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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH WARREN, JR., Petitioner, vs. **EIGHTH JUDICIAL DISTRICT COURT JUDGE, THE HONORABLE RICHARD SCOTTI,** Respondents, and **THE STATE OF NEVADA,** Real Party in Interest.	Supreme Court No. _____ District Court No. C-17-323608-1 Dept. No. II **PETITION FOR WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION, OR IN THE ALTERNATIVE WRIT OF MANDAMUS**

Petitioner Joseph Warren, by and through his counsel JoNell Thomas and Melinda Simpkins, and petitions this Court for a Writ of Certiorari, or in the alternative a Writ of Prohibition, or in the alternative, a Writ of Mandamus pursuant

to NRAP 21, Article 6 §4 of the Nevada Constitution, NRS 34.020, NRS 34.160 and NRS 34.320. Petitioner Warren asks this Court to find that the district court exceeded its jurisdiction by entertaining an appeal by the State from a justice court order finding that the State had failed to present sufficient evidence to bind him over on felony charges. Mr. Warren contends that there is no statute providing for an appeal from such an order and that the State's only viable remedies were to either seek permission to file an Information by affidavit (which the State did seek, in another department, which was denied) or to seek an Indictment from a grand jury (which the State did not do). In the alternative, he asks this Court to find that the district court was obligated to dismiss the State's appeal because it was moot and because it violated district court rules prohibiting multiple applications for the same relief. Finally, and again in the alternative, he asks that this Court find that the district court erred in its interpretation of NRS 171.196. Petitioner has satisfied the procedural requirements of verification and proof of service. See Exhibits 1 and 2.

The district court has remanded proceedings in this case to justice court. Mr. Warren requested that the district court stay its order pending resolution of this petition. The district court denied the request for a stay. Petitioner Warren files contemporaneously with this petition an emergency motion for stay of the district court's order.

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Introduction

Petitioner Warren contends that the district court lacked jurisdiction to hear an appeal from a justice court order finding a lack of probable cause at a preliminary hearing to support felony charges asserted to exist by the State. There is no statute or rule providing for an appeal in these circumstances. A writ of certiorari should issue which vacates the order entered by the district court in excess of its jurisdiction.

In the alternative, Petitioner Warren contends that the district court was obligated to dismiss the State's appeal because the case is moot due to the State's agreement to dismiss the charges at issue pursuant to a plea agreement entered in another case, and because the State violated local and district court rules which prohibit multiple applications for relief in the same matter and before different district court judges. Finally, he contends that the district court erred in its interpretation of a statute concerning the use of hearsay evidence at a preliminary hearing. Mr. Warren respectfully submits that writs of prohibition or mandamus should issue in response to the district court's erroneous rulings.

Routing Statement

This writ proceeding concerns an apparent issue of first impression concerning whether the district courts have appellate jurisdiction over orders from the justice courts finding a lack of probable cause to support felony charges. NRAP 17(10) and

(11) provide for retention by the Supreme Court of matters raising as a principal issue a question of first impression involving the United States or Nevada constitution or common law; and matters raising as a principal issue a question of statewide public importance. Petitioner submits that this matter should be retained by the Nevada Supreme Court.

Parties and Procedural History

Petitioner Warren is the defendant/respondent in the case of State of Nevada v. Joseoph Warren, Eighth Judicial District Court, Case No. C-17-323608-A. The State has attempted to charge him with two counts of sexual assault. The justice court found insufficient evidence to bind him over on those charges. The State appealed that ruling to the district court.

Respondent Judge Scotti was assigned to preside over the State's appeal. Real Party in Interest is the State of Nevada. The State of Nevada, through the Clark County District Attorney's Office, is the entity prosecuting Petitioner Warren.

The preliminary hearing in this case was held in justice court on April 20, 2017. App. 61, 130. After taking the matter under submission, the Justice of the Peace dismissed the charges based upon the State's failure to present sufficient evidence to establish probable cause that Mr. Warren committed the offenses. App. 61-70. The Justice of the Peace authored a thorough 10 page order in support of its decision. App. 61-70.

The State filed a Motion for Leave to File an Information by Affidavit. The motion was docketed in case number C-17-323426-1 and was assigned to the Honorable Judge Cadish, Department VI. App. 188. Mr. Warren filed an opposition to the State's motion. App. 188. Following argument from counsel, Judge Cadish denied the State's motion.[1] App. 188-189.

