

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

THE STATE OF NEVADA,  
  
Petitioner,

No. 79452

Electronically Filed  
Aug 22 2019 11:47 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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.

\_\_\_\_\_ /

**PETITIONER'S APPENDIX – VOLUME 2**

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ATTORNEYS FOR REAL PARTY  
IN INTEREST

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1 Code No. 4185  
2 SUNSHINE LITIGATION SERVICES  
3 151 Country Estates Circle  
4 Reno, Nevada 89511

5 SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF WASHOE

7 KATHLEEN DRAKULICH, DISTRICT JUDGE

8 THE STATE OF NEVADA,

9 Plaintiff,

Case No. CR18-1731

10 vs.

Department No. 1

11 DAVID CHARLES RADONSKI,

12 Defendant.  
13 \_\_\_\_\_/

14 TRANSCRIPT OF PROCEEDINGS

15 PRE-TRIAL MOTIONS

16 May 15, 2019

17 Reno, Nevada  
18  
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23 REPORTED BY: DEBORA L. CECERE, NV CCR #324, RPR

24 JOB # 559300

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A P P E A R A N C E S

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1           MAY 15th, 2019, WEDNESDAY, 10:17 A.M., RENO, NEVADA

2                           -oOo-

3  
4           THE COURT:   Good morning.   Welcome to  
5 Department 1.   Thank you for your flexibility with regard  
6 to shifting chambers this morning.

7           This is Case No. CR18-1116, State of Nevada  
8 versus David Charles Radonski.   This is the date and time  
9 set for a hearing on two motions that the Court has filed.  
10 One, a motion in limine filed by Mr. Jordan Davis on behalf  
11 of Mr. Radonski; the other, a motion to determine  
12 preliminarily instruction to jury regarding mens rea of  
13 arson filed by Mr. Lee from the District Attorney's Office.

14           On behalf of the State, Mr. Lee, good morning,  
15 how are you?

16           MR. LEE:   Good morning, your Honor.

17           THE COURT:   And on behalf of the counsel for  
18 Mr. Radonski, Mr. Davis, Mr. Goodnight, how are you?

19           MR. GOODNIGHT:   Good morning, your Honor.

20           THE COURT:   Excellent.

21           Okay.   Counsel, I thought since we've kind of  
22 got cross motions here that deal essentially with the same  
23 thing, Mr. Lee, I thought I'd start with you, and any  
24 issues that you want to cover with regard to your motion or

1 the defense's motion, go ahead. I'm going to give everyone  
2 an opportunity to say as much as they want to say before we  
3 conclude this process.

4 MR. LEE: Your Honor, are we responding to each  
5 other, too, or are we just doing a one-time here?

6 THE COURT: No one-time. You can begin, give me  
7 your -- the, the support for your motion, the oral  
8 arguments. And then I'll have Mr. Davis go. And then you  
9 can give an opposition to him, he can give an opposition to  
10 you, and then you can both have replies.

11 MR. LEE: Okay. Thank you.

12 Your Honor, what the issue really is here is  
13 just this, for arson to be -- if it was a specific intent,  
14 the State would have to prove that Mr. Radonski intended to  
15 burn up 50,000 acres in this case, two residences, and  
16 dozens of structures.

17 However, that's not the issue. That never is in  
18 an arson case, because arson is a general intent crime.  
19 The issue is did Mr. Radonski intend to light the fire, and  
20 in this case, the firework that caused the fire, that  
21 resulted, or as the statute says, caused to be burned the  
22 50,000 acres, two residences, and dozens of structures.

23 The support for that comes from certainly  
24 statute. It comes from decisional authorities. And it's

1 not supported by what the defense believes it's supported  
2 by.

3 THE COURT: Let me ask first, Mr. Lee, what is  
4 the State's position about first degree arson versus third  
5 degree arson?

6 MR. LEE: Your Honor, just for ease of argument  
7 I discuss third degree arson. First degree is the same.  
8 It's just a matter of what --

9 THE COURT: You're thinking it's a general  
10 intent crime as well?

11 MR. LEE: Yes. It's just a matter of what's  
12 being burned is the only difference between a third and a  
13 first, and actually a second as well.

14 THE COURT: So you concede that, that the only  
15 thing that is different statutorily between first and third  
16 degree arson is what's being burned?

17 MR. LEE: Yes.

18 THE COURT: So to the extent that there is an  
19 intent required for either first or third degree arson,  
20 it's alternatively the same intent required for the other  
21 type of arson.

22 MR. LEE: Absolutely.

23 THE COURT: Okay. Thank you.

24 MR. LEE: And really the language is the exact

1 same as well. So it still comes down to that definition:

2 A person who willfully and  
3 maliciously sets fire to or burns, or  
4 third, causes to be burned.

5 Again, at this point then the statute, it goes  
6 to who aids, counsels or procures the burning, which is a  
7 principle theory of liability.

8 So that's really the intent mechanism. And the  
9 actus reus as well is included in that first part. And the  
10 difference is what's burned.

11 Let me address this part of the defendant's  
12 initial motion in limine. He states that Mr. Radonski  
13 never intended to burn down these houses that were, I don't  
14 know how far away, say a mile away, let's say, hidden in a  
15 valley or a canyon of this mountain range.

16 I don't have any argument to say otherwise. I  
17 don't know that he intended to, but the State doesn't have  
18 to prove that. What the State has to prove is simply that  
19 this fire was set by Mr. Radonski in a willful and  
20 malicious manner. The result thereof is inconsequential  
21 for what he did, the actus reus.

22 We know that from an NRS definition, 205.045,  
23 which I mentioned in my response anyways to the, to  
24 Mr. Radonski's motion.



1           The contiguous fires. And that statute covers  
2           that issue raised by Mr. Radonski. Right?

3                   Whenever a building or structure,  
4                   which is the subject of arson --

5           As we have here in Counts 1 or 2, even 3 and 4,  
6           as we're dealing with the other structures:

7                   -- shall be so situated as to be  
8                   manifestly endangered by any fire and  
9                   shall subsequently be set on fire  
10                  thereby, any person participating in  
11                  setting the fire or such fires shall  
12                  be deemed to have participated in the  
13                  setting such building on fire.

14           So that covers that issue. So the fact that  
15           Mr. Radonski did not intend the result of a house being  
16           burned down, that's not relevant to this decision, your  
17           Honor, because of, one, that statute; and, two, the arson  
18           definition as it states in the statute anyways, causes to  
19           be burned. That's pretty clear as well.

20           So looking at the statute itself, none of those  
21           specific intent triggers, such as the obvious one, with  
22           intent to, that language is absent from the statute.

23           I think perhaps what Mr. Radonski is hanging his  
24           hat on is the definition of maliciousness. And malice,

1       though, it gives a couple of options, there's several  
2       options in that standard definition of 193.0175:

3               Malice imports an evil intent, wish,  
4               or design to vex, annoy, or injure  
5               another person. Malice may be  
6               inferred from an act done in willful  
7               disregard of the rights of another.  
8               Or an act wrongfully done without  
9               just cause or excuse, or an act or  
10              omission of duty betraying a willful  
11              disregard of social duty.

12             In this case, such as lighting a firework in a  
13             dry time of year in an area that's just riddled with dry  
14             brush and things that could ignite fast, as it did. That  
15             certainly is an act or omission of a duty betraying a  
16             willful disregard of a social duty.

17             We know as well from the Ewish decision that  
18             malice does not equate to an intentional conduct.

19             And then the California cases. As far as  
20             malice:

21               An intentional act creating an  
22               obvious fire hazard done without  
23               justification would be malice.

24             And that's a quote from the In re V.V. case.

1           So let me move to some of those California  
2 cases, because those are very important here. Certainly  
3 it's not controlling on this Court's decision, but it's at  
4 the very least very instructive, because this is something  
5 that Nevada has not dealt with in much of any detail.

6           And so when I look at California's decisions,  
7 and, frankly, how I got to these -- and I had done this  
8 research long before this case, just as part of my duties  
9 in the D.A.'s office, but just punching in the definition  
10 of arson, into JustWare, at least the -- especially the  
11 very first part, the mens rea and the actus reus section of  
12 the arson statute, and if you put it in quotations, it  
13 pulls up these cases from California, as well as the  
14 statute because Nevada statute is the same as California  
15 statute.

16           So word for word:

17                   A person who willfully and  
18                   maliciously sets fire to or burns or  
19                   causes to be burned.

20           That is word for word with California and  
21 Nevada.

22           So, therefore, when I have, when I have multiple  
23 decisional authorities in California, in detail discussing  
24 arson statutes, I'm going to pay attention to it, and I

1       urge this Court to as well.

2               First, Atkins, that was decided in 2001. The  
3       issue was simply is evidence of voluntary intoxication,  
4       admissible to negate a mental state.

5               Certainly in specific intent crimes, such as  
6       murder, that's often a defense because it requires a  
7       specific intent; therefore, the voluntary intoxication can  
8       be a defense to that.

9               But the Atkins court held that, no, voluntary  
10      intoxication is not a defense because arson is a general  
11      intent crime. That case breaks down the arson statute.  
12      Now this is an appellate court decision of Atkins. But  
13      there you have an individual defendant who did not like the  
14      victim. It was clear that he hated him, according to the  
15      decision. He even threatened to burn the house down.

16              The evidence from the fire investigation  
17      concluded that there was a specific area of origin. It put  
18      the defendant at or very near that area of origin. They  
19      found a lighter at the area of origin, and they also found  
20      beer cans; in essence, the defendant was drunk in that  
21      case. All the evidence points to that.

22              The defendant's story was, was somewhat similar  
23      to here. He says he was trying to burn some weeds to clear  
24      the area; it got out of control, he tried to put it out, he

1       claimed it was an accident.

2               But, again, looking at the same statute that the  
3 Nevada has, the Court found -- including malicious,  
4 actually -- malicious has a few differences, it's not word  
5 for word, but it's so similar enough that it's very  
6 instructive in the context of an arson especially -- the  
7 Court found that no, it's a general intent crime.

8               That leads to then the In re V.V. case, the  
9 juvenile case.

10              The issue there was simply a sufficiency of  
11 evidence claim. Is malice established by throwing a  
12 firework or a firecracker under these certain dry  
13 conditions and likely to start a fire?

14              The facts were that these two or three juveniles  
15 went up to a mountain, or a little hill in southern  
16 California. The hill covered, like we have here, with dry  
17 brush in a dry time of year. One or both, I think the  
18 decision says that one held the fire cracker, one lit the  
19 fire cracker and threw it, and the third did not want to  
20 participate. But they threw it.

21              One said they tried to throw it into a green  
22 area or concrete area. Not dry area. They missed. The  
23 fire ignited and took off fast, and they got scared and  
24 ran.

1           That's almost exactly what the defense is here.  
2       Mr. Radonski's statement to the police is that he was  
3       trying to light this firework into a concrete area and  
4       something happened that ignited the fire, and he got scared  
5       and ran.

6           Again, looking at the exact same statute, the  
7       Court, in this case the Supreme Court of California,  
8       stated, quote, in the context of arson:

9                       And it requires no specific intent to  
10                      do a further act or achieve a future  
11                      consequence.

12           So we don't have to prove that Mr. Radonski  
13       tried to burn a home down, that he was trying to burn other  
14       structures down.

15                      Arson does not require --

16                      And this is a quote again.

17                               -- does not require intent to cause  
18                               resulting harm, but only a general  
19                               intent to do the act that causes the  
20                               harm.

21                      And then:

22                               Malice can be presumed in an arson  
23                               case --

24                      Just like certainly our statute allows as well.

1                   -- that an intentional act created an  
2                   obvious fire hazard done without  
3                   justification would certainly be  
4                   malicious.

5                   And that's a quote.

6                   If I am to -- you know, and those, and those  
7                   decisions as well discuss U.S. v. Doe, as well a juvenile  
8                   case, though decided in the Federal system where a juvenile  
9                   lit a roll of toilet paper or paper towels on fire in a  
10                  bathroom, put it out, at least the juvenile thought they  
11                  put it out by either blowing on it, but however, the school  
12                  was engulfed in flames because of this act.

13                  So was the school's, burning down the school an  
14                  accident? Absolutely.

15                  I don't think there was anything to prove that  
16                  this juvenile intended to burn down the school. What the  
17                  juvenile intended to do was light the fire, light the roll  
18                  of toilet paper on fire.

19                  The result was different, because as the Court  
20                  discussed it as a general intent crime, this juvenile was  
21                  liable for that.

22                  So going back to In re V.V., which I believe is  
23                  the most thorough discussion, and from a, the higher court  
24                  in California, the highest, it's the same thing.

1           These juveniles did not intend to start this  
2           five-acre brush fire. What they did intend to do is light  
3           this firecracker, which resulted in this.

4           So coming to this case, it's the exact same  
5           situation. We have an individual, Mr. Radonski, who  
6           intended to light the firework. He had lots of fireworks  
7           with him. He stated he lit a firework, in this case a  
8           Roman candle. Subsequent, or as part of the investigation,  
9           fire investigators and the detective tried their own  
10          experiment with this, lighting a Roman candle into a bush,  
11          the fire takes off fast.

12          So he intended to light the firecracker. It was  
13          under these conditions that are perfect for a fire, let's  
14          say, a dry time of year, very dry brush, and then the  
15          obvious result here. But his intent is to the firecracker  
16          and starting that, that firecracker under those  
17          circumstances, not to the result of that act.

18          If I'm to look at the Nevada cases as well,  
19          certainly important, but very distinguishable. The Ewish  
20          decision deals with the principle theory of liability,  
21          which the arson statute certainly allows when it says:

22                   Or who aids, counsels, or procures  
23                   the burning.

24          In Ewish we know it's a principle theory because



1       it states that all three men were charged with throwing a  
2       single Molotov cocktail. If all three of them held onto  
3       that ball at the same time and threw it, then sure, they're  
4       all guilty of the act itself. But Ewish was charged under  
5       that theory, which is a specific intent.

6               So when the Ewish court discusses arson in the  
7       context of specific intent, they're absolutely right.  
8       That's what it was, and that's what it was charged as.

9               With regard to Batt, the Batt decision --

10       THE COURT: Can I take you back to Ewish?

11       MR. LEE: Please.

12       THE COURT: Say it again. You said it was  
13       charged as a specific intent crime.

14       MR. LEE: Yes, because the theory there is that  
15       all these individuals participated in joint participation  
16       to throw the single Molotov cocktail. So, therefore, they  
17       had to go off of the theory of aiding, counseling, or  
18       procuring the burning and not the act of actually doing it,  
19       chucking the cocktail. I don't know if it was ever decided  
20       in Ewish. I may be wrong.

