

1 Finally, the state asserts that Brandy's alleged statement was
2 a statement against interest and therefore a hearsay exception.
3 (State's motion, p. 8). Given that the police themselves did not
4 seem to think that Brandy had done or was aware of anything
5 preventing them from letting her drive away from the Moultrie stop
6 unfettered, there is nothing to support the state's assertion that
7 Brandy's alleged statement was against interest.

8 It is important to note that the only one of the hearsay
9 arguments in the state's motion that the state offered at the
10 preliminary hearing was the argument that the statement was offered
11 for its effect on Kirkland. However, the state undercut its own
12 argument on this issue by repeatedly stressing that Kirkland had
13 consent to search - in other words, that the statement was offered
14 for its truth.

15 The record in the instant case demonstrates that the stronger
16 argument supports the ruling that the statement was hearsay.
17 Especially because the state invented new justifications for
18 admitting the statement that it did not offer at the preliminary
19 hearing, the record is clear that the Justice Court did not commit
20 egregious error.

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III.

CONCLUSION

For all of the reasons presented above, this Court must deny the state's motion and deny leave to file an information by affidavit.

DATED this 4th day of June, 2012.


CHRISTOPHER R. ARABIA, Esq.
Nevada Bar #9749
601 S. 10th St.
Las Vegas, NV 89101
702.281.4093
Attorney for Dfdt. Moultrie

CERTIFICATE OF SERVICE

I certify that I am an employee or agent of CHRISTOPHER R. ARABIA, Attorney at Law, and that on the 4th day of June, 2012, I served the foregoing **DEFENDANT'S OPPOSITION** by hand-delivering and/or emailing and/or faxing and/or mailing first-class postage prepaid, copies to the following parties(s) at the following address(es): Esmeralda DA's Office, Courthouse, Goldfield, NV 89013



an employee or agent of CHRISTOPHER R. ARABIA

EXHIBIT A

1 CASE NO 12-2201

2 The undersigned hereby affirms this document
does not contain a social security number, pursuant
to NRS 239B.030.

3 *Samuel Kaufman*

ESMERALDA TOWNSHIP
JUSTICE COURT
FILED
GOLDFIELD, NEVADA

2012 JAN 11 P 1:30

4
5 IN THE JUSTICE COURT OF ESMERALDA TOWNSHIP,
6 IN AND FOR THE COUNTY OF ESMERALDA, STATE OF NEVADA

7 THE STATE OF NEVADA,)

8)
9 Plaintiff,)

10 vs.)

CRIMINAL COMPLAINT

11 MATTHEW LEON MOULTRIE,)

12 Defendant.)
13)

14 STATE OF NEVADA)

15) ss
16 COUNTY OF ESMERALDA)

17 ANTHONY PHILIPS, Sergeant with the Esmeralda County Sheriff's Office, State of Nevada,

18 being first duly sworn, personally appeared before me and complained and deposed that

19 MATTHEW LEON MOULTRIE, the above-named defendants, on or about December 11, 2011,

20 at or near US Hwy 95, Esmeralda Mile Marker 32, County of Esmeralda, State of Nevada, did

21 commit the crimes of:
22

23 **COUNT I: POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL,**
in violation of NRS 453.337, a category "C" felony, it is unlawful for a person to possess for
24 the purpose of sale flunitrazepan, gamma-hydroxybutyrate, any substance for which
flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance
25 classified in schedule I or II, to wit; said defendant did possess METHAMPHETAMINE, a
26 schedule I controlled substance with the intent to sell.
27
28

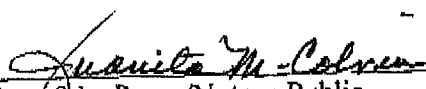
Arthur Wehrmeister, Esq., Esmeralda County District Attorney
1st floor of County Courthouse at corner of Euclid & US 95, P.O. Box 339, Goldfield, NV 89013

Phone: 775-485-6352 Fax: 775-485-6356

1 All of which is contrary to the form of Statute and/or Ordinance in such cases made and provided
2 and against the peace and dignity of the State of Nevada. Said complainant therefore
3 respectfully requests that a warrant be issued for the arrest of said defendant, if not already
4 arrested, so that he may be dealt with according to law.
5

6
7 
8 ANTHONY PHILIPS
9

10 Signed and sworn to (or affirmed) before me on Jan 11-2011 by ANTHONY
11 PHILIPS.

12
13 
14 Justice of the Peace/Notary Public
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FILED

JUN 12 2012
Blinda Elger
ESMERALDA COUNTY CLERK

Case No. 12-832

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF ESMERALDA

THE STATE OF NEVADA,

Plaintiff,

vs.

MATTHEW MOULTRIE,

Defendant.

**SUPPLEMENT TO DEFENSE OPPOSITION
TO MOTION FOR LEAVE OF COURT TO FILE
INFORMATION BY AFFIDAVIT; DEFENSE
MOTION TO STRIKE IN PART**

COMES NOW Defendant MATTHEW MOULTRIE, by and through his attorney CHRISTOPHER R. ARABIA, Esq., who submits this supplement to defendant's opposition to Plaintiff's motion for leave of court to file an information by affidavit. This supplement contains Defense Exhibit B, which was accidentally not included in the filing the of the opposition.

DATED this 11th day of June, 2012.

CR Arabia

CHRISTOPHER R. ARABIA, Esq.
Nevada Bar #9749
601 S. 10th St.
Las Vegas, NV 89101
702.281.4093
Attorney for Dfدت. Moultrie

075

EXHIBIT B

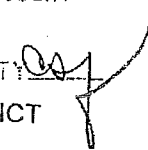
1 CASE NO. CR-FP-09-638

2 DEPT. 2

FILED

2010 AUG -9 P 3:53

ELKO CO DISTRICT COURT

CLERK _____ DEPUTY 

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6 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO
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9
10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 MATTHEW LEON MOULTRIE,

14 Defendant.
15

JUDGMENT OF

CONVICTION

(Probation /Guilty)

16
17 On the 22nd day of February, 2010, the above-named Defendant, MATTHEW LEON
18 MOULTRIE, (date of birth: 03/17/1990 {age: 20}, place of birth: Tucson, Arizona) entered a
19 plea of guilty to the crime of COUNT 1:ATTEMPTED POSSESSION OF A SCHEDULE I OR
20 SCHEDULE II CONTROLLED SUBSTANCE FOR THE PURPOSE OF SALE, A GROSS
21 MISDEMEANOR AS DEFINED BY NRS 453.337 AND 193.330, which crime occurred on or
22 about the 28th day of October,2008 and the 4th day of December, 2008.

23 At the time said Defendant entered his plea of guilty, this Court informed him of the privilege
24 against compulsory self-incrimination, his right to a speedy trial, his right to a trial by jury, and his
25 right to confront his accusers. At said time Defendant was also advised of the maximum penalty for
26 the crime to which he would plead guilty and the elements of that crime. After being so advised, the
27 Defendant stated that he understood these rights and that he still desired this Court to accept his plea
28 of guilty.

1 As a result of the foregoing, this Court on July 12, 2010, finds the above-named Defendant
2 guilty of the crime of COUNT 1: ATTEMPTED POSSESSION OF A SCHEDULE I OR SCHEDULE II
3 CONTROLLED SUBSTANCE FOR THE PURPOSE OF SALE, A GROSS MISDEMEANOR AS
4 DEFINED BY NRS 453.337 AND 193.330, for which he was found guilty and hereby sentences said
5 Defendant on this 12th day of July, 2010 as follows:
6

7 **IT IS HEREBY ORDERED** that the Defendant shall submit to testing to
8 determine his genetic markers in accordance with the provisions of NRS
9 176.0913, and shall pay the One Hundred Fifty Dollar (\$150.00) genetic
10 testing fee in accordance with the provisions of NRS 176.0915.

11 **IT IS FURTHER ORDERED** that in accordance with the provisions of NRS
12 453.575, the Defendant shall pay the Sixty Dollar (\$60.00) forensic fee.

13 For Count 1, the Defendant is hereby sentenced to serve 12 months in the
14 Elko County Jail. The Defendant shall receive credit for 2 days heretofore
15 served as of July 12, 2010.

16 **IT IS FURTHER ORDERED** that the sentence for Count 1 is hereby
17 suspended and the Defendant placed on a term of probation of twenty four
18 (24) months. While on probation, the Defendant shall comply with the
19 standard rules of probation, including the following special conditions:

- 20 1. That the Defendant obtain a substance abuse evaluation at his own
21 expense and, if deemed necessary, that he enter and successfully
22 complete a treatment program as approved by the Division of Parole
23 and Probation;
- 24 2. That the Defendant shall attend NA/AA meetings twice a week, and shall
25 provide proof of attendance to his probation officer for the entire length
26 of his probationary term.

27 **IT IS FURTHER ORDERED** in accordance with the provisions of NRS 176.062, that the
28 Defendant shall forthwith pay to the Elko County Clerk, the sum of Twenty-five Dollars (\$25.00),
as an administrative assessment fee, and judgment therefore is hereby entered against the
Defendant.

IT IS FURTHER ORDERED that the Bail Bond posted in the amount of \$20,000.00, is
hereby exonerated.

//

1 At the time said Defendant entered his plea of guilty, and at the time he was sentenced,
2 he was represented by Roger H. Stewart, Esq.

3 THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this
4 Judgment of Conviction as part of the record in the above-entitled matter.

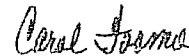
5 DATED this 9 day of August, 2010.
6

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9

10 ANDREW G. PUCCINELLI
11 District Judge/Department 2
12

13 CERTIFIED COPY
14 DOCUMENT ATTACHED IS A
15 TRUE AND CORRECT COPY
16 OF THE ORIGINAL ON FILE

17 30 day of JAN, 2012

18 
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20 CLERK
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Andrew J. Puccinelli, District Judge, Fourth Judicial District Court, Department 2, and that on this 9 day of August, 2010, I served by hand delivery by placing a copy of said document in the agency box located in the Elko County Clerk's Office, a true copy of the foregoing document to:

Elko County District Attorney (2)

Roger H. Stewart, Esq.

State of Nevada, Division of Parole & Probation

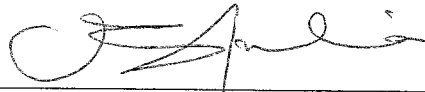
Elko County Sheriff

Elko Bail Bonds

Stefanie Pattani
Stefanie Pattani

CERTIFICATE OF SERVICE

I certify that I am an employee or agent of CHRISTOPHER R. ARABIA, Attorney at Law, and that on the 12th day of June, 2012, I served the foregoing **DEFENDANT'S SUPPLEMENT** by hand-delivering and/or emailing and/or faxing and/or mailing first-class postage prepaid, copies to the following parties(s) at the following address(es): Esmeralda DA's Office, Courthouse, Goldfield, NV 89013



an employee or agent of CHRISTOPHER R. ARABIA

CA

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES



1 CR 12-832

2 Dept. No. 2

3 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

4 IN AND FOR ESMERALDA COUNTY

5
6 THE STATE OF NEVADA

7 Plaintiff,

8 v.

9 MATTHEW LEON MOULTRIE

10 Defendant.

ORDER GRANTING THE STATE
LEAVE TO FILE AN INFORMATION
BY AFFIDAVIT

11
12
13 The Court has received the State's request to file an information by affidavit in
14 this case; which request has been timely opposed by the Defendant. Because the Court
15 finds that there was sufficient evidence presented during the preliminary hearing to
16 support a finding of probable cause, that the Justice Court erred in discharging the
17 Defendant, and that the arguments presented by the Defendant are insufficient to warrant
18 denial, the Court now GRANTS the State's request.

19
20 FACTUAL AND PROCEDURAL BACKGROUND

21 This case originates in a traffic stop performed by the Esmeralda County Sheriff's
22 Office on December 11, 2011. During the stop, a deputy requested permission to search
23 the vehicle and allegedly discovered methamphetamine belonging to the Defendant, a
24 passenger in the vehicle. The Defendant was charged with possession of
25 methamphetamine with the intent to distribute, with an enhancement for a second
26 offense. A preliminary hearing was held on the charge; during the preliminary hearing
27
28



1 the Justice of the Peace upheld a hearsay objection to prevent the deputy from testifying
2 about whether he received consent to search the vehicle the Defendant was riding in.
3 Additionally, although the State filed the charge as a second offense, it was unable to
4 provide evidence of a prior conviction at the preliminary hearing.
5

6 On the basis of the hearsay objection and the State's failure to prove a prior
7 conviction, the Justice of the Peace discharged the Defendant and dismissed the charge.
8 The State filed its request to file an information by affidavit 63 days after the discharge
9 by the Justice Court. The Defendant opposed the State's request on the grounds that: 1) it
10 was untimely, being filed outside the statutory fifteen day window; 2) the information
11 filed by the State alleges a Class D Felony first offense rather than a Class C Felony
12 second offense (which was originally charged); and 3) the Justice of the Peace did not
13 commit egregious error when the hearsay object was upheld.
14

15 DISCUSSION

16 1. THE HEARSAY ERROR IN THE JUSTICE COURT WAS SUFFICIENT TO 17 PERMIT THE STATE TO FILE AN INFORMATION BY AFFIDAVIT

18 The primary procedure for trying a defendant in District Court for felonies and
19 gross misdemeanors is through preliminary hearing and bindover in the Justice Court.
20 However, if a Defendant is discharged in the preliminary hearing, or if he waives his
21 preliminary hearing, the State may file an information by affidavit in the District Court if
22 that Court grants permission to do so. NRS 173.035(2) (2009). The statute governing the
23 filing of informations by affidavit in the District Court does not specify a basis for a
24 Court to allow the state to proceed by affidavits. *Id.* The Nevada Supreme Court has,
25 however, held that the State should only be permitted to proceed on an information filed
26 by affidavit to correct egregious error committed by the Justice Court; not to overcome
27
28



1 deficiencies in the presentation of evidence at a preliminary hearing. *State v. District*
2 *Court*, 114 Nev. 739, 741-42, 964 P.2d 48, 49 (1998). Thus, where the State fails to
3 demonstrate probable cause as to one of the elements of the charged offense and a
4 defendant is discharged, it may not attempt to recharge the defendant in the District
5 Court. *Cranford v. Smart*, 92 Nev. 89, 89, 545 P.2d 1162, 1163 (1976).
6

7 Unfortunately, “egregious” error has not been identified or explained by the
8 Nevada Supreme Court, nor are there any examples of what is egregious error in Nevada
9 case law. Other jurisdictions have equated egregious error with plain error, which is
10 generally defined as an error so significant that it affects the substantial rights of the
11 parties. *Ex parte Taylor*, 666 So.2d 73, 84 (Ala. 1995). Actions to correct plain or
12 egregious error should only be employed when a miscarriage of justice would likely
13 occur otherwise. *Id.*; *see also Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477
14 (2008).
15

16 Having defined as well as possible the parameters for permitting the State to file
17 an information by affidavit, the Court turns now to the facts and law specific to this case.
18 The first error the State complains of is the Justice Court’s decision to uphold a hearsay
19 objection raised by the Defendant when the State attempted to establish that the vehicle
20 the Defendant’s drugs were allegedly found in was searched subject to the driver’s
21 consent. It is well established law that a statement of consent to search given to police is
22 not hearsay if offered for the purpose of explaining why an officer believed he had
23 consent to search the vehicle. *See* NRS 51.035 (defining hearsay as a statement offered
24 for the truth of the matter asserted); *see also e.g. State v. Hodges*, 672 S.E.2d 724, 731
25 (NC Ct. App. 2009) (“...[the statement of consent] was used to explain why [the Officer]
26
27
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1 believed he could conduct the search of the vehicle and proceeded to search the
2 vehicle...[and] was not hearsay as it was admitted to explain his subsequent conduct.”)

