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2 IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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4 JAY LESLIE JIM,

5 Appellant,

6 vs.

CASE NO. 81545

7 THE STATE OF NEVADA,

8 Respondent.

9
10 Appeal From The Fourth Judicial District Court
Of The State of Nevada
11 In And For The County Of Elko

12 **RESPONDENT'S ANSWERING BRIEF**

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STATEMENT OF THE CASE

This appeal stems from the denial of a motion to suppress. Joint Appendix (JA) 114-117. Jim plead guilty to Trafficking in a Schedule I Controlled Substance and Possession of a Firearm by a Prohibited Person after his motion to suppress the firearm and drugs was denied. JA 124-126.¹

¹ Jim's Opening Brief correctly notes an error in the Judgement of Conviction found at JA 125 line 2 which referenced NRS 453.3385.1(c). The correct citation is NRS 453.3385.1(b).

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1 Sgt. Shelley had also been present on September 1st at the Red Lion.
2 JA 115. He testified that he and Officer Chandler made contact with Jim and
3 a female. *Id.* The police told Jim that the registration was suspended. *Id.*
4 The police told Jim, who did not have a driver's license, not to drive or
5 "enforcement action would be taken." *Id.* Shelley knew that Jim was a
6 convicted felon and had recently been released from prison. *Id.* He also
7 knew that Jim had been stopped a month before and had been in possession
8 of a firearm on that occasion. *Id.*

9 When Shelley arrived as backup on September 2nd, Chandler arrested
10 Jim. JA 115. Shelley began an "inventory and impound of the vehicle." *Id.*
11 He entered the driver's door to turn off the car or remove the keys. *Id.* As he
12 did so he saw the butt of a Glock firearm between the car seat and console.
13 *Id.* Shelley is very familiar with Glock firearms because he has owned one
14 for more than twenty years. *Id.* Chandler photographed the Glock in place.
15 *Id.* Baggies could be seen near the butt of the gun. *Id.* Shelley removed the
16 gun from in between the car seat and console and placed it on the seat to be
17 photographed. *Id.* The baggies had a crystalline substance which Shelley
18 recognized as methamphetamine based on his training and experience. *Id.*
19 He seized the gun and baggies, then stopped any further search before
20 obtaining a search warrant. *Id.* He did not prepare an inventory. *Id.* The car

1 was towed to the evidence garage; Shelley followed. *Id.* When Officer
2 Matthew Miller executed the search warrant, he found more
3 methamphetamine and two scales. *Id.* He inventoried only those items seized
4 as evidence because he was not conducting an inventory search; he was
5 searching pursuant to the search warrant. JA 115-116.

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1 removed). On appeal, findings of fact are reviewed for clear error, but the
2 legal consequences of those facts involve questions of law that are reviewed
3 de novo. *See id.*

4 An object is in plain view if the officer is in a place where he had a
5 right and obligation to be. *Collins v. State*, 112 Nev. 1177, 1181, 946 P.2d
6 1055(1997)(internal citations omitted). Sgt. Shelley was in a place where
7 he had a right and obligation to be because he had a right and obligation to
8 begin an inventory search.

9 An inventory search is per se reasonable, and accordingly
10 constitutional when it complies with police department policies. *Diomampo*
11 *v. State*, 124 Nev. 414, 432, 185 P.3d 1031, 1042(2008)(citing *South*
12 *Dakota v. Opperman*, 428 U.S. 364, 376(1976)). At the motions hearing
13 State's Exhibit 4 (JA 222-224) was admitted. It contains the Elko Police
14 Department vehicle impound policy. It dictates that a vehicle will be
15 impounded when the driver is arrested and is not the registered owner. JA
16 224. It further directs that an impound inventory of the vehicle will be
17 completed and a copy of the impound inventory be given to the tow truck
18 driver. *Id.*

19 Sgt. Shelley had a right to be where he was when he saw the gun.
20 Jim was under arrest for driving without a valid license and he was not the

1 registered owner. See JA 207-210 (State's admitted Exhibit 1 – DMV
2 Vehicle Registration Data). Sgt. Shelley followed Elko Police Department
3 policy when he impounded the vehicle. He entered the vehicle to turn off
4 the car or retrieve the keys so the vehicle could be inventoried. When he did
5 so, he saw the gun and baggies in plain view.

