

1 A valid waiver of Miranda must be knowing, voluntary, and intelligent. *United States v.*
2 *Garibary*, 143 F.3d 534, 536 (9th Cir. 1998), citing *United States v. Binder*, 769 F.2d 595, 599
3 (9th Cir. 1985). A reviewing court must consider the totality of the circumstances to determine
4 the validity of the waiver. *Id.* In the case of determining the validity of a waiver, there is a
5 presumption against waiver, and the State bears the burden of overcoming that presumption by a
6 preponderance of the evidence. *United States v. Crews*, 502 F.3d 1130, 1139-40 (9th Cir. 2007),
7 citing *Garibay*, 143 F.3d at 536. To meet the burden, “the Government must prove that, under
8 the totality of the circumstances, the defendant was aware of the nature of the right being
9 abandoned and the consequences of such abandonment.” *Crews*, 502 F.3d at 1140.

10 “Custody” means “a ‘formal arrest or restraint on freedom of movement’ of the degree
11 associated with a formal arrest.” *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517,
12 3520 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714 (1977). When no
13 formal arrest is made, the inquiry, as with Fourth Amendment claims, “is how a reasonable man
14 in the suspect’s position would have understood his situation.” *Berkemer v. McCarty*, 468 U.S.
15 420, 442, 104 S.Ct. 3138, 3151- 52 (1984); *State v. Taylor*, 114 Nev. 1071, 1082, 968 P.2d 315,
16 323 (1998).

17
18 Furthermore, a later advisement of Miranda rights will not render subsequent statements
19 admissible. In *Oregon v. Elstad*, 470 U.S. 298 (1985), a burglary suspect was initially contact by
20 detectives and, without a Miranda warning, gave a statement that implicated himself in the crime.
21 470 U.S. at 301. The suspect was then taken to the police station, where he was advised of his
22 Miranda rights before he gave more details as to his involvement in the crime. *Id.* at 301-02.
23 Before trial, the suspect moved to suppress his statement on the grounds that his initial, non-
24 Mirandized admission had “let the cat out of the bag,” and therefore tainted his subsequent
25
26
27
28

1 confession. *Id.* at 302. The trial court suppressed the initial statement, but not the subsequent,
2 post-Miranda confession. *Id.*

3 On appeal, the U.S. Supreme Court considered whether a post-Miranda confession is
4 admissible if incriminating statements are elicited prior to the Miranda warning- the proverbial
5 “cat out of the bag” situation. The Court relied on the principle that “an accused’s in-custody
6 statements [are] judged solely by whether they were ‘voluntary’ within the meaning of the Due
7 Process Clause,” or whether “a suspect’s statements had been obtained by ‘techniques and
8 methods offensive to due process.’” *Id.* at 304 (internal citations omitted). Indeed, “When police
9 ask questions of a suspect in custody without administering the required warnings, *Miranda*
10 dictates that the answers received be presumed compelled and that they be excluded from
11 evidence at trial in the State’s case in chief.” *Id.* at 317. With regard to additional statements
12 made post-Miranda, where incriminating, pre-Miranda statements have already been made, the
13 Court held “that a suspect who has once responded to unwarned yet uncoercive questioning is
14 not thereby disabled from waiving his rights and confessing after he has been given the requisite
15 *Miranda* warnings.” *Id.* at 318. This inquiry would focus on “the surrounding circumstances and
16 the entire course of police conduct with respect to the suspect in evaluating the voluntariness of
17 his statements.” *Id.*

18 Such coercive effects upon the second, post-Miranda confession/incrimination was
19 examined in *Missouri v. Seibert*, 542 U.S. 600 (2004). In that case, the Court examined “a police
20 protocol for custodial interrogation that calls for giving no warning of the rights to silence and
21 counsel until interrogation has produced a confession. Although such a statement is generally
22 inadmissible, since taken in violation of [*Miranda*], the interrogating officers follows it with
23 *Miranda* warnings and then leads the suspect to cover the same ground a second time. 542 U.S.

1 at 604. This was apparently becoming a common tactic- something the Court referred to as “a
2 question-first practice of some popularity.” *Id.* at 610-11. The Court further described the intent
3 of such a practice: “The object of question-first is to render *Miranda* warnings ineffective by
4 waiting for a particularly opportune time to give them, after the suspect has already confessed.”
5 *Id.* at 611.

7 A plurality of the Court in *Seibert* held that “By any objective measure applied to
8 circumstances exemplified [in a question-first interrogation], it is likely that if the interrogators
9 employ the technique of withholding warnings until after interrogation succeeds in eliciting a
10 confession, the warnings will be ineffective in prepared the suspect for successive interrogation,
11 close in time and similar in content.” *Id.* at 613. More specifically, “Upon hearing warnings only
12 in the aftermath of interrogation and just after making a confession, a suspect would hardly think
13 he had a genuine right to remain silent, let alone persist in so believing once the police began to
14 lead him over the same ground again. *Id.* Ultimately, the plurality held that “when *Miranda*
15 warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to
16 mislead and ‘depriv[e] a defendant of knowledge essential to his ability to understand the nature
17 of his rights and the consequences of abandoning them.’” *Id.* at 613-14 (internal citation omitted).

20 Under the totality of the circumstances standard, the Defendant cannot be said to have
21 waived his *Miranda* rights.

22 First, Defendant absolutely was in custody at the time of his questioning. Defendant had
23 just been arrested by CAT on his warrant out of California: “On 2-16-18 at approximately 1440
24 hours, the Criminal Apprehension Team located [Defendant] at 2630 Wyandotte Street,
25 apartment 1.” *Ex. A* at 10. The CAD log is quite telling of the timeline. *Ex. C* at 1. At 2:40 p.m.
26 an additional police unit is requested to transport the defendant to the jail to be booked on the
27

1 warrant. *Id.* Six minutes after Gathrite is arrested, "Homicide detectives were advised of
2 Gathrite's location and responded." *Id.*

3 The homicide detectives then questioned the Defendant extensively as to the T-Rex
4 shooting, to the tune of *twenty-three* (23) pages of transcript, or *twenty-six* (26) minutes of
5 questioning, prior to issuing any Miranda warning. *Ex. C* at 23. Prior to this warning, Defendant
6 gave several statements, and provided numerous details, that will now presumably be offered as
7 evidence against him on the instant charges.

8 The detectives made every effort to create the illusion that Defendant was providing his
9 statements voluntarily:

10 So, I mean, I know I ain't talking to some bad dude. That's why I came in
11 there and took the cuffs off of you, got you comfortable, and let you hug
12 your kid. Be cool with you. (*Ex. D* at 3);

12 No, no, no. Dude – dude, hey, look. Hey. I know you're here talking to us.
13 I know you got – you feel some kinda way, man, but I – I – I mean, you
14 know, you can leave at any time, dude. We – we ain't gotta, you know, I
15 know you here, I mean, you know, I ain't trying to – I ain't trying to jam
16 you up. Nothing like that. That's why we let you smoke, took you, I mean,
17 we ain't got you handcuffed, nothing. You – you – you a free man.
18 Everything's good right now. (*Id.* at 22); and

16 I mean, would you – would you feel better if I read you your Miranda
17 rights and stuff, man? I mean, I don't have, I mean, you free to go, man. I
18 mean, you know what I'm saying? I – I'm not here to jam you up. I'm
here to simply get your side of the story. (*Id.* at 23).

19 However, these were unquestionably misrepresentations on the detectives' part- at all
20 times they believed the Defendant to be in custody, under arrest, and facing potentially serious
21 charges. Yet they continued to question him without properly advising him of his rights. Recall
22 the excerpt above, under the "Facts" section, wherein Defendant asked permission to retrieve
23 cigarettes from the apartment, only to be told that he needed to remain with the detectives and
24 that someone else would recover his cigarettes for him. Additionally, consider the language of
25 the telephonic warrant application, wherein the details of Defendant's custody status were
26 provided to the judge:

27 ///

1 [Detective, "JS"]: Judge, do you find there's probable cause exists [sic]
2 for the issuance of a Search Warrant?

3 [Judge, "JW"]: I do. One of the things you asked for was a
4 buccal swab but that guy's not going to be there anymore. Does it matter?

5 JS: No, he is still here. He's outside the residence in a patrol car.

6 JW: Okay.

7 JS: He's being arrest [sic] on the Warrant which is not related to the
8 investigation that we're conducting but he is still here.

9 *Ex. D* at 5-6.

10 Having just been arrested by CAT—a specialty team “tasked with locating [the
11 Defendant]” (*Ex. A* at 10)—the Defendant knew, or at the very least *reasonably believed* that he
12 was under arrest, and that he was not free to go:

13 Q: I haven't – I haven't even discussed with my boss about taking you
14 away or even if that's – I don't know if that's – I don't know what's going
15 on with that. I'm being honest with you, dude. I – I ain't even – that hasn't
16 even crossed my mind at this point.

17 A: 'Cause I have a warrant for Cali, so I know I'm goin'...

18 *Ex. D* at 49-50.

19 Second, even when detectives finally Mirandized the Defendant, he did not give a
20 knowing, voluntary waiver of his right to remain silent.

21 The Detectives dispensed with his Miranda warning in quick, conversational fashion, all
22 while downplaying the need even to do so:

23 Q: I – I'm not here to jam you up. I'm here to simply get your side of the
24 story. And that's why I appreciate – and I'll read 'em for you, you want
25 me to read 'em to you, man. I mean, know, uh, you got the right to remain
26 silent. Anything you say can be used against you in a court of law. You
27 have a right to consult with an attorney before questioning. You have a
28 right to the presence of a attorney during questioning. If you cannot afford
an attorney, one will be appointed before questioning.

Id. at 23.

The detective then tried to get an acknowledgement of these rights from Defendant, but
never received one:

///

///

1 Q: You understand all that? You unders- you understand all that, Dre?
2 Yeah? Yes, no, maybe so? I mean, I ain't trying to jam you – I'm just
3 letting you know I ain't trying to trick you with nothing. You see what I'm
4 sayin'? Those are your rights. You know what I'm sayin'? Those are your
5 rights. Now, I'm not saying that, uh, you're under arrest, not like that. I'm
6 just telling you those are your rights. If you – if you feelin' some kinda
7 way – if that makes you feel better – you understand that? Yes, no? Am I
8 making sense?

9 A: It's just that the situation sucks so bad.

10 Q: Right.

11 A: I...

12 Q: I mean, you didn't start it, right?

13 A: No.

14 Q: Okay.

15 A: It just...

16 Q: Tell me this, Dre. [Questioning continues.]

17 *Id.* at 23-24.

18 Having belatedly realized the need to Mirandize Defendant, the detective did it in rough,
19 slipshod fashion, and all while disclaiming the need even to do so because the detective was
20 telling Defendant that he was not under arrest, and was free to leave (clearly untrue).
21 Furthermore, once the detective did manage to provide a somewhat Miranda warning, he did not
22 obtain from Defendant any acknowledgement that he had hear, acknowledged, or even
23 understood the warning ("Yes, no, maybe so?"). Lastly, before Defendant could make any
24 affirmation, assertion of his right to remain silent, to request an attorney, or make any other
25 statement to indicate even that he had heard the Miranda warning, the detective continued ahead
26 with his questioning.

27 The presumption is against the State, in this case. As with the case law cited above, the
28 State now has the burden to show that any claimed waiver of Miranda rights was knowing and
voluntary. Even if the State is able to overcome this burden, this could arguably only apply to the
statements made *after* the Miranda warning was actually given. Prior to the warning, the
Defendant had already provided a significant narrative of events to detectives- details that no
doubt will be introduced against him in court.

1 Accordingly, based on the above, the Defendant's statements—the entire interview and
2 questioning with police—must be suppressed, and deemed inadmissible.

3 3. *The Defendant Could Not Consent to a Search of the Wyandotte Address*

4 Under *Katz v. United States*, the mere occupation of a public place (there, a phone booth)
5 does not render an individual's expectation of privacy unreasonable. 389 U.S. 347, 88 S.Ct. 507,
6 19 L.Ed.2d 576 (1967). What an individual “seeks to preserve as private, even in an area
7 accessible to the public, may be constitutionally protected.” *Katz*, 389 U.S. at 351–52, 88 S.Ct. at
8 511–12 (citations omitted). However, “[w]hat a person knowingly exposes to the public, even in
9 his own home or office, is not a subject of Fourth Amendment protection.” *Id.* at 351, 88 S.Ct. at
10 511 (citations omitted).

11 Whether an individual was entitled to the protection of the Fourth Amendment depends
12 on whether that individual harbored both a subjective and objective expectation of privacy. *Katz*,
13 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). A subjective expectation of privacy is
14 exhibited by conduct which shields an individual's activities from public scrutiny. *Id.* In *Katz*, the
15 critical fact for the court in determining that the defendant had a subjective expectation of
16 privacy was that he “shut the [phone booth] door behind him.” By so doing, *Katz* excluded the
17 public and was entitled to assume his conversation was not being intercepted. *Id.*

18 An objective expectation of privacy, i.e., one which society recognizes as reasonable,
19 must also exist. *Id.*, 389 U.S. at 361, 88 S.Ct. at 516; see also, *Oliver v. United States*, 466 U.S.
20 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1983). “The test of legitimacy is not whether the
21 individual chooses to conceal assertedly ‘private’ activity. Rather, the correct inquiry is whether
22 the government intrusion infringes upon personal and societal values protected by the Fourth
23 Amendment.” *Oliver*, 466 U.S. at 182–183, 104 S.Ct. at 1743–44. In determining whether a
24 reasonable expectation of privacy exists, the Court has considered such factors as “the intention
25 of the Framers of the Fourth Amendment (citation omitted), the uses to which the individual has
26 put a location (citation omitted), and our societal understanding that certain areas deserve the

1 most scrupulous protection from government invasion (citation omitted).” *Oliver*, 466 U.S. at
2 178, 104 S.Ct. at 1741.

3 While consent to search is a waiver of Fourth Amendment protections, such consent must
4 come from the person with actual authority over the area to be searched. *Casteel v. State*, 131
5 P.3d 1, 3 (Nev. 2006); see also *Snyder v. State*, 103 Nev. 275, 280, 738 P.2d 1303, 1037 (“Valid
6 consent to search can be obtained from a third party who possesses common authority over or
7 other sufficient relationship to the premises.”). “A warrantless search is valid if the police
8 acquire consent from a cohabitant who possesses common authority over the property to be
9 searched.” *Casteel*, 131 P.3d at 3. In such cases, law enforcement must reasonably believe that
10 the person granting the consent to search so has the authority to grant consent. *U.S. v. Hamilton*,
11 792 F.2d 837, 842 (C.A.9 (Cal.), 1986) (citing *United States v. Sledge*, 650 F.2d 1075, 1081 (9th
12 Cir. 1981).

13 Furthermore, the violation of another’s expectation of privacy in a constitutionally
14 protected space does not divorce the Defendant from his ability to object to the warrantless
15 search of the premises (prior to the later-issued warrant).

16 Pursuant to the Fourth Amendment of the U.S. Constitution, and further found under
17 Article 1, § 18 of the Nevada Constitution, an individual must have standing to invoke the Fourth
18 Amendment protection against unreasonable searches and seizures. *Dean v. Fogliani*, 81 Nev.
19 541, 544, 407 P.2d 580, 581 (1965). The purpose of this constitutional mandate is to balance the
20 individual’s right of privacy and to curtail the unlawful activity of law enforcement officials. *Id.*
21 at 544, 407 P.2d at 582. Accordingly, the Nevada Supreme Court has held that in order for an
22 individual to claim an unlawful invasion of privacy, one of the following factors must apply:

- 23 1. The individual must be one of the persons against whom the search
24 was directed;
- 25 2. The individual must be one who is charged with illegal possession of
26 property to be suppressed; or
- 27 3. The individual must be anyone who was legitimately on the premises
28 where a search occurs and the fruits of the search are proposed to be
used against him.
Id. at 544-45, 407 P.2d at 582.

1
2 An individual is legitimately on the premises where a search occurred, for purposes of
3 subsection 3 above, if the individual is an overnight guest. *Johnson v. State*, 118 Nev. 787, 794,
4 59 P.3d 450, 455 (2002) (overruled on other grounds by *Nunnery v. State*, 127 Nev. 749, 263
5 P.3d 235 (2011)).

6 Here, the detectives were informed multiple times that Defendant did not own the
7 property, or otherwise was not the primary authority/resident of the property. The Defendant told
8 the detectives as much during his questioning:

9 Q1: So the first time he goes by, he's by himself?

10 A: No. The first time he go by, he's with his friends.

11 Q1: Okay.

12 A: And that's when he – “Oh, blood, y'all gotta clear this out. On dead
13 homies. Too much.” So we, uh, all right. You know, we – basically, you
14 know, we drink and smoke. We do this every day.

15 Q1: Mm-hm.

16 A: We not really – all right. You live here. You have a – we done been up
17 and down the street for – for months. You just barely been over here
18 probably two or three months, but you used to stay across the street. Now
19 your girl and your mom got this spot right across the street. You – you just,
20 like, he came through, like, politicking, but I, like, we was in Cali. Right.
21 We not in Cali, bro. You, uh, it's...⁵

22 *Ex. D* at 21.

23 Accordingly, the detectives were on notice that Defendant was known to be staying in the
24 area of the shooting—Van Patten—and not the Wyandotte address (a quick reference indicates
25 the two areas to be approximately two and a half miles from each other). This is verified by the
26 Report: “[Defendant] lives in the immediate area [of Van Patten] and was the subject of several
27 active criminal investigations.” *Ex. A* at 5.

28 ⁵ Defendant was speaking in the narrative, and was recounting what he was told by T-Rex. As
further clarification, Defendant makes reference to a statement regarding “your girl and your
mom got this spot”- but T-Rex’s mother lives in California, not Las Vegas. *Ex. A* at 8 (“Apollo
provided investigators with the name and telephone number of Tyler’s mother in California”).
Therefore, Defendant’s recitation can only be what was said *to* him, not *by* him.

1 Moreover, Defendant expressed numerous, vocalized, and articulated concerns that the
2 detectives would cause damage to the Wyandotte apartment or otherwise inconvenience his
3 girlfriend and children:

4 A: The apartment not gonna be tore up, is it? 'Cause my girl's still here.
5 (Ex. D at 40);

6 Q1: You got family out here or no?

7 A: She's my only family [Tia].

8 Q1: Okay. And what, you got two kids with her?

9 A: Yeah.

10 Q1: So what – what's the deal with you two? Are you guys kind of,
11 like, you guys still see each other, or is it just here and there? It just kinda
12 depends?

13 A: We see each other. Just – but me a – and this Cali stuff and me being
14 on the run.

15 Q1: Yeah. (*Id.* at 42).

16 Lastly as to this point, one of the detectives questioning Defendant even acknowledged
17 that Defendant was not living at Wyandotte:

18 Q1: So this address on Wyandotte, that's your – that's Tia's place,
19 your girlfriend, baby mama. She's only been here a couple days? And do
20 you – you weren't living here. You – you just stayed here last night and
21 that was it.

22 A: Yeah. (*Ex. D* at 45);

23 Q1: Tia?

24 A: Only person.

25 Q1: Was she over *in that area* when everything happened, or no?
26 So this is where Tia normally stays?

27 A: She just moved here a couple days ago.

28 Q1: Oh, okay. (*Id.* at 40-41, emphasis added).

 Despite knowing that Defendant lived on Van Patten; that Defendant had only stayed at
the Wyandotte address the night before; that Defendant was concerned about police searching his
girlfriend's apartment; and that Defendant and the girlfriend, Tia, would only occasionally see
each other, the detectives perpetrated a myth about Defendant's "dominion and control" over the
premises in order to gain flawed consent to search the premises.

 The property at Wyandotte was under Fourth Amendment protections, with the power of
waiver and/or consent belonging *only* to the girlfriend, Tia. Therefore, any consent given by

1 Defendant was insufficient, and the resulting entry and search of the apartment without a search
2 warrant was improper. As such, any evidence, including the firearm in question, must be
3 suppressed and deemed inadmissible at preliminary hearing.

4 *4. All Fruits of the Defendant's Arrest Must Be Suppressed.*

5 The exclusionary rule, adopted by Nevada, requires courts to exclude evidence that was
6 obtained through a violation of constitutional protections. *Torres v. State*, 341 P.3d 652, 657, 131
7 Nev. Adv. Op. 2 (Nev. 2015). The policy of this rule is to discourage law enforcement from
8 disregarding constitutional protections in the pursuit of evidence. *Id.* This rule extends to
9 evidence that may even be the indirect fruit of an illegal search or arrest. *Id.*, citing *New York v.*
10 *Harris*, 495 U.S. 14, 19 (1990). Such indirect evidence may be saved from exclusion if the
11 violation of Amend. IV protection was sufficiently attenuated to “dissipate the taint.” *Torres*, 341
12 P.3d at 658, citing *Wong Sun v. United States*, 371 U.S. 471, 491 (1963). The taint of an
13 unlawful search and seizure can be so dissipated if the evidence was acquired “by means
14 sufficiently distinguishable to be purged of the primary taint.” *Torres*, 341 P.3d at 658, quoting
15 *Wong*, 371 U.S. at 488, 491.

16 Here, the improper questioning of Defendant is the primary wrong by which all other
17 evidence in this case became tainted. No subsequent evidentiary pursuits can be said to purge the
18 taint, either; the evidence recovered all stems from Defendant’s statements made without proper
19 advisement of his right to remain silent, or the other protections afforded to a defendant under
20 the *Miranda* line of cases. Ultimately, Defendant’s statements, and later his revealing of not only
21 the existence of the firearm but its location, would not have occurred but for the homicide
22 detectives’ improper questioning of Defendant without appropriate, compulsory warnings in
23 opposition to Defendant’s constitutional rights.

24 The interview transcript, cited above and attached to this Motion, demonstrates that a
25 *significant* amount of questioning, wherein a *significant* amount of statements were given, all
26 occurred prior to proper Miranda warnings. Further, Metro has attempted to gloss over this
27 fact—in essence, doctoring the record—by claiming that the questioning was a “post-Miranda”

1 interview. *Ex. A* at 9. This could not be further from the truth, as the questioning took place for
2 almost a half-hour without any Miranda warning, at which point the detective acknowledged that
3 he had not yet given a Miranda warning (“[A]nd I’ll read ‘em for you, you want me to read ‘em
4 to you, man.”⁶). *Ex. D* at 23.

5 The taint of this improper questioning permeates the investigation, as Defendant’s
6 incriminating statements occurred prior to the belated Miranda warning. It was only after the
7 detectives had determined Defendant’s involvement in the shooting that they began to question
8 him about the details of the weapon, and therefore ultimately gleaned the location of the weapon
9 from Defendant’s statements. As such, even the late Miranda warning cannot redeem or
10 otherwise render admissible the statements taken prior to the observation of Defendant’s rights,
11 as there is no telling what direction the questioning would have taken had Defendant been
12 advised of his rights prior to almost twenty-seven (27) minutes of ongoing questioning. Indeed,
13 the Defendant may very well have invoked one or more of his rights advised of under a proper,
14 timely Miranda warning, and the questioning may very well have ceased from or shortly after the
15 outset.

16 As such, the taint of the detectives’ violations is not sufficiently attenuated, and all
17 evidence subsequent to and/or resulting from the Defendant’s questioning *must*, according to
18 Nevada case authority, be suppressed.

19 ///

20 ///

21 ///

22 ///

23 ///

24
25
26
27 ⁶ The context of the statement is that the detective is clearly reading Defendant his Miranda rights
28 for the first time.

1 CONCLUSION

2 Based on the foregoing, Defendant moves this court to suppress any statements made to
3 detectives, as Defendant was not properly advised of his Miranda rights, and even after such
4 attempt to Mirandize Defendant his waiver of rights was not knowing and voluntary.
5 Furthermore, evidence recovered from the Wyandotte address, to include the firearm, must be
6 suppressed as Defendant did not have authority over the property sufficient to consent to a search
7 of the premises.

8 DATED this 10th day of May, 2018.

9 By: 

10 Adrian M. Loba, Esq. (#10919)
11 Attorney for Defendant
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE ACQUIRED IN VIOLATION OF
BOTH THE FOURTH AND FIFTH AMENDMENTS in the above-entitled Court, on the
25 day of MAY 2018, at the hour of 7:30 A.m., or as soon thereafter as counsel
may be heard.

DATED this 10th day of May, 2018.

By: _____

LOBO LAW PLLC

ADRIAN M. LOBO, ESQ.

RECEIPT OF COPY

I hereby certify that on May 2018 I personally received a copy of the foregoing
DEFENDANT'S MOTION TO SUPPRESS EVIDENCE ACQUIRED IN VIOLATION OF
BOTH THE FOURTH AND FIFTH AMENDMENTS to: DISTRICT ATTORNEY's
OFFICE

By: _____
DISTRICT ATTORNEY's OFFICE

**EXHIBIT K / K1 – STATE’S
OPPOSITION TO DEFENDANT’S
MOTION TO SUPPRESS EVIDENCE
WITH EXHIBIT 5**

(Exhibit 1-4 & 6 have been omitted as they are part of the record in the instant moving papers before the court).

ORIGINAL

OPPS

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
SARAH E. OVERLY
Deputy District Attorney
Nevada Bar #012842
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED

2018 MAY 23 P 3:54

JUSTICE COURT
LAS VEGAS NEVADA
BY GMH
DEPUTY

JUSTICE COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DEANDRE GATHRITE
#2592432

Defendant.

CASE NO: 18F03565X

DEPT NO: 11

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

DATE OF HEARING: MAY 25, 2018
TIME OF HEARING: 7:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through SARAH E. OVERLY, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Suppress Evidence.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

//

//

//

//

18F03565X
OPP
Opposition
9468617



PA000338

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS**

3 On February 11, 2018, Las Vegas Metropolitan Police Department “LVMPD” dispatch
4 received several 911 calls regarding a shooting at 2612 Van Patten Street in Las Vegas. See
5 “Officer’s Report” attached as Exhibit 1. When officers arrived, they located Kenyon “T-Rex”
6 Tyler (hereinafter “Tyler”) lying in the sidewalk with multiple gunshot wounds. Id. at 5. Tyler
7 was transported to Sunrise Hospital where he succumbed to his gunshot wounds. Id. at 7.
8 Tyler’s autopsy report revealed his cause of death was multiple gunshot wounds and the
9 manner of death as homicide. Id. at 8.

10 Through the investigative means of patrol and Gang Detectives, a suspect was
11 identified as Deandre “Dre” Gathrite (“Defendant”). Id. at 5. Since Defendant was currently
12 on parole for a felony offense in California, LVMPD Criminal Apprehension Team (“CAT”)
13 was tasked with finding Defendant and located him at his residence of 2630 Wyandotte Street,
14 Apt #1. Id. at 10. An LVMPD Event Log was generated at approximately 1:34 p.m. See
15 “LVMPD CAD Log” attached as Exhibit 2. However, the Defendant was not arrested on the
16 California warrant until approximately 2:40 p.m. See “Temporary Custody Record” attached
17 as Exhibit 3. Homicide detectives subsequently arrived and spoke with the Defendant about
18 the February 11th shooting. See “Gathrite Transcribed Statement” attached as Exhibit 4.

19 During questioning, Detective Grimmiett informed Defendant he did not have to speak
20 to him and was free to leave. Id. at 42-43. Defendant, well aware of how his parole violations
21 worked, corrected Detective Grimmiett and indicated he would be extradited back to
22 California. Id. at 49-50. In fact, Defendant clarified he had been arrested on his California
23 warrant before, “been – been back and forth” and “on the run” since 2014. Id. at 15; 43.
24 Defendant explained that as a result of his arrest he will likely be required to serve “90 days
25 and then just come back and report,” establishing his familiarity with the process of being
26 arrested, held, and extradited on his warrant. Id.

27 Less than a third of the way into the interview, Detective Grimmiett reiterated that
28 Defendant was not required to speak with them and stated they “appreciate” Defendant talking

1 to them. Id. at 22. In an effort to cultivate a rapport with Defendant, Detective Grimmert
2 advised Defendant of his Miranda rights:

3
4 ...there's a reason for everything, right? And that's what you explained to us.
5 There - there's a reason for everything, man. I mean, would you - would you
6 feel better if I read you your Miranda rights and stuff, man? I mean, I don't have,
7 I mean, you free to go, man. I mean, you know what I'm saying? I - I'm not here
8 to jam you up. I'm here to simply get your side of the story. And that's why I
9 appreciate - and I'll read 'em for you, you want me to read 'em to you, man. I
10 mean, know, uh, you got the right to remain silent. Anything you say can be
11 used against you in a court of law. You have a right to consult with an attorney
12 before questioning. You have a right to the presence of a attorney during
13 questioning. If you cannot afford an attorney, one will be appointed before
14 questioning. You understand all that? You unders- you understand all that, Dre?
15 Yeah? Yes, no, maybe so? I mean, I ain't trying to jam you - I'm just letting you
16 know I ain't trying to trick you with nothing. You see what I'm sayin'? Those
17 are your rights. You know what I'm sayin'? Those are your rights. Now, I'm not
18 saying that, uh, you're under arrest, not like that. I'm just telling you those are
19 your rights. If you - if you feelin' some kinda way - if that makes you feel better
20 - you understand that? Yes, no? Am I making sense?

21 Id. at 23.

22 Without hesitation, Defendant continued to speak with Detectives stating, "It's
23 just that the situation sucks so bad." Id. After Detectives advised Defendant of his
24 rights, Defendant continued to detail what occurred on February 11, specifically, that
25 he was shot towards the victim in self-defense as he was running away. Id. at 24-25.
26 Later in the interview, Detectives inquired into the whereabouts of the firearm. Id. at
27 25. Defendant told Detectives the gun was located in the apartment "in the hallway
28 under the AC thing" and indicated it was loaded. Id. at 39.

When asked, Defendant clarified that his girlfriend, Tia Kelly, resides at the
apartment with their two (2) children but had only been there the past two days. Id. at
45. Detectives asked Defendant for consent to retrieve the firearm from the apartment:

...Uh, let me ask you this. Do we have permission to just go in there and get the
gun out the vent and leave, I mean, without having to search the place? Can we
just go in there and get that? I mean, you - you the adult inside the apartment, so
that means you in c- you in care and control of the apartment. So I'm asking you
for permission without having to do a search warrant, and go in there and just

1 grab the gun out of the vent. That's all I'm - that way we ain't gotta search
2 through nothing. We ain't gotta go through her stuff. We ain't gotta go through
3 all that nonsense. We can just go in there - go into the air conditioner vent. I'll
4 even have you show me where it's at. You can go with me so you know we ain't
5 going through all your stuff, or going through all her stuff. We can go into the
6 vent. You can say, "Hey, it's that vent right there." We can open it up, we can
7 get it, and we can bounce.

8 Id. at 47.

9 Defendant initially avoided the question and discusses his desire to see his
10 girlfriend and child before he is taken away. Id. at 49. When Detectives ask again, this
11 time more specifically, Defendant indicated they had his consent to retrieve the firearm
12 from the apartment. Id. at 51. Detectives subsequently acquired a telephonic search
13 warrant to search for other evidence of the shooting.

14 **LEGAL ARGUMENT**

15 Miranda rights are required to be given to a defendant before a custodial
16 interrogation. Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817-818 (1998),
17 *overruled on other grounds by* Sharma v. State, 118 Nev. Adv. Op. No. 69 (October 31,
18 2002). Custody has been defined as a "formal arrest or restraint on freedom of movement"
19 of the degree associated with a formal arrest." Alward v. State, 112 Nev. 141, 154, 912 P.2d
20 243, 252 (1996) (*citing* California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520
21 (1983)). When determining whether a person who has not been arrested is "in custody," the
22 test "is how a reasonable man in the suspect's position would have understood his
23 situation." Alward at 154 (*citing* Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138,
24 3151-3152 (1984)).

25 Once voluntariness of a confession has been raised as an issue, there must be a hearing
26 pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), before an accused's
27 statements are brought before a jury. At this hearing, the Court must hear evidence concerning
28 what the defendant told the police and the circumstances under which the defendant made the
statements. The Court must then decide (1) whether his statement was voluntary using the
totality of the circumstances, and (2) whether Miranda was violated. In this regard, Nevada

1 adopted the “Massachusetts rule.” See Grimaldi v. State, 90 Nev. 89, 518 P.2d 615 (1974). It
2 is the burden of the defendant to ask for such a hearing. See Wilkins v. State, 96 Nev. 367,
3 372, 609 P.2d 309, 312 (1980).

