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4 IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

5
6 THE STATE OF NEVADA,)

No. 78230

7 Appellant,)

8 vs.)

9 KIMBERLY MARIE NYE,)

10 Respondent.)
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12 RESPONSE TO STATE'S APPEAL

13 FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
14 IN AND FOR THE COUNTY OF ELKO

15 **OBJECTION TO STATE'S SUBMITTED POINTS AND AUTHORITIES**

16
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1 ARGUMENT:

2 The State has submitted facts without providing transcripts of this case for the purpose
3 of giving a basis for its appeal. Regarding the appeal the facts would be found as provided
4 by the District Court in it's Order granting the suppression. As part of that Order the Court
5 ruled that the inventory search was insufficient. The State seems to think that an inventory
6 that states a bag is sufficient regarding the contents of the bag. The facts were clear that
7 there was not one item in the bag that was on any inventory list.

8 The State fails to inform this Honorable Court that at the time of the arrest there were
9 four officers on the scene and not one of them searched the bag at the time of the arrest.
10 Under the case law cited by the State they can not wrench this fact situation into a search
11 incident to an arrest. There was truly no basis for the argument by the State that this situation
12 could have been a search incident to an arrest. The arrest in this case was for a belligerent
13 patron of the Casino. As this was a misdemeanor and the arrest was made by a Casino
14 employee a conclusion can be drawn that the officers did not have a basis themselves for any
15 type of arrest. So there was no probable case to make any search of any items of the
16 Respondent.

17 Further, the State attempts to utilize invalid searches to be justified because of
18 inevitable discovery. If this was the status of the law then *Rice v. State*, 113 Nev. 425 (1997)
19 would not exist as this Court would have just held it does not matter if the Officer makes an
20 error everything can be justified by inevitable discovery or that an inventory search could be
21 called a search incident to an arrest after the inventory search was held to be invalid. That
22 is not the status of the law and the facts of this case demonstrate that the State wants this
23 Court to justify all actions by the State in its actions toward its citizens. The State fails to
24 inform the Court that Officer Ortiz had testified at the Preliminary hearing that he was doing
25 an inventory search at the jail. Yet he made no inventory. This was clearly discussed by the
26 cases submitted by the State. The bag was never searched as incident to arrest. The State
27 is trying to color the facts that did not happen. Throughout this entire process not one time
28 did the Respondent give the officers permission to search the bag nor was she asked.

Ultimately the request by the State is found on Page 7 beginning at line 6 of the State's Basis for Appeal as to its reasoning for this Appeal. It is desired by the State that this Honorable Court make searches that are done at the jail always incident to the arrest of a Defendant. This Court has been very clear about searches. Just because this one Officer made a mistake does not mean that any past determinations of this Court have to change. This Court in *Thurlow v. State*, 81 Nev. 510 (1965) was clear that the search had to be substantially contemporaneous with the arrest and confined to the immediate vicinity. There is no doubt what that meant. There were four officers on the scene and Officer Ortiz was the last to arrive. Not one of the officers searched the bag at the scene. The only search took place after the Officer took the bag off the floor, where it was the entire time the Officers were in contact with the Respondent, and they refused to give it to a friend of the Respondent. It was then thrown into the patrol car trunk. Then the same officer that took the Respondent to the jail searched the bag at the jail ostensibly as an inventory search but never provided any inventory of the search. The second, inventory that was done by the jail found nothing in the bag of any consequence nor did they provide an inventory of the bag.

Respondent hereby incorporates the arguments made in its Motion to Suppress filed in this case and attached hereto as Exhibit "1"

CONCLUSION

Based on the forgoing and the request of the State it is hereby requested that this Honorable Court deny this appeal proceeding. In addition, that the Court find that the State has incorrectly sought expansion of *Thurlow* as the two requirements that were held to be needed also included the requirement that the search be “in the immediate vicinity of the arrest”. The position of the State would make it ok for searches that are done at the jail so long as it was not a long drive to the jail. This would make no sense as by way of example if Respondent was arrested at the Red Lion as opposed to the Stockmen’s there would be a different outcome even though the only difference is the distance driven. The Court in *Thurlow* was not contemplating that the second requirement would be modifiable based on how many stop lights or stop signs you would go through before you search. The logical

1 reasoning was that immediate vicinity meant immediate vicinity. Therefore, this appeal
2 should not be allowed.

