IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

v.

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

Respondents,

and

DAVID CHARLES RADONSKI,

Real Party in Interest.
_____/

No. 79452

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

TABLE OF AUTHORITIES (Continued)

/ / /

/ / /

TABLE OF AUTHORITIES (Continued)

Statutes

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REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

I. INTRODUCTION

Nevada caselaw on the subject of arson is very limited. In *Ewish I and Ewish II*, *infra*, the Nevada Supreme Court found that voluntary intoxication could appropriately be raised as a defense to arson. Underlying this finding was the apparent reasoning that arson is a specific intent crime, but no language in the opinion explains *Ewish I* and *II*'*s*

curious departure from the numerous, persuasive state and federal authorities regarding arson statutes of nearly identical construction.

Nevada's arson statute is nearly identical to that of many other states. In those sister states, arson is consistently regarded as a general intent crime, consistent with the common law definition. This Court should depart from the reasoning in *Ewish I* and *II*, and hold, consistent with the Ninth Circuit and other authorities, that arson in Nevada is a general intent crime.

II. FACTS ADDUCED AT PRELIMINARY HEARING

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

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While fire suppression efforts were underway, Radonski arrived on scene. *Id*., 74-75. He told investigators that he had seen the fire from his motorcycle, and claimed that he had observed two vehicles fleeing from the fire's area of origin. Radonski further claimed that he tried to give chase, but could not keep up with the vehicles. *Id*., 75. He told police that he had dropped a silver push-button lighter in the area of the fire sometime the week prior to the fire. *Id*., 75-76.

A few days later, Radonski was re-interviewed. His story changed. When confronted with the photograph taken by Barnett, he admitted that he had initially been in the area of the fire with his blue Dodge Durango, and went back later to get his motorcycle. *Id*., 80-81. He admitted that he had painted his silver bumpers with black paint after the fire had started. *Id*., 82. He told investigators that he was in the area shooting on the day of the fire and had lit one Roman candle firework using a push button vehicle lighter. *Id*., 82-83. He claimed that after the fire started, he tried to put it out by scooping dirt onto it, and using a large water bottle. *Id*., 83-84. He admitted he knew it was illegal to use fireworks in the area. *Id*., 85. After the fire was out, investigators located a car cigarette lighter near the fire's origin, consistent with Radonski's description. *Id*., 53. A small, "pint size" water bottle was also located, but it was inconsistent with the water bottle

described by Radonski. *Id*., 64. The dirt near the area of origin was undisturbed, with no indication of the efforts to extinguish that Radonski described. *Id*., 65. Radonski further indicated that after the fire started, he returned to his home in Reno, and then drove his motorcycle all the way back to Pyramid to shoot at targets. *Id*., 86-87. He never called 911. *Id*.

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

III. STANDARD OF REVIEW

In its Order Directing Answer and Reply issued October 24, 2019, this Court made clear that the question at issue is appropriately pursued via writ of mandamus, rather than a writ of prohibition. Thus, the State seeks relief via writ of mandamus only.

The Court may consider writ petitions when an important issue of law needs clarification and considerations of sound judicial economy are served. *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Ct.*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014). Such is the case here. Questions of law are reviewed *de novo*, even in the context of writ petitions. *Moseley v. Eighth Judicial Dist. Ct.*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008).

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An appeal is generally an adequate remedy precluding writ relief. *Bradford v. Eighth Judicial Dist. Ct.*, 129 Nev. 584, 586, 308 P.3d 122, 123 (2013). The State does not have the right to appeal from "a final judgment or verdict in a criminal case." NRS 177.015(3). Here, if the question at issue is not considered via pretrial writ, the State will have no other adequate remedy at law.

IV. QUESTION PRESENTED

A. Where Nevada's arson statutes contain language widely recognized as derived from the common law, should the jury be instructed that arson is a general intent crime?

V. ARGUMENT

A. Jurisdictions with Common Law Arson Statutes Like Nevada's Recognize It is a General Intent Crime.

First, upon review of Randonski's answer and supporting authority, a concession is in order. In the Petition, the State asserted that where the State alleges an aider and abettor theory of liability in the context of a general intent crime, the crime becomes a specific intent crime. Randonski correctly observes that the State's argument is in error, citing *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) and *Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005). Answer, 7.

