IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANDRE GATHRITE, Petitioner, vs, THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DOUGLAS HERNDON, DISTRICT JUDGE Respondent, and THE STATE OF NEVADA, Real Party In Interest.	Electronically Filed Jan 31 2019 08:35 a.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 77529

ANSWER TO PETITION FOR WRIT OF PROHIBITION AND MANDAMUS

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, STEVEN S. OWENS, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Prohibition and Mandamus in obedience to this Court's order filed January 17, 2019, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

/ / /

/ / /

/ / /

/ / /

Dated this 30th day of January, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

QUESTION PRESENTED

Is this Court's extraordinary intervention warranted to reverse the district court's denial of Petitioner's Motion to Dismiss for Prosecutorial Misconduct and Petition for Writ of Habeas Corpus?

STATEMENT OF THE CASE

On February 26, 2018, the State filed a Criminal Complaint charging Deandre Gathrite ("Petitioner") with one count of Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165) and Ownership or Possession of Firearm By Prohibited Person (Category B Felony - NRS 202.360). I Appendix to Petition ("AP") 0001–02. Petitioner was arraigned on February 28, 2018, and the Public Defender was appointed. I AP 003. Petitioner's preliminary hearing was scheduled for March 23, 2018. I AP 004. After discovering a conflict in representing Petitioner, the Public Defender withdrew as counsel and Adrian Lobo, Esq. was appointed. I AP 004. At the defense's request, the preliminary hearing was reset for April 5, 2018, then April 20, 2018, and then May 11, 2018. I AP 004. On May 9, 2018, both parties stipulated to continuing the preliminary hearing to June 8, 2018. I AP 004.

On May 10, 2018, Petitioner filed a Motion to Suppress Evidence. I AP 004; II AP 315–36. The State filed an Opposition on May 23, 2018. I AP 004; II AP 337–

72. Petitioner filed a Reply on May 24, 2018. I AP 004; II AP 373–83. On May 25, 2018, the justice court ruled the Petitioner's statements to police and the firearm recovered by police suppressed. I AP 004, 052, 054–55.

On June 8, 2018, the State filed a Motion to Continue based on the unavailability of an essential witness, Raymond Moore. I AP 004; II AP 282–86. The justice court granted the motion and reset the preliminary hearing for June 29, 2018, with a status check on negotiations set for June 21, 2018. I AP 004. On June 21, 2018, both parties indicated the case was not resolved and that defense counsel had received Marcum Notice from the State on June 19, 2018. I AP 004–05; 171–78. On June 29, 2018, the State moved for voluntary dismissal by statute and made additional representations regarding the unavailability of witness Raymond Moore. I AP 005; II AP 287–89. The same day, Petitioner moved to dismiss the case with prejudice. I AP 005; II AP 287–89. The justice court denied Petitioner's oral motion and granted the State's motion, dismissing the case without prejudice. I AP 005; II AP 289.

The State then presented information underlying the voluntarily dismissed justice court case to the grand jury. I AP 146–70. On August 15, 2018, an Indictment was filed, charging Petitioner with one (1) count of Ownership or Possession of Firearm by Prohibited Person (Category B Felony). I AP 006–08.

On September 7, 2018, Petitioner filed a Motion to Dismiss for Prosecutorial

Misconduct ("Motion to Dismiss"). I AP 225–45. The State filed an Opposition on September 20, 2018. II AP 246–62. Petitioner filed a Reply on September 24, 2018. II AP 263–78. Also on September 7, 2018, Petitioner filed a Petition for Writ of Habeas Corpus ("Pretrial Writ"). I AP 009–34. The State filed a Return on September 21, 2018. I AP 171–211. Petitioner filed a Reply on September 24, 2018. I AP 212–24. On September 25, 2018, the district court heard argument regarding both the Motion to Dismiss and the Pretrial Writ. II AP 384–91.

The district court determined that both pleadings concerned the same underlying issues—the Motion to Suppress the justice court had granted and the subsequent use of the underlying information before the grand jury—and ordered an evidentiary hearing. II AP 385–91. The evidentiary hearing lasted two days, October 8 and 10, 2018. II AP 393–492; III AP 493–509, 510–630. The district court denied Petitioner's Motion to Dismiss and Pretrial Writ in a combined order filed on October 29, 2018. III AP 699–701. Petitioner's jury trial is currently scheduled for July 15, 2019.

Petitioner filed the instant Petition for Writ of Prohibition and Mandamus ("Petition") on November 30, 2018. On December 7, 2018, Nevada Attorneys for Criminal Justice ("NACJ") moved for leave to file an amicus brief in this matter. This Court granted that motion, and NACJ filed an Amicus Brief on January 14, 2019. This Court ordered an answer to the Petition on January 17, 2019. The State

responds as follows.

STATEMENT OF FACTS

On February 11, 2018, Kenyon Tyler was found lying on the sidewalk with multiple gunshot wounds to the torso. I AP 036, 040. Tyler was transported to Sunrise Hospital and underwent emergency surgery; but he died of his wounds later that same night. I AP 036, 040. Follow-up investigation revealed Petitioner Deandre "Dre" Gathrite had shot Tyler after an argument. I AP 037, 040–45. Detectives' records check on Petitioner revealed a felony parole violation warrant that had issued out of the San Diego County Sherriff's Office in California. I AP 045. Thus, Las Vegas Metropolitan Police Department (LVMPD) Criminal Apprehension Team ("CAT") was tasked with finding Petitioner. I AP 045.

On February 16, 2018, CAT located and made contact with Petitioner at an apartment complex located at 2630 Wyandotte Street in Las Vegas, Clark County. I AP 045, 152–53. An LVMPD Event Log was generated at approximately 1:34 p.m., and Petitioner was arrested on the California warrant at approximately 2:40 p.m. I AP 059; III AP 655. Thus, as Detective Gerry Mauch explained to the grand jury, Petitioner was not in custody pursuant to the investigation of Tyler's murder but on the separate charge of the parole violation. I AP 152–53.

Homicide detectives subsequently arrived. I AP 063–134, 152–53. At about 3:45pm, Detectives Gerry Mauch and Jarrod Grimmett asked to speak with

Petitioner in an unmarked police vehicle. I AP 045, 152–54. Detectives also made a surreptitious recording of Petitioner's statement to them. I AP 064–134.

The transcript of Petitioner's statement reveals the following: Detective Grimmett informed Petitioner that he did not have to speak to police and that he was free to leave. I AP 105–06. Petitioner, well aware of how his parole violations worked, corrected Detective Grimmett and indicated he would be extradited back to California. I AP 112–13. In fact, Petitioner clarified he had been arrested on his California warrant before, "been back and forth" and "on the run" since 2014. I AP 78, 106. Petitioner explained that as a result of his arrest, he would likely be required to serve "90 days and then just come back and report," establishing his familiarity with the process of being arrested, held, and extradited on his warrant. I AP 78, 106

Less than a third of the way into the interview, Detective Grimmett reiterated that Petitioner was not required to speak with police and stated they appreciated Petitioner talking to them. I AP 085. In an effort to cultivate a rapport with Petitioner, Detective Grimmett advised Petitioner of what his rights would be pursuant Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). I AP 086. Without hesitation, Petitioner continued to speak with the detectives, stating, "It's just that the situation sucks so bad." I AP 086. He continued to detail what occurred on February 11, 2018: specifically, that Petitioner shot towards Tyler, the victim, in self-defense as he was running away. I AP 087–88. Later in the interview, the detectives inquired into the

whereabouts of the firearm. I AP 088. Petitioner told the detectives the firearm was inside the apartment "in the hallway under the AC thing" and indicated it was loaded. I AP 102.

When asked, Petitioner clarified that his girlfriend, Tia Kelly, resides at the apartment with their two (2) children but that Petitioner himself had only been there the past two (2) days. I AP 108. Detectives asked Petitioner for consent to retrieve the firearm from the apartment. I AP 110. Petitioner initially avoided the question and discussed his desire to see his girlfriend and child before he was taken away. I AP 112. When detectives asked again, this time more specifically, Petitioner indicated they had his consent to retrieve the firearm from the apartment's air vent. I AP 114.

