IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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,

Respondents,

and

THE STATE OF NEVADA,

Real Party In Interest.

Docket No. 77529

District Court No. C-18-334135-1

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

COMES NOW, the Petitioner DEANDRE GATHRITE aka DEANDRE TERELLE GATHRITE, by and through his counsel of record Adrian M. Lobo, Esq. of Lobo Law, and hereby files this Reply in Support of Petition for Writ of Prohibition and Mandamus Directing the Honorable Douglas Herndon to Dismiss

the Case Against Petitioner. This Reply is based on the points and authorities referenced herein, as well as the pleadings and papers on file with the Court.

DATED this 19th day of February, 2019.

By: __/s/ Adrian M. Lobo_____

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ARGUMENT

Throughout the State's Answer, it ignores the one salient question upon which this whole controversy rests: why did it proceed to the grand jury? No answer is forthcoming, but it is clear that the State was seeking a procedural advantage in doing so, and forum shopping for a more favorable forum than the Justice Court's fatal (to the State's case) ruling that suppressed the State's evidentiary universe.

1. *The State's foremost obligation at the grand jury is to present* legal *evidence*

The State frames its argument in response on the theory that it is only obligated to inform the grand jury as to a determination made following a preliminary hearing. *St.'s Ans. Brief* at 11 (relying on NRS 172.145). The State is ignoring the most basic duty, found under NRS 172.135(2) (in relevant part): [T]he grand jury can receive none but legal evidence…" As argued in the Petition, the justice court's ruling so ruled the State's evidence illegally obtained.

The case of *Grace v. Eighth Judicial Dist. Court of Nev.*, 375 P.3d 1017, 132 Nev. Adv. Op. 51 (Nev. 2016) made it abundantly clear that any justice court could exercise its authority during preliminary proceedings "to suppress *illegally* obtained evidence during preliminary hearings." 375 P.3d at 1018. A judge so empowered to consider the *legality* of evidence, and rendering a ruling that such evidence was

illegally obtained, renders that evidence inadmissible in a later grand jury proceeding, lest the justice court's inherent authority be rendered wholly nugatory.

Thus NRS 172.135(2)'s purpose is a gatekeeping function- evidence for presentation to a grand jury must initially be legal evidence, otherwise it is violative from the outset. The State would rather move further into the proceedings, where it has already presented such evidence, and cloak itself in the "protection" of NRS 172.145(1) by claiming it has no obligation to present the justice court's finding. This is also incorrect.

Specifically, NRS 172.145(1) states, in relevant part, that "It is their duty [of the grand jury] 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…" Furthermore, NRS 172.145(2) states that "If the district attorney is aware of any evidence which will explain away the charge, the district attorney shall submit it to the grand jury."

This is not discretionary; the district attorney is required ("shall") to submit such evidence. The State is apparently aware of this obligation, but is now, for the purposes of preserving its case against Deandre Gathrite, arguing that a court's order *suppressing the same evidence presented to the grand jury* is somehow not relevant to the proceedings. The State's argument is that the justice court's order suppressing Deandre Gathrite's statement was not an order at all, but rather a "legal opinion."

St.'s Ans. at 10 ("Nevada law does not require a prosecutor to disclose the justice court's legal opinions to the grand jury.").

This position appears to argue that justice court magistrates are seated as mere opiners on the law, and that any determination, short of a completed preliminary hearing, is mere legal theatre. This of course is an unsupportable position; the legislature has not allowed for the creation of justice courts merely to empanel jurists to render legal opinions on proceedings. This was acknowledged in the *Grace* case, *supra*, wherein the Nevada Supreme Court recognized a justice court's *authority* to suppress illegally obtained evidence- not merely that the justice court's sitting judge is there only to provide opinions but has the ability to consider suppression issues and render a definitive ruling on them. If the State can simply disregard the justice court's ruling, as it has done here, it renders the justice court ultimate worthless; the State will merely forum shop to the grand jury and present whatever evidence it wants, where there is no danger of preliminary suppression issues.

Regardless, the State is obligated under NRS 172.145(2) to present *any* evidence it is aware of that tends to explain away the charge. While the State may not want to submit to the grand jury that its entire universe of evidence was suppressed at the grand jury, it was nevertheless obligated to have presented other evidence which would have explained away the charge. Here, the State is aware that significant issues existed as to the discovery and recovery of the firearm in question,

and that it had been subject to extensive suppression efforts in the justice court. In addition, the State was aware that Metro homicide detectives' entire meeting and interrogation of Deandre Gathrite was pretextual; Metro arranged for an inactive warrant out of California to be re-activated so they could then use the Criminal Apprehension Team to locate and arrest Deandre Gathrite (Metro lacked sufficient probable cause to task CAT with Deandre Gathrite's apprehension until the California warrant was activated). The State nevertheless continued to present an incorrect and misleading narrative that homicide detectives just happened to be in the area at the time of Deandre Gathrite's arrest, and that Deandre Gathrite was merely being questioned as a witness rather than a suspect.

