

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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3) No.

4 LECORY L. GRACE,) Electronically Filed

5) Oct 06 2015 02:39 p.m.

6) Tracie K. Lindeman

7) Clerk of Supreme Court

8) C-14-297844-A

9))

10 THE EIGHTH JUDICIAL DISTRICT) LV Justice Court Case No.

11 COURT OF THE STATE OF NEVADA,) 14F04566X

12 COUNTY OF CLARK, THE)

13 HONORABLE DOUGAS HERNDON,)

14 DISTRICT COURT JUDGE,)

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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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4 LECORY L. GRACE,

5 Petitioner,

6 v.

7 THE EIGHTH JUDICIAL DISTRICT
8 COURT OF THE STATE OF NEVADA,
9 COUNTY OF CLARK,
10 THE HONORABLE DOUGLAS
 HERNDON, DISTRICT COURT JUDGE,

11 Respondent.

12 and

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14 THE STATE OF NEVADA,

15 Real Party In Interest.
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17 **PETITIONER-DEFENDANT LECORY GRACE'S**
18 **PETITION FOR A WRIT OF MANDAMUS**

19 LECORY GRACE, by and through Clark County Deputy Public
20 Defender Robert E. O'Brien, petitions this Honorable Supreme Court to
21 issue a writ of mandamus compelling the District Court to reverse its prior
22 order ruling that Justice Courts in Nevada do not have authority to consider a
23 motion to suppress where the State attempts to enter evidence at preliminary
24 hearing that was unlawfully obtained by a state actor in violation of the
25 United States and Nevada Constitutions.

26 The Petitioner-Defendant orally moved to suppress illegally obtained
27 evidence during a preliminary hearing in the Las Vegas Justice Court. The
28 motion to suppress was granted and the case was dismissed. In response,

1 Plaintiff-Respondent appealed the dismissal to the District Court for the
2 Eighth Judicial Distict of Nevada, and the District Court granted the appeal,
3 ruled that Justice Courts in Nevada do not have jurisdiction to suppress
4 unlawfully obtained evidence, and remanded the case to Las Vegas Justice
5 Court.

6 This matter concerns an issue of compelling public policy because the
7 District Court's order prohibits Las Vegas Justice Courts from enforcing the
8 protection against unlawful search and seizure contained in the U.S. and
9 Nevada Constitutions. Meanwhile, Justice Courts in other cities and
10 townships throughout Nevada continue to utilize their authority to suppress
11 unlawfully obtained evidence presented by the State at preliminary hearing.
12 As a result of the District Court's order and establishment of new law,
13 citizens of Las Vegas have less protection of their constitutional rights than
14 citizens of any other city in Nevada.

15 This petition is based upon the Search and Seizure clause of the
16 Fourth Amendment to the U.S. Constitution and Article I, Section 18 of the
17 Nevada Constitution; Due Process clauses of the Fifth, Sixth, and Fourteenth
18 Amendments to the U.S. Constitution and similar clauses in Article I,
19 Section 8, of the Nevada Constitution; NRS 48.025; NRS 189.120, and
20 various other state and federal provisions.

21 This matter is currently stayed in the Las Vegas Justice Court (after
22 remand from District Court) awaiting decision on this issue from this Court.
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1 The Routing Statement regarding assignment to the Supreme Court or
2 Court of Appeals has been provided below, at page 7.

3 DATED this 6th day of October, 2015.

4 PHILIP J. KOHN
5 CLARK COUNTY PUBLIC DEFENDER

6
7 By /s/ Robert E. O'Brien
8 ROBERT E. O'BRIEN, #10944
9 Deputy Public Defender
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1 **DECLARATION OF COUNSEL REGARDING**
2 **PROCEDURAL HISTORY OF CASE**

3 Robert E. O'Brien makes the following declaration:

4 1. I am an attorney licensed to practice law in the State of Nevada;
5 I am a deputy public defender representing Petitioner-Defendant Lecory
6 Grace in District Court Case No. C-14-297844-A (LV Justice Ct case no.
7 14F04566X);

8 2. I make this Declaration in support of Petitioner-Defendant's
9 Petition for a Writ of Mandamus;

10 3. I am more than 18 years of age and am competent to testify as
11 to the matters stated herein. I am familiar with the procedural history of the
12 case and the substantive allegations made by The State of Nevada. I also
13 have personal knowledge of the facts stated herein or I have been informed
14 of these facts and believe them to be true;

15 4. On April 14, 2014, Las Vegas Justice Court Judge Eric
16 Goodman presided over a preliminary hearing in State v. Lecory Grace (LV
17 Justice Ct case no. 14F04566X). (See Preliminary Hearing Transcript
18 ("PHT"), Petitioner's Appendix ("PA") at 001-36). At the time for
19 argument, Petitioner-Defendant moved to suppress evidence of the alleged
20 narcotic because it was unlawfully obtained by an illegal police search. (PA
21 at 016). As a result, Petitioner-Defendant requested that the Court suppress
22 the evidence discovered during the search of Mr. Grace as fruit of the
23 poisonous tree. After hearing opposition from the State of Nevada on the
24 issue, the Justice Court granted the motion to suppress and dismissed the
25 case. (PA at 017-28).

