

IN THE SUPREME COURT OF THE STATE OF NEVADA

---

DEANDRE GATHRITE,	) No.	Electronically Filed
	) (Dist Ct. No. C-18-334135-1)	Oct 02 2018 09:49 a.m.
Petitioner,	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
vi.	)	
	)	
THE EIGHTH JUDICIAL DISTRICT	)	
COURT OF THE STATE OF NEVADA,	)	
COUNTY OF CLARK, THE	)	
HONORABLE DOUGLAS W. HERNDON,	)	
DISTRICT COURT JUDGE,	)	
	)	
Respondent,	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Real Party in Interest.	)	

---

**EMERGENCY PETITION FOR WRIT OF PROHIBITION**  
**ARRESTING THE PROCEEDINGS OF THE EIGHTH JUDICIAL**  
**DISTRICT COURT, DEPARTMENT III, THE HONORABLE**  
**DOUGLAS HERNDON PRESIDING**  
**(Relief Prior to Evidentiary Hearing of 10/05/18)**

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

---

DEANDRE GATHRITE,	)	No.
	)	(Dist Ct. No. C -18-334135-1)
Petitioner,	)	
	)	
v.	)	
	)	
THE EIGHTH JUDICIAL DISTRICT	)	
COURT OF THE STATE OF NEVADA,	)	
COUNTY OF CLARK, THE	)	
HONORABLE DOUGLAS W. HERNDON,	)	
DISTRICT COURT JUDGE,	)	
	)	
Respondent,	)	
	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Real Party in Interest.	)	

---

**EMERGENCY PETITION FOR WRIT OF PROHIBITION**  
**ARRESTING THE PROCEEDINGS OF THE EIGHTH JUDICIAL**  
**DISTRICT COURT, DEPARTMENT III, THE HONORABLE**  
**DOUGLAS HERNDON PRESIDING**  
**(Relief Prior to Evidentiary Hearing of 10/05/18)**

COME NOW the Petitioner, DEANDRE GATHRITE aka DEANDRE  
TERELLE GATHRITE, by and through his counsel of record Adrian M.  
Lobo, Esq. of Lobo Law, and hereby petitions this Honorable Supreme Court,  
Pursuant to NRS 34.320 through 34.350, inclusive, for a Writ of Prohibition.

At issue in this Petition is the Petitioner's right, and similarly-situated defendants' right, to due process and appropriate deference to the orders of a justice court on evidentiary issues. This matter also concerns the alleged prosecutorial misconduct and bad faith on the part of the Clark County District Attorney's Office in its continued efforts against the Petitioner in spite of a clear order from the justice court for the suppression of evidence- the same evidence the State continues to rely upon and for which a Writ of Prohibition is necessary to stop the ongoing misconduct. Also at issue is whether a district court, *sua sponte* and without any request by either the defendant in an action or the State as prosecutor, can order an evidentiary hearing for the specific purpose of reconsidering and re-litigating a justice court's decision- to "see if the justice court got it right," in other words.

This Petition is based upon the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and similar clauses appearing in the Nevada Constitution at Article 1, § 8. This Petition cites to the statutory laws of the State of Nevada as set forth herein, and relies upon the record made in both the justice court and the district court in this case.

The relevant documents in support of this Petition are attached in the form of a Petitioner's Appendix ("PA"), separated into two volumes as

follows: Volume 1, PA000001-PA000245; and Volume 2, PA000246-PA000392.

This Petition is made pursuant to NRS 34.330, which provides that an accused may seek extraordinary relief from the “Supreme Court, the Court of Appeals or a district court to an inferior tribunal ... in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law.” Such a Writ of Prohibition may be issued as either alternative or peremptory. *NRS 34.340(1)*. The Court, in its discretion may order that the Writ issued “be made returnable and a hearing thereon be had at any time.” *NRS 34.350*.

The facts and circumstances justifying extraordinary relief are described in the attached Declaration of Adrian M. Lobo, Esq. The Petition is supported by law and other authority contained in the attached Memorandum of Points and Authorities, the attached exhibits, the papers and pleadings on file with the justice court and the district court, and such oral argument as this Court may grant and entertain.

//

//

//

This Petition has been filed concurrently with a separate Motion for an Emergency Stay of Proceedings, such motion for stay having been previously requested, and denied, in the district court.

