IN THE SUPREME COURT OF THE STATE OF NEVADA

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

DEANDRE GATHRITE'S PETITION FOR WRIT OF PROHIBITION AND MANDAMUS DIRECTING THE HONORABLE DOUGLAS HERNDON TO DISMISS THE CASE AGAINST THE PETITIONER
(Relief Prior to Trial Date of 07/15/19)

COMES 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 34.160, inclusive, for a Writ of Mandamus and a Writ of Prohibition arresting the proceedings and ordering the district court, the Hon. Douglas Herndon Presiding, to dismiss the charge against the Petitioner.

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 both a Writ of Mandamus and 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 three volumes as follows: Volume

1, PA000001-PA000245; Volume 2, PA000246-PA000492; and Volume 3, PA000493-PA000701.

This Petition is made pursuant to NRS 34.160, which provides that an accused may seek extraordinary relief from the "Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station". Such a Writ of Mandamus shall issue "in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." *NRS 34.170*.

This Petition also seeks relief under NRS 34.330: "The writ may be issued only by 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." A Writ of Prohibition must be in either an alternative or peremptory form. *NRS 34.340(1)*.

The facts and circumstances justifying extraordinary relief are described in the attached Declaration of Adrian 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 is filed following the granting of a stay of proceedings in the district court, such stay having been entered on October 25, 2018.

DATED this _29th_ day of November, 2018.

By: __/s/ Adrian M. Lobo_____

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DECLARATION OF ADRIAN 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.[1] *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 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*.

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[1] 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.

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 filed a Petition for a Writ of Prohibition on October 2, 2018, asking this Court to prevent the district court's order for an evidentiary hearing. The petition was denied on October 4, 2018.

20. The district court held its evidentiary hearing on October 8, 2018. The State called as its witnesses the two detectives in the case, Jarrod Grimmett and Tate Sanborn. *PA000394.*

21. The evidentiary hearing proceeded, but due to time constraints was continued until October 11, 2018. On the second day, Petitioner called two additional detectives as witnesses, Sean Beck and Gerry Mauch. *PA000511.*

22. On October 29, 2018, the district court entered its order denying Petitioner's motion to suppress evidence[2], the motion to dismiss for prosecutorial misconduct, and the petition for a writ of habeas corpus. *PA000699-PA000701.*

23. The Petitioner is without a plain, speedy, and adequate remedy at law as the continued misconduct of the State, and the improper *sua sponte* actions of the district court, are holding the Petitioner to answer for a charge that is supported by improper evidence that has previously been ordered suppressed.

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[2] The Petitioner never filed such a motion before the district court.

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

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

EXECUTED this __29th___ day of November, 2018.

By: __/s/ Adrian M. Lobo_____

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MEMORANDUM OF POINTS AND AUTHORITIES

1. Jurisdiction

Mandamus is available to order a public official to do what the law requires. It is appropriate for mandamus to issue when a judge refuses to follow the law. Extraordinary relief is available where the petitioner has no plain, speedy, and adequate remedy in the ordinary course of the law. *Margold v. District Court*, 109 Nev. 804, 858 P.2d 33 (1993); *see also NRS 34.160, 34.170*.

Prohibition is necessary when either the conduct of the State, or the actions of the court, are improper and should be enjoined from proceeding. The Writ of Prohibition will arrest the proceedings against the Petitioner pending disposition of this Court's decision on the merits. Such writ may be issued in alternative form, generally stating the allegation against the State and the district court "and commanding such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court … why such party should not be absolutely restrained from any further proceedings" in this matter. *NRS 34.340(2)*. Alternatively, a Writ of Prohibition may issue in peremptory form wherein "the words requiring the party to show cause why the party should not be absolutely

restrained from any further proceedings in such action or matter, must be omitted and a return day inserted." *NRS 34.340(3)*.

This Petition presents four primary issues.

The first issue for consideration of this Court is 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 infected these proceedings with fundamental unfairness. Where a competent justice of the peace has considered the State's evidence and found it to be improper, the State's response was to circumvent that ruling by dismissing its case and proceeding to the far more controlled, prosecution-friendly venue of the grand jury wherein it presented such suppressed evidence wholesale without even so much as a mention of the justice court's ruling.

This procedural impropriety leads to the second issue for consideration: the State's misconduct. Whether the State may or may not proceed with constitutionally infirm evidence, and indeed evidence that has been considered and suppressed by a sitting judge vested with the authority to do so, the State nevertheless acted in bad faith and with the willful intention of prejudicing the Petitioner's civil rights. This was not merely a procedural flap on the State's part; it was a calculated effort to punish the Petitioner in whatever way the State could

muster, with no regard either to Petitioner's rights, the impact to judicial resources, or the waste of public funds and other resources.

While either of these issues alone warrants dismissal, there are additional issues that this Court should consider. Third on the list is whether the district court exceeded its authority in ordering, *sua sponte* and without any request from the State, that an evidentiary hearing be held as to the Petitioner's contemporaneous petition for a writ of habeas corpus and motion for dismissal due to prosecutorial misconduct. Rather than consider the merits of these arguments, the district court chose instead to re-open the justice court's ruling on the suppression issue despite the State's clear lack of any positive invocation of redress of that decision (such as reconsideration or appeal, as would have been the proper method(s)). Not only was this jurisdictionally and procedurally improper, it denied to Petitioner the full benefit of his pleadings and injected such proceedings with fundamental unfairness as the Petitioner's habeas petition and motion to dismiss were predicated on entirely separate issues that the district court did not even approach due to its fixation instead on re-litigating the suppression issue.

Fourth and finally, out of prudence the Petitioner addresses for this Court the suppression issue itself: whether the justice court's ruling was proper given the violations of Petitioner's Fourth and Fifth Amendment rights.

To summarize, this Petition considers, in the following order, these issues:

1. Whether the State may proceed to the grand jury to seek an indictment using evidence that has been considered and ordered suppressed by a justice court;
2. Whether dismissal is appropriate based upon a showing of the State's prosecutorial misconduct;
3. Whether the district court *sua sponte* can re-open and force the parties to a criminal proceeding to re-litigate a justice court's suppression ruling, where neither party has sought reconsideration, appealed, or otherwise moved to set aside the lower court's ruling; and
4. Whether the suppression issues were properly decided by the lower court.

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).

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STATEMENT OF FACTS

The procedural facts are described in the Declaration of Adrian 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 in 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 before the justice court to dismiss the counts 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 ina 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 were 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 resulting location of 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.[3]

The State's Return argued that it was not bound by the justice courts 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*.

[3] 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.

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—an 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 has been held to be inadmissible- the duty to present "legal evidence, and the best evidence in degree." *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.
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> *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. *PA000388-PA000389, PA000391-PA000392*.

At the evidentiary hearing, the testimony of the witnesses largely centered on whether or not the detectives intended to question the Petitioner as a suspect or

merely a witness, and therefore whether he was "in custody" for the purposes of a *Miranda* warning. Det. Grimmett testified as follows:

> Q: And when you arrived – well, first let me ask you, as a general practice, do you try to interview all the witnesses including potential suspects in an investigation?
>
> A: Yes, we do.
>
> Q: Why do you try and interview everyone that you can, especially in a homicide investigation?
>
> A: Well, it's to get a complete story. You want to do a complete and thorough investigation. And by doing the need to interview all the folks that were potentially witnesses or potentially involved in the incident need to be interviewed. That's just what we do. That's our job. That's our expectations is do this, to interview everybody, at least make an attempt to interview everybody. Not that everyone's willing to speak with you, but you at least have to make an attempt to contact those and locate those that were potentially witnesses or involved in the incident itself.
>
> *PA000399-PA000400*

However, Det. Grimmett also testified to facts and circumstances that suggest the entire "scene" wherein Petitioner was interviewed was an orchestrated event to bring Petitioner into custody so that homicide detectives could interview him:

> Q: Were there other people that were present at that address when you arrived?
>
> A: Yes. There were other homicide detectives. Detective Mauch, M-A-U-C-H, Detective DePalma, D-E-P-A-L-M-A, Detective Boucher B-O-U-C-H-E-R, and there were several of the members of the Criminal Apprehension Team that were present as well.
>
> …
>
> Q: Tell me where you first saw the Defendant when you arrived at the scene?
>
> A: When I first arrived at the scene, the Defendant was inside his apartment seated in a chair. His small child was sitting on his lap. And he was handcuffed and there were

several members of the Criminal Apprehension Team around him.

PA000399, *PA000401*.

Det. Grimmett even commented on the overbearing effect this had on Petitioner: "Yes. He was a little – you could see just emotionally he was upset and just, I guess, overwhelmed by the presence of all the detectives that were there …" *PA000422*.

Furthermore, despite this interview apparently being benign information gathering as Det. Grimmett was testifying, the interview with Petitioner was surreptitiously recorded by *both* detective's present. *PA000409-PA000410*, *PA000422*.

