IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, No. 75184

Appellant,

vs.

TAREN DESHAWN BROWN A/K/A,
TAREN DE SHAWNE BROWN A/K/A,
"GOLDY-LOX",

Respondent.
_____/

SUPPLEMENTAL BRIEF IN OPPOSITION TO STATE'S BRIEF IN SUPPORT OF GOOD CAUSE FOR APPEAL

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SUPPLEMENTAL POINTS AND AUTHORITIES IN OPPOSITION TO THE STATE'S BRIEF IN SUPPORT OF GOOD CAUSE FOR APPEAL

Under NRS 177.015(2) the State may seek interlocutory appellate review of a district court's order granting a motion to suppress evidence in a criminal case. However, the State must make "a preliminary showing of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained." In this regard, the Court has directed the parties to brief three issues: (1) whether the suppressed evidence is of substantial importance in the case; (2) whether the suppression of the evidence in the case would significantly impair or terminate the State's ability to prosecute the case; and (3)

whether the appeal was taken for the purpose of delay. Respondent, Taren Deshawn Brown, accepts the State's representation that this appeal was not taken for the purpose of delay. See Supplemental Brief in Support of Good Cause for Appeal (SBS) at 7. Mr. Brown submits the following on the remaining two questions.

Substantial importance

1.

The Court's first question referenced *United States v. W.R. Grace*, 526 F.3d 499, 505 (9th Cir. 2008). *W.R. Grace* re-interpreted 18 U.S.C. § 3731—addressing appeals by the United States. In pertinent part that statute provides:

> [a]n appeal by the United States *shall* lie to a court of appeals from a decision or order of a district court suppressing ... evidence ... in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, *if* the United State attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

(italics added). In *W.R. Grace* the Ninth Circuit, sitting en banc, held that under § 3731 "the United States Attorney's bare certification

regarding delay and materiality in accordance with the terms of [the statute] was sufficient to [establish] appellate jurisdiction to address the government's objections to the district court's orders." 526 F.3d at 502 (overruling *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979) and *United States v. Adrian*, 978 F. 2d 486 (9th Cir. 1992)); *Id.* at 506 (overruling *Loud Hawk's* progeny). The court concluded that "[n]othing in the statute requires the government to go further and prove that the evidence suppressed or excluded by the district court is actually material to the proceedings *before* our jurisdiction can attach." 526 F.3d at 505 (italics in the original).

Prior to *W.R. Grace* the government was required to make a preliminary showing that the excluded evidence was truly material. *Id.* quoting *Loud Hawk*, 628 F.2d at 1150 "(emphasizing that the materiality 'condition must be met before appeal of the suppression order can properly be taken')." In *W.R. Grace* the court noted that "the purposes of our certification-plus rule were salutary—to assure that the government's decision to involve us in the trial process was a carefully considered judgment and to provide us with enough information to determine whether a time-consuming appeal was truly justified." *Id.*

The court concluded however, that given the plain language of the statute it did not have the power "to impose a two-step screening process that Congress has not required." *Id.* at 506. And it abandoned its "certification-plus" rule.

NRS 177.015(2), unlike § 3731, does not contain a corresponding "if-then" jurisdiction statement.[1] It states only that "[t]he State *may, upon good cause shown*, appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court ... from a pretrial order of the district court granting ... a motion to suppress evidence ... ." (italics added). The statute authorizes the court to "establish such procedures as it determines proper" to perform its gatekeeping function, *i.e.* requiring the State to make a preliminary showing "of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained." The purpose of

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[1] The only jurisdictional component of NRS 177.015(2) is its requirement that the State's notice of appeal "must be filed with the clerk of the district court within 2 judicial days and with the Clerk of the Supreme Court within 5 judicial days after the ruling by the district court." See *State v. Loyle*, 101 Nev. 65, 66-67, 692 P.2d 516, 517 (1985) (dismissing appeal where the State did not file a notice of appeal "with the clerk of the supreme court within 5 judicial days after the ruling of the district court" and "the appeal was not perfected in the manner commanded by the statute.") (internal quotation marks omitted).

this statute is identical to the Ninth Circuit's previous "certification-plus rule" under §3731—to make sure that the State's decision to involve this Court in the trial process was a carefully considered judgment and to provide this Court with enough information to determine whether a time-consuming appeal was truly justified. In other words, NRS 177.015(2)—by requiring a good cause showing—contemplates that this Court will impose a screening process when the State is seeking interlocutory appellate review of a district court's pretrial order suppressing evidence. And further, the statute's good cause requirement rests the burden upon the State to convince this Court to entertain its interlocutory appeal.

2.

The State asserts that "Brown's [suppressed] admissions to the police are substantial proof of facts that a reasonable jury would find persuasive in deciding that Brown is guilty of the charged offenses[,]" SBS at 4, and "Brown's statements are compelling evidence that will allow the State to prove various elements of the charged offense." SBS at 5. But these assertions do not tell this Court anything it didn't already know: A criminal defendant's inculpatory statements or

confession is always a windfall for the prosecution. What the State does not tell this Court is the relative strength of its case, *i.e.*, other available witnesses and evidence that are extrinsic to Mr. Brown's statements and are not subject to the district court's order. That is, the State fails to explain why or how a manifest injustice will result if the Court declines appellate review. It offers only conclusory assertions that Mr. Brown's statements are of substantial importance in this case. These assertions standing alone are not be enough to involve this Court in the trial process and do not constitute enough information to determine whether a time-consuming interlocutory appeal is truly justified.

Significantly impair or terminate

Notably, the State does not claim that suppression of Mr. Brown's statements terminates its ability to prosecute the case. Here the State only claims that its ability "to prove Brown's identify to a jury beyond a reasonable doubt ... will be substantially impaired if Brown's admission to being at the scene is suppressed." SBS at 6. The State acknowledges that there is surveillance footage. *Id.* And despite its claim that Mr. Brown waived his preliminary hearing, SBS at 1, there was a preliminary hearing in this case where witnesses testified. Would

the State's case be made easier using Mr. Brown's statements? No doubt. Would the State's case be *significantly* impaired without Mr. Brown's statements? This Court cannot easily discern the answer based on the State's submission.[2]

Conclusion

The Court directed supplemental briefing to allow the State the opportunity to convincingly show that without this Court's intervention a miscarriage of justice will result. Put another way, the State was given the opportunity to demonstrate the need for this Court's involvement in the trial process and to show that a time-consuming interlocutory appeal was truly justified. The State has not met that burden. The Court should dismiss this appeal.

Dated this 25th day of October 2018.

By: *John Reese Petty*
JOHN REESE PETTY
Chief Deputy

By: *Emilie Meyer*
EMILIE MEYER
Deputy Public Defender

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[2] *Cf. People v. Null*, 233 P.3d 670, 675, 681-82 (Colo. 2010) (accepting that suppression of Null's refusal to take a breath test could significantly impede the prosecution's case but concluding suppression was proper remedy, and upholding trial court's suppression order).

CERTIFICATE OF COMPLIANCE

1. I hereby 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 answer has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points and contains a total of 1,636 words. NRAP 32(a)(7)(A)(i), (ii).

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

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

DATED this 25th day of October 2018.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on 25th day of October 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Adam Cate, Deputy District Attorney
Washoe County District Attorney's Office

I further certify that I have on this date, emailed a copy of this document to:

Taren Deshawn Brown (Bk # 1717811)
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John Reese Petty
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