DATED this 2nd day of October, 2018.

ADRIAN M. LOBO  
PETITIONER'S ATTORNEY

By: /s/ Adrian M. Lobo  
Adrian M. Lobo, Esq. (#10919)  
LOBO LAW PLLC  
400 S. 4th St., Ste. 500  
Las Vegas, NV 89101  
Phone: 702.290.8998  
Fax: 702.442.2626  
Email: [adrianlobo@lobolaw.net](mailto:adrianlobo@lobolaw.net)

**DECLARATION OF ADRIAN M. LOBO, ESQ.**

1. I am an attorney licensed to practice law in the State of Nevada; I am the attorney representing the Petitioner, Deandre Gathrite, in this action; I am familiar with the procedural and substantive history of this case.
2. The State of Nevada filed a criminal complaint on February 26, 2018 in Department 11 of Justice Court before the Hon. Eric Goodman, under case no. 18F03565X. *PA000001-PA000002*. The complaint alleged one count of open murder, and one count of a prohibited person in possession of a firearm.
3. On May 10, 2018, the Petitioner filed a Motion to Suppress Evidence Acquired In Violation of Both the Fourth and Fifth Amendments. *PA000315-PA000336*. The State filed its Opposition on May 23, 2018. *PA000337-PA000372*. The Petitioner filed his Reply in Support of the Motion to Suppress on May 24, 2018. *PA000373-PA000383*. Specifically, Petitioner was challenging the State's admission of Petitioner's statement to police for violation of the Fourth and Fifth Amendment (failure to issue proper *Miranda* warnings to the Petitioner), and the resulting seizure of physical evidence (a firearm).

4. The Motion to Suppress came on for hearing in the justice court on May 25, 2018. The justice court granted the Petitioner's Motion to Suppress and ordered that the Petitioner's statement and the physical evidence be suppressed. *PA000054-PA000055*.
5. The State on June 8, 2018, filed a Motion to Continue the preliminary hearing pursuant to *Hill v. Sheriff of Clark County*, 85 Nev. 234 (1969). *PA000282-000284*. The State's supporting affidavit stated that it expected a witness, Raymond Moore, to testify at the preliminary hearing, but that the witness was unavailable "due to his preschedule court appearance in San Bernardino, California" on the same date. *PA000285*. The justice court granted the continuance.
6. On June 29, 2018, the parties appeared for preliminary hearing. At that time, the State represented to the justice court that it had information that the witness, Raymond Moore, had been in an accident and was hospitalized in a coma. *PA000288*. The State announced that it was dismissing the complaint against the Petitioner, but that it had sent a notice to the defense of its intent to seek an indictment. *Id.*

7. Undersigned counsel made an oral motion for a dismissal of the complaint with prejudice based upon undersigned counsel's investigation that revealed Raymond Moore did not have a court date in San Bernardino on June 8, 2018.<sup>1</sup> *PA000290-PA000297*.
8. The justice court denied the Petitioner's oral motion for a dismissal with prejudice. Judge Goodman opined that he did not believe that the State had deliberately misrepresented the witness's availability. *PA000289*. Judge Goodman did, however, caution the State that if it refiled the case, "you better make sure to get proof that he's in a hospital in a coma." *Id.*
9. The State did not appeal the justice court's ruling; it did not move for a reconsideration of the justice court's ruling; and it did not seek any other avenue of redress with regard to the justice court's ruling to suppress the State's evidence.
10. The State went to a grand jury on August 14, 2018 to seek an indictment against the Petitioner *only* on the charge of an ex-felon

---

<sup>1</sup> Undersigned counsel is licensed to practice law in California, and was able to access the relevant jurisdiction's court docket to determine that no hearing under Raymond Moore's active case had been scheduled for June 8, 2018.

in possession of a firearm. The State's entire evidentiary universe at that hearing consisted of the Petitioner's statement to police, and the recovered firearm- both of which had been ordered suppressed by the justice court. *PA000145-PA000170*.

11. The State did not offer the testimony of Raymond Moore. The State likewise did not offer proof that Raymond Moore previously had been unavailable due to a court hearing, a coma, or some other reason.

12. The State did not advise or otherwise admonish the grand jurors as to the justice court's prior ruling on the evidence or of the disposition of the case in the lower court.

