IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 77529

DEANDRE GATHRITE

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, et al.,

Respondent.

AMICUS BRIEF OF NEVADA ATTORNEYS FOR CRIMINAL JUSTICE (NACJ) IN SUPPORT OF PETITIONER AND DISMISSAL OF THE INDICTMENT AGAINST HIM

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Nevada Attorneys for Criminal Justice, Inc. (NACJ)
2. Clark County Office of the Public Defender (CCPD)
3. Lobo Law, PLLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE STATUTES

FEDERAL CASE LAW

///

///

STATE CASE LAW

COURT RULES

SECONDARY SOURCES

IDENTITY OF *AMICUS CURIAE* & STATEMENT OF INTEREST

Nevada Attorneys for Criminal Justice (NACJ) is a state-wide, non-profit organization of criminal defense attorneys in Nevada. Our mission is to ensure accused persons receive effective, zealous representation through shared resources, legislative lobbying, and intra-organizational support. This includes the filing of Amicus Curiae Briefs pertaining to (1) state and federal constitutional issues; (2) other legal matters with broad applicability to accused persons; and (3) controversies with potential to impact our members' ability to advocate effectively for accused persons.

NACJ offers the collective experience of its members to assist this Honorable Court in deciding important issues presented by Petitioner Gathrite's case, and urges this Honorable Court to grant Petitioner Gathrite's favor, and direct the Eighth Judicial District Court to dismiss the indictment against him.

This Amicus Brief is filed in accordance with Nevada Rules of Appellate Procedure 29 and 32; and NACJ's authority to file derives from our Motion of Nevada Attorneys for Criminal Justice (NACJ) to

File Brief of Amici Curiae in Support of Petitioner Gathrite, to which this brief is attached.

ARGUMENT

I. THE STATE SHOULD NOT BE ALLOWED TO ABUSE INDICTMENT PROCEDURE BY PRESENTING ILLEGAL, PREVIOUSLY SUPPRESSED EVIDENCE TO THE GRAND JURY.

As an organization, NACJ is deeply concerned by the State of Nevada's improper exploitation of procedural rules in this case—exploitation calculated to obviate a magistrate's lawful order suppressing evidence pursuant to this Honorable Court's decision in Grace v. Eighth Judicial District Court. 375 P.3d 1017, 132 Nev. Adv. Op. 51 (2016). Specifically, the State sought a grand jury indictment based almost exclusively upon unlawfully obtained and previously suppressed evidence. Permitting the State to circumvent a lawful justice court order by manipulating procedural rules not only renders this Honorable Court's holding in Grace meaningless, it deprives Petitioner Gathrite of important procedural rights, compromises prosecutorial ethics, and jeopardizes the integrity of Nevada's criminal justice system.

The danger here is that the State's abusive forum shopping, perpetrated to obviate a justice court suppression ruling, is easily

repeatable. This Court should limit how the State can proceed before a Grand Jury once the justice court has issued an order suppressing evidence. To present previously suppressed evidence to a Grand Jury, a prosecutor must properly appeal the suppression ruling to the district court through statutorily established procedures. *See* NRS 189.120. If such an appeal does not occur, then the justice court's suppression ruling should be binding on the grand jury. *See* § II, *infra*. Alternatively, if such a decision is not binding, the prosecutor must, at the very least, inform the grand jury about the suppression ruling and/or the facts substantiating the suppression ruling. Without these limitations, a prosecutor remains free to exploit and manipulate the grand jury process at will.

A. THE PROSECUTOR'S ACTIONS IN THIS CASE CONSTITUTE ABUSIVE FORUM SHOPPING.

In this case, the State exploited grand jury procedure to obtain a more favorable evidentiary ruling—and it worked. *See* PA, Vol. 2, 000384 – 000391, 000393 – 000492; Vol. 3, 000493 – 000630. The State, recognizing that the justice court's suppression order eviscerated its case and precluded a probable cause finding at preliminary hearing, requested dismissal. *See* Petitioner's Appendix (hereinafter "PA"), Vol.

1, 000052 – 000055; Vol. 2, 000288 - 000289. In response, the State proceeded to the Grand Jury, purposefully obviating that suppression order, securing a probable cause determination via subterfuge, and furthering an unconstitutional prosecution. *See* PA, Vol. 1, 000146 – 000170.

