

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON J. BOLDEN, A/K/A JASON
JEROME BOLEN

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 79715

Appeal from a Judgment of Conviction
Following a Jury Trial and Verdict
Eighth Judicial District Court, Clark County
The Honorable Richard F. Scotti, District Judge
Case No. C-18-334635-1

APPELLANT'S PETITION FOR EN BANC RECONSIDERATION

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THE STATE OF NEVADA,)		
Respondent.)		

PETITION FOR EN BANC RECONSIDERATION

COMES NOW Appellant JASON J. BOLDEN A/K/A JASON JEROME BOLEN, by and through his attorney BEN NADIG, and petitions, pursuant to NRAP 40A, this Honorable Court for en banc reconsideration of the Panel's decision issued by published opinion on July 8, 2021, which was amended on September 23, 2021 after a petition for rehearing.

This petition is based on the following Memorandum of Points and Authorities and all papers and pleadings on file in this case.

Dated this 21st day of October, 2021.

Respectfully submitted,

By: /s/ Ben Nadig

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MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION AND STANDARD FOR EN BANC RECONSIDERATION

A petition for en banc reconsideration is timely filed within fourteen (14) days after written entry of a Supreme Court panel decision denying rehearing. NRAP 40A(b). In this case, the Panel's Order Denying Rehearing and Amending Opinion was filed on September 23, 2021. On October 6, 2021, Appellant obtained a telephonic extension of time to submit his petition for en banc reconsideration, which is currently due on October 21, 2021. The instant petition has been timely filed.

This Court may consider a petition for en banc reconsideration of a panel decision when "reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court." NRAP 40A(a). To warrant reconsideration on that basis, a petition "shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court . . . and shall include specific citation to those cases." NRAP 40A(c).

This Court may also consider a petition for en banc reconsideration of a panel decision when the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a). To warrant reconsideration on that basis, a petition "shall concisely set forth the issue,

shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved." NRAP 40A(c).

As set forth herein, the en banc Court should reconsider the Panel's Amended Opinion in Bolden v. State, 137 Nev. Adv. Op. 28 (Sept. 23, 2021), because it is contrary to prior published opinions *and* because it involves a "substantial precedential, constitutional and public policy issue," by improperly limiting justice courts' inherent power to dismiss charges after considering credibility and weighing evidence following a preliminary hearing.

II. INTRODUCTION

For over fifty years, the Nevada Supreme Court has recognized the inherent authority of Nevada's justice courts to consider the credibility of the witnesses who testify at preliminary hearings, and to weigh the evidence when determining whether the State has satisfied its burden of establishing probable cause to believe that a crime has occurred, and that the defendant committed it. *See, e.g., Sheriff v. Potter*, 99 Nev. 389, 391 663 P.2d 350, 352 (1983); *Wrenn v. Sheriff*, 87 Nev. 85, 87, 482 P.2d 289, 290 (1971); *Marcum v. Sheriff*, 85 Nev. 175, 179, 451 P.2d 845, 847 (1969); *see also* NRS 176.206.

Part of the justice courts' responsibility at the preliminary hearing is determining whether the evidence presented by the State leads to a

“reasonable inference” that the defendant committed the charged crime. *State v. von Brincken*, 86 Nev. 769, 476 P.2d 733 (1970). This requires that justice courts “find more evidence for guilt than against.” *Id.* Yet, in *Bolden v. State*, 137 Nev. Adv. Op. 28 (Sept. 23, 2021), a Panel of this Court ruled that a justice court commits “egregious error” when, after considering witness credibility and weighing the evidence, the justice court concludes that the evidence does not support a reasonable inference of criminal agency. Slip Op. at 11-12.

Although the Panel properly recognized that “egregious error” means “plain error that affects the outcome of the proceedings,” Slip Op. at 11, the Panel did not identify any error by the justice court, let alone an error under existing law that was “so unmistakable that it reveals itself from a casual inspection of the record.” *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (quoting *Torres v. Farmers Ins. Exch.*, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 n.2 (1990)).

