

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

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HAMZA ZALYAUL,  
Appellant,

v.

THE STATE OF NEVADA  
Respondent.

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Elizabeth A. Brown  
Clerk of Supreme Court

CASE NO: 83334

**PETITION FOR EN BANC RECONSIDERATION**

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JOHN AFSHAR, and submits this Petition for En Banc Reconsideration pursuant to Rule 40A of the Nevada Rules of Appellate Procedure (NRAP). This pleading is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 9th day of January 2023.

Respectfully submitted,

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

BY */s/ John T. Afshar*

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## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. Jurisdiction and Standard for Rehearing**

Nevada Rule of Appellate Procedure 40A(a) permits en banc reconsideration:

- (A) When reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court, or
- (B) When the proceeding involves a substantial precedential, constitutional or public policy issue.

Reconsideration of the panel's decision is warranted for both reasons. First, the panel's decision is incompatible with, while not explicitly overruling, State v. Barren, 128 Nev. 337, 341, 279 P.3d 182, 184 (2012). Second, the panel's decision is incompatible with the Nevada Constitution, and strips the district court of subject matter jurisdiction granted to it by the Constitution by invoking a statute which has no bearing whatsoever on this case. Finally, en banc reconsideration is warranted because it involves substantial public policy concerns, as the panel's Opinion permits and encourages minors to commit horrific acts and then flee the jurisdiction, returning in a few short years without consequence.

A petition for en banc reconsideration is permitted only if a petition for panel rehearing was previously filed and is timely if filed within 14 days after written entry of the panel's decision to deny rehearing. NRAP 40A(b). This Petition for En Banc Reconsideration is permitted because a prior petition for rehearing was filed, and the order denying rehearing was filed Thursday, December 29, 2022.

## **II. Procedural History**

On October 14, 2019, the State of Nevada filed a Criminal Complaint charging Hamza Zalyaul (hereinafter “Zalyaul”) with six (6) counts of SEXUAL ASSAULT OF A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony- NRS 200.364, 200.366- NOC 50105) alleging that Zalyaul sexually assaulted a family friend, S.D., several times in 2013 when S.D. was 11 and Zalyaul was 14. Respondent’s Appendix (“RA”) 001-002.

On March 9, 2021, Zalyaul pleaded guilty pursuant to negotiations to ATTEMPT SEXUAL ASSAULT (Category B Felony- NRS 200.364, 200.366, 193.330- NOC 50119). AA 001-009.

On July 1, 2021, after argument by both defense counsel and the State, with both parties standing by the negotiations, the district court sentenced Zalyaul to a MINIMUM of FORTY-EIGHT (48) MONTHS and a MAXIMUM of ONE-HUNDRED TWENTY (120) MONTHS in the Nevada Department of Corrections (NDOC), with SEVEN (7) DAYS credit for time served AA 032. On July 7, 2021, the district court filed the Judgement of Conviction. AA 038-039.

Zalyaul appealed, and, on November 23, 2022, a panel of this Court held that the district court lacked subject matter jurisdiction and vacated his conviction. Zalyaul v. State, 138 Nev. Adv. Op. 74, 520 P.3d 345 (2022). The State timely petitioned for rehearing, which the panel denied on December 29, 2022. Order

Denying Rehearing, Docket 83334, filed December 29, 2022. The State now petitions for en banc reconsideration.

### **III. Statement of the Facts**

The district court relied on the following facts from the Presentence Investigation Report for sentencing:

On September 13, 2013, the mother of the victim (DOB: 07-11-02) reported her juvenile daughter had been sexually assaulted, by the defendant Hamza Zalyaul, multiple times between the months of June and September of 2013. The victim did not immediately disclose the sexual abuse because she was scared no one would believe her. The victim was brought to the hospital where a general exam was conducted. Attempts were made to locate and positively identify Mr. Zalyaul were unsuccessful because his family had relocated to Morocco.

