

CONCLUSION

Because the initial show-up identification was unnecessarily suggestive and there is no indicia of reliability in Mr. Munoz's identification of Mr. Harvey. Thus, Mr. Harvey requests that the initial identification and all subsequent identifications be suppressed, or alternatively requests an evidentiary hearing before the court.

DATED this 21st day of October, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Jasmin Spells
JASMIN D. SPELLS, #11635
Deputy Public Defender

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NOTICE OF MOTION

TO: CLARK COUNTY DISTRICT ATTORNEY; Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing MOTION on for hearing before the Court on the 2nd day of November, 2016, at 9:30 a.m.

DATED this 21st day of October, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: _____
JASMIN D. SPELLS, #11635
Deputy Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing MOTION was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountydade.com on this _____ day of October, 2016.

By: /s/Jasmin D. Spells - PD
An employee of the
Clark County Public Defender's Office

EXHIBIT A

Exhibit A

See PHT – Pages 2-24

EXHIBIT B

DECLARATION OF ARREST

"Click here to add/edit Event# and ID# on all pages"

Event #: **160330-3003**I.D. #: **7013098****"PRINT"**True Name: **HARVEY, ALFRED**Date of Arrest: **03-30-16**Time of Arrest: **1624****OTHER CHARGES RECOMMENDED FOR CONSIDERATION:**

Other Charges

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with the Las Vegas Metropolitan Police Department, Clark County, Nevada, being so employed for a period of 6 YEARS 11 MONTHS.

That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense(s) of ROBBERY WDW at the location of 4640 W SAHARA, and that the offense(s) occurred at approximately 1621 hours on the 30 day of MARCH, 2016, in the:

☐ County of Clark☒ City of Las Vegas**DETAILS FOR PROBABLE CAUSE:**

On 03-30-16, at approximately 1635 hours, I Officer R. Nelson P# 14002 working as marked patrol unit 3U56 was dispatched to TJ Maxx located at 4640 W Sahara reference a Robbery. Details stated that a male threatened a worker with a knife and left with merchandise.

Upon arrival I made contact with Julian Munoz who works in Loss Prevention for TJ Maxx. Munoz stated that he observed a black male adult wearing a blue dress shirt, blue blazer, and shorts in the children's department who was later identified as Alfred Harvey. Harvey began selecting multiple items very rapidly with no regard to price or size. Harvey then entered the Men's department where Munoz observed him conceal two wallets among multiple other items inside his blazer. Harvey then entered the fragrance department where he selected face cream and multiple other items before exiting the store and passing all points of sale. Munoz approached Harvey and identified himself as Loss Prevention for TJ Maxx. Munoz asked for the unpaid items back and Harvey handed him two wallets. Munoz then asked Harvey to step back inside the store and Harvey refused. Munoz asked again because he did not want to conduct business in front of Harvey's children. At this time Harvey pulled out a knife with a black handle and a blade approximately 4 inches long. Harvey held the knife over his head in a threatening manner and stated to Munoz "we're not doing this today". Munoz immediately felt threatened and feared for his life so he backed off and watched Harvey from a distance.

Munoz could still see items concealed Harvey's blazer and observed him getting in the drivers seat of a UHaul van bearing AZ tag AG55084. The van drove west through the parking lot and north on Decatur. At this time LVMPD air unit spotted the van bearing AZ tag AG55084 turn eastbound Charleston from Decatur then southbound on Vista where Patrol Officer T. Humphreys P#14084 located the van at 1312 Vista and took Harvey into custody. At 1716 hours a Show-Up

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are misdemeanor).

Declarant must sign all page(s)
with an original signature.

R. NELSON

Print Declarant's Name

Declarant's Signature

P#

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
CONTINUATION REPORT

Event #: 160330-3003

ID#: 7013098

was conducted and Munoz identified Harvey 100 percent being the male who stole from the store and threatened him with the knife.

When Officer Humphreys took Harvey into custody, Harvey was in possession of a silver wallet which contained two counterfeit \$100 bills along with a paper with multiple credit card numbers along with pin numbers to those credit cards. During inventory of the Uhaul van due to it being towed Officer Resberg P# 10007 located multiple credit cards with multiple persons names inside the drivers side door. Officer Resberg also located a wallet, face mask lotion, women's lotion and perfume all with TJ Maxx tags on them in the front of the van stuffed in between the drivers seat and console. All TJ Maxx items were impounded as evidence and the credit cards, counterfeit money and paper containing credit card numbers and pins were given to Detective Heindel P#5606 with Fraud and Forgery for further follow up.

Based on the above facts and circumstances of Harvey stealing items from the TJ Maxx, producing a knife and raising it over his head in a threatening manner when confronted by Munoz causing Munoz to feel threatened and fear for his life, Harvey was placed under arrest for Robbery with a deadly weapon and transported to CCDC where he was booked.

Declarant must sign all pages
with an original signature.

R. NELSON

Print Declarant's Name

Declarant's Signature

1402
P#

EXHIBIT C

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
PROPERTY REPORT**

Date of LVMPD Possession 3/30/16	Time of LVMPD Possession 1600	Page(s) 1 OF 1
Event #	160330-3403	

Incident
ROBBERY W/OV

EVIDENCE <input checked="" type="checkbox"/> Felony <input type="checkbox"/> Gross Misd <input type="checkbox"/> Misdemeanor List Other Related Event #'s (if any):		<input type="checkbox"/> NO EVIDENTIARY Value: <input type="checkbox"/> No Owner Identified <input type="checkbox"/> Destroy <input type="checkbox"/> Return To DMV		<input type="checkbox"/> SAFEKEEPING Must provide Owner info in Persons Section AND Identify Owner # for each item Listed		FIREARM IMPOUNDED DUE TO: <input type="checkbox"/> Temporary Protective Order (TPD) <input type="checkbox"/> Extended Order of Protection	
Impounding Officer (Print Name): T. HUNTER		Unit: 3013		P# / Initials T14084 M		Task Force Officers from Other Jurisdictions: PRINT LVMPD SGT Name & P#	
Supervisor Approving (Signature): 		Unit: 722		P# / Initials R7525P			

PERSONS - (S)USPECT / (V)ICTIM / (O)WNER / (F)INDER

<input checked="" type="checkbox"/> S <input checked="" type="checkbox"/> V <input type="checkbox"/> O <input type="checkbox"/> F	Last Name HARVEY	First Name, MI ALFRED	DOB 12/19/76	Phone #	Charge(s) ROBBERY W/OV
#	1				
Street Address 3455 SWENSON #170		City LV	State NV	Zip Code 89119	Arrest Date 3/30/16
					ID# 7013098
<input checked="" type="checkbox"/> S <input checked="" type="checkbox"/> V <input type="checkbox"/> O <input type="checkbox"/> F	Last Name	First Name, MI	DOB	Phone #	Charge(s)
#					
Street Address		City	State	Zip Code	Arrest Date MAY 30 2016
					ID#
<input checked="" type="checkbox"/> S <input checked="" type="checkbox"/> V <input type="checkbox"/> O <input type="checkbox"/> F	Last Name	First Name, MI	DOB	Phone #	Charge(s)
#					
Street Address		City	State	Zip Code	Arrest Date MAY 30 2016
					ID#

FIELD RELEASE ONLY	Released Item(s) #	By Officer P# & Initials	Date Released	Released to Owner (Above Person) #	Owner's Signature
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(Relating to impound)
**ALL ITEMS BELOW WERE FOUND INSIDE A VEHICLE
 VEH THAT THE SUSPECT WAS DRIVING. ALL ITEMS ARE RELATED
 TO THE ROBBERY W/OV AND OTHER CHARGES PENDING AGAINST
 THE SUSPECT.**

PKG #	ITEM #	OWNER #	Make or Brand	MODEL	COLOR	Serial # / QAN State & Gov. Issued ID #s	Qty.	PROPERTY DESCRIPTION	
								W/ Firearms MUST list:	1) Barrel Length 2) Country Manufacturer 3) Caliber 4) Action Type (S/A, Auto, Bolt, Revolver, Etc.)
	1			BLUE	BLUE		1	BLUE SPORTS COAT	
	2			BLACK	BLACK		1	KIDWOD KASIO W/ MISC	
	3						1	FACIAL LOTION	
	4						1	BLACK LEATHER WALLET	
	5						1	WOMEN'S PERFUME	
	6						1	WOMEN'S PERFUME	
	7						1	BAG OF SEVERAL MISC METAL ANTI-THEFT TAGS.	

EXHIBIT D

FYI

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT

Event #

110330-303

"PRINT"

Click here to add/edit Event Number

Specific Crime <u>Robbery W/DW</u>	Date Occurred <u>03-30-16</u>	Time Occurred <u>1021</u>
Location of Occurrence <u>4640 W. SAHARA</u>	Sector/Beat <u>U3</u>	City <input checked="" type="checkbox"/> Las Vegas
TJ Martz		County <input type="checkbox"/>

Your Name (Last / First / Middle) <u>Munoz, Julian, Jose</u>					Date of Birth <u>4/7/1986</u>		Social Security # <u>530-77-0553</u>	
Race <u>H</u>	Sex <u>M</u>	Height <u>6'1"</u>	Weight <u>240</u>	Hair <u>Br</u>	Eyes <u>Br</u>	Work Schol. (Hours) <u></u>	Days Off <u></u>	Business / School <u>TJ Martz</u>
Residence Address (Number & Street) Bldg/Apt. # <u></u>						City <u></u>	State <u></u>	Zip Code <u></u>
Res. Phone <u>702-280-2479</u>						Bus. Phone <u>702-870-7161</u>		
Business (Local) Address (Number & Street) Bldg/Apt. # <u>4640 W. Sahara</u>						City <u>Las Vegas</u>	State <u>NV</u>	Zip Code <u>89102</u>
Occupation <u>Loss Prevention</u>						Departure Date (if Visitor) <u></u>		
Best place to contact you during the day: <u>TJ Martz</u>					Best time to contact you during the day: <u>Any</u>		Can you identify the suspect? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

DETAILS:

On 3-30-2016 at approximately 16:21 hours I, Julian Munoz, observed a black male adult, wearing a hot, blue dress shirt, black blazer, and shorts, in the TJ Martz Children's department selecting merchandise irradically without regard to price or size. I observed the subject enter the Men's department and select 2 wallets among other things. The subject walked around the store and concealed the wallets in his blazer. The subject then entered the Fragrance department, selected a cream, and concealed it in his shorts. The subject then proceeded to exit the building, passing all points of purchase, without attempting to pay for the concealed merchandise. Once outside, I approached the subject, identifying myself as TJ Martz L.P., and asked for the unpaid for merchandise back. The subject handed me the 2 wallets. I then asked the subject to step back in the store with me. The subject refused. I told the subject that I would prefer if we settled everything in the store and not in front of the children. The subject then pulled out what looked like

For Official Use Only

I HAVE READ THIS STATEMENT AND I AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT (LOCATION) 4640 W. Sahara Bldg. H

ON THE 30 DAY OF March, 2016 AT 5:00 ☐ A.M. ☒ P.M.

Witness/Officer:

Witness/Officer:

R. M. (Signature)

H/W2 (Signature)

SIGNATURE OF PERSON GIVING STATEMENT

16F05049X - HARVEY, ALFRED

Page 18 of 23

VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT CONTINUATION

Page 2 of 2

Event #: 100330-3003

a black handled knife, about 4 inches long. At this point I backed off and watched the subject get into a white Chevrolet with Arizona plates and drive off property heading North on Decatur. I backed away from the subject because I felt threatened and feared for my life. When the subject pulled the knife he held it high and said "We're not doing this today."

Witness: [Signature]

Witness: R. [Signature]

LYMPH OF [Signature]

10F03049X - HARVEY, ALFRED

SIGNATURE OF PERSON GIVING STATEMENT

Page 19 of 20

PRINT NAME OF PERSON GIVING STATEMENT

EXHIBIT E

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
SHOW-UP WITNESS INSTRUCTIONS**

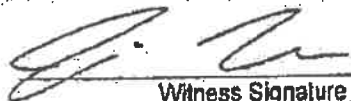
EVENT #: 1100-330-3003

NAME: MUNIZ, JULIAN INTERVIEWED BY: RUELSON 1402

ADDRESS: 4140 W. SAHARA (TT MAXX) LOCATION: 4140 W. SAHARA TT MAXX

PHONE NUMBER: 702-280-2479 DATE: 03-30-16 TIME: 1710

"In a moment I am going to show you a person who is being detained. This person may or may not be a person who committed the crime now being investigated. The fact that this person is detained should not cause you to believe or guess that he/she is guilty. You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those who are guilty. Please keep in mind that clothing can be easily changed. Please do not talk to anyone other than police officers while viewing this person. You must make up your own mind and not be influenced by other witnesses, if any. When you have viewed the person, please tell me whether or not you can make identification. If you can, tell me in your own words how sure you are of your identification. Please do not indicate in any way to other witnesses that you have or have not made an identification. Thank you."


Witness Signature

03-30-16 / 1715
Date/Time

Statement:

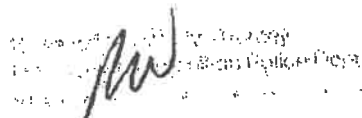
Yes, I am 100% sure that's him. I recognize his face and tattoos on his neck.

Use separate statement for each witness.
Witness must be 18 years of age or older.
Witness must be a resident of Las Vegas.
Witness must be a resident of the same neighborhood as the crime scene.

MAY 19 2016


Witness Signature

03-30-16 / 1718
Date/Time


Officer Signature

Officer Signature

03-30-16 / 1718
Date/Time

***** Below to be completed ONLY after Show-Up has been completed and NOT in the presence of the witness. *****

Detainee Name: <u>HARVEY, ALFRED</u>		DOB: <u>12-19-76</u>	ID or SSN: <u>MH 7013098</u>
Address: <u>3955 SWANSON LN NW 89119</u>		Phone Number: _____	
Mode of transportation used to take witness to Show-Up:			
<input checked="" type="checkbox"/> Marked Patrol Unit	<input type="checkbox"/> Unmarked Unit	<input type="checkbox"/> Private Conveyance	<input type="checkbox"/> Other: _____
# of Officers present at Show Up: _____	Uniformed: <u>1</u>	Plain Clothes: _____	
Lighting Conditions:			
<input checked="" type="checkbox"/> Daytime	<input type="checkbox"/> Nighttime	with: <input type="checkbox"/> Spotlights	<input type="checkbox"/> Streetlight <input type="checkbox"/> Other: _____
Identification Made: <input checked="" type="checkbox"/> Yes/ <input type="checkbox"/> No	Suspect Arrested: <input checked="" type="checkbox"/> Yes/ <input type="checkbox"/> No	Arresting Officer #: <u>1402</u>	



CLERK OF THE COURT

1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 BRYAN SCHWARTZ
6 Deputy District Attorney
7 Nevada Bar #013244
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10
11 Plaintiff,

11 -vs-

12 ALFRED C. HARVEY,
13 #7013098

14 Defendant.

CASE NO: C-16-314260-1

DEPT NO: XXIII

15 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS SHOW-UP
16 IDENTIFICATION AND SUBSEQUENT IN-COURT IDENTIFICATION

17 DATE OF HEARING: 11/02/16
18 TIME OF HEARING: 9:30 AM

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
19 District Attorney, through BRYAN SCHWARTZ, Deputy District Attorney, and hereby
20 submits the attached Points and Authorities in Opposition to Defendant's Motion to Suppress.

21 This Opposition is made and based upon all the papers and pleadings on file herein, the
22 attached points and authorities in support hereof, and oral argument at the time of hearing, if
23 deemed necessary by this Honorable Court.

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On April 1, 2016, the State filed a Criminal Complaint against Alfred Harvey
4 (hereinafter "Defendant") charging him with Robbery with use of a Deadly Weapon. On April
5 18, 2016, the preliminary hearing was held in justice court. At the conclusion, the justice court
6 held Defendant to answer the above charges in district court.

7 On April 20, 2016, Defendant was arraigned in District Court on the above count.
8 Defendant subsequently pled not guilty, and his jury trial is currently scheduled for November
9 7, 2016.

10 STATEMENT OF THE FACTS

11 On March 30, 2016, Julian Munoz, working as loss prevention for T.J. MAXX,
12 observed Defendant, via closed circuit television, select items from the store and place them
13 in his coat and pants. Preliminary Hearing Transcript, 4/18/16, pg. 5-6, 9. Munoz then
14 watched Defendant as he left the store without paying for these items. Id. at 6. Munoz then
15 contacted Defendant outside the store and asked him for the items back. Id. at 6-7. Defendant
16 handed back some, but not all of the items. Id. at 7. Munoz then asked Defendant to return to
17 the store with him, and in response, Defendant pulled out a knife and raised it over head, and
18 told Munoz they were not going to do this today. Id. at 8. Seeing the knife, Munoz backed
19 away and Defendant left in a white U-Haul van. Id. at 8-9. Munoz then contacted the police.
20 Id. at 13. Munoz subsequently identified Defendant during a show-up. Id. at 15.

21 ARGUMENT

22 I. THE COURT SHOULD DENY DEFENDANT'S MOTION TO SUPPRESS

23 Defendant's instant Motion to Suppress argues that this Court should suppress the
24 show-up identification because it is unnecessarily suggestive and unreliable. However, based
25 on the totality of the circumstances, the show-up identification in this case was not
26 unnecessarily suggestive, and further, Munoz's identification is reliable.

27 Generally, "the weight and credibility of identification testimony is solely within the
28 province of the jury." Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979). However,

1 to suppress a pretrial out-of-court identification, the defendant must show that: (1) the
2 identification procedure is unnecessarily suggestive, and (2) if so, the identification is
3 unreliable despite the unnecessarily suggestive procedure. Wright v. State, 106 Nev. 647, 650,
4 799 P.2d 548, 550 (1990) (lineup); Gehrke v State, 96 Nev. 581, 584, 613 P.2d 1028, 1029-30
5 (1980) (showup); see Cunningham v. State, 113 Nev. 897, 944 P.2d 261 (1997) (photographic
6 lineup); Stovall v. Denno, 388 U.S. 293 (1967). The court will make this determination based
7 on the totality of the circumstances surrounding the identification. Jones v. State, 95 Nev.
8 613, 617, 600 P.2d 247, 250 (1979).

9
10 **A. THE SHOW-UP IDENTIFICATION AND PROCEDURE IN THIS CASE
WERE NOT UNNECESSARILY SUGGESTIVE**

11 Defendant claims that the show-up procedure and identification were suggestive. Mtn
12 5-7. However, based on the totality of the circumstances, the show up identification and
13 procedure in this case were not *unnecessarily* suggestive.

14 An on-the-scene-of-arrest show-up identification is inherently suggestive, but
15 nevertheless, the Supreme Court has found such show-ups constitutional. Biggers, 409 U.S.
16 at 198, 93 S.Ct. 375, 34 L.Ed.2d 401. Show-up identifications are not objectionable unless
17 the "procedure was so impermissibly suggestive as to give rise to a very substantial likelihood
18 of irreparable misidentification." United States v. Kessler, 692 F.2d 584, 585 (9th Cir.1982)
19 (citation omitted). However, "[s]hort of that, it is for the jury to weigh the evidence and assess
20 the credibility of the eyewitnesses." Gehrke, 96 Nev. at 584, 613 P.2d at 1029.

21 Properly conducted show-up identifications are a "salutory" police practice permitting
22 eyewitnesses to identify a perpetrator while the incident is fresh on their minds. Kessler, 692
23 F.2d at 585. Courts have discussed the importance and necessity of show-up identifications
24 because not only are the identifications more reliable because the memory is fresher, but also,
25 "prompt identifications serve to exonerate innocent people more expeditiously." Jones v. State,
26 95 Nev. 613, 617, 600 P.2d 247, 250 (1979). Additionally, this type of identification procedure
27 quickly informs police officers whether a potentially dangerous suspect is still at large. Banks
28 v. State, 94 Nev. 90, 95, 575 P.2d 592, 595 (1978).

1 Even though show-up identifications are considered inherently suggestive, show-ups
2 are not unnecessarily suggestive when they are supported by the above policy considerations.
3 In Banks, the victim of a robbery identified the defendant during a show-up soon after the
4 defendant was arrested. 94 Nev. at 95, 575 P.2d at 595. The Court held that the show-up was
5 not unnecessarily suggestive because the victim was the only one who could have possibly
6 exonerated the defendant, as she was the only person who interacted with him and his co-
7 conspirators. Id. at 95, 575 P.2d at 595-96. Additionally, the Court recognized how important
8 it is for police officers to determine as quickly as possible whether a robbery suspect was
9 properly apprehended or was still at large. Id. at 95-96, 575 P.2d at 596. Based on this, the
10 Court concluded that the show-up identification was not unnecessarily suggestive. Id.