21       THE COURT: So distinguishable from this case,  
22       Mr. Radonski's case.

23       MR. LEE: Yes, where there's only one person  
24       involved. And, again, I tried to make it clear, at least

1       in my motion --

2               THE COURT:   You did.

3               MR. LEE:   And also in my charging document.   I'm  
4       not charging Mr. Radonski in any way with the alternative  
5       principle theory of liability -- aiding, counseling, and  
6       procuring.

7               THE COURT:   You made that clear in your motion.  
8       You specifically stated that.

9               MR. LEE:   So, therefore, certainly arson can be  
10      charged as a specific intent under those circumstances.  
11      But here arson is a general intent crime.

12              And for the person who is starting the fire, it  
13      is a general intent crime.

14              Ewish does, though, give some great insight as  
15      to -- into the definition of malice.   And I've stated some  
16      of those already.

17              But, but those things such as intentional act  
18      creating -- or, excuse me -- does not equate to intentional  
19      conduct, that all comes from the Ewish decision.   So Ewish  
20      is instructive to us as to the definition of malice, but  
21      it's not helpful as to specific versus general intent.

22              The Batt decision, which in a footnote,  
23      discusses the willful aspect of the arson statute.   And if  
24      I'm going to Mr. Radonski's response to the State's motion,

1 I think he just misconstrues Batt. He states some, some  
2 quotations from the Batt decision but doesn't give the  
3 context of Batt. I'm trying to find the quotation. Excuse  
4 me. One moment.

5 THE COURT: Page 3.

6 MR. LEE: Yes.

7 THE COURT: Line 18. Is that the quote?

8 MR. LEE: Yes.

9 THE COURT: Okay.

10 MR. LEE: Nothing to suggest that he intended to  
11 bring it forth. Of course he didn't.

12 But it's not giving that as a statement as to  
13 what Batt, as to Batt throwing a firecracker or anything.  
14 It's simply stating Batt had nothing to do with this fire.  
15 In fact, he argued with the co-defendant don't throw this  
16 firecracker here. He stood away.

17 Really, Batt is guilty of one thing and one  
18 thing only, which is not a crime. It's that he was there.  
19 He was present at the scene.

20 The, the Batt decision certainly arises because  
21 he was charged. He was charged not as a principal, but he  
22 was charged as to actually having thrown the firecracker  
23 under the charging document.

24 And the Supreme Court incorrectly stated that

1       there was nothing to suggest, quoting Batt, that he  
2       intended to burn the forest or did anything that even  
3       remotely suggested malice or willfulness on his part.  
4       Again, he was there. He protested. So Batt was convicted,  
5       but that was rightly overturned.

6               His co-defendant was convicted. She's the one  
7       who threw the firecracker.

8               That case came out of 1995.

9               THE COURT: Can the -- can that Batt language,  
10      though, apply to anyone, whether or not they were a  
11      by-stander or to the co-defendant who threw the  
12      firecracker?

13              Is that a statement of the standard irrespective  
14      of who is charged?

15              MR. LEE: In that specific quote, not the  
16      footnote? Is that what you're talking about?

17              THE COURT: That specific quote.

18              MR. LEE: No, because, again, that quote is  
19      giving, giving us some context of Batt. We can't infer  
20      anything more to this because Batt did not participate in  
21      any way and instead protested the firecracker.

22              So the Court is saying there's nothing to  
23      suggest that he intended to do anything on his part.  
24      That's a true statement. And that's what the Court's

1 decision to overturn his conviction resulted from.

2 The only time --

3 THE COURT: So I shouldn't take anything from  
4 the word "or" between:

5 Intended to burn the forest, or that  
6 he did anything even remotely  
7 suggests malice or willfulness on his  
8 part.

9 That's not two separate evaluations for this  
10 Court?

11 MR. LEE: You know, I would have to concede that  
12 it could be two separate evaluations. But in this case  
13 that's not construing the statute in any way. It's just  
14 simply just saying that Batt had nothing to do with the  
15 fire, he's not guilty, conviction overturned.

16 THE COURT: Okay.

17 MR. LEE: The part that Mr. Radonski would have  
18 to hang his hat on from Batt is that footnote.

19 If I can get there. There we go.

20 That the Court did not --

21 And, again, in a footnote.

22 -- find it necessary to discuss in  
23 depth the meaning of the words  
24 willful or malicious but wish to

1 point out that to be guilty a fire  
2 must be caused intentionally or by  
3 design rather than accidentally or  
4 carelessly.

5 I'm not saying that's wrong. I think that's a  
6 correct statement of the law. And that's certainly in line  
7 with what the arson statute requires.

8 Had the, had the Court defined this as to state  
9 that to be guilty a fire must be, the result must be done  
10 intentionally or by design, then I'd be up a creek a little  
11 more, and I'd be arguing purely that it's only dicta. But  
12 in this case I'm embracing this because that's true.

13 What happened here is Mr. Radonski willfully, he  
14 did it on his own volition, he wasn't forced to, he didn't  
15 accidentally light that firecracker or firework. He didn't  
16 throw it or shoot it in this case. He did it on purpose.

17 The result is something different. That's not  
18 the subject of the prosecution because it's a general  
19 intent crime.

20 So Batt doesn't do anything against the State.  
21 It's supportive of what the State is trying to prove here.

22 So really in the California cases, they decided  
23 these unintended results based on intended acts.

24 Batt as well, looking at the case in general,

1 not necessarily specific to Batt, but even to his  
2 co-defendant, who was convicted and not overturned, Batt,  
3 again, the same as California cases, deals with an  
4 unintended result but intended actions. The lighting of  
5 the firecracker in dry brush.

6 So I don't actually stand here very often, your  
7 Honor, and say look to California, look to California, but  
8 when I have a statute that mirrors word for word the arson  
9 statute, and then is discussed in depth by multiple cases  
10 whereas Nevada doesn't have that, it only just has,  
11 somewhat in passing, without any analysis at all, that  
12 voluntary intoxication is a defense, even, even though I  
13 can argue that's an aid and abetting statute.

14 The California cases are very important and give  
15 a full analysis even with digging into the common law of  
16 the arson statute, looking at the clear wording, which is  
17 word for word. And couple all of that with the language of  
18 the statute that says or causes to be burned. It doesn't  
19 have to result -- the result doesn't have to be intended.  
20 The act has to be intended. And certainly that's what we  
21 have here. That's what we've alleged, and that's what  
22 we're asking the Court to instruct the jury on.

23 Now if I can get, just lastly, your Honor, to  
24 the instruction part, and then I'll sit down.

1           The State placed in its initial motion what  
2       instructions it's looking for with regard to part 2 of the  
3       malice definition that the State is seeking. Leaving  
4       malice as it is in 193 in this particular case I think  
5       needs a little more. We can certainly include 193 language  
6       itself, but I think the subsection 2 is important as well.  
7       And it finds its definition from California cases, Atkins  
8       and In re V.V.

9           And, frankly, I think it's fair to Mr. Radonski.  
10       It simply says:

11                   The person who willfully causes the  
12                   fire without legal justification with  
13                   awareness of facts that would lead a  
14                   reasonable person to realize that the  
15                   direct, natural, and highly probable  
16                   consequence, igniting and shooting a  
17                   Roman candle or other firecracker  
18                   under the circumstances in which it  
19                   was done --

20       So under these specific circumstances.

21                   -- would qualify as malicious.

22       That definition, which is, again, finds its  
23       origin in California cases coupled with Ewish which states  
24       that malice is not consumed by intentional conduct, all of



1       those things together make this a reasonable definition and  
2       appropriate, legal definition.

3               It would still require the State to prove that  
4       there should be an awareness of facts to Mr. Radonski, and  
5       that that awareness would lead a reasonable person to  
6       realize that looking at direct, natural, and highly  
7       probable consequences of doing what he did had the result  
8       of what it did. And that would be certainly malice.

9               So to sum it up, an unintended result with an  
10       intended act, is what we have here, perhaps. I'm not  
11       getting into any of the things Mr. Radonski did after  
12       igniting this fire that tend to indicate otherwise.

13              But just from the act of doing what he did and  
14       admitted to what he did, and which proof was found at the  
15       scene, apart from the things that happened afterwards,  
16       there was an unintended result but an intended act.

17              So Mr. Radonski in this case intended to light  
18       the fire, intended to light the Roman candle. He intended  
19       to shoot the Roman candle.

20              Doing that act, and with awareness of the facts  
21       of the dry conditions, the brush in that area, it would  
22       lead a reasonable person to realize that Mr. Radonski's act  
23       and that the direct, natural, and highly probable  
24       consequences of his act, would be the burning of the

1 structures. And the fire, and the devastating fire that  
2 came from it.

3 Given all that, I think it's clear that the  
4 arson statute is actually a general intent as it was  
5 charged. There is an alternative charge of specific, but  
6 not in this case. I did not charge that.

7 And with that I'll rest.

8 THE COURT: Thank you so much, Mr. Lee.

9 When you said you did not charge that, that is  
10 the --

11 MR. LEE: Aiding and abetting.

12 THE COURT: Aiding and abetting.

13 MR. LEE: Can I just check really fast? I want  
14 to check.

15 THE COURT: Let me just --

16 MR. LEE: I did not.

17 THE COURT: You did not charge it that way, but  
18 let me tell you specifically addressed the fact that you  
19 didn't in your original motion at page 6, lines 9 through  
20 18.

21 MR. LEE: Thank you.

22 THE COURT: Mr. Davis.

23 MR. DAVIS: Good morning, your Honor.

24 THE COURT: Good morning.

1           MR. DAVIS: Let's start with this. Arson is a  
2 specific intent crime in Nevada. Period.

3           The Nevada Supreme Court at Ewish v. State in a  
4 1995 per curiam decision that has not been overturned  
5 stated, and I will quote:

6                   Lack of specific intent is a valid  
7 defense to arson.

8           End quote.

9           I do have a copy of that decision. I've  
10 highlighted the appropriate language. I'd like to provide  
11 the Court with a copy of that decision.

12          THE COURT: Okay.

13          Do you have one there for -- Mr. Lee, do you  
14 have a copy of the decision?

15          MR. LEE: I think I have three now.

16          THE COURT: Okay. I have excerpts.

17          MR. DAVIS: Again, your Honor, the State's  
18 arguing that arson is a general intent crime. They're  
19 asking that this Court turn to California for guidance.  
20 And I'm telling this Court you don't need to look to  
21 California when you have a Nevada Supreme Court case that's  
22 directly on point that tells you that lack of specific  
23 intent is a valid defense to arson. I don't know how it  
24 could be more clear.

1           That case is dispositive of this issue. This  
2 Court should follow that Nevada Supreme Court precedent.

3           If you go through and, and you look at the words  
4 willful and malicious, willful is defined in Row v. State  
5 as:

6                   An act and/or omission which is done  
7 intentionally, deliberately, or  
8 designedly as distinguished from  
9 something that is done accidentally.

10          That supports that. That's in line.

11                Batt says to be guilty of malicious  
12 arson, the fire must be caused  
13 intentionally by design, not  
14 accidentally or carelessly.

15          You then look at the definition of malice or  
16 maliciously, and that imports an evil intent, designed to  
17 vex or annoy or injure another person, and it may be  
18 inferred from an act done in a disregard for other people.

19          Now it's our position that Batt v. State  
20 supports the conclusion that arson is a specific intent  
21 crime, and in that case the Court looked at the results of  
22 the ignition.

23          And I'll quote from that decision:

24                There is absolutely nothing to

1                   suggest that he intended to burn the  
2                   forest.

3                   And that was when the Court was asking Mr. Lee  
4                   about that language.

5                   I think that if the Court wasn't interested in  
6                   the intent of what was burned, they wouldn't have included  
7                   that.

8                   They also in that case reference the fact that  
9                   this was a fire, it was a disastrous fire that was started  
10                  accidentally or set accidentally.

11                  The Nevada Supreme Court notes that, not only in  
12                  the decision but in a footnote.

13                  The State cites no controlling authority in  
14                  Nevada for its proposition that arson is a general intent  
15                  crime or that it can choose whether or not to go after an  
16                  individual based upon either a general intent theory or a  
17                  specific intent theory.

18                  There's no Nevada case that says that. There's  
19                  no California case that they cited that says the State can  
20                  elect to choose which theory in terms of general intent or  
21                  specific intent the State can go forward on.

22                  To be clear, the defense in this case has  
23                  submitted multiple Nevada Supreme Court cases to support  
24                  our proposition. The State in its response says:

1                   Defense only cited three cases.

2                   Your Honor, I would submit that I only need to  
3 cite one case that stands for a proposition that I'm  
4 looking for. I think Ewish stands for that. I think  
5 Brimmage stands for that.

6                   If the Court looks at Brimmage in that ending  
7 note in that case, it says something along the lines of  
8 that the jury was instructed properly on a specific intent  
9 for arson. That's, again, a Nevada Supreme Court case.  
10 Hasn't been overturned. On point.

11                  The Court doesn't need to look to California for  
12 guidance. In fact, the Court shouldn't look to California  
13 for guidance if they have Nevada cases on point.

14                  Now I think that the State's argument can be  
15 boiled down into two points.

16                  One, the State is saying it can choose to pursue  
17 the same offense under two separate theories in multiple  
18 ways. For example, it can charge someone with arson under  
19 the theory that that person aided or abetted somebody. If  
20 they go with that theory, then I think that the State is  
21 saying that that's a specific intent crime because they're  
22 using that aiding or abetting language.

23                  In this case they're not. So the second point  
24 that the State is making is that well, if you look at the

1 definition of malice or maliciously, you can break that  
2 down, too, and we can either pursue a general intent theory  
3 under that definition or a specific intent. But, again,  
4 there's no case that says that.

5 Now in going through all of the cases that were  
6 cited by the State, we did go through and distinguish those  
7 in our response. And I'll just go through and kind of  
8 highlight where we distinguish them and why we distinguish  
9 those cases.

10 So the Court or the State cited United States v.  
11 Doe. That's a Ninth Circuit case. That involved a  
12 juvenile that lit a paper towel on fire. That lighting of  
13 the paper towel ultimately led to the school burning down.  
14 That case interpreted a Federal arson statute. So it  
15 wasn't a, it wasn't the Nevada statute. It was a Federal  
16 statute. And the, the Court determined that the  
17 intentional act in that case was the setting of this paper  
18 towel on fire, which resulted in, in the burning of the  
19 school.