13. The grand jury returned an indictment on a single count of Ownership or Possession of Firearm by Prohibited Person. *PA000006*.

14. The Petitioner challenged the indictment by way of a Petition for a Writ of Habeas Corpus, filed on September 7, 2018. *PA000009-PA000034*. The Petitioner also filed a contemporaneous Motion to Dismiss the Indictment for Prosecutorial Misconduct. *PA000225-PA000245*.

15. The State filed a Return to the Petition for a Writ of Habeas Corpus on September 21, 2018. *PA000179-PA000211*. The State also filed an Opposition to the Petitioner's Motion to Dismiss for Prosecutorial Misconduct. *PA000246-PA000262*.
16. The Petitioner filed his Reply In Support of the Petition for a Writ of Habeas Corpus on September 24, 2018. *PA000212-PA000224*. The Petitioner also filed a Reply In Support of the Motion to Dismiss the same day. *PA000263-000278*.
17. Both the Habeas Petition and the Motion to Dismiss came on for hearing on September 25, 2018. At that time, the district court, the Hon. Douglas Herndon presiding, declined to rule on either issue and scheduled an evidentiary hearing for October 8, 2018 at 1:00 p.m. The hearing was scheduled over the Petitioner's objection. *PA000384-PA000391*.
18. Undersigned counsel made an oral motion for a stay of proceedings to pursue writ relief on the issue, but was denied. *Id.*; *see also PA000392*.

19. The Petitioner has authorized me as counsel to prepare and to file  
this Petition for a Writ of Prohibition seeking the requested relief.

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

EXECUTED this 2nd day of October, 2018.

/s/ Adrian M. Lobo  
ADRIAN M. LOBO, ESQ.(#10919)

**Rule 27(e) Certificate:**

**Ruling Required By: Monday, October 1, 2018, 2:11 p.m.**

**Clerk of the Supreme Court Notified by Telephone:**

(Linda, October 1, 2018, 2:11 p.m.)

**District Attorney Notified by Telephone:** (Nicole Cannizzaro, October 1, 2018, 4:23 p.m.)

**Motion Served Via Email:** Nicole Cannizzaro –  
Nicole.Cannizzaro@clarkcountyda.com.

**Addresses of Attorneys & Courts:** District Attorney, Nicole Cannizzaro, 200 Lewis Avenue, Las Vegas, NV 89155, (702) 671-2750; Petitioner's Attorney, Adrian M. Lobo, 400 S. Fourth Street, Suite 500, Las Vegas, Nevada 89101, (702) 290-8998.

## **ROUTING STATEMENT**

“Rule 17: Division of Cases Between the Supreme Court and the Court of Appeals.” Subsection (b) of Rule 17 provides that certain cases shall “presumptively” be heard and decided by the court of appeals. “Pretrial writ proceedings challenging discovery orders or orders resolving motions in limine are presumptively assigned to the court of appeals.” NRAP 17(b)(14). Although this matter arises from a pre-trial writ, it does not involve a discovery order or a motion in limine. Accordingly, this case is not presumptively assigned to the Court of Appeals.

Nevada Supreme Court should decide this pre-trial writ based on an illegal detention because it raises “as a principle issue of statewide importance” ..... NRAP 17 (a)(11).

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **1. Jurisdiction**

A Writ of Prohibition “arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.” *NRS 34.320*. It is appropriate for prohibition to issue when a judge deviates from the prescribed procedures of the court, or otherwise exceeds that court’s authority. Furthermore, prohibition is

specifically indicated as a remedy originating from a higher court than the tribunal to be arrested: “The writ may be issued only by the Supreme Court, the Court of Appeals or a district court to an inferior tribunal ...” *NRS 34.330*. While Nevada courts have often held that the ability to appeal a district court’s decision is a “plain, adequate, and speedy remedy at law,” a writ of prohibition is nevertheless an appropriate remedy where the issue is a jurisdictional challenge. *Sparks Justice Court v. Smith*, 281 P.3d 1220 (Nev. 2009).

There is such a jurisdictional challenge present here, for two reasons.

This Petition stems from the State’s refusal to abide by a justice court’s decision to suppress evidence. In proceeding to the grand jury and securing an indictment using constitutionally infirm evidence, the State has exceeded the district court’s jurisdiction. The indictment is improperly before the district court; nevertheless, the Petitioner has moved that court by way of a Petition for a Writ of Habeas Corpus and a Motion to Dismiss because the Petitioner has no choice.