11 Here, the show-up conducted was not unnecessarily suggestive. Defendant claims that
12 there was no reason why the police officers needed to do a show-up identification. Mtn. 7.
13 Specifically, Defendant argues that “there were no exigent circumstances” that existed to
14 justify the show up. Id. While the Court has consistently held that showups, by their very
15 nature, are suggestive, the present issue revolves around whether the show up conducted in
16 this case was *unnecessarily* suggestive. It was not unnecessarily suggestive because, as in
17 Banks, it was necessary to potentially exonerate the Defendant if he was mistakenly
18 apprehended, and further, to enable police officers to determine whether a potentially armed
19 robbery suspect was still at large. Additionally, the show-up was necessary because Mr.
20 Munoz’s ability to identify the Defendant would logically be better because his mind was
21 fresher – the robbery took place at approximately 4:35 pm and then show-up was conducted
22 at approximately 5:18 pm on March 30, 2016. See State’s Exhibit 1. Thus, the show up was
23 conducted within the hour from when the crime occurred. Therefore, the showup
24 identification was not unnecessarily suggestive and was necessary to support the above policy
25 considerations.

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1 **B. EVEN IF THE COURT FINDS THAT THE IDENTIFICATION**
2 **PROCEDURE WAS UNNECESSARILY SUGGESTIVE, MUNOZ'S**
3 **IDENTIFICATION IS RELIABLE**

4 Defendant claims that the show up procedure and identification were unreliable. Mtn
5 5-6. However, based on the totality of the circumstances, the show-up identification in this
6 case is reliable.

7 The Court enumerated a list of factors to consider when determining whether an
8 identification was reliable. Gehrke, 96 Nev. at 584, 613 P.2d at 1029. These factors include:
9 (1) "the witness' opportunity to view the criminal at the time of the crime," (2) "the witness'
10 degree of attention," (3) "the accuracy of his prior description of the criminal," (4) "the level
11 of certainty demonstrated at the confrontation," and (5) "the time between the crime and the
12 confrontation." Id. (citing Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382 (1972)).
13 In applying these factors to the facts in Gehrke, the Court held that the showup identification
14 was reliable because each witness had an opportunity to see the defendant's face during the
15 crime while they were being held at gun point, their description of the defendant was consistent
16 with what the defendant looked like, the witnesses both testified that there was no doubt that
17 the defendant was the one who robbed them, and the confrontation took place within an hour
18 of the crime. 96 Nev. at 584, 613 P.2d at 1030.

19 Similarly, in Wright, the Court was particularly persuaded that a photographic lineup
20 identification was reliable because the victims "had an opportunity to observe their attacker at
21 close range." Id. Similarly, the Ninth Circuit concluded that an identification was reliable
22 when the witnesses had viewed the suspect for approximately 30 seconds during the robbery
23 and described him to police soon after the incident. United States v. Gregory, 891 F.2d 732,
24 734-35 (9th Cir. 1989); see also Gehrke, 96 Nev. at 584, 613 P.2d at 1030 (finding that an
25 important factor existed to support reliability because the witnesses "had an opportunity to
26 clearly see the robber's face during the holdup").

27 Here, when considering the totality of the circumstances and the factors enumerated in
28 Gehrke, Munoz's identification is reliable.

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1. Munoz had ample opportunity to view Defendant at time of the robbery

Munoz observed Defendant while the Defendant was inside T.J. Maxx and also interacted with the Defendant outside the store, giving him ample time to view the Defendant. Specifically, Munoz testified that he first observed Defendant in T.J. Maxx via closed circuit TV. Defense Ex. 6, pg. 6, 9. He observed Defendant proceeding through the store concealing various items into his coat and pockets, approximating that the Defendant was in the store for 15 to 20 minutes. Id. at 6, 10. Munoz actually described in detail how Defendant was acting while in the store causing Munoz to pay attention to him: "[Defendant] walked in and he quickly started selecting merchandise, kind of at random, and was putting stuff - - picking all that stuff up and putting stuff down, it was just suspicious." Id. at 9-10. Then, after observing him move throughout the store, Munoz approached Defendant once he had exited. Id. at 7. Munoz asked him for the merchandise back, and at first, Defendant indicated that he did not know what Munoz was talking about. Id. Then, when Munoz explained that he needed the items in his pocket back, Defendant returned some of the items he had stolen. Id. Munoz then asked Defendant to come back into the store, and Defendant pulled out the knife and told Munoz they were not doing that today. Id. at 7-8. Munoz then observed Defendant get in a U-Haul van and leave the area. Id. at 8. Thus, even more so than in Gehrke and Gregory, Munoz had ample opportunity to observe Defendant, his face, and clothing, along with interact with him before, during, and after the robbery.

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2. Munoz paid particular attention to Defendant throughout the robbery

As discussed above, Munoz particularly paid attention to Defendant because Munoz was watching him steal items from the store. Id. at 6, 10. Munoz then had a face to face discussion with Defendant, which included Defendant threatening Munoz with a knife. Id. at 7-8. As such, Munoz had reason to pay particular attention to Defendant before, during, and after the robbery.

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1 **3. Munoz's description of the Defendant is consistent with the**
2 **Defendant**

3 Munoz's description of the suspect was consistent with Defendant. Munoz described
4 him as wearing a blazer jacket and shorts, along with a hat. While there is no indication in the
5 current record whether a hat was found, the Defendant was apprehended wearing a blazer and
6 shorts. State's Exhibit 2. Additionally, Munoz described the suspect as a black male adult,
7 which is consistent with the Defendant. Defense Ex. D. Thus, Munoz's general description
8 of the suspect and his clothing are consistent Defendant and the clothing he was wearing at
9 the time he was apprehended.

10 **4. Munoz demonstrated a high level of certainty at the time of the**
11 **confrontation**

12 At the time of confrontation, Munoz indicated that he was 100% sure that Defendant
13 was the suspect who robbed T.J. Maxx. Defense Ex. E.

14 **5. The confrontation occurred within an hour of the robbery**

15 Munoz called 911 to report the robbery at 4:35 pm. (SEE CAD). At 5:18 pm, Munoz
16 identified Defendant in the showup. (SEE CAD). Thus, the showup identification was
17 conducted less than an hour after Munoz was robbed by Defendant.

18 Based on the above factors, it is clear that Munoz's show-up identification of Defendant
19 is reliable.

20 **II. THIS COURT SHOULD NOT BAR ALL SUBSEQUENT IN-COURT**
21 **IDENTIFICATIONS OF DEFENDANT**

22 Defendant requests that any future in-court identification be suppressed. Mtn. 8.
23 However, this Court should deny Defendant's request as he fails to make the appropriate
24 showing to justify barring in-court identifications in all future court proceedings.

25 For this Court to suppress or exclude an in-court identification, the Nevada Supreme
26 Court has stated that the pretrial identification procedures must have been "so unnecessarily
27 suggestive and conducive to irreparable mistaken identification" as to be a denial of due
28 process of law. Carmichel v. State 86 Nev. 205, 206, 467 P.2d 108, 109 (1970) (quoting

//

1 Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972 (1967); Simmons v. United States,
2 390 U.S. 377, 88 S.Ct. 967 (1968); McCray v. State, 85 Nev. 597, 460 P.2d 160 (1969)).

3 In U.S. v. Sambrano, 505 F.2d 284, 286 (1974), the persons accused complained that
4 the pretrial identification procedures used against them were impermissibly suggestive. There,
5 the victims were shown photographs including the two defendants, and identified the first
6 defendant but not the second. Afterwards, a lineup was conducted with the defendants
7 included. One victim chose the first defendant, stating that her identification may be based on
8 being shown the same photograph previously. The other victim chose the first defendant and
9 did not qualify her answer. Neither victim chose the second defendant. At a pretrial hearing,
10 the victims both identified the first defendant, and the second defendant, whom neither had
11 previously identified, but whose photos they had seen in two different procedures. The Court
12 stated that "we do not believe that the suggestion, if any, was so great as to create a substantial
13 likelihood of misidentification." The Court pointed out that:

14 As recently pointed out by the Supreme Court, a mere suggestion that
15 the accused committed the crime does not constitute a due process
16 violation. Rather, in order to make out a constitutional violation, the
17 suggestion must be so 'unnecessary' or 'impermissible' as to create
18 a 'substantial likelihood of irreparable misidentification' based on
the 'totality of the circumstances.' Neil v. Biggers, 409 U.S. 188, 93
S.Ct. 375, 34 L.Ed.2d 401 (1972); Baker v. Hocker, 496 F.2d 615
(9th Cir. 1974).

19 Id. at 286. The Court found no problem with admitting the in-court identification. The Court
20 explained its holding as follows:

21 Viewing all the facts and circumstances of this case, we do not
22 believe that the suggestion, if any, was so great as to create a
23 substantial likelihood of misidentification. The identifying witnesses
24 had the opportunity to observe the robbers for approximately four
25 minutes while the robbery was taking place. During the trial, they
26 again had the opportunity to observe the appellants' appearance and
27 mannerisms and, based on these subsequent observations, positively
28 concluded that these two were the perpetrators of the robbery.
Moreover, additional evidence was introduced at trial establishing
that Padilla was one of the robbers. For example, testimony placed
both Padilla and Sambrano in the getaway car just prior and
immediately after the robbery of the credit union.

Id. at 286.

1 "The reliability of properly admitted eyewitness identification, like the credibility of
2 the other parts of the prosecution's case is a matter for the jury." Foster v. California, 394 U.S.
3 440 (fn. 2), 89 S.Ct. 1127 (1969). "The danger that use of (a pretrial identification technique)
4 may result in convictions based on misidentification may be substantially lessened by a course
5 of cross-examination at trial which exposes to the jury the method's potential for error."
6 Simmons, 390 U.S. at 384, 88 S.Ct. at 971.

7 Here, Defendant has failed to show that the above discussed show-up identification was
8 "so unnecessarily suggestive and conducive to irreparable mistaken identification," such that
9 he would be denied due process. Carmichel, 86 Nev. at 206, 467 P.2d at 109. As noted above,
10 Munoz's identification of Defendant in the show-up is not unnecessarily suggestive, and is
11 certainly reliable. Even if this Court disagreed and suppressed the lineup, Defendant still fails
12 to satisfy the burden necessary to prevent the State from future in-court identifications. Id.
13 Further, this is not the only piece of evidence tying Defendant to this crime. Defendant is
14 captured on surveillance stealing items from T.J. Maxx. The surveillance clearly shows
15 Defendant selecting items and concealing them on his person. Thus, similar to Sambrano,
16 additional evidence exists to tie Defendant to this crime. As such, this Court should not bar
17 the State from any future in-court identifications of Defendant.

18 CONCLUSION

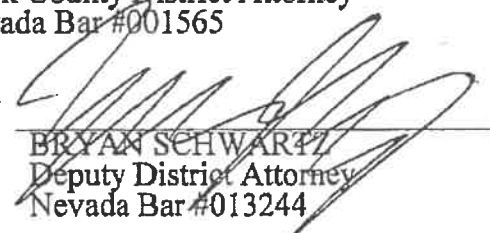
19 The State requests that this Court DENY Defendant's Motion to Suppress.

20 DATED this 31st day of October, 2016.

21 Respectfully submitted,

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

25 BY

26 
27 BRYAN SCHWARTZ
28 Deputy District Attorney
Nevada Bar #013244

1 CERTIFICATE OF ELECTRONIC FILING

2 I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S
3 MOTION TO SUPPRESS SHOW-UP IDENTIFICATION AND SUBSEQUENT IN-
4 COURT IDENTIFICATION, was made this 31st day of October, 2016, by Electronic
5 Filing to:

6 JASMIN D. SPELLS
7 DEPUTY PUBLIC DEFENDER
8 EMAIL: Lillyjd@clarkcountynv.gov;
9 pdclerk@clarkcountynv.gov;

10 P. Manis
11 Secretary for the District Attorney's Office
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BS/pm/L-2

EXHIBIT "1"

LVMPD - COMMUNICATION CENTER
EVENT SEARCH

EVT : LLV160330003003	TYPE: 407	PRI : 0
LOC : TJ MAXX	BLDG:	APT :
ADDR: 4640 W SAHARA AVE	XST : 2501 ARVILLE ST	CITY : LV
CADD: 36:08:48N,115:12:18W	CNAM: JULIAN NROOZ/SEC	CPHONE: 7022802479
MAP : 0252291	S/B : U3	SRA : K338
P/U : 3U56	OFF1: 14002	OFF2 :
DATE: 2016/03/30	INIT: 16:35:27	ARBA : BA
911 : YES	CLSR: 21:11:43	DISP : A

16:35:27	EU	INITIATED BY FRM- TO-LV4804	39	LV4804
16:35:27	CM	Original Location : TJ MAXX	39	LV4804
16:35:27	CM	TL1 RES 414A SUSP ARMED W/KNIFE	39	LV4804
16:35:27	CM	Primary Event: MAIN Opened: 16/03/30 16:35	39	LV4804
16:35:35	USAS 3U56	4640 W SAHARA AVE 407	15	LV5015
16:35:35	EU 3U56	FU FRM- TO-LV/3U56	15	LV5015
16:35:41	USER 3U56	4640 W SAHARA AVE 407	00	LV14002
16:36:01	USAS 692	4640 W SAHARA AVE 407	15	LV5015
16:36:08	USER AIR3	4640 W SAHARA AVE 407	15	LV5015
16:36:08	USER AIR3	4640 W SAHARA AVE 407	15	LV5015
16:36:10	CM	39/NE DEC SMALL UHAUL VAN AZ/AG55084 1636 HRS	39	LV4804
16:36:52	USAS 3U32	4640 W SAHARA AVE 407	15	LV5015
16:37:05	CM	39/EMA,30'S,6'1,150,BLK/BLU BB CAP,BLU DRESS SHIRT,BLK BLAZER,UNK SHORTS	39	LV4804
16:37:05	CM	NBG 408/446 ARMED W/4 INCH BLADE NEG INJ 1637 HRS	39	LV4804
16:37:13	USAR AIR3	4640 W SAHARA AVE 407	15	LV5015
16:37:32	CM	39/WAS W/2 SMALL KIDS AGES 3 YOA & 7 YOA 1637 HRS	39	LV4804
16:37:49	EU 3U56	CM FRM-VERIZON WRLS 800-451 TO-JULIAN NROOZ/SEC	39	LV4804
16:38:03	USAS 3U13	4640 W SAHARA AVE 407	15	LV5015
16:38:10	EU	PN FRM- TO-AZ-AG55084	39	LV4804
16:38:32	USAR 3U56	4640 W SAHARA AVE 407	00	LV14002
16:38:42	USAS 513	4640 W SAHARA AVE 407	15	LV5015
16:38:44	USER 513	4640 W SAHARA AVE 407	00	LV7524
16:39:18	CM	39/RO/2015 GMC VAN, EXP 063016,UHAUL, PHOENIX AZ	39	LV4804
16:39:44	CM	28/EARL APPLE// PHN 612 750 3124// PR WTH .. PR FOLLOWING SUSP.. BB ON	28	LV6656
16:39:44	CM	CHARLESTON / WINSON PULLED INTO THE RAINBOW GARDENS WEDDING // PR IS WHT	28	LV6656
16:39:44	CM	CHEVY TRAVERS.. PR IS ARMED 413/ 9 MM .. PR HAS CCM	28	LV6656
16:40:34	CM	28// SUSP PULLING INTO THE ROBERT CONAN INVITATIONAL CAMPUS // RR OF THE	28	LV6656
16:40:34	CM	RAINBOW GARDENS .// SUSP HAD A 413A/UNK WHERE AT ..LL 1640HRS	28	LV6656
16:40:50	CM	AIR3 HAS UHAUL VAN ON DEC NOW BB ON CHAS 1637 NOW APP FAIRCENTER	15	LV5015
16:40:50	CM	1638 STILL BB APP HINSON #3 LANE 5 CARS BACK 1638 GETTING	15	LV5015
16:40:50	CM	READY TO TURN INTO A CHURCH OR SOME KIND OF BIZ 1639 PULLING INTO	15	LV5015
16:40:51	CM	CAMPUS NOW 1639 MALE GETTING OUT OF THE VAN, HMA OR EMA, WHI SHIRT,	15	LV5015
16:40:51	CM	BLU SHIRTS HAS BMJ GETTING OUT OF VAN ALSO NOW ANOTHER JUV JUST GOT	15	LV5015
16:40:51	CM	OUT BFA, BLK SHIRT, BLK PANTS, BLK SHOES GETTING OUT ALSO 1640	15	LV5015
16:41:14	CM	28/PICKING UP 2 JUVS NOW.. DRVR EMA 35-40 YOA, BLK SHIRT. IN VEH FEM JUV	28	LV6656
16:41:15	CM	5-6 YOA	28	LV6656
16:41:27	USER 3U13	4640 W SAHARA AVE 407	00	LV14084
16:41:46	US 3U56	LO BIZ	15	LV5015
16:42:02	CM	28// JUVS THEY PICKED UP ARE 9 & 12 YOA.. ALSO A FEM IN THE VEH.. MALE	28	LV6656
16:42:02	CM	WAS ARMED W/ THE KNIFE. .NEG 408/446.. OFCRS HAVE SUSP'S.. LL 1641HRS	28	LV6656
16:42:56	CM	28/ ADVG PR TO PUT THE 413 AWAY.. PR WILL WAIT IN VEH FOR OFCRS TO MAKE	28	LV6656
16:42:56	CM	CONT.. PR WMA 73 YOA, BLK /GRN SHIRT, ..LL 1642HRS	28	LV6656

I HEREBY CERTIFY that this is a full, true and correct copy of the original on file with the Las Vegas Metropolitan Police Department, except for the information that is privileged and confidential by law.

RESEARCH ASSISTANT Communications Bureau

5/4/2016 7:29:15 AM

LVMPD - COMMUNICATION CENTER
EVENT SEARCH

16:43:12	CM	28/PR PUT HIS 413 AWAY IN THE CENTER CONSOLE OF HIS VEH .. 1643HRS	28	LV6656
16:43:34	CM	28/PRS WIFE IS THE MGR OF THE ROSS DRESS FOR LESS... PR STATING THAT THE	28	LV6656
16:43:34	CM	ROSS WAS THE VICT OF THE 407/414A.. 1643HRS	28	LV6656
16:43:37	USAR 3U32	4640 W SAHARA AVE 407	15	LV5015
16:43:40	US 3U32	LO SUSP	15	LV5015
16:43:55	US 3U32	LO 1312 VISTA DR--SUSP	15	LV5015
16:43:56	CM	SUBJS ROSS JUST DUMPED PROPERTY HEADED BACK TWRDS VAN WILL BE AT	15	LV5015
16:43:56	CM	1312 VISTA 1641 PER 3U56 MALE DID TERRATEN EMPH W/ SWITCHBLADE KNIFE	15	LV5015
16:43:56	CM	, TOOK WALLETS & COLOGNE OR FRAGRANCE 1643	15	LV5015
16:44:11	USAR 3U13	4640 W SAHARA AVE 407	00	LV14084
16:44:15	CM	28/ PR ADVD THAT OFCRS WERE HANDCUFF THE SUSPS.. 1644 HRS	28	LV6656
16:44:17	USAR 3U13	4640 W SAHARA AVE 407	00	LV14084
16:44:19	USAR 7W35	4640 W SAHARA AVE 407	15	LV5015
16:44:20	USCL AIR3	407	15	LV5015
16:45:21	USCL 513	407	00	LV7524
16:48:49	CM	CAR TO CAR SUSP HAS HIGH END LOTION W/ TJ MAXX STICKER ON IT UNABLE TO	15	LV5015
16:48:49	CM	PRODUCE ANY RECEIPT FOR IT 1648	15	LV5015
16:49:18	US 3U56	LO 4640 W SAHARA--TJ MAXX	15	LV5015
16:54:28	USAR 692	4640 W SAHARA AVE 407	15	LV5015
16:54:49	US 3U13	LO 1312 VISTA DR	15	LV5015
16:54:49	US 692	LO 1312 VISTA DR	15	LV5015
16:54:49	US 7W35	LO 1312 VISTA DR	15	LV5015
17:17:45	CM	3U13 // 3U56 BRINGING VICT OVER FOR A SHOW UP 1717HRS	15	LV13035
17:18:45	CM	3U56 SHOW UP IS 100% POSITIVE 1718HRS	15	LV13035
17:20:00	USCL 692	407	15	LV13035
17:25:02	USAR FC23	4640 W SAHARA AVE 407	11	LV10179
17:41:19	USAO 3U56	1312 VISTA DR 407	15	LV13035
18:11:20	EU	FRM- TO-F 1811HRS	15	LV13035
18:11:20	EU 3U56	TW FRM- TO-F 1811HRS	15	LV13035
18:17:47	USTO 3U56	CCDC 407	00	LV14002
18:25:48	USTO 3U13	BAC 407	00	LV14084
18:29:06	USAO 3U56	CCDC 407	00	LV14002
18:29:32	USCL FC23	407	11	LV10179
18:29:32	US FC23	D FRM- TO-K	11	LV10179
18:48:47	USTO 3U32	BAC 407	00	LV10007
18:49:43	USCL 7W35	407	00	LV8444
18:58:53	USAO 3U32	BAC 407	00	LV10007
19:04:01	USCL 3U32	407	00	LV10007
19:14:39	USAO 3U13	BAC 407	15	LV8204
19:37:55	USCL 3U13	407	00	LV14084
19:37:55	US 3U13	D FRM- TO-K	00	LV14084
21:11:43	USCL 3U56	407	00	LV14002
21:11:43	CM	Route Closed: MAIN A		
21:11:43	CM	Incident Closed: 16/03/30 21:11		
21:11:43	EU 3U56	D FRM- TO-A MAIN	00	LV14002

I HEREBY CERTIFY that this is a full, true and correct copy of the original on file with the Las Vegas Metropolitan Police Department, except for the information that is privileged and confidential by law.