20 By contrast, here Mr. Radonski didn't go out and  
21 set a fire. He lit a firework. And so legally Doe is  
22 distinguishable because it interpreted the mens rea  
23 required to prove the Federal arson statute and not the  
24 Nevada statute.

1           Atkins is the case that the State really hangs  
2           its hat on, and the holding in Atkins is completely  
3           contrary to the holding in Ewish. In Atkins, Atkins holds  
4           that, that voluntary intoxication is not a defense to the  
5           general intent crime of arson.

6           A       That's Atkins. Ewish stands for the exact  
7           opposite proposition, that voluntary intoxication is a  
8           viable defense to the requisite specific intent necessary  
9           to commit arson.

10           So if, if the State is asking the Court to look  
11           to Atkins, the Court can absolutely disregard Atkins  
12           because it's absolutely in contrast to Ewish, which this  
13           case -- which this Court should look to.

14           The Court then says we'll -- the State then says  
15           we'll look to In regarding V.V. And In regarding VV, it  
16           involved two juveniles. There was a third juvenile that  
17           wasn't involved in the throwing of the cherry bomb. That  
18           Court relied heavily upon the Atkins decision to support  
19           its conclusion. And because Atkins completely contradicts  
20           Ewish, that case should be unpersuasive.

21           In fact, the dissent In regarding V.V. is more  
22           in line with how Nevada would come down on this issue.

23           So it's our position that there are Nevada  
24           Supreme Court cases that are on point, that this Court is



1 bound by those decisions, that even if this Court disagrees  
2 with those decisions, it's still bound by those.

3 So there's no need to look to California for  
4 guidance, even though the State wants you to look to  
5 California because Nevada doesn't say what they want it to  
6 say.

7 We believe the Nevada statutes are clear on  
8 their face. We've gone through that in our response.  
9 There's a definition for willfully. There's a definition  
10 for maliciously.

11 And, and in response specifically to some of the  
12 points that the State had made, with regard to the  
13 contiguous fires, the State had said well, you know, that,  
14 that shows that it's a general intent. We disagree. And  
15 we disagree because of this. One second, your Honor.

16 So if you look at the language in that statute,  
17 the example of that is when a person willfully and  
18 maliciously intends to set fire to let's say house A, but  
19 then house B burns down, that person can be liable for  
20 first degree arson for burning down house A and house B,  
21 even though they didn't intend to burn down house B. And  
22 this is a classic example of transferred intent.

23 The State is saying well, that shows general  
24 intent. No, it doesn't because the intent is this person

1 willfully and maliciously intended to set fire to house A.  
2 House B burned. It's transferred intent. We believe it's  
3 transferred specific intent.

4 Let's talk about a couple of hypotheticals.

5 So let's say there's a couple, they want to  
6 spend a romantic evening together. And they're outside.  
7 The husband goes to light a TIKI torch on fire. And that  
8 TIKI torch is next to a fence. And it's windy out. And  
9 they've both been drinking. That TIKI torch blows down, it  
10 lights the fence on fire. That fence then catches the  
11 next-door neighbor's house on fire.

12 And what would the State do? The State would  
13 say that's arson first degree. Why? Because it's a  
14 general intent theory. This person lit a torch, they lit  
15 it willfully. They lit it maliciously because they  
16 betrayed a willful disregard for a social duty since it was  
17 windy outside and this was close to a fence. And under  
18 that set of facts if the Court goes along with the State's  
19 argument and follows Atkins, then voluntary intoxication  
20 isn't a defense, so it doesn't matter that they were  
21 drinking. But if the Court follows Nevada precedent,  
22 Ewish, it would be a defense.

23 Let's talk about if an individual is upset at a  
24 neighbor and goes and sets gasoline to that house, goes in

1       there, lights a fire. First degree arson. I would agree  
2       with that. I don't think the State would dispute it.

3               But in both of those situations the State is  
4       saying they're both first degree arson charges. I think  
5       that there's a difference between those two.

6               So I think in short, I could have kept this  
7       argument simple. The Court can confidently place its hat  
8       on Brimmage, Ewish and Batt. Those are three controlling  
9       Nevada Supreme Court cases for the proposition that in  
10      Nevada arson is a specific intent crime.

11              We would submit on that.

12              THE COURT: Mr. Davis, thank you so much.

13              Mr. Lee.

14              MR. LEE: Let me address somewhat backwards.  
15      First of all, the TIKI torch. What the State would have to  
16      prove in this TIKI torch example is this, that the lighter  
17      of that TIKI torch, without legal justification, and with  
18      awareness that would lead a reasonable person to realize  
19      that the direct, natural, and highly probable consequence  
20      of igniting a TIKI torch would be the burning down of the  
21      neighbor's house. That's the difference.

22              So, no, lighting the TIKI torch, even on my best  
23      day of trying to charge an arson case and prove it would  
24      not amount to arson because that is not a direct, natural,

1 and highly probable consequence of lighting a TIKI torch.

2 Here it's far distinguished. Mr. Radonski lit a  
3 burning ball of fire, a Roman candle, shoots the burning  
4 balls of fire on a dry and windy day in a time of year  
5 where fire danger is readily and very apparent, and  
6 especially last year with the discussions all over about  
7 firing guns even in the areas.

8 Much different. We're not talking about  
9 lighting a TIKI torch. We're talking about illegal  
10 fireworks in a dry, windy area.

11 Going then to the malice aspect and quoting  
12 Ewish because Ewish supports absolutely the State's  
13 understanding of malice and why the State charged this case  
14 as it does.

15 Ewish states on page 229 of the Nevada cite,  
16 footnote 4, quote:

17 Although this definition does refer  
18 to intentional conduct, it also  
19 includes conduct betraying a social  
20 duty. The important fact is that  
21 maliciously is not consumed by  
22 intentional conduct.

23 So certainly in a case such as this where  
24 Mr. Radonski again lit the Roman candle which shoots

1 flaming walls of fire on a dry and a windy day, that counts  
2 as betraying a social duty. And it's not consumed by say  
3 even an intent that of the result, certainly his act was  
4 intentional.

5 With regard to alternative theories, that was  
6 brought up by Mr. Radonski's counsel. Certainly there are  
7 alternative theories the State could charge.

8 One of those, the main difference, as relevant  
9 to this case, is the aid and abet versus directly doing the  
10 act. And Ewish does not in any way contradict my argument.  
11 I did not bring this out very much. I told why I believe  
12 Ewish was an aid and abetting charge, because all three  
13 could not have thrown the firework. But if you look at  
14 Ewish 1, the '94 decision of Ewish, specifically 110 Nev.  
15 221 at 227 to 228, it tells us:

16 Ewish defended against the State's  
17 aiding and abetting charges by flatly  
18 denying any participation, any act of  
19 participation. Ewish also claimed  
20 that he was mentally incapable of  
21 forming a specific intent to aid or  
22 abet.

23 So certainly it's clear, we know that the State  
24 was going off of an aiding or abetting theory in Ewish.

1 I absolutely concede under Sharma and its  
2 progeny that aiding and abetting is a specific intent. So  
3 when it states that arson in this case against Ewish was  
4 specific intent, I agree. Because Ewish was aiding or  
5 abetting in the crime of arson. Not doing the act himself.

6 So given with what we have as a charge in this  
7 case, under Nevada's statutory definition, and certainly as  
8 defined in the only, in the only place where it is defined,  
9 and that's in California with a word-for-word exact statute  
10 as to the actus reus and mens rea aspect of the charge,  
11 it's the general intent crime, the way it's charged and the  
12 way it's set up in the statute.

13 And Ewish doesn't contradict that. Batt doesn't  
14 contradict that. And so we'd ask your Honor to find that  
15 this is a general intent crime and instruct the jury  
16 accordingly.

17 THE COURT: Thank you so much, Mr. Lee.

18 Mr. Davis, your reply.

19 MR. DAVIS: Your Honor, I handed you Ewish, too.

20 THE COURT: You did.

21 MR. DAVIS: I have Ewish in front of me. I  
22 don't have an extra copy.

23 THE COURT: I have a footnote in my, my  
24 preparation.

1 MR. DAVIS: Thank you, your Honor.

2 THE COURT: Yes.

3 MR. DAVIS: So with respect to Ewish number 1,  
4 the State is saying that Ewish doesn't contradict their  
5 argument. And in Ewish, they were going after Ewish on an  
6 aiding or abetting theory, and that means specific intent.

7 THE COURT: Um-hum.

8 MR. DAVIS: But if you go back and you look at  
9 Ewish --

10 THE COURT: Ewish 110?

11 MR. DAVIS: Yes, Ewish dealt with not only Ewish  
12 but Webb, and Webb is the individual -- and I'm quoting now  
13 at footnote, let's -- not a footnote, but at page 228, and  
14 it says this, quote:

15 Webb's trial defense to the Newton  
16 fire bombing was consistent with the  
17 explosive destruction. He took the  
18 stand and admitted committing a  
19 culpable act by throwing the Molotov  
20 cocktail at Newton's home. Webb then  
21 claimed that due to his voluntary  
22 intoxication he could not have formed  
23 the requisite specific intent  
24 necessary to commit arson. This was

1                   a viable defense to a specific intent  
2                   crime and the jury was instructed  
3                   accordingly.

4                   If believed --

5                   THE COURT: Your point is even though it was an  
6                   intoxication defense, the fact is the reference to the  
7                   statute and the crime, irrespective of what the Supreme  
8                   Court is talking about, is the identification of it as a  
9                   specific intent crime.

10                  MR. DAVIS: It identifies it as a specific  
11                  intent crime.

12                  And also with Webb, Webb is the one that  
13                  actually threw this. Ewish might not have thrown it, but  
14                  they could have gone after him on the aiding and abetting  
15                  theory with specific intent. But Webb is the one that  
16                  actually threw it, and he, he argued for, that voluntary  
17                  intoxication was a defense and the jury was instructed  
18                  about that. So, and I think that that cuts the State's  
19                  argument that you can only, we're only pursuing specific  
20                  intent if it's aiding and abetting, because in this case,  
21                  Webb was not charged with an aiding and abetting. He was  
22                  the one who actually threw it. So that's why I think that  
23                  that portion of the case is really important for this Court  
24                  to consider.



1 THE COURT: Okay.

2 MR. DAVIS: And I'm happy to answer any  
3 questions that the Court has regarding any of these cases  
4 or anything else that the Court would like us to add.

5 THE COURT: I do not have any questions right  
6 now, Mr. Davis. Is that it?

7 MR. DAVIS: That's it.

8 THE COURT: Okay. I want to take a note,  
9 Counsel. Hang on.

10 Here is my intention. I want to spend a little  
11 more time with a couple of the things that you each said.  
12 My intention is to get you an order on this quickly. I  
13 gleaned that, but it appears to me that from what was said  
14 in the pleadings, that a lot about this case in the future  
15 of the charges turns on this Court's decision with respect  
16 to this case.

17 Given that Mr. Radonski has been in custody for  
18 a lengthy period of time, the extent to which we can get  
19 you an order quickly I think may address some of the things  
20 that you raised by implication in the briefs.

21 So that is my goal, Counsel, is to get you  
22 something just as quick as I can.

23 I want to thank you so much for coming in and  
24 providing oral argument on this. It has been very helpful.

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Thank you.

MR. DAVIS: Thank you.

MR. LEE: Thank you.

(Whereupon the proceedings were  
concluded.)

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STATE OF NEVADA     )  
                              ) ss.  
WASHOE COUNTY        )

I, DEBORA L. CECERE, an Official Reporter of  
the State of Nevada, in and for Washoe County, DO HEREBY  
CERTIFY:

That I was present at the times, dates, and  
places herein set forth, and that I reported in shorthand  
notes the proceedings had upon the matter captioned within,  
and thereafter transcribed them into typewriting as herein  
appears;

That the foregoing transcript, consisting of  
pages 1 through 41, is a full, true and correct  
transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 14th day of  
August, 2019.

/s/ Debora Cecere  
\_\_\_\_\_  
DEBORA L. CECERE, CCR #324

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF**  
7 **THE STATE OF NEVADA IN AND FOR THE**  
8 **COUNTY OF WASHOE**

9 STATE OF NEVADA,

10 Plaintiff,

CASE NO.: CR18-1731

11 vs.

DEPT. NO.: 1

12 DAVID CHARLES RADONSKI,

13 Defendant.  
14 \_\_\_\_\_/

15  
16 **ORDER AFTER HEARING RE: MENS REA OF ARSON**

17 Presently filed before the Court is (1) the Defendant David Charles Radonski's ("Mr.  
18 Radonski") *Motion in Limine*; and (2) the State's *Motion to Determine, Preliminarily, Instruction*  
19 *to Jury, Re: Mens Rea of Arson*. Both motions were fully brief and submitted to the Court for  
20 consideration. Parties came before the Court on May 15, 2019, to present oral argument.

21 Each of the Motions presently request the Court to make a determination as to the *mens*  
22 *rea* of first and third degree arson. Through the below analysis, the Court finds that the jury in this  
23 case shall be instructed that first and third degree arson are specific intent crimes.

24 **I. Background**

25 Mr. Radonski was arrested on July 31, 2018, as part of an investigation into the "Perry  
26 Fire." The "Perry Fire" was a fire which began on July 27, 2018, burned approximately 51,400  
27 acres southwest of Pyramid Lake. In association with the arrest, Mr. Radonski was charged with

1 the following: (1) Count I, First Degree Arson; (2) Count II, First Degree Arson; (3) Count III,  
2 Third Degree Arson; (4) Count IV, Third Degree Arson; and (5) Count V, Destruction of Timber,  
3 Crops, or Vegetation by Fire. *See* Information. Mr. Radonski has pled not guilty to the crimes  
4 charged. Trial is set to being September 23, 2019.

