IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 52788

DAIMON MONROE

Appellant,

vs.

STATE OF NEVADA

Respondent.

Appeal from a Judgment of Conviction

Eighth Judicial District Court, Clark County

The Honorable David Wall, District Judge

APPELLANT'S OPENING BRIEF

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I.

ISSUES PRESENTED FOR APPEAL

A. WHETHER THE EVIDENCE OBTAINED IN THE INSTANT SEARCHES IS "FRUIT OF THE POISONOUS TREE" AND MUST BE SUPPRESSED.

B. WHETHER THE SEARCH WARRANTS WERE ISSUED WITHOUT PROBABLE CAUSE, IN VIOLATION OF THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

C. WHETHER THE SEARCH WARRANTS AUTHORIZED UNLAWFUL, GENERAL SEARCHES, IN VIOLATION OF THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

D. WHETHER WITHOUT THE UNCONSTITUTIONALLY OBTAINED EVIDENCE THERE IS SUFFICIENT EVIDENCE TO SUSTAIN DAMIAN MONROE'S CONVICTIONS.

E. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN FELONY CONVICTIONS FOR THE POSSESSION OF STOLEN PROPERTY COUNTS AS THERE WAS NO PROPER TESTIMONY AS TO VALUE OF ITEMS.

F. THE COURT ERRED IN ALLOWING THE STATE TO AMEND COUNT ONE ON THE EVE OF TRIAL AND THIS ERROR RESULTED IN THE ADMISSION OF IMPROPER BAD ACTS EVIDENCE

G. THE DISTRICT COURT VIOLATED THE APPELLANT'S EIGHTH AMENDMENT RIGHTS WHEN SENTENCING HIM AS A LARGE HABITUAL FELON AND GIVING HIM CONSECUTIVE LIFE SENTENCES.

II.

STATEMENT OF JURISDICTION AND BAIL STATUS

This is an appeal from a jury verdict in a criminal case. A Judgment of Conviction was filed in the District Court on November 4, 2008 (*See* Appellant's Appendix (AA) bates-stamped documents 0249). This Court has jurisdiction pursuant to Nevada Revised Statute ("NRS") 177.015. Defendant/Appellant Damian Monroe's ("Monroe") Notice of Appeal was filed on August 11, 2008. Monroe is currently in the custody of the Nevada Department of Corrections, serving a sentence of life without the possibility of parole.

III.

STATEMENT OF FACTS & PROCEDURAL HISTORY

A. SUMMARY OF FACTS

The charges in the instant matter arise from the items recovered as a result of searches executed on five Las Vegas properties located at 1504 Cutler, 7400 Pirates Cove #220 , 5900 Smoke Ranch #174, 8100 W. Charleston #A138 and 8265 West Sahara, #B106.

However, the genesis of the instant case was a traffic stop on September 24, 2006, wherein Las Vegas Metropolitan Police Department (Metro) officers stopped a van driven by Daimon Monroe. Following a warrantless search of Monroe's van, Monroe and his passenger, Bryan Ferguson ("Ferguson") were arrested for Possession of Stolen Property, Burglary, and Conspiracy to Commit Burglary. The matter was prosecuted under case Clark County District Court Case No. C228581 and is currently under appeal in Supreme Court Case No. 52234.

Following their arrests in C228581, Ferguson remained in the Clark County Detention

Center, while Monroe was released. During the time that Ferguson was in custody, Las Vegas Metropolitan Police ("Metro") Detective Bradley Nickell ("Nickell") began to review recorded phone conversations made from Clark County Detention Center the to a residential phone number registered to Tonya Trevarthen ("Trevarthen") (AA 1455: 136: 3-22 and AA 1463: 144: 8-9).[1]

According to the Affidavits and Application for Search Warrants (Affidavit), some of the recorded conversation were regarding moving items to and from a storage unit. Detectives contacted numerous storage units in Las Vegas and located a storage unit rented in Trevarthan's name. Detectives also survielled Monroe and watched as he and Trevarthan unloaded items from a storage unit and took them to a home located at 1504 Cutler Drive.

On November 3, 2006, based upon information gathered from the recorded jail conversations, Nickell applied for and received search warrants for 1504 Cutler, 7400 Pirates Cove #220, 5900 Smoke Ranch #174 and 8100 W. Charleston #A138. The Affidavits for all the warrants were identical, recounting the initial incident (Case No. C228581) which led to Monroe's incarceration and attaching the incident report as an exhibit. Further, the Affidavits gave a narration of several of the recorded telephone conversations.

The Court issued the search warrants. The warrants were identical and described the items to be seized as follows:

A) Burglary Tools (implements adapted, designed or commonly used for the commission of burglary such as pry tools, nippers, grinders, lock picks, altered keys, etc.)

B) Items of property that are used to make burglary tools (grinders, torches, files, bending tools, etc.)

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1 Bradley got the phone number off the vehicle impound sheet from Monroe's arrest in the previous matter on September 24, 2006 (AA 1148: 125: 7-9).