RESEARCH ASSISTANT Communications Bureau

5/4/2016 7:29:15 AM

EXHIBIT "2"

Case Report Number:
LLV160330003003-001



Las Vegas Metropolitan Police
Department

Case Report

Administrative

Case Report Number	LLV160330003003-001	Verification	
Subject	Robbery WDW / Julian Munoz (TJ Maxx)	Verification Level	
Disposition	Arrest	Jurisdiction	Las Vegas, City of
Entered On	3/30/2016 7:02:17 PM	Grid	
Entered By	Nelson, Richard M	Sector	U3
Reported On	3/30/2016	Map	
Reporting Officer	Nelson, Richard M	Census/Geo Code	
Reporting Agency	LVMPD - Las Vegas Metropolitan Police Department	Call Source	Phone
		Related Cases	
Report Type		Means	
Assisted By		Other Means	
Occurred On (Date and Time)	Wednesday 3/30/2016 4:21:00 PM	Motives	
Or Between (Date and Time)		Other Motives	
Location	4640 W Sahara	Vehicle Activity	
CSZ	Las Vegas, NV 89102	Direction Vehicle Travelling	
Location Name	TJ Maxx	Cross Street	
		Notified	

For Exceptional Clearances

Clearance Basis

Exceptional Clearance Date

Narrative

On 03-30-16, at approximately 1635 hours, 1 Officer R. Nelson P# 14002 working as marked patrol unit 3U56 was dispatched to TJ Maxx located at 4640 W Sahara reference a Robbery. Details stated that a male threatened a worker with a knife and left with merchandise.

Upon arrival I made contact with Julian Munoz who works in Loss Prevention for TJ Maxx. Munoz stated that he observed a black male adult wearing a blue dress shirt, blue blazer, and shorts in the children's department who was later identified as Alfred Harvey. Harvey began selecting multiple items very rapidly with no regard to price or size. Harvey then entered the Men's department where Munoz observed him conceal two wallets among multiple other items inside his blazer. Harvey then entered the fragrance department where he selected face cream and multiple other items before exiting the store and passing all points of sale. Munoz approached Harvey and identified himself as Loss Prevention for TJ Maxx. Munoz asked for the unpaid items back and Harvey handed him two wallets. Munoz then asked Harvey to step back inside the store and Harvey refused. Munoz asked again because he did not want to conduct business in front of Harvey's

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children. At this time Harvey pulled out a knife with a black handle and a blade approximately 4 inches long. Harvey held the knife over his head in a threatening manner and stated to Munoz "we're not doing this today". Munoz immediately felt threatened and feared for his life so he backed off and watched Harvey from a distance.

Munoz could still see items concealed Harvey's blazer and observed him getting in the drivers seat of a Uhaul van bearing AZ tag AG55084. The van drove west through the parking lot and north on Decatur. At this time LVMPD air unit spotted the van bearing AZ tag AG55084 turn eastbound Charleston from Decatur then southbound on Vista where Patrol Officer T. Humphreys P#14084 located the van at 1312 Vista and took Harvey into custody. At 1715 hours a Show-Up was conducted and Munoz identified Harvey 100 percent being the male who stole from the store and threatened him with the knife.

When Officer Humphreys took Harvey into custody, Harvey was in possession of a silver wallet which contained two counterfeit \$100 bills along with a paper with multiple credit card numbers along with pin numbers to those credit cards. During inventory of the Uhaul van due to it being towed Officer Rasberg P# 10007 located multiple credit cards with multiple persons names inside the drivers side door. Officer Rasberg also located a wallet, face mask lotion, women's lotion and perfume all with TJ Maxx tags on them in the front of the van stuffed in between the drivers seat and console. All TJ Maxx items were impounded as evidence and the credit cards, counterfeit money and paper containing credit card numbers and pins were given to Detective Heindel P#5806 with Fraud and Forgery for further followup.

Based on the above facts and circumstances of Harvey stealing items from the TJ Maxx, producing a knife and raising it over his head in a threatening manner when confronted by Munoz causing Munoz to feel threatened and fear for his life, Harvey was placed under arrest for Robbery with a deadly weapon and transported to CCDC where he was booked.

Offense			
Offense	Robbery, E/DW(F)-NRS 200.380	Domestic Violence	Motivation Not Known)
Code Section		Premises Entered	No
IBR Code		Entry	
IBR Group		Using	
Crime Against	Property	Weapons	Knife/Cutting Instrument (Icepick, Ax, Etc.)
UCR Hierarchy	03	Criminal Activity	Possessing/Concealing
Location Type	Department/Discount Store	Type Security	
Completed	Yes	Tools	
Hate/Bias	Unknown (Offenders		

Offenders

Arrestee Name: Harvey, Alfred

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Case Report Number:
LLV160330003003-001



Las Vegas Metropolitan Police
Department

Aliases

Alias

Alerts

Addresses

Address Type	Address	CSZ	County	Country
Residence	4640 W Sahara	Las Vegas, NV 89107	Clark	United States

Phones

Phone Type Phone Number

Emails

Email Address

Sex	Male	Teeth	
Race	Black or African American	Build	Thin
Ethnicity	Unknown	Height	6' 2"
DOB	12/19/1976	Weight	200
Age	39	Resident	Resident
Eye Color	Brown	POB	
Hair Color	Black	DLN	
Hair Style	Curly	DL State	
Hair Length	Short	DL Country	
Facial Hair		SSN	650-49-9802
Complexion			

Scars, Marks and Tattoos

SMT	Location	Description
-----	----------	-------------

Attire Jean shorts, Blue blazer jacket
Employer/School
Employer Address
Employer CSZ
Occupation/Grade

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16F05049X - HARVEY, ALFRED

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Case Report Number:
LLV160330003003-001

Las Vegas Metropolitan Police
Department



MO
Other MO
Habitual Offender Status

Arrest Information

Arrest For	50138 - Robbery, E/DW(F)-NRS 200.380	Date/Time Released	
Arrest Number	7013098	Released Location	
Arrest Type	Taken Into Custody	Released By	
Armed With	Lethal Cutting Instrument (Icepick, Ax, Etc.)	Release Reason	
Multi-Clearance	Not Applicable	Held For	
Multi-Clearance Offense		Fingerprints	
FBI Number		Photos	
State Number		Miranda Read	No
Arrest Date	3/30/2016	Miranda Waived	
Arrest Location	1312 Vista Las Vegas, NV 89107	Number of Warrants	
Force Level		Juvenile Dispo.	
Date/Time Booked		Adult Present (Name)	
Booked Location		Detention Name	
		Notified Name	

Notes

Victims

Name: TJ Maxx

Victim Type	Business
Victim of	50138 - Robbery, E/DW(F)-NRS 200.380

Aliases

Alias

Alerts

Addresses

Address Type

Address

City

County

State

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16F05049X - HARVEY, ALFRED

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Case Report Number:
LLV160330003003-001



Las Vegas Metropolitan Police
Department

Business	4640 W Sahara	Las Vegas, NV 89102	Clark	United States
----------	---------------	------------------------	-------	---------------

Phones

Phone Type	Phone Number
Business/Work	(702) 670-7161

Emails

Email Address

Sex	POB
Race	DLN
Ethnicity	DL State
DOB	DL Country
Age	SSN
Eye Color	Attire
Hair Color	Employer/School
Facial Hair	Employer Address
Complexion	Employer CSZ
Height	Occupation/Grade
Weight	Testify
Resident	Injury

Offender Relationships

Offender	Relationship
----------	--------------

Circumstances
Just. Hom. Circ.

LEOKA Info

Type	Activity
Assignment	ORI-Other Jurisdiction
Notes	

Case Report Number:
LLV160330003003-001

Las Vegas Metropolitan Police
Department



Name: Munoz, Julian

Victim Type Individual
Victim of 60138 - Robbery, E/DW(F)-NRS 200.380

Aliases

Aliases

Alerts

Addresses

Address Type	Address	City	County	Country
Business	4640 W Sahara	Las Vegas, NV 89102	Clark	United States

Phones

Phone Type	Phone Number
Cellular	(702) 280-2479
Business/Work	(702) 870-7161

Emails

Email Address

Sex	Male	POB	
Race	White	DLN	
Ethnicity	Hispanic or Latino	DL State	
DOB	4/7/1986	DL Country	
Age	29	SSN	530-77-0553
Eye Color	Brown	Attire	
Hair Color	Brown	Employer/School	TJ Maxx
Facial Hair		Employer Address	
Complexion		Employer CSZ	
Height	6' 1"	Occupation/Grade	Loss Prevention
Weight	240	Testify	
Resident	Resident	Injury	None Observed

Offender Relationships

Offender	Relationship
A - Harvey, Alfred	None

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16F05049X - HARVEY, ALFRED

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Case Report Number:
LLV160330003003-001

Las Vegas Metropolitan Police
Department



Circumstances
Just. Hom. Circ.

LEOKA Info

Type
Assignment

Activity
ORI-Other Jurisdiction

Notes

Witnesses _____

Other Entities _____

Properties _____

Property Clothing, belts, glasses, purses/wallets

IBR Type 6
UCR Type 6
Description Tri fold wallet
Status Evidence (Seized)
Count 1
Value 48.00
Manufacturer Tommy Hilfiger
Model

Serial
Number/VIN
Color Black
Recovered Date
Owner V - TJ Maxx
Disposition
Evidence Tag
Alert(s)

Vehicle Information

Vehicle Type
Vehicle Year
Body Style

License Number
License Exp. Date
License State

Color Type	Color
------------	-------

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16F05049X - HARVEY, ALFRED

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Case Report Number:
LLV160330003003-001

Las Vegas Metropolitan Police
Department



Drug Information
Drug Type
Drug Quantity
Drug Measure

Notes

Property Misc. (Cell Phones, Ammo, Bicycles, Worthless Doc, Items not listed)

IBR Type	77	Serial Number/VIN	
UCR Type	77	Color	Pink
Description	Womens lotion	Recovered Date	
Status	Evidence (Seized)	Owner	V - TJ Maxx
Count	1	Disposition	
Value	14.99	Evidence Tag	
Manufacturer		Alert(s)	
Model			

Vehicle Information

Vehicle Type	License Number
Vehicle Year	License Exp. Date
Body Style	License State

Color Type

Drug Information
Drug Type
Drug Quantity
Drug Measure

Notes

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16F05049X - HARVEY, ALFRED

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Case Report Number:
LLV160330003003-001



Las Vegas Metropolitan Police
Department

Property Misc. (Cell Phones, Ammo, Bicycles, Worthless Doc, Items not listed)

IBR Type	77	Serial	
UCR Type	77	Number/VIN	
Description	Hydrating face mask	Color	
Status	Evidence (Seized)	Recovered Date	
Count	1	Owner	V - TJ Maxx
Value	05.99	Disposition	
Manufacturer	Elizabeth Arden	Evidence Tag	
Model		Alert(s)	

Vehicle Information

Vehicle Type	License Number
Vehicle Year	License Exp. Date
Body Style	License State

Color Type	Color
------------	-------

Drug Information
Drug Type
Drug Quantity
Drug Measure

Notes

Property Misc. (Cell Phones, Ammo, Bicycles, Worthless Doc, Items not listed)

IBR Type	77	Description	Perfums
UCR Type	77	Status	Evidence (Seized)

Printed 3/30/2016 8:26 PM

Page 9 of 10

16F05049X - HARVEY, ALFRED

Page 16 of 23

Case Report Number:
LLV160330003003-001

Las Vegas Metropolitan Police
Department



Count 1
Value 49.99
Manufacturer Chloa
Model
Serial
Number/VIN
Color

Recovered Date
Owner V-TJ Major
Disposition
Evidence Tag
Alert(s)

Vehicle Information

Vehicle Type
Vehicle Year
Body Style

License Number
License Exp. Date
License State

Color Type	Color
------------	-------

Drug Information
Drug Type
Drug Quantity
Drug Measure

Notes



CLERK OF THE COURT

1 RSPN
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 STEVEN J. ROSE
6 Deputy District Attorney
7 Nevada Bar #013575
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 ALFRED C. HARVEY,
13 #7013098

14 Defendant.

CASE NO: C-16-314260-1

DEPT NO: XXIII

15 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND/OR
16 SANBORN INSTRUCTION

17 DATE OF HEARING: November 2, 2016
18 TIME OF HEARING: 9:30 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
20 District Attorney, through STEVEN J. ROSE, Deputy District Attorney, and hereby submits
21 the attached Points and Authorities in Opposition to Defendant's Motion to Dismiss and/or for
22 a Sanborn Instruction.

23 This Response is made and based upon all the papers and pleadings on file herein, the
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if
25 deemed necessary by this Honorable Court.

26 //

27 //

28 //

//

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On April 1, 2016, the State filed a Criminal Complaint against Alfred Harvey
4 (hereinafter "Defendant") charging him with Robbery with use of a Deadly Weapon. On April
5 18, 2016, the preliminary hearing was held in justice court. At the conclusion, the justice court
6 held Defendant to answer the above charges in district court.

7 On April 20, 2016, Defendant was arraigned in District Court on the above count.
8 Defendant subsequently pled not guilty, and his jury trial is currently scheduled for November
9 7, 2016.

10 STATEMENT OF THE FACTS

11 On March 30, 2016, Julian Munoz, working as loss prevention for T.J. MAXX,
12 observed Defendant, via closed circuit television, select items from the store and place them
13 in his coat and pants. Preliminary Hearing Transcript, 4/18/16, pg. 5-6, 9. Munoz then
14 watched Defendant as he left the store without paying for these items. Id. at 6. Munoz then
15 contacted Defendant outside the store and asked him for the items back. Id. at 6-7. Defendant
16 handed back some, but not all of the items. Id. at 7. Munoz then asked Defendant to return to
17 the store with him, and in response, Defendant pulled out a knife and raised it over head, and
18 told Munoz they were not going to do this today. Id. at 8. Seeing the knife, Munoz backed
19 away and Defendant left in a white U-Haul van. Id. at 8-9. Munoz then contacted the police.
20 Id. at 13. Munoz subsequently identified Defendant during a show-up. Id. at 15.

21 ARGUMENT

22 Defendant claims that he is entitled to dismissal of the case due to the failure of the
23 police to collect alleged video or photographic evidence from unnamed security officers.
24 Because Defendant cannot show that the evidence was material, or that the failure to collect it
25 was the result of bad faith, he is not entitled to dismissal. Moreover, because he cannot show
26 that the failure to collect the evidence was due to gross negligence, he is not entitled to any
27 presumptions or jury instructions.

28 //

1 A. Destruction of Evidence Versus Failure to Gather Evidence.

2 The Nevada Supreme Court has characterized the distinction between instances in
3 which the police fail to preserve evidence versus fail to gather evidence as a question of
4 whether the police or the State ever had possession and control over the evidence. See
5 Johnson v. State, 117 Nev. 153, 167, 17 P.3d 1008, 1017 (2001). In the instant case,
6 Defendant never alleges that the State was in possession of the alleged photographs or video.
7 Accordingly, the proper standard is a failure to collect evidence. Id.

8 B. Rule for Failure to Gather Evidence.

9 “In a criminal investigation, police officers generally have no duty to collect all
10 potential evidence.” Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001).
11 However, this rule is not absolute, and in certain instances, a failure to collect evidence may
12 warrant sanctions. Id.; see also Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998). Before a
13 defendant is entitled to any sanction against the State, he must progress through a two-step
14 process. First, the defendant must show that the evidence was material, that is, that there is a
15 reasonable probability that the result of the proceedings would be different if the evidence
16 were available. Daniels, 114 Nev. at 267, 956 P.2d at 115. If the evidence is found to be
17 “material” then the court must “determine whether the failure to gather evidence was the
18 result of mere negligence, gross negligence, or a bad faith attempt to prejudice the
19 defendant’s case.” Id. Significantly, in situations involving mere negligence, “no sanctions
20 are imposed, but the defendant can still examine the prosecution’s witnesses about the
21 investigative deficiencies.” Id. (citation omitted). If the court finds gross negligence, “the
22 defense is entitled to a presumption that the evidence would have been unfavorable to the
23 State.” Id. (citation omitted). “In cases of bad faith . . . dismissal of the charges may be an
24 available remedy based upon an evaluation of the case as a whole.” Id.

25 1. Defendants’ Claims Fail the First Prong of the Daniels Test.

26 The test enunciated in Daniels provided that in cases where the defense is claiming
27 that the State failed to gather evidence, the defense has the burden of establishing that the
28 evidence was “material.” Id. Thus, it is the burden of the defense to illustrate to a

1 reasonable probability that, had the evidence been available to the defense, the result of the
2 proceeding would have been different.” Id. Importantly, the Nevada Supreme Court has
3 clearly held that mere speculation that a particular piece of evidence might have been
4 exculpatory is insufficient.

5 For instance, in Daniels, after a jury convicted Daniels of first degree murder, Daniels
6 raised a claim regarding the detective’s failure to draw his blood upon arrest. According to
7 Daniels, had the State gathered this evidence, it would have revealed that he had ingested PCP
8 prior to the crime and bolstered his defense that he lacked capacity to specifically intend the
9 murder he committed. Id. at 266, 956 P.2d at 114. The Nevada Supreme Court rejected
10 Daniels’s claim that the blood evidence was “material.” Instead the court concluded that
11 “whether the blood evidence would likely have prevented Daniels’ conviction is pure
12 speculation.” Id. at 268, 956 P.2d at 115.

13 The Nevada Supreme Court similarly rejected another defendant’s speculative claim
14 that that ungathered evidence was exculpatory in Steese v. State, 114 Nev. 479, 960 P.2d 321
15 (1998). In Steese, the defendant murdered the victim in a residential trailer and then stole the
16 victim’s truck. After the police processed both the trailer and the truck for evidence, they
17 released both to the victim’s family. The victim’s sister later found a pair of blood-soaked
18 jeans inside the trailer and disposed of them without telling the police. The victim’s brother
19 found a gold chain inside the victim’s truck, notified police, and the police never collected
20 the item. Id. at 491, 960 P.2d at 320. On appeal, Steese claimed that the police committed
21 prejudicial misconduct by failing to preserve material evidence. Id. at 419, 960 P.2d at 329.
22 Essentially, Steese claimed that testing on these two items of evidence could have exculpated
23 him.