The State's calculated and devious decision to proceed before the grand jury exemplifies government conduct which grand juries are intended to protect against: "assur[ing] that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor . . . ." State v. Babayan, 106 Nev. 155, 165, 787 P.2d 805, 814 (citing United States v. Gold, 470 F.Supp. 1336, 1346 (N.D. Ill. 1979) (quoting United States v. DiGrazia, 213 F.Supp. 232, 235 (N.D. Ill. 1963))) (internal quotation marks omitted).

The State has argued that, when it comes to the presentation of exculpatory evidence, NRS 172.145 merely obliges it to inform the grand jury about insufficient evidence presented at preliminary hearing, resulting in dismissal. PA, Vol. 1, 000179 – 000211. There may not have been a preliminary hearing in this case, but the State certainly knew no probable cause finding would issue if it proceeded to

preliminary hearing. PA, Vol. 1, 000052 – 000055; Vol. 2, 000288 – 000289. As such, the State was acutely aware of the insufficiency of its evidence. Nonetheless, the State elected to move for dismissal—to avoid the inevitable—and pursued a venue where it believed it could present unlawfully obtained evidence with impunity.

The State's conduct exploited statutory law to undermine an unfavorable evidentiary ruling. The grand jury is not a prosecutorial tool, and no law permits the State to utilize the grand jury in this way. In fact, considered from the perspective of fundamental fairness, Nevada Law counsels against the same. This corruption of grand jury smacks of forum shopping in its most insidious form, as it jeopardized Petitioner Gathrite's liberty. The indictment against Deandre Gathrite must be dismissed to prevent future conduct of this kind by the State of Nevada.

B. THE PROSECUTOR NEVER HAD GOOD CAUSE TO CONTINUE PETITIONER GATHRITE'S PRELIMINARY HEARING IN JUSTICE COURT.

"Good cause must be shown by the prosecution for securing a continuance of a preliminary examination." Sheriff v. Roylance, 110 Nev. 334, 337, 871 P.2d 359, 361 (1994) (citing Bustos v. Sheriff, 87

Nev. 622, 623-24, 491 P.2d 1279, 1280-81 (1971)). Good cause exists where the State "prepare[s] and submit[s] to the magistrate an affidavit" stating factual circumstances to justify the continuance. Hill v. Sheriff, 85 Nev. 234, 235-36, 452 P.2d 918 (1969).

Subsequent to the justice court's order suppressing Petitioner Gathrite's statement and the fruits thereof, the parties appeared for preliminary hearing. *See* PA, Vol. 1, 000003 – 000005. Petitioner Gathrite was ready to proceed. The State, in open court, filed a Hill Motion, which contained the sworn affidavit of Deputy District Attorney, Sarah Overly. PA, Vol. 1, 000283 – 000286. That sworn affidavit stated civilian witness, Raymond Moore, was "an essential witness for the State of Nevada . . . ." Id. The justice court found good cause to continue the preliminary hearing. *See* Id.

At the reset preliminary hearing date, June 29, 2018, Raymond Moore again failed to appear. The State moved the court to dismiss the case against Petitioner Gathrite. PA, Vol. 2, 000288 – 000289. The State's motion to dismiss was granted without prejudice, and the State made a record that it had served notice of intent to seek indictment via email on June 19, 2018. Id.

On August 14, 2018, the State initiated proceedings before the grand jury, and did not call its "essential witness," Raymond Moore. "[a] new proceeding for the same offense (whether by complaint, indictment or information) is not allowable when the original proceeding has been dismissed due to the willful failure of the prosecutor to comply with important procedural rules." Maes v. Sheriff, 86 Nev. 317, 319, 468 P.2d 332, 333 (1970); *accord* Sheriff v. Simpson, 109 Nev. 430, 432, 851 P.2d 428, 430 (1993).

Where, as here, the State files a Hill Motion swearing a particular witness is "essential" to establishing probable cause, and later secures probable cause without said witness, "good cause" never existed. In Petitioner Gathrite's case, Judge Goodman could not dismiss with prejudice because the truth did not surface until after the State caused Judge Goodman's loss of jurisdiction with its motion to dismiss. Had the fallacy in the State's affidavit materialized while the matter was in justice court, Judge Goodman likely would have dismissed with prejudice.

Under these circumstances, the State undoubtedly exhibited willful disregard—or, at the very least, conscious indifference—to

Petitioner Gathrite's important procedural rights. Permitting the State to proceed "would not only encourage callous disregard of the rights of those accused of crime, with wanton unconcern for unnecessary expense to the State, but would destroy the orderly procedures that [this Honorable Court's] previous holding[s] . . . are intended to require." Broadhead v. Sheriff, 87 Nev. 219, 222-23, 484 P.2d 1092, 1094 (1971).