3
4 The Justice of the Peace erred when it upheld the hearsay objection to the
5 Officer’s statements about why he chose to search the vehicle in this case. The
6 Defendant’s statement of consent was admissible to explain the officer’s subsequent
7 conduct and to establish simply that the statement was made. *See Id.* As such the
8 statement of consent was not hearsay and should have been admitted. An erroneous
9 ruling on the rules of evidence is not normally significant enough to rise to the level of
10 plain error; however, in this case the error prevented the Justice of the Peace from
11 considering admissible evidence in making her determination of probable cause. Thus,
12 the State’s right to proceed in a criminal matter was substantially affected and the filing
13 of an information by affidavit is the appropriate remedy.

14
15 2. THE JUSTICE COURT ALSO ERRED BY DENYING THE STATE’S MOTION
16 TO AMEND THE INFORMATION

17 An information may be amended at any time prior to a verdict at trial so long as
18 no additional or different offenses are alleged and the substantial rights of the defendant
19 are not affected. NRS 173.095(1) (1995). Amendment to conform charges to the
20 evidence is allowed if it does not change the theory of prosecution or negate the method
21 of defense. *State v. District Court*, 116 Nev. 374, 377, 997 P.2d 126, 129 (2000); *Green*
22 *v. State*, 94 Nev. 176, 177, 576 P.2d 1123, 1123 (1978).

23
24 In this case, the State sought to amend its information to remove the repeat
25 offender element of the charges after it failed to provide any proof of the Defendant’s
26 prior conviction (if indeed there is a prior conviction) for possession during the
27 preliminary hearing. Since the Defendant was not even in a trial and there was no verdict
28



1 to be given, the State should have been permitted to amend the information. The Justice
2 of the Peace denied the motion to amend and then discharged the Defendant because,
3 among other things, the State had not proven that the Defendant was a repeat offender.
4 This was an error, and warrants an order permitting the State to proceed by affidavit. The
5 State presented sufficient evidence to establish probable cause as to all the elements of a
6 first offense possession with intent to sell charge and it should have been permitted to
7 proceed on that charge.
8

9 3. THE STATE'S DELAY IN FILING IN THE DISTRICT COURT, ALTHOUGH
10 SIGNIFICANT, HAS NOT PREJUDICED THE DEFENDANT

11 Under NRS 173.035, a request from the State to file an information by affidavit
12 must be filed within fifteen days after a defendant is discharged by the Justice Court.
13 However, if the State misses the fifteen day deadline, denial of the motion to proceed by
14 affidavit is not mandatory; rather, the Court has the discretion to deny and should do so if
15 the Defendant is prejudiced by the delay. *Berry v. Sheriff of Clark County*, 93 Nev. 557,
16 558, 571 P.2d 109, 110 (1977). To warrant denial of the State's motion, the Defendant's
17 showing of prejudice must be actual and will not be satisfied by speculation about what
18 could have happened if the State had not delayed. *Mello v. State*, 93 Nev. 662, 664, 572
19 P.2d 533, 534 (1977).
20

21 The Defendant's first allegation of prejudice is that he has not been active in
22 defending his case during the State's period of delay because he thought the case was
23 finished. Crucially, however, the Defendant does not explain to the Court exactly what
24 he could have been doing during the 63 day delay that he is unable to do now. The
25 prejudice complained of is speculative and does not warrant denial of the State's motion.
26 The Defendant also alleges that he is prejudiced by the delay since he is not a resident of
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1 Esmeralda County; however, it is unclear how this makes the State's delay prejudicial.
2 Whether the Defendant was charged 63 days ago or today he still will have to travel to
3 Esmeralda County and be subject to any attendant inconveniences. The Defendant's last
4 allegation of prejudice is that he has not been able to consult with counsel during the
5 delay because he did not know he was going to be re-charged; however, the Court is sure
6 that the Defendant will have adequate time to consult with his counsel prior to trial.
7

8 CONCLUSION

9 For the reasons outlined above, the Court now GRANTS the State's motion to file
10 an information by affidavit in this case.

11 By the Court this 2nd day of July, 2012,
12

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Hon. Robert W. Lane
District Court Judge



CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 26th day of June, 2012,
he mailed copies of the foregoing Cont Order to the following:

Robert Glennen
(Courthouse Mailbox)

Christopher Arabia
(Courthouse Mailbox)

C. David Gravett
C. David Gravett
Law Clerk for the Court

AFFIRMATION

The undersigned hereby affirms that the document Cont Order does
not contain the social security number of any person.

C. David Gravett
C. David Gravett
Law Clerk for the Court

1 **Case No. CR-12-832**

2 **Dept 2**

3 The undersigned hereby affirms this document
does not contain a social security number, pursuant
to NRS 239B.030

4 *[Signature]*

F I L E D

JUL 05 2012

[Signature]
ESMERALDA COUNTY CLERK

5 **IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,**
6 **IN AND FOR THE COUNTY OF ESMERALDA**

7
8 **THE STATE OF NEVADA,**

9 Plaintiff,

10 **v.**

INFORMATION

11 **MATTHEW LEON MOULTRIE,**

12 Defendant. _____/

13 ROBERT GLENNEN III, Esq, Esmeralda County Deputy District Attorney,
14 informs the Court that, on or about the 11th day of December, 2011, and before the
15 filing of this information, in Esmeralda County, State of Nevada, the defendant did then
16 and there commit the following offense(s), to-wit:

17 **COUNT I: POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT**
18 **TO SELL**, in violation of NRS 453.337, a category "D" felony, it is unlawful
19 for a person to possess for the purpose of sale flunitrazepan, gamma-
20 hydroxybutyrate, any substance for which flunitrazepam or gamma-
21 hydroxybutyrate is an immediate precursor or any controlled substance
22 classified in schedule I or II, to wit; said defendant did possess
23 METHAMPHETAMINE, a schedule I controlled substance with the intent to
24 sell.

ESMERALDA COUNTY DISTRICT ATTORNEY
P.O. BOX 339
GOLDFIELD, NEVADA 89013
(775) 485-6352

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All of which is contrary to the form, force and effect of the statutes in such cases made
and provided, and against the peace and dignity of the State of Nevada

DATED this 9th day of May, 2012.


ROBERT GLENNEN III

The names and addresses of the witnesses known to the District Attorney at the time
of filing the information are the following:

Deputy Matthew Kirkland
Esmeralda County Sheriff's Office
Goldfield NV 89013

Sergeant Anthony Philips
Esmeralda County Sheriff's Office
Goldfield NV 89013

Las Vegas Metropolitan Police Department
400 Stewart Avenue
Las Vegas NV 89101-2984

090

ESMERALDA COUNTY DISTRICT ATTORNEY
P.O. BOX 339
GOLDFIELD, NEVADA 89013
(775) 485-6352

Case No. CR-12-832
Dept 1

The undersigned hereby affirms this document
does not contain a social security number, pursuant
to NRS 239B.030.

FILED

NOV 19 2013
Angela Furell
ESMERALDA COUNTY CLERK

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF ESMERALDA

THE STATE OF NEVADA,

Plaintiff,

vs.

MATTHEW LEON MOULTRIE,

Defendant.

CONDITIONAL GUILTY
PLEA AGREEMENT

I hereby agree to enter a conditional plea of guilty to the offense of
POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL, a category
"D" felony, in violation of NRS 453.337, as more fully alleged in the Information on file
herein and/or in the charging document attached hereto as Exhibit A.

My conditional guilty plea is based upon the plea agreement in this case which,
is as follows: 1) the state consents to my preservation of the right to appeal, under
NRS 174.035(3); 2) the state agrees that it will dismiss and/or not pursue any
additional charges relating to this matter; and 3) the state agrees that it will not pursue
the habitual offender enhancement in this case.

091

ML
CA

Defendant's Initials
Attorney's Initials

1 **This guilty plea is conditional. NRS 174.035(3) specifies:**

2 3. With the consent of the court and the district attorney, a defendant may enter
3 a conditional plea of guilty, guilty but mentally ill or nolo contendere, reserving in
4 writing the right, on appeal from the judgment, to a review of the adverse
5 determination of any specified pretrial motion. A defendant who prevails on
6 appeal must be allowed to withdraw the plea.

7
8 **As contemplated by NRS 174.035(3), I expressly and in writing reserve my**
9 **right to appeal for the purpose of obtaining a review of the District Court's**
10 **adverse determination of my obtaining a review of the District Court's adverse**
11 **determination of the state's motion for leave to file an information by affidavit**
12 **(i.e. a review of District Court's decision to grant the state's motion for leave to**
13 **file an information by affidavit); I also expressly and in writing reserve my right**
14 **to withdraw my guilty plea.**

15 **I also understand that my attorney will not file this plea agreement unless**
16 **the District Court consents on the record during the plea hearing to my**
17 **reservation of the right to appeal, as required by NRS 174.035(3).**

18 **CONSEQUENCES OF THE PLEA**

19 I understand that by pleading guilty I admit the facts which support all the
20 elements of the offense(s) to which I now plead as set forth in Exhibit 1.

21 I understand that as a consequence of my plea of guilty I may be imprisoned for
22 a period of not less than one (1) year or more than FOUR (4) years in the state prison
23 and that I may be further fined up to FIVE THOUSAND DOLLARS (\$5,000.00). I
24

092




Defendant's Initials
Attorney's Initials

1 understand that I may receive probation for this offense. I also understand that the law
2 requires me to pay an administrative assessment fee.

3 I understand that, if appropriate, I will be ordered to make restitution to the
4 victim of the offense(s) to which I am pleading guilty and to the victim of any related
5 offense which is being dismissed or not prosecuted pursuant to this agreement. I will
6 also be ordered to reimburse the State of Nevada for expenses related to my
7 extradition, if any.

8 I understand that my sentence is in the discretion of the sentencing judge.

9 I understand that if more than one sentence of imprisonment is imposed and I
10 am eligible to serve the sentences concurrently, the sentencing judge has the
11 discretion to order the sentences served concurrently or consecutively.

12 I understand that information regarding charges not filed, dismissed charges or
13 charges to be dismissed pursuant to this agreement may be considered by the judge
14 at sentencing.

15 I have not been promised or guaranteed any particular sentence by anyone. I
16 know that my sentence is to be determined by the court within the limits prescribed by
17 statute. I understand that if my attorney or the State of Nevada or both recommend
18 any specific punishment to the court, the court is not obligated to accept the
19 recommendation.

20 I understand that the division of parole and probation of the department of
21 motor vehicles and public safety will prepare a report for the sentencing judge before
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23
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093

MM
CJA

Defendant's Initials
Attorney's Initials

1 sentencing. This report will include matters relevant to the issue of sentencing,
2 including my criminal history. I understand that this report may contain hearsay
3 information regarding my background and criminal history. My attorney and I will each
4 have the opportunity to comment on the information contained in the report at the time
5 of sentencing.

6
7 **WAIVER OF RIGHTS**

8 By entering my plea of guilty, I understand that I have waived the following rights and
9 privileges:

- 10 1. The constitutional privilege against self-incrimination, including the right to
11 refuse to testify at trial, in which event the prosecution would not be allowed to
12 comment to the jury about my refusal to testify.
- 13 2. The constitutional right to a speedy and public trial by an impartial jury, free
14 of excessive pretrial publicity prejudicial to the defense, at which trial I would be
15 entitled to the assistance of an attorney, either appointed or retained. At trial,
16 the state would bear the burden of proving beyond a reasonable doubt each
17 element of the offense charged.
- 18 3. The constitutional right to confront and cross-examine any witnesses who
19 would testify against me.
- 20 4. The constitutional right to subpoena witnesses to testify on my behalf.
- 21 5. The constitutional right to testify in my own defense.
- 22
23
24

094

MM
CSA

Defendant's Initials
Attorney's Initials

1 6. The right to appeal the conviction, with the assistance of an attorney, either
2 appointed or retained, unless the appeal is based upon reasonable
3 constitutional, jurisdictional or other grounds that challenge the legality of the
4 proceedings and except as otherwise provided in subsection 3 of NRS 174.035.

5
6 **VOLUNTARINESS OF PLEA**

7 I have discussed the elements of all the original charges against me with my
8 attorney and I understand the nature of these charges against me. I have decided to
9 enter my guilty plea herein after a review of North Carolina v. Alford, 400 U.S. 25
10 (1970) and Tiger v. State, 98 Nev. 555, 654 P.2d 1031 (1982). I understand that an
11 "Alford plea is a guilty plea accompanied by a denial of the facts constituting the
12 offense. In Alford, the Supreme Court held that such a plea is constitutionally sound if
13 it is knowingly entered for a valid reason, for instance, to avoid the possibility of a
14 harsher penalty. However, the district judge, in accepting the plea, must determine that
15 there is a factual basis for the plea, and he must further inquire into and seek to
16 resolve the conflict between the waiver of trial and the claim of innocence. The court's
17 inquiry should be addressed to the defendant personally, and not simply to his
18 counsel. Moreover, the district judge, as in accepting other guilty pleas, must also
19 determine that the accused understands the elements of the offense with which he is
20 charged." Tiger, 98 Nev. at 558.