24 After noting that the correct legal analysis regarding the failure of the police to
25 impound the bloody jeans from the crime scene and the victim’s chain from the truck was an
26 analysis regarding a failure to gather evidence as explained in Daniels, the Nevada Supreme
27 Court specifically applied the two-pronged test to Steese’s claims. The court explained, that

28 //

1 [w]hile Steese alleges in his brief that testing of the blood on
2 the jeans may have exculpated him, he has failed to point to
3 any facts in the record which support this. We conclude that
4 Steese's naked speculation is insufficient to show that a
5 different result was likely at trial had the police located this
6 evidence. Therefore, we conclude that this evidence was not
7 constitutionally material.

8 Id. at 491-92, 960 P.2d at 329.

9 The court reached the same conclusion regarding the gold chain from the truck. It
10 explained that Steese made an identical argument with regard to the gold chain. Steese
11 claimed that the gold chain possibly contained human hair and bodily fluids that could be
12 subject to DNA testing. Concluding that this speculation failed to satisfy the first prong of
13 the Daniels test which relied on a decision issued by the New Mexico Supreme Court in
14 State v. Ware, 118 N.M. 319, 881 P.2d 679 (1994), the Nevada Supreme Court stated, "we
15 conclude that the materiality requirement of Ware is simply not met by Steese's naked
16 speculation." Id. at 492, 960 P.2d at 330.

17 In Randolph, the Nevada Supreme Court again rejected a defendant's speculative
18 claims about the materiality of evidence that was not gathered by the police. In Randolph,
19 both Randolph and his co-defendant, Garner, were charged with multiple crimes including
20 murder with use of a deadly weapon for the shooting murder of Shelly Lokken while she
21 worked as a graveyard shift bartender. A witness who saw both Randolph and Garner return
22 to a trailer after the murder saw Garner change out of his clothing. The clothing that Garner
23 was wearing when he was arrested tested negative for blood. 117 Nev. 970 at 986, 36 P.3d
24 at 435. When police arrested Garner, they noted that the trunk of his car contained a pile of
25 clothing, but they did not look through it to see if it included the clothing originally worn by
26 Garner as described by the witness. Id. On appeal, Randolph claimed that the State failed to
27 gather "potentially exculpatory" evidence because if the police had found the clothing and if
28 the Garner's clothing had tested positive for blood, it would have supported Randolph's
claim that Garner was, in fact, the shooter. Randolph argued that he was entitled to a jury

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1 instruction that the “ungathered evidenced was presumed to be unfavorable to the State.” Id.
2 at 987, 36 P.3d at 435.

3 The Nevada Supreme Court concluded that Randolph failed to satisfy the first prong
4 of the Daniels test. The court explained

5 Randolph has not shown that the ungathered evidence was
6 material. If testing of Garner’s clothing or shoes had revealed
7 the victim’s blood, it is possible that Randolph might not have
8 received the death sentence. However, Randolph has not
9 demonstrated a reasonable probability that such testing would
10 have revealed any blood. He offers no evidence to corroborate
his allegation that Garner was the shooter. The possibility that
Garner’s clothing and shoes would have been favorable to his
case remains mere speculation.

11 Id. at 987, 36 P.3d at 435.

12 Applying the foregoing analysis to the instant case, it is abundantly clear that
13 Defendant fails to satisfy the first prong of the Daniels test. Defendant claims that the
14 alleged evidence is “undeniably material,” claiming that

15 Surely there can be no doubt that the videotape evidence of the
16 alleged incident would have proven beyond a reasonable doubt
17 whether [Defendant] committed the offense; whether or not the
18 actions constitute robbery and whether or not there was a weapon
present. Additionally photographs could also prove beyond a
reasonable doubt whether [Defendant] was the actual perpetrator.
It is also possible that photographs could depict the presence of a
knife or weapon if it existed and the demeanor of the individual.

19 Motion at 4–5. Defendant’s claims demonstrate the lack of merit of his motion.
20

21 First, the State would note that there is no actual evidence that any videos other than
22 the security video from inside TJ Maxx ever existed. Further, Defendant has already
23 indicated that he is in possession of such video. At issue are photographs that, to the State’s
24 understanding, were taken of the U-Haul vehicle, and were deleted by the security officer
25 taking them, that same day. There is no evidence that the photographs taken by the security
26 officer actually depict the robbery itself. It is the State’s understanding that the photographs
27 were not of the robbery, and simply showed the U-Haul in which Defendant fled the scene.
28 The sole support for Defendant’s claims come from his “belief that the [security] officer(s)

1 took video surveillance and/or photographs of the alleged perpetrator on the day in
2 question.” Motion at 3. This is insufficient.

3 Not only does Defendant fail to demonstrate that the alleged evidence depicts what he
4 claims it does, he provides nothing more than pure speculation that the evidence was
5 material. Defendant provides no evidentiary basis from which to support his conclusions, or
6 allow this Court to find that it was exculpatory. See Boggs v. State, 95 Nev. 911, 913, 604
7 P.2d 107, 108 (1979) (“It is not sufficient that the showing disclose merely a hoped-for
8 conclusion from examination of the destroyed evidence...”).

9 Indeed, the testimony of the victim, along with the arrest reports attached to
10 Defendant’s motion, demonstrate that Defendant was captured on surveillance video inside
11 the TJ Maxx store, along with two children. Defendant is observed by the victim stealing
12 varied items from the store. When Defendant leaves the store without paying, the victim
13 confronts him. When asked to return to the store to avoid confronting the Defendant in front
14 of his kids, Defendant instead drew a knife from his pocket. The victim was able to provide a
15 clear and consistent description of the knife, describing hearing a clicking sound as the blade
16 snapped into place, and providing color and size descriptions. Further, the victim watched as
17 Defendant fled the scene in a U-Haul vehicle. That vehicle was tracked by a Las Vegas
18 Metropolitan Police Department air-unit. When Defendant was arrested, a show-up was
19 performed, and he was positively identified by the victim. Moreover, an inventory of the U-
20 Haul vehicle revealed several items matching those stolen from the TJ Maxx store. Given
21 that Defendant was seen getting into the U-Haul vehicle, which was then tracked by the air
22 unit, and Defendant taken into custody shortly thereafter, Defendant cannot show how
23 additional pictures of him getting into the U-Haul and driving away would be exculpatory.
24 Moreover, such pictures would not bear on the issues Defendant raises in his motion, such as
25 the presence of a knife or the Defendant’s or victim’s demeanor. Defendant merely
26 speculates that the alleged video or photographs would be exculpatory. Id. Thus, Defendant
27 fails to satisfy the first prong of the Daniels test.

28 //

1 2. Defendant Rodriguez Fails The Second Prong of the Daniels Test.

2 Although unnecessary to discuss given that Defendant's claim does not meet the first
3 prong of the test required in failure to gather evidence cases, the State also notes that
4 Defendant would also not be entitled to any of the "remedies" discussed in Daniels because
5 he does not satisfy the second prong of the test as well. As previously discussed, the second
6 inquiry in failure to gather evidence situations is whether the failure to gather evidence was
7 the product of negligence, gross negligence, or bad faith. See Daniels, 114 Nev. at 267, 956
8 P.2d at 115. If the failure to gather was the product of negligence, no sanctions are imposed.
9 If the failure to gather evidence amounts to gross negligence, then the defense is entitled to a
10 presumption that the evidence would have been unfavorable to the State. If the failure to
11 gather was done in bad faith, dismissal is "an available remedy based upon an evaluation of
12 the case as a whole." Id.

13 After being convicted of first degree murder with use of a deadly weapon and other
14 charges, Daniels alleged that the police failed to gather his blood. According to Daniels, had
15 his blood been collected, he could have demonstrate that he lacked the specific intent to
16 commit murder because he had ingested and was under the influence of PCP at the time of
17 the crime. After concluding that Daniels had not satisfied the first part of the prescribed
18 analysis in failure to gather evidence cases, the Nevada Supreme Court also noted that
19 "Daniels also failed to establish that the State's failure to gather blood evidence was caused
20 by negligence, gross negligence, or bad faith." Id. at 268, 956 P.2d at 116. The court
21 reasoned that although the detective had been aware that witnesses had described Daniels's
22 behavior as strange, he also knew that the nurse who performed Daniels's initial medical
23 screening did not notice any signs that Daniels was under the influence of a controlled
24 substance and that Daniels had told her that he had not taken any drugs. The detective also
25 explained that prior to his tape-recorded interview of Daniels, Daniels had admitted to
26 smoking marijuana the previous day, but denied recent drug use. Id. Therefore the court
27 found that "a reasonable jury could not find that the detective was negligent, grossly

28 //

1 negligent or acted in bad faith by deferring to the nurse's professional judgment and Daniels'
2 own assertion that he was not intoxicated." Id.

3 Similarly, in Steese, 114 Nev. 479, 960 P.2d 231, after finding that Steese failed to
4 establish the first requirement of the failure to gather evidence inquiry, the Nevada Supreme
5 Court determined that he also failed to show gross negligence or bad faith. The court
6 explained how at least two police officers did not find the bloody jeans when they searched
7 the residential trailer. In fact, the victim's family did not discover the jeans until they had
8 the trailer professionally cleaned. At that point, the family did not notify the police of the
9 existence of the jeans. The Nevada Supreme Court concluded that "[t]his merely suggests
10 that the police failed to search every dark corner of the trailer for evidence; it does not imply
11 they acted in bad faith or with gross negligence." Id. at 492 n.3, 960 P.2d at 329 n.3.

12 The Nevada Supreme Court conducted the same analysis in Randolph, 117 Nev. 970,
13 36 P.3d 424. Once again, after finding that Randolph had not met the first prong of the
14 failure to gather evidence test in complaining that the police did not attempt to gather
15 Garner's clothing and shoes, the Nevada Supreme Court found that Randolph did not show
16 that the failure to gather the evidence was the product of gross negligence or bad faith. The
17 court explained:

18 Even assuming the evidence was material, the failure to collect
19 it was at worst negligent. First, Randolph has not shown that
20 police could have collected the brown shirt and pants. He
21 simply assumes that a search of the trailer or the clothing in the
22 trunk of Garner's car would have uncovered them. Second,
23 Randolph has not shown that the potential evidentiary
24 significance of Garner's shoes, which were available to police,
25 was so obvious that it was gross negligence not to impound and
26 test them.

27 Id. at 987–88, 36 P.3d at 435.

28 Here, Defendant has not shown that the police ever knew about the alleged
photographs or video. Defendant has not alleged that the security officer, or officers,
informed the police of the video or photographs. Defendant cannot provide any indication as
to when the photographs or video were deleted. It is hard to imagine that the police would act

1 with gross negligence, much less in bad faith, if the alleged evidence were deleted by the
2 security officer or officers before the police learned of its existence and had the opportunity
3 to collect it.

4 Defendant's attempt to describe the officers' actions as bad faith fails utterly.
5 Defendant states that Metro officers are trained to impound evidence, and that because the
6 evidence here was not impounded, the court should disregard the facts of the case and simply
7 assume bad faith. Motion at 6. This is not the law. To dismiss this case, Defendant must
8 show that the officers *purposefully failed to collect the video in order to prejudice the*
9 *defendant's case.* State v. Ware, 118 N.M. 319, 881 P.2d 679 (1994). There is simply no
10 evidence supporting this bellicose allegation, as evidenced by the defendant's failure to
11 support his position with any fact or law.

12 Additionally, the defendant has not established that the officers were grossly negligent
13 either. Daniels, 114 Nev. at 267, 956 P.2d at 115 ("When gross negligence is involved, the
14 defense is entitled to a presumption that the evidence would have been unfavorable to the
15 State."). Gross negligence exists when the potentially exculpatory value of the uncollected
16 evidence is patently obvious, and the police nonetheless do not collect it. See Randolph v.
17 State, 117 Nev. 970, 988, 36 P.3d 424, 435 (2001) (finding no gross negligence when the
18 defendant "has not shown that the potential evidentiary significance of [the pieces of
19 evidence], which were available to police, was so obvious that it was gross negligence not to
20 impound and test them."). Here, it is the State's understanding that the photographs were
21 deleted at some time on the day of the robbery. However, there is no evidence that the officers
22 were ever aware of the existence of the evidence. Defendant cannot even speculate as to when
23 the evidence was destroyed, and thus cannot contend that it occurred after a time where the
24 officers could have recovered it. Defendant has simply failed to show any negligence on the
25 part of the officers. Thus he is not entitled to relief. Id.

26 However, should this Court require additional information to compensate for the lack
27 of detail set forth in the Motion, the proper remedy is not granting the Motion, but setting an
28 evidentiary hearing. If this Court chooses, a hearing could be held for the limited purpose of

1 determining what pictures were taken by the security officer, what they depicted, and the
2 circumstances under which they were deleted. Although Defendant has failed to bear his
3 burden in demonstrating the materiality of the evidence or the bad faith/gross negligence by
4 the officers, an evidentiary hearing would be essential before granting this Motion.

5 CONCLUSION


6 Based on the foregoing, the State respectfully asks the Court to deny the instant motion.

7 DATED this 1st day of November, 2016.

8 Respectfully submitted,

9 STEVEN B. WOLFSON
10 Clark County District Attorney
11 Nevada Bar #01565

12 BY


13 STEVEN J. ROSE
14 Deputy District Attorney
15 Nevada Bar #013575

16 CERTIFICATE OF ELECTRONIC FILING

17 I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S
18 MOTION TO DISMISS AND/OR SANBORN INSTRUCTION, was made this 1st day of
19 November, 2016, by Electronic Filing to:

20 JASMIN D. SPELLS
21 DEPUTY PUBLIC DEFENDER
22 EMAIL: Lillyjd@clarkcountynv.gov;
23 pdclerk@clarkcountynv.gov;


24 Secretary for the District Attorney's Office

25
26
27
28 SJR/pm /L-2

Alvin D. Linn

CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER
2 NEVADA BAR NO. 0556
3 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
4 NEVADA BAR NO. 11635
5 PUBLIC DEFENDERS OFFICE
6 309 South Third Street, Suite 226
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8 Telephone: (702) 455-4685
9 Facsimile: (702) 455-5112
10 Lillyjd@clarkcountynv.gov
11 Attorneys for Defendant

DISTRICT COURT HEARING REQUIRED
DATE: 11-2-16
CLARK COUNTY, NEVADA TIME: 9:30am

9 THE STATE OF NEVADA,

10 Plaintiff,

11 v.

12 ALFRED C. HARVEY,

13 Defendant,

CASE NO. C-16-314260-1

DEPT. NO. XXIII

DATE: November 2, 2016
TIME: 9:30 a.m.

14
15 **MOTION TO ALLOW DEFENDANT TO COVER HIS FACE TATTOOS**

16 COMES NOW, the Defendant, ALFRED C. HARVEY, by and through JASMIN
17 D. SPELLS, Deputy Public Defender and hereby moves this Honorable Court to allow Mr. Harvey
18 to appear before the jury without facial tattoos.

19 This Motion is made and based upon all the papers and pleadings on file herein, the
20 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

21 DATED this 24th day of October, 2016.

22 PHILIP J. KOHN
23 CLARK COUNTY PUBLIC DEFENDER

24
25 By: /s/ Jasmin Spells
26 JASMIN D. SPELLS, #11635
27 Deputy Public Defender
28

DECLARATION

JASMIN D. SPELLS makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender for the Clark County Public Defender's Office appointed to represent Defendant Alfred C. Harvey in the present matter;

2. I am more than 18 years of age and am competent to testify as to the matters stated herein. I am familiar with the procedural history of the case and the substantive allegations made by The State of Nevada. I also have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 24th day of October, 2016.

/s/ Jasmin Spells
JASMIN D. SPELLS

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 STATEMENT OF RELEVANT FACTS

3 Mr. Harvey, the Defendant in the instant case is charged by way of Information with one
4 count of Robbery with use of a Deadly Weapon, to wit a knife. Mr. Harvey has entered a plea of
5 not guilty and this case is currently set for trial on November 7, 2016.
6

7 The Honorable Judge Saragosa held a preliminary hearing on April 18, 2016. At the
8 preliminary hearing, the State called one witness, Mr. Julian Munoz. Mr. Munoz testified that on
9 March 30, 2016, he came into contact with Mr. Harvey outside a TJ Maxx store. [Preliminary
10 Hearing Transcript, (April 18, 2016) (attached hereto as Exhibit A) "PHT" pp. 5, 7]. Mr. Munoz
11 stated that he saw Mr. Harvey take items from the store without paying on CCTV (closed circuit
12 television). PHT pp. 6-7-9. When Mr. Munoz confronted Mr. Harvey outside, he states that Mr.
13 Harvey pulled a knife out of his left pocket and held it over his head. PHT p. 8. Based upon the
14 testimony, it appears that this was a short encounter. *See generally* PHT. Mr. Munoz further
15

16 Officer Nelson was dispatched to the TJ Maxx at approximately 1635 hours. *See*
17 Declaration of Arrest (Exhibit B). Mr. Munoz described the suspect as being a Black male,
18 wearing a hat, blue dress shirt, black blazer and dark shorts. *See* Voluntary Statement (Exhibit C).
19 Mr. Munoz failed to mention any descriptors for weight, height, or eye color. He did not include
20 any information about unique marks like piercings or tattoos. Additionally, Mr. Munoz failed to
21 mention anything regarding the individual's skin tone or hair descriptors.

22 Officers conducted show-up identification with security officer Munoz at approximately
23 1715. *See* Declaration of Arrest. During the show-up identification, Mr. Harvey was handcuffed
24 and surrounded by two police officers. PHT pp. 15-16. Mr. Munoz remained in rear of a patrol car
25 during the show-up identification. *Id.* Mr. Munoz was approximately 30-40 feet from Mr. Harvey
26 during the show-up. PHT p. 16. There were not any other suspects presented in this show-up
27 identification. *See generally* PHT. Mr. Munoz wrote that he was 100% sure the identification was
28

1 correct, writing that he recognized tattoos on the defendant's neck. *See* Show-Up Witness
2 Instructions (Exhibit D).

3 Mr. Harvey has entered a plea of not guilty and this case is currently set for trial on
4 November 7, 2016.

6 LEGAL ARGUMENT

7 A defendant is presumed innocent until proven guilty. *Coffin v. United States*, 156 U.S.
8 432, 453, 39 L. Ed. 481, 15 S. Ct. 394 (1895). The presumption of innocence is a basic component
9 of a fair trial, *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and a
10 defendant cannot be compelled to stand trial in prison attire because it undermines that
11 presumption, *see id.* at 504–05. *Villa v. State*, 373 P.3d 970 (Nev. 2011). The Fifth and Fourteenth
12 Amendments prohibit the use of visible physical restraints on a defendant, “absent a trial court
13 determination... that they are justified by a state interest specific to a particular trial.” *Deck v.*
14 *Missouri*, 544 U.S. 622, 629, 125 S. Ct. 2007, 2012 (2005). The guilt or innocence of the
15 defendant is a question to be determined by the jury, free from any improper influence of any kind
16 or character whatever. *State v. Ah Chuey*, 14 Nev. 79, 89 (1879).

17 In the instant case, Mr. Harvey is requesting to cover his facial tattoos to ensure that he
18 receives a fair trial. Often, members of society pre-judge someone from their tattoos and this
19 affects the ability of the defendant to have a fair trial free of bias and/or prejudice. *See for example*,
20 David Ferrera, Neo-Nazi gets makeover to hid tattoos from jury, Las Vegas Review Journal July
21 24, 2016, <http://www.reviewjournal.com/crime/homicides/neo-nazi-gets-makeover-hide-tattoos->
22 jury. Here, Mr. Harvey's facial tattoos are analogous to visible shackles and restraints on his body.
23 They can give the false appearance that simply because he has face tattoos that he is a “bad guy, a
24 criminal or guilty of this offense.” None of these labels are fair or based in logical reasoning.
25 Significantly, the witness here does not identify Mr. Harvey by his face tattoos so there is no
26 colorable argument that granting this motion affects the State's ability to proceed with their case.
27 Thus, Mr. Harvey humbly requests that this Court grant his request to cover his facial tattoos.

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CONCLUSION

Based on the foregoing, Mr. Harvey prays that this Court grant the instant motion.

DATED this 24th day of October, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Jasmin Spells
JASMIN D. SPELLS, #11635
Deputy Public Defender

EXHIBIT A

Exhibit A

See PHT – Pages 2-24

EXHIBIT B

DECLARATION OF ARREST

"Click here to add/edit Event# and ID# on all pages"

Event #: 160330-3003

I.D. #: 7013088

"PRINT"

True Name: HARVEY, ALFRED

Date of Arrest: 03-30-16

Time of Arrest: 1824

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:

Other Charges

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with the Las Vegas Metropolitan Police Department, Clark County, Nevada, being so employed for a period of 6 YEARS 11 MONTHS.