Moreover, "criminal accusations should proceed or terminate on principles compatible with judicial economy, fair play and reason . . . ." State v. Lamb, 97 Nev. 609, 611, 637 P.2d 1201, 1202 (1981) (citing McNair v. Sheriff, 89 Nev. 434, 438, 514 P.2d 1175, 1177 (1973)). Here, fair play, reason, and judicial economy demand dismissal with prejudice because the State—even as of this writing—has presented no viable excuse for its failure to abide by important procedural rules. Failure to dismiss with prejudice under these circumstances threatens basic notions of fairness and due process. Justice, therefore, demands that the indictment against Petitioner Gathrite be dismissed.

C. ONCE BEFORE THE GRAND JURY, THE PROSECUTOR DID NOT PRESENT LAWFUL EVIDENCE.

"[T]he purpose and function of the grand jury . . . is to assure that 'that persons will not be charged with crimes simply because of the zeal,

malice, partiality or other prejudice of the prosecutor . . . ." Babayan, 106 Nev. at 165, 787 P.2d at 814 (citing Gold, 470 F.Supp. at 1346 (quoting DiGrazia, 213 F.Supp. at 235)). The grand jury "act[s] as a bulwark between those sought to be charged with crimes and their accusers," so it must "act as an informed body throughout the entire course of the proceedings. Babayan, 106 Nev. at 168, 787 P.2d at 816.

Whether the Grand Jury is an "informed body" wholly depends on the prosecutor, who is responsible for selecting the witnesses who testify, presenting the evidence through examination and/or exhibits, and instructing the Grand Jury on the law. Robert G. Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. LAW & CRIMINOLOGY 2, 160 (1974). "As a public official and lawyer, the prosecutor may also command considerable respect from the lay persons constituting the grand jury." *Id.* at 161. This weighty responsibility engenders "the danger that the prosecutor may also be able to prejudice or even manipulate the grand jurors, and obtain an indictment when there may not be sufficient evidence to hold an accused for trial." *Id.* "[I]f the prosecutor is successful in obtaining an indictment under these

conditions, the grand jury becomes the 'tool' of the prosecutor and no longer protects the interests of the accused," as intended. *Id.*

As such, Nevada has an old and well-established rule: "The 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(2); State v. Logan, 1 Nev. 509, 515 (1865); Gordon v. Eighth Jud. Dist. Ct., 112 Nev. 216, 223, 913 P.3d 240, 245 (1996); *see, e.g.*, Rugamas v. Eighth Judicial Dist. Ct., 129 Nev. 424, 427-28, 305 P.3d 887, 890 (2013); Moran v. Cortopassi, 106 Nev. 200, 201-02, 789 P.2d 582, 583 (1990); Phillips v. Sheriff, 93 Nev. 309, 312, 565 P.2d 330, 332 (1977); Lightford v. Sheriff, 88 Nev. 403, 404, 498 P.2d 1323, 1324 (1972). "As none but legal evidence can be introduced upon the trial of the defendant, it would be clearly improper to find an indictment where there is not sufficient *legal* evidence to justify a conviction; hence the rule that the grand jury should receive none but legal evidence." Logan, 1 Nev. at 516 (emphasis original).

To that end, "[i]t is incumbent upon prosecutors who make presentations before grand juries to be adequately informed of the facts and to have conducted sufficient legal research to enable them to

properly inform the grand jury on the law and to assist it in its investigation." Babayan, 106 Nev. at 168, 787 P.2d at 816 (citing United States v. Sousley, 453 F.Supp. 754, 758 n. 1 (W.D. Mo. 1978)). The prosecutor who fails in this regard irreparably impairs the Grand Jury's independence by curtailing relevant questions, and stifling potential investigation into the credibility and/or accuracy of the State's evidence. *See id.*

Here, the prosecutor irreparably impaired the Grand Jury's independence by presenting it with previously suppressed, illegal evidence: Petitioner Gathrite's unlawfully obtained statement, and the fruits thereof, to wit: a firearm. The State's conduct in this regard is absolutely reprehensible. The prosecutor took evidence she knew to be unlawful, and manipulated the Grand Jury to achieve a desired result—an unconstitutional result. The prosecutor's misconduct compromised notions of due process and fair play, hallmarks of the American criminal justice system.