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Understandably, Radonski relies primarily on *Ewish v. State*, 110 Nev. 221, 871 P. 2d 306 (1994) (*Ewish I*) and *Ewish v. State*, 111 Nev. 1365, 904 P.2d 1038 (*Ewish II*). But he appears to recognize that to the extent that *Ewish I* and *II* regard arson as a specific intent crime, those cases are squarely at odds with persuasive Ninth Circuit and state authority regarding nearly identical state statutes. Randonski argues that the State's reliance on *United States v. Doe,* 136 F.3d 631 (9th Cir. 1998) is "misplaced" but can only offer citations to the opinion of the sole dissenting judge to support that analysis. Answer, 9. To the contrary, *Doe* is highly persuasive authority worthy of this Court's consideration. In *Doe,* the Ninth Circuit recognized that the words "willfully and maliciously," as used in Nevada's arson statute, are "established by proof that the defendant set the fire intentionally, and without lawful excuse. Every state jurisdiction with an arson statute containing the general terms 'willfully and maliciously' has so interpreted the statute." *United States v. Doe,* 136 F.3d 631, 635-636 (9th Cir. 1998). The *Doe* Court further recognized that California, Florida, Michigan, Mississippi, Nevada, New Mexico, Oklahoma, South Carolina, Vermont, the Virgin Islands, and West Virginia all have arson statutes employing the terms "willfully and maliciously," and

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approach the mens rea element of arson consistent with the common law approach, treating it as a crime of general intent. *Id*., fn. 6.

Randonski relies in part on *Commonwealth v. Pfeiffer*, 482 Mass. 110, 121 N.E. 3d 1130 (2019), but this reliance is somewhat misplaced. Although *Pfeiffer* certainly acknowledges a split of authority regarding whether or not arson is a specific or general intent crime, it also recognizes that in states with "willful and malicious" statutes like Nevada, "common-law arson has been widely acknowledged as a crime of general intent," and that "in other jurisdictions where the 'willful and malicious' language was adopted by statute or code, courts have uniformly followed the common law and interpreted the language as setting forth a general intent crime." *Pfeiffer*, 121 N.E. 3D 1130 at 1140 (2019), *citing State v. Scott*, 118 Ariz. 383, 385, 576 P.2d 1383 (Ct. App. 1978); *People v. Atkins*, 25 Cal. 4th 76, 84-85, 104 Cal.Rptr.2d 738, 18 P.3d 660 (2001); *Linehan v. State*, 476 So.2d 1262, 1265 (Fla. 1985), *State v. O'Farrell*, 355 A.2d 396, 398 (Me. 1976); *State v. Doyon*, 416 A.2d 130, 135 (R.I. 1980); *Doe, supra*, 136 F.3d at 634-635; *United States v. M.W.*, 890 F.2d 239, 240-241 (10th Cir. 1989); and *United States v. Acevedo-Velez*, 17 M.J. 1, 2-3 (C.M.A. 1983). Noting that the Massachusetts legislature "has given no indication...that it intended to deviate from the common-law general intent requirement for the crime of

arson" the *Pfeiffer* decision concludes that "proof of general intent of malice is all that is required." *Id*. at 1141. Like Nevada and California, Massachusetts' arson statutes contain the "willfully and maliciously" language:

> § 5. Wood and other property; burning or aiding in burning
>
> Whoever *willfully and maliciously* sets fire to, or burns or otherwise destroys or injures by burning, or causes to be burned or otherwise so destroyed or injured, or whoever aids, counsels or procures the burning of, a pile or parcel of wood, boards, timber or other lumber, or any fence, bars or gate, or a stack of grain, hay or other vegetable product, or any vegetable product severed from the soil and not stacked, or any standing tree, grain, grass or other standing product of the soil, or the soil itself, or any personal property of whatsoever class or character exceeding a value of twenty-five dollars, of another, or any boat, motor vehicle as defined in section one of chapter ninety, or other conveyance, whether of himself or another, shall be punished by imprisonment in the state prison for not more than three years, or by a fine of not more than five hundred dollars and imprisonment in a jail or house of correction for not more than one year.
>
> M.G.L.A. 266 § 5 (emphasis added).

Pfeiffer does recognize that some jurisdictions have declared arson to be a specific intent crime, but makes clear that in those states, "the statutes have been drafted or amended to achieve that end." *Id*. at 1140. In contrast with the statutes of California, Nevada, and Massachusetts, *Pfeiffer* points to Wyoming's statute as an example of a statute with a construction consistent with a specific intent crime. *Pfeiffer* at 1140. In Wyoming, "a

person is guilty of first-degree arson if he maliciously starts a fire or causes an explosion *with intent to destroy or damage an occupied structure*." W.S. 1977 § 6-3-101. Wyoming's statute clearly deviates from common law arson, supporting an interpretation that in that state, it is a specific intent crime.

