IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, No.

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE KATHLEEN DRAKULICH, DISTRICT JUDGE,

Respondents,

and

DAVID CHARLES RADONSKI,

Real Party in Interest.
_____/

Electronically Filed
Aug 22 2019 10:58 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

I. INTRODUCTION

This writ petition asks the Court to examine whether arson is a general or specific intent offense.

II. ROUTING STATEMENT

Cases that raise as a principal issue a question of statewide public importance are retained by the Supreme Court. NRAP 17(a)(12). The

district court's order regarding the applicable mens rea for arson raises an issue of statewide public importance and provides an opportunity to clarify the intent element of the crime. The State respectfully requests that the Nevada Supreme Court retain and decide this petition.

III. FACTS ADDUCED AT PRELIMINARY HEARING

The following facts were adduced at preliminary hearing. On the afternoon and evening of July 27, 2018, David Charles Radonski ("Radonski") started a fire off a dirt road south of Pyramid Highway, near Appian Way. Victoria Barnett and her boyfriend were near Pyramid Highway around the time the fire started. They saw a car some distance away, and saw a man get out, circle his car, and get back in. They then looked over to see a "blaze on the mountain," and observed the same vehicle, a bright blue SUV with metallic fenders and no front license plate, driving away from the fire's area of origin. They were able to photograph of the vehicle. 1 Petitioner's Appendix ("PA") 9-13.

While fire suppression efforts were underway, Radonski arrived on scene. *Id.*, 74-75. He told investigators that he had seen the fire from his motorcycle, and claimed that he had observed two vehicles fleeing from the fire's area of origin. Radonski further claimed that he tried to give chase, but could not keep up with the vehicles. *Id.*, 75. He told police that he had

dropped a silver push-button lighter in the area of the fire sometime the week prior to the fire. *Id*., 75-76.

A few days later, Radonski was re-interviewed. His story changed. When confronted with the photograph taken by Barnett, he admitted that he had initially been in the area of the fire with his blue Dodge Durango, and went back later to get his motorcycle. *Id*., 80-81. He admitted that he had painted his silver bumpers with black paint after the fire had started. *Id*., 82. He told investigators that he was in the area shooting on the day of the fire, and had lit one Roman candle firework using a push button vehicle lighter. *Id*., 82-83. He claimed that after the fire started, he tried to put it out by scooping dirt onto it, and using a large water bottle. *Id*., 83-84. He admitted he knew it was illegal to use fireworks in the area. *Id*., 85. After the fire was out, investigators located a car cigarette lighter near the fire's origin, consistent with Radonski's description. *Id*., 53. A small, "pint size" water bottle was also located, but it was inconsistent with water bottle described by Radonski. *Id*., 64. The dirt near the area of origin was undisturbed, with no indication of the efforts to extinguish that Radonski described. *Id*., 65. Radonski further indicated that after the fire started, he returned to his home in Reno, and then drove his motorcycle all the way back to Pyramid to shoot at targets. *Id*., 86-87. He never called 911. *Id*.

At the time of the preliminary hearing, investigators estimated that the approximate cost of the fire suppression was $4.8 million dollars. That figure did not include property damage to homes and structures. *Id*., 87.

IV. PROCEDURAL HISTORY

A preliminary hearing was held on October 8, 2018. 1 PA 1-166. On October 16, 2018, Radonski was charged by information with two counts of First Degree Arson, two counts of Third Degree Arson, and one count of Destruction of Timber, Crops, or Vegetation By Fire. *Id*., 168-172. He was arraigned on October 15, 2019. *Id*., 173.

On January 28, 2019, the State filed its Motion to Determine, Preliminarily, Instruction to Jury, Re: Mens Rea of Arson. *Id*., 174-186. Randonski filed a Response to the State's Motion to Determine the Mens Rea of Arson on February 7, 2019. *Id*., 187-195. The district court held a hearing on the motion on May 15, 2019. 2 JA 196-236. Following the hearing, the district court issued its Order After Hearing Re: Mens Rea of Arson on June 12, 2019, which declined to instruct the jury that arson is a general intent crime. *Id*., 237-243. On June 21, 2019, the State filed a Motion to Reconsider Order After Hearing. *Id*., 244-265. After Randonski opposed, the State filed a reply in support of its motion. *Id*., 266-276. The

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district court denied the motion to reconsider on August 13, 2019. *Id*., 277-282.