Adding insult to injury, the State presented this evidence to the Grand Jury in direct contravention of a lawful justice court suppression order. Certainly the State may choose whether to prosecute by

information or indictment, but no law that permits the State to seek an indictment to avoid a lawful court order. Judge Goodman rendered his decision, and the State was obliged to abide by the same in proceeding to the Grand Jury, as no other court had exercised jurisdiction over Petitioner Gathrite's case. Because the State presented illegal evidence to the Grand Jury, the resultant indictment against Petitioner Gathrite must be dismissed.

D. THE STATE FAILED TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY.

In addition to providing the grand jury with only legal, competent evidence, the State was obliged to educate the Grand Jury with respect to Judge Goodman's suppression order. This would have at least permitted the Grand Jury to assess the credibility of the State's witnesses, both of whom were homicide detectives for the Las Vegas Metropolitan Police Department; consider the legality of Petitioner Gathrite's statement; and make an independent determination whether to include the previously suppressed statement (and the fruits thereof) in their probable cause calculus.

"The grand jury's 'mission is to clear the innocent, no less than to bring to trial those who may be guilty.'" Sheriff v. Frank, 103 Nev. 160, 165, 734 P.2d 1241, 1244 (1987) (quoting United States v. Dionisio, 410 U.S. 1, 16-17 (1973)). Accordingly, NRS 172.145(2) requires the State to present to the grand jury any exculpatory evidence of which she is aware, and that tends to explain away the charge. Ostman v. Eighth Judicial Dist. Ct., 107 Nev. 563, 564 (1991); *accord* Moran v. Schwarz, 108 Nev. 200, 202 (1992); Lay v. State, 110 Nev. 1189, 1197 (1994); King v. State, 116 Nev. 349, 358-59 (2000).

"Exculpatory evidence" is evidence tending to explain away the charge(s). State v. Babyan, 106 Nev. 155, 169 (1990) (quoting Lane v. Dist. Ct., 104 Nev. 427, 463 (1988) (Steffen, J., concurring)). The State must be aware of the "potential exculpatory value [of the evidence] when [s]he present[s] the case to the grand jury." Mayo v. Eighth Judicial Dist. Ct., 132 Nev. Adv. Op. 79, 384 P.3d 486, 487 (2016). Where the district attorney is aware that certain evidence exists, and where she is also aware of the exculpatory nature of said evidence, she *must* present the same to the grand jury. *See* Mayo, 384 P.3d at 487 (2016) (emphasis added). That the State was aware of exculpatory

evidence in this case is beyond contest; after all, the prosecutor who conducted the grand jury proceeding was also present for Judge Goodman's suppression order.

"[W]hether particular evidence is exculpatory is generally left to the discretion of the district court," and district courts should be vigilant "[w]here . . . a prosecutor refuses to present exculpatory evidence," because in so doing [s]he . . . destroys the existence of an independent and informed grand jury." Ostman, 107 Nev. at 564, 816 P.2d at 459; Frank, 103 Nev. at 165, 734 P.2d at 1245 (quoting Gold, 470 F.Supp. at 1353) (internal quotation marks omitted). Because the State's failure to present exculpatory evidence "irreparably impair[s] the proper performance of the grand jury's mission to pursue its investigation independently of the prosecuting attorney," any indictment arising therefrom is defective, and must be dismissed. *See* Frank, 103 Nev. at 166 (citing Gold, 470 F.Supp. at 1353; Gibbons v. State, 97 Nev. 299 (1981)); Babayan, 106 Nev. at 169.

The only judge who had exercised jurisdiction over this case prior to the grand jury proceeding was Judge Goodman, who determined that Petitioner Gathrite's statement was unlawfully obtained. If the State

was not obliged to omit reference to the statement entirely (since the detective testifying at grand jury elicited the unconstitutional statement), then it was least required to provide the grand jury with factual information relied upon by the justice court in rendering its suppression order. *See* PA, Vol 1, 000145 – 0004170.

Like the determination of whether evidence is exculpatory for the purposes of NRS 172.145(2), whether to suppress evidence for Fourth and Fifth Amendment purposes is a fact-intensive inquiry focused on, *inter alia*, the totality of the circumstances. As such, the State was required to provide factual information to the grand jury that, consistent with Judge Goodman's previous determination, casted doubt on the legality and admissibility of Petitioner Gathrite's statement and the fruits thereof. At least under those circumstances, the State would have empowered the Grand Jury to discharge its investigatory function to render an informed probable cause determination. Because this did not happen, the indictment against Petitioner Gathrite must be dismissed.