6 For an object to be lawfully seized pursuant to the plain view
7 exception to the warrant requirement, its incriminating nature must be clear
8 without exceeding the scope of an officer's legal access to the object. See
9 *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149(1987). Sgt. Shelley
10 immediately recognized the butt of the Glock firearm. He knew Jim was a
11 convicted felon prohibited from possessing a firearm. He also saw the
12 baggies. When he moved the gun to secure it, he discovered the baggies
13 contained methamphetamine. He did not exceed the scope of his legal
14 access to the evidence.

15 Sgt. Shelley did not proceed with the inventory search but instead
16 sealed the vehicle and a search warrant was obtained. See JA 243-259
17 (State's admitted Exhibit 8). The search warrant return documents
18 methamphetamine and two scales being found. *Id.* Jim has not challenged
19 the warrant.
20

1 Alternatively, even if the search and seizure were unconstitutional,
2 exclusion of the evidence is not an appropriate remedy. *See Davis v. United*
3 *States*, 131 S. Ct. 2419, 180 L. Ed. 2d 285(2011). It was objectively
4 reasonable for the officers to begin an inventory search of Jim's vehicle after
5 they arrested him and impounded the vehicle. Certainly, it is not reasonable
6 to expect the officers to stop, leaving a gun and drugs in the vehicle, which
7 would have risked officers' safety and the loss of evidence.

8 CONCLUSION

9 Jim's Fourth Amendment right to be free from unreasonable searches
10 and seizures was not violated when Sgt. Shelley entered the vehicle to
11 conduct an impound inventory. Sgt. Shelley was merely retrieving the keys
12 when he saw the handgun. The incriminating nature of the gun was
13 immediately apparent due to Jim's status as a convicted felon.

14 The baggies had to be removed to secure the gun and their removal
15 revealed that they contained suspected methamphetamine. Thus, the
16 inventory exception to the warrant requirement gave Sgt. Shelley legal
17 access to the position where the plain view exception to the warrant
18 requirement justified seizure of the evidence.

19 Alternatively, the application for and execution of a search warrant
20 demonstrates that Sgt. Shelley acted in good faith when he stopped the

1 impound inventory. Therefore, even if the search and seizure was
2 unconstitutional, suppression is not an appropriate remedy. The State asks
3 that the district court's order be upheld and Jim's appeal denied.

4 RESPECTFULLY SUBMITTED this 28th day of December, 2020.

5 TYLER J. INGRAM
6 Elko County District Attorney

7 By: _____

8 JEFFREY C. SLADE
9 Deputy District Attorney
10 State Bar Number: 13249

1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that this Respondent's Answering Brief complies with
3 the formatting requirements of NRAP 32(a)(4), the typeface requirements of
4 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This
5 Respondent's Answering Brief has been prepared in a proportionally spaced
6 typeface using Microsoft Office Word 2013, in size 14 point Times New
7 Roman font.

8 I further certify that this brief complies with the page or type-volume
9 limitations of NRAP 32(a)(7) because, excluding the parts of the
10 Respondent's Answering Brief exempted by NRAP32(a)(7)(C), it contains
11 approximately 1,482 words.

12 I hereby certify that I have read the Respondent's Answering Brief,
13 and to the best of my knowledge, information, and belief, it is not frivolous
14 or interposed for any improper purpose. I further certify that this brief
15 complies with all applicable Nevada Rules of Appellate Procedure, in
16 particular NRAP 28(e), which requires every assertion in the brief regarding
17 matters in the record to be supported by appropriate references to the record
18 on appeal.

19 ///

20 ///

1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the
3 Nevada Rules of Appellate Procedure.

4 DATED this 28th day of December, 2020.

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