3 **RESPECTFULLY SUBMITTED** this 8th day April, 2019.

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8 By: /S/ David D. Loreman
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12 **CERTIFICATE OF SERVICE**

13 I certify that this document was filed electronically with the Nevada Supreme Court
14 on the 8th day of April, 2019. Electronic Service of the Objection shall be made in
15 accordance with the Master Service List as follows:

16 Honorable Aaron Ford
17 Nevada Attorney General

18 and

19 Chad Thompson
20 Deputy Elko County District Attorney
21 Attorney for Appellant

22
23 /S/ Reta J. Loreman
24
25
26
27
28

EXHIBIT "1"

EXHIBIT "1"

1 CASE NO. CR-FP-18-2614

2 DEPT. NO. 2

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9 THE STATE OF NEVADA

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Plaintiff,

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vs.

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KIMBERLY MARIE NYE,

13

Defendant.

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COMES NOW, Defendant, KIMBERLY MARIE NYE, by and through her

16

attorney of record, DAVID D. LOREMAN, ESQ., of David D. Loreman, Chtd., who

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Moves to Suppress the Evidence Obtained by the State. This Motion is made and based

18

upon the papers and pleadings on file, and the Points and Authorities attached hereto and

19

incorporated herein by this reference.

20

DATED this 13th day of December 2018.

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FILED
2018 DEC 13 PM 1:07
ELKO CO DISTRICT COURT
CLERK _____ DEPUTY 

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 ISSUES PRESENTED:

- 3 1. Whether Officer Ortiz search of Nye's backpack was a valid inventory search.
4 2. Whether the search of Nye's backpack at the jail was a proper search incident to
5 arrest.

6 FACTS:

7 1. Ms. Nye was bound over on the possession charge after the June 26, 2018
8 preliminary hearing.

9 2. Officer Ortiz testified that on March 29, 2018, he responded to a call from the
10 Stockmen's Casino regarding a disturbance of a security guard caused together by a male and
11 two females. Preliminary Hearing Transcript [P.H.T.] 8. Thus, Ortiz expected to be removing
12 these persons from the casino. P.H.T. 8. Ortiz entered the casino and proceeded to the front
13 desk area where he encountered Sgt. Locuson, Corporal Daz, and Officer Bogdon speaking with
14 one of the two females. See P.H.T. 9. Ortiz also encountered the security guard whom he
15 believed was named Hurlburt. See P.H.T. 9-10. Inasmuch as Ortiz was the last officer to get to
16 Stockmen's he initial listened to the rest. See P.H.T. 10-11. Eventually he spoke with the
17 security officer who described the woman, Ms. Nye as being belligerent being cut off from
18 drinking alcohol, P.H.T. 11. The guard said that all he wanted Nye to do was to move on.
19 P.H.T. 11. Inasmuch as Nye was now causing a disturbance with the police the guard
20 remembered that "she'd been previously trespassed, [and] was going to get the trespass notice.
21 And as she refused to leave, he would wish to place her under citizen's arrest. P.H.T. 11.

22 3. Ortiz indicated that Nye refused to leave after "Everyone there asked her to leave.
23 She continued to gamble, smoke her cigarette, drink her alcohol--" P.H.T. 11. Everyone
24 included the security guard. P.H.T. 12, 13. Nye's drink and her cigarettes were in the area of
25 the slot machine she was playing. P.H.T. 13.

26 4. The security guard went to get a piece of paper which turned out to be "a trespass
27 notice with the female we were having contact with, her name, the date and time she was
28 trespassed, and then her picture on the trespass notice. P.H.T. 13-14. This document indicated

1 Nye was trespassed on March 21. P.H.T. 14. It indicated Nye had been notified of this by
2 someone named Jackie on March 20. P.H.T. 34. The security guard also indicated Nye had
3 been notified. P.H.T. 34-35.

4 5. At about 2:50 or 3:00 P.M. the security guard then told Nye he was placing her
5 under citizen's arrest. P.H.T. 15. Ortiz asked Nye to get up because she was under arrest. She
6 got "a little belligerent" so Ortiz had to be assisted by Corp. Daz in getting handcuffs on her.
7 P.H.T. 15. The little belligerence included "going off, yelling, [and] cursing at us . . ." plus
8 telling them to "fuck off, that she was going to have her stepdad or dad get her off on the charge.
9 She told Officer Bogdon to bend her over and fuck her." P.H.T. 15-16. Ortiz concluded that
10 Nye was intoxicated. P.H.T. 16.