Lastly, the State's reliance on *Sheriff v. Harrington*, 108 Nev. 869, 840 P.2d 588 (1992) is misplaced. First, the justice court in *Harrington* did not rule on suppression; it ruled on admissibility of prior convictions. Second, the *Harrington* case, and its holding stating that the justice court's ruling was "an opinion on a legal issue" was prior to the *Grace* case, *supra*, wherein the Nevada Supreme Court recognized the justice court's legal authority to render definitive rulings on suppression issues. *Harrington* is factually distinct, and is outdated law.

It is an untenable position, and an offensive one, to suggest that the State can ignore the ruling of a sitting judge simply because an alternative exists (the grand jury). This is clear forum shopping, and subjects defendants such as Deandre

Gathrite to endless uncertainty in the system. The basis of the preliminary proceeding is an observance of a defendant's basic, constitutional, and due process rights- to "weed out" groundless and unsupported charges of grave offenses and to *relieve* the accused of the degradation and the expense of a criminal trial." *State v. Von Brincken*, 86 Nev. 769, 772 (1970). What the State suggests here is that instead preliminary proceedings exist for the State's benefit, and to provide as many forums and as many bites at the proverbial apple until it eventually can take a bite of the defendant.

As this is wholly antithetical to the concepts of fairness, justice, due process, and good faith, the State's position must be rejected.

2. The State improperly equates a bind-over with preliminary proceedings

The State's second argument is that justice court proceedings are entirely preliminary in nature, and not binding on district courts. *St.'s Ans.* at 19-20. That is not what is at issue here.

Specifically, this controversy concerns the propriety of ignoring a justice court's ruling with regard to other proceedings at the preliminary level: the grand jury. This is not an argument about whether the district court is bound by the justice court, but whether the State improperly ignored the justice court's order in other preliminary proceedings. Indeed, the universe of evidence in preliminary

proceedings is a continuum with regard to the preliminary hearing *or* the presentment of evidence for an indictment.

Simple logic undermines the State's argument. If evidentiary issues were to be resolved only at the district court level, then no defendant is safe; the State can seek an indictment against anyone, for anything, and using anything it wishes as "evidence." By the State's logic, the remedy against such an improper indictment—for example, one secured using illegal evidence, or evidence not in the best degree, would be to challenge it at the district court level (after an indictment, warrant, arrest, and possibly bail, of course). Instead, the Nevada Supreme Court recognized the justice court's ability to hear and to decide suppression matters- the natural product of which is to render whether evidence is legal, or in the best degree.

Again, the protections of the preliminary proceedings are for a defendant's benefit, not the State's. While the State can move freely between justice court or the grand jury in seeking a charging instrument, once it has dipped its foot in both ponds it has done so at its own peril. The justice court has the power to suppress evidence, and thus this evidentiary ruling necessary should encompass the continuum of preliminary proceedings lest the State favor one forum over another, or run from one forum to another when motion practice does not go its way.

Furthermore, moving from preliminary hearing to grand jury should afford a defendant *more* protections, not less. Under Nevada law, grand jury proceedings can

take place entirely absent the defendant. *NRS 172.095(1)(d)*. In many cases, a defendant (or prospective defendant) received only a Marcum notice of the State's intent to seek an indictment, and the defendant has one opportunity to appear and testify (at their peril) or to give to the State exculpatory info that he then hopes will be presented to explain away the offered charges against him. *NRS 172.145(1)-(2)*. Otherwise, the universe of evidence presented to the grand jury is often entirely fashioned by the State, according to the State's own designs, strategy, and motives.

By contrast, the preliminary hearing is an adversarial proceeding. The defendant may present evidence and witnesses, cross-examine the State's witnesses, and file motions (for example, to suppress evidence). *NRS 171.196(5)*. The defendant in a preliminary hearing is afforded evidentiary protections, such as from hearsay evidence. *NRS 171.196(6)*. The defendant is permitted discovery prior to a preliminary hearing. *NRS 171.1965*. The defendant has a right to notice of the charges "forthwith." *NRS 171.178(4)*. The defendant is informed of his rights before the justice court. *NRS 171.186*. The defendant is afforded multiple protections from unreasonable delays in the preliminary proceedings. *NRS 171.178(1)-(5)*.