In addition, the district court exceeded its jurisdiction when it order an evidentiary hearing on the suppression issue. Neither the Petitioner nor the State appealed the justice court’s decision, challenged the decision, or otherwise sought reconsideration. Therefore ordering an evidentiary hearing

is in essence forcing the Petitioner to re-litigate the justice court issue, all while being subjected to continued incarceration and threatened with ongoing prosecution. The only issues before the district court were whether the State violated the statutory requirement to present to the grand jury “none but legal evidence, and the best evidence in degree” when it presented evidence it knew to have been ordered suppressed by a tribunal of competent jurisdiction and inherent authority; and whether the State’s prosecutor committed misconduct in failing to admonish the grand jury of the justice court’s ruling (in essence, concealing the questionable nature of the evidence and the prior disposition of its case) and failing to provide appropriate notice of the grand jury hearing to defense counsel.

As such, this Petition concerns the durability of the justice court’s decision and whether or not the district court has jurisdiction to reconsider such decisions *sua sponte* when the State has not sought such reconsideration through the proper procedures.

#### **STATEMENT OF FACTS SUPPORTING EMERGENCY WRIT:**

COMES NOW, Petitioner, DEANDRE GATHRITE, by and through his counsel of record ADRIAN M. LOBO, Esq. of Lobo Law PLLC, and moves this Honorable Court to grant an emergency stay of the proceedings in the above entitled case.

The procedural facts are described in the Declaration of Adrian M. Lobo, attached above and thereby made part of this Petition. The following additional facts are also relevant.

From May 10, 2018 to May 24, 2018, Petitioner and the State filed their respective motion practice in justice court as to the underlying suppression issue. At issue was whether the Petitioner's statement was admissible owing to detectives' failure to issue *Miranda* warning to the Petitioner until after detectives had elicited incriminating statements. The detectives then used the un-*Mirandized* statements to secure a firearm of evidentiary value. *PA000315-PA000336*. At the hearing on the suppression issue, the justice court, the Hon. Eric Goodman presiding, agreed with the Petitioner:

This is all a ruse by Metro to get him custody to interview him about the murder case. So he was in custody and, when he is custody [sic], they should have read him his Miranda Rights. They didn't, not until 28 pages into this. They violated his rights. The fact it's a murder case doesn't matter to me. It doesn't matter if he is caught with 20 pounds of weed or if it's a murder case. They violated his rights. Because they violated his rights when he was in custody, I'm going to suppress his statement. Because the gun comes from the statements made during the interview, I'm going to suppress the gun[.]  
*PA000054-PA000055*.

Judge Goodman was emphatic in his ruling, and stated again to the State: "No. The statement is out, the gun is out." *PA000055*.

The suppressed evidence had the effect of being dispositive. Without the statement and the firearm, the State claimed that its only other evidence—the testimony of a supposed witness, Raymond Moore—would be sufficient to support a probable cause determination. However, the State filed a motion on June 8, 2018 (the date of the preliminary hearing) to continue under the representations that Moore had a court date in San Bernardino, California. *PA000283-PA000286*. The preliminary hearing was reset to June 29, 2018, to allow for the witness’s availability.

Meanwhile, defense counsel began investigating the witness in order to prepare for preliminary hearing. During the course of the investigation, defense counsel discovered that the witness did not actually have a court date in San Bernardino, according to the court’s docket. *PA000290-000297*. At the continued preliminary hearing on June 29, the State notified the justice court that the witness “has been in a bad accident, which resulted in his hospitalization, which resulted in his current placement in a coma.” *PA000288*. The State then moved to dismiss the complaint, and stated on the record that it had provided notice to the Petitioner of the State’s intent to seek an indictment. *Id.*

The Petitioner made an oral motion to dismiss with prejudice, citing the questionable representations of the State with regard to the witness’s

unverified court date that apparently had kept him from testifying at the prior preliminary hearing. *Id.* Judge Goodman denied the Petitioner’s motion but warned the State:

I’m not going to dismiss it with prejudice at this point. I think most lawyers, both for the defense and the State, just work with what they’re given. I don’t think there’s any kind of bad faith in making these representations to the Court, but I do expect that if this gentleman is in a coma in a hospital, that at some point, if they are going to take this forward, they are going to bring proof that he’s in the hospital in a coma ...