The State also filed an appeal from the justice court's order, which was docketed in the district court as case number C-17-323608-A, and assigned to the Honorable Judge Scotti, Department 2, on May 16, 2017. App. 1-3. Mr. Warren filed a motion to dismiss the appeal, in which he argued that there is no statutory right to appeal from a justice court order refusing to bind over charges following a

[1]Several grounds were raised in opposition to the State's motion for leave to file Information by affidavit. Judge Cadish found that the State's failure to file a sufficient affidavit was dispositive and denied the motion on that ground. App. 188-189.

preliminary hearing and that the district court therefore lacked jurisdiction to hear the appeal. App. 104, 166. The State opposed the motion to dismiss. App. 213. Following argument from counsel, the district court concluded that it had jurisdiction to hear the appeal. App. 227, 236. Mr. Warren now challenges that decision. He asked the district court to stay its decision pending this writ proceeding, but that request was denied by the district court. App. 235-238.

The State filed an Opening Brief in support of its appeal. App. 109. It argued that the justice court erred in its interpretation of a statute concerning hearsay evidence at a preliminary hearing and erred in finding that there was not probable cause to support the charges. App. 111-116. Mr. Warren filed an Answering Brief. App. 173. He contended that the appeal should be denied because (1) the State had already litigated the issue presented and having lost could not relitigate the issue in a new forum; (2) the State had already agree to dismiss any charges in the appeal, so the appeal was moot; and (3) the justice court correctly ruled on the merits concerning the scope of NRS 171.186(6). App. 180-186. Following argument from counsel, the district court orally ruled in the State's favor on each of the issues.[2] App. 248. On September 8, 2017, the district court entered its written order. App. 240-45. The

[2]A transcript of this argument is not yet available. A supplemental appendix will be filed as soon as it is received. The citation to App. 248 is to the district court's minute order.

district court concluded that it had jurisdiction to hear the appeal and found that NRS 171.196(6) allowed the State to present hearsay evidence at the preliminary hearing. App. 243. This petition for extraordinary relief now follows. Mr. Warren submits that this Court's intervention is warranted because of the important legal issues presented in this matter and because it will be impossible to obtain the relief requested in the ordinary course of the law. He requested that the district court stay its remand to the justice court, but that request was denied by the district court. App. 248.

Synopsis of the Legal Arguments

The State seeks to charge Joseph Warren with kidnapping and sexual assault. At the preliminary hearing, the State failed to call the alleged victim as a witness, even though the State claimed she was in fact available, and instead relied upon the testimony of a SANE nurse and a recording of a garbled 911 call to justify its charges. After thoroughly considering the issues, the justice court found that statements made by the alleged victim to the SANE nurse were not admissible under NRS 171.196(6) and that the State failed to present sufficient evidence to establish probable cause that Warren committed the alleged offenses.

The State then sought reversal of the justice court's decision by filing a motion for leave to file Information by affidavit. That motion was assigned to Judge Cadish and was denied. The State again sought reversal of the district court's decision, this

time by filing an appeal before Judge Scotti. Mr. Warren contends that there is no statutory right permitting an appeal of this nature and that the district court exceeded its jurisdiction by entertaining the merits of the State's appeal. He also contends that the district court was obligated to dismiss the State's appeal because it was moot as the State had already agreed to dismiss the charges at issue in this case in the context of another criminal case in which Mr. Warren had entered a guilty plea. Likewise, he argued that the State's appeal should be dismissed because the State's multiple filings before different district court judges violated district court and local rules prohibiting multiplicitous proceedings. Should the jurisdictional and procedural arguments be rejected by the Court, it is Mr. Warren's position that the district court's ruling should nevertheless be reversed because it was wrong on the merits of its interpretation of NRS 171.196(6).

A Writ of Certiori Is The Appropriate Remedy

Petitioner Warren submits that he may seek relief from this Court by a Petition for a Writ of Certiorari. NRS 34.020 provides:

> 1. This writ may be granted, on application, by the Supreme Court, the Court of Appeals, a district court, or a judge of the district court....
> 2. The writ shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

> 3. In any case prosecuted for the violation of a statute or municipal ordinance wherein an appeal has been taken from a Justice Court or from a municipal court, and wherein the district court has passed upon the constitutionality or validity of such statute or ordinance, the writ shall be granted by the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Curt pursuant to Section 4 of Article 6 of the Nevada Constitution upon application of the State or municipality or defendant, for the purpose of reviewing the constitutionality or validity of such statute or ordinance, but in no case shall the defendant be tried again for the same offense.

"A writ of certiorari is appropriate to remedy jurisdictional excesses committed by an inferior tribunal, board or officer, exercising judicial functions." Las Vegas Police Prot. Ass'n v. District Court, 122 Nev. 230, 241, 130 P.3d 182, 190 (2006). See also Figliuzzi v. Eighth Judicial District Court, 111 Nev. 338, 341-42, 890 P.2d 798, 800-01 (1995).

