

IN THE SUPREME COURT OF THE STATE OF NEVADA

Hamza Zalyaul,
Appellant,

vs.

The State of Nevada,
Respondent.

) Supreme Court Case No.: 83334
)
) Electronically Filed
) APPELLANT'S ANSWER TO FEB 10 2023 01:29 PM
) RESPONDENT'S PETITION FOR Elizabeth A. Brown
) EN BANC RECONSIDERATION Clerk of Supreme Court

COMES NOW, ALEXIS E. MINICHINI, ESQ., Retained Counsel, and
hereby files this Answer to Respondent's Petition for En Banc
Reconsideration. This Answer is based on the following Memorandum of
Points and Authority and all pleadings and papers on file herein.

DATED this 10th day of February, 2023.

NEVADA DEFENSE GROUP

By: Alexis E. Minichini

Alexis E. Minichini, Esq.

Nevada Bar No. 15438

Nevada Defense Group

1389 W. Galleria Drive,

Henderson, NV 89014

Attorney for Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

The State petitions this Court to reconsider the Panel's decision for two reasons, namely that this decision (1) is incompatible with the Nevada Constitution as well as *State v. Barren*¹; and (2) 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." Respondent's Petition at 2.

The State's petition should be denied largely in part because the State has failed to raise any issue that has not already been addressed in the briefs and at oral argument, and materially misstates the law in *Barren*. Furthermore, the decision is not incompatible with the Nevada Constitution nor will it create the "absurd result" urged by the State. As more fully discussed below, the Petition should be denied.

I. Standard for Petition for En Banc Reconsideration and Answer

As a general rule, "[e]n banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered" except where (1) necessary to "maintain uniformity of decisions of the Supreme

¹ 128 Nev. 337 (2012).

Court”, or (2) the proceedings involve a substantial public policy issue. NRAP 40A (a). “Matters presented in the briefs and oral arguments may not be reargued in the petition[.]” NRAP 40A (d).

A petition for rehearing must first be filed and denied before the petition for en banc reconsideration will be accepted. NRAP 40A (b). Respondent’s petition for rehearing was filed on December 27, 2022 and the order denying rehearing was filed on December 29, 2022. Respondent’s petition for en banc reconsideration was timely filed thereafter on January 9, 2023.

No answer to a petition for en banc consideration shall be filed unless requested by the Court. NRAP 40A (e). On January 25, 2023, this Court issued its Order directing Appellant to file an answer to the petition for en banc reconsideration.

II. Facts and Procedural History

A full recitation of facts is unnecessary for this Court to resolve the issues presented in the petition as the relevant facts are largely undisputed. The alleged acts all stem from the summer of 2013, between the months of June and September. Specifically, the named victim alleged that the

Petitioner, Hamza², had sexually assaulted her numerous times over the course of that summer. Respondent's Appendix ("RA") 001-2. In the summer of 2013, the alleged victim was 11 years old and Hamza was 14. The acts were eventually disclosed to law enforcement later in 2013, shortly after it was discovered that the Zalyauls had relocated to Morocco.

Despite the early disclosure, and though Hamza's identity was known to law enforcement at the time the allegations were brought, police ultimately closed the case shortly after it opened without any further action at that time. However, in February 2019, the case was reassigned and reopened, the alleged victim was reinterviewed, and an arrest warrant was filed on October 17, 2019—over six years after the dates of the allegations and well after Hamza had turned 21. Hamza was ultimately arrested in January 2020 and charged in Las Vegas Justice Court with multiple counts of Sexual Assault of a Minor under Fourteen, a Category A felony.

² For clarity, the defendant is hereinafter referred to as "Hamza" as his father is also referred to as "Mr. Zalyaul" in the PSI and in Respondent's Petition.