C) Items of property including tools, electronic equipment, household items, retail merchandise and other individual pieces of property which contain specific identifiable descriptions and/or the serial numbers which would enable officers to compare and confirm through comparison with stolen property and police crime reports that said property is, in fact stolen and if said property is confirmed stolen for officers to seized the same.

(AA 0008; AA 0043; AA 0142; AA 0174; AA 0219).

Upon Ex Parte Motion, Detective Nickell sought, and was granted, an Order Sealing Affidavit. The Order issued simultaneously with the warrants. Consequently, a copy of the Order Sealing Affidavit was left at the premises with the search warrant, in lieu of the Affidavit in support of the warrant.

According to the Warrant Return for the 7400 Pirate's Cove location, the officers seized two tools, a "figurine" and a golf club (AA 0247).

According to the Warrant Return for the 5900 Smoke Ranch location, officers seized 212 items. The items seized included numerous items of memorabilia and artwork, hair products, lotions, a box of vitamins and a box of shoes (AA 0120 - AA 0125).

According to the Warrant Return for the 8100 W. Charleston location, officers seized 204 items. The items seized included artwork, memorabilia, furniture, boxes of clothes and cigarettes. No tools were confiscated and only a couple of electronics with serial numbers were taken. (AA 0201 - AA 0206).

According to the Warrant Return for the 1504 Cutler location, officers seized 388 items. The items seized included televisions, stereos, computers and other electronic items along with numerous tools. Of the tools seized, only a couple of grinders fit the description listed on the face of the

warrant. Most of the tools seized were woodworking type power tools such as saws; two pruners and a hedge trimmer were also confiscated. The property return sheet also included artwork, sports memorabilia, a knife set, cigars, a humidor, exercise equipment, musical instruments, a coffee maker and the proverbial sink (no notation as to whether kitchen or bathroom) (AA 0070 - AA 0091). As result of the search of the 1504 Cutler residence, Detectives became aware that Monroe had rented storage unit B-106 at 8265 West Sahara.

On November 7, 2006, Detective Tim Schoening ("Schoening") applied for a search warrant for 8265 West Sahara, unit B-106. The previous warrants were attached to the Affidavit for 8265 West Sahara, unit B-106 as Exhibit "A" (AA 0141 - AA 0167).

The Court issued the search warrant. The warrant listed the items to be seized as follows:

> Burglary Tools, Stolen property such as paintings, sports memorabilia, art work, appliances, furniture

(AA 0137)

Upon Ex Parte Motion, Schoening sought, and was granted, an Order Sealing Affidavit. The Order was issued simultaneously with the warrant. Consequently, as with the previously executed warrants, a copy of the Order Sealing Affidavit was left at the premises with the search warrant, in lieu of the Affidavit in support of the warrant.

According to the Warrant Return for the 8265 West Sahara location, officers seized 96 items. The items seized included numerous items of artwork and memorabilia but also included, a disco ball and Halloween masks (AA 0169 -AA 0172).

Monroe was subsequently charged, by way of Indictment, with twenty-seven counts of Possession of Stolen Property.

At trial in the matter, the State witnesses testified as to the values of items recovered from

the properties:

Regarding Count Three:

> Michael Lantsbereger of Touch of Las Vegas testified as to what he ***thought*** the ***purchase price*** of the items has been (See AA 0593: 207: 3- 6: 208: AA 0594).

Regarding Count Six:

> Kay Friedrich of See's Candies, testified as to the retail price of candy. (See AA 0612: 226: 18- 1: 229: AA 0615).

Regarding Count Ten:

> Marcus Giannella of Milton Homer Refine Home Furnishings testified to the retail price of the furnishing. However, he was not sure of the retail prices on some of the items, giving price ranges that varied by hundreds and thousands of dollars and using language like "probably" and "I would guess" (See AA 0513: 127 -130: AA 0516).

Regarding Count Eleven:

> Scott Michels of Cal Spas testified that the value of the hot tub, was $2,310 (See AA 0586: 200: 2).

Additionally, witnesses for See America (AA 0548: 162: 16-17), and Family Guitar Center (AA 0569: 183: 7-19) and Land Baron testified as to purchase price (AA 0438: 52-53: AA 0439).

B. PROCEDURAL HISTORY

1. Hearing on Motions to Suppress

On May 7, 2008, Monroe filed a joinder to co-Defendant Bryan Ferguson's ("Ferguson") Motion to Suppress evidence derived from the warrantless search of Monroe's van on September 24, 2006, as "fruit of the poisonous tree" (AA 0299). Monroe also filed a Motion to Suppress the evidence acquired as a result of the search warrants (AA 0302). The basis for Monroe's Motion was

that the search warrants were over-broad and void of particularity.

Trial commenced on May 12, 2009. Prior to beginning the trial, a hearing was conducted on the foregoing matters. Regarding Ferguson's Motion to Suppress, Judge Bell denied the Motion, concluding that the stop began as a proper Terry stop and developed into probable cause (AA 0304: 21: 11-2: AA 0305).

