No. 26-5966

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IN THE

SUPREME COURT OF THE UNITED STATES

MELVIN M. HUDSPATH — PETITIONER
(Your Name)

vs.

Tim GARRETT, et, al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITE STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MELVIN M. HUDSPATH
(Your Name)

1200 Prison Rd
(Address)

LOVELOCK, NV, 89419
(City, State, Zip Code)

(Phone Number)

# QUESTIONS PRESESENTED

1. WHETHER A CELLPHONE IS A "CONTAINER"

2. WHETHER THE PANEL ERRED IN ITS HOLDING THAT RILEY V. CALIFORNIA DID NOT APPLY, CONTRADICTING GRIFFITH'S RULE OF RETROACTIVITY

3 WHETHER CERTIORARI SHOULD BE GRANTED BASED ON THE NINTH CIRCUIT DECISION, WHICH IS IN CONFLICT WITH THE UNITED STATES SUPREME COURT DECISION REGARDING RILEY V. CALIFORNIA

4. WHETHER CERTIORARI SHOULD BE GRANTED BASED ON DEFENSE COUNSEL'S INEFFECTIVENESS

## LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1.) Tim Garrett, et al

2). Aaron Ford, Attorney General For the State of Nevada

3. United States Court of Appeals for the Ninth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[✓] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was AUGUST 27, 2025.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 29, 2025, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was May 16, 2017. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

1. TRIAL TESTIMONY SHOWS THAT CALIFORNIA POLICE OFFICERS SEIZED AND SEARCHED PETITIONER'S CELL-PHONE WITHOUT A WARRANT, FINDING INCULPATORY EVIDENCE THAT LED TO HIS CONVICTION

2. AFTER PETITIONER IS CONVICTED, PETITIONER RAISES CLAIMS RELATED TO THE CALIFORNIA OFFICERS UNLAWFUL SEARCH OF HIS CELLPHONE ON DIRECT APPEAL, STATE POST CONVICTION AND FEDERAL HABEAS CORPUS

3. THE PANEL HELD THAT RILEY V. CALIFORNIA did NOT APPLY, CONTRADICTING GRIFFITH'S RULE OF RETROACTIVITY

REASONS FOR GRANTING THE PETITION

1. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION CONFLICTS WITH UNITED STATES SUPREME COURT AND NINTH CIRCUIT PRECEDENT REGARDING RETROACTIVITY, THE GOOD FAITH DOCTRINE AND DEFENSE COUNSEL'S OBLIGATIONS

2. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION CONFLICTS WITH UNITED STATES SUPREME COURT AND NINTH CIRCUIT PRECEDENT REGARDING STRICKLAND'S DEFICIENT PERFORMANCE PRONG

3. CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL DENIED RELIEF BASED ON AN ARGUMENT THAT THE STATE did NOT RAISED AND THAT THE PARTIES did NOT HAVE A CHANCE TO ADDRESS

## STATEMENT IN SUPPORT OF CERTIORARI [redacted]

While Melvin Hudspath was at a friend's house, a California deputy arrested him on an outstanding warrant for car theft and placed him in the back of a patrol car. Then the deputy walked to Hudspath's car, pulled his cellphone out, and searched it, all without a warrant. He found videos depicting illegal acts. A second officer searched the phone again the next day, again without a warrant. These obviously illegal searches occurred mere months before *Riley v. California* was decided, which holds that officers must obtain a warrant before searching a suspect's cellphone.

Under *Griffith/Davis*, the rule in *Riley* applied retroactively to Hudspath's case. And under that rule in *Riley*, the officers violated the Fourth Amendment. Despite the clear merit of a suppression motion, Hudspath's lawyer sat idly by and failed to seek relief.

Yet the panel found that counsel did not render deficient performance. This is fundamentally wrong. The error lies in the panel coming up with a new, substantively wrong *post hoc* rationale that contradicts defense counsel's stated reason for not filing a suppression motion.

