**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| THE STATE OF NEVADA, | ) | |
| Appellant, | ) | |
| | ) | **Supreme Crt No**.: 78230 |
| vs. | ) | **Dist. Crt. No.** CR-FP-18-2614 |
| KIMBERLY MARIE NYE, | ) | |
| Respondent. | ) | |

**APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, HONORABLE ALVIN R. KACIN, PRESIDING**

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# RESPONDENT'S ANSWERING BRIEF

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## ROUTING STATEMENT

As the Appellant notes there is no ***NRAP*** 17 subject directly on point under which this case should be assigned to the Supreme Court instead of the Court of Appeals. ***App. Brief*** at 1. However, Appellant suggest that under ***NRAP*** 17 (a)(11) & (12), the Supreme Court should decide the case. ***Id.***

This seems thoroughly against the intent of ***NRAP*** 17(a)(11) which indicates the Supreme Court should retain matters of first impression as the Appellant admits noting that it is seeking to determine whether ***Rice v. State***, 113 Nev. 425, 936 P.2d 319 (1997) "remains the law." ***App. Brief*** at 1. This clearly is not one of first impression as the Nevada Supreme Court has determined the issue.

Alternatively, the Appellant is claiming that ***Rice's*** holding with regard to search incident to arrest is of "statewide public importance" under ***NRCP*** 17(a)(12). ***App. Brief*** at 1. This too is nonsense. ***Rice*** only restricts searches incident to arrest when the arrestee is safely under law enforcement control before the container is searched and inventory searches when they are done improperly. It is difficult conjure the notion that overturning these very reasonable restrictions on police conduct are of "statewide public importance." Moreover, Appellant's citations to cases in favor of such routing all resulted in grants of suppression: in two earlier Nevada cases where the improper searches, incident to arrest, of vehicles were done hours or days later; in a similar federal case involving a phone in a vehicle over an hour after arrest; and in a United States Supreme Court case

limiting the scope of contemporaneous search incident of a cell phone from the arrestee's pocket. Furthermore, the segments quoted from the two Nevada cases support the later holding in Rice and establish the consistency of search incident law in Nevada. ***See App. Brief*** at 2 (and cases cited therein); ***App. Brief*** at 15-16.

The two quotes follow. In ***Thurlow v. State***, 81 Nev. 510, 513 (1965) the Nevada Supreme Court found that "A search can be incident to arrest 'only if it is ***substantially contemporaneous*** with the arrest and is confined to the ***immediate vicinity*** of the arrest . . . This right to search and seize without a search warrant extends to the thing under the accused's immediate control.'" ***See App. Brief*** at 15.

The second is from ***Scott v. State***, 86 Nev. 145, 147 (1970): "'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.' It is apparent that the search in the instant matter was not incident to Scott's arrest, since it was remote in time and place from his arrest." ***See App. Brief*** at 16.

It is apparent what Nevada law is on this topic and thus the case should be assigned to the Court of Appeals.

## ISSUES PRESENTED

**Issue One:** The District Court properly concluded that the search of Nye's backpack at the jail was not proper as search incident to arrest.

**Issue Two:** Inevitable discovery does not apply.

**Issue Three:** The District Court found correctly that suppression was the proper remedy for deliberate conduct in violation of ***Rice*** and ***State v. Greenwald***, 109 Nev. 808 (1993).

**Issue Four:** There are other alternative reasons that this was not a valid search incident to arrest.

**Issue Five:** Alternatively, Ortiz' search of Nye's backpack can be found to be an invalid inventory search.

## STATEMENT OF FACTS

Ms. Nye was bound over on the possession charge after the June 26, 2018, preliminary hearing. Officer Ortiz testified that on March 29, 2018, he responded to a call from the Stockmen's Casino regarding a disturbance of a security guard caused together by a male and two females. Preliminary Hearing Transcript ***Appendix*** (hereinafter ***App.***) 11. Thus, Ortiz expected to be removing these persons from the casino. ***App.*** 11. Ortiz entered the casino and proceeded to the front desk area where he encountered Sgt. Locuson, Corporal Daz, and Officer Bogdon speaking with one of the two females. ***App.*** 12. Ortiz also encountered the security guard whom he believed was named Hurlburt. ***App.*** 12-13. Inasmuch as Ortiz was the last officer to get to Stockmen's he initially listened to the rest. ***App.*** 13-14. Eventually he spoke with the security officer who described the woman, Ms. Nye, as being belligerent about being cut off from drinking alcohol, ***App.*** 14. The guard said that all he wanted Nye to do was to move on. ***App.*** 14.

Inasmuch as Nye was now causing a disturbance with the police the guard remembered that "she'd been previously trespassed, [and] was going to get the trespass notice," and as she refused to leave, he would wish to place her under citizen's arrest. ***App.*** 14.

Ortiz indicated that Nye refused to leave after "Everyone there asked her to leave. She continued to gamble, smoke her cigarette, drink her alcohol--" ***App.*** 14. Everyone included the security guard. ***App.*** 15, 16. Nye's drink and her cigarettes were in the area of the slot machine she was playing. ***App.*** 16.

The security guard went to get a piece of paper which turned out to be "a trespass notice with the female we were having contact with, her name, the date and time she was trespassed, and then her picture on the trespass notice." ***App.*** 16-17. This document indicated Nye was trespassed on March 21. ***App.*** 17. It indicated Nye had been notified of this by someone named Jackie on March 20. ***App.*** 37. The security guard also indicated Nye had been notified. ***App.*** 37-38.

At about 2:50 or 3:00 P.M. the security guard then told Nye he was placing her under citizen's arrest. ***App.*** 18. Ortiz asked Nye to get up because she was under arrest. She got "a little belligerent" so Ortiz had to be assisted by Corp. Daz in getting handcuffs on her. ***App.*** 18. The little belligerence included "going off, yelling, [and] cursing at us . . ." plus telling them to "fuck off, that she was going to have her stepdad or dad get her off on the charge. She told Officer Bogdon to bend her over and fuck her." ***App.*** 18-19 & 148. Ortiz concluded that Nye was

intoxicated. ***App.*** 19.