Instead, the Panel announced a new rule that requires justice courts to find probable cause “if an inference of criminal agency can be drawn from the evidence,” regardless of the justice court’s actual conclusions about the credibility and weight of the evidence presented by the State. Slip Op. at 11-12 (emphasis added). As a result of this decision, even if a justice court

concludes that an inference of criminal agency is unreasonable based on its own evaluation of the weight of the evidence and the credibility of witnesses, if any of the evidence could conceivably permit a trier of fact to draw an “inference of criminal agency,” the justice court must now bind the case over so that the jury can make the “ultimate credibility determination at trial.” *Id.*

Although the Panel relies on language taken from *Wrenn*, 87 Nev. at 87, 482 P.2d at 290, *Miner v. Lamb*, 86 Nev. 54, 58, 464 P.2d 451, 453 (1970), and *Bryant v. Sheriff*, 86 Nev. 622, 624, 472 P.2d 345, 346 (1970), to support its new rule, the Panel takes that language out of context. Crucially, each of those cases involved a challenge by the defendant to the sufficiency of the evidence, not a challenge by the State to a justice court’s dismissal of a criminal complaint. The standard of review on a defendant’s challenge to the sufficiency of the evidence is much different from the standard of review on a challenge by the State to the justice court’s “egregious error” in dismissing charges.

Instead of applying a sufficiency of the evidence standard, the Panel should have looked to this Court’s “egregious error” decisions in *Feole v. State*, 113 Nev. 628, 939 P.2d 1061 (1997), *Cipriano v. State*, 111 Nev. 534, 540, 894 P.2d 347, 351 (1995), and *Murphy v. State*, 110 Nev. 194, 871 P.2d

916 (1994),¹ which applied the more deferential “egregious error” standard of review to the justice court’s lack of probable cause finding.

Reconsideration is required because the new rule announced by the Panel conflicts with directly controlling law that allows justice courts to dismiss criminal complaints based on credibility concerns, and because the Panel owed deference to the justice court’s factual findings under the “egregious error” standard of review. NRAP 40A(c).

Reconsideration is also required because the new rule announced by the Panel will undermine the inherent authority of justice courts across the State of Nevada to dismiss criminal complaints after evaluating the credibility of witnesses and weighing evidence. Because justice courts will no longer be allowed to dismiss charges based on conflicting evidence, preliminary hearings will no longer protect accused individuals from unwarranted and costly criminal trials. NRAP 40A(c). For all these reasons, the en banc court should reconsider the Panel’s decision in *Bolden*.

¹ These three decisions were discussed in detail by the Court of Appeals in *Moultrie v. State*, 131 Nev. 924, 364 P.3d 606 (Nev. App. 2015). The cases remain good law on the subject of “egregious error,” although they were overruled on other grounds by *State v. Sixth Judicial Dist. Court*, 114 Nev. 739, 964 P.2d 48 (1998) (holding that “the state may not refile [] original charges in justice court if the defendant was not bound over” and that “[t]o the extent that *Murphy*, *Cipriano*, and *Feole* differ from this scheme, they are expressly overruled.”)

III. LEGAL ARGUMENT

A. **THE PANEL DECISION IS CONTRARY TO PUBLISHED DECISIONS THAT AUTHORIZE JUSTICE COURTS TO CONSIDER WITNESS CREDIBILITY AND WEIGH EVIDENCE WHEN DETERMINING PROBABLE CAUSE.**

Reconsideration is required because the new rule announced by the Panel is contrary to prior published opinions of the Nevada Supreme Court that both empower and require justice courts to consider witness credibility and weigh the evidence in determining probable cause. Reconsideration is required because the Panel incorrectly interpreted *Wrenn*, *Miner*, and *Bryant* as requiring justice courts to evaluate the evidence in the light most favorable to the prosecution when determining probable cause. Finally, reconsideration is required because the Panel owed deference to the justice court's findings pursuant to this Court's authority in *Murphy*, *Cipriano*, and *Feole*.

1. The Panel's decision conflicts with *von Brincken v. State* and other decisions that require justice courts to consider witness credibility and weigh the evidence when determining probable cause.

