

1 A respondent's failure to address an issue raised on appeal can be considered
2 a confession of error. Polk v. State, 233 P.3d 357, 359-60 (Nev. 2010). An
3 appellant's assertion of "significant constitutional issues ... compels a response"
4 from the state. Id.

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6 *In the instant case, Moultrie asserted that the alleged third-party consent*
7 *to search was invalid as applied to Moultrie's backpack* because the police knew
8 the backpack belonged to Moultrie, Moultrie indisputably never consented, and
9 there was no evidence of apparent or actual authority of the third-party to consent.
10 (Fast Track Statement, p. 13 lines 4-8, p. 13 line 4 through p. 15 line 25).

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12 *The state failed to address this issue in its response.*

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14 Based on Polk, the failure to respond to important constitutional arguments
15 should be regarded as a confession of error, i.e. confession of a constitutional
16 violation and concession that the Justice Court properly disallowed the fruits of the
17 search stemming from the invalid third-party consent. *Therefore, the discharge at*
18 *the preliminary hearing was proper and absolutely not an egregious error.*

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23 **II. THE DISCHARGE WAS PROPER BECAUSE THE STATE CHARGED**
24 **2ND OFFENSE POSSESSION WITH INTENT BUT OFFERED ZERO**
25 **EVIDENCE OF A 1ST OFFENSE; THE STATE'S RESPONSE 1) FAILED**
26 **TO MENTION THAT IT MADE NO EFFORT TO AMEND UNTIL AFTER**
27 **CLOSING ARGUMENTS AT THE PRELIMINARY HEARING, AND 2)**
28 **REPEATEDLY CITED THE LAW PERTAINING TO THE AMENDMENT**
OF INFORMATIONS, EVEN THOUGH THERE WAS NO INFORMATION
IN EXISTENCE WHILE THE CASE WAS IN THE JUSTICE COURT

1 Regarding the punishment for the offense of Possession of Controlled
2 Substance with Intent to Sell, NRS 453.337(2)(b) provides that a second offense
3 shall be punished as a category C felony. The sole count of the criminal complaint
4 alleged “Possession of Controlled Substance with Intent to Sell ... a category C
5 felony” (i.e. a 2nd Offense). (AA 1). The Nevada Supreme Court has held with
6 respect to the requirements at preliminary hearing in the non-status
7 enhancement/priors context, “the State must substantiate the existence of the
8 offenses at the preliminary hearing.” Parsons v. State, 116 Nev. 928, 936, 10 P.3d
9 836, 841 (2000), cited in Hobbs v. State, 251 P.3d 177, 182 (2011).

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14 **Despite the law as elucidated in Hobbs and Parsons, the state offered**
15 **nothing to substantiate the existence of the alleged prior offense at the**
16 **preliminary hearing.** Given that failure, the Justice Court properly declined to
17 bind the case over based on the lack of even slight or marginal evidence of the
18 necessary prior offense. *Under the circumstances of the instant case, the assertion*
19 *of egregious error is preposterous.*

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22 The state asserts that during the preliminary hearing, the state “moved to
23 amend the complaint” to 1st Offense Possession with Intent to Sell “to conform to
24 the evidence.” (Fast Track Response, last sentence on page 2, AA 56). This
25 seemingly innocuous assertion is misleading because it implies that this was a
26 simple case of the state amending before submission and argument.
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1 During the preliminary hearing in the instant matter, the state rested its case
2 with the statement, “the State has no further witnesses.” (AA 52). Moultrie
3 declined to put on a case, at which point the state declared its readiness to make a
4 closing statement and then made the statement. (AA 52).

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6 **After the state completed its closing statement,** Moultrie’s counsel began
7 his closing argument by stating, “All right. I’m going to ask for a discharge.” (AA
8 54). **Moultrie’s counsel argued at length that the state’s failure to introduce**
9 **evidence of a 1st offense possession with intent to sell “would preclude a**
10 **bindover” on a charge of 2nd offense possession with intent.** (AA 55).

11 [Emphasis added.]

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15 At that point, the state had rested, the state had made its closing argument,
16 and Moultrie had argued in his closing that the complete lack of substantiation of a
17 1st offense precluded a bindover on a 2nd offense. **It was only then, after closing**
18 **arguments, that the state sought to amend the complaint to a 1st offense and**
19 **admitted, “I don’t have any evidence of any priors.”** (AA 56). [Emphasis
20 added.] The Justice Court then discharged Moultrie. (AA 56).

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24 Both the state and the District Court rely on the inapplicable law governing
25 the amendment of an information to buttress their arguments that the Justice Court
26 should have permitted the amendment of the complaint after the closing arguments
27 at the preliminary hearing. (Pages 7 and 8 of fast track response, AA 85-86).