Detective Philip DePalma, operating under the true belief that Petitioner had given police consent to retrieve the weapon, entered the apartment. I AP 162–63. He recovered an Amadeo Rossi 357 Magnum, with serial number F379181, from inside the hallway air conditioning vent where Petitioner said it would be. I AP 163. After detectives located this gun, they applied for and received a telephonic search warrant for the rest of the apartment and for Petitioner's DNA and cell phone. I AP 046. A records check revealed Petitioner is a four-time convicted felon with at least one felony conviction out of the Eighth Judicial District Court, Clark County, State of Nevada. I AP 046, 150.

ISSUE PRESENTED

Whether this Court's extraordinary intervention is warranted to reverse the district court's denial of Petitioner's Motion to Dismiss and Pretrial Writ.

STANDARD FOR EXTRAORDINARY RELIEF

This Court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981). This Court may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction. NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; see also Hickey, 105 Nev. at 731, 782 P.2d 1336, 1338 (1989). This Court has previously emphasized the "narrow circumstances" under which mandamus or prohibition are available and has cautioned that extraordinary remedies are not a means for routine correction of error. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070 (2005).

SUMMARY OF THE ARGUMENT

Petitioner asks this Court to exercise extraordinary intervention and reverse

the district court's denial of his Motion to Dismiss and Pretrial Writ.[1] Specifically, Petitioner alleges that the State improperly presented to the grand jury evidence that the justice court had previously suppressed, and that the district court should have dismissed the case based on these actions. Petition at 13–14. However, by statute, the only justice court-level ruling the State is obliged to reveal to the grand jury is a finding of lack of probable cause. Because there was no preliminary hearing, there was no such finding. Nevada law does not require a prosecutor to disclose the justice court's legal opinions to the grand jury. Nor does the law consider such legal opinions to be exculpatory evidence—or indeed, evidence, period. Petitioner has not alleged any prosecutorial misconduct that would have justified the district court in granting Petitioner's Motion to Dismiss or Pretrial Writ. Finally, Petitioner has not established that the district court erred in its finding that the underlying Motion to Suppress should not have been granted. Therefore, this Petition should be denied.

/ / /

/ / /

/ / /

[1] As Petitioner points out, though the district court's combined order indicates a denial of Petitioner's "Motion to Suppress Evidence, Motion to Dismiss for Prosecutorial Misconduct, and Petition for Writ of Habeas Corpus," Petitioner did not file a separate Motion to Suppress before the district court. Petition at 10; III AP 699–701. However, because the Motion to Dismiss and Pretrial Writ necessitated a finding on the suppression issue, the district court considered the issue during the evidentiary hearing and thus addressed it in the denial order. II AP 385–91.

ARGUMENT

I. THE STATE WAS NOT OBLIGED TO DISCLOSE TO THE GRAND JURY THE JUSTICE COURT'S LEGAL OPINION ON THE SUPPRESSION OF EVIDENCE

The State did not act improperly when it presented to the grand jury Petitioner's statement to police and the firearm found in his apartment. Petition at 13–14, 27–53. NRS 172.145 specifically lays out the only information the State must provide to the grand jury. Thus, what information from the justice court level the State must provide to the grand jury is a statutory matter; and the statute does not require the State to disclose to the grand jury the justice court's rulings beyond a finding of a lack of probable cause. Further, because the grand jury is governed by the district court—not the justice court—the justice court's legal opinion as to the suppression issue was not binding. That is, it did not preclude the State from presenting the case, including the evidence the justice court had suppressed, to the grand jury.

A. **The State did not violate NRS 172.145, as the justice court made no finding as to probable cause and evidentiary decisions made by the justice court do not fall within the statutory language.**

NRS 172.145 governs the presentation of certain required information to a grand jury. Petitioner contends the State violated NRS 172.145 by not advising the grand jury of the justice court's ruling on his Motion to Suppress. Petition at 27–54.

However, neither this statute nor any other authority requires to present the justice court's legal opinion to the grand jury.

Pursuant to NRS 172.145, the grand jury must hear only two specific things: a defendant's statement regarding a finding of lack of probable cause and any exculpatory evidence. The statute specifies, in relevant part:

> 1. The grand jury is not bound to hear evidence for the defendant, except that the *defendant is entitled to submit a statement which the grand jury must receive providing whether a preliminary hearing was held concerning the matter and, if so, that the evidence presented at the preliminary hearing was considered insufficient to warrant holding the defendant for trial*. It is their duty, however, to weigh all evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they shall order that evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.
> 2. 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.

NRS 172.145 (emphases added).

In this case, however, a preliminary hearing was never held; the State moved for voluntary dismissal before that point. II AP 289. The only determination the justice court made was that, based on what the court perceived as a constitutional violation, Petitioner's statement should be suppressed at the time of the preliminary hearing. I AP 004, 052, 054–55. Despite Petitioner's attempts to conclude that the State's other evidence would not have supported a finding of probable cause, the justice court never made such a finding; it did *not* rule that the evidence was insufficient to warrant holding the defendant for trial. Id.; Petition at 18–19. Thus,

despite Petitioner's allegation that the State "intentionally concealed" the contents of his letter detailing the suppression and other justice court-related issues, the State was not required by NRS 172.145(1)'s plain, unambiguous language to provide any of that information to the grand jury. Petition at 46–47.

Further, Petitioner has not argued that the justice court's determination is evidence that will explain away the charge. Indeed, a justice court's legal ruling on an evidentiary issue is not "evidence."[2] Sheriff v. Harrington, 108 Nev. 869, 871, 840 P.2d 588, 589 (1992). And a justice court's legal ruling does not "explain away" any charges because, as this Court has explicitly held, "it does not tend to negate [the defendant's] guilt."[3] Id. Thus, NRS 172.145 did not oblige the State to discuss the justice court's ruling with the grand jury.

---

[2] And thus Petitioner's argument that there is any "ambiguity" in the "exculpatory evidence" referred to in NRS 172.145(2)—specifically in whether it includes a justice court's evidentiary rulings—is utterly without merit. Petition at 53.

[3] Petitioner seems to allege that certain other evidence he alleges is exculpatory, including information about Tyler and Petitioner's alleged actions in self-defense, should have been provided to the grand jury. Petition at 20, 46–47. However, Petitioner does not offer any specific argument about those issues in this Petition. Thus, this Court should not consider them. NRAP 28; Maresca v. State, 103 Nev. 669, 672–73, 748 P.2d 3, 6 (1987) (holding that it is an appellant's responsibility to provide relevant authority and cogent argument, and when appellant fails to adequately brief the issue, it will not be addressed by this court); see also Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Even if this Court did consider that information, the State sought only an indictment on the charge of Ownership or Possession of Firearm By Prohibited Person. Any evidence regarding the murder is irrelevant to that charge, and certainly does not "explain away the charge." NRS 172.145(2).

B. **The justice court's evidentiary ruling did not prohibit the State from presenting this case to the grand jury in full**.

This Court has explicitly held that a legal ruling by the justice court, precluding certain evidence, does not render a subsequent grand jury presentation of that exact same evidence impermissible. Harrington, 108 Nev. at 869, 840 P.2d at 588. In Harrington, the defendant faced charges of felony driving under the influence ("DUI"). Id. at 870–71, 840 P.2d at 588. At the preliminary hearing, the justice court ruled the defendant's prior DUI convictions were constitutionally invalid, and therefore, the State had failed to prove a necessary element for the felony DUI charge. Id. The justice court then dismissed the case at the preliminary hearing. Id. at 870–71, 840 P.2d at 588–89.

Following the dismissal, the State presented the case—including the prior convictions the justice court had precluded—to the grand jury, which returned an indictment for the felony DUI charge. Id. The defendant filed a petition for writ of habeas corpus, arguing the State violated its duty to preset exculpatory evidence to the grand jury by failing to disclose the justice court had ruled the prior conviction constitutionally infirm. Id. The district court granted the petition, and the State appealed. Id. In ruling that the State did not violate its ethical obligations when presenting the prior convictions to the grand jury, this Court stated a legal ruling by a justice of the peace is "not evidence regarding the charge, but was rather an opinion on a legal issue." Id. at 871, 840 P.2d at 589.