Although justice courts are "courts of limited jurisdiction and only have the authority granted by statute," *Parsons v. State*, 116 Nev. 928, 933 10 P.3d 836, 839 (2000), they also have "limited inherent authority to act in a particular manner to carry out [their] authority granted by statute." *State v. Sargent*, 122 Nev. 210, 214, 128 P.3d 1052, 1054-55 (2006). As this Court explained in *Grace v. Eighth Judicial Dist. Ct.*, 132 Nev. 511, 375 P.3d 1017

(2016), “justice courts are statutorily empowered to conduct preliminary hearings for gross misdemeanor and felony charges”² and “*must examine the evidence presented*” to determine if probable cause exists “to believe that an offense has been committed and that the defendant has committed it.”³

To carry out justice courts’ statutory authority to conduct preliminary hearings, this Court ruled that justice courts have “express and limited inherent authority to suppress illegally obtained evidence during preliminary hearings.” *Id.* at 514-15, 375 P.3d at 1018. Additionally, justice courts have express and limited inherent authority to evaluate witness credibility and weigh evidence when determining probable cause. *See, e.g., von Brincken*, 86 Nev. at 773, 476 P.2d at 735; *Potter*, 99 Nev. at 391, 663 P.2d at 352; *Wrenn*, 87 Nev. at 87, 482 P.2d at 290; *Marcum*, 85 Nev. at 179, 451 P.2d at 847, *discussed infra*.

The purpose of a preliminary hearing is 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.” *von Brincken*, 86 Nev. at 772, 476 P.2d at 735. “The preliminary hearing is not a trial and the issue of the

² 132 Nev. at 513, 375 P.3d at 1018 (citing NRS 171.196, NRS 171.206, and *Parsons*, 116 Nev. at 933, 10 P.3d at 839) (emphasis added).

³ 132 Nev. at 513, 375 P.3d at 1018 (quoting NRS 171.206) (emphasis added).

defendant's guilt or innocence is not a matter before the court." *Parsons*, 116 Nev. at 933 10 P.3d at 839. However, the preliminary hearing does require an "evidentiary evaluation of whether there is 'probable cause to believe that an offense has been committed and that the defendant has committed it.'" *Id.* (quoting NRS 171.206).

Although the State's burden at preliminary hearing is lower than it is at trial, the State nevertheless, "does have the responsibility of establishing facts that will lead to the reasonable inference that" the defendant committed the crime charged. *von Brincken*, 86 Nev. at 773, 476 P.2d at 735. As this Court explained in *von Brincken*:

While the inference drawn need not be a necessary inference, it still remains that the inference must be reasonable, not unreasonable or so remote as to be unwarranted. Probable cause requires that there shall be more evidence for guilt than against. It must be supported by evidence which inclines the mind to believe, though there may be room for doubt. The state of facts must be such as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion.

Id. (emphasis added).

To carry out these responsibilities, justice courts must have the inherent power to evaluate witness credibility and weigh evidence; without such powers, justice courts would be unable to determine whether the evidence reasonably infers the defendant's guilt. Indeed, several cases have recognized

that it is the justice court's "function" to consider the credibility of the witnesses who testify at the preliminary hearing when evaluating the sufficiency of the State's evidence. *See, e.g., Potter*, 99 Nev. at 391, 663 P.2d at 352 ("[w]hen the evidence is in conflict at the preliminary hearing it is the function of the magistrate to determine the weight to be accorded to the testimony of the witnesses"); *Wrenn*, 87 Nev. at 87, 482 P.2d at 290 (same); *Marcum*, 85 Nev. at 179, 451 P.2d at 847 ("At a preliminary examination the credibility of a witness is one of the matters to be weighed by the magistrate."). Plainly, weighing witness credibility is an aspect of the justice court's limited inherent authority at the preliminary hearing. *See, e.g., Sargent*, 122 Nev. at 214, 128 P.3d at 1054-55; *Grace*, 132 Nev. at 513, 375 P.3d at 2018.

The Panel's decision in this case conflicts with more than 50 years of legal precedent recognizing justice courts' inherent authority to evaluate witness credibility, weigh evidence, and determine whether inferences of criminal agency are "reasonable." Ignoring the vast weight of this authority, the Panel concluded that Bolden "overreads *Wrenn*" and that *Wrenn* did not permit the justice court to weigh witness credibility at a preliminary hearing. Slip Op. at 11. The Panel claims that "*Wrenn* implicitly recognizes the slight-or-marginal-evidence standard and does not license the justice court to

dismiss charges based on conflicting evidence where the evidence permits the finder of fact to draw ‘an inference of criminal agency.’” Slip Op. at 11 (emphasis added). In essence, the Panel has said that if an inference of criminal agency is at all possible, then the case must be bound over and submitted to the jury to make “the ultimate credibility determination at trial.” Slip Op. at 12.

