IN THE SUPREME COURT OF THE STATE OF NEVADA

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WILBER ERNESTO MARTINEZ GUZMAN,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF WASHOE; THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE,
Respondents,
and,
THE STATE OF NEVADA,
Real Party In Interest.
_____/

No. 79079

REPLY TO ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF MANDAMUS

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A Writ of Prohibition is appropriate

As a preliminary matter the Real Party In Interest's (Real Party) attempt to limit this Court's consideration of the Petition to mandamus review should be rejected. Real party asserts that "Guzman does not allege that the district court exceeded its jurisdiction in this case; thus, his Petition is more appropriately one for mandamus." Answer to Petition for Writ of Prohibition or, in the Alternative, Writ of Mandamus at 13 (Answer). On the contrary, Mr. Guzman contests the very power of the district court to preside over the Douglas County counts (*i.e.*, Counts III, IV, V, and VI of the Indictment), because the district court's power to preside over these counts rests entirely on the power of the Washoe County grand jury to return viable counts. If a county grand jury is without power to return a proper indictment, then a district court is without power to preside over the alleged crimes charged in that indictment. Because the Washoe County grand jury was without power to return an indictment on the Douglas County counts, the district court is without power to preside over them. Thus, the Petition is more appropriately one for prohibition.

The "territorial jurisdiction" of the Second Judicial District Court falls within the boundaries of Washoe County

In Nevada, the power of the grand jury is found in NRS 172.105. This one-sentence statute contains two clauses set off by a comma and provides:

> The grand jury may inquire into all public offenses triable in the district court or in a Justice Court, committed within the territorial jurisdiction of the district court for which it is impaneled.

The second clause of the statute—"committed within the territorial jurisdiction of the district court for which it is impaneled"—is an adverbial clause that modifies the verb "inquire" contained in the first clause of the statute. That modification specifically limits a grand jury's inquiry of "public offenses triable in the district court or in a Justice Court" to those public offenses that are[1] "*committed* within the territorial jurisdiction of the district court for which it is impaneled."

The term "territorial jurisdiction" as used in NRS 172.105 is not a moving target. The statute was enacted in 1967. At that time the term "territorial jurisdiction" had the following public definition:

> n : the sovereign jurisdiction that a state has over the land within its boundary limits, over its

[1] Or "which are" or "so long as they are"—.

> inland and territorial waters and to a reasonable extent over the airspace above and subsoil below in such land and waters, and over all persons and things within those areas subject to its control (as on its vessels or on its aircraft over the high seas) — compare EXTRATERRITORIALITY

Webster's Third New International Dictionary of the English Language (unabridged) 2361 (1965). Key to the definition of "territorial jurisdiction" is the notion of boundary limits. *Accord* Black's Law Dictionary 1642 (revised 4th ed. 1968) (defining "territorial jurisdiction" as "[t]erritory over which a government or a subdivision thereof has jurisdiction. Jurisdiction considered as limited to cases arising or persons residing within a defined territory, as, a county, a judicial district, etc. The authority of any court is limited by the boundaries thus fixed.") (paragraph break and citation omitted). Under these definitions—existing at the time of the enactment of the statute—"the 'territorial jurisdiction' of the district court must be either the territory of the district or of the county where the court is located." *State v. Cox*, 147 P.2d 858, 860 (Utah 1944).

Here, the "territorial jurisdiction" of the Second Judicial District Court—for which the grand jury was empaneled—falls within the boundaries of Washoe County. See NRS 3.030. Therefore, under NRS

172.105 the Washoe County grand jury's power to inquire into public offenses triable in the district or justice courts is specifically limited to those offenses committed within the boundaries of Washoe County. Nothing in the Real Party's answer disrupts this conclusion.

The district court's "finding" is not applicable to the Motion to Dismiss and, in any event, it is not substantially supported by the record

The Real Party takes issue with Mr. Guzman's assertion that the Douglas County counts occurred solely in Douglas County. See Answer at 14-18. Real Party argues that the Court should ignore the charging language in their indictment and instead defer to the district court's "finding"—that "[t]he formation of intent and preparatory acts were in Washoe County even though they culminated in the charged crimes that took place in Douglas County." See Answer at 14-15 (citing to Petitioner's Appendix at 217). The district court's "finding" however, was in its order denying a petition for writ of habeas corpus; the quoted language is not found in the district court's order denying the motion to dismiss. In the latter order, the district court simply concluded that a grand jury's power is coextensive with that of a district court. PA 201-02 (Order Denying Motion to Dismiss). The district court's conclusion

mistakenly conflated a grand jury's power with that of a sitting district court judge.

