

IN THE SUPREME COURT OF THE STATE OF NEVADA

A.J

Petitioner.

vs.

EIGHTH JUDICIAL DISTRICT COURT

JUDGE OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF CLARK;

AND THE HONORABLE WILLIAM O.

VOY, DISTRICT JUDGE,

Respondent,

and

THE STATE OF NEVADA,

Real Party in interest

) Supreme Court No. 70119

)
) Electronically Filed
) Aug 07 2017 09:19 a.m.
) Elizabeth A. Brown
) Clerk of Supreme Court

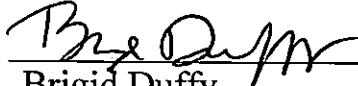
PETITION FOR EN BANC RECONSIDERATION

COMES NOW the Clark County District Attorney STEVEN B. WOLFSON, through Director District Attorney Brigid Duffy, on behalf of the State of Nevada and submits this Petition for En Banc Reconsideration of the Published Opinion issued by a Panel of this Court. This Petition is based on the following memorandum and all papers and pleadings on file herein.

DATED this 7th day of August, 2017.

Respectfully submitted,

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

BY 
Brigid Duffy
Director District Attorney
Juvenile Division
Nevada Bar #006961

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**¹

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4 Petitioner sought extraordinary relief in this Court on April 11, 2016. This
5 Court directed Respondents to file an Answer within fifteen (15) days of the Order.
6 On June 9, 2016, Respondent filed its Answer to the Petition. On January 27, 2017,
7 this honorable Court filed an Order Submitting for Decision without Oral Argument.
8 June 1, 2017, the Opinion was filed granting Petitioner's writ. On June 30, 2017, the
9 State filed a Petition for Rehearing. On July 27, 2017, that request was denied.
10

11 This Petition for En Banc Reconsideration follows.
12

13 **LEGAL ARGUMENT**²

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15 “En banc reconsideration is appropriate when needed to preserve precedential
16 uniformity or the matter presents issues involving substantial precedential,
17 constitutional or public policy value.” Choy v. Ameristar Casinos, Inc., 128 Nev.
18 Adv. Op. 29, p. , 279 P.3d 191, 192 (2012) (citing, NRAP Rule 40A(a)). This matter
19 deals directly with substantial precedential issues concerning statutory interpretation,
20 as well as substantial public policy issues in addressing Sexually Exploited Youth in
21 our Juvenile Justice System, giving this Court grounds for reconsideration under
22 NRAP Rule 40A(a).
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28 ¹ The Statement of the Case and Statement of Facts are substantially the same as those in Respondent's Answering Brief; the Statement of the Case is updated here. The Statement of Facts in the brief is incorporated herein by reference.

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

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2 **I. En Banc Reconsideration is Necessary to Preserve Uniformity of this**
3 **Court's Prior Decisions**

4 In a published decision the Panel ignored both the United States Supreme Court
5 and this Court's precedence of how statutes are to be interpreted. The court must first
6 look at the statute's plain language. If the plain language is unambiguous, it does not
7 look beyond the plain meaning to determine its meaning.
8

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

12 Since NRS 62C.240’s plain language is facially clear, and this Court has not
13 stated otherwise, the Court should not have gone beyond its plain language. However;
14 this Court began its analysis of NRS 62C.240 by looking at legislative history. In
15 order to take this step, the Court quoted *Great Basin Water Network v. Taylor*, 126

22 ³ *Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co.*, 864 F.2d 648 (9th Cir. 1988); *U.S. v. U.S. Steel Corp.*, 482
23 F.2d 439, 444 (7th Cir. 1973); *C.I.R. v. Mercantile Nat. Bank at Dallas*, 276 F.2d 58 (5th Cir. 1960); *U.S. v. Korpan*, 237
24 F.2d 676 (7th Cir. 1956); *Nippon Kogaku (USA), Inc. v. U. S.*, 673 F.2d 380 (C.C.P.A. 1982); *Rota v. Brotherhood of*
25 *Ry., Airline and S. S. Clerks*, 338 F. Supp. 1176 (E.D. Pa. 1972); *Burlesque Artists Ass’n v. American Guild of Variety*
26 *Artists*, 187 F. Supp. 393 (S.D. N.Y. 1958); *Area G Home and Landowners Organization, Inc. (HALO) v. Anchorage*,
27 927 P.2d 728 (Alaska 1996); *Friends of Makakilo v. D.R. Horton-Schuler Homes, LLC*, 134 Haw. 135, 338 P.3d 516
28 (2014); *State v. Ui*, 66 Haw. 366, 663 P.2d 630 (1983); *Biggiam v. Board of Trustees of Community College Dist. No.*
516, 154 Ill. App. 3d 627 (2d Dist. 1987); *People on Complaint of Hughes v. Ziegler*, 29 Misc. 2d 429, 214 N.Y.S.2d
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).