11 6. Having placed Nye in handcuffs the officers "Grabbed her belongings, escorted
12 her out, at one time kind of lifting her up and moving her. Then she walked off on her own
13 outside." P.H.T. 16.

14 7. The belongings of Ms. Nye included "her backpack, her stuff with her, her
15 personal belongings." P.H.T. 17. Regarding the position of the backpack Ortiz stated that "I
16 don't recall if she had it on or if it was down to the side by her feet." P.H.T. 37. He did not
17 recall if he was given the backpack or picked it up. P.H.T. 37-38.

18 8. Ms. Nye told the officers that she wanted to "pass it [the backpack] to a friend."
19 Ortiz indicated that there were no friends of Nye around at this time and no one with her. P.H.T.
20 17. It is believed contrariwise that when Nye wanted to leave her backpack with her friend,
21 Ortiz told him he would be arrested if he took it.

22 9. In any event Ortiz did not look for the person to whom Nye referred, and
23 indicated that "There was no one in the immediate area" to give it to. P.H.T. 28. Ortiz wrote in
24 his report that he told her she could not because all property on her person would go to jail with
25 her. P.H.T. 25; Exhibit A, Ortiz Report. He indicated that this was the Elko Police Department
26 Policy but did not know any specific number for this policy. P.H.T. 25-26. Contrariwise, he
27 indicated that in vehicle stops when there is a person who can take the vehicle he has let a person
28 take the car "If it's within a reasonable time." P.H.T. 26. Contrariwise, he when asked about

1 wallets he answered yes when asked whether he always takes the person's property no matter
2 where it was. P.H.T. 26. He indicated that this was "So I can later on not be called out for a
3 theft. I've had that happen before." P.H.T. 26. He apparently thought this could happen when
4 allowing property to be given to friends. See P.H.T. 27. After being reminded that there were
5 three officers watching and security cameras going when Nye wanted to give off the backpack,
6 Ortiz here apparently worried instead that an accusation of theft might be possible not against
7 him but against the person to whom the back pack might have been given. See P.H.T. 27.

8 In any event to get Nye to the police car from the casino the police had to "just move her
9 along" as she continued to be belligerent. P.H.T. 17-18. She apparently continued to make
10 threats as she was transported to the jail. P.H.T. 18. At the jail deputies came out, took Nye
11 into custody, and started their booking process by searching her. P.H.T. 18.

12 10. Ortiz grabbed Nye's property and "inventoried her backpack before having it
13 placed in the property bin at the jail." P.H.T. 18. Ortiz indicated then when he did an inventory
14 at the jail he normally did not fill out an inventory form because "That's the deputies' job to do
15 that. They do it in there." P.H.T. 28. He indicated that he was inventorying it at the jail
16 "Because I had not inventoried it on the scene" and "Because I didn't do my own outside."
17 P.H.T. 29. Ortiz indicated that the primary purposes of his inventory were not to be accused of
18 stealing; to find "Any illegal contraband" and "to gather all the information on whatever you're
19 searching and document that." P.H.T. 31, 32.

20 11. Ortiz further elaborated that "I did an inventory, but I didn't do their [the
21 deputies'] job. When a deputy - in the booking process, deputies search them, take them to the
22 cell. They do a strip search. They put them in a holding cell, the arrestee in a holding cell.
23 Depending on what they're doing and when the arrestee came in, they'll take them back out and
24 then start the booking process, fingerprints, picture, and then start going through their property
25 bin and everything enters into their system." P.H.T. 29 (emphasis added).

26 12. Ortiz then agreed that the deputies at the jail would then do the inventory search
27 and write everything down. See P.H.T. 29.

28 13. Ortiz indicated that he normally searches an arrestee incident to an arrest "at the

1 time of the arrest.” P.H.T. 18. In this case he did not search Nye at the Stockmen’s when
2 making the arrest “Just because of how she was acting. . . . I didn’t feel safe to do it on scene,
3 how she was acting. I felt that we needed to get her – remove her from the scene and take her
4 straight to jail.” P.H.T. 18-19.