26 5. The State appealed the decision of the Las Vegas Justice Court
27 to the Eighth Judicial District Court Dept. III (District Judge Herndon).
28

1 After briefing from the parties, the District Court heard oral argument on
2 July 17, 2014.

3 6. On July 31, 2015, District Court Judge Herndon issued a
4 written Findings of Fact, Conclusions of Law, and Order Granting the
5 State's appeal. (PA at 037-45). As part of the written opinion and order, the
6 District Court concluded that Nevada Justice Courts do not have jurisdiction
7 to consider motions to suppress as part of preliminary hearings. Based on
8 this finding, the District Court ordered the case remanded to justice court for
9 further proceedings without consideration of whether evidence submitted
10 during preliminary hearing had been unlawfully obtained.

11 7. On August 21, 2015, Petitioner-Defendant moved the District
12 Court for an Emergency Motion to Stay in order to petition the Supreme
13 Court on the issue. On September 1, 2015, the District Court denied
14 Petitioner-Defendant's Emergency Motion to Stay.

15 8. On remand, the Las Vegas Justice Court held a status check on
16 October 2, 2015 and granted a stay in this matter to determine if the Nevada
17 Supreme Court would hear this issue.

18 9. This petition seeks a Supreme Court Opinion finding that
19 Nevada Justice Courts have authority to consider motions to suppress as part
20 of felony and gross misdemeanor preliminary hearings and an Order
21 requiring the District Court to deny the State's appeal in this case.
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1 I declare under penalty of perjury that the foregoing is true and
2 correct.

3 DATED this 6th day of October, 2015.

4 PHILIP J. KOHN
5 CLARK COUNTY PUBLIC DEFENDER

6
7 By /s/ Robert E. O'Brien
8 ROBERT E. O'BRIEN, #10944
9 Deputy Public Defender
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1 important issue of law that requires clarification and public policy is served
2 by this court's exercise of its original jurisdiction.

3 In addition, if Petitioner-Defendant did not present this writ, he would
4 arguably waive the right to challenge the validity of the District Court's
5 decision if the Las Vegas Justice Court were to bind the case over for felony
6 trial. *See, e.g., Simpson v. Eighth Jud. Dist. Ct.*, 88 Nev. 654, 661, 503 P.2d
7 1225 (1973).

8 This Court's intervention is merited in light of the significant issues of
9 Nevada law, which are also issues of first impression. As a matter of public
10 policy, the District Court's finding that Nevada Justice Courts do not have
11 authority to consider a motion to suppress as part of a preliminary hearing
12 significantly alters Nevada evidence law, Nevada criminal procedure, and
13 overturns this Court's decision in *Goldsmith v. Sheriff of Lyon Co.*, 85 Nev.
14 295, 303, 454 P.2d 86, 91 (1969).

15 The Petitioner requests that this Honorable Court validate the
16 authority of Nevada Justice Courts to determine if evidence submitted by the
17 State at preliminary hearing is lawful evidence. *See Goldsmith*, 85 Nev. 295
18 (1969); *see also* NRS 48.025 (evidence is admissible unless "limited by the
19 Constitutions of the United States or the State of Nevada"); NRS 47.020
20 (applying Nevada's Evidence Code to "all stages of proceedings" including
21 preliminary hearings).

22 Furthermore, this Petition seeks a much-needed Supreme Court Order
23 that will resolve the conflicts among the various courts in Nevada. Based on
24 the Eighth Judicial District Court's order, Justice Courts in Las Vegas
25 arguably may not consider the legality of evidence introduced by the State.
26 Meanwhile, Justice Courts in every other township and city in Nevada
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1 continue the common practice of ensuring evidence presented by the State at
2 a preliminary hearing must be lawful.

3 The issue in this Petition is a matter of first impression.

4 **PROCEDURAL FACTS**

5 The State of Nevada filed a Criminal Complaint in Las Vegas Justice
6 Court on or about March 24, 2014, charging Defendant-Petitioner Lecory
7 Grace with one (1) count of Possession of a Controlled Substance. (PA at
8 046).

9 On April 14, 2014, Las Vegas Justice Court Judge Eric Goodman
10 conducted a preliminary hearing in this case. (PA at 001-36). During the
11 preliminary hearing, the State of Nevada ("State") called one (1) witness,
12 Las Vegas Metropolitan Police Officer Allyn Goodrich ("Goodrich"), to
13 demonstrate probable cause that Petitioner-Defendant Lecory Grace
14 ("Grace") should be held for trial on the charge of Possession of Controlled
15 Substance (NRS 453.336).