As to Monroe's Motion to Suppress Evidence obtained as a result of the search warrants, Judge Bell found that the warrants were valid, without making any statements regarding Monroe's assertions of vagueness and void of particularity. (AA 0327: 43-44: AA 0328).

2. Appeal (Clark County District Court Case No. C228581 - Previous Case).

On February 23, 2009, Monroe filed an appeal in C228521. The basis for appeal was that the district court had erred in failing to suppress the evidence obtained from the warrantless search of Monroe's van, as neither the search, nor Monroe's detention fell within any recognized exception to the Fourth Amendment of the United States Constitution or Article 1, Section 18 of the Nevada Constitution.

V.

LEGAL ARGUMENT

A. THE EVIDENCE OBTAINED IN THE INSTANT SEARCHES IS "FRUIT OF THE POISONOUS TREE" AND MUST BE SUPPRESSED.

As noted above, on February 23, 2009, Monroe filed an appeal in C228521. The basis for appeal was that the district court had erred in failing to suppress the evidence obtained from the warrantless search of Monroe's van, as neither the search, nor Monroe's detention, fell within any recognized exception to the Fourth Amendment of the United States Constitution or Article 1, Section 18 of the Nevada Constitution.

The "fruit of the poisonous tree" doctrine, also known as the "exclusionary rule" is a judicially created remedy to deter government violations of the Constitution. United States v. Leon, 468 U.S. 897, 906 (1984). The exclusionary rule requires that evidence obtained directly or indirectly through government violations of the Fourth Amendments may not be introduced by the prosecution at trial, at least for the purpose of providing direct proof of the defendant's guilt. *See* Mapp v. Ohio, 367 U.S. 643, 654 (1961). When a court improperly admits evidence in violation of the exclusionary rule, reversal is required unless the error was harmless beyond a reasonable doubt. *See* Chapman v. California, 386 U.S. 18, 23-24 (1967).

In addition to barring physical, tangible materials obtained either during or as a direct result of an unlawful invasion, the exclusionary rule also bars overheard, verbal statements (*See* Silverman v. United States, 365 U.S. 505 (1961)) as well as testimony as to matters observed during an unlawful invasion. *See* McGinnis v. United States, 227 F.2d 598 (1955). Thus, the verbal evidence which derives from the unauthorized arrest and unlawful detention in this matter is just as much the "fruit" of official illegality as the more common tangible fruits of an unwarranted intrusion. *See* Nueslein v. District of Columbia, 115 F.2d 690 (1940).

Although the Supreme Court recognizes exceptions to the exclusionary rule (i.e., the "good faith" exception, the independent source exception, inevitable discovery exception and attenuation), none of these exceptions applied in C228521. As such, all evidence obtained through the illegal, warrantless search and detention of Monroe should have been suppress at trial. Furthermore, as the search warrants in the instant matter were issued based upon evidence obtained through the illegal search and detention, it is "fruit of the poisonous tree" and must be excluded as well.

Therefore, if Monroe's conviction in C228521 is reversed, and the evidence suppressed, the

proper application of the "fruit of the poisonous tree" doctrine requires the same outcome in the instant matter. In advance of this argument and in the interest of economy, Appellant seeks to adopt and join in all arguments involving Appeals #52234 and #52916, the Appellant's direct appeals of the cases arising out of the initial car stop and the appeals of co-defendant Brian Ferguson including Appeal #52877. While the trials for the charges in the instant case were heard separately from those cases, the issues and the pretrial motions were similar and the various counsel joined into each other's motions as were applicable. If this is not sufficient, Appellant seeks to supplement and/or expand his appeals.

B. THE SEARCH WARRANTS WERE NOT SUPPORTED BY PROBABLE CAUSE IN VIOLATION OF THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

The Fourth Amendment states, in pertinent part, "No warrant shall issue, but upon probable cause, supported by Oath or affirmation . . ." U.S. Const. amend. IV. The Fourth Amendment is made applicable to the states by the Fourteenth Amendment of the United States Constitution. Mapp v. Ohio, *supra*. Probable cause requires "trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for" are subject to seizure and at the place to be searched. Keesee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994); *see also* Illinois v. Gates, 462 U.S. 213, 238-39 (1983); United States v. Collins, 61 F.3d 1379, 1384 (9th Cir. 1995). The Nevada Supreme Court will reverse a finding of probable cause if the evidence in its entirety provides no substantial basis for the magistrate's finding. Garrettson v. State, 114 Nev. 1064, 1068-69, 967 P.2d 428, 431 (1998).

The first four warrants in question were prepared by and based upon affidavits by Metro Detective Nickell. Nickell asserts that there is probable cause based upon: 1) Monroe's prior arrest

2) excerpts of Monroe's jail house calls, and 3) investigation which discovered properties rented by the defendants.

1) The jail house phone calls did not give rise to probable cause.