5 14. In any event, as Ortiz was going through the backpack as part of the inventory
6 purpose he “found a sunglass case, there was a burnt glass pipe, and then a black container,
7 probably like a film container, a little black container with a white crystal substance inside.”
8 P.H.T. 19. He also found “on the main compartment on the side pocket [of the backpack], there
9 was a clear container with some more white crystal substance inside.” P.H.T. 19. Ortiz later
10 refers to this as a “clear white container.” P.H.T. 21. Both substances NIK tested positive as
11 methamphetamine. P.H.T. 22.

12 15. Ortiz indicated that he opened the containers in the backpack “To see what was
13 within the containers within the bag.” P.H.T. 33.

14 16. Ortiz was requested to get the Stockmen’s video of the incident by the District
15 Attorney’s office after the Public Defender’s office [then appointed before conflicting out]
16 requested this. P.H.T. 36. He was told by Stockmen’s that they would get it but at the time of
17 the preliminary hearing had not received it. P.H.T. 36-37.

18 17. Ms. Sally Woods testified that on March 21 she had just started training as an
19 executive on duty at Stockmen’s. P.H.T. 40. She indicated that the “86” form on Ms. Nye was
20 a permanent form but that she did not know Ms. Nye. P.H.T. 41. Woods indicated that the
21 notified by Jackie section of the form meant that Woods was notified by Jackie and since there
22 was no date for Nye being notified, Nye probably was not notified. P.H.T. 41-42. She noted
23 that because the general manager of Stockmen’s had not signed off on the form it could have but
24 had not necessarily been copied and distributed. P.H.T. 45.

25 18. Officer Bogdon testified that he was called to Stockmen’s at 3:00 in the morning
26 March 29 in regard to a disturbance. P.H.T. 47-48. He did not recall if any other officer
27 arrived before him. See P.H.T. 48. At Stockmen’s he spoke to Ms. Nye. He did not recall her
28 initial location in Stockmen’s but did recall she was sitting at a casino [gaming] machine when

1 he talked with her later on. See P.H.T. 48-49. He thought the call was because of two
2 individuals. P.H.T. 52. He did not know if the call was because Stockmen's wanted the
3 individuals removed but did know it concerned someone spilling a drink on another and people
4 being belligerent. P.H.T. 51. He did not know if he told Nye or any security people to leave.
5 P.H.T. 52.

6 19. Bogdon indicated that Nye had at least one bag on the floor next to her. P.H.T.
7 49.

8 20. Bogdon was there when Nye was placed in handcuffs. P.H.T. 50. He described
9 this process as "fairly routine" although "She was somewhat aggressive towards us." He also
10 noted that Nye was might in part be from intoxication. See P.H.T. 50. He did not know if the
11 backpack was still on the floor when Nye was being cuffed and did not recall seeing any officer
12 take it from her. P.H.T. 50. He did not know if Nye had the backpack when she was taken
13 outside or if it was taken by an officer. P.H.T. 51. He did not know if he ever picked up the
14 backpack. P.H.T. 52.

15 21. Sgt. Locuson testified that he was at Stockmen's on March 29 but did not recall
16 the order in which the officers arrived. See P.H.T. 57. He recalled that Nye was at a machine
17 near the front desk of the casino. P.H.T. 58. He did not recall whether she had a backpack on
18 her or sitting down by the machine. P.H.T. 58. He did not recall whether Nye had her backpack
19 with her when she was handcuffed. See P.H.T. 58-59. He talked to her very briefly and did not
20 recall if anyone asked her to leave the casino. P.H.T. 60.

21 22. He answered no when asked if he recalled "any extraneous issues or motion or
22 anything with regard to getting her in the handcuffs by the officers. Did they take anything from
23 her." P.H.T. 59.

24 23. He did not recall any other patron involved in the Nye matter but recalled being
25 called there because various individuals being belligerent to casino employees and patrons. See
26 P.H.T. 59. As sergeant, Locuson was in charge but apparently had Ortiz take the lead because
27 the casino was part of Ortiz' beat. P.H.T. 60-61.

