

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

JACOB DISMONT #2889638,

Petitioner

vs.

THE HONORABLE VALERIE ADAIR,  
District Judge; and THE EIGHTH JUDICIAL  
DISTRICT COURT of the State of Nevada in  
and for the County of Clark,

Respondent,

THE STATE OF NEVADA;

Real Party in Interest.

Supreme Court Case No. \_\_\_\_\_

Electronically Filed  
District Court Case No. C-15-290260-2  
May 29 2015 01:46 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**PETITION FOR WRIT OF PROHIBITION**

From the Eighth Judicial District Court, Clark County, Nevada,  
The Honorable Valerie Adair, Department 21

**PETER S. CHRISTIANSEN, ESQ.**

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*Attorneys for Petitioner,*

*Jacob Dismont*

1                                    **NOTICE OF PETITION FOR WRIT OF PROHIBITION<sup>1</sup>**

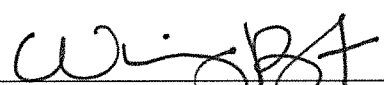
2 TO:    The Honorable Valerie Adair, Eighth Judicial District Court Judge, Department 21,  
3           Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155, Courtroom 11C

4 TO:    Steven B. Wolfson, Esq., Clark County District Attorney, and Jacqueline Bluth, Esq.,  
5           Chief Deputy District Attorney, 200 Lewis Avenue, Las Vegas, Nevada 89155,  
6           attorneys for Real Party in Interest, the State of Nevada

7 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the foregoing Petition for  
8 Writ of Prohibition will be brought before the above-entitled court.

9           Respectfully submitted this this 29<sup>th</sup> day of May, 2015.

10                                    **CHRISTIANSEN LAW OFFICES**

11                                     #13642  
12                                    FOR  
13                                    PETER S. CHRISTIANSEN, ESQ.  
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21                                    Attorneys for Petitioner, Jacob Dismont

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26  
27                                    <sup>1</sup> NRAP 21(A)(1) provides, in pertinent part: “[a] petition directed to a court shall also be  
28 accompanied by a notice of the filing of the petition, which shall be served on all parties to the  
proceeding in that court.”

**APPENDIX**

(the below referenced documents are attached to the end  
of this Petition under the appropriate tab)

Tab #	Description	Date
1	Indictment	June 4, 2013
2	Grand Jury Transcript	June 5, 2013
3	Defendant Jacob Dismont's Motion to Dismiss	May 17, 2015



1 II.

2 **ISSUES PRESENTED**

- 3 1. Whether the district court improperly allowed the State of Nevada to substantively  
4 alter the Grand Jury's Indictment by striking a theory of intent without returning to  
5 the Grand Jury.

6 III.

7 **THE FACTS NECESSARY TO UNDERSTAND THE ISSUES**  
8 **PRESENTED BY THE PETITION**

9 The alleged facts are as follows:<sup>2</sup> Co-Defendant Michael Solid drove Dismont's vehicle  
10 near the intersection of Charleston and Scholl. Dismont exited the vehicle and approached  
11 Marcos Arenas, who was walking nearby. Dismont then grabbed Mr. Arenas' iPad, and a  
12 struggle ensued. Dismont took the iPad from Mr. Arenas, and retreated to the vehicle. After  
13 Dismont had possession of the iPad and retreated to the vehicle, Mr. Arenas approached the  
14 vehicle as it was driving away. He attempted to run alongside the vehicle, latching onto it, until  
15 he eventually let go and was run over by the vehicle.

16 On June 4, 2013, a Grand Jury proceeding took place. Deputy District Attorney Robert  
17 ("Brad") Turner, Esq. advised the grand jury on the elements of the crimes charged. In so  
18 doing, he instructed the Grand Jury that "[m]urder is the unlawful killing of a human being with  
19 malice aforethought, either express or implied."<sup>3</sup> He informed the Grand Jury that "express  
20 malice is that deliberate intention unlawfully to take away the life of a fellow creature which is  
21 manifested by external circumstances capable of proof."<sup>4</sup> Mr. Turner then went on to explain  
22 that murder committed in the perpetration of a robbery may be conclusive evidence of malice  
23 aforethought.<sup>5</sup> The Grand Jury returned, charging Dismont with the crimes of conspiracy to  
24 commit robbery, robbery, and murder with use of a deadly weapon.<sup>6</sup> The murder charge stems

25 \_\_\_\_\_  
26 <sup>2</sup> See Appendix, Tab 1.

27 <sup>3</sup> See Appendix, Tab 2, 8:9-11.

28 <sup>4</sup> *Id.* at 8:22-25.

<sup>5</sup> *Id.* at 9:3-11.