After lengthy negotiations, Hamza ultimately pled guilty in District Court to one count of Attempt Sexual Assault, a Category B felony, with the State agreeing to have no opposition to probation. Appellant's Appendix ("AA") 001. Additionally, the parties agreed that if Hamza received an Honorable Discharge from probation, he would be entitled to withdraw his plea and plead guilty to a reduced charge of Open or Gross Lewdness, a gross misdemeanor. Id. The State further had no opposition to sealing the case upon honorable discharge. Id. However, the District Court at sentencing did not follow the negotiations, and instead sentenced Hamza to a term of 4-10 years in the Nevada Department of Corrections. The Judgment of Conviction was filed on July 7, 2021. AA 038-40.

Hamza appealed, and this Court held that the District Court lacked subject matter jurisdiction and vacated his conviction and sentence. *Zalyaul v. State*. The State petitioned for rehearing, which was denied on December 29, 2022.³ The State then petitioned for en banc reconsideration, which was filed on January 9, 2023. On January 25, 2023, Court directed Appellant to

³ Order Denying Rehearing, Docket 83334, filed December 29, 2022.

Answer the State's petition pursuant to NRAP 40A (e).⁴ This Answer follows.

ARGUMENT

I. En Banc Reconsideration is Unwarranted because the Panel's Decision is not Incompatible with *Barren* or the Nevada State Constitution

As an initial matter, the arguments raised in the State's petition have already been litigated and addressed in the briefs and at oral argument. Indeed, the State discussed *State v. Barren* at length in their Answering Brief. See, Respondent's Answering Brief at 15-16. Again, it is *undisputed* that had juvenile delinquency proceedings been brought against Hamza contemporaneous in time with the disclosure to law enforcement, he would fall squarely within the juvenile delinquency statutes. See, *Zalyaul v. State*, 520 P.3d 345 (Nev. 2022). However, because the State failed to take *any* action whatsoever, despite knowing exactly who Hamza was, charges were not brought against him until he was well past 21, and well outside the jurisdiction of the Juvenile Court.

⁴ Order Directing Answer to Petition for En Banc Reconsideration, Docket 83334, filed January 25, 2023

What the State conveniently omits from its Petition is that the defendant in *Barren* was (1) 17 years old at the time he committed the offense, falling within the jurisdiction of the Juvenile Court's jurisdiction; and (2) his identity remained completely unknown until a DNA match confirmed Barren's identity after he had already turned 21. *Barren* at 338. These factual distinctions are critical, as this is ultimately the distinction drawn between a "criminal act" committed by adults and "delinquent acts" committed by juveniles. Indeed, "NRS 62B.330(3) expressly exclude[d] from the juvenile court's jurisdiction cases such as Barren's:"

For the purposes of this section, each of the following acts shall be deemed not to be a delinquent act, and the juvenile court does not have jurisdiction over a person who is charged with committing such an act:

....

(e) A category A or B felony and any other related offense arising out of the same facts as the category A or B felony, regardless of the nature of the related offense, if the person was at least 16 years of age but less than 18 years of age when the offense was committed, and:

....

(2) The person is not identified by law enforcement as having committed the offense until the person reaches 21 years of age.

Barren at 341-42 (emphasis added). Hamza was 14 at the time of the alleged acts, and he had already been identified as having allegedly committed the offense in 2013 when Hamza was still 14 years old. *Barren* does not apply to Hamza because Barren was 17 at the time he committed the offenses – making him eligible for certification proceedings to be charged criminally as an adult – and his identity remained unknown until DNA was matched back to him after he had turned 21. The Juvenile Court therefore would have retained jurisdiction of Hamza had the State brought timely charges against him. The State cannot be permitted to intentionally delay prosecution of Juveniles, whose identities are well known, until after they fall outside the Juvenile Court’s jurisdiction in the hopes of prosecuting them as adults for delinquent acts committed as *children*. Again, this issue has already been litigated in the briefs and oral argument. The State has clearly misstated the law in *Barren* and intentionally omitted key factual distinctions between *Barren* and the instant matter from its Petition. Therefore, the Panel’s opinion is not incompatible with *Barren* and the State’s Petition should be denied.

