# MINUTES OF THE MEETING
# OF THE
# ASSEMBLY COMMITTEE ON JUDICIARY

## Seventy-Fourth Session
## February 21, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:03 a.m., on Wednesday, February 21, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT**:

Assemblyman. Bernie Anderson, Chairman
Assemblyman William Horne, Vice Chairman
Assemblywoman Francis Allen
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblyman Marcus Conklin
Assemblywoman Susan Gerhardt
Assemblyman Ed Goedhart
Assemblyman Garn Mabey
Assemblyman Mark Manendo
Assemblyman Harry Mortenson
Assemblyman John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

**STAFF MEMBERS PRESENT**:

Jennifer M. Chisel, Committee Policy Analyst
Risa Lang, Committee Counsel
Judith Maddock, Committee Secretary
Matt Mowbray, Committee Assistant

**OTHERS PRESENT**:

Richard A. Gammick, District Attorney, Washoe County
Kristin L. Erickson, representing Nevada District Attorneys Association
Luke J. Prengaman, representing Nevada District Attorneys Association
Stephen Dahl, Justice of the Peace, Department 1, North Las Vegas Township; President, Nevada Judges Association
Howard S. Brooks, Attorney at Law, Office of the Public Defender, Clark County
Cotter C. Conway, Deputy Public Defender, Washoe County
Lee Rowland, Staff Attorney, American Civil Liberties Union of Nevada, Las Vegas
Lisa A. Rasmussen, President, Nevada Attorneys for Criminal Justice, Las Vegas
Jason Frierson, Attorney at Law, Office of the Public Defender, Clark County
Ben Graham, Legislative Representative, Clark County District Attorney and the Nevada District Attorney's Association

**Chairman Anderson:**
[Meeting called to order. Roll called.]

Before we turn to the regular business, I have had a bill draft request that has been delivered to the Committee for introduction.

**BDR 12-373**—Submitted by Management Service Director of the Office of the County Manager of Washoe County, relative to the providing for the recovery of certain fees and expenses for the settlement of administration of small estates.

ASSEMBLYMAN CONKLIN MOVED TO INTRODUCE BDR 12-373.

ASSEMBLYMAN OCEGUERA SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

We have two bills here in front of us today. Mr. Horne, is there a problem with one of the issues?

**Assemblyman Horne:**
Yes Mr. Chairman. Assembly Bill 63 came out of Assembly Concurrent Resolution No. 17 of the 73rd Session. In order to present it, I need District

Court Judge Kathy Hardcastle from Clark County. She was going to testify, however she is very ill this morning. Can we repost this to be heard at a later date? I apologize to those who have come for this bill.

**Assembly Bill 63: Revises provisions governing the additional penalty for the use of certain weapons in the commission of crime. (BDR 15-151)**

**Chairman Anderson:**
Is there anyone here who has traveled a great distance to speak on this bill? Mr. Gammick, is this the bill you had a desire to speak on?

**Richard A. Gammick, District Attorney, Washoe County:**
Yes it is, but we are only talking 30 miles, so it is not really a great distance.

**Chairman Anderson:**
We ask that A.B. 63 be reposted. That will probably be in March. With that, we will turn our attention to Assembly Bill 65. Ms. Erickson?

**Assembly Bill 65: Revises the provisions pertaining to the filing of motions to suppress evidence in criminal proceedings. (BDR 14-319)**

**Kristin L. Erickson, representing Nevada District Attorneys Association:**
Assembly Bill 65 is a procedural bill and is an attempt to clarify and codify the procedure to file a motion to suppress evidence. Assembly Bill 65 requires that a motion to suppress evidence be filed in the trial court. Our justice courts are busy with misdemeanor trials and preliminary hearings for gross misdemeanor and felony cases. The bill will reduce the already heavy caseloads in justice courts by requiring that motions to suppress in felony and gross misdemeanor trials be filed in the trial court, which is district court. This will reduce the amount of time spent in preliminary hearings, reduce court congestion, and will also help to avoid re-litigating the same issues in both justice and district courts.

**Luke J. Prengaman, representing Nevada District Attorneys Association:**
I am here to support A.B. 65. It does no more than formalize current law by requiring that motions to suppress filed in felony or gross misdemeanor cases be heard at the district court level, not at the justice court level. The procedure formalized in the bill avoids all of the inherent difficulties and delays involved in resolving the constitutional challenges in felony and gross misdemeanor cases at this very preliminary stage of the prosecution, while still protecting the defendant's rights. Pursuant to Chapter 175 of *Nevada Revised Statutes* (NRS), the defendant may and should raise any constitutional issues for suppression in the district court by written motion. I believe the consideration of suppression

issues in the justice courts is really inconsistent with the purpose of that hearing.

The Nevada Supreme Court has remarked a number of times about the basic screening function of the preliminary hearing. It is supposed to be a quick and simple determination of probable cause, and that is really the only issue. The probable cause is a very low threshold; it requires only slight or marginal evidence. All inferences from the facts should be drawn in favor of the prosecution at that stage. The purpose is really to weed out weak cases.