That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense(s) of ROBBERY WDW at the location of 4640 W SAHARA, and that the offense(s) occurred at approximately 1821 hours on the 30 day of MARCH, 2016, in the:

☐ County of Clark☒ City of Las Vegas

DETAILS FOR PROBABLE CAUSE:

On 03-30-16, at approximately 1635 hours, I Officer R. Nelson P# 14002 working as marked patrol unit 3U56 was dispatched to TJ Maxx located at 4640 W Sahara reference a Robbery. Details stated that a male threatened a worker with a knife and left with merchandise.

Upon arrival I made contact with Julian Munoz who works in Loss Prevention for TJ Maxx. Munoz stated that he observed a black male adult wearing a blue dress shirt, blue blazer, and shorts in the children's department who was later identified as Alfred Harvey. Harvey began selecting multiple items very rapidly with no regard to price or size. Harvey then entered the Men's department where Munoz observed him conceal two wallets among multiple other items inside his blazer. Harvey then entered the fragrance department where he selected face cream and multiple other items before exiting the store and passing all points of sale. Munoz approached Harvey and identified himself as Loss Prevention for TJ Maxx. Munoz asked for the unpaid items back and Harvey handed him two wallets. Munoz then asked Harvey to step back inside the store and Harvey refused. Munoz asked again because he did not want to conduct business in front of Harvey's children. At this time Harvey pulled out a knife with a black handle and a blade approximately 4 inches long. Harvey held the knife over his head in a threatening manner and stated to Munoz "we're not doing this today". Munoz immediately felt threatened and feared for his life so he backed off and watched Harvey from a distance.

Munoz could still see items concealed in Harvey's blazer and observed him getting in the drivers seat of a UHaul van bearing AZ tag AG55084. The van drove west through the parking lot and north on Decatur. At this time LVMPD air unit spotted the van bearing AZ tag AG55084 turn eastbound Charleston from Decatur then southbound on Vista where Patrol Officer T. Humphreys P#14084 located the van at 1312 Vista and took Harvey into custody. At 1715 hours a Show-Up

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are misdemeanor).

Declarant must sign all page(s)
with an original signature.

R. NELSON

Print Declarant's Name


Declarant's Signature


P#

CONTINUATION REPORT

Event #: 160330-3003

ID#: 7013098

was conducted and Munoz identified Harvey 100 percent being the male who stole from the store and threatened him with the knife.

When Officer Humphreys took Harvey into custody, Harvey was in possession of a silver wallet which contained two counterfeit \$100 bills along with a paper with multiple credit card numbers along with pin numbers to those credit cards.

During inventory of the Uhaul van due to it being towed Officer Resberg P# 10007 located multiple credit cards with multiple persons names inside the drivers side door. Officer Resberg also located a wallet, face mask lotion, women's lotion and perfume all with TJ Maxx tags on them in the front of the van stuffed in between the drivers seat and console.

All TJ Maxx items were impounded as evidence and the credit cards, counterfeit money and paper containing credit card numbers and pins were given to Detective Heindel P#5606 with Fraud and Forgery for further follow up.

Based on the above facts and circumstances of Harvey stealing items from the TJ Maxx, producing a knife and raising it over his head in a threatening manner when confronted by Munoz causing Munoz to feel threatened and fear for his life, Harvey was placed under arrest for Robbery with a deadly weapon and transported to CCDC where he was booked.

Declarant must sign all page(s)
with an original signature.

R. NELSON

Print Declarant's Name

Declarant's Signature

14WZ
P#

EXHIBIT C

VOLUNTARY STATEMENT

Event #

NV330-303

Click here to add/edit Event Number

"PRINT"

THIS FORM IS TO BE COMPLETED BY OFFICER

Specific Crime ROBBERY W/DW		Date Occurred 03-30-16	Time Occurred 1621
Location of Occurrence 4640 W. SAHARA TJ MAXX		Sector/Beat U3	City <input checked="" type="checkbox"/> County <input type="checkbox"/>

Your Name (Last / First / Middle) Munoz, Julian, Jose		Date of Birth 4/7/1986	Social Security # 530-77-0553
Race H	Sex M	Height 6'8"	Weight 240
Hair Bro	Eyes Bro	Work Sched. (Hours)	Days Off
Business / School TJ Maxx			
Residence Address (Number & Street) Bldg/Apt. # 4640 W. Sahara H		City Las Vegas	State NV
Zip Code 89102		Res. Phone 702-280-2479 #	Bus. Phone 702-870-7161
Business (Local) Address (Number & Street) Bldg/Apt. # 4640 W. Sahara H		City Las Vegas	State NV
Zip Code 89102		Occupation Loss Prevention	Departure Date (if Visitor)
Best place to contact you during the day: TJ Maxx		Best time to contact you during the day: Any	
Can you identify the suspect?		<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

DETAILS:

On 3-30-2016 at approximately 16:21 hours I, Julian Munoz, observed a black male adult, wearing a hat, blue dress shirt, black blazer, and shorts, in the TJ Maxx Children department selecting merchandise irradically without regard to price or size. I observed the subject enter the Men's department and select 2 wallets among other things. The subject walked around the store and concealed the wallets in his blazer. The subject then entered the Fragrance department, selected a cream, and concealed it in his shorts. The subject then proceeded to exit the building, passing all points of purchase, without attempting to pay for the concealed merchandise. Once outside, I approached the subject, identified myself as TJ Maxx L.P. and asked for the unpaid for merchandise back. The subject handed me the 2 wallets. I then asked the subject to stop back in the store with me. The subject refused. I told the subject that I would prefer if we settled everything in the store and put in front of the children. The subject then pulled out what looked like

For Official Use Only

I HAVE READ THIS STATEMENT AND I AFFIRM TO THE TRUTH AND ACCURACY OF THE FACTS CONTAINED HEREIN. THIS STATEMENT WAS COMPLETED AT (LOCATION) **4640 W. Sahara Bldg. H**

ON THE **30** DAY OF **March**, 2016 AT **5:00** ☐ A.M. ☒ P.M.

Witness/Officer:

Witness/Officer:

LVPD 85 (Rev. 10-15-14) 16F05049X - HARVEY, ALFRED

Page 18 of 23

VEGAS METROPOLITAN POLICE DEPARTMENT
VOLUNTARY STATEMENT CONTINUATION

Page 2 of 2

Event #: 100330-3003

a black handled knife about 4 inches long. At this point I backed off and watched the subject get into a white Chevrolet with Arizona plates and drive off property heading North on Decatur. I backed away from the subject because I felt threatened and feared for my life. When the subject pulled the knife he held it high and said "We're not doing this today."

Witness: [Signature]

Witness: R. Martinez

1402

101-05049X - HARVEY, ALFRED

SIGNATURE OF PERSON GIVING STATEMENT

Page 19 of 20

SIGNATURE OF PERSON GIVING STATEMENT

EXHIBIT D

**LAS VEGAS METROPOLITAN POLICE DEPARTMENT
SHOW-UP WITNESS INSTRUCTIONS**

EVENT #: 100330-3003

NAME: MUNOZ, JULIAN INTERVIEWED BY: RAEISON 1402

ADDRESS: 4640 W. SAHARA (TTMAXX) LOCATION: 4640 W. SAHARA TTMAXX

PHONE NUMBER: 702-780-2479 DATE: 03-30-16 TIME: 1710

"In a moment I am going to show you a person who is being detained. This person may or may not be a person who committed the crime now being investigated. The fact that this person is detained should not cause you to believe or guess that he/she is guilty. You do not have to identify anyone. It is just as important to free innocent persons from suspicion as it is to identify those who are guilty. Please keep in mind that clothing can be easily changed. Please do not talk to anyone other than police officers while viewing this person. You must make up your own mind and not be influenced by other witnesses, if any. When you have viewed the person, please tell me whether or not you can make identification. If you can, tell me in your own words how sure you are of your identification. Please do not indicate in any way to other witnesses that you have or have not made an identification. Thank you."


Witness Signature

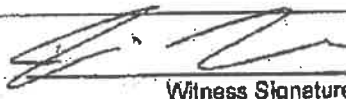
03-20-16/1715
Date/Time

Statement:

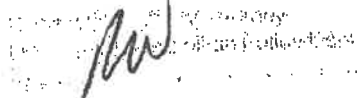
Yes, I am 100% sure that's him. I recognize his face and tattoos on his neck.

Witness Name: MUNOZ, JULIAN
Witness Address: 4640 W. SAHARA (TTMAXX)
Witness Phone Number: 702-780-2479

MAY 04 2016


Witness Signature

03-30-16 1718
Date/Time


Officer Signature


Officer Signature

03-30-16 1718
Date/Time

***** Below to be completed ONLY after Show-Up has been completed and NOT in the presence of the witness. *****

Detainee Name: <u>HARVEY, ALFRED</u>		DOB: <u>12-19-76</u>	ID or SSN: <u>10# 7013090</u>
Address: <u>3955 SWANSON LN NW 84114</u>		Phone Number: _____	
Mode of transportation used to take witness to Show-Up:			
<input checked="" type="checkbox"/> Marked Patrol Unit	<input type="checkbox"/> Unmarked Unit	<input type="checkbox"/> Private Conveyance	<input type="checkbox"/> Other _____
# of Officers present at Show-Up: _____	Uniformed: _____	Plain Clothes: _____	
Lighting Conditions:			
<input checked="" type="checkbox"/> Daytime	<input type="checkbox"/> Nighttime	with: <input type="checkbox"/> Spotlights	<input type="checkbox"/> Streetlight <input type="checkbox"/> Other: _____
Identification Made: <input checked="" type="checkbox"/> Yes/ <input type="checkbox"/> No	Suspect Arrested: <input checked="" type="checkbox"/> Yes/ <input type="checkbox"/> No	Arresting Officer P#: <u>14002</u>	


CLERK OF THE COURT

1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 BRYAN SCHWARTZ
6 Deputy District Attorney
7 Nevada Bar #013244
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13
14 Plaintiff,

15 -vs-

16 ALFRED C. HARVEY,
17 #7013098

18 Defendant.

CASE NO: C-16-314260-1

DEPT NO: XXIII

19 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO ALLOW DEFENDANT TO
20 COVER HIS FACE TATTOOS

21 DATE OF HEARING: 11/02/16
22 TIME OF HEARING: 9:30 AM

23 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
24 District Attorney, through BRYAN SCHWARTZ, Deputy District Attorney, and hereby
25 submits the attached Points and Authorities in Opposition to Defendant's Motion to Allow
26 Defendant to Cover His Face Tattoos.

27 This Opposition is made and based upon all the papers and pleadings on file herein, the
28 attached points and authorities in support hereof, and oral argument at the time of hearing, if
deemed necessary by this Honorable Court.

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On April 1, 2016, the State filed a Criminal Complaint against Alfred Harvey
4 (hereinafter "Defendant") charging him with Robbery with use of a Deadly Weapon. On April
5 18, 2016, the preliminary hearing was held in justice court. At the conclusion, the justice court
6 held Defendant to answer the above charges in district court.

7 On April 20, 2016, Defendant was arraigned in District Court on the above count.
8 Defendant subsequently pled not guilty, and his jury trial is currently scheduled for November
9 7, 2016.

10 On October 25, 2016, Defendant filed the instant Motion to cover his Face Tattoos.
11 The State responds as follows.

12 STATEMENT OF THE FACTS

13 On March 30, 2016, Julian Munoz, working as loss prevention for T.J. MAXX,
14 observed Defendant, via closed circuit television, select items from the store and place them
15 in his coat and pants. Preliminary Hearing Transcript, 4/18/16, pg. 5-6, 9. Munoz then
16 watched Defendant as he left the store without paying for these items. Id. at 6. Munoz then
17 contacted Defendant outside the store and asked him for the items back. Id. at 6-7. Defendant
18 handed back some, but not all of the items. Id. at 7. Munoz then asked Defendant to return to
19 the store with him, and in response, Defendant pulled out a knife and raised it over head, and
20 told Munoz they were not going to do this today. Id. at 8. Seeing the knife, Munoz backed
21 away and Defendant left in a white U-Haul van. Id. at 8-9. Munoz then contacted the police.
22 Id. at 13. Munoz subsequently identified Defendant during a show-up. Id. at 15.

23 ARGUMENT

24 I. THE COURT SHOULD DENY DEFENDANT'S MOTION BECAUSE
25 THEY DO NOT CONSTITUTE A DEPRIVATION OF THE RIGHT TO A
26 FAIR TRIAL

27 Defendant fails to provide any legal authority to support his request to cover his facial
28 tattoos. Further, relevant case law from other jurisdictions supports the State's position that
Defendant's Motion should be denied.

1 A defendant's tattoos do not constitute a deprivation of his right to a fair trial. People
2 v. Minter, 37 N.E.3d 238, 262-263 (Ill. App. Ct. 2015). In Minter, the Appellate Court of
3 Illinois dealt with a tattoo issue. Id. In fact, in that case the defendant also filed a pretrial
4 motion requesting that the defendant be allowed to apply make up to cover tattoos on his face
5 in an armed robbery case. Id. at 248. The trial court rejected the pre-trial motion and the
6 subsequent motions during trial about tattoos. Id. On appeal, the Defendant argued that the
7 trial court's rulings regarding his tattoos deprived him of a fair trial because they created the
8 possibility that the jury would view him negatively because of his tattoos. Id. at 262. In
9 rejecting Defendant's claim, the court stated:

10 Turning to the substance of defendant's argument, neither defendant nor
11 the State cites to any relevant Illinois precedent on this issue. We have not
12 uncovered any, either. However, other jurisdictions have dealt with this issue.
13 We look to those decisions to inform our analysis.

14 In Jackson v. United States, 945 A.2d 621, 623 (D.C. 2008), the
15 defendant claimed that the trial court erred in denying his motion to permit him
16 to use cover-up makeup to conceal a teardrop tattoo on his face. Defendant
17 argued that the tattoo amounted to other-crimes evidence because "[i]n some
18 circles, the presence of a teardrop tattoo means that the person wearing it has
19 killed somebody." Id. On appeal, the District of Columbia Court of Appeals
20 rejected the contention that the tattoo amounted to other-crimes evidence,
21 finding that the meaning of the tattoo was open to interpretation and did not
22 definitively signal criminal behavior. Id. at 626. Though it acknowledged the
23 possibility that jurors would interpret the tattoo negatively, the court found that
24 the trial court did not abuse its discretion in denying the defendant's motion
25 because the defendant was not prejudiced. Id. The court also noted that two of
26 the State's witnesses relied upon the tattoo in identifying the defendant. Id. at
27 627.

28 In State v. Ross, 2012-0109, p. 9 (La. Ct. App. 4/17/13); 115 So. 3d 616,
the trial court granted the State's motion in limine to prevent the defendant from
covering the teardrop tattoos on his face with makeup. The court found that the
defendant's tattoos were relevant to establish his identity because one of the
State's witnesses identified him by the tattoos. Id. at 12-13. The court also found
that the jury's being able to see the tattoos did not prejudice the defendant
because no testimony was elicited regarding their meaning. Id.

Finally, in State v. Ortiz, 2013 UT App 100, ¶ 1, 300 P.3d 786, the Court
of Appeals of Utah rejected the defendant's argument that he should have been
permitted to cover his facial tattoos because they were irrelevant and unfairly
prejudicial. The court rejected the fundamental premise of the defendant's
argument: that his facial tattoos were even evidence that could be considered

1 irrelevant or prejudicial. Id. ¶ 2. According to the court, the tattoos were simply
2 part of the defendant's general appearance and were not subject to the limits of
3 the rules of evidence. Id. The court noted that neither the State nor any of the
4 witnesses referred to the tattoos during his trial. Id. ¶ 4. None of the witnesses
5 identified the defendant via his tattoos. Id. ¶ 4 n.2. The court also noted that
6 tattoos are not inherently prejudicial in the same way as prison clothing or
7 handcuffs. Id.

8 We can draw several principles from these cases that apply to this case.
9 Like the teardrop tattoos at issue in each of these cases, defendant's tattoos were
10 never given a negative meaning. To the contrary, defendant attached innocuous
11 meanings to each of his tattoos in his testimony. The State introduced no gang
12 evidence to rebut this testimony and made no argument that defendant's tattoos
13 should be negatively interpreted. As the court in Ortiz stated, tattoos do not carry
14 the same inherently prejudicial effect as prison clothing or handcuffs. While
15 defendant's tattoos did not serve a relevant purpose like identification, they were
16 simply a part of his general appearance until he elected to explain their meaning.
17 Until that point, defendant's tattoos did not even constitute evidence that would
18 be required to meet the standard of relevancy.

19 We also reject defendant's contention that the trial court's ruling
20 compelled him to exercise his right to testify and waive his right to remain silent.
21 Defendant elected to explain the meaning of his tattoos to the jury, fearing that
22 the jury would draw negative inferences from them. However, the mere fact that
23 defendant sought to avoid the prejudicial effect of his appearance does not
24 render his waiver of his right to silence involuntary. Cf. People v. Poe, 16 Ill.
25 App. 3d 805, 805-07, 306 N.E.2d 900 (1974) (proper admission of other-crimes
26 evidence did not compel defendant to testify to dispel prejudicial effect of that
27 evidence); People v. Tillman, 116 Ill. App. 2d 24, 32, 253 N.E.2d 873 (1969)
28 (defendant was not compelled to testify to explain why he fled after State
introduced evidence of flight). As the trial court noted, defendant chose to get
the tattoos; no one compelled him to. Likewise, no one compelled him to explain
their meaning in court.

Defendant cannot show that allowing the jury to see his unaltered
physical appearance was reversible error. Defendant chose to tattoo his own face
and then chose to explain the meaning of those tattoos to the jury. The State
presented no evidence to give a negative meaning that would have necessitated
such explanation. We conclude that the trial court did not commit error in
precluding defendant from covering his facial tattoos with makeup.

Id. at 262-263.

While the Nevada Supreme Court has not addressed the above issues, the rationale from
other jurisdictions provides helpful guidance to this Court. Additionally, the Nevada Supreme

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1 Court has held that the showing of a defendant's tattoos does not violate the defendant's self-
2 incriminating rights. Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

3 Here, the Court should deny Defendant's Motion because his facial tattoos do not
4 violate his right to a fair trial. Defendant specifically claims that he will not receive a fair trial
5 because he may be judged based on his tattoos. Mtn. 4. Defendant further compares his tattoos
6 to "visible shackles and restraints on his body." Id. However, these arguments are without
7 merit. Defendant's tattoos are merely part of his general appearance and the State does not
8 plan to elicit any negative testimony regarding the meaning of any of Defendant's tattoos.
9 Ross, 115 So.3d at 12-13; Ortiz, 300 P.3d at 787-88. Further, Defendant relies on the Las
10 Vegas Review Journal article where the Honorable Judge Scotti allowed the defendant to cover
11 his tattoos to ensure he got a fair trial. However, this same defendant's request was denied by
12 the Honorable Judge Leavitt:

13 "I'm just not convinced you tried hard enough to pick a jury," said District Judge
14 Michelle Leavitt, who is overseeing the murder case. "They could be impacted;
15 they just have to be fair and impartial, regardless of the fact that they don't like
16 the tattoos or they impact them in a negative way. They should be able to set it
aside. And it's just outrageous if a juror can't do that."

17 See David Ferrera, *Jury should see neo-Nazi tattoos in Las Vegas murder trial, judge rules*,
18 LAS VEGAS REVIEW JOURNAL (Oct. 20, 2016, 11:12 p.m.)
19 [http://www.reviewjournal.com/crime/homicides/jury-should-see-neo-nazi-tattoos-las-vegas-](http://www.reviewjournal.com/crime/homicides/jury-should-see-neo-nazi-tattoos-las-vegas-murder-trial-judge-rules)
20 [murder-trial-judge-rules](http://www.reviewjournal.com/crime/homicides/jury-should-see-neo-nazi-tattoos-las-vegas-murder-trial-judge-rules). Thus, Defendant's right to a fair trial will not be effected if his
21 tattoos are visible because the jurors will not be qualified to sit on the jury if they cannot be
22 fair and impartial based on Defendant's tattoos.