1 *The state and District Court have alleged that the Justice Court did*
2 *something it could not possibly have done with respect to a document that could*
3 *not possibly have existed – the information does not yet exist while the case is in*
4 *the Justice Court.*

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6 **The Justice Court’s task in the instant case was to assess whether the**
7 **state demonstrated that there was probable cause to believe that Moultrie**
8 **committed the charged offense. NRS 171.206. The state failed to meet its**
9 **burden, so the Justice Court discharged. (AA 56). That is not an error.**

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14 **III. THE STATE INCORRECTLY ASSERTS THAT JUSTICE COURT**
15 **EGREGIOUSLY ERRED BY EXCLUDING AS HEARSAY A PURPORTED**
16 **STATEMENT OF CONSENT FOR THE POLICE OFFICER TO SEARCH**
17 **THE VEHICLE; THE JUSTICE COURT ALLOWED THE OFFICER TO**
18 **TESTIFY THAT HE HAD RECEIVED PERMISSION TO SEARCH**

19 When Deputy Kirkland attempted to testify as to what the driver said in
20 response to Kirkland’s request to search the vehicle, Moultrie objected and the
21 Court sustained. (AA 24). **The State rephrased and Kirkland testified, “I**
22 **asked Brandy’s permission.”** (AA 25). [Emphasis added.]

23
24 **Moultrie again objected and the Court ruled, “I’ll allow that answer.”**
25 (AA 25). [Emphasis added.] The state then asked Kirkland, “Did you in fact
26 search the vehicle?” and Kirkland replied, “Yes, I did.” (AA 25). Some additional
27 argument about the propriety of the search ensued, and the Court indicated that it
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1 had allowed the search of the vehicle but not necessarily the backpack of
2 Moultrie's inside the vehicle:¹
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4 MR. BRADSHAW: I've asked this witness whether he
5 had permission to search the vehicle. That is not a
6 hearsay issue because he's not quoting anybody. I'm
7 simply asking him **whether he obtained permission or
had permission to search.**

8 THE COURT: **The vehicle.**

9 MR. BRADSHAW: **The vehicle.**
10

11 THE COURT: **Now we're talking about a backpack.**
12 (AA 28). [Emphasis added.]

13 Another subsequent exchange further suggests that the Justice Court's issue
14 was not with the permission to search the vehicle but with whether there was
15 permission to search the backpack:
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18 MR. BRADSHAW: I'm not asking him to testify as to
19 what somebody quoted that's not available for cross
20 examination in the court today. I'm simply asking him
21 about his actions, **did he or did he not obtain or have
permission to search the vehicle.**
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23 ¹ The propriety of the backpack search is discussed at pp. 13-15 of the Fast Track
24 Statement; the state did not address the issue in its Response (**See** Part I of the
25 instant Reply Brief from p. 1 ln. 21 through p. 2 ln. 23 for discussion of the state's
26 confession of error through failure to address).
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1 THE COURT: **The vehicle only. We're now moved on**
2 **to the backpack.** Did he ask – it's your question but he
3 **needed permission to get in the backpack. That's not**
4 **the vehicle so if you can get on to that, you can go**
5 **forward.**

(AA 30). [Emphasis added.]

6 *The state never attempted to establish that the police had permission to*
7 *search the backpack.*

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9 When the state asked Deputy Kirkland about what he found in the backpack,
10 Moultrie's counsel stated, "I just want to make sure that my objection to all this is
11 noted." (AA 31).

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13 **The Justice Court did not exclude as hearsay the state's testimony about**
14 **permission to search the vehicle and in fact seems to have allowed it. (AA 25,**
15 **28, 30). Thus, there is no basis for the state's claim of egregious error stemming**
16 **from a hearsay error by the Justice Court.**

20 IV. CONCLUSION

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22 For the foregoing reasons, in addition to the reasons elucidated in the fast
23 track statement, this Honorable Court should reverse the District Court's granting
24 of the motion for leave to file an information by affidavit.

1 **CERTIFICATE OF COMPLIANCE**

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3 1. I hereby certify that this brief and/or reply complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and
5 the type style requirements of NRAP 32(a)(6) because:

6 This brief had been prepared in a proportionally spaced typeface using
7 Times New Roman font in 14-point; or

8 This brief has been prepared in a monospaced typeface using Corel
9 WordPerfect X4 with 10 characters per inch, Courier New 12-point font.
10

11 2. I further certify that this brief complies with the page- or type-volume
12 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted
13 by NRAP 32(a)(7)(C), it is either:

14 Proportionally spaced, has a typeface of 14 points or more, and contains
15 words; or

16 Monospaced, has 10.5 or fewer characters per inch, and contains
17 words or lines of text; or

18 Does not exceed 5 pages, or has been submitted in conjunction with a
19 motion for leave to file a reply in excess of 5 pages.

20 3. Finally, I hereby certify that I have read this appellate brief, and to the
21 best of my knowledge, information, and belief, it is not frivolous or interposed for
22 any improper purpose. I further certify that this brief complies with all applicable
23 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which
24 requires every assertion in the brief regarding matters in the record to be
25 supported by appropriate references to the page and volume number, if any, of
26

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1 the transcript or appendix where the matter relied on is to be found. I understand
2 that I may be subject to sanctions in the event that the accompanying brief is not
3 in conformity with the requirements of the Nevada Rules of Appellate Procedure.

4 DATED this 19th day of September, 2014.

5
6 /s/
7 CHRIS ARABIA, Esq.
8 Nevada Bar #9749
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10
11 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
12 **A F F I R M A T I O N – NRS 239B.030**

13 The undersigned does hereby affirm that the preceding document,
14 APPELLANT’S FAST TRACK STATEMENT filed in case number 65390 does
15 **NOT** contain the social security number of any person.

16 DATED this 19th day of September, 2014

17
18 /s/
19 CHRIS ARABIA, Esq.
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