Yet, this holding flies in the face of *von Brincken*, which requires justice courts to find that any such inference “must be reasonable, not unreasonable or so remote as to be unwarranted.” 86 Nev. at 773, 476 P.2d at 735. It is not enough that the inference be “permissible”—it must be “reasonable” for the justice court to bind the case over. In addition, *von Brincken* held that “[p]robable cause requires that there shall be more evidence for guilt than against.” *Id.* (emphasis added).

The Panel’s decision conflicts with *von Brincken* because it requires a justice court to find probable cause if any evidence would permit an inference of criminal agency—even if there was more evidence against guilt than for it. Because the Panel’s decision conflicts with directly controlling law that both empowers and requires justice courts to consider witness credibility and weigh the evidence in determining probable cause, en banc reconsideration is necessary. NRAP 40A(c).

2. The Panel's Opinion incorrectly applied the "sufficiency of the evidence" standard of review from *Wrenn*, *Miller*, and *Bryant* when evaluating whether the justice court engaged in plain or "egregious error."

As the Panel acknowledged, when a justice court dismisses criminal charges for lack of probable cause, the State may file an information by affidavit in district court only "if the district court finds that the justice court committed egregious error." Slip Op. at 11. "Egregious error occurs when the justice of the peace 'commits plain error that affects the outcome of the proceedings.'" Slip Op. at 11 (citing *Moultrie*, 131 Nev. at 930, 364 P.3d at 611). The plain error standard of review is extremely deferential, and does not allow the district court to substitute its judgment for that of the justice court. Rather, the district court must find an "error [that] is so unmistakable that it reveals itself from a casual inspection of the record." *Patterson*, 111 Nev. at 1530, 907 P.2d at 987 (quoting *Torres v. Farmers Ins. Exch.*, 106 Nev. 340 n.2, 793 P.2d at 842 n.2 (1990)).

Likewise, when a defendant seeks to challenge a bindover on the grounds that the justice court erred in finding probable cause, the standard of review on appeal is *also* exceptionally deferential to the justice court. The standard of review in such cases is a "sufficiency of the evidence" standard, and that is the procedural posture in which *Wrenn*, *Miner*, and *Bryant* all

arose.⁴ When sufficiency of the evidence is challenged on appeal, “[t]he relevant inquiry for [the appellate] court is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Hutchins v. State*, 110 Nev. 103, 107–08, 867 P.2d 1136, 1139 (1994) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

In this case, the Panel superimposed the sufficiency of the evidence standard that was utilized in *Wrenn*, *Miner*, and *Bryant* over the “egregious error” standard that applied in this case. Although *Wrenn* did say that “if an inference of criminal agency can be drawn from the evidence it is proper for the [justice of the peace] to draw it, thereby leaving to the jury at trial the ultimate determination of which of the witnesses are more credible,” Slip Op. at 11 (citing *Wrenn*, 87 Nev. at 87, 482 P.2d at 290), this statement was made in the context of a sufficiency of the evidence challenge, where the Supreme Court was required to view the evidence in the light most favorable to the

⁴ See *Wrenn*, 87 Nev. at 87, 482 P.2d at 290 (affirming on appeal from the denial of a petition for writ of habeas corpus alleging insufficient evidence at the preliminary hearing); *Miner*, 86 Nev. at 57-59, 464 P.2d at 453-454 (affirming “on appeal from the denial of a pre-trial application for habeas corpus testing probable cause at a preliminary hearing”); *Bryant*, 86 Nev. at 624, 472 P.2d at 346 (affirming on appeal from denial of a petition for writ of habeas corpus where “[t]he thrust of the appellant’s pre-trial habeas petition, and principal contention on appeal, is that the evidence was insufficient to constitute probable cause to hold him for trial on the offense charged.”).

prosecution, to uphold the justice court's finding of probable cause. This Court's statement in *Wrenn* that it was "proper" for the justice court to draw an inference of criminal agency was simply a recognition that the justice court acted appropriately when it bound the case over, viewing the facts in the light most favorable to the prosecution.

But that is not the appropriate standard of review to apply when a justice court has dismissed criminal charges. When filing an information by affidavit, the burden is on the State to establish plain, or "egregious error," and these cases did not hold that a justice court commits "egregious error" by failing to draw every possible inference in favor of the State in the face of conflicting evidence.