Having placed Nye in handcuffs the officers "Grabbed her belongings, escorted her out, at one time kind of lifting her up and moving her. Then she walked off on her own outside." ***App.*** 19.

The belongings of Ms. Nye included "her backpack, her stuff with her, her personal belongings." ***App***. 20. At the preliminary hearing regarding the position of the backpack Ortiz stated that "I don't recall if she had it on or if it was down to the side by her feet." ***App.*** 40. At the preliminary hearing he did not recall if he was given the backpack or picked it up. ***App.*** 40-41. At the suppression motion hearing he indicated instead that the bag was on the floor. ***App.*** 148.

Ms. Nye told the officers that she wanted to "pass it [the backpack] to a friend." Ortiz indicated that there were no friends of Nye around at this time and no one with her. ***App***. 20. She did not tell him where her friends were. ***App***. 148.

In any event Ortiz did not look for the person to whom Nye referred, and indicated that "There was no one in the immediate area" to give it to. ***App. 31***; ***App.*** 151. Ortiz wrote in his report that he told her she could not because all property on her person would go to jail with her. ***App.*** 28; ***App.*** 120 (Ortiz Report); ***See Also App.*** 148 (Ortiz states that the "backpack was going to jail with her"). He indicated that this was the Elko Police Department Policy but did not know any specific number for this policy. ***App.*** 28-29. Contrariwise, he indicated that in vehicle stops when there is a person who can take the vehicle he has let a

person take the car "If it's within a reasonable time." ***App.*** 29. Contrariwise, he when asked about wallets he answered yes when asked whether he always takes the person's property no matter where it was. ***App.*** 29. He indicated that this was "So I can later on not be called out for a theft. I've had that happen before." ***App.*** 29. He apparently thought this could happen when allowing property to be given to friends. ***App***. 30. After being reminded that there were three officers watching and security cameras going when Nye wanted to give off the backpack, Ortiz here apparently worried instead that an accusation of theft might be possible not against him but against the person to whom the back pack might have been given. See ***App***. 30.

After searching Nye "real quick, her person, waist band," Ortiz made the decision to "put the backpack in the back trunk." ***App.*** 149. He noted that he always put property going to jail with people in the trunk. ***App.*** 149. He indicated there was no particular reason he did not have one of the three other officers present at this time search the bag, but admitted this was an option. ***App***. 149. The only reason he could think of for not doing this was because he "just wanted to get her out of there in a hurry." ***App***.149.

In any event, to get Nye to the police car from the casino the police had to "just move her along" as she continued to be belligerent. ***App.*** 20-21. She apparently continued to make threats as she was transported to the jail, ***App***. 21, and/or indicate that her dad or step dad would get her off while calling Ortiz "every

name in the book." ***App.*** 149. When asked if this were unusual he noted that it '[h]appens all the time." ***App.*** 149. At the jail deputies came out, took Nye into custody, and started their booking process by un-cuffing and searching her. ***App.*** 21; ***App.*** 149.

Ortiz grabbed Nye's property and "inventoried her backpack before having it placed in the property bin at the jail." ***App.*** 21. He was about five to six feet away from her while doing this as other deputies searched Nye; both processes took about the same time. ***App***. 149-150. At the preliminary hearing Ortiz indicated then when he did an inventory at the jail he normally did not fill out an inventory form because "That's the deputies' job to do that. They do it in there." ***App.*** 31. He indicated that he was inventorying it at the jail "Because I had not inventoried it on the scene" and "Because I didn't do my own outside." ***App***. 32.

Ortiz indicated that the primary purposes of his inventory were not to be accused of stealing; to find "Any illegal contraband" and "to gather all the information on whatever you're searching and document that." ***App.*** 34, 35. Ortiz further elaborated that "I did an inventory, but I didn't do their [the deputies'] job. When a deputy – in the booking process, deputies search them, take them to the cell. They do a strip search. They put them in a holding cell, the arrestee in a holding cell. Depending on what they're doing and when the arrestee came in, they'll take them back out and then start the booking process, fingerprints, picture, and then start going through their property bin and everything enters into their

system." ***App***. 32 (emphasis added). Ortiz then agreed that the deputies at the jail would then do the inventory search and write everything down. ***App***. 32.

Contrariwise, at the motion hearing, Ortiz stated that his searching the backpack was not an inventory but a search incident to arrest. ***App.*** 151. He indicated that such a search was to determine if there were items that were a "[d]anger to me or illegal." ***App.*** 152.

The inventory thereafter created at the jail by the booking officer merely listed the backpack as just a "bag." ***App***. 151. This inventory was done later, apparently after Nye had been given jail clothes and Ortiz had finished writing his probable cause statement. ***App***. 150. Ortiz indicated that he did not ever think of getting a warrant to search the bag and had never sought to get a warrant to search property at the jail. ***App***. 150. He indicated he might have thought to seek a warrant if he'd left the backpack at the casino and been called about it half an hour or an hour later. ***App***. 150.

At the preliminary hearing Ortiz indicated that he normally searches an arrestee incident to an arrest "at the time of the arrest." ***App***. 21. In this case he did not search Nye at the Stockmen's when making the arrest "Just because of how she was acting. . . . I didn't feel safe to do it on scene, how she was acting. I felt that we needed to get her – remove her from the scene and take her straight to jail." ***App.*** 21-22. At the motions hearing he admitted that getting Nye under control was more important than searching the backpack. ***App***. 151.

In any event, as Ortiz was going through the backpack as part of the inventory or search incident purpose he "found a sunglass case, there was a burnt glass pipe, and then a black container, probably like a film container, a little black container with a white crystal substance inside." ***App***. 22. He also found "on the main compartment on the side pocket [of the backpack], there was a clear container with some more white crystal substance inside." ***App.*** 22. Ortiz later refers to this as a "clear white container." ***App***. 24. Both substances NIK tested positive as methamphetamine. ***App***. 25.

Ortiz indicated that he opened the containers in the backpack "To see what was within the containers within the bag." ***App***. 36. To do so required opening not only the bag but the containers. ***App***. 152.