4 The State’s burden of proof at a Jackson v. Denno hearing is a preponderance of the
5 evidence, both with respect to voluntariness (Brimmage v. State, 93 Nev. 434, 567 P.2d 54
6 (1977), Falcon v. State, 110 Nev. 530, 874 P.2d 772 (1994)), and with respect to Miranda.
7 Falcon, 110 Nev. 530, 874 P.2d 772. In making this determination, the Court is to look at the
8 totality of the circumstances. See Alward v. State, 112 Nev. 141, 912 P.2d 243 (1996);
9 Passama v. State, 103 Nev. 212, 735 P.2d 321 (1987).

10 If the Court finds that the statement was involuntary, it ceases to exist legally and cannot
11 be used for any purpose. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978). If it was
12 voluntary but Miranda was violated, it can only be used for impeachment if the defendant
13 testifies and contradicts the statement. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971);
14 Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215 (1975); McGee v. State, 105 Nev. 718, 782 P.2d
15 1329 (1989).

16 Coercive police conduct is a “necessary predicate” to a finding that a Defendant’s
17 statement is involuntary such that its admission violates the Defendant’s Due Process rights.
18 Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 522 (1986). “A confession is
19 admissible only if it is made freely and voluntarily, without compulsion or inducement.”
20 Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732, 734-35 (1980). In order to be considered
21 voluntary, a confession must be the product of free will and rational intellect. Blackburn v.
22 Alabama, 361 U.S. 199, 208, 80 S. Ct. 274, 280 (1960). A confession is involuntary if it is
23 the product of physical intimidation or psychological torture. Townsend v. Sain, 372 U.S.
24 293, 307, 83 S. Ct. 745, 754 (1963). To determine the voluntariness of a confession, the court
25 must consider the effect of the totality of the circumstances on the will of the defendant.
26 Passama, 103 Nev. at 213, 735 P.2d at 323. The question is whether the defendant’s will was
27 overborne when he confessed. Id.

1 Furthermore, it is well settled law that the interrogating police officers are entitled to
2 an unequivocal invocation of the right to either an attorney or the right to remain silent. *See*
3 Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350 (1994). Even, “I think I better talk to a
4 lawyer first,” has been found not to be unequivocal. *See* State v. Eastlack, 883 P.2d 999
5 (Ariz.1994).

6 **I. DEFENDANT WAS NOT IN CUSTODY FOR PURPOSES OF**
7 **TRIGGERING MIRANDA WARNINGS**

8 The bare fact of custody may not in every instance require a warning even when the
9 suspect is aware that he is speaking to an official, but we do not have occasion to explore that
10 issue here.” Illinois v. Perkins, 496 U.S. 292 (1990). Instead, we simply “reject[ed] the
11 argument that *Miranda* warnings are required whenever a suspect is in custody in a technical
12 sense and converses with someone who happens to be a government agent.” *Id.* at 297.

13 Whether a suspect is “in custody” is an objective inquiry. J. D. B. v. North Carolina,
14 564 U.S. 261 (2011). Two discrete inquiries are essential to the determination: first, what were
15 the circumstances surrounding the interrogation; and second, given those circumstances,
16 would a reasonable person have felt he or she was at liberty to terminate the interrogation and
17 leave. *Id.* Once the scene is set and the players’ lines and actions are reconstructed, the court
18 must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or
19 restraint on freedom of movement of the degree associated with formal arrest. *Id.*

20 “Custody” is a term of art that specifies circumstances that are thought generally to
21 present a serious danger of coercion. *Id.* at 508-509. In determining whether a person is
22 in custody in this sense, the initial step is to ascertain whether, in light of “the objective
23 circumstances of the interrogation,” Stansbury v. California, 511 U.S. 318, 322-323 (1994) a
24 “reasonable person [would] have felt he or she was not at liberty to terminate the interrogation
25 and leave.” Thompson v. Keohane, 516 U.S. 99, 112 (1995). And in order to determine how
26 a suspect would have “gauge[d]” his “freedom of movement,” courts must examine “all of the
27 circumstances surrounding the interrogation.” Howes v. Fields, 565 U.S. 499, 509 (2012).

1 Miranda adopted a “set of prophylactic measures” designed to ward off the “inherently
2 compelling pressures’ of custodial interrogation,” Shatzer, 559 U.S. at 103, 130 S. Ct. at 1217,
3 175 L. Ed. 2d at 1050 (quoting Miranda, 384 U.S., at 467), but Miranda did not hold that such
4 pressures are always present when a prisoner is taken aside and questioned about events
5 outside the prison walls. Indeed, Miranda did not even establish that police questioning of a
6 suspect at the station house is always custodial. Mathiason, 429 U.S., at 495 (1977) (declining
7 to find that Miranda warnings are required “simply because the questioning takes place in the
8 station house, or because the questioned person is one whom the police suspect”). Howes v.
9 Fields, 565 U.S. 499, 507-508 (2012).

10 A prisoner is not always considered “in custody” for purposes of Miranda whenever a
11 prisoner is isolated from the general prison population and questioned about conduct outside
12 the prison. Id. at 508. The three elements of that rule — (1) imprisonment, (2) questioning in
13 private, and (3) questioning about events in the outside world--are not necessarily enough to
14 create a custodial situation for Miranda purposes. Id. A prisoner, unlike a person who has not
15 been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing
16 for prompt release. Id. When a person is arrested and taken to a station house for interrogation,
17 the person who is questioned may be pressured to speak by the hope that, after doing so, he
18 will be allowed to leave and go home. Id. On the other hand, when a prisoner is questioned,
19 he knows that when the questioning ceases, he will remain under confinement. Id. at 511
20 (citing Shatzer, 559 U.S., at 124, n. 8). Third, a prisoner, unlike a person who has not been
21 convicted and sentenced, knows that the law enforcement officers who question him probably
22 lack the authority to affect the duration of his sentence. Id. And “where the possibility of parole
23 exists,” the interrogating officers probably also lack the power to bring about an early
24 release. *Ibid.* “When the suspect has no reason to think that the listeners have official power
25 over him, it should not be assumed that his words are motivated by the reaction he expects
26 from his listeners.” Id. (citing Perkins, 496 U.S., at 297). Under such circumstances, there is
27 little “basis for the assumption that a suspect . . . will feel compelled to speak by the fear of
28

1 reprisal for remaining silent or in the hope of [a] more lenient treatment should he confess.” Id.
2 at 512 (*citing Shatzer*, 496 U.S., at 296-297).

3 We fail to see why questioning about criminal activity outside the prison should be
4 regarded as having a significantly greater potential for coercion than questioning under
5 otherwise identical circumstances about criminal activity within the prison walls. Id. at 513.
6 In both instances, there is the potential for additional criminal liability and punishment. Id. If
7 anything, the distinction would seem to cut the other way, as an inmate who confesses to
8 misconduct that occurred within the prison may also incur administrative penalties, but even
9 this is not enough to tip the scale in the direction of custody. Id. “The threat to a citizen's Fifth
10 Amendment rights that *Miranda* was designed to neutralize” is neither mitigated nor
11 magnified by the location of the conduct about which questions are asked. Id. at 514.

12 In Fields, the Defendant was a prisoner escorted from his prison cell into a conference
13 room by a corrections officer. Id. at 502. Once inside, Defendant was questioned between five
14 to seven hours by two sheriff’s deputies regarding allegations of sexual conduct with a 12-
15 year-old boy that pre-existed his prison sentence. Id. at 502-503. Sheriffs told Defendant he
16 was free to leave and return to his cell and the conference room door sometimes remained
17 open and other times shut. Id. at 503. During the interview, Defendant became upset and stood
18 up shouting expletives. Id. Sheriffs told Defendant to sit down and that he could go back to
19 his cell if he didn’t want to cooperate. Id. Defendant eventually confessed to the sexual abuse.
20 Id. Defendant even repeatedly indicated he did not wish to speak to detectives anymore but
21 did not request to leave. Id. When the interview was over, Defendant was delayed in his
22 transport back to his cell and didn’t return until well after the hours he typically retired. Id. at
23 503-504. At no point during Defendant’s entire interaction with Sheriffs was the Defendant
24 Mirandized. Id. at 504. Defendant was later charged with criminal sexual conduct and sought
25 to suppress his confession based on a *Miranda* violation. Id.

26 The Supreme Court determined that the Defendant was not in custody for purposes of
27 *Miranda*. Id. at 514. The court weighed the totality of the circumstances in making this
28 determination:

1
2 ...Respondent did not invite the interview or consent to it in advance, and he
3 was not advised that he was free to decline to speak with the deputies. The
4 following facts also lend some support to respondent's argument
5 that Miranda's custody requirement was met: The interview lasted for between
6 five and seven hours in the evening and continued well past the hour when
7 respondent generally went to bed; the deputies who questioned respondent
8 were armed; and one of the deputies, according to respondent, "[u]sed a very
9 sharp tone," and, on one occasion, profanity.

10 These circumstances, however, were offset by others. Most important,
11 respondent was told at the outset of the interrogation, and was reminded again
12 thereafter, that he could leave and go back to his cell whenever he wanted. ("I
13 was told I could get up and leave whenever I wanted"). Moreover, respondent
14 was not physically restrained or threatened and was interviewed in a well-lit,
15 average-sized conference room, where he was "not uncomfortable." He was
16 offered food and water, and the door to the conference room was sometimes
17 left open. "All of these objective facts are consistent with an interrogation
18 environment in which a reasonable person would have felt free to terminate the
19 interview and leave." Yarborough, 541 U.S., at 664-665.

20 Because he was in prison, respondent was not free to leave the conference
21 room by himself and to make his own way through the facility to his cell.
22 Instead, he was escorted to the conference room and, when he ultimately
23 decided to end the interview, he had to wait about 20 minutes for a corrections
24 officer to arrive and escort him to his cell. But he would have been subject to
25 this same restraint even if he had been taken to the conference room for some
26 reason other than police questioning; under no circumstances could he have
27 reasonably expected to be able to roam free. And while respondent testified
28 that he "was told . . . if I did not want to cooperate, I needed to go back to my
cell," these words did not coerce cooperation by threatening harsher
conditions. ("I was told, if I didn't want to cooperate, I could leave").
Returning to his cell would merely have returned him to his usual
environment.

23 Id. at 515-516.

24 In Minnesota v. Murphy, the Defendant sought to suppress statements made during a
25 meeting with his probation officer on an unrelated charge. Minnesota v. Murphy, 465 U.S.
26 420 (1984). The court held that "custody" for Miranda purposes has been narrowly
27 circumscribed. Id. at 430. The court reasoned that the extraordinary safeguard of Miranda
28 warnings do not apply outside the context of the inherently coercive custodial interrogations

1 for which it was designed. Id. The court found that Defendant's situation was not unlike
2 suspects in noncustodial settings:

3 ...the nature of probation is such that probationers should expect to be
4 questioned on a wide range of topics relating to their past criminality.
5 Moreover, the probation officer's letter, which suggested a need to discuss
6 treatment from which Murphy had already been excused, would have led a
7 reasonable probationer to conclude that new information had come to her
8 attention. In any event, Murphy's situation was in this regard indistinguishable
9 from that facing suspects who are questioned in noncustodial settings and
10 grand jury witnesses who are unaware of the scope of an investigation or that
11 they are considered potential defendants.

12 Id. at 432.

13 In Junior v. State, the Defendant tested positive for drugs while on parole. Junior v.
14 State, 107 Nev. 72 (1991). After Defendant absconded, a warrant was issued for his arrest.
15 Id. at 74. Defendant was subsequently arrested and charged with three counts of being under
16 the influence of a controlled substance. Id. The Defendant asserted that the parole officer
17 should be required to have Mirandized him prior to his submission of the drug test. Id. The
18 Supreme Court held there was no relevant authority for the proposition that evidence of an
19 independent felony offense obtained by a parole officer in his official capacity could not be
20 used in a subsequent prosecution for the offense. Id. at 74-75.

21 In Holmes v. State, the Defendant argued that his non Mirandized statements made
22 while being interviewed by Nevada Detectives in his California Parole Officer's office
23 should be suppressed. Holmes v. State, 306 P.3d 415 (2013). The Court held that Miranda
24 warnings were not required since the interrogation was not custodial. Id. at 423.

25 In Mathiason, the court held that a parolee who voluntarily came to a police station at
26 the request of a police officer, who was immediately informed that he was not under arrest,
27 who was thereafter questioned about a burglary, who confessed to the burglary after the
28 questioning officer falsely stated that the parolee's fingerprints were found at the scene of the
burglary, and who left the police station without hindrance at the close of his one-half hour
interview, was not in custody or otherwise deprived of his freedom of action in any
significant way for purposes of the requirement that an individual must be in custody or
deprived of his freedom before police must give Miranda warnings. Oregon v. Mathiason,

1 429 U.S. 492 (1977). The court held that the questioning officer's false statement about the
2 parolee's fingerprints has nothing to do with whether he was in custody for purposes of
3 Miranda warnings. Id. Additionally, despite the police officer advising the parolee of his
4 Miranda rights after he had confessed, the court held that the parolee's confession did not
5 have to be excluded in his prosecution for burglary on the ground that it was not preceded by
6 Miranda warnings. Id.

7 Here, Defendant's motion to suppress mistakenly focuses on the subsequent
8 advisement of Miranda rights after questioning had commenced and overlooks the threshold
9 issue of Defendant's custody status for purposes of triggering Miranda in the first place.
10 Defendant quickly states that he was "absolutely" in custody based on his arrest for the
11 California warrant. See "Defendant's Motion to Suppress" at 10. However, the
12 circumstances surrounding the Defendant's arrest clearly establish he was not "in custody"
13 for purposes of triggering Miranda warnings in the instant case.

14 On February 14, 2018, a Sheriff's Warrant for Defendant's arrest was issued out of
15 San Diego County, California for Defendant's 2010 felony conviction for Manufacturing
16 and/or Possessing a Dangerous Weapon. Defendant was on parole for the offense and the
17 warrant authorized Defendant be extradited back to California. On February 16, 2018,
18 Defendant was located by the LVMPD Criminal Apprehension Team (CAT) and arrested.
19 When Defendant was arrested on the warrant, he had no Nevada charges pending. In fact,
20 after Defendant was questioned and the firearm was recovered, the Defendant was not
21 arrested on either the Murder or Possession of Firearm by Prohibited Person charge. Instead,
22 Defendant was transported to the Clark County Detention Center exclusively on his
23 California warrant. Five days later, California lifted the hold and Defendant was released
24 from the detention center. LVMPD Detectives did not obtain the Defendant's arrest warrant
25 for the murder or firearm charge until February 26, 2018 and after interviewing two
26 additional witnesses.¹ See Exhibit 1 at 11-12. The LVMPD CAT team located Defendant on
27 that day and arrested Defendant on the murder and possession of firearm charges.
28

¹ Raymond Moore was interviewed on February 21 and Towan Abrams was interviewed on February 23.

1 Similar to Fields, where police sheriffs questioned the Defendant while he was
2 serving a prison sentence for a separate offense, Detectives here spoke to Defendant while he
3 was in custody on his California parole violation. Like in Fields, the Defendant's status of
4 being in custody on his California felony offense for which he was on parole had no bearing
5 on the independent Nevada investigation into Tyler's murder. Also similar to Fields,
6 Detectives here had no influence on Defendant's California sentence or extradition.
7 Additionally, questioning by Detectives had no impact on Defendant's restraint since he was
8 going to remain in custody on his California warrant independent of whether Detectives
9 questioned him on an unrelated event or not. At no point throughout questioning did
10 Detectives make any promises or insinuations regarding the impact of Defendant's
11 California sentence.

12 Furthermore, the objective circumstances surrounding Defendant's questioning
13 clearly establishes his freedom of movement did not trigger Miranda. Once Detectives made
14 contact with the Defendant, his handcuffs were removed, he was permitted to smoke outside
15 of the patrol car, he was given the opportunity to hug his child, and was repeatedly told that
16 he could "leave at any time" and was a "free man." See Exhibit 4 at 3; 11; 22. Similar to
17 Fields, where police told Defendant he could leave and return to his cell, the Defendant here
18 could have refused to speak to police and simply awaited transport to jail on his warrant.
19 Instead, Defendant spoke with Detectives, smoked a cigarette, and never expressed any
20 desire to end questioning.

21 Moreover, the circumstances here were far less coercive than those in Fields, where
22 the court still found Defendant was not in custody for purposes of triggering Miranda. In
23 Fields, the interview lasted between five (5) to seven (7) hours and continued into the night
24 past Defendant's bed time. At one point during questioning, Defendant became upset and
25 stood up from his seat as if to leave. Police used a sharp tone and even cursed throughout the
26 interview. And most notably, at no point did police advise Defendant of his Miranda rights.
27 Here, however, the Defendant was interviewed in the afternoon for less than three (3) hours.
28 The conversation never turned hostile, Defendant never indicated he wanted to terminate the
conversation, and Defendant was advised of his Miranda rights approximately twenty-five
(25) minutes into questioning. See Exhibit 4 at 22-23.

1 Finally, Defendant was fully aware of the circumstances of his arrest and what to
2 anticipate as a result. Defendant repeatedly educated Detectives on his California case,
3 specifically, that he had been on the run since 2014 due to his California probation
4 violations. Defendant explained the process of getting extradited to California on the warrant
5 where he would serve minimal time in custody before getting released. Defendant even
6 explained to Detectives he would definitely be extradited back to California:

7 Q: I haven't - I haven't even discussed with my boss about taking you away or
8 even if that's - I don't know if that's - I don't know what's going on with that.
9 I'm being honest with you, dude. I - I ain't even - that hasn't even crossed my
10 mind at this point.

11 A: 'Cause I have a warrant for Cali, so I know I'm goin'...

12 Q: You have a warrant?

13 A: Yeah. In Cali.

14 Q: Will they extradite them? You sure?

15 A: Yes. Mmm.

16 Q: I don't know about that at this point. I mean...

17 A: That's why I don't - that's why I'm saying I - I know I'm not goin' - 'cause
18 I - it's a lot going on now.

19 Exhibit 4 at 49-50.

20 Defendant's knowledge of his extradition process stemmed not only from his
21 California warrant but his extensive criminal history, which includes multiple felony arrests
22 and convictions dating back over the course of ten (10) years. Defendant's familiarity with
23 the system only further substantiates his proficiency with the criminal justice system,
24 including his rights when speaking to law enforcement.

25 Therefore, when looking at the totality of the circumstances involving Defendant's
26 and the supporting case law, it is evident Defendant was not in custody for purposes of
27 triggering Miranda when speaking with Detectives. Thus, any Miranda advisement at the
28 time of the questioning was elective and not required pursuant to the Fifth Amendment.

29 II. DEFENDANT'S STATEMENTS WERE VOLUNTARY

30 A defendant bears the initial burden of arguing that a statement was involuntarily given
31 and requesting the appropriate hearing. Wilkins v. State, 96 Nev. 367, 372, 609 P.2d 309, 312
32 (1980). Following a challenge to the voluntariness of a confession, the State must prove by a

1 preponderance of the evidence that the confession was voluntary. Rosky v. State, 121 Nev.
2 184, 192 n.18, 111 P.3d 690, 695 (2005) (citing Lynum v. Illinois, 372 U.S. 528, 534, 83 S.
3 Ct. 917 (1963)). In such an analysis, the Court must consider whether a defendant's will is
4 overborne by physical intimidation or psychological pressures. Id. The court must review the
5 totality of the circumstances to determine whether a defendant's confession was voluntarily
6 given. Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). "Factors to be
7 considered include: the youth of the accused; his lack of education or his low intelligence; the
8 lack of any advice of constitutional rights; the length of detention; the repeated and prolonged
9 nature of questioning; and the use of physical punishment such as the deprivation of food or
10 sleep." Id.

11 The United States Supreme Court has recognized that before there can be a finding that
12 a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth
13 Amendment, there must first be a finding of some coercive police conduct. Colo. v. Connelly,
14 479 U.S. 157, 166-677, 107 S. Ct. 515, 521-22 (1986) (recognizing that absent a police
15 conduct prong, courts would be required to "divine a defendant's motivation for speaking or
16 acting as he did even though there be no claim that governmental conduct coerced his
17 decision."); see also United States v. Salameh, 152 F.3d 88, 117 (2d Cir. 1998) (quoting United
18 States v. Chrismon, 965 F.2d 1465, 1469 (7th Cir. 1992)) ("A diminished mental state is only
19 relevant to the voluntariness inquiry if it made mental or physical coercion by the police more
20 effective.").

21 A. No Coercive Environment

22 As previously noted above, the totality of the circumstances surrounding Defendant's
23 questioning clearly establish Defendant's statements were voluntary. Defendant was in a
24 comfortable environment whereby he was questioned in the middle of the afternoon, his
25 handcuffs were removed, he was permitted to smoke cigarettes, and even hug his child. At no
26 point did Detectives threaten, harass, or promise Defendant any benefits in exchange for
27 speaking with them. The conversation never grew hostile and Defendant even agreed that
28

1 Detectives treated him with respect and did not harass or threaten him in any way. Exhibit 4
2 at 44.

3 Additionally, Detectives indicated they appreciated the Defendant's honesty and that
4 he was agreeing to speak with them. Detectives even reiterated they were aware Defendant
5 did not have to speak with them:

6
7 I mean, I'm not gonna tell you how to feel, man, one way or the other 'cause I
8 can't imagine what you're going through in your head. I mean, I get it. You
9 sitting here, you talking to us and I appreciate your cooperation. And I know it
10 ain't something that you have to do, but, uh, but you sitting here talking to us,
11 man, and - and - and all that is a blessing in itself, man, given how things coulda
12 transpired, right?...

13 Exhibit 4 at 27.

14 B. Defendant Waived His Miranda Rights

15 The prosecution does not need to show that a waiver of Miranda rights was express. An
16 "implicit waiver" of the "right to remain silent" is sufficient to admit a suspect's statement into
17 evidence. Butler, *supra*, at 376, 99 S. Ct. 1755, 60 L. Ed. 2d 286. Butler made clear that a
18 waiver of Miranda rights may be implied through "the defendant's silence, coupled with an
19 understanding of his rights and a course of conduct indicating waiver." 441 U.S., at 373, 99 S.
20 Ct. 1755, 60 L. Ed. 2d 286. The Court in Butler therefore "retreated" from the "language and
21 tenor of the Miranda opinion," which "suggested that the Court would require that a waiver .
22 . . be 'specifically made. Berghuis v. Thompkins, 560 U.S. 370, 384 (2010). The question of
23 waiver must be determined on "the particular facts and circumstances surrounding that case,
24 including the background, experience, and conduct of the accused." North Carolina v. Butler,
25 441 U.S. 369, 374-375 (1979).

26 Here, Defendant asserts that Detectives belatedly realized their error in not advising
27 him of his Miranda rights earlier in the interview. However, this lack of advisement only
28 supports the argument that the circumstances did not trigger the need for Miranda warnings.
Detectives did not feel compelled to advise Defendant of his Miranda rights at the outset of

1 the interview since Defendant was not “in custody” for purposes of their questioning. Instead,
2 Detective Grimmatt advised Defendant of his rights in order to develop a rapport, not out of
3 legal necessity. This is further evidenced by Detective Grimmatt’s comments prior to reading
4 the warnings:

5
6 Q: ...there’s a reason for everything, right? And that’s what you explained to
7 us. There - there’s a reason for everything, man. I mean, would you - would
8 you feel better if I read you your Miranda rights and stuff, man? I mean, I
9 don’t have, I mean, you free to go, man. I mean, you know what I’m saying? I
10 - I’m not here to jam you up. I’m here to simply get your side of the story. And
11 that’s why I appreciate - and I’ll read ‘em for you, you want me to read ‘em to
12 you, man. I mean, know, uh, you got the right to remain silent. Anything you
13 say can be used against you in a court of law. You have a right to consult with
14 an attorney before questioning. You have a right to the presence of a attorney
15 during questioning. If you cannot afford an attorney, one will be appointed
16 before questioning. You understand all that? You unders- you understand all
17 that, Dre? Yeah? Yes, no, maybe so? I mean, I ain’t trying to jam you - I’m
18 just letting you know I ain’t trying to trick you with nothing. You see what I’m
19 sayin’? Those are your rights. You know what I’m sayin’? Those are your
20 rights. Now, I’m not saying that, uh, you’re under arrest, not like that. I’m just
21 telling you those are your rights. If you - if you feelin’ some kinda way - if that
22 makes you feel better - you understand that? Yes, no? Am I making sense?

23 Id. at 23.

24 Without articulating any concerns or questions regarding the rights that were
25 just explained, the Defendant immediately resumed talking to Detectives, stating “It’s
26 just that the situation sucks so bad.” Id. Furthermore, Defendant is a thirty (30) year
27 old man with at least four (4) prior felony convictions, one of which he had been “on
28 the run” from since 2014. The ease at which Defendant answered questions, was
familiar with the extradition process, and continued to engage with Detectives post
Miranda, clearly demonstrates Defendant knowingly and voluntarily waived his
rights.

//

//

//

1 **III. DEFENDANT HAD AUTHORITY TO CONSENT TO THE SEARCH**
2 **FOR THE FIREARM**

3 The Fourth Amendment to the United States Constitution provides protection against
4 unreasonable search and seizure by the State. An unreasonable search is one conducted
5 without a warrant issued upon probable cause, unless the search falls under one of the
6 exceptions to the warrant requirement. Katz v. United States, 389 U.S. 347 (1967). Consent to
7 search is one such exception. See generally Bustamonte, 412 U.S. 218, 93 S. Ct. 2041. The
8 State must prove consent by “clear and persuasive evidence.” McIntosh v. State, 86 Nev. 133,
9 136, 466 P.2d 656, 658 (1970).

10 The validity of a consent to search is governed by the voluntariness of that consent.
11 Bustamonte, 412 U.S. 218, 93 S. Ct. 2041. The voluntariness of a search does not require
12 that a person know of his rights. Id. at 234, 93 S. Ct. at 2051 (“knowledge of a right to
13 refuse is not a prerequisite of a voluntary consent.”). Instead, the question of voluntariness
14 is a factual determination to be made by examining the totality of the surrounding
15 circumstances. Sparkman v. State, 95 Nev. 76, 79, 590 P.2d 151, 154 (1979).

16 Actual authority is proved (1) where defendant and a third party have mutual use of and
17 joint access to or control over the property at issue, or (2) where defendant assumes the risk
18 that the third party might consent to a search of the property. State v. Taylor, 114 Nev. 1071,
19 1074 (1998).

20 Whether an individual has apparent authority to consent to a search must be judged
21 against an objective standard, namely, would the facts available to the officer at that moment
22 warrant a person of reasonable caution to believe that the consenting party had authority over
23 the property. Id. Whether the basis for authority to consent to a search exists is the sort of
24 recurring factual question to which law enforcement officials must be expected to apply their
25 judgment; and all the Fourth Amendment requires is that they answer it reasonably. Id. Thus,
26 the Fourth Amendment does not invalidate warrantless searches based on a reasonable mistake
27 of fact, as distinguished from a mistake of law. Id.

1 "The authority which justifies the third-party consent does not rest upon the law of
2 property, with its attendant historical and legal refinements, but rests rather on mutual use of
3 the property by persons generally having joint access or control for most purposes, so that it
4 is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection
5 in his own right and that the others have assumed the risk that one of their number might
6 permit the common area to be searched. Randolph at 110.

7 It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth
8 Amendment, what is generally demanded of the many factual determinations that must
9 regularly be made by agents of the government -- whether the magistrate issuing a warrant,
10 the police officer executing a warrant, or the police officer conducting a search or seizure
11 under one of the exceptions to the warrant requirement -- is not that they always be correct,
12 but that they always be reasonable. Ill. v. Rodriguez, 497 U.S. 177, 185-186 (1990).

13 Here, Defendant provided Detectives with consent to recover the firearm associated
14 with the February 11th shooting:

15 Q: Well, I mean, I don't know. I'm - I'm just telling you I don't know if that's
16 the case. If that's the case, and that's what you're tellin' me, and I'm a believe
17 what you tellin' me, I'm telling you right now, if that's the case, we still gonna
18 sit here like you are right now, smoking your Newports, until old girl get here
19 regardless. I'm telling you that 'cause if you wanna see her, then I'm a - I'm a
20 give you that because you been cool with me. But what I'm asking you is, do
21 we have your permission to go get the gun out of the AC vent?

22 A: Yeah. I appreciate it.

23 Id. at 51.

24 The factual circumstances demonstrate that Defendant had actual authority to
25 consent to the search and recovery of the firearm. At the time Defendant consented,
26 he indicated only him and his girlfriend, along with their two children, resided at the
27 apartment. Id. at 45. This was corroborated when police arrived to find Defendant as
28 the only adult inside of the apartment. Throughout the interview, Detectives noted
that Defendant had "care and control" of the apartment which he did not deny. Id. at

1 47. This was further proven by the fact that Defendant had access to the air vent in the
2 hallway of the apartment where he placed the firearm. Id. at 39.

3 Additionally, the circumstances suggest that Defendant had been residing with
4 his girlfriend whenever he was in Las Vegas. Although Defendant states he only
5 stayed at the apartment the previous night, he indicates that his girlfriend had only
6 resided at the apartment for a couple of days herself. Id. at 45. Defendant further
7 states that he and his girlfriend have been together for five (5) years, share two
8 children together, and see each other when they can. Id. at 42;54. Defendant tells
9 Detectives that his girlfriend is the only family he has in Las Vegas and that he stays
10 with their baby when she goes to work. Id.

11 Defendant asserts in his motion that it was apparent he was staying in the area
12 of the Van Patten complex and not the Wyandotte address when he gave consent to
13 search. However, Defendant's only support for this assertion is based on a statement
14 he made during the interview where he referenced his socializing at the Van Patten
15 complex. Specifically, Defendant tells Detectives that the conflict between himself
16 and Tyler stemmed from the Defendant encroaching into Tyler's "hood."

17 **A:** And that's when he - "Oh, blood, y'all gotta clear this out. On dead homies.
18 Too much." So we, uh, all right. You know, we - basically, you know, we
19 drink and smoke. We do this every day.

20 **Q1:** Mm-hm.

21 **A:** We not really - all right. You live here. You have a - we done been up and
22 down the street for - for months. You just barely been over here probably two
23 or three months, but you used to stay across the street. Now your girl and your
24 mom got this spot right across the street. You - you just, like, he came through,
25 like, politicking, but I, like, we was in Cali. Right. We not in Cali, bro. You,
26 uh, it's...

27 **Q:** Right, right. (Unintelligible).

28 **A:** We not - ain't nobody out here on that. Everybody's out here chillin'. In
Cali you can't just chill in different areas. Shoot. You in somebody hood.

Q: Right.

Exhibit 4 at 21.

Defendant indicated that on the day of the shooting he was at the Van Patten
apartments drinking and smoking with the guys since his girlfriend doesn't drink or

1 smoke, further suggesting he was likely residing with his girlfriend on the day of the
2 shooting, be it near the area of the Van Patten complex or not. Id. at 55.

3 Furthermore, Detectives sought to limit the scope of Defendant's consent,
4 specifically, to only retrieving the firearm from the air conditioning unit. Id. at 47-48.
5 After obtaining consent, Detectives entered the apartment, accessed the air vent
6 specifically described by the Defendant, and only recovered the revolver and
7 ammunition. Only after recovering the firearm did Detectives obtain a telephonic
8 search warrant to search for additional firearms, ammunition, firearm related items,
9 and a DNA sample from Defendant. See "Telephonic Search Warrant" attached as
10 Exhibit 6.

11 Finally, even if this court were to determine Defendant lacked actual authority,
12 it is certainly reasonable for Detectives to have believed Defendant had apparent
13 authority to give consent. Not only was the Defendant the only person at the
14 residence, the only other resident was his girlfriend of five years and mother of his
15 children. Defendant was not restricted from any areas of the apartment and was
16 particularly familiar with all areas of the unit as demonstrated by his placing the
17 firearm in an air vent in the hallway.

18 Therefore, since Defendant had actual authority through mutual use and joint
19 access to the apartment, his consent was valid and the firearm should not be
20 suppressed.

21 **IV. THERE IS NO BASIS TO EXCLUDE EVIDENCE UNDER THE** 22 **EXCLUSIONARY RULE**

23 Under the United States Supreme Court's precedents, the exclusionary rule
24 encompasses both the primary evidence obtained as a direct result of an illegal search or
25 seizure and evidence later discovered and found to be derivative of an illegality, the so-called
26 fruit of the poisonous tree. But the significant costs of this rule have led the Supreme Court to
27 deem it applicable only where its deterrence benefits outweigh its substantial social costs.
28 Suppression of evidence has always been the Supreme Court's last resort, not its first impulse.
Utah v. Strieff, 136 S. Ct. 2056, 2057 (2016).