The trial court granted the State's motion to stay the September 23, 2019, trial on August 20, 2019, in order to allow the State to pursue the instant petition. 2 PA 285-287.

V. STANDARD OF REVIEW

A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. A writ of prohibition may issue only where there is no plain, speedy, and adequate remedy at law. NRS 34.330. Where a district court orders that a jury instruction be given that is an incorrect statement of law, it exceeds its jurisdiction. *State v. Second Judicial District Court*, 108 Nev. 1030, 842 P.2d 733 (1992).

Where there is no "plain, speedy, and adequate remedy in the ordinary course of law," extraordinary relief may be available. NRS 34.170; NRS 34.330; *see Oxbow Constr., LLC v. Eighth Judicial Dist. Ct*., 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014). A petitioner bears the burden of demonstrating that the extraordinary remedy of mandamus or prohibition

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is warranted. *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Ct.*, 405 P.3d 651, 653 (Nev. 2017*); see also Pan v. Eighth Judicial Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

An appeal is generally an adequate remedy precluding writ relief. *Pan*, 120 Nev. at 224, 88 P.3d at 841; *see also Bradford v. Eighth Judicial Dist. Ct.*, 129 Nev. 584, 586, 308 P.3d 122, 123 (2013). The State does not have the right to appeal from "a final judgment or verdict in a criminal case." NRS 177.015(3). The Court may also consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served. *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Ct.*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014).

In the context of writ petitions, this Court reviews district court orders for an arbitrary or capricious abuse of discretion. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law...." *State v. Eighth Judicial Dist. Ct. (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011)(internal quotations and citations omitted). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Armstrong*, 127 Nev. at 932, 267

P.3d at 780 (internal quotations omitted). Questions of law are reviewed de novo, even in the context of writ petitions. *Moseley v. Eighth Judicial Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

VI. QUESTION PRESENTED

A. Should the jury be instructed that Arson is a general intent crime?

B. Where the State alleges that Radonski started the fire himself, should the jury be instructed that Arson is a crime of general intent?

VII. ARGUMENT

A. This Court Should Hold That As Charged Against Radonski, Arson is a General Intent Crime, and Require the District Court to Proffer a Jury Instruction Consistent Its Finding.

In this petition, the State seeks an order from this Court 1) finding that as applied to this case, to prove the crime of Arson, the State must prove general intent; and 2) directing the district court to provide the jury instruction consistent with a general intent crime. The State's position is in harmony with common law, Ninth Circuit jurisprudence, and compelling California authorities that analyze arson's mens rea based on California's decidedly similar statute.

1. The Ninth Circuit has recognized that Nevada's arson statute describes a general intent crime, and California courts have interpreted its nearly identical arson statutes' mens rea as a crime of general intent.

The Ninth Circuit has recognized that the words "willfully and

maliciously," as used Nevada's arson statute are "established by proof that the defendant set the fire intentionally, and without lawful excuse. Every state jurisdiction with an arson statute containing the general terms 'willfully and maliciously' has so interpreted the statute." *United States v. Doe*, 136 F.3d 631, 635-636 (9th Cir. 1998). California, Florida, Michigan, Mississippi, Nevada, New Mexico, Oklahoma, South Carolina, Vermont, the Virgin Islands, and West Virginia all have arson statutes employing the terms "willfully and maliciously," and approach the mens rea element of arson consistent with the common law approach, treating it as a crime of general intent. *Id*., fn. 6. A general intent is an "intent to do that which the law prohibits." *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005). *See also, People v. Lara*, 44 Cal.App.5th 102, 107, 51 Cal.Rptr.2d 402, 405 (Cal. App. 2 Dist., 1996)("As with all general intent crimes, the required mental state entails only an intent to do that act that causes the harm"). It does not require proof that the defendant intended the precise harm or result of the act, but it is the intent to do the act. *Id*. A specific intent requires an intent to achieve a harm or particular result. *Id*.

In Nevada, First Degree Arson is defined as follows:

> *A person who willfully and maliciously sets fire to or burns or causes to be burned*, or who aids, counsels or procures the burning of:

A person who *willfully and maliciously sets fire to or burns or causes to be burned*, or who aids, counsels or procures the burning of any:

1. Dwelling house or other structure or mobile home, whether occupied or vacant; or

2. Personal property which is occupied by one or more persons, whether the property of the person or of another, is guilty of arson in the first degree which is a category B felony and shall be punished by imprisonment for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $15,000.

