IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE KATHERINE M. DRAKULICH, DISTRICT JUDGE,
Respondents,
and,
DAVID CHARLES RADONSKI,
Real Party in Interest.
_____/

No. 79452

ANSWER AGAINST ISSUANCE OF REQUESTED WRIT

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Introduction

The State asked the district court whether arson is a general or specific intent crime. After briefing and argument by counsel, the district court answered that the Nevada Supreme Court characterizes arson as a specific intent crime. See 2JA 237-43 (Order After Hearing Re: Mens Rea of Arson). Subsequently, in its Order Denying Motion to Reconsider Order After Hearing Re: Mens Rea of Arson, the district court explained further that in *Ewish v. State*, 110 Nev. 221, 871 P.2d 306 (1994),

> [the Nevada Supreme Court] makes a direct distinction between the specific intent crime of arson and the general intent crime of explosive destruction. In so doing, the [Supreme] Court not only confirms that arson is not a general intent crime, but also declines to characterize arson as a specific intent crime *only* when it is based on a theory of aiding and abetting. Importantly, the *Ewish I* court evaluates whether Defendant Webb possessed the requisite specific intent based solely on the independent conduct of Defendant Webb namely, "throwing the Molotov cocktail at Newton's home." Even if aiding and abetting was one of the State's theories of conviction as recognized by the *Ewish I* court, it did not factor into the [Supreme] Court's analysis of the intent required to substantiate a conviction for arson. The *Ewish* courts are clear in holding that a lack

> of specific intent is a defense to arson, and do not provide any indication that their decision should not be applied to future arson cases.

2JA 281 (italics added).

The State now seeks a writ of prohibition or mandamus against the district court's order—concluding that arson is a specific intent crime and denying the State's motion for a general intent arson jury instruction. This Court directed the Real Party in Interest, David Charles Radonski (Mr. Radonski), to file an answer against issuance of the requested writ. The Court has limited the State's request to a writ of mandamus. See Order Directing Answer and Reply fn. 1 (filed on October 24, 2019).

Routing Statement

Mr. Radonski agrees with the State that the Nevada Supreme Court should keep and decide this writ petition. However, for the reasons and argument to follow, this Court should affirm the district court's findings and conclusions in all respects and deny the State's petition for writ of mandamus.

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MEMORANDUM OF POINTS AND AUTHORITIES AGAINST ISSUANCE OF THE REQUESTED WRIT

Standard of Review

Because "[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously," this Court reviews the district court's order under a manifest abuse of discretion standard. *Office of Washoe County Dist. Atty. v. Second Judicial Dist. Court*, 116 Nev. 629, 635, 5 P.3d 562, 565 (200) (citing *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). "Statutory interpretation is a question of law that [this court] review[s] de novo, even in the context of a writ petition." *State v. Second Judicial Dist. Court (Ayden A.)*, 132 Nev. Adv. Op. 33, 373 P.3d 63, 65 (2016) (citation and internal quotation marks omitted, alterations in the original); *Office of Attorney General v. Justice Court*, 133 Nev. Adv. Op. 12, 392 P.3d 170, 172 (2017) ("In the context of a writ petition, questions of statutory interpretation are reviewed de novo.") (citation omitted). Finally, "[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. An abuse of discretion occurs if the district court's decision is

arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks and footnote omitted).

Discussion

In Nevada arson is a specific intent crime no matter how charged

Nevada's first-degree arson statute, NRS 205.010, states in relevant part:

> A person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any:
>
> 1. Dwelling house or other structure or mobile home, whether occupied or vacant; or
>
> 2. Personal property which is occupied by one or more persons,
>
> whether the property of the person or of another, is guilty of arson in the first degree which is a category B felony[.]

Similarly, Nevada's statutes for second-, third-, and fourth-degree arson contemplate the person "who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any ... ." See NRS 205.015 (second degree), NRS 205.020 (third degree), and NRS 205.025 (fourth degree). To "be guilty of malicious arson a fire must be caused intentionally or by design, rather

than accidentally or carelessly[.]" *Batt v. State*, 111 Nev. 1127, 1131 n. 3, 901 P.2d 664, 666 n.3 (1995).