Mr. Warren contends that the district court lacks jurisdiction to consider an appeal by the State from an order of the justice court finding that the State failed to present probable cause in support of charges and refusing to bind over felony charges. Certiorari is the appropriate remedy as there is no right of appeal from the district court's order remanding the case to justice court for further proceedings. See Zamarripa v. First Judicial District Court, 103 Nev. 638, 640, 747 P.2d 1386, 1387 (1987); Las Vegas v. Carver, 92 Nev. 198, 547 P.2d 688 (1976).

In The Alternative, A Writ of Prohibition Or Mandamus Is The Appropriate Remedy

Petitioner Warren will suffer irreparable harm if he is forced to continue litigation in this matter. The State has already agreed that the charges should be dismissed and the appeal to the district court was therefore seeking a mere advisory decision. Moreover, the State has violated district court and local court rules which prohibit the multiplicity of proceedings and the forum shopping which has taken place here. Finally, there is no merit to the State's legal argument. The expense, turmoil, emotional burden, and other hardships associated with the State's continued prosecution of this case cannot be cured on direct appeal from a judgment of conviction and warrant immediate intervention by this Court.

This Court has "original jurisdiction to issue writs of mandamus and prohibition." Gonzalez v. Eighth Judicial Dist. Court, 298 P.3d 448, 449 (Nev. 2013); Nev. Const. art. 6 § 4. A writ of mandamus may issue to compel the performance of an act that the law requires "as a duty resulting from an office, trust or station." NRS 34.160. A writ of prohibition is available to halt proceedings occurring in excess of a court's jurisdiction. NRS 34.320. "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 or where discretion has been manifestly abused or

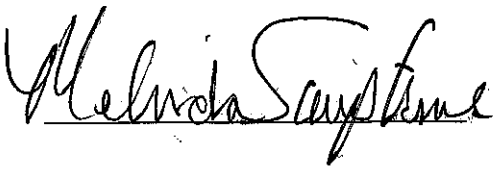
exercised arbitrarily or capriciously. The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. This Court considers whether judicial economy and sound judicial administration militate for or against issuing the writ. The decision to entertain a mandamus petition lies within the discretion of this court." Redeker v. Eighth Judicial Dist. Court (Mosley), 122 Nev. 164, 167, 127 P.3d 520, 522 (2006) (citing NRS 34.160, NRS 34.170, Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981); Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989); State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990)). "This Court may also exercise its discretion to entertain a writ petition "[w]here the circumstances establish urgency or strong necessity, or an important issue of law requires clarification and public policy is served by this court's exercise of its original jurisdiction." Schuster v. Eighth Judicial Dist. Court, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007).

Petitioner Warren has no other plain, adequate or speedy remedy at law to protect his right not to face additional proceedings which have been ordered by a district court without jurisdiction over his case. Moreover, judicial economy and sound judicial administration warrant issuance of the writ and this case presents an opportunity for this Court to clarify an important issue of law.

Request for Relief

Wherefore, based on the foregoing and the accompanying Points and Authorities, Petitioner Warren respectfully requests that this Court issue a Writ of Certiorari in which it vacates the district court's order of remand based upon the district court's lack of jurisdiction to hear an appeal from a justice court order finding a lack of probable cause to support felony charges. In the alternative, he requests that this Court issue a Writ of Prohibition which vacates the district court's order of remand and prohibits the district court from taking any further action in this case because it is moot and because the State violated district court and local rules by filing multiple cases concerning the same matter. In the alternative, he requests that this Court issue a Writ of Mandamus which vacates the district court's order of remand, and compels the district court to deny the State's appeal on its merits.

Dated this __ day of September, 2017.



JoNell Thomas

Melinda Simpkins

POINTS AND AUTHORITIES IN SUPPORT OF WRIT

Statement of the Facts

The State contends that Defendant Joseph Warren Jr. sexually assaulted Kearstin Ellis. App. 140. Warren contests that allegation and asserts that he had consensual sex with Ellis in exchange for methamphetamine. App. 139. After the exchange was completed, Ellis reported that she had been sexually assaulted at Freedom Park[3]. She was transported to University Medical Center where she underwent a SANE evaluation by Jeri Dermanelian, a registered nurse, who owns a company called Rose Heart that provides sexual assault nurse examinations. App. 133. Her specific duties and responsibilities are to provide options for patients that come in with a chief complaint of sexual assault. App. 133. During that examination, evidence was collected and turned over to the Las Vegas Metropolitan Police Department. App. 136.

Joseph Warren, Jr. was subsequently arrested and charged with one count of First Degree Kidnapping, one count of Sexual Assault, one count of Battery with

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[3]Although Kearstin Ellis allegedly made a call to 911 to report the alleged sexual assault, the 911 telephone call presented by the State at the Preliminary Hearing is unintelligible due to the garbled language used by the caller. App. 138. In addition, the caller never states their name during the call and the 911 operator never asks. The transcript submitted by the State at the Preliminary Hearing was not admitted as evidence and the district court instead relied on the audio recording. App. 140.

