A valid waiver of Miranda must be knowing, voluntary, and intelligent. *United States v. Garibary*, 143 F.3d 534, 536 (9th Cir. 1998), citing *United States v. Binder*, 769 F.2d 595, 599 (9th Cir. 1985). A reviewing court must consider the totality of the circumstances to determine the validity of the waiver. Id. In the case of determining the validity of a waiver, there is a presumption against waiver, and the State bears the burden of overcoming that presumption by a preponderance of the evidence. *United States v. Crews*, 502 F.34 1130, 1139-40 (9th Cir. 2007), citing *Garibay*, 143 F.3d at 536. To meet the burden, "the Government must prove that, under the totality of the circumstances, the defendant was aware of the nature of the right being abandoned and the consequences of such abandonment." *Crews*, 502 F.3d at 1140.

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

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

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

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

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

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

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

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

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

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

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

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

> So, I mean, I know I ain't talking to some bad dude. That's why I came in there and took the cuffs off of you, got you comfortable, and let you hug your kid. Be cool with you. (*Ex. D* at 3);
> No, no, no. Dude – dude, hey, look. Hey. I know you're here talking to us. I know you got – you feel some kinda way, man, but I – I – I mean, you know, you can leave at any time, dude. We – we ain't gotta, you know, I know you here, I mean, you know, I ain't trying to – I ain't trying to jam you up. Nothing like that. That's why we let you smoke, took you, I mean, we ain't got you handcuffed, nothing. You – you – you a free man. Everything's good right now. (*Id.* at 22); and
> I mean, would you – would you feel better if I read you your Miranda rights and stuff, man? I mean, I don't have, I mean, you free to go, man. I 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).

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

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> [Detective, "JS"]: Judge, do you find there's probable cause exists [sic] for the issuance of a Search Warrant?
> [Judge, "JW"]: I do. One of the things you asked for was a buccal swab but that guy's not going to be there anymore. Does it matter?
> JS: No, he is still here. He's outside the residence in a patrol car.
> JW: Okay.
> JS: He's being arrest [sic] on the Warrant which is not related to the investigation that we're conducting but he is still here.
> *Ex. D* at 5-6.

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

> Q: I haven't – I haven't even discussed with my boss about taking you away or even if that's – I don't know if that's – I don't know what's going on with that. I'm being honest with you, dude. I – I ain't even – that hasn't even crossed my mind at this point.
> A: 'Cause I have a warrant for Cali, so I know I'm goin'…
> *Ex. D* at 49-50.

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

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

> Q: I – I'm not here to jam you up. I'm here to simply get your side of the story. And that's why I appreciate – and I'll read 'em for you, you want me to read 'em to you, man. I mean, know, uh, you got the right to remain silent. Anything you say can be used against you in a court of law. You have a right to consult with an attorney before questioning. You have a 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:

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> Q: You understand all that? You unders- you understand all that, Dre? Yeah? Yes, no, maybe so? I mean, I ain't trying to jam you – I'm just letting you know I ain't trying to trick you with nothing. You see what I'm sayin'? Those are your rights. You know what I'm sayin'? Those are your rights. Now, I'm not saying that, uh, you're under arrest, not like that. I'm just telling you those are your rights. If you – if you feelin' some kinda way – if that makes you feel better – you understand that? Yes, no? Am I making sense?
> A: It's just that the situation sucks so bad.
> Q: Right.
> A: I...
> Q: I mean, you didn't start it, right?
> A: No.
> Q: Okay.
> A: It just...
> Q: Tell me this, Dre. [Questioning continues.]
> *Id.* at 23-24.

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

The presumption is against the State, in this case. As with the case law cited above, the 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.

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

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

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

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

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

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

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

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

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

> 1. The individual must be one of the persons against whom the search was directed;
> 2. The individual must be one who is charged with illegal possession of property to be suppressed; or
> 3. The individual must be anyone who was legitimately on the premises 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.

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

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

> Q1: So the first time he goes by, he's by himself?
> A: No. The first time he go by, he's with his friends.
> Q1: Okay.
> A: And that's when he – "Oh, blood, y'all gotta clear this out. On dead homies. Too much." So we, uh, all right. You know, we – basically, you know, we drink and smoke. We do this every day.
> Q1: Mm-hm.
> A: We not really – all right. You live here. You have a – we done been up and down the street for – for months. You just barely been over here probably two or three months, but you used to stay across the street. Now your girl and your mom got this spot right across the street. You – you just, like, he came through, like, politicking, but I, like, we was in Cali. Right. We not in Cali, bro. You, uh, it's...[5]
> *Ex. D* at 21.

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

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[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.

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

> A: The apartment not gonna be tore up, is it? 'Cause my girl's still here. (*Ex. D* at 40);
> Q1: You got family out here or no?
> A: She's my only family [Tia].
> Q1: Okay. And what, you got two kids with her?
> A: Yeah.
> Q1: So what – what's the deal with you two? Are you guys kind of, like, you guys still see each other, or is it just here and there? It just kinda depends?
> A: We see each other. Just – but me a – and this Cali stuff and me being on the run.
> Q1: Yeah. (*Id.* at 42).

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

> Q1: So this address on Wyandotte, that's your – that's Tia's place, your girlfriend, baby mama. She's only been here a couple days? And do you – you weren't living here. You – you just stayed here last night and that was it.
> A: Yeah. (*Ex. D* at 45);
> Q1: Tia?
> A: Only person.
> Q1: Was she over *in that area* when everything happened, or no? So this is where Tia normally stays?
> A: She just moved here a couple days ago.
> 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

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

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

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

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

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

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

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

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

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[6] The context of the statement is that the detective is clearly reading Defendant his Miranda rights for the first time.

CONCLUSION

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

DATED this 10th day of May, 2018.

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

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 9:30 A.m., or as soon thereafter as counsel may be heard.

DATED this 10th day of May, 2018.

LOBO LAW PLLC

By: _____

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
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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.

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18F03565X
OPP
Opposition
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POINTS AND AUTHORITIES

STATEMENT OF FACTS

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

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

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

Less than a third of the way into the interview, Detective Grimmett reiterated that Defendant was not required to speak with them and stated they "appreciate" Defendant talking

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

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

Id. at 23.

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

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

Id. at 47.

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

LEGAL ARGUMENT

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

Once voluntariness of a confession has been raised as an issue, there must be a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), before an accused's statements are brought before a jury. At this hearing, the Court must hear evidence concerning 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> …Respondent did not invite the interview or consent to it in advance, and he was not advised that he was free to decline to speak with the deputies. The following facts also lend some support to respondent's argument that Miranda's custody requirement was met: The interview lasted for between five and seven hours in the evening and continued well past the hour when respondent generally went to bed; the deputies who questioned respondent were armed; and one of the deputies, according to respondent, "[u]sed a very sharp tone,", and, on one occasion, profanity.
>
> These circumstances, however, were offset by others. Most important, respondent was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted. ("I was told I could get up and leave whenever I wanted"). Moreover, respondent was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was "not uncomfortable." He was offered food and water, and the door to the conference room was sometimes left open. "All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave." Yarborough, 541 U.S., at 664-665.
>
> Because he was in prison, respondent was not free to leave the conference room by himself and to make his own way through the facility to his cell. Instead, he was escorted to the conference room and, when he ultimately decided to end the interview, he had to wait about 20 minutes for a corrections officer to arrive and escort him to his cell. But he would have been subject to this same restraint even if he had been taken to the conference room for some reason other than police questioning; under no circumstances could he have reasonably expected to be able to roam free. And while respondent testified 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.