Even if the Court were inclined to consider the district court's finding here, it should nonetheless decline to give it deference. Although the Real Party has submitted a 526 page appendix containing transcripts of Mr. Guzman's interrogation and the grand jury proceedings held in this matter, it fails to pinpoint even one page of the appendix in support of the district court's finding.[2] Generally, a district court's findings of fact will not be disturbed "if they are supported by substantial evidence." *Bedore v. Franklin*, 122 Nev. 5, 9-10, 124 P.3d 1168, 1171 (2006) (internal quotation marks and footnote omitted). But "deference is not owed to legal error," *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010), or to "findings so conclusory they may mask legal error." *David v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015). Because the district court's "finding" is pure conjecture, this Court should not give it deference. More importantly, the district court's "finding" is not

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[2] Nothing in the Real Party's statement of the facts, Answer at 5-12, specifically locates the formation of intent and preparatory acts vis-vis the Douglas County counts in Washoe County.

relevant to the power of the Washoe County grand jury under NRS 172.105, which is a separate reason to reject the district court's conclusory finding.

Following suit, the Real Party moves away from the statute and argues that "territorial jurisdiction"—for trial purposes—can be established "by a preponderance of the evidence," that "Nevada law does not require the State to allege a specific county in a charging document, it only requires an allegation that the crime occurred 'within the State of Nevada'" (citing *Application of Alexander*, 80 Nev. 354, 358-59, 393 P.2d 615, 617 (1964)[3]), and that "[c]harging documents are subject to change throughout trial." Answer at 16. Accepting these observations as true, they are also not relevant to this Court's review. What is relevant and what should be at the forefront of this Court's

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[3] In *Alexander* the indictment failed to allege that a murder "was committed in the State of Nevada." Based on existing case law the Court concluded that there can be no conviction without a formal and sufficient accusation and without a formal and sufficient accusation the court does not acquire jurisdiction. In Nevada the rule is "the allegation in the indictment" must allege that the crime occurred "within the State of Nevada." This rule has nothing to do with the power of a grand jury to inquire into triable offenses *within* its territorial jurisdiction. It only requires that any indictment returned by a grand jury have the "within the State of Nevada" language.

review is the fact that any legal action commenced without jurisdiction is void.

The Real Party also argues that Mr. Guzman's interpretation of the statute is impractical. See Answer at 27-28. This argument is vulnerable to the claim of overstatement. Additionally, though raised below, the district court did not rest its decision on any aspect of this argument. Nor should this Court's legal analysis be swayed by an argument better suited for the Legislature. *Cf. Renown Health v. Vanderford*, 126 Nev. 221, 225, 235 P.3d 614, 616 (2010) ("This court may refuse to decide an issue if it involves policy questions better left to the Legislature."). To the extent that the concerns expressed by the Real Party should be addressed, they are better left to the Legislature.

The Real Party misreads the plain language of the statute

The Real Party insists that Mr. Guzman's reading of NRS 172.105 is "inconsistent with its plain language." Answer at 20. Yet after quoting the statute, Answer at 19-20, it is the Real Party who contradicts the statute's plain language by claiming that the power of a grand jury "is not limited simply by district boundaries." Answer at 21. This claim ignores the second clause of the statute. While "territorial

jurisdiction" can be synonymous with statewide authority, it is not exclusively synonymous with statewide authority; it can also refer to "a county" or "a judicial district" etc.—Black's Law Dictionary 1642 (4th ed. 1968).

NRS 172.105 limits a grand jury to the boundaries of the judicial district which it is impaneled. Stated concretely, the Washoe County grand jury is limited to the Second Judicial District, which is within the boundaries of Washoe County. Given the express boundary limitation contained in the statute, this Court should decline the Real Party's invitation to read "territorial jurisdiction" so as to "confer grand juries with the jurisdiction to inquire into crimes statewide." Answer at 23-25. See *Douglas v. State*, 130 Nev. 285, 293, 327 P.3d 492, 498 (2014) ("courts should not add things to what a statutory text states or reasonably implies"). If the Legislature wants grand juries to have statewide jurisdiction, it has the power to say so.

Similarly, this Court should reject the Real Party's claim that Mr. Guzman's "interpretation of the phrase 'territorial jurisdiction' ... render[s] the initial phrase in NRS 172.105 meaningless." Answer at 25. Not so. As previously stated, the second clause of NRS 172.105

modifies the verb "inquire" contained in the first clause. This legislative modification, while limiting, is not meaningless.[4]

Finally, the Real Party contends that because other statutes—*e.g.*, NRS 172.175 and NRS 172.185—that were enacted at the same time as NRS 172.105 define the power of the grand jury (at least in relation to their respective subject matter) "in terms of the 'county' or 'district'" instead of "territorial jurisdiction," this must mean that "county" and "district" boundaries do not apply to the grand jury's work under NRS 172.105. Answer at 28-29. This conclusion is wrong. First, NRS 172.105 uses "territorial jurisdiction" instead of "county" or "district" because the subject matter of the statute is "public offenses." Second, NRS 172.105 uses "territorial jurisdiction" instead of "county" or "district" because not every judicial district in Nevada is within the boundaries of a single county; some judicial districts are multi-county districts. See NRS 3.010 (creating eleven judicial districts for sixteen

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[4] The Real Party agrees that the statute is not ambiguous so an exploration of legislative history is not necessary. Briefly though, NRS 172.105 was introduced as section 83 to Assembly Bill 81 in 1967. When introduced the bill contained mandatory language: "The grand jury *must* inquire ... ." Before the bill was adopted the word "must" was replaced with the permissive word "may": "the grand jury may inquire ... ." The legislative history shows little else regarding section 83.

counties (and one independent city)). Statutes should be read in harmony, and Mr. Guzman's reading of NRS 172.105 does not violate this rule.