Ortiz was requested to get the Stockmen's video of the incident by the District Attorney's office after the Public Defender's office [then appointed before conflicting out] requested this. ***App***. 39. He was told by Stockmen's that they would get it but at the time of the preliminary hearing had not received it. ***App***. 39-40.

Deputy Melonie Edgmond indicated she did the booking of Nye at the jail. ***App***. 143-44. This includes going through the person's clothing and pockets, plus removing their belts, jewelry and shoes. ***App***. 143 & 166. The person is then sent for a strip search—apparently even when charged with trespassing. ***App.*** 143; ***See Also App***. 32 (Ortiz at the preliminary hearing). If the person has a bag or purse,

the bag or purse will be put in a bucket with their clothing behind the booking desk. ***App***. 143. If the arresting officer has not searched the bag or purse—such as when there has been a combative arrestee or a weather problem-- he usually goes through it there as the booking officer views him. ***App.*** 143. However, the booking officer will normally perform a second search of such items. ***App***. 143. The booking officer performs an inventory of the items in the purse or bag. ***App***.143-144. She did one in Nye's case. ***App***. 143-144. Edgmond indicated that this same policy had been in effect for the thirteen years she'd worked at the jail and that the revised manual for the jail effective in 2018 had not changed anything. ***App***. 144. She indicated that the reason the arresting officer would tend to go through items like unsearched bags and purses was because the booking officers try not to become witnesses in the case. ***App***. 145. She did not have any specific memory about this case and Ortiz' actions. ***App***. 146. If Ortiz had removed any item from the bag she was unaware of it. ***App***. 146.

On cross-examination she admitted that her inventory referred to Nye's backpack and contents as a "bag" because "sometimes I don't put what the contents—it just depends." ***App***. 145; ***See Also App***. 183-84. She indicated that "if there is items in the bag, we don't inventory every single item in the bag. Sometimes there is just too much stuff to list. So we'll just put bag." ***App***. 145. She admitted that when she examines such as bags she's looking for weapons and contraband regardless of the type of case. ***App***. 143-146. The inventory she did

was done in such a manner that it could not be told whether any of the items were inside the "bag." ***App***. 146 (ambiguous); ***See Also App***. 183-84 (Order describes her testimony).

Ms. Sally Woods testified that on March 21 she had just started training as an executive on duty at Stockmen's. ***App***. 43. She indicated that the "86" form on Ms. Nye was a permanent form but that she did not know Ms. Nye. ***App***. 44. Woods indicated that the notified by Jackie section of the form meant that Woods was notified by Jackie and since there was no date for Nye being notified, Nye probably was not notified. ***App***. 44-45. She noted that because the general manager of Stockmen's had not signed off on the form it could have but had not necessarily been copied and distributed. ***App***. 48-49.

Officer Bogdon testified that he was called to Stockmen's at 3:00 in the morning March 29 in regard to a disturbance. ***App***. 50-51. He did not recall if any other officer arrived before him. ***App***. 51. At Stockmen's he spoke to Ms. Nye. He did not recall her initial location in Stockmen's but did recall she was sitting at a casino [gaming] machine when he talked with her later on. ***App***. 51-52. He thought the call was because of two individuals. ***App***. 55. He did not know if the call was because Stockmen's wanted the individuals removed but did know it concerned someone spilling a drink on another and people being belligerent. ***App***. 55. He did not know if he told Nye or any security people to leave. ***App***. 55.

Bogdon indicated that Nye had at least one bag on the floor next to her.

***App***. 52.

Bogdon was there when Nye was placed in handcuffs. ***App.*** 53. He described this process as "fairly routine" although "She was somewhat aggressive towards us." He also noted that Nye's attitude was also in part from her intoxication. ***App.*** 53. He did not know if the backpack was still on the floor when Nye was being cuffed and did not recall seeing any officer take it from her. ***App***. 53. He did not know if Nye had the backpack when she was taken outside or if it was taken by an officer. ***App***. 54. He did not know if he ever picked up the backpack. ***App***. 54.

Sgt. Locuson testified that he was at Stockmen's on March 29 but did not recall the order in which the officers arrived. ***App***. 60. He recalled that Nye was at a machine near the front desk of the casino. ***App.*** 61. He did not recall whether she had a backpack on her or sitting down by the machine. ***App***. 61. He did not recall whether Nye had her backpack with her when she was handcuffed. ***App***. 61-62. He talked to her very briefly and did not recall if anyone asked her to leave the casino. ***App***. 63.

Locuson answered no when asked if he recalled "any extraneous issues or motion or anything with regard to getting her in the handcuffs by the officers. Did they take anything from her." ***App.*** 62. He did not recall any other patron involved in the Nye matter but recalled being called there because various individuals being belligerent to casino employees and patrons. ***App***. 62-63. As

sergeant, Locuson was in charge but apparently had Ortiz take the lead because the casino was part of Ortiz' beat. ***App.*** 63-64.

Mr. Marcellino Torres testified that he worked security for Stockmen's on March 29 but on the 8:00 A.M. morning shift. ***App.*** 66. His duties did not include taking care of the casino videotapes; this is the duty of whoever is the executive on duty. ***App***. 66-67. They are normally viewed, if applicable, by a person working on the applicable shift. ***App***. 67. He indicated that the videotaping area covers the front desk area. ***App***. 67. He indicated it was normal practice for security guards to ask a person to leave when the person "is pretty drunk or is insulting people." ***App***. 68-69. Alternatively the security person might ask the EOD [executive on duty] for approval or to tell the person to leave. ***App***. 69. He did not know who the executive on duty was for the night of Nye's arrest. ***App.*** 69.

The court summarized the circumstances of the arrest as follows (***App.*** 183-185):

"Nye was arrested at 3:15 AM. Nye, who had a backpack on the floor next to her when she was arrested, yelled and cursed during the arrest. Nye even told [Officer] Bogdon to bend over and "fuck" her. Nye told the officers that she wanted to give the backpack to a friend; however, no one appeared to be accompanying her. Because Nye was continuing to cause a disturbance. Attract onlookers and become "aggressive" with officers Ortiz decided immediately to remove the backpack and her from the casino.