California's arson statute contains very similar intent language:

§ 451. Arson of structure, forest land or property; great bodily injury; inhabited structure or property; owned property; punishment

A person is guilty of arson when he or she *willfully and maliciously sets fire to or burns or causes to be burned* or who aids, counsels, or procures the burning of, any structure, forest land, or property.

As no Nevada Supreme Court decision analyzes the applicable mens rea for arson outside the narrow context of accomplice liability, California case law provides persuasive guidance, especially because the California arson statute, as it pertains to the mens rea element, is identical. In *People v. Atkins*, 25 Cal. 4th 76, 18 P.3d 660 (Cal. 2001),a defendant charged with arson sought a voluntary intoxication defense. The California Supreme Court held that voluntary intoxication was not available as a defense, because the crime of arson is a general intent crime. The Court noted that

language typical of a specific intent crime, such as "with the intent" to accomplish or "for the purpose of" accomplishing a further result is absent from the statute. *Atkins* at 667. Arson does not require an additional intent that the burning be accomplished, but "only an intent to do the act that causes the harm." *Id*. at 667. In defining "willfully," the *Atkins* Court cited to a definition of general intent crime that is identical to Nevada's definition. "The word, willfully, when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." *Id*. at 666; *see also Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984)(defining "willful" with the same definition).

The *Atkins* Court concluded that the California statute's inclusion of "willfully and maliciously" is to ensure that the initial ignition of the fire is a "deliberate and intentional act, as distinguished from an accidental or unintentional ignition." *Atkins*, 18 P.3d at 668; *cf. Batt v. State*, 111 Nev. at 1132 n.4, 901 P2d at 667 n.4 (1995) ("a fire must be caused intentionally or by design, rather than accidentally or carelessly").

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Another California case, *In re V.V.*, 51 Cal. 4th 1020, 252 P.3d 979 (2011), also provides helpful analysis. In that case, two minors lit a large firecracker (a "cherry bomb") and tried to throw it onto a concrete area. *In re VV* at 980-981. Instead, they missed and it landed in a brush-covered hillside, resulting in a five acre brush fire. *Id*. The minors challenged the sufficiency of the evidence leading to their juvenile wardship, arguing that because they lit a firecracker without the intent to cause a fire or any other harm, they could not be adjudicated for arson. While they conceded that the intent to commit the resulting harm is not an element of arson, but, like Radonski, they maintained that there must be evidence that they intended to cause a larger fire or some other harm. The California Supreme Court disagreed. It noted that malice will be implied from the intentional or deliberate "ignition or act of setting a fire without a legal justification." *Id*. at 984; *cf*. NRS 193.0175 (providing that malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty). The Court clarified that it is the initial igniting of the fire to which the mens rea applies, not the result of the initial ignition. *Id*. at 984-987. In terms of the word "willfully," as used in the California arson statute, the Court explained that it implied no evil intent,

but simply that "the person knows what he is doing, intends to what he is doing and is a free agent." *Id.*, *citing Atkins, supra*. This definition of willfully is consistent with jury instructions previously approved by the Nevada Supreme Court in general intent cases. *See Jenkins v. State*, 110 Nev. 865, 877 P.2d 1063 (2002).

2. *Ewish I* and *Ewish II* regard accomplice liability for arson, and their holdings do not apply to Randonski.

Nevada case law examining the applicable *mens rea* of arson, apart from the context of accomplice liability, is somewhat scarce.

In *Ewish v. State*, 110 Nev. 221, 871 P. 2d 306 (1994) (*Ewish I*), three defendants participated in throwing a Molotov cocktail at two residences, killing two people inside the first residence. Ewish acted as a lookout for both firebombings, and later bragged about the crimes. *Id.*, 225. Webb claimed that he was in Ewish's car during the first firebombing, and was in a "cocaine coma" for a second, remembering only that someone handed him the firebomb, and that he threw it through a bedroom window. *Id.*, 224.

In *Ewish I, supra*, the Court discussed NRS 193.0175's definition of malice:

> Although this definition does refer to intentional conduct, it also includes conduct betraying a social duty...the important fact is that "maliciously" is not consumed by intentional

> conduct. Thus, the crime malicious destruction does not require the specific intent to commit some further act, beyond the prohibited conduct itself.