Because the memorandum conflicts with multiple United States Supreme Court and Ninth Circuit cases, CERTIORARI [redacted] should be granted. *See* FRAP 40(b)(1)(A); FRAP 40(b)(2)(A)–(B).

[redacted]

## I. Trial testimony shows that California police officers seized and searched Melvin Hudspath's phone without a warrant, finding inculpatory evidence that led to his convictions

On March 20, 2014, Antonio Juarez, a Deputy Sheriff in San Bernardino County, responded to a call for a welfare check at a home in Victorville, California. 6-ER-962. Deputy Juarez understood that someone from Las Vegas wanted police to check on two children at the residence because she "had just found out some news of some videos that were found by a cousin or a friend of hers." 7-ER-965. A second caller—someone from Victorville—indicated that there were videos on a phone of "some sexual acts being performed by a child." 6-ER-965.

As Deputy Juarez arrived at the residence, he saw Hudspath and another male get out of a Toyota Camry in the driveway and walk into the house. 6-ER-963. Deputy Juarez went to the front door of the house, where he was greeted by Denise Belton and her daughter Daneah Belton, and came inside. 6-ER-964-66, 1033.

Deputy Juarez was in the living room when he met Hudspath. 6-ER-967. He asked Hudspath for his identification, and Hudspath left the living room to retrieve it. 6-ER-967. When Hudspath left the room, Daneah whispered to Deputy Juarez, "That's him." 6-ER-968. Hudspath eventually returned and gave Deputy Juarez his name and date of birth. 6-ER-968. Deputy Juarez ran his name and learned that there was an outstanding warrant for Hudspath's arrest for grand larceny auto. 6-ER-996. Deputy Juarez arrested Hudspath on the warrant and placed him in his patrol car. 6-ER-978, 1024, 1053.

At some point while Hudspath was separated from the Beltons, Daneah told Deputy Juarez that she had been going through Hudspath's cellphone and found videos of a child performing sexual acts on an adult. 6-ER-969. Deputy Juarez asked Daneah if she knew where the phone was, and she said it was either in the house or in Hudspath's car. 6-ER-986. Deputy Juarez testified that Daneah searched the house, while he "went outside and looked in the car." 6-ER-986. Daneah testified that she actually showed Deputy Juarez where the phone was in the car. 6-ER-1023-24.

The car window was rolled down, and the phone was sitting on the

driver's seat of the car. 6-ER-986. Without a warrant and without asking Hudspath for permission to search, Deputy Juarez reached into the car and picked up the phone. 6-ER-986. Deputy Juarez believed he did not need a warrant or Hudspath's permission to search because he had already arrested Hudspath on the warrant for grand larceny auto, so he was conducting a lawful "search incident to arrest." 6-ER-995-96.

Deputy Juarez then testified that he re-entered the house with the phone and asked Daneah if it belonged to Hudspath. 6-ER-987. She identified it as Hudspath's phone, and Deputy Juarez handed it to her. 6-ER-987. He told her to show him what she was talking about. 6-ER-988. She showed him one video, and he took the phone back. 6-ER-988.

Deputy Juarez delivered the phone to a colleague, Detective Scott Stafford, the next morning (March 21, 2014). 6-ER-990; 7-ER-1120. Detective Stafford reviewed the contents of the cellphone. 7-ER-1109, 1120. He watched several videos. 7-ER-1109-10. This led him to "determine[] there was stuff on there that [he] needed to get off," and only then did he write an application for a search warrant. 7-ER-1120.

The United States Supreme Court decided *Riley v. California*, 573

U.S. 373, on June 25, 2014. *Riley* holds that "a warrant is generally required before [a search of a cell phone], even when a cell phone is seized incident to arrest." 573 U.S. at 401.

Based largely on what the officers found on Hudspath's phone, on January 28, 2015, Hudspath was charged in Clark County, Nevada, with numerous sex offenses. 4-ER-709.

