IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

CASE NO.78230

KIMBERLY MARIE NYE,

Respondent.

APPELLANT'S REPLY BRIEF

THE HONORABLE AARON D. FORD
ATTORNEY GENERAL OF NEVADA
100 N. CARSON STREET
CARSON CITY, NV 89701

TYLER J. INGRAM
Elko County District
Attorney's Office
CHAD B. THOMPSON
State Bar Number: 10248
540 Court Street, 2nd Floor
Elko, NV 89801
(775) 738-3101
ATTORNEYS FOR APPELLANT

DAVID D. LOREMAN
State Bar Number: 3867
445 5TH STREET, SUITE 210
ELKO, NV 89801
(775) 738-6606
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS I

ARGUMENT 1

CONCLUSION 8

CERTIFICATE OF COMPLIANCE 10

CERTIFICATE OF SERVICE 12

ARGUMENT

I. Nye suggests that Thurlow, Scott and Rice are in harmony with one another and that there is no schism amongst the circuits.

Nothing could be further from the truth. Nye did not address the most recent United States Supreme Court case in its brief which clarifies, to some extent, the state of the law.

> Three related precedents govern the extent to which officers may search property found on or near an arrestee. Chimel *v.* California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685, requires that a search incident to arrest be limited to the area within the arrestee's immediate control, where it is justified by the interests in officer safety and in preventing evidence destruction. In United States *v.* Robinson, 414 U. S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427, the Court applied the Chimel analysis to a search of a cigarette pack found on the arrestee's person. It held that the risks identified in Chimel are present in all custodial arrests, 414 U. S., at 235, 94 S. Ct. 467, 38 L. Ed. 2d 427, even when there is no specific concern about the loss of evidence or the threat to officers in a particular case, id., at 236, 94 S. Ct. 467, 38 L. Ed. 2d 427. The trilogy concludes with Arizona *v.* Gant, 556 U. S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485, which permits searches of a car where the arrestee is unsecured and within reaching distance of the passenger compartment, or where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle, id., at 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485. Pp. 381-385, 134 S. Ct. 2473, 189 L. Ed. 2d, at 439-441.

Riley v. California, 573 U.S. 373, 374, 134 S. Ct. 2473, 2477-78 (2014).

What now follows, via the likes of Camou, Byrd and Knapp previously cited

in the opening brief, is the debate over the "time of the arrest" and "time of the search" analysis. Items, bags or containers of any sort on or near an arrestee will always be reduced to police control in order to be searched, such that unless the officer is doing the unthinkable, telling the person they are under arrest and then just huddling together with the defendant while searching the bag or purse, then in reality there is no search incident to arrest exception as it pertains to removable bags or containers from a person. United States v. Garcia, 605 F.2d 349, 355, (7th Cir. 1979); United States v. Fleming, 677 F.2d 602 (7th Cir. 1982). This is not supported by the above case law. To take such a position requires reversal of Robinson, but the Supreme Court did not do that in Gant, which the "time of the search" proponents point to as the reason why they have ruled the way they have. A bag in their hands or at their feet cannot be searched, but a cigarette package in their pocket can? What is the difference and how is an officer supposed to know?

The Rice v. State, 113 Nev. 425 (1997) Nevada Supreme Court decision, preceded Camou, Byrd and Knapp by 15 plus years, and made no such "time of arrest" or "time of search" analysis, neither did they cite to or address Thurlow or Scott. While Thurlow via the "substantially contemporaneous with the arrest" language suggests that it adopts the "time

of the arrest" avenue, it appears that Rice without saying so, would be adopting the "time of the search" reasoning. However, there is no overruling of Thurlow or Scott in the Rice decision. Under Thurlow, the search of the backpack in Rice should have been allowed as it was in the immediate vicinity and was searched immediately after the arrest and once placing the defendant in the car, which is as contemporaneous as it gets without searching the bag while the person is still holding it, but Rice failed to follow through and conduct a Thurlow analysis. Id. There is a split and this needs to be decided.

The case cited by Nye, but cited improperly, further accentuates the issue. State v. Carrawell, 841 S.W.3d 833 (Mo. 2016). In Missouri, it appears that they have chosen the "time of the search" interpretation, where the concurring opinion argues for the "time of the arrest." While the Missouri decision is opposite to the state of Washington Byrd decision, what is important to note is that based upon the split decisions about this topic, they upheld the search in the Missouri case as the officer is not to be left high and dry while the courts are unable to agree. Id. at 846 citing Davis v. United States, 564 U.S. 229 (2011).

As it applies to Nye's case, while the officer testified that he would have searched the bag at the scene, his normal practice, due to her behavior

and his close proximity to the jail he put the bag in the trunk without searching it and went to the jail. The reality is though, if Rice is really the law in Nevada and not Thurlow, then Officer Ortiz, once he had handcuffed the unruly Nye and reduced the bag to his or another officer's possession then no search of the bag is allowed, period. The bag could only be searched after stating the words 'you're under arrest' and then proceeding to search it while Nye is free to move about. This makes no sense for officers or arrestees. Such a ruling renders the "substantially contemporaneous with the arrest" inquiries as to time and place meaningless, with the new inquiry from Rice being whether at the time of the search could the person have reached in there and gotten a weapon or destroyed evidence. Such a standard overrules Robinson.

Ortiz's actions were reasonable in light of Thurlow, and what appears to be a recent split amongst courts who are presumptively more aware of the law than he. Ortiz had zero intent to circumvent her 4th amendment rights, but rather initiated a weighing of his obligation to keep the peace and remove her and proceed with protocol. Furthermore, with Thurlow still on the books and not being addressed in Rice, and Rice not delineating any sort of new rule, the officer was reasonable to conclude that to remove her to the jail and conduct the search there would be substantially contemporaneous.