Ewish, 110 Nev. 221, fn. 4.

However, in reading *Ewish I*, it appears that both Webb and Ewish were charged under a theory of aiding and abetting. A copy of the 1990 indictment in that case, obtained by the State and attached to the Motion for Reconsideration, confirms that the information alleged that each defendant aided and abetted the others. 2 PA 254-265. Aiding or abetting is a specific intent crime. That is, the aider and abettor must have knowingly aided the other person with the intent that the other person commit the crime. *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002). It was in that context of alleged accomplice liability that the Court found that voluntary intoxication could be a viable defense to a specific intent crime. *Ewish I* at 228.

After the appellants in *Ewish* sought rehearing, the Court published a per curiam opinion, *Ewish v. State*, 111 Nev. 1365, 904 P.2d 1038 (*Ewish II*) (1995). In *Ewish II*, the Court commented that "Ewish's theory that he aided and abetted his co-defendant in firebombing two residences, but lacked the specific intent to do so, is likewise consistent with the crime of explosive destruction." *Ewish II*, 111 Nev. 1365 at 1366.

Relying on *Ewish I* and *Ewish II*, *supra*, the district court concluded that that "the Nevada Supreme Court has clearly stated that the lack of specific intent is a defense to arson." 2 JA 241. The State respectfully asserts that this conclusion was in error, because *Ewish I* and *Ewish II* regarded defendants who were charged with aiding and abetting one another; therefore, the State was required to prove specific intent. Alternatively, to the extent this Court may find *Ewish I* and *Ewish II* contemplate arson to be a specific intent crime regardless of the theory alleged, the State submits that the *Ewish I* and *II* courts erred. The State's position is supported by the Ninth Circuit's decision *Doe, supra,* which recognized that arson is a general intent crime in Nevada, and issued after *Ewish I* and *II*.

3. Randonski has been charged with a general intent crime.

The construction of NRS 205.020 allows the crime of Arson to be alleged as a specific or a general intent crime. Under NRS 205.020, the phrasing of "willfully and maliciously setting fire to, burning, or causing to be burned" is consistent with a general intent crime. But, where the theory of criminal liability is based on an accomplice role, the statute also allows the State to charge to allege liability via a specific intent theory: "aiding, counseling, or procuring the burning." Here, the State's theory of liability is

not that Radonski aided or abetted in the crime. Instead, the State alleges that Radonski willfully and maliciously committed the crime. Therefore, the applicable mens rea element is consistent with the statutory definition of malice. NRS 193.0175 provides, in relevant part:

> 'Malice' and 'maliciously' import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.
>
> NRS 193.0175

VIII. CONCLUSION

The State respectfully requests that this Court issue a writ of prohibition or mandamus directing the district court to provide the jury with mens rea instructions consistent with those used for general intent crimes.

DATED: August 21, 2019.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Chief Appellate Deputy

AFFIDAVIT OF JENNIFER P. NOBLE

STATE OF NEVADA

COUNTY OF WASHOE

I, JENNIFER P. NOBLE, do hereby swear under penalty of perjury that the assertions of this affidavit are true.

1. That your affiant is a duly licensed attorney in the State of Nevada and is counsel of record for Petitioner.

2. That your affiant has read the foregoing Petition and he believes that it correctly describes the procedural history of this case.

3. That this Petition is brought in good faith and not for purposes of delay or any other improper reason.

JENNIFER P. NOBLE

Subscribed and sworn to before me
on this 21st day of August, 2019
by Jennifer P. Noble.

WANDA JACKSON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 17-2611-2 - Expires May 1, 2021

Notary Public

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this petition complies with the page limitations of NRAP 32(a)(7)(B)(i) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(c), it does not exceed 80 pages.

3. Finally, I hereby certify that I have read this appellate petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 21, 2019.

CHRISTOPHER J. HICKS
Washoe County District Attorney

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on August 21, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

Jordan A. Davis, Deputy Public Defender

Joanna L. Roberts, Deputy Public Defender

I further certify that I served a copy of this document by e-mailing a true and correct copy thereof, to the Chamber of:

The Honorable Kathleen Drakulich, Second Judicial District Court, Department 1

/s/ Margaret Ford
MARGARET FORD