IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS WILLIAM RANDOLPH, Petitioner, vs. THE HONORABLE TIERRA DANIELLE JONES, DISTRICT JUDGE; AND THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, Respondents, THE STATE OF NEVADA, Real Party in Interest.	Electronically Filed Aug 17 2023 02:00 PM Elizabeth A. Brown Clerk of Supreme Court CASE NO: 87127

ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, ALEXANDER G. CHEN, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed August 16, 2023, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 17th day of August, 2023.

Respectfully submitted,

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

BY */s/ Alexander G. Chen*
ALEXANDER G. CHEN
Chief Deputy District Attorney
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Thomas Randolph is being re-tried for the case of Murder with Use of a Deadly Weapon, Burglary with Use of a Deadly Weapon, and Conspiracy to Commit Murder in case 09C250966. Although Randolph's first conviction resulted in the jury sentencing him to death, the State informed the district court on June 1, 2023 that it would no longer be seeking the death penalty in this case. As such, Randolph's trial currently taking place in Department X of the Eighth Judicial District Court is not a death penalty case.

Trial commenced in this matter on August 8, 2023. On August 9, 2023, defense counsel broached with the district court the possibility of both counsel arguing during closing arguments. The district court took the matter under advisement, but later that day the court ruled that this is a non-capital case. Defense

has known that this was a not a capital case since June 1, 2023, so it was going to restrict one counsel to conducting the closing argument.

Randolph filed the instant petition for writ of mandamus on August 14, 2023. On the morning of August 16, 2023, this Court issued an order directing an answer.

SUMMARY OF THE ARGUMENT

The district court is given full discretion pursuant to NRS 175.151 to decide how many counsel are permitted to argue during closing argument.

ARGUMENT

A. EXTRAORDINARY RELIEF BY ISSUANCE OF A WRIT OF MANDAMUS IS NOT WARRANTED IN THIS CASE

Randolph is seeking extraordinary relief to overturn a district court's discretionary ruling that only one attorney will be permitted to argue during closing arguments. "[M]andamus is an extraordinary remedy, and the decision of whether a petition will be entertained lies within the discretion of this court." Hickey v. Eighth Jud. Dist. Court, 105 Nev. 729, 731 (1989). However, extraordinary relief will not issue "where the petitioner has a plain, speedy and adequate remedy, such as an appeal, in the ordinary course of law." Id. at 731. The petitioner carries "the burden of demonstrating that extraordinary relief is warranted." Pan, 120 Nev. at 228; see also NRAP 21(a). This Court has previously emphasized the "narrow circumstances" under which mandamus is available and has cautioned that

extraordinary remedies are not a means for routine correction of error. State v. District Court (Riker), 121 Nev. 225 (2005).

Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v. Second Judicial Dist. Court, 116 Nev. 629, 635 (2000). Thus, a writ of mandamus will only issue to control a court's arbitrary or capricious exercise of its discretion." Id. *citing* Marshall v. District Court, 108 Nev. 459, 466 (1992); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954 (1996); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, (1981).

Even without further exploring the merits of his argument, this type of issue is not one that warrants extraordinary judicial intervention. The district court has not in any way precluded the *information* that may be argued in closing arguments. Either of his attorneys could communicate with the other to collaborate over the topics that should be covered in closing arguments. Instead, the district court has only limited the number of attorneys that may argue. This subject matter should not be granted extraordinary review.

B. THIS IS NOT A CASE WHERE THE DEATH PENALTY IS A POSSIBLE PUNISHMENT, THEREFORE NRS 175.151'S PROVISION ALLOWING FOR TWO ATTORNEYS TO ARGUE TO THE JURY DOES NOT APPLY

Randolph claims that he is entitled to a Writ of Mandamus because the district court rejected his request to allow both of his counsel to argue during closing

arguments. In this case, however, there is a statute directly on point that gives the district court discretion to allow, or deny, multiple counsel in a non-capital case. NRS 175.151 is entitled "Number of counsel who may argue case." It reads, "[I]f the indictment or information be for an offense punishable with death, two counsel on each side may argue the case to the jury, but in such case, as well as in all others, the counsel for the State must open and conclude the argument. If it be for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side."

The interpretation of a statute is question of law subject to de novo review. State v. Kopp, 118 Nev. 199, 202 (2002). Statutes should be given their plain meaning and "must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502 (1990). Only if the plain meaning of a statute is ambiguous will this court then look beyond the language to consider the meaning in light of its spirit, subject matter, and public policy. Moore v. State, 117 Nev. 659, 661-62 (2001).

NRS 175.151's language plainly and unambiguously provides the district court permissive authority on controlling who argues a case to the jury. The statute explains that two counsel may argue when the case is punishable by death. Randolph argues that because this is a murder case, death is a possible punishment. This is an

errant reading of the statute.

First-Degree murder is the only possible offense that may result in a sentence of death. NRS 200.030(4)(a). A sentence of death, however, is not the only possible punishment for a first-degree murder conviction. Not all first-degree murder cases seek the death penalty. To seek a sentence of death, there must be aggravating circumstances that are found as defined in NRS 200.033. Moreover, those aggravating circumstances must outweigh any mitigating circumstances. Id. All of this must be specifically alleged by the State, and the State is required to inform the court of its intent to seek or not seek this form of penalty.