## 5 **II. Parties' Arguments**

6 Through his *Motion in Limine* and *Response to the State's Motion to Determine the Mens*  
7 *Rea of Arson*, Mr. Radonski asserts that the jury in this trial must be instructed that under Nevada  
8 law, first- and third-degree arson requires specific intent. Mr. Radonski cites to NRS 205.010,  
9 which provides that first-degree arson is where "[a] person . . . willfully and maliciously sets fire  
10 to or burns or causes to be burned . . . [a] [d]welling house." Mr. Radonski argues that the statute,  
11 through the use of the term "maliciously" and the statutory definition of "malice," makes it clear  
12 that first-degree arson requires a specific intent.<sup>1</sup> Further, Mr. Radonski contends that Nevada  
13 case law is clear on the mens rea for arson. Mr. Radonski states that the Nevada Supreme Court  
14 held in *Batt v. State*, that to be found guilty of malicious arson, a fire must be caused intentionally  
15 or by design, rather than accidentally or carelessly. 111 Nev. 1127, 1131, 901 P.2d 664, 666  
16 (1995). Mr. Radonski further cites to the court in *Ewish v. State*, which held that a viable defense  
17 to arson is that the defendant lacked the specific intent necessary to commit the crime, and as such,  
18 the jury should be instructed according. 110 Nev. 221, 228, 871 P.2d 306, 311 (1994). Mr.  
19 Radonski additionally argues that, in an even earlier decision, the Nevada Supreme Court found  
20 that the district court properly instructed the jury on the specific intent required for the crimes of  
21 robbery and arson. *Brimmage v. State*, 93 Nev. 434, 443, 567 P.2d 54, 60 (1977). Alleging that  
22 Nevada statutes are clear on their face, and the terms "willful" and "maliciously" are defined in  
23 statute and case law, Mr. Radonski petitions the Court to instruct the jury that: (1) arson is a specific  
24 intent crime; and (2) in order to be found guilty of arson the State must prove that the fire was  
25 caused intentionally or by design, rather than accidentally or carelessly.

26  
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<sup>1</sup> Pursuant to NRS 193.0175, "malice" is defined as "an evil intent, wish or design to vex, annoy or injure another person."

1 Alternatively, the State asserts that under Nevada statute, arson may be charged as either a  
2 specific intent crime or a general intent crime, and here, it has been charged as a general intent  
3 crime. The State asserts that arson can be alleged under a general intent theory pursuant to NRS  
4 205.020, willfully and maliciously setting fire to, burning, or causing to be burned. However, the  
5 State contends that NRS 205.020 also contains a specific intent theory: aiding, counseling, or  
6 procuring the burning. *See Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) (Aiding  
7 or abetting is a specific intent crime. That is, the aider and abettor must have knowingly aided the  
8 other person with the intent that the other person commit the crime). Here, the State asserts that it  
9 did not pursue the aiding or abetting theory, and as such, arson as charged against Mr. Radonski  
10 follows a general intent theory. Additionally, the State contends that arson may be alleged as a  
11 specific intent crime through the statutory definition of malice under NRS 193.0175, which  
12 provides:

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

17 The State argues, under this definition, that a person can start a fire with intent to “injure another  
18 person” (specific intent) or to cause a fire without legal justification or willfully disregarding a  
19 social duty (general intent). Again, the State argues that it is not alleging specific intent, but rather  
20 pursuing the general intent theory of maliciousness.

21 In distinguishing *Ewish*, the State argues that unlike Mr. Radonski, Ewish and his co-  
22 defendant were charged as aiders and abettors, under the specific intent theory of NRS 205.020.  
23 As such, the State contends, the Nevada Supreme Court statements regarding specific intent for  
24 the crime of arson do not apply to the present case. As to *Brimmage*, the State contends that the  
25 Nevada Supreme Court fails to provide a discussion as to which arson theory was pursued in that  
26 action, and as such, it is not a reliable source of case law to support Mr. Radonski’s broad assertion  
27 that arson is a specific intent crime in all instances.

1 By distinguishing the cases cited by Mr. Radonski, the State asserts that the Nevada  
2 Supreme Court has not specifically held whether arson is strictly a general intent or specific intent  
3 crime, and further, the Court should look to other jurisdictions to make this determination.  
4 Specifically, the State petitions the Court to look to California, as the California arson statute is  
5 identical to the Nevada arson statute, as it pertains to the mens rea. The State requests the Court  
6 to rule in line with *People v. Atkins*, wherein the California Supreme Court held that arson “requires  
7 only a general criminal intent.” 18 P.3d 660 (Cal. 2001). The State further asserts that *In re V.V.*,  
8 is instructive, in that the California Supreme Court found that it is the initial igniting of the fire to  
9 which the mens rea applies, rather than the result of the initial ignition. 252 P.3d 979, 983 (Cal.  
10 2011). Lastly, the State points to the federal case, *U.S. v. Doe*, wherein the federal court held that  
11 “[a]n intentional act creating an obvious fire hazard . . . done without justification . . . would  
12 certainly be malicious.” 136 F.3d 631 (9th Cir. 1998).

### 13 **III. Analysis**

14 Upon review of Nevada law, and the arguments presented, the Court finds that Nevada law  
15 provides that arson is a specific intent crime, and as such, the Court need not look beyond Nevada  
16 case law to other jurisdictions.

17 In Ewish cases<sup>2</sup>, three co-defendants, Ewish, Webb, and Nelson, were all charged with two  
18 counts of arson, two counts of murder with a deadly weapon, and nine counts of attempted murder  
19 with a deadly weapon. The criminal charges arose from an evening of criminal activity, wherein  
20 the co-defendants allegedly threw Molotov cocktails into two houses, causing the houses to catch  
21 fire and resulting in two deaths. Both Webb and Ewish claimed they lacked the capacity to form  
22 the specific intent necessary to commit arson, murder, or the aiding and abetting of murder or  
23 arson. In the initial case, “*Ewish I*,” the Court addressed the issue of whether the district court  
24 improperly denied a jury instruction requested by the defense which described a lesser related  
25 offense to arson. 110 Nev. 221, 871 P.2d 306 (1995). Webb asserted that due to his voluntary  
26

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27 <sup>2</sup> The Nevada Supreme Court has issued two opinions in the Ewish matter, *Ewish v. State*, 110 Nev. 221, 871 P.2d 306 (1995), referred herein as *Ewish I*, and *Ewish v. State*, 111 Nev. 1365, 904 P.2d 1038 (1995), referred herein as *Ewish II*.

1 intoxication, he could not have formed the requisite specific intent necessary commit arson. In  
2 commenting on Webb's defense, the Nevada Supreme Court stated, "[t]his was a viable defense  
3 to a specific intent crime, and the jury was instructed accordingly." *Id.* Ewish presented a similar  
4 defense, asserting that due to his mental impairment, meek personality, and intoxication on the  
5 night of the crimes, he could not have formed the specific intent necessary to aid and abet murder  
6 or arson. *Id.* at 224, 871 P.2d at 310. The Nevada Supreme Court commented that "[i]f believed,  
7 Webb's and Ewish's respective defenses would refute arson." *Id.* at 228, 871 P.2d at 311. Further,  
8 the *Ewish I* court held that "[i]f believed, Webb's and Ewish's respective defenses would refute  
9 murder, arson, and even explosive destruction . . . The lesser related instruction is simply not  
10 required where a defendant completely denies culpability and is either guilty of the charged crime  
11 or not guilty at all." *Id.* at 228, 871 P.2d at 311 (citing *State v. Williams*, 144 Ariz. 479, 486, 698  
12 P.2d 724, 731 (1985); *People v. Geiger*, 35 Cal.3d 510, 199 Cal.Rptr. 45, 58, 674 P.2d 1303, 1315  
13 (Ct.App.1984)).

14 In the second iteration of the Ewish case, "*Ewish II*," Ewish petitioned the court for a  
15 rehearing, alleging that the Nevada Supreme Court misapprehended his defenses to the crime of  
16 arson. 111 Nev. 1365, 904 P.2d 1038 (1995). Upon review, the *Ewish II* court agreed, finding  
17 that *Ewish I* failed to adequately consider Ewish's alternative defense that he lacked specific intent  
18 to commit arson and concluding that Ewish's alternative theory that he lacked specific intent to  
19 commit arson is consistent with the crime of explosive destruction. *Id.* As such, the *Ewish II* court  
20 held that because Ewish presented a defense that he lacked specific intent to commit arson, the  
21 district court erred in refusing to instruct the jury on the lesser related offense of explosive  
22 destruction. *Id.* The Nevada Supreme Court reversed both of Ewish's arson convictions, and  
23 remanded the matter to the district court for a new trial on the arson charges.

24 This Court finds, through *Ewish I* and *Ewish II*, that the Nevada Supreme Court has clearly  
25 stated that the lack of specific intent is a sufficient defense to arson. Following such, this Court  
26 finds that Nevada case law supports the assertion that arson is a specific intent crime.

27 ///

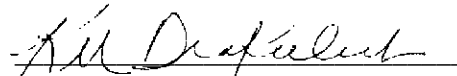


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Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the jury in Defendant David Charles Radonski's trial,  
shall be instructed that arson, both first degree and third degree, is a specific intent crime.

DATED this 12<sup>th</sup> day of June 2019.

  
KATHLEEN M. DRAKULICH  
District Judge

1 **CERTIFICATE OF SERVICE**

2 CASE NO. CR18-1731

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the  
4 STATE OF NEVADA, COUNTY OF WASHOE; that on the 12<sup>th</sup> day of June, 2019, I  
5 electronically filed the **ORDER AFTER HEARING RE: MENS REA OF ARSON** with the  
6 Clerk of the Court by using the ECF system.

7 I further certify that I transmitted a true and correct copy of the foregoing document by the  
8 method(s) noted below:

9 **Electronically filed with the Clerk of the Court by using the ECF system which will send a**  
10 **notice of electronic filing to the following:**

11 LYNN BRANZELL, ESQ. for DAVID CHARLES RADONSKI (TN)


12 JORDAN DAVIS, ESQ. for DAVID CHARLES RADONSKI (TN)

13 MATTHEW LEE, ESQ. for STATE OF NEVADA

14 JOSEPH GOODNIGHT, ESQ. for DAVID CHARLES RADONSKI (TN)

15 DIV. OF PAROLE & PROBATION

16 **Deposited to the Second Judicial District Court mailing system in a sealed envelope for**  
17 **postage and mailing by Washoe County using the United States Postal Service in Reno,**  
18 **Nevada: [NONE]**

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21 DANIELLE KENT  
22 Department 1 Judicial Assistant  
23  
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25  
26  
27

1 Code 2645  
2 Christopher J. Hicks  
3 #007747  
4 One South Sierra Street  
5 Reno, NV 89501  
6 (775) 328-3200  
7 Attorney for Plaintiff

8  
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
10  
11 IN AND FOR THE COUNTY OF WASHOE.

12 \* \* \*

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR18-1731

15 v.

Dept. No. 1

16 DAVID CHARLES RADONSKI,

17 Defendant.

18 /

19 MOTION TO RECONSIDER ORDER AFTER HEARING, RE: MENS REA OF ARSON

20 COMES NOW, the State of Nevada, by and through CHRISTOPHER J.  
21 HICKS, District Attorney of Washoe County, and MATTHEW LEE, Chief  
22 Deputy District Attorney, and hereby respectfully and cautiously  
23 moves this Court to reconsider its Order After Hearing, Re: Mens Rea  
24 of Arson, which was entered on June 12, 2019, following the hearing  
25 on May 15, 2019. This motion is made and based upon the attached  
26 Points and Authorities, attached exhibit, Ewish v. State ("Ewish I"),  
110 Nev. 221, 871 P.2d 306 (1994) and Ewish v. State ("Ewish II"),  
111 Nev. 136, 904 P.2d 1038 (1995).

///

///

1 POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 On June 12, 2019, this Court entered its Order determining that  
4 arson is a specific-intent crime and that the jury shall be  
5 instructed accordingly. Since this decision was based upon the  
6 decisions in *Ewish I* and *Ewish II*,<sup>1</sup> the State urges this Court to  
7 review the *Ewish* decisions in light of the underlying facts and  
8 charging theories, that is, *Ewish* and his co-defendant were charged  
9 under a theory of **aiding and abetting**, not direct liability. When  
10 the liability theory of any crime is one of "aiding and abetting," as  
11 it was in *Ewish*, then that changes a general intent crime into one of  
12 specific intent.<sup>2</sup> The general statutory framework of arson is clearly  
13 one requiring a general intent.

14 Based upon this Court's Order, the State believes that this  
15 Court simply misapprehended the fact that *Ewish* was prosecuted and  
16 convicted on an aiding and abetting theory. But, the Supreme Court's  
17 decision in *Ewish* referencing arson as a specific-intent crime must  
18 be viewed in light of the aiding and abetting liability only, as  
19 ///

20  
21 \_\_\_\_\_  
22 <sup>1</sup> As stated, "This Court finds, through *Ewish I* and *Ewish II*, that the  
23 Nevada Supreme Court has clearly stated that the lack of specific  
24 intent is a sufficient defense to arson. Following such, this Court  
25 finds that Nevada case law supports the assertion that arson is a  
26 specific intent crime." Order After Hearing, 5:24-25 (June 12,  
2019).

<sup>2</sup> *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) (Aiding  
or abetting is a specific intent crime. That is, the aider and  
abettor must have knowingly aided another person with the intent that  
the other person commit the crime).

1 described in Sharma. See id. It must not be read to hold  
2 universally that arson is a general intent crime.

3 Because Mr. Radonski is not being charged as an aider and  
4 abettor, the arson charges in this case, CR18-1731, require a general  
5 intent. And, the analysis of *Ewish I* and *Ewish II*, based upon an  
6 aiding and abetting prosecution and conviction, is entirely  
7 distinguishable.

## 8 **II. LEGAL SUPPORT OF RECONSIDERATION**

9 A Court may reconsider its previous decisions when new issues of  
10 fact or law are raised or when a prior decision is clearly erroneous.  
11 Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246  
12 (1976); Masonry and Tile Contractors Ass'n of Southern Nevada v.  
13 Jolley, Urga & Wirth, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). A  
14 reconsideration should not be permitted for a simple "reargument" of  
15 an issue already decided. U.S. v. Real Property Located at Incline  
16 Village, 976 F.Supp. 1327, 1353 (D. Nev. 1997).

17 The State does not make this motion lightly; however, after  
18 careful consideration of the Order After Hearing, the decisions of  
19 *Ewish I* and *Ewish II*, and after obtaining from Clark County the  
20 attached charging document in *Ewish's* original case, it is compelled  
21 to urge this Court to reconsider its Order based upon a clear  
22 erroneous factual underpinning to this Court's decision. Because the  
23 instant Order was based upon *Ewish*, and since *Ewish* was prosecuted on  
24 a charge of aiding and abetting the crime of arson.

25 ///

26 ///

1     **III. ANALYSIS**

2             Since this Court's basis for holding that arson is a specific  
3     intent crime was the decision in *Ewing I* and *Ewing II*, which involved  
4     a theory and conviction for aiding and abetting, the decision is  
5     flawed and should be reconsidered.

