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No. 97071-8

Court of Appeals Cause No. 35966-2-III

Stevens County Superior Court Cause No. 18-2-00062-7

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

Respondent,

vs.

**STEVENS COUNTY DISTRICT  
COURT JUDGE,**

Petitioner.

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**PETITIONER'S AMENDED PETITION FOR REVIEW  
BY THE SUPREME COURT OF WASHINGTON**

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## I. IDENTITY OF PETITIONER

Petitioner is The Hon. Gina Tveit, the duly elected Judge of the Stevens County District Court. Judge Tveit asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part II of this petition.

## II. CITATION TO THE COURT OF APPEALS DECISION

Division III of the Court of Appeals filed its published decision on March 12, 2019. *State of Washington v. Stevens Cnty. Dist. Court Judge*, \_\_ Wn.App. \_\_, 436 P.3d 430 (Wn.App. 2019). A copy of the Court of Appeals' opinion is attached as **Appendix A**.

## III. ISSUES PRESENTED FOR REVIEW

The precise issue before this Court is whether the Superior Court can, in first appearances, exercise its concurrent jurisdiction over misdemeanor cases where the case was or is likely to be filed in the District Court. Particularly, can the Superior Court enter orders on preliminary appearances in cases that are filed in the District Court?<sup>1</sup> The Court of Appeals ruled that a preliminary appearance is not part of the process of a criminal trial and not a "critical stage" in the proceeding

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<sup>1</sup> The issue does not involve other proceedings in a misdemeanor case since the Court of Appeals ruled that in "critical stage" proceedings the priority of action rule applies and only the judges in the court where the case is initially filed can enter orders at any critical stage of the proceedings.

thereby permitting the Superior Court to hold preliminary appearance hearings in cases filed in District Court as an exception to **the priority of action rule**. The priority of action doctrine confers exclusive jurisdiction on the Court in which the charging document was first filed.<sup>2</sup>

The Court of Appeals ruling is erroneous and would create a number of substantive legal problems as well as practical problems in the administration of a case first filed in District Court. If, for example, the Superior Court Judge at the preliminary appearance made a determination to not release a defendant then how could the defendant appeal that decision? The appeal from a District Court decision is directly to the Superior Court. Therefore, the appeal of a preliminary order entered by a Superior Court Judge in a District Court case would result in appealing the order to the very Court that entered the order. In counties with only one judge it may result in appealing the order to the same judge that entered the order in the first place. The preliminary appearance is an important and critical stage of the proceedings and the priority of action rule should apply.

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<sup>2</sup> The priority of action rule also applies between the Public Employee Relations Commission (PERC) and Superior Court. “[W]e have developed the ‘priority of action rule,’ under which the superior court is precluded from ruling on any issue in a case already pending before PERC . . . .” *City of Yakima v. Int’l Ass’n of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 675-76, 818 P.2d 1076 (1991). The purpose of this rule is to prevent “unseemly, expensive, and dangerous conflicts of jurisdiction and of process.” *Id.* at 675.

#### IV. STATEMENT OF THE CASE

The Stevens County Superior Court Judges decided that they would hear all first appearances<sup>3</sup> regardless of whether the case was filed in the Superior Court or the District Court. On February 2, 2018, the State attempted to file in District Court an order on first appearance signed by one of the Stevens County Superior Court Judges. Judge Tveit concluded that the Superior Court Judge had no lawful authority to enter the order and directed the District Court Clerk to not accept the order for filing. Judge Tveit's decision was based on the longstanding practice and rule that the Court where the case was filed has jurisdiction to make all rulings related to the action.

In response to the District Court Judge's ruling refusing to accept an order signed by a Superior Court Judge in a District Court case, the Stevens County Prosecuting Attorney sought and obtained an *ex parte* Writ of Mandamus. (CP 62-63.) The District Court Judge answered the Writ by setting forth the fact that the Superior Court Judges lack any jurisdiction or other authority to enter orders on first appearance in cases that were filed originally in the District Court. Judge Tveit asserted that the actions of the Superior Court Judges were *ultra vires* to their authority. (CP 135.) On February 28, 2018, the matter was then heard by Hon. John

F. Strohmaier of Lincoln County Superior Court sitting as a visiting judge in Stevens County. On March 7, 2018, Judge Strohmaier filed a memorandum opinion concluding that the District Court was acting within its power to refuse the Superior Court's attempt to hear cases and enter orders in District Court cases unless the Superior Court judicial officer was acting as a District Court Judge *pro tempore*. (CP 178.)