Randolph wishes to argue that because he is charged with first-degree murder, NRS 175.151 applies to him because that charge may be punishable by death. However, death is not a possible sentence in this case thus it is a noncapital case. The State has withdrawn the prospect of a sentence of death, and now it would be impossible for Randolph to be punished by death. As such, the district court did not err in ruling that this is not the type of case that mandates trial with two defense attorneys.

In Butler v. State, this Court examined the language in NRS 175.151 and noted that the two sentences in the statute each addressed a separate and distinct grant of authority, one to capital defendants and the other to noncapital defendants. 120 Nev. 879, 893 (2004). This court reasoned that "the first sentence provides that

"counsel…may" argue to the jury. Moreover, reading the statute to give discretion to the trial court in both capital and noncapital cases would render the entire first sentence and its distinct wording superfluous." Id., at 893-94. Thus, this reiterates that there is a different standard between capital and noncapital cases. The statute could have stated that two attorneys could argue in every murder case, but instead the legislature delineated between capital and noncapital cases.

Given that this is not a case punishable by death, the statute clearly gives the district court authority to decide how many attorneys may argue the case to the jury. NRS 175.151 says that "the court may, in its discretion, restrict the argument to one counsel on each side." This language not only is clear in terms of the court's ability to use its own discretion, but the use of the word "may" signals that this should be construed as a permissive grant of authority. *See* Butler, 120 Nev. at 893 (2004).

Although interpretation of a statute is subject to de novo review, discretionary rulings are subject to an abuse of discretion. This court has reviewed ruling with respect to closing arguments for an abuse of discretion. Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 704 (2009). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120 (2001).

There is no issue with the district court's discretionary ruling here, and certainly nothing that warrants extraordinary intervention. The statute provides the

district court with the ability to exercise its own discretion regarding the number of counsel that may participate in a non-death penalty case's arguments. Randolph argues that the district court's interpretation of the statute is incorrect, but assuming that the district court has properly interpreted the statute, Randolph has not explained nor shown that the district court abused its discretion in refusing to allow two counsel to argue the closing argument.

The issuance of a writ in this case would essentially strip the district court of the discretion provided by NRS 175.151. If this court were to rule that the district court is not entitled to make a discretionary ruling on the number of counsel that can argue in a non-death penalty case, it would eliminate the purpose of the statute. Issuance of a writ would mean that the district court is now obligated to allow for multiple attorneys to argue in any non-death penalty case. A result like this would truly render NRS 175.151 nugatory.

C. THIS COURT SHOULD REJECT RANDOLPH'S ALTERNATIVE ARGUMENT THAT ONLY ONE COUNSEL FROM THE STATE SHOULD BE ALLOWED TO ARGUE

Randolph then proceeds to argue that if he is not allowed to have two counsel argue on his behalf during closing argument, then the State should be prohibited from having separate attorneys argue the closing statement and the rebuttal. Randolph argues that NRS 175.151's statement "the counsel for the State must open and conclude the argument" means that the same counsel must argue the case.

First, reading of "the counsel for the State" can plainly be interpreted as the attorneys for the State. However, if the counsel is meant to refer to a singular counsel, then it still would follow that the district court is authority to exercise its discretion in allowing one attorney to give the closing argument, and another one to provide the rebuttal.

This is the ruling that the district court made. One attorney is allowed to give the closing argument for the State, one defense attorney may argue the closing argument, and then one attorney was permitted to provide the rebuttal. As the district court noted, the closing argument is not the same as a rebuttal argument. ROA000010. This is not a situation where the State has sought to divide its closing arguments between two attorneys, or to divide the rebuttal between two attorneys. Instead, there are two separate arguments, and the district court has given permission for one attorney from the State to do each of the arguments. Thus, Randolph's argument that is unfair for two State attorneys to argue is not correct.

CONCLUSION

This is not a case where a punishment of death is being sought. It is understandable in a case where the most severe punishment is available, two attorneys could be required to argue the case as indicated in NRS 175.151. However, this case does not present the voluminous information that would be covered by a capital case – especially given that there is no aggravating and mitigating evidence

to cover. Instead, this is a non-capital case where the district court has appropriately exercised its discretion, and the situation does not give rise to this Court's need to provide extraordinary intervention.

Dated this 17th day of August, 2023.

Respectfully submitted,

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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 17th day of August, 2023.

BY */s/ Alexander G. Chen*

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Answer to Mandamus Writ 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 brief 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 brief complies with the page and type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 1,940 words, 165 lines of text and does not exceed 15 pages.
3. **Finally, I hereby certify** that I have read this Answer to Mandamus Writ, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of August, 2023.

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 August 17, 2023. 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 on August 17, 2023, a copy was sent via email to:

District Court, Department 10's JEA for Judge Jones:

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BY */s/ E. Davis*
Employee, District Attorney's Office

AC//ed