"On the way to Ortiz's patrol car, Nye continued to be "belligerent." Nevertheless, Ortiz was able to place her in the passenger area of the car. After putting the backpack in the car's trunk, the officer drove the short distance to the Elko County Jail with his arrestee. On the way to the facility, Nye continued to yell and call Ortiz "every name in the book."

"At the jail, Edgmond "started the booking process" by searching Nye. Ortiz proceeded to retrieve and look through Nye's backpack "before having it placed in the property bin at the jail." During his inspection of the backpack's "main compartment." Ortiz discovered the pipe and a "little black container" inside a "sunglass case." Inside the "little black container," Ortiz found "a clear container containing more methamphetamine. Ortiz agrees that he did not produce an inventory of the backpack and its contents. The contraband was found by 3:26 AM.

"But for Nye's conduct, which raised safety concerns for the officers, Ortiz would have searched the backpack incident to the arrest at the Stockmen's. Although he appears at one point also to characterize such a search as an "inventory," Ortiz acknowledges that the intrusion is not performed to produce a written list of the property in the container searched. At bottom Ortiz agrees he searches such containers as Nye's backpack to look for weapons and contraband." (emphasis added). ***App***. 183-84.

The Court then noted the sheriff's policies "essentially require booking

deputies to produce an inventory of an inmate's clothing and personal property 'at the time of booking' and requires booking deputies to describe all inmate property 'in sufficient detail to ensure the property can be identified properly.' The policy does not contain standardized criteria regulating the opening of containers found during inventories." ***App***. 184.

Judge Kacin noted that in cases where the officer was unable to for reason of combativeness or weather to perform an immediate search incident they "will in practice conduct an immediate on-camera search of any containers . . . accompanying the arrestee to the facility" and summarized what the booking officer would do subsequently. ***App***. 184.

The judge noted that Edgmond "produced no written inventory of the contents of Nye's backpack, which is described in a property receipt as simple a 'bag.' In practice, whether a list of items in such a container is produced depends on whether it contains many items or just a few. Edgmond essentially agrees that the overriding purpose of the intrusion is look for weapons and contraband." ***App***. 184-85.

Judge Kacin final sentence of his order stated:

> Ortiz ***indeed engaged in deliberate conduct in violation*** of ***Greenwald*** and ***Rice*** that is worthy of deterrence. See ***Herring v. United States***, 555 U.S. 135, 144 (2009) (exclusionary rule applies to "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence," not every error that occurs). The pipe and the two quantities of

methamphetamine must be suppressed. [emphasis added]

***App***. 188. He ruled the evidence should be suppressed based on Ortiz's conduct in violation of ***Rice*** and ***Greenwald***. He stressed that Ortiz did not make a proper search incident to arrest and that there was no actual ***legal*** inventory of the backpack. ***App.*** 185-86. The prosecution then appealed this case.

## SUMMARY OF THE ARGUMENT

Respondent in this matter agrees with the Supreme Court of Nevada in the cases of ***Rice*** and ***Greenwald***. Respondent believes that the Honorable Judge Alvin R. Kacin reviewed the facts presented to him and made the necessary findings based on the observations made of the witnesses testimony both oral and documentary. That the demeanor as witnesses were being questioned by Counsel for the State and Ms. Nye gave him the insight as to the honest review of the actions of law enforcement in the present case. A critical component is the finding that Officer Ortiz "engaged in deliberate conduct" (App. 188) in violation of Nevada Case Law. In viewing this matter it would be hard to understand how 4 officers of the Elko Police Department could not search a bag at the scene. Nor could anyone of them truly even remember the "bag". It certainly did not make an impression on anyone of them during their contact with Ms. Nye. In looking at the testimony of the officers none of them could even remember really where it was at any particular time nor could any of them remember how Officer Ortiz got the "bag" to place it in the vehicle trunk. The problems are compounded by Officer

Ortiz in his testimony at the preliminary hearing when he claimed his search to be an inventory. Then at the motion hearing he now claims and stresses that he was not doing and inventory search that it was a search incident to arrest. The State in its Response did not even make an argument that it was an inventory search. Ms. Nye submits to this Court that the State is attempting to cover up an error of law enforcement in its argument. This position, aside from trying to justify Ortiz's actions, also claims that Nevada Supreme Court was wrong in its rulings in ***Rice*** and ***Greenwald***. Consequently claiming that Judge Kacin was wrong for following those rulings. Eighteen of the cases cited by the State all preceded ***Rice*** in time. It is submitted by Ms. Nye that the State claims that the Nevada Supreme Court in ***Rice*** must have missed these cases or did not understand them in coming to there decision in ***Rice*** based on the State's appeal in this case and argument in its opening brief. Ms. Nye in this Answering Brief submits that the Nevada Supreme Court in ***Rice*** was a Court that certainly knew what it was doing and was aware of all the cases at the time.

Ultimately the Elko County Sheriff's Office did not follow its policy in its inventory or the existing case law in Nevada to provide for a legal inventory. It is also submitted that Ortiz did not do a search incident to arrest and the attempt of the State to claim it is such does not make common sense and is in-opposite to the usage of the English language and definitions, specifically "substantially contemporaneous".

Based on the law of ***Rice*** and the reasoning found in the Order of Judge Kacin it is respectfully submitted that the Appeal of the State should be denied.

## ARGUMENT

**A. Issue One**: **The District Court properly concluded that the search of Nye's backpack at the jail was not proper as search incident to arrest.**

The case is essentially on all fours with this issue is ***Rice v. State***, 113 Nev. 425, 936 P.2d 319 (1997). In Judge Kacin's thoughtful and careful opinion he described the facts of Rice as follows:

"In ***Rice***, a University of Nevada patrol sergeant stopped a suspect 'for not having a headlight or reflector on his bicycle.' The suspect 'immediately "escalated" his voice and became hostile'. Id. Further, the suspect 'was highly agitated, highly aggressive and demonstrated jerky movements[.] '[B]ased on past experience' the patrol sergeant felt the suspect 'was either looking for an escape route or a physical altercation.' Thinking the suspect might escape, the patrol sergeant 'asked him to step off his bicycle and remove his backpack because it appeared to have a heavy object in it.