1 The United States Supreme Court has recognized several exceptions to the exclusionary
2 rule. Id. Three of these exceptions involve the causal relationship between the unconstitutional
3 act and the discovery of evidence. Id. First, the independent source doctrine allows trial courts
4 to admit evidence obtained in an unlawful search if officers independently acquired it from a
5 separate, independent source. Id. Second, the inevitable discovery doctrine allows for the
6 admission of evidence that would have been discovered even without the unconstitutional
7 source. Id. Third is the attenuation doctrine: Evidence is admissible when the connection
8 between unconstitutional police conduct and the evidence is remote or has been interrupted by
9 some intervening circumstance, so that the interest protected by the constitutional guarantee
10 that has been violated would not be served by suppression of the evidence obtained. Id. at 2057
11 (emphasis added).

12 A. No Miranda Violation Occurred

13 As previously argued above, Miranda was not triggered based on the totality of the
14 circumstances. Since Miranda warnings were not required and Defendant voluntarily spoke to
15 Detectives and revealed the location of the firearm from the shooting, none of the Defendant's
16 statements were obtained as a result of a Fifth Amendment violation.

17 B. Miranda Waivers Do Not Apply to Consent Exceptions to Warrantless Searches

18 The Miranda framework should not be applied when considering the validity of a
19 consent to search. See generally Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041
20 (1973). This is in part because a consent to search is not a testimonial, self-incriminating
21 statement that would invoke Miranda concerns. See, e.g., United States v. Calvetti, 836 F.3d
22 654, 663 (6th Cir. 2016) (“[A] consent to search is not a self-incriminating statement subject
23 to the protection of the Fifth Amendment”); United States v. McClellan, 165 F.3d 535, 544
24 (7th Cir. 1999) (“[A] request for consent to search is not an interrogation within the meaning
25 of Miranda because the giving of such consent is not a self-incriminating statement.” (internal
26 quotations omitted)); United States v. McCurdy, 40 F.3d 1111, 1118 (10th Cir. 1994) (“An
27 officer's request to search a defendant's automobile does not constitute interrogation invoking
28 a defendant's Miranda rights.”).

1 The United States Supreme Court has clearly defined testimonial evidence as an
2 accused's communication that "itself, explicitly or implicitly, relate[s] a factual assertion or
3 disclose[s] information." Doe v. United States, 487 U.S. 201, 210, 108 S. Ct. 2341, 2347
4 (1988); see also Michael J. Zydney Mannheimer, Toward a Unified Theory of Testimonial
5 Evidence Under the Fifth and Sixth Amendments, 80 TEMP. L. REV. 1135, 1137 (2007) ("In
6 the Self-Incrimination Clause context, 'testimonial' refers to statements of fact or value, as
7 opposed to physical evidence or statements introduced merely to prove how they were
8 made[.]"). By this definition, a consent to search is not itself testimonial because "it does not
9 'relate a factual assertion or disclose information.'" United States v. Calvetti, 836 F.3d 654,
10 663 (6th Cir. 2016) (quoting Pennsylvania v. Muniz, 496 U.S. 582, 594, 110 S. Ct. 2638, 2646
11 (1990)). This is true even when the consent to search leads to incriminating real or physical
12 evidence, as it did in this case. See People v. Thomas, 12 Cal. App. 3d 1102, 1110-11, 91 Cal.
13 Rptr. 867 (Cal. Ct. App. 1970) ("The fact that the search leads to incriminating evidence does
14 not make the consent testimonial.") Thus, the requirements of Miranda, which apply to the
15 admission of self-incriminating, testimonial statements made under custodial interrogation, do
16 not apply to a defendant's consent to search.

17 Beyond the fact that a consent to search does not fall under the definition of a
18 testimonial, self-incriminating statement, there is an even more fundamental reason that the
19 Miranda waiver requirements do not apply when considering the validity of a consent to
20 search: Miranda and its progeny are designed to protect interests that do not apply when
21 considering the validity of a consent to search. In fact, Defendant's attempt to apply waiver
22 analysis to a consent to search rather than looking to the Fourth Amendment has been rejected
23 by the United States Supreme Court. In Schneckloth v. Bustamonte, the Court emphasized that
24 the validity of a consent on the one hand, and a knowing and intelligent waiver on the other,
25 are distinct inquiries. 412 U.S. 218, 246, 93 S. Ct. 2041, 2057 (1973). The Bustamonte Court
26 considered whether a consent search was valid even though Bustamonte had not been informed
27 of his right to refuse consent. Id. The Court held that "there is nothing in the purposes or
28 application of the waiver requirements ... that justifies, much less compels, the easy equation

1 of a knowing waiver with a consent search. To make such an equation is to generalize from
2 the broad rhetoric of some of our decisions, and to ignore the substance of the differing
3 constitutional guarantees.” Id. Thus, unlike the notice requirement that applies when
4 considering Fifth Amendment rights, when reviewing the validity of a consent to search, there
5 is no requirement that a person be informed of his right to refuse to consent before consent
6 could be voluntarily given. Id. at 231, 93 S. Ct. at 2050 (“For it would be thoroughly
7 impractical to impose on the normal consent search the detailed requirements of an effective
8 warning.”).

9 Shortly after the United States Supreme Court’s decision in Bustamonte, the Fifth
10 Circuit explicitly laid out the reasoning behind why the *ratio decidendi* of the Miranda
11 decision – to strengthen the Fifth Amendment – should not be applied to a Fourth Amendment
12 search and seizure analysis:

13 In a fifth amendment context a defendant's statements, in and of
14 themselves, present the potential constitutional evil.^{12]} For
15 purposes of the fourth amendment, however, it is an unreasonable
16 search that must be condemned, not the use of a defendant's
17 statements proving consent to a search. A search and seizure
18 produces real and physical evidence, not self-incriminating
19 evidence. Our task under the fourth amendment is to test the
20 reasonableness of a search and exclude evidence procured
21 unreasonably. We have been appropriately warned of the dangers
22 inherent in “the domino method of constitutional adjudication . . .
23 wherein every explanatory statement in a previous opinion is made
24 the basis for extension to a wholly different situation.” Therefore,
25 Miranda's ratio decidendi which was enunciated to strengthen the
26 fifth amendment's function in preserving the integrity of our
27 criminal trials should not be superimposed *ipso facto* to the wholly
28 different considerations in fourth amendment analysis.

22 ² This potential “constitutional evil” has been defined in earlier jurisprudence as a recurrence of the methods and ideas that
23 led to coerced confessions in events such as the Inquisition and the Star Chamber, “even if not in their stark brutality.”
24 Ullmann v. United States, 350 U.S. 422, 428, 76 S. Ct. 497, 501 (1956). In later decisions, the Court addressed what the
privilege against self-incrimination was designed to protect against yet again, clarifying that:

25 “At its core, the privilege [against self-incrimination] reflects our fierce unwillingness to subject those
26 suspected of crime to the cruel trilemma of self-accusation, perjury or contempt that defined the
operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating
private thoughts and forsaking their oath by committing perjury.”

27 Pennsylvania v. Muniz, 496 U.S. 582, 596, 110 S. Ct. 2638, 2647 (1990) (internal citations and quotations omitted). There
28 was no such trilemma here, as Defendant was not asked for a self-accusatory statement, and did not face perjury, contempt,
or other censure if he refused to give consent to search his car (i.e., as discussed in detail *infra*, Defendant’s consent to
search was voluntarily given.)

1 United States v. Garcia, 496 F.2d 670, 675 (5th Cir. 1974) (quoting Bustamonte, 412 U.S. at
2 246, 93 S. Ct. at 2057) (emphasis added). Accordingly, because a consent to search is not a
3 testimonial, self-incriminating statement within the meaning of the Fifth Amendment, and
4 because the *ratio decidendi* of Miranda is different than that of protecting Fourth Amendment
5 rights against unreasonable search and seizure, the waiver analysis that culminated in the
6 Supreme Court’s decision in Miranda does not apply when determining the validity of a
7 consent to search. A consent to search results in evidence that is real and physical. Garcia, 496
8 F.2d at 675.

9 Here, Defendant seeks to suppress real and physical evidence, specifically, the firearm
10 recovered from the apartment. However, the United States Supreme Court has drawn a clear
11 distinction between “real or physical” evidence and “testimonial” evidence, holding that real
12 or physical evidence is not subject to Fifth Amendment protections against self-incrimination.
13 Muniz, 496 U.S. at 591, 110 S. Ct. at 2645; Schmerber v. California, 384 U.S. 757, 764, 86 S.
14 Ct. 1826, 1832 (1966). In fact, courts have long held that the privilege against self-
15 incrimination bars compelled communication or testimony, but that it is not violated by
16 physical evidence—even when that physical evidence is obtained from a defendant’s person
17 rather than from a distinct location like a vehicle. See, e.g., Schmerber, 384 U.S. 757, 86 S.
18 Ct. 1826. (This is so even when the real or physical evidence is compelled from the person of
19 the accused, such as participation in a line-up, or a blood draw to determine blood alcohol
20 content. See id.; Muniz, 496 U.S. at 591, 110 S. Ct. at 2645).

21 Thus, when the evidence that a defendant seeks to suppress is real and physical, rather
22 than self-incriminating testimonial statements elicited during a custodial interrogation, the
23 admissibility of that real or physical evidence is not governed by a Fifth Amendment-based
24 Miranda analysis. Instead, courts should turn to existing Fourth Amendment jurisprudence to
25 determine if the search was valid and the evidence may be considered.

26 Here, since Defendant gave consent to recover the firearm from the apartment, there
27 was an adequate exception to the Fourth Amendment warrant requirement and the firearm
28 should not be suppressed.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

- 2
- 3
- 4
- 5
- 6
- 7

8

9
10

2

3

4
5

1

7
8

20

22

24

07

28

EXHIBIT “5”

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 1

EVENT #: 180211-3549

SPECIFIC CRIME: MURDER WITH A DEADLY WEAPON

DATE OCCURRED: _____ TIME OCCURRED: _____

LOCATION OF OCCURRENCE: _____

CITY OF LAS VEGAS CLARK COUNTY

NAME OF PERSON GIVING STATEMENT: RAYMOND MOORE

DOB: 6-24-76

SOCIAL SECURITY #: _____

RACE: _____

SEX: _____

HEIGHT: _____

WEIGHT: _____

HAIR: _____

EYES: _____

HOME ADDRESS: 2626 Van Patten, Apt #1
Las Vegas, NV 89109

PHONE 1: _____

WORK ADDRESS: _____

PHONE 2: _____

The following is the transcription of a tape-recorded interview conducted by SERGEANT SANBORN, P# 5450, LVMPD HOMICIDE SECTION, on 2/21/2018 at 1535 hours. Also present is DETECTIVE MAUCH, P# 8566, HOMICIDE SECTION and DETECTIVE MURRAY, P# 13458.

Q: Operator this is Detective T. Sanborn, S-A-N-B-O-R-N, P# 5450, conducting one voluntary taped statement under LVMPD Event # 180211-3549. Date is February - what is the date, February 21, 2018, time approximately 1535 hours. Location is inside my unmarked LVMPD vehicle parked in Commercial Center. Uh, subject giving the statement is Raymond Moore. DOB 6-24-76. He lives at 2626 Van Patten, Apartment # 1, Las Vegas, Nevada, 89109. And has a contact cell number of [REDACTED]. Present with me is my partner Detective G.

Vol. Statement, No Affidavit (Rev. 07/12) - 004000 3037

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 2

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

hangin' with somebody that live in your building," so T-Rex kept sayin', "Blood on the dead homies, I don't give a fuck about none of that." So he got to the point to where they was goin' back and forth, back and forth. And I'm like, "All right. All right Rex man, look we fuckin' to go in front of my building." So I'm still right there drinkin', I'm standin' right there by, uh - by Dre and, uh, he kept trying to press him an- and, you know, Dre kept saying like, "Man you trippin', man. You - we don't know what you on," like, you know, so he kept...

Q: Were you guys inside the gate or outside?

A: No we was outside the gate.

Q: Outside, okay.

A: So he was standin' like between the gate, him and his other friend was standin' like between the gate and we already outside the gate like on the, uh, sidewalk. So, uh, he was goin' back and forth for like 15, 20 minutes to where Dre was like, "Man you - you- you trippin'." so he was like, "Man you lookin' like a - ya all lookin' like a thug," and everything and hangin' outside. And he was like, "But I be here every day, like this is what we do. Like, you know, we hang right here. Like we hang in all the apartment building." So T-Rex kept saying, "Blood on the dead homies man. I don't give a fuck about none of that man, you know," this and that, this and that. Kept goin' on and on and, um, to about like at the last minute Dre was just, "Man I see you with your gun on you and all of that, I'm not trippin'," and he was like, "Man I don't give a fuck about none of th, that's what

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 2

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Mauch, M-A-U-C-H, P# 8566, as well as Detective T.J. Murray, M-U-R-R-A-Y, P# 13458. Okay you go by Ray right, just Ray? All right Ray, you're aware this statement's being recorded?

A: Yes.

Q: Okay. My partners and I, we're conducting a follow-up investigation into a shooting which took place over on Van Patten on February 11, uh, it happened out in front of 2612 out there involving a guy named T-Rex...

A: Mm-hm.

Q: ...uh, my understanding is is that, uh, you may have been out there with a group of guys?

A: I was - I was the witness and I was right there when everything took place.

Q: Okay. So go ahead and tell me...

A: So...

Q: ...tell me what you recall and what you saw.

A: So basically I would say about like between 7:00 and 8:00 I was - I was hanging out there with T-Rex - no I was hangin' out with a dude named, uh, Dre and another dude by the name of TY, he also got shot and he got shot on Sherwood the same night. So what happened was we was just hangin' out drinkin', mindin' our own business, not botherin' nobody, you know, we just doin' our own thing. T-Rex kept comin', tellin' us like, "Blood we can't be out there, we gotta go somewhere else," so we - so Dre was like, "Man you trippin', like, you know, I'm

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 4

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

T-Rex kept sayin' so it kept goin' back and forth and, um, by the time I look, I turned my back, Dre just shot him, boom boom. Then, you know, uh, T-Rex was tryin' to shoot back but his bo- his friend that was right there with him took the gun out - out of T-Rex hand and, uh, then he started shootin' at Dre and at my other friend. And, uh...

Q: Who's - who's the other friend, TY or someone else?

A: Yeah TY.

Q: TY, okay.

A: That's how, uh, TY he had ran to Eureka and, uh, he leave and come back and that's when he got shot six times, uh, right there by Eureka so Dre left so now everybody was sayin', "Oh yeah, you know, it's on with all the Crips, it a Crip and Blood thing, you know, it's on with all the Crips," so I just stay away and just stay in the house because they sayin' that I supposed to be next so I just stay in the house. I don't go to the store or nothin' so I - sometime I send my wife to the store and she get nervous 'cause every time my wife go to the store they come out, follow her to the store, follow her, see where she goin' or see what she doin' and she got fed up and she just told me to, uh, tell you guys what really happened. So that's what I'm here right now...

Q: Okay. What - do you remember what T-Rex was wearing or what he was dressed like?

A: He had on all red. He had a red shirt, red pants and some red shoes.

Voluntary Statement (Rev. 05/10)

PA000364

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 6

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Q: And then how about T- Rex- you said T-Rex had a gun?

A: Yeah he had a gun in his pocket and he was tryin' to shoot...

Q: Which pocket, do you remember?

A: Uh, the left pocket.

Q: So he had a gun in his left pocket. Did he - did he take it out or did he...

A: Yeah he took it out, he was tryin' to shoot but he was already hit...

Q: That was after he was hit though, how about before he was hit? Like...

A: No he kept - he kept like bringin' it in and out like, "Blood, I don't give a fuck about none of that so," you know, Dre kept saying like, "Blood," I mean like, "Cuz I see you with your blower like I ain't known that, I ain't even trippin'," so, you know, he kept doin' it, kept doin' it to where Dre just shot him.

Q: Now what about the other dude that was with T-Rex?

A: He had on all white.

Q: All white. Do you know who that guy is?

A: Uh...

Q: Or a nickname or...

A: ...I think he go by the name of Ju- Juge.

Q: What is it?

A: Juge.

Q: Juge? Like G...

A: Yeah like...

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 6

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Q: ...G-U-G?

A: ...yeah like Juge. Like you juggin' something, like his name Juge, he chubby. And he - and then like a lot of people called him Little Rick Ross 'cause he look like Rick Ross 'cause he...

Q: Is that the dude that I had stopped on Sherwood? The guy wearin' all black that day?

A: Yeah. Yeah.

Q: Devin?

A: Yeah.

Q: That's the same dude?

A: Yeah that was him.

Q: And he was out there with him? Now did...

A: He was the one that was shootin' back.

Q: Did he have his own gun before...

A: No he took it from T-Rex.

Q: He took it when T-Rex took it - after T-Rex took his out?

A: Yeah. He took it from T-Rex. That's why - that's how my wife was sayin' they tampered with the evidence and he took it and tried to make like he didn't have a gun. But like if everybody was like that they said T-Rex hand was still like this, like tryin' to shoot so he took it and starts - Juge...

Q: So where does he - where does he start shootin' at, like where does Dre go,

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 7

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

does Dre run toward Sahara? Or...

A: No he's still, uh, tow- towards, uh...

Q: ...towards Karen?

A: ...towards Linwood.

Q: Toward Linwood? Where's that, one...

A: Yeah, you know, like the other - the other street.

Q: Oh across the street? So...

A: Yeah. Like - like by 7-Eleven.

Q: Okay. So this, uh - what are you callin' this guy again? Ju- I can't...

A: Juge.

Q: Juge?

A: Yeah.

Q: Juge, not like jug like a jug of milk?

A: No, Juge. It's like - it's like a jug but it's Juge.

Q: Juge.

A: I think J-U- J-U-G-E or something like that. Something like that.

Q: Juge. Juge, all right. He starts shooting - is he shooting out from the gate...

A: Yeah.

Q: ...out toward Linwood?

A: Yeah he's - he's shootin' 'cause Dre runnin' that way and he start shootin' back at Dre. And then he turned the gun and started shootin' at TY and TY...

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 8

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Q: Where did TY go?

A: He ran towards the Eureka.

Q: Which way did you go?

A: I ran right in the house 'cause it was right next door to my house. I ran right in - in the house and ran to my window looked in the window. I ran right in the house.

Q: So is it just you - it's just you, TY...

A: It was me, Dre, TY, we was right there mindin' our business so it was, uh, Rex...

Q: And then T-Rex...

A: It was T-Rex and Juge, they was walking and they walked towards the store and he was like, "Man ya all still right here. Blood, like, you know, Blood this, Blood that," like, you know.

Q: Now isn't that T-Rex' dope spot though right there on the corner?

A: Yeah. Yeah. But see we wasn't inside the gate, we was outside the gate.

Q: Had you guys hung out there before? And was there no problems? What was the problem today?

A: I don't even know what the problem was. See like I was tryin' to tell them like only reason why I ended up outside because of my wife wanted me to go get her something to eat. And it - so once - when I went to go get her something to eat I stopped and got me somethin' to drink.

Q: Do you remember anything about T-Rex' gun or the gun that he took out and

Voluntary Statement (Rev. 05/10)

PA000365

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 9

EVENT #: 160211-3549
STATEMENT OF: Raymond Moore

tried to fire?

A: Um, I think he had a 45 I think - a 45 I think.

Q: Had you seen it before or is this the first time?

A: No that's the first time but I knew he had a lot of guns in there. He - he had a lot of guns. But that's the only one that he I guess carry.

Q: Now what about Dre, did you know Dre had a gun on him?

A: Yeah Dre always have his gun.

Q: What...

A: Dre always ke- keep his gun.

Q: What's Dre's gun?

A: A 357.

Q: Where did he have it this night?

A: He had it in his pants but like when he - I guess he feel like it was gonna be some tension so Dre took it from his pants and put it like in his - in his, uh, coat pocket.

Q: What was Dre wearin'?

A: He was ha- he had on all black. He had on all black. Some black sweats and a black, uh, hoodie like this one.

Q: And how long have you known Dre?

A: Uh, about a couple of months.

Q: A couple months. How many times have you seen him?

Voluntary Statement (Rev. 09/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 11

EVENT #: 160211-3549
STATEMENT OF: Raymond Moore

A: I start hangin' - I start kicking it with him, you know, I start hanging out with him. He come to my house from time to time.

Q: I'm showing you a picture...

A: Yeah that's Dre.

Q: This is the Dre that you're...

A: Yeah.

Q: ...that you're referring to?

A: Yeah.

Q: Okay.

A: That's the Dre.

Q: So about how many times does this, uh, Juge guy get - how many shots do you think he shoots at Dre?

A: About five I think. About four or five.

Q: Four or five. And how many times does Dre shoot at T-Rex?

A: Just three.

Q: Three times?

A: Mm-hm.

Q: Did you see how many times he hit T-Rex?

A: Uh, I didn't - I didn't see how many times he got hit. 'Cause as soon as I heard it I - I ran right in the house. And then that's when, uh, I was on the phone with, uh

Voluntary Statement (Rev. 09/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 10

EVENT #: 160211-3549
STATEMENT OF: Raymond Moore

A: I see him a lot. See, 'cause I didn't - I didn't really know who he was 'cause when I came back from California I had got into it with another dude over there and, uh, I didn't know who Dre was at the time 'cause he was sittin' right there with his gun, he always keep a gun on him. That's what everybody knew about Dre, he always keep a gun.

Q: Did you know his - is that was hi- did you know him as Dre, is that what his - his...

A: Yeah.

Q: ...nickname? Did you know any other name? Like any other like government names or anything like that...

A: Uh, no.

Q: ...or just Dre?

A: Just Dre or Baby Joker.

Q: Baby Joker. And have you heard anything since or do you still just know him as Dre?

A: Just Dre.

Q: So if I show you a picture of a guy you could recognize if it was the Dre that you've seen?

A: Mm-hm.

Q: How many times you think you've seen Dre in the past?

A: A lot.

Q: Lots of times?

Voluntary Statement (Rev. 09/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 12

EVENT #: 160211-3549
STATEMENT OF: Raymond Moore

- with TY, that's when he said the dude shot at him so he was shootin' back at Juge.

Q: T- TY fired also?

A: Yeah because he start- uh, 'cause Juge started shootin' at him 'cause like I say we all was right there...

Q: Mm-hm.

A: ...and, you know, we was all Crips right there and they was Bloods right there.

Q: So what did - what was...

A: (Unintelligible)...

Q: ...what was TY firing?

A: Um, a 45.

Q: 45?

A: Yeah he had his own gun. 'Cause he went upstairs and got his gun because he - him and T-Rex already had like problems already.

Q: Okay. TY lives inside that same...

A: Yeah.

Q: ...courtyard, right?

A: Yeah. He live upstairs.

Q: So TY went up and got his?

A: Yeah.

Q: How - how soon after TY got - went and got his gun did the shooting start? Like

Voluntary Statement (Rev. 09/10)

PA000366

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 13

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

when'd he come down?
A: Uh, probably like 30, 40 minutes.
Q: Oh so he had his gun for a bit?
A: Yeah. I didn't even know it 'til he told me. 'Cause - see 'cause everybody know he quiet, he don't really talk that much. And that's what he was sayin' when he went upstairs he like, "Man why you - why TY so quiet? He don't talk, he don't laugh, he don't say nothin'." I said, "Man them the main ones you gotta watch."
Q: So then after - so the progression would be Dre shoota...
A: TY.
Q: ...T-Rex.
A: Yeah.
Q: T-Rex pulls his gun out, it doesn't work. Juge picks up T-Rex's gun and shoots at Dre and TY.
A: Yeah.
Q: TY is shoot-has his own 45...
A: Yeah.
Q: ...and shoots back at Juge.
A: Yeah. And then - but they...
Q: Now does Juge get hit or no?
A: No. No.
Q: Does TY get hit right then or...

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 15

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

A: And then I was askin' TY - before he was already hit I was askin' him why did he run to Eureka, he could've ran towards the back in my house. 'Cause I ran in my front.
Q: Where's your --where's your building re- in regards to the scene, is it south toward Karen or towards Sahara?
A: No, uh, Karen.
Q: Toward Karen?
A: My house is like right like this T-Rex building...
Q: Mm-hm.
A: ...and that's my building...
Q: Oh so you're...
A: ...side by side...
Q: So...
A: ...right through the little alley. It's like the...
Q: So you're one south?
A: Yeah.
Q: On the same street, right?
A: Yeah. Goin' towards Karen.
Q: Okay now a little bit earlier you said for some reason you had - you had turned your back...
A: Yeah.

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 14

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

A: No not right then and there, no.
Q: He got hit later like...
A: Yeah probably like 15, 20 minutes later.
Q: On the street over, right? On...
A: Yeah on Sherwood.
Q: Yeah. Now who did that?
A: They said Juge did it. And then they - then they said somebody else did it so, you know, they were saying there was another dude, it was another Blood that did it, that be right there with - with, uh, T-Rex.
Q: So if I had a picture of the guy who - if I had a picture of the guy - I have a surveillance picture of the guy who shot...
A: Yeah.
Q: ...TY, if I showed you that picture you'll be able to - you'd see if it's one of the guys that's out there?
A: Right. Mm-hm.
Q: All right. I didn't bring that one with me, sorry. I - that's a different shooting so, um, but...
A: But it was all connected.
Q: Yeah yeah, we've...
A: That was all connected.
Q: We figured it was so...

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 16

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Q: ...right at the time of the shooting?
A: Mm-hm.
Q: So when you turn around, describe exactly what you see when you turn around. Where is T-Rex standing?
A: Uh, T-Rex was, uh, walking...
Q: Where's his back toward?
A: No I - like, uh, my back is turned but I'm still looking because I was drinking, me and Dre was drinking.
Q: What were you drinking out of?
A: Uh, some vodka.
Q: Okay.
A: So, uh, T-Rex walk up towards, uh, Dre.
Q: On that little sidewalk like...
A: Yeah the little...
Q: Outside the gate...
A: He comin' out the gate.
Q: ...comin' out the gate, okay.
A: Yeah he comin' out the gate walkin' up on him. And Dre - like me and Dre was sittin' side by side with our back turned but, you know, they still goin' words for words so Dre turned towards him and then I turned towards him and I was like, "Man we fin' to go kickin' in front of my building." But, uh, TY - I mean, uh, T-Rex

Voluntary Statement (Rev. 05/10)

PA000367

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 17

EVENT #: 160211-3549
STATEMENT OF: Raymond Moore

kept walkin' towards Dre to where he just got...

Q: Where's Dre, toward the sidewalk now?

A: Yeah we was...

Q: Like Dre's back toward the sidewalk?

A: No he turned towards T-Rex now because...

Q: Mm-hm, facin' him, now they're facing each other?

A: Yeah they - yeah they face to face now but it's like T-Rex went up like - like doin' like this back and forth, walkin' up, steppin' back walkin' up, steppin' back.

Q: So - and then - then what happens like right at the time of the shooting? What is - what's T-Rex doing? Does he got his gun out pointing it at Dre?

A: He was trying to shoot back...

Q: No no no before...

A: ...but the gun had failed.

Q: No no no, before that. Before...

A: No no he didn't - he - he - he wanted to but he just kept pullin' it out and puttin' it back in his pants, pull it out, put it back in...

Q: So when he gets shot what's he doing? Just - does he have the gun out or in or out or...

A: No, like when he got shot - but when he seen Dre pull his out he tried to pull his out but he was already hit so he was already tryin' to shoot 'cause he - his hands was like this. And, uh, once he - once he felt that's when the dude Juge took the

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 18

EVENT #: 160211-3549
STATEMENT OF: Raymond Moore

A: Right, he did, see 'cause like everybody was sayin', "Why did T-Rex do that and they know how Dre is?" He not gonna take too much of it, he gonna be the first one to shoot...

Q: Okay.

A: ...so and that's what he - that's what he did, the first one...

Q: So he finally had enough and he pulls his. Now T-Rex is tryin' to get his out of his pocket...

A: Yeah so...

Q: ...but he don't get it out in time.

A: Yeah he already hit.

Q: So now you left so you didn't see what happened to anything out there...

A: No 'cause when I - when I seen Juge start shootin' at Dre I thought Dre had got hit - hit in the foot 'cause when Dre started runnin' towards the, uh, by 7-Eleven, uh, he started limp...

Q: Mm-hm.

A: ...so I was like oh he got hit. So the next thing you know he...

Q: Now what do you hear what happens at the scene afterwards? Do - you leave, right? You don't stay - the cops - you leave before the cops get there and all that, right?

A: As soon as I heard the first police at the corner I'm - I'm already in the house lookin' out the window. But my wife got everything, she - she recorded

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 18

EVENT #: 160211-3549
STATEMENT OF: Raymond Moore

gun and start shootin'. Then he put that gun up and, uh, started shootin' with the 25.

Q: Where'd he do that at?

A: The same...

Q: The same area?

A: Yeah, same area. 'Cause that's why everybody said it was like three different - uh, they heard like three or four different guns. 'Cause like three of 'em - it was like three, four different guns. Dre had his 357...

Q: There's only five people out here though we're talkin' about though, right?

A: Yeah.

Q: There's just the five of you?

A: It was us three and them two.

Q: And them two, okay.

A: Yeah so, you know, we was all right there. But T-Rex was the one who provoked everything.

Q: He kept it going verbally but it...

A: Yeah...

Q: ...but it didn't - it doesn't sound like he had his gun out first to shoot it, it sounded like...

A: I mean, but see what it was...

Q: Sounds like Dre just had enough of it, like...

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 20

EVENT #: 160211-3549
STATEMENT OF: Raymond Moore

everything else like about everybody was sayin' Dre did it, the whole street said Dre did it, the - everybody and...

Q: Yeah.

A: ...the police came and everybody actin' like they so mad and everything, they, you know, goin' crazy, you know...

Q: What do you mean, in the neighborhood...

A: Yeah.

Q: ...like neighborhood people type thing?

A: Yeah the neighborhood.

Q: I mean but what else could - I mean what else could Dre have done or - I mean he could've took off, he just walked thru - just left and been like forget...

A: He could've - yeah he could've walked off but...

Q: ...could've just said forget it, let's get out of here.

A: ...no, but he didn't want to - I guess he didn't want to go that route.

Q: Yeah.

A: Especially when you - when you - when you threaten somebody and both of you have a gun it's like somethin' gotta give.

Q: So now when I was searching that crime scene I found a dope stash up in the blocks, the concrete blocks...

A: Oh yeah yeah yeah yeah.

Q: ...whose is that?

Voluntary Statement (Rev. 05/10)

PA000368

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 21

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

A: Oh that was, uh, what's the name? That was TY's.
Q: TY?
A: Yeah.
Q: Why is his stashed up there?
A: Because he live in the building and he was standin' right there at first.
Q: Is that - so like he sells is that way or no?
A: Yeah. Yeah he...
Q: So if someone comes up he grabs it out of the block and sells it and...
A: Yeah yeah.
Q: ...the that way he don't have it on him type thing?
A: Right.
Q: What about T-Rex though, he lets TY - I mean that's okay for...
A: That - that - that...
Q: ...TY to sell and...
A: No that's the whole problems was see he was already havin' like little issues with TY but he never say nothin' to TY 'cause, you know, TY is quiet so T-Rex already seen him sellin' - sellin', uh, something in front of him comin' through the building. But he never said nothing to TY.
Q: How long has T-Rex been around the neighborhood?
A: Um, probably a couple of months.
Q: A couple months.

Voluntary Statement (Rev. 03/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 23

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

A: I don't know if they keep it but everything that he had it was gone.
Q: Now where does Juge live or stay?
A: In T-Rex building- I mean T-Rex, uh, place.
Q: In # 11 right on the corner? Is he still there?
A: Yeah. And then when he come out he had go way down the street to Sherry building where all the other Bloods at.
Q: And that's like the manager's office across the street, right down where I talked to...
A: Yeah the white building.
Q: ...kind of right where...
A: Yeah.
Q: ...I talked to him at.
A: Yeah but, uh, you know, the white - the white apartment building that's where all the Bloods hang out at.
Q: Have you seen Juge with the gun since or no?
A: No. Uh, no I ain't seen him with it but, uh, I heard somebody, uh, one of the Bloods got it in - in Sherry building in the manager building.
Q: Where does she live at? Oh the one over by the office, like...
A: Yeah she stay right there in the white building.
Q: How many Bloods are there over there, is it a lot?
A: Yeah it's a lot of 'em over there.