21 I understand that the state would have to prove each element of the charge(s)
22 against me at trial.
23
24

095



Defendant's Initials
Attorney's Initials

1 I have discussed with my attorney any possible defenses and circumstances
2 which might be in my favor. My attorney has thoroughly investigated my case and has
3 acted exclusively in my best interest.

4 All of the foregoing elements, consequences, rights and waiver of rights have
5 been thoroughly explained to me by my attorney.
6

7 I believe that pleading guilty and accepting this plea bargain is in my best
8 interest and that a trial would be contrary to my best interest.

9 I am signing this agreement voluntarily, after consultation with my attorney and I
10 am not acting under duress or coercion or by virtue of any promises of leniency,
11 except for those set forth in this agreement.

12 I am not now under the influence of intoxicating liquor, a controlled substance or
13 other drug which would in any manner impair my ability to comprehend or understand
14 this agreement or the proceedings surrounding my entry of this plea.
15

16 My attorney has answered all my questions regarding this guilty plea agreement
17 and its consequences to my satisfaction and I am satisfied with the services provided
18 by my attorney.

19 Dated: This 19 day of Nov, 2013.

Matthew Menta
Defendant

21 Agreed to on this 22nd day of April, 2013.

W. St. George
District Attorney

096

MM Defendant's Initials
CSA Attorney's Initials

CERTIFICATE OF COUNSEL

I, the undersigned, as the attorney for the defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the defendant the allegations contained in the charges to which GUILTY pleas are being entered.
2. I have advised the defendant of the penalties for each charge and the restitution that the defendant may be order to pay.
3. All pleas of guilty or guilty but mentally ill offered by the defendant pursuant to this agreement are consistent with all the facts known to me and are made with my advice to the defendant and are in the best interest of the defendant.
4. To the best of my knowledge and belief, the defendant:
 - (a) Is competent and understands the charges and the consequences of pleading GUILTY as provided in this agreement.
 - (b) Executed this agreement and will enter a GUILTY pursuant hereto voluntarily.
 - (c) Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time of the execution of this agreement.

Dated: This 19th day of the month of Nov of the year 2013.


Attorney for Defendant

097

MM Defendant's Initials
CF Attorney's Initials

CASE NO. CR-12-832

FILED

DEPT NO. 2

APR - 2 2014

ESMERALDA COUNTY CLERK

IN AND FOR THE FIFTH JUDICIAL DISTRICT COURT
COUNTY OF ESMERALDA, STATE OF NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,)	TRANSCRIPT OF PROCEEDINGS
)	
vs.)	SENTENCING HEARING
)	
MATTHEW LEON MOULTRIE,)	
)	
Defendant.)	
-----)	

BEFORE THE HONORABLE ROBERT W. LANE, DISTRICT COURT JUDGE
230 CROOK STREET, GOLDFIELD, NEVADA 89013
ON TUESDAY, JANUARY 21, W014
AT 10:13 A.M.

APPEARANCES:

For the State:	Robert Glennen, Esq.
	Esmeralda County District Attorney
For the Defendant:	Christopher R. Arabia, Esq.
	Esmeralda County Public Defender

Reported by: Deborah Ann Hines, CCR #473, RPR

1 TUESDAY, JANUARY 21, W014

2 ---oOo---

3 THE COURT: Moultrie, 12-832, time and place
4 set for sentencing. We have a PSI dated
5 December 30th in which the division recommends
6 probation, 19 to 48 months underlying, five years
7 probation, all the standard costs and fees.

8 Mr. Moultrie is present represented by
9 Mr. Arabia. We're going to hear from Chris and then
10 from Mr. Moultrie and then from Mr. Glennen.

11 MR. ARABIA: All right. Well, your Honor,
12 what I would ask is that you follow the
13 recommendation of probation. Mr. Moultrie has had
14 some issues. He's on probation and he's in drug
15 court in Elko. He's moved into phase two. I didn't
16 a hundred percent recognize him at first. He looks
17 good. I think he's doing his best.

18 And as for this case, I think he put it well
19 in his statement, I committed my crimes because I was
20 being an idiot. And he at least recognizes that, so
21 I think that would be appropriate that you put him on
22 probation; and it would also be consistent with the
23 plea deal we have on this case, which is a
24 conditional plea pending appeal. So that's what I
25 would ask.

1 THE COURT: Thank you, sir.

2 Mr. Moultrie, anything you'd like to say?

3 THE DEFENDANT: No, other than I'm doing
4 great, working full time. Just glad, not this Monday
5 but last Monday, I was phased into phase two of drug
6 court.

7 THE COURT: How long have you been clean
8 now?

9 THE DEFENDANT: I've been clean almost eight
10 months now.

11 THE COURT: All right. Anything else you'd
12 like to say?

13 THE DEFENDANT: No.

14 THE COURT: All right. Mr. Glennen?

15 MR. GLENNEN: Your Honor, the presentence
16 report is well considered, and we would request that
17 your Honor follow it. I believe parole and probation
18 is requesting \$500 on legal services in this case.

19 THE COURT: That's correct.

20 Anything else from the division?

21 OFFICER GODFREY: No, your Honor. We'd just
22 ask that it's consecutive to the Elko County case.

23 THE COURT: All right. We'll go ahead and
24 follow the recommendations of the division and make
25 it consecutive with all the standard fines and fees

1 and the 19 to 48 months suspended for five years, put
2 you on probation with all the terms that they're
3 recommending.

4 What we normally do is we'll have the
5 division do an analysis of you and say, Does this guy
6 have an anger management problem or gambling problem
7 or whatever, and whatever they recommend to me that
8 you need, I'll go ahead and sign off on.

9 THE DEFENDANT: Okay.

10 THE COURT: And we'll put you on probation
11 for the five years. Hopefully you'll stay clean from
12 drugs and stay out of trouble. If you mess up, we'll
13 see you soon and we'll give you that 19 months.

14 Any questions for me about what's going on?

15 THE DEFENDANT: No, sir.

16 THE COURT: Good luck to you.

17 THE DEFENDANT: Thank you.

18 (Thereupon the proceedings
19 were concluded at 10:16 a.m.)

20 * * * * *

21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF NEVADA)

SS:

COUNTY OF NYE)

I, Deborah Ann Hines, certified court reporter, do hereby certify that I took down in shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated; and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 18th day of February, 2014.



Deborah Ann Hines, CCR #473, RPR

FILED

CASE NO. CR-12-832
DEPT. 2

MAR 04 2014
Angela Jewell
ESMERALDA COUNTY CLERK

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF ESMERALDA

THE STATE OF NEVADA,

Plaintiff,

vs.

MATTHEW LEON MOULTRIE,

Defendant.

JUDGMENT

On the 19th day of November, 2013, the Defendant above-named appeared before the Court with his counsel Christopher R. Arabia, Esquire, and having been found guilty of the crime of, COUNT 1: POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL, in violation of NRS 453.337, a category D felony.

On the 21st day of January, 2014, the Defendant appeared before the Court for sentencing with his counsel, Christopher R. Arabia, Esq., and the State was represented by Robert E. Glennen III, Esmeralda County District Attorney. No sufficient legal cause was shown by the Defendant as to why judgment should not be pronounced against him.

The Court adjudged the Defendant guilty of the crimes of,
COUNT 1: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL, in violation of NRS 453.337, a category D felony.

Defendant sentenced to 19 months to 48 months in the Nevada State Prison, suspended.

Defendant be placed on probation for a term of five (5) years.

Defendant shall receive twenty (20) days credit for presentence incarceration.

1 Defendant shall pay to the Clerk of the Court a twenty five dollars and no cents (\$25.00)
2 assessment fee.

3 Defendant shall pay a sixty dollar (\$60.00) Forensic Fee.

4 Defendant shall pay a three dollar (\$3.00) DNA Administrative Assessment.

5 Defendant shall pay the Clerk of the Court a five hundred dollar (\$500.00) fee for his
6 Attorney.

7 Defendant's sentence shall run consecutive to Elko County case CRFO-13-0640.

8 Defendant shall remain in and successfully complete the Fourth Judicial District Court
9 Adult Drug Court Program.

10 Defendant shall completely abstain from the use, possession or consumption of any
11 alcoholic beverages. Further, the Defendant completely abstain from being present in any
12 cocktail lounge, bar or similar establishment operated for the primary purpose of serving
13 alcoholic beverages, unless required to be so present during actual employment purposes.

14 Defendant shall completely abstain from gambling, or from being present in a gambling
15 establishment except for employment purposes.

16 Defendant shall maintain steady and gainful employment as approved by Nevada Parole
17 and Probation, and if not employed full time, participate in employment/vocational
18 training.

19 Defendant resolve all outstanding warrants within 30 days of probation grant.

20 The immediately after sentencing, the Defendant shall report to the Esmeralda County
21 Sheriff's Office to be formally booked on the charges of the instant offense.

22 DATED this 3rd day of March, 2014.

23
24
25
26
27
28

DISTRICT JUDGE

1 crystal substance, there was?

2 A. No, I do not.

3 Q. At some point did you make a definite
4 identification of the fellow that you knew as Matthew,
5 the passenger in the car?

6 A. Yes, by his ID card.

7 Q. What sort of ID card was that?

8 A. His Nevada ID card.

9 Q. Did any other officers arrive on the scene to
10 assist you with this situation?

11 A. Deputy Philips.

12 Q. And when did Deputy Philips arrive in relation
13 to your interaction with Matthew?

14 A. I don't know exact time.

15 Q. Did Deputy Philips arrive before or after you
16 finished searching the interior of the car?

17 A. While I was in the process of still searching
18 it. I already found the meth -- or the crystal substance
19 at that point before Deputy Philips arrived.

20 Q. Okay.

21 MR. ARABIA: I just want to object to
22 the characterization of it as meth and ask that that be
23 stricken and that the white crystal description remain.

24 THE COURT: I will strike that reference
25 to crystal meth until it's established.

1 MR. BRADSHAW: Thank you.

2 Q. (By Mr. Bradshaw) Did you at any time

3 conduct any kind of tests or do any further research

4 to determine -- you, yourself -- what the crystal

5 substance is or was at that time?

6 A. No, I did not.

7 Q. Okay. And What did you do then with Mr.

8 Moultrie at the end of search the vehicle?

9 A. I brought him in to Esmeralda County Sheriff's

10 Office.

11 Q. Did you find any other evidence that you took

12 into custody at that time when you were searching, other

13 than the white crystal substance that you described and

14 the money and those items that you described already?

15 Anything in addition?

16 A. No, I did not.

17 Q. What happened to the vehicle after you took

18 Mr. Moultrie into custody?

19 A. I released it to Brandy, the owner of the

20 vehicle, so she could get to work.

21 Q. Thank you.

22 MR. BRADSHAW: Nothing further of this

23 witness.

24 THE COURT: You may step down.

25 Oh, I'm sorry. You may cross examine

1 this witness.

2
3 CROSS EXAMINATION
4

5 BY MR. ARABIA:

6 Q. Do you have a video camera system in your car?

7 A. Yes, I do.

8 Q. Okay. Did it capture this incident?

9 A. I am ninety-nine percent sure it did.

10 Q. Where is Mile Marker 32? What county?

11 A. Esmeralda County.

12 Q. You alerted to an incident where Matthew was
13 a passenger in a car that was stopped.

14 A. Yes, sir.

15 Q. Okay. Isn't it true that you searched him and
16 his things and didn't find anything at that incident?

17 A. That is correct.

18 Q. So, similar to Brandy, he wasn't doing anything
19 wrong in that incident?

20 I'll rephrase that. That's a bad
21 question.

22 You testified that you did a search
23 of him, of Matthew and his belongings, and didn't turn
24 anything up.

25 A. On the Nick Stone stop?

1 Q. Yes.
2 A. Yes.
3 Q. Okay. And that was approximately three weeks
4 before the incident here?
5 A. Yeah, approximately three weeks.
6 Q. Okay.
7 MR. ARABIA: Court's indulgence for a
8 brief moment.
9 THE COURT: All right.
10 Q. (By Mr. Arabia) In your report, you wrote that
11 there was a backpack located in the rear seat behind the
12 passenger seat. Was it on the seat or on the floor? Do
13 you recall?
14 A. I do not recall.
15 Q. But it was in the back of the vehicle?
16 A. Uh-huh.
17 MR. ARABIA: All right. Nothing further.
18 Thank you.
19 THE COURT: Redirect?
20 MR. BRADSHAW: Nothing. Subject to
21 recall, however.
22 I call Officer Philips.
23 THE COURT: Don't discuss your testimony
24 please while you're waiting.
25 MR. KIRKLAND: Yes.

1 THE COURT: I'll remind you that you
2 were previously sworn. Please be seated.
3

4 ANTHONY PHILIPS,
5 called as a witness on behalf of the State, being first
6 duly sworn, testified as follows:
7

8 DIRECT EXAMINATION
9

10 BY MR. BRADSHAW:

11 Q. State your name for the record and please
12 spell your last name.

13 A. Anthony Philips, P-h-i-l-i-p-s.

14 Q. And state your occupation.

15 A. Sergeant with Esmeralda County Sheriff's Office.

16 Q. And how long have you been so employed?

17 A. With Esmeralda, since 2005.

18 Q. And before that, did you have any prior law
19 enforcement experience?

20 A. Since 1984.

21 Q. You've been a police officer?

22 A. Yes.

23 Q. In December of 2011, what was the -- I'm sorry.
24 Withdraw that question.

25 What training or experience have you had

1 to qualify you to perform the duties of a sergeant in
2 the sheriff's office?

3 A. Well, since the academy, I've been to several
4 supervisor schools. I've been a lieutenant area commander
5 with Nye County, been an undersheriff, been a sergeant
6 with Nye County, just ongoing schools.