The Court of Appeals reversed the trial court's ruling and held that preliminary appearances are not a critical stage of the proceedings and therefore either the Superior Court Judge or the District Court Judge had jurisdiction to enter orders on preliminary appearances regardless of where the case was originally filed.

## **V. STANDARD OF REVIEW**

The question before this court is a question of law which should be reviewed *de novo*. In a mandamus action, “[t]he determination of whether a statute specifies a duty that the person must perform is a question of law.” *Cost Mgmt. Serves., Inc. v. City of Lakewood*, 178 Wn.2d 635, 649, 310 P.3d 804 (2013), quoting *River Park Square, LLC v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

## **VI. ARGUMENT**

### **1. THE COURT SHOULD ACCEPT REVIEW BECAUSE**

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<sup>3</sup> At first appearances the judicial officer would make decisions regarding probable cause, the conditions of release, assignment of counsel and scheduling of later in court hearings.

**THIS CASE INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE CONSTITUTION AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.**

*Significant Question of Law Under the Washington State*

*Constitution* – Pursuant to RAP 13.4(b)(3), this petition involves a significant question of law under the Constitution of the State of Washington. The rule mirrors RAP 2.3(d)(2) involving discretionary review by the Courts of Appeal.

The significant constitutional question involves Wash. Const. Art. IV, § 12 (Inferior Courts) and Wash. Const. Art IV, § 6 (Jurisdiction of Superior Courts). The former provides: “The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution.” The latter provides in part: “The superior court shall have original jurisdiction . . . in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law . . . .”

The Legislature has given the District Court jurisdiction “[c]oncurrent with the superior court of all misdemeanors and gross misdemeanors committed in their respective counties . . . .” RCW 3.66.060. The statute authorizes a District Court to impose a fine of \$5,000 and a jail sentence of one year. *Id.* “The legislature has sole

authority to prescribe [District Court] jurisdiction and powers.” *Smith v. Whatcom Cnty. Dist. Ct.*, 147 Wn.2d 98, 104, 52 P.3d 485 (2002).

Here, the Superior Court usurped the jurisdiction of the District Court, which was created by the Legislature based upon Wash. Const. Art. IV, § 12. Therefore, a significant question of law under the Constitution of the State of Washington is involved.

*Issue of Substantial Public Interest* – Pursuant to RAP 13.4(b)(4), this petition involves an issue of substantial public interest that should be decided by the Supreme Court. The rule is substantially similar to RAP 2.3(d)(3) involving discretionary review by the Courts of Appeal. An opinion of this Court involving standing suggests that “substantial public importance” is related to the controversy “immediately affect[ing] significant segments of the population.” *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004) (applying a less rigid and more liberal approach to standing).

An example of an issue of substantial public interest was described in *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005), which involved interaction between a prosecutor’s office and the Superior Court. The Pierce County Prosecuting Attorney sent a memo to all Superior Court judges Pierce County announcing that the prosecutor’s office would no longer recommend drug offender sentencing alternative (DOSA)

sentences. A defendant convicted of delivery of a controlled substance argued that the prosecuting attorney’s memo was an improper ex parte communication. The Court granted a petition for review to decide the issue. The Court stated: **“This case presents a prime example of an issue of substantial public interest.** *Watson*, 155 Wn.2d at 577.

(Emphasis added.) The Court added:

The Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County . . . where a DOSA sentence was or is at issue. . . . [I]t invites unnecessary litigation on that point and creates confusion generally.

*Id.* Here, as explained below, the priority of action rule is intended to avoid potential irreconcilable conflicts the administration of a case. Both the Superior Court and the District Court cannot administer the same case. If, for example, the Superior Court intervenes and issues rulings on District Court cases then the Superior Court cannot fairly exercise its appellate court jurisdiction over the case.

During 2018 there were 46,512 criminal cases filed in this state’s Superior Courts including 633 criminal cases in the Stevens County Judicial District.<sup>4</sup> During this same year there were 25,138 non-traffic misdemeanor cases filed in the District Courts including 312 in Stevens

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<sup>4</sup> Caseloads of the Courts of Washington: Superior Court – Cases Filed by Type of Case (Washington State Courts 2018 Annual Report).

County District Court.<sup>5</sup> The application of the priority of action rule (aka jurisdictional priority rule) affects significant segments of the population. The issue raised here involves an issue of substantial public interest that should be decided by the Washington Supreme Court.