Id. at 515-516.

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

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

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

Id. at 432.

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

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

In Mathiason, the court held that a parolee who voluntarily came to a police station at the request of a police officer, who was immediately informed that he was not under arrest, who was thereafter questioned about a burglary, who confessed to the burglary after the 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,

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

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

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

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

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

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

Moreover, the circumstances here were far less coercive than those in Fields, where the court still found Defendant was not in custody for purposes of triggering Miranda. In Fields, the interview lasted between five (5) to seven (7) hours and continued into the night past Defendant's bed time. At one point during questioning, Defendant became upset and stood up from his seat as if to leave. Police used a sharp tone and even cursed throughout the interview. And most notably, at no point did police advise Defendant of his Miranda rights. Here, however, the Defendant was interviewed in the afternoon for less than three (3) hours. 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.

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

> **Q**: I haven't - I haven't even discussed with my boss about taking you away or even if that's - I don't know if that's - I don't know what's going on with that. I'm being honest with you, dude. I - I ain't even - that hasn't even crossed my mind at this point.
> **A**: 'Cause I have a warrant for Cali, so I know I'm goin'...
> **Q**: You have a warrant?
> **A**: Yeah. In Cali.
> **Q**: Will they extradite them? You sure?
> **A**: Yes. Mmm.
> **Q**: I don't know about that at this point. I mean...
> **A**: That's why I don't - that's why I'm saying I - I know I'm not goin' - 'cause I - it's a lot going on now.

Exhibit 4 at 49-50.

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

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

II. DEFENDANT'S STATEMENTS WERE VOLUNTARY

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

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

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

A. No Coercive Environment

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

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

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

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

Exhibit 4 at 27.

B. Defendant Waived His Miranda Rights

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

Here, Defendant asserts that Detectives belatedly realized their error in not advising him of his Miranda rights earlier in the interview. However, this lack of advisement only 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

the interview since Defendant was not "in custody" for purposes of their questioning. Instead, Detective Grimmett advised Defendant of his rights in order to develop a rapport, not out of legal necessity. This is further evidenced by Detective Grimmett's comments prior to reading the warnings:

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

Id. at 23.

Without articulating any concerns or questions regarding the rights that were just explained, the Defendant immediately resumed talking to Detectives, stating "It's just that the situation sucks so bad." Id. Furthermore, Defendant is a thirty (30) year old man with at least four (4) prior felony convictions, one of which he had been "on 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.

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III. DEFENDANT HAD AUTHORITY TO CONSENT TO THE SEARCH FOR THE FIREARM

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

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

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

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

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

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

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

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

Id. at 51.

The factual circumstances demonstrate that Defendant had actual authority to consent to the search and recovery of the firearm. At the time Defendant consented, he indicated only him and his girlfriend, along with their two children, resided at the apartment. Id. at 45. This was corroborated when police arrived to find Defendant as 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

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

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

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

> **A:** And that's when he - "Oh, blood, y'all gotta clear this out. On dead homies. Too much." So we, uh, all right. You know, we - basically, you know, we drink and smoke. We do this every day.
> **Q1**: Mm-hm.
> **A**: We not really - all right. You live here. You have a - we done been up and down the street for - for months. You just barely been over here probably two or three months, but you used to stay across the street. Now your girl and your mom got this spot right across the street. You - you just, like, he came through, like, politicking, but I, like, we was in Cali. Right. We not in Cali, bro. You, uh, it's...
> **Q**: Right, right. (Unintelligible).
> **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

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

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

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

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

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

Under the United States Supreme Court's precedents, the exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree. But the significant costs of this rule have led the Supreme Court to deem it applicable only where its deterrence benefits outweigh its substantial social costs. 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).

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

A. No Miranda Violation Occurred

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

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

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

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

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

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

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

> In a fifth amendment context a defendant's statements, in and of themselves, present the potential constitutional evil.[2] For purposes of the fourth amendment, however, it is an unreasonable search that must be condemned, not the use of a defendant's statements proving consent to a search. A search and seizure produces real and physical evidence, not self-incriminating evidence. Our task under the fourth amendment is to test the reasonableness of a search and exclude evidence procured unreasonably. We have been appropriately warned of the dangers inherent in "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Therefore, Miranda's *ratio decidendi* which was enunciated to strengthen the fifth amendment's function in preserving the integrity of our criminal trials should not be superimposed *ipso facto* to the wholly different considerations in fourth amendment analysis.

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[2] This potential "constitutional evil" has been defined in earlier jurisprudence as a recurrence of the methods and ideas that led to coerced confessions in events such as the Inquisition and the Star Chamber, "even if not in their stark brutality." 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:

> "At its core, the privilege [against self-incrimination] reflects our fierce unwillingness to subject those 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."

Pennsylvania v. Muniz, 496 U.S. 582, 596, 110 S. Ct. 2638, 2647 (1990) (internal citations and quotations omitted). There 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.)

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

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

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

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

C. Inevitable Discovery Doctrine

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

CONCLUSION

For the foregoing reasons, the State respectfully requests that Defendant's Motion to Suppress Evidence be DENIED.

DATED this _____ day of September, 2018.

Respectfully submitted,

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

BY _____
SARAH E. OVERLY
Deputy District Attorney
Nevada Bar #012842

CERTIFICATE OF EMAIL SERVICE

I hereby certify that service of State's Opposition to Defendant's Motion to Suppress Evidence, was made this 23rd day of May, 2018, by email transmission to:

Adrian Lobo, Esq.
adrianlobo@lobolaw.net

BY _____
SARAH E. OVERLY
Deputy District Attorney
Nevada Bar #012842

EXHIBIT "5"

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: [redacted]
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.

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

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 fixin' 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 dont 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

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.

Q: And then how about T- T-Re- 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...

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,

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...

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

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?

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?

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

- 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

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 shoots...

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...

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...

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.

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

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 fell that's when the dude Juge took the

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...

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 ho- hit in the foot 'cause when Dre started runnin' towards the, uh, by 7-Eleven, uh, he started limpin'...

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

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?

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.

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 ol' 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...

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.

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...

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.

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

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...

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 else?

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 off from that...

A: Mm-hm.

Q1: ...and then - then shoots off his 25?

A: Yeah.

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.

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 deuce-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

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.

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 CenterView.

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...

Q: Who's NuNu?

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 COMMERICAL CENTER LAS VEGAS, NV ON THE 21ST DAY OF FEBRUARY, 2018 AT 1605 HOURS.