Harrington is directly on point. The State did not violate NRS 172.145 by not advising the grand jury of the justice court's ruling because that ruling was not a finding on probable cause; it was "an opinion on a legal issue," and was not exculpatory evidence. Id.; NRS 172.145(1). Thus, there was no requirement for the State to share the justice court's ruling with the grand jury.

C. **Petition offers no other authority that the State was bound by the justice court's evidentiary decision**.

To get around the fact that no authority requires the State to disclose a justice court's legal opinion on evidentiary issues to the grand jury, Petitioner attempts to rely on a justice court's inherent authority to suppress evidence *at the time of preliminary hearing,* authority acknowledged in decisions such as Grace v. Eighth Judicial District Court, 132 Nev. __, 375 P.3d 1017 (2016). Petition at 27–39. But Petitioner's reliance on Grace and related authority to support his argument that the State was forever bound by the justice court's suppression of particular evidence is misplaced.

In Grace, at preliminary hearing, the defense moved to suppress narcotics found on the defendant's person at the time of the defendant's arrest because the State failed to call the officer who initially arrested her pursuant to a probation warrant. Id. at __, 375 P.3d at 1019–20. Instead, the State called only the officer who searched the defendant after the arresting officer had transferred custody of the defendant; the searching officer testified he had found the narcotics in defendant's

possession after conducting a search incident to arrest. Id. At preliminary hearing, the defense moved to suppress the narcotics, arguing the State had failed to establish a proper and valid arrest, and therefore, the search incident to arrest was invalid. Id. The justice court agreed and ordered the evidence suppressed and the case dismissed. Id. The State appealed the justice court's order, arguing the justice court was a court of limited jurisdiction, and therefore lacked the authority to rule on a motion to suppress at the time of the preliminary hearing. Id. The district court agreed and remanded the case back to the justice court for a preliminary hearing. Id.

On a writ of mandamus, this Court ruled justice courts have the limited and inherent authority to grant or deny motions to suppress because such motions are intrinsically tied to the statutory duties carried out by the justice courts: namely, to conduct preliminary hearings and determine probable cause. Id. at 51, P.3d at 1020–21. This Court reasoned that in the exercise of the statutory duties conferred upon the justice courts, the courts necessarily possessed inherent authority to adjudicate evidentiary matters at issue in the context of a preliminary hearing. Id. at 51, P.3d at 1020. In so ruling, this Court relied upon the statutory language in NRS 47.020 (rules of evidence apply at the time of a preliminary hearing) and NRS 48.025 (instructing that only relevant evidence is admissible). Id. Notably, this Court focused on the authority of a justice court to rule on suppression motions in the context of a preliminary hearing for the purpose of establishing probable cause, and cautioned

this inherent authority was limited in nature. Id. In fact, this Court further noted that specifically because NRS 47.020 did not mention preliminary hearings by name, the absence of such a delineated item meant the statute was intend to apply to that specific hearing. Id.

The Grace ruling is much more limited than Petitioner suggests. This Court specifically noted the justice court's authority to rule on motions to suppress is *only* derived from the inherent authority in its limited jurisdiction to conduct preliminary hearings. In so finding, this Court noted the limitations of the jurisdiction of the justice courts and found the jurisdiction is limited only insofar as it relates to their jurisdiction over preliminary hearings. Grace, 375 P.3d at 1018 ("Thus, the authority to even hear such motions is entirely related to, and tied solely to, the conduction of a preliminary hearing") (citing State v. Sargent, 122 Nev. 210, 128 P.3d 1052 (2006)).

The Grace decision did not abrogate Harrington or otherwise suggest that a justice court's legal opinions must be presented to the grand jury. 108 Nev. at 871, 840 P.2d at 589. It simply clarifies that at the time of a preliminary hearing, the justice court has the limited and inherent authority to hear motions to suppress in relation to the evidence presented at the preliminary hearing.

Neither Grace nor NRS 189.120 prohibits the State from circumvent the justice court's jurisdiction altogether—seeking an indictment through the grand jury

rather than an information through the justice courts. Petitioner argues that NRS 189.120 gives the State the option to appeal a justice court's suppression order to the district court—and, ostensibly, that such an appeal is the State's only recourse when the justice court suppresses evidence. Petition at 29. However, the statute explicitly lays out that through such an appeal, the State will challenge the justice court's suppression of evidence that will be presented *at the justice court level*. That is:

> 1. The State may appeal to the district court from an order of a justice court granting the motion of a defendant to suppress evidence.
>
> 2. Such an appeal shall be taken:
>
> (a) Within 2 days after the rendition of such an order during a trial or preliminary examination.
> (b) Within 5 days after the rendition of such an order before a trial or preliminary examination.

NRS 189.120. In other words, the statute indicates only that the State can challenge an order made by the justice court before or during a preliminary hearing—the justice court's domain—if the State wishes to present that evidence to the justice court. It does not, however, indicate that the justice court is the State's only avenue.[4]

[4] It must be noted that even if the State had elected that avenue in this case, Petitioner would still be here, complaining about the district court's admission of this very evidence. This is made clear by the fact that though this Petition challenges the district court's refusal to grant Petitioner's Motion to Dismiss and Pretrial Writ—which Petitioner alleges the district court should have decided without an independent decision on the suppression issue, Petition at 63–69—Petition still spends the last thirty pages of his Petition challenging the district court's own ruling on the suppression issue. Petitioner fails to recognize the dispositive nature of the district court's ruling on the suppression issue on this very Petition. Indeed, the

That the State has the discretion to present the evidence elsewhere has repeatedly made clear by this Court. As discussed *supra*, this Court has ruled a legal ruling by the justice court does not prevent the State from presenting to the grand jury the exact information the justice court has deemed inadmissible. See Harrington, 108 Nev. at 869, 840 P.2d at 588.

Moreover, Petitioner's position regarding the binding nature of the justice court's legal opinion on a motion is untenable in the nature of criminal proceedings generally and inconsistent with Nevada law. For example, during a preliminary hearing, the parties often object to testimony for a number of evidentiary reasons—hearsay, impermissible character evidence, lack of foundation—yet, the same testimony, questions, and even objections may be raised in a subsequent motion, or at the time of trial without argument that the justice court's evidentiary ruling was or is binding on the district court at the time of trial. Similarly, for motions to suppress that are denied by the justice courts, the defense is free to file the same exact motion with the trial court. This undermines Petitioner's arguments that a

---

district court's ruling demonstrates that even had the State elected to continue through the justice court by appealing the justice court's ruling on the Motion to Suppress to the district court via NRS 189.120, the result would have been exactly the same: the district court would have overturned the justice court's ruling because this evidence was not illegally obtained and should never have been suppressed. Petitioner's and NACJ's arguments that the State's exercising its discretion to go before the grand jury, rather than the court that incorrectly suppressed the evidence, was "reprehensible" because the evidence itself was "illegal" utterly ignore this fact. See, e.g., Amicus Brief at 11.

justice court's legal opinion on a motion to suppress is a "final judgment" pursuant to NRS 177.015. Petition at 30–31. Further, the plain language of NRS 189.120 does not provide that a determination of the justice court on a motion to suppress is mandatory, binding authority for the district court. Nor does the statute prohibit the district court from hearing the same motion.

Indeed, district courts have original jurisdiction to decide issues of admissibility at the time of trial, including ruling on motions to suppress. It is inconsistent to assume because a justice court, for example, denied a motion to suppress at the time of a preliminary hearing that the defense would be absolutely barred as perhaps law of the case, from raising the issue of suppression before the trial court. If it were the case that the district courts were inherently bound by the rulings of the justice court, NRS 172.145 would be superfluous, and the district court would be prohibited from re-addressing any issue raised on and ruled on at the justice court level—presumably including findings of probable cause, decisions of bail, objections at preliminary hearing, and the like.