Voluntary Statement (Rev. 03/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 22

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

A: He ain't been there that long. But...
Q: Normally he - normally he okay or is he always kind of...
A: Normally he all right. First he started off sellin' weed but you know, uh, then he started sellin' dope, powder to crystal, everything. But see the manager, she play a big of part too because she the one who givin' everybody these apartments.
Q: Sherry?
A: Yeah.
Q: Now what did you - have you heard anything since, like I know that obviously Juge took - took T-Rex's gun so there...
A: Mm-hm.
Q: ...was no gun left there for T-Rex...
A: Right.
Q: ...what about his phone? I heard he was on the phone, call his baby mama and then someone has the phone now.
A: Yeah somebody took his phone, somebody took his money out his pocket, somebody took his jewelry off and everything.
Q: Okay.
A: The only one probably could di- could've did that was Juge 'cause he was the - he was the only one - he was the only Blood right there when it happened.
Q: Oh like takin' it just to keep...

Voluntary Statement (Rev. 03/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 24

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Q: What kind of Bloods are they, do you know or have you heard 'em say?
A: Um, one of 'em Crenshaw Mafia, Black P Stone Bloods, uh, CenterView Piru, uh, Athens Park Bloods, uh, 135 Piru, uh...
Q: Now Dre, what's Dre? Is he anything?
A: He a Crip.
Q: He's a Crip. Is he...
A: Yeah.
Q: ...associated or just - or documented somewhere or...
A: Yeah he from Insane Crip, that's in Long Beach, California.
Q: So was there anything about the argument that was gang - like is it Blood...
A: Evil.
Q: ...Cuz goin' on or is it just more business...
A: No just...
Q: ...a more business type argument?
A: No T-Rex the one - the one who kept sayin', "Blood this, Blood that," like he kept sayin', "Blood, Blood, Blood." But Dre wasn't even sayin' cuz or nothin' like that...
Q: No?
A: ...but, you know, everybody know where Dre from.
Q: How long's Dre been around?
A: He been around for a little while. Probably almost a year.
Q: Al- over there a year? It's longer than...

Voluntary Statement (Rev. 03/10)

PA000369

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 26

EVENT #: 180211-3548
STATEMENT OF: Raymond Moore

A: Almost.
Q: ...longer than T-Rex then?
A: Yeah he was over there way before T-Rex.
Q: All right.
A: Then right - right after that that's when Juge and all - everybody else came.
Q: So did you see where Dr- er, T-Rex ended up fallin' down at or - or...
A: Uh, right the- uh, right by the hallway like, you know, right by the gate in the middle between the streets and the gate.
Q: Kind of - was he toward his window or no? Like...
A: Um...
Q: ...you know where that back window of his, kind of?
A: Yeah the - the front window...
Q: Yeah. Yeah.
A: ...he lay right there.
Q: Right underneath there?
A: Yeah.
Q: How close together were - how close together were Dre and T-Rex when the shooting took place?
A: Like this.
Q: Like they're right on top of one another?
A: They was close stance just like this face to face.

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 27

EVENT #: 180211-3548
STATEMENT OF: Raymond Moore

have been getting into it?
A: Mm...
Q: I don't know if Jeremiah's...
A: ...yeah they had got into it.
Q: ...I don't know what his nickname is.
A: Yeah what it was it was between, uh, Jeremiah and, uh, Dre's baby mama. So he came and shot at - shot at the house and that's why Dre shot back at him.
Q: That was all recently, right...
A: Yeah everything...
Q: ...like pretty recent?
A: ...right around that - that time. Like a couple of days down the line between Jeremiah and them.
Q: None of these other folks died though, right? These are all...
A: No.
Q: ...just shootings, right?
A: Yeah only one that died was T-Rex. All right Gerry is there anything you can think of?
Q1: Hey so when - when T-Rex has the gun in his pocket and he's kind of going back and forth...
A: Mm-hm.
Q1: ...and all this conversation's going on before the shooting...

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 28

EVENT #: 180211-3548
STATEMENT OF: Raymond Moore

Q: Does Dre have to put his arm out, extend his arm out or no?
A: Yeah 'cause see 'cause Dre - 'cause T-Rex got - 'cause T-Rex know Dre keep his gun and T-Rex know Dre is gonna shoot so he kept comin' back and forth so, you know, once he got a little arm length that's when Dre pull up out, boom boom boom.
Q: Mm.
A: Shot three time.
Q: What color - do you remember what color Dre's revolver is?
A: It was chrome.
Q: Chrome. You had seen it on him before?
A: Yeah. All the time.
Q: Now has Dre done any other type of shootings over there? I mean is he...
A: Yeah he did a couple of 'em. He, uh, shot the other dude, uh, like last year. Shot the dude name Goo in the foot or in - or - or in the leg.
Q: Goo?
A: Yeah.
Q: Where was that at?
A: That was right there, uh, on Sherwood betw- in the alley.
Q: Why'd he do that?
A: I don't know why.
Q: How about anything else? Anything lately? Did he shoot - did him and Jeremiah

Voluntary Statement (Rev. 05/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 29

EVENT #: 180211-3548
STATEMENT OF: Raymond Moore

A: Mm-hm.
Q1: ...does Juge have his gun out at all?
A: No.
Q1: Okay so his gun isn't visible...
A: No.
Q1: ...the 25 he has is somewhere also?
A: Somewhere else, in his pocket or somethin'...
Q1: Okay.
A: ...but he never - he never brung it out, he never - 'cause he didn't - he didn't even think nothin' was gonna happen.
Q1: Right.
A: Really...
Q1: So...
A: ...I didn't even know nothin' was gonna happen.
Q1: Okay so no one else has a gun out with T-Rex...
A: No.
Q1: ...and then T-Rex gets shot and then Juge takes T-Rex's gun, fires a couple of from that...
A: Mm-hm.
Q1: ...and then - then shoots off his 25?
A: Yeah.

Voluntary Statement (Rev. 05/10)

PA000370

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 29

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Q1: Okay.
A: Yeah.
Q: Was Juge involved in the shit-talking?
A: No.
Q: No?
A: Nobody - see nobody - we was all right there but...
Q: Just - just T-Rex and...
A: And Dre.
Q: ...and Dre just goin' back and forth.
A: They was - they was the only ones goin' back and forth. Nobody else said nothin'.
Q: Was anybody - do you remember anybody drinking out of a Coke can that was on the wall?
A: Mm...
Q: There's a little, you know, that little - right outside the gate there's a little wall?
A: Yeah, uh, it probably a female I think 'cause it was a few females but then they had left...
Q: Mm-hm.
A: ...but whatever, but they wasn't there during the shooting...
Q: No.
A: 'Cause you know - you know when you drink something they'll just throw it down.

Voluntary Statement (Rev. 03/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 31

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

forgot to ask you that you thinks important? Has - have Dre and him got into it before? Is this something like- like's been going on...
A: No.
Q: ...for a long time or...
A: No. They never got into it, they never had words. Like, you know, Dre is respectful sometimes, you know what I mean, and T-Rex he respectful at times too so when this happened everybody was surprised when they was like, "Man that's messed up man. Like what he was on like? You know, why did he went so far?" And I'm like shit that's what I wanted to know. Why did - why did T-Rex come in flexing like that. We just right there chillin' mindin' our own business, we wasn't botherin' nobody.
Q: Yeah everybody has a bad day though, right? I mean...
A: Yeah true that, but then...
Q: ...for whatever reason.
A: ...matter of fact he just came back from California.
Q: T-Rex?
A: Yeah he just came back from California from a concert. But I knew what it was, he was just bad 'cause he seen TY right there. But he nev- he ain't - he not gonna say nothin' to TY always quiet.
Q: Wasn't TY in the building before T-Rex?
A: No T-Rex was in it before him.

Voluntary Statement (Rev. 03/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 30

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Q: And there's - you know there's a little water box next to the landscaping?
A: Mm-hm.
Q: Had that thing been shot before do you - do you know?
A: Not that I know of, no.
Q: So if there was bullet holes in it it might be from the shooting?
A: Yeah they sa- yeah 'cause they said Dre gun was a, uh, 357, and then Juge had the - the little sauce-five, that's why everybody said it's a big hole and it's a little hole.
Q: What, in the box?
A: Yeah in the hole...
Q: Oh...
A: ...yeah in the wall.
Q: Oh in the wall, in the wall.
A: Yeah.
Q: All right.
A: So I didn't even - I didn't even know.
Q: All right. And sorry Gerry, anything?
Q1: No that's it.
Q: T.J?
Q2: No.
Q: All right Ray, is there anything - is there anything else you can think of that I

Voluntary Statement (Rev. 03/10)

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 32

EVENT #: 180211-3549
STATEMENT OF: Raymond Moore

Q: Oh.
A: 'Cause at first, uh, we used to just go hangout right there and, uh, but then he started messin' with my cousin and that's when my cousin moved in and he moved in the same day.
Q: Who stays in # 1, the apartment right across the aisle, like right across the gateway from...
A: Oh, uh, they another Blood.
Q: Blood family?
A: Yeah.
Q: Or is it a...
A: Yeah they from, uh...
Q: Is there a girl that lives there, like a young girl?
A: Yeah it's a girl, yeah it's a young girl. She, uh, her mother an her, uh, step-pops is, uh, from CentarView.
Q: What's her name, do you know the young girl's name?
A: I don't even know her name.
Q: How old is she about?
A: Probably like 15, 16. Probably 15, 16. See because NuNu, she working - the girl NuNu she working with the Bloods tryin' to set us up. Like she...
Q: Set you up, what do you mean like?
A: Like she be tryin' to get us outside at 1:00, 2:00 in the morning...

Voluntary Statement (Rev. 03/10)

PA000371

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT
PAGE 53

EVENT #: 160211-3848
STATEMENT OF: Raymond Moore

Q: Who's Nulu?

A: That's another girl that know - it be like everything that the Crips say she'll go back and tell the Bloods and then what the Bloods say she'll come back and tell some - some of 'em but not everybody.

Q: Mm-hm. All right is there anything else you can think of about this particular shooting that I haven't asked that you thinks important.

A: No. Not right now.

Q: All right. Operator that's the, uh, end of the interview. It's the same location, the same people present. Time is approximately 1605 hours. Thank you.

THIS VOLUNTARY STATEMENT WAS COMPLETED AT COMMERCIAL CENTER
LAS VEGAS, NV ON THE 21ST DAY OF FEBRUARY, 2018 AT 1605 HOURS.

TS:nettranscripts
TS004

*Reviewed by Detective Sanborn PN 5450 on 03-20-18.

**EXHIBIT L / L1 - DEFENDANT'S REPLY
IN SUPPORT OF MOTION TO SUPPRESS
EVIDENCE FOR PRELIMINARY
HEARING**

1 **RPLY**

2 **ADRIAN M. LOBO, ESQ.**
3 Nevada Bar # 10919
4 400 S. 4th Street, Ste. 500
5 Las Vegas, Nevada 89101
6 702.290.8998
7 702.442.2626 (fax)
8 adrianlobo@lobolaw.net
9 Attorney for the Defendant

FILED

2018 MAY 24 P 1:38

JUSTICE COURT
LAS VEGAS NEVADA
BY DEPUTY **SMH**

7 **JUSTICE COURT**

8 **CLARK COUNTY, NEVADA**

9 **THE STATE OF NEVADA,**

10 **Plaintiff,**

11 **vs.**

12 **DEANDRE GATHRITE,**

13 **Defendant**

Case No.: 18F03565X

Dept. No.: 11

14
15 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE FOR**
16 **PRELIMINARY HEARING**

17 COMES NOW the Defendant, DEANDRE GATHRITE, by and through his counsel of
18 record Adrian M. Lobo, Esq., and hereby files this Reply in Support of his Motion to Suppress
19 Evidence for Preliminary Hearing. The State is attempting to substitute a suspect's familiarity
20 with his charges, and with California's extradition process, for a proper Miranda warning. The
21 State provides no authority for this and thus the Defendant's statement must be suppressed for a
22 failure to observe the Defendant's civil rights.

23 DATED this 24th day of May, 2018.

24
25
26 By: 

Adrian M. Lobo, Esq. (#10919)
Attorney for Defendant

18F03565X
REPL
Reply
9472093



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

16
17
18
19
20
21
22
23
24
25
26
27
28

1 None of these factual scenarios have *any* bearing on this situation. The Defendant here was
2 not attending a regularly-scheduled check-in with his probation officer; the Defendant was not
3 being asked to submit to a drug test pursuant to his parole; and the Defendant did not voluntarily
4 come into a police station and give a statement.

5 Instead, the Defendant had *just been arrested* by Metro's "Criminal Apprehension
6 Team,"¹ and placed in the back of a car while handcuffed. The CAT then called the homicide
7 detectives to come speak with Defendant. There is absolutely no question that Defendant was in
8 custody, and was not free to leave. The State even acknowledges all of this, even as it attempts to
9 argue that, somehow, Defendant was not arrested when CAT placed him in handcuffs and put him
10 in the back of a car to wait for homicide detectives:

11 On February 16, 2018, Defendant was located by the LVMPD Criminal
12 Apprehension Team (CAT) and arrested. When Defendant was arrested on
13 the warrant, he had no Nevada charges pending. In fact, after Defendant was
14 questioned and the firearm was recovered, the Defendant was not arrested
15 on either the Murder or Possession of Firearm by Prohibited Person charge.
16 Instead, Defendant was transported to the Clark County Detention Center
17 exclusively on his California warrant.
18 *Id.* at 11 (emphasis added).

19 Thus the State's argument appears to be that while the Defendant *was* arrested, it was not
20 for the instant charges. Instead, because Defendant was arrested on other charges, he was not in
21 custody for the purposes of being questioned.

22 This is exactly the trap that many errant law enforcement officials fall into with regard to
23 Miranda. The *Miranda* case and its progeny do not require a formal arrest; indeed, custodial
24 interrogation often takes place prior to the determination and application of any formal charges.
25 Thus the State's argument that Defendant was not charged with the instant charges until after his

26 ¹ The argument that the arrest by a team specifically formed, trained, and sent forth to apprehend
27 somehow does not amount to custodial restraint on freedom is not only logically disingenuous, it
28 ignores the very name of the team itself.

1 arrest by CAT on the parole warrant is unavailing, and the State's own case law undermines its
2 position (both the case law that is applicable to this situation and the extraneous case law dealing
3 with other factually distinct scenarios). Instead, the State is trying to argue that "the Defendant's
4 status of being in custody on his California felony offense for which he was on parole had no
5 bearing on the independent Nevada investigation" on these charges. *Id.* at 12.

6 Furthermore, the State is putting the proverbial cart before the horse in arguing that
7 Defendant was free to terminate the interrogation at any time. Without a proper Miranda warning,
8 this is an ineffective argument; Miranda is what triggers for a defendant the proposition that they
9 hold the ability to terminate questioning. Indeed, proper Miranda warnings require that a suspect
10 in custody and subject to questioning be advised that they have the right to remain silent- that is,
11 to terminate questioning. In the absence of that warning, the State cannot argue that the Defendant
12 was free to do precisely what he had not yet been advised he could do- that is the very essence of
13 a Miranda warning.

14 The actions of the detectives also undermine the State's argument of a non-custodial
15 interrogation. While the detectives may have created the impression that the Defendant was not
16 under arrest, this is undermined by their other actions as set forth in the underlying Motion: not
17 allowing Defendant to leave (they make it a point to tell him to remain, and they will retrieve
18 things from the apartment); the statements wherein they "allow" Defendant to hug his child again
19 before they take him; and where the Detectives play dumb about Defendant's California warrant
20 as they question him *with CAT members looking on*. This "mummer's farce" of a show of how
21 free the Defendant was (despite having just been arrested by a team whose sole job it is to locate
22 suspects and arrest them on warrants) is undermined by the Defendant's own cognition of the
23 entire charade: "'Cause I have a warrant for Cali, so I know I'm goin'..." *Id.* at 13.

24 No matter how much the detectives may have tried to create the impression that they were
25 all just having a casual chat, the Defendant was still very much in custody (could *not* leave), and
26 even acknowledged that he was in custody. Any argument to the contrary simply is not supported
27 by the facts of this case.

Lastly, as perhaps the most salient example of custodial interrogation, the detectives ultimately *did* give Miranda warnings to the Defendant once they realized they had elicited incriminating statements. If the State's position is that Miranda was not required, it is contradicted by the detective's decision to provide it once Defendant had given his statements.

For the foregoing reasons, Defendant was in custody and the lack of Miranda warning requires suppression of his statement.

Regardless, the State is arguing that the statements were voluntarily given- first, because the environment was not coercive, and because the Defendant waived his rights under *Miranda*.

The environment absolutely was coercive. Again, Defendant had just been arrested by CAT and then made to wait while the detectives were summoned to speak with him. The detectives then questioned him at length, while prompting the Defendant that they would let him hug his child again; let him smoke a cigarette again; and that if Defendant did not tell them what they wanted to know, it could result in his girlfriend's apartment being torn apart during a search.

The nature of the questioning itself is very coercive. Defendant is under arrest for a mere parole violation, of which Defendant knows he may face extradition, do six months in California corrections, and then be re-released as before, multiple times. Suddenly, Defendant has two homicide detectives questioning him extensively, repeatedly, and with the threat of those charges if he does not tell them “his side” of the story. The seriousness of the case is implied in the way detectives gingerly let him hug his child again (on the implication that he may not see them for some time after this). The detectives also tell him that if he does not consent to a search, the apartment—which is not Defendant’s abode, but rather his girlfriend’s and his children’s home—will be torn apart and left a mess for her to deal with after they have left.

Ignoring for a moment the inherently coercive environment of an arrest by a Criminal Apprehension Team, the questioning by sophisticated, trained detectives, and the possibility of multiple felony charges, the detectives then decided to throw in carrot-on-a-stick tactics of allowing “going-away” hugs with a child, and low-key threatening to trash the child’s and mother’s

1 apartment if Defendant did not cooperate. If this is not inherently coercive in and of itself, then it
2 begs the question of what constitutes coercive interrogation.

3 3. *The Defendant Did Not Have Actual Authority Over the Wyandotte Address*

4 Once more, the State's own case law undermines its position in this matter. Simply,
5 Defendant was there merely to watch his child and did *not* have any actual authority over the
6 property. Nor can the State claim any subjective, good faith belief by the detectives that Defendant
7 had actual authority, as this was specifically disclaimed by Defendant, and *acknowledged* by the
8 detectives.

9 As set forth in the Motion, Defendant informed the detectives multiple times that it was
10 not his apartment, he was not the primary resident, and that he was merely there in itinerant,
11 transient fashion. Not only did detectives know that Defendant did not live at that address, they
12 *also* knew where he *did* live- At Van Patten, in the apartments where the underlying shooting took
13 place. This fact was not only acknowledged by detectives, but it was memorialized in their report
14 on the shooting.

15 The State's Opposition verifies this, without even realizing it: "Defendant further states
16 that he and his girlfriend have been together for five (5) years, share two children together, *and*
17 *see each other when they can.*" *St. 's Opp.* at 19 (emphasis added). People who live together do not
18 "see each other when they can"- ergo Defendant was merely a guest at Wyandotte and had no
19 authority to consent to the search. Furthermore, "Defendant tells Detectives that his girlfriend is
20 the only family he has in Las Vegas and that he stays with their baby *when she goes to work.*" *Id.*
21 (emphasis added). Somebody who lives at a resident does not stay there only when the primary
22 resident "goes to work"- ergo Defendant was merely a guest at Wyandotte and had no authority to
23 consent to the search.

24 Nor is the State's position convincing- that detective's subjective understanding was
25 sufficient to rely on Defendant's apparent consent. Again, as cited in the Motion, the detectives
26 acknowledge that the apartment was the girlfriend Tia's home, and not the Defendant's. Any
27 argument of a subjective reliance is undermined by this acknowledgement, and the detectives were
28

1 obligated to secure a warrant (in advance, not subsequent to defective consent), or wait for Tia. In
2 fact, the detectives did so acknowledge that they could wait for Tia to return home. *Id.* at 18. Again,
3 this was tempered by the coercive suggestion to Defendant that if he did not consent, the apartment
4 would be torn apart and wrecked, leaving Tia and Defendant's children to clean up, and with the
5 risk that their property would be broken or damaged.

6 As set forth in the Motion, the property at Wyandotte was under Fourth Amendment
7 protections, with the power of waiver and/or consent belonging *only* to the girlfriend, Tia.
8 Therefore, any consent given by Defendant was insufficient, and the resulting entry and search of
9 the apartment without a search warrant was improper. As such, any evidence, including the firearm
10 in question, must be suppressed and deemed inadmissible at preliminary hearing.

11 *4. Suppression is Appropriate*

12 The State's argument here is premised on the fact that no Miranda violation occurred, that
13 the consent was valid, and that the weapon would have been found via inevitable discovery.
14 Obviously these are hotly contested matters, and indeed the basis of the Motion and related
15 pleadings herein before this Court. Therefore if the Court finds that a Miranda violation did occur,
16 and/or that the consent to search was invalid, then the appropriate remedy is suppression.

17 The inevitable discovery argument is more concerning, as it is a quick-coat of varnish over
18 the defective warrant itself. The State's entire argument is as follows:

19 Detectives acquired a telephonic search warrant for the apartment where the
20 firearm was previously recovered. The basis for establishing probable cause
21 to search the apartment did not include any of the Defendant's statements
22 or the firearm recovered. Thus, even if this court were to find that
23 Defendant's statement were illegally obtained, police had an independent
24 basis to obtain a search warrant for the apartment whereby the firearm
25 would have been recovered.

26 *St. 's Opp.* at 25.

27 However, the warrant application, attached to the Motion as Exhibit E (and again here for
28 convenience), tells a different story:

Through my training and experience I've learned the examination of the
crime scene and the recovering of the above described property is necessary

1 in providing the cause and manner of death, the circumstances involved
2 related to the death, and to potentially identify the perpetrator of the crime.
3 A thorough microscopic crime scene search of the premises is necessary in
4 order to establish the location of the crime, its extent, and the circumstances
5 surrounding the crime. This search may involve the damaging or removal
6 of items such as carpeting, wallboard, and other interior/exterior surfaces.
7 The evidence of dominion and control as described is necessary in
8 establishing dominion and control over the premises and often assists in
9 identifying the perpetrator. Such evidence is normally left or maintained
10 upon or within the premises.

11 *Ex. E – Warrant Application* at 4.²

12 Then, incredibly, the detective made the following statement to the judge: “Just one second,
13 Judge. I want to make sure that I noted earlier that we’re looking for all handguns and ammunition
14 and the cell phone that was taken off the person of Gathrite in our Search Warrant.” *Id.* at 5.

15 Accordingly, the warrant is defective. First, it indicates to the judge that the Defendant had
16 dominion and control over the area, despite the apartment having been established as Tia’s primary
17 residence and the Defendant as only an itinerant, transient guest. Second, the warrant application
18 tips the judge off that certain items already have been found- specifically, the handgun,
19 ammunition, and cell phone. Third, the warrant application misrepresents Wyandotte as the scene
20 of the crime; that the evidence sought at Wyandotte would be crucial to establishing “the location
21 of the crime, its extent, and the circumstances surrounding the crime”- all of which were already
22 known to detectives since the shooting had occurred at Van Patten, and Defendant by this point
23 had already given them numerous statements to establish all of details.

24 Additionally, the warrant application contained additional details not germane to the
25 investigation, but which may have had a prejudicial, coercive effect on the judge’s decision.
26 Specifically, the warrant application sought “gang paraphernalia”- a term not only undefined, but
27

28 ² The first, second, and last pages of the Warrant Application are not numbered, and the third page
is numbered as “2”. For clarity, the Warrant Application will be treated as pages 0 through 8.

1 for which detectives never discussed or even attempted to search for when they re-entered the
2 apartment. *Id.* at 0, 3.

3 Lastly, the warrant application falsely represented to the judge that “The apartment which
4 Gathrite was removed from has been secured awaiting the Search Warrant for the items we have
5 listed earlier.” *Id.* at 4. Obviously, the apartment not only was not secured (detectives went back
6 in to recover cigarettes, and to recover the firearm), but the entire purpose of the warrant was
7 retrospective in nature in that the items recovered were “NOTHING,” a buccal swab, and the cell
8 phone already recovered from Defendant. *Id.* at 8.

9 As such, State’s representation that the warrant was fully information and thus based on
10 valid probable cause is disingenuous. As is clear from the application itself, the detectives sought
11 to cure their defective consent by representing that the apartment itself was the scene of a crime;
12 that “gang paraphernalia” might be found there, despite not being part of their investigation or
13 reason for investigating the crime; that other evidence necessary to the case would be found there,
14 despite having everything they needed from Defendant’s statements and the recovery of the
15 firearm; and by finding “NOTHING” in a cursory, post-warrant search of the apartment.

16 Lastly, the warrant application does not even list the firearm and ammunition recovered
17 prior to the warrant application. *Id.* at 8.

18
19
20
21
22
23
24
25 //

26 //

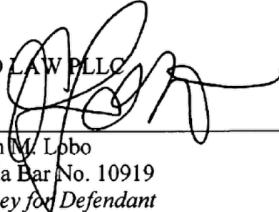
27 //

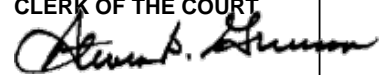
1 **CONCLUSION**

2 Based on the foregoing, Defendant moves this court to suppress any statements made to
3 detectives, as Defendant was not properly advised of his Miranda rights, and even after such
4 attempt to Mirandize Defendant his waiver of rights was not knowing and voluntary. Furthermore,
5 evidence recovered from the Wyandotte address, to include the firearm, must be suppressed as
6 Defendant did not have authority over the property sufficient to consent to a search of the premises.
7 The evidence recovered is not subject to inevitable discovery, as the warrant details were
8 improperly presented to the judge.

9 DATED this 24th day of May, 2018.

10
11 LOBO LAW PLLC

12 By: 
13 Adrian M. Lobo
14 Nevada Bar No. 10919
15 Attorney for Defendant
16
17
18
19
20
21
22
23
24
25
26
27
28



DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DEANDRE GATHRITE,

Defendant.

CASE NO. C-18-334135-1

DEPT. NO. III

BEFORE THE HONORABLE DOUGLAS W. HERNDON, DISTRICT COURT JUDGE

TUESDAY, SEPTEMBER 25, 2018

RECORDER'S TRANSCRIPT OF PROCEEDINGS
DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS AND
DEFENDANT'S MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT

APPEARANCES:

For the State:

NICOLE J. CANNIZZARO
Chief Deputy District Attorney

For the Defendant:

ADRIAN LOBO, ESQ.

RECORDED BY: SARA RICHARDSON, COURT RECORDER

1 LAS VEGAS, NEVADA, TUESDAY, SEPTEMBER 25, 2018, 11:41 A.M.

2 * * * * *

3 THE COURT: So let's do Gathrite on page 2. He's present in custody.
4 Ms. Lobo's here on his behalf. Ms. Cannizzaro on behalf of the State. So
5 here -- here's why I kind of called it out of order, first off, I didn't have a
6 chance to read the replies because I didn't get them until this morning and I
7 didn't get here until late because of our other meeting. That being said, my
8 sense is a lot of what's in the petition and certainly what's in the motion to
9 dismiss stems from the allegation of failure to advise of Miranda, fruit of the
10 poisonous tree, obviously a request to suppress everything, fair?

11 MS. LOBO: In the State's opposition.

12 THE COURT: Well, I mean, in --

13 MS. LOBO: In -- in -- or the underlying, yeah.

14 THE COURT: -- in your moving papers as well it's alleging that
15 Judge Goodman granted a motion to suppress, State never should have put this
16 on at the grand jury, we're still in a state of constitutional considerations that
17 would warrant, you know, suppressing it and therefore dismissing it, right?

18 MS. LOBO: Yes, and then in my reply I address some of, like, the
19 procedural -- I analogized essentially to different case law. So I would like the
20 Court to consider and if you haven't --

21 THE COURT: Well, all I was getting at was I think it needs to have a
22 hearing. So before we get into any of the other allegations from the writ, I
23 mean, the core issue in my mind, is getting to the motion to dismiss and the
24 suppression issues which, in my mind, I think is appropriate to have an
25 evidentiary hearing. I don't know how many witnesses or how long you-all

1 think you need for that, I can set it, you know, any time in the next week or so
2 if you're available. Our trial kind of went away.

3 MS. LOBO: Well, and it -- yeah, it would be my recommendation at least
4 or -- at least like my position that we would like to be heard on the writ as to
5 the applicability as to whether or not the justice court has the authority given
6 the Grace decision.

7 THE COURT: Right.

8 MS. LOBO: And how that applies to the statutory authority and if
9 Your Honor then decides that you know, it's not binding --

10 THE COURT: Right.

11 MS. LOBO: -- and that it was proper and that we're moving forward in
12 that direction, then I would want to submit additional moving papers. But it
13 would be my preference to do the writ argument.

14 THE COURT: So I think the justice court does have authority, pursuant to
15 Grace, that was my case.

16 MS. LOBO: Right. I -- I --

17 THE COURT: And I'm the one that invited Robert O'Brien to appeal it
18 because I thought they should have that discretion. But I also think if you're
19 going to do that then maybe they should have had an evidentiary hearing as
20 well, maybe, maybe not.

21 But ultimately what I think about the suppression issue is pertinent
22 to if -- if Judge Goodman was right and if there is any carry forward to the
23 State having some obligation to then not do -- not present it at the grand jury.
24 If I disagree with it, then it's really moot and they present it to the grand jury.
25 But at least in my mind and what I've read so far, and I haven't seen the replies

1 yet, it starts with that level of an evidentiary hearing about the suppression
2 issues. So that's kind of the thing that I want to get out of the way first.

3 MS. LOBO: I would object, just for the record, I respect the Court, but I
4 would object to that based upon the way that the arguments are laid out in the
5 pleadings. I actually had an opportunity to listen to the oral argument last night
6 because I figured it's on point. I wanted to hear what the justices asked in the
7 Grace oral argument and I think that it's pretty on point to the writ, but I
8 understand, I respect the Court's ruling if you want the hearing on the
9 evidentiary issue, but that goes straight to the heart of my argument is that
10 there were procedural mechanisms that were in place for the State to use.

11 The proper thing to have, at least from our position, would have
12 been to have an appeal and Your Honor would have decided it or Doug Smith
13 would have decided it, actually I think it would have been you because it was a
14 homicide. So to appeal it that way and the way that I've seen it done, at least
15 when variations of these issues have come up is that they do it concurrent. I
16 don't doubt anything that they have the right to go to the grand jury. But I
17 usually see it concurrent, you know, pleading there and then an appeal going on
18 at the same time in other cases. And this was not done in this case. So there
19 was no reconsideration. There was other appropriate mechanisms to challenge
20 Goodman's ruling and it's our position that he didn't need an evidentiary hearing
21 and it's part of my argument as to how thorough and why it took so long to get
22 there because I knew something nefarious was going on.

23 THE COURT: Well, I'm not disputing that, you know, what Eric thought
24 at the time that he made his ruling. I just know that from my perspective, me
25 deciding that issue is at the core of moving forward with the other thing. So it

1 just seems to be appropriate to have an evidentiary hearing. So we can, like I
2 said, we can set it any time in the next week if you-all are available.

3 MS. CANNIZZARO: And, Your Honor, the only thing the State would ask
4 for is two weeks so we can get subpoenas. And I don't know who this case is
5 going to be assigned to. It was Ms. Overly's case. She has since been
6 reassigned to another team, so this case will have to be reassigned as well. I'm
7 obviously standing in for today's purposes to sort of help. I don't know if I will
8 inherit this case or another deputy will inherit this case.

9 THE COURT: Okay.

10 MS. CANNIZZARO: But we would probably just need a little bit of time
11 even for myself to kind of make sure I'm up to speed on all of that as well.

12 THE COURT: How about like the 8th, Monday the 8th?

13 MS. LOBO: Well, and, Judge, if I can just for the record, I know that the
14 Court's going to set this, but I'm inclined to ask for a stay to take this exact
15 issue up. I don't believe an evidentiary hearing was necessary and that just the
16 way it resides within Your Honor's sound discretion, if this motion had been
17 brought here, it resides in that judge's sound discretion at the justice court
18 level.

19 THE COURT: Okay. But you're taking a stay to appeal something where
20 I haven't even issued a decision?

21 MS. LOBO: No, no, no. So you want to go forward with an evidentiary
22 hearing?

23 THE COURT: To decide what I think about the constitutional issue that's
24 being raised that -- that you're alleging that --

25 MS. LOBO: Right.

1 THE COURT: -- the evidence should have been suppressed.

2 MS. LOBO: I understand.

3 THE COURT: That Judge Goodman was right in suppressing it and that
4 the State shouldn't have been able to take that evidence to the grand jury. And
5 I'm saying I want to decide that issue for myself and I think it needs to have an
6 evidentiary hearing rather than just looking at the transcript of the prelim.

