IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS PIMENTEL Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CAROLYN ELLSWORTH, DISTRICT JUDGE Respondents, And THE STATE OF NEVADA, Real Party In Interest.	Electronically Filed Sep 05 2014 10:24 a.m. Tracie K. Lindeman Clerk of Supreme Court CASE NO: 66304

ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS/PROHIBITION

COMES NOW, the State of Nevada, Real Party In Interest, by STEVEN B. WOLFSON, District Attorney, through his Appellate Deputy, RYAN J. MACDONALD, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus/Prohibition in obedience to this Court's Order filed August 19, 2014 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 5th day of September, 2014.

Respectfully submitted,

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Nevada Bar #001565

BY */s/ Ryan J. MacDonald*
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MEMORANDUM OF
POINTS AND AUTHORITIES

This petition challenges an Order of the district court denying Luis Pimentel's pretrial habeas petition. Pimentel requests extraordinary intervention because he believes that death following a challenge to fight is not an alternate theory of First-Degree Murder, but rather some other crime, despite the plain language of NRS 200.450. Pimentel also requests that this Court perform an interlocutory sufficiency-of-the-evidence review. First, this Court should decline to intervene because there is no arbitrary exercise of discretion to correct and neither are there matters of judicial economy that would militate in favor of intermediate review. Second, this Court should decline to intervene even if it entertains the merits, as merit is entirely lacking from the petition.

Statement of the Facts

Pimentel challenges the probable cause finding in this case as it relates to the theory of criminal liability that he engaged in a "challenge to fight" with the victim in this case, Robert "Bobby" Holland, and during this fight, became liable for First-Degree Murder when he shot and killed Bobby.

According to eyewitness Tim Hildebrand, Bobby was looking for his girlfriend Amanda at the Arizona Charlie's casino on December 22, 2013. PA 61, 74. When Tim encountered both Pimentel and Bobby, it appeared Pimentel wanted to fight Bobby. PA 74. Tim developed this opinion throughout the evening based on the fact that Pimentel "kept telling [Bobby] that [Pimentel] wanted to fight." PA 75. Pimentel first told Bobby that Pimentel wanted to fight that night at Arizona Charlie's. *Id.* Tim testified that Pimentel "kept telling [Bobby], kind of meet me at my house," which was at Siegel Suites. *Id.* Pimentel told Bobby that Pimentel wanted to fight Bobby "like ten" times. *Id.* In response, Bobby said "yeah, yeah, I'll meet you there, I'll meet you there." PA 75-76.

Later that morning, at the Siegel Suites, Bobby confronted Pimentel. PA 73. Specifically, Bobby told Pimentel that Pimentel was not going to have sexual relations with Bobby's girlfriend Amanda. PA 73. Pimentel responded "the hell I'm not," and that Pimentel planned on showing Amanda "what a real man is." PA 73-74. After Pimentel told Bobby that Pimentel intended on having sex with

Bobby's girlfriend and to show her "what a real man is," Bobby punched Pimentel in the face. PA 77. Pimentel stumbled back and then lifted his shirt to pull out a firearm. PA 78. Bobby stated "what are you going to do, shoot me dude?" PA 80. Pimentel pointed the firearm at Bobby and pulled the trigger, but the gun misfired. Bobby tried to flee, but Pimentel chased him down. PA 126-30. Pimentel then shot Bobby once in the torso. PA 79-81. After Bobby fell down face-first, Pimentel shot him once more in the back while standing over him. *Id.*

At the close of the preliminary hearing where this evidence was adduced, the State moved to amend its Complaint to include a First-Degree Murder theory of "challenge to fight" pursuant to NRS 200.450. PA 148-49. The Justice of the Peace agreed that "there was testimony by Mr. Hildebrand, both at Arizona Charlie's, that Mr. Pimentel, the Petitioner was instigating or challenging Bobby to a fight … that Lorenzo [Pimentel] kept telling Bobby he wanted to fight." PA 155. The case was then bound over and Pimentel filed a pretrial habeas petition claiming that challenge-to-fight-resulting-in-death is not a theory of First-Degree Murder, but rather some other crime that must be pleaded in a separate count. The district court disagreed:

> The statute [NRS 200.450(3)] is pretty specific. It says: Should death ensue to a person in such a fight or should such a person die from any injuries received in such a fight, the person causing or having any agency in causing the death, . . . is guilty of murder in the first degree and shall be punished [as provided in subsection 4 of NRS 200.030]. So it doesn't say that you're guilty of challenge to fight. If a death results it is murder in the

> first degree. It's not a separate offense. I'd like it – and kind of to how forgery, you know, there are all those statutes that say you can commit forgery this way, then there's another statute you can commit forgery, but it's all forgery. And I think that the pleading certainly is sufficient to put you on notice that that's what they're charging. . . . Now at trial you're absolutely correct that they're going to have to prove up the elements of the way to get to first-degree murder just like they would have to prove up felony murder elements. And you'll be entitled to jury instructions and to completely argue that there was – either that there wasn't a challenge to fight or that they didn't meet the elements, what have you. But that's a matter for jury instructions.
> Supp PA 29-30.