1 Nev. 187, 196 (2010): “[T]his court determines the Legislature’s intent by evaluating
2 the legislative history and construing the statute in a manner that conforms to reason
3 and public policy.” ⁴However, two sentences prior, the *Great Basin* Court states, “To
4 determine legislative intent, this court will not go beyond a statute’s plain language if
5 the statute is facially clear.” *Great Basin Water Network*, 126 Nev. at 196.
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7 If this case is permitted to continue as published precedence in Nevada it
8 removes from the prosecutor the ability to make charging decisions and cases would
9 be determined by the original arrest charge of the police, even if the prosecutor chose
10 not to file the specific charge. For example; police routinely arrest 16 year olds on an
11 allegation of attempt murder, which by statute is an allegation outside the jurisdiction
12 of the juvenile court⁵. However; if upon review of the police submission the
13 prosecutor files a lesser charge like assault with a deadly weapon, the 16 year old
14 would remain in the juvenile system. However; the logic of this Court’s decision
15 opens the argument that the child is outside the juvenile courts jurisdiction because
16 the arrest was for attempt murder. Put in the words of the Petitioner’s Statement of
17 Issue it would read as follows; “Whether NRS 62B.330(3) applies to juveniles, ages
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24 ⁴ Opinion at page 8

25 ⁵ NRS 62B.330(3) For the purposes of this section, each of the following acts shall be deemed not to be a
26 delinquent act, and the juvenile court does not have jurisdiction over a person who is charged with
27 committing such an act: (a) Murder or attempted murder and any other related offense arising out of the same
28 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 16 and above, who are arrested for attempt murder, demonstrated clearly by the
2 referral charge, underlying facts of the arrest, or other persuasive evidence, even when
3 the District Attorney leaves the words “attempt murder” off of the delinquency
4 petition that is filed as a result of the core operative facts”. An incredibly dangerous
5 precedent set by this Court’s decision. If this Court continues to ignore Nevada
6 precedence and proceed to review the legislative history to determine the intent of
7 NRS 62C.240; this Court should ensure to consider the legislative history in its
8 entirety.
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11 Jason Frierson, then Chair of the Interim Committee on Child Welfare and
12 Juvenile Justice, was cited as evidence of the intent of the statute. The Court focuses
13 on Speaker Frierson’s use of the word “arrest” in his testimony.⁶ This Court however;
14 fails to include the exchange on March 3, 2015, in the Assembly Judiciary where Mr.
15 Frierson states: I do not want to speak for the intent of the bill. It was my
16 understanding that the three subsections under section 4 apply only to the charge of
17 soliciting to engage in prostitution, not any other charges. If they were charged with
18 anything else, the intent of the language was to apply specifically to a charge of
19 soliciting. *Hearing on A.B.153 Before the Assembly Judiciary Comm. 78th Leg. (Nev.,*
20 *March 3, 2015)*. On that same day in testimony, Professor Berkheiser testified that it
21 is her understanding that this legislation does not exempt an individual from
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28 ⁶ Opinion pg. 9