7 MS. LOBO: Okay.

8 THE COURT: So, I mean, I'm going to -- I think you're correct in asking
9 for the stay. I would deny the stay. But you can certainly file the writ and --
10 and request a stay from the Supreme Court. So if --

11 MS. LOBO: Okay. I have an order.

12 THE COURT: Okay.

13 MS. LOBO: For --

14 THE COURT: If they --

15 MS. CANNIZZARO: And I --

16 THE COURT: If they grant that in the next couple of weeks, then we'll
17 vacate whatever hearing we have and -- and see what they're going to do. My
18 sense would be they would kind of say their intervention isn't warranted
19 because I haven't really issued a decision yet, so.

20 MS. LOBO: Right.

21 THE COURT: But so let's hold off on that a second.

22 MS. LOBO: Okay. Okay.

23 THE COURT: Let's just see, how about Monday the 8th? Can we do
24 Monday the 8th?

25 MS. CANNIZZARO: I would tentatively say yes, Your Honor.

1 THE COURT: Okay.

2 MS. CANNIZZARO: That should give us enough time to at least

3 subpoena the case.

4 THE COURT: And get somebody assigned to it.

5 MS. CANNIZZARO: And get someone --

6 THE COURT: Okay.

7 MS. CANNIZZARO: -- to handle it.

8 THE COURT: What about, Adrian, are you available on that date?

9 MS. LOBO: Let's see.

10 THE COURT: We'd be looking at maybe 1:00 o'clock if you're available.

11 MS. LOBO: I could do 1:00 o'clock on that day.

12 THE COURT: Okay. So let's plan on that. And then obviously if you file

13 the writ or request a stay from the Supremes and they grant that, then we'll

14 just vacate that and await their decision.

15 MS. LOBO: Okay.

16 THE CLERK: That will be October 8th, 1:00 p.m.

17 MS. LOBO: All right. Thank you.

18 THE COURT: Okay. Thank you.

19 MS. LOBO: And then if I can approach, I brought an order but I didn't

20 know if it would be as to which issue.

21 THE COURT: Yeah. What, exactly what is it that --

22 MS. LOBO: Just to, I had actually the grant or the denial so I don't know

23 if the Court's comfortable with interlineation.

24 THE COURT: Sure

25 . MS. LOBO: As to --

1 THE COURT: Let me take a look.

2 MS. LOBO: Okay.

3 Thank you.

4 THE COURT: All right. You can -- you can sign at the bottom.

5 MS. LOBO: Yes.

6 THE COURT: And just file it open court.

7 MS. CANNIZZARO: And can -- may I inquire as to what the order is that
8 was sent --

9 THE COURT: The order is just a motion -- a motion to stay proceedings
10 was denied and I interlineated it to put your name in there instead of Sarah's.

11 MS. LOBO: It doesn't say the basis on it.

12 THE COURT: I wrote the date in.

13 MS. CANNIZZARO: That's fine. I just wanted to make sure because I
14 wasn't sure about what it was. That's fine, Your Honor.

15 THE COURT: Yeah, no, you're okay. It's just a generic order saying they
16 moved for a stay and I denied it.

17 PROCEEDING CONCLUDED AT 11:51 A.M.

18 * * * * *

19

20

21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-video recording of this proceeding in the above-entitled case.

23

24

25



SARA RICHARDSON
Court Recorder/Transcriber

SEP 25 2018

BY: Kory Schlitz
KORY SCHLITZ, DEPUTY

1 **ORDR**

2 **ADRIAN M. LOBO, ESQ.**

3 Nevada Bar #10919

4 **LOBO LAW PLLC**

5 400 S. 4th Street Suite 500

6 Las Vegas, Nevada 89101

7 Phone: (702) 290-8998

8 Fax: (702) 442-2626

9 Email: adrianlobo@lobolaw.net

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 THE STATE OF NEVADA,)

13 Plaintiff,)

14 vs.)

15 DEANDRE GATHRITE,)

16 Defendant,)

CASE NO. CASE NO. C-18-334135-1

DEPT. NO. III

17 **ORDER DENYING DEFENDANT'S MOTION TO STAY PROCEEDINGS**

18 DATE OF HEARING:

19 TIME OF HEARING:

20 THIS MATTER having come on for hearing before the above entitled Court on
21 the 25 day of September, 2018 the Defendant being present, represented by ADRIAN M.
22 LOBO, ESQ., the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney,
23 through ~~SARAH OVERLY~~ ^{NICOLE CANIZZARO}, Chief District Attorney, and the Court having heard the arguments of
24 counsel and good cause appearing therefor,

25 IT IS HEREBY ORDERED that DEFENDANT'S MOTION TO STAY PROCEEDINGS
26 shall be, and is, DENIED.

27 DATED this 25 day of September, 2018.

28 DISTRICT JUDGE

Submitted by:

LOBO LAW, PLLC

By

ADRIAN M. LOBO (#10919)

Lobo Law PLLC

400 South Fourth Street Suite 500

Las Vegas, NV 89101

Telephone: (702) 290-8998

Facsimile: (702) 442-2626

Attorney for Defendant

C-18-334135-1
ODM
Order Denying Motion
4782585



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANDRE GATHRITE,

Petitioner,

**THE HONORABLE JUDGE
DOUGLAS W. HERNDON,
EIGHT JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA**

Respondent,

And

THE STATE OF NEVADA,
Real Party in Interest.

Electronically Filed
Oct 02 2018 11:31 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Docket No: 77081

DISTRICT COURT CASE NO.: CASE NO. C-18-334135-1

**APPENDIX TO PETITION
FOR WRIT OF PROHIBITION**

(VOLUME II)

**ADRIAN M. LOBO
Lobo Law PLLC
Nevada Bar No. 10919
400 South 4th Street, Suite 500
Las Vegas, Nevada 89101
Office: (702) 290-8998
Fax: (702) 442-2626**

**THE HONORABLE JUDGE
DOUGLAS W. HERNDON
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Office: (702) 671-4312
Fax: (702) 671-4311**

**STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar No. 1565
Regional Justice Center
200 Lewis Avenue
PO Box 552212
Las Vegas, Nevada 89155
Office: (702) 671-2500**

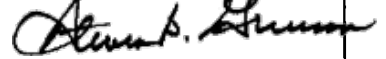
ATTORNEY FOR THE PETITIONER

ATTORNEYS FOR THE STATE

INDEX

VOLUME	DOCUMENT NAME/FILE DATE	PAGE NO.
1	Criminal Complaint Justice Court Case No. 18F03565X (February 26, 2018)	PA000001-PA000002
1	Register of Actions Justice Court Case No. 18F03565X.....	PA000003-PA000005
1	Indictment District Court Case No. C-18-334135-1 (August 15, 2018)	PA000006-PA000008
1	Petition for Writ of Habeas Corpus District Court Case No. C-18-334135-1(September 7, 2018).....	PA000009-PA000034
	EXHIBIT A – Officer’s Report.....	PA000035-PA000048
	EXHIBIT B – Declaration of Arrest.....	PA000049-PA000050
	EXHIBIT C – Reporter’s Transcript of Proceedings for 05/25/18 Justice Court Case No. 18F03565X.....	PA000051-PA000055
	EXHIBIT D – Email Correspondence between counsel and Deputy District Attorney Sarah Overly (Dated 04/11/18).....	PA000056-PA000057
	EXHIBIT E – CAD Log Event No. 18021600-2092.....	PA000058-PA000062
	EXHIBIT F - Defendant’s Transcribed Statement for 02/16/18.....	PA000063-PA000134
	EXHIBIT G – Search Warrant, Application and Return	PA000135-PA000144
	EXHIBIT H – Grand Jury Transcript of Proceedings for 08/14/18 District Court Case No. C-18-334135-1	PA000145-PA000170
	EXHIBIT I - Marcum Letter sent to the State of Nevada with enclosures (Dated 06/20/18)	PA000171-PA000178
1	Return on Petition for Writ of Habeas Corpus (Exhibits Omitted) District Court Case No. C-18-334135-1 (September 21, 2018).....	PA000179-PA000211
1	Reply in Support of Petition for Writ of Habeas Corpus District Court Case No. C-18-334135-1 (September 24, 2018).....	PA000212-PA000224
1	Defendant’s Motion to Dismiss for Prosecutorial Misconduct District Court Case No. C-18-334135-1 (September 7, 2018) (All Exhibits Incorporated from Defendant’s Petition for Writ of Habeas Corpus as A1-L1).....	PA000225-PA000245
2	State’s Opposition to Defendant’s Motion to Dismiss for Prosecutorial Misconduct District Court Case No. C-18-334135-1 (September 20, 2018).....	PA000246-PA000262
2	Reply in Support of Defendant’s Motion to Dismiss for Prosecutorial District Court Case No. C-18-334135-1 (September 24, 2018).....	PA000263-PA000278

VOLUME	DOCUMENT NAME/FILE DATE	PAGE NO.
	EXHIBIT A-1 - DNA Report (Dated 09/19/18).....	PA000279-PA000281
	EXHIBIT B-1 - State's Motion to Continue Justice Court Case No. 18F03565X (June 8, 2018).....	PA000282-PA000286
	EXHIBIT C-1 - Reporter's Transcript of Dismissal Justice Court Case No. 18F03565X (June 29, 2018).....	PA000287-PA000289
	EXHIBIT D-1 – San Bernardino Docket for Case FSB18001710	PA000290-PA000297
2	Defendant's Supplemental Exhibits J/J1 – L/L1 to Petition for Writ of Habeas Corpus and Defendant's Motion to Dismiss for Prosecutorial Misconduct District Court Case No. C-18-334135-1 (September 28, 2018).....	PA000298-PA000314
	EXHIBIT J/J1 – Defendant's Motion to Suppress Evidence Acquired in Violation of the Fourth and Fifth Amendment Justice Court Case No. 18F03565X (Exhibits Omitted).....	PA000315-PA000336
	EXHIBIT K/K1 – State's Opposition to Defendant's Motion to Suppress Evidence Justice Court Case No. 18F03565X (Exhibits Omitted with the exception of Exhibit 5 – Statement of Raymond Moore).....	PA000337-PA000372
	EXHIBIT L/L1 – Defendant's Reply in Support of Motion to Suppress Justice Court Case No. 18F03565X (Exhibits Omitted)	PA000373-PA000383
2	Recorder's Transcript of Hearing (September 25, 2018) District Court Case No. C-18-334135-1.....	PA000384-PA000391
2	Order Denying Defendant's Motion to Stay Proceedings District Court Case No. C-18-334135-1 (September 25, 2018)	PA000392



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 SARAH E. OVERLY
6 Deputy District Attorney
7 Nevada Bar #012842
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 DEANDRE GATHRITE,
13 #2592432

14 Defendant.

CASE NO: C-18-334135-1

DEPT NO: III

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR**
16 **PROSECUTORIAL MISCONDUCT**

17 DATE OF HEARING: SEPTEMBER 25, 2018
18 TIME OF HEARING: 9:00 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through SARAH E. OVERLY, Deputy District Attorney, and hereby
21 submits the attached Points and Authorities in Opposition to Defendant's Motion To Dismiss
22 For Prosecutorial Misconduct.

23 This Opposition is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

26 //

27 //

28 //

//

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On February 26, 2018, Deandre Gathrite ("Defendant") was charged by way of
4 Criminal Complaint with one (1) count of Murder with Use of Deadly Weapon (Category A
5 Felony) and one (1) count of Ownership or Possession of Firearm by Prohibited Person
6 (Category B Felony) in Justice Court Case No. 18F03565X. Defendant was arraigned on
7 February 28, 2018 and the Public Defender was appointed. Preliminary Hearing was scheduled
8 for March 23, 2018. Subsequent to discovering a conflict in representing Defendant, the Public
9 Defender withdrew as counsel and Adrian Lobo, Esq. was appointed. The Preliminary Hearing
10 was reset for April 5, 2018 where defense sought to continue the hearing. The Preliminary
11 Hearing was reset for April 20, 2018. The Defense sought to continue the preliminary hearing
12 and the hearing was reset for May 11, 2018. On May 9, 2018 both parties continued the
13 preliminary hearing by means of stipulation and the hearing was reset for June 8, 2018.

14 On May 10, 2018, Defense filed a motion to suppress evidence. The State filed an
15 Opposition on May 23, 2018. On May 25, 2018, the Justice Court ruled that the Defendant's
16 statements provided to police and the firearm recovered by police suppressed. On June 8, 2018,
17 the State filed a Motion to Continue based on the unavailability of an essential witness,
18 Raymond Moore. The Court granted the motion and the preliminary hearing was reset for June
19 29, 2018 with a status check on negotiations set for June 21, 2018.

20 On June 21, 2018, both parties indicated the case was not resolved and that the defense
21 counsel had received Marcum Notice from the State via email on June 19, 2018. On June 29,
22 2018, the State made a Motion to Dismiss the case and made additional representations
23 regarding the unavailability of witness Raymond Moore. Defense made an oral motion to
24 dismiss the case with prejudice, which was denied by the Justice Court. The case was instead
25 dismissed without prejudice pursuant to the State's Motion.

26 On August 15, 2018, an Indictment was filed charging Defendant with one (1) count of
27 Ownership or Possession of Firearm by Prohibited Person (Category B Felony) stemming
28 from the facts associated with the prior Justice Court case. The Defendant was arraigned in

1 District Court on September 4, 2018 where he pled not guilty and invoked his right to trial
2 within sixty (60) days. Jury trial is currently scheduled for November 13, 2018, with a
3 respective Calendar Call date of November 8, 2018.

4 On September 7, 2018, the Defense filed the instant Motion To Dismiss For
5 Prosecutorial Misconduct. The State responds as follows.

6 **STATEMENT OF FACTS**

7 On February 16, 2018, Detectives with the Las Vegas Metropolitan Police Department
8 were conducting an investigation that led them to an apartment complex located at 2630
9 Wyandotte Street in Clark County. "Grand Jury Transcript" GJT, 7-8. Pursuant to that
10 investigation, Detectives made contact with the Defendant¹ at Apartment #1 of that apartment
11 complex. GJT, 7-8. The Defendant was not in custody pursuant to the investigation police
12 were conducting but was in custody on separate charges. GJT, 8. Detective Mauch and
13 Grimmitt spoke with the Defendant in an unmarked police vehicle. GJT, 9. Defendant
14 indicated he was involved in the current shooting investigation being conducted by police and
15 revealed that he was in possession of a revolver involved in that shooting. GJT, 9. The
16 Defendant indicated that the revolver was located in Apartment #1, the apartment he was
17 residing at with his girlfriend and child. GJT, 11.

18 Specifically, the Defendant indicated the firearm was located in the duct work inside
19 the air conditioning unit of the apartment. GJT, 12. Defendant subsequently gave police
20 consent to enter the apartment and recover the firearm from the air vent. GJT, 12. Detective
21 DePalma entered the apartment and recovered an Amadeo Rossi 357 Magnum, with serial
22 number F379181 from inside the hallway air conditioning vent. GJT, 18.

23 **LEGAL ARGUMENT**

24 Defendant primarily contends the State engaged in prosecutorial misconduct because it
25 presented evidence the Justice Court ruled could not be admitted at the time of a preliminary
26

27 ¹ Defendant is a convicted felon, having previously been adjudicated in 2012 of Assault with
28 Deadly Weapon (Category B Felony) and Discharging Firearm At or Into Vehicle (Category
B Felony) in the Eighth Judicial District Court of Clark County, Nevada in Case No. C271196-
1. GJT, 5; Exhibit 3.

1 hearing. Further, Defendant argues the State engaged in misconduct because it impermissibly
2 introduced character evidence in violation of NRS 48.045, and asks this Court to dismiss the
3 instant case in its entirety.² First, a motion to dismiss is an inappropriate vehicle to challenge
4 the validity of a Grand Jury Indictment, and thus this Motion should be denied in its entirety.
5 Second, dismissal is not warranted because the State did not engage in prosecutorial
6 misconduct, and dismissal of an indictment, even on the basis of actual governmental
7 misconduct is “an extreme sanction that should be utilized infrequently.” Lay v. State, 110
8 Nev. 1189, 1198-99, 886 P.2d 448, 454 (1994) (citing Sheriff v. Keeney, 106 Nev. 213, 216,
9 791 P.2d 55, 57 (1990)). Accordingly, the State requests this Court to deny the instant Motion
10 in its entirety.

11 **I. DEFENDANT’S MOTION TO DISMISS IS AN IMPROPER PROCEDURE**
12 **FOR DISMISSING THE INSTANT INDICTMENT, AND SHOULD BE**
13 **DENIED IN ITS ENTIRETY.**

14 In the instant Motion, Defendant is ostensibly challenging the probable cause
15 determination made by the grand jury, albeit on the basis the State engaged in prosecutorial
16 misconduct. Although the pleading is entitled a “Motion to Dismiss”, it is in fact seeking a
17 remedy provided by way of a pre-trial petition for writ of habeas corpus. NRS 34.710 provides
18 that, “A district court shall not consider any pretrial petition for habeas corpus . . . based on
19 alleged lack of probable cause or otherwise challenging the court’s right or jurisdiction to
20 proceed to the trial of a criminal charge unless a petition is filed in accordance with NRS
21 34.700.” NRS 34.710(1)(a) (2017).

22 As indicated in NRS 34.710(1)(a), any pretrial petition for writ of habeas corpus is
23 governed by the requirements of NRS 34.700. NRS 34.700 states in whole:

24 1. Except as provided in subsection 3, a pretrial petition for a writ of
25 habeas corpus based on alleged lack of probable cause or otherwise
challenging the court's right or jurisdiction to proceed to the trial of a
criminal charge may not be considered unless:

26 ² The State notes these arguments are also detailed at length in Defendant’s Pretrial Petition
27 for Writ of Habeas Corpus. While the State’s position is that a Motion to Dismiss is an
28 improper vehicle for challenging the validity of a Grand Jury Indictment, as discussed, *infra*,
the State nevertheless addresses Defendant’s arguments for dismissal here. The State also will
address the substance of these arguments in the context of its Return to Defendant’s Petition.

1 (a) The petition and all supporting documents are filed within 21 days
after the first appearance of the accused in the district court; and

2 (b) The petition contains a statement that the accused:

3 (1) Waives the 60-day limitation for bringing an accused to trial; or

4 (2) If the petition is not decided within 15 days before the date set for
trial, consents that the court may, without notice or hearing, continue
the trial indefinitely or to a date designated by the court.

5 NRS 34.700(1) (2017). The Defendant's Motion to Dismiss fails to comply with NRS 34.700,
6 and as such should be denied.

7 **II. THE STATE DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT.**

8 **A. The State Did Not Commit Misconduct In Presenting Defendant's**
9 **Statement To The Grand Jury.**

10 Defendant's primary contention focuses on the State's presentation of Defendant's
11 statements to police as evidence at the Grand Jury. In this case, the Justice Court entertained
12 Defendant's Motion to Suppress evidence prior to the preliminary hearing in this case, and
13 during that hearing, the Justice Court reviewed arguments of counsel and ruled the statement
14 could not be admitted at the time of the preliminary hearing. It bears noting, the Justice Court
15 did not conduct a hearing to elicit testimony from the detectives involved in this case, and
16 relied solely upon the arguments made by counsel. Additionally, although the Justice Court
17 ruled on the suppression motion, a preliminary hearing never took place in the instant case,
18 and the motion to suppress was filed and heard separately from the probable cause
19 determination.

20 The Nevada Supreme Court has continuously held "dismissal of an indictment on the
21 basis of governmental misconduct is an extreme sanction which should be infrequently
22 utilized." Keeney, 106 Nev. at 216, 791 P.2d at 57 (1990) (quoting United States v. Owen,
23 580 F.2d 365, 367 (9th Cir. 1978)). To support an allegation of prosecutorial misconduct
24 regarding a Grand Jury, there must be a finding that government misconduct "unfairly
25 manipulated or invaded the independent province of the grand jury." Id. at 220. In State v.
26 Babayan, 106 Nev. 155, 787 P.2d 805 (1990), the Supreme Court addressed the dismissal of
27 an indictment with prejudice. "Dismissal with prejudice is warranted when the evidence
28 against a defendant is irrevocably tainted or the defendant's case on the merits is prejudiced

1 to the extent that 'notions of due process and fundamental fairness would preclude
2 reindictment.' United States v. Lawson, 502 F. Supp 158, 169 (D.Md1980)." Id. at 171, 787
3 P.2d at 817 (citations omitted). In Babayan, the Court held that trial court did not abuse its
4 discretion in dismissing indictments against defendant, as prosecution failed to present clearly
5 exculpatory evidence to grand jury, and therapists who gave expert testimony before grand
6 jury did so with substantial conflicts of interest that were not brought to grand jurors' attention.
7 Id. at 155, 787 P.2d at 805. The Court further held that trial court improperly dismissed
8 indictments with prejudice. Id.

9 The Court further stated:

10 The district court also found that the prosecutorial misconduct
11 directed towards respondent Babayan rose to a constitutional level as
12 it violated his right to due process. Although we agree that portions
13 of the prosecution's presentations before the grand jury were deficient
14 and denied respondent Babayan due process of law, the denial of due
15 process before the grand jury, in and of itself, does not mandate
16 dismissal with prejudice. If it did, then every instance in which a
17 prosecutor failed to present exculpatory evidence or was otherwise
18 deficient in presenting the State's position, would require that
19 indictment be dismissed with prejudice. Although errors occurred in
20 this case, dismissal without prejudice will remedy the derelictions in
21 the absence of an irremedial evidentiary taint or prejudice to the
22 defendant's case on the merits.

23 Id. at 171, 787 P.2d at 817.

24 Thus, the first question before this Court is whether the State engaged in prosecutorial
25 misconduct at all. Defendant argues the State was somehow bound by the Justice Court's
26 decision when presenting evidence to the Grand Jury, yet, cites no statute or case law that
27 expressly prohibits the State from alternatively presenting a case to the Grand Jury before a
28 preliminary hearing is held. In support of his Motion, Defendant relies heavily on a justice
court's inherent authority to suppress evidence *at the time of preliminary hearing* as
acknowledged in Grace v. Eighth Judicial District Court, 132 Nev. Adv. Rep. 51, 375 P.3d
1017 (2016).

In Grace, the defense made a motion at the time of the preliminary hearing to suppress
narcotics found on the defendant's person at the time of her arrest because the State failed to

1 call the officer who initially arrested the defendant pursuant to a probation warrant. Id. at 51,
2 375 P.3d at 1019-20. Instead, the State called only the officer who searched the defendant after
3 the arresting officer had transferred custody of the defendant, who testified he had found the
4 narcotics in defendant's possession after conducting a search incident to arrest. Id. At the time
5 of the preliminary hearing, the defense moved to suppress the narcotics, arguing the State had
6 failed to establish a proper and valid arrest, and therefore, the search incident to arrest was
7 invalid. Id. The justice court agreed and ordered the evidence suppressed and the case
8 dismissed. Id. The State appealed the justice court's order, arguing the justice court was a court
9 of limited jurisdiction, and therefore lacked the authority to rule on a motion to suppress at the
10 time of the preliminary hearing. Id. The district court agreed and remanded the case back to
11 the justice court for a preliminary hearing. Id.

12 On a writ of mandamus, the Supreme Court ruled justice courts have the limited and
13 inherent authority to grant or deny motions to suppress because such motions are intrinsically
14 tied to the statutory duties carried out by the justice courts – namely to conduct preliminary
15 hearings and determine probable cause. Id. at 51, P.3d at 1020-21. The Court reasoned that in
16 the exercise of the statutory duties conferred upon the justice courts, the courts necessarily
17 possessed inherent authority to adjudicate evidentiary matters at issue in the context of a
18 preliminary hearing, relying upon the statutory language in NRS 47.020 (rules of evidence
19 apply at the time of a preliminary hearing) and NRS 48.025 (instructing that only relevant
20 evidence is admissible). Id. at 51, P.3d at 1020. Notably, the Supreme Court focused on the
21 authority of a justice court to rule on suppression motions in the context of a preliminary
22 hearing for the purpose of establishing probable cause, and cautioned this inherent authority
23 was limited in nature. Id. In fact, the Supreme Court further noted that specifically because
24 NRS 47.020 did not mention preliminary hearings by name, the absence of such a delineated
25 item meant the statute was intend to apply to that specific hearing. Id. The Grace decision,
26 however, does not stand for the proposition that the State is without recourse when a motion
27 to suppress is granted without an evidentiary hearing, and when a preliminary hearing does
28 not actually take place. Nor does the Grace decision specifically prohibit the State from

1 seeking a grand jury indictment in the same case. The Grace decision simply clarifies that at
2 the time of a preliminary hearing, the justice court has the limited and inherent authority to
3 hear motions to suppress in relation to the evidence presented at the time of the preliminary
4 hearing.

5 Defendant's reliance on Grace for the proposition that the State was forever bound by
6 the justice court's legal decision on a motion to suppress when no preliminary hearing
7 occurred is misplaced. Indeed, the Supreme Court has ruled a legal ruling by the justice court
8 does not render a subsequent grand jury presentation impermissible. See, Sheriff v.
9 Harrington, 108 Nev. 869, 840 P.2d 588 (1992). In Harrington, the defendant was facing
10 charges of felony driving under the influence ("DUI") during the course of a preliminary
11 hearing. Id. at 870-71, 840 P.2d at 588. At the preliminary hearing, the justice court ruled the
12 defendant's prior convictions for DUI were constitutionally invalid, and therefore, the State
13 had failed to prove a necessary element for the felony DUI charge. Id. The justice court then
14 dismissed the case at the preliminary hearing. Id. at 870-71, 840 P.2d at 588-89.

15 Following the dismissal, the State presented the case – including the same precluded
16 prior convictions – to the grand jury, who returned an indictment for the felony DUI charge.
17 Id. at 871, 840 P.2d at 588-89. The defendant filed a petition for writ of habeas corpus, arguing
18 the State violated its duty to preset exculpatory evidence to the grand jury by failing to disclose
19 the justice court had ruled the prior conviction constitutionally infirm. Id. The district court
20 granted the petition, and the State appealed. Id. In ruling that the State did not violate its ethical
21 obligations when presenting the case to the grand jury, the Supreme Court stated a legal ruling
22 by a justice of the peace is "not evidence regarding the charge, but was rather an opinion on a
23 legal issue." Id. at 871, 840 P.2d at 589.

24 Similarly, there is nothing that prevents the State from seeking an indictment even when
25 a preliminary hearing is still pending, or has been bifurcated, or even when a complaint – for
26 any number of reasons – is dismissed. NRS 173.015 specifically states "the first pleading on
27 the part of the state is the indictment or information." NRS 173.015 (2017). This statute makes
28 no distinction between when or even if the State must choose one procedure over the other.

1 See, State v. Maes, 93 Nev. 49, 559 P.2d 1184 (1977). The Nevada Supreme Court has held
2 the State may choose one or the other, and, may seek an indictment, even while an information
3 may still be pending, or where a preliminary hearing has only partially taken place. Id.

4 In Maes, the State charged the defendant with sexual assault by way of a criminal
5 complaint. Id. at 50, 559 P.2d at 1184. A preliminary hearing was scheduled, and prior to the
6 preliminary hearing, the defense argued certain elements and facts of the charged crime to the
7 justice court, suggesting the State lacked probable cause and was relying upon inadmissible
8 evidence in their case. Id. Specifically, defense counsel argued these infirmities would negate
9 a finding of probable cause by the justice court at the time of the preliminary hearing. Id.

10 Following that argument, the State presented the case to the grand jury, who issued an
11 indictment charging defendant with the same crimes. Id. The defendant filed a motion to
12 dismiss the indictment, arguing the State had engaged in a “contemptible procedure” when the
13 prosecutor ignored the arguments of defense counsel, implicitly recognizing the validity of the
14 arguments and acknowledging the inadmissibility of the evidence, and instead, bypassed the
15 preliminary hearing. Id. The district court agreed, dismissed the indictment, and ordered the
16 case remanded to justice court for a preliminary hearing. Id.

17 In reviewing NRS 173.015, the Nevada Supreme Court held the State had not engaged
18 in “contemptible procedure” by presenting the case to the grand jury, and furthermore, had no
19 duty to follow the arguments of counsel before the justice court in electing to pursue either a
20 preliminary hearing or an indictment from the grand jury even if the arguments of counsel
21 indicated some of the evidence may be deemed inadmissible at a preliminary hearing. Id. at
22 51, 559 P.2d at 1185. Specifically, the Court held the State was not required to pursue one
23 process simply because it began first, but rather, it was up to the State to elect how to proceed
24 in charging a defendant, even if it means the State pursues an indictment while a preliminary
25 hearing began, but had not yet finished. Id.

26 Here, the State did not engage in prosecutorial misconduct simply because the
27 prosecutor elected to present the case to the Grand Jury prior to a preliminary hearing being
28 held. As with Maes, the State was well within its rights to proceed in charging Defendant

1 however it deemed appropriate in accordance with NRS 173.015. Further the State did not
2 engage in prosecutorial misconduct by presenting evidence that the Justice Court deemed
3 inadmissible for the purposes of a preliminary hearing, similar to Harrington. The Justice
4 Court's ruling was a legal opinion regarding the evidence at the time of the preliminary
5 hearing. While Defendant argues this was a binding decision on all future proceedings, that
6 position is inconsistent with the progeny of case law granting the State the authority to pursue
7 indictment even in cases where the justice court *dismisses* the case for lack of probable cause.
8 See NRS 172.145 (2017) (providing process for the reading of a statement to the grand jury
9 specifically in cases where the same case is presented to a justice court and dismissed for lack
10 of probable cause).

11 Moreover, Defendant's position regarding the binding nature of the justice court's legal
12 opinion on a motion is untenable in the nature of criminal proceedings generally and
13 inconsistent with Nevada law. For example, during a preliminary hearing, the parties often
14 object to testimony for a number of evidentiary reasons – hearsay, impermissible character
15 evidence, lack of foundation – yet, the same testimony, questions, and even objections may be
16 raised in a subsequent motion, or at the time of trial without argument that the justice court's
17 evidentiary ruling was or is binding on the district court at the time of trial. Similarly, for
18 motions to suppress that are denied by the justice courts, the defense is free to file the same
19 exact motion with the trial court. The plain language of NRS 189.120 does not provide that a
20 determination of the justice court on a motion to suppress is mandatory, binding authority for
21 the district court. Nor does the statute prohibit the District Court from hearing the same motion.
22 Indeed, District Courts have original jurisdiction to decide issues of admissibility at the time
23 of trial, including ruling on motions to suppress. It is inconsistent to assume because a justice
24 court, for example, denied a motion to suppress at the time of a preliminary hearing that the
25 defense would be absolutely barred as perhaps law of the case, from raising the issue of
26 suppression before the trial court. If it were the case that the district courts were inherently
27 bound by the rulings of the justice court, NRS 172.145 would be superfluous, and the district
28 court would be prohibited from re-addressing any issue raised on and ruled on at the justice

1 court level – presumably including findings of probable cause, decisions of bail, objections at
2 preliminary hearing, and the like.

3 Further, the ruling of Grace is more limited than Defendant suggests. The Supreme
4 Court specifically noted the justice court’s authority to rule on motions to suppress is *only*
5 derived from the inherent authority in its limited jurisdiction to conduct preliminary hearings.
6 In so finding, the Court pointed to State v. Sargent, 122 Nev. 210, 128 P.3d 1052 (2006),
7 noting the limitations of the jurisdiction of the justice courts and finding the jurisdiction is
8 limited only insofar as it relates to their jurisdiction over preliminary hearings. Grace, 375
9 P.3d at 1018 (“Thus, the authority to even hear such motions is entirely related to, and tied
10 solely to, the conduction of a preliminary hearing”). In Sargent, the Court determined justice
11 courts do not have the inherent authority to even order a defendant to appear at a preliminary
12 hearing because the physical presence of the defendant was but one of many ways the State
13 could identify the defendant, and outside of establishing identity at the preliminary hearing,
14 the justice courts lacked jurisdiction. Id.