<sup>6</sup> *Id.* at 186:23 – 187:5.

1 from one of three possible theories of liability, and the State has no way to support its theory is  
2 the one upon which the Grand Jury returned the true bill.

3 On June 5, 2013, an Indictment was filed against Dismont, charging him with the crimes  
4 of (1) Conspiracy to Commit Robbery (Category B Felony – NRS 199.480, 200.380); (2)  
5 Robbery (Category B Felony – NRS 200.380) and (3) Murder with Use of a Deadly Weapon  
6 (Category A Felony – NRS 200.010, 200.030, 193.165).<sup>7</sup>

7 Count 3 of the Indictment, charging Dismont with Murder with Use of a Deadly  
8 Weapon, provides as follows, in pertinent part:

9 [Dismont] ... did then and there willfully, unlawfully, feloniously, and without  
10 authority of law, and with malice aforethought, kill MARCOS ARENAS a  
11 human being... the said killing having been (1) done with premeditation and  
12 deliberation; and/or (2) committed during the perpetration or attempted  
13 perpetration of a robbery, to wit; (1) by directly committing the acts  
14 constituting the offense and/or (2) by Defendants conspiring with each other to  
commit robbery; and/or (3) by Defendants aiding or abetting each other in the  
commission of the crime... ”<sup>8</sup>

15 Thus, the Indictment reflects three possible theories of liability under which the State  
16 intends to prove the murder charge against Dismont. On May 17, 2015, Dismont filed a Motion  
17 to Dismiss the murder count based on the premise that the asportation of the stolen property was  
18 complete prior to the time of the alleged murder and the facts as alleged are insufficient to  
19 establish premeditation and deliberation.<sup>9</sup> Alternatively, Dismont moved to permit the jury to  
20 consider the lesser included offenses of second degree murder and involuntary manslaughter.<sup>10</sup>

21 At a May 28, 2015 hearing, Judge Adair denied Dismont’s Motion to Dismiss, finding  
22 that whether the robbery was complete at the time of the murder was a question of fact for the  
23 jury to determine. The State then orally moved to amend the Grand Jury’s Indictment to strike  
24 the “premeditation and deliberation” language from Count 3 in an effort to prevent Dismont  
25 from seeking all of the lesser included offenses of a first degree murder charge. No proposed

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26 <sup>7</sup> See Appendix, Tab 1.

27 <sup>8</sup> *Id.* at 3:5-16.

28 <sup>9</sup> See Appendix, Tab 3.

<sup>10</sup> *Id.*

1 amended Indictment was presented. Dismont opposed the State's oral motion, given that trial is  
2 scheduled to commence on June 1, 2015, and the proposed amendment derails Dismont's theory  
3 of defense under which he has been operating for the last two years. Judge Adair granted the  
4 State's Motion, permitting the State to substantively change the Grand Jury's Indictment to  
5 strike "premeditation and deliberation" in the murder count. Judge Adair also determined that  
6 Dismont would not be prejudiced by the striking of "premeditation and deliberation" language  
7 from the indictment because the facts are in line with a felony murder charge. However,  
8 Dismont argued that the lesser offenses of second degree murder and manslaughter also meet  
9 the facts of this case. Dismont orally requested a stay of the trial, which was denied.

10 The jury is charged with considering whether Dismont should be held responsible for  
11 Mr. Arenas' death, and they should not be limited to an "all or nothing" option for determining  
12 culpability. Dismont plans to forward the defense that the crime was a petit larceny, a  
13 misdemeanor under NRS 205.230, which would render the death of Mr. Arenas involuntary  
14 manslaughter under NRS 200.070, or at best, second degree murder. The State affirmed in open  
15 court that its abandonment of this theory of liability was for the purpose of preventing  
16 Defendant from proffering his theory of defense. Dismont will now be forced to defend himself  
17 at trial on an Indictment which has not been heard by 12 or more Grand Jury members, and the  
18 State has no possible way of supporting its theory is the one upon which the Grand Jury  
19 returned the true bill.

#### 20 IV.

#### 21 REASONS WHY THE WRIT SHOULD ISSUE

#### 22 1. **The State Does Not Have The Authority To Substantively Amend The Grand** 23 **Jury's Indictment.**

24 NRS 173.095(1) provides that a court may permit an indictment "to be amended at any  
25 time before verdict or finding if no additional or different offense is charged and if substantial  
26 rights of the defendant are not prejudiced." Unlike an Information, which is the product of a  
27 court proceeding, an Indictment "may be found only upon the concurrence of 12 or more  
28 jurors." NRS 172.255(1).

