

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA ex rel. THE
OFFICE OF THE ATTORNEY
GENERAL OF THE STATE OF
NEVADA,

Petitioner,

vs.

THE JUSTICE COURT OF LAS
VEGAS TOWNSHIP IN AND FOR
THE COUNTY OF CLARK; and
THE HONORABLE JUSTICE OF
THE PEACE DEBORAH J. LIPPIS,

Respondents,

and

MARIA ESCALANTE; and RAMIRO
FUNEZ,

Real Parties in Interest.

Supreme Court Case No. 70795.

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Tracie K. Lindeman
Clerk of Supreme Court

Case No. 16M-03289A-B

**PETITIONER'S EMERGENCY
MOTION UNDER NRAP 27(e) TO
STAY PROCEEDINGS PENDING
THIS COURT'S DECISION TO
DIRECT AN ANSWER TO THE
WRIT PETITION**

**ACTION REQUESTED BY
SEPTEMBER 12, 2016**

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I. INTRODUCTION

As set forth more fully in the writ petition, the Honorable Deborah J. Lippis of the Las Vegas Justice Court declared unconstitutional a portion of Nevada's trespass statute, NRS 207.200(1)(a), without ensuring that the Office of the Attorney General received prior notice and an opportunity to be heard before rendering a decision. Because the Justice Court's refusal to allow the Attorney General to participate violates NRS 30.130, and, left unaddressed, potentially has broad implications that extend beyond this particular case that could significantly hamper the Attorney General's constitutional duty to defend state statutes, the Attorney General has petitioned this Court for a writ of mandamus or prohibition.

After the Attorney General filed the Petition, the Justice Court entered a temporary sixty-day stay of the lower court proceedings pending this Court's decision to direct an answer to the Petition. That stay will expire on September 13, 2016—in less than fourteen days. Therefore, the Attorney General respectfully requests that this Court consider this Motion on an emergency basis and enter a further stay of proceedings until the Court determines whether to direct an answer to the Petition. If an answer is directed, the Attorney General also requests a stay of the Justice Court proceedings pending a decision on the merits of the Petition.

II. STATEMENT OF FACTS

After being cited for vagrancy and trespass under NRS 207.200(1)(a), the Defendants-Real Parties in Interest filed a motion to dismiss both charges arguing,

amongst other things, that NRS 207.200(1)(a) is unconstitutionally vague. (App. 003-18.) They did not provide a copy of the motion to dismiss to the Attorney General's Office or otherwise alert it to the pending constitutional challenge to the trespass statute. Nonetheless, on May 6, 2016, the Justice Court granted the motion to dismiss in part. (*Id.* 062-76.) It ruled "that the reference in NRS 207.200(1)(a) to acting with intent 'to vex or annoy the owner or occupant thereof' is unconstitutionally vague." (*Id.* at 073.) The Justice Court ordered Real Parties in Interest to provide a copy of the ruling to the Attorney General *after* it was issued. (*Id.* at 076.)

Upon being notified of the Justice Court's Order, the Attorney General promptly filed a Notice of Appearance and Motion to Place on Calendar. (*Id.* at 079-81.) The Attorney General explained the ramifications of the Justice Court's Order, asked to be heard, and requested a briefing schedule before the Justice Court's constitutional ruling became final. (*Id.* at 079-81.) Real Parties in Interest objected to the Attorney General's participation and contended that he was not entitled to notice before the Court ruled. (*Id.* at 082-91.)

At a May 13, 2016 hearing on the Attorney General's filing, the Justice Court stayed its Order on the constitutionality of NRS 207.200(1)(a) and requested briefing only on the Attorney General's ability to be heard. (*See id.* at 115.) On May 27, 2016, the Attorney General filed a brief setting forth the reasons that he was entitled to notice and an opportunity to be heard before the Justice Court declared the statute unconstitutional. (*Id.* at 092-98.)

The Justice Court issued a second Order on June 24, 2016 finding that the requirement to provide notice to the Attorney General under NRS 30.130 only applies to declaratory relief actions, has no applicability to criminal proceedings, and does not encompass statutory challenges. (*Id.* at 099-107.) The Justice Court indicated that it would only permit the Attorney General to participate if it took “exclusive charge of the pending criminal case” under NRS 228.120 and it was clear that it would not reconsider its ruling on the constitutionality of NRS 207.200(1)(a). (*Id.* at 104-05.)

As a result of the Justice Court’s erroneous interpretation of NRS 30.130, the Attorney General filed the Petition on July 14, 2016 challenging the Justice Court’s refusal to afford notice and an opportunity to be heard. (*Id.* at 108-13.) Upon motion by the Attorney General, the Justice Court agreed to impose a temporary sixty-day stay while this Court considers whether to direct an answer to the Petition. (*See* Ex. 1 to Notice of Sixty-Day Stay Pending Decision on Answer to Writ Petition, July 26, 2016, on file.)¹

To date, this Court has not determined whether it requires an answer to the Petition and, without action, the stay will expire on September 13, 2016. If the stay expires, the Justice Court will be depriving the Attorney General of his obligation to defend state statutes and will be proceeding without jurisdiction, as described in the

¹ NRAP 8(a)(2)(A)(ii) (“The motion shall ... state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.”).

Petition. Therefore, this Emergency Motion is necessary to halt the lower court from continuing in error.