The State's theory was that Hudspath had sexually assaulted his ex-girlfriend Kimberly Williams' sister R.H., who was under fourteen at the time, and filmed it on his phone while he was visiting Las Vegas. *See generally* 7-ER-1294-1305 (State's closing argument). The primary evidence against Hudspath at trial were the videos that California officers extracted from his phone and the testimony of R.H., which even the deputy district attorney conceded would sound "fantastical" and "impossible," if it were not for the videos. 7-ER-1312.

At trial, Deputy Juarez explained he did not obtain a warrant "because [Hudspath] was being arrested on warrants others [sic] he was under arrest search incident to arrest including the car." 6-ER-995. Defense counsel asked, "What was the warrant?" and the deputy district attorney explained, "Grand larceny auto." 6-ER-996. Counsel then

agreed to Deputy Juarez telling the inquisitive jury that under California law he did not need a warrant. 6-ER-996.

The defense trial theory was that the videos, which did not show the man's face, depicted someone other than Hudspath, and R.H., who had memory issues, was mistaken. *See, e.g.*, 7-ER-1306, 1312.

## II. After Hudspath is convicted, he raises claims related to the California officers' unlawful search of his cellphone on direct appeal, state post-conviction, and federal habeas corpus

After a five-day jury trial, Hudspath was found guilty of various counts of sexual assault of a minor, lewdness with a minor, use of a minor to produce pornography, and possession of a visual presentation depicting sexual conduct of a child. 4-ER-645-48.

Hudspath then tried to dismiss his attorney for sentencing, and the court held a hearing. 7-ER-1328. Hudspath explained that before trial, he asked his counsel to file a motion to suppress evidence that argued that his cellphone data was unlawfully obtained without a warrant. 7-ER-1329, 1331. Counsel never filed a motion. 7-ER-1329-30. Counsel explained why: for him, Deputy Juarez "asked about where the phone was located, picked up the phone out of—*in plain view,* is what

his testimony was and looked at—to verify what he was told by the young lady on the phone." 7-ER-1334 (emphasis added). The trial court denied the request for substitute counsel. 7-ER-1329-38.

The court imposed an aggregate sentence of 70 years to life. 3-ER-588-91.

The Nevada Supreme Court affirmed Hudspath's convictions on direct appeal, concluding it was not "plain error" to admit the videos. 1-ER-57-61.

In Nevada state district court, Hudspath pursued state post-conviction relief. 3-ER-441. The Nevada Supreme Court affirmed the denial of post-conviction relief without an evidentiary hearing. 1-ER-52-55. It acknowledged its direct appeal decision and noted that trial counsel was not ineffective for failing to make a meritless challenge to the officers' search. 1-ER-54.

After Hudspath initiated federal habeas proceedings and was appointed counsel, the Federal Public Defender filed the operative amended petition asserting that trial counsel was ineffective for not moving to suppress. 2-ER-261.

The district court denied the petition but granted a certificate of

appealability. 1-ER-3-4. It found it should not defer to the Nevada Supreme Court because it had unreasonably determined the facts and unreasonably applied three Supreme Court cases (*Strickland*, *Kimmelman*, and *Davis*). 1-ER-19-20. However, it found that on de novo review, trial counsel was not ineffective for failing to file a motion to suppress because the motion lacked merit. 1-ER-20.

Hudspath appealed, and the panel issued a memorandum affirming the district court's result but not its reasoning. It held:

> Hudspath's counsel testified that he "looked into the issue" of a motion to suppress the cell phone evidence and concluded there was "no issue" after his investigation. Counsel could have reasonably concluded that officers may conduct a warrantless search of a cell phone within a vehicle if they have probable cause to search the vehicle. *See United States v. Ross*, 456 U.S. 798, 823-25 (1982) (allowing warrantless search of containers and packages within a vehicle). Given the evolving case law and ambiguities regarding warrantless cell phone searches at the time of Hudspath's arrest, Hudspath's counsel acted "within the 'wide range' of professional assistance" when he decided not to file the motion.