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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

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FILED
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JUSTICE COURT
LAS VEGAS NEVADA
BY_____
DEPUTY

JUSTICE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DEANDRE GATHRITE, Defendant	Case No.: 18F03565X Dept. No.: 11

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE FOR PRELIMINARY HEARING

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

DATED this 24th day of May, 2018.

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

18F03565X
REPL
Reply
9472093

MEMORANDUM OF POINTS AND AUTHORITIES

A. Legal Argument

1. Jurisdiction Is Proper Before This Court

First, Defendant notes that the State did not challenge the contention that the underlying Motion is properly before this Court, and that this Court has the jurisdiction to decide this matter.

2. Defendant Absolutely *Was In Custody*

In its Opposition, the State spends a great deal of time arguing that the Defendant was not in custody and therefore was not required to be Mirandized. This position is wholly contradicted by the facts of this case.

The State's own case law bears this out, wherein the State cites a two-part, objective analysis:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.
> *St.'s Opp.* at 6 (citing *J.D.B. v. North Carolina*, 564 U.S. 261 (2011)).

The State goes on to cite a host of scenarios, none of which are availing here. First, the State spends an inordinate amount of briefing describing and providing citations for the custodial interrogation standards/considerations of prisoners. It is unclear how this is applicable to the present case, but perhaps serves to highlight the State's confusion as to the custodial status of the Defendant. *See Id.* at 7-9. Second, the State cites a couple of cases wherein defendants on probation made incriminating statements during discussions with their probation officers, only to challenge the lack of Miranda warnings at these probation check-ins. *Id.* at 9-10. Third, the State relies on a parolee case wherein the defendant challenged a failed drug test on the grounds that "the parole office should be required to have Mirandized him prior to his submission of the drug test." *Id.* at 10. And fifth, the State gives a case law example of a parolee who *voluntarily* came into a police station and made a statement. *Id.* at 10-11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Suppression is Appropriate

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

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

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

However, the warrant application, attached to the Motion as Exhibit E (and again here for 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

> in providing the cause and manner of death, the circumstances involved related to the death, and to potentially identify the perpetrator of the crime. A thorough microscopic crime scene search of the premises is necessary in order to establish the location of the crime, its extent, and the circumstances surrounding the crime. This search may involve the damaging or removal of items such as carpeting, wallboard, and other interior/exterior surfaces. The evidence of dominion and control as described is necessary in establishing dominion and control over the premises and often assists in identifying the perpetrator. Such evidence is normally left or maintained upon or within the premises.
> *Ex. E – Warrant Application* at 4.[2]

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

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

Additionally, the warrant application contained additional details not germane to the investigation, but which may have had a prejudicial, coercive effect on the judge's decision. Specifically, the warrant application sought "gang paraphernalia"- a term not only undefined, but

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[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.

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

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

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

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

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CONCLUSION

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

DATED this __24th__ day of ___May___, 2018.

LOBO LAW PLLC

By: _____
Adrian M. Lobo
Nevada Bar No. 10919
Attorney for Defendant

Electronically Filed
9/26/2018 3:30 PM
Steven D. Grierson
CLERK OF THE COURT

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

Case Number: C-18-334135-1

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

* * * * * *

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

MS. LOBO: In the State's opposition.

THE COURT: Well, I mean, in --

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

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

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

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

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

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

THE COURT: Right.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

MS. LOBO: Right.

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

MS. LOBO: I understand.

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

MS. LOBO: Okay.

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

MS. LOBO: Okay. I have an order.

THE COURT: Okay.

MS. LOBO: For --

THE COURT: If they --

MS. CANNIZZARO: And I --

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

MS. LOBO: Right.

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

MS. LOBO: Okay. Okay.

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

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

THE COURT: Okay.

MS. CANNIZZARO: That should give us enough time to at least subpoena the case.

THE COURT: And get somebody assigned to it.

MS. CANNIZZARO: And get someone --

THE COURT: Okay.

MS. CANNIZZARO: -- to handle it.

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

MS. LOBO: Let's see.

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

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

THE COURT: Okay. So let's plan on that. And then obviously if you file the writ or request a stay from the Supremes and they grant that, then we'll just vacate that and await their decision.

MS. LOBO: Okay.

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

MS. LOBO: All right. Thank you.

THE COURT: Okay. Thank you.

MS. LOBO: And then if I can approach, I brought an order but I didn't know if it would be as to which issue.

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

MS. LOBO: Just to, I had actually the grant or the denial so I don't know if the Court's comfortable with interlineation.

THE COURT: Sure

. MS. LOBO: As to --

THE COURT: Let me take a look.

MS. LOBO: Okay.

Thank you.

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

MS. LOBO: Yes.

THE COURT: And just file it open court.

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

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

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

THE COURT: I wrote the date in.

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

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

PROCEEDING CONCLUDED AT 11:51 A.M.

* * * * * * * * * *

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

Sara Richardson

SARA RICHARDSON
Court Recorder/Transcriber

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 25 2018

BY: Kory Schlitz
KORY SCHLITZ, DEPUTY

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DEANDRE GATHRITE, Defendant,	)	CASE NO. CASE NO. C-18-334135-1 DEPT. NO. III

ORDER DENYING DEFENDANT'S MOTION TO STAY PROCEEDINGS

DATE OF HEARING:

TIME OF HEARING:

THIS MATTER having come on for hearing before the above entitled Court on the 25 day of September, 2018 the Defendant being present, represented by ADRIAN M. LOBO, ESQ., the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through ~~SARAH OVERLY~~ NICOLE CANIZARO, Chief District Attorney, and the Court having heart the arguments of counsel and good cause appearing therefor,

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

DATED this 25 day of September, 2018.

DISTRICT JUDGE

Submitted by:
LOBO LAW, PLLC

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

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.

Supreme Court Docket No: 77081

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

APPENDIX TO PETITION FOR WRIT OF PROHIBITION

(VOLUME II)

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DEANDRE GATHRITE,
#2592432

Defendant.

CASE NO: C-18-334135-1

DEPT NO: III

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT

DATE OF HEARING: SEPTEMBER 25, 2018
TIME OF HEARING: 9:00 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 Dismiss For Prosecutorial Misconduct.

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.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

LEGAL ARGUMENT

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

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[1] Defendant is a convicted felon, having previously been adjudicated in 2012 of Assault with 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.

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

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

In the instant Motion, Defendant is ostensibly challenging the probable cause determination made by the grand jury, albeit on the basis the State engaged in prosecutorial misconduct. Although the pleading is entitled a "Motion to Dismiss", it is in fact seeking a remedy provided by way of a pre-trial petition for writ of habeas corpus. NRS 34.710 provides that, "A district court shall not consider any pretrial petition for 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 unless a petition is filed in accordance with NRS 34.700." NRS 34.710(1)(a) (2017).

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

> 1. Except as provided in subsection 3, a pretrial petition for a writ of 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:

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[2] The State notes these arguments are also detailed at length in Defendant's Pretrial Petition for Writ of Habeas Corpus. While the State's position is that a Motion to Dismiss is an 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.