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E. STATE COULD HAVE APPEALED THE JUSTICE COURT SUPPRESSION ORDER, PROPERLY PLACING THE ISSUE BEFORE THE DISTRICT COURT.

NRS 189.120 states as follows: "The State may appeal to the district court from an order of a justice court granting the motion of a defendant to suppress evidence." This statute provided the State with a remedy—a remedy that would have properly placed the suppression issue before the district court. That the State elected not to pursue this option highlights the prosecutor's bad faith motives, emphasizes the exploitation of grand jury procedure, and strongly favors dismissal of the indictment against Petitioner Gathrite.

The State's improper actions here demonstrate precisely why limitations must be placed on how the State can proceed before a Grand Jury once a justice court has suppressed evidence. It is simply too easy for the State to circumnavigate a justice court suppression order by removing the case to the Grand Jury. This Court should implement rules, consistent with Grace, prior precedent, and the statutory scheme, that ensure the State cannot obtain an indictment based on evidence that a justice court has determined was illegally obtained.

II. JUSTICE COURT SUPPRESSION ORDERS ANTECEDENT TO GRAND JURY PROCEEDINGS SHOULD BE VIEWED AS BINDING ON THE STATE UNTIL JURISDICTION PROPERLY RESIDES WITH THE DISTRICT COURT.

NACJ is equally concerned that, after a true bill based on unlawfully obtained evidence issued, the Eighth Judicial District Court, through the Honorable Douglas Herndon, treated a magistrate's lawful suppression order as a nonbinding on the State for the purposes of deciding Petitioner's Writ of Habeas Corpus. In so doing, Judge Herndon tacitly sanctioned the State's abuse of the grand jury process to avoid an adverse ruling; *sua sponte* raised and relitigated a decided suppression issue in violation of EDCR 3.40; then ruled in the State's favor notwithstanding a previous, valid, final judgment.

A. THE JUSTICE COURT ORDER DISMISSING THE CASE AGAINST PETITIONER GATHRITE WITHOUT PREJUDICE WAS A FINAL JUDGMENT.

Judge Goodman's dismissal without prejudice in justice court was a final judgment. Dredge Corp. v. Peccole *et al.*, 89 Nev. 26, 27, 505 P.2d 290 (1973). "A final judgment is an order that disposes of all issues and leaves nothing for [the justice court's] future consideration." Warren v. Eighth Judicial Dist. Ct., 134 Nev. Adv. Op. 77, 427 P.3d 1033, 1036 (2018) (quoting Sandstrom v. Second Judicial Dist. Ct., 121 Nev. 657,

659, 119 P.3d 1250, 1252 (2005)) (internal quotation marks omitted). Dismissal of a matter in justice court—even where it is dismissed without prejudice—is final judgment because "the case is closed, and the State may not proceed on the dismissed complaint." Id. at 1036.

When the State requested dismissal in this case, it enshrined the justice court suppression order with its requested final judgment. The suppression issue had been thoroughly briefed, argued, and decided. No other court had considered the issue. No other court had exercised jurisdiction over Petitioner Gathrite's case, or its attendant facts and circumstances. Moreover, jurisdiction did not yet reside with the district court, as the State did not appeal the suppression order. The State moved for dismissal, so it could not have appealed from the final judgment of dismissal without prejudice—the State's own requested remedy. Furthermore, the State did not move the justice court for leave to file an information. *See, e.g.*, Moultrie v. State, 131 Nev. Adv. Op. 93, 364 P.3d 606 (2015); Parsons v. State, 116 Nev. 928, 10 P.3d 836 (2000). Instead, the State elected to proceed before the grand jury and, in so doing, was bound by a lawful suppression order that should have

controlled—or at the very least contextualized—the evidence it presented to the grand jury.

Principles of issue preclusion are analogous and instructive here: "The allied doctrine of issue preclusion ordinarily bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment." Bravo-Fernandez v. U.S., 137 S. Ct. 352, 358 (2016). "It applies in both civil and criminal proceedings, with an important distinction." Id. "In civil litigation, where issue preclusion and its ramifications first developed, the availability of appellate review is a key factor." Id. Here, the State had multiple avenues of review available: (1) it could have could have moved the justice court for reconsideration of its order; (2) it could have moved the justice court to amend its order; or (3) it could have appealed under NRS 189.120, which specifically provides for review of suppression orders in justice court.