"Just as the patrol sergeant started to pat the bag, he saw the suspect "move his right hand down. The patrol sergeant 'then saw "a bulk and distinctive outline" of a Derringer in one of the suspect's pockets. The peace officer responded in part by handcuffing the suspect and taking the firearm.

"Another officer arrived after the suspect was arrested for operating a

bicycle without a headlight and carrying a concealed weapon. After the patrol sergeant put the suspect in a patrol car, the other officer 'walked over, got the backpack, [and] opened it to check it to make sure there was no further contraband.' In the backpack, the peace officers 'found money, two bullets, and what they thought to be drugs and drug paraphernalia. Apparently, the patrol sergeant maintained the pair 'were attempting the conduct an inventory on the scene.' " ***App***. 185-86 (citing ***Rice***, 113 Nev. at 427)(individual citations omitted).

Then relying on Rice to find that to hold that Ortiz' search was not a valid search incident to arrest the District Court declared:

"The district court in ***Rice*** denied a motion to suppress the firearm and the evidence found in the backpack. ***Id***. at 426. The Nevada Supreme Court effectively affirmed the denial of the motion to suppress the firearm, but reversed the decision on not suppressing the contraband in the backpack. Relying primarily on [***State v.***] ***Greenwald*** [109 Nev. 808 (1993)], the ***Rice*** court concluded that the search of the backpack was neither a search incident to arrest nor an inventory. ***Id.*** at 430-31. In ***Greenwald***, the court held that the search of the suspect's motorcycle after he 'was safely locked away in a police car was not a valid search incident to arrest because there was no conceivable need to disarm him or prevent him from concealing or destroying evidence. ***Id.*** at 430 (citing ***Greenwald***, 109 Nev. at 810). As in ***Rice***, '[t]he same is true in this case.' Nye was placed in a police car and then given to a booking deputy before Ortiz searched the backpack. In other

words, like the suspect in ***Rice***, Nye was safely under law enforcement control before her backpack was searched. 'Thus, under ***Greenwald***, the backpack was not validly searched incident to arrest.'" ***App***. 186. Note too that the level of commotion caused by Nye seems less than threatening than that discussed in ***Rice*** and apparently occurred in a closed space with more law enforcement personnel present. Judge Kacin did understand that in both ***Rice*** and the present case the officers were confronted with a person that was not being cooperative. This issue was not a factor in the ultimate determination of the Court as it was consistent in both the present case and ***Rice***. ***App.*** 183 and ***App***. 185

Contrariwise, the Appellant, inter alia, appears to argue that the ***United States v. Chadwick***, 433 U.S. 1, 15 (1977) language "that warrantless searches of luggage or other property seized at the time of arrest cannot be justified as incident to that arrest . . . if the search is remote in time or place from the arrest" should mean that since the Elko jail was only .7 miles from the spot of the arrest it was not remote in place. ***See Appellant Brief*** at 16-17. This is foolish; being transported from a place where one is at liberty to one where trespassers are strip searched is remote in the sense of having very little connection or relationship with the prior place. It is thoroughly dissimilar although coincidentally nearby.

Similarly, the Appellant argues in part that the place is not "remote" since Ortiz was standing five or six feet from Nye when he began his search. Again the logic is nonsense. First, this was the position Ortiz apparently chose when Nye

was secured and being booked at the jail. Second, merely because an officer later places a container near the arrestee when he searches it does not convert a search into a search incident. Indeed at that point it is he who is creating any justification of the search as incident. This is clearly wrong. ***See United States v. Perea***, 986 F.2d 633, 636, 643 (2d Cir. 1993)(placing bag in police vehicle near arrested defendant did not make its search incident to arrest); ***United States v. Rothman***, 492 F.2d 1260, 1265 (9th Cir. 1974)(bringing baggage to arrested defendant did not make its search incident to arrest); ***United States v. Rigales***, 630 F.2d 364, 366-67 (5th Cir. 1980)(police could not open heavy zippered bag found in automobile incident to a warrant arrest of a person who had bullets in his jacket); ***See Also United States v. Monclavo-Cruz,*** 662 F.2d 1285, 1286-88 (9th Cir. 1981)(search of purse with arrested defendant being questioned an hour afterward at station house not search incident to arrest).

Appellant also argues that the careful and thoughtful tests of ***United States v. Knapp***, 917 F.3d 1161, 1168-69 (10th Cir. 2019) including (1) whether the person is handcuffed; (2) numbers of officers and arrestees; (3) relative positions of officers, arrestees and the place itself; and (4) ease or difficulty with which arrestee could gain axis to the searched area are too onerous in contrast to merely recalling whether the person was in possession of the item at the time of arrest. This is somewhat ironic inasmuch as testimony of all of the police officers at the hearings varied as to the location of the backpack or if it even existed but varied little as to

the ***Knapp*** factors. ***Knapp*** wisely focused on ***Arizona v. Gant***, 556 U.S. 332, 343-44 (2009) and determined that whether "at the time of the search" the arrestee had the capability to access weapons or destroy evidence was the primary inquiry. ***Knapp, Supra*** at 1168 (emphasis added in Knapp). The ***Knapp*** court then ruled that a zipped shut purse an officer had removed three or four chairs away from her, was not in her immediate control when the handcuffed Ms. Knapp when it was placed on the hood of a police car. ***Knapp, Supra*** at 1164. The prosecution argued unsuccessfully that this was proper under search incident and inevitable discovery. This was the holding despite the handcuffed Knapp's admission under interrogation that the purse contained a gun. ***Knapp, Supra*** at 1164, 1166-70.