The state would suggest that these are reasonable actions given his competing duties. This is not the heinous conduct that the Herring court is looking for when it invokes the exclusionary rule. If there is an exigency factor that should be considered it is due to the circumstances of the Defendant's behavior and this clearly should be viewed in the State's favor. Even if this is not deemed a valid search incident to arrest, Officer Ortiz's actions in this case were reasonable and the evidence should not be excluded based upon Herring and Davis.

II. Other issues raised by Nye – giving the bag to a friend; The inventory search at the jail; Opaque items searched within the bag.

Nye continues to state that Nye should have been given the opportunity to give her backpack to her friend, but admits there was no friend present anywhere. Surely Nye isn't suggesting that the police have an obligation to taxi her around town to find a friend? The police are neither a taxi service nor a package delivery service. The first case cited by Nye, State v. Graham, 898 P.2d 1206 (Mont. 1995), has nothing to do with this issue. The second case, United States v. Goodrich, 183 F. Supp. 2d 135 (D. Mass. 2001), highlights the community caretaking doctrine, which Officer Ortiz in this case followed by taking her belongings to the jail with her

rather than leave them on the floor of the casino. Neither case stands for the proposition that the police must look for the friend.

Once at the station, Officer Ortiz did search the backpack, in accordance with the jail policy, as did Deputy Edgmond:

> "a. The sheriff or his designee will set forth a list of items that an inmate will be allowed to keep in their possession while in the facility."
> "k. If feasible, this accounting shall take place in the presence of the officer bringing the inmate to the facility or some other staff member."
> AA p. 192-193.

As so noted in the inventory policy, the language clearly indicates that they are looking for items that cannot be kept at the facility, this was Officer Ortiz's job.

The officer calling it an inventory search does not change the legal analysis. Officers are not lawyers. The nuances and exceptions regarding the 4th Amendment case law are best reviewed by a court not during the tense situation on the side of the road or while dealing with an unruly defendant. The Rice court even concedes as much by reviewing the case, on its own initiative even though it wasn't briefed on either issue, for both a search incident to arrest and an inventory search when the officers clearly state it was an inventory. Rice at 427, 430-431.

Finally, searching a bag is no different than a container within a bag and the officers have a duty to keep dangerous items out of an institution like a jail. They did so and accounted, i.e. inventoried, that which was kept at the jail, not what was seized and removed from the jail, in compliance with the policy stating that "All property shall be inventoried and receipted." AA p. 192. This must necessarily include all containers. Much is made of the inventory, but does Greenwald really stand for the proposition that in a woman's purse or bag an officer must include on the inventory the following type of list: 1 tissue, 1 nail file, 1 eyeliner, 1 package of gum with 3 pieces left in the package, 2 hair ties, 3 crumpled pieces of paper with the following writing upon them... and on and on. An officer like Deputy Edgmond is trying to keep items out of the jail as well as secure the inmate's property. If unallowed items are located they bring it to the attention of the arresting officer and then inventory the item, as simply a bag. This should be sufficient and is precisely the type of inventory that Greenwald suggested she conduct if she is really conducting an inventory.

Deputy Edgmond did make an inventory of Nye's things that were kept in the jail storage bag at the jail while awaiting her release. The District Court's finding that the inventory at the jail, of the property to be stored

there, was not a sufficient inventory to support a finding of inevitable discovery was clearly erroneous and should be reversed.

CONCLUSION

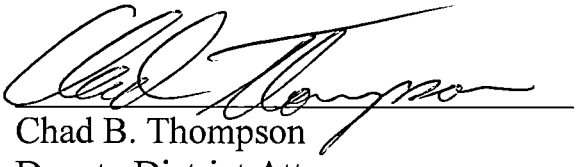
To be clear what this court must decide is what guidance to give an officer. Rice did not discuss Thurlow so clarification is needed. The United States Supreme Court decisions Riley and Robinson suggest containers on or near the person may be searched if it is substantially contemporaneous with the arrest, time and place. It is impossible to search an item without reducing it to police control away from the Defendant such that in every case under the "time of the search" analysis searching an item will be deemed not a search incident to arrest, in essence abolishing the search incident to arrest rule as it applies to containers on or in the control of an arrestee. This can't be what the Supreme Court intended. Under Thurlow, the Rice officers should have been able to search the backpack. Greenwald was totally inapplicable because the motorcycle was not going to go with the officers in the car ride to the jail and it is a place to be searched not a part of the person as Robinson makes clear is permissible. An officer should be able to search a bag carried by an arrestee prior to putting it in the car at the very least.

Alternatively, the exclusionary rule should not be applied due to the reasonable efforts to remove her from the area based upon the Defendant's

behavior, the short delay that it caused and the inventory that was conducted at the jail.

RESPECTFULLY SUBMITTED this 28 day of August, 2019.

TYLER J. INGRAM
Elko County District Attorney

By: 
Chad B. Thompson
Deputy District Attorney
State Bar Number: 10248

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in size 14 point Times New Roman font.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Reply Brief exempted by NRAP32(a)(7)(C), because it contains 2,057 words.

I hereby certify that I have read the Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28 day of August, 2019.

TYLER J. INGRAM
Elko County District Attorney
540 Court Street, 2nd Floor
Elko, NV 89801

By: _____
Chad B. Thompson
Deputy District Attorney
State Bar Number: 10248

CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of August, 2019. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

Honorable Aaron D. Ford
Nevada Attorney General

and

DAVID D. LOREMAN
Attorney for Appellant

Erika Weber
CASEWORKER

DA#: AP-19-00513