In the majority of the calls, Monroe and Ferguson discuss their disbelief at the turn of events. In some calls, the men refer to "Matthew"; Nickell believes that "Matthew" is a nickname for a burglary tool (AA 1456: 137: 5-6). However, at no time in the conversations does Monroe admit that he has stolen property in his possession, or even reference stolen property. Therefore, the recorded conversations did not give rise to, or contribute to, a finding of probable cause.

2) Metro's "investigation" did not give rise to probable cause.

The "investigation" conducted by Metro only confirmed that Monroe had rented properties. That fact offers no support for the assertion that Monroe had stolen property. The investigation did not uncover any evidence to indicate that there was stolen property at any of the locations. Therefore, the Metro "investigation" did not give rise to, or contribute to, a finding of probable cause.

3) The prior arrest, *by itself*, is an insufficient basis for a determination of probable cause.

Based upon the complete lack of probable cause emanating from the calls and the investigation, the grounds for "probable cause" appears to be the prior arrest. However, by itself, a prior arrest is an insufficient basis for a warrant. *See* United States v. Harris, 403 U.S. 573, 579-580 (1971) (affiant's own knowledge of respondent's background, *coupled with informant information,* afforded a basis upon which a magistrate could find probable cause). In this instance, the police offered no additional information on which to justify the issuance of a warrant. Because the warrant was issued based solely upon Monroe's prior arrest, there was no probable cause, and the warrant

was invalid.

C. THE SEARCH WARRANTS AUTHORIZED UNLAWFUL, GENERAL SEARCHES, IN VIOLATION OF THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

As noted above, the Fourth Amendment requires that a warrant describe the persons or things to be seized with particularly. U.S. Const. amend. IV. The description must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized. *See* United States v. Spilotro, 800 F.2d 959 (9th Cir. 1986); *see also* United States v. Crozier, 777 F.2d 1376, 1380 (9th Cir. 1985); citing Marron v. United States (Citations omitted).

The purpose of the particularity requirement is to make "general searches under (a warrant) impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927). A general order to explore and rummage through a person's belongings is not permitted. United States v. Cook, 657 F.2d 730, 733 (5th Cir. 1981).

In determining whether a description is sufficiently precise, the Ninth Circuit Court of Appeals has concentrated on one or more of the following: (1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and, (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. Spilotro, 800 F.2d at 963.

1. The warrants failed to set out objective standards by which to differentiate items that were subject to seizure from those which were not.

Assuming arguendo, probable cause existed for the warrant to issue (which Appellant does

not concede), the next step in the afore-mentioned analysis is whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not. Id.

When there is probable cause to believe that premises to be searched contains a class of generic items or goods, a portion of which are stolen or contraband, a search warrant may direct inspection of the entire class or all of the goods if there are objective, articulated standards for the executing officers to distinguish between property legally possessed and that which is not. United States v. Hillyard, 667 F.2d 1336, 1340 (9th Cir.1982) (citations omitted) (emphasis added). In order to meet the particularity requirement, the State can also refine the scope of the warrant by reference to particular criminal episodes, time periods and subject matter. Cardwell, 680 F.2d at 78.

In the instant matter, the descriptions contained within the warrants did not offer any guidelines to executing officers to distinguish items subject to seizure from those which were not. Id. As noted above the November 3, 2006 warrants described the items to be seized as

> A) Burglary Tools (implements adapted, designed or commonly used for the commission of burglary such as pry tools, nippers, grinders, lock picks, altered keys, etc.)
>
> B) Items of property that are used to make burglary tools (grinders, torches, files, bending tools, etc.)
>
> C) Items of property including tools, electronic equipment, household items, retail merchandise and other individual pieces of property which contain specific identifiable descriptions and/or the serial numbers which would enable officers to compare and confirm through comparison with stolen property and police crime reports that said property is, in fact stolen and if said property is confirmed stolen for officers to seized the same.

The November 7, 2006 warrant, described the items to be seized as: "[S]tolen property such

as paintings, sports memorabilia, art work, appliances, furniture . . ." The warrants at issue contained no preambulatory statement limiting the search to evidence of particular criminal episodes, instead, seeking the broad categories of "items of property . . . with serial numbers" "stolen property" and "burglary tools." These are not sufficient descriptions. As the Supreme Court noted in United States v. Cardwell, 680 F.2d 75 (9th Cir.1982):

> "limiting" the search to only records that are evidence of the violation of a certain statute is generally not enough. . . . such a limitation forced the executing officers "to make a legal distinction between fraudulent records and records that are not fraudulent, which they were not qualified to do." The foregoing statements are equally applicable to the warrant presently before us. If items that are illegal, fraudulent, or evidence of illegality are sought, the warrant must contain some guidelines to aid the determination of what may or may not be seized.
>
> Id. at 78.

