IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANDRE GATHRITE,
Appellant,
v.
THE STATE OF NEVADA
Respondent.

CASE NO: 77529

PETITION FOR EN BANC RECONSIDERATION

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER G. CHEN, and petitions this Court for en banc reconsideration in the above-captioned appeal.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 30th day of December, 2019.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM
POINTS AND AUTHORITIES

On November 7, 2019, a panel of this Court issued an Order in this case, reversing the district court's denial of Appellant's Petition for Writ of Habeas Corpus. On November 19, 2019, the State filed a Petition for Rehearing, which was denied on December 20, 2019. The State now seeks en banc reconsideration.

En banc reconsideration of a panel decision will not be ordered except when "(1) reconsideration by the full court is necessary to secure or maintain uniformity in its decisions, or (2) the proceeding involves a substantial precedential, constitutional, or public policy issue." NRAP 40A(a). The instant motion is timely filed within 10 days of the Order Denying Rehearing. NRAP 40A(b). In finding that the State presented evidence to the grand jury that had been previously suppressed by the justice court, in violation of NRS 172.135(2), the proceeding involved a substantial precedential, constitutional or public policy issue as described *infra*.

First, as an initial matter, a panel of this Court overlooked the threshold issue in this matter: whether the evidence was improperly suppressed by the justice court. The issue as to the justice court's ruling is a threshold issue because a panel of this Court has determined the evidence presented to the grand jury was improper because it had been previously suppressed by the justice court. However, the district court denied Appellant's Petition for Writ of Habeas Corpus based on the fact that the justice court's ruling was incorrect. If the justice court incorrectly suppressed

Appellant's statements and, thus, the firearm, which a superior court determined it did, then the evidence presented to the grand jury was legal, not governed by the justice court's improper ruling and Appellant's claim is meritless. Therefore, examination of the justice court's ruling is necessary to determine whether the evidence is legal. A panel of this Court overlooked this threshold issue and, thus, the State's Petition for Rehearing should be granted.

Moreover, a panel of this Court misapprehended the justice court's jurisdiction over district court proceedings. 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.

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 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. Therefore, the State's Petition for Rehearing en banc should be granted.

Further, a panel of this Court misapprehended the significance of Sheriff v. Harrington, 108 Nev. 869, 840 P.2d 588 (1992). 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 present 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.

While Harrington discusses presentation of evidence regarding exculpatory evidence, this Court's holding is analogous to the instant case. In Harrington, after the justice court determined that defedant's previous convictions were constitutionally invalid *and dismissed the case after preliminary hearing*, the State presented the evidence of defendant's convictions to the grand jury and defendant's case was bound over to district court. Id. at 870–71, 840 P.2d at 588–89. This Court found that the evidence was not exculpatory and the State was not obligated to

present the justice court's ruling to the grand jury. This Court further determined, in a footnote, that defendant's convictions were not unconstitutional. Here, there were similar circumstances in that the justice court had suppressed Appellant's statements prior to preliminary hearing. The State took the case to the grand jury and presented this suppressed evidence at the hearing. Under Harrington, this was permissible and not exculpatory information that the State was obligated to present. As a panel of this Court misapprehended the significance of Harrington, the State's Petition for Rehearing en banc should be granted.

Furthermore, the decision reached by a panel of this Court would lead to absurd results. In the instant case, the justice court suppressed Appellant's statements prior to the preliminary hearing. After the case was presented to the grand jury and Appellant was indicted, the district court held that the justice court's ruling was improper and that the statements never should have been suppressed. Oftentimes, at the time of preliminary hearing, there is very little discovery completed. Pursuant to NRS 171.196, a defendant must be granted a preliminary hearing within fifteen (15) days of the date of his or her arraignment, which must be performed within seventy-two (72) hours. See NRS 171.178. Within such a short period of time, the State often has only the arrest report to proceed with. Further, the State must work diligently to subpoena and speak with witnesses in this short period of time. Meanwhile, defendants can file frivolous stock evidentiary motions with

minimal effort in the hopes the justice court will suppress certain evidence and prevent the State from presenting such evidence to the grand jury. However, once transcripts of witness interviews and other such discovery are provided to the State, only then can it be determined that the justice court's ruling was improper. Based on this Court's current ruling, the State would be bound by the justice court's improper evidentiary ruling unless, as discussed below, more litigation is created through filing and appeals. Forcing the State to be bound by an improper evidentiary ruling would lead to absurd results that a panel of this Court could not have intended.

The State's Petition for Rehearing en banc should also be granted in the interest of judicial economy. With the current ruling, the district court, the justice court and, eventually, likely this Court will suffer an onslaught of filings and appeals related to evidentiary rulings. Now, defendants will file frivolous evidentiary motions in every case with the hope that the justice court will suppress evidence and, thus, also preclude the State from presenting such evidence to the grand jury. The State will have to respond to these motions at the justice court level as well as file appeals in the district court for rulings the State feel is improper. Once the appeal is filed, there are additional responses required and even evidentiary hearings at the district court level. This creates a delay in a defendant's ability to have a preliminary hearing pending appeal and creates a burden on the district court. Not only will all these extra hearings be required, but once the case has been bound over to the district

court, defendants can re-litigate these evidentiary issues and start the process all over again.

Finally, this Court has held that, where a criminal complaint is previously dismissed and the State chooses to proceed with seeking a grand jury indictment, it starts a new case. Warren v. Eighth Judicial Dist. Court, 134 Nev. 649, 652, 427 P.3d 1033, 1036 (2018). A panel of this Court cited Warren in its order, however, overlooked its significance. Here, the State started a new case when it voluntarily dismissed Appellant's case prior to preliminary hearing and brought the case before the grand jury. As the case before the grand jury was new, the State was not bound by the previous justice court ruling as that ruling had been made in a separate justice court case rather than the new grand jury case. After the indictment was filed, Appellant was free to file a Motion to Suppress, which he did, and have it heard before the district court. The district court determined Appellant's rights were not violated and denied the motion. As the significance of Warren was overlooked in this case, the State's Petition for Rehearing en banc should be granted.

WHEREFORE, the State respectfully requests that en banc reconsideration be granted and the Order be amended.

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Dated this 30th day of December, 2019.

Respectfully submitted,

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BY */s/ Alexander Chen*

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points and contains 1,740 words and 136 lines of text.

Dated this 30th day of December, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

AARON D. FORD
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ADRIAN M. LOBO, ESQ.
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/s/ J. Garcia
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