So I’m not going to dismiss it with prejudice, but, State, if you are making representations he’s in a coma in the hospital, you better make sure to get proof that he’s in a hospital in a coma.

*PA000289.*

The State proceeded to the grand jury on August 14, 2018—almost two months after providing notice of its intent to seek indictment. Prior to the grand jury proceedings, on June 20, 2018 (the day after the State’s notice), undersigned counsel sent to the State a letter requesting “that the State comply with its duty under NRS 172.145(2) and present any and all exculpatory evidence the State is aware of to the Grand Jury...” *PA000172*. Undersigned counsel specifically requested that the State present the transcript of the justice court hearing wherein the Petitioner’s statement, and the firearm, were suppressed; information regarding that known criminal history, gang affiliation, and history of violence of the alleged victim of the homicide in question; additional details from the witness Moore’s prior statement that was

exculpatory in nature, including the contention that Petitioner had acted in self-defense; and additional details regarding the alleged shooting and the weapon Petitioner is alleged to have fired. *PA000173-PA000174*.

Not only was none of the exculpatory evidence presented, the State presented *only* the Petitioner's statement and the firearm to the grand jurors. Moreover, the State did not make any mention either of the justice court's suppression of that evidence, or of the dismissal in justice court. The State did not offer Moore as a witness, nor did it produce any evidence to support its prior representations to Judge Goodman that Moore was unavailable due to being in a coma. On the "strength" of the State's evidence, the grand jury returned an indictment.

The Petitioner immediately petitioned for habeas relief, raising as the primary contention that the State's evidence was not "legal evidence, and the best evidence in degree" because it knowingly presented suppressed evidence—so suppressed because it had been obtained in violation of the Petitioner's constitutional rights.<sup>2</sup>

---

<sup>2</sup> The Petitioner raised other arguments in the Habeas Petition, but these are outside of the scope of this Petition. The primary issue—that the State ignored the justice court's ruling—is germane to this Petition.

The State's Return argued that it was not bound by the justice court's ruling because the ruling was merely a "legal opinion" and not binding on the State. *PA000183-PA000190*. The State then, in copy-paste fashion, re-inserted its suppression argument from the justice court opposition in a clear effort to re-litigate the suppression issue before the justice court. *PA000190-PA000201*.

Petitioner's Reply in Support of the Habeas Petition argued that while the State can (and often does) elect whether to proceed either to justice court or to a grand jury, it cannot possibly be a permissible argument that the State can do so freely in order to avoid or otherwise circumvent the findings of the justice court. *PA000214-PA000216*. Furthermore, the State's ability to move from one arena to another would only encourage such "forum shopping" in that anytime the State experienced an adverse ruling by a justice court it would simply dismiss and proceed to a grand jury—and otherwise independent body that makes no determination as to the admissibility of evidence. Therefore, the system relies upon a prosecutor *not* to present evidence that she knows to have been held inadmissible. *Id.*

The Petition for a Writ of Habeas Corpus came before the district court, the Hon. Douglas Herndon presiding, on September 25, 2018. In a brief hearing, Judge Herndon announced that he was ordering an evidentiary

hearing: “So before we get into any of the other allegations from the writ, I mean, the core issue in my mind, is getting to the motion to dismiss and the suppression issues which, in my mind, I think is appropriate to have an evidentiary hearing.” *PA000385*. The Petitioner objected, stating that the justice court’s ruling had never been challenged. *PA000386*. Nevertheless, Judge Herndon stated once more his intention to hold an evidentiary hearing specifically to re-litigate the justice court’s ruling:

But ultimately what I think about the suppression issue is pertinent to if – if Judge Goodman was right and if there is any carry forward to the State having some obligation to then not do – not present it at the grand jury. If I disagree with it, then it’s really moot and they present it to the grand jury. But at least in my mind and what I’ve read so far, and I haven’t seen the replies yet, it starts with that level of an evidentiary hearing about the suppression issues. SO that’s kind of the thing that I want to get out of the way first.

*PA000386-PA000387*.

The Petitioner again objected, and again reminded the district court that the State had pursued none of the procedural avenues for such a reconsideration of the justice court ruling. *PA000387*. The Petitioner then made the oral motion for a stay of proceedings to pursue this Petition, but was denied.