In summary, Petitioner can point to nothing—not the justice court's limited jurisdiction, nor any case nor statute—that prevents the State from fully availing itself of the grand jury process and presenting all legal evidence, even when the justice court has offered a legal opinion on that same evidence.

/ / /

D. **Nevada statute, and this Court's discussion of the same, explicitly authorized the State to seek an indictment in this manner**.

Nevada law specifically provides that "the first pleading on the part of the state is the indictment *or* information." NRS 173.015 (emphasis added). This Court has clarified that Nevada law does not specify when or even *if* the State must choose one procedure over the other. See State v. Maes, 93 Nev. 49, 559 P.2d 1184 (1977). Indeed, the State may choose one or the other—and, it may seek an indictment even while an information is pending, or where a preliminary hearing has only partially taken place. Id. The Nevada legislature has given, and this Court has clarified and affirmed, the State's discretion in such matters.

This discretion has been in operation for decades and is precisely why Petitioner's arguments that the current legal process "ignores common sense and sets an unhealthy precedent," and indeed all of NACJ's arguments concerning the State's right to seek an indictment despite proceedings before the justice court, are misguided. Petition at 32; Amicus Brief at 2–22. Indeed, NACJ asks this Court to exceed its power and trample over legislative intent by placing "limitations… on how the State can proceed before a grand jury." Amicus Brief at 16. The very request demonstrates that there currently are no such limitations. Nevada statute, and this Court's precedent, demonstrate that such were never intended.

In Maes, the State charged the defendant with sexual assault by way of a criminal complaint. Id. at 50, 559 P.2d at 1184. A preliminary hearing was

scheduled, and prior to it, the defense argued certain elements and facts of the charged crime to the justice court, suggesting the State lacked probable cause and relied upon inadmissible evidence. Id. Specifically, defense counsel argued these infirmities would negate a finding of probable cause by the justice court at the time of the preliminary hearing. Id.

Following that argument, the State presented the case to the grand jury, which issued an indictment charging defendant with the same crimes. Id. The defendant filed a motion to dismiss the indictment, arguing the State had engaged in a "contemptible procedure" when the prosecutor ignored the arguments of defense counsel, implicitly recognizing the validity of the arguments and acknowledging the inadmissibility of the evidence, and instead, bypassed the preliminary hearing. Id. The district court agreed, dismissed the indictment, and ordered the case remanded to justice court for a preliminary hearing. Id.

In reviewing NRS 173.015 on appeal from the district court's dismissal, this Court held the State had not engaged in "contemptible procedure" by presenting the case to the grand jury. Id. at 51, 559 P.2d at 1185. It was the defense that chose to reveal its strategy in open court, suggesting preliminary hearing might result in a finding of no probable cause. Id. The State was not required to subject itself to that strategy, and was not required to pursue one process simply because it began first. Id. Rather, it was up to the State to elect how to proceed in charging a defendant,

even if it means the State pursues an indictment where it had first sought a preliminary hearing. Id.

Such an exercise of discretion "cannot be categorized as an abuse of the power vested in the prosecution." Id. "It can neither be categorized as 'conscious indifference to rules of procedure affecting a defendant's rights or the willful neglect thereof." Id. (citing State v. Austin, 87 Nev. 81, 83, 482 P.2d 284, 285 (1971); Maes v. Sheriff, 86 Nev. 317, 468 P.2d 332 (1970); Hill v. Sheriff, 85 Nev. 234, 452 P.2d 918 (1969)). Indeed, a defendant has "*no* vested right to a preliminary hearing." Id. (citing Moore v. Sheriff, 89 Nev. 288, 289, 511 P.2d 1046, 1046–47; Cairns v. Sheriff, 89 Nev. 113, 508 P.2d 1015 (1973)) (emphasis added). Thus, there is no right to disregard when the State's exercises its discretion to go before the grand jury rather than the justice court.

Petitioner and NACJ are arguing a case of sour grapes. This Court has already rejected all of Petitioner's "second bite at the apple," policy-based arguments and the allegations by NACJ that the State is "forum shopping" and "manipulating procedural rules" by using its discretion to proceed before the grand jury rather than the justice court. See, e.g., Petition at 36; Amicus Brief at 2. The Nevada legislature has specifically given the State this discretion, and this Court has clarified that that discretion extends even to proceeding before the grand jury when there is a suggestion that presenting the case to the justice court may result in a negative

outcome for the State. NRS 173.015; Maes, 93 Nev. at 51, 559 P.2d at 1185. And if State has proceeded in the justice court first, NRS 172.145 lays out only one thing the State must reveal to the grand jury: a finding of a lack of probable cause. Such did not apply here, because there was no preliminary hearing. Maes explicitly held that the State is not required to reveal any other "various infirmities in the case which may have precluded a finding of probable cause" to the grand jury. 93 Nev. at 51, 559 P.2d at 1185.

The State's discretion is very clearly laid out by the legislature and has been detailed by this Court. There is no "ambiguity" in this criminal statute, and nothing to interpret "in the accused's favor" per Petitioner's "Rule of Lenity" argument. Petition at 48–53; State v. Lucero, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011).

Therefore, the State was well within its discretion, and did not engage in prosecutorial misconduct simply because the prosecutor elected to voluntarily dismiss the justice court case—before preliminary hearing—and present the case to the grand jury. As with Maes, the State was well within its rights to proceed in charging Petitioner however it deemed appropriate in accordance with NRS 173.015. Further, once it got to the grand jury, the State did not engage in prosecutorial misconduct by presenting evidence that the justice court had suppressed. See Harrington, 108 Nev. at 869, 840 P.2d at 588. The justice court's ruling was a legal opinion regarding the evidence at the time of the preliminary hearing. Id. Petitioner's

argument that this was a binding decision on all future proceedings is inconsistent with the State's statutory authority to pursue indictment even in cases where the justice court *dismisses* the case for lack of probable cause. See NRS 172.145.

In summary, Petitioner's reliance on Grace, NRS 189.120, and related justice court authority for his argument that the State was forever bound by the justice court's legal decision on the Motion to Suppress, when no preliminary hearing occurred and when the State used its statutory discretion to instead proceed through the grand jury, is misplaced and ignores NRS 173.015 and Maes, which explicitly authorize the State to exercise discretion in this manner. The State properly presented the evidence in question to the grand jury and thereby obtained the Indictment against Petitioner.

II. BECAUSE THERE WAS NO PROSECUTORIAL MISCONDUCT, THE DISTRICT COURT PROPERLY DENIED PETITIONER'S MOTION TO DISMISS AND PRETRIAL WRIT

Petitioner has failed to establish that the district court erred in denying Petitioner's Motion to Dismiss and his Pretrial Writ. Petition at 14. As Petitioner admits, despite other issues in the Pretrial Writ that "are outside the scope of this Petition," Petitioner's Motion to Dismiss and Pretrial Writ primarily contended the State engaged in prosecutorial misconduct because it presented evidence the justice court had suppressed for preliminary hearing purposes. Petition at 54–63. However, as discussed above—and as the district court found below—"the State did not have

a legal obligation to inform the Grand Jury that the Justice Court had suppressed that evidence" and "the evidence was properly presented to the Grand Jury." III AP 701; see also Section I, *supra*. Thus, there was no prosecutorial misconduct—and thus, no grounds to grant the Motion to Dismiss or the Pretrial Writ.

In Nevada, prosecutorial misconduct involves a two-step analysis: 1) whether there was any misconduct and 2) if there was, whether a remedy is warranted. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). One such remedy may be the dismissal of an indictment. But this Court has continuously held "dismissal of an indictment on the basis of governmental misconduct is an extreme sanction which should be infrequently utilized." Sheriff v. Keeney, 106 Nev. 213, 216, 791 P.2d 55, 57 (1990) (quoting United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978)). To support an allegation of prosecutorial misconduct regarding a grand jury, there must be a finding that government misconduct "unfairly manipulated or invaded the independent province of the grand jury." Id. at 220. The dismissal of an indictment with prejudice is only "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.'" State v. Babayan, 106 Nev. 155, 171, 787 P.2d 805, 817 (1990) (citing United States v. Lawson, 502 F.Supp. 158, 169 (D.Md1980)).