The instant case is analogous to United States v. Spilotro, *supra*. In Spilotro, along with the warrant request, the investigating FBI agent submitted a 157 page affidavit, detailing surveillance and telephone taps. The Ninth Circuit noted that the investigation exposed "a general pattern of criminal wrongdoing without providing strong evidence of isolated criminal transactions," and concluded that "there was probable cause to believe that Spilotro supervised a loan shark and bookmaking operation." Spilotro, 800 F.2d at 964. The search warrant in Spilotro authorized the seizure of:

> [C]ertain property, namely notebooks, notes, documents, address books and other records; safe deposit box keys, cash, gemstones and other items of jewelry and other assets; photographs, equipment including electronic scanning devices, and other items and paraphernalia, which are evidence of violations of 18 U.S.C. § 1084, 1952, 1955, 892-894, 371, 1503, 1511, 2314, 2315, 1962-1963 and which are or may be: (1) property that constitutes evidence of the commission of a criminal offense; or (2)

> contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense . . .
> Id. at 961.

Notwithstanding the Court's stance on probable cause, the Court deemed the warrant was general and invalid. Id. at 965. The Court concluded that a more precise description of the items sought was possible. Id. at 964. For example, the Court stated that the authorization to seize "gemstones and other items of jewelry" was far too broad, and provided "no basis for distinguishing these diamonds from others the government could expect to find on the premises." Id. at 965. In the instant matter, the authorization to seize "stolen property" and "burglary tools" was far too broad, and provided no basis for distinguishing any stolen property from any other property, or burglary tools from regular tools on the premises. Regarding seizure of the alleged stolen property, the officers' discretion was unfettered. Furthermore, there was no limitation as to time or description as to what *specific* items were to be seized. Id. As the warrants stand, they authorized wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide no guidelines to distinguish items used lawfully from those the government had probable cause to seize. Spilotro, 800 F.2d at 964. The Stated failed, in the warrant and the affidavit, to narrow the class of items sought, or link any items in any way to a particular theft. The instant warrants basically authorized the State to conduct a fishing expedition. This general search is exactly what the Fourth Amendment was designed to prevent. Officers rummaged through all of the items on the premises and collected everything, including entire categories of items not generally evidence of criminal activity such as perfume, lotion, hair products, vitamins and a kitchen sink; items which did not have serial numbers. Of course, such seizures were inevitable as the warrants contained no

objective, articulated standards to distinguish between property that was legally possessed and that which was not.

2. The government could have describe the items with more particularly at the time the warrant was issued.

The next issue in the analysis is whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. Generic classifications in a warrant are acceptable only when a more precise description is not possible. Cardwell, 680 F.2d at 78 (quoting United States v. Bright (citations omitted)).

Here, the November 3, 2006 warrants seek the seizure of "burglary tools," described as "implements adapted, designed or commonly used for the commission of burglary such as pry tools, nippers, grinders, lock picks, altered keys, etc." The November 7, 2006 warrant is even less descriptive, stating only "[B]urglary tools." The State could have been more precise in its description of burglary tools, as the State allegedly already had one in their possession. According to the Affidavits, prior to receiving the search warrants, the State allegedly had, within its possession, one of the burglary tools that Monroe allegedly used to commit burglaries; it was not an ordinary tool, but one that had been altered considerably. However, neither the warrant, nor the affidavit describe this tool, or any other "burglary tool" in a way that could differentiate them from other tools. The failure to adequately describe the tools sought rendered the warrant general and therefore, invalid.

It should also be noted that the warrant's description of "burglary tools" is at odds with the statute regarding defining burglary tools (NRS 205.080), which requires that such items be possessed under circumstances evidencing intent to use them in the commission of a crime. *See* NRS 205.080. Obviously, the purpose of the statute is to allow the legal possession of tools within a person's home

or storage unit. However, the warrants issued are so general they authorize the seizure of an entire category of items which are not generally the evidence of criminal activity. Spilotro, 800 F.2d at 964.

Additionally, the warrants issued on November 3, 2007 insufficiently describe the categories of property sought, as the warrants never specifically identified a type of property. Moreover, the "stolen property" is never identified by category, nor is it explained how officers would determine that the items were in fact "stolen property." As the State had previously charged Monroe with burglary and possession of stolen property, the State clearly could have been more specific in its description of the items sought.

3. The generality of the warrants cannot be cured by the affidavit.

Its well settled law of the Ninth Circuit that a "search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement ***if*** (1) the affidavit accompanies the warrant, ***and*** (2) the warrant uses suitable words of reference which incorporate the affidavit therein." In re Seizure of Property Belonging to Talk of the Town Bookstore, Inc., 644 F.2d 1317, 1319 (9th Cir. 1981). As the United States Supreme Court stated in Groh v. Ramirez, 540 U.S. 551 (2004), "unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit." Groh, 540 U.S. at 560.

In this matter, the warrants were constitutionally infirm. Assuming that the Affidavits, if incorporated, would have cured the generality of the warrants, the State was required to attach the affidavit to the warrant at the time of execution. Instead, the State kept the application and affidavit in support thereof under seal, so, the constitutionally mandated particularized description was

required to be within the four corners of the warrant. States v. McGrew, 122 F.3d 847, 849 (9th Cir.1997). Failing such a description in the warrant, supporting documents that met the particularity requirement, such as an application and affidavit were required to be attached to the warrant. Id. This long-standing Ninth Circuit rule was not followed, and, thus, the warrant was invalid and cannot be cured by any language in the Affidavit or application.