16 Officer Goodrich testified that, on March 20, 2014, he was on duty
17 and supervising the transport of several prisoners from the Planet Hollywood
18 Security Office to the prisoner transport van. (PA at 005-06). He testified
19 that he witnessed a "search incident to arrest" and observed a baggie of
20 white substance "in his shoe or sock on his foot". (PA at 007). Goodrich
21 testified that he did not arrest Mr. Grace and did not witness the arrest of Mr.
22 Grace. (PA at 010). He did not know why Mr. Grace was taken into
23 custody and had been told by someone that it was due to a probation
24 violation. (PA at 011). Goodrich did not receive or review any paperwork
25 discussing the basis of the violation. (Id.)

26 At the time for argument, Petitioner-Defendant challenged the search
27 of Mr. Grace as unlawful and argued that evidence of the alleged narcotic
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1 should be suppressed. (PA at 016). Specifically, Petitioner-Defendant
2 argued that a “search incident to arrest” is a limited exception to the warrant
3 requirement and that the State must demonstrate probable cause for the
4 arrest in order for the warrant exception to apply. (PA at 017). Further,
5 Petitioner-Defendant argued that there was no evidence that Mr. Grace was
6 lawfully taken into custody because no evidence was admitted about the
7 basis for Mr. Grace’s arrest. (PA at 016-17). As a result, Petitioner-
8 Defendant requested that the Court suppress the evidence discovered during
9 the search of Mr. Grace as fruit of the poisonous tree.

10 The State opposed the motion to suppress by challenging the Justice
11 Court’s authority to hear Fourth Amendment issues and arguing that a
12 motion to suppress could only be raised in District Court. (PA at 017-28).

13 Las Vegas Justice Court Judge Goodman found that the Nevada
14 Legislature granted authority to the Justice Court to hear suppression issues
15 during a preliminary hearing. (PA at 020-28). Specifically, Judge Goodman
16 noted that the Nevada District Attorneys Association had previously asked
17 the Nevada Legislature to prohibit Fourth Amendment issues being raised
18 outside of the District Court. (PA at 020). He stated that the Legislature
19 rejected the Nevada District Attorneys Association’s position because the
20 Legislature “didn’t want the State to come in and say [‘]Oh we have illegally
21 obtained evidence but it’s okay, we can put the illegally obtained evidence
22 on and then we’ll deal with it in the District Court.’” (PA at 020). The
23 Justice Court also noted that a magistrate without such authority to consider
24 the legality of a search would be a toy monkey doing little more than
25 clapping cymbals or a rubber stamp for the District Attorney that simply
26 repeated “Send it up to the District Court, Send it up to the District Court,
27 Send it up to the District Court.” (PA at 025).

1 Further, Judge Goodman held that the State had the burden when
2 introducing evidence obtained during a “search incident to arrest” of
3 showing that the defendant was lawfully under arrest or “actually [under]
4 arrest for a reason.” (PA at 021, 023). The Justice Court found that the
5 State failed to demonstrate that Mr. Grace was lawfully under arrest, noting
6 “All you needed to do was have a person here who actually arrested [Grace]
7 for the probation violation and explain why it was for a probation violation.”
8 (PA at 023). Judge Goodman noted that he didn’t have any information in
9 the record about the alleged probation violation. (PA at 026). As a result,
10 the Justice Court granted the motion to suppress and dismissed the case
11 against Grace. (PA at 029).

12 On May 27, 2014, the State of Nevada appealed the suppression order
13 of the Las Vegas Justice Court and dismissal, arguing that the Justice Court
14 does not have jurisdiction to consider a motion to suppress. (PA at 047-56).
15 On June 4, 2014, Petitioner-Defendant LeCory Grace filed his Opposition to
16 the State’s Appeal, contending that the Justice Court did have authority to
17 suppress illegally obtained evidence based on NRS 189.120, legislative
18 history, and Nevada law’s mandate that a justice court may only consider
19 “lawful” evidence during a preliminary hearing. (PA at 057-150).
20 Petitioner-Defendant also noted that the Justice Court’s authority to hear
21 suppression issues in a preliminary hearing has also been the subject of prior
22 litigation in Las Vegas and prior written opinions issued by the Las Vegas
23 Justice Court. (*See, e.g.*, May 14, 2014 Order in State v. Larry Elder, LV
24 Just. Ct. case no. 08F15022X, PA at 151-61). The State filed its Reply on
25 June 5, 2014. (PA at 163-67). After briefing from the parties, the District
26 Court heard oral argument on July 17, 2014.
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1 On July 31, 2015, the District Court issued a written Findings of Fact,
2 Conclusions of Law, and Order Granting the State's appeal. (PA at 037-45).
3 As part of the written opinion and order, the District Court concluded that
4 Nevada Justice Courts do not have authority to consider motions to suppress
5 as part of preliminary hearings. (Id. at 041-43). The District Court reasoned
6 that since Justice Courts are courts of limited jurisdiction and may not
7 consider the lawfulness of evidence that the State submits at preliminary
8 hearing. (Id.) In addition, the District Court reasoned that this limited
9 authority prohibits Justice Courts from considering motions to suppress
10 unlawful evidence because that issue would be "collateral" to the Justice
11 Court's responsibility of finding whether there is probable cause to bind the
12 case over to District Court for a trial. (Id. at 042). Based on this finding that
13 justice courts lack authority to consider constitutional issues, the District
14 Court ordered the case remanded to Justice Court for further proceedings
15 without consideration of whether evidence submitted during preliminary
16 hearing had been unlawfully obtained.