15 Defendant argues the State’s decision to present the probable cause hearing to the grand
16 jury rather than in the form of a preliminary hearing is tantamount to cases wherein prosecutors
17 are repeatedly admonished or ordered by the trial court not to engage in certain conduct, yet
18 continue to do so, irrespective of the trial court’s order. See, Motion, p. 12-13. In support of
19 this, Defendant cites to McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984), and argues
20 that the circumstances presented in McGuire mirror the State’s presentation of evidence before
21 the grand jury in this case. McGuire is acutely distinguishable from the instant case. In
22 McGuire, the Supreme Court felt it necessary given the three (3) pending appeals involving
23 the same indiscretions committed by the same prosecutor during three (3) separate trials
24 warranted a published opinion admonishing him of his misconduct. Id. at 154-56, 677 P.2d at
25 1062-63. The prosecutor in these trials attempted to elicit details of prior robbery convictions
26 from the defendant, expressly told the jury they could consider the defendant’s prior
27 convictions as evidence of the instant crime, referred to the defendant as an “Aryan Warrior”,
28 argued to the jury about whether the defendant was the “type” of person they should let out on

1 the streets, commented on the defendant's invocation of his right to remain silent, made
2 disparaging comments about defense counsel's ability as an attorney to the jury, referred to
3 the cost of taxpayer dollars to bring in certain witnesses, argued the jury should consider their
4 own daughters in determining the guilt of a defendant facing rape charges, told the jury if they
5 found the defendant not guilty he never wanted to "hear [them] complain," and argued to the
6 jury he would not present a case if the defendant was not truly guilty. Id. at 156-159, 677 P.2d
7 at 1063-65. In both cases, the trial judge admonished the prosecutor at the time of trial,
8 however, the prosecutor continued to engage in misconduct. Id.

9 The instant case is inapposite from McGuire. The trial court's order, as discussed supra,
10 was a legal conclusion related to the preliminary hearing, and was not an order admonishing
11 the prosecutor at the time of trial. Here, the parties were not before a jury at the time of trial,
12 and unlike the facts here, the actions of the prosecutor in McGuire were specifically prohibited
13 by statute, had previously been addressed to the prosecutor in prior cases, and prohibited by
14 previous, multiple Nevada Supreme Court decisions. In this case, there is no statute or case
15 law prohibiting the State from seeking an indictment following a legal opinion of the justice
16 court, and in fact, as argued supra, the State is not bound at the grand jury from presenting
17 evidence irrespective of a legal opinion from the justice court. See Harrington, 108 Nev. at
18 871, 840 P.2d at 589. This case is not a case of blatant, rampant misconduct on part of the
19 State or a willful and deliberate disregard for court orders. As such, it does not constitute
20 prosecutorial misconduct, and cannot warrant dismissal of the Indictment.

21 **B. The State Did Not Engage In Prosecutorial Misconduct By Discussing The**
22 **Shooting At the Grand Jury.**

23 Defendant next argues the State engaged in impermissible misconduct because the
24 prosecutor referenced the shooting during the grand jury testimony. While it is true NRS
25 48.045 prohibits the admission of character evidence or evidence of other acts at the time of
26 trial to prove conformity therewith, there are nevertheless exceptions to that general rule. The
27 State is entitled to present the complete story surrounding the facts and circumstances of a case
28 in order to provide the grand jury with the complete story. The general rule of law pertaining

1 to the "complete story" or *res gestae* was set forth by the Nevada Supreme Court in Dutton v.
2 State, 94 Nev. 461, 581 P.2d 856 (1978). There the Court stated:

3 "The State is entitled to present a full and accurate account of the
4 circumstances of the commission of the crime, and if such an
5 account also implicates the defendant or defendants in the
6 commission of other crimes for which they have not been charged,
7 the evidence is nevertheless admissible."

8 (quoting State v. Izatt, 534 P.2d 1107 (Idaho 1975).

9 In Dutton, the defendant and a co-offender entered a police sponsored store which was
10 fronting as a "fencing" operation. Id. Negotiations were entered into with regard to several
11 items of property, including some bronze wear and a camera. Id. As a result of that conduct,
12 the defendant was indicted for possession of the stolen property, to include the stolen camera.
13 Id. In finding no error with regard to the evidence dealing with his possession of the bronze
14 wear, which was likewise stolen from the victim at the same time as the camera, the Court
15 stated, "courts have long adhered to the rule that all the facts necessary to prove the crime
16 charged in the indictment, when linked to the chain of events which support that crime, are
17 admissible." Id.

18 The Nevada Supreme Court reaffirmed the doctrine in State v. Shade, 111 Nev. 887,
19 900 P.2d 327 (1995). Shade was charged with possession of controlled substances:
20 Methamphetamine and Cocaine. Id. The drugs were found by officers pursuant to a vehicle
21 stop, following an investigation involving the purchase/sale of a quantity of heroin by
22 defendant Shade and his son-in-law. Id. The trial court prohibited the prosecution from
23 revealing to the trial jury evidence pertaining to the uncharged heroin transaction. Id. The
24 Nevada Supreme Court in overruling the trial court stated:

25 "If the agents are not allowed to testify regarding their surveillance,
26 the State cannot inform the jury how Shade obtained the drugs or that
27 officers suspected Shade was participating as a lookout during the
28 purchase of the drugs that were ultimately found in the car he was
29 driving. *Without such testimony, the State cannot effectively
30 prosecute the transportation of illegal narcotics charges pending
31 against Shade.*

32 . . . The charges at issue were contemporaneous to the heroin
33 purchase, arose out of the same transaction, and involved the same
34 participants. *The excluded evidence was inextricably intertwined with
35 the charged crimes and completed a story leading up to Shade's*

1 *ultimate arrest.* We conclude that the State's witnesses could not
2 adequately testify about the methamphetamine and cocaine charges
3 without some reference to the heroin sale and the accompanying
surveillance activity. The district court, thus abused its discretion by
granting the motion in limine. The district court should have admitted
the evidence and issued a cautionary instruction to the jury.

4 (emphasis added).

5 It is important to note that the Shade court relied upon Allan v. State, 92 Nev. 318
6 (1976), a case where the defendant complained that the trial court erred by admitting evidence
7 of uncharged lewd behavior in a Sexual Assault on Minor case. The Allan court explained the
8 complete story doctrine:
9

10 When several crimes are intermixed or blended with one another, or
11 connected such that they form an indivisible criminal transaction and
12 when full proof by testimony, whether direct or circumstantial, of any
13 one of them can- not be given without showing the others, evidence
of any or all of them is admissible against a defendant on trial for any
offense which is itself a detail of the whole criminal scheme.

14 Id. at 7 (citing Allan, supra at 321). Ultimately, the Allan court found the evidence admissible
15 stating:

16 The testimony regarding the additional acts of fellatio, as well as the
17 act of masturbation, was admissible as part of the *res gestae* of the
18 crime charged. Testimony regarding such acts is admissible because
19 the acts complete the story of the crime charged by proving the
immediate context of happenings near in time and place. Such
evidence has been characterized as the same transaction or the *res*
gestae.

20 Id. at 8 (citing Allan, supra at 320).

21 Returning to the facts of Shade, the Court found that the district court improperly denied
22 the undercover officer from testifying about the uncharged acts. Specifically, the district court
23 erroneously relied on NRS 48.035(1), which provides for the weighing of the relative,
24 probative and prejudicial value of the evidence. The Shade court recognized that when the
25 complete story doctrine applies:

26 The determinative analysis is not a weighing of the prejudicial effect
27 of evidence of other bad acts against the probative value of that
28 evidence. If the doctrine of *res gestae* is invoked, the controlling
question is whether witnesses can describe the crime charged without
referring to related uncharged acts. If the court determines that the
testimony is relevant to the uncharged acts, it must not exclude the
evidence of the uncharged acts.

1 Id. at 9.

2 The Shade court found that the uncharged acts should be admitted because, “the charges
3 at issue were contemporaneous to the heroin purchase, arose out of the same transaction, and
4 involved the same participants.” Id. at 10. Therefore, it was necessary for the officer to be
5 able to explain the events leading up to the arrest of the defendant for sale of controlled
6 substance.

7 In Brackeen v. State, 104 Nev. 547, 763 P.2d 59 (1988), the defendant was convicted
8 of Burglary and Possession of Credit Card Without Consent of the Owner. The defendant
9 entered a pizza parlor, sat down at a table occupied by the Millers, and began eating their pizza
10 and drinking their beer without their permission. Id. The defendant, thereafter, left the pizza
11 parlor and was observed by the Millers to burglarize several automobiles. Id. The trial court
12 allowed into evidence testimony that the defendant had helped himself to the Millers’ pizza
13 and beer even though the defendant had not been charged with that conduct. Id. The Nevada
14 Supreme Court ruled that this evidence was admissible in that it bore on the identification of
15 Brackeen by the Millers, and:

16 Additionally, the description of Brackeen’s pilfering was admissible
17 as an integral part of the Millers’ narration of the events leading up to
18 Brackeen’s removal of the personal property from the vehicles in the
19 parking lot. We have adopted the rule that the State is entitled to
20 present a full and accurate account of the circumstances surrounding
21 the commission of a crime, and such evidence is admissible even if it
implicates the accused in the commission of other crimes for which
he has not been charged.

22 Apparent from the Nevada Supreme Court’s holdings is the preference for permitting the State
23 to present a full and accurate picture of the offense charged.

24 Here, the State did not present impermissible character evidence to the grand jury, but
25 rather, presented such facts as part of the res gestae of the instant case. The three complained
26 of instances wherein the State discussed the shooting with Detective Mauch served to
27 demonstrate to the grand jury why the detectives were interviewing the defendant, and why
28 they asked specifically about whether he had a firearm in his possession. Notably, the State

1 never once advised the Grand Jury of the facts surrounding the murder, or even the fact that
2 the Defendant was charged with murder, or even that the victim died as a result of a gunshot
3 wound inflicted by the Defendant. Rather, the State merely elicited very limited testimony to
4 demonstrate the circumstances for why the detectives had spoken with Defendant, and why
5 they were asking questions about his individual possession of the firearm. Because this
6 evidence was elicited as part of the complete story of the case and to give context to the facts
7 at hand, the State did not violate NRS 48.045.

8 This argument, as discussed above, is without merit. However, even if this Court finds
9 the evidence admitted at the Grand Jury was improper, the appropriate remedy is not, contrary
10 to Defendants' position, to dismiss the Indictment in its entirety. Rather, the remedy is to
11 review the evidence without regard to any improper evidence and determine whether there is
12 sufficient probable cause. Robertson v. State, 84 Nev. 559, 445 P.2d 352 (1968).

13 Although the rules of evidence governing the presentation of a jury trial are generally
14 applicable to a grand jury proceeding, the Nevada Supreme Court has long recognized that the
15 nature of the proceeding and the fact that guilt is not at issue before the grand jury permits the
16 relaxation of the rules in order to accommodate the process. In Robertson, the Court stated
17 that regardless of the presentation of inadmissible testimony if there is the slightest sufficient
18 legal evidence and best in degree to support the indictment then the indictment will be
19 sustained. See also Franklin v. State, 89 Nev. 387, 513 P.2d 1256, wherein the Court stated:

20 The legal efficacy of an indictment will be sustained if there has been
21 presented to the grand jury the slightest sufficient legal evidence and
22 best in degree even though inadmissible evidence may also have been
adduced . . .

23 Furthermore, as discussed above, in Sheriff v. Keeney, 106 Nev. 213, 791 P.2d 55
24 (1990), the Nevada Supreme Court specifically stated, "[p]reliminarily, we observe that
25 dismissal of an indictment on the basis of governmental misconduct is an extreme sanction
26 which should be infrequently utilized." Id. at 216, 791 P.2d at 57.

27 The evidence presented to the Grand Jury in this case far exceeds the State's burden to
28 present "slight or marginal" evidence that Defendants committed the crime alleged in the

1 Indictment. Here, Defendant readily admitted he had a firearm in his possession. He also
2 advised detectives where he was residing, and where the firearm could be located, even giving
3 consent for the search of the apartment. Thus, even if this Court finds the reference to the
4 shooting was improper, when striking that evidence and disregarding it, the State has
5 nevertheless met its burden of establishing probable cause for the crime charged.

6 **CONCLUSION**

7 The instant Motion to Dismiss is procedurally improper, and as a result, should be
8 denied in its entirety. Even if this Court declines to dismiss the instant Motion for its
9 procedural defects, the Motion should nevertheless be denied because the State did not engage
10 in prosecutorial misconduct. For these and the foregoing reasons, the State requests this Court
11 to DENY Defendant's Motion to Dismiss For Prosecutorial Misconduct in its entirety.

12 DATED this 20th day of September, 2018.

13 Respectfully submitted,

14 STEVEN B. WOLFSON
15 Clark County District Attorney
16 Nevada Bar #001565

17 BY 

18 SARAH H. OVERLY
19 Deputy District Attorney
20 Nevada Bar #12842

21 **CERTIFICATE OF SERVICE**

22 I certify that on the 20th day of September, 2018, I mailed a copy of the foregoing

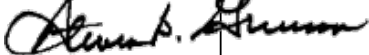
23 Order to:

24 ADRIAN M. LOBO, ESQ.
25 adrianlobo@lobolaw.net

26 BY 

27 M. HERNANDEZ
28 Secretary for the District Attorney's Office

SEO/mah/L1



1 **RIS**

2 ADRIAN M. LOBO, ESQ.
3 Nevada Bar # 10919
4 400 S. 4th Street, Ste. 500
5 Las Vegas, Nevada 89101
6 702.290.8998
7 702.442.2626 (fax)
8 adrianlobo@lobolaw.net
9 Attorney for the Defendant

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12
13 GATHRITE, DEANDRE aka GATHRITE,
14 DEANDRE TERELLE, ID# 2592432

15 Defendant.

Case No.: C-18-334135-1

Dept. No.: III

16 **REPLY IN SUPPORT OF MOTION TO DISMISS FOR PROSECUTORIAL**
17 **MISCONDUCT**

18 COMES NOW, the Defendant, DEANDRE GATHRITE aka DEANDRE TERELLE
19 GATHRITE, by and through the undersigned counsel of record, Adrian M. Lobo, Esq. and hereby
20 files this Reply in Support of the Motion to Dismiss for Prosecutorial Misconduct.

21 This Reply is based on the pleadings and papers on file with the court, the attached
22 Memorandum of Points and Authorities, and oral argument to be taken at the time set for hearing.

23 **ADRIAN M. LOBO, ESQ.**

24 By: /s/ Adrian M. Lobo
25 Adrian M. Lobo, Esq. (#10919)
26 400 S. Fourth St., Ste. 500
27 Las Vegas, NV 89101
28 702.290.8998
Attorney for Defendant

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. Additional Facts Pertinent to This Reply**

3 Rather than produce *any* alternative evidence to support its continued pursuit of a
4 conviction against the Defendant, the State instead doubled down on the firearm in question- a
5 piece of evidence that has already been ordered suppressed. Specifically, the State sought a DNA
6 analysis of the firearm in order, presumably, to establish possession by the Defendant. This DNA
7 analysis was performed on July 26, 2018—almost a full month after the dismissal of the justice
8 court case—and completed on September 19, 2018. *See Exhibit A-1 – DNA Report, Sept. 19, 2018.*

9 No appeal of the justice court’s ruling seeking admission of the firearm was, or has been,
10 filed. The State therefore requested DNA testing on a suppressed piece of evidence.

11 **2. Legal Argument**

12 The State’s Opposition is unavailing for several reasons- all of which shall be explored
13 below. For the following reasons, dismissal of the case against the Defendant is the most
14 appropriate remedy given the State’s clear misconduct, as evidenced by the record in this case.

15 *A. The Motion to Dismiss is Proper*

16 The State argues that the instant Motion is “seeking a remedy provided by way of a pre-
17 trial petition for writ of habeas corpus ... based on alleged lack of probable cause or otherwise
18 challenging the court’s right or jurisdiction to proceed to the trial of a criminal charge.” *State’s*
19 *Opp.* at 4 (citing NRS 34.710(1)(a)). This is an interesting take, since the Motion does not
20 challenge either probable cause, or this Court’s jurisdiction; the Motion alleges that the State has
21 broken a number of its ethical responsibilities as a prosecutor. The Motion is exactly that- a motion
22 to dismiss based on reasons other than probable cause or this Court’s jurisdiction.¹ The Motion is
23 in no way styled as a petition for anything, but is a document moving this Court to consider the
24 legal argument presented and to render a decision.

25 _____
26
27 ¹ Indeed, filing a motion before this Court is relying upon the court’s jurisdiction to dismiss the
28 case.

1 This is permissible pursuant to the Rule of Practice for the Eighth Judicial District Court
2 (EDCR). Under Rule 3.20—appropriately titled “Motions”—there are no restrictions on the types
3 of motions that may be brought before the district court, provided the procedural requirements of
4 the Rule are met. As the Motion complies with Rule 3.20, there is no reason to dismiss it outright,
5 as the State argues.

6 Lastly to this point, NRS 174.095 states that “Any defense or objection which is capable
7 of determination without the trial of the general issue may be raised before trial by motion. The
8 prosecutorial misconduct evident in this case is capable of determination without the presumptive
9 trial on a weapons charge, therefore the underlying Motion is properly before this Court.
10 Furthermore, NRS 174.105(1) mandates that a challenge of prosecutorial misconduct be raised by
11 motion, and not as part of a Petition for a Writ of Habeas Corpus:

12 Defenses and objections on defects in the institution of the prosecution,
13 other than insufficiency of the evidence to warrant an indictment, or in the
14 indictment, information or complaint, other than that it fails to show
jurisdiction in the court or to charge an offense, may be raised only by
15 motion before trial.

16 The underlying Motion is properly before this Court, and properly distinct from the
17 contemporaneous Petition for a Writ of Habeas Corpus.

18 *B. The State’s Conduct “Unfairly Manipulated or Invaded the Independent Province of the*
19 *Grand Jury”*

20 The State cites case law more appropriate in a defense motion (such as the instant Motion),
21 to wit:

22 “To support an allegation of prosecutorial misconduct regarding a Grand
23 Jury, there must be a finding that government conduct ‘unfairly manipulated
or invaded the independent province of the grand jury.’” *State’s Opp.* at 5
24 (citing *Sheriff v. Keeney*, 106 Nev. 213, 216, 791 P.2d 55, 57 (1990);

25 “Dismissal with prejudice is warranted when the evidence against a
26 defendant is irrevocably tainted or the defendant’s case on the merits is
27 prejudiced to the extent that ‘notions of due process and fundamental
fairness would preclude reindictment.’” *State’s Opp.* at 5-6 (citing *State v.*
28 *Babayan*, 106 Nev. 155, 171, 787 P.2d 805, 817 (1990).

1 In this case, both of the State's own scenarios are present. First, the State unfairly
2 manipulated *and* invaded the independent province of the grand jury in two ways. First, the State
3 ignored defense counsel's request to be informed of the date and time of the proceedings, as set
4 forth in the underlying Motion. This denied to Defendant the opportunity to appear if he chose; to
5 provide to the State exculpatory evidence for inclusion and presentation to the grand jury; and/or
6 otherwise to seek further relief from the court. The only notice the Defendant had was when he
7 was arrested on the warrant, after the proceedings had already occurred.

8 Second, the State failed to advise the grand jury of the lower court's disposition of the very
9 same evidence it presented to the grand jurors in seeking and securing an indictment. Not only did
10 this violate the statutory mandate that a grand jury be presented with only legal evidence (NRS
11 172.135(2)), it improperly led the grand jury to return an indictment. Where the grand jury is
12 concerned, its role is not to question the legality of the evidence (arguably, NRS 172.135(2) exists
13 to assure grand jurors that the evidence presented for its consideration is legal and admissible) but
14 to determine if the evidence so presented is sufficient for a probable cause determination in support
15 of an indictment.

16 *C. This Is Not a Matter of the State Merely Choosing One Vehicle of Prosecution Over*
17 *Another*

18 The State mistakenly presumes that only the preliminary hearing is controlling in the lower
19 court; that anything preceding or not directly occurring at the preliminary hearing somehow does
20 not count when it comes to presenting evidence to the grand jury. This undermines the very system
21 of the justice court and the bind-over process in that if a prosecutor is not bound by a justice court's
22 determinations on substantive issues such as *the admissibility of the State's evidence*, then the
23 grand jury will be merely another means to a prosecutorial end as it has been in this case.

24 The State's position is ridiculous because the State is arguing against both logic and
25 common sense. The State's argument is that because the preliminary hearing never took place, the
26 justice court's order is ineffective as to the admissibility of evidence before a grand jury:
27 "Defendant argues the State was somehow bound by the Justice Court's decision when presenting
28

1 evidence to the Grand Jury, yet, cites no statute or case law that expressly prohibits the State from
2 alternatively presenting a case to the Grand Jury before a preliminary hearing is held.” *State’s Opp.*
3 at 6. To adopt the State’s reasoning ignores three very important, very basic concepts of our justice
4 system.

5 First, if a justice court rules in a defendant’s favor on a *suppression* issue and *suppresses*
6 *the State’s evidence*, this could very well obviate the need for a preliminary hearing. That is
7 precisely what occurred in this case- the State’s evidence was suppressed and the State was forced
8 to dismiss its Complaint against the Defendant prior to (without holding) a preliminary hearing.
9 Should the State then be permitted to proceed to a grand jury, with no mention of its woes in the
10 lower court and essentially have a second bite at the apple just because the weakness of its case
11 throttled the prosecutorial exercise in its infancy and before the apparently critical stage of a
12 preliminary hearing? What, then, is the point of having an impartial magistrate in a justice court
13 setting to weigh evidentiary issues and render such decisions?

14 Second, the State could purposefully use this supposed loophole as a way of harassing or
15 otherwise pursuing questionable prosecution (for a multitude of reasons). In this case, the evidence
16 was suppressed at the justice court level leaving the State to find some other evidence it could use
17 in an effort to have the Defendant bound over to district court. Coming up empty (the State made
18 a gesture of calling Raymond Moore, who, inexplicably, did not appear to testify) the State was
19 forced to dismiss its Complaint for a lack of evidence upon which to proceed. Rather than accept
20 this as a poorly supported and insufficiently presented case (owing to the evidence suppression),
21 the State strategically dismissed and instead went to a grand jury where it presented all of the
22 previously suppressed evidence as the universe of proof in this case and with no mention of its
23 adverse treatment at the justice court level.

24 Thirds, the issue of admissibility is not exclusive of the grand jury procedure. In this case,
25 the State was given a prognostication as to its fortunes at trial: the evidence is inadmissible.
26 Bypassing this ruling and submitting the matter to a grand jury, in a vacuum, is so much “kicking
27 the can down the road” where the later proceedings at the district court level would be presented

1 with the same matter of admissibility. Sure, a grand jury (not presented with the existence and
2 outcome of the evidentiary issues) would indict (as it often does), but a similarly situated defendant
3 is going to move immediately for the suppression of evidence, as was done in the justice court,
4 and will cite for the district court the prior record and order of suppression. In other words, the
5 State is wasting time, judicial resources, and taxpayer dollars.

6 The grand jury indicted on the basis of evidence that had already been held *by a judge* to
7 be inadmissible. To argue that this is not binding on a prosecutor ignores the case law and statutory
8 provisions cited to in the underlying Motion (despite the State's claim to the contrary). In the
9 interests of being thorough, however, NRS 177.015 is informative on this point. According to that
10 statute, the proper remedy for the State when faced with an order suppressing the whole of its
11 evidence was to appeal to the district court. *NRS 177.015(1)(a)*. To argue that the State can merely
12 dismiss its complaint against a defendant and then seek a more favorable forum elsewhere to evade
13 the inadmissibility of its evidence ignores common sense and sets an unhealthy precedent.

14 The State's Opposition attempts to frame everything as a decision between whether to
15 pursue an information or an indictment: "[NRS 173.015] makes no distinction between when or
16 even if the State must choose one procedure over the other." *State's Opp.* at 8. Again, this ignores
17 the core controversy in this matter- the statutory mandate that only *legal* evidence be presented to
18 the grand jury. Obviously this means that the State must be on the "honor system" in presenting
19 evidence to a grand jury, in that the grand jury's function is not to determine the legality of the
20 evidence presented. This whole duty-based system is informed by evidentiary determinations-
21 when a court of competent jurisdiction (the State so acknowledges that a justice court has the
22 authority to make evidentiary rulings) has ruled evidence inadmissible, this ruling *must* be
23 respected and such evidence necessarily must be precluded from presentation to the grand jurors.

24 The State again misstates the issue in its reliance on *State v. Maes*, 93 Nev. 49, 559 P.2d
25 1184 (1977). In the *Maes* case, the core issue was whether the State was restricted only to an
26 information *or* an indictment, as indicated in the *Maes* court's holding: "There can be no
27 exclusivity of one process over the other simply because it was instituted first." 93 Nev. at 51, 559

1 P.2d at 1185. Most tellingly, and fatal to the State’s argument here, the *Maes* court went on to
2 “uphold the validity of this indictment *subject only to claims of prosecutorial abuse.*” *Id.* (emphasis
3 added).

4 What the State has conveniently left out of its hasty generalization of the *Maes* case is the
5 most distinguishing facet of the holding that ultimately sets it apart from this case: “Defense
6 counsel chose to make in open court and within the hearing of the prosecution certain
7 representations concerning defense strategy which it is contended prompted the indictment.” *Id.*
8 In other words, the State is attempting to substitute the courtroom banter of *Maes* for the formal,
9 noticed, argued, and decided *evidentiary* issue in this case. Here, defense counsel did not merely
10 expound on the weaknesses of the State’s case in open forum and within earshot of the prosecutor;
11 counsel filed a motion, tendered argument, and was granted a favorable opinion as a result that
12 suppressed the State’s evidence.

13 And this order of the justice court was no mere “opinion,” as the State argues. *State’s Opp.*
14 at 8. In support of this proposition, the State cites to *Sheriff v. Harrington*, 108 Nev. 869, 840 P.2d
15 588 (1992). The *Harrington* case deals with whether the lower court’s *ruling itself* should have
16 been presented to the grand jury as exculpatory evidence: “Specifically, Harrington claimed that
17 the state should have presented to the grand jury the fact that in the preliminary hearing, the justice
18 of the peace determined that Harrington’s 1990 DUI conviction was constitutionally infirm for
19 enhancement purposes.” 108 Nev. at 871, 840 P.2d at 589.

20 What the *Harrington* court was ruling on was whether or not the justice of the peace’s
21 decision not to allow a felony DUI charge was in and of itself exculpatory evidence. Whether or
22 not the defendant’s prior DUI conviction was sufficient to support the felony DUI charge is not
23 exculpatory—it does not “explain away the charge”—and therefore the State’s reliance on
24 *Harrington* is entirely misplaced. The *Harrington* court’s classification of the lower court’s ruling
25 as “an opinion” is not meant to diminish the effect of that opinion, but rather to *distinguish* it on
26 the important point of whether the lower court’s decision was, in and of itself, exculpatory
27 evidence. Indeed, any order by a court at *any* level is “a legal opinion”—the critical distinction is

1 what force and effect the opinion has. In *Harrington*, the court held that such an opinion did not
2 fill the capacity of exculpatory evidence- a very limited holding indeed.

3 Here, the Defendant is not arguing that the justice court's suppression of the State's
4 evidence is in itself exculpatory (or even that it should be), but instead the Defendant is arguing
5 that the order rendered the evidence inadmissible for subsequent purposes, regardless of the forum
6 (the grand jury, in this case). While the justice court's suppression of evidence is not itself
7 exculpatory, it *is* dispositive (the State was forced to dismiss its Complaint), that decision should
8 have been respected going forward. Otherwise the appropriate procedure would have been to
9 pursue an appeal of that decision in order for the State to redeem its evidence.

10 Instead, the State has moved the proceedings to a new venue, with a new body making a
11 probable cause determination, and attempted to hide behind an improperly applied discretion to do
12 so. Nevertheless, the State has ignored its obligation to present "none but legal evidence" to a
13 grand jury, and has purposefully, intentionally, and willfully presented inadmissible (not legal)
14 evidence in its ongoing crusade against the Defendant.

15 *D. The State Ignores the Proper Procedure(s)*

16 The State's own questionable conduct in this case—justice court ruling aside—is itself
17 improper conduct of a prosecutor. "A prosecutor must be prepared to present his case at the time
18 scheduled or show 'good cause' for his inability to do so." *Sheriff v. Terpstra*, 111 Nev. 860, 861,
19 899 P.2d 548, 549 (1995). There is no presumption that good cause exists. *Joey E., a Minor v.*
20 *State*, 113 Nev. 621, 622, 939 P.2d 1056, 1057 (1997) (citation omitted). The prosecution bears
21 the burden of proving a legal excuse where it has caused the dismissal of an earlier case. *Sheriff v.*
22 *Marcus*, 116 Nev. 188, 191, 995 P.2d 1016, 1018 (2000). Furthermore whether, based on the facts
23 not in dispute, the State has demonstrated good cause and met the constitutional standard of
24 reasonable diligence in procuring witnesses for trial, is a question of law to be determined upon a
25 consideration of the totality of circumstances. *Hernandez v. State*, 124 Nev. ___, ___, 188 P.3d
26 1126, 1132-34 (2008) (applying good cause analysis applicable for continuances to the issue of
27 good cause to admit preliminary hearing testimony).

It is well established that “[a] new proceeding for the same offense (whether by complaint, indictment or information) is not allowable when the original proceeding has been dismissed due to the willful failure of the prosecutor to comply with important procedural rules.” *Maes v. Sheriff*, 86 Nev. 317, 319, 468 P.2d 332, 333 (1970) (even though NRS 178.562(2), addressing voluntary dismissals, may not have been intended to bar a subsequent criminal complaint under such circumstances, basic fairness does). This rule applies “equally to situations where there has been conscious indifference to rules of procedure affecting a defendant’s rights,” and where the prosecutor acted intentionally or in bad faith to violate procedural rules. The State’s representatives do not have “an unrestricted right to blunder interminably, which they may exercise by repeated refiling of the same charges, limited only by the applicable statute of limitations.” *State v. Austin*, 87 Nev. 81, 83, 482 P.2d 284, 285 (1971). “[O]ur criminal justice system can ill afford to bestow on prosecutors... largesse... for which no cause is shown.” *McNair v. Sheriff*, 89 Nev. 434, 436, 514 P.2d 1175, 1176 (1973).

The State acts with conscious indifference and thereby waives its right to proceed anew when it fails to take advantage of procedures (such as seeking a continuance) to avoid an involuntary dismissal, though it has the opportunity to do so. For example, in *Maes* the State was not prepared to go forward at a preliminary hearing but had the opportunity to seek a continuance by making a proper showing of good cause and willfully failed to utilize it. Instead the State allowed the case to be dismissed on a defense motion. The Nevada Supreme Court determined that the State could not later file a second complaint charging identical offenses. *Id.* at 319-20, 468 P.2d at 333. Similarly, in *McNair*, 89 Nev. at 436-41, 514 P.2d at 1178-79, the Nevada Supreme Court held that where a justice court dismissed a complaint after the prosecutor, who was unprepared, failed to support an oral request for continuance with a showing of good cause, the subsequent indictment by the State was barred. In doing so, the Court noted that to condone the prosecutor's conduct would allow prosecutors to avoid the rules designed to prevent delay and do nothing, resulting in forced dismissals with no consequence. *Id.* See also *Salas v. Sheriff*, 91 Nev. 802, 543 P.2d 1343 (1975) (holding that defendant's habeas petition should have been granted

1 because the justice court erred in allowing a continuance where the necessary witness had not been
2 subpoenaed and the prosecutor offered no legal reason for his failure to arrange for the appearance
3 of a necessary witness or to be prepared to go forward with the preliminary hearing); *Ormound v.*
4 *Sheriff*, 95 Nev. 173, 591 P.2d 258 (1979) (willful failure found where prosecutor failed to utilize
5 uniform act to obtain attendance of non-resident witness at the preliminary hearing); overruled in
6 part by *Terpstra*, 111 Nev. at 863, 899 P.2d at 550 (overruling Ormound's requirement that the
7 Uniform Act must be utilized before good cause can be found, and concluding that failure to use
8 legal means to secure a witness's testimony is not necessarily a dispositive factor in analyzing
9 whether a prosecutor has been diligent, but it is a significant one).