Intent to Commit Sexual Assault and two counts of Open and Gross Lewdness. App. 5-6. The Preliminary Hearing was held on April 20, 2017. App. 130. During that hearing, counsel stipulated to the admission of DNA reports. App. 132. The State called only one witness, Jeri Dermanelian, the SANE nurse, who testified, over objection, as to what Kearstin Ellis allegedly told her during the examination. App. 133. The State asserted that this testimony was allowed pursuant to the hearsay exception regarding statements made for purposes of medical diagnosis or treatment. App. 133. It was during this examination that Ellis allegedly told Dermanelian that:

> [S]he was walking home. She was going to go to her fiance's house. She was stopped. When she stopped, she went to have a cigarette. A male came up to her that she didn't know and asked her if he could have a cigarette. She gave him a cigarette. And she stated that she was forced to have finger to vagina and then penis to vagina intercourse in a bathroom. She stated she was in a standing position and bent over. She stated that the male used a garbage bag to wrap as a possible condom. The garbage bag came off, and there was penis to vagina intercourse without the wrapper. The ejaculation took place in the vagina.
>
> The patient states that she was forced to smoke methamphetamines. The male told her that the methamphetamines would make her wet. And she stated that she was not hit with an open hand or closed fist. There was no gun or knife used in the sexual assault.

App. 133. Dermanelian went on to state that Ellis did, in fact, test positive for both methamphetamine and marijuana. App. 134.

Dermanelian also described the options that Ellis was given at the time of her forensic examination:

> A. The patient, as an adult, is given four options – or four choices – as to which type of examination they want done.
>
> Q. And what are those four options?
>
> A. Briefly, the first option is to decline the exam at the end of the conversation, after they have more knowledge on what's included in each one of the options. If they choose not to go forward, they can just simply say they don't want the exam,, and the exam will stop at that time.
>
> The second option is what I term medical only. It's a medical exam that does a head-to-toe assessment. Sexually transmitted and infection testing is done, including blood and pelvic exam, if it's a female, and potentially an anal exam also. The patient would be given antibiotics to prevent gonnorrhea and chlamydia. Morning-after medication wold be discussed, and a urine pregnancy and urine drug screen would be done on a medical. What's made clear to the patient is that with a medical-only exam, there's no forensics evidence collected, no sexual assault kit obtained, and that there would be no photographs of their body taken.
>
> The third choice is called an anonymous or a Jane Doe sexual assault exam. Jane Doe for the females. John Does for the males. And that's an anonymous sexual assault kit that would be completed. And all of the medical examinations, testing, and head-to-toe assessment that's offered in Option 2 would be also included in Option 3. The 30-day window would be given to the patient so they could decide if they wanted to go forward from a legal perspective. They have 30 days to activate their case. So photographs would be taken with that exam and a sexual assault kit would be completed.
>
> The fourth option is the full, forensic sexual assault kit, the medical. And then that includes the law enforcement where the patient is going

to be notified that they're going to request a criminal investigation to be initiated regarding a sexual assault complaint.

Q. And which of those options did Miss Ellis choose?

A. Fourth.

App. 134.

On cross examination, Dermanelian testified that she strictly does forensic examinations and that she does them primarily for police departments. App. 136. She also admitted that law enforcement was involved with the instant examination, she received information from law enforcement, Ellis was transported to her examination by law enforcement, she sent a sexual assault kit to the Las Vegas Crime Lab, and she collected evidence for the Las Vegas Metropolitan Police Department. App. 136. Dermanelian also testified that, upon meeting Ellis, she knew that the chief complaint was sexual assault *because "That was her chief complaint to the triage nurse."* App. 136, indicating that Dermanelian was not the only medical professional to see and speak with Ellis at the hospital.

At that point, counsel renewed the objection to Dermanelian's testimony because it was not for the purposes of medical diagnosis and treatment. App. 137. In their argument opposing, the State cited to Medina v. State, 122 Nev. 346, 143 P.3d 471 (Nev. 2006) for the proposition that because the confrontation clause does not

apply at preliminary hearings, Dermanelian's testimony should stand.[4] App. 137. At the end of extensive argument and additional testimony regarding the medical treatment provided to Kearstin Ellis,[5] the justice court allowed Dermanelian's testimony to remain in evidence as a statement made for the purpose of medical diagnosis or treatment. App. 138.