The Supreme Court has noted on many occasions that this is not intended to be a mini trial, or a fishing expedition for discovery. There are other procedures in place to address those issues. The defendant's guilt or innocence is not addressed. The only issue is if there is slight or marginal evidence. Consideration of suppression issues is inconsistent with this. There may be a number of simple suppression issues, but I would suggest you consider the simple as well as the difficult cases. Suppression issues can be very complex, and require many witnesses. This raises concerns. If you get into a complex issue at this hearing, what is intended to be quick and simple is then a lengthy process. That presents many problems for the prosecution. One problem is going to the hearing. The subpoena of a witness is an expense and inconvenience. Suppression issues provide more than sufficient evidence. These issues change the fundamental nature of the hearing. The burdens of proof are different at the preliminary hearing than they are for suppression. The state, at suppression, has the affirmative burden of overcoming the defense's challenge by a preponderance of the evidence. This is a much greater burden than the minimal, slight, or marginal evidence threshold for the preliminary hearing. When a prosecutor is preparing to go forward with slight or marginal evidence and is then confronted with a suppression issue, the nature of the

hearing has changed. Suppression issues are aimed at the most important and significant evidence in the case. If the evidence is suppressed, the prosecution ends. At that preliminary hearing, you have an affirmative burden to prove by a preponderance of the evidence, or face the possibility of losing the prosecution at an early stage. By statute, this hearing must occur within 15 days of the defendant's initial appearance. At this stage, all of the needed materials may not be available.

Additionally, there is a notice issue. Motions are often made in the middle of a preliminary hearing with no notice of a motion to suppress, and it puts the prosecutor in a situation of responding off the cuff to complex constitutional issues. In every area of constitutional law, both federal and state courts have produced a large amount of case law. I want to be able to prepare rather than

proceed and try to convince the judge that what I am saying is true; or ask for a continuance so that I can bring the authority in writing to support my case. This will delay the proceeding and the defendant's pretrial incarceration. With this bill, we could go to the hearing and the only issue we would address is what the statute says—probable cause. We then proceed to the next level where there is a statutory procedure in place, and the defendant may raise those questions at a specified suppression hearing. The bill in no way takes anything away from the defendant. Assembly Bill 65 is constitutional. Suppression is a trial right. There is no right of a defendant to seek suppression at the preliminary hearing stage. There is a rule in federal court which is basically the same as A.B. 65. This merely streamlines the process for the courts. Less time is spent litigating these issues.

**Chairman Anderson:**
Bear with me as I go through this process a little bit. The preliminary hearing is a simplistic process. The law enforcement agency has come to a judge and asked for an arrest warrant based on probable cause. There was enough factual evidence to convince the judge that the person should be apprehended. Is that step one?

**Luke Prengaman:**
Yes, in a case where a warrant is sought as opposed to an arrest.

**Chairman Anderson:**
We are talking about gross misdemeanors and felonies, not other crimes that are happening in plain sight. That will usually be the case right?

**Luke Prengaman:**
The warrant process is actually more the exception than the rule; although, it does occur. The most common situation is a probable cause arrest by the investigating agency, which results in the filing of a criminal complaint. There is a constitutional probable cause review hearing within 48 hours, which would be the equivalent of the warrant process. Essentially, those are the two ways that a case would get to appointment.

**Chairman Anderson:**
A judge issues a warrant based upon a statement from the police officer that there is probable cause and sufficient evidence that somebody's rights should be taken away from them. This happens because they broke the rules that we put in our statutes.

Now it comes to another judge. You then appear in front of that judge. In that appearance, the first question to be broached is whether you have indeed

fulfilled the requirements of the warrant that was first issued, that there have not been any other violations, the warrant was served correctly, and proper search and seizure was executed. This can then be proven by testimony of the police officer if needed, during this first hearing?

**Luke Prengaman:**
I think that addresses the heart of the bill.

**Chairman Anderson:**
Is that what is supposed to take place there?

**Luke Prengaman:**
What is technically supposed to take place is simply the…

**Chairman Anderson:**
We are not talking about what you would like to take place, but what does take place.

**Luke Prengaman:**
According to statute, the purpose of the preliminary hearing is for the magistrate to measure the evidence against the elements. The only questions to be answered are whether there is slight or marginal evidence to show the elements of the crime, charged in the complaint, were committed and the defendant committed them.

**Chairman Anderson:**
If the judge feels that the evidence in the original arrest warrant is present, he holds you over for trial for the felony or the gross misdemeanor. It might be possible for someone to enter a plea at that point?

**Luke Prengaman:**
Once bound over, they would enter the plea, but they are not specifically called on to plead in this situation.

**Chairman Anderson:**
No, but it is possible?

**Luke Prengaman:**
It is not. That has been litigated and because of the limited grant of jurisdiction to the magistrate, it does not happen in justice court. It only happens in the trial court.

**Chairman Anderson:**
So, he is going to have to go to the next step regardless of what happens in justice court? Due to the fact that it is a gross misdemeanor or a felony, it is going to have to go? Even though that happens on television it is not the way it happens in the real world.