23 Additionally, despite Defendant's contention that his tattoos are not relevant to the case,
24 Defendant's tattoos are relevant to the identification of Defendant. At the show-up, Munoz
25 indicated: "Yes, I am 100% sure that's him. I recognize his face and *tattoos on his neck*."
26 Defense Ex. D (emphasis added). Moreover, the T.J. Maxx surveillance video shows
27 Defendant moving through the store, selecting and concealing items. Since the video zooms
28 in on Defendant's face, his tattoos are clearly visible on the surveillance video as well.

1 Therefore, Defendant's tattoos should not be covered because they are a basis for the
2 identification in this case. Jackson, 945 A.2d at 627; Ross, 115 So.3d at 12-13.

3 Further, while Defendant compares his tattoos to "visible shackles and restraints on his
4 body," this comparison is belied by the fact that, as noted in Minter, he chose to tattoo his face
5 and neck area. Thus, these tattoos are in no way as inherently prejudicial as prison clothing
6 or handcuffs. Minter, 37 N.E.3d at 263; Ortiz, 300 P.3d at 787-88. As such, Defendant fails
7 to demonstrate that he will be prejudiced based on his tattoos.

8 **CONCLUSION**

9 The State requests that this Court DENY Defendant's Motion to Cover Defendant's
10 Tattoos.

11 DATED this 31st day of October, 2016.

12 Respectfully submitted,

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

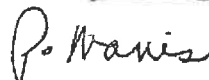
15 BY 

16 BRYAN SCHWARTZ
17 Deputy District Attorney
Nevada Bar #013244

18 **CERTIFICATE OF ELECTRONIC FILING**

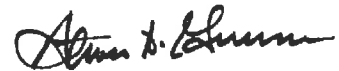
19 I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S
20 MOTION TO ALLOW DEFENDANT TO COVER HIS FACE TATTOOS, was made this
21 31st day of October, 2016, by Electronic Filing to:

22 JASMIN D. SPELLS
23 DEPUTY PUBLIC DEFENDER
24 EMAIL: Lillyjd@clarkcountynv.gov;
pdclerk@clarkcountynv.gov;

25 

26 Secretary for the District Attorney's Office

27
28 BS/pm/L-2



CLERK OF THE COURT

NWEW
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
BRYAN SCHWARTZ
Deputy District Attorney
Nevada Bar #013244
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALFRED C. HARVEY,
#7013098

Defendant.

CASE NO: C-16-314260-1

DEPT NO: XXIII

SECOND SUPPLEMENTAL NOTICE OF WITNESSES
[NRS 174.234(1)(a)]

***Denotes Change**

TO: ALFRED C. HARVEY, Defendant; and

TO: JASMIN SPELLS, DEPUTY PUBLIC DEFENDER, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
NEVADA intends to call the following witnesses in its case in chief:


<u>NAME</u>	<u>ADDRESS</u>
CUSTODIAN OF RECORDS OR DESIGNEE	Clark County Detention Center, 330 S. Casino Center Blvd., Las Vegas, NV
CUSTODIAN OF RECORDS OR DESIGNEE	LVMPD Communications
CUSTODIAN OF RECORDS OR DESIGNEE	LVMPD Dispatch

1	CUSTODIAN OF RECORDS	LVMPD Records, 400 S. Martin Luther King Blvd.,
2	OR DESIGNEE	Las Vegas, NV
3	CUSTODIAN OF RECORDS	LVMPD Project Management & Video Bureau
4	OR DESIGNEE	
5	CUSTODIAN OF RECORDS	Arizona DMV
6	OR DESIGNEE	
7	CUSTODIAN OF RECORDS	TJ Maxx, 4640 W. Sahara Ave., Las Vegas, NV
8	OR DESIGNEE	
9	APPEL, ERROL	C/O Clark County District Attorney's Office
10	*APPEL, JULIE	C/O Clark County District Attorney's Office
11	BARELA, RICHARD	LVMPD P#4504
12	BILYEU, R.	LVMPD P#7524
13	BRAMBLE, SHAWN	TJ Maxx, 4640 W. Sahara Ave., Las Vegas, NV
14	*CUSTODIAN OF RECORDS	Ross
15	OR DESIGNEE	
16	HEINDEL, E.	LVMPD P#5606
17	HUMPHERY, T.	LVMPD P#14084
18	LOPEZ-ROSENDE, F.	LVMPD P#8864
19	MUNOZ, JULIAN	C/O Clark County District Attorney's Office
20	NELSON, R.	LVMPD P#14002
21	RESBERG, E.	LVMPD P#10007
22	RUMERY, F.	LVMPD P#5817
23	VELASQUEZ, A.	LVMPD P#8444
24	WATTS, JOSEPH OR DESIGNEE	Clark County District Attorney's Office-Investigator
25	WILLSON, W.	LVMPD P#5274
26	///	
27	///	
28	///	

1 These witnesses are in addition to those witnesses endorsed on the Information or
2 Indictment and any other witness for which a separate Notice of Witnesses and/or Expert
3 Witnesses has been filed.

4 STEVEN B. WOLFSON
5 DISTRICT ATTORNEY
6 Nevada Bar #001565

7 BY

 #13575 (bar)
8 BRYAN SCHWARTZ
9 Deputy District Attorney
10 Nevada Bar #013244

11 **CERTIFICATE OF ELECTRONIC FILING**

12 I hereby certify that service of Second Supplemental Notice of Witnesses, was made
13 this 4TH day of November, 2016, by Electronic Filing to:

14 JASMINE SPELLS, Deputy Public Defender
15 EMAIL: lillydj@clarkcountynv.gov;
16 pdclerk@clarkcountynv.gov


17 Secretary for the District Attorney's Office
18
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28 16F05049X/pm/L-2


CLERK OF THE COURT

0071
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Lillyjd@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-16-314260-1
)	
v.	)	DEPT. NO. XXIII
)	
ALFRED C. HARVEY,)	
	)	DATE: 11 / 28 / 16
Defendant,	)	TIME: 9:30 a.m.

MOTION IN LIMINE

COMES NOW, the Defendant, ALFRED C. HARVEY, by and through JASMIN D. SPELLS, Deputy Public Defender, and hereby moves this Court to preclude the following testimony:

- (1) Testimony that Mr. Harvey's kid(s) were with him at the time of the incident;
- (2) Testimony that at the time of arrest, Mr. Harvey was in possession of two counterfeit \$100 bills, credit card numbers and credit card pin numbers and
- (3) Testimony that officers found credit cards with multiple names on them inside the driver door of the U-Haul van.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, Memorandum of Points and Authorities in support hereof, and oral argument at the time set for hearing this Motion.

///

///

///

1 DATED this 8th day of November, 2016.

2
3 PHILIP J. KOHN
4 CLARK COUNTY PUBLIC DEFENDER

5 By: /s/ Jasmin D. Spells
6 JASMIN D. SPELLS, #11635
7 Deputy Public Defender
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1 if its probative value is “substantially outweighed by the danger of unfair prejudice, of confusion
2 of the issues or of misleading the jury. Nev. Rev. Stat. § 48.035.

3 Committing a crime with the assistance of a child is codified in Nev. Rev. Stat. § 193.162.
4 This statute allows for a consecutive enhancement ranging from 1-20 years to be applied to any
5 category A or B felony, Id. A child is defined as anyone under the age of eighteen. Id. This
6 statute is similar to the deadly weapon and gang enhancement statutes.

7 Here, there is video surveillance from the retail store. The defense is not requesting that any
8 of the video surveillance be redacted to exclude pictures of children while shopping in the store.
9 The defense would request that any video surveillance of Mr. Harvey outside the store with his
10 children be redacted as much as it practical and possible. In this case, the fact that Mr. Harvey
11 had his children with him is an uncharged bad act. It is not relevant to the crime in question. It is
12 also not res gestae and the State has failed to file a motion arguing such and requesting this Court
13 allow said evidence.

14 Mr. Harvey is not charged with committing any crime with the assistance of a child. The
15 mere fact that his children were present does not tend to prove any material element of the crime
16 charged: robbery. Thus this fact is not relevant. Similarly the State has not charged any fraud or
17 forgery related crimes in the instant case. Thus, any reference to counterfeit bills or personal
18 identifying credit card information is not relevant to the robbery allegations here.

19 The testimony the defendant seeks to preclude in this motion is irrelevant and
20 impermissible. It only seeks to illicit information about uncharged acts that Mr. Harvey is
21 currently not on trial for. This testimony is not only irrelevant, but it is also more prejudicial than
22 probative. This type of evidence seeks to bias the jury against Mr. Harvey and amounts to
23 nothing more than prejudicial and/or propensity evidence. None of this evidence is necessary or
24 relevant to the conduct charged in the Information. Not only is this evidence prejudicial, it is a
25 waste of judicial economy, time and resources. Accordingly, the above listed testimony must be
26 precluded.

27 CONCLUSION

28

1 Based on the foregoing, Mr. Harvey respectfully requests that this Honorable Court issue an
2 order granting the prayers of the instant Motion in Limine.

3
4 DATED this 8th day of November, 2016.

5 PHILIP J. KOHN
6 CLARK COUNTY PUBLIC DEFENDER

7
8 By /s/ Jasmin D. Spells
9 JASMIN D. SPELLS, #11635
10 Deputy Public Defender
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YOU WILL PLEASE TAKE NOTICE that the foregoing MOTION IN LIMINE
will be heard on NOV. 28 2016, at 9:30 a.m. in District Court, Department XXIII.
DATED this 8th day of November, 2016.

By /s/ Jasmin D. Spells
JASMIN D. SPELLS, #11635
Deputy Public Defender

I hereby certify that service of the above and forgoing MOTION was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountynyda.com on this 8th day of November, 2016

By: /s/Jasmin D. Spells - PD
An employee of the
Clark County Public Defender's Office

EXHIBIT A

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

ARREST REPORT

☒ City☐ County☒ Adult☐ Juvenile

Sector/Beat

U3

ID/EVENT# 7013098	ARRESTEE'S NAME (Last) Harvey		(First) Alfred		(Middle)		S.S.# XXXXXXXX
ARRESTEE'S ADDRESS (Number, Street, City, State, Zip Code) 3955 Swenson #170 Las Vegas, NV 89119							
CHARGES Robbery WDW							
OCURRED	DATE 03-30-16	DAY OF WEEK WED	TIME 1821	LOCATION OF ARREST (Number, Street, City, State, Zip Code) 1312 Vista Las Vegas, NV 89107			
RACE B	SEX M	D.O.B. 12-18-76	HT. 6'2	WT. 200	HAIR BLK	EYES BRO	PLACE OF BIRTH LA, CA
ARRESTING OFFICER #1: R. NELSON			P#: 14002	ARRESTING OFFICER #2:			P#:
CONNECTING REPORTS (Type or Event Number) FELONY ARREST PACKET 160330-3003							

APPROVED BY (PRINTED NAME): _____

CIRCUMSTANCES OF ARREST:

On 03-30-16, at approximately 1635 hours, Officer R. Nelson P# 14002 working as marked patrol unit 3056 was dispatched to TJ Maxx located at 4640 W Sahara reference a Robbery. Details stated that a male threatened a worker with a knife and left with merchandise.

Upon arrival I made contact with Julian Munoz who works in Loss Prevention for TJ Maxx. Munoz stated that he observed a black male adult wearing a blue dress shirt, blue blazer, and shorts in the children's department who was later identified as Alfred Harvey. Harvey began selecting multiple items very rapidly with no regard to price or size. Harvey then entered the Men's department where Munoz observed him conceal two wallets among multiple other items inside his blazer. Harvey then entered the fragrance department where he selected face cream and multiple other items before exiting the store and passing all points of sale. Munoz approached Harvey and identified himself as Loss Prevention for TJ Maxx. Munoz asked for the unpaid items back and Harvey handed him two wallets. Munoz then asked Harvey to step back inside the store and Harvey refused. Munoz asked again because he did not want to conduct business in front of Harvey's children. At this time Harvey pulled out a knife with a black handle and a blade approximately 4 inches long. Harvey held the knife over his head in a threatening manner and stated to Munoz "we're not doing this today". Munoz immediately felt threatened and feared for his life so he backed off and watched Harvey from a distance.

Munoz could still see items concealed in Harvey's blazer and observed him getting in the drivers seat of a Uhaul van bearing AZ tag AG55084. The van drove west through the parking lot and north on Decatur. At this time LVMPD air unit spotted the van bearing AZ tag AG55084 turn eastbound Charleston from Decatur then southbound on Vista where Patrol Officer T. Humphreys P#14084 located the van at 1312 Vista and took Harvey into custody. At 1715 hours a Show-Up was conducted and Munoz identified Harvey, 100-percent being the male who stole from the store and threatened him with the knife.

When Officer Humphreys took Harvey into custody, Harvey was in possession of a silver wallet which contained two counterfeit \$100 bills along with a paper with multiple credit card numbers along with pin numbers to those credit cards. During inventory of the Uhaul van due to it being towed Officer Resberg P# 10007 located multiple credit cards with multiple persons names inside the drivers side door. Officer Resberg

CONTINUATION REPORTID/EVENT #: 160330-3003

also located a wallet, face mask lotion, women's lotion and perfume all with TJ Maxx tags on them in the front of the van stuffed in between the drivers seat and console. All TJ Maxx items were impounded as evidence and the credit cards, counterfeit money and paper containing credit card numbers and pins were given to Detective Heindel P#5606 with Fraud and Forgery for further follow up.

Based on the above facts and circumstances of Harvey stealing items from the TJ Maxx, producing a knife and raising it over his head in a threatening manner when confronted by Munoz causing Munoz to feel threatened and fear for his life, Harvey was placed under arrest for Robbery with a deadly weapon and transported to CCDC where he was booked.

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
NOV 15 2016

BY Carol Donahoo
CAROL DONAHOO, DEPUTY

JURL

DISTRICT COURT
CLARK COUNTY, NEVADA

The State of Nevada,

Plaintiff,

CASE NO. C314260

DEPT. NO. VIII

-vs-

Alfred C. Harvey,

Defendant.

JURY LIST

- | | |
|---------------------------|-------------------------|
| 1. Susie Chang | 8. Lee Wortham-Thomas |
| 2. Peter Vlassopoulos | 9. Meseret Gemed |
| 3. Erik Bagger | 10. Melissa Svejda |
| 4. Nicole Miller | 11. Randall Robarts |
| 5. Michelle Moline | 12. Christopher Carrier |
| 6. Felicitas Luna-Herrera | |
| 7. David Franklin | |

ALTERNATES

13. Marlene Mecall
14. Danielle Rae

C-16-314260-1
JURL
Jury List
4800985



ORIGINAL

AINF
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
BRYAN SCHWARTZ
Deputy District Attorney
Nevada Bar #013244
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
NOV 16 2016

BY Carol Donahoe
CAROL DONAHOO, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

C-16-314260-1
AINF
Amended Information
4600986



THE STATE OF NEVADA,

Plaintiff,

-vs-

ALFRED C. HARVEY,
#7013098

Defendant.

CASE NO. C-16-314260-1

DEPT NO. VII

AMENDED

INFORMATION

STATE OF NEVADA }
COUNTY OF CLARK } ss:

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

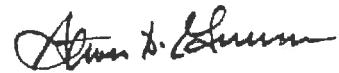
That ALFRED C. HARVEY, the Defendant(s) above named, having committed the crime of **ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138)**, on or about the 30th day of March, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did willfully, unlawfully, and feloniously take personal property, to-wit: miscellaneous clothing items from the person of JULIAN MUNOZ, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of JULIAN MUNOZ, with use of a deadly weapon, to-wit: a knife, defendant using force or fear to obtain or retain possession of

1 the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate
2 escape.

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

5 BY  #13575 (for)
6 BRYAN SCHWARTZ
7 Deputy District Attorney
8 Nevada Bar #013244
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27 DA#16F05049X/pm/L-2
28 LVMPD EV#1603303003
(TK4)



CLERK OF THE COURT

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Lillyjd@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-16-314260-1
)	
v.	)	DEPT. NO. VIII
)	
ALFRED C. HARVEY,)	
)	
Defendant,)	

DEFENDANT'S PROPOSED JURY INSTRUCTIONS AND VERDICT FORM

COMES NOW, the Defendant, ALFRED C. HARVEY, by and through JASMIN D. SPELLS, Deputy Public Defender and hereby submits his proposed jury instructions.

DATED this 16th day of November, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Jasmin Spells
JASMIN D. SPELLS, #11635
Deputy Public Defender

INSTRUCTION NO. _____

1 You are here to determine whether the defendant is not guilty or guilty from the evidence
2
3 in the case. You are not called upon to return a verdict as to the guilt of any other person. So, if
4 the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant,
5 you should so find, even though you may believe one or more persons are also guilty.
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2 In deciding the facts of this case you may have to decide which witnesses to believe and
3 which witnesses not to believe. You may believe everything a witness says, only part of it or
4 none of it.

5 In considering the weight or value of the testimony of any witness you may consider the
6 appearance, attitude and behavior of the witness when testifying and a number of other things
7 including:
8

- 9 1. The witnesses ability to see or hear or know of the things the witness testifies;
- 10 2. The quality of the witness's memory;
- 11 3. The inclination of the witness to speak truthfully;
- 12 4. Whether or not the witness has any interest in the outcome of the case or any motive,
13 bias or prejudice;
- 14 5. Whether the witness is contradicted by anything the witness said or wrote before trial;
5 and
- 16 6. How reasonable is the witness's testimony when considered with other evidence
17 which you believe.
18

19 In deciding whether or not to believe a witness, keep in mind people sometimes forget
20 things. You need to consider whether a contradiction is an innocent lapse of memory or an
21 intentional falsehood, and that may depend on whether it has to do with an important fact or with
22 only a small detail.
23

24 The weight or value of evidence does not necessarily depend on the number of witnesses
25 testifying for one side. You must consider all the evidence and you may decide the testimony of
26 a smaller number of witnesses on one side has more weight or value than that presented by the
27 larger number of witnesses on the other side.
28

INSTRUCTION NO. _____

1 It is a constitutional right of a defendant in a criminal trial that he may not be compelled
2
3 to testify. Thus, the decision as to whether he should testify is left to the defendant on the advice
4 and counsel of his attorney. You must not draw any inference of guilt from the fact that he does
5 not testify, nor should this fact be discussed by you or enter into your deliberations in any way.
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INSTRUCTION NO. _____

The flight, or absence of flight, of a person immediately after the alleged commission of a crime is not in itself sufficient to establish guilt or lack of guilt; it is however, a circumstance which may be considered in reaching your verdict. The weight which should be placed on this circumstance is left entirely to the jury.

1
2 It is unnecessary to prove both violence and intimidation. If the fact be attended with
3 circumstances of terror, such threatening word or gesture as in common experience is likely to
4 create an apprehension of danger and induce a man to part with his property for the safety of his
5 person, it is robbery. It is not necessary to prove actual fear, as the law will presume it in such
6 case.

7
8 In order to constitute robbery, the taking must be accomplished either by force or
9 intimidation, this element being the gist and distinguishing characteristic of the offense; but there
10 need not be force and intimidation, either being sufficient without the other.

1 Every person charged with the commission of a crime shall be presumed innocent unless
2
3 the contrary is proved by competent evidence beyond a reasonable doubt.

4 The burden is on the State to prove beyond a reasonable doubt that the defendant
5 committed an unlawful taking of personal property "specifically, miscellaneous clothing items"
6 from the person of another, or in his presence, against his will, by means of force or violence or
7 fear of injury, immediate or future, to his person or property and that such force was used to:

- 8 (1) Obtain or retain possession of the property,
9
10 (2) To prevent or overcome resistance to the taking of the property, or
11 (3) To facilitate escape with the property,
12 you must find the defendant not guilty of Robbery.

1 If you are not convinced beyond a reasonable doubt that the defendant used a deadly
2 weapon in the commission of an unlawful taking of personal property “specifically,
3 miscellaneous clothing items” from the person of another, or in his presence, against his will, by
4 means of force or violence or fear of injury, immediate or future, to his person or property and
5 that such force was used to:
6

7 (1) Obtain or retain possession of the property,

8 (2) To prevent or overcome resistance to the taking of the property, or
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10 (3) To facilitate escape with the property,

11 you must find the defendant not guilty of Robbery with use of a Deadly Weapon.
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INSTRUCTION NO. _____

Petit larceny is the intentional stealing, taking, carrying away or driving away personal goods with a value of less than \$650, with the specific intent to permanently deprive the owner of said property.

When a person is accused of committing a particular crime and at the same time and by the same conduct may have committed another offense of lesser grade or degree, the latter is with respect to the former, a lesser included offense.