10 Here, the State's Complaint in justice court was not "involuntarily" dismissed as with the
11 foregoing cases, but it very likely could have been. As set forth in the underlying Motion, the
12 State's evidentiary universe was suppressed, and the justice court admonished the State that it
13 would need to present other evidence to support a probable cause determination. On the
14 preliminary hearing date, June 8, 2018, the State sought a continuance and asserted that good cause
15 existed to continue the matter because Raymond Moore had a prescheduled court date in San
16 Bernardino, California. See *Exhibit B-1- State's Motion to Continue* at 3. At the following
17 preliminary hearing date, June 29, 2018, the State told the court that the District Attorney's office
18 had contact with Moore on June 25 and with an unknown individual on June 26 who told them
19 that Moore would not be present in court because he was in a car accident and comatosed. See
20 *Exhibit C-1 Reporter's Transcript of proceedings June 29, 2018* at 3. Upon the failure of the
21 State's witness to appear, the State moved to have the Complaint dismissed.²

22 Based on the foregoing case law, this would have been sufficient to warrant dismissal of
23 the State's case (although the State had its own case dismissed). Under these facts—all similar to

24
25
26 ² The defense requested that this dismissal be with prejudice because court records revealed
27 Raymond Moore, in fact, did not have a court date in California on June 8, 2018. See *Exhibit D-*
28 *1 San Bernardino County Docket for Case FSB18001710*.

1 the facts in the cited jurisprudence—the State would be barred from bringing a new charging
2 instrument alleging the same offense(s). The State did that in this case because it sought a different
3 venue—the grand jury—and used suppressed evidence while *again* failing to produce the witness
4 it claimed to have in the lower court proceedings (either by design or because the witness again
5 failed to show). This is precisely the type of interminable blundering warned against in the case
6 law- that the State is seeking the proper venue whereby no one will be able to question the evidence
7 it presents (despite a prior ruling that the evidence was inadmissible), and its own procedural
8 missteps (an unreliable witness) are resolved by simply moving to a venue wherein the witness
9 was not required in light of the other evidence put forth.

10 *E. The State’s Policy Arguments Ignore Existing Procedures*

11 The State’s final set of arguments center on policy and procedure:

12 If it were the case that the district courts were inherently bound by the
13 rulings of the justice court, NRS 172.145 would be superfluous, and the
14 district court would be prohibited from re-addressing any issue raised on
15 and ruled on at the justice court level—presumably including findings of
16 probable cause, decisions of bail, objections at preliminary hearing, and the
17 like.

18 *State’s Opp.* at 10-11.

19 This, of course, ignores the fact that for *every single one* of the State’s examples, there is a
20 statutory scheme in place addressing exactly how to proceed in those situations. We shall take the
21 examples one by one.

22 First, the State argues that a justice court order would bind the district court with regard to
23 “findings of probable cause.” This ignores the very detailed procedure set forth with regard to
24 petitions for a writ of habeas corpus (the State should be aware of this- it cites to the relevant
25 statutes in its effort to paint the underlying Motion as being in violation of that statutory scheme).
26 That such a procedure exists undermines the State’s claim of a slippery slope whereby justice
27 courts control any subsequent challenges to probable cause determinations.

28 Second, the State argues that a justice court order would bind the district court with regard
to “decisions of bail.” This ignores the very detailed procedure set forth in NRS chapter 178 for

1 the admission of defendants to bail, when bail is appropriate, conditions upon bail, bail during the
2 pendency of appeals, bail hearings following justice court proceedings, factors to consider when
3 granting bail, etc. These procedures, with a veritable library unto themselves of statutory
4 provisions and jurisprudence, thoroughly undermine the State's concern that justice courts would
5 bind the district courts from making bail determinations.

6 Third, the State argues that a justice court order would bind the district court with regard
7 to "objections at preliminary hearing." This ignores NRS chapter 177, providing various means by
8 which both the State and defendants in criminal actions may appeal both final and intermediate
9 orders of a lower court. In addition, the State is ignoring the reality of jurisdiction here. The justice
10 court proceedings exist to make probable cause determinations for bind-over to district court.
11 Accordingly, the objections are made for the purposes of the probable cause determination, and
12 thus subsequent bind-over necessarily means relitigating various issues before the district court as
13 the quantum of proof and calculus of the analyses is changed due to the different ultimate end- for
14 district court, trial and potential conviction.

15 To argue otherwise is not only disingenuous, but it ignores the very real history of this case.
16 The State, not satisfied with its difficulties in obtaining a probable cause determination for bind-
17 over, chose instead to move to a different venue but one in which the ultimate goal was still the
18 same: a probable cause determination. Accordingly, the objections, arguments, motion, order, etc.
19 from justice court *absolutely* should still apply in a grand jury hearing- a proposition supported by
20 the heretofore cited cases and statutes (for example, the obligation to present only legal evidence).
21 The State is here making a defective argument that this Court is somehow bound by the justice
22 court's decision, which is not the Defendant's argument. Instead, the Defendant is arguing that the
23 *State* was bound by the justice court's decision, and therefore should not have presented suppressed
24 evidence to a different body (the grand jury) for the same purpose (a probable cause determination).

25 Ultimately, the State's argument on this point betrays its own impropriety. While it
26 attempts to cite numerous examples (above) that would otherwise be beholden or somehow
27 controlled by the justice court, it instead demonstrates its own failure to appreciate the numerous.

1 specific statutory schemes and other procedures put in place specifically to preserve those areas of
2 law or otherwise to provide remedies from the justice court (such as an appeal to the district court-
3 a remedy that the State did not elect here despite the statutory mandates). That these carve-outs
4 exist only serves to demonstrate with clarity the State's ongoing failure to observe proper
5 procedure, to the detriment of the Defendant.

6 *F. There Was No "Complete Story" or Res Gestae Excuse for Introducing Uncharged Bad*
7 *Acts*

8 The State claims that its focused examination of Det. Mauch was part of an effort to present
9 a complete story to the grand jurors, and therefore was not impermissible introduction of prior bad
10 acts. *State's Opp.* at 15. This argument must give way to the plain meaning of the charge presented
11 in the proposed indictment: possession of a firearm by a prohibited person. Ignoring, for a moment,
12 the plain wording of that charge, we turn to the elements necessary to prove such a charge.

13 Ownership or possession of firearm by a prohibited person is covered under NRS 202.360.
14 It states, in relevant part, that "A person shall not own or have in his or her possession or under his
15 or her custody or control any firearm if the person" meets certain criteria that prohibit them from
16 having such ownership or possession of a firearm. Therefore, the two main concerns for a probable
17 cause determination are 1) did the defendant have in his possession a firearm?; and 2) was the
18 defendant prohibited from having in his possession a firearm? The inquiry ends there.

19 The State's claims that it was necessary to elicit additional testimony in order to present
20 some "complete story" ignores the reality of the charge- simple possession. For the purposes of
21 this type of charge, the simple act of having the firearm would constitute the offense. It is not
22 necessary to elicit purposefully testimony that a defendant had been arrested on another charge;
23 that a defendant had been arrested by a specialty team of officers tasked with serving warrants;
24 that a defendant was facing "other charges" in addition to the *lone* weapons charge at issue during
25 the instant grand jury proceedings; that the firearm in question had been fired recently; that the
26 firearm in question had been used in a homicide recently; and/or that a defendant had used the
27 firearm in a homicide recently.

1 The grand jury could have made a probable cause determination on the mere possession of
2 a firearm without additional, prejudicial information that tended to show the Defendant was
3 connected to other crimes, was already under arrest on unrelated charges, and that the weapon had
4 not only been fired recently, but that it had been fired by the Defendant as part of a homicide.³ The
5 State also claims that it presented this extraneous information in as limited a manner as possible:
6 “Notably, the State never once advised the Grand Jury of the facts surrounding the murder, or even
7 the fact that Defendant was charged with murder, or even that the victim died as a result of a
8 gunshot wound inflicted by the Defendant.” *State’s Opp.* at 15-16. However, the transcript speaks
9 for itself.

10 One of the witnesses, Det. DePalma, testified that is a homicide detective; that he was
11 working in that capacity pursuant to this case; and that he was working the case alongside of the
12 *other* detective-witness who testified before the grand jury.⁴ It is not difficult to connect those dots
13 and see that the “shooting” alluded to resulted in the death of the person shot. This was
14 impermissible bad acts evidence, and propensity evidence, that tainted the grand jury proceedings.

15 16 CONCLUSION

17 Based on the foregoing, the appropriate remedy is a dismissal of the Indictment. The
18 prosecutor’s misconduct in this case is both the sum of its parts, and determinable from any of
19 those “parts” in isolation.

20 The prosecutor ignored numerous procedural requirements in seeking to charge the
21 Defendant for whatever crime the State feels will stick regardless of the lower court’s ruling and
22 the patent defects in its case. The prosecutor presented inadmissible, and therefore not legal,
23 evidence to the grand jury. The prosecutor improperly tainted the evidence against the Defendant

24
25
26 ³ The Defendant is not conceding to any of these allegations, but merely summarizing the witness’s
27 testimony for illustrative purposes.

28 ⁴ See underlying Motion, Ex. G at 16-17.

1 by introducing uncharged bad acts evidence and propensity evidence for a simple weapons charge.
2 Lastly, the prosecutor's conduct in this case flies in the face of controlling case law and is nothing
3 but an exercise in excess in terms of time, judicial economy, and taxpayer resources for both grand
4 jury proceedings and DNA testing on a simple weapons charge.

5 Accordingly, the Defendant prays for relief by way of a dismissal of the Indictment against
6 him.

7 DATED this 24th day of September, 2018.

8 **LOBO LAW PLLC**

9 By: /s/ Adrian M. Lobo
10 Adrian M. Lobo, Esq. (#10919)
11 400 S. Fourth St., Ste. 500
12 Las Vegas, NV 89101
13 702.290.8998
14 *Attorney for Defendant*
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

9
0
1
2
3
4
5
6
7
8
9
20
21
22
23
24
25
26
27
28

0
1
2
3
4
5
6
7
8
9
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

EXHIBIT A-1

Las Vegas Metropolitan Police Department Forensic Laboratory Report of Examination Biology/DNA Forensic Casework		Distribution Date: September 19, 2018 Agency: LVMPD Location: Homicide & Sex Crimes Bureau Primary Case #: 180211-3549 Incident: Homicide Requester: Tate A Sanborn Lab Case #: 18-01476.5
Subject(s):	Deandre Gathrite (Suspect)	

The following evidence was examined and results are reported below.

Lab Item #	Impound Pkg #	Impound Item #	Description	Examination Summary
Item 13	016064 - 2	3	Swab from the revolver (grip, cylinder release and hammer)	
Item 14	016064 - 4	5	Reference Standard from Deandre Gathrite*	• Full male profile

* Last name spelled differently than on the request

DNA Results and Conclusions:

Lab items 13 and 14 were subjected to PCR amplification at the following STR genetic loci: TH01, D3S1358, vWA, D21S11, TPOX, DYS391, D1S1656, D12S391, SE33, D10S1248, D22S1045, D19S433, D8S1179, D2S1338, D2S441, D18S51, FGA, D16S539, CSF1PO, D13S317, D5S818, and D7S820. The sex-determining Amelogenin locus was also examined. Where applicable, STRmix was used for interpretation.

Lab Item 13: Swab from the revolver

Number of Contributors: 4, at least one male
Approximate Mixture Proportions: 50:37:7:5
Individually Included: Deandre Gathrite (Item 14) LR = at least 260 trillion, 260×10^{12}

The probability of observing the DNA profile is at least 260 trillion times more likely if it originated from Deandre Gathrite (Item 14) and three unknown random contributors than if it originated from four unknown random contributors.

Notes:

- The evidence is returned to secure storage.
- The performance of the tests referenced in this report commenced on 7/26/18 and is considered final in accordance to the "Distribution Date" listed on page 1 of the report.
- DNA extracts generated during the analysis of this case and/or cuttings taken from the evidence may be available for future testing.
- For comparison purposes, please collect reference buccal swab(s) from individuals believed to be involved in (or who have had reasonable access to) this incident. When a reference buccal swab is obtained, please submit a Forensic Laboratory Request in Property Connect to complete the case.
- Where applicable, likelihood ratios (LR) were calculated to assess whether each submitted reference standard is statistically included or excluded, individually, as a contributor to the reported DNA profile(s). The reported LR value for an "Individually Included" reference standard is reflective of the likelihood ratio calculation associated with the listed individual, without being considered in combination with other reference standards, except where an "Assumed Contributor" is denoted.
- Mixture proportions signify the approximate percentage of each contributor to the mixture DNA profile.
- The likelihood ratios are based upon propositions that can explain the evidence. This includes assumptions as to the number of contributors present in the DNA profile and, unless otherwise noted, that each unknown contributor is unrelated to the named reference standards. Since a range of propositions might explain the evidence, either interested party to this case, prosecution and/or defense, may request an additional likelihood ratio that incorporates an additional proposition that more accurately represents their position. All requests must be submitted in a timely manner, must be reasonable given the test results, and must be within the capability and validated application of the program used.
- Statistical probabilities were calculated using the recommendations of the National Research Council (NRC II) utilizing the NIST database (Hill, C.R., Duewer, D.L., Kline, M.C., Coble, M.D., Butler, J.M. (2013) U.S. population data for 29 autosomal STR loci. Forensic Sci. Int. Genet. 7: e82-e83 and Steffen, C., Coble, M., Gettings, K., Vallone, P. Corrigendum to 'U.S. Population Data for 29 Autosomal STR Loci' [Forensic Sci. Int. Genet. 7 (2013) e82-83]. Forensic Sci. Int. Genet. 31: e36-e40). The probability that has been reported is the most conservative value obtained from the US Caucasian (CAU), African American (BLK), and Hispanic (HSP) population databases. All likelihood ratios calculated by the LVMPD are truncated to three significant figures.

---This report does not constitute the entire case file. The case file may be comprised of worksheets, images, analytical data and other documents.---



Allison Rubino, #14784
Forensic Scientist II

- END OF REPORT -

EXHIBIT B-1

ORIGINAL

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
SARAH E. OVERLY
Deputy District Attorney
Nevada Bar #012842
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

LAS VEGAS JUSTICE COURT
FILED IN OPEN COURT

JUN - 8 2018

RP
Clerk

JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

DEANDRE GATHRITE,
aka Deandre Terelle Gathrite, #2592432
Defendant.

CASE NO: 18F03565X

DEPT NO: 11

STATE'S NOTICE OF MOTION AND MOTION TO CONTINUE

DATE OF HEARING: JUNE 8, 2018
TIME OF HEARING: 9:00 A.M.

TO: DEANDRE GATHRITE, aka Deandre Terelle Gathrite, Defendant; and

TO: ADRIAN LOBO, ESQ., Attorney for Defendant

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that the State
respectfully moves this Court to continue the above entitled case.

///

///

///

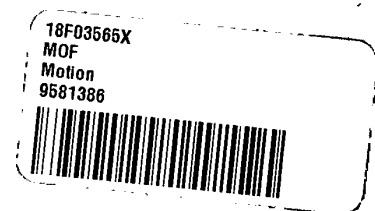
///

///

///

///

///




1 This Motion, which will be heard in Justice Court on the 8th day of June, 2018, at 9:00
2 o'clock, A.M., is based upon Hill v. Sheriff of Clark County, 85 Nev. 234 (1969), and is
3 supported by the following Affidavit.

4 DATED this _____ day of June, 2018.

5 STEVEN B. WOLFSON
6 Clark County District Attorney
7 Nevada Bar #001565

8 BY


9 SARAH E. OVERLY
10 Deputy District Attorney
11 Nevada Bar #012842
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AFFIDAVIT

STATE OF NEVADA }
COUNTY OF CLARK }ss:

SARAH E. OVERLY, being first duly sworn, deposes and says:

1. That RAYMOND MOORE is a witness for the State of Nevada in this matter; that RAYMOND MOORE is currently homeless and resides in San Bernardino, California;

2. The following efforts were made to procure the attendance of this witness at the preliminary hearing scheduled for June 8, 2018. The LVMPD Homicide Detectives, along with the Clark County District Attorney's Office Out of State Desk have had contact with Moore since the inception of the case on February 26, 2018. Travel arrangements for Moore were made for him to appear at the preliminary hearing date scheduled for April 5, 2018. The preliminary hearing was subsequently continued at the request of defense and reset to May 11, 2018. Subsequent motions were filed and the May 11th preliminary hearing date was vacated by stipulation of both parties and continued to June 8, 2018. Moore contacted LVMPD Detective Gerald Mauch on June 6, 2018 with a different telephone number inquiring into his appearance for a future court date. The Clark County District Attorney's Office Out of State desk made contact with Moore the same day whereby he indicated he would be unable to attend the preliminary hearing due to his prescheduled court appearance in San Bernadino, California on June 8, 2018;

3. Raymond Moore is an essential witness for the State of Nevada in that he is expected to testify that on February 11, 2018, he was at the apartment complex of 2612 Van Patten in Clark County, that he witnessed the victim Kenyon Tyler and the Defendant exchange words, that both Tyler and the Defendant possessed firearms, and that Defendant removed the firearm from his pants pocket and shot Tyler while Tyler's gun remained in his pants pocket;

///
///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. It is necessary to seek a continuance in this matter because Raymond Moore is an essential witness and is unavailable to testify at the preliminary hearing scheduled for June 8, 2018.
5. Raymond Moore will be available to testify at a future court date. Your affiant first learned on or about June 7, 2018 that this witness would not be available to testify at the scheduled hearing.
6. That this motion is made in good faith and not for the purpose of delay.

Executed on _____
(Date) (Signature)

mah/L1

EXHIBIT C-1

1 CASE NO. 18F03565X

2 DEPT. NO. 11

3

4 IN THE JUSTICE COURT OF THE LAS VEGAS TOWNSHIP

5 COUNTY OF CLARK, STATE OF NEVADA

6

7

8 THE STATE OF NEVADA,

9 Plaintiff,

10

Vs

11

DEANDRE GATHRITE,

12

Defendant.

13

14 REPORTER'S TRANSCRIPT
15 OF
16 DISMISSAL

17 BEFORE THE HONORABLE ERIC A. GOODMAN

18 JUSTICE OF THE PEACE

19

20 TAKEN ON FRIDAY, JUNE 29, 2018
21 AT: 9:00 A.M.

22 APPEARANCES:

23 For the State:

SARAH OVERLY
Deputy District Attorney

24 For the Defendant:

ADRIAN LOBO, ESQ.

25

REPORTED BY: PATSY K. SMITH, C.C.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 1

ORIGINAL

2018 SEP 8 AM 11:00

FILED

09:16AM

09:16AM

09:17AM

09:17AM

1 resulted in his hospitalization, which resulted in his
2 current placement in a coma.3 The State's not aware of any additional
4 information that has to do with his condition, but by
5 virtue of that, he is clearly not able to come to court
6 today and testify.7 So, as a result, I recognized that the
8 State already sought to have a Hill Motion. So the State
9 would be dismissing pursuant to statute today, but I would
10 note that a Marcum Notice was emailed on June 19th to
11 defense counsel and I would also just make a record with
12 regards to the offer that was extended.13 There was an offer of a battery with
14 substantial bodily harm, a C felony. The most recent offer
15 that was discussed was to stipulate to the minimum sentence
16 of 12-to-30 months with the State not seeking habitual
17 treatment, with the State not pursuing any of the murder
18 charges in the future, with no referral to the Feds, and
19 with the Feds agreeing themselves not to pursue additional
20 charges against the defendant.21 It's my understanding that that offer has
22 been rejected and so I just wanted to make a record of
23 that.24 THE COURT: Sir, you want to reject the
25 offer?PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 2

1 LAS VEGAS, NEVADA, FRIDAY, JUNE 29, 2018

2

* * * * *

3

4 THE COURT: Ms. Lobo, let's go on your

09:14AM 5 case, Gathrite, Deandre Gathrite.

6 DEFENDANT: Yes, sir.

7 THE COURT: Good morning.

8 THE DEFENDANT: Good morning.

9 THE COURT: State, it's my understanding

09:14AM 10 you have some representations you want to make.

11 MS. OVERLY: That's correct, your Honor,

12 and I had informed defense counsel about this yesterday.

13 At this point in time, the State would

14 like to make a record.

09:15AM 15 The State had continued this case at the
16 last setting by use of filing a Hill Motion for its -- its
17 essential witness, Raymond Moore. That was granted and the
18 prelim was continued to today's date.09:15AM 19 Since that time, the State has, by way of
20 its out-of-state desk, made contact with Mr. Moore and
21 other individuals contacting our out-of-state office and
22 relaying information about Mr. Moore.09:15AM 23 Twice, both on June 25th and also early
24 this morning, an individual reached out to our office
25 indicating that Mr. Moore had been in a bad accident, whichPATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 4

1 THE DEFENDANT: Yes.

2 THE COURT: Okay.

3 You know what the offer is, don't you?

4 THE DEFENDANT: Yes.

09:17AM 5 THE COURT: You know it cleans it up with
6 a 12-to-30 with whatever credit you have so far?

7 THE DEFENDANT: Yes.

09:17AM 8 THE COURT: That's your decision. I just
9 need to make a record. I need to make a record.

10 Ms. Lobo.

11 MS. LOBO: Yes, your Honor, I believe on
12 June 8th, when we were scheduled for our last prelim, I
13 told the Court I was in trial. I accepted the State's
14 representations that Mr. Moore was unavailable because he
15 had a pending matter, I believe, in San Bernardino County,
16 then I inquired further as to the case number or what he
17 was in custody for so I could at least see when or if he
18 was going to be released.19 When I looked it up on the docket system
09:18AM 20 on June 8th, there's no entry as to the court setting. He
21 had a May 8th court date. It looks like he was, in fact,
22 on probation. This, of course, happened after, of course,
23 it had been continued.24 Now we're in a situation where it appears
09:18AM 25 on June 25th and again this morning the State had contact
PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

1 and it appears he's going to be unavailable again and we
2 don't know when he'll be available or anything about his
3 medical condition, but I was going to be asking the State
4 or the Court today to dismiss pursuant to -- to dismiss
09:18AM 5 with prejudice pursuant to NRS 174.085.

6 I know the State can voluntarily do this
7 at any time, but the substance of the case and the crux of
8 this case is the gun and it's also his statement. The
9 witness Ray Moore, who we did not hear from, who I don't
09:19AM 10 know if you ever will get the opportunity to hear from,
11 would have said things that were beneficial towards us.

12 I understand that at this point it seems
13 that the State's not going to be able to be successful on a
14 re-filing of a charge that has to, presumably, come back in
09:19AM 15 front of this Court if they were to then be able to get Mr.
16 Moore or another individual or procure other evidence
17 beside the gun and his statement, if he gave another one.
18 I mean we're in a situation where, under NRS 174.085,(6),
19 it has to be brought back before your Honor.

09:19AM 20 So we're in a situation where I believe,
21 at least as of right now -- I don't know. I'm certainly
22 not accusing Ms. Overly of intentionally misrepresenting
23 anything. I don't know where the source of that
24 information came from on June 8th, but we would be asking
09:19AM 25 that the State dismiss this with prejudice.

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

1 THE COURT: I'm not going to dismiss it
2 with prejudice at this point. I think most lawyers, both
3 for the defense and the State, just work with what they're
4 given. I don't think there's any kind of bad faith in
09:20AM 5 making these representations to the Court, but I do expect
6 that if this gentleman is in a coma in a hospital, that at
7 some point, if they are going to take this forward, they
8 are going to bring proof that he's in the hospital in a
9 coma --

09:20AM 10 MS. LOBO: Correct.

11 THE COURT: -- not just somebody trying to
12 avoid coming to court.

13 So I'm not going to dismiss it with
14 prejudice, but, State, if you are making representations
09:20AM 15 he's in a coma in the hospital, you better make sure to get
16 proof that he's in a hospital in a coma.

17 So this case will be dismissed today.

18 MS. LOBO: All right. Thank you.

19 THE COURT: All right.

09:20AM 20 Is anything else holding him?

21 MS. LOBO: No, there's not. There's no
22 hold from California.

23 THE COURT: I didn't think there was going
24 to be.

09:20AM 25 MS. LOBO: Yeah, I didn't think so either,

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

1 even though I would kind of prefer it.

2 THE DEFENDANT: Thank you.

3 THE COURT: Thank you.

4 MS. LOBO: Thank you.

09:21AM 5 THE COURT: You should thank her. She did
6 the work.

7 THE DEFENDANT: I know.

8
9 (Off the record discussion not reported.)

10
11 (Off the record at 9:25 A.M.)

12
13 * * * * *

14
15 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF
16 PROCEEDINGS.

17 /s/ Pats. K. Smith
18 PATSY K. SMITH, C.C.R. #190

19
20
21
22
23
24
25

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

EXHIBIT D-1

Case Information

FSB18001710 | The People of the State of California vs. Raymond Dwayne Moore

Case Number	Court	File Date
FSB18001710	San Bernardino Criminal	05/02/2018
Case Type	Case Status	
Felony	Inactive	

Party

Plaintiff
The People of the State of California

Defendant	Active Attorneys▼
Moore, Raymond Dwayne	Lead Attorney
DOB	Public Defender
XX/XX/XXXX	Retained

Charge

Moore, Raymond Dwayne

	Description	Statute	Level	Date
001	PC236-F: False Imprisonment	236	Felony	05/01/2018
002	PC243(E)(1)-M: Battery on Spouse/Cohabiting/Noncohab Former Spouse/Etc	243(E)(1)	Misdemeanor	05/01/2018

Disposition Events

05/03/2018 Plea ▼

Judicial Officer
Gilbert, Ronald J

Defendant
Moore, Raymond Dwayne

001	PC236-F: False Imprisonment	Not Guilty
002	PC243(E)(1)-M: Battery on Spouse/Cohabiting /Noncohab Former Spouse/Etc	Not Guilty

05/08/2018 Plea ▼

Judicial Officer
Bilash, Colin J

Defendant
Moore, Raymond Dwayne

001	PC236-F: False Imprisonment	No Contest
-----	-----------------------------	------------

05/08/2018 Disposition ▼

Judicial Officer
Bilash, Colin J

Moore, Raymond Dwayne

001 PC236-F: False Imprisonment
002 PC243(E)(1)-M: Battery on
Spouse/Cohabiting/Noncohab
Former Spouse/Etc

Convicted - Plea
Dismissal/Stricken - Pursuant to Plea

05/08/2018 Felony Probation ▼

001 PC236-F: False Imprisonment Felony Probation

Probation

Type: Formal Probation (Supervised)

Start Date: 05/08/2018

Term: 3 Years

End Date: 05/07/2021

Status

Status	Date	Comment
Active	05/08/2018	

Events and Hearings

05/02/2018 eFiling - Initial Filing

05/03/2018 Defendant Arraigned on Complaint

05/03/2018 Defendant Advised of Rights

05/03/2018 10th Day:

05/03/2018 60th day is:

05/03/2018 Case assigned for all purposes to: ▼

Judicial Officer
Malone, Steve C

05/03/2018 Bail Setting

05/03/2018 Pursuant to PC1270.2(a)

05/03/2018 District Attorney Notified

05/03/2018 Public Defender Notified

05/03/2018 Commitment Pending scanned

05/03/2018 Waiver of Personal Presence

05/03/2018 In Custody Arraignment ▼

**Portal Minute Order

Judicial Officer
Gilbert, Ronald J

Hearing Time
1:00 PM

Result
Held

05/08/2018 Change Of Plea Form Filed

05/08/2018 Referred to Probation for Pre-sentence Report

05/08/2018 Referred to Probation - PC29810

05/08/2018 Criminal Protective Order Issued/Filed

05/08/2018 Defendant released from custody

05/08/2018 Restitution Fine stayed - PC1202.45 (CC)

05/08/2018 Const./court operations fee of \$70 per conviction (CC)

05/08/2018 Total monthly payment schedule ordered at:

05/08/2018 Court finds NO ability to pay probation supervision fee

05/08/2018 Restraining Orders Entered Into Clets.

05/08/2018 Probation Officer Notified

05/08/2018 Conviction Certified By Clerk of the Court

05/08/2018 Defendant Waived Right to Trial by Jury

05/08/2018 Defendant Waived Privilege Against Compulsory Self-Incrimina

05/08/2018 Defense Counsel Concurred in Defendants Plea or Admission

05/08/2018 Defendant Waived Right to Confront And Cross Examine Witness

05/08/2018 Court Found Plea Was Knowledgeable, Intelligently Made,

05/08/2018 Defendant advised of Charges and Direct Consequences of Plea

05/08/2018 Pre-Preliminary Hearing ▼

Judicial Officer
Bilash, Colin J

Hearing Time
8:30 AM

Cancel Reason
Vacated

05/08/2018 Pre-Preliminary Hearing ▼

**Portal Minute Order

Judicial Officer
Bilash, Colin J

Hearing Time
8:30 AM

Result
Held

05/15/2018 Preliminary Hearing ▼

Judicial Officer
Bilash, Colin J

Hearing Time
8:30 AM

Vacated

06/18/2018 Probation Officer's Memo Received ▼

Comment

Rcvd Prohibited Persons Relinq Form - placed in Cal/Split Clerk In-Bin

06/18/2018 Probation Officer's Memo Received ▼

Comment

Court Memo Rcvd - JA Bin

06/18/2018 Relinquishment Form Findings

06/22/2018 Modification of Probation ▼

Judicial Officer

Bilash, Colin J

Hearing Time

8:30 AM

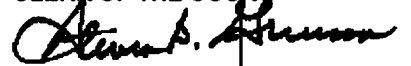
Financial

No financial information exists for this case.

Documents

**Portal Minute Order

**Portal Minute Order



SUPE
ADRIAN M. LOBO, ESQ.
Nevada Bar # 10919
400 S. 4th Street, Ste. 500
Las Vegas, Nevada 89101
702.290.8998
702.442.2626 (fax)
adrianlobo@lobolaw.net
Attorney for the Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

GATHRITE, DEANDRE aka GATHRITE,
DEANDRE TERELLE, ID# 2592432

Defendant.

Case No.: C-18-334135-1

Dept. No.: III

DATE: October 8, 2018

TIME: 1:00p.m.

**SUPPLEMENTAL EXHIBITS J/J1-L/L1 TO DEFENDANT'S PETITION
FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS FOR
PROSECUTORIAL MISCONDUCT**

COMES NOW, the Defendant DEANDRE GATHRITE, by and through his attorney,
ADRIAN M. LOBO ESQ., and hereby submits Supplemental Exhibits to Defendant's Petition for
Writ of Habeas Corpus and Motion to Dismiss for Prosecutorial Misconduct to provide
background information as to the pleadings filed in 18F03565X.

- Exhibit J/J1- Defendant's Motion to Suppress Evidence Acquired in Violation of
both the Fourth and Fifth Amendments (filed May 10, 2018)¹

¹ (With the exception of State's Opposition to Defendant's Motion to Suppress Exhibit 5-
Statement of Raymond Moore, all exhibits to pleadings filed in 18F03565X are omitted as they
are part of the record in the instant moving papers before the court.)

- Exhibit K/K1- State's Opposition to Defendant's Motion to Suppress Evidence with Exhibit 5 (filed May 23, 2018)
- Exhibit L/L1- Defendant's Reply in Support of Motion to Suppress Evidence for Preliminary Hearing (filed May 24, 2018)

DATED this 28th day of September, 2018

LOBO LAW PLLC

By: /s/ Adrian M. Lobo
Adrian M. Lobo, Esq. (#10919)
400 S. Fourth St., Ste. 500
Las Vegas, NV 89101
702.290.8998
Attorney for Petitioner

//

//

//

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

TO: DISTRICT ATTORNEY, its attorneys:

DATED this 28th day of September, 2018.

Attorney for Petitioner

Attorney for Defendant

EXHIBIT A- OFFICER'S REPORT

(Exhibit A has been omitted as they are part of the record in the instant moving papers before the court).

EXHIBIT B - DECLARATION OF ARREST FOR 02/16/18

(Exhibit B has been omitted as they are part of the record in the instant moving papers before the court).