6             The Supreme Court clearly spelled out that the conviction in  
7     Ewish was for aiding and abetting. And as the Sharma decision  
8     explains, aiding and abetting of even a general intent crime requires  
9     the State to prove that the person aiding and abetting have the  
10    specific intent that the crime be committed. Sharma, 118 Nev. at  
11    655, 56 P.3d at 872. One can aid and abet in the commission of a  
12    general intent crime or of a specific intent crime. But either way,  
13    it is the theory of aiding and abetting that makes any crime become  
14    one of a specific intent.

15            Multiple examples directly from the *Ewish I* and *II* decisions  
16    illustrate that the defendants in Ewish were prosecuted and convicted  
17    for aiding and abetting. First, in *Ewish I*, the defense claimed that  
18    the indictment allegations "did not match its **aiding and abetting**  
19    **theory of conviction** at trial." 110 Nev. at 236, 871 P.2d at 316  
20    (emphasis added). The decision continues, "[Ewish] asserts that the  
21    State's indictments allege that he was directly responsible for the  
22    acts constituting arson" and therefore, "he was inadequately apprised  
23    of the **State's theory of conviction.**" Id. (emphasis added).

24            In rejecting this claim, the Supreme Court determined that  
25    considering the whole of the indictment, including the theory that  
26    ///

1 the "indictment alleged that Nelson<sup>3</sup> threw the Molotov cocktails while  
2 Ewish and Webb **encouraged** the actions. The indictments also stated  
3 that Ewish **entered into an agreement** with the other two codefendants  
4 and **acted as a lookout.**" 110 Nev. at 236, 871 P.2d at 316 (emphasis  
5 added). The court concluded, "While these charged do not expressly  
6 list **aiding and abetting**, it is clear that this was **one of the**  
7 **State's theories of conviction.**" Id. (emphasis added).

8 As further evidence of the aiding and abetting charge, earlier  
9 in the decision the Supreme Court again stated that this was aiding  
10 and abetting. It reasoned, "Ewish defended against the **State's**  
11 **aiding and abetting charges** by flatly denying active participation in  
12 either crime." 110 Nev. at 227, 871 P.2d at 311 (emphasis added).  
13 And additionally, "Ewish also claimed that he was mentally incapable  
14 of forming the **specific intent to aid in or abet** any criminal  
15 activity." Id. (emphasis added).

16 Next, the Information itself alleges the following case theory  
17 throughout the counts:<sup>4</sup>

18 Each Defendant aiding and abetting the others in  
19 the following manner, to-wit: by each defendant  
20 entering into an agreement with the others to  
21 throw an incendiary device...by one or all of the  
22 defendants preparing a Molotov cocktail, by all  
23 three Defendants being present at the scene when

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24 <sup>3</sup> Defendant Nelson was acquitted of all charges and was not a party to  
25 *Ewish I.* 110 Nev. at 225, 871 P.2d at 309.

26 <sup>4</sup> In *Ewish I*, Mr. Ewish complained that the arson charges "did not  
match the State's aiding and abetting theory of conviction." This  
contention can be seen in Count XII and XIII the attached  
Information. However, as stated already on Page 4 of this Motion,  
the Supreme Court dismissed that argument, that "[w]hile these  
charges do not expressly list aiding and abetting, it is clear that  
this was one of the State's theories of conviction."

1 the incendiary device was thrown, Defendant  
2 TIMOTHY EDWARD WEBB being the driver of the motor  
3 vehicle used to carry himself and MITCHELL NELSON  
4 and JOSEPH ANOTHNY EWISH to and from the scene of  
5 the fire bombing, Defendants TIMOTHY EDWARD WEBB  
and JOSEPH ANTHONY EWISH counselling,  
encouraging, and inducing the action of Defendant  
MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting  
as a lookout...

6 See a copy of the original Information from Clark County Case No.  
7 90C095684-1, attached hereto as Exhibit "1."

8 As to one of the subject properties of the crime, it's alleged  
9 in the Information that "...MITCHELL NELSON actually throwing the  
10 incendiary device into the residence..." As to the other subject  
11 property, it alleged, "...it being unknown to the State of Nevada  
12 whether the incendiary device was actually thrown by MITCHELL NELSON,  
13 JOSEPH ANTHONY EWISH, or TIMONTY EDWARD WEBB..." Id.

14 So, when the Supreme Court found that lack of specific intent is  
15 a valid defense to arson, it was making that decision for the Ewish  
16 case only, which involved "aiding and abetting charges." 110 Nev. at  
17 227, 871 P.2d at 311. All references to arson as a specific intent  
18 crime in Ewish must be understood under this lens of aiding and  
19 abetting. To hold that the arson statute by itself (the willful and  
20 malicious setting fire to, burning or causing to be burned) is a  
21 specific intent crime simply because of statements within the Ewish  
22 decision (which is clearly an aiding and abetting theory case), is,  
23 respectfully, to clearly err.

#### 24 **IV. CONCLUSION**

25 This Court found that arson requires specific intent because  
26 *Ewish I* and *Ewish II* discuss arson in that manner. However, and



1 respectfully, this finding is clearly erroneous because the  
2 prosecution and conviction in *Ewish I* and *Ewish II* were based upon  
3 aiding and abetting, not direct liability. The arson statute in  
4 general terms cannot be declared to require specific intent based on  
5 those two decisions.

6 AFFIRMATION PURSUANT TO NRS 239B.030

7 The undersigned does hereby affirm that the preceding  
8 document does not contain the social security number of any person.

9 Dated this 21st day of June, 2019.

10 CHRISTOPHER J. HICKS  
11 District Attorney  
12 Washoe County, Nevada

13 By /s/ Matthew Lee  
14 MATTHEW LEE  
15 10654  
16 Chief Deputy District Attorney  
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CERTIFICATE OF SERVICE BY E-FILING

I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JORDAN DAVIS, D.P.D.  
350 S. CENTER STREET  
RENO, NEVADA 89501

DATED this 21st day of June, 2019.

/S/DANIELLE RASMUSSEN  
DANIELLE RASMUSSEN

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**INDEX OF EXHIBITS**

**EXHIBIT 1**

**INFORMATION CASE NUMBER C95684 (CLARK COUNTY)  
NUMBER OF PAGES: 1**

FILED  
Electronically  
CR18-1731  
2019-06-21 04:14:19 PM  
Jacqueline Bryant  
Clerk of the Court  
Transaction # 7335660 : csulezic

Exhibit 1

Exhibit 1



1 COUNT I - Murder With Use of a Deadly Weapon

2 did then and there, without authority of law and with malice  
3 aforethought, wilfully and feloniously kill JIMMY LOPEZ, a human  
4 being, by throwing an incendiary device into the residence at  
5 7101 Hurricane Way, Las Vegas, Clark County, Nevada, thereby  
6 setting the house on fire and causing JIMMY LOPEZ to die of smoke  
7 inhalation, with a deadly weapon, to-wit: a molotov cocktail,  
8 each Defendant aiding and abetting the others in the following  
9 manner, to-wit: by each Defendant entering into an agreement  
10 with the others to throw an incendiary device into the residence  
11 at 7101 Hurricane Way, Las Vegas, Nevada, by one or all of the  
12 Defendants preparing a molotov cocktail, by all three Defendants  
13 being present at the scene when the incendiary device was thrown,  
14 Defendant TIMOTHY EDWARD WEBB being the driver of the motor  
15 vehicle used to carry himself and MITCHELL NELSON and JOSEPH  
16 ANTHONY EWISH to and from the scene of the fire bombing,  
17 Defendants TIMOTHY EDWARD WEBB and JOSEPH ANTHONY EWISH  
18 counselling, encouraging, and inducing the action of Defendant  
19 MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as a lookout,  
20 and MITCHELL NELSON actually throwing the incendiary device into  
21 the residence at 7101 Hurricane Way, Las Vegas, Nevada,  
22 thereafter all Defendants fleeing the scene of said fire bombing  
23 and failing to notify authorities and/or failing to render any  
24 medical assistance to the occupants of the house.

25 COUNT II - Murder With Use of a Deadly Weapon

26 did then and there, without authority of law and with malice  
27 aforethought, wilfully and feloniously kill EPPIE LOPEZ, a human  
28 being, by throwing an incendiary device into the residence at

1 7101 Hurricane Way, Las Vegas, Clark County, Nevada, thereby  
2 setting the house on fire and causing EPPIE LOPEZ to die of smoke  
3 inhalation, with a deadly weapon, to-wit: a molotov cocktail,  
4 each Defendant aiding and abetting the others in the following  
5 manner, to-wit: by each Defendant entering into an agreement  
6 with the others to throw an incendiary device into the residence  
7 at 7101 Hurricane Way, Las Vegas, Nevada, by one or all of the  
8 Defendants preparing a molotov cocktail, by all three Defendants  
9 being present at the scene when the incendiary device was thrown,  
10 Defendant TIMOTHY EDWARD WEBB being the driver of the motor  
11 vehicle used to carry himself and MITCHELL NELSON and JOSEPH  
12 ANTHONY EWISH to and from the scene of the fire bombing,  
13 Defendants TIMOTHY EDWARD WEBB and JOSEPH ANTHONY EWISH  
14 counselling, encouraging, and inducing the action of Defendant  
15 MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as a lookout,  
16 and MITCHELL NELSON actually throwing the incendiary device into  
17 the residence at 7101 Hurricane Way, Las Vegas, Nevada,  
18 thereafter all Defendants fleeing the scene of said fire bombing  
19 and failing to notify authorities and/or failing to render any  
20 medical assistance to the occupants of the house.

21 COUNT III - Attempt Murder With Use of a Deadly Weapon

22 did then and there, without authority of law and with malice  
23 aforethought, wilfully and feloniously attempt to kill MARY  
24 LOPEZ, a human being, by throwing an incendiary device into the  
25 residence at 7101 Hurricane Way, Las Vegas, Clark County, Nevada,  
26 thereby setting the house on fire, with a deadly weapon, to-wit:  
27 a molotov cocktail, each Defendant aiding and abetting the others  
28 in the following manner, to-wit: by each Defendant entering into

1 an agreement with the others to throw an incendiary device into  
2 the residence at 7101 Hurricane Way, Las Vegas, Nevada, by one or  
3 all of the Defendants preparing a molotov cocktail, by all three  
4 Defendants being present at the scene when the incendiary device  
5 was thrown, Defendant TIMOTHY EDWARD WEBB being the driver of the  
6 motor vehicle used to carry himself and MITCHELL NELSON and  
7 JOSEPH ANTHONY EWISH to and from the scene of the fire bombing,  
8 Defendants TIMOTHY EDWARD WEBB and JOSEPH ANTHONY EWISH  
9 counselling, encouraging, and inducing the action of Defendant  
10 MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as a lookout,  
11 and MITCHELL NELSON actually throwing the incendiary device into  
12 the residence at 7101 Hurricane Way, Las Vegas, Nevada,  
13 thereafter all Defendants fleeing the scene of said fire bombing  
14 and failing to notify authorities and/or failing to render any  
15 medical assistance to the occupants of the house.

16 COUNT IV - Attempt Murder With Use of a Deadly Weapon

17 did then and there, without authority of law and with malice  
18 aforethought, wilfully and feloniously attempt to kill CRYSTAL  
19 LOPEZ, a human being, by throwing an incendiary device into the  
20 residence at 7101 Hurricane Way, Las Vegas, Clark County, Nevada,  
21 thereby setting the house on fire, with a deadly weapon, to-wit:  
22 a molotov cocktail, each Defendant aiding and abetting the others  
23 in the following manner, to-wit: by each Defendant entering into  
24 an agreement with the others to throw an incendiary device into  
25 the residence at 7101 Hurricane Way, Las Vegas, Nevada, by one or  
26 all of the Defendants preparing a molotov cocktail, by all three  
27 Defendants being present at the scene when the incendiary device  
28 was thrown, Defendant TIMOTHY EDWARD WEBB being the driver of the



1 motor vehicle used to carry himself and MITCHELL NELSON and  
2 JOSEPH ANTHONY EWISH to and from the scene of the fire bombing,  
3 Defendants TIMOTHY EDWARD WEBB and JOSEPH ANTHONY EWISH  
4 counselling, encouraging, and inducing the action of Defendant  
5 MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as a lookout,  
6 and MITCHELL NELSON actually throwing the incendiary device into  
7 the residence at 7101 Hurricane Way, Las Vegas, Nevada,  
8 thereafter all Defendants fleeing the scene of said fire bombing  
9 and failing to notify authorities and/or failing to render any  
10 medical assistance to the occupants of the house.

11 COUNT V - Attempt Murder With Use of a Deadly Weapon

12 did then and there, without authority of law and with malice  
13 aforethought, wilfully and feloniously attempt to kill RONALD  
14 LOPEZ, a human being, by throwing an incendiary device into the  
15 residence at 7101 Hurricane Way, Las Vegas, Clark County, Nevada,  
16 thereby setting the house on fire, with a deadly weapon, to-wit:  
17 a molotov cocktail, each Defendant aiding and abetting the others  
18 in the following manner, to-wit: by each Defendant entering into  
19 an agreement with the others to throw an incendiary device into  
20 the residence at 7101 Hurricane Way, Las Vegas, Nevada, by one or  
21 all of the Defendants preparing a molotov cocktail, by all three  
22 Defendants being present at the scene when the incendiary device  
23 was thrown, Defendant TIMOTHY EDWARD WEBB being the driver of the  
24 motor vehicle used to carry himself and MITCHELL NELSON and  
25 JOSEPH ANTHONY EWISH to and from the scene of the fire bombing,  
26 Defendants TIMOTHY EDWARD WEBB and JOSEPH ANTHONY EWISH  
27 counselling, encouraging, and inducing the action of Defendant  
28 MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as a lookout,

1 and MITCHELL NELSON actually throwing the incendiary device into  
2 the residence at 7101 Hurricane Way, Las Vegas, Nevada,  
3 thereafter all Defendants fleeing the scene of said fire bombing  
4 and failing to notify authorities and/or failing to render any  
5 medical assistance to the occupants of the house.