What the State is arguing for in this controversy is that all of the panoply of rights afforded to a defendant in the preliminary hearing arena be disposable simply because the State did not like the justice court's ruling; that the State should be allowed to proceed to a more hostile forum, with even less protections for a

defendant (indeed very few, as the State pointed out in its own Answer) in a quest for a charging instrument.

Not only is such a prospect antithetical to the presumption of innocence, notions of fairness, and due process, it is a "system" seriously prone to abuse by overzealous and unethical prosecutors who when faced with a "loss" at the justice court, will simple redefine the terms of the preliminary proceedings to suit their ends.

3. The State did not address Deandre Gathrite's actual claim of prosecutorial misconduct

The State attempts to distinguish *McGuire v. State*, 100 Nev. 153, 677 P.2d 1060 (1984) as "acutely distinguishable," and "an inapposite comparison to the instant case" because the facts of *McGuire* are different. *St.'s Ans.* at 28-29. Deandre Gathrite did not cite *McGuire* for its factual analogy to his own case; he cited it for the important policy arguments announced therein, none of which were addressed or argued by the State in its Answer.

Specifically, the Petition offered the extreme cost to tax payers of prosecutors chasing indictments when the State loses at the justice court; the possible undermining of grand jurors' decisions by having to reverse an errant indictment due to the prosecutors' misconduct in hounding Deandre Gathrite for any charge they can get to stick; the extreme prejudice to Deandre Gathrite of having been arrested and jailed for extensive periods *twice* in this same matter, because the State could

not adequately proceed at preliminary hearing; the utter waste and occupation of limited judicial resources in keeping this frivolous prosecution going- once more, with the ultimate goal of *two* extensive preliminary proceedings, multiple prosecutors' time and effort, this Court's time in considering this motion practice, and taxpayer funds all being for a mere probationable weapons charge; and the danger that this behavior will be emulated as desirable behavior, policy, and procedure by other prosecutors.

4. The District Court improperly reconsidered the justice court's decision

The State's argument on this point is predicated on the district court's authority to hear the same or similar motions as were raised in justice court. *St.'s Ans.* at 18. That is a misrepresentation of this case, however; the basis for Deandre Gathrite's motion practice at the district court level was identical to this Petition and concerned whether the State improperly presented suppressed evidence to the grand jury. Instead of considering that argument, the district court instead chose to reframe the suppression argument as being newly before it rather than the product of the proper appellate avenues set forth in the statute. *Pet.* At 67-68 (citing *PA000386-387*[1]).

[1] "But ultimately what I think about the suppression issue is pertinent to if – if Judge Goodman was right and if there is any carry forward to the State having some obligation to then not do – not present it at the grand jury. If I disagree with it, then it's really moot and they present it to the grand jury."

It is a perennial concept in Nevada law that "[N]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided." *Walsh v. State*, 887 P.2d 1239, 1240, 110 Nev. 1385, 1388 (Nev. 1994) (citing *Paramount Ins. V. Rayson & Smitley*, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970)). Clearly, as cited in the Petition, there were numerous statutory avenues (and deadlines) available to the State to challenge the justice court's suppression. Instead, the State went before the grand jury, presented the suppressed (illegally obtained) evidence, and the district court improperly reconsidered suppression rather than the propriety of the State's actions as the threshold determination.

In doing so, the district court rendered all of the statutory appellate avenues nugatory. This has created for the State an alternative "appeal," not found anywhere in the statute. It can merely dismiss its case at the justice court, proceed to grand jury, and if/when the defendant challenges the procedure only *then* will the State argue the suppression matter, as if on first impression before the district court as opposed to an appeal or reconsideration.

Like the district court before it, the State's argument puts the proverbial cart before the horse; it argues the *suppression* argument, rather than the propriety of ignoring the justice court's ruling (on the basis of, "the suppression argument should have been in the State's favor anyway, so it was okay to present to the grand jury").

This is readily apparent in the district court's "full ruling," as reproduced by the State in its Answer. *St.'s Ans.* at 33-35. Most pertinently in its Order the district court *acknowledged* that it considered suppression before actually considering Deandre Gathrite's argument as to the State's failure to honor the justice court's decision: "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." *Id.* at 35 (citing *III AP 699-701*).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the underlying Petition, Deandre Gathrite prays for relief by way of a Writ of Mandamus directing the district court to dismiss the instant indictment against him.

DATED this 19th day of February, 2019.

By: /s/ Adrian M. Lobo

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of February, 2019. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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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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DATED this 19th day of February, 2019.

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