LEGAL ARGUMENT

This Petition centers primarily on one simple question: did the State act inappropriately when it dismissed its justice court complaint against the Petitioner and went before the grand jury where it presented suppressed evidence to secure its indictment? All other issues raised in this Petition stem from this initial question of both procedural and ethical propriety. Regardless of whether the State can proceed to the grand jury with suppressed evidence, was the prosecution acting vindictively and therefore unethically when it did so? Then, perhaps independently of the first

two issues, was it proper for Judge Herndon to re-open and conduct an evidentiary hearing on the "correctness" of the justice court's suppression ruling when the State had failed to avail itself of any of the mechanisms for challenging that decision? And lastly, in the event this Court is not persuaded by any of the foregoing issues, the final question is was the district court's ruling as to the suppression issue—violations of Petitioner's Fourth and Fifth Amendment rights—incorrect?

1. Whether the State may proceed to the grand jury to seek an indictment using evidence that has been considered and ordered suppressed by a justice court.

A. 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*. Accordingly, the justice court's decision to suppress the State's evidence was well within the ambit of that tribunal.

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

As with the *Grace* decision, the justice court entertained and decided a suppression motion that was timely noticed, pled, and argued before it. Once the State lost on this issue, and the justice court ordered that the State's evidence (the Petitioner's statement to detectives and the firearm recovered from the girlfriend's

apartment) be suppressed, the State was bound by that court's decision. The State's options at that point were either to seek reconsideration of the justice court's order; to appeal the decision to the district court; to move forward with other evidence to support a probable cause determination (proceed to preliminary hearing on other evidence); or to dismiss the case. While the State did dismiss its case in justice court, it then went before the grand jury where it offered the same, previously suppressed evidence.

A motion for rehearing or reconsideration would not have been compulsory, however. The State had a second option: to appeal the decision. NRS 189.120 is the statute directly on point for such a procedure: "The State may appeal to the district court from an order of a justice court granting the motion of a defendant to suppress evidence." *NRS 189.120(1)*. The exact motion practice at issue in this case was inarguably a motion to suppress evidence, thus NRS 189.120(1) is clearly the State's vehicle for challenging the justice court's ruling, and provided the State with an immediate avenue of redress.

And indeed, the State's appeal would need to have been immediate: "Such an appeal shall be taken: … (b) Within 5 days after the rendition of such an order before a trial or preliminary examination." *NRS 189.120(2)(b)*. The justice court's ruling suppressing the evidence was announced on May 25, 2018. *PA000004*.

Accordingly, any such appeal would have been due no later than June 1, 2018. No such appeal was filed. It was not until the State encountered difficulties with an apparent witness, Raymond Moore, that it realized it no longer had sufficient evidence to convince the justice court, and therefore it dismissed its complaint.

Likewise, NRS 177.015 also provides an avenue of redress wherein the justice court's ruling is a "final judgment" of a case- the district court. *NRS 177.015(1)(a)*. NRS 177.015 (or Chapter 177 as a whole) does not specify what a "final judgment" entails, but the other provisions are informative in suggesting that a ruling by the justice court wherein the whole of the State's evidentiary universe is suppressed (see below) would certainly qualify as "final" in that the State would be—and was—unable to proceed. For example, consider NRS 177.015(1)(b), allowing for the State to appeal "To the appellate court of competent jurisdiction ... from an order of the district court granting a motion to dismiss, a motion for acquittal or a motion in arrest of judgment, or granting or refusing a new trial." NRS 177.015(2) also allows for an appeal to an appellate court "from a pretrial order of the district court granting or denying a motion to suppress evidence[.]" While these provisions apply to an appeal from a district court's decision, the statute is written in a tiered fashion, with each avenue of redress being the next

highest court in the judicial system (justice court is appealed to district court; district court is appealed to the appellate or Supreme Court).

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 the 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 *Sandtrom* 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.

The State did not timely move to reconsider the justice court's order or to bring an appeal before the proper tribunal. Accordingly, the State must bear the burden of the justice court's adverse ruling.

C. The justice court's ruling is durable, even where the State proceeds before a grand jury.

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 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*.[4] The Justice Court's ruling was a legal opinion regarding the evidence at the time of the preliminary hearing. *PA000255.*

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. This repeated is silent

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[4] *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.

on one salient point of law, however: why the Nevada legislature chose to create an appellate process for mere "legal opinions" of the justice court? Additionally, the State's position ignores not only the holding of the *Grace* decision, but the policy underlying that decision:

> Moreover, our resolution of this matter will promote judicial economy by ensuring the state's justice courts have a uniform view regarding *their power to suppress* illegally obtained evidence during preliminary hearings.
>
> *Grace*, 375 P.3d at 1020 (emphasis added).

The *Grace* decision says nothing about justice courts being empowered only to render "legal opinions," but that they are empowered actively to suppress evidence where, in that court's determination, such evidence was illegally obtained. This is precisely what was done here, but the State now argues that the justice court's role is merely an advisory one, apparently.

And indeed, as alluded above, the justice court's power to decide suppression issues is a critical role at the preliminary hearing phase of a case. This is not a bail motion, or discovery motion, or some other brand of judicial economy and "housekeeping." Instead, suppression motions have the very real possibility of being dispositive in a case- either if the evidence is suppressed and the State loses

the initiative (as with here), or if a defendant loses and decides to accept a negotiation without the need for further time and resources of the court. This is precisely in keeping with the policy undergirding the *Grace* decision, and precisely why this is such a critical issue at this point in time. Rather than have a dispositive effect, a suppression motion is merely a roadsign directing the State to go elsewhere, and to "try again" to get a conviction.

The State undermines its own argument, however: "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 since it failed to do so at the lower level. 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 respect that decision, the State went to the grand jury, presented suppressed evidence to secure an indictment, and now seeks to re-litigate (untimely) 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.

And of course, this ignores an undeniable truth: had the State prevailed on the suppression motion in justice court, it would not have sought an indictment before the grand jury. In essence, the State attempts to defend its actions by saying that the justice court cannot undermine the grand jury process, all while it uses the grand jury process to undermine the justice court. The entire concept would be comedic if it did not threaten the Petitioner's freedom, to say nothing of future defendants.

D. The suppressed evidence should not have been presented to the grand jury.

At issue here is not whether the State could dismiss its case and proceed to the grand jury, but whether it could proceed to the grand jury with suppressed evidence.

The role of the grand jury is to take evidence, weigh it, and to determine if the evidence is sufficient to hold the accused to answer for the charges against him.

It is fundamentally unfair to require a defendant to stand trial unless he is committed upon a criminal charge with reasonable or probable cause. *Shelby v. Sixth Judicial Dist. Court*, 82 Nev. 204, 207, 414 P.2d 942 (1966).

NRS 172.135 states the following:

> 1. In the investigation of a charge, for the purpose of either presentment or indictment, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them or furnished by legal documentary evidence or by the deposition of witnesses taken as provided in this title, except that the grand jury may receive any of the following:
>
> (a) An affidavit or declaration from an expert witness or other person described in NRS 50.315 in lieu of personal testimony or a deposition.
>
> (b) An affidavit of an owner, possessor or occupant of real or personal property or other person described in NRS 172.137 in lieu of personal testimony or a deposition.

> 2. … [T]he grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence. …
>
> *NRS 172.135(1)-(2)*.

Thus the purpose of the grand jury process is to observe and to protect the rights of the accused, and to preserve the presumption of innocence. "The purpose of the preliminary proceedings is to weed out groundless or unsupported charges of grave offenses and to relieve the accused of the degradation and the expense of a criminal trial. Many unjustifiable prosecutions are stopped at that point, where the lack of probable cause is clearly disclosed." *State v. Von Brincken*, 86 Nev. 769, 772 (1970).

Accordingly, the grand jury does not determine guilt or innocence, but needs only to have before them *legally sufficient evidence* to establish probable cause. *Franklin v. State*, 89 Nev. 382, 388, 513 P.2d 1252, 1257 (1973), *citing Kinsey v. Sheriff*, 87 Nev. 361, 487 P.2d 340 (1971) (emphasis added).

Furthermore, NRS 171.206 states, in pertinent part, the following:

> If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall

forthwith hold the defendant to answer in the district court; otherwise the magistrate shall discharge the defendant.

The probable cause necessary at a preliminary hearing has been defined as slight, even marginal, evidence because it does not involve a determination of guilt or innocence of an accused. *Sheriff, Washoe County v. Dhadda*, 980 P.2d 1062, 115 Nev. 175 (1999) (*rehearing denied*). The Nevada Supreme Court has held that although the State's burden at the preliminary hearing is "slight, it remains incumbent upon the State to produce some evidence" as to each of the State's burdens. *Woodall v. Sheriff*, 95 Nev. 218, 220 (1979); *see also Marcum v. Sheriff*, 85 Nev. 175, 178 (1969) ("The state must offer some competent evidence on those points to convince the magistrate that a trial should be held").