**EXHIBIT C – REPORTER’S TRANSCRIPT OF
NEGOTIATIONS / MOTION BEFORE
HONORABLE ERIC A. GOODMAN JUSTICE
OF THE PEACE TAKEN ON 05/25/2018**

Page 1

1 CASE NO. 18F03565X
2 DEPT. NO. 11

**CERTIFIED
COPY**

4 IN THE JUSTICE COURT OF THE LAS VEGAS TOWNSHIP
5 COUNTY OF CLARK, STATE OF NEVADA

8 THE STATE OF NEVADA,)
9 Plaintiff,)
10 Vs) Case No. 18F03565X
11 DEANDRE GATHRITE,)
12 Defendant.)

14 REPORTER'S TRANSCRIPT
15 OF
16 POSSIBLE NEGOTIATIONS/MOTION
17 BEFORE THE HONORABLE ERIC A. GOODMAN
18 JUSTICE OF THE PEACE

19 TAKEN ON FRIDAY, MAY 25, 2018
20 AT: 7:30 A.M.

APPEARANCES:

21 For the State: SARAH OVERLY
22 Deputy District Attorney
23 For the Defendant: ADRIAN M. LOBO, ESQ.

24 REPORTED BY: PATSY K. SMITH, C.C.R. #190

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

07:51AM

07:52AM

07:52AM

07:52AM

07:52AM

1 would rule on it and then I have just brief
2 supplementation, another tidbit I didn't put in the Reply.
3 THE COURT: Okay, go ahead.
4 MS. LOBO: Okay.
5 One of the things that was not fully
6 flushed out, and forgive me because I'm in trial right now,
7 is that I didn't state in there that it was explicit. I
8 think the Court knows and is well aware how the CAT Team
9 works and that they're not out there just, you know,
10 finding who's on parole violations or probation violations
11 or who's a fugitive in another state.
12 This is done at the request of another
13 jurisdiction or it's done at the request of detectives
14 locally here and it's a focused team that is designed to,
15 you know, extract a particular person for a particular
16 reason and one of the things that was a little bit -- not a
17 little, a lot disturbing about this case was the fact that
18 it was Homicide who contacts CAT, CAT who contacts
19 California Parole, and has that warrant listed on NCIC in
20 order to, you know, actually execute the arrest warrant at
21 the house.
22 So I just don't know how they get around
23 the fact that this is, you know, not something that, you
24 know, trying to keep an arms-length distance away as either
25 though it's parole or probation. That is not analogous to
PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 2

1 LAS VEGAS, NEVADA, FRIDAY, MAY 25, 2018

2 * * * * *

07:50AM 4 THE COURT: All right, let's go on Deandre
5 Gathrite.

6 Good morning.

7 MS. LOBO: Good morning.

8 THE DEFENDANT: Good morning.

07:50AM 9 THE COURT: All right, this is basically
10 on for possible negotiations.

11 You also filed a Motion to suppress the
12 statement and the gun --

13 MS. LOBO: That is correct, Judge.

07:51AM 14 THE COURT: -- as being, basically, the
15 fruit of the poisonous tree and other reasons, but really
16 if the statement gets suppressed, the gun gets suppressed.

17 MS. LOBO: Correct.

07:51AM 18 THE COURT: So there was also possible
19 negotiations. Is this going to be negotiated or are we
20 actually just going on the Motion?

21 MS. LOBO: I think we're going forward on
22 the Motion. We went back and forth and we weren't able to
23 reach a resolution.

07:51AM 24 THE COURT: All right.

25 MS. LOBO: So we would wish the Court

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 4

1 that. This is directly at their behest and request.

2 THE COURT: Okay.

3 MS. OVERLY: And, your Honor, I want to
4 address that and then if I can address something else as
07:53AM 5 well?

6 THE COURT: Sure.

7 MS. OVERLY: With regards to the CAT
8 Team's arrest of the defendant on his parole violation, as
9 your Honor is well aware, the CAT Team has no control over
07:53AM 10 issuing warrants. California, that jurisdiction --

11 THE COURT: Oh, but who triggered it?

12 MS. OVERLY: Triggered what?

13 THE COURT: Who triggered it? Who
14 triggered the arrest? Was it San Diego? Did San Diego
07:53AM 15 call Metro and say, Please don't pick him up, or was it the
16 homicide detectives that got CAT to go pick him up so they
17 could interview him about a murder you are interested in?

18 MS. OVERLY: Homicide detectives became
19 well aware that he was on parole while this was going on,
07:53AM 20 this investigation was going on.

21 THE COURT: Right, I understand.

22 MS. OVERLY: They contacted California.

23 THE COURT: Right.

24 MS. OVERLY: They indicated to California
07:53AM 25 he was on parole and they said, Well, actually, we need to

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 5

1 issue a warrant for him because he's been MIA. He keeps
2 doing this since 2014 where he disappears.
3 THE COURT: So this is triggered by Metro?
4 MS. OVERLY: Yes, their contact to Metro.
07:54AM 5 THE COURT: There is triggered by Metro.
6 They want to get him in custody.
7 MS. OVERLY: Yes.
8 THE COURT: They have information he may
9 have committed a murder. They want to get him in custody
07:54AM 10 so they can interview a murder, correct?
11 MS. OVERLY: They want to locate him, yes,
12 the CAT Team, yes. That's what they do. They have a basis
13 to arrest him on a parole violation, but contact with them
14 is independent of that. They have no control of whether or
07:54AM 15 not he is going to get arrested on a parole violation.
16 Ultimately, that was the circumstances
17 under which he was located and found, but there was -- it's
18 not like Metro contacted them and said, Hey, issue this
19 warrant. He had a active warrant validly issued out of
07:54AM 20 California by California's Department of Parole & Probation
21 and the means by which they located him was that, but that
22 warrant was an independent valid warrant nonetheless and,
23 when he was arrested in this particular incident, he was
24 arrested exclusively on that warrant. He was never, during
07:55AM 25 any of the interaction, arrested on this murder.

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 6

1 THE COURT: But he was arrested for the
2 sole purpose of allowing the detectives to go over and
3 interview him about the murder.
4 MS. OVERLY: Well, I mean that's something
07:55AM 5 that I think would need to be flushed out by the detectives
6 themselves, if they were to testify at a preliminary
7 hearing, which was kind of what I think --
8 THE COURT: Why do they need to flush it
9 out? This is the information I have in front of me. This
07:55AM 10 is what's in the application. This is everything I have in
11 front of me is that they wanted to arrest him solely so
12 they could get over there, talk to him because they have
13 all this information about him, but it's on the streets.
14 Nobody on the street is going to stand up and say, Yeah, he
07:55AM 15 did it and I will testify.
16 MS. OVERLY: Right.
17 THE COURT: So they have to get him in
18 custody. They have to arrest him and get him in custody so
19 they can come interview him about the murder.
07:55AM 20 MS. OVERLY: Well, yes, they wanted to --
21 I think the State's Motion is, yes, they wanted to locate
22 him. If the means by which they located him was, in fact,
23 he was arrested on a parole violation, then, yes, he was.
24 He was arrested on a parole violation and that was the
07:56AM 25 means by which CAT contacted him. They went over there and

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 7

1 they interviewed him, but --
2 THE COURT: So to get this straight, they
3 contact San Diego, San Diego says, Okay, we will issue a
4 warrant, now you have a basis to go arrest him.
07:56AM 5 MS. OVERLY: That's correct.
6 THE COURT: Which is triggered by Metro --
7 MS. OVERLY: That's correct.
8 THE COURT: -- wanting to arrest him so
9 that -- wanting to locate him, arrest him so they can have
07:56AM 10 him in custody to interview him.
11 MS. OVERLY: That's my understanding, yes.
12 THE COURT: So he was in custody and he
13 was in custody on behalf of Metro --
14 MS. OVERLY: No.
07:56AM 15 THE COURT: -- so homicide detectives can
16 go over and talk to him about this murder case.
17 MS. OVERLY: But I think that's where the
18 legal issues are alleged in the Motion is that, yes, he was
19 technically in custody, as they were in those cases cited
07:56AM 20 in the Motion. Yes, he was in custody and that was the
21 means and under the circumstances by which they went and
22 interviewed him, but he was not under a custodial
23 interrogation and in custody in reference to this case.
24 THE COURT: They know exactly why they
07:56AM 25 wanted to talk to him. They know exactly why they want to

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

Page 8

1 arrest him, get him in custody. Why didn't they just read
2 him his Miranda rights?
3 MS. OVERLY: I mean I think that arguably
4 they could have, at the outside, read him his Miranda
07:57AM 5 rights.
6 THE COURT: They could have or should
7 have?
8 MS. OVERLY: Well, the State's argument is
9 that they were not legally required to read him Miranda at
07:57AM 10 the time.
11 THE COURT: It's 28 pages into the
12 interview with him before they even bother to read him his
13 Miranda and it's one of the worse things I have seen, in
14 terms of reading him his Miranda rights, and I'm just going
07:57AM 15 to turn to page 28 on this. I think it was 28; I may be
16 off a page.
17 From the detective, and this is on the
18 third line of the page towards kind of the end of that, "I
19 mean would you -- would you feel better if I read you your
07:57AM 20 Miranda rights and stuff, man?"
21 I mean that's what the detective said.
22 The standard isn't does it make you better if he had his
23 Miranda rights read to him. The standard is if he is in
24 custody, he needs to have his Miranda rights read before
07:58AM 25 they interview him. It's not whether somebody feels

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

1 better. That's not the way the Fifth Amendment works.

2 MS. OVERLY: No, I understand that, your

3 Honor, and I think if the detective believes he was, in

4 fact, under custodial interrogation and in custody with

07:58AM 5 regards to this case, they would have read him Miranda,

6 either by card or memory, at the outset of the interview,

7 but based on their position, it was the State's position in

8 its Opposition was that he, in fact, was not. They didn't

9 feel the need to issue these Miranda warnings at the outset

07:58AM 10 or throughout any point in time in the interview, as they

11 didn't in Fields rather.

12 THE COURT: The interviews basically are

13 voluntary. They are always voluntary interactions with the

14 police. You cited a case where the guy's in prison, they

07:58AM 15 bring him in the interview room, and he is free to leave.

16 He may have be in prison, but in prison, his cell is his

17 home. So they say, You are free to leave. That means go

18 back to your cell and just go back to what is basically his

19 home.

07:59AM 20 MS. OVERLY: Correct.

21 THE COURT: If he was free to leave, that

22 means he was going to be uncuffed, let out, put in a police

23 car, go back to his apartment, make a sandwich, turn on the

24 TV, and go on with his day or by free means he is going to

07:59AM 25 be in handcuffs and put in the back of the car?

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

1 MS. OVERLY: Well, free to leave in the

2 same respect as he was in Fields. I mean like that's why

3 the State believes it's analogous. In that case, they even

4 indicated that he was free to leave and by that, they meant

07:59AM 5 free to leave and go back to his cell.

6 THE COURT: His cell is his home.

7 MS. OVERLY: Correct.

8 THE COURT: Right. He's not free to go

9 back to his home, right?

07:59AM 10 MS. OVERLY: No, he's not because of this

11 active parole violation where he was going to independently

12 go back to California, as he had been doing since 2014.

13 THE COURT: And that's the ball that Metro

14 got started rolling.

07:59AM 15 MS. OVERLY: Correct.

16 THE COURT: Correct.

17 MS. OVERLY: And the ball -- Metro's ball

18 started rolling, but it's a ball he created for himself and

19 had this warrant issued nonetheless.

07:59AM 20 THE COURT: All right.

21 MS. OVERLY: So the State's argument was

22 similar to that case. He could have indicated, with his

23 extensive criminal history and his knowledge about the

24 criminal justice system, and merely say to them, I don't

08:00AM 25 want to talk to you about this. They would have taken him

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

1 back to CCDC and that would have been, granted, his

2 temporary home, but just like in Fields, it's like him

3 going back to his cell. He was going to be extradited back

4 to California, as he indicated he well knew in the

08:00AM 5 interview.

6 MS. LOBO: One other thing for the Court

7 too.

8 Mr. Gathrite, it was so bazaar and strange

9 to him. He's appeared a few times before your Honor on the

08:00AM 10 fugitive calendar. He's been extradited back and forth.

11 This is the one time California didn't come to get him.

12 California was not interested this time. He's gone back

13 and forth like two, three times. They always come get him.

14 Somebody said, Don't bother, he's got a murder case.

08:00AM 15 MS. OVERLY: Well, I think that's --

16 THE COURT: Well, no, whatever you have

17 locally, you have to clean up the new local charges first

18 before they come pick you up. So he does have an open

19 murder case. They are not going to come get him.

08:00AM 20 MS. LOBO: Here's the thing, Judge. He is

21 not booked for murder, though. It's just they don't bother

22 to come get him. It's not until a week later.

23 MS. OVERLY: And, your Honor, just one

24 brief thing.

08:01AM 25 THE COURT: Sure.

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

1 MS. OVERLY: If they were to be --

2 typically, as your Honor knows, these issues are litigated

3 up in District Court as well and after they're litigated in

4 a motion, like in Jackson V Denno, a preliminary hearing is

08:01AM 5 typically ordered at that point in time.

6 The reason I mentioned the preliminary

7 hearing is because it would be the State's position that

8 given the jurisdiction in which we are in right now, if

9 that your Honor felt that under Jackson V Denno or

08:01AM 10 something of equal footing would be appropriate, that a

11 preliminary hearing would suffice, so forth, that would

12 flush out those issues.

13 THE COURT: I'm not sure what issues there

14 are to flush out. He is clearly in custody. This was all

08:01AM 15 triggered by Metro. They was all set in motion. They knew

16 exactly what they were doing. They knew exactly what they

17 were doing. They wanted to get him in custody so they

18 could interview him on the murder case.

19 That is the only reason how this thing

08:02AM 20 starts. It's the only reason to contact San Diego. This

21 is all a ruse. This is all a ruse by Metro to get him in

22 custody to interview him about the murder case. So he was

23 in custody and, when he is custody, they should have read

24 him his Miranda Rights. They didn't, not until 28 pages

08:02AM 25 into this.

PATSY K. SMITH, OFFICIAL COURT REPORTER
(702) 671-3795

1 They violated his rights. The fact it's a
 2 murder case doesn't matter to me. It doesn't matter if he
 3 is caught with 20 pounds of weed or if it's a murder case.
 4 They violated his rights.
 08:02AM 5 Because they violated his rights when he
 6 was in custody, I'm going to suppress his statement.
 7 Because the gun comes from the statements made during the
 8 interview, I'm going to suppress the gun --
 9 MS. OVERLY: And, your Honor --
 08:02AM 10 THE COURT: -- and that's going to be this
 11 Court's ruling.
 12 So you can proceed to prelim, if you want
 13 to, but the statement is not coming in and the gun is not
 14 coming in.
 08:02AM 15 MS. OVERLY: And, your Honor, can I ask
 16 then what your specific ruling would be in reference to the
 17 State's Opposition in reference to how Miranda does not
 18 apply to the issue of consent with regards to the retrieval
 19 of the gun?
 08:03AM 20 THE COURT: The gun is a fruit of the
 21 poisonous tree. The only information they have is the
 22 information they gleaned while interviewing him illegally
 23 because they knew he wasn't read his Miranda rights
 24 properly. All of this is the fruit of the poisonous tree.
 08:03AM 25 MS. OVERLY: But, your Honor --
 PATSY K. SMITH, OFFICIAL COURT REPORTER
 (702) 671-3795

1 THE COURT: So the only information they
 2 have about the gun is the information he gave during the
 3 interview. So if the statement goes out, the gun goes out.
 4 MS. OVERLY: Okay.
 08:03AM 5 So, specifically, the State's Opposition
 6 references how the Miranda warnings and any illegally
 7 obtained statements is non-testimonial for purposes of
 8 somebody's rights being violated.
 9 So I just want to be clear that your
 08:03AM 10 Honor's ruling is independent of that, I guess, case law?
 11 THE COURT: Do they have the gun without
 12 the statement? Do they get the gun without the statement
 13 from him as to where the gun was?
 14 MS. OVERLY: Well, the argument is, your
 08:03AM 15 Honor, that his consent is not testimonial. So it's not
 16 technically considered his statement. It's independent of
 17 the usual Miranda suppression because it's not testimonial.
 18 THE COURT: I have a gun that he said was
 19 hidden here. That's the information received in the
 08:04AM 20 investigation. I have the gun used in the murder. It's
 21 located here.
 22 MS. OVERLY: I understand, but the State's
 23 argument is that he consented to them accessing the
 24 apartment to retrieve a firearm and that that consent
 08:04AM 25 allowed them to go inside and obtain that and then,
 PATSY K. SMITH, OFFICIAL COURT REPORTER
 (702) 671-3795

1 additionally, the State's Inevitable Discovery Doctrine,
 2 I'm not sure if your Honor wants to rule on that issue as
 3 well?
 4 THE COURT: No. The statement is out, the
 08:04AM 5 gun is out. You can proceed however you want, but the
 6 statement is not coming in at prelim. The gun is not
 7 coming in at prelim. So --
 8 MS. OVERLY: So the Inevitable Discovery
 9 Doctrine would be denied as well in that respect?
 08:04AM 10 THE COURT: Counsel, the statement is out.
 11 The gun is out.
 12 MS. OVERLY: Okay.
 13 THE COURT: So okay.
 14 MS. LOBO: Thanks, Judge.
 08:04AM 15 THE COURT: Okay, do we have a prelim set?
 16 MS. LOBO: Friday.
 17 THE CLERK: June 8.
 18 MS. LOBO: Next Friday, one week.
 19 THE COURT: All right.
 08:05AM 20 MS. LOBO: Thank you.
 21 THE CLERK: June 8, 9 A.M. stands.
 22
 23 (Off the record discussion not reported.)
 24
 25 * * * * *

PATSY K. SMITH, OFFICIAL COURT REPORTER
 (702) 671-3795

1
 2 ATTEST: FULL, TRUE, ACCURATE AND CERTIFIED TRANSCRIPT OF
 3 PROCEEDINGS.
 4 /s/ Patsy K. Smith
 5 PATSY K. SMITH, C.C.R. #190
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

PATSY K. SMITH, OFFICIAL COURT REPORTER
 (702) 671-3795

**EXHIBIT D – EMAIL CORRESPONDENCE FROM
DEPUTY DISTRICT ATTORNEY SARAH OVERLY**

Adrian Lobo <adrianlobo@lobolaw.net>

Deandre Gathrite, 18F03565X

Sarah Overly <Sarah.Overly@clarkcountyda.com>
To: Adrian Lobo <adrianlobo@lobolaw.net>

Wed, Apr 11, 2018 at 2:25 PM

Hi Adrian,

Per Detective Sanborn, the CAT team reached out to Defendant's parole officer in California. CA P&P issued a warrant for Defendant's arrest. The CAT team was able to locate him through his girlfriend's lease. However, there were no reports generated by the CAT team.

Once the warrant was issued it was put into NCIC. However, per Detective Sanborn, once the Defendant is booked on the warrant it is cleared from NCIC. Thus, any NCIC run currently done would not reflect the warrant back when it was originally issued by CA.

As for the gun, that was recovered after Defendant gave consent to retrieve it. Metro subsequently did a SW to recover other evidence, which is why the gun is not on the return. The gun will be reflected in the CSA impound report. However, that has not yet been prepared. I'll provide that as well as the autopsy report when I receive it.

Thanks.

Sarah Overly
Deputy District Attorney
(702) 671-2627 (direct)
(702) 868-2445 (fax)
Sarah.Overly@ClarkCountyDA.com

From: Adrian Lobo [mailto:adrianlobo@lobolaw.net]
Sent: Tuesday, April 10, 2018 10:34 AM
To: Sarah Overly <Sarah.Overly@clarkcountyda.com>
Subject: Re: Deandre Gathrite, 18F03565X

Hi Sarah,

[Quoted text hidden]

PA000309

EXHIBIT E – LVMPD CAD LOG (EVENT NO. LLV180216002092)

(Exhibit E has been omitted as they are part of the record in the instant moving papers before the court).

**EXHIBIT F – DEANDRE GATHRITE’S
SURREPTITIOUS RECORDING
STATEMENT FROM 02/16/18**

(Exhibit F has been omitted as they are part of the record in the instant moving papers before the court).

EXHIBIT G – LVMPD APPLICATION FOR TELEPHONIC SEARCH WARRANT

(Exhibit G has been omitted as they are part of the record in the instant moving papers before the court).

EXHIBIT H – REPORTER’S TRANSCRIPT OF PROCEEDINGS TAKEN ON 08/14/18

(Exhibit H has been omitted as they are part of the record in the instant moving papers before the court).

EXHIBIT I – LETTER
CORRESPONDENCE FROM ADRIAN
M. LOBO 06/20/18

(Exhibit I has been omitted as they are part of the record in the instant moving papers before the court).

**EXHIBIT J/J1 – DEFENDANT’S
MOTION TO SUPPRESS
EVIDENCE ACQUIRED IN
VIOLATION OF BOTH THE
FOURTH AND FIFTH
AMENDMENTS**

1 **MOT**

2 **ADRIAN M. LOBO, ESQ.**

3 Nevada Bar # 10919

4 400 S. 4th Street, Ste. 500

5 Las Vegas, Nevada 89101

6 702.290.8998

7 702.442.2626 (fax)

8 adrianlobo@lobolaw.net

9 Attorney for the Defendant

FILED

2018 MAY 10 A 8:53

JUSTICE COURT
LAS VEGAS NEVADA
BY AMC
DEPUTY

7 **JUSTICE COURT**

8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 DEANDRE GATHRITE,

13 Defendant

Case No.: 18F03565X

Dept. No.: 11

14 **DEFENDANT'S MOTION TO SUPPRESS EVIDENCE ACQUIRED IN VIOLATION OF**
15 **BOTH THE FOURTH AND FIFTH AMENDMENTS**

16
17 COMES NOW the Defendant, DEANDRE GATHRITE, by and through his counsel of
18 record Adrian Lobo, Esq., and hereby files this Motion to Suppress Evidence for Preliminary
19 Hearing. The evidence in question was obtained in violation of the Defendant's constitutional
20 rights under both the U.S. and Nevada Constitutions, and must not be introduced or heard at the
21 Preliminary Hearing.

22 This Motion is based on the pleadings and papers on file with the court, the attached
23 Memorandum of Points and Authorities, and oral argument entertained by the court at the time
24 set for hearing.

25 DATED this 10th day of May, 2018.

26 By: 

27 Adrian M. Lobo, Esq. (#10919)
28 Attorney for Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

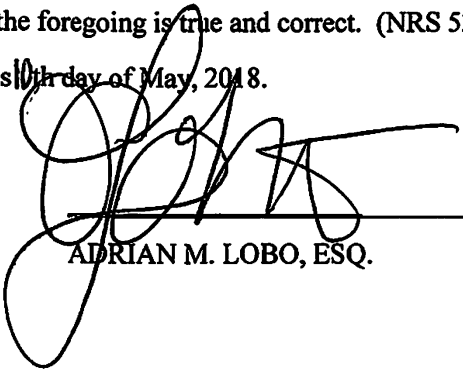
DECLARATION

ADRIAN M. LOBO makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada.
2. I am the appointed attorney for DEANDRE GATHRITE that has been assigned by the Office of Appointed Counsel to represent GATHRITE in the instant matter.
3. I make this Declaration in support of this Motion to Suppress Evidence Before Preliminary Hearing.
4. I am more than eighteen (18) years of age, and I am competent to testify as to the matters stated herein. I am familiar with the facts, circumstances, and procedural history of this case.
5. I have personal knowledge pertaining to the facts stated herein, or I have been informed of these facts and believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 10th day of May, 2018.


ADRIAN M. LOBO, ESQ.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. Statement of Facts**

3 The Defendant is charged by the State with two counts: 1) Open Murder, with a deadly
4 weapon enhancement; and 2) Owning or possessing a gun by a prohibited person. This case
5 stems from the February 11, 2018 shooting death of a drug dealer by the name of "T-Rex,"¹ at
6 approximately 2612 S. Van Patten Street in Las Vegas, near the intersection of E. Sahara Ave.
7 and Joe Brown Dr. *See Exhibit A – Officer's Report Continuation* at 1.

8 It is difficult to follow Metro's investigation, as the Officer's Report states that "Subjects
9 in the area were reluctant to communicate with police and no witnesses provided formal
10 statements. *Id.* at 5. The Report goes on to say that "Gang Crimes Detectives developed
11 information that a black male from the neighborhood known as 'Dre' was responsible for the
12 shooting," but it does not detail how this information was developed given the above-cited
13 reluctance and lack of formal statements. *Id.* Even more fortuitously, "Patrol Investigation
14 Detectives familiar with the area provided information regarding the possible identity of 'Dre.'"
15 *Id.*

16 "Dre" was, somehow, identified as the Defendant, and the Report also claims that he
17 "was the subject of several active criminal investigations." *Id.* Despite apparently being the
18 subject of "several active" investigations, on February 11, 2018 the Defendant did not have a
19 warrant for his arrest in Nevada or California. *See Exhibit B - Declaration of Arrest for Fugitive*
20 *Arrest.* The report references a police records check was conducted but does not say what date
21 this search was conducted on or even which database was searched. *Ex. A* at 10.² Oddly as luck
22 would have it, on February 14, 2018, a California warrant was issued for Defendant's arrest on a
23 Parole Violation for a weapons related offense. *Id.*

24
25
26
27 ¹ T-Rex's real name was Kenyon Tyler.

28 ² A simple SCOPE search would reveal Gathrite's prior fugitive filings in Clark County.

1 The Metro Criminal Apprehension Team (CAT) was tasked with locating the Defendant,
2 and tracked him to 2630 Wyandotte St., Apt. #1 in Las Vegas. The Defendant was arrested on
3 the outstanding San Diego warrant on February 16, 2018 at approximately 1:24 p.m. *Id. See also*
4 *Exhibit C- CAD LOG Event #180216-2092* .

5 Following the CAT arrest, Metro Homicide detectives arrived at Wyandotte at 2:56 p.m.
6 and contacted the Defendant at the scene of his arrest and began to question him surreptitiously
7 about the T-Rex shooting. *Ex. C.* at 1. This interview was only partially transcribed,³ and is
8 described as a “post-Miranda” interview with the Defendant. *Ex. A* at 9. The Report goes on to
9 summarize that the interview resulted in the Defendant admitted that he fired at T-Rex, but
10 “didn’t know if he hit anyone”. *Id.* The Defendant further told the detectives the location of the
11 gun used in the shooting. *Id.*

12 In fact, these details were not “post-Miranda,” as the Report claims. In fact, the detectives
13 also misrepresented to Defendant that he was free to leave at any time during the interview,
14 despite this interview taking place immediately following the Defendant’s apprehension by
15 CAT:

16 Q: Let me ask you this, man. ‘Cause here’s – here’s the magic question,
17 man. I mean, I know they kinda run up. You ain’t out looking for trouble,
18 you know, ‘cause that ain’t you ‘cause I know all about your history. I
19 know all about what you, you know, we done done our research. You e-
20 you feel me? So, I mean, I know I ain’t talking to some bad dude. That’s
21 why I came in there and took the cuffs off of you, got you comfortable,
22 and let you hug your kid. Be cool with you. You – you feel me? ‘Cause I
23 know what kinda p- I know what kinda person you are, man. So what I’m
24 asking, man, basically, what it boils down to is why’d you pull the trigger,
25 man? What happened? Walk me through it, man. Walk me through how it
26 went down. You know what I’m sayin’? So I can explain that. That’s what
27 I’m trying to say ‘cause I know that wasn’t what – you didn’t go lookin’
28 for it.

26 ³ Both the audio recording of the Defendant’s questioning and the corresponding transcript
27 clearly begin partway through the interview (and both begin at the same point). The only
28 discernable timeline is through the CAD Log of his arrest. Homicide detectives arrive at 2:56
p.m., and then Gathrite is not booked into CCDC until 6:18 p.m. *Ex. C* at p.1-2.

1 *Exhibit D – Transcribed Interview with Defendant at 3.*

2
3 The detective continued to elicit details of the shooting from the Defendant:

4 Q: So what point in time did you pull yours out? I mean, 'cause he got
5 they shit out first, so at what point in time you pull yours out? Was it
6 before or after them?

7 A: Wasn't – wasn't before them.

8 Q: So it was after them.

9 A: Or I wouldn't have been able to be out there.

10 Q: Right. Exactly. So they got they's out, and at some point in time
11 during this whole talking that they goin' back and forth, at what point in
12 time do you pull yours out? It was, I mean, was it...

13 A: I don't know. It just – it just happened so fast.

14 *Id.* at 10.

15 It is clear that during this questioning, the Defendant was not free to leave:

16 A: Can – can I smoke a cigarette? I'm just...

17 Q: You got a cigarette?

18 A: I do. My pack in on the counter in there [in the Wyandotte Apartment].
19 I...

20 Q: Uh...

21 Q1: Hey, you care if you have an old one? I got some old ones
22 there if that's okay. You just wanna step out [of the patrol car]?

23 A: Uh, yeah. I had just...

24 Q: I'll text my boy and have him go – I'll text him to have – you said it's
25 on the kitchen counter? All right.

26 *Id.* at 10-11.

27 Only after Defendant had provided numerous, incriminating details about the T-Rex
28 shooting did detectives finally see fit to Mirandize him, on page 23 of the interview.

29 Eventually, the Defendant told detectives that the firearm used in the T-Rex shooting was
30 located in an air vent inside of the Wyandotte apartment. *Id.* at 39. The detectives asked
31 Defendant for consent to enter the apartment to recover the weapon, on the premise that the
32 Defendant had dominion and control over the apartment. *Id.* at 47. The Defendant was reluctant
33 to allow this, and stated to detectives specifically that the apartment was not actually his
34 residence. *Id.* at 40. The detectives even acknowledged that the apartment was not Defendant's
35 residence:

1 Q1: And this address on Wyandotte, that's your – that's Tia's place,
2 your girlfriend, baby mama. She's only been here a couple days? And do
3 you – you weren't living here. You – you just stayed here last night and
4 that was it.

A: Yeah.

Id. at 45.

5 Detectives ultimately recovered the firearm from the apartment, where Defendant told
6 them it would be located (in an air conditioning vent). Once recovered, the detectives then
7 applied telephonically for a search warrant to search for additional evidence in the premises. The
8 warrant sought the following:

- 9 1. Paperwork such as rent receipts, utility bills, and addressed letters
10 showing the name(s) of persons residing at the premises. Paperwork
11 such as proof of insurance, DMV registration showing the name(s) of
12 persons owning or responsible for the vehicle(s).
- 13 4. Photographs, video and/or audio tapes, DVD or CD's, cellular phones,
14 Electronic Storage Devices such as lap or desk top computers, game
15 consoles, tablets and like items. To include pass or pattern codes for
16 the same.
- 17 5. Telephonic information to include; caller ID history, answering
18 machine messages, voicemails, phone directories, contacts, call history,
19 photographs, audio and/or video recordings stored electronically in
20 residential or cellular phones.
- 21 6. A thorough, microscopic examination and documentation of the crime
22 scene to discover trace evidence to include but not limited to:
23 fingerprints, blood, hair, fibers and bodily fluid samples.
- 24 10. Epithelial cells from the mouth of [Defendant's name and date of birth
25 are handwritten], to be collected via Buccal Swab.⁴
26 *See Exhibit E – Search Warrant Application* at 1.

21 In addition, the Warrant Application indicated that detectives would search for additional,
22 handwritten items: "Handguns and Ammunition"; "Cell phone off person of [Defendant]"; and
23 "Gang Paraphernalia [sic]". *Id.* The Application indicated the address of "2630 Wyandotte #1"-
24

25
26
27 ⁴ Line Items 2-3, and 7-9 contained additional items to be recovered, but these lines had been
28 crossed out. *See Ex. E* at 1.

1 the apartment belonging to Defendant's girlfriend. *Id.* The Application was dated February 16,
2 2018 at 1735 hours (5:35 p.m.). *Id.*

3 No additional items were recovered from or in the apartment. *Ex. A* at 11.

4 **B. Legal Argument**

5 *1. Jurisdiction Is Proper Before This Court*

6 The ability of a Justice Court to hear motions similar to the one at bar has been
7 recognized by the Nevada Supreme Court in the recent decision *Grace v. Eighth Judicial Dist.*
8 *Court of Nev.*, 375 P.3d 1017, 132 Nev. Adv. Op. 51 (Nev. 2016). That case, which originated
9 before this very court, considered "whether Nevada's justice courts are authorized to rule on
10 motions to suppress during preliminary hearings." 375 P.3d at 1018. The Court held that "the
11 justice courts have express and limited inherent authority to suppress illegally obtained evidence
12 during preliminary hearings." *Id.*

13 Specifically, the Court based its decision on the concept that "the evidence presented at a
14 preliminary hearing 'must consist of legal, competent evidence,'" and "[t]herefore, justice courts'
15 authority to make probable cause determinations includes a limited inherent authority to suppress
16 illegally obtained evidence." *Id.* at 1021 (citation omitted).

17 *2. Defendant's Statement Must Be Suppressed Due to the Failure to Mirandize Him*
18 *Before Questioning*

19 Certain rights are guaranteed to a suspect facing questioning by law enforcement,
20 conducive to the Amendment V right against self-incrimination. *Miranda v. Arizona*, 384 U.S.
21 436 (1966). Specifically, "the prosecution may not use statements, whether exculpatory or
22 inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the
23 use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at
24 444. These procedural safeguards have been memorialized as the so-called "Miranda warnings"
25 and typically encompass admonitions that the accused has the right to remain silent; that waiving
26 the right may result in his statements being used against him in court; and that he has the right to
27 an attorney. *Id.* at 479.