The Panel's opinion is similarly not incompatible with the Nevada Constitution, specifically as it addresses the jurisdiction of the District Courts. It is the State's delay *alone* which caused the jurisdictional void in the instant case. Had the State issued a Writ of Attachment⁵, Hamza could have been apprehended immediately upon his return to the U.S. and charges initiated accordingly. The State's conclusion that analysis of the Juvenile Statutes was erroneous, despite their clear implications in this case, further highlights the heart of Appellant's contention: the State's leave to charge whomever—regardless of whether their identity is known to law enforcement—whenever they decide to initiate charges would effectively render the Juvenile Statutes, and their exclusive jurisdiction over delinquent acts, null and void. Indeed, as previously argued in Appellant's Reply Brief, "[i]t would be absurd to assume that the absence of a juvenile statute wholly applicable to [Hamza] means that the legislature intended for someone in his unique situation to lose the protections and privileges

⁵ Simply put, a Writ of Attachment is the Juvenile Court's version of an arrest warrant.

of the juvenile statutes.”⁶ For these reasons, the Petition for En Banc Reconsideration should be denied.

II. En Banc Reconsideration is Unwarranted because the Panel’s Opinion is Consistent with the Public Policy Interest of Discouraging the State’s Delay of Prosecution to Create Jurisdictional Sinkholes

The only “absurd result” at risk in the instant case is the one argued for by the State; namely, that jurisdiction should be determined at the time of filing, rather than the age of the person charged at the time the alleged offense was committed. This is contrary to fundamental notions of due process, as the State has failed to cite a single justification for the 7-year delay in bringing charges against Hamza. This, unlike *Barren*, was not a situation where the identity of the defendant was wholly unknown for years. On the contrary, Hamza and the alleged victim were close family friends.

⁶ “These rulings have not been made on the uncritical assumption that the constitution rights of children are indistinguishable from those of adults. Indeed, our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.” *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

The State argues that should the Panel's decision stand, "minors who commit serious felonies [would] be able to avoid punishment in any court if only they are able to evade jurisdiction until they turn 21." Respondent's Petition for En Banc Reconsideration at 12. This completely ignores the fact that it was the State who delayed prosecution. While it is undisputed that Hamza and his family relocated shortly before disclosure was made to police, the State has failed to explain the purpose for the *further* delay when it was ultimately discovered that Hamza had returned to Las Vegas sometime in 2016, and charges were *still* not brought until 3 years later.

Contrary to the State's assertion, the Panel's decision does not encourage minors to go on wild crime sprees on the eve of their sixteenth birthday and somehow avoid apprehension for at least 5 years for the sole purpose of tolling the applicable statutes. Rather, the State seeks permission and approval from this Court to disregard the jurisdiction of the Juvenile Statutes as they pertain to delinquent acts that would have been Category A felonies if committed as an adult, and simply initiate charges in Justice Court for such "horrific acts"

whenever the State decides to file. The “absurd result” urged for by the State is to create a jurisdictional sinkhole where the prosecution may be delayed without any justification, to deny juveniles of the services offered by the Juvenile Court, so that they may face life in prison for a delinquent act committed as a child. Because the only “absurd result” at issue is the one advanced by the State, the Petition for En Banc Reconsideration should be denied.

DATED this 10th day of February, 2023.

NEVADA DEFENSE GROUP

By: Alexis E. Minichini
Alexis E. Minichini, Esq.
Nevada Bar No. 15438

CERTIFICATE OF COMPLIANCE

1. I 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Book Antiqua font.
2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 40A because it is prpoprtionately spaced, has a typeface of 14 points or more, and contains 2,181 words.

Dated this 10th day of February, 2023.

Respectfully Submitted By:

Alexis E. Minichini

Nevada Defense Group
ALEXIS E. MINICHINI, ESQ.
Nevada Bar No. 15438
1389 Galleria Drive,
Henderson, Nevada 89014
(702) 988-2600
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on the 10th day of February, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List.

Alexis E. Minichini
Alexis E. Minichini