In Babayan, the Court held that trial court did not abuse its discretion in dismissing indictments against defendant, as the prosecution failed to present clearly exculpatory evidence to grand jury, and therapists who gave expert testimony before grand jury did so with substantial conflicts of interest that were not brought to grand jurors' attention. Id. at 155, 787 P.2d at 805. However, this Court clarified that the trial court improperly dismissed indictments *with prejudice*:

> The district court also found that the prosecutorial misconduct directed towards respondent Babayan rose to a constitutional level as it violated his right to due process. Although we agree that portions of the prosecution's presentations before the grand jury were deficient and denied respondent Babayan due process of law, the denial of due process before the grand jury, in and of itself, does not mandate dismissal with prejudice. If it did, then every instance in which a prosecutor failed to present exculpatory evidence or was otherwise deficient in presenting the State's position, would require that indictment be dismissed with prejudice. Although errors occurred in this case, dismissal without prejudice will remedy the derelictions in the absence of an irremedial evidentiary taint or prejudice to the defendant's case on the merits.

Id. at 171, 787 P.2d at 817.

Thus, the first question before this Court in deciding whether its extraordinary intervention is warranted in reversing the district court's refusal to grant Petitioner's Motion to Dismiss (and the related Pretrial Writ) is whether the State engaged in misconduct at all. As discussed *supra*, Petitioner cites no authority supporting his argument that the State committed prosecutorial misconduct in presenting to the grand jury evidence the justice court had suppressed. See Section I. Indeed, as this

Court has explicitly held, the prosecutor does not act in a "contemptible" manner, nor is it indifferent to or neglectful of a defendant's rights, when it elects to proceed before the grand jury rather than before the justice court—even where proceedings before the justice court suggest that there may be weaknesses in the case. Maes, 93 Nev. at 51, 559 P.2d at 1185.

Petitioner also argues that the State's conduct here constituted misconduct in that it was tantamount to cases wherein prosecutors are repeatedly admonished or ordered by the trial court not to engage in certain conduct, yet continue to do so, or wherein a prosecutor knows a case is not supported by probable cause. Petition at 54–63. However, these arguments are also without merit.

Petitioner cites to McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984), and argues that the circumstances presented in McGuire mirror the State's presentation of evidence before the grand jury in this case. McGuire is acutely distinguishable, however. In McGuire, this Court felt it necessary given the three (3) pending appeals involving the same indiscretions committed by the same prosecutor during three (3) separate trials warranted a published opinion admonishing him of his misconduct. Id. at 154–56, 677 P.2d at 1062–63. The prosecutor in these trials attempted to elicit details of prior robbery convictions from the defendant, expressly told the jury they could consider the defendant's prior convictions as evidence of the instant crime, referred to the defendant as an "Aryan Warrior," argued to the jury about whether

the defendant was the "type" of person they should let out on the streets, commented on the defendant's invocation of his right to remain silent, made disparaging comments about defense counsel's ability as an attorney to the jury, referred to the cost of taxpayer dollars to bring in certain witnesses, argued the jury should consider their own daughters in determining the guilt of a defendant facing rape charges, told the jury if they found the defendant not guilty he never wanted to "hear [them] complain," and argued to the jury he would not present a case if the defendant was not truly guilty. Id. at 156–59, 677 P.2d at 1063–65. In both cases, the trial judge admonished the prosecutor at the time of trial; however, the prosecutor continued to engage in misconduct. Id.

McGuire is an inapposite comparison to the instant case. The trial court's order, as discussed *supra*, was a legal opinion regarding what could be presented at the preliminary hearing, and was not an order admonishing the prosecutor at the time of trial. Here, the parties were not before a jury at the time of trial, and unlike the State exercising its discretion to go before the grand jury, the actions of the prosecutor in McGuire were specifically prohibited by statute, had previously been addressed to the prosecutor in prior cases, and prohibited by previous, multiple decisions by this Court. In this case, there is no statute or case law prohibiting the State from seeking an indictment following a legal opinion of the justice court, and in fact, as argued *supra*, the State is not prohibited from presenting to the grand jury

evidence irrespective of a legal opinion from the justice court. See Harrington, 108 Nev. at 871, 840 P.2d at 589. This case is not a case of blatant, rampant misconduct on part of the State or a willful and deliberate disregard for court orders. As such, it does not constitute prosecutorial misconduct, and cannot warrant dismissal of the Indictment.

Further, the justice court's evidentiary determination did not create some kind of ethical bind on the prosecutor. Petition at 58. Though Nevada Rule of Professional Conduct Rule 3.8 does require that a prosecutor "refrain from a charge that the prosecutor knows is not supported by probable cause," as discussed *supra*, the Nevada legislature has also given prosecutors the discretion to seek that probable cause determination either at preliminary hearing or before the grand jury. NRPC 3.8; NRS 173.015. And this Court has not found that a prosecutor anticipating issues in the justice court and electing to proceed before the grand jury, instead, violates ethical duties. Maes, 93 Nev. at 51, 559 P.2d at 1185. Indeed, it is clear that the prosecutor believed that despite the justice court's legal opinion, there was probable cause; and it is clear that this belief was well-supported, given the district court's refusal to suppress the evidence. III AP 699–701. Thus, Petitioner's alleged ethical issues do not constitute prosecutorial misconduct, and cannot warrant dismissal of the Indictment.

For all these reasons, Petitioner's assertion that his Motion to Dismiss and Pretrial Writ should have been granted, and that the Indictment should have been dismissed on the basis of prosecutorial misconduct, is without merit. As such, the Petition should be denied.

III. THE DISTRICT COURT DID NOT ERR IN MAKING ITS OWN RULING ON THE SUPPRESSION ISSUE AND IN FINDING THAT THE JUSTICE COURT INCORRECTLY SUPPRESSED EVIDENCE

Petitioner addresses the issue of his statement's admissibility independently. Petition at 63–97. Thus, to the extent this Court considers the issue and does not simply deny this Petition on the basis that the district court properly denied the Motion to Dismiss and the Pretrial Writ, the State responds as follows.

A. **The district court properly addressed the suppression issue**.

Petitioner beings by challenging the district court's ability to decide the suppression issue at all. Petition at 63–69. However, the district court could not have decided Petitioner's Motion to Dismiss or his Pretrial Writ without inquiring into the suppression issue. It is clear that, for all the reasons argued in Sections I and II, *supra*, the State is not bound by the justice court's evidentiary rulings when it elects to go before the grand jury. However, the State *is* bound by the district court's evidentiary rulings—demonstrated by the district courts' power to review and potentially dismiss an indictment for lack of probable cause. See, e.g., NRS 34.710. In addition to the so-called "prosecutorial misconduct" arguments, Petitioner's

Pretrial Writ challenged probable cause: that is, the legal sufficiency of the evidence presented to the grand jury, which included Petitioner's statement to police and the firearm recovered in the apartment.[5] I AP 021–27. Thus, the district court could only have examined probable cause by examining the evidence itself and determining whether it was illegally obtained.

Petitioner also fails to establish that the district court exceeded its authority in ordering an evidentiary hearing regarding Petitioner's Motion to Dismiss and Pretrial Writ. Petition at 63–69. As Petitioner himself admits, this Court denied his Petition for a Writ of Prohibition "asking this Court to prevent the district court's order for an evidentiary hearing." See Order Denying Petition for Writ of Prohibition, Nevada Supreme Court Case No. 77081. Further, Petitioner cites only civil cases and rules that concern "motion[s] once heard and disposed of" not being "renewed in the same cause." Petition at 68–69; Eighth Judicial District Court Rule ("EDCR") 13. First, these rules concern motions for reconsideration by the same court—not the district court independently considering issues that the justice court may have at one time entertained but which do not bind the district court, particularly given the district court's independent function of reviewing the probable cause

[5] Again, Petitioner discussed other allegedly illegal evidence in his Pretrial Writ. I AP 029–33. However, because Petitioner makes no arguments about them in this Petition, this Court should not address them. See, e.g., Maresca, 103 Nev. at 672–73, 748 P.2d at 6.

determinations of the grand jury. See, e.g., NRS 34.710. Second, the district court proceedings on which the district court ordered the evidentiary hearing were not part of the "same cause" as the justice court case that had been voluntarily dismissed. II AP 289. Thus, there was no bar to an evidentiary hearing.