C. AS THE SEARCH WARRANTS FAILED TO COMPLY WITH THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT, THE EVIDENCED SEIZED MUST BE SUPPRESSED.

The presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant. Groh v. Ramirez, *supra*. The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. Stanford v. Texas, 379 U.S. 476 (1965); United States v. Cardwell, 680 F.2d at 77-78; United States v. Crozier, 674 F.2d 1293, 1299 (9th Cir. 1982); United States v. Klein, 565 F.2d 183, 185 (CA1 1977); United States v. Gardner, 537 F.2d 861, 862 (6th Cir. 1976); United States v. Marti, 421 F.2d 1263, 1268-1269 (2nd Cir. 1970). Total suppression is appropriate when a warrant is wholly lacking in particularity. United States v. Sears, 411 F.3d 1124, 1130 (9th Cir. 2005).

The property evidence seized as a result of the search warrants in the instant matter, must be suppressed as the warrants authorized an unlawful general search in violation of The Fourth Amendment of the United States Constitution. *See* United States v. Leon, 104 S. Ct. 3405 (1984), United States v. Crozier, *supra*, United States v. Spilotro, *supra*. United States v. Washington, 782 F.2d 807, 819 (9th Cir. 1986).

D. WITHOUT THE UNCONSTITUTIONALLY OBTAINED EVIDENCE THERE IS

INSUFFICIENT EVIDENCE TO SUSTAIN DAMIAN MONROE'S CONVICTIONS.

The standard of review [when analyzing the sufficiency of evidence] in a criminal case is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Viewing the evidence in the light most favorable to the prosecution, had the district court properly suppressed the evidence seized under the invalid search warrants, which were obtained as fruit of the poisonous tree, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Without the property illegally seized, there is virtually no evidence that links Monroe to the property. Therefore, the case must be remanded with instructions to dismissed based upon insufficient evidence.

E. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN FELONY CONVICTIONS FOR THE POSSESSION OF STOLEN PROPERTY COUNTS AS THERE WAS NO PROPER TESTIMONY AS TO VALUE OF ITEMS

In prosecution for receiving stolen property, proof of value of the property is necessary to determine grade of offense and penalty to be inflicted. *See* NRS 205.275; *see also* Bain v.Sheriff, Clark County, 88 Nev. 699, 700, 504 P.2d 695, 696 (1972). Pursuant to NRS 205.275, when the value of the goods is more than $250, but less than $2,500, the offense is a "C" felony, subject to a maximum 5 year prison sentence and, or, a $10,000.00 fine. If the goods are more than $2,500.00, the offense is a "B" felony, subject to a maximum ten year prison sentence. NRS 205.275; NRS 193.130. The State bears the burden of proof of proving value. Bryant v. State, 114 Nev. 626, 629, 959 P.2d 964, 966 (1998). The measure of value is generally the fair market value of the stolen

property. Romero v. State, 116 Nev. 344, 347, 996 P.2d 894, 897 (2000) (Emphasis Added). The cost to replace a stolen item may be relevant to establishing the fair market value of that property when the replacement is a used item of similar age and specifications as the stolen item. Romero, at 347, 996 P.2d at 897. **However, when the replacement cost is based upon the current market price for an unused new item, such evidence alone is generally not sufficient to establish the monetary thresholds which distinguish between misdemeanor, gross misdemeanor and felony property crimes.** Id. at 347, 996 P.2d at 896 (Emphasis Added). Likewise, testimony regarding the purchase price of stolen tools is insufficient to prove felony possession of stolen property beyond a reasonable doubt. In Bryant v. State, *supra*, the Nevada Supreme Court concluded that although the State presented testimony regarding the purchase price of the tools, the State failed to present any evidence establishing the fair market value of the stolen tools ***and*** failed to justify the use of an alternative method of valuation. Thus, the State failed to prove the elements of felony possession of stolen property beyond a reasonable doubt. Bryant, 114 Nev. at 630, 959 P.2d at 966.