7 Q. Thank you. What training have you had in
8 recognizing controlled substances?

9 A. I'm certified in NIK testing. That's a narcotics
10 identification kit. I've been to Quantico to the FBI
11 school on meth labs.

12 Q. Over the course of your career, have you had
13 occasion to identify or to see and observe and identify
14 methamphetamine?

15 A. Yes.

16 Q. And drawing your attention to the issue that
17 brings us together today, do you remember on the -- I
18 guess it's the 12th of November, 2011 -- assisting Officer
19 Kirkland on a traffic stop in Nye County -- I mean in
20 Esmeralda County?

21 A. Yes.

22 Q. Do you remember --

23 A. I think it was on the 11th of December, wasn't
24 it?

25 Q. I guess that's the way it reads, 12/11/2011.

1 A. Yeah.

2 Q. Do you remember arriving at that traffic stop?

3 A. Yes.

4 Q. What did you observe when you first arrived?

5 A. A white SUV stopped. Deputy Kirkland searched

6 the vehicle. I asked him what he had going on and he

7 told me.

8 Q. Do you remember at this stop, was it within

9 Esmeralda County?

10 A. Yes, by Mile Marker 33, right around there

11 somewhere, on US 95.

12 Q. US 95?

13 A. Uh-huh.

14 Q. Thank you. Now what was your -- did you have

15 contact with any of the people that were inside the car

16 that was stopped?

17 A. Yeah. I talked to Brandy Bodily.

18 Q. Had you known her previously?

19 A. Yes.

20 Q. Was there any other people in the car besides

21 Brandy, the car that was stopped?

22 A. Mr. Moultrie.

23 Q. Do you recognize Mr. Moultrie here today?

24 A. Yes, I do.

25 Q. Could you point him out?

1 A. He's sitting right there at the end of the
2 table in the green shirt.

3 MR. BRADSHAW: The record will reflect
4 this officer has identified the defendant in this matter,
5 Matthew Leon Moultrie?

6 THE COURT: The record will so reflect.

7 Q. (By Mr. Bradshaw) Did you have any further
8 contact with Mr. Moultrie after you assisted Deputy
9 Kirkland with the traffic stop?

10 A. Yes. Back at the sheriff's office, I did.

11 Q. Who transported Mr. Moultrie back to the
12 sheriff's office?

13 A. That would have been Deputy Kirkland.

14 Q. So what happened at the sheriff's office that
15 you had contact with Mr. Moultrie?

16 A. I advised Mr. Moultrie that I wanted to speak
17 to him.

18 Q. Was Mr. Moultrie in custody at this time?

19 A. Yes.

20 Q. Did he agree to speak with you?

21 A. Yes.

22 Q. Did you read him his Miranda rights?

23 A. Yes, I did.

24 Q. Did he understand them to your -- in your --

25 A. Yes. As I read Miranda rights, I just don't go

1 right through them. I do each line at a time and have
2 them initial each line that they understand.

3 Q. Did that happen?

4 A. Yes.

5 Q. Did you feel Mr. Moultrie understood the Miranda
6 rights warning?

7 A. Uh-huh.

8 Q. Did you indeed speak with Mr. Moultrie after you
9 gave the Miranda warning?

10 A. Yes.

11 Q. Now what was the nature of that interaction with
12 Mr. Moultrie?

13 A. It was about the substance that Deputy Kirkland
14 found, how it was packaged, whose it was.

15 Q. What did Mr. Moultrie say about what kind of
16 substance it was?

17 A. At first he said it belonged to a different
18 individual.

19 Q. Who was that?

20 A. Nick Stone.

21 Q. When you said at first, then did that story
22 change?

23 A. Yes.

24 Q. How did it change or --

25 A. I explained to Mr. Moultrie that I find it hard

1 to believe that somebody would leave their meth and money
2 laying around. Knowing those people, they protect that
3 stuff more than anything else, and then he admitted it
4 was his.

5 Q. So what in fact did he admit exactly?

6 A. That it was his and that -- he said it was
7 for personal use at first and then I explained to him
8 it wasn't my first day on the job and the way it was
9 packaged -- he knew how much every package weighed.
10 In fact he weighed it and separated it himself. They
11 don't do that for personal use.

12 Q. Mr. Moultrie explained that he had weighed it
13 and packaged it?

14 A. Yes.

15 Q. What did you believe the substance was that was
16 weighed and packaged?

17 A. Methamphetamine.

18 Q. And why do you think that? Why did you think
19 that at the time?

20 A. Just from the look of it and the consistency
21 of it. Then I tested it.

22 Q. And what kind of a test did you run on it?

23 A. A NIK, narcotics identification kit.

24 Q. And what was the results of that test?

25 A. Positive for amphetamine.

1 Q. Did you -- in the sequence of events in your
2 interaction with Mr. Moultrie, when did you run that test?

3 A. That was the last thing I did.

4 Q. After you'd interviewed him?

5 A. Uh-huh.

6 Q. So during the interview -- well, let me withdraw
7 that question.

8 Did you have occasion to personally
9 observe the -- what you believed was methamphetamine
10 and the money that was associated with it that had been
11 taken --

12 A. Yes.

13 Q. -- by Deputy Kirkland?

14 A. Yes.

15 Q. Could you describe that in some detail as to
16 what -- exactly how it was packaged and how much money
17 there was?

18 A. Not looking at my report but I knew it was a
19 blue and white plastic box and when he found it, there
20 was actually -- one of the little packages was on the
21 outside with a -- I don't think it was a rubber band --

22 MR. ARABIA: Wait. I'm going to object
23 to that. I think he's testifying as to what someone else
24 found. I think he should stick to what he found or saw.

25 MR. PHILIPS: I am testifying to what

1 I saw.

2 MR. ARABIA: I thought you said it was
3 Matt. In that case I would withdraw the objection.

4 Q. (By Mr. Bradshaw) Continue on.

5 A. There was a blue and white package and it had
6 a -- one of the packages of the substance was on the
7 outside of it with -- I don't think it was a rubber
8 band. I think it was like a pony tail or hair tie or
9 something -- anyway, holding it on the outside. Inside
10 was more packages and there was fifty dollars in there.
11 That's when we got into what it weighed.

12 Q. Did you weigh it?

13 A. Yes.

14 Q. You weighed the so-called methamphetamine?

15 A. Yes.

16 Q. Do you recall, without looking at your report,
17 how much it weighed?

18 A. No, I don't recall.

19 Q. Okay. And how much money was there in total?

20 A. Fifty dollars.

21 Q. And what did Mr. Moultrie say about the money
22 and the -- what you believed was methamphetamine at the
23 time?

24 A. When he first said it, there was -- he had
25 weighed them out and packaged them in twenty-three

1 grams -- I believe it was, I can't remember -- and those
2 would sell for fifty dollars.

3 Q. Did Mr. Moultrie admit that he was selling
4 methamphetamine?

5 A. Finally he did, yes.

6 Q. What did he say exactly?

7 A. He was selling for a guy named Mike out of
8 Silver Peak and he would be giving that money -- the
9 money was -- belonged to Mike.

10 Q. The money that had been confiscated, the fifty
11 dollars?

12 A. Yes. And any extra he could make off it, he
13 kept.

14 Q. Did Mr. Moultrie say how many sales he had made
15 or anything like that?

16 A. No, sir.

17 Q. What else did you talk to Mr. Moultrie about?

18 A. About setting up a deal with Mike in Silver Peak.

19 Q. Did that happen?

20 A. Kind of.

21 Q. Let me withdraw that question.

22 Did you try to set up something with
23 Mr. Moultrie and Mike?

24 A. Yes.

25 Q. And the purpose of that was what?

1 A. To get the supplier.
2 Q. And that would be Mr. Moultrie's supplier?
3 A. Yes.
4 Q. What did Mr. Moultrie say about whether he would
5 or could do that?
6 A. He said he would. He said that he would have to
7 text him, that they didn't call each other.
8 Q. And did that happen?
9 A. Yes.
10 Q. Did Mr. Moultrie use his own phone or someone
11 else's phone?
12 A. I believe it was Brandy's phone, if I recall
13 correctly.
14 Q. Did Mr. Moultrie have that phone on his person
15 at the time you were talking with him?
16 A. Yes.
17 Q. And you had not confiscated that at the time?
18 A. No.
19 Q. Okay. And in fact was there some kind of setup
20 arranged or how did that turn out?
21 A. Yes, there was.
22 Q. What happened?
23 A. That vehicle was stopped.
24 Q. When you say that vehicle, whose vehicle was
25 stopped?

1 A. It was actually Nichole White and Mike.

2 Q. And this is the same Mike that you referred to
3 that Mr. Moultrie said he was selling for?

4 MR. ARABIA: Objection. Leading.

5 THE COURT: Rephrase that please.

6 MR. BRADSHAW: Yes.

7 Q. (By Mr. Bradshaw) Who is Mike again?

8 A. The person he said he got his meth from that he
9 was selling it for.

10 Q. And the woman's name that you mentioned?

11 A. Nichole White.

12 Q. Do you know anything about her?

13 A. No.

14 Q. You said that the vehicle that those two people
15 were in was stopped?

16 A. Yes.

17 Q. Who stopped it?

18 A. Deputy Kirkland.

19 Q. Okay. Do you have any personal knowledge of what
20 the result of that stop was?

21 A. Yes. I was on that stop.

22 Q. And what happened?

23 A. We found nothing. He said he was coming to
24 get --

25 MR. ARABIA: Objection. Hearsay.

1 Q. (By Mr. Bradshaw) Yes, without quoting them,
2 did you have occasion to find contraband or not?

3 A. Nope.

4 Q. And were those two people detained in any way?

5 A. For a very short time.

6 Q. Was this out on the highway?

7 A. Yes. They actually agreed to come to the office
8 also.

9 Q. So they did come to the office?

10 A. Yes.

11 Q. And you interviewed them there?

12 A. Yes.

13 Q. And were there any further efforts made to effect
14 a buy from Mike using Mr. Moultrie?

15 A. He agreed to that but never heard from him.

16 Q. So it didn't happen?

17 A. Didn't happen.

18 Q. How much time did you give Mr. Moultrie to make
19 that happen?

20 A. I cannot remember without referring to my report.
21 I think it's in there.

22 Q. Were there any further tests done on the
23 methamphetamine that you tested with a NIK test that
24 was found in the vehicle that Mr. Moultrie was a passenger
25 in? Were there any further tests done to further identify

1 the substance, the white substance?

2 A. I don't believe it's been sent to Metro yet
3 until it goes up to court.

4 Q. Okay. Just to be clear, did or did not Mr.
5 Moultrie admit that the methamphetamine that you
6 ultimately tested with a NIK test belonged to him?

7 MR. ARABIA: Objection. Asked and
8 answered.

9 THE COURT: Well, it has been asked and
10 answered so I will sustain.

11 MR. BRADSHAW: Thank you. Nothing
12 further from this witness.

13 THE COURT: Thank you.

14 Mr. Arabia?

15 MR. ARABIA: Thanks.

16
17 CROSS EXAMINATION
18

19 BY MR. ARABIA:

20 Q. Good afternoon.

21 A. How are you?

22 Q. All right.

23 On the -- I want to make sure I
24 understand. You, I think, said that Matthew had
25 Brandy's phone on him?

1 A. You know, I'm not clear on that or he said he
2 needed to use Brandy's because he was out of minutes.
3 Somehow we ended up using her phone.

4 Q. He was in custody at that time though?

5 A. Yes.

6 Q. Would someone in custody normally have a phone
7 on their person or how did that -- what was the mechanics
8 of that?

9 MR. BRADSHAW: Objection, Your Honor.
10 Calls for speculation. If he could just be asked whether
11 he had the phone on his person or not.

12 MR. ARABIA: Yeah, that's fine.

13 Q. (By Mr. Arabia) Did he have the phone --
14 Brandy's phone on his person?

15 A. I don't remember.

16 Q. Okay. And then the interview, was any of that
17 recorded?

18 A. I can't remember that either. I think it was.

19 Q. All right.

20 MR. ARABIA: Nothing further. Thank you.

21 THE COURT: Any redirect?

22 MR. BRADSHAW: No.

23 THE COURT: Subject to recall?

24 MR. BRADSHAW: Subject to recall. Well,
25 yeah. Yes.

1 THE COURT: Okay.
2
3 MR. BRADSHAW: Keep him handy.
4 And the State has no further witnesses.
5 THE COURT: Mr. Arabia?
6 MR. ARABIA: Your Honor, I just want to
7 state for the record that I've discussed with Mr. Moultrie
8 the fact that at this preliminary hearing, he does have
9 the right to introduce evidence and witnesses and whatnot
10 and to testify. We've discussed all of those issues.
11 We're not going to present witnesses and he's not going
12 to testify today.
13 THE COURT: All right.
14 Are you ready to make a closing statement
15 or --
16 MR. BRADSHAW: Yes, I'm ready.
17 THE COURT: All right.
18 MR. BRADSHAW: Thank you.
19 We're charging this person with
20 possession of a controlled substance with intent to sell.
21 We described that there was a highway stop based upon no
22 headlights in an area that the law requires headlights
23 to be on in; that it was in a certain portion of Esmeralda
24 County.
25 The vehicle was pulled over. The officer
had permission to search the car from the driver and the

1 owner of the car and Mr. Moultrie was the passenger in
2 the car.

3 Contraband was found in a backpack,
4 which contraband ultimately was admitted by Mr. Moultrie
5 belonged to him, that he was selling -- well, the
6 contraband was described and tested for methamphetamine
7 with a NIK test, and we heard testimony from the officer
8 that he had been trained in administering the NIK test
9 and that the NIK test returned a result of methamphetamine
10 or methamphetamine derivatives -- I can't remember exactly
11 what he said -- and that this defendant then admitted that
12 the methamphetamine and some money that was found with it
13 belonged to him and that he was selling methamphetamine
14 for a person named Mike that lives -- lived in the area;
15 that the officers tried to get Mr. Moultrie to set up a
16 situation with Mike where they could make an arrest of
17 Mr. Moultrie's dealer, who was alleged to be Mike. That
18 didn't happen.

19 So we believe that we've met the
20 elements of the crime, that is, that this defendant
21 in fact possessed methamphetamine and money, packaged
22 in a way that, in the officers' judgment and professional
23 experience and their opinions, was packaged for sale;
24 that this defendant admitted that he was selling
25 methamphetamine; that this happened in Esmeralda County.