**2. THE PRELIMINARY APPEARANCE IS A CRITICAL STAGE IN THE PROCEEDINGS AND THE PRIORITY OF ACTION RULE SHOULD APPLY.**

This case squarely addresses whether the Superior Court has any authority to make decisions and enter orders **in cases that were first filed in the District Court** when it is not acting in its appellate capacity.

The District Court is a constitutional court created by the Legislature. Wash. Const. Art. IV, § 12. The District Court is not merely a division of the Superior Court.<sup>6</sup> District Courts are created by statute. *See generally* RCW 3.02.010-.060, RCW Ch. 35 and RCW Ch. 35A. “Review of the proceedings in a court of limited jurisdiction shall be by the superior court . . . .” RCW 3.02.020. District Courts are authorized to adopt their own rules of procedure in addition to rules prescribed to them by the Supreme Court. RCW 3.30.080. District Court Judges are specifically authorized in RCW Ch. 3.34. More importantly, the

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<sup>5</sup> Caseloads of the Courts of Washington: Courts of Limited Jurisdiction – Non-Traffic Misdemeanors (Washington State Courts 2018 Annual Report).

<sup>6</sup> An example of a court that is a division of the Superior Court would be the Juvenile Court. *State v. Werner*, 129 Wn.2d 485, 492, 918 P.2d 916 (1996) (“The juvenile court is

Legislature has conferred upon District Courts broad powers to hear misdemeanors, gross misdemeanors and violations of city ordinances concurrent with the Superior Court, to hear and determine traffic infractions and to sit as a committing magistrate and conduct preliminary hearings. RCW 3.66.060.

The fact that District Court and the Superior Court have concurrent jurisdiction over misdemeanors and gross misdemeanors does not make them a unified court. Each is a separate constitutionally created court with concurrent jurisdiction over misdemeanors and gross misdemeanors depending in which Court the Prosecuting Attorney chooses to file the case.

The question is not whether the Superior Court and District Court have concurrent jurisdiction over a matter. It is instead a matter of where the case was filed. The Court of Appeals acknowledged that **the priority of action doctrine** generally would give the District Court exclusive jurisdiction on all matters related to cases filed in District Court. *State ex. rel. Harger v. Chapman*, 131 Wash. 581, 230 P. 833 (1924).

The Court of Appeals in the case at bar carved out an exception to the priority action doctrine for preliminary appearances. The Court of Appeals ruled that preliminary appearance hearing “is a special

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only a division of the superior court, not a separate constitutional court.” -- *citing* RCW

proceeding that is not considered a ‘critical stage’ of a criminal prosecution.” 436 P.3d at 434, *citing Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975); *State v. Jackson*, 66 Wn.2d 24, 28-29, 400 P.2d 774 (1965) and RCW 3.66.060(1), (2). The Court of Appeals compared the preliminary appearance hearing to the issuance of search warrants. *Id.* at 434-35. It concluded that since search warrants can be issued by the District Court in cases filed in the Superior Court then preliminary appearances can be heard by the Superior Court in cases filed in District Court. *Id.* at 435. This is a false equivalency. The issuance of search warrants by the District Court in Superior Court cases are specifically authorized by statute. Preliminary appearances have so similar authorization.

Petitioner argues that since the Court has the authority to determine the conditions of release, including the setting of bail or restrictions on the freedom of the defendant, it is a critical stage of the proceedings and the priority of action rule should apply.

*Chapman, supra*, held that in the absence of a statute giving the Superior Court or the District Court exclusive jurisdiction, the one first assuming jurisdiction is entitled to exercise it to the exclusion of the other. (CP 176.) Specifically, *Chapman* held:

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13.04.021(1)).

The offense with which the relator has been charged is a gross misdemeanor. This court, in *State ex rel. Murphy v. Taylor*, 101 Wash. 156, 172 P. 217, considering the jurisdiction of the superior courts, stated that ‘justices of the peace have concurrent jurisdiction with the superior court of all cases of gross misdemeanor,’ and inferentially adds that, in the absence of a statute giving one or the other courts exclusive jurisdiction, **the one first assuming jurisdiction is entitled to exercise it to the exclusion of the other.**

131 Wash. at 585. (Emphasis added.) This holding has never been contradicted or overruled by any later case. This holding was cited with approval in *State v. Birch*, 183 Wash. 670, 678, 49 P.2d 921, 924 (1935), and more recently by the Supreme Court in *Seattle Seahawks, Inc. v. King Cnty.*, 128 Wn.2d 915, 916-17, 913 P.2d 375 (1996) and *State v. Cummings*, 87 Wn.2d 612, 614, 555 P.2d 835, 836 (1976).