> (a) The petition and all supporting documents are filed within 21 days after the first appearance of the accused in the district court; and
> (b) The petition contains a statement that the accused:
> (1) Waives the 60-day limitation for bringing an accused to trial; or
> (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.

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

II. THE STATE DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT.

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

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

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

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

The Court further stated:

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

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

Thus, the first question before this Court is whether the State engaged in prosecutorial misconduct at all. Defendant argues the State was somehow bound by the Justice Court's decision when presenting evidence to the Grand Jury, yet, cites no statute or case law that expressly prohibits the State from alternatively presenting a case to the Grand Jury before a 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "If the agents are not allowed to testify regarding their surveillance, the State cannot inform the jury how Shade obtained the drugs or that officers suspected Shade was participating as a lookout during the purchase of the drugs that were ultimately found in the car he was driving. *Without such testimony, the State cannot effectively prosecute the transportation of illegal narcotics charges pending against Shade.*
>
> . . . .The charges at issue were contemporaneous to the heroin purchase, arose out of the same transaction, and involved the same participants. *The excluded evidence was inextricably intertwined with the charged crimes and completed a story leading up to Shade's*

> *ultimate arrest.* We conclude that the State's witnesses could not adequately testify about the methamphetamine and cocaine charges 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.

(emphasis added).

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

> When several crimes are intermixed or blended with one another, or connected such that they form an indivisible criminal transaction and when full proof by testimony, whether direct or circumstantial, of any 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.

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

> The testimony regarding the additional acts of fellatio, as well as the act of masturbation, was admissible as part of the *res gestae* of the crime charged. Testimony regarding such acts is admissible because 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*.

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

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

> The determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that 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.

Id. at 9.

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

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

> Additionally, the description of Brackeen's pilfering was admissible as an integral part of the Millers' narration of the events leading up to Brackeen's removal of the personal property from the vehicles in the parking lot. We have adopted the rule that the State is entitled to present a full and accurate account of the circumstances surrounding 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.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED this 20th day of September, 2018.

Respectfully submitted,

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

BY _____
SARAH E. OVERLY
Deputy District Attorney
Nevada Bar #12842

CERTIFICATE OF SERVICE

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

ADRIAN M. LOBO, ESQ.
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BY _____
M. HERNANDEZ
Secretary for the District Attorney's Office

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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

REPLY IN SUPPORT OF MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT

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

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

ADRIAN M. LOBO, ESQ.

By: /s/ Adrian M. Lobo
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Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

1. Additional Facts Pertinent to This Reply

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

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

2. Legal Argument

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

A. The Motion to Dismiss is Proper

The State argues that the instant Motion is "seeking a remedy provided by way of a pre-trial petition for writ of 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." *State's Opp.* at 4 (citing NRS 34.710(1)(a)). This is an interesting take, since the Motion does not challenge either probable cause, or this Court's jurisdiction; the Motion alleges that the State has broken a number of its ethical responsibilities as a prosecutor. The Motion is exactly that- a motion to dismiss based on reasons other than probable cause or this Court's jurisdiction.[1] The Motion is in no way styled as a petition for anything, but is a document moving this Court to consider the legal argument presented and to render a decision.

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[1] Indeed, filing a motion before this Court is relying upon the court's jurisdiction to dismiss the case.

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

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

> Defenses and objections on defects in the institution of the prosecution, other than insufficiency of the evidence to warrant an indictment, or in the 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 motion before trial.

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

B. The State's Conduct "Unfairly Manipulated or Invaded the Independent Province of the Grand Jury"

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

> "To support an allegation of prosecutorial misconduct regarding a Grand 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 (citing *Sheriff v. Keeney*, 106 Nev. 213, 216, 791 P.2d 55, 57 (1990);
>
> "Dismissal with prejudice is warranted when the evidence against a defendant is irrevocably tainted or the defendant's case on the merits is prejudiced to the extent that 'notions of due process and fundamental fairness would preclude reindictment.'" *State's Opp.* at 5-6 (citing *State v. Babayan*, 106 Nev. 155, 171, 787 P.2d 805, 817 (1990).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The State Ignores the Proper Procedure(s)

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

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

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

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

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

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

E. The State's Policy Arguments Ignore Existing Procedures

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

> If it were the case that the district courts were inherently bound by the rulings of the justice court, NRS 172.145 would be superfluous, and the district court would be prohibited from re-addressing any issue raised on and ruled on at the justice court level—presumably including findings of probable cause, decisions of bail, objections at preliminary hearing, and the like.
> *State's Opp.* at 10-11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

Based on the foregoing, the appropriate remedy is a dismissal of the Indictment. The prosecutor's misconduct in this case is both the sum of its parts, and determinable from any of those "parts" in isolation.

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

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[3] The Defendant is not conceding to any of these allegations, but merely summarizing the witness's testimony for illustrative purposes.

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

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

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

DATED this __24th___ 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 Defendant

CERTIFICATE OF ELECTRONIC TRANSMISSION

A copy of the above and foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT** was automatically served this 24th day of September, 2018 to the State at the same time that the document was filed via e-filing and sent to: pdmotions@clarkcountyda.com

LOBO LAW PLLC

By: */s/ Alejandra Romero*
Legal Assistant to:
ADRIAN M. LOBO, ESQ., #10919
Attorney for Defendant

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 Gatharite (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:

1. The evidence is returned to secure storage.
2. 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.
3. DNA extracts generated during the analysis of this case and/or cuttings taken from the evidence may be available for future testing.
4. 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.
5. 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.
6. Mixture proportions signify the approximate percentage of each contributor to the mixture DNA profile.
7. 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.
8. 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

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

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.

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

DATED this _____ day of June, 2018.

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

BY _____
SARAH E. OVERLY
Deputy District Attorney
Nevada Bar #012842

AFFIDAVIT

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

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;

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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

CASE NO. 18F03565X
DEPT. NO. 11

ORIGINAL

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

FILED
2018 SEP 8 A11:00

THE STATE OF NEVADA,
Plaintiff,
Vs
DEANDRE GATHRITE,
Defendant.
Case No. 18F03565X

REPORTER'S TRANSCRIPT
OF
DISMISSAL

BEFORE THE HONORABLE ERIC A. GOODMAN
JUSTICE OF THE PEACE

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

APPEARANCES:
For the State: SARAH OVERLY
Deputy District Attorney
For the Defendant: ADRIAN LOBO, ESQ.