1 And we believe that we have met the
2 elements of the crime that we've alleged and we ask the
3 Court to bind over as charged.

4 THE COURT: Okay.

5 Mr. Arabia?

6 MR. ARABIA: All right. I'm going to
7 ask for a discharge. I've got five reasons. I think two
8 of them are more evidentiary in nature and then three of
9 them are legal, so I'll start with the evidence first.

10 I don't think there was any evidence
11 introduced that there was any justification for the
12 search, no consent, no reasonable suspicion. He made
13 allusions to an incident where Matthew was actually, much
14 like Brandy in this case who wasn't charged, wasn't doing
15 anything wrong. There was no evidence of consent so
16 there would have been no justification for the search
17 and everything that followed would be fruits of the
18 poisonous tree.

19 The second issue with the evidence is
20 I don't think anything was admitted. I don't think there
21 was items admitted into evidence or anything ID'd as
22 such. There were references to things but I was waiting
23 to object to evidence being admitted. If there was any,
24 and I don't think that there was, which means that there
25 wouldn't be anything to support the bindover.

1 The third thing is this case was charged
2 as a C-felony and I'm going to -- I have a copy of the
3 statute for Your Honor and for the State.

4 It's very clear in Section (2)(b) of the
5 statute that for it to be a Category C felony as it's
6 charged -- well, first of all, the way it's charged,
7 there's supposed to be -- they're basically charging it
8 as a second offence. There's nothing in the complaint
9 alleging that there was ever a first offense, so there's
10 that problem.

11 The second problem is there was no
12 evidence introduced of a prior that would allow a
13 bindover on a second offense. The way the statute reads
14 is you would need to have a first offense, a Category D
15 felony. They haven't introduced anything like that and
16 he doesn't actually have any felony convictions, so that,
17 right there, also would preclude a bindover, even if they
18 introduced something, which they did not.

19 So based on the consent issue -- and if
20 your ruling was definitive on that, I wasn't clear on
21 that, that's why I brought that up. I wouldn't, you know,
22 argue that in front of you but I do think that that issue,
23 by itself, would justify it.

24 I don't recall them introducing exhibits
25 and having them admitted by the Court. That's failure

1 number two.

2
3 Number three, the complaint is not
4 drafted in a way that gives us any notice that they were
5 going for the second offense. They didn't introduce a
6 prior which would be, you know, some evidence that the
7 prior felony -- and they couldn't actually do that
8 because there isn't one.

9 And so for all of those reasons, a
10 discharge is warranted here. Thank you.

11 THE COURT: Thank you.

12 MR. BRADSHAW: First of all, I probably
13 agree with the Category C-D issue and I move to amend the
14 complaint to conform with the evidence to charge --

15 MR. ARABIA: That can't be done now.

16 MR. BRADSHAW: -- a Category D felony.
17 That's all I can do at this point. I don't have any
18 evidence of any priors.

19 THE COURT: All right.

20 I do find that the State has not met its
21 burden of proof in this matter for the various reasons
22 that Mr. Arabia has stated on the record and the complaint
23 is effective and cannot be amended at this time, so I am
24 not binding the defendant over and he's been discharged
25 from custody and any pretrial release obligations.

Court is adjourned.

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CERTIFICATE

I, DanRa Boscovich, certify that I am a
Certified Court Reporter in the State of Nevada; that I
attended the above-entitled hearing and reported the
proceedings; and that the foregoing constitutes a full,
true and correct transcript of the same to the best of
my knowledge, skill and ability.

Dated: April 4, 2012.


DanRa Boscovich
DanRa Boscovich, CCR 218

EXHIBIT 2

058

1 **Case No. CR-12-832**
2 **Dept 2**

3 The undersigned hereby affirms this document
4 does not contain a social security number, pursuant
5 to NRS 239B.030.

6 

7
8 **IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,**
9 **IN AND FOR THE COUNTY OF ESMERALDA**

10 **THE STATE OF NEVADA,**

11 Plaintiff,

12 v.

INFORMATION

13 **MATTHEW LEON MOULTRIE,**

14 Defendant. /

15 ROBERT GLENNEN III, Esq, Esmeralda County Deputy District Attorney,
16 informs the Court that, on or about the 11th day of December, 2011, and before the
17 filing of this information, in Esmeralda County, State of Nevada, the defendant did then
18 and there commit the following offense(s), to-wit:

19 **COUNT I: POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT**
20 **TO SELL**, in violation of NRS 453.337, a category "D" felony, it is unlawful
21 for a person to possess for the purpose of sale flunitrazepan, gamma-
22 hydroxybutyrate, any substance for which flunitrazepam or gamma-
23 hydroxybutyrate is an immediate precursor or any controlled substance
24 classified in schedule I or II, to wit; said defendant did possess
METHAMPHETAMINE, a schedule I controlled substance with the intent to
sell.

059

1 All of which is contrary to the form, force and effect of the statutes in such cases made
2 and provided, and against the peace and dignity of the State of Nevada

3 DATED this 9th day of May, 2012.

4 
5 ROBERT GLENNEN III

6 The names and addresses of the witnesses known to the District Attorney at the time
7 of filing the information are the following:

8
9 Deputy Matthew Kirkland
10 Esmeralda County Sheriff's Office
Goldfield NV 89013

Sergeant Anthony Philips
Esmeralda County Sheriff's Office
Goldfield NV 89013

11 Las Vegas Metropolitan Police Department
12 400 Stewart Avenue
Las Vegas NV 89101-2984
13
14
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16
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19
20
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060

Case No. 12-832

FILED

JUN 05 2012

Angela Jewell, Deputy
ESMERALDA COUNTY CLERK


IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF ESMERALDA

THE STATE OF NEVADA,
Plaintiff,
vs.
MATTHEW MOULTRIE,
Defendant.

**OPPOSITION TO STATE'S MOTION
FOR LEAVE OF COURT TO FILE
INFORMATION BY AFFIDAVIT; DEFENSE
MOTION TO STRIKE IN PART**

COMES NOW Defendant MATTHEW MOULTRIE, by and through his attorney CHRISTOPHER R. ARABIA, Esq., who submits this opposition to Plaintiff's motion for leave of court to file an information by affidavit. This Opposition is based upon the attached points and authorities, the pleadings and papers on file herein, and the evidence, testimony, and argument to be adduced at hearing.

DATED this 4th day of June, 2012.


CHRISTOPHER R. ARABIA, Esq.
Nevada Bar #9749
601 S. 10th St.
Las Vegas, NV 89101
702.281.4093
Attorney for Defendant Moultrie

061

1 DECLARATION OF CHRIS ARABIA, Esq. IN LIEU OF AFFIDAVIT
2 AS CONTEMPLATED BY NRS 53.045

3 I, Chris Arabia, hereby declare under penalty of perjury that
4 the foregoing is true and correct to the best of my knowledge:

5 Declarant is a duly licensed attorney in the State of Nevada
6 and is the attorney for defendant Moultrie.

7 Declarant hereby incorporates the entirety of this motion into
8 this declaration, as if fully set forth herein.

9 Declarant received in pre-trial discovery a copy of a
10 purported prior conviction of defendant Moultrie for a Nevada gross
11 misdemeanor offense. Declarant took no action from the time of
12 discharge to the time the state's motion was filed (63 days). As
13 far as declarant is aware, Moultrie does not reside in the Fifth
14 Judicial District.

15 EXECUTED this 4th day of June, 2012.

16
17 
18 Chris Arabia

19 POINTS AND AUTHORITIES

20 STATEMENT OF RELEVANT FACTS

21 The defendant Matthew Moultrie ("Moultrie") was charged by
22 criminal complaint with "**Possession of Controlled Substance with**
23 **Intent to Sell**, in violation of NRS 453.337, **a category "C"**
24 **felony....**"¹ [Italics added, bold original.]

25
26 ¹ The State has submitted a proposed information for an alleged category "D" felony violation of NRS
27 453.337 even though the complaint charged an alleged category "C" felony violation of NRS 453.337 (i.e. second
28 offense). This was no accident, and it is no accident that the State's motion repeatedly refers to Possession with
Intent without specifying the section of 453.337 or the category of felony involved. It is offensive that the State has
tried to hoodwink this court and violate Moultrie's Due Process rights with a stealth move to a whole new charge.

1 NRS 453.337(2) provides in pertinent part:

2 2. Unless a greater penalty is provided in NRS
3 453.3385, 453.339 or 453.3395, **a person who**
4 **violates this section shall be punished:**

5 (a) For the first offense, for a category D
6 felony as provided in NRS 193.130.

7 (b) For a second offense, or if, in the case
8 of a first conviction of violating this
9 section, the offender has previously been
10 convicted of a felony under the Uniform
11 Controlled Substances Act or of an offense
12 under the laws of the United States or any
13 state, territory or district which, if
14 committed in this State, would amount to a
15 felony under the Uniform Controlled Substances
16 Act, **for a category C felony as provided in**
17 **NRS 193.130.**

18 Additionally, NRS 453.337(2)(c) provides for punishment as a
19 category "B" felony for some violations of 453.337.

20 The sole count of the complaint alleged:

21 **COUNT I: POSSESSION OF CONTROLLED SUBSTANCE**
22 **WITH INTENT TO SELL**, in violation of NRS
23 453.337, a category "C" felony, it is unlawful
24 for a person to possess for the purpose of
25 sale flunitrazepan, gamma-hydroxybutyrate, any
26 substance for which flunitrazepan or gamma-
27 hydroxybutyrate is an immediate precursor or
28 any controlled substance classified in
schedule I or II, to wit; said defendant did
possess METHAMPHETAMINE, a schedule I
controlled substance with the intent to sell.
[Italics and underline added, bold original.]
(Defense Exhibit A).

At the beginning of the preliminary hearing on March 21, 2012,
the Justice Court read the charge in the criminal complaint filed
by the state: "The defendant is charged with, Count 1, possession
of controlled substance with intent to sell, a violation of Nevada
Revised Statute 453.337, **a Category C felony.**" (PHT 1-3). [Both
emphases added.] The State made no comment in response.

1 As part of pre-trial discovery, the State provided a copy of
2 a purported prior gross misdemeanor offense committed by Moultrie.
3 (Defense Exhibit B).

4 ARGUMENT

5 I.

6 THE COURT SHOULD DENY THE STATE'S MOTION BECAUSE THE PROPOSED
7 INFORMATION IS EXTREMELY UNTIMELY (FILED 63 DAYS AFTER THE
8 PRELIMINARY HEARING AND NOT THE 15 DAYS OUTLINED IN THE
9 STATUTE), THE STATE HAS SHOWN NO GOOD CAUSE FOR THE
10 DELAY, AND THE DELAY HAS GREATLY PREJUDICED MOULTRIE

11 NRS 173.035 mandates that the information "shall be filed
12 within 15 days after the holding or waiver of the preliminary
13 hearing." [Emphasis added.]

14 NRS 178.556(1) provides that the District Court may dismiss an
15 information that is not filed within 15 days after the preliminary
16 examination.

17 The Nevada Supreme Court has ruled that minor violations of
18 the 15-day rule do not require dismissal if the defendant is unable
19 to show prejudice. Berry v. Sheriff, 93 Nev. 557, 559 (1977) (4-
20 day delay deemed insufficient to compel dismissal where no
21 prejudice shown); Thompson v. State, 84 Nev. 682, 683 (1970) (9-day
22 delay held insufficient where no prejudice shown).

23 Analyzing NRS 178.556(2), the section of the statute dealing
24 with the 60-day speedy trial right, the High Court has held that
25 dismissal is mandatory if the State fails to show good cause for
26 violating the 60-day trial rule. Anderson v. State, 86 Nev. 829,
27 834 (1970). The logic of Anderson is appropriate to apply to the
28 other half of NRS 178.556, the section containing the 15-day rule.

1 In the instant case, 63 days passed from the time of the
2 preliminary hearing to the time of the state's filing of its motion
3 and proposed information. This is nothing like the trivial delays
4 in Berry and Thompson; the 48-day violation in the instant case is
5 more than 3.5 times greater than the Berry and Thompson delays
6 combined.

7 Furthermore, the state's delay has substantially prejudiced
8 Moultrie. The Justice Court discharged him, he had reason to
9 believe that the case was almost certainly finished once the 15
10 days passed (especially given the rarity of grand juries in the
11 Fifth District), he has been living since late March/early April in
12 a world without this case hanging over him, he had reason to forget
13 about the case and his defense, he had reason not to confer with
14 his attorney to optimize his trial defense, the defense has done
15 nothing on this case and thereby permanently diminished the
16 potential effectiveness of a defense, and Moultrie does not live in
17 the Fifth Judicial District. (See Declaration of Chris Arabia at
18 page 2 of this Opposition).

19 Additionally, the state has made no showing of anything
20 resembling good cause for its delay.

21 The state's long, causeless delay contravenes the spirit of
22 NRS 178.556 and requires this Court to deny the state's motion.

23
24 II.

25 THE JUSTICE COURT DID NOT COMMIT EGREGIOUS ERROR AS CONTEMPLATED
26 BY NRS 173.035(2) AND THE STATE IS CLEARLY ABUSING THE STATUTE
27 FOR AN IMPROPER SECOND CHANCE AT PROSECUTING MOULTRIE;
28 THUS, THIS COURT SHOULD DENY THE STATE'S MOTION

1 The Nevada Supreme Court has articulated a clear standard for
2 the types cases that justify the State's use of NRS 173.035(2) to
3 circumvent a discharge by the Justice Court: "That statute
4 contemplates a safeguard against egregious error by a magistrate in
5 determining probable cause, not a device to be used by prosecutor
6 to satisfy deficiencies in evidence at a preliminary examination,
7 through affidavit." Cranford v. Smart, 92 Nev. 89, 91, 545 P.2d
8 1162 (1976). To avoid instances of prosecutors unfairly relying on
9 NRS 173.035(2), the Cranford Court expressly adopted a more
10 exacting standard than the previous "arbitrary or mistaken
11 decision" standard described a mere four years earlier in Ryan v.
12 Eighth Judicial District Court, 88 Nev. 638, 640, 503 P.2d 842
13 (1972). Subsequent Supreme Court interpretations of NRS
14 173.035(2) evidently do not define "egregious." According to the
15 Legal Dictionary, egregious means "extremely and conspicuously
16 bad." The World English Dictionary ("outstandingly bad; flagrant")
17 and Dictionary.com ("extraordinary in some bad way; glaring;
18 flagrant") contain similar definitions connoting high-octane
19 awfulness.