Hudspath now requests FOR WRIT OF CERTIORARI [redacted]

//

## ARGUMENT

### I. [redacted] should be granted.

[redacted] should be granted of this memorandum, which excuses the wretched performance of an attorney who failed to move for obvious suppression. The panel denied relief based on an argument that the State did not raise, and that the parties did not have a chance to address, causing it to render a decision that conflicts with multiple United States Supreme Court and Ninth Circuit cases, including on the illegality of warrantless cellphone searches, the retroactivity of new decisions issued before a conviction becomes final, the good-faith doctrine, and *Strickland*'s deficient-performance prong.

#### A. [redacted] should be granted because the decision conflicts with United States Supreme Court and Ninth Circuit precedent regarding retroactivity, the good-faith doctrine, and defense counsel's obligations.

The panel wrongly denied relief by finding that defense counsel "could have" believed that a motion to suppress would lack merit based on the general car-search exception to the warrant requirement.

The panel failed to follow existing law, which holds that (1) *Riley* applies under *Griffith*'s retroactivity rule, and under *Riley*, the officers here violated the Fourth Amendment; (2) even analyzing the officers'

good-faith reliance on the pre-*Riley* car-search exception, that exception did not specifically authorize the cellphone search here; and (3) defense attorneys are expected to make plausible arguments.

### 1. The panel held that *Riley* did not apply, contradicting *Griffith*'s rule of retroactivity.

The facts are clear. Both Deputy Juarez and Detective Stafford searched Hudspath's phone without a warrant. Deputy Juarez searched the phone after he reached into Hudspath's car and retrieved it, while Hudspath was sitting in a locked police car watching the events unfold. And Detective Stafford searched the phone after Deputy Juarez gave it to him the next day. Despite the "technological advances" that have made the "process of obtaining a warrant itself more efficient," *Riley v. California*, 573 U.S. 373, 401 (2014), neither officer first obtained a warrant before searching the cellphone's contents.

As *all* reasonable defense attorneys would recognize, these searches violate *Riley*. And *Riley* applies retroactively because it was decided before trial. "Though the search took place before *Riley* was decided, we apply the new constitutional rule announced in *Riley*" because

it was decided before the conviction became final. *United States v. Jenkins*, 850 F.3d 912, 918 (7th Cir. 2017). That is the rule from *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . not yet final"), which the United States Supreme Court applied in the Fourth Amendment context in *Davis v. United States*, 564 U.S. 229, 244 (2011). The State has conceded that if Deputy Juarez had executed this search after *Riley* was decided, he would have violated *Riley*. 2-ER-179.

Relegating *Riley* to a footnote, the panel determined that defense counsel "could have reasonably concluded that officers may conduct a warrantless search of a cell phone within a vehicle if they have probable cause to search the vehicle." But *Riley* applied to Hudspath's case, and it states that officers generally may not search a cellphone without a warrant, and a cellphone is not a container. *Riley*, 573 U.S. at 386, 397. So defense counsel could not have reasonably concluded as the panel said. On this alone, CERTIORARI [redacted] should be granted.

//

### 2. Even analyzing the issue under the rubric of the officers' good faith, defense counsel still acted inexcusably.

Even considering the good-faith doctrine's potential application, defense counsel still needed to move for suppression.

Under the good-faith doctrine, "when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." *Davis*, 564 U.S. at 241. But the good-faith exception applies "only when 'binding appellate precedent' expressly instruct[s] the officer what to do." *United States v. Lara*, 815 F.3d 605, 613 (9th Cir. 2016). By contrast, "Good faith is not established where existing precedent is unclear or makes the government's position only 'plausibly . . . permissible.'" *United States v. Holmes*, 121 F.4th 727, 734-35 (9th Cir. 2024) (citing *United States v. Cano*, 934 F.3d 1002, 1021 (9th Cir. 2019)). It does not apply when "the government cites only cases from which it could have plausibly argued that the searches were permissible." *Lara*, 815 F.3d at 614.

So too here. The generic car-search doctrine, which allows searches of "containers" within the car, *United States v. Ross*, 456 U.S.