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

LAS VEGAS, NEVADA, FRIDAY, JUNE 29, 2018

* * * * *

THE COURT: Ms. Lobo, let's go on your
09:14AM case, Gathrite, Deandre Gathrite.
DEFENDANT: Yes, sir.
THE COURT: Good morning.
THE DEFENDANT: Good morning.
THE COURT: State, it's my understanding
09:14AM you have some representations you want to make.
MS. OVERLY: That's correct, your Honor, and I had informed defense counsel about this yesterday.
At this point in time, the State would like to make a record.
09:15AM The State had continued this case at the last setting by use of filing a Hill Motion for its -- its essential witness, Raymond Moore. That was granted and the prelim was continued to today's date.
Since that time, the State has, by way of
09:15AM its out-of-state desk, made contact with Mr. Moore and other individuals contacting our out-of-state office and relaying information about Mr. Moore.
Twice, both on June 25th and also early this morning, an individual reached out to our office
09:15AM indicating that Mr. Moore had been in a bad accident, which

resulted in his hospitalization, which resulted in his current placement in a coma.
The State's not aware of any additional information that has to do with his condition, but by
09:16AM virtue of that, he is clearly not able to come to court today and testify.
So, as a result, I recognized that the State already sought to have a Hill Motion. So the State would be dismissing pursuant to statute today, but I would
09:16AM note that a Marcum Notice was emailed on June 19th to defense counsel and I would also just make a record with regards to the offer that was extended.
There was an offer of a battery with substantial bodily harm, a C felony. The most recent offer
09:16AM that was discussed was to stipulate to the minimum sentence of 12-to-30 months with the State not seeking habitual treatment, with the State not pursuing any of the murder charges in the future, with no referral to the Feds, and with the Feds agreeing themselves not to pursue additional
09:17AM charges against the defendant.
It's my understanding that that offer has been rejected and so I just wanted to make a record of that.
THE COURT: Sir, you want to reject the
09:17AM offer?

THE DEFENDANT: Yes.
THE COURT: Okay.
You know what the offer is, don't you?
THE DEFENDANT: Yes.
09:17AM THE COURT: You know it cleans it up with a 12-to-30 with whatever credit you have so far?
THE DEFENDANT: Yes.
THE COURT: That's your decision. I just need to make a record. I need to make a record.
09:17AM Ms. Lobo.
MS. LOBO: Yes, your Honor, I believe on June 8th, when we were scheduled for our last prelim, I told the Court I was in trial. I accepted the State's representations that Mr. Moore was unavailable because he
09:17AM had a pending matter, I believe, in San Bernardino County, then I inquired further as to the case number or what he was in custody for so I could at least see when or if he was going to be released.
When I looked it up on the docket system
09:18AM on June 8th, there's no entry as to the court setting. He had a May 8th court date. It looks like he was, in fact, on probation. This, of course, happened after, of course, it had been continued.
Now we're in a situation where it appears
09:18AM on June 25th and again this morning the State had contact

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

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

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

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

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

MS. LOBO: Correct.

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

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

So this case will be dismissed today.

MS. LOBO: All right. Thank you.

THE COURT: All right.

Is anything else holding him?

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

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

MS. LOBO: Yeah, I didn't think so either,

even though I would kind of prefer it.

THE DEFENDANT: Thank you.

THE COURT: Thank you.

MS. LOBO: Thank you.

THE COURT: You should thank her. She did the work.

THE DEFENDANT: I know.

(Off the record discussion not reported.)

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

* * * * * *

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

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

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

	Description	Statute	Level	Date
001	PC236-F: False Imprisonment	236	Felony	05/01/2018
002	PC243(E)(1)-M: Battery on Spouse/Cohabitating/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/Cohabitating /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	Convicted - Plea
002	PC243(E)(1)-M: Battery on Spouse/Cohabitating/Noncohab Former Spouse/Etc	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.
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Las Vegas, Nevada 89101
702.290.8998
702.442.2626 (fax)
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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

//

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NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DISTRICT ATTORNEY, its attorneys:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Supplemental Exhibits to Defendant's Petition for Writ of Habeas Corpus and Motion to Dismiss at the time set for Evidentiary Hearing in the above-entitled Court, on the _8th__ day of _October _____, 2018, at the hour of __1:00 p.m., or as soon thereafter as counsel may be heard.

DATED this 28th day of September, 2018.

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

CERTIFICATE OF ELECTRONIC TRANSMISSION

A copy of the above and foregoing Supplemental Exhibits were automatically served on September 28, 2018 on the State at the same time that the document was filed via e-filing and sent to: pdmotions@clarkcountyda.com

LOBO LAW PLLC

By: __*/s/ Adrian M. Lobo* ____
ADRIAN M. LOBO, #10919
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

CASE NO. 18F03565X
DEPT. NO. 11

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

THE STATE OF NEVADA,)
Plaintiff,)
Vs)Case No. 18F03565X
DEANDRE GATHRITE,)
Defendant.)

REPORTER'S TRANSCRIPT
OF
POSSIBLE NEGOTIATIONS/MOTION

BEFORE THE HONORABLE ERIC A. GOODMAN
JUSTICE OF THE PEACE

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

APPEARANCES:

For the State: SARAH OVERLY
Deputy District Attorney

For the Defendant: ADRIAN M. LOBO, ESQ.

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

LAS VEGAS, NEVADA, FRIDAY, MAY 25, 2018

* * * * *

THE COURT: All right, let's go on Deandre Gathrite.

Good morning.

MS. LOBO: Good morning.

THE DEFENDANT: Good morning.

THE COURT: All right, this is basically on for possible negotiations.

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

MS. LOBO: That is correct, Judge.

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

MS. LOBO: Correct.

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

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

THE COURT: All right.

MS. LOBO: So we would wish the Court

would rule on it and then I have just brief supplementation, another tidbit I didn't put in the Reply.

THE COURT: Okay, go ahead.

MS. LOBO: Okay.

07:51AM One of the things that was not fully flushed out, and forgive me because I'm in trial right now, is that I didn't state in there that it was explicit. I think the Court knows and is well aware how the CAT Team works and that they're not out there just, you know,

07:52AM finding who's on parole violations or probation violations or who's a fugitive in another state.

This is done at the request of another jurisdiction or it's done at the request of detectives locally here and it's a focused team that is designed to,

07:52AM you know, extract a particular person for a particular reason and one of the things that was a little bit -- not a little, a lot disturbing about this case was the fact that it was Homicide who contacts CAT, CAT who contacts California Parole, and has that warrant listed on NCIC in

07:52AM order to, you know, actually execute the arrest warrant at the house.

So I just don't know how they get around the fact that this is, you know, not something that, you know, trying to keep an arms-length distance away as either

07:52AM though it's parole or probation. That is not analogous to

that. This is directly at their behest and request.

THE COURT: Okay.

MS. OVERLY: And, your Honor, I want to address that and then if I can address something else as

07:53AM well?

THE COURT: Sure.

MS. OVERLY: With regards to the CAT Team's arrest of the defendant on his parole violation, as your Honor is well aware, the CAT Team has no control over

07:53AM issuing warrants. California, that jurisdiction --

THE COURT: Oh, but who triggered it?

MS. OVERLY: Triggered what?

THE COURT: Who triggered it? Who triggered the arrest? Was it San Diego? Did San Diego

07:53AM call Metro and say, Please don't pick him up, or was it the homicide detectives that got CAT to go pick him up so they could interview him about a murder you are interested in?

MS. OVERLY: Homicide detectives became well aware that he was on parole while this was going on,

07:53AM this investigation was going on.

THE COURT: Right, I understand.

MS. OVERLY: They contacted California.

THE COURT: Right.