III. ARGUMENT

A. Standard for Granting a Stay Pending a Writ

When considering a stay, this Court considers a number of factors: (1) whether the object of the writ petition will be defeated if the stay is denied; (2) whether petitioner will suffer irreparable injury if the stay is denied; (3) whether the real party in interest will suffer irreparable harm if a stay is granted; and (4) whether petitioner is likely to prevail on the merits of the writ petition. NRAP 8(c); *see also Hansen v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). No single factor is dispositive and, if one or two factors are especially strong, they may counterbalance other weak factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). These same factors apply in criminal proceedings. *See State v. Robles-Nieves*, 129 Nev. Adv. Op. 55, 306 P.3d 399, 401 (2013).

B. The Attorney General is Likely to Prevail on the Merits of the Writ Petition.

“[A] movant does not always have to show a probability of success on the merits, the movant must ‘present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.’” *See Hansen*, 116 Nev. at 659, 6 P.3d at 987 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)).

As shown in the Petition, the Attorney General has presented a “substantial case” on a “serious legal question” about whether his office is entitled to notice before a court declares a statute unconstitutional. Even the Justice Court acknowledged that certain aspects of NRS 30.130 are, at minimum, unclear. (App. 102 n.3 (stating “[i]t is unclear why NRS 30.130 refers to ‘municipal ordinance or franchise’ in the first part of the sentence and then to [statute] in the later part of the sentence.”); *id.* at 4 n.4 (stating definition of “a copy of the proceeding is unclear”).) The Justice Court’s ruling may have implications on the Attorney General’s statutory right to participate in other future cases and, if the Attorney General is correct, the Justice Court is without jurisdiction to proceed with the remainder of the case.

C. The Object of the Writ Petition Will be Defeated and the Attorney General Will Suffer Irreparable Harm if a Stay is Denied.

These two factors can be considered together. “Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay.” *Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39.

Here, if this case proceeds while the Petition is pending, the Attorney General may be deprived of the opportunity to be heard even if this Court later grants relief. For example, if the case proceeds to trial, the Attorney General may not have the opportunity to be heard at all. *See Robles-Nieves*, 129 Nev. Adv. Op. 55, 306 P.3d at 401 (State’s right to appeal effectively eliminated if the trial proceeds). In the absence of a

stay, it is possible that the Attorney General's Petition may be effectively rendered moot. Therefore, a stay is warranted pending the outcome of the Petition.

D. Real Parties in Interest Will Not Suffer Any Harm if a Stay is Granted.

In contrast to the Attorney General, the Real Parties in Interest will not suffer any harm if a stay is granted. During the pendency of the stay, the criminal prosecution of the Defendants will be paused and no harm will be inflicted. This is confirmed by the Justice Court's earlier stay while the parties briefed the issues related to the Attorney General's receipt of notice and ability to be heard as well as the current temporary stay. It should be emphasized that the Attorney General is not seeking this stay to hamper the defense and the Defendants' rights to a speedy trial under the Sixth Amendment and NRS 178.556 are not implicated; the Defendants are not currently being held in custody. *See Robles-Nieves*, 129 Nev. Adv. Op. 55, 306 P.3d at 404-06.

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IV. CONCLUSION

Based upon the foregoing, the Office of the Attorney General respectfully requests that this Court stay the lower court proceedings pending its decision to direct an answer to the Petition. If an answer is requested, the Attorney General asks that the case remain stayed until the Petition is resolved.

Dated: September 2, 2016.

ADAM PAUL LAXALT
Attorney General

/s/ Jordan T. Smith
Lawrence VanDyke (Bar No. 13643C)
Solicitor General
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Assistant Solicitor General

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555 East Washington Avenue, Suite 3900
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NRAP 27(e) CERTIFICATE

I, Jordan T. Smith, being first duly sworn, upon his oath deposes and says:

1. I am an Assistant Solicitor General with the Office of the Attorney General and counsel for Petitioner in the above-captioned matter.

2. I make this Declaration in support of Petitioner's Emergency Motion Under NRAP 27(e) to Stay Proceedings Pending this Court's Decision to Direct an Answer to the Writ Petition.

3. The relief sought and all grounds advanced in support of the Motion were presented to the lower court. However, it only imposed a temporary stay of proceedings pending this Court's decision to direct an answer to the Petition. The temporary stay will expire on September 13, 2016.

4. This Motion is necessary to ensure that the Attorney General is not deprived of his duty to defend the constitutionality of state statutes. All facts showing the existence and nature of the claimed emergency are set forth in the Motion.

5. The relief requested in this Motion is needed in less than 14 days to avoid the harm that the Attorney General's Office will suffer by being deprived of the opportunity to defend a statute from constitutional attack as required by NRS 30.130.

6. Action is requested on or before September 12, 2016.

7. The telephone numbers and office addresses of the attorneys for the parties are:

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8. I have made every practicable effort to notify the clerk of the Supreme Court and counsel of the filing of this Motion. All counsel were notified by email on the date of filing of this Motion and were served with a copy of this Motion.

/s/ Jordan T. Smith
JORDAN T. SMITH

CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the formatting requirements of NRAP 27(d) and the typeface and type-style requirements of NRAP 27(d)(1)(E) because this Motion has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in double-spaced Garamond font. This filing also complies with NRAP 32.

I further certify that I have read this Motion and that it complies with the page or type-volume limitations of NRAP 27(d)(2) and NRAP 32 because, it is proportionately spaced, and does not exceed 10 pages.

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Motion complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion regarding matters in the record to be supported by appropriate references to the record on appeal. 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: September 2, 2016.

ADAM PAUL LAXALT
Attorney General

/s/ Jordan T. Smith
Jordan T. Smith, Assistant Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petitioner's Emergency Motion Under NRAP 27(e) to Stay Proceedings Pending this Court's Decision to Direct an Answer to the Writ Petition with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on September 2, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case may not be registered CM/ECF users. I have emailed and mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within three calendar days to the following non-CM/ECF participants:

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