B. **The district court properly decided the suppression issue**.

"Suppression issues present mixed questions of law and fact. While this court reviews the legal questions de novo, it reviews the district court's factual determinations for sufficient evidence." 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, there was sufficient evidence supporting the district court's rationale for not suppressing the evidence. ." Johnson, 118 Nev. at 794, 59 P.3d at 455. That is, that Petitioner's statements were not made in a custodial interview; they were voluntary and should not have been suppressed by the justice court. In full, the district court's ruling was:

> THE COURT FINDS, based on the testimony presented at the evidentiary hearing, that Defendant gave valid consent for the police to search 2630 Wyandotte Street, Apartment #1 for the firearm. Detective Grimmett read Defendant the consent to search card, and although Defendant did not sign the card, he gave verbal consent. However, the issue of consent is irrelevant in this case. If a person has neither asserted a property nor possessory interest in the thing searched, or has not asserted an interest in the property seized, they are not entitled to challenge the search of those areas. Rakas v. Illinois, 439 U.S. 128, 130 n.1, 99 S. Ct. 421 (1978). See also Lewis

v. Dist. Ct., 125 Nev. 1056, 281 P.3d 1195 (2009) (Unpub.) and Walsh v. Dzurenda, 2018 Nev. App. Unpub. LEXIS 538. Defendant admits that he had no possessory interest in the apartment searched, as counsel acknowledged that he did not live there with the lessee and mother of his child, Tia Kelly. Thus, Defendant had no expectation of privacy in that area and no standing to challenge the search in this case.

THE COURT FURTHER FINDS, based on the testimony presented at the evidentiary hearing, that at best the mention of an attorney during Defendant's voluntary statement was equivocal. The case law is clear that the invocation of the right to counsel must be unequivocal. Moreover, Defendant was not in custody on these charges when Defendant gave his voluntary statement. As in the analogous case of Howes v. Fields, 56[5] U.S. 499, 509 (2012), Defendant was taken away from the CAT Detectives who had control over him on another unrelated matter and to Homicide Detectives who wished to talk to him about this matter, was allowed to be unrestrained with handcuffs removed, was told several times that he was free to leave, was not threatened, and was made comfortable by the questioning detectives—in this case, including an offer of cigarettes. Based on the totality of the circumstances surrounding Defendant's interview, THE COURT FINDS that a reasonable person would have thought that they were free to stop the questioning. Defendant was not arrested on anything related to what they were interviewing him about. Therefore, as this was not a custodial interrogation, Defendant was not entitled to invoke the constitutional right to counsel. Howes v. Fields, 56[5] U.S. 499, 509 (2012); State v. Lanning, 109 Nev. 1198, 1200, 866 P.2d 272, 273 (1993). Even if Defendant had made an unequivocal request for counsel, which he did not, it would have had no effect on the police questioning. Police were not obliged to give Defendant a Miranda warning as this was a noncustodial interview; therefore, they were not obliged to cease questions upon a request for counsel.

THE COURT FURTHER FINDS that Defendant's voluntary statement to detectives should not have been suppressed before the Justice Court, the State did not have a legal obligation to inform the Grand Jury that the Justice Court had suppressed that evidence, the alleged violation of Marcum is moot, and the evidence was properly presented to the Grand Jury. The finding of probable cause to support

> a criminal charge may be based on "slight, even 'marginal' evidence...because it does not involve a determination of the guilt or innocence of an accused." Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). As the evidence should not be suppressed, it was legal evidence, and the State met its burden of slight or marginal evidence to sustain a finding of probable cause.

III AP 699–701.

Petitioner has not rebutted the fact that he has no standing to challenge the search of an apartment that was not his. Rakas, 439 U.S. at 130 n.1, 99 S. Ct. at 424. It is true that physical evidence may be excluded when it is the product of an interview that violates Miranda. U.S. v. Patane, 542 U.S. 630, 124 S.Ct. 2620 (2004). However, Defendant's statement did not implicate Miranda. See Section III(C), *infra*. Thus, any evidence seized as a result of that statement are not "fruit of the poisonous tree." Further, as the district court correctly ruled in citing Rakas, "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." Id. And "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has *not* had any of his Fourth Amendment rights infringed." Id. at 134, 99 S. Ct. at 425 (emphasis added). "Overnight guests" may have Fourth Amendment rights in a home and "can challenge a search." Johnson, 118 Nev. at 794, 59 P.3d at 455. However, consent to search is a waiver of Fourth Amendment rights. See, e.g., Casteel v. State, 122 Nev. 356, 359, 131 P.3d 1, 3 (2006).

Here, Petitioner wants it both ways. He admits that he did not have the authority to consent to a search because he had no possessory interest in the apartment searched. Petition at 89–97. Yet, he also claims that he had Fourth Amendment privacy rights in the home because he was an overnight guest. Petition at 92–96. What Petitioner fails to realize is that if he asserts lack of authority to consent to search the apartment, that lack of authority also means that Petitioner had no Fourth Amendment rights in the apartment to waive. Thus, either Petitioner has no Fourth Amendment privacy rights in the apartment because he had no possessory interest in it and thus no standing to challenge the firearms' seizure and its admissibility as evidence—or, he waived the Fourth Amendment privacy rights he gained as a result of being an overnight guest in the apartment by giving detectives his consent to search it. And there was sufficient evidence that the former factual situation provides the correct analysis—particularly given Petitioner's admission in this Petition that he did not have possessory interest in the apartment. Id.; Johnson, 118 Nev. at 794, 59 P.3d at 455. In other words, as the district court found, Petitioner does not have standing to challenge the search, the firearm itself was lawfully seized, and the justice court should never have suppressed it.

Neither has Petitioner rebutted the district court's factual finding that he was not in custody on the relevant charges—and thus, that his statements to police were made in a noncustodial interview wherein he was not entitled to be read Miranda

rights. Fields, 56 U.S. at 509. The State reiterates the arguments it made before the district court regarding these latter points.

C. **Defendant was not in custody on the relevant charges and so was not entitled to *Miranda* rights**.

Miranda rights are required to be given to a defendant before a custodial interrogation. Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817–18 (1998), overruled on other grounds by Sharma v. State, 118 Nev. Adv. Op. No. 69 (October 31, 2002). Custody has been defined as a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996) (citing California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983)). When determining whether a person who has not been arrested is "in custody," the test "'is how a reasonable man in the suspect's position would have understood his situation.'" Id. (citing Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151–52 (1984)).

"The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official." Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394 (1990). The United States Supreme Court has "reject[ed] the argument that Miranda warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent." Id. at 297, 110 S.Ct. at 2397.

Whether a suspect is "in custody" is an objective inquiry. J. D. B. v. North Carolina, 564 U.S. 261, 270, 131 S.Ct. 2394, 2402 (2011). Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Id. "Custody" is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. Id. at 508–09. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of "the objective circumstances of the interrogation," Stansbury v. California, 511 U.S. 318, 322–23 (1994), a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995). And in order to determine how a suspect would have "gauge[d]" his "freedom of movement," courts must examine "all of the circumstances surrounding the interrogation." Howes v. Fields, 565 U.S. 499, 509, 132 S.Ct. 1181, 1189 (2012).

Miranda adopted a "set of prophylactic measures" designed to ward off the "'inherently compelling pressures' of custodial interrogation." Maryland v. Shatzer, 559 U.S. 98, 103, 130 S.Ct. 1213, 1217 (quoting Miranda, 384 U.S., at 467). But Miranda did not hold that such pressures are always present when a prisoner is taken aside and questioned about events outside the prison walls. Indeed, Miranda did not even establish that police questioning of a suspect at the

station house is always custodial. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1977) (declining to find that Miranda warnings are required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect"); see also Fields, 565 U.S. at 507–08, 132 S.Ct. at 1189.