1 delinquency prosecution for crimes other than solicitation of prostitution. She
2 continues on to say we are only talking about “prostitution related crimes, not other
3 crimes”. And she offers to clarify section 4 subsection 2 of the original bill and that
4 “we would be amenable to that”. *Id.* Prior to introduction in the Nevada State Senate,
5 Amendment No. 152 was filed. *78th Session of the Nevada State Legislature (2015*
6 *)*The bill sponsor, Assemblyman Araujo, testified before the Senate Judiciary
7 committee that, “we have worked diligently to ensure we had a bill everyone could
8 rally around and would have the support needed to move it forward.” *Hearing on*
9 *A.B.153 Before the Senate Judiciary Comm. 78th Leg. (Nev., April 29, 2015)* Ms.
10 Roske testifies; “this bill has changed quite a bit during the legislative process.” *Id.* “I
11 represent children who have been arrested and prosecuted for engaging in or soliciting
12 acts of prostitution. This is an important first step toward a true safe harbor bill to
13 decriminalize prostitution for children.” *Id.* There is no reference to “prostitution
14 related crimes” in the oral testimony or in the questions of the Senate committee. The
15 only acts discussed were solicitation and prostitution, if the intent was to add any
16 other offenses that intent is not found in any of the testimony during the hearing
17 before Senate Judiciary. The written testimony of Professor Berkheiser discusses
18 other state’s safe harbor laws and indicates that those states grant “immunity from
19 prosecution for prostitution-related offenses”. *Id.* “AB 153 takes a hybrid approach,
20 by providing that a minor who is suspected of engaging in prostitution or the
21 solicitation of prostitution be placed under the supervision of the juvenile court”. *Id.*

1 Professor Berkheiser does not mention “prostitution related charges” as being
2 included in amended AB 153 and she has the knowledge of the other state’s safe
3 harbor laws, if that was her intent then it should have been made clear for the
4 legislature to vote on. If Professor Berkheiser or Ms. Roske had a different intent they
5 should have made that clear to the policy making body of the Nevada State
6 Legislature, instead, they are attempting to use this Honorable Court to insert its intent
7 over the State Legislature’s. Ms. Duffy, on behalf of the Juvenile Division of the
8 Clark County District Attorney’s Office, testified in support of the bill and
9 specifically acknowledged appreciation for “working with the sponsors to get the
10 language to work with our system.” *Id.* It is now not this honorable court’s job to act
11 as a super legislature and place the Court’s desired policy on what the legislative body
12 was provided testimony on and voted unanimously on.

17 **II. This Proceeding Implicates Substantial Precedential, Constitutional**
18 **and/or Public Policy Issues**

19 ***A. The Panel’s Accusation that the District Attorney is filing Fictitious***
20 ***Charges Diminishes Public Confidence in the Clark County District***
21 ***Attorney’s Office and the Nevada Judicial System***

22 In its published decision the Panel referred to the charge of Obstructing a Public
23 Officer in A.J.’s initial petition as fictitious.⁷ However, the declaration of arrest
24 clearly sets forth facts establishing the offense of Obstruction⁸. When officers made
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27 ⁷ See Opinion pages 8,10. See also Black’s Law Dictionary 2nd. Ed definition of Fictitious; founded on a fiction; having
28 the character of a fiction; false, feigned, or pretended.

⁸ NRS 197.190 **Obstructing Public Officer.** Every person who, after due notice, shall refuse or neglect to make or
furnish any statement, report or information lawfully required of the person by any public officer, or who, in such

1 contact with A.J. she refused to provide both her name and date of birth, thus, she
2 committed the offense of Obstructing a Public Officer. Upon receipt of the request for
3 prosecution a charge was filed that could be proven beyond a reasonable doubt if the
4 case were to proceed to trial. At no point was there a decision to charge an offense not
5 fully supported by the facts alleged. However, the Panel's decision necessarily
6 accuses the District Attorney's office of making such a decision and therefore, of
7 prosecutorial misconduct.⁹ Such an erroneous accusation has the potential for far
8 reaching and extremely detrimental consequences.

11
12 In *In Re Halverson*, this Court reiterated the importance of maintaining public
13 confidence in the legal system. This Court stated "an effective justice system requires
14 public confidence (...) [i]t is important not only that the integrity of the judiciary be
15 preserved but that the appearance of that integrity be maintained." *In re Halverson*
16 123 Nev. 493, 522 (2007). The vital role that public confidence plays in maintaining
17 the legal system is underscored by the very existence of rules that govern the
18 professional conduct of both judges and attorneys; people tasked with imposing the
19 governing laws in this state. If confidence in the system tasked with imposing the
20 governing laws begins to wane, the very foundation of that system is at risk and the
21 system may no longer be effective.