28 24. Mr. Marcellino Torres testified that he worked security for stockmen's on March

1 29 but on the 8:00 A.M. morning shift. P.H.T. 63. His duties did not include taking care of the
2 casino videotapes; this is the duty of whoever is the executive on duty. See P.H.T. 63-64. They
3 are normally viewed, if applicable, by a person working on the applicable shift. See P.H.T. 64.
4 He indicated that the videotaping area covers the front desk area. P.H.T. 64. He indicated it
5 was normal practice for security guards to ask a person to leave when the person “is pretty drunk
6 or is insulting people.” P.H.T. 66. Alternatively the security person might ask the EOD
7 [executive on duty] for approval or to tell the person to leave. See P.H.T. 66. He did not know
8 who the executive on duty was for the night of Nye’s arrest. See P.H.T. 66.

9 ARGUMENT

10 1. Whether Ortiz search of Nye’s backpack was a valid inventory search.

11 a. The inventory by Ortiz was improper.

12 The case most on point on this issue is *Rice v. State*, 113 Nev. 425, 430-31, 936 P.2d
13 319 (1997). In *Rice*, the officer told the defendant to remove a backpack which appeared to have
14 a heavy object in it from his back and properly patted down the backpack. As the officer was
15 doing so he saw the outline of a Derringer in the defendant’s pocket and grabbed the defendant’s
16 hand, handcuffed him, and took the gun. The officer arrested the defendant for operating a
17 bicycle without a light and for carrying a concealed weapon. The officer then “walked over, got
18 the backpack, [and] opened it to check to make sure there was no further contraband.” 113 Nev.
19 at 427. The Nevada Supreme Court found that the search was not valid as an inventory search
20 since the officer admitted he was looking for contraband and because there was no indication
21 that a formal inventory was prepared at the time of Rice’s arrest. 113 Nev. at 430-31.

22 Also on point is *Bailey v. State* 2016 Nev. Unpub. LEXIS 801. In *Bailey*, the Nevada
23 Supreme Court has ruled that an item may not be part of an inventory search when it is not on
24 the arrestee at the time of arrest—as appears to be the case here--and the arrestee did not ask for
25 the item. *Bailey* at 1.

26 Likewise, here as in *Rice*, Ortiz did no formal inventory of what he characterized as an
27 inventory search and admitted that he was in part looking for contraband. Indeed, even when an
28 inventory record lacks specific entries to show it is for the protection of property contraband

1 found will be suppressed. *State v. Greenwald*, 109 Nev. 808, 858 P.2d 36 (1993)(inventory was
2 use and contraband suppressed when found hidden in a zippered toiletry case and quantities of
3 non-contraband items found were not listed); e.g., *Weintraub v. State*, 110 Nev. 287, 871 P.2d
4 339 (1994)(listing only 8 items and not listing over a hundred was improper inventory); *accord*
5 *United States v. Taylor*, 636 F.3d 461, 464-66 (8th Cir 2011)(“misc. tools” for hundreds of them
6 plus testimony that would not have arrested and impounded but for belief that narcotics crime
7 evidence would be found improper): *United States v. Reed*, 2018 U.S. Dist. LEXIS 94483 at 19-
8 20 (need to comply with inventory procedures; failure to document inventory made search
9 invalid); *State v. Stauder*, 264 S.W.3d 360, 361-65 (Tex. App. 2008)(failure to comply with
10 inventory procedures by failing to prepare inventory list rendered search of vehicle improper);
11 *See United States v. Vernon*, 511 Fed. Appx. 318, 322-23 (5th Cir. 2013)(failure to show
12 compliance with inventory policy led to suppression); *United States v. Verno*, 511 Fed. Appx.
13 318, 322-23 (5th Cir. 2013)(failure to comply with inventory policy meant evidence should be
14 suppressed); *United States v. Hope*, 102 F.3d 114, 116-17(5th Cir. 1996)(Texas officer saying
15 Memphis police did inventory insufficient to prove Memphis procedure followed); *United States*
16 *v. Monclavo-Cruz*, 662 F.2d 1285, 1286-89 (9th Cir. 1981)(search of purse with arrested defendant
17 being questioned an hour afterward at station house not search incident to arrest or justified as
18 inventory); *State v. Hamilton*, 67 P.3d 871, 876-79 (Mont. 2003)(where lost wallet apparently
19 contained identification and check book clearly visible opening coin purse and taking inventory
20 though none was recorded was invalid search)(state const.); *See Also United States v. Caskey*, 2013
21 U.S. Dist. LEXIS 1167 at 4-14 (failure to show that search complied with inventory policy when
22 list did not comply with noting valuables but rather with evidence likely valuable to kidnaping
23 investigation); *State v. Baylor*, 2014 Iowa App. 1237 at 9-13 (inventory search must comply with
24 procedures); *See Also*, e.g., *United States v. Bullock*, 71 F.3d 171, 178 (5th Cir. 1995)(officer's
25 un rebutted testimony that he followed standardized procedure sufficed to show proper inventory);
26 *United States v. Judge*, 846 F.2d 274, 276 (5th Cir. 1988)(DEA inventory must comply with their
27 procedure in regard to closed containers; remanded to determine compliance).