After calling counsel to the bench and expressing concern about the issue of consent, the Court questioned the State regarding the whereabouts of their witness. The State asserted that they knew where Kearstin Ellis was, however, they were proceeding solely on the evidence and testimony presented. Thereafter, the State entered into evidence a 911 call over objection and attempted to enter into evidence

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[4]In Medina v. State, 122 Nev. 346, 350, 143 P.3d 417 (Nev. 2006), this Court stated "SANE nurses are funded by the State of Nevada Department of Social Services and are trained to conduct sexual assault examinations. A particular duty of a SANE nurse is to gather evidence for possible criminal prosecution in cases of alleged sexual assault. SANE nurses do not provide medical treatment."

[5]This "medical treatment" consisted of: "The medical history was obtained, the history of the event was obtained, the sexually transmitted infection blood testing was drawn, urine was obtained, the antibiotics were administered, the morning-after medication was administered, and the discharge information was given to the patient. Referral information was given to the patient for the 12-week follow-up for the second HIV and syphilis test." Of note, however, is that had Kearstin Ellis been seeking only medical treatment, she could have chose the option that allowed only for medical treatment. She did not. She chose the criminal investigation option so, even though this "medical treatment" was given to her, it was done for the purpose of criminal investigation.

the transcript of that 911 call - which was denied. App. 138-140. The State then rested without calling any other witnesses or presenting any other evidence. The justice court then took the matter under advisement and issued its written decision, which is discussed in detail below, dismissing all counts. App. 140.

As set forth above, and discussed in detail below, the State first sought to challenge the justice court's order by seeking relief from Department 6, Judge Cadish, in form of a motion for leave to file Information by affidavit. After that motion was dismissed, the State again sought to challenge the justice court's order by way of appeal to Department 2, Judge Scotti. Judge Scotti granted relief to the State and this petition for extraordinary relief now follows.

Argument

A. The District Court Did Not Have Jurisdiction To Hear The State's Appeal.

Petitioner Warren contends that there is no right of appeal, by either statute or rule, from a justice court order finding a lack of probable cause to support felony charges following a Preliminary Hearing.

Nevada has defined available remedies for the State following dismissal of a criminal complaint at a preliminary hearing based upon a lack of probable cause. After a magistrate dismisses a criminal complaint at a preliminary hearing for lack of

probable cause, the State is prohibited from refiling the same charge that was dismissed because of insufficient evidence. Nevada criminal procedure dictates that "the discharge of a person accused upon preliminary examination is a bar to another complaint against the person for the same offense, but does not bar the finding of an indictment or the filing of an information." NRS 178.562(2). If a defendant is not bound over for a charge, the State may either: (1) seek an indictment by a grand jury; or (2) seek leave to file an "information by affidavit" in the district court, pursuant to NRS 173.035(2).[6] State v. Sixth Judicial District Court, 114 Nev. 739, 743, 964 P.2d 48, 50 (1998). Other cases which suggest a different scheme were overruled. Id.

The State's challenge to a justice court's decision finding a lack of probable cause at a preliminary hearing is through a motion for leave to file an information by affidavit or by seeking an indictment before a grand jury. See e.g. Moultrie v. State,

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[6]NRS 173.035(2) provides:

If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the Attorney General when acting pursuant to a specific statute or the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process must forthwith be issued thereon. The affidavit need not be filed in cases where the defendant has waived a preliminary examination, or upon a preliminary examination has been bound over to appear at the court having jurisdiction.

364 P.3d 606 (Nev. App. 2015) (addressing the district court's decision on a motion for leave to file an information by affidavit after the justice court found that the State did not meet its burden of proof for a felony and discharged the defendant); Parsons v. State, 115 Nev. 91, 978 P.2d 963 (1999) (addressing a district court's decision on a motion for leave to file an information by affidavit after the justice court dismissed charges at a preliminary hearing). Other than seeking an Indictment, there is no other method for challenging a justice court's probable cause determination.

The right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists. Castillo v. State, 106 Nev. 349, 352, 729 P.2d 1133, 1135 (1990). No statute or court rule provides for an appeal from a justice court order finding that the State failed to present probable cause to support a charge at a preliminary hearing. In its Notice of Appeal, the State cited to NRS 177.015 and Sandstrom v. Second Judicial Dist. Court, 121 Nev. 657, 119 P.3d 1250 (2005) as authority for the assertion that it may appeal from the justice court's finding of a lack of probable cause. App. 2-3. Neither supports the State's assertion. In Sandstrom, this Court considered an original petition for a writ of certiorari, filed by a defendant, who argued that a district court lacked jurisdiction to entertain an appeal by the State from a justice court order granting a motion to dismiss a misdemeanor criminal complaint. Id. at 658, 119 P.3d at 1251. Sandstrom did not address felony charges for which no

probable cause was found, but instead concerned only misdemeanor complaints over which the justice court has final decision making authority. Specifically, this Court noted that under the Nevada Constitution, the legislature has the authority to "'prescribe by law the manner, and determine the cases in which appeals may be taken from Justices and other courts.'" Id. at 659, 119 P.3d at 1252 (quoting Nev. Const. art. 6, § 8). The legislature defined "the parameters of the district courts' appellate jurisdiction respecting criminal misdemeanor cases originating in justice court [by enacting NRS 177.015, which] provides in pertinent part: "The partied 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.'" Id. The Court found that dismissal of a misdemeanor complaint was a final judgment because it "dispose[d] of all issues and [left] nothing for future consideration." Id.