If you are not convinced beyond a reasonable doubt that the defendant is guilty of the offense charged, he may, however be found guilty of any lesser included offense, if the evidence is sufficient to establish guilty beyond a reasonable doubt of the lesser included offense.

The offense of Robbery necessarily includes the lesser offense of petit larceny. You are instructed that if you are not convinced beyond a reasonable doubt that the defendant is guilty of Robbery, you may find the defendant guilty of Robbery, if you so find beyond a reasonable doubt.

You are instructed that you may only mark one box on the verdict form.

Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. The process of remembering consists of three stages: acquisition – the perception of the original event; retention – the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval – the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.

1 If the evidence permits two reasonable interpretations, one of which points to the
2 Defendant's guilt and the other to the Defendant being not guilty, you must adopt the
3 interpretation that points to the Defendant being not guilty, and reject that interpretation that
4 points to his guilt.
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6 If, on the other hand, one interpretation of this evidence appears to you to be reasonable
7 and the other interpretation to be unreasonable, you must accept the reasonable interpretation and
8 reject the unreasonable.
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1 Before you may rely on circumstantial evidence to conclude that fact necessary to find
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3 the defendant guilty has been proved, you must be convinced that the State has proved each fact
4 essential to that conclusion beyond a reasonable doubt.

5 Also before you may rely on circumstantial evidence to find the defendant guilty, you
6 must be convinced that the only reasonable conclusion supported by the circumstantial evidence
7 is that the defendant is guilty. If you can draw two or more reasonable conclusions from the
8 circumstantial evidence and one of those reasonable conclusions points to innocence and another
9 to guilt, you must accept the one that points to innocence. However, when considering
10 circumstantial evidence, you must accept only reasonable conclusions and reject any that are
11 unreasonable.
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1 **VER**

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4 DISTRICT COURT
5 CLARK COUNTY, NEVADA
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7
8 THE STATE OF NEVADA,

9 Plaintiff,

Case No: C-16-314260-1

10 ALFRED C. HARVEY,

11 Defendant,
12

Dept No: VIII

13 **VERDICT**

14
15 We, the jury in the above entitled case, find the Defendant ALFRED C. HARVEY, as
16 follows:

17 *(please check the appropriate box, select only one)*

- 18 ☐ Not Guilty
19 ☐ Guilty of Robbery with use of a deadly weapon
20 ☐ Guilty of Robbery
21 ☐ Guilty of Petit Larceny
22

23 DATED this _____ day of November, 2016
24

25 _____
FOREPERSON
26
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CERTIFICATE OF ELECTRONIC SERVICE

A copy of the above and foregoing DEFENDANT'S PURPOSED JURY INSTRUCTIONS AND VERDICT FORM was served via electronic e-filing to the District Attorney's Office at Motions@clarkcountydade.com on this 16th day of November, 2016.

By: /s/ Kristina Byrd
Secretary, Clark County Public Defender

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ALFRED C. HARVEY,) No. 72829/75911
)
)
Appellant,)
)
)
vi.)
)
)
THE STATE OF NEVADA,)
)
)
Respondent.)

PHILIP J. KOHN Clark County Public Defender 309 South Third Street Las Vegas, Nevada 89155-2610	STEVE WOLFSON Clark County District Attorney 200 Lewis Avenue, 3 rd Floor Las Vegas, Nevada 89155
Attorney for Appellant	ADAM LAXALT Attorney General 100 North Carson Street Carson City, Nevada 89701-4717 (702) 687-3538

CERTIFICATE OF SERVICE

ADAM LAXALT
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

ALFRED C. HARVEY, NDOC# 1174900
C/O SOUTHERN DESERT CORRECTIONAL CENTER
P.O. BOX 208
INDIAN SPRINGS, NV 89070

BY /s/ Rachel Howard
Employee, Clark County Public Defender's Office

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Electronically Filed
Oct 23 2018 08:40 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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STEVE WOLFSON
Clark County District Attorney
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 687-3538

Counsel for Respondent

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Case No. 72829

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Thomas J. Linn
CLERK OF THE COURT

FILED
JUSTICE COURT, LAS VEGAS TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, 2016 APR -1 P 12:09

Plaintiff, JUSTICE COURT
LAS VEGAS, NEVADA

C-16-314260-1
Dept.: XXIII

-vs-

DEPUTY

CASE NO: 16F05049X

DEPT NO: 4

ALFRED C. HARVEY #7013098,

Defendant.

CRIMINAL COMPLAINT

The Defendant above named having committed the crime of ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138), in the manner following, to-wit: That the said Defendant, on or about the 30th day of March, 2016, at and within the County of Clark, State of Nevada, did willfully, unlawfully, and feloniously take personal property, to-wit: miscellaneous clothing items, from the person of JULIAN MUNOZ, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of JULIAN MUNOZ, with use of a deadly weapon, to-wit: a knife, defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate escape.

All of which is contrary to the form, force and effect of Statutes in such cases made and provided and against the peace and dignity of the State of Nevada. Said Complainant makes this declaration subject to the penalty of perjury.

ACM. Carroll
04/01/16

16F05049X/cb
LVMPD EV# 1603303003
(TK4)



RIM
IMAGED


CLERK OF THE COURT

1 CASE NO. C314260

2

3

IN THE JUSTICE COURT OF LAS VEGAS TOWNSHIP

4

CLARK COUNTY, STATE OF NEVADA

5

6 STATE OF NEVADA,

)

7 PLAINTIFF,

)

8 VS.

)

CASE NO. 16F05049X

9 ALFRED C. HARVEY,

)

10 DEFENDANT.

)

)

11

12

REPORTER'S TRANSCRIPT OF PRELIMINARY HEARING

13

14

BEFORE THE HONORABLE MELISSA SARAGOSA, JUSTICE OF THE PEACE

15

16

MONDAY, APRIL 18, 2016

17

10:47 O'CLOCK A.M.

18

19 FOR THE STATE:

BRYAN S. SCHWARTZ,
DEPUTY DISTRICT ATTORNEY

20

21 FOR THE DEFENDANT:

JASMIN D. SPELLS,
DEPUTY PUBLIC DEFENDER

22

23

* * * *

24 REPORTED BY: KIT MACDONALD, C.C.R.
CERTIFICATE NO. 65

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* * * *

1 LAS VEGAS, CLARK COUNTY, NEVADA, MONDAY, APRIL 18, 2016

2

3 10:47 O'CLOCK A.M.

4

5 * * * * *

6

7 **THE COURT:** ALFRED HARVEY, 16F05049X.

8 GOOD MORNING.

9 **THE DEFENDANT:** GOOD MORNING, MA'AM.

10 **MS. SPELLS:** GOOD MORNING, YOUR HONOR, JASMIN SPELLS ON
11 BEHALF OF MR. HARVEY. WE ARE READY TO PROCEED THIS MORNING.

12 **THE COURT:** OKAY. STATE, HOW MANY WITNESSES?

13 **MR. SCHWARTZ:** ONE WITNESS, YOUR HONOR.

14 **THE COURT:** ALL RIGHT. MR. HARVEY HAVE A SEAT, WE'LL GET
15 STARTED IN JUST A MINUTE, SIR.

16 (WHEREUPON DISCUSSIONS WERE HELD ON OTHER CASES.)

17 **THE COURT:** AND ALFRED HARVEY, 16F05049X.

18 **MS. SPELLS:** JASMIN SPELLS ON HIS BEHALF.

19 YOUR HONOR WE'RE READY TO PROCEED. THE DEFENSE WOULD
20 INVOKE THE EXCLUSIONARY RULE, PLEASE.

21 **THE COURT:** ALL RIGHT. ANY MATTERS OTHER THAN THE
22 EXCLUSIONARY RULE THAT WE NEED TO TAKE UP BEFORE WE BEGIN?

23 **MS. SPELLS:** NO, YOUR HONOR.

24 **MR. SCHWARTZ:** NOT WITH THE STATE, YOUR HONOR.

25 **THE COURT:** ALL RIGHT. WHO'S YOUR FIRST WITNESS, STATE?

1 **MR. SCHWARTZ:** STATE IS GOING TO CALL JULIAN MUNOZ.

2 **THE COURT:** ALL RIGHT. ANY OTHER WITNESS, OTHER THAN
3 JULIAN MUNOZ, NEED TO STEP OUT INTO THE HALLWAY AND WAIT UNTIL
4 MY MARSHAL INFORMS YOU THAT IT IS YOUR TURN TO TESTIFY.

5 MR. MUNOZ, YOU MAY COME ON UP TO THE WITNESS STAND.

6 **MS. SPELLS:** YOUR HONOR, COULD WE HAVE A BRIEF
7 INDULGENCE, MR. HARVEY HASN'T COME TO COUNSEL TABLE YET.

8 **THE COURT:** YES. WE'LL JUST GET HIM SWORN IN.

9 GO AHEAD AND REMAIN STANDING, MR. MUNOZ, FOR A MOMENT,
10 AND BE SWORN IN BY MY CLERK.

11 **THE MARSHAL:** RAISE YOUR RIGHT HAND.

12

13

JULIAN MUNOZ,

14 CALLED AS A WITNESS BY THE STATE, AND HAVING BEEN FIRST DULY
15 SWORN TO TESTIFY TO THE TRUTH, THE WHOLE TRUTH, AND NOTHING
16 BUT THE TRUTH, TESTIFIED AS FOLLOWS:

17

18 **THE WITNESS:** YES.

19 **THE CLERK:** PLEASE BE SEATED.

20 STATE YOUR FIRST AND LAST NAME AND SPELL IT FOR THE
21 RECORD.

22 **THE WITNESS:** IT'S JULIAN MUNOZ, J-U-L-I-A-N. MUNOZ,
23 M-U-N-O-Z.

24 **THE COURT:** ALL RIGHT. HOLD ON JUST A MOMENT WHILE WE
25 GET MR. HARVEY OVER TO HIS COUNSEL TABLE.

1 **THE WITNESS:** OKAY.

2 **THE COURT:** ALL RIGHT. STATE, YOU MAY PROCEED WITH
3 QUESTIONS.

4 **MR. SCHWARTZ:** THANK YOU, YOUR HONOR.

5

6 **DIRECT EXAMINATION**

7 **BY MR. SCHWARTZ:**

8 **Q** MR. MUNOZ, WHERE DO YOU WORK?

9 **A** I WORK AT T.J. MAXX.

10 **Q** IN WHAT CAPACITY DO YOU WORK AT T.J. MAXX?

11 **A** I'M IN LOSS PREVENTION.

12 **Q** ALL RIGHT. I WANT TO DIRECT YOUR ATTENTION TO MARCH
13 30TH, 2016, WERE YOU WORKING AT T.J. MAXX AS LOSS PREVENTION
14 OFFICER?

15 **A** YES.

16 **Q** AND DID YOU HAVE OCCASION TO COME INTO CONTACT WITH
17 SOMEONE THAT DAY THAT YOU ALSO SEE IN THE COURTROOM TODAY?

18 **A** YES.

19 **Q** AND CAN YOU PLEASE POINT TO THAT PERSON AND IDENTIFY
20 AN ARTICLE OF CLOTHING THAT THEY'RE WEARING?

21 **A** HE'S WEARING THE BLUE JUMPSUIT AND GLASSES.

22 **MR. SCHWARTZ:** AND, YOUR HONOR, COULD THE RECORD PLEASE
23 REFLECT IDENTIFICATION OF THE DEFENDANT?

24 **THE COURT:** IT WILL.

25

1 BY MR. SCHWARTZ:
2 Q AND BEFORE WE GET INTO HOW YOU CAME INTO CONTACT
3 WITH THE DEFENDANT, WHERE'S YOUR T.J. MAXX LOCATED?
4 A IT'S OFF OF SAHARA AND DECATUR.
5 Q WOULD THAT BE 4640 WEST SAHARA?
6 A YES.
7 Q AND THAT'S HERE IN LAS VEGAS, CLARK COUNTY, NEVADA?
8 A YES.
9 Q CAN YOU DESCRIBE FOR US HOW YOU CAME INTO CONTACT
10 WITH THE DEFENDANT?
11 A I CONTACTED HIM BECAUSE HE WAS IN THE STORE
12 STEALING.
13 Q OKAY. AND DID YOU OBSERVE HIM IN THE STORE PRIOR TO
14 YOUR CONTACT WITH HIM?
15 A YES, I DID.
16 Q AND WHAT DID YOU OBSERVE HIM DOING?
17 A I OBSERVED HIM SELECT TWO WALLETS AND A CREAM AND
18 CONCEAL THEM. THE TWO WALLETS WERE IN HIS COAT, THE CREAM
19 WENT INTO HIS PANTS.
20 Q AFTER YOU OBSERVED THIS, WHAT DID THE DEFENDANT DO
21 NEXT?
22 A HE EXITED THE STORE.
23 Q DID YOU SEE HIM PAY FOR ANY OF THESE ITEMS?
24 A HE DID NOT.
25 Q AND IS IT AT THAT POINT, ONCE HE EXITED THE STORE,

1 THAT THAT'S WHEN YOU CONTACTED HIM?

2 **A** YES.

3 **Q** WANT DID YOU SAY TO HIM?

4 **A** I IDENTIFIED MYSELF AS T.J -- T.J. MAXX LOSS

5 PREVENTION, AND I ASKED HIM FOR THE UNPAID MERCHANDISE BACK.

6 **Q** AND WERE YOU ABLE TO OBTAIN ALL THE MERCHANDISE BACK

7 THAT HE HAD TAKEN?

8 **A** HE HANDED ME THE TWO WALLETS, BUT I DID NOT

9 ACCEPT -- OBTAIN THE CREAM.

10 **Q** AND ONCE HE -- ONCE THIS HAPPENED, WHAT -- WHAT, IF

11 ANYTHING, DID HE SAY TO YOU, OR DID YOU SAY TO HIM?

12 **A** SO I ASKED FOR THE MERCHANDISE BACK, AND HE'S -- HE

13 WAS -- HE SAID AT FIRST HE DIDN'T KNOW WHAT I WAS TALKING

14 ABOUT, AND I TOLD HIM I NEED THE TWO WALLETS IN YOUR POCKET,

15 AND HE'S LIKE, OH, OKAY, HERE YOU GO. AND AT THAT POINT I

16 ASKED HIM TO COME BACK INTO THE STORE WITH ME. HE SAID HE

17 WASN'T GOING TO COME BACK INTO THE STORE. AND I WAS LIKE -- I

18 TOLD HIM, YOU KNOW, WE DON'T HAVE TO DO THIS RIGHT NOW OUT

19 HERE IN FRONT OF THE KIDS, AND THEN AT THAT POINT IS WHEN HE

20 PULLED OUT THE KNIFE.

21 **Q** WERE THERE TWO CHILDREN OUT THERE?

22 **A** YEAH, THERE WAS TWO CHILDREN WITH HIM. I DON'T KNOW

23 WHOSE CHILDREN THEY WERE, BUT THEY WERE WITH HIM.

24 **Q** OH. WERE THEY WITH HIM IN THE STORE, AS WELL?

25 **A** YES.

1 Q AND YOU MENTIONED HE PULLED OUT A KNIFE.
2 A YES.
3 Q CAN YOU DESCRIBE WHERE HE PULLED THAT KNIFE OUT
4 FROM?
5 A HE PULLED IT OUT OF HIS LEFT POCKET.
6 Q AND ABOUT HOW LONG WOULD YOU SAY THE BLADE OF THE
7 KNIFE WAS?
8 A MAYBE FOUR INCHES.
9 Q WAS IT A KNIFE THAT YOU MANUALLY OPEN WITH YOUR HAND
10 OR --
11 A I COULDN'T -- I WOULDN'T BE ABLE TO TELL YOU THAT,
12 IT WAS REAL QUICK.
13 Q OKAY.
14 A I HEARD THE SNAP AND THEN, YOU KNOW, HE CAME UP WITH
15 IT. BECAUSE I WAS ON --- I WAS ON HIS RIGHT SIDE, HE PULLED IT
16 FROM HIS LEFT SIDE. I HEARD THE SNAP AND THEN HE CAME UP WITH
17 IT OVER HIS HEAD, HE SAID, WE'RE NOT DOING THIS RIGHT TODAY,
18 AND AT THAT POINT I BACKED OFF.
19 Q HE HAD THE KNIFE OVER HIS HEAD FACING YOU?
20 A YEAH.
21 Q AND AT THAT POINT YOU BACKED OFF, AND WHAT -- WHAT
22 DID THE DEFENDANT DO?
23 A HE WALKED OUT TOWARDS HIS CAR.
24 Q DID YOU SEE WHAT KIND OF CAR HE LEFT IN?
25 A YEAH, IT WAS A WHITE U-HAUL VAN.

1 **Q** WHITE.

2 AND YOU DIDN'T -- YOU NEVER RECEIVED -- AT THAT
3 POINT YOU DIDN'T RECEIVE THE FACE CREAM BACK?

4 **A** NO.

5 **MR. SCHWARTZ:** THE STATE HAS NO FURTHER QUESTIONS AT THIS
6 TIME, YOUR HONOR.

7 **THE COURT:** OKAY.

8 CROSS.

9 **MS. SPELLS:** THANK YOU, YOUR HONOR.

10

11 **CROSS-EXAMINATION**

12 **BY MS. SPELLS:**

13 **Q** GOOD MORNING MR. MUNOZ.

14 **A** GOOD MORNING.

15 **Q** NOW, YOU INDICATED THAT YOU WERE WORKING LOSS
16 PREVENTION ON MARCH 30TH, 2016?

17 **A** YES.

18 **Q** WERE YOU WORKING ON THE FLOOR?

19 **A** I WAS WORKING IN THE -- OUR OFFICE.

20 **Q** IN YOUR OFFICE WERE YOU VIEWING CLOSED CIRCUIT TV?

21 **A** YES.

22 **Q** AND HOW WAS IT THAT MR. HARVEY CAME TO YOUR
23 ATTENTION?

24 **A** HE WALKED IN AND HE QUICKLY STARTED SELECTING
25 MERCHANDISE, KIND OF AT RANDOM, AND WAS PUTTING STUFF --

1 PICKING ALL THAT STUFF UP AND PUTTING STUFF DOWN, IT WAS JUST
2 SUSPICIOUS.

3 Q AND IS THIS ALL THROUGH CLOSED CIRCUIT TV THAT YOU
4 WERE VIEWING THIS?

5 A YES.

6 Q DID YOU SAVE THAT VIDEO AT ALL?

7 A YES.

8 Q HAVE YOU HANDED IT OVER TO THE DISTRICT ATTORNEY AS
9 OF YET?

10 A I DON'T KNOW. I THINK WE HANDED A COPY TO THE
11 POLICE.

12 Q OKAY.

13 A BUT I KNOW I HAVE A COPY IN MY OFFICE.

14 Q OKAY.

15 THE COURT: YOU DO OR DO NOT?

16 THE WITNESS: I BELIEVE I DO.

17 THE COURT: OKAY.

18 BY MS. SPELLS:

19 Q AND AFTER LOOKING AT THE CLOSED CIRCUIT TELEVISION,
20 DID YOU EXIT THE OFFICE AT SOME POINT?

21 A YES. I EXITED APPROXIMATELY AFTER -- AFTER HE
22 CONCEALED THE WALLETS.

23 Q DO YOU KNOW APPROXIMATELY HOW LONG HE HAD BEEN IN
24 THE STORE AT THAT TIME PERIOD?

25 A MAYBE 15, 20 MINUTES.

1 Q AND WHEN YOU EXITED THE OFFICE, WAS THERE ANOTHER
2 LOSS PREVENTION ASSOCIATE STILL IN THE OFFICE?
3 A YES.
4 Q AND WHO WAS THAT?
5 A HIS NAME IS SHAWN BRAMBLE (PHONETIC).
6 Q YOU MADE CONTACT WITH MR. HARVEY WHERE AT IN THE
7 STORE?
8 A I DID NOT MAKE -- I CONTACTED HIM WHEN HE EXITED THE
9 STORE.
10 Q NOW, YOU INDICATED THAT MR. HARVEY FIRST CAME TO
11 YOUR ATTENTION WHEN HE WAS INSIDE OF THE STORY SELECTING
12 MERCHANDISE, CORRECT?
13 A YES.
14 Q DID YOU SEE MR. HARVEY ENTER THE STORE?
15 A YES.
16 Q AND DID YOU SEE THAT ON CLOSED CIRCUIT TELEVISION?
17 A YES.
18 Q AND WHEN YOU SAVED THE VIDEO, YOU SAVED THAT PORTION
19 AS WELL?
20 A I BELIEVE SO, YES.
21 Q YOU INDICATED THAT YOU ASKED MR. HARVEY FOR THE TWO
22 WALLETS BACK?
23 A YES.
24 Q DID YOU ASK HIM FOR THE FACE CREAM BACK?
25 A NO, NOT AT THAT POINT.