6 COUNT VI - Attempt Murder With Use of a Deadly Weapon

7 did then and there, without authority of law and with malice  
8 aforethought, wilfully and feloniously attempt to kill MARK  
9 LOPEZ, a human being, by throwing an incendiary device into the  
10 residence at 7101 Hurricane Way, Las Vegas, Clark County, Nevada,  
11 thereby setting the house on fire, with a deadly weapon, to-wit:  
12 a molotov cocktail, each Defendant aiding and abetting the others  
13 in the following manner, to-wit: by each Defendant entering into  
14 an agreement with the others to throw an incendiary device into  
15 the residence at 7101 Hurricane Way, Las Vegas, Nevada, by one or  
16 all of the Defendants preparing a molotov cocktail, by all three  
17 Defendants being present at the scene when the incendiary device  
18 was thrown, Defendant TIMOTHY EDWARD WEBB being the driver of the  
19 motor vehicle used to carry himself and MITCHELL NELSON and  
20 JOSEPH ANTHONY EWISH to and from the scene of the fire bombing,  
21 Defendants TIMOTHY EDWARD WEBB and JOSEPH ANTHONY EWISH  
22 counselling, encouraging, and inducing the action of Defendant  
23 MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as a lookout,  
24 and MITCHELL NELSON actually throwing the incendiary device into  
25 the residence at 7101 Hurricane Way, Las Vegas, Nevada,  
26 thereafter all Defendants fleeing the scene of said fire bombing  
27 and failing to notify authorities and/or failing to render any  
28 medical assistance to the occupants of the house.

1 COUNT VII - Attempt Murder With Use of a Deadly Weapon

2 did then and there, without authority of law and with malice  
3 aforethought, wilfully and feloniously attempt to kill JOHN  
4 LOPEZ, a human being, by throwing an incendiary device into the  
5 residence at 7101 Hurricane Way, Las Vegas, Clark County, Nevada,  
6 thereby setting the house on fire, with a deadly weapon, to-wit:  
7 a molotov cocktail, each Defendant aiding and abetting the others  
8 in the following manner, to-wit: by each Defendant entering into  
9 an agreement with the others to throw an incendiary device into  
10 the residence at 7101 Hurricane Way, Las Vegas, Nevada, by one or  
11 all of the Defendants preparing a molotov cocktail, by all three  
12 Defendants being present at the scene when the incendiary device  
13 was thrown, Defendant TIMOTHY EDWARD WEBB being the driver of the  
14 motor vehicle used to carry himself and MITCHELL NELSON and  
15 JOSEPH ANTHONY EWISH to and from the scene of the fire bombing,  
16 Defendants TIMOTHY EDWARD WEBB and JOSEPH ANTHONY EWISH  
17 counselling, encouraging, and inducing the action of Defendant  
18 MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as a lookout,  
19 and MITCHELL NELSON actually throwing the incendiary device into  
20 the residence at 7101 Hurricane Way, Las Vegas, Nevada,  
21 thereafter all Defendants fleeing the scene of said fire bombing  
22 and failing to notify authorities and/or failing to render any  
23 medical assistance to the occupants of the house.

24 COUNT VIII - Attempt Murder With Use of a Deadly Weapon

25 did then and there, without authority of law and with malice  
26 aforethought, wilfully and feloniously attempt to kill BILLY JACK  
27 HORN, a human being, by throwing an incendiary device into the  
28 residence at 7101 Hurricane Way, Las Vegas, Clark County, Nevada,

1 thereby setting the house on fire, with a deadly weapon, to-wit:  
2 a molotov cocktail, each Defendant aiding and abetting the others  
3 in the following manner, to-wit: by each Defendant entering into  
4 an agreement with the others to throw an incendiary device into  
5 the residence at 7101 Hurricane Way, Las Vegas, Nevada, by one or  
6 all of the Defendants preparing a molotov cocktail, by all three  
7 Defendants being present at the scene when the incendiary device  
8 was thrown, Defendant TIMOTHY EDWARD WEBB being the driver of the  
9 motor vehicle used to carry himself and MITCHELL NELSON and  
10 JOSEPH ANTHONY EWISH to and from the scene of the fire bombing,  
11 Defendants TIMOTHY EDWARD WEBB and JOSEPH ANTHONY EWISH  
12 counselling, encouraging, and inducing the action of Defendant  
13 MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as a lookout,  
14 and MITCHELL NELSON actually throwing the incendiary device into  
15 the residence at 7101 Hurricane Way, Las Vegas, Nevada,  
16 thereafter all Defendants fleeing the scene of said fire bombing  
17 and failing to notify authorities and/or failing to render any  
18 medical assistance to the occupants of the house.

19 COUNT IX - Attempt Murder With Use of a Deadly Weapon

20 did then and there, without authority of law and with malice  
21 aforethought, wilfully and feloniously attempt to kill MARY  
22 NEWTON, a human being, by throwing an incendiary device into the  
23 residence at 6509 Hillview Avenue, Las Vegas, Clark County,  
24 Nevada, thereby setting the house on fire, with a deadly weapon,  
25 to-wit: a molotov cocktail, each Defendant aiding and abetting  
26 the others in the following manner, to-wit: by each Defendant  
27 entering into an agreement with the others to throw an incendiary  
28 / / /

1 device into the residence at 6509 Hillview Avenue, Las Vegas,  
2 Nevada, by one or all of the Defendants preparing a molotov  
3 cocktail, by all three Defendants being present at the scene when  
4 the incendiary device was thrown, Defendant TIMOTHY EDWARD WEBB  
5 being the driver of the motor vehicle used to carry himself and  
6 MITCHELL NELSON and JOSEPH ANTHONY EWISH to and from the scene of  
7 the fire bombing, Defendants TIMOTHY EDWARD WEBB and JOSEPH  
8 ANTHONY EWISH counselling, encouraging, and inducing the action  
9 of Defendant MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as  
10 a lookout, Defendants acting in concert in committing the acts as  
11 part of a continuing course of conduct described in acts I, II,  
12 III, IV, V, VI, VII, and VIII of this pleading; it being unknown  
13 to the State of Nevada whether the incendiary device was actually  
14 thrown by MITCHELL NELSON, JOSEPH ANTHONY EWISH, or TIMOTHY  
15 EDWARD WEBB, thereafter all Defendants fleeing the scene of said  
16 fire bombing and failing to notify authorities and/or failing to  
17 render any medical assistance to the occupants of the house.

18 COUNT X - Attempt Murder With Use of a Deadly Weapon

19 did then and there, without authority of law and with malice  
20 aforethought, wilfully and feloniously attempt to kill RICKEY  
21 NEWTON, a human being, by throwing an incendiary device into the  
22 residence at 6509 Hillview Avenue, Las Vegas, Clark County,  
23 Nevada, thereby setting the house on fire, with a deadly weapon,  
24 to-wit: a molotov cocktail, each Defendant aiding and abetting  
25 the others in the following manner, to-wit: by each Defendant  
26 entering into an agreement with the others to throw an incendiary  
27 device into the residence at 6509 Hillview Avenue, Las Vegas,  
28 / / /

1 Nevada, by one or all of the Defendants preparing a molotov  
2 cocktail, by all three Defendants being present at the scene when  
3 the incendiary device was thrown, Defendant TIMOTHY EDWARD WEBB  
4 being the driver of the motor vehicle used to carry himself and  
5 MITCHELL NELSON and JOSEPH ANTHONY EWISH to and from the scene of  
6 the fire bombing, Defendants TIMOTHY EDWARD WEBB and JOSEPH  
7 ANTHONY EWISH counselling, encouraging, and inducing the action  
8 of Defendant MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as  
9 a lookout, Defendants acting in concert in committing the acts as  
10 part of a continuing course of conduct described in acts I, II,  
11 III, IV, V, VI, VII, and VIII of this pleading; it being unknown  
12 to the State of Nevada whether the incendiary device was actually  
13 thrown by MITCHELL NELSON, JOSEPH ANTHONY EWISH, or TIMOTHY  
14 EDWARD WEBB, thereafter all Defendants fleeing the scene of said  
15 fire bombing and failing to notify authorities and/or failing to  
16 render any medical assistance to the occupants of the house.

17 COUNT XI - Attempt Murder With Use of a Deadly Weapon

18 did then and there, without authority of law and with malice  
19 aforethought, wilfully and feloniously attempt to kill MARK  
20 NEWTON, a human being, by throwing an incendiary device into the  
21 residence at 6509 Hillview Avenue, Las Vegas, Clark County,  
22 Nevada, thereby setting the house on fire, with a deadly weapon,  
23 to-wit: a molotov cocktail, each Defendant aiding and abetting  
24 the others in the following manner, to-wit: by each Defendant  
25 entering into an agreement with the others to throw an incendiary  
26 device into the residence at 6509 Hillview Avenue, Las Vegas,  
27 Nevada, by one or all of the Defendants preparing a molotov  
28 / / /

1 cocktail, by all three Defendants being present at the scene when  
2 the incendiary device was thrown, Defendant TIMOTHY EDWARD WEBB  
3 being the driver of the motor vehicle used to carry himself and  
4 MITCHELL NELSON and JOSEPH ANTHONY EWISH to and from the scene of  
5 the fire bombing, Defendants TIMOTHY EDWARD WEBB and JOSEPH  
6 ANTHONY EWISH counselling, encouraging, and inducing the action  
7 of Defendant MITCHELL NELSON, JOSEPH ANTHONY EWISH also acting as  
8 a lookout, Defendants acting in concert in committing the acts as  
9 part of a continuing course of conduct described in acts I, II,  
10 III, IV, V, VI, VII, and VIII of this pleading; it being unknown  
11 to the State of Nevada whether the incendiary device was actually  
12 thrown by MITCHELL NELSON, JOSEPH ANTHONY EWISH, or TIMOTHY  
13 EDWARD WEBB, thereafter all Defendants fleeing the scene of said  
14 fire bombing and failing to notify authorities and/or failing to  
15 render any medical assistance to the occupants of the house.

16 COUNT XII - First Degree Arson

17 did then and there wilfully, unlawfully, maliciously, and  
18 feloniously set fire to, and thereby cause to be burned, a  
19 certain dwelling house, located at 7101 Hurricane Way, Las Vegas,  
20 Clark County, Nevada, said property being then and there the  
21 property of JIMMY LOPEZ and/or MARY LOPEZ, by use of an  
22 incendiary device, to-wit: a molotov cocktail, which was used to  
23 set the house on fire.

24 COUNT XIII - First Degree Arson

25 did then and there wilfully, unlawfully, maliciously, and  
26 feloniously set fire to, and thereby cause to be burned, a  
27 certain dwelling house, located at 6509 Hillview Avenue, Las  
28 Vegas, Clark County, Nevada, said property being then and there

1 the property of MARY NEWTON and/or RICKEY NEWTON, SR., by use of  
2 an incendiary device, to-wit: a molotov cocktail, which was used  
3 to set the house on fire.

4 REX BELL  
5 District Attorney  
6 NEVADA BAR #001799

7 By Melvin T. Harmon  
8 MELVIN T. HARMON  
9 Chief Deputy District Attorney

10  
11  
12  
13 The names of witnesses known to the District Attorney's  
14 Office at the time of filing this information are as follows:

15 ALBRIGHT, JANET DR.  
16 UMC  
17 Las Vegas, NV

*Rick Armbrust  
LVN*

BLACKWELL, ROBERT  
6240 Fargo  
Las Vegas, NV

*Orrian Booth  
LVN*

17 AUGSBERGER, RICH  
18 Bureau of ATF  
19 Las Vegas, NV

*Craig Balliet  
New Haven, Ind.*

BOWERS, VICTOR DR.  
UMC  
Las Vegas, NV

19 BANDT, PAUL DR.  
20 UMC  
21 Las Vegas, NV

BYALL, ELLIOTT  
ATF  
Walnut Creek, CA

21 BAXTER, BOB  
22 7021 Hurricane Way  
23 Las Vegas, NV

CABRALES, AL  
LVMPD #2045  
IDEN

23 BAXTER, Mrs.  
24 7021 Hurricane Way  
25 Las Vegas, NV

CALDWELL, K.  
LVMPD #  
FSD

25 BENTON, COLLEEN  
26 Address Unknown  
27 New York

CASTLEBERRY, C.  
Fire Dept.  
Las Vegas, NV

*David Chambers  
LVN*

27 BETZ, BILL  
28 Bureau of ATF  
Walnut Creek, CA

CHASE, WAYNE  
1704 Pinto Ln - Coroner  
Las Vegas, NV



1 CODE 2650  
2 WASHOE COUNTY PUBLIC DEFENDER  
3 JORDAN A. DAVIS, BAR# 12196  
4 350 S. CENTER ST, 5<sup>TH</sup> FLR  
5 RENO, NV 89501  
6 ATTORNEY FOR DEFENDANT

7 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
8  
9 IN AND FOR THE COUNTY OF WASHOE.

10 THE STATE OF NEVADA,

11 Plaintiff,

Case No. CR18-1731

12 vs.

Dept. No. 1

13 DAVID CHARLES RADONSKI,

14 Defendant.  
15 \_\_\_\_\_/

16 **OPPOSITION TO THE STATE'S MOTION FOR RECONSIDERATION**

17 COMES NOW, DAVID CHARLES RADONSKI (the "Defendant"), by counsel  
18 Washoe County Public Defender JOHN L. ARRASCADA and Deputy Public  
19 Defender JORDAN A. DAVIS, hereby files this Opposition to the State's Motion for  
20 Reconsideration. This Opposition is made and based upon the points and  
21 authorities submitted in support hereof, and any oral argument which may be  
22 heard in this matter.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **INTRODUCTION**

25 The State's Motion to Reconsider (the "Motion") is based upon the same  
26 arguments previously raised in pleadings and during oral argument. In its Motion,  
the State re-argues that *Ewish* is distinguishable from the present case because

1 Ewish and his co-defendants were charged as aiders and abettors, under a specific  
2 intent theory. The State fails to offer any new evidence that this Court's previous  
3 ruling was clearly erroneous. By merely re-alleging the same arguments made  
4 prior to the Court's Order After Hearing Re: *Mens Rea* of Arson (the "Order"), the  
5 State has not identified any newly discovered evidence, clear error, or an  
6 intervening change in controlling case law to justify reconsideration. Accordingly,  
7 the State's Motion must be denied.

### 8 **LEGAL ARGUMENT**

9 "A district court may reconsider a previously decided issue if substantially  
10 different evidence is subsequently introduced or the decision is clearly erroneous."  
11 *Masonry and Tile v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489  
12 (1997); *see also Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246  
13 (1976) ("Only in very rare instances in which new issues of fact or law are raised  
14 supporting a ruling contrary to the ruling already reached should a motion for  
15 rehearing be granted."). Further, to the extent that the State argues that the  
16 district court would repeat its error in denying its Motion, the denial of a motion to  
17 reconsider is not an appealable decision. *Phelps v. State*, 111 Nev. 1021, 1022, 900  
18 P.2d 344, 345 (1995) (no statute or court rule provides for an appeal from an order  
19 denying a motion for reconsideration).