Sandstrom does not apply, by either its plain language or by its rationale, to a justice court's finding of a lack of probable cause to support felony charges. Such an order does not dispose of all issues and it does not leave nothing for future consideration. Rather, as set forth above, following an order like that at issue here, the State may seek an indictment by a grand jury; or (2) seek leave to file an "information by affidavit" in the district court, pursuant to NRS 173.035(2). State v.

Sixth Judicial District Court, 114 Nev. at 743, 964 P.2d at 50. These statutory remedies were provided by the Legislature, rendering NRS 177.015 inapplicable to this type of order.

There is no rule providing for an appeal to the district court from an order of the justice court finding a lack of probable cause to support felony charges. Likewise, there is no case authority finding that such an appeal is possible. The district court lacked jurisdiction over the appeal. A writ of certiorari should issue based upon the district court's actions which were taken in excess of its jurisdiction.

B. The State Had Already Litigated The Issue Presented And Having Lost Could Not Relitigate In A New Forum

The district court also erred in finding that the State was allowed to pursue remedies before both Judge Cadish and Judge Scotti. District court and local court rules prohibited the State's second bite at the apple.

Nevada District Court Rule 13(7) provides that "No motion once heard and disposed of shall be renewed in the same cause, nor shall the same matters therein embraced be reheard, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." Likewise, DCR 18(1) and DCR 19 precluded Judge Scotti's consideration of an issue which was already heard by Judge Cadish. The Eighth Judicial District Court Rules also precluded the State's actions

in the district court. EJDC Rule 7.12 provides that "When an application or a petition for any writ or order shall have been made to a judge and is pending or has been denied by such judge, the same application, petition or motion may not again be made to the same or another district judge, except in accordance with any applicable statute and upon the consent in writing of the judge to whom the application, petition or motion was first made." The State's efforts to multiply the proceedings is also akin to forum shopping. Judicial economy mandates that the State not be given repetitive opportunities to present arguments which have already been dismissed by another court. The district court erred in not dismissing the State's appeal on these grounds.

C. The State Had Already Agreed To Dismiss Any Charges In This Case, So Its Appeal Was Moot

As explained at length in Exhibit B to Mr. Warren's Answering Brief in the district court, which is a Reporter's Transcript of Unconditional Waiver of Preliminary Hearing, in Justice Court Case No. 17F04527X, the State agreed in the context of another case against Mr. Warren that if Judge Cadish denied the State's motion for leave to file an Information by affidavit, this case would be dismissed, the State would not proceed on it and the State would not appeal Judge Cadish's ruling. App. 194-96. They further agreed that Mr. Warren would then plead guilty to attempt sexual assault in Justice Court Case No. 17F04527X, the parties would stipulate to

a sentence of two-to-five years, and would stipulate that the sentence would run concurrent with two other cases involving open and gross lewdness. App. 194-96. On June 13, 2017, Mr. Warren fulfilled his obligations under this agreement by entering his plea in the other case. App. 200. According to the terms of the State's agreement, as stated in open court, it was obligated to end its prosecution of this case.

In essence, the State was seeking an advisory decision from the district court even though the case was moot. An appellate court's duty, however, is not to render advisory opinions but to resolve actual controversies by an enforceable judgment. In re: Serota, 309 P.3d 1037, 1040 (Nev. 2013). See also State v. Viers, 86 Nev. 385, 386, 469 P.2d 53, 54 (1970) (finding that Nevada Constitution Article 6, Section 4 prohibits appellate jurisdiction over moot questions of law). This Court explained:

> The Supreme Court of the United States in the case of Mills v. Green, 159 U.S. 651 (1895), said: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

Id. at 386-87, 469 P.2d at 54.

Based upon the State's agreement in the companion case, and Mr. Warren's compliance with the terms of that agreement, further prosecution of this matter was not allowed and the only available remedy was dismissal of the appeal. The district court erred in allowing the State to argue the merits of its appeal, and in ruling in the State's favor, despite the lack of case or controversy.