**Luke Prengaman:**
That is correct.

**Chairman Anderson:**
The defendant goes to trial. Does the judge have the opportunity to verify, to his satisfaction, that the elements have been proven correct? Is that what the issue is in front of us? Is the proof of the warrant sufficient and has it been served correctly? Does the judge get to verify that, because you are about to hold this guy over for a longer period of time and set bail and other kinds of elements?

**Luke Prengaman:**
I think that is the heart of the issue. Supreme Court case law and the statutes relating to this issue support this. The only charge in the statute for the preliminary hearing is an evidentiary evaluation as to the elements of the crime and the identity of the offender. That is the slight or marginal evidence. Technically speaking, the statute says nothing about the constitutionality of how any evidence was obtained.

**Chairman Anderson:**
What if the judge asks you a question regarding the evidentiary process, and you cannot answer it? Is it then his choice to not proceed?

**Luke Prengaman:**
That is correct. If he felt that we did not show slight or marginal evidence relative to one of the elements of the crime, he could choose to not proceed. For instance, if we could not show that the defendant possessed the drugs he is accused of possessing, the magistrate would, at that point, discharge the defendant. However, if he did find that we met that requirement, he would bind him over for trial.

**Chairman Anderson:**
You do not think there is a possibility more of these cases would be dismissed because he could not satisfy in his own mind that the evidentiary rule had been presented well? You do not have the opportunity to satisfy his questioning.

**Luke Prengaman:**
If the exclusionary rule did apply, then that determination could be made. As it stands right now, if you were the magistrate, and you believed there was probable cause...

Let us take a drug case—possession of drugs. There are very simple elements. The defendant possessed methamphetamine; the prosecution needs to show the identity of the drug and that the defendant was in possession. If we showed that, as things stand now, even if the magistrate had some question in his mind about why the vehicle was stopped in the first place, I would suggest that the next step is for the magistrate to say, "What is my authority to address that issue?" There are two sources: statute or constitution. As the law currently stands, there is very limited authority of magistrates at preliminary hearings. The statute does not give them the authority to consider those issues. Next as the magistrate, I would look to the Nevada Constitution. The Constitution has the exclusionary rule, but does that trump state law and give me the ability to consider this issue? The answer is no. The United States Supreme Court—the court closest to the federal constitution—has stated in unequivocal terms, in the *Pennsylvania Board of Parole and Probation v. Scott* [524 U.S. 357 (1998)] case specifically and repeatedly that they recognized, considered and declined to extend the exclusionary rule outside of the actual trial itself where guilt or innocence is decided. In that case, the decision was that the prosecution could use illegally obtained evidence at a parole violation hearing. There was no right to suppress that evidence even though it meant that the defendant was going to prison. In the *Pennsylvania* case, the Supreme Court held that, in preliminary proceedings— addressing specifically preliminary hearing and grand jury proceedings in the federal courts—the exclusionary rule does not apply at those proceedings. That is why the federal rule of procedure preventing defendants from making constitutional objections at those preliminary proceedings has stood since 1972 as constitutional. Even though a magistrate may be concerned, you would lack the authority. The appropriate thing to do would be to bind the defendant over so that he can then raise the issues in a trial court expeditiously.

**Chairman Anderson:**
Let me break that down to a shorter statement. If I am a magistrate who has to make this determination, and I have a doubt in my mind, my only choice is to send it on or dismiss it?

**Luke Prengaman:**
No.

**Chairman Anderson:**
Please make it short and to the point.

**Luke Prengaman:**
You, as the magistrate, would lack the authority to make a constitutional decision at this stage. Your only option if you believe the elements were met is to bind him over. The only way you could dismiss the case is if you did not believe the elements were met.

**Chairman Anderson:**
So, he is not allowed to make the decision? Once the original arrest warrant is issued, it is over? Once those elements are shown, the next place to go is seen only as a pass-through process?

**Luke Prengaman:**
Yes.

**Chairman Anderson:**
Now that I understand, my concerns just go way up. Mr. Horne?

**Assemblyman Horne:**
Is it your contention today that, in order to show probable cause, the district attorney at justice court should be allowed to present illegally obtained evidence?

**Luke Prengaman:**
I guess the bottom line to my answer would be yes, but that is a complicated, and loaded question.

**Assemblyman Horne:**
I apologize if it seems like a loaded question, and I am trying not to make this a judicial proceeding. You cited case law arguing the constitutionality of your proposal, but at a preliminary hearing the defendant is standing in jeopardy still. You are going to a judge saying you have probable cause, do not look at how the evidence was seized, or whether the evidence that we are presenting is constitutionally legal or not. We want to keep him in jeopardy until we get to district court. Is it or is it not the purpose of the justice court to filter out those very cases? You cited the burden and the caseload the justice court has, but district court has a heavy load as well. All you are doing is shifting that burden to a district court. By the time a case gets to district court, many of these issues should have already been fleshed out. Since your burden is so low anyway—slight or marginal evidence—if you cannot reach that without using

illegally obtained evidence, maybe you should wait until you bring the charges to begin with.