20 Regardless, the magnitude of error necessary for proper resort
21 to NRS 173.035(2) is indisputably great; remarkably, the State has
22 resorted to 173.035(2) even though the Justice Court clearly did
23 not err in discharging Moultrie (*had* the Justice Court erred in the
24 instant case, everyday errors, minor errors, and arguable errors of
25 a magistrate would simply not suffice).

26 //

27 //

1 A.

2 The state charged Moultrie with second offense, "C" felony
3 Possession with Intent to Sell but offered no testimony or
4 evidence that the instant case constituted a second offense as
5 contemplated by NRS 453.337; under such circumstances, a
6 discharge by the Justice Court was absolutely proper.

7 Alleged violations of NRS 453.337 can be charged as category
8 "B," "C," or "D" felonies depending on the defendant's prior
9 record, with the category "C" felony expressly available for
10 certain second offenses. NRS 453.337(2).

11 In the instant case, the state charged Moultrie with a
12 category "C" felony (See Defense Exhibit A), provided a copy of a
13 purported prior offense to Moultrie as part of discovery (See
14 Defense Exhibit B),² and offered no correction or amendment when
15 the Justice Court read the complaint's allegation of a category "C"
16 felony. (PHT 2-3).

17 During the preliminary hearing, the state failed to present
18 any evidence of any purported prior offense. The state also never
19 amended the complaint to a category "D" felony, an offense which
20 does not require a prior transgression under NRS 453.337.

21 It was only after the state had presented and submitted its
22 case, made its closing statement, and listened to Moultrie's
23 closing statement that the state made an untimely motion to amend
24 the complaint after conceding that it had not made the case for the
25 offense charged. (PHT 40).

26
27
28 ² The purported prior was for a gross misdemeanor in Nevada, which actually would not have satisfied the requirements of NRS 453.337(2)(b).

1 Rather than address this issue in its motion for leave of
2 court to file an information by affidavit and proposed information,
3 the state embarked on the much less taxing (and totally lawless)
4 path of no resistance: the state simply changed the offense from
5 the category "C" felony alleged in the complaint to a category "D"
6 felony in the proposed information. (See state's Exhibit 2 and
7 Defense Exhibit A). The state's concurrent omission throughout its
8 motion of the section and felony of 453.337 hardly seems
9 coincidental.

10 The state's omission of the prior offense from its laundry
11 list of required elements also hardly seems coincidental. (State's
12 motion, p. 9).

13 The state presented absolutely no evidence of an element of
14 the offense charged. Therefore, the Justice Court quite properly
15 discharged Moultrie and the state's assertion of "egregious error"
16 is spurious, preposterous - outrageous.

B.

The Justice Court did not commit error in ruling a hearsay statement to be hearsay and even if a different court might have ruled differently, the Justice Court absolutely did not commit egregious error; the state's argument on the hearsay issue makes factual assertions not supported by citations to the record, and Moultrie moves to strike those assertions

27 At the preliminary hearing, Deputy Kirkland ("Kirkland")
28 attempted to testify that during the traffic stop at the center of

1 the instant case, a woman named Brandy said that Kirkland could
2 search the vehicle, i.e. that Brandy gave consent. The Justice
3 Court sustained Moultrie's objection based on hearsay. (PHT 8).

4 The state has claimed that Kirkland obtained permission and/or
5 consent to search the vehicle. (See e.g. PHT 8-9, 11-13, 36).
6 Thus, the statement attributed to Brandy was offered for its truth,
7 i.e. to establish that Kirkland had consent. Citing NRS 51.035,
8 the state contends that the statement was not hearsay because it
9 was only offered for its effect on Kirkland. (State's motion, p.
10 8). This assertion is belied by the state's repeated reliance on
11 the statement's truth-in other words, that Deputy Kirkland had
12 permission-to justify the search.

13 The state next alleges that Brandy's statement was an
14 implicating statement and that Moultrie adopted it as an admission
15 by failing to dissent. (State's motion, p. 8). There is nothing
16 in the record to establish that the alleged consent of Brandy was
17 an implicating statement (and the police let her and her vehicle
18 go, PHT 19, which suggests that the police felt that Brandy had
19 neither engaged in nor was aware of any conduct for which she could
20 implicate herself or anyone else).

21 There is also no evidence that Moultrie adopted or heard
22 Brandy's alleged statement; there is only the state's assertion
23 without citation that Moultrie was sitting next to Brandy (which
24 should be stricken along with all similar assertions, so the
25 defense moves to strike the following from the state's motion:
26 lines 21-22 on page 6, lines 6-7 on page 7, and lines 7 and 16-17
27 on page 8). (State's motion, p. 8).
28

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 MATTHEW LEON MOULTRIE,

4 Appellant,

5 vs.

6 STATE OF NEVADA,

7 Respondent.

8 Case No.: 65390

9 Electronically Filed
10 Jul 01 2014 02:47 p.m.
11 Tracie K. Lindeman
12 Clerk of Supreme Court

13 **APPELLANT'S APPENDIX**

14 CRIMINAL COMPLAINT	1-2
15 MOTION FOR LEAVE TO FILE	3-60
16 INFORMATION BY AFFIDAVIT	
17 (PRELIMINARY HEARING TRANSCRIPT)	(17-57)
18 OPPOSITION TO MOTION FOR LEAVE TO FILE	61-81
19 INFORMATION BY AFFIDAVIT, AND SUPPLEMENT	
20 ORDER GRANTING MOTION	82-88
21 INFORMATION	89-90
22 CONDITIONAL GUILTY PLEA AGREEMENT	91-97
23 SENTENCING HEARING	98-102
24 JUDGMENT OF CONVICTION	103-104

1 CASE NO 12-2201

2 The undersigned hereby affirms this document
3 does not contain a social security number, pursuant
4 to NRS 239B.030.

ESMERALDA TOWNSHIP
JUSTICE COURT
FILED
GOLDFIELD, NEVADA

2012 JAN 11 P 1:30

5 IN THE JUSTICE COURT OF ESMERALDA TOWNSHIP,
6 IN AND FOR THE COUNTY OF ESMERALDA, STATE OF NEVADA

7 THE STATE OF NEVADA,)

8)
9 Plaintiff,)

10 vs.)

CRIMINAL COMPLAINT

11 MATTHEW LEON MOULTRIE,)

12)
13 Defendant.)

14 STATE OF NEVADA)

15 :SS

16 COUNTY OF ESMERALDA)

17 ANTHONY PHILIPS, Sergeant with the Esmeralda County Sheriff's Office, State of Nevada,

18 being first duly sworn, personally appeared before me and complained and deposed that

19 MATTHEW LEON MOULTRIE, the above-named defendants, on or about December 11, 2011,

20 at or near US Hwy 95, Esmeralda Mile Marker 32, County of Esmeralda, State of Nevada, did

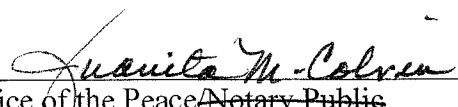
21 commit the crimes of:

22 **COUNT I: POSSESSION OF CONTROLLED SUBSTANCE WITH INTENT TO SELL,**
23 in violation of NRS 453.337, a category "C" felony, it is unlawful for a person to possess for
24 the purpose of sale flunitrazepan, gamma-hydroxybutyrate, any substance for which
25 flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance
26 classified in schedule I or II, to wit; said defendant did possess METHAMPHETAMINE, a
27 schedule I controlled substance with the intent to sell.
28

1 All of which is contrary to the form of Statute and/or Ordinance in such cases made and provided
2 and against the peace and dignity of the State of Nevada. Said complainant therefore
3 respectfully requests that a warrant be issued for the arrest of said defendant, if not already
4 arrested, so that he may be dealt with according to law.
5

6
7 
8 ANTHONY PHILIPS

9
10 Signed and sworn to (or affirmed) before me on Jan 11-2011 by ANTHONY
11 PHILIPS.

12
13 
14 Justice of the Peace/Notary Public
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FILED

Case No. CR-12-832
Department 2

MAY 23 2012
Salinda Elgar
ESMERALDA COUNTY CLERK

The undersigned affirms that
this document does not contain
the social security number of
any person.

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA IN AND FOR THE COUNTY OF ESMERALDA

THE STATE OF NEVADA,

Plaintiff,

v.

MATTHEW LEON MOULTRIE,

Defendant.

NOTICE OF MOTION AND
MOTION FOR LEAVE OF COURT
TO FILE INFORMATION BY
AFFIDAVIT

TO: MATTHEW LEON MOULTRIE, Defendant

AND TO: Christopher Arabia, Esq., Attorney for Defendant,

NOTICE IS HEREBY GIVEN that the undersigned will bring on
the above Motion for hearing before the above-entitled Court in
the courtroom of the Esmeralda County Courthouse, Goldfield,
Nevada, ON June 19th, 2012, AT 10:00 A.M., or as
soon thereafter as counsel may be heard.

DATED this 9th day of May, 2012.

ARTHUR WEHRMEISTER
ESMERALDA COUNTY DISTRICT ATTORNEY

By

Robert E. Glenn III
ROBERT E. GLENN III
Deputy District Attorney

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POINTS AND AUTHORITIES

1. PROCEDURAL BACKGROUND

On March 20, 2012, a Preliminary Hearing was held in the Esmeralda Justice Court for the defendant. (Exhibit 1, hereinafter PHT). At conclusion of that hearing, Defendant was not bound over on any charges. (PHT 40).

The State requests this honorable court and, based upon the following argument set forth herein below, respectfully asks this court to grant its Motion for Leave of Court to File Amended Information by Affidavit to include the discharged Count POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL.

2. FACTS

On March 21, 2012, a Preliminary hearing was held in the Justice Court of Esmeralda Township County of Esmeralda, State of Nevada for the defendant Matthew Leon Moultrie, hereinafter referred to as "Moultrie."

The defendant was discharged on Count I, possession of controlled substance with intent to sell, for unlawfully possessing METHAMPHETAMINE, a schedule I controlled substance with intent to sell (PHT 40).

On December 11, 2011, Deputy Matthew Kirkland, hereinafter referred to as Kirkland, while on patrol at approximately Esmeralda County Mile Marker 33, stopped a white SUV bearing Nevada registration 420 XKS, for no headlights (PHT 7).

Q. (By Mr. Bradshaw): Could you tell us how that contact occurred?

MATTHEW KIRKLAND: After I spoke with Brandy, I went back up to

1 the vehicle, after I ran her, and I spoke with Brandy and asked
2 her if I could look in her vehicle. She said she -
3 MR. ARABIA: Objection. Hearsay.
4 THE COURT: Sustained.
5 Q. (By Mr. Bradshaw) Did you in fact search the vehicle?
6 A. Yes, I did
7 Q. And why did you search it? Did you have permission to
8 search?
9 A. Yes, I -
10 MR. ARABIA: Objection. Hearsay. It's just trying to get around
11 the previous objection.
12 THE COURT: Sustained
13 Q. (By Mr. Bradshaw) What did you do to actually search the
14 vehicle?
15 MR. ARABIA: What was that? I didn't hear.
16 MR. BRADSHAW: I asked the question, what did you do to actually
17 search the vehicle.
18 MR. KIRKLAND: I asked Brandy's permission.
19 MR. ARABIA: And I have the same objection.
20 MR. BRADSHAW: He is not actually quoting Brandy at this time with
21 that question.
22 THE COURT: I'll allow that answer.
23 BRADSHAW: Did you in fact search the vehicle?
24 KIRKLAND: Yes, I did. (PHT 8 - 9)
25 Methamphetamine was found in a backpack, which Mr. Moultrie
26 admitted belonged to him, and which tested positive for
27 methamphetamine after a NIK test by a trained officer. (PHT 27,
28 30).

1 The defendant then admitted that the methamphetamine and
2 some money that was found with it belonged to him and that he was
3 selling methamphetamine for a person named Mike that lived in the
4 area. (PHT 27, 30).

5 3. STANDARD FOR INFORMATION BY AFFIDAVIT

6 According to NRS 173.035(2), the prosecuting attorney may
7 file an Information by Affidavit, if, after preliminary hearing,
8 the accused has been discharged. This is to correct egregious
9 error by the lower court, and the Information must be supported
10 by affidavits of competent witnesses. Here, the Justice Court
11 committed egregious error by failing to allow testimony that the
12 driver of the vehicle gave permission for the search of the
13 vehicle while right next to Defendant, and by failing to bind
14 Defendant over for trial despite evidence on each element of the
15 crime being presented.

16 Nevada State law requires a justice court judge to forthwith
17 hold a defendant to answer in the district court if it appears
18 from the evidence produced at the preliminary examination "That
19 there is probable cause to believe an offense has been committed
20 and the defendant has committed it." Beasley v. Lamb, 79 Nev.
21 78, 378 P.2d 524 (1963). Marcum v. Sheriff, Clark County, 85
22 Nev. 175, 178 (Nev. 1969).

23 NRS 171.206 states in pertinent part:

24 If from the evidence it appears to the magistrate that
25 there is probable cause to believe that an offense has
26 been committed and that the defendant has committed it,
the magistrate shall forthwith hold the defendant to
answer in the district court... (emphasis added).

27 A preliminary hearing is not a trial. State v. Holt, 47
28 Nev. 233, 219 P. 557 (1923); Overton v. State, 78 Nev. 198, 370

1 P.2d 677 (1962). The issue of innocence or guilt is not before
2 the magistrate. Marcum v. Sheriff, Clark County, 85 Nev. 175,
3 178-179 (Nev. 1969). That function is constitutionally placed
4 elsewhere. Id. The full and complete exploration of all facets
5 of the case is reserved for trial and is not the function of a
6 preliminary examination. Id.