D. The Justice Court Correctly Ruled On The Merits As NRS 171.196(6) Does Not Allow For Admission Of Hearsay Evidence At A Preliminary Hearing, Absent Certain Circumstances Which Are Not Present Here.

Although this Court should not reach the merits of this legal issue, should it do so, reversal is mandated because the State's position lacks merit. The State contends that the justice court erred in finding that NRS 171.196 prohibits the introduction of hearsay evidence at a preliminary hearing, absent certain exceptions which are not relevant here. The State is wrong. The justice court's reading of the statute was correct.

NRS 171.196 addresses preliminary hearings and how they are to be conducted in Nevada. In 2015, the Nevada Legislature enacted AB 193, which amended NRS 171.196 by adding subsection (6) to the statute:

> Hearsay evidence consisting of a statement made by the alleged victim of the offense is admissible at a preliminary examination conducted

> pursuant to this section only if the defendant is charged with one or more of the following offenses:
>
> (a) A sexual offense committed against a child who is under the age of 16 years if the offense is punishable as a felony. As used in this paragraph, "sexual offense" has the meaning ascribed to it in NRS 179D.097.
>
> (b) Abuse of a child pursuant to NRS 200.508 if the offense is committed against a child who is under the age of 16 years and the offense is punishable as a felony.
>
> (c) An act which constitutes domestic violence pursuant to NRS 33.018, which is punishable as a felony and which resulted in substantial bodily harm to the alleged victim.

Mr. Warren is not charged with any of the enumerated offenses set forth in NRS 171.196(6).

The State contends that NRS 171.196 does not supplant traditional hearsay rules, while Warren contends that it does. In considering this issue, the justice court first considered the title of NRS 171.196 and the plain language of the statute. App. 67. Specifically, the justice court noted that the title of the statute is:

> Preliminary examination: Waiver; time for conducting; postponement; introduction of evidence and cross-examination of witnesses by defendant; **admissibility of hearsay evidence.**

App. 67 (citing NRS 176.196) (emphasis added). The justice court explained the significance of this title:

> That title is indicative of what the Legislature intended to accomplish. See Coast Hotels & Casinos v. Nev. State Labor Comm'n, 117 Nev. 835, 841-42 (2001) (recognizing that a title is typically prefixed to a statute in the form of a descriptive heading of a brief summary of the contents of the statute and that "[t]he title of a statute may be considered in determining legislative intent").

App. 67-68. The justice court then addressed the plain language of the statute:

> In addition, the preamble to NRS 171.196(6) declares that "hearsay evidence consisting of a statement made by the alleged victim of the offense is admissible at a preliminary examination conducted pursuant to this section **only if** the defendant is charged with one or more of the enumerated offenses. [*Emphasis added*]. In order to give meaning to every word and phrase in NRS 171.196(6), the Court must interpret "only if" to mean what it says. A hearsay statement from a victim is admissible at a preliminary hearing "only if" one or more enumerated offenses is charged.

App. 67-68 (footnotes omitted) (citing Slade v. Caesar's Entm't Corp., 373 P.3d 74, 75 (Nev. 2016) (emphasizing that "[a] statute must be construed as to 'give meaning to all of [its] parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation'"); Law Offices of Barry Levinson, P.C. v. Milko, 124 Nev. 355, 366 (2008) (declaring that "[o]ne tenet of statutory construction requires statutes to be 'construed as a whole and not be read in a way that would render words or phrases superfluous and make a provision nugatory.'"). The justice court also noted that the State's interpretation of NRS 171.196 would essentially delete the word "only" out of the statute, in

contrast to the rule that it is improper to "cherry-pick" the language that should be deemed operative in a Nevada statute." App. 68 fn. 7. It found that the State's interpretation of the statute would create an additional hearsay exception for victim statements, while the actual language of NRS 171.196(6) creates the *only* hearsay exception that applies to victim statements at preliminary hearings. Id. (emphasis in original).

In addition to considering the plain language of the statute, the justice court also addressed, at length, the legislative history of the statute and statements made during hearings on Assembly Bill 193. App. 68-69. The court noted that the new statute did not take away or erode trial rights, but only addressed evidence at a preliminary hearing. Id. The justice court concluded that under NRS 171.196(6) statements allegedly made by Ellis to the SANE nurse and on the 911 call were inadmissible because they were hearsay and that without that evidence the State was unable to satisfy even a "slight-or-marginal" evidence standard to obtain a bindover to District Court. App. 70.