17 Petitioner-Defendant moved the District Court for an Emergency
18 Motion to Stay on August 21, 2015. (PA at 168-74). The motion asked the
19 District Court to issue a stay while Petitioner-Defendant petitioned the
20 Supreme Court for a ruling on the issue of Nevada Justice Courts' authority
21 to consider whether evidence presented by the State during a preliminary
22 hearing is lawful evidence. The State opposed the motion for stay. (PA at
23 175-180). On September 1, 2015, the District Court denied Petitioner-
24 Defendant's Emergency Motion to Stay and remanded the case to Las Vegas
25 Justice Court to proceed without any evidence being suppressed. The
26 District Court issued a Remittitur on September 16, 2015. (PA at 181).
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1 On remand, the Las Vegas Justice Court held a status check on
2 October 2, 2015. At that time, Petitioner-Defendant moved for the Justice
3 Court to stay the case pending a petition to the Nevada Supreme Court on
4 the issue. The State opposed the request for a stay. Las Vegas Justice Court
5 Judge Goodman granted the request for a stay, expressing that justice courts
6 throughout the state needed guidance on the issue because there is now a
7 split between Nevada jurisdictions on what authority justice courts have
8 regarding motions to suppress.¹

9 This petition seeks a Supreme Court Opinion finding that Nevada
10 Justice Courts have authority to consider motions to suppress as part of
11 felony and gross misdemeanor preliminary hearings and an Order requiring
12 the District Court to deny the State's appeal in this case.

14 DISCUSSION OF ISSUES

15 Justice Courts have authority to consider motions to suppress as part
16 of a preliminary hearing because under Nevada law, Justice Courts may only
17 consider lawful, competent evidence. This authority for Justice Courts to
18 consider whether evidence the State attempts to introduce at preliminary
19 hearing was lawfully obtained has been recognized by Nevada statute and in
20 the Nevada Legislature's history of refusing to eliminate this Justice Court
21 authority.

22 ///

23 ///

25 ¹ Petitioner-Defendant initially moved for a stay of proceedings in Las
26 Vegas Justice Court on September 4, 2015. While the issue was addressed
27 at that time, the motion was improper because the District Court had yet to
28 issue a remittitur. As a result, Petitioner-Defendant properly motioned for a
stay on October 2, 2015 after the Justice Court and the parties had received
the Remittitur.

1 ///

2 **I. Justice Courts Have Authority to Consider a Motion to Suppress**
3 **as Part of a Preliminary Hearing because a Justice Court May**
4 **Only Consider Legal, Competent Evidence Under Nevada Law**

5 Evidence obtained in violation of the Fourth Amendment may not be
6 considered by a Justice Court during a preliminary hearing because such
7 unlawful evidence is inadmissible. *See* NRS 48.025 (evidence is admissible
8 unless “limited by the Constitutions of the United States or the State of
9 Nevada”); NRS 47.020 (applying Nevada’s Evidence Code to “all stages of
10 proceedings” including preliminary hearings); Goldsmith v. Sheriff of Lyon
11 Co., 85 Nev. 295, 303, 454 P.2d 86, 91 (1969).

12 This Court has been clear in its prior decisions that the U.S.
13 Constitution and the Nevada Rules of Evidence apply in Justice Court. In
14 Goldsmith v. Sheriff of Lyon Co., this Court stated that “evidence received
15 at a preliminary examination must be legal evidence.” 85 Nev. 295. Going
16 further, this Court established that the “proof which will authorize a
17 magistrate in holding an accused person for trial must consist of legal,
18 competent evidence. No other type of evidence may be considered by the
19 magistrate.” *Id.* (quoting People v. Schuber, 71 Cal.App.2d 773, 163 P.2d
20 498 (1945)).

21 Under this standard, this Court has firmly established that Justices of
22 the Peace are required to consider the constitutionality, legality, and
23 competency of evidence submitted by the State as part of a preliminary
24 hearing. When presented with a question of evidence’s legality, a justice
25 court may not act as the proverbial blind, deaf, and dumb monkeys (hear no
26 evil, see no evil, speak no evil). Instead, Nevada precedent, Nevada’s Rules
27 of Evidence, the Nevada State Constitution, and the U.S. Constitution
28 require the Justice Court to weigh the issue and make a ruling. To do

1 otherwise would transform the justice courts into, to use Judge Goodman's
2 metaphor, a rubber stamp simply binding up every case to district court
3 without consideration of the evidence.