MS. OVERLY: They indicated to California

07:53AM he was on parole and they said, Well, actually, we need to

PA000304

issue a warrant for him because he's been MIA. He keeps doing this since 2014 where he disappears.

THE COURT: So this is triggered by Metro?

MS. OVERLY: Yes, their contact to Metro.

07:54AM THE COURT: There is triggered by Metro. They want to get him in custody.

MS. OVERLY: Yes.

THE COURT: They have information he may have committed a murder. They want to get him in custody

07:54AM so they can interview a murder, correct?

MS. OVERLY: They want to locate him, yes, the CAT Team, yes. That's what they do. They have a basis to arrest him on a parole violation, but contact with them is independent of that. They have no control of whether or

07:54AM not he is going to get arrested on a parole violation.

Ultimately, that was the circumstances under which he was located and found, but there was -- it's not like Metro contacted them and said, Hey, issue this warrant. He had a active warrant validly issued out of

07:54AM California by California's Department of Parole & Probation and the means by which they located him was that, but that warrant was an independent valid warrant nonetheless and, when he was arrested in this particular incident, he was arrested exclusively on that warrant. He was never, during

07:55AM any of the interaction, arrested on this murder.

THE COURT: But he was arrested for the sole purpose of allowing the detectives to go over and interview him about the murder.

MS. OVERLY: Well, I mean that's something

07:55AM that I think would need to be flushed out by the detectives themselves, if they were to testify at a preliminary hearing, which was kind of what I think --

THE COURT: Why do they need to flush it out? This is the information I have in front of me. This

07:55AM is what's in the application. This is everything I have in front of me is that they wanted to arrest him solely so they could get over there, talk to him because they have all this information about him, but it's on the streets. Nobody on the street is going to stand up and say, Yeah, he

07:55AM did it and I will testify.

MS. OVERLY: Right.

THE COURT: So they have to get him in custody. They have to arrest him and get him in custody so they can come interview him about the murder.

07:55AM MS. OVERLY: Well, yes, they wanted to -- I think the State's Motion is, yes, they wanted to locate him. If the means by which they located him was, in fact, he was arrested on a parole violation, then, yes, he was. He was arrested on a parole violation and that was the

07:56AM means by which CAT contacted him. They went over there and

they interviewed him, but --

THE COURT: So to get this straight, they contact San Diego, San Diego says, Okay, we will issue a warrant, now you have a basis to go arrest him.

07:56AM MS. OVERLY: That's correct.

THE COURT: Which is triggered by Metro --

MS. OVERLY: That's correct.

THE COURT: -- wanting to arrest him so that -- wanting to locate him, arrest him so they can have

07:56AM him in custody to interview him.

MS. OVERLY: That's my understanding, yes.

THE COURT: So he was in custody and he was in custody on behalf of Metro --

MS. OVERLY: No.

07:56AM THE COURT: -- so homicide detectives can go over and talk to him about this murder case.

MS. OVERLY: But I think that's where the legal issues are alleged in the Motion is that, yes, he was technically in custody, as they were in those cases cited

07:56AM in the Motion. Yes, he was in custody and that was the means and under the circumstances by which they went and interviewed him, but he was not under a custodial interrogation and in custody in reference to this case.

THE COURT: They know exactly why they

07:56AM wanted to talk to him. They know exactly why they want to

arrest him, get him in custody. Why didn't they just read him his Miranda rights?

MS. OVERLY: I mean I think that arguably they could have, at the outside, read him his Miranda

07:57AM rights.

THE COURT: They could have or should have?

MS. OVERLY: Well, the State's argument is that they were not legally required to read him Miranda at

07:57AM the time.

THE COURT: It's 28 pages into the interview with him before they even bother to read him his Miranda and it's one of the worse things I have seen, in terms of reading him his Miranda rights, and I'm just going

07:57AM to turn to page 28 on this. I think it was 28; I may be off a page.

From the detective, and this is on the third line of the page towards kind of the end of that, "I mean would you -- would you feel better if I read you your

07:57AM Miranda rights and stuff, man?"

I mean that's what the detective said. The standard isn't does it make you better if he had his Miranda rights read to him. The standard is if he is in custody, he needs to have his Miranda rights read before

07:58AM they interview him. It's not whether somebody feels

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

MS. OVERLY: No, I understand that, your Honor, and I think if the detective believes he was, in fact, under custodial interrogation and in custody with regards to this case, they would have read him Miranda, either by card or memory, at the outset of the interview, but based on their position, it was the State's position in its Opposition was that he, in fact, was not. They didn't feel the need to issue these Miranda warnings at the outset or throughout any point in time in the interview, as they didn't in Fields rather.

THE COURT: The interviews basically are voluntary. They are always voluntary interactions with the police. You cited a case where the guy's in prison, they bring him in the interview room, and he is free to leave. He may have be in prison, but in prison, his cell is his home. So they say, You are free to leave. That means go back to your cell and just go back to what is basically his home.

MS. OVERLY: Correct.

THE COURT: If he was free to leave, that means he was going to be uncuffed, let out, put in a police car, go back to his apartment, make a sandwich, turn on the TV, and go on with his day or by free means he is going to be in handcuffs and put in the back of the car?

MS. OVERLY: Well, free to leave in the same respect as he was in Fields. I mean like that's why the State believes it's analogous. In that case, they even indicated that he was free to leave and by that, they meant free to leave and go back to his cell.

THE COURT: His cell is his home.

MS. OVERLY: Correct.

THE COURT: Right. He's not free to go back to his home, right?

MS. OVERLY: No, he's not because of this active parole violation where he was going to independently go back to California, as he had been doing since 2014.

THE COURT: And that's the ball that Metro got started rolling.

MS. OVERLY: Correct.

THE COURT: Correct.

MS. OVERLY: And the ball -- Metro's ball started rolling, but it's a ball he created for himself and had this warrant issued nonetheless.

THE COURT: All right.

MS. OVERLY: So the State's argument was similar to that case. He could have indicated, with his extensive criminal history and his knowledge about the criminal justice system, and merely say to them, I don't want to talk to you about this. They would have taken him

back to CCDC and that would have been, granted, his temporary home, but just like in Fields, it's like him going back to his cell. He was going to be extradited back to California, as he indicated he well knew in the interview.

MS. LOBO: One other thing for the Court too.

Mr. Gathrite, it was so bazaar and strange to him. He's appeared a few times before your Honor on the fugitive calendar. He's been extradited back and forth. This is the one time California didn't come to get him. California was not interested this time. He's gone back and forth like two, three times. They always come get him. Somebody said, Don't bother, he's got a murder case.

MS. OVERLY: Well, I think that's --

THE COURT: Well, no, whatever you have locally, you have to clean up the new local charges first before they come pick you up. So he does have an open murder case. They are not going to come get him.

MS. LOBO: Here's the thing, Judge. He is not booked for murder, though. It's just they don't bother to come get him. It's not until a week later.

MS. OVERLY: And, your Honor, just one brief thing.

THE COURT: Sure.