NRS 172.145(2) imposes a duty upon the State to present any exculpatory evidence to a grand jury: "If the district attorney is aware of any evidence which will explain away the charge, the district attorney shall submit it to the grand jury." This duty has been held by the Nevada Supreme Court to be "plain and unambiguous". *Sheriff, Clark County v. Frank*, 103 Nev. 160, 165, 734 P.2d 1241, 1244 (Nev., 1987). A violation of this duty can also be found where the State "actively discouraged the grand jury from receiving and exploring evidence" of an exculpatory nature. *Id.* Where "'a prosecutor refuses to present exculpatory evidence, he, in effect, destroys the existence of an independent and informed

grand jury.'" *Id*., 734 P.2d at 1245 (citing *United States v. Gold*, 470 F.Supp. 1336, 1353 (N.D. Ill. 1979)).

A prosecutor "cannot act in a way that overlooks inherent prejudice to the person under criminal investigation". *United States v. Gold*, 470 F.Supp at 1346. This undermines the function of the grand jury to "protect citizens from malicious prosecutions", since it is "not given information which is material to its determination." *Id.* at 1353.

As set forth in NRS 172.135(2), and most pertinent to this Petition, "the grand jury can receive none but *legal* evidence" (emphasis added). Thus any evidence that has been adjudicated as inadmissible by a court would be improper if presented to a grand jury.

First and foremost, the presentation of *any* evidence relating to, derived from, or otherwise connected with, the Petitioner's statement is a violation of NRS 172.135(2), as such evidence has already been suppressed by the lower court. Despite the justice court's clear ruling, the State knowingly, intentionally presented inadmissible evidence when it allowed its witness, Det. Mauch, to testify as to the Petitioner's statement- a statement that had already been suppressed by the justice court and therefore was inadmissible.

At the grand jury hearing, the State called Det. Mauch and immediately laid the foundation for his testimony as having been derived *entirely* from the Petitioner's statement received pursuant to his interrogation by Det. Mauch on February 16, 2018:

> Q: Now where is it that you spoke with Mr. Gathrite?
>
> A: We conducted the interview in my plain, unmarked vehicle.
>
> Q: And who was that interview conducted with?
>
> A: Myself and Detective Grimmett.
>
> Q: And you indicated that he was not in custody at that time?[5]
>
> A: Correct.
>
> Q: Did he agree to speak with you?
>
> A: Yes, he did.

[5] This question, and the Detective's response, is a gross misrepresentation of the situation, and flies in the face of the justice court's ruling. It will be discussed further below.

Q: And pursuant to that discussion, did you ask him questions about this separate investigation?

A: Yes.

Q: And did he reveal his involvement in that investigation?

A: Yes, he did.

Q: And did he indicate if he possessed anything of interest to Metro pursuant to that involvement?

A: Yes.

Q: What was that?

A: That was a I believe silver in color revolver.

PA000154.

Nothing from Det. Mauch's testimony indicates that any evidence supporting the single charge in the Indictment stemmed from independent police work. Rather, the firearm is only attributed to the Petitioner by way of the Petitioner's statement- a statement, once again, that was ordered *suppressed* by the lower court, in full exercise of what the Nevada Supreme Court described as the justice courts' "express and limited inherent authority to suppress illegally obtained evidence" during preliminary proceedings. As discussed above, the State failed to appeal this ruling, and instead chose to seek an indictment through the grand jury

process, but did so by presenting *the exact same body of evidence* that had been ruled suppressed—and therefore inadmissible—by the justice court.

The State's use of the suppressed testimony did not constitute legal evidence, and thus the entire proceeding was defective and the Indictment must be dismissed.

Nor is this simply a matter of the State seeking an indictment as to the *sufficiency* of the evidence, as would have been proper. Instead, the State pretended that that entire lower court proceeding never took place, and did so in two ways.

First, the State did not honor its obligations under the *Marcum* case when it failed to present any of the exculpatory evidence in its possession. Not only did this violate the State's compulsory obligation under NRS 172.145(2)—a duty held by the NSC to be "plain and unambiguous"—it ignored the very specific, very detailed Marcum Letter sent to the State on June 21, 2018, wherein the State was then obligated to present to the Grand Jury information consistent with NRS 172.145(1). The defense's Marcum Letter very specifically requested that the State present to the Grand Jury the "Reporter's Transcript of the Las Vegas Justice Court proceedings on May 29, 2018 before the Honorable Eric Goodman holding both the gun and Gathrite's statement as inadmissible evidence that was seized in violation of both the Fourth and Fifth Amendment rights of the United States

Constitution and the Nevada State Constitution." *PA000172*. Undersigned counsel even enclosed the referenced transcript for the State's convenience, and the State *still* failed to present it to the Grand Jury.

Second on this point, the State intentionally concealed this exculpatory information from the Grand Jury. As cited above, the transcript of Det. Mauch's examination, conducted by the same Deputy District Attorney that argued the suppression motion before the justice court, wholly ignored that the Petitioner's interrogation had already been held by a court of competent jurisdiction to be a violation of *Miranda* and its progeny. Instead, the State examined Det. Mauch, and Det. Mauch played along, with the same, heretofore rejected argument that the Petitioner was not "in custody" because, despite having been arrested by Metro's Criminal Apprehension Team, the detectives were questioning him about another case.

In not only failing to present evidence to the Grand Jury of the lower court's disposition—an act not only compelled by statute in general, but also specifically compelled once requested by the Petitioner—the State violated its duty under Nevada law. As stated in relevant case law, cited herein, the State's active concealment of the lower court's ruling (by presenting the evidence in a manner already disposed of and ruled upon by the justice court) constituted active

discouragement of the grand jury from receiving and exploring evidence, and thus undermined the purpose and intent of "an independent and informed grand jury."

Accordingly, the indictment should be dismissed improper evidence was submitted to the grand jury.

E. The Rule of Lenity mandates that the indictment be dismissed.

Lastly, the State's entire argument on this point is that it is free to seek a probable cause determination in either justice court or via the grand jury, and that it can move from one venue to another (and presumably back again) as easily as one would cross a room. This is because nothing in the NRS explicitly precludes doing so, despite contrary arguments based in fundamental fairness and due process. There is one other argument that can be made against this practice: the Rule of Lenity.

The Rule of Lenity "demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor." *State v. Lucero*, 249 P.3d 1226, 1230, 127 Nev. Adv. Op. 7 (2011) (quoting *Moore v. State*, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006)). Ambiguity is the "cornerstone" of the Rule of Lenity. *Lucero*, 249 P.3d at 1230. If a statute cannot be resolved according to common methods of statutory interpretation, such as plain language, legislative history, reason, and public policy, then the Rule of Lenity will apply. *Schofield v. State*, 372 P.3d 488,

492, 132 Nev. Adv. Op. 26, 5-6 (2016). A statute is ambiguous when it can reasonably be interpreted two or more ways. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

The ambiguity complained of in this case can be found in at least three different statutes- each representing a different concept at issue here.

The first such statute is NRS Chapter 173, generally (titled, "Indictment and Information"). According to NRS 173.015, "The first pleading on the part of the State is the indictment or information." This statute makes no distinction between when the State must choose one procedure versus another, and does not mandate whether it is limited to one or the other. Indeed, in *State v. Maes*, 93 Nev. 49, 559 P.2d 1184 (1977), the Nevada Supreme Court held that the State may choose either an indictment or information, and that it may even seek indictment while an information is still pending, or where a preliminary hearing has only partially taken place.

What the State has failed to appreciate in these proceedings is the timing of this process, which undergirds the discretionary nature of this "first pleading." The State *can/may* proceed through one procedure or another, but as a *discretionary* decision and not a reactive one. What the State has done here is sought an indictment specifically to avoid the negative consequences of the justice court's

suppression of the State's evidence. The State argues that such a practice is permissible because the statute lacks any positive provision for or against such action, while Petitioner argues that the State's actions are in bad faith, and undermine the tenets of fundamental fairness inherent to due process.

On the plain language of the statute, either interpretation could be reasonable and thus the Rule of Lenity mandates that the statute be interpreted and applied to prevent, or at the very least to mitigate, the State's prosecutors playing the justice court against the grand jury when preliminary motion practice does not go their way.

The second statute is NRS 172.135(2), concerning the admissibility of evidence before the grand jury. This brief is replete with Petitioner's argument that the evidence submitted to the grand jury was not legal evidence, as it had previously been suppressed. The State's argument, culled from previous pleadings in this matter before the district court, was (and presumably will continue to be) that the evidence was legal because the justice court's order had no durability once the State dismissed and proceeded to the grand jury. While it is the Petitioner's contention that the justice court's order survives unless appealed and overruled—as is provided for through other statutory mechanisms, discussed herein—the order rendered the State's evidentiary universe inadmissible as not legal evidence.

Thus, the ambiguity in the statute pertains to whether or not the State can proceed with the same evidence found to be inadmissible in one probable cause arena when it goes to the other—justice court versus grand jury, or *vice versa*). While the State argues on this fundamentally by claiming the justice court's decision was wrong, and thus the evidence never should have been suppressed in the first place, the evidence *was* so suppressed and therefore even in the presence of contrary opinion (as with here, in the justice court's and the district court's decisions being at odds with one another) the Rule of Lenity means that the ambiguity in the statute should be resolved in favor of the Petitioner. The justice court's order should be considered durable unless and until overturned through proper appellate channels, even if the State takes its case to the grand jury.