1 **b. The failure to do a search incident to arrest does not justify an improper inventory.**

2 Likewise when items are taken from the defendant are not subject to a search incident to
3 arrest they are also not searchable as an inventory later. *State v. Padilla*, 728 A.2d 279 (N.J. Super.
4 1999). In *Padilla*, police received a tip that a man in a hotel room had a gun. After knocking and
5 getting permission to enter they properly seized drug contraband and a firearm in plain view.
6 However, other items found during the subsequent inventory of defendants' possessions taken from
7 the room and brought to the police station with them were suppressed because the defendants were
8 not given the opportunity to consent to search or make other arrangements for disposing of their
9 property. 728 A.2d at 283-87. *See Also State V. Hummel*, 2016 N.J. Super. Unpub. LEXIS 2085.
10 In *Hummel*, the warrant less search a purse taken away during an interview of a person "secured to
11 a bar in the room" was not valid as an inventory since the officer wanted to check for weapons and
12 when told there was \$500 in the purse proceeded to go through all its items. 2016 LEXIS 2085 at
13 17-18.

14 **c. Nye should have been permitted to give the backpack to her friend.**

15 Moreover, when Nye sought to give the backpack to a friend, Ortiz was wrong to seize it
16 then take it to the jail and claim to be inventorying it. *See United States v. Maddox*, 614 F.3d
17 1046, 1048-50 (9th Cir. 2010)(search of laptop back in vehicle as inventory invalid when officer not
18 permit alternative of defendant's friend moving vehicle); *See Also State V. Olendorff*, 341 P.3d 779
19 (Or. App. 2014)(state const.). In *Olendorff*, a defendant about to be taken to jail asked that her
20 purse—which she had declined to give permission to search—be given to her boyfriend who had
21 arrived while the purse was on the trunk of a patrol car and defendant was handcuffed in the patrol
22 car for driving when license suspended. 341 P.3d at 780. The court suppressed the evidence found
23 in the purse noting "once the defendant gave the officers another option—releasing the purse . . . [to
24 the boyfriend] pursuant to the defendant's request—their original justification for taking the purse
25 from the defendant dissipated." 341 P.3d at 784. This ruling occurred under an Oregon constitution
26 which allows search incident to an arrest (1) to protect the officer's safety; (2) to prevent the
27 destruction of evidence; and to discover evidence of the crime of arrest.

1 **d. The inventory followed an illegal seizure of the backpack.**

2 Furthermore, the illegal inventory on the heels of what appears to have been an illegal
3 seizure seems wrong. In the following cases a subsequent search even following a legal search or
4 seizure were deemed improper. *See United States v. Khoury*, 901 F.2d 948, 958-60 (11th Cir. 1990)
5 (subsequent examination of diary after already leafing through it for inventory improper); *United*
6 *States v. Rosas*, 2011 U.S. Dist. LEXIS 151622 at 19-30 (can't subsequently search as inventory
7 when have already searched with probable cause); *See Also United States V. Davis*, 430 F.3d 345
8 (6th Cir. 2005)(second sniff by second drug dog after first drug dog failed to alert did not provide
9 probable cause); *United States v. Esparza*, 2007 U.S. Dist. LEXIS 66455 at 1-10 (sniff by
10 explosives dog did not provide probable cause to search after drug sniffing dog failed to alert);
11 *Robinson v. City of San Diego*, 954 F. Supp. 2d 1010, 1021 (S.D. Cal. 2013)(rechecking license
12 plate improper when cause for stop vitiated); *State v. Smith*, 345. Md. 460, 469-70 693 A.2d 749
13 (1997)(double checking waistband in Terry pat down exceeded scope).