In the district court, the State contested the justice court's conclusions concerning NRS 171.196(6) and argues that the new statute is an expansion of existing well-settled hearsay exceptions. App. 114. The State contended that the plain language of the statute provides for an expansion of the admission of hearsay

evidence. App. 114-15. The State failed, however, to address the actual language of the statute, which clearly states that "Hearsay evidence consisting of a statement made by the alleged victim of the offense is admissible at a preliminary examination conducted pursuant to this section ***only if*** the defendant is charged with one ore more of the [enumerated] offenses." NRS 171.196(6) (emphasis added). Under the State's analysis, the statute would be expected to state something akin to "in addition to other rules allowing admission of hearsay evidence, hearsay statements are also admissible at a preliminary hearing if the statements are made by the alleged victim of the offense and the defendant is charged with one or more of the [enumerated] offenses. . . ." The statute, however, is not written in this manner.

"Statutory language must be given its plain meaning if it is clear and unambiguous." Grace v. District Court, 375 P.3d 1017, 1020 (Nev. 2016); Kingdomware Techs., Inc. v. United States, 136 S.Ct. 1969, 1976 (2016). Here, the Legislature used the term "only if" and that term is clear in its meaning that hearsay statements made by the alleged victim of the offense are admissible at a preliminary hearing if they meets the requirements of the NRS 171.196(6). There is no other plausible interpretation for the use of the term "only if" in this statute. Certainly the State failed to cite any authority explaining why the term "only if" means that it is an expansion of hearsay rules, rather than a restriction.

Even if there were some ambiguity in the statute, a point not conceded by Mr. Warren, the State's argument would still lack merit as the rule of lenity requires that the statute be interpreted in favor of the defendant in a criminal case. State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1227 (2011); Yates v. United States, 135 S.Ct. 1074, 1088 (2015); Bell v. United States, 349 U.S. 81, 83 (1955).

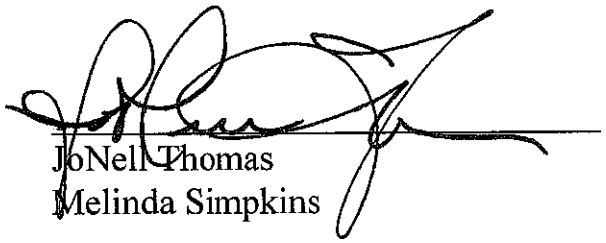
The State contended that the Legislative History of AB 193 (2015), supports its expansive reading of the statute. App. 114-15. The State cited to statements made by prosecutors concerning the intent of the bill. The statements of the prosecutors presented to the Legislature are not reflective of the intent of the legislature in enacting this statute. Of critical importance is the fact that original bill, as presented by the prosecutors, would have allowed all hearsay to be introduced at a preliminary hearing, but the legislature rejected this language and thereby rejected the prosecutors' position on this issue.

The justice court correctly applied the law. The State's argument to the contrary lacks merit and the justice court's order should therefore have been affirmed by the district court. Instead, the district court adopted the State's arguments and found that the statute was an expansion of the State's ability to present hearsay testimony, not a restriction. App. 245. For the reasons set forth above, its ruling was erroneous and should be reversed.

CONCLUSION

Petitioner Warren respectfully urges this Court to find that the district court exceeded its jurisdiction by hearing the State's appeal, by failing to dismiss the State's appeal despite the lack of case and controversy, and by failing to dismiss the appeal based upon the State's violation of district court and local rules. Finally, the justice court's legal ruling was correct and the district court erred in ruling in the State's favor. Extraordinary relief is warranted.

Dated this 12th day of September, 2017.



JoNell Thomas
Melinda Simpkins

EXHIBIT A

VERIFICATION

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

MELINDA SIMPKINS, being first duly sworn, deposes and says:

That she is one of the attorneys of record for Petitioner in the above entitled matter; that she has read the foregoing Petition, knows the contents thereof, and that the same is true of her own knowledge, except for those matters therein stated on information and belief, as to those matters, she believes them to be true; that Petitioner Joseph Warren, Jr. personally authorizes her to commence this action.

MELINDA SIMPKINS

SUBSCRIBED and SWORN to me
this 13 day of September, 2017.

NOTARY PUBLIC in and for said
County and State

KATHLEEN FITZGERALD
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 05-10-19
Certificate No: 92-1867-1

EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that on 9/13 2017 a true and accurate copy of this PETITION FOR WRIT OF CERTIORARI, OR IN THE ALTERNATIVE PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION and APPENDIX OF RECORD were served on the following,

BY ELECTRONIC FILING TO

Jacob Villani, Chief Deputy District Attorney
Genevieve Craggs
District Attorney's Office
200 Lewis Ave 3rd Floor
Las Vegas, NV 89101

BY HAND DELIVERY TO

The Honorable Judge Richard Scotti
330 South 3rd Street, 11th Floor
Las Vegas NV 89101

Dated: 9/12/2017

M Fitzgerald
An employee of the Special
Public Defender