The third statute is NRS 172.145. This statute deals specifically with the State's obligation to present exculpatory evidence before the grand jury. The Petitioner has argued that this statute obligated and compelled the State to disclose to the grand jury that the evidence it was presenting had previously been suppressed. The State's contrary position was that since no preliminary hearing was held in justice court, it need not present any "evidence" as to those proceedings and can proceed anew. To reduce the competing perspectives to sub-provisions, the Petitioner argues that the suppression of evidence in justice

court should have been presented to the grand jury as exculpatory evidence under NRS 172.145(2), whereas the State argues the more appropriate sub-provision is NRS 172.145(1) (due to the triggering event of the preliminary hearing).

The ambiguity is best described by summarizing the risk of this behavior, as it perfectly encapsulates the argument at the center of this entire controversy.

The State went to justice court based solely on the Petitioner's statement to detectives, and physical evidence recovered as a result of that statement. When this evidence was suppressed, the State had no evidence to present. While the State claimed to have had a corroborating witness, questionable availability issues (discussed in this brief) ultimately resulted in the State's dismissal of the complaint. To phrase it another, more pertinent way, the State was *unable* to proceed to preliminary hearing because it had no evidence to present. Rather than inure to the Petitioner's benefit, the State instead is now, in essence, "weaponizing" this inability to proceed to preliminary hearing in arguing that since no preliminary hearing was ever held, it need not disclose to the grand jury the reason why.

The public policy at risk here is hopefully obvious. The State's position is that motion practice in the justice court—and specifically suppression matters that are both dispositive *and* that have been upheld by this Court as valid exercise of

the justice courts' jurisdiction—can be rendered utterly meaningless and a complete waste of time and resources simply by dismissing and refiling before the grand jury so long as the justice court proceedings never went all the way to preliminary hearing. Such practices are prone to abuse as they could be employed merely to harass a defendant rather than seeking a legitimate probable cause determination.

Accordingly, the ambiguity at issue with NRS 172.145 is the exculpatory nature of the State's record in justice court: whether the loss(es) incurred there up to, but not including, preliminary hearing would constitute "exculpatory evidence," especially where the State's loss was dispositive of its entire case *without the need for a preliminary hearing* (NRS 172.145(2); or whether a preliminary hearing is the ultimate barrier of entry for any such exculpatory evidence (NRS 172.142(1)). As the statute is not clear, the Rule of Lenity should be applied to require that the State mention, at the very least, that the same evidence it is presenting to the grand jury was previously suppressed in justice court- even if a preliminary hearing was never held.

Accordingly, the only appropriate remedy is dismissal of the Indictment, by way of a Writ of Mandamus directing the district court to do so.

2. Whether dismissal is appropriate based upon a showing of the State's prosecutorial misconduct

This case is a clear example of prosecution not for prosecution's sake, but out of some errant desire to use the authority of the Office of the District Attorney to punish the Petitioner for perceived wrongs. Unfortunately, the State's fascination with the Petitioner in this case has resulted in the State disregarding the prior order of the justice court, circumventing the Petitioner's due process rights, and pursuing a vendetta against the Petitioner in a way that compromises not only the integrity of the District Attorney's office, but the legal profession as a whole.

A. Legal Standard

The Nevada Supreme Court has not only taken a dim view of prosecutors ignoring a court's rulings, it has *actively admonished prosecutors for doing so*. In the case of *McGuire v. State*, 100 Nev. 153 (1984), the prosecutor made several disparaging remarks about both the defendants and defense counsel. *Id.* at 156-57. The court termed the misconduct as a "contemptuous and blatant disregard for the trial court's rulings." *Id.* at 157. In a harsh and criticizing rebuke of the prosecutorial misconduct in the *McGuire* case, the court announced multiple policy-based reasons for ensuring prosecutors conducted their duty in an ethical manner:

We view with grave concern the staggering cost to the taxpayer of financing our criminal justice system. Of equal concern to this court is the trauma to which victims of crime must be resubjected when a new trial is required. We accordingly approach with great sensitivity the prospect of reversing the verdicts of citizens who have been impaneled as jurors to sit in judgment of the guilt or innocence of an accused. It has nevertheless been the solemn responsibility of appellate courts to safeguard the fundamental right of every person accused of criminal behavior to a fair trial, basically free of prejudicial error. This is but a reflection of the high value our nation and state place on an individual life, and the right of each citizen to liberty and the lawful pursuit of happiness. It is the obligation of government to vouchsafe to its citizens a continuing respect for these values. We therefore conclude that it is an intolerable affront to the criminal justice system, the state and its citizens that the type of egregious conduct outline in part in this opinion be allowed to occur in our courtrooms. The waste and diversion of limited judicial

> and human resources are but some of the inevitable consequences of such behavior. Another is the danger that youthful prosecutors may, in their zeal to learn, be persuaded that emulation and perpetuation of such conduct may be both effective and acceptable. These and other consequences not discussed herein must be foreclosed or at least minimized.
>
> *Id.* at 158-59.

The Nevada Supreme Court has considered numerous cases of alleged prosecutorial misconduct, across a range of activity falling under the term. When considering prosecutorial misconduct, the court employs a two-step analysis. *Valdez v. State*, 196 P.3d 465, 476 (Nev. 2008). The first step of the analysis is to determine if the prosecutor's conduct was improper. *Id.* If the conduct was indeed improper, then the court determines whether the conduct warrants a remedy. *Id.* Where the remedy requested is dismissal of an indictment, the court will determine if the alleged prosecutorial misconduct substantially prejudiced the defendant, such that it resulted in basic unfairness that violated the defendant's right to due process. *Sheriff, Clark County v. Keeney*, 791 P.2d 55, 57, 106 Nev. 213, 216 (Nev. 1990). In Nevada, "'the dismissal of an indictment serves equally well to eliminate prejudice to a defendant and to curb the prosecutorial excesses of a District

Attorney or his staff.'" 791 P.2d at 57, 106 Nev. at 217 (quoting *State v. Babayan*, 106 Nev. 155, 171, 787 P.2d 805, 818 (1990)). "Dismissal with prejudice is warranted when the evidence against a defendant is irrevocably tainted or the defendant's case on the merits is prejudiced to the extent 'that notions of due process and fundamental fairness would preclude reindictment.'" *Keeney*, 791 P.2d at 57, 106 Nev. at 217 (quoting *Babayan*, 106 Nev. at 171, 787 P.2d at 818).

B. The State committed prosecutorial misconduct when it completely ignored the justice court's ruling and presented the same evidence to the grand jury.

Most egregiously, the State presented to the grand jury evidence that had already been ruled as inadmissible. The State's entire probable cause pitch to the grand jury in this case was predicated on the statements made by the Petitioner during his improper and un-Mirandized interrogation by two Metro detectives, and the eventual discovery (based on these statements) of a firearm. As demonstrated from the record above, the admissibility of not only the Petitioner's statements, but of the gun itself (as a fruit of those statements) was litigated and ruled upon by the justice court in no uncertain terms.

The Nevada Rules of Professional Conduct (NRPC) set forth special considerations for prosecutors. Rule 3.8 – Special Responsibilities of a Prosecutor

– requires that a prosecutor "Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." *NRPC, Rule 3.8(a)*. Furthermore, the State may only present to a grand jury "none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." *NRS 172.135(2)*.

Here, the State ignored both of its duties- first, by pursuing a charge against the Petitioner that it knew was not supported by probable cause; and second, by submitting improper evidence to the grand jury. With regard to probable cause, the State is pursuing a charge that was already dismissed in the lower court as a direct result of that court's suppression of both the Petitioner's statement and the recovered firearm (as a fruit of the statement). This would require some other evidentiary basis to proceed, such as an independent witness, admissible statements by the Petitioner, etc. The State produced no such evidence, and instead chose to rely upon evidence that a court of competent jurisdiction has already ruled as inadmissible and suppressed- thus the State knowingly and willfully put improper evidence before the grand jury for a probable cause determination. The State also failed to present to the grand jury the exculpatory evidence showing that the justice court had suppressed the very same evidence, despite a clear and unequivocal request from Petitioner that the State do so.

The fact that this evidence was suppressed renders it "irrevocably tainted" and thus dismissal of the indictment, with prejudice, is the appropriate remedy in this case. The evidence never should have been presented, and never should have been received or considered by the grand jurors. Furthermore, as the State did not present any additional or independent evidence beyond what was already suppressed, it is undeniable that the grand jury's probable cause determination was based solely on this tainted evidence.

The statutory duty to present only legal evidence to a grand jury is, in most cases, a retrospective analysis. As the grand jury proceedings are closed to the defense (beyond the inclusion of exculpatory evidence and possibly a defendant's choosing to testify), the first impression as to the legality of evidence presented to the grand jurors is typically after-the-fact. Here, however, grand jurors had (or should have had) the benefit of a prior determination as to the legality of the evidence presented- the justice court's ruling. To permit the State to proceed to a grand jury, armed and forewarned that the evidence it intended to present was inadmissible, is to undermine the purpose and authority of the justice court (again, authority that the Nevada Supreme Court has affirmed is "express" and "inherent").