Reconsideration is required because the Panel ignored the procedural posture in which *Wrenn*, *Miner*, and *Bryant* arose and misapplied the law by superimposing a sufficiency of the evidence standard of review upon an egregious error challenge. NRAP 40A(c).

3. The Supreme Court should have applied the deferential standard set forth in *Murphy*, *Cipriano*, and *Feole*, in determining whether "egregious error" occurred.

The procedural posture in this case is akin to that of *Murphy*, *Cipriano* and *Feole*, where the appellants challenged their convictions post-trial on the

basis that the district court erred by allowing the State to file an information by affidavit on grounds of “egregious error.”

In *Murphy*, this Court reversed the appellant’s convictions because the State had failed to demonstrate “egregious error” and the record supported the justice of the peace’s “conclusion that the State had utterly failed to produce evidence to show probable cause existed that Murphy had possessed stolen cattle.” 110 Nev. at 198, 871 P.2d at 918. Although the reversal in *Murphy* was the result of a complete failure of evidence, both *Cipriano* and *Feole* were reversed because this Court understood that it was not “egregious error” for justice courts to dismiss a criminal complaint after weighing evidence and credibility.

In *Cipriano*, a jury convicted the defendant of attempted sexual assault after a justice court dismissed that charge and the State obtained leave from the district court to refile the charge by affidavit. At preliminary hearing, the alleged victim Jeri testified as follows:

Cipriano bent down toward her chair and tried to kiss her. Jeri refused. Undaunted, Cipriano tried to put his hands down her pants, touched her vaginal area and breasts outside her clothing and grabbed her buttocks. Jeri struggled with Cipriano for the next few minutes, continually telling him to stop. Cipriano finally complied with these demands and left the house at approximately 5 p.m. He told Jeri not to tell anyone about the incident because he did not want trouble.

111 Nev. at 537, 894 P.2d at 349. A police officer also testified at the preliminary hearing that Cipriano told him he went over to Jeri's house to "get lucky" and that he "was going to try and f[---] her." *Id.* Despite this testimony, the justice of the peace refused to bind Cipriano over on the attempted sexual assault charge, finding "that there was no evidence suggesting that Cipriano had the intent to commit sexual assault." *Id.* at 537, 894 P.3d at 349-50.

The State was permitted to refile the charge by affidavit after arguing that Cipriano's intent to commit sexual assault was evidenced by his statements to the officer. *Id.* But on appeal, this Court found that the information by affidavit had been permitted in error:

[w]e cannot conclude that the justice of the peace made an egregious error in finding that the attempted sexual assault charge lacked probable cause. The State's evidence at the preliminary hearing was remarkably weak with respect to that charge. While we may have reached a different conclusion than the justice of the peace, the failure to bind over was not egregious error.

Id. (emphasis added). Although a jury later heard that exact same evidence⁵ and reached the opposite conclusion from the justice of the peace, this Court still reversed Cipriano's conviction because the justice court had not committed egregious error by dismissing the charge.

⁵ *Cipriano*, 111 Nev. at 538, 894 P.2d at 350.

This Court reached a similar conclusion in *Feole*. Feole was charged with preventing or dissuading a witness from reporting a crime and intimidating a witness. Feole's former roommate Tiscareno told him she might report his son's marijuana use to the police, and Feole responded by telling Tiscareno "that if she 'snitched,' her body would be found in the desert." *Feole*, 113 Nev. at 629-30, 939 P.2d at 1062. Tiscareno reported Feole's son to police and moved out. Then, when Tiscareno next saw Feole, he "made shoveling motions saying, 'Remember what I told you.'" *Id.* After a preliminary hearing where the justice of the peace dismissed the charges, the State filed an information by affidavit charging Feole with attempted preventing or dissuading witness from reporting crime. *Id.*

After his conviction, Feole appealed the district court's decision permitting the State to file the information by affidavit. This Court looked at the testimony that was offered at the preliminary hearing and recognized that the justice court properly discounted Tiscareno's direct examination testimony about Feole's threat based on her concessions during cross-examination. *Id.* at 631, 939 P.2d at 1063. Although Tiscareno gave contradictory testimony that a jury later relied on to convict Feole, this Court said it was not "egregious error" for the justice of the peace to dismiss the charges against him. *Id.* at 631-32, 939 P.2d at 1063. Rather than viewing all

of the testimony in the light most favorable to the State, this Court acknowledged that, based on the entirety of the evidence, “it is unlikely that Feole could have intended [his statements] to prevent Tiscareno from reporting or testifying against [his son].” *Id.*