798, 824 (1982), did not specifically authorize the particular police practice of searching a cellphone. A "container" under United States Supreme Court case law "denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." *New York v. Belton*, 453 U.S. 454, 461 n.4 (1981); *see also Ross*, 456 U.S. at 822 (providing "paper bags, locked trunks, lunch buckets, and orange crates" as examples). Conversely, "[t]oday's cell phones are unlike any of the container examples the Supreme Court has provided in the vehicle context." *United States v. Camou*, 773 F.3d 932, 943 (9th Cir. 2014); *see also Jenkins*, 850 F.3d at 920 (holding that pre-*Riley* case law did not specifically authorize officers' cellphone search).

Thus, *all* reasonable defense attorneys would have moved to suppress, given the strength of the argument and the benefits of suppression. Throughout the entire course of the criminal case, *Riley* was available, and it repudiated the notion that a cellphone is equivalent to a container. The analogy of a cellphone to a container "crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of

a screen." *Riley*, 573 U.S. at 397. Reasonable attorneys would have seized on the opportunity to suppress almost all the evidence in this case based on an available United States Supreme Court decision that directly states the search here was illegal. It's not even debatable.

Moreover, even if there is a possibility that an argument will lose, when an argument is plausible and carries great potential benefit, *Strickland* requires counsel to make that argument. *See, e.g.*, *Leeds v. Russell*, 75 F.4th 1009, 1019-20 (9th Cir. 2023) (holding that counsel is expected to make arguments based on reasonable interpretations of existing law); *Mahrt v. Beard*, 849 F.3d 1164, 1171 (9th Cir. 2017) ("We conclude that trial counsel should have moved to suppress the firearms and ammunition. There was at least a chance that such a motion would have succeeded."). Therefore, even if the officers' actions might have possibly been justified by the good-faith doctrine (which they were not), an effective attorney would have still sought exclusion.

Because the panel improperly denied relief based on an argument that contradicts United States Supreme Court and Ninth Circuit authority on *Riley*, *Griffith* retroactivity, the good-faith doctrine, and the *Strickland* standard, [redacted] should be granted.

### B. [redacted] should be granted because the decision conflicts with United States Supreme Court and Ninth Circuit precedent regarding *Strickland*'s deficient-performance prong.

Because the panel improperly denied relief based on an argument that conflicts with United States Supreme Court and Ninth Circuit authority on *Strickland*'s deficient-performance prong, [redacted] should be granted.

Even though defense counsel already explained why he did not file a motion to suppress, 7-ER-1334—and it was an explanation so absurd no court has approved it—the panel explained counsel "could have" relied on another rationale. But the panel's reliance on a justification defense counsel never gave disregards controlling Supreme Court cases about *Strickland*'s deficient-performance prong. Under *Strickland*, the court must evaluate the attorney's stated reason for a decision, not an imagined reason. Courts "may not indulge '*post hoc* rationalization' for counsel's decision-making that contradicts the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (quoting *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003), which holds, "[w]hen

viewed in this light, the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct").

For example, in *Kimmelman*, counsel rendered deficient performance by not filing a motion to suppress "not due to strategic considerations," but due to ignorance. 477 U.S. 365, 385 (1986). The Court analyzed and found lacking the justifications that counsel actually offered, which "betray[ed] a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation." *Ibid.* The Court has taken that approach consistently in cases since then. *E.g.*, *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding counsel's deficiency consisted in their failure to investigate, "not because of any strategic calculation but because [counsel] incorrectly thought that state law barred access" to records); *Hinton v. Alabama*, 571 U.S. 263, 273, 275 (2014).

Federal appellate courts follow this binding precedent in deciding questions of deficient performance. "[I]t is not the role of a reviewing court to engage in a *post hoc* rationalization for an attorney's actions by 'construct[ing] strategic defenses that counsel does not offer' or engage in Monday morning quarterbacking." *Brown v. Sternes*, 304 F.3d 677,

691 (7th Cir. 2002) (citation omitted). Therefore, applying *Harrington*, this Court analyzes defense counsel's stated reasons for taking, or failing to take, a particular action. *E.g.*, *Noguera v. Davis*, 5 F.4th 1020, 1042 (9th Cir. 2021) ("The State speculates that [counsel] curtailed their investigation because they believed mental health evidence would suggest that [defendant] was prone to violence. Counsel did not provide that explanation. We decline to entertain this *post hoc* rationalization because it is inconsistent with [counsel's] admitted failure to investigate mental health evidence . . . ."); *White v. Ryan*, 895 F.3d 641, 667 (9th Cir. 2018) (declining to engage in *post hoc* rationalization of an attorney's failure to request a client's records because he testified that he "just flat didn't think of it"); *Easter v. Franke*, 694 F. App'x 540, 540 (9th Cir. 2017).