1 The amendment here, which removed an entire theory of liability for the murder offense,  
2 was more than the correction of a clerical error because it materially altered the Indictment.  
3 The amendment denies Dismont his right to due process because it cannot be determined  
4 whether the Grand Jury would have found probable cause for the murder charge with the  
5 absence of the premeditation and deliberation language which was subsequently removed from  
6 the Indictment by the State. *See State v. Hancock*, 114 Nev. 161, 955 P.2d 183 (1998).

7 It has long been the law of this state that the Grand Jury alone may materially alter its  
8 Indictment:

9 There can be no difference of opinion as to what is meant by the expression  
10 "indictment of a grand jury." It manifestly means a written accusation made  
11 and presented by the inquisition known as a grand jury. But if, after being  
12 presented to the court, an indictment so found be in any particular materially  
13 modified or altered; if anything of substance be added to or taken therefrom  
14 by the court, in cannot with any degree of propriety be denominated an  
15 indictment of a grand jury. If, as in this case, something material be added to  
16 it, the portion so added would not be a finding or accusation by the jury, but  
17 by the court; nor if it modified in any essential matter would the portion so  
18 modified be their work.

19 If the courts have the power to add or to take from anything material in an  
20 indictment, where is the limit to that power? If one can arrogate to itself any  
21 portion, upon what rule could it be held that it should not take upon itself the  
22 entire duties of the grand jury? Clearly no indictment upon which a person  
23 can be legally tried can be found except by a grand jury, and the courts have  
24 no more authority to add any material charge, accusation or allegation to it  
25 than they have to find the bill in the first instance.

26 *State v. Chamberlain*, 6 Nev. 257, 260 (1871). The district court erred by allowing the State to  
27 amend the Grand Jury's Indictment, in violation of this clearly established rule of law.

28 In certain instances, "an amendment to an indictment can implicate rights under the U.S.  
Constitution which are applicable to the states, such as fair notice of criminal charges, double  
jeopardy, and effective assistance of counsel." *Watson v. Jago*, 558 F.2d 330, 338 (6th Cir.  
1977). "An amendment of the indictment occurs when the charging terms of the indictment are  
altered, either literally or in effect, by the prosecutor or court after the grand jury has last passed  
on them." *United States v. Montgomery*, 384 F.3d 1050, 1060 (9th Cir. 2004). If the change in



1 the indictment constitutes an amendment, it is prejudicial per se and may warrant reversal of a  
2 conviction. *Jones v. Smith*, 231 F.3d 1227, 1232 (9th Cir. 2000).

3 Here, the district court erred by allowing the State to unilaterally amend the Grand  
4 Jury's Indictment against Dismont in violation of clearly established law. Dismont will now be  
5 forced to proceed to trial on an Indictment which has not been heard by 12 or more Grand Jury  
6 members, and the State has no way of supporting their theory of liability is the theory upon  
7 which the Grand Jury returned the true bill.

8 **2. Dismont Will Be Unfairly Prejudiced By The State's Amendment Of The**  
9 **Indictment.**

10 Dismont will be substantially prejudiced if required to proceed to trial with the  
11 dismissed "premeditation and deliberation" language from Count 3 of the Indictment. It is  
12 impossible to know to what degree the language was considered during the Grand Jury's  
13 deliberations on the murder charge, and the State cannot establish its theory is the one upon  
14 which the Grand Jury returned. The State's intention of amending the Indictment is to prevent  
15 Dismont from seeking the lesser included offenses to first degree murder at trial. The district  
16 court incorrectly agreed with the State, ruling that Dismont should not be permitted to forward  
17 his defense theory that the crime was a petit larceny, a misdemeanor under NRS 205.230, which  
18 would render the death of Mr. Arenas involuntary manslaughter under NRS 200.070, or at best,  
19 second degree murder.

20 Dismont has been preparing his theory of defense since the Grand Jury's return and the  
21 Indictment filed on June 5, 2013. Permitting the State to strike a theory of liability from the  
22 murder count on the eve of trial will unfairly prejudice Dismont because all preparation for his  
23 defense has been conducted on the Indictment as charged. An amended Indictment will  
24 preclude Dismont from presenting the theory of defense which has been directed on the premise  
25 that the murder was "(1) done with premeditation and deliberation; and /or (2) committed  
26 during the perpetration or attempted perpetration of a robbery, to wit; (1) by directly committing  
27 the acts constituting the offense and/or (2) by Defendants conspiring with each other to commit  
28 robbery; and/or (3) by Defendants aiding or abetting each other in the commission of the

1 crime...”<sup>11</sup> The district court has indicated that as a result of the “amendment,” the jury will not  
2 now be permitted to consider lesser included offenses of second degree murder or involuntary  
3 manslaughter.