And then there are the important policy bases to consider (enumerated in the *McGuire* case, above). Specifically, actions such as those the State has engaged in here violate almost every one of those policy bases announced in *McGuire*.

First, the State's actions here have incurred a "staggering cost to the taxpayer" of financing this entire endeavor. The State has managed to incur the following ongoing costs in this case to-date: an untenable justice court action by way of the initial criminal complaint[6]; the impaneling of grand jurors; the use of court resources and personnel for a grand jury hearing; the use of prosecutors' time; the use of two Metro detectives' time to testify before the grand jury; the use of the same two Metro detectives' time, *and* two additional Metro detectives' time, to testify at a two-day evidentiary hearing; the use of court resources and personnel for a two-day evidentiary hearing; the costs of appointed defense counsel and personnel in fighting this frivolous, vindictive action at both the justice court and district court levels; and now the costs that will attach to, and be derived from, this Petition.

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[6] While admittedly this assertion is retrospective in nature, it factors in to the State's ongoing misuse of public resources, money, and time as a whole.

Second, this Court is now faced with the prospect "of reversing the [determination] of citizens who have been impaneled as [grand] jurors" to make a probable cause determination in this case. This never should have occurred to begin with, as this was not a first-shot effort at prosecuting the Petitioner but instead comes after motion practice as to the legality and admissibility of the State's evidentiary universe. The State knew it was going before the grand jury with questionable evidence, and even further manipulated the proceedings to ensure an indictment would result (as seen by not only the State's presentation of Petitioner's suppressed statement, but by its theatre with Det. Mauch regarding the "in custody" determination wherein the State pretended as if the justice court was not clear and unambiguous in its rejection of this very argument).

Third, this case is clearly one of prejudicial error in that the State is proceeding on an unsustainable path of introducing inadmissible evidence to a grand jury, and concealing the prior court's ruling. Additionally, the Petitioner was arrested *again*, and held in custody at the Clark County Detention Center, unable to make bail, while the motion practice and *sua sponte* evidentiary hearing played out. This not only left Petitioner jailed on the basis of evidence previously ruled to have been illegally obtained and therefore inadmissible, it cost the Petitioner his employment, separated him from his children, created a hardship on his children

due to the loss of his income and availability, and cause strain on his relationship with his girlfriend (the mother of his children).

Fourth, this whole indictment represents a "waste and diversion of limited judicial and human resources." The costs to the taxpayer are hand-in-glove with the consumption (waste) of judicial resources, outlined above. For clarity, this case has resulted in multiple proceedings at the justice court level; a petition for habeas corpus, motion to dismiss, and a two-day evidentiary hearing at the district court level; a petition for a writ of prohibition and this contemporaneous petition for a writ of mandamus at the appellate court level. This expenditure of resources is all the more egregious when the Court considers that this has all been undertaken for the potential prosecution of a *weapons charge*, with a potential "victory" for the State of conviction on a low-level, probationable offense.

Lastly, and perhaps most importantly, there is a danger that other "youthful prosecutors, in their zeal to learn, [may] be persuaded that emulation and perpetuation of such conduct may be both effective and acceptable." The conduct here is that if, as a prosecutor, you are unhappy with the justice court's ruling, you can simply "forum shop" via the grand jury and indictment process- even if you present the same evidence that was ruled inadmissible in the lower court.

The State ignored the justice court's ruling and attempted to circumvent that court's findings by submitting suppressed evidence to the grand jury. This conduct was clearly improper, and in violation of the State's special duties as a prosecutor, as well as the State's obligation to present only legal evidence to a grand jury. Based on the prevailing case law, as well as the policy considerations set forth by the Nevada Supreme Court, dismissal of the Indictment, with prejudice, is the appropriate remedy.

3. **Whether the district court *sua sponte* can re-open and force the parties to a criminal proceeding to re-litigate a justice court's suppression ruling, where neither party has sought reconsideration, appealed, or otherwise moved to set aside the lower court's ruling.**

Before the district court was the Petitioner's Motion to Dismiss the State's Indictment due to prosecutorial misconduct, and a contemporaneous Petition for a Writ of Habeas Corpus. The basis of these filings in district court were identical to the basis underlying this Petition: that the State improperly ignored the justice court's order and used illegally obtained, previously suppressed evidence to secure its indictment. Petitioner's argument was and is supported by the justice court's order suppressing the evidence, and the State's failure to pursue any avenue either

to have the justice court reconsider/amend its determination or to appeal the suppression to the district court.

With the State's avenues of redress so exhausted, and any relevant deadlines having elapsed, the district court was wholly without authority to order, *sua sponte*, an evidentiary hearing to determine whether the justice court's ruling was correct or not.

This principle is perennial in Nevada. In the case of *Dredge Corp. v. Peccole*, 505 P.2d 290, 89 Nev. 26 (Nev., 1973), the plaintiff's quiet title action had been dismissed without prejudice. *Id.* The defendant in the case later moved the court to dismiss the action without prejudice, in essence asking the court to alter its prior dismissal (there having been no further action in the case). *Id.* This motion was granted, and the plaintiff appealed. *Id.*

In reversing the district court, the Nevada Supreme Court held that, "The court's original order, dismissing the action 'without prejudice,' was a final judgment. If respondents believed the court abused its discretion by dismissing the action 'without prejudice,' they could have appealed." *Id.* Furthermore, the Court went on to state that, "Respondents' motion to dismiss 'with prejudice' an action already dismissed years earlier 'without prejudice' cannot be justified by our rules governing motions after judgment. … Indeed, respondents' motion violated DCR

20(4)."[7] *Id.* at 290-91. The Court concluded that the district court was "without jurisdiction to alter the judgment" because the ruling was not "in conformity with established procedures." *Id.* at 291; see also *Gibbs v. Giles*, 607 P.2d 118, 96 Nev. 243 (Nev., 1980) (finding as proper the lower court's grant of a motion to reconsider a dismissal since the motion comported with DCR 13(4)[8]); *Bowler v. First Judicial Dist. Court of State, in and for Churchill County*, 234 P.2d 593, 68 Nev. 445 (Nev., 1951) (denying a motion because it was seeking to relitigate a

[7] The text of DCR 20(4) appears in a footnote to the case: "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." *Dredge*, 505 P.2d at 291, fn. 1. This mirrors the current rule found under the Rules of the District Courts of the State of Nevada (DCR), Rule 13(7): "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."

[8] This Rule was identical to the current DCR 13(7).

previously disposed of matter without leave of the court pursuant to the analogous Rule IX).

Here, as has been illustrated throughout this Petition, the State failed to avail itself of any avenues either to reconsider the justice court's decision or to appeal it. Pursuant to DCR 13(7), the State could have filed a motion for leave to re-open the justice court's decision, but no such motion was ever filed. Instead, the State simply copied its argument from its previous opposition to the suppression motion filed in justice court, and incorporated that argument in an unresponsive fashion in its Return to the Petitioner's Petition for a Writ of Habeas Corpus. *See generally PA000179-PA00021*

Pursuant to DCR 13(7), the district court lacked the authority to reopen the justice court's determination. The State's inclusion of its previous arguments in its Return notwithstanding, the district court is on record as having stated that the decision to reopen the justice court's ruling was being done *sua sponte*:

> Well, all I was getting at was I think it needs to have a 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

Undersigned counsel objected to an evidentiary hearing, and instead urged the district court to consider only the issues before it:

> Well, and it – yeah, it would be my recommendation at least or – at least like my position that we would like to be heard on the writ as to the applicability as to whether or not the justice court has the authority given the *Grace*[9] decision … And how that applies to the statutory authority and if Your Honor then decides that you know, it's not binding … and that it was proper and that we're moving forward in that direction, then I would want to submit additional moving papers. But it would be my preference to do the writ argument.
>
> *PA000386*

The district court again stated its intention to revisit the justice court's ruling:

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[9] *Grace v. Eighth Judicial Dist. Court of Nev.*, 375 P.3d 1017, 132 Nev. Adv. Op. 51 (Nev. 2016), *supra*.

> 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 as 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*.

Undersigned counsel again objected. *PA000387*. Over defense objections, the district court ordered the evidentiary hearing *sua sponte*, without any request from the State for leave to re-litigate the suppression issue.

This was clearly erroneous, and in excess of the district court's authority under DCR 13(7).

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. The plain text of the Rule makes clear under what very limited circumstances a district court may re-hear a decided

motion: "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." The Rule allows for no discretion- "No motion once heard and disposed of shall be renewed …"

Furthermore, the cited case law, stretching back through decades of Nevada jurisprudence and founded on multiple re-writes of the district court rules wherein the same standard appears word-for-word, is very clear that a district court may only revisit a decided motion under very specific, very limited circumstances. In the absence of those circumstances, the district court is without authority or jurisdiction, *sua sponte* or otherwise, to reopen a decided motion.