7 The evidence need not be sufficient to support a conviction.
8 Maskaly v. State, 85 Nev. 111, 450 P.2d 790 (1969). Nor must the
9 State produce the quantum of proof required to establish the
10 guilt of the accused beyond a reasonable doubt. Robertson v.
11 Sheriff, 85 Nev. 681, 462 P.2d 528 (1969). The State is not
12 required to negate all inferences which might explain the
13 defendant's conduct. Johnson v. State, 82 Nev. 338, 418 P.2d 495
14 (1966); Beasley v. Lamb, 79 Nev. 78, 378 P.2d 524 (1963).

15 It is firmly established that the finding of probable cause
16 may be based on slight, even marginal, evidence. State v.
17 Boueri, 99 Nev. 790, 795 (Nev. 1983). The State is merely
18 required to present enough evidence to support a reasonable
19 inference that the accused committed the offense. Kinsey v.
20 Sheriff, 87 Nev. 361, 487 P.2d 340 (1971); Morgan v. Sheriff, 86
21 Nev. 23, 467 P.2d 600 (1970). The justice court should not
22 concern itself if the evidence might, by itself, be insufficient
23 to convict the defendant of the charged offense. McDonald v.
24 Sheriff, 89 Nev. 326, 512 P.2d 774 (1973).

25 Identification by one witness may be sufficient enough to
26 establish probable cause to believe the defendant committed the
27 offense. Sheriff, Clark County v. Badillo, 95 Nev. 593, 594-595
28 (Nev. 1979). The fact that this testimony is in direct conflict

1 with that of another witness is of no import at this stage of the
2 proceedings. Id. The ultimate question of the credibility of
3 the witnesses is for the Trier of fact at trial. Wrenn v.
4 Sheriff, 87 Nev. 85, 482 P.2d 289 (1971). A justice court does
5 not consider defenses or pass on the sufficiency of the evidence
6 to justify conviction, but only decides if there is enough
7 evidence to bind over the defendant to the district court for
8 trial. Woerner v. Justice Court, 116 Nev. 518, 1 P.3d 377
9 (2000), Parsons v. State, 116 Nev. 528, 10 P.3d 836 (2000), State
10 v. Justice Court, 112 Nev. 803, 919 P.2d 401 (1996).

11 Under NRS 48.025, "all relevant evidence is admissible" at
12 preliminary hearing. This is subject only to certain
13 Constitutional or prejudicial exceptions. West v. State, 119
14 Nev. 410, 75 P.3d 808 (2003); Williams v. State, 118 Nev. 536, 50
15 P.3d 1116 (2002).

16 4. THE JUSTICE COURT'S EGREGIOUS ERRORS

17 The lower court committed egregious error by not binding the
18 defendant over on the charge of POSSESSION OF A CONTROLLED
19 SUBSTANCE WITH INTENT TO SELL based upon the evidence presented,
20 and further by preventing testimony that the driver of the car in
21 which Defendant was seated consented to the search right in front
22 of Defendant. The justice court was presented sufficient
23 evidence at the preliminary hearing to establish probable cause
24 to believe that an offense had been committed and that the
25 defendant committed the offense. However the justice court
26 failed to hold the defendants to forthwith answer in the district
27 court. The Criminal Complaint alleged POSSESSION OF CONTROLLED
28 SUBSTANCE WITH INTENT TO SELL, in violation of NRS 453.337.

1 First, the Court erred egregiously in sustaining an
2 objection to the driver's consent based upon hearsay. Consent
3 exempts a search from the probable cause and warrant requirements
4 of the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218
5 (1973); Davis v. State, 99 Nev. 25, 656 P.2d 855 (1983). Here,
6 the vehicle driver consented to the search right next to
7 Defendant, methamphetamine was found based upon that search, and
8 Defendant admitted it was his meth and that he intended to sell
9 it. (PHT 8, 9, 27, 30).

10 NRS 51.035 defines "Hearsay":

11 "Hearsay" means a statement offered in evidence to
12 prove the truth of the matter asserted unless:

13 1. The statement is one made by a witness while
14 testifying at the trial or hearing;

15 2. The declarant testifies at the trial or
16 hearing and is subject to cross-examination concerning
17 the statement, and the statement is:

18 (a) Inconsistent with the declarant's testimony;

19 (b) Consistent with the declarant's testimony and
20 offered to rebut an express or implied charge against
21 the declarant of recent fabrication or improper
22 influence or motive;

23 (c) One of identification of a person made soon
24 after perceiving the person; or

25 (d) A transcript of testimony given under oath at
26 a trial or hearing or before a grand jury; or

27 3. The statement is offered against a party and
28 is:

(a) The party's own statement, in either the
party's individual or a representative capacity;

(b) A statement of which the party has manifested
adoption or belief in its truth;

(c) A statement by a person authorized by the
party to make a statement concerning the subject;

1 (d) A statement by the party's agent or servant
2 concerning a matter within the scope of the party's
3 agency or employment, made before the termination of
the relationship; or

4 (e) A statement by a coconspirator of a party
5 during the course and in furtherance of the conspiracy.

6 Here, the statement ruled hearsay was by the defendant's
7 driver, to the question may I search, answered 'yes' in
8 defendant's presence. First, that statement is not offered for
9 the truth of the matter, so is not hearsay. The 'yes' is offered
10 only for the fact it was said, and the effect on the hearer: "I
11 have consent to search". See Weber v. State, 121 Nev. 554, 576,
12 577, 119 P.3d 107 (2005).

13 Second, any statements by the driver are party admissions.
14 Failure to dissent to implicating statements by another is ruled
15 an adoptive admission. Maginnis v. State, 93 Nev. 173, 561 P.2d
16 922 (1977); McKenna v. State, 101 Nev. 338, at 345, 705 P.2d 614
17 (1985). Therefore, the consent by the driver was an admission by
18 the driver adopted by the Defendant sitting next to her, and is
19 not hearsay and should have been admitted. Finally, the driver's
20 consent to search is a statement against her interest, and a
21 hearsay exception. Soebbing v. Carpet Barn, Inc., 109 Nev. 78,
22 847 P.2d 731 (1993). Therefore, ruling that consent inadmissible
is not only legal error, but egregiously so.

23 After considering all of the evidence presented in its
24 totality, the justice court committed egregious error by not
25 finding slight, or even marginal evidence, existed when it ruled,
26 "Defendant is discharged. No probable cause shown." (PHT 40).

27 The Criminal Complaint alleged POSSESSION OF CONTROLLED
28 SUBSTANCE WITH INTENT TO SELL, in violation of NRS 453.337. This

1 requires proof that: 1) On December 11, 2011; 2) in Esmeralda
2 County; 3) Defendant; 4) possessed; 5) Methamphetamine; 6)
3 intending to sell it. The evidence shows all of those elements.
4 The crime was committed December 11, 2011 in Esmeralda County,
5 (PHT 6), by Defendant (PHT 10), and a valid search was done of
6 the vehicle which turned up methamphetamine (PHT 8,9), which
7 tested positive for methamphetamine, (PHT 27), which belonged to
8 Defendant, (PHT 27), that he weighed and packaged, (PHT 27), and
9 which Defendant intended to sell. (PHT 30).

10 **5. CONCLUSION**

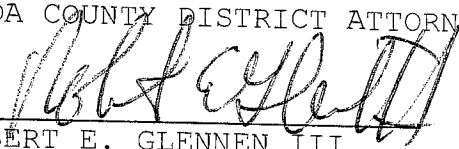
11 This Honorable Court should allow the State leave to file an
12 Information by Affidavit. The "Proposed Information" is attached
13 herein as Exhibit 2. In addition, this Court should find that the
14 Amended Information by Affidavit is proper to correct egregious
15 error in this case, namely, discharge of the defendant on the
16 Criminal Complaint.

17 The State's motion should be GRANTED.

18 DATED this day of 9th May, 2012.

19 ARTHUR WEHRMEISTER
20 ESMERALDA COUNTY DISTRICT ATTORNEY

21 By

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23 ROBERT E. GLENNEN III
24 Deputy District Attorney
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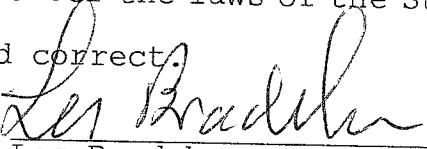
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AFFIDAVIT

STATE OF NEVADA)
) ss:
COUNTY OF LYON)

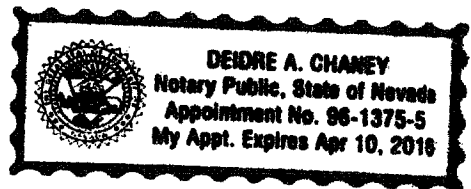
Deputy District Attorney Les Bradshaw, being first duly sworn,
deposes and says that:

1. I am the Deputy District Attorney prosecuting this case;
2. I was present at the preliminary hearing conducted on March 21, 2012;
3. The statements of fact made herein are true and correct to the best of my knowledge and belief;
4. I declare under penalties of perjury under the laws of the State of Nevada that the foregoing is true and correct.


Les Bradshaw

SUBSCRIBED AND SWORN TO ME
THIS 14th DAY OF MAY, 2012.


NOTARY PUBLIC



AFFIDAVIT

STATE OF NEVADA)
COUNTY OF ESMERALDA) ss:

I, Deputy Matthew Kirkland, being first duly sworn, deposes and says that:

1. I worked as a Deputy Sheriff on January 11th, 2012 ;
2. I was present at the preliminary hearing conducted on March 21, 2012;
3. The statements of fact made therein are true and correct to the best of my knowledge and belief;
4. When I stopped the vehicle Defendant was riding in on December 11, 2011, I asked the driver if I could search the car, and the driver, Brandy, said 'yes'. This was the testimony I was prepared to give at preliminary hearing when the court sustained an objection and I was unable to testify to that.
5. I declare under penalties of perjury under the laws of the State of Nevada that the foregoing is true and correct.

SUBSCRIBED AND SWORN TO ME
THIS 23rd DAY OF MAY, 2012.

Sandra S. Johnson
NOTARY PUBLIC

Matthew Kirkland
Matthew Kirkland




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AFFIDAVIT


STATE OF NEVADA)
) ss:
COUNTY OF ESMERALDA)

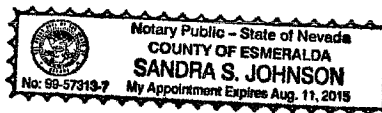
I, Deputy Matthew Kirkland, being first duly sworn, deposes and says that:

1. I worked as a Deputy Sheriff on January 11th, 2012 ;
2. I was present at the preliminary hearing conducted on March 21, 2012;
3. The statements of fact made therein are true and correct to the best of my knowledge and belief;
4. I declare under penalties of perjury under the laws of the State of Nevada that the foregoing is true and correct.


Sergeant Anthony Philips

SUBSCRIBED AND SWORN TO ME
THIS 22nd DAY OF MAY, 2012.


NOTARY PUBLIC



1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), and NEFR 9, I certify that I am an
3 employee of the Esmeralda County District Attorney's Office, that
4 I am over the age of 18 years and not a party to the within
5 action. I am familiar with the practice of the Esmeralda County
6 District Attorney's Office, for the service of documents via
7 facsimile, U.S. Postal Service and electronic mail and that, in
8 accordance with standard practice, I caused a true and correct
9 copy of the foregoing NOTICE OF MOTION AND MOTION FOR LEAVE OF
10 COURT TO FILE AMENDED INFORMATION BY AFFIDAVIT for District Court
11 Case No. CR-12-832, State of Nevada vs. Matthew Leon Moultrie to
12 be served on the parties below via the following method(s):

13 _____ Via Hand Delivery
14 _____ Via Facsimile -
15 _____ Via Overnight Delivery
16 _____ Via Email -
17 x Placing the foregoing document(s) in a sealed
18 envelope with postage thereon fully prepaid in the United States
19 Postal Service, at Goldfield, Nevada, addressed as follows:
20

21 DATED: May 23, 2012.

22 Christopher Arabia, Esq.
23 601 S. 10th Street, Suite 107
24 Las Vegas, NV 89101

25
26
27 Danielle Johnson
28 Secretary to the Esmeralda County District Attorney

EXHIBIT 1

ESMERALDA TOWNSHIP
JUSTICE COURT
FILED
GOLDFIELD, NEVADA

2012 APR -9 P 3:36

1 CASE NO. 12-2201
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6 IN THE JUSTICE COURT OF ESMERALDA TOWNSHIP
7 COUNTY OF ESMERALDA, STATE OF NEVADA
8

9 * * *

10 THE STATE OF NEVADA, : Transcript of:
11 Plaintiff, : PRELIMINARY HEARING
12 -vs- :
13 :
14 MATTHEW LEON MOULTRIE, :
15 Defendant. :
16
17 * * *

18
19 The above-entitled cause of action came on regularly
20 for hearing before the Honorable Judge Juanita Colvin at
21 Goldfield, Nevada on March 21, 2012.
22

23 DanRa Boscovich, Reporter
24 Certified Court Reporter License No. 218
25

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3 APPEARANCES

4 For the Plaintiff: LES BRADSHAW
5 District Attorney
6 PO Box 339
7 Goldfield, Nevada 89013

8 For the Defendant: CHRISTOPHER ARABIA
9 Attorney at Law
10 PO Box 35945
11 Las Vegas, Nevada 89133

12 * * * * *

13 WEDNESDAY, MARCH 21, 2012, 3:15 O'CLOCK P.M.

14
15 PROCEEDINGS

16
17 THE COURT: Justice Court of Esmeralda
18 Township is in session.

19 This is the time and place set for the
20 preliminary examination in Case Number 12-2201. The
21 complaint was filed January 11th, 2012, in the Justice
22 Court of Esmeralda Township, wherein the State of Nevada
23 is plaintiff versus Matthew Leon Moultrie, defendant.

24 The defendant is charged with, Count 1,
25 possession of controlled substance with intent to sell,

1 a violation of Nevada Revised Statute 453.337, a
2 Category C felony.

3 Let the record show that the defendant
4 was arraigned March 5th, 2012, and is present in court
5 today represented by Christopher R. Arabia, Esquire,
6 Public Defender for Esmeralda County. The State of
7 Nevada is represented by Les Bradshaw, Deputy District
8 Attorney for Esmeralda County.