4 The State cannot show that the district court’s decision allowing the State to amend the  
5 Grand Jury’s Indictment will not have a prejudicial impact on the jury’s verdict, or that it was  
6 mere harmless error. The district court must be prohibited from proceeding with the action as  
7 against Dismont with an amended Indictment striking the “premeditation and deliberation”  
8 language from Count 3.

9 **3. Dismont Has No Plain, Speedy, Adequate Remedy At Law.**

10 A writ of prohibition may issue to arrest the proceedings of a district court exercising its  
11 judicial functions when such proceedings are in excess of the court’s jurisdiction. NRS 34.320.  
12 This writ is an extraordinary remedy addressed to the sound discretion of this Court. *Smith v.*  
13 *District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

14 Defendant respectfully requests a writ of prohibition, pursuant to NRS 34.320 and  
15 34.330, commanding the district court not to exceed its jurisdiction and restraining the district  
16 judge from conducting further proceedings in the underlying action based on the amended  
17 Indictment. In the absence of relief, trial will proceed based on an Indictment that is beyond the  
18 district court’s authority, and thus there is no other plain, speedy, adequate remedy at law.

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<sup>11</sup> See Appendix, Tab 1, at 3:5-16.


V.

**CONCLUSION**

Wherefore, it is respectfully requested the Supreme Court issue a writ of prohibition arresting the district court from proceeding with the action as against Dismont with an amended Indictment striking a theory of intent from the murder count.

Respectfully submitted this this 29<sup>th</sup> day of May, 2015.

**CHRISTIANSEN LAW OFFICES**

 #13662  
FOR  
PETER S. CHRISTIANSEN, ESQ.  
Nevada Bar No. 5254  
KENDELEE LEASCHER WORKS, ESQ.  
Nevada Bar No. 9611  
810 S. Casino Center Blvd., Suite 104  
Las Vegas, Nevada 89101  
*Attorneys for Petitioner, Jacob Dismont*

VERIFICATION, PURSUANT TO NRAP 21(a)(5)<sup>12</sup>

STATE OF NEVADA            )  
  )       SS:  
COUNTY OF CLARK        )

PETER S. CHRISTIANSEN, ESQ., being first duly sworn, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of Nevada, and appointed counsel for Petitioner, Jacob Dismont, in the above-entitled matter;

2. That I have read the foregoing Petition for Writ of Prohibition and know the content thereof; that the same is true of his own knowledge except for those matters therein stated upon information and belief, and as to those matters he believes the same to be true

3. That Jacob Dismont has no other remedy at law available, and that the only means to address this issue is through the instant writ;

4. That Counsel signs this verification on behalf of Jacob Dismont, under his direction and authorization;


5. I declare under penalty of perjury that the foregoing is true and correct.

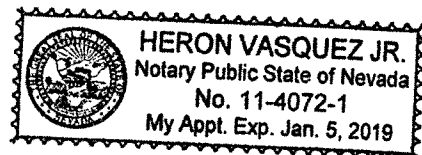
Dated this 25 day of May, 2015.

By   
PETER S. CHRISTIANSEN, ESQ.

Subscribed and Sworn to

Me on this 29<sup>th</sup> day of May, 2015.

  
\_\_\_\_\_  
Notary Public in and for said County and State.



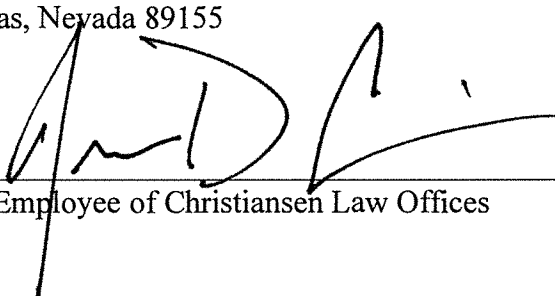
<sup>12</sup> NRAP 21(a)(5) provides: "Verification. A petition for an extraordinary writ shall be verified by the affidavit of the petitioner or, if the petitioner is unable to verify the petition or the facts stated therein are within the knowledge of the petitioner's attorney, by the affidavit of the attorney. The affidavit shall be filed with the petition."

CERTIFICATE OF SERVICE

The undersigned, an employee of Christiansen Law Offices, hereby certifies that on the 29<sup>th</sup> day of May, 2015, I caused to be hand delivered a true and correct copy of the foregoing Petition for Writ of Prohibition to the following:

Steven B. Wolfson, Esq.  
Clark County District Attorney  
Jacqueline Blue, Esq.  
Chief Deputy District Attorney  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

The Honorable Valerie Adair  
Eighth Judicial District Court Judge  
Department 21  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

By   
An Employee of Christiansen Law Offices