Indeed the Appellant's argument that ***Knapp*** curtails officer safety does not apply to this case since Ortiz' safety can scarcely be much of an issue when he has successfully brought his handcuffed arrestee to the jail and subsequently with cuffs, shoes and belts, etc., removed she was being booked. Note also that ***Knapp*** and another case cited by the Appellant, ***Byrd v. State***, 310 P.3d 791 (Wash. 2012), are actually in harmony with respect to the location of the container issue. The Byrd opinion basically hangs its hat on the fact since the purse was on the defendant's lap, thus being removed "from her person" at the time of her arrest, it could be searched incident. ***Id***. at 798-99.

Appellant also attempts to argue that the "roughly contemporaneous" language of certain Ninth Circuit cases make this a valid search incident despite

cases like ***Rice*** and ***Knapp*** or even a commonsense use of the definition of "contemporaneous". These cases are distinguishable from ***Knapp*** based on the notion that the item searched must have been in the arrestee's control at the time of arrest. ***See Also United States v. Camou***, 773 F.3d 932. 942-43 (9th Cir. 2014) (cell phones are not containers for vehicular search after arrest). Much as the "remote" analysis above is not really dependent on distance, so too "roughly contemporaneous" analysis should not be contingent upon the distance between arrest site and place of incarceration, but this is the argument of the ***Appellant's Brief*** at 17-18--including the notion that a vast schism exists between the Ninth and Tenth Circuits on the Routing Statement issue of whether "time of arrest" versus "time of the search." ***See also Appellant's Brief*** at 2 (Routing Statement). This sleight of hand argument ignores the ***Knapp*** focus on accessibility and possible destruction; contrariwise these factors appear to be wisely considered in Judge Kacin's opinion. Instead, the Appellant's argument would make "roughly contemporaneous" standard dependent on the luckiness or unluckiness of proximity to the incarcerating facility. The absurdity of this argument is perhaps most clear in a county like Elko which has an overall area over twice the size of New Jersey.

In truth, ***Rice*** and the instant case represents a logical line of search incident analysis in Nevada. As noted in the Appellee's Routing Statement and the Appellant Brief Nevada law preceding ***Rice*** can be summarized from the

following quotes: In ***Thurlow v. State***, 81 Nev. 510, 513 (1965) the Nevada Supreme Court found that "A search can be incident to arrest 'only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest . . . This right to search and seize without a search warrant extends to the thing under the accused's immediate control.'" ***See Appellant Brief*** at 15.

The second quote is from ***Scott v. State***, 86 Nev. 145, 147 (1970): "'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.' It is apparent that the search in the instant matter was not incident to Scott's arrest, since it was remote in time and place from his arrest." ***See Appellant Brief*** at 16.

Clearly, Judge Kacin's Order comports with ***Scott*** and ***Thurlow*** besides ***Rice***. In all, the remoteness and contemporaneous arguments only support ***Rice***, ***Scott***, and ***Thurlow***. Moreover, not only did Ortiz not make a valid search incident to arrest at the jail but clearly he didn't even think he was doing so at the time.

Additionally, many of the cases Appellant has cited for allowing search incident after the item is seized and the arrestee is handcuffed, ***Appellant's Brief*** at 13, are distinguishable from the instant case. For example ***United States v. Nelson***, 102 F.3d 1344, 1346-47 (4th Cir. 1996) allows such a search incident when the search was at the scene and the delay was reasonable. Here the second but not the first applies. In ***United States v. Morales***, 923 F.2d 621, 622 (8th Cir 1990), the

defendant was arrested but not handcuffed when his bags were searched about three feet away from him. In ***United States v. Herrera***, 810 F.2d 989, 990 (10th Cir. 1987) authorities surveilling the defendant had seen him take a letter with a tracking device enclosed, placed it in a briefcase, then walk towards his car so they knew the evidence was in the briefcase.

This search made in another place without a warrant while the arrestee was being booked and was essentially without access to the container was not incident to the arrest.

**B. Issue Two**: **Inevitable discovery does not apply.**

Again Judge Kacin's opinion is right on point. Although noting that despite Deputy Edgmond's normal procedure left "little doubt that Edgmond inevitably would have discovered both quantities of methamphetamine and the pipe in Nye's backpack had Ortiz not searched it first. However, the court cannot conclude that the contraband would have been found in a ***lawful*** inventory." ***App.*** 187 (emphasis original).

Thus, the District Court was correct to conclude that the deputy failed to produce an actual inventory of the search of the backpack and hence concluded correctly that "'Without an inventory, we can have no inventory search.' ***Greenwald***, ***Supra.*** at 811. For that reason alone, the court must conclude that Edgmond would not have inevitably discovered the methamphetamine and pipe in a ***lawful*** inventory search." ***App***. 187 (emphasis original).

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

For other cases analogous to why inevitability does not apply here: ***See State v. Warren*** 37 P.3d 270, 274-75 (Utah App. 2001) (cannot assume inevitability of finding contraband in vehicle simply because it was going to be impounded); ***See Also United States v. Warren***, 152 F.3d 1034, 1040 (8th Cir. 1998)(exploitation of illegal entry to premises did not support notion that warrant would be granted inevitably); cf. ***United States v. Keszthelyi***, 308 F.3d 557, 571-72 (6th Cir. 2002)(second search not inevitable when first search warrant had terminated); ***Rodriguez v. State***, 187 So. 3d 841, 849-50 (Fla. 2015)(must at least be seeking a search warrant to argue inevitability of illegal search); ***Lee v. State***, 774 A.2d 1183, 1192-93 (Md. App. 2001)(improper no knock clause in search warrant precluded inevitability) .

**C. Issue Three**: **The District Court found correctly that suppression was the proper remedy for deliberate conduct in violation of *Rice* and *Greenwald*.**

Judge Kacin correctly and succinctly found that the exclusionary rule applied. He declared that: "Given the longstanding rule of ***Greenwald*** and ***Rice***, the court is not persuaded by the prosecution's argument that '[a]pplication of the exclusionary rule is unwarranted' here. Ortiz indeed engaged in deliberate conduct

in violation of Greenwald and Rice that is worthy of deterrence. ***See Herring v. United States***, 555 U.S. 135, 144 (2009)(exclusionary rule applies to 'deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence,' not every error that occurs). The pipe and the two quantities of methamphetamine must be suppressed." ***App***. 188.