The holding in *Cummings* was followed in *State v. Dolman*, 22 Wn.App. 917, 921, 594 P.2d 450 (1979), where the Court of Appeals held that the issuance of a citation to the defendant conferred jurisdiction on the San Juan County District Court. In *Dolman* after the citation was issued the deputy prosecutor decided to file the charges in Superior Court. *Id.* at 919. The citation was never filed in District Court. The Court of Appeals still held that jurisdiction was conferred on the District Court once the citation was issued and accepted. The court stated at 918: “We agree with the trial court that even if the citation and notice to appear were not

formally filed in district court, prosecution in superior court is barred.” *Id.* at 918.

Likewise, the State’s reliance on *Matter of 13811 Highway 99, Lynnwood, Washington*, 194 Wn.App. 365, 374, 378 P.3d 568 (2016) is misplaced. In fact, that case acknowledges the “priority of action” rule. The court stated: “Under the priority of action rule, ‘the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved.’” 194 Wn.App. at 374, *quoting Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn.App. 37, 41, 321 P.3d 266 (2014). The relevant issue in the *Matter of 13811 Hwy. 99* case was whether a search warrant issued out by an inferior court pursuant to statute would divest the Superior Court of jurisdiction to determine if the seized property should be returned. The search warrant was issued out by the City of Lakewood. The District Court rules provided that the motion for return of goods seized in a warrant should be filed in the court that issued the warrant. The Superior Court rules did not include that restriction. The Court of Appeals determined that the Superior Court had jurisdiction to hear and decide the motion for return of seized items in a case filed in the Superior Court. The court rejected the City’s claim that it had exclusive jurisdiction to hear the matter. Again, that is not the issue before this Court. At bar, there is no dispute that the Superior Court and District

Court have concurrent jurisdiction. The criminal rules do not provide otherwise. Judge Tveit is not arguing that the District Court rules divest the Superior Court of jurisdiction. She argues that once a case is filed in Superior Court or District Court that particular court is vested with the power to make all rulings on the case to the exclusion of the other Court. This has to be the rule in order to avoid potential irreconcilable conflicts in the administration of the case.

The Superior Court and the District Court both have jurisdiction over misdemeanors and gross misdemeanors. However, both Courts cannot hear or administer the same case. The Court wherein the case is first filed has the jurisdiction to hear all matters related to the case. The other Court cannot “intervene” and issue out rulings or orders in the case. Judge Strohmaier correctly ruled that Judge Tveit lawfully refused to accept orders filed by the Superior Court Judges in cases that were initially filed in District Court. The ruling is consistent with the law and practical necessity. If the Superior Court could intervene and issue rulings on District Court cases then how could it fairly exercise its appellate court jurisdiction over these same cases? Could a Superior Court Judge make a ruling in the District Court case and then if the matter was appealed to the Superior Court reverse his or her ruling? Clearly not.

The court opinions cited by the Court of Appeals – *Gerstein* and *Jackson* -- do not compel the result reached by the Court of Appeals. These cases should be limited to when the Constitution requires that counsel be appointed.

- *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court did not say that a preliminary hearing cannot amount to a critical stage of the prosecution. Defendants were alleged sex offenders who were charged in Florida under a prosecutor’s information. 420 U.S. at 105. The Florida courts previously held that the filing of an information foreclosed the suspect’s right to a preliminary hearing. *Id.* at 106. The only possible method for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days and arraignment, which was often delayed a month or more after arrest. *Id.* The issues were “whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention, and if so, whether the adversary hearing ordered by the District Court and approved by the Court of Appeals is required under the Constitution.” *Id.* at 111. The Court stated at 122:

Because of its limited function and its nonadversarial character, the probable cause determination is not a “critical stage” in the prosecution that would require appointed counsel. The Court has identified as “critical stages” those pretrial procedures that would impair defense

on the merits if the accused is required to proceed without counsel.

Here, the preliminary hearing at issue was not simply a probable cause hearing. It was a first appearance before a judicial officer to make decisions regarding probable cause, conditions of release, assignment of counsel and scheduling of later in-court hearings. There can be significant consequences to a defendant at such a hearing.