At a later date, during an unrelated investigation, it was discovered Mr. Zalyaul was living back in Las Vegas. In February 2019, the case was reopened. The victim was interviewed and reported during the summer of 2013, the defendant sexually assaulted her on numerous occasions. The first incident occurred at the defendant's family apartment. The victim, her siblings and the defendant's mother were there. Mr. Zalyaul asked the victim to come into the kitchen and she accompanied him. He instructed her to crouch down on the kitchen floor and pull her pants down. He slid his pants down and inserted his penis into her vagina. After about ten minutes, he pulled out and ejaculated. The victim cried afterwards stating "it hurt" and was "disgusting."

The following Sunday, while at the Mosque, Mr. Zalyaul came over to the women's section and told the victim to come to the restroom. They entered a stall in the restroom where the defendant told the victim to grab his penis and "suck it like a lollipop." While she was positioned against a wall, he instructed her to spread open the cheeks of her buttocks. He engaged her in anal intercourse and ejaculated. The victim remained in the stall for a few minutes then left. Later,

she appeared to be limping and her father asked if she was okay. She told him she was fine because the defendant instructed her not to tell anyone about what had occurred.

The next incident occurred a week later at the defendant's family apartment. While the victim was in the bathroom, Mr. Zalyaul picked the lock with a paperclip. The defendant had the victim pull down her pants, bend over and he anally penetrated her. The victim tried to call for help but the defendant covered her mouth. The defendant's mother came into the bathroom; however, the defendant and victim were already dressed. The defendant told his mother that everything was fine, and the victim had stubbed her toe. As soon as the mother left, Mr. Zalyaul penetrated the victim's vagina. She told him it hurt, and he responded it was okay.

On another occasion, the victim's family and the defendant's family went to the lake to swim. The victim went to the van to change out of her wet clothes. When she entered the van, the defendant was inside. She asked him to exit the van so she could change; however, he refused. She took off her shirt and the defendant made her perform fellatio. When she attempted to leave the van, Mr. Zalyaul discouraged her by saying she would smell like him.

On two separate occasions the defendant showed the victim pornography depicting young teens between the ages of thirteen and sixteen engaged in sexual acts. Mr. Zalyaul told the victim it was normal. The victim did not know if the defendant ever filmed the assaults on her as her back was to him.

Approximately three weeks after Mr. Zalyaul moved to Morocco, the victim disclosed the sexual abuse to her mother who disclosed the abuse to the victim's father. Her father contacted the defendant's uncle and told him Mr. Zalyaul had raped his daughter.

At a later date, the victim saw Mr. Zalyaul during a religious event. She informed her father, but he was unable to locate the defendant. A week later, her father located the defendant and questioned him about the assault. Mr. Zalyaul told the father he was young and did not know why he committed the offenses. A short time later, the victim's father brought her to the defendant's family apartment

where the families sat and discussed the abuse. He asked the defendant why he abused his daughter and Mr. Zalyaul again stated he did not know why. Mr. Zalyaul and the victim's father began arguing. Following the argument, her father told everyone in attendance that what was said that day would be kept there and told the defendant not to go near the places he frequents. At the conclusion of the investigation, a warrant was issued for the arrest of Mr. Zalyaul.

On January 7, 2020, Mr. Zalyaul was arrested, transported to the Clark County Detention Center and booked accordingly.

Presentence Investigation Report ("PSI") 4-5.

#### **IV. Legal Argument**

##### **A. The Panel's Opinion is incompatible with the Nevada Constitution and Barren**

The panel held that both the juvenile court and the district court lacked jurisdiction over this matter. This holding is correct as to juvenile courts, but incorrect as to district courts.

To be abundantly clear, no portion of this case involved juvenile courts. Zalyaul was charged with committing crimes in the district court, pleaded guilty to committing crimes in the district court, and was sentenced in the district court. The panel's entire analysis and focus on juvenile courts and their associated statutes was erroneous and is discussed here only because the panel's Opinion relied upon them.