This Court has characterized arson as a specific intent crime. See *Ewish v. State*, 110 Nev. 221, 228, 871 P.2d 306, 311 (1994) (*Ewish I*) (noting defendant's claim that "due to his voluntary intoxication, he could not have formed the requisite specific intent necessary to commit arson" and further stating that voluntary intoxication is "a viable defense to a specific intent crime"); *Ewish v. State*, 111 Nev. 1365, 1367, 904 P.2d 1038, 1039 (1995) (*Ewish II*) ("lack of specific intent is a valid defense to arson"). The State argues that *Ewish I* & *II* are not controlling because they involved a claim of aiding or abetting and, according to the State, "aiding and abetting" is *always* a specific intent crime. See Petition for Writ of Prohibition or Mandamus (Petition) at 13 ("Aiding or abetting is a specific intent crime.").

But that is not correct. One can aid or abet the commission of a general intent crime and that does not require a specific intent on the part of the aider or abettor. An aider or abettor must, however, have a specific intent when the underlying primary offense requires such intent. *Compare Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872

(2002) (holding that "in order for a person to be held accountable for a specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime") *with Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005) ("[t]o hold a defendant criminal liable for a specific intent crime, Nevada requires proof that *he possessed the state of mind required by the statutory definition of the crime*" and that "[t]he mental state required to commit a general intent crime does not raise the same concern as that necessary to commit a specific intent crime") (italics added); and see *Mitchell v. State*, 122 Nev. 1269, 1277, 149 P.3d 33, 38 (2006) (concluding that Mitchell could not be convicted of attempted murder (a specific intent crime) "as an aider or abettor unless he, not just Smith, had the specific intent that Keel be killed.").

The reasoning in *Sharma*, *Bolden*, and *Mitchell* supports the conclusion reached in *Ewish*. Because arson is a specific intent crime, the co-defendants in *Ewish*, had to have the requisite specific intent to commit arson even as aiders or abettors[1]; and that specific intent, the

[1] Recall however, Webb's specific intent was based on his independent

Court acknowledged, could be lacking due to voluntary intoxication, if the jury so found.[2] Thus, contrary to the State's assertion that Nevada's arson statutes create two separate intent standards depending on whether one is charged solely as the principal or charged vicariously as an aider or abettor—see 1PA 179 ("Under Nevada's statutory scheme, arson can be alleged as a specific or a general intent crime[.]"); and Petition at 14 ("The construction of NRS 205.020 allows the crime of Arson to be alleged as a specific or general intent crime.")—Nevada's arson statute establishes only one intent—specific intent.

Accordingly, the district court's conclusions were correct. See 2PA 241 (Order After Hearing Re: Mens Rea of Arson) ("This Court finds, through *Ewish I* and *Ewish II*, that the Nevada Supreme Court has clearly stated that the lack of specific intent is a sufficient defense to arson. Following such, this Court finds that Nevada Law supports the assertion that arson is a specific intent crime.").

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conduct and not as an aider or abettor.

[2] See e.g., NRS 193.220: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent."

The State's reliance on United States v. Doe *is misplaced*

The State slips *United States v. Doe*, 136 F.3d 631 (9th Cir. 1998), into its argument that Nevada's arson statute is a general intent crime. Petition at 7-8. *Doe*, however, was a fractured opinion interpreting a federal arson statute where Judge Fletcher, writing in dissent, challenged the majority's assumptions about the common law. Judge Fletcher noted, "[a]t common law, arson 'is the willful and malicious burning of the dwelling of another.' As such, '[a]rson was one of the earliest felonies *in which the mental element was stressed.*' The required intent 'cannot be inferred from the mere act of burning,' although it can be inferred from such facts as the defendant's removal of 'most of the contents of the building shortly before the fire,' 'threats to destroy the property later burned,' and 'ill will, unfriendly relations and trouble between the defendant and the owner of the property burned.'" 136 F.3d at 638 (italics added, citations omitted, alteration in the original). Indeed, "[a]bsent evidence to the contrary, it is assumed that every burning is accidental and not the result of criminality. Therefore, the burden is on the prosecutor to show that it was willful and malicious." *Id.* (internal quotation marks and citations omitted); and *Id.* at 639

(citing *Grable v. Varela*, 564 P.2d 911, 913 (Ariz. Ct. App. 1977) (holding that intentionally setting a grass fire that spread out of control to burn a house was insufficient to satisfy the arson statute's requirement of "willfully and maliciously.") (internal quotation marks omitted).[3]

In addition to the critique provided by Judge Fletcher of *Doe's* reasoning, the "decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court," *Blanton v. North Las Vegas Mun Court*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987), and this Court is not obligated to adopt *Doe's* reasoning, particularly where, as here, this Court has already found arson to be a specific intent crime.