#### 20 **A. THE STATE IS ATTEMPTING TO REARGUE AN ISSUE THAT THIS COURT HAS** 21 **ALREADY RULED UPON WHICH IS IMPROPER.**

22 The State is attempting to reargue an issue that this Court has already  
23 ruled upon, which is improper. *In re AgriBioTech, Inc.*, 319 B.R. 207, 209  
24 (D.Nev.2004)("A motion for reconsideration is not an avenue to re-litigate the same  
25 issues and arguments upon which the court already has ruled."); *Rosiere v. United*  
26 *States*, No. 216CV02286GMNPAL, 2017 WL 3814668, at \*1-2 (D. Nev. Aug. 30,

2017)(A motion for reconsideration should not be “used to ask the Court to rethink what it has already thought.”); *Saintal v. Foster*, No. 2:11-CV-00445-MMD, 2013 WL 5757917, at \*1 (D. Nev. Oct. 23, 2013)(Motions for reconsideration are not “the proper vehicles for rehashing old arguments,” and are not “intended to give an unhappy litigant one additional chance to sway the judge.”); *Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, No. 03:04-CV-00034-LRH, 2015 WL 1692788, at \*6 (D. Nev. Apr. 15, 2015)(denying a motion to reconsider noting that motions cannot be used merely to reargue an issue that has already been decided).

Here, the State is attempting to reargue the same points raised during oral argument, as well as, in its Motion to Determine, Preliminary, Instruction to Jury, Re: *Mens Rea* of Arson (the “Original Motion”) and in its Response in Opposition to Defendant’s Motion in Limine (the “Response”). Specifically, the State urges this Court to reconsider its Order based upon the Court’s alleged “misapprehension” of the underlying facts and charging theories in *Ewish*, namely that Ewish and his co-defendants were charged under a theory of aiding and abetting and not under a theory of direct liability.<sup>1</sup> The State’s Motion is based entirely upon the same set of facts, legal theories and arguments already presented to this Court.<sup>2</sup> These arguments were raised in the State’s Original Motion and Response, fully briefed by both parties and argued before this Court during oral argument. Both sides were allowed ample opportunity to provide their respective positions and the Court took this matter under advisement and issued a six (6) page Order detailing the

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<sup>1</sup> This exact same argument was raised in the State’s Response at pages 3-4 where the State attempted to distinguish *Ewish* from the present case by arguing that *Ewish* was decided under an aiding and abetting theory.

<sup>2</sup> In its Motion, the State attaches an Information from August 1990 charging Ewish and his co-defendants with arson. The State fails to explain why this additional evidence was not previously available or why it did not bring this to the Court’s attention until after the Order was entered. Regardless, the Information does not alter the conclusions reached by this Court.

1 parties' positions and articulating the Court's analysis on how it reached its  
2 decision. The Court's Order at page 3 confirms that this issue was previously  
3 raised by the State:

4 "In distinguishing *Ewish*, the State argues that unlike Mr.  
5 Radonski, Ewish and his co-defendant were charged as aiders  
6 and abettors, under the specific intent theory of NRS 205.020.  
7 As such, the State contends, the Nevada Supreme Court  
statements regarding specific intent for the crime of arson do  
not apply to the present case." Order at 3.

8 In its Motion, the State rehashes the same argument. Specifically, the State  
9 contends:

10 "Because Mr. Radonksi is not being charged as an aider and  
11 abettor, the arson charges in this case, CR18-1731, require a  
12 general intent. And, the analysis of *Ewish I* and *Ewish II*,  
based upon an aiding and abetting prosecution and conviction,  
is entirely distinguishable." Motion at 3.

13 This very same argument has already been raised by the State and ruled  
14 upon by this Court in a decision consistent with Nevada law.

15 In *Ewish v. State*, the defendant, Webb, who was charged with arson took  
16 the stand and admitted committing a culpable act by throwing a molotov cocktail  
17 at a home. *Ewish v. State*, 110 Nev. 221, 228, 871 P.2d 306, 311 (1994), on reh'g,  
18 111 Nev. 1365, 904 P.2d 1038 (1995). The defendant then claimed that due to his  
19 voluntary intoxication, he could not have formed the requisite specific intent  
20 necessary to commit arson. *Id.* The Nevada Supreme Court concluded that this  
21 was a viable defense to a specific intent crime, and the jury had been instructed  
22 accordingly. *Id.*

23 Subsequently, in a *per curiam* decision, the Nevada Supreme Court again  
24 noted that lack of specific intent is a valid defense to arson. *Ewish v. State*, 111  
25 Nev. 1365, 1367, 904 P.2d 1038, 1039 (1995)("[w]e indicated in our prior opinion,  
26 with respect to Ewish's co-defendant, that lack of specific intent is a valid defense

1 to arson . . . "). The State now claims that "when the Supreme Court found that  
2 lack of specific intent is a valid defense to arson, it was making that decision for  
3 the *Ewish* case only, which involved "aiding and abetting charges." Motion at 6.  
4 This statement is unsupported. The Nevada Supreme Court did not limit its ruling  
5 to the facts of this particular case. Both *Ewish I* and *Ewish II* were published  
6 decisions and reflect the current status of the law. Contrary to the State's  
7 argument, the Nevada Supreme Court did not find that arson is a general intent  
8 crime; however, under a theory of aiding and abetting, arson is a specific intent  
9 crime. To be clear, nowhere in *Ewish I* or *Ewish II* did the Court say anything  
10 about arson being a general intent crime. No Nevada case holds that arson is a  
11 general intent crime. Instead, the authority holds the opposite – that arson is a  
12 specific intent crime. The Court's Order was not "clearly erroneous" and does not  
13 involve the Court's arbitrary analysis of fact or law. Accordingly, the State's  
14 Motion must be denied.

### 15 **CONCLUSION**

16 The State has not identified any newly discovered evidence, clear error, or  
17 an intervening change in controlling case law to justify reconsideration, and  
18 therefore, the State's Motion must be denied.

### 19 **AFFIRMATION PURSUANT TO NRS 239B.030**

20 The undersigned does hereby affirm that the preceding document does not  
21 contain the social security number of any person.

22 Dated this 25<sup>th</sup> day of June, 2019.

23 JOHN L. ARRASCADA  
24 Washoe County Public Defender

25 /s/ Jordan A. Davis  
26 JORDAN A. DAVIS  
Deputy Public Defender

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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of the Washoe County Public Defender's Office, Reno, Washoe County, Nevada, and that on this date electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

MATTHEW LEE  
Deputy District Attorney

Dated this 25<sup>th</sup> day of June, 2019.

/s/ Jessica Haro  
JESSICA HARO

1 Code 2645  
2 Christopher J. Hicks  
3 #007747  
4 One South Sierra Street  
5 Reno, NV 89501  
6 (775) 328-3200  
7 Attorney for Plaintiff

8 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
9 IN AND FOR THE COUNTY OF WASHOE.

10 \* \* \*

11 THE STATE OF NEVADA,

12 Plaintiff,

Case No. CR18-1731

13 v.

Dept. No. 1

14 DAVID CHARLES RADONSKI,

15 Defendant.

16 \_\_\_\_\_/  
17 REPLY TO OPPOSITION OF STATE'S MOTION TO  
18 RECONSIDER ORDER AFTER HEARING, RE: MENS REA OF ARSON

19 COMES NOW, the State of Nevada, by and through CHRISTOPHER J.  
20 HICKS, District Attorney of Washoe County, and MATTHEW LEE, Chief  
21 Deputy District Attorney, and hereby replies to the defendant's  
22 opposition to the State's Motion to Reconsider its Order After  
23 Hearing, Re: Mens Rea of Arson, which opposition was filed on June  
24 25, 2019. This reply is made and based upon the attached Points and  
25 Authorities, the State's prior Motion to Reconsider, Ewish v. State  
26 ("Ewish I"), 110 Nev. 221, 871 P.2d 306 (1994) and Ewish v. State  
("Ewish II"), 111 Nev. 136, 904 P.2d 1038 (1995).

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1 and abetting.<sup>1</sup> And we know, as set forth in its Motion to Reconsider,  
2 that an aiding and abetting theory requires specific intent because  
3 the person aiding and abetting must have the intent that the other  
4 person commit the crime.<sup>2</sup>

5 The State is not arguing that the court in *Ewish* held that arson  
6 is a general intent crime. *Ewish* did not reach this issue regarding  
7 the arson statute. In fact, no Nevada decision has reached that  
8 issue. *Ewish* only held that for an aiding and abetting arson charge,  
9 voluntary intoxication was a defense, since the aiding and abetting  
10 theory made arson a specific intent crime. It would be legally  
11 improper to expand and apply that holding to the arson statutes in  
12 general. This is the basis for the State's motion to reconsider -  
13 that this Court's Order took the limited, distinguishable holding in  
14 *Ewish* and applied it to all arson statutes universally.

15 In the instant case, Mr. Radonski is not being charged as an  
16 aider and abettor. Therefore it would be error to claim that *Ewish*  
17 requires that he be prosecuted with a specific intent.

18 ///

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23 <sup>1</sup> It is immaterial that for only one of the arson charges, only one of  
24 the defendants in *Ewish* took the stand and admitted throwing the  
25 firebomb. It is the prosecution theory that controls, and the  
26 Supreme Court acknowledged that despite this testimony of one of the  
defendants for one of the arsons, they were both convicted under an  
aiding and abetting prosecution, as set forth in *Ewish I*, 110 Nev. at  
227, 236, 871 P.2d at 311, 316.

<sup>2</sup> *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) (Aiding  
or abetting is a specific intent crime).

1     **II.   CONCLUSION**

2           This Court found that arson requires specific intent because  
3     *Ewish I* and *Ewish II* discuss arson in that manner. However, and  
4     respectfully, this finding is clearly erroneous because the  
5     prosecution and conviction in *Ewish I* and *Ewish II* were based upon  
6     aiding and abetting, not direct culpability. *Ewish I* and *Ewish II*  
7     therefore cannot serve as the basis to universally hold that the  
8     arson statute in its normal form requires specific intent.

9  
10                             AFFIRMATION PURSUANT TO NRS 239B.030

11           The undersigned does hereby affirm that the preceding  
12     document does not contain the social security number of any person.

13           Dated this 28th day of June, 2019.

14                             CHRISTOPHER J. HICKS  
15                             District Attorney  
                              Washoe County, Nevada

16  
17                             By /s/ Matthew Lee  
18                             MATTHEW LEE  
                              10654  
                              Chief Deputy District Attorney

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CERTIFICATE OF SERVICE BY E-FILING

I certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

JORDAN DAVIS, D.P.D.  
350 S. CENTER STREET  
RENO, NEVADA 89501

DATED this 28th day of June, 2019.

/S/Matthew Lee  
MATTHEW LEE

1 2840

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF**  
7 **THE STATE OF NEVADA IN AND FOR THE**  
8 **COUNTY OF WASHOE**

9 STATE OF NEVADA,

10 Plaintiff,

CASE NO.: CR18-1731

11 vs.

DEPT. NO.: 1

12 DAVID CHARLES RADONSKI,

13 Defendant.  
14 \_\_\_\_\_/

15  
16 **ORDER DENYING MOTION TO RECONSIDER ORDER**  
17 **AFTER HEARING RE: MENS REA OF ARSON**

18 Currently before the Court is the State of Nevada's *Motion to Reconsider Order After Hearing,*  
19 *re: Mens Rea of Arson* ("Motion") filed June 21, 2019. On June 25, 2019, Defendant David Charles  
20 Radonski ("Mr. Radonski") filed an *Opposition to the State's Motion for Reconsideration*. On June  
21 28, 2019, the State filed a *Reply to Opposition of State's Motion to Reconsider Order After Hearing,*  
22 *re: Mens Rea of Arson* and submitted the Motion to the Court for consideration.

23 **I. Background**

24 Mr. Radonski was arrested on July 31, 2018, as part of an investigation into the "Perry Fire."  
25 The "Perry Fire" was a fire which began on July 27, 2018, burned approximately 51,400 acres  
26 southwest of Pyramid Lake. In association with the arrest, Mr. Radonski was charged with the  
27 following: (1) Count I, First Degree Arson; (2) Count II, First Degree Arson; (3) Count III, Third  
28 Degree Arson; (4) Count IV, Third Degree Arson; and (5) Count V, Destruction of Timber, Crops, or

1 Vegetation by Fire. *See* Information. Mr. Radonski has pled not guilty to the crimes charged. Trial is  
2 set to begin September 23, 2019.

3 On May 15, 2019, the parties came before this Court and presented oral argument regarding  
4 whether first and third degree arson are specific or general intent crimes. On June 12, 2019, this Court  
5 entered an order addressing the parties' arguments and found that the Nevada Supreme Court has  
6 clearly held that the lack of specific intent is a sufficient defense to arson, citing to *Ewish v. State*, 110  
7 Nev. 221, 871 P.2d 306 (1995), referred to as *Ewish I*, and *Ewish v. State*, 111 Nev. 1365, 904 P.2d  
8 1038 (1995), referred to as *Ewish II*.

9 **II. Legal Standard**

10 Pursuant to DCR 13(7), no motion once heard and disposed of shall be renewed in the same  
11 cause, nor shall the same matters therein embraced be reheard, unless by leave of the court upon  
12 motion therefor, after notice of such motion to the adverse parties. Although this Court has inherent  
13 authority to reconsider its prior orders, it will only do so if a party subsequently introduces  
14 substantially different evidence or establishes that the decision is clearly erroneous. *Masonry and Tile*  
15 *Contractors Ass'n of So. Nev. v. Jolley Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 589  
16 (1997). Furthermore, arguments not raised in the original motion practice cannot be maintained or  
17 considered in a motion for reconsideration. *See, Achrem v. Expressway Plaza, Ltd.*, 112 Nev. 737,  
18 742, 917 P.2d 447, 450 (1996); *Chowdhry v. NLVH, Inc.*, 111 Nev. 560, 562-63, 893 P.2d 385, 387  
19 (1995). "Only in very rare instances in which new issues of fact or law are raised supporting a ruling  
20 contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las*  
21 *Vegas*, 92 Nev. 402,405, 551 P.2d 244, 246 (1976). Additionally, WDCR 12(8) provides in relevant  
22 part:

23 The rehearing of motions must be done in conformity with D.C.R. 13, Section 7. A  
24 party seeking reconsideration of a ruling of the court, other than an order which  
25 may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file  
26 a motion for such relief within 10 days after service of written notice of entry of the  
order or judgment, unless the time is shortened or enlarged by order.