District Courts of Nevada have original jurisdiction in all cases not otherwise provided for by law. Nev. Const. art 6, § 1; Moore v. Orr, 30 Nev. 458, 98 P. 398 (1908); State v. Barren, 128 Nev. 337, 341, 279 P.3d 182, 184 (2012). Barren

recognized that “some court always has jurisdiction over a criminal defendant,” and that “jurisdiction is determined on the date when the State initiates proceedings rather than the date when a defendant allegedly committed the offenses.” Barren, 128 Nev. 337, 340, 344-45, 279 P.3d 182, 184, 187. Here, the State initiated proceedings against Zalyaul via Criminal Complaint on October 14, 2019. RA 1-2. Zalyaul was born on September 11, 1998. PSI at 2. Accordingly, when the State initiated proceedings, Zalyaul was 21 years, 1 month, 4 days old. A juvenile court does not have jurisdiction over a person older than 21, and no proceedings were ever initiated in juvenile court. NRS 62B.410. The analysis, therefore, is straightforward. The district court had jurisdiction over Zalyaul because his case was a subset of “all cases not otherwise provided for by law.” Nev. Const. art 6, § 1.

Rather than engage in this straightforward analysis, the panel engaged in a convoluted discussion of why the juvenile court lacked jurisdiction (which was correct, but irrelevant except to refute the appellant’s claims,) and then held that the district court also lacked jurisdiction because of Zalyaul’s age when he committed the crimes to which he pleaded guilty. This was explicitly contrary to Barren, which surveyed cases across the country and explained **at length** why jurisdiction was determined at the time the State initiates proceedings and held that “[d]etermining jurisdiction at the time of the offense would ‘create an absurd result.’” Barren, 128 Nev. 337 at 344, 279 P.3d at 187.

This case is a straightforward application of Barren which, like this case, involved a defendant who committed (among other things) a sexual assault when the defendant was a minor but who was not charged until he became an adult. But rather than apply Barren, the panel embraced the “absurd result” caused by looking to a defendant’s age when he or she committed the crimes and determining which court might have had jurisdiction if the defendant had been charged then. The panel did so without any reasoned discussion of why Barren either doesn’t apply here, or why Barren should now be overruled, and did not explicitly either overrule or modify Barren. The panel’s decision is simply incompatible with Barren and overrules it *sub silentio*. It is also incompatible with the Nevada Constitution’s grant of subject matter jurisdiction to the district court in all cases (criminal or otherwise) not otherwise provided for by law. Having determined that the juvenile court did not have jurisdiction, the district court, by default, must have. To hold otherwise is clearly erroneous.

The juvenile court lacked jurisdiction because Zalyaul was not charged until he was older than 21 years and was, therefore, not a “child” pursuant to NRS 62B.030 and, in turn, NRS 62A.030(1)(b). Zalyaul v. State, 138 Nev. Adv. Op. 74 (2022) at 2. Juvenile courts only have jurisdiction over “a child”, as defined by the statute. NRS 62B.310(1). (“If the juvenile court exercises jurisdiction *over a child...*”)(emphasis added.) The juvenile court also lacked jurisdiction for a second,



related reason - jurisdiction in the juvenile court generally terminates whenever a delinquent child becomes 21. NRS 62B.410. Accordingly, if the juvenile court ever would have had jurisdiction over Zalyaul, it would have lost that jurisdiction prior to Zalyaul being charged. Because the juvenile court never had jurisdiction over Zalyaul, and would have lost it by the time he was charged even if it ever had, the proceedings against Zalyaul were not conducted “pursuant to” NRS 62B or Title 5 generally and were, therefore, not conducted by Juvenile Courts. NRS 62B.300. Accordingly, NRS 62B.310’s grant of exclusive jurisdiction was never invoked.

**B. The Panel’s Focus On Whether Zalyaul Committed A “Delinquent Act” Was Unnecessary and Erroneous**

The panel held that “[n]otwithstanding the juvenile courts’ exclusive jurisdiction over delinquent acts, the State contends that if a juvenile has not been charged with delinquent acts by the time he or she turns 21, then those acts automatically transform into criminal offenses that may be prosecuted in the district court.” Zalyaul, 138 Nev. Adv. Op. at 3.

Yet again, the panel implicitly overruled Barren, which explored this exact issue. Having reviewed cases outside of Nevada, this Court held that “to conclude that the Nevada Revised Statutes give ‘the juvenile court exclusive jurisdiction over all offenses committed by minors, regardless of the age of the person when the proceedings are commenced, would render the language concerning proceedings against persons younger than [21] years of age superfluous. ... Determining

jurisdiction at the time of the offense would “create an absurd result” contrary to the plain language of NRS 62B.330(3)(e).” Barren, 128 Nev. at 344, 279 P.3d at 187. The panel then went on to embrace this “absurd result,” despite the fact that the juvenile court was never implicated in this case; Zalyaul was charged in district court, with crimes, not delinquent acts.