**Luke Prengaman:**
When we speak of illegally obtained evidence—that is a legal conclusion. Getting to that point involves quite a bit of litigation. Largely, these are not simplistic issues or cases. There are clear cut cases, but many times it is hotly contested whether or not the evidence was obtained illegally. If you ask, "Do I want to use illegally obtained evidence to keep somebody in jeopardy?" My answer is absolutely not. My duty as a prosecutor is to fairness; to make sure that guilt does not escape or innocence suffer. If I had unconstitutionally obtained evidence, I would not want to use that. The determination is a conclusion. According to the Constitution and the statute, the place for litigating is the district court, where a judge can finally determine, hear both sides, and focus on the main issue. That is what the Nevada Constitution and the statute provides for.

**Assemblyman Horne:**
Are our justice court judges qualified to hear that very thing? You say it is a legal conclusion, but they are qualified to make that conclusion if you present evidence, particularly in the evidence suppression area. If you are going to use evidence to show probable cause, do you think that it would be good for you to have your ducks in a row for that challenge? In most counties, the justice court judge is an attorney and can make those decisions. If you are relying on evidence that a defense attorney claims was illegally obtained, is that justice court judge qualified to decide whether or not the evidence can be used to show probable cause? When it gets to district court it is already fleshed out. There may be new stuff that comes up later, but what you needed to show probable cause has already been met, and it is now in district court and being prepared for trial. It seems like you are back-loading the entire burden to district court. Then the process will be slowed there, particularly when most things settle in justice court anyway.

**Luke Prengaman:**
I do not disagree with many of the things you have said. I think the issue is one of forum. Where is the appropriate place to litigate this issue? Most often it is something that will be litigated. I believe the evidence is lawful, the defense claims it is not, and a judge needs to decide. The question is where that should occur?

**Assemblyman Horne:**
Which judge?

**Luke Prengaman:**
Whichever judge. That is why I am saying it is a question of forum. I would suggest that the law, as it exists now, puts that in the trial court's hands because of the limited purpose of the preliminary hearing. We are talking about a constitutional rule of exclusion. The Supreme Court—the arbitrator of that rule—has said that it applies only at the trial level. It protects the defendant from being convicted based on illegal evidence, not from being held over for trial or revoked and sent to prison from his parole.

**Assemblyman Horne:**
We know parole revocations and standing for trial are two different things.

**Luke Prengaman:**
This is to illustrate the court has held, that the exclusionary rule has great social cost, because it is judge-created and not required by the Constitution. The Supreme Court has said that they are limiting the social cost and applying it only at the trial level. You can invoke it at the trial level to keep from being convicted. You could say that you want it to happen at this earlier proceeding. That is not the law now. According to statute, those things are not addressed. According to the Constitution, it is not addressed at the preliminary stages. I know that A.B. 65 is formalizing that in statute. This way in very serious cases, I know that I am not going to have my case dismissed 15 days later. The defendant will have all constitutional rights at the appropriate stage.

**Chairman Anderson:**
I thought that the judges in justice courts were attorneys. That was the whole argument why justices needed to be attorneys. I thought that you get into justice court fairly quickly. District court often has a much more crowded calendar and is therefore farther in the distance. Am I misled?

**Luke Prengaman:**
I do not believe so. A defendant has the right to a preliminary hearing within 15 days. If they are bound over for trial, it is usually within ten days or so. They then appear to enter a plea in district court. They have a right to a speedy trial within 60 days if they choose. Your total time frame as a defendant, if you desire, is approximately 90 days. It starts from the time you are arrested to your preliminary hearing—two weeks—then to district court—approximately ten days—and then you can file your suppression motion if you desire as soon as trial is set. In judicial time, that is very speedy to have a trial in 90 days. It is not a great delay to get to the point where the Nevada Constitution and statutes place the responsibility for determining the important constitutional issues.

**Chairman Anderson:**
This is the area in which you work in Washoe County. How many of these trials have you done this last year, in 2006?

**Luke Prengaman:**
I believe I did two trials.

**Chairman Anderson:**
How many of those two did the whole process begin within 90 days?

**Luke Prengaman:**
They were both homicide cases and, by the defendants' desires, neither one began in 90 days. Often defendants waive that right in order to prepare for the trial.

**Chairman Anderson:**
I do not want to leave us with the impression that 90 days is the norm. That is not the reality because 90 percent of those cases are going to be plead at that point. Very few are going to move on and make it to the actual trial stage.

**Luke Prengaman:**
That is generally correct. Most cases are negotiated at the preliminary hearing stage. If a defendant desired to invoke all of his rights and get to trial in 90 days, he could.

**Assemblyman Mortenson:**
If a judge is not allowed to suppress illegally collected evidence at the preliminary hearing, is that illegal evidence a matter of record now? If in the second proceeding, the judge suppresses that, do the jurors have the information from the first hearing?

**Luke Prengaman:**
There is no prejudice whatsoever. When you go to district court trial, you begin anew, and you must justify the admission of any evidence, even if it was admitted at the preliminary examination. If a defendant moved to suppress evidence and succeeded, the jury would never see it.