4 Therefore, pursuant to Nevada statute and Nevada evidence rules,
5 Justice Courts have authority to consider a motion to suppress challenging
6 whether evidence presented by the State at preliminary hearing is lawful
7 evidence.

8
9
10 **II. Authority for the Justice Court to Consider a Suppression Issue**
11 **during a Preliminary Hearing is Recognized by Statute**

12 The Nevada Legislature has granted authority through NRS 189.120
13 for Nevada Justice Courts to rule upon suppression issues during a
14 preliminary hearing in felony and gross misdemeanor criminal cases.

15 While justice courts are courts of limited jurisdiction, they hold the
16 authority granted to them by statute. NRS 4.370; Parsons v. State, 116 Nev.
17 928, 933, 10 P.3d 836, 839 (2000). In criminal matters, justice courts'
18 jurisdiction is limited to misdemeanor cases unless otherwise "provided by
19 specific statute." NRS 4.370(3); Parsons, 116 Nev. at 933. Pursuant to NRS
20 171.206, the Legislature established jurisdiction for justice courts to conduct
21 "preliminary examinations" (a.k.a. preliminary hearings) in felony and gross
22 misdemeanor cases "to make an evidentiary evaluation of whether there is
23 'probable cause to believe that an offense has been committed and that the
24 defendant has committed it.'" Parsons, 116 Nev. at 933 (quoting NRS
25 171.206).

26 Recognizing that justice courts have authority to hear consider the
27 constitutionality of evidence, the Legislature passed NRS 189.120 to provide
28 a remedy for prosecutors who disagree with a justice court's ruling on

1 whether evidence must be suppressed in a felony or gross misdemeanor
2 case. NRS 189.120 specifically creates the ability for prosecutors to appeal
3 from an order suppressing evidence by a Justice of the Peace **during a**
4 **preliminary hearing:**

5 1. The State may appeal to the district court from an order of a
6 justice court granting the motion of a defendant to suppress
7 evidence.

8 2. Such an appeal shall be taken:

9 (a) Within 2 days after the rendition of such an order during a
10 trial or **preliminary examination.**

11 (b) Within 5 days after the rendition of such an order before a
12 trial or **preliminary examination.**

13 3. Upon perfecting such an appeal:

14 (a) After the commencement of a trial or preliminary
15 examination, further proceedings in the trial shall be stayed
16 pending the final determination of the appeal.

17 (b) Before trial or preliminary examination, the time
18 limitation within which a defendant shall be brought to trial
19 shall be extended for the period necessary for the final
20 determination of the appeal.

21 NRS 189.120 (**emphasis added**).

22 In drafting NRS 189.120, the Legislature recognized the authority of
23 justice courts to consider the constitutionality of searches and admissibility
24 of evidence at preliminary hearings for felony and gross misdemeanor
25 cases.² The statute establishes procedural steps for the State to appeal from
26 the justice court's exercise of its authority to suppress evidence at a
27 preliminary hearing. NRS 189.120(1)-(2). In creating a remedy for

28 ² Preliminary hearings do not exist in misdemeanor cases. They are solely a
creature of felony and gross misdemeanor cases in Nevada. See NRS
171.206.

1 prosecutors unsatisfied with a justice court's decision to suppress unlawfully
2 obtained evidence in a preliminary hearing, the Legislature recognized the
3 authority of the justice courts to consider the constitutionality/admissibility
4 of evidence the State seeks to introduce in a felony or gross misdemeanor
5 case.

6 The Legislature's recognition of the justice courts' authority to
7 suppress evidence is also established in the legislative history of NRS
8 189.120. In 1969, the District Attorneys for Washoe County, Clark County,
9 and Ormsby County recognized the justice court's authority to suppress
10 evidence in a felony case and they lobbied the Legislature to create a remedy
11 that would allow prosecutors to appeal from a justice court order suppressing
12 evidence in a preliminary hearing. *See* March 17, 1969 Assembly Judiciary
13 Committee Minutes for Assembly Bill ("AB") 641 (1969), 55th Session (PA
14 at 182-199). When discussing the need for NRS 189.120 and the right to
15 appeal from a justice court order suppressing evidence in a felony case,
16 Assemblyman Mr. Torvinen stated:

17 This is one the district attorneys want very badly. At the
18 **preliminary hearing** they produce evidence and the court
19 moves to suppress it because it was taken without a warrant or
20 something. The case is dismissed and they turn the guy loose
21 and that is the end of it. With this, the State can appeal the case.
22 Then they go back and continue the preliminary hearing, etc.
Now the district attorney has no remedy.

23 Assembly Judiciary Hearing Minutes for AB 641 at 2 (PA at 188).

24
25 Based on the plain language of NRS 189.120 and the legislative
26 history of the statute, the Legislature has explicitly recognized that justice
27 courts have authority to consider motions to suppress as part of a
28 preliminary hearing in a felony or gross misdemeanor case.