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1       **III. Discussion**

2       The State comes now requesting this Court to reconsider the *Order After Hearing, Re: Mens*  
3 *Rea of Arson* entered June 12, 2019 (“June 12, 2019 Order”). The State asserts that this Court  
4 misapprehended their argument, alleging that this Court’s analysis and conclusion in the June 12, 2019  
5 Order, are based upon flawed case law involving a theory and conviction for aiding and abetting arson,  
6 whereas the present case is pursuing arson under a direct liability theory. *See generally* Mot. The  
7 State contends that when the Nevada Supreme Court found that the lack of specific intent is a valid  
8 defense to arson, it was making a decision only as to the *Ewish* cases, which involved only “aiding  
9 and abetting charges.” *Id.* at 6:14-17 (citing *Ewish I*, 110 Nev. at 227, 871 P.2d at 311).

10       Mr. Radonski opposes the present Motion, asserting that the State is attempting to reargue an  
11 issue that this Court has already ruled upon and contends that the State presented the same points  
12 raised during oral argument and earlier written pleadings. *See generally* Opp. Mr. Radonski further  
13 opposes the State’s assertion that the decisions of *Ewish I* and *II* were limited in scope to that particular  
14 case, asserting that the *Ewish* courts, nor any other Nevada Supreme Court decision, has held that  
15 arson is a general intent crime.

16       The State replied to Mr. Radonski’s opposition, clarifying that the *Ewish* decisions stood only  
17 for the position that aiding and abetting of arson is a specific intent crime, and did not extend  
18 universally to the arson statute in general. The State further asserts that the Court, through the June  
19 12, 2019 Order, failed to analyze the distinction raised by the State that the *Ewish* cases addressed the  
20 aiding and abetting of arson, and the present case is pursuing arson under a direct liability theory.

21       Upon careful review of the record and the arguments presented, the Court does not find good  
22 cause to grant the State’s Motion. Through the present Motion, the State provides the same argument  
23 as presented in their previous pleadings and through oral argument. The underlying issue for this  
24 Court, taken under advisement following oral argument, was whether first and third-degree arson are  
25 general or specific intent crimes in Nevada. In approaching this issue, the parties provided case law  
26 from Nevada, the *Ewish* cases, as well as case law from other jurisdictions. Through the initial  
27 pleadings and through oral argument, the State encouraged this Court to distinguish the *Ewish*  
28 decisions from the present action and follow the law of other jurisdictions, alleging that arson is a

1 general intent crime, unless pursued under an aiding and abetting theory. The Motion contends that the  
2 State's theory in *Ewish I and II* was that the defendants aided and abetted one another not only as to  
3 murder and attempted murder, but as to arson.

4 Mr. Radonski, however, argued that the *Ewish* cases are applicable to the present action,  
5 contending that the *Ewish* cases are valid and controlling.

6 The Motion accurately points to the fact that the *Ewish I* court addressed Defendant Ewish's  
7 claim that the manner in which the Information charged arson did not match the State's aiding and  
8 abetting theory of conviction at trial. In response to this claim, the *Ewish I* court responded:

9 We disagree. The State's indictments alleged that Nelson threw the  
10 Molotov cocktails while Ewish and Webb encouraged the actions. The  
11 indictments also state that Ewish entered into an agreement with the other  
12 two codefendants and acted as a lookout.<sup>1</sup> While these charges do not  
expressly list aiding and abetting, it is clear that this was one of the State's  
theories of conviction.

13 *Ewish I*, 110 Nev. at 236, 871 P.2d at 316.

14 While the Court's response noted that aiding and abetting was a theory of the State's case, it  
15 does not change the Court's very clear statement regarding the requisite intent for the crime of arson.  
16 In discussing Defendant Webb's contention that he was entitled to an instruction on the lesser included  
17 offense explosive destruction, the Court stated:

18 Webb's trial defense to the Newton firebombing was consistent with  
19 explosive destruction. He took the stand and admitted committing a  
20 culpable act by throwing the Molotov cocktail at Newton's home. Webb  
21 then claimed that due to his voluntary intoxication, he could not have  
22 formed the requisite specific intent necessary to commit arson. *This was a*  
*viable defense to a specific intent crime*, and the jury was instructed  
23 accordingly. *If believed, the only crime Webb could have committed was*  
*explosive destruction, a general intent offense*.

24 *Id.*, 110 Nev. at 228, 871 P.2d at 311. Emphasis added.

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27 <sup>1</sup> The specific aiding and abetting language and the allegations that Nelson threw the Molotov cocktails while Ewish and  
28 Webb encouraged the actions and that Ewish entered into an agreement with the other two codefendants and acted as a  
lookout are set forth in the Information in the charges of Murder With Use of a Deadly Weapon and Attempt Murder With  
Use of a Deadly Weapon. There is no such language in the charges of First Degree Arson.

1 Here, the *Ewish I* court makes a direct distinction between the specific intent crime of arson  
2 and the general intent crime of explosive destruction. In so doing, the Court not only confirms that  
3 arson is not a general intent crime, but also declines to characterize arson as a specific intent crime  
4 only when it is based on a theory of aiding and abetting. Importantly, the *Ewish I* court evaluates  
5 whether Defendant Webb possessed the requisite specific intent based solely on the independent  
6 conduct of Defendant Webb namely, “throwing the Molotov cocktail at Newton’s home.” Even if  
7 aiding and abetting was one of the State’s theories of conviction as recognized by the *Ewish I* court, it  
8 did not factor into the Court’s analysis of the intent required to substantiate a conviction for arson. The  
9 *Ewish* courts are clear in holding that the lack of specific intent is a defense to arson, and do not provide  
10 any indication that their decision should not be applied to future arson cases. As such, this Court finds  
11 the State failed to establish that the June 12, 2019 Order was clearly erroneous, and denies the State’s  
12 Motion. The holding of the June 12, 2019 Order remains the law of this case.

13 Accordingly, and good cause appearing,

14 IT IS HEREBY ORDERED that State of Nevada’s *Motion to Reconsider Order After*  
15 *Hearing, re: Mens Rea of Arson* is DENIED.

16 DATED this 13<sup>th</sup> day of August, 2019.

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18 KATHLEEN DRAKULICH  
19 DISTRICT JUDGE  
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1 **CERTIFICATE OF SERVICE**

2 CASE NO. CR18-1731

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the  
4 STATE OF NEVADA, COUNTY OF WASHOE; that on the 13<sup>th</sup> day of August, 2019, I  
5 electronically filed the **ORDER DENYING MOTION TO RECONSIDER ORDER AFTER**  
6 **HEARING RE: MENS REA OF ARSON** with the Clerk of the Court by using the ECF system.

7 I further certify that I transmitted a true and correct copy of the foregoing document by the  
8 method(s) noted below:

9 **Electronically filed with the Clerk of the Court by using the ECF system which will send a notice**  
10 **of electronic filing to the following:**

11 JORDAN DAVIS, ESQ. for DAVID CHARLES RADONSKI (TN)

12 MATTHEW LEE, ESQ. for STATE OF NEVADA

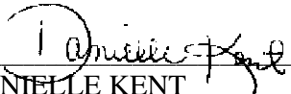
13 DIV. OF PAROLE & PROBATION

14 LYNN BRANZELL, ESQ. for DAVID CHARLES RADONSKI (TN)

15 JOSEPH GOODNIGHT, ESQ. for DAVID CHARLES RADONSKI (TN)

16 **Deposited to the Second Judicial District Court mailing system in a sealed envelope for postage**  
17 **and mailing by Washoe County using the United States Postal Service in Reno, Nevada:**

18 [NONE]

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22 DANIELLE KENT  
23 Department 1 Judicial Assistant  
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Code: 3937

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff(s),

Case No. CR18-1731

vs

Dept. No. 1

DAVID CHARLES RADONSKI

Defendant(s).

COURT NOTE – HEARING

This document does not contain the Social Security Number of any person.

Signature: \_\_\_\_\_

Print: Jessica Stephens

# **SJDC HEARING**

☒ **IN CUSTODY**  
(Check all that apply)

☐ **OUT OF CUSTODY**  
(Check all that apply)

☐ **NSP INMATE**  
(See Additional Case Notes below)

☒ **CURRENT CASE**

Charge(s): First Degree Arson x 2, Third Degree Arson x 2, destruction of timber, crops

Bail \$ 50,000 ☒ Cash Only

☒ PS Supervision ☐ DAS Supervision ☐ No Supervision

☐ Conditions of Release: \_\_\_\_\_

☐ **TRAILING CASE**

Charge(s): \_\_\_\_\_

Court: \_\_\_\_\_ Case #: \_\_\_\_\_ Next Court Date/Time: \_\_\_\_\_

Bail \$ \_\_\_\_\_ ☐ Cash Only Charge Level: \_\_\_\_\_

☐ PS Supervision ☐ DAS Supervision ☐ No Supervision

☐ **ADDITIONAL/UNRELATED CASE(S)**

☐ Charge(s): \_\_\_\_\_ Top Charge: \_\_\_\_\_

☐ Local Court: \_\_\_\_\_ ☐ Outside Jurisdiction (Extraditable): \_\_\_\_\_

☐ Pre-adjudication ☐ Post-adjudication Must Release Date: \_\_\_\_\_

Bail \$ \_\_\_\_\_ ☐ Cash Only ☐ No Bail Hold

☐ Charge(s): \_\_\_\_\_ Top Charge: \_\_\_\_\_

☐ Local Court: \_\_\_\_\_ ☐ Outside Jurisdiction (Extraditable): \_\_\_\_\_

☐ Pre-adjudication ☐ Post-adjudication Must Release Date: \_\_\_\_\_

Bail \$ \_\_\_\_\_ ☐ Cash Only ☐ No Bail Hold

☐ Charge(s): \_\_\_\_\_ Top Charge: \_\_\_\_\_

☐ Local Court: \_\_\_\_\_ ☐ Outside Jurisdiction (Extraditable): \_\_\_\_\_

☐ Pre-adjudication ☐ Post-adjudication Must Release Date: \_\_\_\_\_

Bail \$ \_\_\_\_\_ ☐ Cash Only ☐ No Bail Hold

Additional Case Notes:  
No prior supervision on this case.

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF**  
7 **THE STATE OF NEVADA IN AND FOR THE**  
8 **COUNTY OF WASHOE**

9 STATE OF NEVADA,

10 Plaintiff,

CASE NO.: CR18-1731

11 vs.

DEPT. NO.: 1

12 DAVID CHARLES RADONSKI,

13 Defendant.  
14 \_\_\_\_\_/

15 **ORDER STAYING CASE**

16 On August 14, 2019, the State of Nevada filed a *Motion to Stay the Proceedings Pending*  
17 *Resolution of a Petition for Writ of Mandamus or Prohibition* and an *Errata to Motion to Stay the*  
18 *Proceedings Pending Resolution of a Petition for Writ of Mandamus or Prohibition* (collectively  
19 “Motion to Stay”). Through its Motion, the State provides notice to this Court that it is working on a  
20 petition for writ of mandamus and/or prohibition challenging this Court’s June 16, 2019 ruling  
21 regarding a jury instruction concerning the intent element of Arson, reconsideration of which was  
22 denied on August 13, 2019. *See generally*, Mot. Accordingly, the State is requesting a stay of the  
23 proceedings, including the jury trial set for September 23, 2019, pending a resolution of the petition  
24 for writ of mandamus and/or prohibition.  
25

26 On August 19, 2019, Defendant Radonski filed an *Opposition to the State’s Motion to Stay*  
27 *the Proceedings Pending Resolution of a Petition for Writ of Mandamus or Prohibition*. Defendant  
28 asserts that the request for a stay is premature as the State has yet to file the writ with the Nevada

1 Supreme Court and a stay would be appropriate if the Nevada Supreme Court entertains the writ filed  
2 by the State. *See generally*, Opp..

3 On August 20, 2019, the parties appeared before the Court for a motion to confirm and the  
4 Court heard oral arguments on the Motion to Stay. Having heard the arguments from the State and  
5 Defendant and having considered the pleadings on file, this Court finds good cause to stay this action  
6 and vacate the trial currently scheduled for September 23, 2019.

7 Accordingly, and good cause appearing,

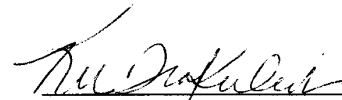
8 IT IS HEREBY ORDERED that the State of Nevada's Motion to Stay is GRANTED. This  
9 matter is stayed pending resolution of the petition for writ of mandamus and/or prohibition anticipated  
10 to be filed with the Nevada Supreme Court.

11 IT IS HEREBY FURTHER ORDERED that the September 23, 2019 trial is VACATED.

12 IT IS HEREBY FURTHER ORDERED that submission of pending motions are VACATED.  
13 Any pending motions may be resubmitted after resolution of the petition for writ of mandamus and/or  
14 prohibition.

15 IT IS SO ORDERED.

16 DATED this 21<sup>st</sup> day of August, 2019.

17   
18 KATHLEEN DRAKULICH  
19 DISTRICT JUDGE  
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1 **CERTIFICATE OF SERVICE**

2 CASE NO. CR18-1731

3 I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the  
4 STATE OF NEVADA, COUNTY OF WASHOE; that on the 21<sup>st</sup> day of August, 2019, I  
5 electronically filed the **ORDER STAYING CASE** with the Clerk of the Court by using the ECF  
6 system.

7 I further certify that I transmitted a true and correct copy of the foregoing document by the  
8 method(s) noted below:

9 **Electronically filed with the Clerk of the Court by using the ECF system which will send a notice**  
10 **of electronic filing to the following:**

11 JORDAN DAVIS, ESQ. for DAVID CHARLES RADONSKI (TN)

12 MATTHEW LEE, ESQ. for STATE OF NEVADA


13 DIV. OF PAROLE & PROBATION

14 LYNN BRANZELL, ESQ. for DAVID CHARLES RADONSKI (TN)

15 JOSEPH GOODNIGHT, ESQ. for DAVID CHARLES RADONSKI (TN)

16 **Deposited to the Second Judicial District Court mailing system in a sealed envelope for postage**  
17 **and mailing by Washoe County using the United States Postal Service in Reno, Nevada:**

18 [NONE]

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22 DANIELLE KENT  
23 Department 1 Judicial Assistant  
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## **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on August 22, 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 Chambers of:

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

/s/ Margaret Ford  
MARGARET FORD