Prior to the start of the trial, Defendant Ferguson had filed a motion to exclude expert testimony as to value. This motion was joined in by Appellant and during the hearing of the motion the Court ruled that the owners could testify as to value of their items. Unfortunately, the Court failed to place the proper limits as to this type testimony. In the instant matter, the State consistently substituted either the retail price or purchase price for fair market value, without ever once justifying their use of an alternative method of valuation. As noted above, regarding counts three, eleven, fifteen and twenty-two: the State presented only evidence regarding the purchase price. AA 0548: 162: 16-17; AA 0569: 183: 7-19; AA 0438: 52-53: AA 00439; and AA 0593: 207: 3- 6: 208: AA 0594. While regarding counts six and ten and eight, the State's witnesses testified as to the retail

price of the items; not the replacement costs, which in their case would have been ***wholesale*** (AA 0593: 207: 3- 6: 208: AA 0594; and AA 0513: 127 -130: AA 0516). Furthermore, the State carelessly and irresponsibly presented speculative testimony regarding value as both Michael Lantsbereger of Touch of Las Vegas and Marcus Giannella of Milton Homer Refine Home Furnishings testified that they were not sure of the value:

> Michael Lantsbereger testified as to what he *thought* the purchase price of the items has been (See AA 0593: 207: 3- 6: 208: AA 0594).
>
> Marcus Giannella testified he was not sure of the retail prices on some of the items, giving price ranges that varied by hundreds and thousands of dollars and using language like "probably" and "I would guess" (See AA 0513: 127 -130: AA 0516).

The most glaring evidence of a failure to consider admissible testimony as to value is presented in Count Eleven. The only testimony as to value of the value of the hot tub in question was that of Scott Michels of Cal Spas who testified that the value of the hot tub, new, was $2,310 (See AA 0586: 200: 2). In spite of this, the Jury disregarded the Instructions and testimony and convicted Monroe of a "B" felony in Count Eleven. Accordingly, the conviction in Count Eleven as well as all the other counts must be reversed as the State failed to present any evidence establishing the fair market value of the stolen tools ***and*** failed to justify the use of an alternative method of valuation.

F. THE COURT ERRED IN ALLOWING THE STATE TO AMEND COUNT ONE ON THE EVE OF TRIAL AND THIS ERROR RESULTED IN THE ADMISSION OF IMPROPER BAD ACTS EVIDENCE

NRS 173.095(1) provides that no indictment can be amended unless "no additional or

different offense is charged and if substantial right of the defendant are not prejudiced." In the instant case, the district attorney moved to amend the language in Count One on the eve of trial. The amended language as show below contained allegations not raised at the grand jury. In Count One of the Indictment filed on December 15, 2006, the Appellant was originally charged with Conspiracy to Possess Stolen Property and/or to Commit Burglary to wit:

> [D]efendants did then and there meet with other and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit the crime, to-wit: possession of stolen property and/or burglary, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Count 1 through 27, said acts being incorporated by this reference as though fully set forth herein, and/or Defendants did continue after committing said acts in Counts 1 through 27 to conceal and/or hide the proceeds and/or stolen property of the Defendant's acts.

On May 1, 2008, the State sought approval by the district court to amend the indictment to add language. The court granted the State permission to file an amended indictment, over the objections of defense counsel, noting that if the changes were just to add clarifying language, then no issue regarding the amendment existed.

In the Amended Indictment filed on May 1, 2008, Count One was Amended to add the language included in italics and read:

> did then and there meet with each other and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit the crime, to-wit: possession of stolen property and/or burglary, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Count 1 through 27, said acts being incorporated by this reference as though fully set forth herein, and/or *by the Defendants committing burglaries of Anku Crystal Palace and Just for Kids Dentistry on September 24, 2007*, and/or Defendants did continue after committing said acts in Counts 1 through 27 to conceal and/or hide the proceeds and/or stolen property of the Defendant's acts.

Of greatest significance is that none of the other counts have anything to do with Anku Crystal Palace or Just for Kids Dentistry. The other twenty-six counts were all possession of stolen property, without any mention of burglary activity. Additionally, no testimony regarding a conspiracy to commit burglary of Anku Crystal Palace or Just for Kids Dentistry was offered to the Grand Jury. The only testimony offered was that the Appellant and his co-defendant were stopped on September 24, 2006, and a picture from Count Three was found in the van they were in. In fact, the conspiracy to commit burglary of the Anku Crystal Palace and Just for Kids Dentistry came from case C227874 which is currently on appeal with this Court as case No. 52234. The State dismissed the conspiracy charge that case on February 6, 2008. After dismissing the conspiracy charge for burglarizing the Anku Crystal Palace and Just for Kids Dentistry, the State sought to amend the Indictment in the instant case almost two years after taking the case before the grand jury and obtaining an indictment not having that language contained in it. This was nothing more than a blatant attempt to bootstrap bad acts evidence into the instant case without conforming with the proper procedures. The district court erred in falling for the State's assertion that the amended Indictment merely clarified as this allowed the State to now admit all the evidence from case C227874 during the jury trial on the instant case. Such actions were an abuse of discretion and should not have been allowed to occur as it prejudiced the defendant.