9 Are the parties ready to proceed at this
10 time?

11 MR. ARABIA: We are.

12 MR. BRADSHAW: Yes.

13 MR. ARABIA: Your Honor, there's one
14 quick thing I want to put on the record before we go any
15 further. There's a person by the name of Nicholas Stone
16 who I represented on a probation hearing some time ago --
17 I think it was -- I think it was back in late 2010 -- and
18 his name does come up in passing in this case. I looked
19 at it pretty closely and I don't see a conflict. There
20 could potentially be one down the road which -- a case
21 that I was appointed in this court to Nick Stone on.

22 I'm ready to go forward with the prelim
23 but I wanted to make sure that was on the record because,
24 as I said, I've looked at this and I don't think that
25 there's a conflict at this time. If one came up later,

1 I may not be able to represent Nick Stone or something.
2 Obviously we can deal with that then but --
3 THE COURT: Okay.
4 Ready to proceed?
5 MR. BRADSHAW: Yes. The State invokes
6 the exclusionary rule and I have two witnesses before the
7 State today and I would request that all other witnesses
8 be excluded except the one that's testifying.
9 THE COURT: All right.
10 Do you have any witnesses?
11 MR. ARABIA: No.
12 THE COURT: If you'll stand and raise
13 your right hand please?
14
15 (Whereupon the witnesses were sworn by
16 the Court.)
17
18 THE COURT: First witness?
19 MR. BRADSHAW: Matthew Kirkland.
20 THE COURT: You're going to wait out
21 there and not discuss your testimony. Correct?
22 MR. PHILIPS: Yes, ma'am.
23 THE COURT: All right.
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MATTHEW RICHARD KIRKLAND,

called as a witness on behalf of the State, being first
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRADSHAW:

Q. Thank you. State your name for the record and
spell your last name.

A. Matthew Richard Kirkland, K-i-r-k-l-a-n-d.

Q. And what is your employment?

A. Work for Esmeralda County Sheriff's Office.

Q. And how long have you been so employed?

A. A little over two years.

Q. And what are your duties at the sheriff's office?

A. Deputy out on the road.

Q. And what special training or classes have you
had to qualify you for your job?

A. I went to my CAT-1 Academy up in Carson City,
Nevada.

Q. Have you had any special training in recognizing
drugs?

A. Yes. While we were at the academy, we went
through a drug recognition class.

Q. And what did that training consist of in

1 specific?

2 A. Showing us the drugs and informing us what they
3 do.

4 Q. And how many traffic stops have you made during
5 your law enforcement career just approximately, not down
6 to the very number but -- is it more than two hundred?

7 A. Yeah. I'd say approximately fifteen hundred,
8 two thousand.

9 Q. Okay. Drawing your attention to the events
10 that bring us together today, on December 11th of 2012,
11 do you remember working that day?

12 A. Yes, I do.

13 Q. And what were your duties that day?

14 A. I was running traffic on Highway 95.

15 Q. And where were you working within Esmeralda
16 County?

17 A. Between Goldfield and Tonopah.

18 Q. Do you remember where you were working
19 specifically around two-thirty or fourteen-twenty-three
20 hours that day?

21 A. Approximately Mile Marker 33.

22 Q. And is that in Esmeralda County?

23 A. Yes, it is.

24 Q. And did you have occasion to make a traffic
25 stop around two-thirty that day?

1 A. Yes, I did.
2 Q. Do you remember that event?
3 A. Yes. I stopped a white TrailBlazer traveling
4 north on Ninety-Five with no headlights on.
5 Q. And why did you stop it because of the
6 headlights?
7 A. We have a headlight section law in Nevada,
8 daytime headlights.
9 Q. And was that law applicable to that section of
10 the highway where you made this stop?
11 A. Yes, it was.
12 Q. Had you made stops in this area before based on
13 that --
14 A. Yes, I do.
15 Q. -- that law?
16 A. Yes, I did.
17 Q. And did you in fact effect the traffic stop?
18 A. Yes, I did.
19 Q. And did you have contact with the people in the
20 vehicle?
21 A. Yes, I did.
22 Q. Can you tell us what that contact was?
23 A. I went up to the driver's door and a female
24 driver, Brandy, was driving the vehicle and I asked her
25 for a license and registration and insurance.

1 Q. And then what happened?

2 A. At that point in time I went back to my vehicle
3 and ran Brandy with dispatch. She came back no warrants
4 and her license was valid.

5 Q. And her insurance?

6 A. Her insurance was valid.

7 Q. And was there -- did you say there was a
8 passenger in the car?

9 A. There was a passenger.

10 Q. And did you make contact with the passenger?

11 A. Yes, I did.

12 Q. Could you tell us how that contact occurred?

13 A. After I spoke with Brandy, I went back up to
14 the vehicle, after I ran her, and I spoke with Brandy
15 and asked her if I could look in her vehicle. She said
16 she --

17 MR. ARABIA: Objection. Hearsay.

18 THE COURT: Sustained.

19 Q. (By Mr. Bradshaw) Did you in fact search the
20 vehicle?

21 A. Yes, I did.

22 Q. And why did you search it? Did you have
23 permission to search?

24 A. Yes, I --

25 MR. ARABIA: Objection. Hearsay. It's

1 just trying to get around the previous objection.

2 THE COURT: Sustained.

3 Q. (By Mr. Bradshaw) What did you do to actually
4 search the vehicle?

5 MR. ARABIA: What was that? I didn't
6 hear.

7 MR. BRADSHAW: I asked the question,
8 what did you do to actually search the vehicle.

9 MR. KIRKLAND: I asked Brandy's
10 permission.

11 MR. ARABIA: And I have the same
12 objection.

13 MR. BRADSHAW: He is not actually quoting
14 Brandy at this time with that question.

15 THE COURT: I'll allow that answer.

16 Q. (By Mr. Bradshaw) Did you in fact search the
17 vehicle?

18 A. Yes, I did.

19 Q. And what about the passenger? Where was he
20 during the search?

21 A. He was in the passenger seat and I asked him
22 to step out and I recognized him from a stop about three
23 weeks prior to this stop.

24 Q. So you had prior contact with the passenger?

25 A. Yes, I did.

1 Q. And did you ascertain the passenger's name?

2 A. I knew his name as Matthew.

3 Q. Did you know his last name?

4 A. Not at that point in time, no, I did not.

5 Q. Is Matthew, the passenger, here in the court
6 today?

7 A. Yes. He's sitting right there.

8 MR. BRADSHAW: And will the record
9 reflect that the witness has identified the defendant in
10 this matter --

11 THE COURT: The record will reflect.

12 MR. BRADSHAW: -- Matthew Leon Moultrie?

13 Thank you.

14 Q. (By Mr. Bradshaw) Then -- so where was
15 Mr. -- where was the passenger when you were searching
16 the vehicle?

17 A. He was standing on the shoulder with Brandy.

18 Q. Was that in front or in back of the vehicle?

19 A. In front of the vehicle.

20 Q. Can you describe the results of your search of
21 the vehicle?

22 A. In the backpack, I found a --

23 MR. ARABIA: Your Honor, at this point
24 I'm going to object to the search just because I haven't
25 heard anything that would provide legal justification for

1 it, before we get too far into what may or may not have
2 been recovered. What I'm inferring here is that they're
3 claiming it was a consent search. There's no evidence
4 that there was consent provided.

5 THE COURT: Sustained.

6 MR. BRADSHAW: I did ask -- sorry.
7 May I speak?

8 THE COURT: You may.

9 MR. BRADSHAW: I did ask the witness if
10 he had permission to search. That would not be hearsay
11 because he's not quoting anybody.

12 MR. ARABIA: Well, no, it is.

13 MR. BRADSHAW: I'm asking him whether he
14 felt he that had permission.

15 THE COURT: That's not what you asked
16 him. There was nothing about what he felt.

17 Q. (By Mr. Bradshaw) Did you have permission to
18 search the vehicle?

19 MR. ARABIA: Again, I object because
20 it's one thing to use that answer to move forward but
21 at the point where we're going to start bringing the
22 evidence in, there's no evidence that there was consent
23 and so it's one thing, like I said, to say that, you know,
24 he had permission for the purposes of moving forward in
25 this hearing, but at the point where they're trying to

1 introduce the evidence, they either have to have consent
2 or reasonable suspicion and that's what we're missing at
3 this point.

4 THE COURT: Actually we're talking about
5 the backpack. Was there permission to search the backpack
6 is where we're at. Correct?

7 MR. ARABIA: Well, whose permission are
8 we talking about?

9 Here's the overall problem though.
10 The whole search portion of this started with they're
11 claiming that there was consent. They don't have any
12 evidence that there was and anything that follows from
13 that is fruit of the poisonous tree, so I'm objecting
14 to all of that at this point.

15 MR. BRADSHAW: I've asked this witness
16 whether he had permission to search the vehicle. That
17 is not a hearsay issue because he's not quoting anybody.
18 I'm simply asking him whether he obtained permission or
19 had permission to search.

20 THE COURT: The vehicle.

21 MR. BRADSHAW: The vehicle.

22 THE COURT: Now we're talking about a
23 backpack.

24 MR. BRADSHAW: Yes, but I believe that
25 the objection is about the legality of the officer's

1 search of the vehicle, so I guess I'm going back to that.
2 I want to establish that this officer had permission from
3 the owner of the vehicle to search the vehicle.

4 MR. ARABIA: And that's --

5 MR. BRADSHAW: If that's not an issue
6 now, then I'll move forward.

7 MR. ARABIA: Well, it is an issue. He's
8 saying that he had permission. There was hearsay offered
9 which is inadmissible and I haven't heard anything else
10 and, again, using that word as a mask for the fact they
11 don't actually have it is not sufficient.

12 MR. BRADSHAW: I believe that the officer
13 can testify whether he had permission or did not have
14 permission to search the vehicle. That's not -- in my
15 view, it's not a hearsay issue because he's not quoting
16 anybody. He's simply stating his belief as to whether
17 he had permission or didn't have permission.

18 MR. ARABIA: Well, he was testifying that
19 he got the permission by asking a question of someone and
20 then quoting their response, which is hearsay, and
21 repackaging that as permission doesn't really get around
22 the fact that what they're basically doing is they're
23 saying they had permission in the form of a hearsay
24 statement but it's not hearsay, so it's not an admissible
25 statement no matter how you describe it.

1 MR. BRADSHAW: I've not asked this witness
2 to quote anyone. I'm simply asking --

3 MR. ARABIA: The permission itself was
4 a statement which is inadmissible so it's not admissible
5 so it doesn't matter what he felt or whatever.

6 MR. BRADSHAW: I'm not asking him to
7 testify as to what somebody quoted that's not available
8 for cross examination in the court today. I'm simply
9 asking him about his actions, did he or did he not obtain
10 or have permission to search the vehicle.

11 THE COURT: The vehicle only. We're
12 now moved on to the backpack. Did he ask -- it's your
13 question but he needed permission to get in the backpack.
14 That's not the vehicle so if you can get on to that, you
15 can go forward.

16 MR. BRADSHAW: Okay.

17 May I consult with the witness? Can we
18 take a two-minute break and let me consult --

19 MR. ARABIA: I'm going to object to that.
20 I think we should move forward with the questioning.

21 MR. BRADSHAW: I just want to ask the
22 witness about this document that I may or may not be able
23 to introduce.

24 THE COURT: I'll allow you two minutes.
25 We'll recess and you have two minutes.

1 (Recess.)

2
3 THE COURT: Okay. We're back on the
4 record.

5 MR. BRADSHAW: Thank you.

6 THE COURT: Mr. Bradshaw?

7 MR. BRADSHAW: Thank you.

8 Q. (By Mr. Bradshaw) When you were searching the
9 vehicle, inside the vehicle what did you find?

10 A. Found a backpack.

11 Q. And did you search the backpack?

12 A. Yes, I did.

13 Q. What did you find in the backpack?

14 A. In the side compartment in the backpack was a
15 small black bag.

16 MR. ARABIA: Your Honor, I just want to
17 make sure that my objection to all this is noted.

18 THE COURT: So noted.

19 MR. ARABIA: Thank you.

20 Q. (By Mr. Bradshaw) What was in the small black
21 bag?

22 A. In the small black bag, there was a blue and
23 white plastic case. On the outside of the case was a
24 hair tie with a plastic bag with a crystal substance on
25 it. Inside the bag was fifty dollars plus a glass pipe.

1 Q. And where was the glass pipe?
2 A. Inside the little black bag.
3 Q. Was the little black bag inside of anything when
4 you first encountered it?
5 A. It was on the outside pocket of the backpack.
6 Q. Then what happened?
7 A. I looked inside and I found the blue and white
8 case with white substance, crystal substance, on the
9 outside. At that point in time I placed Matthew in
10 handcuffs until I could figure out exactly what I was
11 dealing with.
12 Q. And why did you place him in handcuffs
13 specifically?
14 A. The backpack had -- was sitting right behind
15 him, where he was sitting and -- actually I think it was
16 on the floor board but I'd have to look at the notes
17 again to find out exactly where the backpack was sitting.
18 Q. Did you speak with Matthew about the backpack?
19 A. Yes, I did.
20 Q. And that would be the defendant in this matter,
21 Matthew Leon Moultrie?
22 A. Yes, I did.
23 Q. And what did Matthew say about the backpack?
24 A. He said the contents -- he didn't know that that
25 container was on it -- or in the backpack. He informed

1 me that that was Nick Stone's.

2 Q. Do you know who Nick Stone is?

3 A. Yes, I do.

4 Q. Who is he?

5 A. He's a gentleman that lives in Tonopah, Nevada,
6 and we -- three weeks prior, I was with NHP and I was on
7 that stop with them.

8 Q. Was Nick Stone involved in that other stop?

9 A. Yes, he was.

10 Q. Okay. Can you summarize for the Court the
11 articles that you believe -- that you found in the
12 backpack or the small case that was in the backpack?
13 Can you summarize that evidence that you found?

14 A. There was fifty dollars cash; there was a
15 glass pipe; there was a straw inside the blue and white
16 case. There was four small plastic bags of crystal
17 substance inside and one small bag on the outside of
18 the blue and white case held on by a hair tie.

19 Q. Do you have an opinion as to what the white
20 crystal substance was or is?

21 A. Yeah. At that point in time I had the opinion
22 that it was crystal meth.

23 Q. And what is that opinion based on?

24 A. On my training.

25 Q. And do you know how much, by weight of the