4. Whether the suppression issues were properly decided by the lower court.

A. The Petitioner's statement should be suppressed as not having been properly warned of its legal impact pursuant to the Miranda *progeny of cases.*

Ultimately, the district court's decision to deny suppression of the State's evidence was incorrect, and was clearly contrary to established case law on the subject- both state and federal. Primarily, the Petitioner was not made aware of his

rights pursuant to the *Miranda* decision and its progeny. Secondary to this is the issue of whether the Petitioner was in a position to consent to a search of premises where he was not a resident, but merely present for the purposes of watching the children that lived there.

Certain rights are guaranteed to a suspect facing questioning by law enforcement, conducive to the Amendment V right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). Specifically, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id*. at 444. These procedural safeguards have been memorialized as the so-called "Miranda warnings" and typically encompass admonitions that the accused has the right to remain silent; that waiving the right may result in his statements being used against him in court; and that he has the right to an attorney. *Id*. at 479.

A valid waiver of Miranda must be knowing, voluntary, and intelligent. *United States v. Garibary*, 143 F.3d 534, 536 (9th Cir. 1998), citing *United States v. Binder*, 769 F.2d 595, 599 (9th Cir. 1985). A reviewing court must consider the totality of the circumstances to determine the validity of the waiver. Id. In the case of determining the validity of a waiver, there is a presumption against waiver, and

the State bears the burden of overcoming that presumption by a preponderance of the evidence. *United States v. Crews*, 502 F.34 1130, 1139-40 (9th Cir. 2007), citing *Garibay*, 143 F.3d at 536. To meet the burden, "the Government must prove that, under the totality of the circumstances, the defendant was aware of the nature of the right being abandoned and the consequences of such abandonment." *Crews*, 502 F.3d at 1140.

These are established safeguards that inure to the benefit of the person who is in custody and facing questioning by law enforcement personnel.

"Custody" as a concept is defined as "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1977). When no formal arrest is made, the inquiry, as with Fourth Amendment claims, "is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151- 52 (1984); *State v. Taylor*, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998). Thus a question of "custody" is not a matter of official designation, but instead is whether the suspect believes that he is in custody or not.

Furthermore, a later advisement of Miranda rights will not render subsequent statements admissible. In *Oregon v. Elstad*, 470 U.S. 298 (1985), a burglary suspect was initially contacted by detectives and, without a Miranda warning, gave a statement that implicated himself in the crime. 470 U.S. at 301. The suspect was then taken to the police station, where he was advised of his Miranda rights before he gave more details as to his involvement in the crime. *Id.* at 301-02. Before trial, the suspect moved to suppress his statement on the grounds that his initial, non-Mirandized admission had "let the cat out of the bag," and therefore tainted his subsequent, post-Mirandized confession. *Id.* at 302. The trial court suppressed the initial statement, but not the subsequent, post-Miranda confession. *Id*.

On appeal, the U.S. Supreme Court considered whether a post-Miranda confession is admissible if incriminating statements are elicited prior to the Miranda warning- the proverbial "cat out of the bag" situation. The Court relied on the principle that "an accused's in-custody statements [are] judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause," or whether "a suspect's statements had been obtained by 'techniques and methods offensive to due process.'" *Id.* at 304 (internal citations omitted). Indeed, "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and

that they be excluded from evidence at trial in the State's case in chief." *Id.* at 317. With regard to additional statements made post-Miranda, where incriminating, pre-Miranda statements have already been made, the Court held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.* at 318. This inquiry would focus on "the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." *Id.*

Such coercive effects upon the second, post-Miranda confession/incrimination was examined in *Missouri v. Seibert*, 542 U.S. 600 (2004). In that case, the Court examined "a police protocol for custodial interrogation that calls for giving no warning of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of [*Miranda*], the interrogating officers follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time. 542 U.S. at 604. This was apparently becoming a common tactic- something the Court referred to as "a question-first practice of some popularity." *Id.* at 610-11. The Court further described the intent of such a practice: "The object of question-first is to render *Miranda* warnings ineffective by

waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 611.

A plurality of the Court in *Seibert* held that "By any objective measure applied to circumstances exemplified [in a question-first interrogation], it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in prepared the suspect for successive interrogation, close in time and similar in content." *Id.* at 613. More specifically, "Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. *Id.* Ultimately, the plurality held that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Id.* at 613-14 (internal citation omitted).

In essence, the concern was that law enforcement would coerce a confession, only to Mirandize the suspect and then ask him to repeat everything he had already confessed in the hopes of retroactively "sanitizing" the confession.

Under the bevy of case law concerning statements elicited from the subject of police questioning, as cited above, the Petitioner cannot be said to have waived his Miranda rights.

First, the Petitioner absolutely was in custody at the time of his questioning.

The Petitioner had just been arrested, at *gun-point*, by CAT (again, Metro's "*Criminal Apprehension Team*") pursuant to a warrant from California: "On 2-16-18 at approximately 1440 hours, the Criminal Apprehension Team located [Petitioner] at 2630 Wyandotte Street, apartment 1." *PA000045*. The CAD log is also quite telling of the timeline, and confirms the Petitioner's arrest. *PA000059*. At 2:40 p.m. an additional police unit was requested specifically to transport the Petitioner to the jail. *Id*. ("REQ UNIT FOR TRANSPORT"). Six minutes after the Petitioner was arrested by the CAT, "Homicide detectives were advised of Gathrite's location and responded." *PA000045*; *see also PA000059* (the CAD log showing multiple Homicide detectives—designated by "H" in the unit number—arriving on-scene).

The homicide detectives then questioned the Petitioner extensively as to the shooting, to the tune of *twenty-three* (23) pages of transcript, or *twenty-six* (26) minutes of questioning, prior to issuing any Miranda warning. Prior to this warning, the Petitioner gave several statements, and provided numerous details,

that were ultimately offered as evidence against him in the initial justice court proceedings, at the grand jury proceedings, and before the district court.

The detectives made every effort to create the illusion that the Petitioner was providing his statements voluntarily:

> So, I mean, I know I ain't talking to some bad dude. That's why I came in there and took the cuffs off of you, got you comfortable, and let you hug your kid. Be cool with you. *PA000066*;
>
> No, no, no. Dude – dude, hey, look. Hey. I know you're here talking to us. I know you got – you feel some kinda way, man, but I – I – I mean, you know, you can leave at any time, dude. We – we ain't gotta, you know, I know you here, I mean, you know, I ain't trying to – I ain't trying to jam you up. Nothing like that. That's why we let you smoke, took you, I mean, we ain't got you handcuffed, nothing. You – you – you a free man. Everything's good right now. *PA000085*; and
>
> I mean, would you – would you feel better if I read you your Miranda rights and stuff, man? I mean, I don't have, I mean,

> you free to go, man. I mean, you know what I'm saying? I – I'm not here to jam you up. I'm here to simply get your side of the story. *Id.*

However, these were unquestionably misrepresentations on the detectives' part- at all times they knew that the Petitioner in fact was in custody, under arrest, and facing potentially serious charges (in addition to a unit standing by *to take the Petitioner to jail* as soon as the detectives were done with their questioning, they were investigating the Petitioner for potential murder charges). Regardless, detectives continued to question the Petitioner without properly advising him of his rights. Indeed, despite the State's (and detectives') claim that the Petitioner was "free to go" whenever he wanted, at one point the Petitioner wanted to retrieve cigarettes from the apartment only to be told that he needed to remain with the detectives and that someone else would get cigarettes for him. *PA000073-74*.

Further undermining the State's and detectives' claim is the language from the search warrant application wherein detectives *acknowledged* that the Petitioner was in custody:

> [Detective, "JS"]: Judge, do you find there's probable cause exists [sic] for the issuance of a Search Warrant?

[Judge, "JW"]: I do. One of the things you asked for was a buccal swab but that guy's not going to be there anymore. Does it matter?

JS: No, he is still here. He's outside the residence in a patrol car.

JW: Okay.

JS: He's being arrest [sic] on the Warrant which is not related to the investigation that we're conducting but he is still here.

PA000141-142.

Having just been arrested by CAT—a specialty team "tasked with locating [the Defendant]" (*PA000045*)—the Defendant knew, or at the very least *reasonably believed*, that he was under arrest and that he was not free to go:

Q: I haven't – I haven't even discussed with my boss about taking you away or even if that's – I don't know if that's – I don't know what's going on with that. I'm being honest with you, dude. I – I ain't even – that hasn't even crossed my mind at this point.

A: ‘Cause I have a warrant for Cali, so I know I’m goin’…

PA000112-113.

And lastly as to this point, the entire exercise was a pretense to get the Petitioner into custody. The State’s position is that the detectives were not obligated to issue Miranda warnings to the Petitioner because he was not “in custody” for the murder investigation, but only for his warrant. This is a blatant, objectively false misrepresentation. Instead, the entire CAT arrest was orchestrated by Metro for the sole purpose of locating the Petitioner to just so they could question him.