The court then filed a short order denying the writ. Supp PA 30-31. Pimentel now seeks this Court's intervention in the matter.

Extraordinary Intervention is Unwarranted

This Court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion.[1] NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). The writ will not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law, NRS 34.170; NRS 34.330; *Hickey v. Dist. Court*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989), and an adequate remedy is available as this issue is reviewable upon direct appeal should

[1]Pimentel also submits this petition as one sounding in prohibition. Because there is no challenge to the district court's jurisdiction in denying the petition, prohibition is inappropriate. *See Rugamas v. State*, 129 Nev. ___, ___, 305 P.3d 887, 892 (2013).

there be a conviction, *see e.g., Daniels v. State*, 114 Nev. 261, 956 P.2d 111 (1998) (reviewing district court's denial of pretrial petition on direct appeal). Ultimately, however, the decision is entirely discretionary with this Court. *See Rugamas v. State*, 129 Nev. ___, ___, 305 P.3d 887, 892 (2013). In exercising that discretion, this Court has often considered principles of judicial economy that militate for looking to the merits of a petition. *See e.g., Redeker v. District Court*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006) (concluding that review of interlocutory petition challenging notice pleading in death penalty case was warranted on judicial-economy grounds), *limited on other grounds by Hidalgo v. Dist. Court*, 124 Nev. 330, 341, 184 P.3d 369, 377 (2008). Despite the availability of an adequate remedy by way of direct appeal, pretrial petitions have also been entertained "[w]here an important issue of law requires clarification and public policy is served by this Court's exercise of its original jurisdiction." *Schuster v. District Court*, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007). None of these exceptions obtains here: (1) first, there is nothing particularly complex or lengthy about the underlying case or the challenge-to-fight issue that would require interlocutory intervention, and (2) no "important" issue or clarification of the law exists in this case—the operative question of whether challenge-to-fight-resulting-in-death is a variation of First-Degree Murder or some other new species of murder is something that can be reviewed by this Court on direct appeal in the event of a

conviction.

The District Court did not Manifestly Err in Denying the Pretrial Habeas Petition

Even if this Court were to review the merits of the petition, there are none to entertain. First, as to the contention that the Information was faulty because premeditated murder and challenge-to-fight-resulting-in-death are different offenses, the claim is puzzling and appears to rest on the mere fact that the theories of liability (or "crimes") exist in different sections of NRS Chapter 200. So what?: as the district court noted, the plain words of the challenge-to-fight-resulting-in-death subsection [200.450(3)] designate the offense proscribed as "murder in the first degree" and specifically guide the reader to NRS 200.030(4). The only statutory provision defining First Degree Murder is NRS 200.030(1). Thus, this Court must read NRS 200.030 and NRS 200.450 together to determine whether First Degree Murder pursuant to NRS 200.450 is a stand-alone charge or can be included as a theory of *mens rea* under NRS 200.030. *See Holmes v. State*, 114 Nev. 1357, 1363-64, 972 P.2d 337, 341 (1998) (Commission of a felony and premeditation are merely alternative means of establishing the single *mens rea* element of First Degree Murder, rather than constituting independent elements of the crime). Indeed, it is this Court's obligation to construe statutory provisions in harmony with each other when possible. *See Williams v. Clk. Co. Dist. Attorney*,

118 Nev. 473, 485, 50 P.3d 536, 543 (2002).[2]

Second, Pimentel claims that the district court erred in concluding that he had sufficient notice of underlying facts as pleaded in the Information. It is difficult to see how this is so. Pimentel was present at the preliminary hearing where the testimony supporting this was adduced. In the instant petition, Pimentel cites to cases warning of "indefinite indictments" and that allegations cannot be made solely in the conclusory language of the statute. Pet. at 9-10. Yet there was no indictment; and the Information accuses Pimentel of "on or about the 22nd day of December" "with premeditation and deliberation, and with malice aforethought, and/or after challenging Robert Holland to a fight, kill the said Robert Holland, a human being, by shooting at and/or into the body of Robert Holland, with . . . a firearm." PA 175-76. The State submits that this is quite specific as to when the killing occurred, how the killing was achieved, what tool was used, who was killed

[2]Pimentel demands that all-other-kinds of murder and challenge-to-fight-resulting-in-death be pleaded in separate counts. Pet. at 9. Consider the practical effect of what Petitioner is arguing. Pimentel's alternative is to have two separate counts of, functionally, First Degree Murder in this case. Count one would be an Open Murder count in which the State will argue premeditation, deliberation, and willfulness is present and that Petitioner should be convicted of First Degree Murder. Count two would be "Challenge to Fight – First Degree Murder" wherein the State would argue the killing took place as a result of a challenge to fight and subsequent fight itself. Potentially, Petitioner could be convicted of two separate counts of First Degree Murder in this case. The Court and parties would then be in the position of having to argue whether these counts are unconstitutionally duplicative and, if not, whether the statutory scheme contemplates two punishments under NRS 200.030 and NRS 200.450. *See Jackson v. State*, 128 Nev. ___, ___, 291 P.3d 1274, 1277-78 (2012).

and who is alleged to have done the killing.