A prisoner is not always considered "in custody" for purposes of Miranda whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison. Fields, 565 U.S. at 508, 132 S.Ct. at 1189.

> The three elements of that rule—(1) imprisonment, (2) questioning in private, and (3) questioning about events in the outside world—are not necessarily enough to create a custodial situation for Miranda purposes.
>
> . . .
>
> A prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release. When a person is arrested and taken to a station house for interrogation, the person who is questioned may be pressured to speak by the hope that, after doing so, he will be allowed to leave and go home. On the other hand, when a prisoner is questioned, he knows that when the questioning ceases, he will remain under confinement. Shatzer, 559 U.S., 130 S.Ct. at 1224–25, n. 8.
>
> [A] prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence. And "where the possibility of parole exists," the interrogating officers probably also lack the power to bring about an early release. Id. "When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners." Perkins,

> 496 U.S., at 297, 110 S.Ct. at 2394. Under such circumstances, there is little "basis for the assumption that a suspect . . . will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of [a] more lenient treatment should he confess." Id. at 296–97, 110 S.Ct. at 2394.

Id. at 511, 132 S.Ct. at 1189.

In Fields, the defendant was a prisoner escorted from his prison cell into a conference room by a corrections officer. Id. at 502, 132 S.Ct. at 1185. Once inside, Defendant was questioned between five to seven hours by two sheriff's deputies regarding allegations of sexual conduct with a 12-year-old boy that pre-existed his prison sentence. Id. at 502–03, 132 S.Ct. at 1185–86. Sheriffs told the defendant he was free to leave and return to his cell and the conference room door sometimes remained open and other times shut. Id. at 503, 132 S.Ct. at 1186. During the interview, the defendant became upset and stood up, shouting expletives. Id. Sheriffs told the defendant to sit down and that he could go back to his cell if he did not want to cooperate. Id. The defendant eventually confessed to the sexual abuse. Id. The defendant even repeatedly indicated he did not wish to speak to detectives anymore but did not request to leave. Id. When the interview was over, the defendant was delayed in his transport back to his cell and did not return until well after the hours he typically retired. Id. at 503–04, 132 S.Ct. at 1186. At no point during the defendant's entire interaction with sheriffs was he Mirandized. Id. at 504, 132 S.Ct.

at 1186. The defendant was later charged with criminal sexual conduct and sought to suppress his confession based on a Miranda violation. Id.

This Court determined that the defendant was not in custody for purposes of Miranda. Id. at 514, 132 S.Ct. at 1192. The court weighed the totality of the circumstances in making this determination:

> …Respondent did not invite the interview or consent to it in advance, and he was not advised that he was free to decline to speak with the deputies. The following facts also lend some support to respondent's argument that Miranda's custody requirement was met: The interview lasted for between five and seven hours in the evening and continued well past the hour when respondent generally went to bed; the deputies who questioned respondent were armed; and one of the deputies, according to respondent, "[u]sed a very sharp tone,", and, on one occasion, profanity.
>
> These circumstances, however, were offset by others. Most important, respondent was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted. ("I was told I could get up and leave whenever I wanted"). Moreover, respondent was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was "not uncomfortable." He was offered food and water, and the door to the conference room was sometimes left open. "All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave." Yarborough, 541 U.S., at 664–665.
>
> Because he was in prison, respondent was not free to leave the conference room by himself and to make his own way through the facility to his cell. Instead, he was escorted to the conference room and, when he ultimately decided to end the interview, he had to wait about 20 minutes for a corrections officer to arrive and escort him to his cell. But he would have been subject to this same restraint even if he had been taken to the conference room for some reason other than

> police questioning; under no circumstances could he have reasonably expected to be able to roam free. And while respondent testified that he "was told . . . if I did not want to cooperate, I needed to go back to my cell," these words did not coerce cooperation by threatening harsher conditions. ("I was told, if I didn't want to cooperate, I could leave"). Returning to his cell would merely have returned him to his usual environment.

Id. at 515–16, 132 S.Ct. at 1193–94.

One defendant sought to suppress statements made during a meeting with his probation officer on an unrelated charge. Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136 (1984). The United States Supreme Court held that "custody" for Miranda purposes has been narrowly circumscribed. Id. at 430, 104 S.Ct. at 1143–44. The Court reasoned that the extraordinary safeguard of Miranda warnings do not apply outside the context of the inherently coercive custodial interrogations for which it was designed. Id. The Court found the defendant's situation was not unlike suspects in noncustodial settings:

> …the nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality. Moreover, the probation officer's letter, which suggested a need to discuss treatment from which Murphy had already been excused, would have led a reasonable probationer to conclude that new information had come to her attention. In any event, Murphy's situation was in this regard indistinguishable from that facing suspects who are questioned in noncustodial settings and grand jury witnesses who are unaware of the scope of an investigation or that they are considered potential defendants.

Id. at 432, 104 S.Ct. at 1145.

Another defendant tested positive for drugs while on parole. Junior v. State, 107 Nev. 72, 807 P.2d 205 (1991). After the defendant absconded, a warrant was issued for his arrest, and he was subsequently arrested and charged with three counts of being under the influence of a controlled substance. Id. at 74, 807 P.2d at 206. The defendant asserted the parole officer should be required to have Mirandized him prior to his submission of the drug test. Id. This Court held there was no relevant authority for the proposition that evidence of an independent felony offense obtained by a parole officer in his official capacity could not be used in a subsequent prosecution for the offense. Id. at 74–75, 807 P.2d at 207.

Another defendant argued that his non-Mirandized statements made while being interviewed by Nevada detectives in the office of his California Parole Officer should be suppressed. Holmes v. State, 129 Nev. 567, 306 P.3d 415 (2013). This Court held that Miranda warnings were not required since the interrogation was not custodial. Id. 579, 306 P.3d at 423.

The United States Supreme Court has also held that a parolee who voluntarily came to a police station at the request of a police officer, who was immediately informed that he was not under arrest, who was thereafter questioned about a burglary, who confessed to the burglary after the questioning officer falsely stated that the parolee's fingerprints were found at the scene of the burglary, and who left the police station without hindrance at the close of his one-half hour interview, was

not in custody or otherwise deprived of his freedom of action in any significant way for purposes of the requirement that an individual must be in custody or deprived of his freedom before police must give Miranda warnings. Mathiason, 429 U.S. at 492, 97 S.Ct. at 71150. The Court held that the questioning officer's false statement about the parolee's fingerprints has nothing to do with whether he was in custody for purposes of Miranda warnings. Id. Additionally, despite the police officer advising the parolee of his Miranda rights after he had confessed, the court held that the parolee's confession did not have to be excluded in his prosecution for burglary on the ground that it was not preceded by Miranda warnings. Id.

Here, Petitioner was in custody only for the California warrant when detectives questioned him about Tyler's murder and the firearm. Petitioner's argument relies entirely on the fact that Petitioner was "in custody in a technical sense." Perkins, 496 U.S. at 297, 110 S.Ct. at 2397. But the circumstances surrounding the Petitioner's arrest clearly establish he was not "in custody" for purposes of triggering Miranda warnings in the instant case.

The district court found that Petitioner's case was "analogous" to Fields. III AP 699–701. Again, the district court discussed the facts:

> Defendant was taken away from the CAT Detectives who had control over him on another unrelated matter and to Homicide Detectives who wished to talk to him about this matter, was allowed to be unrestrained with handcuffs removed, was told several times that he was free to leave, was not threatened, and was made comfortable by the questioning detectives—in this case, including an offer of cigarettes.

> Based on the totality of the circumstances surrounding Defendant's interview, THE COURT FINDS that a reasonable person would have thought that they were free to stop the questioning. Defendant was not arrested on anything related to what they were interviewing him about.

III AP 699–701.

