officer. Upon receipt of the request for prosecution a
2 Deputy District Attorney reviewed the declaration of arrest and filed a
3 charge that could be proven beyond a reasonable doubt if the case were to
4 proceed to trial. There was not a review of the declaration and decision to
5 charge an offense that was false and/or not fully supported by the facts
6 alleged. This panel's reference to the charge as fictitious necessarily accuses
7 the District Attorney's office of engaging in prosecutorial misconduct by
8 filing charges that are either false and/or not fully supported by the
9 evidence.¹⁰ Such an accusation has the potential for far reaching and
10 detrimental consequences.
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14 In *In Re Halverson*, this Court reiterated the importance of
15 maintaining public confidence in the legal system. This Court stated "an
16 effective justice system requires public confidence (...) [i]t is important not
17 only that the integrity of the judiciary be preserved but that the appearance
18 of that integrity be maintained." *In re Halverson* 123 Nev. 493, 522 (2007).
19 The vital role that public confidence plays in maintaining the legal system is
20 underscored by the very existence of rules that govern the professional
21 conduct of both judges and attorneys; people tasked with imposing the
22 governing laws in this state. If confidence in the system tasked with
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27 ¹⁰ See Nevada Rules of Professional Conduct; Rule 3.8(a) Special Responsibilities of a Prosecutor. The
28 prosecutor in a criminal case shall: refrain from prosecuting a charge that the prosecutor knows is not
supported by probable cause.

1 imposing the governing laws begins with wane, the very foundation of that
2 system is at risk and the system may no longer be effective.

3 The tone of the opinion is antagonistic towards the District Attorney's
4 office. "The legislative history of NRS 62C.240 indicates that the
5 Legislature intended for the conduct and circumstances surrounding than
6 arrest to trigger NRS 62C.240, not the fictitious conduct the district attorney
7 alleges in the petition"¹¹ The opinion has a chilling effect upon prosecutors
8 by raising the specter of prosecutorial misconduct through the alleged filing
9 of fictitious charges when in fact the Clark County District Attorney's office
10 has worked diligently with system partners to help protect victims of sex
11 trafficking. The attack on the District Attorney's Office in a published
12 decision is unwarranted because the assertions that the charge of Obstructing
13 a Public Officer is fictitious are unfounded and a misrepresentation of fact.
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18 DATED this 29th day of June, 2017.

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20 Respectfully submitted,

21
22 STEVEN B. WOFLSON
23 Clark County District Attorney
24 Nevada Bar #001565

25 BY Brigid J. Duffy
26 BRIGID J. DUFFY
27 Director District Attorney
28 Juvenile Division
Nevada Bar #006961

¹¹ Opinion pg. 8

VERIFICATION


STATE OF NEVADA)
COUNTY OF CLARK) ss:

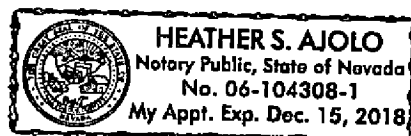
BRIGID DUFFY, being first duly sworn, deposes and says:

That she is the Chief Deputy District Attorney acting for STEVEN B. WOLFSON, District Attorney and the Petitioners in the above captioned Petition; that she has read the foregoing PETITION FOR REHEARING and knows the contents therein and that the same is true and correct to her own knowledge except as to those matters therein set forth on information and belief and as to those matters she believes same to be true. The Petitioner has no other remedy at law available, and that the only means to address this issue is through the instant petition. Counsel signs this verification on behalf of the Department of Family Services, under its direction and authorization.


BRIGID J. DUFFY

SUBSCRIBED AND SWORN to
before me this 29th day of June, 2017
by: BRIGID J. DUFFY


Notary Public in and for said
State and County



CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this petition for rehearing/reconsideration or
3 answer complies with the formatting requirements of NRAP 32(a)(4), the
4 typeface requirements of NRAP 32(a)(5) and the type style requirements of
5 NRAP32(a)(6) because it has been prepared in a proportionally spaced
6 typeface using Microsoft Word 2003 in 14 point font of the Times New
7 Roman style.
8
9

10 2. I further certify that this petition complies with the page or type-
11 volume limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6),
12 because it is either proportionately spaced, has a typeface of 14 points or
13 more and contains 3758 words and 395 lines of text.
14

15 Dated this 29 day of June, 2017.
16
17

18 Respectfully submitted,
19

20 STEVEN B. WOFLSON
21 Clark County District Attorney
22 Nevada Bar #001565

23 BY Brigid J. Duffy
24 BRIGID J. DUFFY
25 Director District Attorney
26 Juvenile Division
27 Nevada Bar #006961
28

CERTIFICATE OF MAILING

I hereby certify that service of the **PETITION FOR REHEARING**
was made this 29th day of June, 2017, by depositing a copy in the U.S.


Mail, postage pre-paid and addressed to the following:

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