**Assemblyman Mortenson:**
Do newspapers ever have access to what happens at a preliminary trial?

**Luke Prengaman:**
They do; they are open public hearings.

**Assemblyman Cobb:**
May a prosecutor use evidence that he or she knows for a fact to be obtained illegally?

**Luke Prengaman:**
A prosecutor who knows evidence has been obtained illegally has an ethical obligation not to use it.

**Assemblyman Cobb:**
Maybe this is just a state bar rule, but I thought it was illegal or unethical to present evidence that you know to be false or illegally obtained.

**Luke Prengaman:**
I would suggest a distinction between evidence you know is false and illegally obtained evidence. If it is not an issue that is up for litigation, and all suppression issues are. I would ethically not present it or use it against the defendant, knowing it was false.

**Chairman Anderson:**
Mr. Cobb raises the issue that is almost always demonstrated in television: the fruit of the poison tree doctrine. You would be ill-advised to present a case that you knew had those kinds of serious flaws. Those could possibly be exposed. The likelihood of the entire case being thrown out and disallowing the other evidence could substantially harm a re-filing of your complaint. You want your case to be as clean as possible. Would that be a fair statement?

**Luke Prengaman:**
Yes. I think we are talking about two tracks. As a prosecutor, I have a responsibility to the truth; I have a duty to use resources wisely. When I negotiate cases, I factor in the overall strength of the case in making plea bargains. That duty, and what I am talking about with A.B. 65 is the law.

**Chairman Anderson:**
I was following up with Mr. Cobb's point that you, as the prosecutor, and the district attorney's office make a value judgment based upon the information that is presented to you. Recognizing there is the possibility of constitutional questions—so you are not exposed to the inherent dangers of the fruit of the poison tree concept—thus endangering the entire case. You make that determination and the recommendation to follow through.

**Luke Prengaman:**
Yes.

**Chairman Anderson:**
You make a weighted judgment based upon the information that is given from the arresting officer and the other process. Am I to draw the conclusion that the judge would not have the opportunity to make the same kind of weighted judgment relative to the information presented?

**Luke Prengaman:**
No. I, as the prosecutor, know far more about the case than the limited amount of information presented at the preliminary hearing.

**Chairman Anderson:**
I just wanted to make sure that my reasoning was okay.

**Assemblyman Segerblom:**
Under the current rule, motions to suppress can be brought up in preliminary hearings in justice court?

**Luke Prengaman:**
It is practice to raise them. The state of the law actually says that there is no basis for motions to suppress, but it is practice.

**Assemblyman Segerblom:**
In a case where the justice of the peace grants the motion, do you have a right to appeal that?

**Luke Prengaman:**
Yes.

**Assemblyman Segerblom:**
So, that would go to the district court?

**Luke Prengaman:**
Yes.

**Assemblyman Ohrenschall:**
When I look at the differentiation between Sections 5(a) and 5(b) of the bill, the misdemeanor, which would only go to the justice court, and gross misdemeanor and felony, which would only go to the district court, I have a tough time understanding why the justice court has the competency to suppress in a misdemeanor case, but not a more serious case.

**Luke Prengaman:**
It is not a matter of competence. Our justices of the peace are as competent as our district court judges. It is a matter of original authority, constitutionality, and statute. Justices of the peace have original jurisdiction over all misdemeanors, and by virtue of that original jurisdiction, they hear suppression issues. It is the district court, by constitution, that has original jurisdiction over gross misdemeanor and felony cases. It is a limited grant of authority to the justices of the peace to do the preliminary examination. The Supreme Court has limited justices of the peace because it is not their original authority. That is why the defendant does not plead in justice court. Justices of the peace do not determine competency in gross misdemeanor or felony cases, and they cannot order discovery.

**Assemblyman Ohrenschall:**
If there is a motion to suppress in justice court for a gross misdemeanor or felony, are the constitutional issues that arise given a full and fair hearing? Are they merely given quick decision? Is your issue in this circumstance time to prepare?

**Luke Prengaman:**
Yes. I am forced to address very significant constitutional issues off the cuff. Hopefully, I can cite the appropriate cases and make the right arguments from memory. I am at a distinct disadvantage when caught in the middle of a preliminary hearing, or just before with such a motion. This is something that could end my case, setting the guilty free. I want to bring all of the written authority possible. My other option is to request a continuance, causing a delay. In many cases, it can be two weeks to a month. We are litigating this issue in a place where the law says it should occur somewhere else. This causes us delays and excess, repetitive litigation. This is nothing more than a recognition of the prevailing law.

**Assemblyman Ohrenschall:**
Continuances are usually granted to the prosecution?

**Luke Prengaman:**
Yes and no. I have been fortunate. I have an example of a drug case where I was hit midstream. I had done my complete examination when the issue came up. I then had to backtrack causing the hearing to be protracted.

**Chairman Anderson:**
At justice court or district court level?

**Luke Prengaman:**
At the justice court level in a preliminary hearing with a one witness examination. It could have been short, but the defense was prepared with case law and cross-examined my witness. I could not catch up or fully respond. I asked for a continuance. The magistrate set up a briefing schedule, and the case got so protracted that we were delayed four to six weeks after that hearing. Finally, my office took it to grand jury to get that case into district court.