MS. OVERLY: If they were to be -- typically, as your Honor knows, these issues are litigated up in District Court as well and after they're litigated in a motion, like in Jackson V Denno, a preliminary hearing is typically ordered at that point in time.

The reason I mentioned the preliminary hearing is because it would be the State's position that given the jurisdiction in which we are in right now, if that your Honor felt that under Jackson V Denno or something of equal footing would be appropriate, that a preliminary hearing would suffice, so forth, that would flush out those issues.

THE COURT: I'm not sure what issues there are to flush out. He is clearly in custody. This was all triggered by Metro. They was all set in motion. They knew exactly what they were doing. They knew exactly what they were doing. They wanted to get him in custody so they could interview him on the murder case.

That is the only reason how this thing starts. It's the only reason to contact San Diego. This is all a ruse. This is all a ruse by Metro to get him in custody to interview him about the murder case. So he was in custody and, when he is custody, they should have read him his Miranda Rights. They didn't, not until 28 pages into this.

They violated his rights. The fact it's a murder case doesn't matter to me. It doesn't matter if he is caught with 20 pounds of weed or if it's a murder case. They violated his rights.

08:02AM Because they violated his rights when he was in custody, I'm going to suppress his statement. Because the gun comes from the statements made during the interview, I'm going to suppress the gun --

MS. OVERLY: And, your Honor --

08:02AM THE COURT: -- and that's going to be this Court's ruling.

So you can proceed to prelim, if you want to, but the statement is not coming in and the gun is not coming in.

08:02AM MS. OVERLY: And, your Honor, can I ask then what your specific ruling would be in reference to the State's Opposition in reference to how Miranda does not apply to the issue of consent with regards to the retrieval of the gun?

08:03AM THE COURT: The gun is a fruit of the poisonous tree. The only information they have is the information they gleaned while interviewing him illegally because they knew he wasn't read his Miranda rights properly. All of this is the fruit of the poisonous tree.

08:03AM MS. OVERLY: But, your Honor --

THE COURT: So the only information they have about the gun is the information he gave during the interview. So if the statement goes out, the gun goes out.

MS. OVERLY: Okay.

08:03AM So, specifically, the State's Opposition references how the Miranda warnings and any illegally obtained statements is non-testimonial for purposes of somebody's rights being violated.

So I just want to be clear that your

08:03AM Honor's ruling is independent of that, I guess, case law?

THE COURT: Do they have the gun without the statement? Do they get the gun without the statement from him as to where the gun was?

MS. OVERLY: Well, the argument is, your

08:03AM Honor, that his consent is not testimonial. So it's not technically considered his statement. It's independent of the usual Miranda suppression because it's not testimonial.

THE COURT: I have a gun that he said was hidden here. That's the information received in the

08:04AM investigation. I have the gun used in the murder. It's located here.

MS. OVERLY: I understand, but the State's argument is that he consented to them accessing the apartment to retrieve a firearm and that that consent

08:04AM allowed them to go inside and obtain that and then,

additionally, the State's Inevitable Discovery Doctrine, I'm not sure if your Honor wants to rule on that issue as well?

THE COURT: No. The statement is out, the

08:04AM gun is out. You can proceed however you want, but the statement is not coming in at prelim. The gun is not coming in at prelim. So --

MS. OVERLY: So the Inevitable Discovery Doctrine would be denied as well in that respect?

08:04AM THE COURT: Counsel, the statement is out. The gun is out.

MS. OVERLY: Okay.

THE COURT: So okay.

MS. LOBO: Thanks, Judge.

08:04AM THE COURT: Okay, do we have a prelim set?

MS. LOBO: Friday.

THE CLERK: June 8.

MS. LOBO: Next Friday, one week.

THE COURT: All right.

08:05AM MS. LOBO: Thank you.

THE CLERK: June 8, 9 A.M. stands.

(Off the record discussion not reported.)

* * * * * *

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

/s/ Patsy K. Smith
PATSY K. SMITH, C.C.R. #190

EXHIBIT D – EMAIL CORRESPONDENCE FROM DEPUTY DISTRICT ATTORNEY SARAH OVERLY

Adrian Lobo <adrianlobo@lobolaw.net>

Deandre Gathrite, 18F03565X

Sarah Overly <Sarah.Overly@clarkcountyda.com> Wed, Apr 11, 2018 at 2:25 PM
To: Adrian Lobo <adrianlobo@lobolaw.net>

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)

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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]

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

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JUSTICE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DEANDRE GATHRITE, Defendant	Case No.: 18F03565X Dept. No.: 11

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE ACQUIRED IN VIOLATION OF BOTH THE FOURTH AND FIFTH AMENDMENTS

COMES NOW the Defendant, DEANDRE GATHRITE, by and through his counsel of record Adrian Lobo, Esq., and hereby files this Motion to Suppress Evidence for Preliminary Hearing. The evidence in question was obtained in violation of the Defendant's constitutional rights under both the U.S. and Nevada Constitutions, and must not be introduced or heard at the Preliminary Hearing.

This Motion is based on the pleadings and papers on file with the court, the attached Memorandum of Points and Authorities, and oral argument entertained by the court at the time set for hearing.

DATED this 10th day of May, 2018.

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

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.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Statement of Facts

The Defendant is charged by the State with two counts: 1) Open Murder, with a deadly weapon enhancement; and 2) Owning or possessing a gun by a prohibited person. This case stems from the February 11, 2018 shooting death of a drug dealer by the name of "T-Rex,"[1] at approximately 2612 S. Van Patten Street in Las Vegas, near the intersection of E. Sahara Ave. and Joe Brown Dr. *See Exhibit A – Officer's Report Continuation* at 1.

It is difficult to follow Metro's investigation, as the Officer's Report states that "Subjects in the area were reluctant to communicate with police and no witnesses provided formal statements. *Id.* at 5. The Report goes on to say that "Gang Crimes Detectives developed information that a black male from the neighborhood known as 'Dre' was responsible for the shooting," but it does not detail how this information was developed given the above-cited reluctance and lack of formal statements. *Id.* Even more fortuitously, "Patrol Investigation Detectives familiar with the area provided information regarding the possible identity of 'Dre.'" *Id.*

"Dre" was, somehow, identified as the Defendant, and the Report also claims that he "was the subject of several active criminal investigations." *Id.* Despite apparently being the subject of "several active" investigations, on February 11, 2018 the Defendant did not have a warrant for his arrest in Nevada or California. *See Exhibit B - Declaration of Arrest for Fugitive Arrest.* The report references a police records check was conducted but does not say what date this search was conducted on or even which database was searched. *Ex. A* at 10.[2] Oddly as luck would have it, on February 14, 2018, a California warrant was issued for Defendant's arrest on a Parole Violation for a weapons related offense. *Id.*

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[1] T-Rex's real name was Kenyon Tyler.

[2] A simple SCOPE search would reveal Gathrite's prior fugitive filings in Clark County.