The Supreme Court has held that “critical stages” of criminal proceedings are those that “hold significant consequences to the accused.” *Bell v. Cone*, 535 U.S. 685, 696 (2002). The critical stages of the criminal prosecution begin once the state starts judicial proceedings against a defendant by way of a “formal charge, preliminary hearing, indictment, information, or arraignment.” *United States v Gouveia*, 467 U.S. 180, 190 (1984). The *Gerstein* Court noted that in *Coleman v. Alabama*, 399 U.S. 1 (1970), **the Coleman Court held that a preliminary hearing can be a critical stage of a prosecution.** *Id.* at 123. The *Gerstein* Court stated at 123-24:

The Fourth Amendment probable cause determination is addressed only to pretrial custody. . . . **Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely.** There is no single preferred pretrial procedure, and the nature of the probable cause determination usually be shaped to accord with a State’s pretrial procedure viewed

as a whole. While **we limit our holding to the precise requirements of the Fourth Amendment**, we recognize the desirability of flexibility and experimentation by the States.

(Emphasis added.) In *Gerstein*, the Court's held that the probable cause determination is not a critical stage in the prosecution that would require appointed counsel under the Fourth Amendment. 420 U.S. at 122-23. The *Gerstein* Court did not say that a probable cause determination could never be a critical stage. The *Gerstein* Court stated that "we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114. A critical stage is one in which the defendant's rights could be sacrificed or lost. *United States v. Wade*, 388 U.S. 218, 225 (1967). In *White v. Maryland*, 373 U.S. 59 (1963), the Court held that where a defendant entered a guilty plea at the preliminary hearing the preliminary hearing was a critical stage in the proceedings. *Gerstein* should be limited to the issue in the case: **whether counsel was constitutionally required to be appointed.**

- *State v. Jackson*, 66 Wn.2d 24, 28-29, 400 P.2d 774 (1965), also involved the issue of appointment of counsel was constitutionally required. Defendant was charged with car theft. Our Supreme Court held that the failure to appoint counsel at the preliminary hearing at which the

defendant pleaded not guilty and during which nothing occurred which became material during defendant's trial did not constitute a constitutional denial of counsel at a critical stage of the case. The court stated at 29-30:

**Under the circumstances of this case**, we do not consider the failure to appoint counsel at the preliminary hearing a denial of counsel at a "critical stage" in the proceedings involved, nor was the appellant prejudiced in any manner that deprived him of due process of law.

(Emphasis added.) It was only for the purpose of determining whether a due process violation occurred that the court found that the preliminary hearing was not a critical stage. The Court did not state that a preliminary hearing cannot be a critical stage. The Court's opinion in *Jackson* was discussed in *Matter of Sanchez*, 189 Wn.2d 1023, 408 P.3d 1089 (2017), another case involving whether appointment of counsel was constitutionally required. The *Sanchez* Court stated at 1089:

This court has held that failure to appoint counsel for a preliminary hearing at which the defendant pleaded not guilty and where nothing substantive occurred did not constitute denial of the right to counsel. [*Citing Jackson*, 66 Wn.2d at 29-30.] Whether the pretrial hearing is called a preliminary hearing or an arraignment or an appearance is irrelevant. "The name of the stage of the criminal proceeding is not controlling." *Id.* at 28. In contrast, "[a] complete denial of counsel at a critical stage of the proceedings is presumptively prejudicial and calls for automatic reversal." [Citations omitted.]

*Jackson* and *Sanchez* should be limited to their facts: **whether a constitutional violation occurred** because counsel was not appointed.

The cases do not prevent a preliminary hearing from being considered a critical stage of the proceedings. The cases do not address the issue raised here.

The jurisdictional priority rule is not unique to the state of Washington. *See, e.g., Brinkman v. Brinkman*, 923 N.W.2d 380, 384 (Neb. 2019); *State ex rel. Otten v. Henderson*, 953 N.E.2d 809, 814 (Ohio 2011); *In re Vairin M.*, 647 N.W.2d 208, 215 (Wis. 2002). *See also* 21 C.J.S. Courts, Priority of Jurisdiction § 255 (updated March 2019).

## VII. CONCLUSION

The Court should reverse the holding of the Court of Appeals under the priority of action rule and remand the case with directions to dismiss the writ.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of April, 2019.