The decisions in *Cipriano* and *Feole* demonstrate that it is not “egregious error” for a justice court to dismiss a criminal complaint after weighing evidence and credibility. These decisions directly conflict with the Panel’s conclusion that justice courts are not “license[d] to dismiss charges based on conflicting evidence where the evidence permits the finder of fact to draw ‘an inference of criminal agency.’” Slip Op. at 11. Reconsideration is necessary. NRAP 40A(c).

B. THE PANEL DECISION INVOLVES A SUBSTANTIAL PRECEDENTIAL, CONSTITUTIONAL AND PUBLIC POLICY ISSUE BECAUSE IT UNDERMINES JUSTICE COURTS’ INHERENT AUTHORITY TO WEIGH EVIDENCE AND DISMISS CRIMINAL COMPLAINTS.

This proceeding involves a “substantial precedential, constitutional or public policy issue”—namely, the scope of justice courts’ inherent authority to dismiss charges following a preliminary hearing. *See, e.g.*, NRS 171.206. Criminal defendants across the State of Nevada will be adversely impacted by the Panel’s decision, which will make it all-but-impossible for justice courts to dismiss charges if the State can point to *any* evidence that *could* permit a

trier of fact to infer criminal agency. Slip Op. at 11. By requiring justice courts to view conflicting evidence in the light most favorable to the State, the Panel's ruling undermines justice courts' inherent authority to weigh evidence and dismiss criminal complaints. As a result, more accused individuals will be forced to suffer the degradation and expense of a criminal trial, regardless of how weak and incredible the evidence against them may be. Because the impact of the Panel's decision is far-reaching, the en banc Court should reconsider it.

Pursuant to Article 6, Section 1 of the Nevada Constitution, "[t]he judicial power of this State is vested in a court system, comprising a Supreme Court, a court of appeals, district courts, and justices of the peace." Nev. Const. Art. 6, § 1 (emphasis added). NRS Chapter 171 describes the proceedings that occur in justice court after criminal complaint is filed, and NRS 171.206 sets forth the justice court's authority following the preliminary examination. Specifically, NRS 171.206 states:

If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold the defendant to answer in the district court; otherwise the magistrate shall discharge the defendant. . . .

NRS 176.206 (emphasis added). By its plain language, this statute confers power on the justice courts to evaluate the evidence presented at the

preliminary hearing and determine, based on how that evidence “appears to the magistrate,” whether probable cause exists. This necessarily means that justice courts are authorized to weigh the evidence and make credibility determinations as they see fit, discharging a defendant if it “appears to the magistrate” that probable cause does not exist.

Prior to this Panel’s decision, justice courts could consider the credibility of the witnesses who testified at preliminary hearing and could weigh the evidence when determining probable cause, or lack thereof. *See, e.g., Potter*, 99 Nev. at 391, 663 P.2d at 352; *Wrenn*, 87 Nev. at 87, 482 P.2d at 290; *Marcum*, 85 Nev. at 179, 451 P.2d at 847; *see also Murphy*, 110 Nev. at 198, 871 P.2d at 918; *Cipriano*, 111 Nev. at 540, 894 P.2d at 351; *Feole*, 113 Nev. at 631-32, 939 P.2d at 1063.

This Panel’s decision improperly limits that inherent authority by second-guessing the justice court’s actual findings (which were based on evidence that that was witnessed personally by the justice court) and concluding, based on a cold record, that the evidence “was sufficient to show that a crime had been committed and that there were reasonable grounds to believe that [Bolden] had committed it.” Slip op. at 12.

IV. CONCLUSION

The Panel's ruling strips justice courts of their inherent power to consider the credibility of witnesses and to determine the weight to be accorded to witness testimony at preliminary hearing. The Panel reached this result by ignoring several decisions that directly control the dispositive issue in the case—whether the justice court committed “egregious error” that would permit the district court to grant the State's motion for leave to proceed by information filed in district court. The en banc Court should reconsider the Panel's ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for en banc 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:

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DATED this 21st day of October, 2021.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 21st day of October, 2021. 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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