This Petition follows.

## **LEGAL ARGUMENT**

This Petition centers on one simple question: can the district court, without any request (be it an appeal, motion, etc.) reconsider and potentially overturn the justice court's ruling, or does this exceed the district court's jurisdiction? It is the Petitioner's position that Judge Herndon exceeded the district court's jurisdiction when he *sua sponte* ordered an evidentiary hearing to reconsider Judge Goodman's ruling to suppress the evidence offered by the State in the justice court proceedings.

### **1. The Justice Court has the authority to decide suppression issues**

The ability of a justice court to hear suppression motions has been recognized by the Nevada Supreme Court in the recent decision *Grace v. Eighth Judicial Dist. Court of Nev.*, 375 P.3d 1017, 132 Nev. Adv. Op. 51 (Nev. 2016). That case, which also originated from both Judge Goodman's and later Judge Herndon's courts, considered "whether Nevada's justice courts are authorized to rule on motions to suppress during preliminary hearings." 375 P.3d at 1018. The Nevada Supreme Court held that "the justice courts have express and limited inherent authority to suppress illegally obtained evidence during preliminary hearings." *Id.*

Specifically, the Court based its decision on the concept that "the evidence presented at a preliminary hearing 'must consist of legal, competent

evidence,”” and “[t]herefore, justice courts’ authority to make probable cause determinations includes a limited inherent authority to suppress illegally obtained evidence.” *Id.* at 1021 (citation omitted).

Furthermore, Judge Herndon recognized not only the *Grace* decision, but its effect on this case: “So I think the justice court does have authority, pursuant to *Grace* that was my case. ...And I’m the one that invited [the *Grace* appeal] because I thought they should have that discretion.” *PA000386*.

Here, as with the *Grace* decision, the justice court entertained and decided a suppression matter that was timely noticed, pled, and argued before it. To this day, the State has not challenged the justice court’s authority to render that decision, but instead has argued that the justice court’s ruling was of no practical effect since the State could (as it did) simply flee to the grand jury for a more favorable outcome:

//

//

//

Further the State did not engage in prosecutorial misconduct by presenting evidence that the Justice Court deemed inadmissible for the purposes of a preliminary hearing, similar to *Harrington*.<sup>3</sup> The Justice Court's ruling was a legal opinion regarding the evidence at the time of the preliminary hearing. PA000255.

Likewise, the State has not challenged the justice court's ruling itself, but has only sought to re-litigate the matter in its entirety via a cut-and-paste of its justice court pleadings into its Return on the Petitioner's Habeas Petition.

Accordingly, the justice court's ruling was a valid ruling, within that court's recognized, inherent power.

**2. The State failed to avail itself of the procedural remedies following the justice court's ruling.**

---

<sup>3</sup> *Sheriff v. Harrington*, 108 Nev. 869, 840 P.2d 588 (1992). It is the Petitioner's position that the State has grossly misstated the holding of this case. The *Harrington* court held that the evidentiary ruling of a justice court was not, in itself, exculpatory evidence, but instead a "legal opinion." In other words, *Harrington* stands for the proposition that a ruling cannot itself be introduced as a piece of evidence- a completely different issue entirely than what is argued in this case.

The State's proper avenue when confronted with an adverse ruling is not to seek greener pastures (wherein it totally ignores the ruling), but to appeal the decision. NRS 177.015 is informative on this point. According to that statute, the State when faced with an order suppressing the whole of its evidence should have appealed to the district court. *NRS 177.015(1)(a)*. To argue that the State can merely dismiss its complaint against a defendant and then seek a more favorable forum elsewhere to evade the inadmissibility of its evidence ignores common sense and sets an unhealthy precedent.

The support for this proposition comes from the State itself. "If the justice court's interlocutory legal opinions were binding upon the grand jury, NRS 172.145 would be rendered meaningless." *PA000189-PA000190*. Applying the State's own argument conversely, the grand jury system cannot itself render the justice court procedure meaningless- precisely what the State is attempting to do here by claiming that the grand jury is the ultimate "do over" wherein it can present the same evidence exclusive of the justice court's adverse ruling. This not only renders the justice courts ultimately meaningless for probable cause determinations, it is the State outright admitting that it will forum shop to get the result it wants (if the State loses, for whatever reason, it will just go to the grand jury where it has much more control over the

proceedings- to include the apparent ability to ignore any adverse rulings it suffered in justice court).