1
2 **III. The Legislature has Rejected Prior Attempts to Strip Nevada**
3 **Justice Courts of Authority to Consider a Suppression Issue**
4 **during a Preliminary Hearing**

5 Not only has the Legislature conveyed authority to the Justice Court
6 to hear suppression issues during a preliminary hearing, the Legislature has
7 also rejected two (2) prior attempts to amend the statute and eliminate this
8 authority.

9 A. 2007 Proposal to Remove Justice Court Authority

10 In the 2007 Legislative Session, the Legislature considered and
11 rejected Assembly Bill 65 (hereinafter "AB 65"). See Feb. 21, 2007
12 Assembly Judiciary Hearing Minutes for AB 65 ("AB 65 Judiciary Min.")
13 (PA at 200-26). AB 65 would have made two significant changes to
14 criminal procedure in Nevada. See AB 65 Text as Introduced ("AB 65
15 Text") (PA at 227-29). First, Section 1 of AB 65 proposed to add the
16 following language to NRS 174.125 in order to limit the ability of
17 defendants to address suppression issues in Justice Court:
18

19 *5. In a criminal prosecution of an offense that is:*

20 *(a) A gross misdemeanor or felony, a motion to suppress*
21 *evidence may be made only in the district court.*

22 *(b) A misdemeanor, a motion to suppress evidence may be*
23 *made only in the justice court.*³

24 AB 65 Text at 2 (PA at 228).

25 Second, Section 2 of AB 65 proposed to amend NRS 189.120 in order
26 to remove references to the Justice Court's common practice of considering
27

28 ³ Quoted language in *italics* represents language AB 65 proposed to add to
NRS 174.125.

1 suppression issues raised during preliminary hearings. The proposed
2 changes would have amended NRS 189.120(2) as follows:

3
4 1. The State may appeal to the district court from an order of a justice
5 court granting the motion of a defendant to suppress evidence.

6 2. Such an appeal [~~shall~~] *must* be taken:

7 (a) Within 2 days after the rendition of such an order during a
8 trial. [~~or preliminary examination.~~]

9 (b) Within 5 days after the rendition of such an order before a
10 trial. [~~or preliminary examination.~~]

11 3. Upon perfecting such an appeal:

12 (a) After the commencement of a trial, [~~or preliminary~~
13 ~~examination,~~] further proceedings in the trial [~~shall~~] *must* be
14 stayed pending the final determination of the appeal.

15 (b) Before trial, [~~or preliminary examination,~~] the time
16 limitation within which a defendant [~~shall~~] *must* be brought to
17 trial [~~shall~~] *must* be extended for the period necessary for the
18 final determination of the appeal.⁴

19 AB 65 Text at 2-3 (PA at 228-29).

20 The Assembly Judiciary Committee discussed the proposed changes
21 in AB 65 at a hearing on February 21, 2007 and ultimately rejected the
22 Nevada District Attorneys Association's proposal to eliminate the Justice
23 Court's authority to hear suppression issues. (PA at 200-26). Nevada
24 Assemblyman William Horne expressed his concerns about AB 65 by
25 asking the representative of the Nevada District Attorneys Association, "Is it
26 your contention today that, in order to show probable cause, the district

27 ⁴ Quoted language in *italics* represents language AB 65 proposed to add to
28 NRS 189.120. Language which has been struck through is statutory
language AB 65 proposed removing from NRS 189.120.

1 attorney at justice court should be allowed to present illegally obtained
2 evidence?" (PA at 208). When the Nevada District Attorneys Assoc.
3 responded that the "bottom line" answer was "yes," Assemblyman Horne
4 responded that he was concerned that AB 65 would be used to keep a
5 defendant "in jeopardy until [he gets] to district court" and that he believed
6 that by "the time a case gets to district court, many of these issues should
7 have already been fleshed out." (PA at 208). Assemblyman Horne added
8 that he thought it was "the purpose of the justice court to filter out those very
9 cases". He also expressed concerns that AB 65 would simply shift the
10 burden of hearing suppression issues "to a district court" and noted that the
11 "district court has a heavy [case] load" already. (PA at 208).

12 The Nevada District Attorneys Association responded to
13 Assemblyman Horne's concerns by stating that the issue of whether
14 evidence was "illegally obtained" was a legal conclusion that should only be
15 heard in a district court. In response, Assemblyman Horne stated that
16 Justices of the Peace "are qualified to make that conclusion if you present
17 evidence, particularly in the evidence suppression area". The Assemblyman
18 added that if a District Attorney was "going to use evidence to show
19 probable cause," then "it would be good for you to have your ducks in a row
20 for that challenge" in the Justice Court. (PA at 209). He noted that litigating
21 these issues in a justice court would ensure that the issue "is already fleshed
22 out" by the time the case gets to a district court. (PA at 209). He added that
23 AB 65 seemed to "back-load[] the entire burden to district court" and would
24 cause "the process [to] be slowed there". (PA at 209).