This seems particularly apt when Ortiz' rationale for the search appears, which was initially in his report and preliminary hearing testimony, that this was an inventory search. He apparently only changed to justifying it as a search incident to arrest when that was how the prosecution below framed its response to the initial motion to suppress. ***See App.*** 107-12 (Opposition to Motion to Suppress not even arguing an inventory by Ortiz). Appellant seems now to argue that Ortiz was acting on something like "good faith" on federal precedent, but how much good faith can you have when you apparently change your "inventory" to "search incident" only after the prosecutor subsequently frames his arguments that way, and where your controlling law is ***Rice***? Clearly it is absurd to believe that Ortiz was relying on federal precedent. Similarly how much "good faith" can buttress a booking inventory consisting of a "bag" in a state that knows of its own precedent of ***Greenwald*** and ***Weintraub v. State***, 110 Nev. 287, 288-89, 871 P.2d 339 (1994) (listing only 8 items and not listing over a hundred was improper inventory)?

**D. Issue Four**: **There are other alternative reasons that this was not a valid search incident to arrest.**

**a. The backpack was apparently out of Nye's control both before and after Ortiz seized it.**

Either alternative suffices to negate a search incident to arrest analysis. ***See State v. Carrawell***, 481 S.W.2d 833 (Mo. 2016). In ***Carrawell***, an officer was arresting a man carrying a plastic bag for his gestures and swearing disturbing the peace of those around him. The man attempted to enter a door and the policeman grabbed hold of him, telling him to drop the bag as he attempted to handcuff him. Eventually when the policeman ripped the bag from Carrawell's hands it fell to the ground with a breaking sound. The officer secured the arrestee in his car then went back and searched the bag, finding a broken plate and a smaller plastic bag containing heroin. The court ruled that since the bag was not within the area of the arrestee's control this was not a valid search incident to arrest but that since there was precedent that supported allowing this search at the time it occurred the search occurred in good faith. ***Id.*** at 838-46. In finding the search not incident to arrest, the court noted that the ***United States v. Edwards***, 415 U.S. 800, 803 (1974) "exception to the general rule allowing the item to be within the immediate control applies only to items that are so entwined with the arrestee's person that they cannot be separated from the person at the time of arrest." ***Carrawell***, ***Supra.*** at 840. Obviously, the backpack was separated from Ms. Nye at the time of arrest and quite likely before it and even if taken from her, Ortiz could not search it then nor take it with him then much later perform a search incident to arrest. ***See***

***People v. Morales***, 2 N.Y.S.3d 472, 473-76 (A.D. 2015)(when defendant arrested and his jacket under control of police and on a vehicle's trunk, search of jacket was not search incident); ***People v. Julio***, 666 N.Y.S.2d 171, 172 (A.D. 1997)(search of bag not incident to arrest where bag in possession of officer, and defendant who had abandoned ammunition clip was handcuffed); ***People v. Wilcox***, 22 N.Y.S.3d 717, 718-20 (A.D. 2015)(even where pill bottle containing suspected heroin fell from jacket while arresting defendant, subsequent search after arrest, removal of cuffs to get jacket off, re-cuffing, and securing jacket in another room not search incident) (state const.).

**b. Search incident analysis also supports allowing Nye to give the backpack to her friend**.

Under search incident analysis, Ortiz was wrong to prevent Nye from giving the backpack to her friend. ***See State v. Graham***, 898 P.2d 1206, 1207-08 (Mont. 1995). In Graham, the defendant, who was passenger in vehicle stopped and arrested on a warrant, asked to leave her purse in the vehicle--which neighbor was retrieving-- because the purse contained food stamps her children would need. Police took the purse to the police station anyway and inventoried it finding drugs. The drugs were not admissible as a search incident to arrest because the search was not relevant to the warrants, would not have prevented an escape, and did not protect the arresting officer. ***See also United States v. Goodrich***, 183 F. Supp. 2d 135, 137, 140-45 (D. Mass 2001)(whether an appropriate person is available to

move vehicle factor in decision to tow; wife of defendant who would take car from parking lot constituted an appropriate situation to release vehicle rather than tow it; towing policy should be written). Although Ortiz indicated he did not see such a person, it seems clear Nye should have been given the chance to point out the friend since (1) police had been summoned to a disturbance by three people and (2) however much disturbance Nye had caused she was merely being [citizen] arrested for trespassing. Allowing her to give the backpack to a friend also makes sense since Ortiz stressed that part of the reason he would not allow her to do it was because of possible accusations of theft. Clearly, these are far more likely if he takes the backpack.

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

**E. Issue Five**: **Alternatively, Ortiz' search of Nye's backpack can be found to be an invalid inventory search**.

**a. The inventory by Ortiz was improper**.

Had the District Court taken Ortiz at his original and preliminary hearing stance that this was a valid inventory search that search would have still been illegal under ***Rice***. In ***Rice***, after one officer then "walked over, got the backpack, [and] opened it to check to make sure there was no further contraband," ***Id.*** at 427, the Nevada Supreme Court found that the search was not valid as an inventory search since the officer admitted he was looking for contraband and because there

was no indication that a formal inventory was prepared at the time of Rice's arrest. ***Id.*** at 430-31. This took place in the present case in both instances with Ortiz falsely claiming doing an inventory and producing no inventory and Deputy Edgmond admits to be looking for contraband and in the written inventory is a "bag".