The State's reference to California cases is not dispositive

In *People v. Atkins*, 18 P.3d 660 (Cal. 2001), the California Supreme Court concluded, in a case involving a claim of involuntary intoxication, that arson was a general intent crime and thus the defense

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[3] In *Grable* the appellate court, interpreting a statute worded as ours, said: "In order for a fire to be set willfully it must be set knowingly and stubbornly and with an alleged unlawful purpose. Mere carelessness or accident does not constitute a willful setting. The required malice is the deliberate and intentional firing of a building or other defined structure, as contrasted with an accidental or unintentional ignition thereof." 564 P.2d at 913 (paragraph break and citations omitted).

did not apply. In reaching this conclusion the court resolved a split of opinion existing in the California intermediate courts of appeal. *Id.* 18 P.3d at 664-65; and see *United States v. Doe*, 136 F.3d at 636 n.6 (noting then existing split in California). But California's approach is not dispositive; other states have concluded that arson is a specific intent crime. See *Commonwealth v. Pfeiffer*, 121 N.E. 3d 1130, 1140-41 (Mass. 2019) (noting split of authority and collecting cases).

For example, in *Holbrook v. State*, 772 A.2d 1240, 1250 (Md. 2001) (internal quotation marks omitted), the court said that the terms "maliciously"—defined as "an act done with intent to harm a person or property"—and "willfully"—defined as "an act which is done intentionally, knowingly, and purposefully"—in the arson statute meant "that the Legislature intended for arson to be a specific intent crime." In *In re: David P.*, 170 A.3d 818 (Md. App. 2017), the appellate court noted the parties' agreement that "arson is a specific intent crime" and observed that "[a] specific intent is not simply the intent to do the immediate act but embraces the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act." 170 A.3d at 823 (quoting *Smith v.*

State, 398 A.2d 426 (Md. App. 1979) (internal quotation marks omitted). Continuing, the court added:

> [a]pplying this understanding to arson, the *mens rea* requires not only having to do the immediate act of setting a fire, but also embracing the purpose of causing the harm to person or property. Further, "[m]ere knowledge that a result is substantially certain to follow from one's actions is not the same as the specific intent[.]"

Id. 170 A.3d at 823 (alterations in the original, citations omitted). The "willful and malicious" standard "imposes a specific intent *mens rea* requirement[.]" *Id.*

The district court's order should be affirmed

The district court correctly found that Nevada law "provides that arson is a specific intent crime, and as such, the Court need not look beyond Nevada case law to other jurisdictions." 2JA 240 (Order After Hearing Re: Mens Rea of Arson). The State presents no compelling reason or argument for this Court to look to other jurisdictions for guidance. The doctrine of *stare decisis* requires adherence to past precedent unless "compelling," "weighty," or "conclusive" reasons exist for overruling it. Stated differently, prior case law will not be overruled unless it was "badly reasoned" or is "unworkable." See *Cooper v. State*,

134 Nev. Adv. Op. 52, 422 P.3d 722, 731 (2018) (Pickering, J., dissenting) (quoting and comparing *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) and *State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013)). The State makes none of these arguments. Instead it insists that the crime of arson is both a general intent crime and a specific intent crime depending upon how the State elects to charge the offense. This Court has held otherwise and need not adopt the State's pliable interpretation. Instead, this Court should reaffirm its understanding of the intent element for the crime of arson as expressed in the *Ewish* cases.

CONCLUSION

A district court does not manifestly abuse its discretion or act arbitrarily or capriciously when following controlling Supreme Court precedent. Accordingly, Mr. Radonski respectfully requests this Court deny the State's request for a writ of mandamus.

Dated this 19th day of November 2019.

By: *John Reese Petty*
JOHN REESE PETTY
Chief Deputy Public Defender
By: *Jordan A. Davis*
JORDAN A. DAVIS
Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This answer has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points and contains a total of 2,765 words. NRAP 32(a)(7)(A)(i), (ii).

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

accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of November 2019.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on 19th day of November 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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