JERRY MOBERG & ASSOCIATES

  
\_\_\_\_\_  
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Attorney for Respondent Judge Gina Tveit

**CERTIFICATE OF SERVICE**

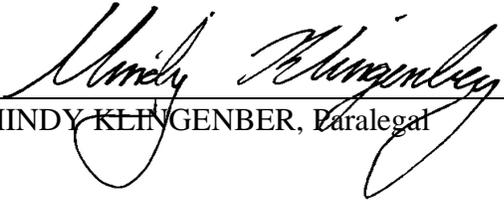
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DATED this 19<sup>th</sup> day of April, 2018 at Ephrata, WA.

JERRY MOBERG & ASSOCIATES, P.S.



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## **APPENDIX A**

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CASE # 359662

State of Washington v. Stevens County District Court Judge  
STEVENS COUNTY SUPERIOR COURT No. 182000627

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Washington Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. RAP 12.4(b). Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the opinion (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

A handwritten signature in cursive script that reads "Renee S. Townsley".

Renee S. Townsley  
Clerk/Administrator

RST:btb  
Attachment

c: **E-mail** Honorable John F. Strohmaier (visiting judge)  
c: **E-mail** Evelyn A. Bell, Stevens County Superior Court Administrator

**FILED**  
**MARCH 12, 2019**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	No. 35966-2-III
	)	
Appellant,	)	
	)	
v.	)	
	)	PUBLISHED OPINION
STEVENS COUNTY DISTRICT COURT	)	
JUDGE,	)	
	)	
Respondent.	)	

PENNELL, J. — Washington’s superior and district courts share a limited amount of concurrent criminal jurisdiction. When one court exercises its jurisdiction in a specific case, the priority of action doctrine prohibits another court from interfering. But what constitutes the same case for purposes of the priority of action doctrine is not always clear. Our case law establishes that a search warrant proceeding is not part of the same case for purposes of the doctrine because one proceeding does not have a preclusive effect on the other. We now hold that the same is true for a preliminary appearance hearing. A court’s authority to hold a preliminary appearance hearing is separate from the authority to adjudicate a criminal trial, and the preliminary appearance hearing has no preclusive effect on the criminal trial process.

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Because a preliminary appearance hearing is distinct from the criminal trial process, a district court's exercise of authority over a substantive criminal charge does not preclude the superior court from holding a preliminary appearance hearing. This matter is therefore reversed, with instructions that the State be granted a writ of mandamus directing the district court to recognize the validity of preliminary appearance orders issued by the superior court.

## FACTS

This case arises from a dispute between judges of the superior and district courts of Stevens County regarding how to handle preliminary appearances for individuals arrested and detained in the county jail. The conflict began on January 29, 2018, when the administrator for the Stevens County Superior Court sent an e-mail to the superior and district court judges, prosecutors, and others notifying them that all in-custody first appearances for both courts were to be heard by the superior court at noon on Mondays through Fridays.

The superior court administrator's e-mail was not well-received by the district court. On February 2, 2018, Stevens County District Court Judge Gina Tveit e-mailed the district court staff directing that no orders be filed in a district court case unless signed by a district court judge or district court judge pro tem. This e-mail was copied to the

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superior court judges, the county clerk, the county's chief corrections officer, and the superior court administrator (who then forwarded it to the prosecutor's office).

On February 5, 2018, the Stevens County Superior Court judges jointly signed an administrative order requiring all preliminary appearances be heard by the superior court judges or a court commissioner. The order identified the reasons for instituting the policy, including: scheduling conflicts between the courts, the clerks, the jail, and attorneys; the hardship to the jail to accommodate different first appearances held in both courts; the frequent interruptions and excessive delays caused by the current procedure; and the superior court's ability to remedy the situation by conducting all first appearances during the noon hour via video to the jail.

The Stevens County prosecuting attorney subsequently filed a petition for writ of mandamus, seeking to require Judge Tveit to rescind her February 2, 2018, directive and to recognize the validity of superior court preliminary appearance orders. According to the affidavit in support of the petition, a Stevens County Superior Court judge presided over an in-custody first appearance for an individual named Edwin Maestas concerning two gross misdemeanors. The superior court judge entered a CrR 3.2 hearing order and set the matter over to the district court for 1:30 p.m. that day. The district court staff did not file the order or set the matter on the district court's docket. The State's affidavit also

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referenced two other criminal cases where Judge Tveit disregarded the administrative order and presided over the preliminary appearances.