This much is evident from the State's wholesale regurgitation of the suppression pleadings in the Return to the Habeas Petition. The State was relying on its favorable outcome before the grand jury to give it the second opportunity it wanted to relitigate the issue of the Petitioner's statement and its admissibility. The State already fought this battle and lost; the justice court heard all of the State's arguments, read its pleadings and citations, and still ruled against it. Rather than be bound by that decision, the State went to the grand jury, presented suppressed evidence to secure an indictment, and now seeks to re-litigate the issue for its second bite at the apple.

And indeed, all of the State's points were argued, analyzed, and decided in the justice court. The State argued again in its Return that the Petitioner's statement is admissible; that the Petitioner was not in custody when he gave the statement; that the Petitioner's statement was voluntary; and/or that the Petitioner waived his Miranda rights. Upon arguing all of these same points, nearly word-for-word, the justice court had the following exchange with the State:

THE COURT: ...The standard is if he is in custody, he needs to have his Miranda rights read before they interview him. It's not whether somebody feels better. That's not the way the Fifth Amendment works.

THE STATE: No, I understand that, your Honor, and I think if the detective believes he was, in fact, under custodial interrogation and in custody with regards to this case, they would have read him Miranda, either by card or memory, at the outset of the interview, but based on their position, it was the State's position in its Opposition was that he, in fact, was not. They didn't feel the need to issue these Miranda warnings at the outset or throughout any point in time in the interview, as they didn't in Fields rather.

THE COURT: The interviews basically are voluntary. They are always voluntary interactions with the police. You cited a case where the guy's in prison, they bring him in the interview room, and he is free to leave. He may have be [sic] in prison, but in prison, his cell is his home. So they say, You are free to leave. That means go back to your cell and just go back to what is basically his home.

THE STATE: Correct.

THE COURT: If he was free to leave, that means he was going to be uncuffed, let out, put in a police car, go back to his apartment, make a sandwich, turn on the TV, and go on with his day or by free means he is going to be in handcuffs and put in the back of the car?

THE STATE: Well, free to leave in the same respect as he was in Fields. I mean like that's why the State believes it's analogous. In that case, they even indicated that he was free to leave and by that, they meant free to leave and go back to his cell.

THE COURT: His cell is his home.

THE STATE: Correct.

THE COURT: Right. He's not free to go back to his home, right?

THE STATE: No, he's not because of this active parole violation where he was going to independently go back to California, as he had been doing since 2014.

*PA0000054.*

The State obviously disagreed with the justice court's ruling (it sunk the State's case). Rather than appeal, or even move for reconsideration, the

State simply side-stepped the justice court. It now argues that expecting it to respect the justice court's decision somehow undermines the justice system in general, all while trying to ignore and circumvent that very same decision.

This was not the proper procedure. Under NRS 177.015 the proper procedure is laid out:

The party aggrieved in a criminal action may appeal only as follows:

1. Whether that party is the State or the defendant:
  - (a) To the district court of the county from a final judgment of the justice court.

NRS 177.015(1)(a) (Emphasis added).

The justice court's ruling, arguably, had the effect of a dismissal- the case only remained open because the State questionably represented that it could bring other evidence for a probable cause determination (an absentee witness). Regardless, the justice court's ruling left the State with no other option but to dismiss, and thus this provision of the NRS was triggered; an appeal to the district court was the appropriate avenue available to the State. Alternatively, the State could have filed a motion to reconsider the ruling in justice court, pursuant to the Eighth Judicial District Court Rules (EDCR), Rule 3.20. These procedural avenues are supported by case law.

The power of district court to hear appeals from justice court is stated in the case of *Sandstrom v. Dist. Ct.*, 119 P.3d 1250 (Nev., 2005). In that case,

a justice court in Washoe County had dismissed a misdemeanor complaint following defendant's motion. *Id.* at 1251. The State appealed to the appropriate district court, and that court remanded the matter for further proceedings. *Id.* The defendant challenged the district court's remand, arguing that nothing in the law granted to district courts the power to hear appeals of justice court dismissals in misdemeanor cases. *Id.* The *Sandstrom* court disagreed, and stated the following:

The power of the district courts to entertain appeals from justice court orders is firmly rooted in the Nevada Constitution, as well as in our case law. Our State Constitution bestows on the Legislature the authority to "prescribe by law the manner, and determine the cases in which appeals may be taken from Justices and other courts." [Footnote omitted]. More specifically, district courts are granted exclusive "final appellate jurisdiction in cases arising in Justices [sic] Courts and such other inferior tribunals as may be established by law." [Footnote omitted].  
*Id.* at 1252.