That the State had access to review, reconsideration, and appellate review is significant here, because "preclusion doctrine is premised on 'an underlying confidence that the result achieved in the initial litigation was substantially correct.'" Id. (citing Standefer v. United States, 447 U.S. 10, 23, n. 18, 100 S. Ct. 1999, 64 L.Ed.2d 689

(1980)). "In the absence of appellate review such confidence is often unwarranted." Standefer, 447 U.S., at 23, n. 18, 100 S.Ct. 1999.

In this case, the suppression issue was litigated and determined in justice court. After motions practice and argument, Judge Goodman suppressed Petitioner Gathrite's unlawfully obtained statement and a firearm (as fruit of the poisonous tree). Thereafter, a final judgment issued—a final judgment issued on the State's motion. *See* Dredge, 89 Nev. at 27, 505 P.2d at 290 (defining dismissal without prejudice as a "final judgment"). Unlike in the Double Jeopardy context, where the State has no appellate remedy after acquittal at trial, the State, in this case, had an appellate remedy. That remedy is clearly delineated in NRS 189.120. That the State failed to avail itself of its appellate remedy is of no consequence: The suppression issue was decided, and it bound the State until the district court's superseding jurisdiction was properly in place.

Justice court suppression orders are properly viewed as binding on the State up to and including grand jury proceedings. To treat a justice court suppression ruling as anything other than binding under these circumstances would render Grace v. Eighth Jud. Dist. Ct. impotent.

375 P.3d 1017, 132 Nev. Adv. Op. 51. This Court certainly would not have vested justice courts with the authority to order suppression if it envisioned those orders as having no force or effect. Additionally, treating justice court suppression orders as binding on the state (at least until superseding jurisdiction properly resides with the district court) will preclude the State from abusing grand jury procedure to accomplish its own odious objectives, as exemplified by the instant case.

Because the State should have treated the justice court's suppression order as binding in the grand jury context, but instead used the grand jury as a tool to obviate a lawful suppression order, this Court should dismiss the indictment against Petitioner Gathrite.

B. A DISTRICT COURT JUDGE MAY NOT *SUA SPONTE* RAISE, AND THEN FORCE THE PARTIES TO RELITIGATE, A JUSTICE COURT SUPPRESSION ORDER NOT PROPERLY BEFORE THE COURT.

Once the true bill issued, Petitioner Gathrite's case was properly before the district court; however, the suppression issue was not. In district court, Petitioner Gathrite filed a Writ of Habeas Corpus challenging the grand jury's probable cause determination. The arguments set forth were, *inter alia*, that (1) presentation of Petitioner's statement to the grand jury violated NRS 172.135; and (2) presentation

of Petitioner's statement to the grand jury violation NRS 172.145. PA, Vol. 1, 000009 – 000034. Petitioner was very careful, however, to avoid relitigation of the suppression issue's merits, as a writ of habeas corpus is not the proper vehicle for the same. *See* id.; Eighth Judicial District Court Rule (EDCR) 3.40 (stating that a writ of habeas corpus is to be used for challenges to probable cause and jurisdiction).

The State, however, in violation of EDCR 3.40, specifically addressed the merits of the suppression order in its Return. PA, Vol. 1, 000179 – 000211. This was entirely inappropriate and, to the extent the State's argument addressed the merits of the justice court suppression order, the district court should have ignored the same in rendering a determination on the Petitioner's Writ. Instead, the Honorable Douglas Herndon *sua sponte* scheduled an evidentiary hearing—over defense objection—on the suppression issue, which was not properly before the court. He then used his determination on the suppression issue, after hearing evidence, as a basis for denying Petitioner's Writ. This was procedurally improper, and warrants dismissal of the indictment.

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CONCLUSION

Without this Honorable Court's intervention, the Clark County District Attorney's Office (CCDA) will continue to improperly exploit procedural rules to escape adverse rulings, thereby stripping grand juries of their independent function to evaluate legal, competent evidence; imperiling the right of accused persons to due process under the law; permitting odious and overt forum shopping; encouraging unconstitutional police conduct; and potentially producing legally unsound and fundamentally unjust convictions.

As such, NACJ urges this Honorable Court preserve the integrity of the grand jury process, protect Petitioner's important procedural rights, strengthen the Grace holding, and preclude the State from forum shopping by directing the Honorable Douglas Herndon to dismiss the case against Petitioner Gathrite.

Dated this 7th day of December, 2018.

Respectfully submitted,
NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14 point font: or

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:

[X] Proportionately spaced. Has a typeface of 14 points or more and contains 4,366 words which does not exceed the 7,000 word limit.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I

may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7 day of December, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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STEVEN B. OWENS

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

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