The State's petition for mandamus was heard by a visiting superior court judge, appointed pursuant to RCW 4.12.040. Citing the priority of action rule, the visiting judge denied the State's petition. In his memorandum opinion dated March 7, 2018, the judge reasoned that a preliminary appearance is part of a criminal case and once the district court assumes jurisdiction of a case through a filed criminal charge, the superior court is prohibited from exercising jurisdiction.

The State timely appeals.

#### ANALYSIS

A statutory writ of mandamus may be issued "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." RCW 7.16.160. Our case law recognizes the availability of a statutory writ when a judge of a court of limited jurisdiction takes action that is legally erroneous and not correctable on appeal. *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827-28, 920 P.2d 206 (1996). Legal issues regarding the propriety of a writ are reviewed de novo. *Burd v. Clarke*, 152 Wn. App. 970, 972, 219 P.3d 950 (2009).

The State filed a mandamus petition in order to compel the Stevens County District Court to recognize and file preliminary hearing orders issued by the superior court in

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district court cases. Because district court clerks act at the direction of district court judges, RCW 3.54.020, the mandamus petition was directed at Stevens County District Court Judge Tveit. According to the State, mandamus should issue because Judge Tveit's instruction that the district court staff not accept preliminary hearing orders from superior court is based on a mistake of law. According to the State, the superior court retains authority to hold a preliminary hearing and enter related orders, even after a district court case has been filed and the district court has assumed exclusive original jurisdiction over the trial process.

Our assessment of the State's position requires an analysis of superior court jurisdiction and how that jurisdiction is, or is not, limited by a district court's exercise of jurisdiction over a particular criminal case. In this context, the term "jurisdiction" refers to a court's power to act. *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 173 Wn.2d 608, 616, 268 P.3d 929 (2012).

Superior and district courts are separate courts, but they enjoy a significant amount of concurrent criminal authority. The superior court's authority is derived directly from the state constitution. WASH. CONST. art. IV, § 5. A superior court has broad criminal jurisdiction over felonies and misdemeanors "not otherwise provided for by law." *Id.* at § 6. In contrast to superior courts, a district court's powers are limited to what is

prescribed by statute. *Id.* at §§ 10, 12.<sup>1</sup> The statute setting forth a district court’s criminal jurisdiction is RCW 3.66.060. Among other things, this statute grants a district court jurisdiction over all misdemeanors and gross misdemeanors. This conferral of authority is explicitly concurrent with the jurisdiction of the superior court. RCW 3.66.060.

Concurrent jurisdiction carries a risk of misuse. Left unchecked, a prosecutor might abuse his or her access to concurrent courts by filing “‘successive prosecutions based upon essentially the same conduct’” in order to “‘hedge against the risk of an unsympathetic jury,’” place an unwarranted “‘hold upon a person after he [or she] has been sentenced to imprisonment,’” or might simply “‘harass’” an accused person “‘by multiplicity of trials.’” *State v. McNeil*, 20 Wn. App. 527, 532, 582 P.2d 524 (1978) (internal quotation marks omitted) (quoting COMMENTARY TO ABA STANDARDS RELATING TO JOINDER AND SEVERANCE, § 1.3 at 19 (Approved Draft, 1968)).

To guard against misuse of concurrent jurisdiction, our case law has developed the doctrine of priority of action. Also known as the first-in-time rule, the priority of action doctrine holds that “the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved.” *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981); *see also State ex. rel. Harger v. Chapman*,

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<sup>1</sup> The state constitution refers to district court judges as “justices of the peace.” *Id.*

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131 Wash. 581, 584-85, 230 P. 833 (1924). The priority of action doctrine is reflected in the procedural rules governing district court, which provide that “[i]f two or more charging documents are filed against the same defendant for the same offense in different courts, and if each court has jurisdiction, the court in which the first charging document was filed shall try the case.” CrRLJ 5.3.

Whether the priority of action doctrine applies in a given case turns on principles of res judicata. In order for the priority of action doctrine to apply, “there must be identity of [(1)] subject matter, [(2)] relief, and [(3)] parties.” *Am. Mobile Homes of Wash. v. Seattle-First Nat’l Bank*, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990). If these criteria are not met, the doctrine does not apply and a court retains authority to act according to its concurrent jurisdiction. *In re Search Warrant for 13811 Highway 99*, 194 Wn. App. 365, 374, 378 P.3d 568 (2016).