The Metro Criminal Apprehension Team (CAT) was tasked with locating the Defendant, and tracked him to 2630 Wyandotte St., Apt. #1 in Las Vegas. The Defendant was arrested on the outstanding San Diego warrant on February 16, 2018 at approximately 1:24 p.m. *Id. See also Exhibit C- CAD LOG Event #180216-2092* .

Following the CAT arrest, Metro Homicide detectives arrived at Wyandotte at 2:56 p.m. and contacted the Defendant at the scene of his arrest and began to question him surreptitiously about the T-Rex shooting. *Ex. C.* at 1. This interview was only partially transcribed,[3] and is described as a "post-Miranda" interview with the Defendant. *Ex. A* at 9. The Report goes on to summarize that the interview resulted in the Defendant admitted that he fired at T-Rex, but "didn't know if he hit anyone". *Id.* The Defendant further told the detectives the location of the gun used in the shooting. *Id.*

In fact, these details were not "post-Miranda," as the Report claims. In fact, the detectives also misrepresented to Defendant that he was free to leave at any time during the interview, despite this interview taking place immediately following the Defendant's apprehension by CAT:

> Q: Let me ask you this, man. 'Cause here's – here's the magic question, man. I mean, I know they kinda run up. You ain't out looking for trouble, you know, 'cause that ain't you 'cause I know all about your history. I know all about what you, you know, we done done our research. You e- you feel me? So, I mean, I know I ain't talking to some bad dude. That's why I came in there and took the cuffs off of you, got you comfortable, and let you hug your kid. Be cool with you. You – you feel me? 'Cause I know what kinda p- I know what kinda person you are, man. So what I'm asking, man, basically, what it boils down to is why'd you pull the trigger, man? What happened? Walk me through it, man. Walk me through how it went down. You know what I'm sayin'? So I can explain that. That's what I'm trying to say 'cause I know that wasn't what – you didn't go lookin' for it.

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[3] Both the audio recording of the Defendant's questioning and the corresponding transcript clearly begin partway through the interview (and both begin at the same point). The only 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.

Exhibit D – Transcribed Interview with Defendant at 3.

The detective continued to elicit details of the shooting from the Defendant:

> Q: So what point in time did you pull yours out? I mean, 'cause he got they shit out first, so at what point in time you pull yours out? Was it before or after them?
> A: Wasn't – wasn't before them.
> Q: So it was after them.
> A: Or I wouldn't have been able to be out there.
> Q: Right. Exactly. So they got they's out, and at some point in time during this whole talking that they goin' back and forth, at what point in time do you pull yours out? It was, I mean, was it…
> A: I don't know. It just – it just happened so fast.
> *Id.* at 10.

It is clear that during this questioning, the Defendant was not free to leave:

> A: Can – can I smoke a cigarette? I'm just…
> Q: You got a cigarette?
> A: I do. My pack in on the counter in there [in the Wyandotte Apartment]. I…
> Q: Uh…
> Q1: Hey, you care if you have an old one? I got some old ones there if that's okay. You just wanna step out [of the patrol car]?
> A: Uh, yeah. I had just…
> Q: I'll text my boy and have him go – I'll text him to have – you said it's on the kitchen counter? All right.
> *Id.* at 10-11.

Only after Defendant had provided numerous, incriminating details about the T-Rex shooting did detectives finally see fit to Mirandize him, on page 23 of the interview.

Eventually, the Defendant told detectives that the firearm used in the T-Rex shooting was located in an air vent inside of the Wyandotte apartment. *Id.* at 39. The detectives asked Defendant for consent to enter the apartment to recover the weapon, on the premise that the Defendant had dominion and control over the apartment. *Id.* at 47. The Defendant was reluctant to allow this, and stated to detectives specifically that the apartment was not actually his residence. *Id.* at 40. The detectives even acknowledged that the apartment was not Defendant's residence:

Q1: And this address on Wyandotte, that's your – that's Tia's place, your girlfriend, baby mama. She's only been here a couple days? And do you – you weren't living here. You – you just stayed here last night and that was it.
A: Yeah.
Id. at 45.

Detectives ultimately recovered the firearm from the apartment, where Defendant told them it would be located (in an air conditioning vent). Once recovered, the detectives then applied telephonically for a search warrant to search for additional evidence in the premises. The warrant sought the following:

1. Paperwork such as rent receipts, utility bills, and addressed letters showing the name(s) of persons residing at the premises. Paperwork such as proof of insurance, DMV registration showing the name(s) of persons owning or responsible for the vehicle(s).
4. Photographs, video and/or audio tapes, DVD or CD's, cellular phones, Electronic Storage Devices such as lap or desk top computers, game consoles, tablets and like items. To include pass or pattern codes for the same.
5. Telephonic information to include; caller ID history, answering machine messages, voicemails, phone directories, contacts, call history, photographs, audio and/or video recordings stored electronically in residential or cellular phones.
6. A thorough, microscopic examination and documentation of the crime scene to discover trace evidence to include but not limited to: fingerprints, blood, hair, fibers and bodily fluid samples.
10. Epithelial cells from the mouth of [Defendant's name and date of birth are handwritten], to be collected via Buccal Swab.[4]
See Exhibit E – Search Warrant Application at 1.

In addition, the Warrant Application indicated that detectives would search for additional, handwritten items: "Handguns and Ammunition"; "Cell phone off person of [Defendant]"; and "Gang Parapharnalia [sic]". *Id.* The Application indicated the address of "2630 Wyandotte #1"-

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[4] Line Items 2-3, and 7-9 contained additional items to be recovered, but these lines had been crossed out. *See Ex. E* at 1.

the apartment belonging to Defendant's girlfriend. *Id.* The Application was dated February 16, 2018 at 1735 hours (5:35 p.m.). *Id.*

No additional items were recovered from or in the apartment. *Ex. A* at 11.

B. Legal Argument

1. Jurisdiction Is Proper Before This Court

The ability of a Justice Court to hear motions similar to the one at bar has been recognized by the Nevada Supreme Court in the recent decision *Grace v. Eighth Judicial Dist. Court of Nev.*, 375 P.3d 1017, 132 Nev. Adv. Op. 51 (Nev. 2016). That case, which originated before this very court, considered "whether Nevada's justice courts are authorized to rule on motions to suppress during preliminary hearings." 375 P.3d at 1018. The Court held that "the justice courts have express and limited inherent authority to suppress illegally obtained evidence during preliminary hearings." *Id.*

Specifically, the Court based its decision on the concept that "the evidence presented at a preliminary hearing 'must consist of legal, competent evidence,'" and "[t]herefore, justice courts' authority to make probable cause determinations includes a limited inherent authority to suppress illegally obtained evidence." *Id.* at 1021 (citation omitted).

2. Defendant's Statement Must Be Suppressed Due to the Failure to Mirandize Him Before Questioning

Certain rights are guaranteed to a suspect facing questioning by law enforcement, conducive to the Amendment V right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). Specifically, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. These procedural safeguards have been memorialized as the so-called "Miranda warnings" and typically encompass admonitions that the accused has the right to remain silent; that waiving the right may result in his statements being used against him in court; and that he has the right to an attorney. *Id.* at 479.