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

Likewise, here as in ***Rice***, Ortiz did no formal inventory of what he characterized as an inventory search and admitted that he was in part looking for contraband. Indeed, even when an inventory record lacks specific entries to show it is for the protection of property contraband found will be suppressed. ***State v. Greenwald***, 109 Nev. 808, 858 P.2d 36 (1993)(inventory was ruse and contraband suppressed when found hidden in a zippered toiletry case and quantities of non-contraband items found were not listed); e.g., ***Weintraub v. State***, 110 Nev. 287, 288-89, 871 P.2d 339 (1994)(listing only 8 items and not listing over a hundred was improper inventory); ***Accord United States v. Taylor***, 636 F.3d 461, 464-66 (8th Cir 2011)("misc. tools" for hundreds of them plus testimony that would not have arrested and impounded but for belief that narcotics crime evidence would be found improper): ***United States v. Reed***, 2018 U.S. Dist. LEXIS 94483 at 19-20

(need to comply with inventory procedures; failure to document inventory made search invalid); ***State v. Stauder***, 264 S.W.3d 360, 361-65 (Tex. App. 2008)(failure to comply with inventory procedures by failing to prepare inventory list rendered search of vehicle improper); ***See United States v. Vernon***, 511 Fed. Appx. 318, 322-23 (5th Cir. 2013)(failure to show compliance with inventory policy led to suppression); ***United States v. Hope***, 102 F.3d 114, 116-17 (5th Cir. 1996)(Texas officer saying Memphis police did inventory insufficient to prove Memphis procedure followed); ***United States v. Monclavo-Cruz***, 662 F.2d 1285, 1286-89 (9th Cir. 1981)(search of purse with arrested defendant being questioned an hour afterward at station house not search incident to arrest or justified as inventory); ***State v. Hamilton***, 67 P.3d 871, 876-79 (Mont. 2003)(where lost wallet apparently contained identification and check book clearly visible opening coin purse and taking inventory though none was recorded was invalid search)(state const.); ***See Also United States v. Caskey***, 2013 U.S. Dist. LEXIS 1167 at 4-14 (failure to show that search complied with inventory policy when list did not comply with noting valuables but rather with evidence likely valuable to kidnaping investigation); ***State v. Baylor***, 860 N.W.2d 924, (Iowa Ct. App. 2014) ("In the context of an inventory search, the government must produce evidence that the impoundment and the inventory search procedures were in place and that law enforcement complied with those procedures. ***United States v. Kennedy,*** 427 F.3d 1136, 1144 (8th Cir.2005)."); ***See Also***, e.g., ***United States v. Judge***, 846 F.2d 274,

276 (5th Cir. 1988)(DEA inventory must comply with their procedure in regard to closed containers; remanded to determine compliance).

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

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

**c. Nye should also have been permitted to give the backpack to her friend under inventory analysis.**

Moreover, when Nye sought to give the backpack to a friend, Ortiz was wrong to seize it then take it to the jail and claim to be inventorying it. ***See United***

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

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

Furthermore, the illegal inventory on the heels of what appears to have been an illegal seizure seems wrong. In the following cases a subsequent search even following a legal search or seizure were deemed improper. ***See United States v. Khoury***, 901 F.2d 948, 958-60 (11th Cir. 1990)(subsequent examination of diary after already leafing through it for inventory improper); ***United States v. Rosas***, 2011 U.S. Dist. LEXIS 151622 at 19-30 (can't subsequently search as inventory

when have already searched with probable cause); ***See Also United States v. Davis***, 430 F.3d 345 (6th Cir. 2005)(second sniff by second drug dog after first drug dog failed to alert did not provide probable cause); ***United States v. Esparza***, 2007 U.S. Dist. LEXIS 66455 at 1-10 (sniff by explosives dog did not provide probable cause to search after drug sniffing dog failed to alert); ***Robinson v. City of San Diego***, 954 F. Supp. 2d 1010, 1021 (S.D. Cal. 2013)(rechecking license plate improper when cause for stop vitiated); ***State v. Smith***, 345. Md. 460, 469-70 693 A.2d 749 (1997)(double checking waistband in Terry pat down exceeded scope).

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

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

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

Last, even if the property had been ostensibly inventoried properly, there would still be the question of whether the [apparently first] searched black case and the white or clear should have been opened as part of the inventory. ***See State v. Ridderbush***, 692 P.2d 667, 671-72 (Or. App. 1984)(basic principal that "no closed, opaque container may be opened to determine what, if anything is inside it so the

contents may be inventoried in turn")under (state constitution.; based on principle s that inventories of impounded personal property are for "(1) the protection of the person's property while in police custody; (2) the reduction or elimination of false claims against the police for lost or stolen property; and (3) the protection against possible injury to persons or property from impounded but un-inventoried property")(state const.); ***See Also State v. Hite***, 338 P.3d 803, 805-812 (Or. App. 2014)(state const.)(inventory policy requiring officers to look for broad range of items, such as food or alcohol, and hence open all closed containers meant search of backpack violated state constitution as overbroad).

In any event, the violations noted above indicate that if Ortiz' search is instead to be analyzed as an "inventory" search of Nye's backpack, it was improper and the evidence found therein should be suppressed.

## CONCLUSION

In view of the above authorities, the illegally obtained evidence was properly suppressed. Common sense application of this Court's past definitions of the English language should not be ignored for the State's ultimate purpose of the Ends justifying the Means. Contemporaneous is defined as "taking place at the same time as another occurrence" ***Definition of Contemporaneous, Black's Law Dictionary Free 2nd Ed. and The Law Dictionary***, (Aug. 13, 2019, 2:41 p.m.), https://thelawdictionary.org/contemporaneous/. Certainly ***Rice*** should not be overruled based on the presentation of the State in the present case. The "bag" was

not searched incident to arrest (not even remotely contemporaneous with the arrest) nor was a legal inventory performed by Ortiz or the Elko County Sheriff's Office based on well established cited authorities. Without actually doing the requisite search or inventory correctly the State should not be rewarded for the errors and the exclusionary rule was appropriately applied by the District Court. As the evidence was properly suppressed the Appeal of the State should be denied.

Dated this 14th day of August, 2019.

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## CERTIFICATE OF COMPLIANCE

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Dated this 14th day of August, 2019.

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## CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of August, 2019. Electronic Service of the Appellant's Response Brief shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

Tyler J. Ingram, Esq.
Elko County District Attorney
Chad B. Thompson, Esq.
Deputy District Attorney

DATED this 14th day of August, 2019.

/s/ Reta J. Loreman