We have previously held that the priority of action doctrine does not apply in the search warrant context. *See, e.g., id.* at 374-75; *State v. Stock*, 44 Wn. App. 467, 474, 722 P.2d 1330 (1986). Although superior courts share authority to issue search warrants with courts of limited jurisdiction, *see* RCW 10.79.035 and RCW 2.20.030, a search warrant proceeding is distinct from a criminal trial and has no preclusive effect on the trial process. *Stock*, 44 Wn. App. at 474-75. Looking at the priority of action test, none of the three elements of identity—parties, subject matter, and requested relief—are

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present. *Search Warrant for 13811 Highway 99*, 194 Wn. App. at 374. Thus, the existence of a criminal charge in one court does not preclude another court from addressing a search warrant application.

The priority of action analysis yields the same result for preliminary appearance hearings as it does for search warrant proceedings. There is no shared identity between a preliminary appearance hearing and a criminal trial. A preliminary appearance hearing is a special proceeding that is not considered a “critical stage” of a criminal prosecution. *See Gerstein v. Pugh*, 420 U.S. 103, 122-23, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *State v. Jackson*, 66 Wn.2d 24, 28-29, 400 P.2d 774 (1965); *see also* RCW 3.66.060(1), (2) (differentiating between the power over a criminal trial and the power to conduct preliminary hearings). The subject matter of a preliminary appearance hearing is limited to a nonadversarial determination of probable cause, appointment of counsel, custody, and an advisement of rights. CrR 3.2.1; CrRLJ 3.2.1. Nothing decided at a preliminary hearing has any preclusive effect at a subsequent trial. Indeed, because a preliminary appearance hearing is not a critical stage of a criminal prosecution, the topics of trial—guilt and punishment—are not available for resolution. *See Gerstein*, 420 U.S. at 122; *Jackson*, 66 Wn.2d at 28-29; *In re Pers. Restraint of Sanchez*, 197 Wn. App. 686, 702, 391 P.3d 517 (2017).

The motivating purposes of the priority of action rule would not be served by applying it in the current circumstances. Permitting different courts to handle a preliminary hearing and criminal trial does not create a risk of prosecutorial mischief. To the contrary, broadening the number of courts empowered to handle a preliminary hearing helps protect a defendant's right to be free of unwarranted detention.

As is true in the search warrant context, a court's authority to conduct a preliminary hearing is separate from the authority to adjudicate a criminal trial. The criminal trial process commences with the filing of formal charges and subsequent arraignment. CrR 2.1, 3.3(c)(1), 4.1; CrRLJ 2.1, 3.3(c)(1), 4.1. In this context, a court's role is reactive; it has no authority to proceed without receiving some sort of formal charge. But a preliminary hearing is different. A court has a constitutional duty to take proactive measures to protect the rights of detained persons. *County of Riverside v. McLaughlin*, 500 U.S. 44, 52-53, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). This duty persists regardless of whether the prosecutor's office has filed formal charges. *See Gerstein*, 420 U.S. at 116-17. Our court rules recognize this unique duty and specify that district and superior courts have a shared responsibility for ensuring that "any" person detained is afforded a prompt preliminary hearing, regardless of whether charges have been filed or in which court. CrR 3.2.1(d)(1); CrRLJ 3.2.1(d)(1).

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Because a preliminary hearing is a proceeding separate from the process of a criminal trial, Judge Tveit's directive that the Stevens County District Court not accept preliminary appearance orders from superior court was legally erroneous. Unless a preliminary appearance hearing has already been held, the superior court retains the power and duty to promptly hold a preliminary appearance hearing for a detained person, even if a charge has been filed in district court. The State is therefore entitled to mandamus, directing Judge Tveit to recognize the legal validity of superior court orders in this context.

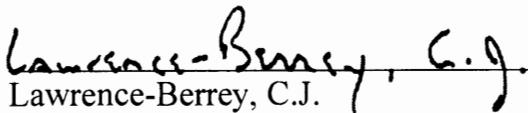
#### CONCLUSION

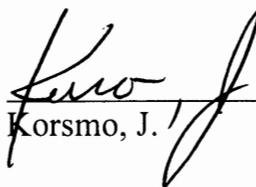
This matter is reversed and remanded to superior court with instructions to grant the State's petition for writ of mandamus.



\_\_\_\_\_  
Pennell, J.

WE CONCUR:

  
Lawrence-Berrey, C.J.

  
\_\_\_\_\_  
Korsmo, J.

**JERRY MOBERG & ASSOCIATES, P.S.**

**April 19, 2019 - 2:39 PM**

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**Appellate Court Case Title:** State of Washington v. Stevens County District Court Judge  
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