**Chairman Anderson:**
Mr. Prengaman, we are going to let you up. Ms. Erickson, is there anyone else on behalf of the District Attorney's Association to testify? Judge Dahl?

**Stephen Dahl, Justice of the Peace, Department 1, North Las Vegas Township; President, Nevada Judges Association:**
I am here to testify against the bill. I want to make it clear that this would not just be a procedural change, it would be a substantive change in what has been a long practice in Nevada. There has never been a suggestion from the Nevada Supreme Court or in statute that says it is improper to raise suppression motions at the justice court level. The statute on preliminary hearings, NRS 171.206, states, "if from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, they will be bound up to district court." Until today, everybody believed that when the law said the court should consider evidence it meant the court should consider legal evidence. The proposition today is that you consider all kinds of evidence. That would be a change.

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

According to this bill, the defendant, the system, and everybody else would be better off if I had ignored that and bound it up to district court for trial. You cannot ignore these issues in front of you. The defense attorney at a preliminary hearing has a right to a full and fair cross examination of anybody who is testifying against his client. If this passes, anything to do with

suppression issues becomes irrelevant. Why would anyone question the police officer about the stop? Why would we question Miranda rights? It would all be irrelevant because the justice of the peace would not even be allowed to consider any of this. I have been a judge for 12 years and have done hundreds of preliminary hearings and dozens of suppression motions. The proponents of the bill say not to worry about most of these cases, only the difficult ones. The fact is that most of the cases are easy. Mr. Segerblom asked about appeals. These issues hardly ever get appealed. I know I have never been reversed on a suppression motion. I have never done a full-blown suppression motion with witnesses, etcetera. We do not do that at the justice court level. We address the issues as they come up. If something is done illegally, we take appropriate action. The justice courts are not so busy that we do not have time to deal with the necessary basic legal issues of whether or not someone should be held for their crime. This change is unnecessary. These issues get handled fairly quickly. They have the right to appeal, but that hardly ever happens.

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 apply at the preliminary hearing stage. The Supreme Court has been careful about what justices of the peace can and cannot do. They limit us in some areas, give us more power in others.

**Chairman Anderson:**
Given your 12 years in the court, how many warrants have you had to sign over that time?

**Stephen Dahl:**
There are two kinds—search warrants and bench warrants. I have done hundreds of both.

**Chairman Anderson:**
The search warrants are more relevant.

**Stephen Dahl:**
I have done hundreds of arrest warrants.

**Chairman Anderson:**
Do you make a value judgment based on the information presented at that time by the police officer or district attorney's office? A judgment as to whether you

think sufficient evidence has been presented to take another person's freedom or property away?

**Stephen Dahl:**
Most arrest warrants are fairly simple and only one page. There is not a lot of room for question. There have been occasions where I have refused to sign one because I needed more information. I do look at it.

**Chairman Anderson:**
You look at it to make sure the technical elements are all there, as well as the knowledge it is going to appear in front of another court? Should you take all of the cases to district court? Why does it go through the second court system if all you do is rubber-stamp them through?

**Stephen Dahl:**
The judges do not think we are rubber-stamping. First, you look at probable cause, then at the preliminary hearing. Evidence must be provided that a crime was committed and by the accused. These elements must be met to move to trial.

**Chairman Anderson:**
That is the point. Not only do you move to trial, but you move beyond the warrant. You are involved in the whole process from before the warrant to the preliminary hearing where you have the ability to question the evidence that was first brought when you signed the warrant.

**Stephen Dahl:**
I understand better now. Frequently that is an issue. I may read a warrant or probable cause paperwork and think it is questionable. For probable cause, I usually give the benefit of the doubt and figure it out at the hearing. I have not heard testimony, but I assume we will get more information later. The preliminary hearing is where you get information you may have questioned earlier when you authorized the arrest or the hold on probable cause. Under this bill, either you do not sign it because you have questions, or you sign it and never get to address it again. The suggestion is that we can dismiss, but not suppress. Dismissal kills a case. Suppression does not necessarily do that. I do not think it streamlines the system.

**Chairman Anderson:**
You—the president of the Nevada Judges Association—are opposed to the bill. You feel it takes away the opportunity of the justices of the peace to carry out their function. Are you saying that there is no need for this nuance?

**Stephen Dahl:**
Yes.

**Assemblyman Carpenter:**
Judge, can I have an example where they asked to suppress the evidence? You said most of the time it is not appealed to the district court?

**Stephen Dahl:**
One example I gave earlier: the officers will testify differently than expected at the hearing. Police reports may imply consent to search, but on the stand they say consent was not given. Those cases get dismissed. Nevada law, on searching vehicles, is different than most states. In Nevada, the police have an hour to try to obtain a search warrant. For a while, the police in my part of the State were considering having dogs sniff the car in question. If they had a dog sniff the car and the dog reacted to possible controlled substances, they could search. That is the law in a lot of states, but not Nevada. That issue would come up—using the dog instead of getting a search warrant. I have spent days working on a technical murder case on a motion to dismiss. The vast majority of issues on suppression matters are not that technical.