Yet here, the panel deviated from the correct approach. Defense counsel explained why he did not file a motion to suppress—and it was an explanation so absurd no court has approved it. The panel improperly denied relief based on a *post hoc* rationalization for counsel's actions, contradicting United States Supreme Court and Ninth Circuit authority on *Strickland*'s deficient-performance prong.

### C. Certiorari [redacted] should be granted because the panel denied relief based on an argument that the State did not raise, and that the parties did not have a chance to address.

Lastly, the panel denied relief based on a flawed argument that the State did not raise, and that the parties did not have a chance to address: that defense counsel "could have" believed that a motion to suppress would lack merit based on the car-search exception to the warrant requirement. The panel failed to follow existing law by raising a new argument for the State and not giving the parties a chance to address it.

Notably, this is not the first time that a decisionmaker in Hudspath's case has denied relief based on a new legal argument that the State did not raise and that the parties did not address.

The Nevada Supreme Court denied relief on direct appeal by citing the unbriefed inevitable-discovery doctrine. 1-ER-59 n.1. The State conceded in this appeal that the inevitable-discovery doctrine does not apply. *See* 3/3/2025 Oral Argument Video, at 14:20-14:35 (counsel agreeing that this Court should not defer to the Nevada Supreme Court).

Next, the district court denied relief by finding that Hudspath was under a fictitious arrest for possession of child pornography, and therefore the search-incident-to-arrest exception applied to justify the cell-phone search. 1-AA-23. Appellant's briefing explains why this new approach was wrong, OB at 17-19, and this Court did not affirm the district court's reasoning.

In both instances, a court identified a new legal argument that the State did not make, denied relief on that basis without ordering supplemental briefing, and as a result, decided the case incorrectly.

So too here. The State never argued that defense counsel "could have" believed that a motion to suppress would lack merit based on the car-search exception. Nor did the lower court mention that possibility. Nor did the Court order supplemental briefing. The panel improperly raised and decided this issue without any input.

"In our adversary system . . . we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). The court "system 'is designed around the premise that [parties] know what

is best for them, and are responsible for advancing the facts and argument entitling them to relief.'" *United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part)).

As a result, where an appellee fails to raise an argument in their answering brief, they have waived it. *E.g.*, *United States v. Ngumezi*, 980 F.3d 1285, 1291 (9th Cir. 2020) (finding the government's "failure to make [an] argument prevents us from upholding the denial of the suppression motion on that theory"); *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009). Nor will this Court usually "entertain[] arguments on appeal that were not presented or developed before the district court." *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 992 (9th Cir. 2010).

Here, the State didn't argue below or on appeal that defense counsel "could have" believed that a motion to suppress would lack merit based on the car-search exception. Accordingly, the panel should have considered the issue forfeited. At the very least, the panel should have ordered supplemental briefing on this yet-to-be-raised question to allow Hudspath a chance to address it.

BECAUSE THE PANEL IMPROPERLY DENIED RELIEF BASED ON AN ARGUMENT THE STATE did NOT RAISE, CERTIORARI SHOULD BE GRANTED

## CONCLUSION

CERTIORARI SHOULD BE GRANTED BECAUSE THE PANEL'S ORDER CONTRADICTS UNITED STATES SUPREME COURT AND NINTH CIRCUIT AUTHORITY. SEE FRAP 40(b)(1)(A); FRAP 40(b)(2)(A)-(B)

RESPECTFULLY SUMITTED

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