The *Pfeiffer* decision also notes that in Maryland, though the statutory construction is consistent with a common law interpretation of the crime of arson, the Legislature took specific action to define "maliciously." Though previously treated as a general intent crime by the Maryland courts, arson became a specific intent crime only after the Maryland legislature "expressly defined 'maliciously' as 'acting with intent to harm a person or property.' " *Pfeiffer* at 1140, *citing Holbrook v. State*, 354 Md. 354, 371, 772 A.2d 1240 (2001). To date, the Nevada Legislature has made no such statutory changes indicating a desire to depart from the the current definition of malice provided in NRS 193.0175, which is consistent with a general intent crime:

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

This Court has recognized that even as applied to more serious crimes, such as murder, malice may be implied, and demonstrated by an act implying malignant recklessness. "[M]alice, as applied to murder, 'does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty.'" *Guy v. State*, 108 Nev. 770, 777, 839 P.2d 578, 582–83 (1992). *Ewish I* and *Ewish II* lead to the questionable result that a more specific intent must be demonstrated for arson than must be demonstrated for more serious crimes, such as second degree murder and felony murder.

And Radonski certainly does not attempt to argue that *Ewish I* and *II* are inconsistent with the California Supreme Court's treatment of its nearly identical statute. Instead, he simply dismisses the California authorities as "not dispositive." Answer, 10. But those cases support the State's position that *Ewish I* and *II* are at odds with the majority of jurisdictions that have statutes worded similarly or identically to Nevada's arson statute. California's arson statutes are remarkably similar, rendering the California authorities provided by the State as highly persuasive.

In Nevada, First Degree Arson is defined as follows:

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

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

> 1. Dwelling house or other structure or mobile home, whether occupied or vacant; or
>
> 2. Personal property which is occupied by one or more persons, whether the property of the person or of another, is guilty of arson in the first degree which is a category B felony and shall be punished by imprisonment for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $15,000.

California's arson statute contains very similar intent language:

> § 451. Arson of structure, forest land or property; great bodily injury; inhabited structure or property; owned property; punishment
>
> A person is guilty of arson when he or she *willfully and maliciously sets fire to or burns or causes to be burned* or who aids, counsels, or procures the burning of, any structure, forest land, or property.

In *People v. Atkins*, 25 Cal. 4th 76, 18 P.3d 660 (Cal. 2001), the California Supreme Court noted that language typical of a specific intent crime, such as "with the intent" to accomplish, or "for the purpose of" accomplishing a further result, is absent from California's arson statute. *Atkins* at 667. It recognized that arson does not require an additional intent that the burning be accomplished, but "only an intent to do the act that causes the harm." *Id*. at 667. In defining "willfully," the *Atkins* Court

cited to a definition of general intent crime that is identical to Nevada's definition. "The word, willfully, when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." *Id*. at 666; *see also Childers v. State*, 100 Nev. 280, 283, 680 P.2d 598, 599 (1984)(defining "willful" with the same definition).

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

Another California case, *In re V.V.*, 51 Cal. 4th 1020, 252 P.3d 979 (2011), also provides helpful analysis. In that case, two minors lit a large firecracker (a "cherry bomb") and tried to throw it onto a concrete area. *In re VV* at 980-981. The California Supreme Court held that malice will be implied from the intentional or deliberate "ignition or act of setting a fire without a legal justification." *Id*. at 984; *cf.* NRS 193.0175 (providing that malice may be inferred from an act done in willful disregard of the rights of

another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty). As to the term "willfully," as used in the California arson statute, the Court explained that it implied no evil intent, but simply that "the person knows what he is doing, intends to do what he is doing and is a free agent." *Id., citing Atkins, supra*. This definition of willfully is consistent with jury instructions previously approved by the Nevada Supreme Court in general intent cases. *See Jenkins v. State*, 110 Nev. 865, 877 P.2d 1063 (2002).

VI. CONCLUSION

Nevada should join the majority of jurisdictions in recognizing that its arson statute, derived from common law, describes a general intent crime. The State respectfully requests that this Court issue a writ of mandamus directing the district court to provide the jury with mens rea instructions consistent with those used for general intent crimes.

DATED: December 3, 2019.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JENNIFER P. NOBLE
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply 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 reply has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this reply complies with the page limitations of NRAP 32(a)(7)(B)(i) because, excluding the parts of the petition exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate reply, 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 reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the reply regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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

DATED: December 3, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on December 3, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

/s/ Margaret Ford
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