Recently, in the United States Supreme Court case of *Crawford v. Washington* [541 U.S. 36, 61-62 (2004)] the rules on hearsay and excited utterances were changed. That led to discussion in justice court on certain statements. Recently, there have been some very good cases in the Nevada Supreme Court that are clear on what should happen.

I have suggested a procedural change that I think is worth thinking about. It would require that motions to suppress actually be in writing and filed at least a few days prior to the preliminary hearing. That would give the district attorney's office the notice they need and a chance to respond. Many concerns could be addressed if the motion was filed at least five days before a hearing in writing.

**Chairman Anderson:**
So, your concern is that there should be a warning shot before a case goes to preliminary hearing?

**Stephen Dahl:**
I have no problem with that. There is one other solution: when they make a motion to suppress during a preliminary hearing, I go ahead and have the hearing, then delay the decision on the motion to a later time.

**Chairman Anderson:**
Is there somebody here who would recommend work with the District Attorney's Association on some language if we were to move in that direction?

**Stephen Dahl:**
Ben Graham and I have actually been working together on that.

**Chairman Anderson:**
If we decide to move with this bill, we will see what can be worked out.

**Assemblyman Carpenter:**
This does not apply to your area. The bill says, "In any judicial district in which a single judge is provided all of the motions subject to the provisions of subsection 1 must be made in writing with not less than 10 days notice, unless they can prove lack of time."

**Stephen Dahl:**
As the statute stands, those are pretrial motions as opposed to pre-preliminary hearing motions. I suggested that we would add something like a subsection 5, which would say, "In all criminal prosecutions resulting in a preliminary hearing, any motion subject to subsection 1 shall be filed in writing and shall be made so far in advance of the hearing."

**Assemblyman Carpenter:**
That makes sense.

**Assemblyman Horne:**
If we have a chain of procedure where the motions need to be in writing, there are instances where unexpected issues come up during the preliminary hearing. I would move to suppress at that time, so would you suspend proceedings until a written motion was obtained or would you make a ruling then?

**Stephen Dahl:**
It would depend on whether or not it was a complicated issue. I would finish the hearing, let them argue, and brief it afterwards.

**Assemblyman Horne:**
I wanted to make sure it did not preclude the possibility of an oral motion.

**Chairman Anderson:**
Let us turn to Mr. Brooks from Clark County. Mr. Conway will be next.

**Howard Brooks, Attorney at Law, Office of the Public Defender, Clark County:**
The primary job of justice court in a felony case is to decide at a preliminary hearing whether slight or marginal legal evidence supports the charge. When illegal evidence is introduced at the preliminary hearing, the other side is supposed to object. The objection may be called an objection, a suppression motion, a motion to strike, etcetera. There is no precise definition of what a motion to suppress is. The prosecutor speaks of his surprise when these things arise. I assure you we are equally, if not more, surprised. We are at a complete disadvantage. Most prosecutors know what is questionable, and what issues are going to be the subject of a suppression motion or objection. A competent prosecutor comes to court armed with case law to support position.

I cannot file, in writing, a motion to suppress before the preliminary hearing unless I have a complete notice of what the prosecutor intends to present. The prosecutor cited some federal cases which are totally inapplicable. The Nevada Supreme Court case *Goldsmith v. Sheriff* [85 Nev.295, 454 P.2d 86 (1969)] is applicable. In that case, the Nevada Supreme Court said that courts, including justice courts, must hear legal evidence; that includes applying the rules of evidence. The authority to enforce comes from the Nevada and federal constitutions. It is not statutory, it is constitutional.

Most suppression issues are handled in two or three minutes. Justice court records are helpful at district court level to verify the outcome of these types of issues. District court will be at a disadvantage if this step is negated. District attorneys are constantly trying to lower their own justice court burden through legislation.

**Chairman Anderson:**
Did you indicate that the email I received was also sent to the rest of the Committee?

**Howard Brooks:**
I did.

**Chairman Anderson:**
Did you wish it to be submitted as part of the record today?

**Howard Brooks:**
I think that the *Goldsmith* case is crucial with this issue.

**Chairman Anderson:**
Please enter the email into the record as (Exhibit C).

**Cotter C. Conway, Deputy Public Defender, Washoe County:**
I am in opposition to the bill, joining the comments of Mr. Brooks and Judge Dahl.

**Lee Rowland, Staff Attorney, American Civil Liberties Union of Nevada, Las Vegas:**
I also submitted written testimony on the *Goldsmith* case (Exhibit D). It is important to realize in the federal system, preliminary hearings are not used. Federal court cases are irrelevant in Nevada. However, the Nevada Supreme Court has held that a preliminary hearing's evidence must be legal evidence. Having a court where illegally obtained evidence can be presented is unconstitutional, especially when it will be suppressed at the next level. That is an inefficient use of justice court, and prolongs the entire process. This proposed bill would make justice court and justices of the peace merely a formality. We are against it.