Further, Given that NRS 200.030 defines First Degree Murder, the more appropriate course of action for the Court is to harmonize the statutes to the extent they conflict and determine that if a killing occurs in the course and scope of the conduct proscribed in NRS 200.450, that the killing becomes not an independent element of the crime but a means of establishing the single *mens rea* of First Degree Murder. *See Holmes*, *supra*. This would also support this Court's long-standing jurisprudence that a jury need not be unanimous on theories of liability, such as in the case where a First Degree Murder is pleaded alternatively by enumerated means, premeditation and deliberation, or felony murder. *See Crawford v. State*, 121 Nev. 744, 749-50, 121 P.3d 582, 586 (2005).

The soundest way of viewing the "challenge to fight" theory within NRS 200.030, is to deem it a functional equivalent to the felony-murder rule in NRS 200.030(1)(b). Setting aside premeditation and deliberation for the moment, the various means aggravating a murder to First Degree include enumerated means in NRS 200.030(1)(a)—use of poison, lying in wait, and torture, which are different from the felony murder rule in subsection (b), in that they do not denote actual crimes per se. *See Collman v. State*, 116 Nev. 687, 712-13, 7 P.3d 426, 442 (2000). Thus, murder must be established with both a killing and malice, and then if the facts demonstrate one of these enumerated means, the designation of the

murder is First Degree by law. *Id*. Felony murder on the other hand imparts malice from the commission or attempted commission of the underlying dangerous felony. *Id*. Thus a killing, not necessarily even intentional, occurring in the course of the commission of the dangerous felony is deemed First Degree Murder. *See Sanchez-Dominguez v. State*, 130 Nev. __, __, 318 P.3d 1068, 1075 (2014). The underlying felony need not even be pled as a charge to support a conviction of First-Degree Murder. *See Shaw v. State*, 104 Nev. 100, 102, 753 P.2d 88, 102 (1988), *overruled on other grounds by Alford v. State*, 111 Nev. 1409, 906 P.2d 714 (1995).

The challenge to fight statute operates in the same manner as the felony murder rule. Because the challenge to fight statute explicitly states that a challenge to fight murder is a First Degree Murder and because First Degree Murder is defined in NRS 200.030, this Court can simply treat challenges to fight that reach the level of a killing as a theory of the element of *mens rea* for First Degree Murder under NRS 200.030, and include said theory along with any other theories identified in the same statute in one count of Open Murder. This harmonizes the statutes and negates the need for further discussion as to whether the State must charge two separate counts of Murder, both potentially First Degree Murder, for the underlying acts in the case when there exists only one murder-victim.

Third, Pimentel argues that the district court erred in concluding that

sufficient evidence was adduced at the preliminary hearing to support the State's burden to prove that there exists probable cause to believe that Pimentel committed First-Degree Murder by means of a challenge to fight. The State need not prove probable cause of First Degree Murder; the State must only prove probable cause exists for one count of Open Murder. *See Howard v. Sheriff*, 83 Nev. 150, 153, 425 P.2d 596, 597 (1967) ("Statutes which provide different punishments for First and Second Degree Murder do not create two separate and distinct crimes—Murder in the First Degree and Murder in the Second Degree—which must be pleaded accordingly."). Simply put, there need not be evidence of First Degree Murder to support an Open Murder charge. *See Wrenn v. Sheriff*, 87 Nev. 85, 482 P.2d 289 (1971). Thus, Petitioner's claim that insufficient evidence exists to hold him to answer to this theory, assuming the Court agrees with the State's position that it should be a theory as opposed to a separate count, is legally meritless.

In any event, however, the State plainly admitted sufficient evidence to support the theory and to provide Petitioner notice of the theory, as explained above in the statement of facts. That testimony plainly demonstrates that Pimentel challenged Bobby orally to a fight, Bobby accepted the challenge, a fight occurred and Bobby's death ensued. Pursuant to NRS 200.450, this course of conduct constitutes a challenge to fight and is illegal. The evidence at the preliminary hearing is unequivocal and compelling; and certainly enough to meet the State's

burden at this pretrial stage of the proceedings.

Conclusion

For the foregoing reasons, no relief—much less extraordinary relief—is warranted and the petition should be DENIED.

Dated this 5th day of September, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 5, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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RJM//ed