This much was conveyed to defense counsel by the deputy district attorney prosecuting the Petitioner’s case:

> Per Detective Sanborn, the CAT team reached out to Defendant’s parole officer in California. CA P&P issued a warrant for Defendant’s arrest. The CAT team was able to locate him through his girlfriend’s lease. However, there were no reports generated by the CAT team.
>
> Once the warrant was issued it was put into NCIC. However, per Detective Sanborn, once the Defendant is booked on the

> warrant it is cleared from NCIC. Thus, any NCIC run currently done would not reflect the warrant back when it was originally issued by CA.
>
> *PA000057*.

Accordingly, California only issued a warrant upon the request of, or following contact from, Metro's CAT team. While the State has argued that Metro did not orchestrate California's issuing a warrant for the Petitioner on a stale parole violation[10], this defies logic. To suggest that CAT was merely enforcing California's warrant is to suggest that CAT randomly calls outside jurisdictions to check on the parole status of people such as the Petitioner. Instead, the true scenario is that Metro asked California to issue a warrant for the Petitioner's arrest so that Metro could deploy CAT's resources to locate him- specifically for questioning.

This is acknowledged in the State's email, and it is supported by the CAD log showing the immediate notification and arrival of Homicide detectives at the

[10] Most telling in this regard is that California declined to retrieve the Petitioner from Clark County once he was in custody.

Petitioner's location a mere *six minutes* after CAT's locating and arresting the Petitioner.

Ultimately, law enforcement believed the Petitioner to be in custody, and indeed had orchestrated his arrest specifically to arrange questioning. Even if this much were not true, as cited to in case law, above, the relevant inquiry is whether the suspect reasonably believes himself to have been in custody at the time of questioning. The Petitioner affirmatively acknowledged that he was under arrest, and therefore he should have been Mirandized from the outset of the questioning, and not after significant statements had already been made.

Even when detectives finally Mirandized the Petitioner, he did not give a knowing, voluntary waiver of his right to remain silent.

The detectives dispensed with the Miranda warning in quick, conversational fashion, and all while downplaying the need even to do so:

> Q: I – I'm not here to jam you up. I'm here to simply get your side of the story. And that's why I appreciate – and I'll read 'em for you, you want me to read 'em to you, man. I mean, know, uh, you got the right to remain silent. Anything you say can be used against you in a court of law. You have a right to consult with an attorney

before questioning. You have a right to the presence of a attorney during questioning. If you cannot afford an attorney, one will be appointed before questioning.

PA000086.

The detective then tried to get an acknowledgement of these rights from the Petitioner, but never received one:

Q: You understand all that? You unders- you understand all that, Dre? Yeah? Yes, no, maybe so? I mean, I ain't trying to jam you – I'm just letting you know I ain't trying to trick you with nothing. You see what I'm sayin'? Those are your rights. You know what I'm sayin'? Those are your rights. Now, I'm not saying that, uh, you're under arrest, not like that. I'm just telling you those are your rights. If you – if you feelin' some kinda way – if that makes you feel better – you understand that? Yes, no? Am I making sense?

A: It's just that the situation sucks so bad.

Q: Right.

A: I…

Q: I mean, you didn't start it, right?

A: No.

Q: Okay.

A: It just…

Q: Tell me this, Dre. [Questioning continues.]

PA000086-87.

Having belatedly realized the need to Mirandize the Petitioner, the detective did it in rough, slipshod fashion, and all while disclaiming the need even to do so because the detective was telling the Petitioner that he was not under arrest and that he was free to leave (clearly untrue). Furthermore, once the detective did manage to provide a somewhat-Miranda warning, he did not obtain from the Petitioner any acknowledgement that he had heard, acknowledged, or even understood the warning ("Yes, no, maybe so?"). Lastly, before the Petitioner could make any affirmation, assertion of his right to remain silent, to request an attorney, or make any other statement to indicate even that he had heard the Miranda warning, the detective continued ahead with his questioning.

While Miranda warnings tend to be technical affairs, and once Mirandized it is incumbent upon the suspect to assert his rights, the quick, throwaway nature of the Miranda warning here is at issue precisely because of its belatedness.

Recall from *Oregon v. Elstad* above that once the "cat is out of the bag" the Miranda calculus changes somewhat, and courts must now consider "the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." 470 U.S. at 318. In essence, this case turns on the admissibility of the Petitioner's statement, made without the benefit of a Miranda warning, and then later "sanitized" by a half-hearted Miranda warning and subsequent retrodding of previous admissions. This is precisely the matter at issue in *Oregon v. Elstad*, and why the State needs so desperately to convince the courts in the tortured procedural posture of this case that the Petitioner was not truly in custody at the time of his statement and thus the *Miranda* progeny should not apply at all.

The presumption is against the State, in this case. As with the case law cited above, the State now has the burden to show that any claimed waiver of Miranda rights was knowing and voluntary. Even if the State is able to overcome this burden, this could arguably only apply to the statements made *after* the Miranda warning was actually given. Prior to the warning, the Petitioner had already provided a significant narrative of events to detectives- details that ultimately were used against him in justice court, and later before the grand jury.

Accordingly, based on the above, the Petitioner's statements—the entire interview and questioning with police—were properly suppressed by the justice court, and should have been suppressed by the district court.

B. The physical evidence must be suppressed as improper fruit of the Petitioner's statement.

The exclusionary rule, adopted by Nevada, requires courts to exclude evidence that was obtained through a violation of constitutional protections. *Torres v. State*, 341 P.3d 652, 657, 131 Nev. Adv. Op. 2 (Nev. 2015). The policy of this rule is to discourage law enforcement from disregarding constitutional protections in the pursuit of evidence. *Id.* This rule extends to evidence that may even be the indirect fruit of an illegal search or arrest. *Id.*, citing *New York v. Harris*, 495 U.S. 14, 19 (1990). Such indirect evidence may be saved from exclusion if the violation of Amend. IV protection was sufficiently attenuated to "dissipate the taint." *Torres*, 341 P.3d at 658, citing *Wong Sun v. United States*, 371 U.S. 471, 491 (1963). The taint of an unlawful search and seizure can be so dissipated if the evidence was acquired "by means sufficiently distinguishable to be purged of the primary taint." *Torres*, 341 P.3d at 658, quoting *Wong*, 371 U.S. at 488, 491.

Further, violations of *Miranda* can lead to the exclusion of physical evidence secured based on the improperly elicited statements, not merely testimonial

evidence. *United States v. Patane*, 542 U.S. 630 (2004) is very similar to the *Seibert* case, *supra*, and is factually very analogous to this case as well. In *Patane*, the defendant was an ex-felon suspected of possessing a firearm. 542 U.S. at 634. Responding officers contacted the defendant and began to question him without the benefit of a full Miranda warning. *Id.* at 635. When asked about the gun, the defendant eventually divulged the location of the gun and gave the officers permission to retrieve the weapon. *Id.*

The *Patane* plurality considered whether the acknowledged failure to provide proper Miranda warnings should result in the exclusion of physical, as opposed to testimonial, evidence sought to be introduced- in *Patane*'s case, the firearm located by the officers subsequent to the defendant's admission that he had a gun in his constructive possession. The plurality held that the physical fruits of a defendant's statements can be suppressed where the statements leading to the discovery of the evidence were coerced. *Id.* at 644. Furthermore, where the physical evidence cannot be introduced without also implicated otherwise inadmissible testimonial evidence, such physical evidence must be excluded as well. *Id.* at 643-44.

Here, the improper questioning of the Petitioner was the primary wrong by which all other evidence in this case became tainted. No subsequent evidentiary

pursuits can be said to purge the taint, either; the evidence recovered all stems from the Petitioner's statements made without proper advisement of his right to remain silent, or the other protections afforded to a defendant under the *Miranda* line of cases. Ultimately, the Petitioner's statements, and later his revealing of not only the existence of the firearm but its location, would not have occurred but for the detectives' improper questioning of the Petitioner without appropriate, compulsory warnings in opposition to his constitutional rights.

The interview transcript, cited above and in the Petitioner's Appendix, demonstrates that a *significant* amount of questioning, wherein a *significant* amount of statements were given, all occurred prior to proper Miranda warnings. Further, Metro has attempted to gloss over this fact—in essence, doctoring the record—by claiming that the questioning was a "post-Miranda" interview. *PA000045*. This could not be further from the truth, as the questioning took place for almost a half-hour without any Miranda warning, at which point the detective acknowledged that he had not yet given a Miranda warning ("[A]nd I'll read 'em for you, you want me to read 'em to you, man."[11]). *PA000086*.

[11] The context of the statement is that the detective is clearly reading Defendant his Miranda rights for the first time.