25 Later in this same February 21, 2007, hearing, Justice of the Peace Stephen
26 Dahl from North Las Vegas Justice Court testified in his capacity as
27
28

1 President of the Nevada Judges' Association. (PA at 215-19). He
2 articulated the following concerns about AB 65:

3
4 I am here to testify against the bill. I want to make it clear that
5 this would not just be a procedural change, it would be a
6 substantive change in what has been a long practice in Nevada.
7 There has never been a suggestion from the Nevada Supreme
8 Court or in statute that says it is improper to raise suppression
9 motions at the justice court level. The statute on preliminary
10 hearings, NRS 171.206, states, "if from the evidence it appears
11 to the magistrate that there is probable cause to believe that an
12 offense has been committed and that the defendant has
13 committed it, they will be bound up to district court." Until
14 today, everybody believed that when the law said the court
15 should consider evidence it meant the court should consider
16 legal evidence.⁵ The proposition today is that you consider all
17 kinds of evidence. That would be a change.

18 I had a police report in which the officer said she pulled
19 somebody over due to no registration. That led to a search
20 which led to discovery of some illegal substances. During the
21 preliminary hearing, it turns out that lack of registration to this
22 officer meant a temporary tag on the back of a car like the one
23 you get when you buy a new car. She testified that she pulled
24 over every car she saw with this tag because she knew some
25 people who stole cars put those tags up to cover up their crimes.
26 She did not look at the tag to see if it had been altered, or look
27 for valid dates. I finally asked, "If I buy a new car, put the tag
28 in my window, you will pull me over, regardless?" She said,
"Yes." You can guess what happened to that case. It got
dismissed.

⁵ See also Goldsmith v. Sheriff of Lyon County, 85 Nev. 295, 303, 454 P.2d 86, 91 (1969) (stating the "evidence received at a preliminary examination must be legal evidence").

1
2 According to this bill, the defendant, the system, and everybody
3 else would be better off if I had ignored that and bound it up to
4 district court for trial. You cannot ignore these issues in front
5 of you. The defense attorney at a preliminary hearing has a
6 right to a full and fair cross examination of anybody who is
7 testifying against his client. If this passes, anything to do with
8 suppression issues becomes irrelevant. Why would anyone
9 question the police officer about the stop? Why would we
10 question Miranda rights? It would all be irrelevant because the
11 justice of the peace would not even be allowed to consider any
12 of this. I have been a judge for 12 years and have done
13 hundreds of preliminary hearings and dozens of suppression
14 motions. The proponents of the bill say not to worry about
15 most of these cases, only the difficult ones. The fact is that
16 most of the cases are easy. Mr. Segerblom asked about appeals.
17 These issues hardly ever get appealed. I know I have never
18 been reversed on a suppression motion. I have never done a
19 full-blown suppression motion with witnesses, etcetera. We do
20 not do that at the justice court level. We address the issues as
21 they come up. If something is done illegally, we take
22 appropriate action. The justice courts are not so busy that we
23 do not have time to deal with the necessary basic legal issues of
24 whether or not someone should be held for their crime. This
25 change is unnecessary. These issues get handled fairly quickly.
26 They have the right to appeal, but that hardly ever happens.

27
28 Federal courts are different than state courts. They have a
grand jury system and preliminary hearings are very informal.
At a preliminary hearing, the State has a burden of actually
convincing a judge that a case should move forward for trial. It
is a different system. The federal system does not apply to how
we do things in Nevada. There are places where the rules of
evidence do not apply— sentencing hearings and probation.
There has been no suggestion that the rules of evidence do not

1 apply at the preliminary hearing stage. The Supreme Court has
2 been careful about what justices of the peace can and cannot do.
3 They limit us in some areas, give us more power in others.
4 (PA at 215-16).

5 The Nevada Legislature ultimately rejected the proposed changes to
6 the authority of the justice courts contained in AB 65 based on the concerns
7 of the Nevada Judges' Association, the Legislature's concerns about the
8 burden the change would place on the district courts, and concerns about the
9 increase in time that a defendant would spend in custody without having
10 constitutional issues litigated.

11 B. 2015 Proposal to Remove Justice Court Authority

12 Similarly, in the most recent legislative session, the Legislature again
13 rejected attempts to revise NRS 189.120 to eliminate justice court authority
14 to hear motions to suppress as part of a preliminary hearing in felony and
15 gross misdemeanor cases. On February 26, 2015, the Assembly Committee
16 of Judiciary discussed the Initial Draft of Assembly Bill 193 (2015), which
17 contained significant revisions to Nevada criminal procedure. (PA at 230-
18 41).

19 As part of the initial proposed bill, on February 26, 2015, AB 193
20 contained revisions to NRS 189.120. Specifically, the proposed changes
21 would have amended NRS 189.120 as follows:

22
23 1. The State may appeal to the district court from an order of a justice
24 court granting the motion of a defendant to suppress evidence.