14 **e. Even a proper inventory following an illegal one would not justify the illegal one.**

15 Similarly, even if a proper inventory search were performed after Ortiz illegal inventory
16 search this would also be improper. *Barnato v. State*, 88 Nev. 508, 512-15, 501 P.2d 643
17 (1972)(officer could not attempt to return by ostensibly legal means to make a second seizure from
18 marijuana plant when his first seizure from the same plant was illegal).

19 **f. Whether opaque items should have been opened in a proper inventory.**

20 Last, even if the property had been ostensibly inventoried properly, there would still be the
21 question of whether the [apparently first] searched black case and the white or clear should have
22 been opened as part of the inventory. *State v. Ridderbush*, 692 P.2d 667, 671-72 (Or. App.
23 1984)(basic principal that "no closed, opaque container may be opened to determine what, if
24 anything is inside it so the contents may be inventoried in turn")(state const. based on principle s
25 that inventories of impounded personal property are for "(1) the protection of the person's
26 property while in police custody; (2) the reduction or elimination of false claims against the
27 police for lost or stolen property; and (3) the protection against possible injury to persons or
28 property from impounded but un-inventoried property")(state const.); *See Also State V. Hite*,

1 338 P.3d 803, 805-812 (Or. App. 2014)(state const.)(inventory policy requiring officers to look
2 for broad range of items, such as food or alcohol, and hence open all closed containers meant
3 search of backpack violated state constitution as overbroad).

4 In any event, the violations noted above indicate that the “inventory” search of Nye’s
5 backpack was improper and the evidence found therein should be suppressed.

6 2. **Whether the search of Nye’s backpack at the jail was a proper search incident to**
7 **arrest.**

8 a. **Ortiz’ conduct cannot be justified as a valid search incident to arrest.**

9 Ortiz’ rationale for the search appears in part based on the notion that it should be allowed
10 since he was unable to search the backpack incident to arrest. Again *Rice* seems right on point. To
11 repeat the facts: In *Rice*, the officer told the defendant to remove a backpack which appeared to
12 have a heavy object in it from his back and properly patted down the backpack. As the officer was
13 doing so he saw the outline of a Derringer in the defendant’s pocket and grabbed the defendant’s
14 hand, handcuffed him and took the gun. The officer arrested the defendant for operating a bicycle
15 without a light and for carrying a concealed weapon. The officer then “walked over, got the
16 backpack, [and] opened it to check to make sure there was no further contraband.” 113 Nev. at 427.

17 In *Rice*, our Supreme Court then also found that this was not a valid search incident to arrest
18 since Rice was placed in the patrol car before the backpack was searched. 113 Nev. at 430. Since
19 Ortiz apparently took the backpack away from Nye—likely from a position of the floor as Bogdon’s
20 testimony suggests, but regardless if he instead took it from her much like the officer in *Rice*--Ortiz
21 could not search it incident to arrest since he had taken the handcuffed Nye to his police car and to
22 the jail since seizing the backpack.

23 b. **The backpack was apparently out of Nye’s control both before and after Ortiz**
24 **apparently seized it.**

25 Either case suffices to negate a search incident to arrest analysis. *See State v. Carrawell*,
26 481 S.W.2d 833 (Mo. 2016). In *Carrawell*, an officer was arresting a man carrying a plastic bag
27 for his gestures and swearing disturbing the peace of those around him. The man attempted to enter
28 a door and the policeman grabbed hold of him, telling him to drop the bag as he attempted to