While the *Sandstrom* case affirms that district courts may hear appeals of justice court orders, the factual pattern of that case also serves as an example for the proper procedure that should have been followed here. Specifically, the State in *Sandstrom* "unsuccessfully sought reconsideration of the justice court order and then timely appealed the order granting the motion to dismiss to the district court." *Id.* at 1251.

Here, the State did not seek any reconsideration of or otherwise appeal the justice court's ruling. It merely dismissed its case and went to a different venue, and pretended as if the justice court proceedings had never happened. Predictably, the grand jury indicted on the basis of the Petitioner's statement, which then had the effect of *limiting* the Petitioner's avenue of redress (the Habeas Petition<sup>4</sup>). This outcome is even more distressing because a defendant in the Petitioner's shoes is not only deprived of his favorable outcome in justice court, but the State will no doubt seek to press its newfound advantage by relitigating its prior loss(es) as has been done here (and in a responsive pleading, no less).

---

<sup>4</sup> The Petitioner also filed a contemporaneous Motion to Dismiss for Prosecutorial Misconduct, as set forth herein, but he is speaking in general terms here on behalf of other defendants similarly situated, and similarly at the mercy of other prosecutors that deprive a defendant of the benefit of diligent defense work in a justice court setting. When the State moves to a decidedly prosecutor-friendly venue such as a grand jury proceeding, a defendant suffers a distinct disadvantage and, upon indictment, becomes limited to habeas relief with a closed evidentiary universe whereas before he enjoyed a favorable—and arguably dispositive—outcome in justice court.

This problem is exacerbated when the district court encourages the practice by ordering an evidentiary hearing for the State's benefit, as opposed to holding the State to the justice court's ruling.

Accordingly, the district court has exceeded its jurisdiction in ordering an evidentiary hearing without a basis to do so. The State did not pursue any avenues of either appeal or reconsideration in an effort to reform or to overturn the justice court's ruling. Instead, the State conceded defeat by dismissing its case—all amidst questionable representations—only to seek an indictment on the same evidence it had conceded (by its inaction) was inadmissible. Without a properly noticed, timely, and procedurally sound appeal of some sort, the district court's sudden decision to order an evidentiary hearing to revisit the justice court's ruling is without basis in the law, and works to the detriment of Petitioner and similarly situated defendants.

A writ of prohibition is necessary to prevent the excess of the district court's jurisdiction, and to prevent further irreparable harm to the Petitioner.

## **CONCLUSION**

Based on the foregoing, the Petitioner humbly requests that this Court issue a writ of prohibition, arresting the district court's order of an evidentiary hearing.

DATED this 2nd day of October, 2018

ADRIAN M. LOBO  
PETITIONER'S ATTORNEY

By: /s/ Adrian M. Lobo  
Adrian M. Lobo, Esq. (#10919)  
LOBO LAW PLLC  
400 S. 4th St., Ste. 500  
Las Vegas, NV 89101  
Phone: 702.290.8998  
Fax: 702.442.2626  
Email: [adrianlobo@lobolaw.net](mailto:adrianlobo@lobolaw.net)

## **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2<sup>nd</sup> of October, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT  
Nevada Attorney General

STEVEN B. WOLFSON  
Clark County District Attorney

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

THE HONORABLE JUDGE DOUGLAS W. HERNDON  
REGIONAL JUSTICE CENTER  
200 LEWIS AVE  
LAS VEGAS, NEVADA 89155

DATED this 2<sup>nd</sup> day of October, 2018.

By: /s/ Alejandra Romero  
Alejandra Romero  
Legal Assistant to Adrian M. Lobo, Esq.  
Lobo Law PLLC  
400 S. 4th Street, Suite 500  
Las Vegas, NV 89101  
Phone: 702.290.8998  
Fax: 702.442.2626