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26 statement, report or information shall make any willfully untrue, misleading or exaggerated statement, or who shall
27 willfully hinder, delay or obstruct any public officer in the discharge of official powers or duties, shall, where no other
28 provision of law applies, be guilty of a misdemeanor.

⁹ See Nevada Rules of Professional Conduct; **Rule 3.8(a) Special Responsibilities of a Prosecutor**. The prosecutor in a criminal case shall: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

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2 If the Panel's published decision is allowed to stand, it will have a chilling
3 effect on prosecutors by raising the specter of prosecutorial misconduct through the
4 alleged filing of fictitious charges when in fact the Clark County District Attorney's
5 office has worked diligently with system partners to help protect victims of sex
6 trafficking. The attack on the District Attorney's Office in a published decision is
7 unwarranted because the assertions that the charge of Obstructing a Public Officer is
8 fictitious are unfounded and a misrepresentation of fact.
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11
12 **CONCLUSION**

13 For the foregoing reasons, the State respectfully requests this Honorable Court
14 grant En Banc Reconsideration of the Panel's decision.
15

16 DATED this 7th day of August, 2017.

17 Respectfully submitted,
18

19 STEVEN B. WOLFSON
20 Clark County District Attorney
Nevada Bar #001565

21 BY Brigid Duffy
22 Brigid Duffy
23 Director District Attorney /
24 Juvenile Division
Nevada Bar #006961
25
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1
2 VERIFICATION


3 STATE OF NEVADA)
4 COUNTY OF CLARK) ss:

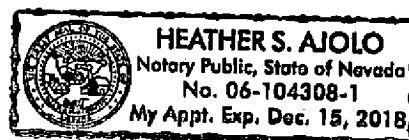
5 BRIGID DUFFY, being first duly sworn, deposes and says:

6 That she is the Chief Deputy District Attorney acting for STEVEN B.
7 WOLFSON, District Attorney and the Petitioners in the above captioned Petition; that
8 she has read the foregoing PETITION FOR EN BANC CONSIDERATION and
9 knows the contents therein and that the same is true and correct to her own knowledge
10 except as to those matters therein set forth on information and belief and as to those
11 matters she believes same to be true. The Petitioner has no other remedy at law
12 available, and that the only means to address this issue is through the instant petition.
13

14
15 
16 BRIGID J. DUFFY

17 SUBSCRIBED AND SWORN to
18 before me this 7th day of August, 2017.

19 
20 Notary Public in and for said
21 State and County



CERTIFICATE OF COMPLIANCE

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

9 2. I further certify that this petition complies with the page or type-volume
10 limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6), because it is either
11 proportionately spaced, has a typeface of 14 points or more and contains 1,972 words
12 and 165 lines of text.
13

14 Dated this 7th day of August, 2017.
15

16 Respectfully submitted,
17

18 STEVEN B. WOLFSON
19 Clark County District Attorney
Nevada Bar #001565

20 BY Brigid Duffy
21 Brigid Duffy
22 Director District Attorney
23 Juvenile Division
24 Nevada Bar #006961
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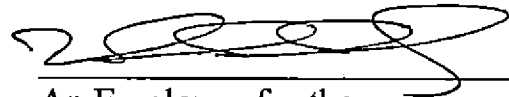
1 **CERTIFICATE OF MAILING**

2 I hereby certify that service of the **PETITION FOR EN BANC CONSIDERATION**
3 was made this 2th day of August, 2017, by depositing a copy in the U.S. Mail,
4 postage pre-paid and addressed to the following:

5 SUSAN D. ROSKE, ESQ.
6 Nevada Bar No. 001584
7 Chief Deputy Public Defender
8 601 N. Pecos Rd.
9 Las Vegas, NV 89101
Supervising, Adjunct Professor
Thomas & Mack Legal Clinic
702-455-2003

10 S. ALEX SPELMAN
11 Student Attorney, ACR 49.5
12 Thomas & Mack Legal Clinic
13 Williams S. Boyd School Of Law
14 University of Nevada, Las Vegas
P.O. Box 71075
Las Vegas, NV 89170-1075
702-895-2080

15 ADAM LAXALT
16 Nevada Bar No. 012426
17 Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

18 
19

20 An Employee for the
21 Clark County District Attorney's Office,
22 Juvenile Division

23 **HEATHER S. AJOLO**
24
25
26
27
28