The taint of this improper questioning permeates the investigation, as the Petitioners's incriminating statements occurred prior to the belated Miranda warning. It was only after the detectives had determined the Petitioner's involvement in the shooting that they began to question him about the details of the weapon, and therefore ultimately gleaned the location of the weapon from the Petitioner's statements. As such, even the late Miranda warning cannot redeem or otherwise render admissible the statements taken prior to the observation of the Petitioner's rights, as there is no telling what direction the questioning would have taken had the Petitioner been advised of his rights prior to almost twenty-seven (27) minutes of ongoing questioning. Indeed, the Petitioner may very well have invoked one or more of his rights advised of under a proper, timely Miranda warning, and the questioning may very well have ceased from there or shortly after the outset.

Consistent with the *Patane* plurality, the gun ultimately recovered was based off of inadmissible statements elicited in violation of *Miranda*. The police tactics in eliciting the Petitioner's statements, as described herein, were coercive in the extreme, and thus the physical evidence should have been excluded. Furthermore, this case concerns a shooting, and ultimately a weapon possession charge- the key

piece of evidence in the State's case therefore is the gun itself.[12] Therefore the location and recovery of the weapon is too inextricably linked to the Petitioner's otherwise inadmissible statements made in violation of his right against self-incrimination.

As such, the taint of the detectives' violations is not sufficiently attenuated, and all evidence subsequent to and/or resulting from the Petitioner's questioning *must*, according to Nevada case authority, be suppressed.

C. The Petitioner could not consent to a search of the Wyandotte address

Under *Katz v. United States*, the mere occupation of a public place (there, a phone booth) does not render an individual's expectation of privacy unreasonable. 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). What an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351–52, 88 S.Ct. at 511–12 (citations omitted). However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id*. at 351, 88 S.Ct. at 511 (citations omitted).

[12] See also PA000279-281, the State's DNA report on the firearm in question.

Whether an individual was entitled to the protection of the Fourth Amendment depends on whether that individual harbored both a subjective and objective expectation of privacy. *Katz*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). A subjective expectation of privacy is exhibited by conduct which shields an individual's activities from public scrutiny. *Id*. In *Katz*, the critical fact for the court in determining that the defendant had a subjective expectation of privacy was that he "shut the [phone booth] door behind him." By so doing, Katz excluded the public and was entitled to assume his conversation was not being intercepted. *Id*.

An objective expectation of privacy, i.e., one which society recognizes as reasonable, must also exist. *Id*., 389 U.S. at 361, 88 S.Ct. at 516; see also, *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1983). "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government intrusion infringes upon personal and societal values protected by the Fourth Amendment." *Oliver*, 466 U.S. at 182–183, 104 S.Ct. at 1743–44. In determining whether a reasonable expectation of privacy exists, the Court has considered such factors as "the intention of the Framers of the Fourth Amendment (citation omitted), the uses to which the individual has put a location (citation omitted), and our societal

understanding that certain areas deserve the most scrupulous protection from government invasion (citation omitted)." *Oliver*, 466 U.S. at 178, 104 S.Ct. at 1741.

While consent to search is a waiver of Fourth Amendment protections, such consent must come from the person with actual authority over the area to be searched. *Casteel v. State*, 131 P.3d 1, 3 (Nev. 2006); see also *Snyder v. State*, 103 Nev. 275, 280, 738 P.2d 1303, 1037 ("Valid consent to search can be obtained from a third party who possesses common authority over or other sufficient relationship to the premises."). "A warrantless search is valid if the police acquire consent from a cohabitant who possesses common authority over the property to be searched." *Casteel*, 131 P.3d at 3. In such cases, law enforcement must reasonably believe that the person granting the consent to search so has the authority to grant consent. *U.S. v. Hamilton*, 792 F.2d 837, 842 (C.A.9 (Cal.), 1986) (citing *United States v. Sledge*, 650 F.2d 1075, 1081 (9th Cir. 1981).

Furthermore, the violation of another's expectation of privacy in a constitutionally protected space does not divorce a defendant from his ability to object to the warrantless search of the premises (prior to the later-issued warrant).

Pursuant to the Fourth Amendment of the U.S. Constitution, and further found under Article 1, § 18 of the Nevada Constitution, an individual must have

standing to invoke the Fourth Amendment protection against unreasonable searches and seizures. *Dean v. Fogliani*, 81 Nev. 541, 544, 407 P.2d 580, 581 (1965). The purpose of this constitutional mandate is to balance the individual's right of privacy and to curtail the unlawful activity of law enforcement officials. *Id.* at 544, 407 P.2d at 582. Accordingly, the Nevada Supreme Court has held that in order for an individual to claim an unlawful invasion of privacy, one of the following factors must apply:

> 1. The individual must be one of the persons against whom the search was directed;
>
> 2. The individual must be one who is charged with illegal possession of property to be suppressed; or
>
> 3. The individual must be anyone who was legitimately on the premises where a search occurs and the fruits of the search are proposed to be used against him.
>
> *Id.* at 544-45, 407 P.2d at 582.

An individual is legitimately on the premises where a search occurred, for purposes of subsection 3 above, if the individual is an overnight guest. *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002) (overruled on other grounds by *Nunnery v. State*, 127 Nev. 749. 263 P.3d 235 (2011)).

Here, the detectives were informed multiple times that the Petitioner did not own the property, or otherwise was not the primary authority/resident of the property. The Petitioner told the detectives as much during his questioning:

Q1: So the first time he goes by, he's by himself?

A: No. The first time he go by, he's with his friends.

Q1: Okay.

A: And that's when he – "Oh, blood, y'all gotta clear this out. On dead homies. Too much." So we, uh, all right. You know, we – basically, you know, we drink and smoke. We do this every day.

Q1: Mm-hm.

A: We not really – all right. You live here. You have a – we done been up and down the street for – for months. You just barely been over here probably two or three months, but you used to stay across the street. Now your girl and your mom got this spot right across the street. You – you just,

like, he came through, like, politicking, but I, like, we was in Cali. Right. We not in Cali, bro. You, uh, it's…[13]

PA000084.

Accordingly, the detectives were on notice that Defendant was known to be staying in the area of the shooting—Van Patten—and not the Wyandotte address (a quick reference indicates the two areas to be approximately two and a half miles from each other). This is verified by the detectives' report generated in this case: "[Petitioner] lives in the immediate area [of the Van Patten address] and was the subject of several active criminal investigations." *PA000040*.

Moreover, the Petitioner expressed numerous, vocalized, and articulated concerns that the detectives would cause damage to the Wyandotte apartment or otherwise inconvenience his girlfriend and children:

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[13] The Petitioner was speaking in the narrative, and was recounting what he was told by "T-Rex." As further clarification, the Petitioner referenced a statement regarding "your girl and your mom got this spot"- but "T-Rex"'s mother lives in California, not Las Vegas. *PA000043* ("Apollo provided investigators with the name and telephone number of Tyler's mother in California". Therefore, the Petitioner's recitation can only be what was said *to* him, not *by* him.

A: The apartment not gonna be tore up, is it? 'Cause my girl's still here. *PA000103*;

Q1: You got family out here or no?

A: She's my only family [Petitioner's girlfriend].

Q1: Okay. And what, you got two kids with her?

A: Yeah.

Q1: So what – what's the deal with you two? Are you guys kind of, like, you guys still see each other, or is it just here and there? It just kinda depends?

A: We see each other. Just – but me a – and this Cali stuff and me being on the run.

Q1: Yeah.

PA000105.

Lastly as to this point, one of the detectives questioning the Petitioner even acknowledged that the Petitioner was not living at Wyandotte:

Q1: So this address on Wyandotte, that's your – that's Tia's place, your girlfriend, baby mama. She's only been here a couple

days? And do you – you weren't living here. You – you just stayed here last night and that was it.

A: Yeah. *PA000108*;

Q1: Tia?

A: Only person.

Q1: Was she over *in that area* when everything happened, or no? So this is where Tia normally stays?

A: She just moved here a couple days ago.

Q1: Oh, okay.

PA000103-104 (emphasis added).

Despite knowing that the Petitioner lived on Van Patten; that the Petitioner had only stayed at the Wyandotte address the night before; that the Petitioner was concerned about police searching his girlfriend's apartment; and that the Petitioner and his girlfriend, Tia, would only occasionally see each other, the detectives perpetrated a myth about the Petitioner's "dominion and control" over the premises in order to gain flawed consent to search the premises.

The property at Wyandotte was under Fourth Amendment protections, with the power of waiver and/or consent belonging *only* to the Petitioner's girlfriend,

Tia. Therefore, any supposed consent given by the Petitioner was insufficient, and the resulting entry and search of the apartment without a search warrant was improper. As such, any evidence, including the firearm in question, was properly suppressed by the justice court- a decision that should have been upheld by the district court.

CONCLUSION

Based on the foregoing, the Petitioner humbly requests that this Court issue a Writ of Mandamus dismissing the Indictment against him.

DATED this __29th___ day of November, 2018.

By: __/s/ Adrian M. Lobo_____

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the **29th of November, 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:

Honorable Douglas Herndon
District Court, Department III
Regional Justice Center
200 Lewis Ave.,
Las Vegas, NV 89155

DATED this _29th_ day of November_, 2018.

BY: */s/ Alejandra Romero*
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