25 2. Such an appeal [~~shall~~] *must* be taken:

26 (a) Within 2 days after the rendition of such an order during a
27 trial. [~~or preliminary examination.~~]

28 (b) Within 5 days after the rendition of such an order before a
trial. [~~or preliminary examination.~~]

1
2 3. Upon perfecting such an appeal:

3 (a) After the commencement of a trial, [~~or preliminary~~
4 ~~examination,~~] further proceedings in the trial [~~shall~~] *must* be
5 stayed pending the final determination of the appeal.

6 (b) Before trial, [~~or preliminary examination,~~] the time
7 limitation within which a defendant [~~shall~~] *must* be brought to
8 trial [~~shall~~] *must* be extended for the period necessary for the
9 final determination of the appeal.⁶

10 Initial AB 193 Text, Section 12 (Feb. 26, 2015) (PA at 241).

11 By the close of the 2015 legislative session, the Legislature passed AB
12 193, but not before deleting revisions to NRS 189.120 prior to the bill's
13 passage. *See* Final Version of AB 193 as Introduced ("AB 193") (PA at
14 248). As a result of amendments to AB 193, the 2015 Legislature rejected
15 the proposed language that would have eliminated authority for justice
16 courts to consider and rule upon suppression issues raised during a
17 preliminary hearing in felony or gross misdemeanor cases.

18 Therefore, in choosing not to revise NRS 189.120 during two (2)
19 separate legislative sessions, the Legislature rejected the proposed limits to
20 justice court authority (contained in AB 65 (2007) and Initial AB 193 Text
21 (2015)). As a result, the Legislature has recognized and affirmed on several
22 occasions that justice courts have authority to hear and rule upon
23 suppression issues raised during a preliminary hearing.

24 **IV. This Court Has Previously Recognized the Justice Courts'**
25 **Authority to Consider the Constitutionality of Searches**

26 ⁶ Quoted language in *italics* represents language the Initial AB 193 Text
27 proposed to add to NRS 189.120. Language which has been ~~struck through~~
28 is statutory language that Initial AB 193 Text proposed removing from NRS
189.120.

1
2 While this Court has never specifically considered the authority of
3 Nevada Justice Courts to hear motions to suppress in a felony or gross
4 misdemeanor matter, this Court is familiar with the procedural dictates of
5 NRS 189.120. *See, e.g., Salaiscooper v. Eighth Judicial Dist. Court*, 117
6 Nev. 892, 900-01, 34 P.3d 509, 515 (2001) (citing NRS 189.120 and
7 commenting that “the justice courts are often called upon to resolve
8 constitutional issues in ruling on motions to suppress evidence”);
9 *Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140,
10 1141 (1980) (stating “Here, the district court clearly had the power, under
11 NRS 189.120, to review the order of the justice court granting the motion to
12 suppress”).

13 While the prior cases deal with motions to suppress arising from
14 misdemeanor matters, they indicate that Justice Courts are often called upon
15 to determine questions of constitutionality and lawfulness of evidence. In
16 these cases, this Court recognized that Justice Courts hold the authority to
17 make such determinations under NRS 189.120, which also envisions the
18 State being able to appeal suppression orders resulting from Justice Court
19 suppression of evidence during a preliminary hearing.

20 CONCLUSION

21 This Court should affirmatively rule that Nevada Justice Courts have
22 authority to hear motions to suppress as part of their authority to conduct
23 preliminary hearings in felony and gross misdemeanor cases based on
24 Nevada case law and evidence law which dictates that the Justice Court may
25 only consider lawful, constitutional, and competent evidence at a
26 preliminary hearing. In addition, the Legislature’s intention for Justice
27 Courts to make rulings on the lawfulness of proposed evidence is
28 recognized in 1) Nevada statute (NRS 189.120), which permits the State to

1 appeal from the suppression of evidence in preliminary hearings by a Justice
2 of the Peace and 2) the Legislature's rejection of attempts to remove this
3 authority from NRS 189.120 during the 2007 and 2015 legislative sessions.

4 Therefore, this Court should recognize the authority for Nevada
5 Justice Courts to consider motions to suppress as part of a preliminary
6 hearing in felony and gross misdemeanor matters. And, as a result, this
7 Court should issue an order reversing the District Court's granting the
8 State's appeal in this case, which was based on this issue of Justice Court
9 authority.

10
11 **SUMMARY**

12 Based on the above facts, law, and argument, the Petitioner-Defendant
13 respectfully requests that this Honorable Court grant this Petition for a Writ
14 of Mandamus and order the District Court to deny the State of Nevada's
15 appeal of the Las Vegas Justice Court's Order suppressing evidence
16 presented during preliminary hearing.

17 DATED this 6th day of October, 2015.

18 PHILIP J. KOHN
19 CLARK COUNTY PUBLIC DEFENDER

20
21 By /s/ Robert E. O'Brien
22 ROBERT E. O'BRIEN, #10944
23 DEPUTY PUBLIC DEFENDER
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