The Real Party's reliance on State v. Jackson *is misplaced*

Perhaps sensing that this Court will not endorse an unbounded county grand jury—despite its repeated call for "statewide jurisdiction"—the Real Party offers that territorial jurisdiction "does not equate to a grand jury having unlimited power to inquire into offenses completely unrelated to the district where it is impaneled." Answer at 29. Real Party suggests that Nevada's venue statute can be used to cabin the exercise of the grand jury's power. But NRS 172.105 does not cross-reference venue statutes and this notion advanced by the Real Party does not originate in Nevada case law. Instead the Real Party relies on *State v. Jackson*, 23 N.E.3d 1023 (Ohio 2014) to support its argument. Answer at 30-31. *Jackson* is inapposite. *Jackson* followed an unreported Ohio intermediate appellate court case—*State v. Ahmed*, 2005 WL 1406282 (Ohio Ct. App. 2005)—to reach the result proffered by the Real Party. See 23 N.E. 3d at 1047-48. In Ohio *Ahmed* has been criticized for "putting the cart before the horse" and "inserting words

into [a statute] to expand the duty of the grand jury, in contravention to the statute's clear and definite meaning." See *State v. Miller*, 23 N.E. 3d 278 (Ohio Ct. App. 2014). In *Miller* the appellate court said:

> We believe the court in *Ahmed* put the cart before the horse. Instead of focusing on whether the Grand Jury acted within its statutory powers, the court in *Ahmed* focused on whether the court of common pleas had proper jurisdiction and venue. We recognize that, generally, courts of common pleas are vested with statewide jurisdiction. Further, R.C. 2931.03 gives the court of common pleas original jurisdiction in felony cases. However, felony jurisdiction "is invoked by the return of a proper indictment by the grand jury of that county." The General Assembly, when enacting R.C. 2939.08, decided that the duty of the grand jury would be limited. Pursuant to this statute, a grand jury may only inquire and present offenses which were committed *within its county.* R.C. 2939.08. We found *Ahmed* to be unpersuasive because the court inserted words into R.C. 2929.08 to expand the duty of the grand jury, in contravention to the statute's clear and definite meaning.

23 N.E. 3d at 286 n.7 (some citations omitted, italics in the original). The *Miller* court found *Ahmed's* claim that "Ohio's jurisdiction and venue statutes '*impliedly* authorize a grand jury to indict on offenses outside its county provided that such offenses are part of a course of criminal conduct involving the county where the grand jury resides'" to

be an unsupported assumption on the part of the court. 23 N.E. 3d at 286 n.7 (citations omitted, italics in the original); and *Id.* ("The court did not give any explanation as to how it came to such an assumption, and unfortunately, neither did the Court in *Jackson*."). Nonetheless, the *Miller* court, as an Ohio intermediate appellate court, was bound by the Ohio Supreme Court's opinion in *Jackson*. This Court is not. *Cf. McNamara v. State*, 132 Nev. Adv. Op. 60, 377 P.3d 106, 117 (2016) ("[W]e are not bound by the Florida District Court of Appeal.").

The *Miller* court's observations highlight the infirmities in the Real Party's similar argument. As in *Miller* the Real Party's argument "puts the cart before the horse" by focusing not on the power of the grand jury under NRS 172.105, but instead by focusing on the power of a district court. Additionally, as in *Miller*, the Real Party would have this Court read NRS 172.105 expansively in contravention to the statute's clear and definite meaning. This Court should pass.

CONCLUSION

For the reasons argued this Court should conclude that the Washoe County grand jury did not have the power to return an indictment on the Douglas County offenses as they are outside the boundaries of Washoe

County. Because the Washoe County grand jury did not have the power to return an indictment on the Douglas County counts, the district court is without power to preside over them. This Court should issue a writ directing the district court to dismiss the Douglas County counts.

DATED this 2nd day of September 2019.

JOHN L. ARRASCADA
Washoe County Public Defender

By: _____
JOHN REESE PETTY
Chief Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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: This petition has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts though exempted by NRAP 32(a)(7)(C), it is proportionately spaced,

has a typeface of 14 points and contains a total of 2,875 words. NRAP 32(a)(7)(A)(i), (ii).

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

DATED this 2nd day of September 2019.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 2nd day of September 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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