Zalyaul could commit “crimes” even when he was somewhat older than 14. NRS 194.010. He is one of “all persons” who are liable to punishment. NRS 194.020 further emphasizes that he is liable for punishment as “[a] person who commits in the State any crime, in whole or in part.” NRS 194.020(1). Zalyaul was capable of committing crimes as a 14-year-old, was charged with committing crimes, admitted to committing crimes, was liable for punishment for committing those crimes, and was sentenced pursuant to the NRS for committing those crimes. No portion of that was in error. The panel’s circular reasoning that, if Zalyaul had been charged as a minor in juvenile court he would have been charged with delinquent acts and, therefore, cannot be charged with crimes for those acts after he turned 21 in district court is the “absurd result” that Barren rejected.

### **C. En Banc Reconsideration Is Warranted Because The Panel’s Opinion Implicates A Substantial Issue of Public Policy**

Barren rejected that result, at least in part, because it would embrace a horrific public policy. In Barren’s review of sister state’s treatment of similar statutes, the

Barren Court approvingly cited State v. Little, 241 Or. 557 (1965). Barren quoted

Little as follows:

The court held that determining a juvenile court's jurisdiction based on the offender's age at the time of the offense “would create an absurd result.” *Id.* at 630. Such a rule “would make it possible for a person to commit any number of dangerous felonies a few days before his sixteenth birthday and then, by evading arrest until he is [21], escape both corrective measures as a juvenile and punishment as an adult.” *Id.* (footnote omitted). Under such a rule, “a person [could] commit crimes before his sixteenth birthday, happy in the knowledge that his worse fate, if caught, [would] be a brief period of treatment as a delinquent child.” *Id.* (also noting that “[i]t [was] extremely unlikely that if the Assembly had considered the precise problem [at issue], it would have intended to create a hiatus in the law that could wholly frustrate the administration of justice when a serious offense has been committed by a person below the age for discretionary remand”).

Barren, 128 Nev. at 343–44, 279 P.3d at 186.

The panel, here, embraced exactly the absurd result that Barren rejected and Little warned against. Zalyaul committed “any number of dangerous felonies” – six, in fact, as charged in the Criminal Complaint, and then “evaded arrest until he [turned] 21” when his family moved him to Morocco. PSI at 4-5. The panel’s opinion grants Zalyaul, and similarly situated defendants, the “happy ... knowledge” that, if he is successful in evading arrest until he turns 21, he has evaded any possibility of punishment because neither the juvenile court nor the district court has jurisdiction over him.

The panel concluded that the legislature must have intended this result by citing to a juvenile statute – NRS 62B.335. Zalyaul 138 Nev. Adv. Op. at 8. But

62B.335 is a statute allowing cases in juvenile court to be resolved if a person over whom the juvenile court already has jurisdiction because they were charged via delinquency petition is not apprehended until after the juvenile turns 21. In other words, it extends the jurisdiction a juvenile court already has. It does not allow a juvenile court to claw back jurisdiction from a district court when no proceedings were even instituted in juvenile court, much less obliterate any court's jurisdiction over a criminal defendant. There is no public policy justification, much less evidence that the Legislature intended, the proposition that minors who commit serious felonies be able to avoid punishment in any court if only they are able to evade jurisdiction until they turn 21. If the Legislature were to intend such an absurd result, this Court ought to require them to say so more clearly than by supposed implication when passing a bill *extending* jurisdiction.

### **CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court grant en banc reconsideration and issue a new opinion or order affirming Zalyaul's Judgment of Conviction.

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Dated this 9<sup>th</sup> day of January, 2023,

Respectfully submitted,

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Nevada Bar # 001565

BY */s/ John T. Afshar*

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**CERTIFICATE OF COMPLIANCE**

1. **I hereby certify** that this petition for en banc reconsideration or 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points contains 2,918 words and 275 lines of text.

Dated this 9<sup>th</sup> day of January, 2023.

Respectfully submitted,

STEVEN B. WOLFSON  
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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 9, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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JTA//ed