1 handcuff him. Eventually when the policeman ripped the bag from Carrawell's hands it fell to the
2 ground with a breaking sound. The officer secured the arrestee in his car then went back and
3 searched the bag, finding a broken plate and a smaller plastic bag containing heroin. The court ruled
4 that since the bag was not within the area of the arrestee's control this was not a valid search
5 incident to arrest but that since there was precedent that supported allowing this search at the time it
6 occurred the search occurred in good faith. 481 S.W.3d at 838-46. In finding the search not
7 incident to arrest, the court noted that the *United States v. Edwards*, 415 U.S. 800, 803 (1974)
8 "exception to the general rule allowing the item to be within the immediate control applies only to
9 items that are so entwined with the arrestee's person that they cannot be separated from the person at
10 the time of arrest." 481 S.W.3d at 840. Obviously, the backpack was separated from Ms. Nye at
11 the time of arrest and quite likely before it and even if taken from her, Ortiz could not search it then
12 nor take it with him then much later perform a search not incident to arrest. *See People v. Wilcox*,
13 22 N.Y.S.3d 717, 718-20 (A.D. 2015)(even where pill bottle containing suspected heroin fell from
14 jacket while arresting defendant, subsequent search after arrest, removal of cuffs to get jacket off,
15 recuffing, and securing jacket in another room not search incident); *People v. Morales*, 2 N.Y.S.3d
16 472, 473-76 (A.D. 2015) (when defendant arrested and his jacket under control of police and on a
17 vehicle's trunk, search of jacket was not search incident); *People v. Julio*, 666 N.Y.S.2d 171, 172
18 (A.D. 1997)(search of bag not incident to arrest where bag in possession of officer, and defendant
19 who had abandoned ammunition clip was handcuffed).

20 Nor could Ortiz leave the backpack somewhere and return to search it incident to arrest.
21 *United States v. Maddox*, 614 F.3d 1046, 1048-50 (9th Cir. 2010)(returning for items on defendant's
22 seat and searching them not valid when defendant already arrested and in patrol car); *Carrawell*;
23 *State v. Lamay*, 103 P.3d 448, 449-52 (Idaho 2004)(where defendant was taken from hotel room
24 and arrested officers could not go back in room and search backpack incident to arrest).

25 **c. Search incident to arrest does not apply when it is the officer who places the item**
26 **near the arrestee's control.**

27 Even assuming Ortiz placed the backpack in the interior compartment of Ortiz' police car
28 [with Ms. Nye] the bag was only near Ms. Nye's control because control Ortiz insisted it be so—a

1 circumstance which does not permit search incident to arrest. *See United States v. Perea*, 986 F.2d
2 633, 636, 643 (2d Cir. 1993)(placing bag in police vehicle near arrested defendant did not make its
3 search incident to arrest); *United States v. Rothman*, 492 F.2d 1260, 1265 (bringing baggage to
4 arrested defendant did not make its search incident to arrest); *United States v. Rigales*, 630 F.2d
5 364, 366-67 (5th Cir. 1980)(police could not open heavy zippered bag found in automobile incident
6 to a warrant arrest of a person who had bullets in his jacket); *See Also United States V. Monclavo-*
7 *cruz*, 662 F.2d 1285, 1286-88 (9th Cir. 1981)(search of purse with arrested defendant being
8 questioned an hour afterward at station house not search incident to arrest).

9 **d. Search incident analysis also supports allowing Nye to give the backpack to her**
10 **friend.**

11 Under search incident analysis, much like the inventory analysis in issue 1, Ortiz was wrong
12 to prevent Nye from giving the backpack to her friend. *See State v. Graham*, 898 P.2d 1206, 1207-
13 08 (Mont. 1995). In *Graham*, the defendant, who was passenger in vehicle stopped and arrested on
14 a warrant, asked to leave her purse in the vehicle--which neighbor was retrieving-- because the purse
15 contained food stamps her children would need. Police took the purse to the police station anyway
16 and inventoried it finding drugs. The drugs were not admissible as a search incident to arrest
17 because the search was not relevant to the warrants, would not have prevented an escape, and did
18 not protect the arresting officer. *See also United States v. Goodrich*, 183 F. Supp. 2d 135, 137, 140-
19 45 (D. Mass 2001)(whether an appropriate person is available to move vehicle factor in decision to
20 tow; wife of defendant who would take car from parking lot constituted an appropriate situation to
21 release vehicle rather than tow it; towing policy should be written).

22 Thus the search of the backpack by Ortiz cannot be justified under search incident to arrest
23 analysis.

24 CONCLUSION

25 In view of the above authorities, the illegally obtained evidence should be suppressed.
26
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1 DATED this 13th day of December 2018.

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11 CERTIFICATE OF MAILING

12 Pursuant to *NRCP* 5(b), I hereby certify that I am an employee of DAVID D.
13 LOREMAN, CHTD., and that on the 13th day of December 2018, I deposited for mailing,
14 postage prepaid, at Elko, Nevada, a true and correct copy of the within document addressed
15 to:

16 Chad Thompson, Esq.
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