**Chairman Anderson:**
I suppose the justice courts may have some other misdemeanors to deal with to justify their existence. It is the legislative prerogative to define the jurisdiction and limits of various courts in the State. It is not the court's right to do that in and of itself. While the Constitution creates the court system, the Legislature gets to decide the jurisdictional area. We do not do things that are unconstitutional. We have very good legal counsel. I was surprised that you did not have a response to Judge Dahl's suggestion.

**Lee Rowland:**
This is the first I have heard of it. I am not a trial attorney, so I would defer to Mr. Brooks' judgment. The idea that the defense needs to give the prosecution a warning of evidence to be presented seems to be backward.

**Chairman Anderson:**
Did you say you are not a trial attorney?

**Lee Rowland:**
I am not a trial attorney. I do not practice criminal law, but I am an attorney.

**Chairman Anderson:**
Questions?

**Lisa A. Rasmussen, President, Nevada Attorneys for Criminal Justice, Las Vegas:**
Everything Mr. Brooks said is accurate, and I would like to expound. I am a practicing trial attorney in both state and federal court. Federal cases are

inapplicable in this circumstance. There is a substantial difference between grand jury law in Nevada and in the federal system. There are two ways which a case may be brought to trial or a defendant charged: grand jury or by complaint which proceeds to preliminary hearing. It does not make sense to limit the preliminary hearing. I litigate my cases at the preliminary hearing level. I often make motions for discovery. The response from the district attorney's office is always that I do not have a right to do that. I always respond that I need a complete record of the preliminary hearing to litigate now or later in district court. If this bill passes, it limits more of my rights to file any motions at all, or even object. Binding a defendant over is a critical event in the proceedings and should not be dispensed of. As Mr. Brooks said, we are the ones at a disadvantage.

**Chairman Anderson:**
Is there anything that has not already been said?

**Lisa Rasmussen:**
This is another means to strip us of the ability to do anything meaningful at the preliminary hearing at the justice court level.

**Chairman Anderson:**
You do not think that has already been said?

**Lisa Rasmussen:**
No.

**Chairman Anderson:**
The issues that you bring up at preliminary hearing are not brought up again at district level, at bail, and again at every stage in the road?

**Lisa Rasmussen:**
We may or may not bring them up at every stage. Often we do not have the tools to bring them up at the early stage.

**Chairman Anderson:**
I want to draw the correct conclusion. The reason for the preliminary hearing is because of the question of discovery. This gives you the availability of knowing what evidence is out there for you to raise at subsequent events in the trial process?

**Lisa Rasmussen:**
Or at the preliminary hearing.

**Chairman Anderson:**
Or to eliminate those at preliminary hearing?

**Lisa Rasmussen:**
Right.

**Chairman Anderson:**
Any other questions? Any others who wish to speak? Is there some issue that has not been raised yet?

**Jason Frierson, Attorney at Law, Office of the Public Defender, Clark County:**
No, I would only say that I agree.

**Chairman Anderson:**
Are there any other questions from members of the Committee? [There were none.]

**Ben Graham, Legislative Representative, Clark County District Attorney and the Nevada District Attorney's Association:**
Only a couple of jurisdictions have grand juries. That is a whole other issue. I do not know where the young lady practices that she gets complete discovery. These matters are raised again and again at the district court level.

**Chairman Anderson:**
The question of discovery usually falls between the justice court and the district court filing. Additionally, can it ever happen before these filings?

**Ben Graham:**
Yes, it is available. Anything in our file is available before the preliminary hearing to the defense counsel.

**Chairman Anderson:**
Let us make sure.

**Assemblyman Horne:**
To clarify, we get discovery when we are assigned a client. There are times that we do not have the entire discovery. I may then request a continuance, but the district attorney's office says, "We are ready to go with what we have." There is the question of disadvantage because of unavailable discovery.

**Chairman Anderson:**
Judge Dahl?

**Stephen Dahl:**
In the vast majority of cases, the defense attorneys get discovery at the time the complaint is filed. The district attorney's office has a packet of discovery. There is not a huge problem.

**Chairman Anderson:**
Any others to be heard? I will close the hearing on A.B. 65. Some work needs to be done on the bill. I suggest that both sides participate in the discussion. It is going back to the board, and will be in a later work session.

The next work session will contain these bills: A.B. 20, A.B. 14, and possibly A.B. 25 and A.B. 44.

Meeting adjourned [at 10:04 a.m.]

RESPECTFULLY SUBMITTED:

Judy Maddock
Recording Secretary

RESPECTFULLY SUBMITTED:

Janie Novi
Transcribing Secretary

APPROVED BY:

Assemblyman Bernie Anderson, Chair

DATE:

## EXHIBITS

**Committee Name: Committee on Judiciary**

**Date: February 21, 2007 Time of Meeting: 8:00 a.m.**

| Bill | Exhibit | Witness / Agency | Description |
|---|---|---|---|
| | A | The Committee on Judiciary | Agenda |
| | B | The Committee on Judiciary | Attendance Roster |
| A.B. 65 | C | Howard Brooks, Clark County Public Defender's Office | Email Testimony |
| A.B. 65 | D | Lee Rowland, ACLU of Nevada | Submitted Testimony |