The filing of the amended indictment also violated the statute of limitations. NRS 171.090(1) states that a gross misdemeanor offense must be filed within two years after the commission of the offense. "The general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought." *Siragusa v. Brown*, 114 Nev. 1384, 1392, 971 P.2d 801, 806 (1998). The time period where statutes

of limitation run usually begins when the crime at issue is completed. *Woolsey v. State,* 111 Nev. 1440, 1443, 906 P.2d 723, 726 (1995) (citing *Campbell v. Griffin*, 101 Nev. 718, 722, 710 P.2d 70, 72 (1985)); see also *Toussie v. United States*, 397 U.S. 112, 115 (1970) (citing *Pendergast v. United States*, 317 U.S. 412, 418 (1943). The underlying purpose of a statute of limitations is to limit exposure to criminal prosecution to a fixed period of time after the occurrence of the crimes at issue. *Toussie*, 397 U.S. 114. This limitation is to protect people from having to defend themselves against criminal accusations when the basic facts may have become blurred by the passage of time and to lessen the danger of punishment for things which happened in the far-distant past. *Id.* at 114-115. The limitation period also encourages law enforcement officials to promptly investigate criminal activity. *Id.* at 115. For these reasons, statutes of limitations are to be "liberally construed" in favor of the defendant. *Id.* In the instant case, the burglary language added in Count 1 happened over two years before the amended Indictment was filed.

The improper amending of the Indictment necessarily meant that improper character evidence would be admitted. To overcome the presumption that other bad acts are indadmissable, the prosecutor must request a hearing and establish, outside the presence of a jury, that (1) the prior bad act is relevant to the crime charged; (2) the prior act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice. *Id.* (citing *Tinch v. State*, 113 Nev 1170, 1176, 946 P.2d 1061 (1997)); *Tabish v. State*, 119 Nev. 293, 72 P.3d, 584, 593 (2003). Although relevance may exist, and the evidence may be provable under the clear and convincing evidence standard, if the admission of the evidence risks an improper spillover effect, then the evidence cannot be deemed admissible. *Tabish*, 119 Nev. 293, 72 P.3d at 594. This Court has stated that the use of bad acts is "heavily disfavored" as such bad acts are often highly prejudicial

or irrelevant. *Braunstein v. State*, 118 Nev. 68, 73, 40 P.3d 413 (2002).

In the instant case, even though Appellant was not charged with the crime of burglary, the jury heard from numerous witnesses regarding the burglary of Anku Crystal Palace and Just for Kids Dentistry. This evidence prevented Appellant from having a fair trial as he was in essence fighting not only the possession of stolen property charges but the underlying burglary on each of the counts based on the admission of the Anku and Dentistry burglaries. This resulted in the ultimate situation of propensity evidence carrying the day. In fact, it appeared that the evidence was only offered for showing criminal propensity and as such, it should not have been allowed during the trial. One only needs to look at the jury's verdict in count 11, *a count in which the State conceded that there was not sufficient evidence to convict as a "B" felony*, the jury ignored the evidence and convicted Appellant regardless. (AA 1551: 48: 15-20).

G. THE DISTRICT COURT VIOLATED THE APPELLANT'S EIGHTH AMENDMENT RIGHTS WHEN SENTENCING HIM AS A LARGE HABITUAL FELON AND GIVING HIM CONSECUTIVE LIFE SENTENCES.

The Eighth Amendment of the United States Constitution provides that cruel and unusual punishments shall not be inflicted. U.S. Const., Amend VIII. The Eighth Amendment of the United States Constitution forbids an extreme sentence disproportionate to the crime. Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246 (2004). While NRS 207.012 does allow for repeat offender felons to be sentenced as habitual criminals which sentences of 10 years to life, the legislative history behind those sentencing schemes reveals that such a sentence was mainly reserved for those repeat offenders who committed violent crimes, not a thief or property crime repeat offender. (See Minutes of the Joint Meeting of Senate Committee on Judiciary and Assembly Committee on Judiciary, 68th Sess. 161 (1995) (statement of Sheriff Jerry Keller); Minutes of the Subcommittee Meeting of the Senate

Committee on Judiciary, 68th Sess. 246 (1995) (statement of District Attorney Stewart Bell)). In the instant case, Appellant was sentenced to two consecutive sentences of LIFE WITHOUT THE POSSIBILITY OF PAROLE. This was run consecutive to case C227874, the burglaries of Anku Crystal Palace and Just for Kids Dentistry in which appellant was given small habitual treatment. The sentence imposed on the Appellant is excessive and disproportionate to the crimes charged. Accordingly, the habitual criminal adjudications should be vacated and appellant should be re-sentenced.

CONCLUSION

Based on the foregoing facts, Defendant/Appellant Damian Monroe respectfully submits that the evidence in the instant matter was derived from the unlawful search of Monroe's van and, thus must be excluded as fruit of the poisonous tree. Without the illegal detainment, Appellant and his co-Defendant never would have been incarcerated and officers would not have been able to listen in on their conversations. Additionally, the warrants issued were not supported by probable cause and were overly broad and vague.

Appellant also respectfully submits that the State failed to prove the element of valuation in the aforementioned counts beyond a reasonable doubt and that the trial Court improperly allowed highly prejudicial testimony of other crimes. In addition to these errors, the Court imposed a sentence that amounted to cruel and unusual punishment. Accordingly, Appellant respectfully

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requests that this Honorable Court reverse the convictions in said counts.

Respectfully submitted this 15 day of June, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15 day of June, 2009.

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