A review of the record confirms that there was sufficient evidence for the district court's factual finding that Petitioner was not in custody on the instant case. Johnson, 118 Nev. at 794, 59 P.3d at 455. On February 14, 2018, a Sheriff's Warrant for Petitioner's arrest was issued out of San Diego County, California for Petitioner's felony conviction for a weapons offense. I AP 045; III AP 655–59, 677. Petitioner was on parole for the offense and the warrant authorized Petitioner be extradited back to California. III AP 655–59. On February 16, 2018, Petitioner was located by LVMPD CAT and arrested. I AP 045; III AP 655. When Petitioner was arrested on the warrant, he had no Nevada charges pending. III AP 657. In fact, after Petitioner was questioned and the firearm was recovered, the Defendant was not arrested on either the Murder or Possession of Firearm by Prohibited Person charge. Instead, Petitioner was transported to the Clark County Detention Center ("CCDC") exclusively on his California warrant. III AP 655. Five days later, on February 21, 2018, California lifted the hold and Petitioner was released from CCDC. I AP 047. LVMPD Detectives did not obtain the Petitioner's arrest warrant for the murder or firearm charge until February 26, 2018, after additional witnesses were interviewed.

I AP 046; III AP 670. The LVMPD CAT team located Petitioner on that day and arrested Petitioner on the murder and possession of firearm charges. III AP 670.

As an initial matter, Petitioner offers absolutely no factual support for the proposition that the California warrant was a "pretense to get Petitioner into custody" on the murder case. Petition at 79–81. Indeed, the fact that Petitioner was arrested on the California warrant, released on it five (5) days later, and then not arrested on the murder charge until five (5) days after that—*after* further investigation, including other witness interviews—undermines Petitioner's unsupported assertion. I AP 046; III AP 670. Further, and quite tellingly, Petitioner can offer no authority supporting an argument that even if the California warrant were a "pretense," it was still a legal warrant, and it still meant Petitioner was legally in custody on a matter separate from the murder investigation.

Petitioner was not in custody on this matter when he made his statement to police. Similar to Fields, where sheriffs questioned the defendant while he was serving a prison sentence for a separate offense, detectives here spoke to Petitioner while he was in custody on his California parole violation. Just as in Fields, Petitioner was in custody on another matter—his California felony warrant—which had no bearing on the current investigation. Also similar to Fields, detectives had no influence on Petitioner's California sentence or extradition. LVMPD detectives' questioning had no impact on Petitioner's restraint, since he was going to remain in

custody on his California warrant independent of whether detectives questioned him on an unrelated event or not. That is, like the Fields defendant, Petitioner knew "that when the questioning cease[d], he [would] remain under confinement." Id. at 511, 132 S.Ct. at 1189. Petitioner even corrected the detectives when they suggested he was free to leave. I AP 112–13. At no point throughout questioning did detectives make any promises or insinuations regarding the impact of Petitioner's California warrant or sentence.

Furthermore, the objective circumstances surrounding Petitioner's questioning clearly establishes his freedom of movement did not trigger Miranda. Once detectives made contact with Petitioner, his handcuffs were removed, he was permitted to smoke outside of the patrol car, he was given the opportunity to hug his child, and was repeatedly told that he could "leave at any time" and was a "free man." I AP 085. Petitioner insinuates that his freedom to leave was compromised because detectives told Petitioner "that he needed to remain with the detectives and that someone else would get cigarettes for him." Petition at 77. First, this misconstrues the record. Petitioner never asked to leave the police car or to get his own cigarettes and detectives never told him he had to remain with them; Petitioner only asked if he could smoke. The exchange was as follows:

> **A**: Can - can I smoke a cigarette? I'm just...
> **Q**: You got a cigarette?
> **A**: I do. My pack is on the counter in there. I...
> **Q**: Uh...

> **Q1**: Hey, you care if you have an old one? I got some old ones there if that's okay. You just wanna step out?
> **A**: Uh, yeah. I had just...
> **Q**: I'll text my boy and have him go - I'll text him to have - you said it's on the kitchen counter? All right.
> **A**: Yeah. They're Newport (unintelligible).

I AP 073–74. Further, even if Petitioner had been explicitly told to stay with detectives—which he was not—the situation is exactly analogous to Fields, wherein "respondent was not free to leave the conference room by himself and to make his own way through the facility to his cell. Instead, he was escorted to the conference room and, when he ultimately decided to end the interview, he had to wait about 20 minutes for a corrections officer to arrive and escort him to his cell." 565 U.S. at 515–16, 132 S.Ct. at 1193–94. Petitioner, too, was "not free to leave" the police car by himself because he was in custody on the California warrant; he, too, would have needed an "escort" to the CAT team. Id.

Similar to Fields, where police told the defendant he could leave and return to his cell, Petitioner could have refused to speak to police and simply awaited transport to jail on his warrant. Instead, Petitioner spoke with detectives, smoked a cigarette, and never expressed any desire to end questioning.

Moreover, the circumstances here were far less coercive than those in Fields, where the court nonetheless found Petitioner was not in custody for purposes of triggering Miranda. In Fields, the interview lasted between five (5) to seven (7) hours and continued well into the night. 565 U.S. at 515–16, 132 S.Ct. at 1193–94. At one

point during questioning, the defendant became upset and stood up from his seat as if to leave. Id. Police used a sharp tone and even cursed throughout the interview. Id. And most notably, at no point did police advise the defendant of his Miranda rights. Id. Here, however, the Petitioner was interviewed in the afternoon for less than three (3) hours. I AP 064–134. The conversation never turned hostile. I AP 064–134. Defendant never indicated he wanted to terminate the conversation. I AP 064–134. And, Petitioner was advised of his Miranda rights approximately twenty-five (25) minutes into questioning. I AP 086.

Finally, Petitioner was fully aware of the circumstances of his arrest and what to anticipate as a result. I AP 105–06, 112–13. Petitioner repeatedly educated detectives on his California case: specifically, that he had been "on the run" since 2014 due to his California probation violations. I AP 105–06, 112–13. Petitioner explained the process of being extradited to California on a warrant, where he would serve minimal time in custody before being released. I AP 105–06, 112–13. Petitioner even explained to detectives he would definitely be extradited:

> **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'...
> **Q**: You have a warrant?
> **A**: Yeah. In Cali.
> **Q**: Will they extradite them? You sure?
> **A**: Yes. Mmm.
> **Q**: I don't know about that at this point. I mean...

> **A**: That's why I don't - that's why I'm saying I - I know I'm not goin' - 'cause I - it's a lot going on now.

I AP 112–13.

Petitioner's knowledge of his extradition process stemmed not only from his California warrant but his extensive criminal history, which includes multiple felony arrests and convictions dating back over the course of ten (10) years. III AA 676–78. Petitioner's familiarity with the system only further substantiates his proficiency with the criminal justice system, including his rights when speaking to law enforcement.

Therefore, when looking at the totality of the circumstances and the supporting case law, it is evident Petitioner was not in custody for purposes of triggering Miranda when speaking with detectives about Tyler's murder and Petitioner's firearm. Thus, any Miranda advisement at the time of the questioning was elective and not required pursuant to the Fifth Amendment.

In summary, the district court correctly found that because Petitioner was not in custody on the underlying offense when he made his statement to police, there was no requirement that he be read Miranda rights. III AP 699–701. His statement was noncustodial and voluntary, and the justice court should not have suppressed it. Thus, to the extent it challenges the district court's independent ruling on the suppression issue, this Petition should be denied.

/ / /

CONCLUSION

Based on the foregoing, the State respectfully requests that the Petition for Writ of Prohibition and Mandamus be DENIED.

Dated this 30th day of January, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney

AFFIDAVIT

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information and belief.

Dated this 30th day of January, 2019.

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 30, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

ADRIAN M. LOBO
Counsel for Petitioner

SARAH K. HAWKINS
Nevada Attorneys for Criminal Justice

STEVEN S. OWENS
Chief Deputy 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
Eighth Judicial District Court, Dept. III
Regional Justice Center, 16th Fl.
200 Lewis Avenue
Las Vegas, Nevada 89101

BY */s/ J. Garcia*
Employee, District Attorney's Office

SSO/Andrea Orwoll/jg