1 Q THESE PARTICULAR WALLETS, DO THEY GENERALLY HAVE
2 A -- ONE OF THOSE DEVICES --
3 A SECURITY DEVICE?
4 Q YES..
5 A NO, THEY DON'T.
6 Q DO THEY HAVE A LITTLE WHITE MAGNETIC SECURITY DEVICE
7 INSIDE THE WALLETS?
8 A NO, THEY DO NOT.
9 Q ANY SECURITY DEVICES ON YOUR FACE CREAM?
10 A NO.
11 Q NOW, WHAT TIME OF DAY WAS THIS?
12 A MID AFTERNOON.
13 Q WAS THE SUN OUT?
14 A YES..
15 Q YOU INDICATED THAT THIS KNIFE, MR. HARVEY HAD IT IN
16 HIS LEFT HAND?
17 A YES..
18 Q AND HE PULLS IT FROM HIS LEFT POCKET?
19 A YES..
20 Q WITH HIS LEFT HAND?
21 A YES..
22 Q WHAT COLOR WAS THE KNIFE?
23 A I BELIEVE IT WAS BLACK.
24 Q ANY OTHER DISTINGUISHING CHARACTERISTICS ABOUT THE
25 KNIFE?

1 **A** NO. I GOT A REAL QUICK LOOK AT IT.

2 **Q** YOU SAID YOU DIDN'T RECALL WHETHER OR NOT THE BLADE

3 FOLDED IN OR OUT?

4 **A** YEAH. I MEAN NO.

5 **Q** DID YOU MAKE CONTACT WITH THE POLICE AT ALL?

6 **A** YES. AFTER HE PULLED THE KNIFE I BACKED UP AND I

7 DIALED 9-1-1.

8 **Q** WHEN YOU MADE CONTACT WITH THE POLICE, DID YOU GIVE

9 A DESCRIPTION OF THE PARTICULAR PERSON?

10 **A** YES, I DID.

11 **Q** DO YOU RECALL GIVING A DESCRIPTION OF ANY TATTOOS?

12 **A** I BELIEVE -- I BELIEVE I DID.

13 **Q** DID YOU GET A -- DID YOU GIVE A HEIGHT?

14 **A** I BELIEVE SO.

15 **Q** NOT SURE THOUGH?

16 **A** YEAH.

17 **Q** WHEN SPEAKING WITH OFFICERS, DID YOU TELL THEM ANY

18 TYPE OF HAIR COLOR?

19 **A** NO. WELL, I TOLD THEM HE WAS WEARING A HAT. HE WAS

20 WEARING A HAT AT THE TIME.

21 **Q** WHAT WAS THE DESCRIPTION OF THE HAT?

22 **A** I BELIEVE IT WAS A WHITE HAT.

23 **Q** DID IT HAVE ANY LOGOS OR INSIGNIA ON IT?

24 **A** NOT THAT I NOTICED.

25 **Q** DID YOU GIVE A DESCRIPTION OF CLOTHING?

1 **MR. SCHWARTZ:** YOUR HONOR, I'M GOING TO OBJECT TO THE
2 RELEVANCE OF THIS, GIVEN THAT HE'S ALREADY IDENTIFIED THIS AS
3 THE PERSON, I DON'T BELIEVE IT'S RELEVANT THE
4 IDENTIFICATION -- THE DESCRIPTION HE GAVE OF THE DEFENDANT TO
5 THE OFFICERS AFTER.

6 **THE COURT:** MISS SPELLS?

7 **MS. SPELLS:** YOUR HONOR, IT'S ABSOLUTELY RELEVANT TO THE
8 DESCRIPTION AND TO EVEN HIS IDENTIFICATION TODAY.

9 HE SAW MR. HARVEY SITTING IN THE JURY BOX, HE SAW HIM
10 STAND UP, HE SAW HIM WALK OVER HERE. I MEAN TO POINT HIM OUT,
11 ANYONE COULD HAVE POINTED HIM OUT. IT'S THE STATE VERSUS
12 ALFRED HARVEY. HE WAS FULLY AWARE OF WHO MR. ALFRED HARVEY
13 WAS BEFORE THE STATE EVEN INQUIRED AS TO WHETHER OR NOT THE
14 PERSON SEATED TO MY LEFT WAS THE SAME PERSON THAT HE SAW OR
15 ALLEGEDLY SAW ON OR ABOUT MARCH 30TH.

16 **THE COURT:** OBJECTION IS OVERRULED.

17 **BY MS. SPELLS:**

18 **Q** I BELIEVE MY LAST QUESTION WAS WHETHER OR NOT YOU
19 GAVE OFFICERS ANY DESCRIPTION AS TO THE CLOTHING THE PERSON
20 WAS WEARING.

21 **A** YES.

22 **Q** AND WHAT DID YOU SAY?

23 **A** HE HAD A BLAZER ON AND SHORTS.

24 **Q** COLOR OF BLAZER?

25 **A** IT WAS A -- MAYBE A DARK BLUE.

1 Q ANY TEAM INFORMATION OR?
2 A I'M SORRY?
3 Q OH, I'M SORRY, YOU SAID BLAZER, I WAS THINKING
4 JERSEY.
5 WHAT COLOR SHORTS?
6 A I BELIEVE THEY WERE DARK COLORED, ALSO.
7 Q DID YOU GIVE ANY OTHER IDENTIFYING DESCRIPTIONS,
8 PIERCINGS?
9 A NO.
10 Q AND DID YOU EVER DO A SHOW-UP IDENTIFICATION WITH
11 THE POLICE?
12 A YES.
13 Q AT THE TIME THAT YOU DID THE SHOW-UP IDENTIFICATION,
14 WAS THE INDIVIDUAL HANDCUFFED?
15 A YES.
16 Q WAS THERE A BRIGHT LIGHT SHINING ON HIM?
17 A NO.
18 Q WHERE WAS THE SHOW UP DONE?
19 A A FEW BLOCKS FROM MY STORE, I DON'T KNOW EXACTLY
20 WHERE.
21 Q DURING THE SHOW-UP IDENTIFICATION, WERE YOU INSIDE
22 OF A VEHICLE OR OUTSIDE OF A VEHICLE?
23 A INSIDE.
24 Q AND THAT WAS A PATROL CAR?
25 A YES.

1 Q WERE YOU IN THE FRONT OR THE REAR?
2 A I WAS IN THE REAR.
3 Q ON THE LEFT-HAND SIDE OR THE RIGHT-HAND SIDE.
4 A I WAS ON THE RIGHT-HAND SIDE.
5 Q WHERE WAS THE INDIVIDUAL AT IN RELATION TO YOU?
6 A HE WAS ACROSS THE STREET IN FRONT OF A BUILDING.
7 Q DO YOU KNOW APPROXIMATELY HOW MANY FEET?
8 A MAYBE 30, 40.
9 Q WAS THE INDIVIDUAL WITH ANY -- WITH ANY OFFICERS?
10 A YES.
11 Q HOW MANY OFFICERS?
12 A I BELIEVE TWO.
13 Q DO YOU RECALL THEIR LOCATION?
14 A YEAH, THEY WERE STANDING NEXT TO HIM.
15 Q ON THE LEFT OR THE RIGHT?
16 A I -- I DON'T RECALL.
17 Q WERE YOU EVER TOLD, WE GOT THE GUY?
18 A UM --
19 MR. SCHWARTZ: OBJECTION, YOUR HONOR.
20 THE WITNESS: I MEAN THEY TOLD ME --
21 THE COURT: WAIT, HOLD ON JUST A MOMENT, THERE'S AN
22 OBJECTION PENDING.
23 THE WITNESS: OH, I'M SORRY.
24 MR. SCHWARTZ: THAT WOULD BE A HEARSAY STATEMENT.
25 THE COURT: SUSTAINED.

1 BY MS. SPELLS:
2 Q WERE YOU GIVEN ANY PAPERWORK WITH REGARD TO THE
3 SHOW-UP IDENTIFICATION?
4 A I'M SORRY, I DON'T UNDERSTAND.
5 Q WERE YOU GIVEN ANY PAPERWORK FROM THE POLICE
6 OFFICERS WITH ANY INSTRUCTIONS WITH REGARD TO THE SHOW-UP
7 IDENTIFICATION?
8 A NO -- OH, LIKE TO SIGN?
9 Q OR TO READ.
10 A LIKE -- I MEAN I -- LIKE BEFOREHAND OR AFTERWARDS, I
11 DON'T UNDER --
12 Q BEFORE.
13 A BEFORE, NO.
14 Q AFTERWARDS WERE YOU GIVEN ANY PAPERWORK?
15 A I WAS GIVEN PAPERWORK TO SIGN THAT I IDENTIFIED HIM,
16 YES.
17 Q SO BEFORE THE SHOW-UP IDENTIFICATION WERE YOU GIVEN
18 ANY INSTRUCTIONS BY THE OFFICER?
19 A NO.
20 Q DO YOU KNOW WHICH OFFICER WAS DRIVING THE VEHICLE
21 YOU WERE LOCATED IN?
22 A NO, I DO NOT.
23 Q WHEN MR. HARVEY ENTERED THE STORE, DID YOU SEE HIM
24 ENTER WITH ANY MERCHANDISE ON HIS PERSON?
25 A NO.

1 **Q** DID HE HAVE ANY BAGS WITH HIM?
2 **A** HE DID NOT.
3 **Q** NOW, YOU THINK THIS BLAZER [SIC] WAS INSIDE OF HIS
4 COAT, WHERE AT INSIDE HIS COAT?
5 **A** I BELIEVE IT WAS ON THE RIGHT SIDE, ON THE INSIDE
6 POCKET.
7 **Q** WHERE WAS THE FACE CREAM?
8 **A** THOSE WERE IN HIS SHORTS.
9 **Q** IN A POCKET OR ON TOP OF THE SHORTS?
10 **A** YEAH, THE POCKET SHORTS.
11 **Q** AND YOU ARE POINTING TO YOUR LEFT-HAND SIDE?
12 **A** YES, I BELIEVE SO.
13 **MS. SPELLS:** I WILL PASS THE WITNESS, YOUR HONOR.
14 **THE COURT:** ANY REDIRECT?
15 **MR. SCHWARTZ:** JUST BRIEFLY, YOUR HONOR.
16 SHOWING DEFENSE COUNSEL JUST THE SHOW-UP WITNESS
17 INSTRUCTION FORM.
18 IF I MAY APPROACH THE WITNESS?
19 **THE COURT:** YOU MAY.
20 ARE YOU GOING TO HAVE THAT MARKED?
21 **MR. SCHWARTZ:** I'M NOT GOING TO ADMIT IT, YOUR HONOR.
22 **THE COURT:** OKAY.
23 **REDIRECT EXAMINATION**
24 **BY MR. SCHWARTZ:**
25 **Q** MR. MUNOZ, DOES THIS FORM LOOK FAMILIAR TO YOU?

1 **A** YES.

2 **Q** AND IS THIS THE WITNESS FORM THAT YOU WERE GIVEN BY
3 THE OFFICERS AT THE SHOW UP?

4 **A** YES.

5 **Q** AND DID YOU READ THESE INSTRUCTIONS TO YOURSELF
6 PRIOR TO THE SHOW UP?

7 **A** NO, HE GAVE THIS TO ME AFTERWARDS.

8 **Q** AND DID YOU SIGN IT AFTERWARDS?

9 **A** YES.

10 **Q** DID YOU WRITE A DATE AND TIME AFTERWARDS?

11 **A** NO. THAT -- THAT -- I DON'T BELIEVE THAT WAS MY --
12 MY DATE AND TIME.

13 **Q** OKAY. DID YOU -- DID YOU PUT A DIFFERENT DATE AND
14 TIME?

15 **A** NO, I DID NOT.

16 **Q** YOU DIDN'T PUT A DATE AND TIME?

17 **A** NO, I DID NOT.

18 **MR. SCHWARTZ:** NO FURTHER QUESTIONS.

19 **THE COURT:** ALL RIGHT.

20 ANY RECROSS ON THAT AREA?

21 **MS. SPELLS:** NO RECROSS WITH REGARD TO -- WELL, ACTUALLY
22 COURT'S BRIEF INDULGENCE.

23 I NEED TO MAKE A RECORD, AND THEN IF I COULD JUST SEE
24 THAT. I ACTUALLY DO NOT HAVE A COPY OF THAT IN MY DISCOVERY
25 AT ALL.

1 **THE COURT:** OKAY.

2 **MS. SPELLS:** SO --

3 **MR. SCHWARTZ:** IT'S THE LAST PAGE.

4 **MS. SPELLS:** JUST THE -- I DON'T HAVE IT.

5 (DISCUSSION BETWEEN MS. SPELLS AND MR. SCHWARTZ.)

6 **MS. SPELLS:** SO WE JUST ASK FOR A COPY OF IT AT THE
7 STATE'S EARLIEST CONVENIENCE.

8 AND I JUST HAVE ONE -- A FEW QUESTIONS, ACTUALLY.

9 **THE COURT:** OKAY.

10

11

RECROSS-EXAMINATION

12 **BY MS. SPELLS:**

13 **Q** THE STATE JUST SHOWED YOU A COPY OF THE SHOW-UP
14 IDENTIFICATION SHEET THAT YOU SIGNED?

15 **A** UM-HUM.

16 **Q** YOU HAVE TO SAY YES --

17 **A** YES, I'M SORRY.

18 **Q** -- IF YOUR ANSWER IS YES.

19 AND YOU INDICATED THAT YOU SIGNED THAT AFTER YOU
20 MADE AN IDENTIFICATION?

21 **A** YES.

22 **Q** AND IT WAS A POSITIVE IDENTIFICATION?

23 **A** YES.

24 **Q** WERE YOU READ THOSE INSTRUCTIONS PRIOR TO MAKING THE
25 IDENTIFICATION?

1 **A** I WASN'T READ, BUT I WAS -- THEY KIND OF GENERALIZED
2 THEM TO ME.

3 **Q** OKAY. WERE YOU GIVEN THAT PAPER PRIOR TO MAKING THE
4 IDENTIFICATION?

5 **A** NO.

6 **Q** WHEN YOU SAY THEY GENERALIZED THEM TO YOU, DO YOU
7 KNOW WHO THEY IS?

8 **A** IT WAS ONE OF THE OFFICERS, I ACTUALLY DIDN'T GET
9 HIS NAME FOR MY REPORT.

10 **MS. SPELLS:** OKAY. THANK YOU.

11 NO FURTHER QUESTIONS.

12 **MR. SCHWARTZ:** NOTHING FURTHER, YOUR HONOR.

13 **THE COURT:** THANK YOU FOR YOUR TESTIMONY, YOU'RE FREE TO
14 STEP DOWN.

15 **MR. SCHWARTZ:** AT THIS TIME THE STATE'S GOING TO REST.

16 **THE COURT:** ALL RIGHT. STATE HAVING RESTED, DEFENSE?

17 **MS. SPELLS:** COURT'S BRIEF INDULGENCE.

18 (DISCUSSION BETWEEN MS. SPELLS AND THE DEFENDANT.)

19 **MS. SPELLS:** YOUR HONOR, I HAVE ADVISED MR. HARVEY THAT
20 HE DOES HAVE A RIGHT TO TESTIFY AT THIS PROCEEDING, HE'S GOING
21 TO FOLLOW MY ADVICE AND NOT TESTIFY.

22 THE DEFENSE WOULD REST AT THIS TIME.

23 **THE COURT:** ALL RIGHT. ARGUMENT?

24 **MR. SCHWARTZ:** STATE WOULD RESERVE FOR REBUTTAL, YOUR
25 HONOR.

1 **THE COURT:** MISS SPELLS?

2 **MS. SPELLS:** YOUR HONOR, WE'RE GOING TO SUBMIT.

3 **THE COURT:** MR. HARVEY, PLEASE STAND.

4 **THE DEFENDANT:** YES, MA'AM.

5 **THE COURT:** APPEARING TO ME FROM THE TESTIMONY PRESENTED

6 AT THIS PRELIMINARY HEARING, THERE IS SUFFICIENT EVIDENCE TO

7 BELIEVE THAT THE CRIME OF ROBBERY WITH USE OF A DEADLY WEAPON

8 HAS BEEN COMMITTED AND THAT YOU COMMITTED IT. I HEREBY ORDER

9 THAT YOU BE HELD TO ANSWER IN THE EIGHTH JUDICIAL DISTRICT

10 COURT ON THE FOLLOWING DATE AND TIME.

11 **THE CLERK:** APRIL 20TH, 10 O'CLOCK, LOWER LEVEL, DISTRICT

12 COURT ARRAIGNMENT.

13

14 (AT 11:27 A.M. THE PROCEEDINGS WERE RECESSED.)

15 * * * *

16 **ATTEST:** FULL, TRUE AND CERTIFIED TRANSCRIPT.

17 /S/KIT MACDONALD

18 KIT MACDONALD, C.C.R.

19 COURT REPORTER

20 C.C.R. NO. 65

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REPORTER'S DECLARATION

STATE OF NEVADA)
COUNTY OF CLARK)

I, KIT MACDONALD, A CERTIFIED COURT REPORTER IN AND
FOR THE STATE OF NEVADA, HEREBY DECLARE THAT PURSUANT TO NRS
239B.030 I HAVE NOT INCLUDED THE SOCIAL SECURITY NUMBER OF ANY
PERSON WITHIN THIS DOCUMENT.

I FURTHER DECLARE THAT I AM NOT A RELATIVE OR
EMPLOYEE OF ANY PARTY INVOLVED IN SAID ACTION, NOR A PERSON
FINANCIALLY INTERESTED IN THE ACTION.

/S/KIT MACDONALD
KIT MACDONALD, C.C.R.
C.C.R. NO. 65

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
TEMPORARY CUSTODY RECORD

Page 1 of 1
DATE OF ARREST: 3/30/16 TIME OF ARREST: 1624
I.D. # 2013038 Event #: 160300-3005
I.D. ESTAB. BY: SLOP

INTAKE NAME (AKA, ALIAS, ETC.) Last First Middle TRUE NAME Last First Middle
HARVEY, ALFRED Q. HARVEY, ALFRED Q.

ADDRESS 3955 SUMNER BLDG./APT. # 170 CITY LV STATE NV ZIP 89119 PRESENT OR LAST PLACE OF EMPLOYMENT
DATE OF BIRTH 12/15/36 RACE BUK SEX M HEIGHT 5'2 WEIGHT 200 HAIR BUK EYES BRN SOCIAL SECURITY # 556-49-5802 Speak English? Yes CNO PLAGE OF BIRTH PARADISE CA

LOCATION OF CRIME (# - Street - City - State - Zip) 4640 W. SUMNER LV, NV 89107 CC Citizen Arrest Y 1312 VISTA 4th Sector/Beat U3 PCN #

BKG. CODE CHARGE ORD / NRS # M GM F ARR TYPE EVENT NUMBER WARR / NCIC NUMBER COURT LV JC DC OTHER

50128 ROBBERY WITH A WEAPON 350 \$4000 PC

10F05049X

CONFIDENTIAL

ARREST TYPE: PC - PROBABLE CAUSE BS - BONDSMAN SURRENDER BW - BENCH WARRANT WA - WARRANT RM - REMAND GI - GRAND JURY IND.

Arresting Officer's Signature (Print Name) P # Agency APPROVAL CONTROL # FOR ADDITIONAL CHARGES:

Time Stamp at BOOKING 03-30-16 21:06 DSD RECORD

FOR PROBABLE CAUSE/NCIC HIT ARREST SEE PAGE TWO FOR DETAILS. BENCH WARRANT SERVED ON: 16F05049X PCAP

PROBABLE CAUSE Arrest Documents 6338412 90th V-13 RAN 4102

JUDGE: Melissa Saragosa

STANDARD BAIL O.R. RELEASE PROBABLE CAUSE JUVENILE I.A.D.

9999 RI LI DID

**Justice Court, Las Vegas Township
Clark County, Nevada**

Court Minutes



L006338549

16F05049X State of Nevada vs. HARVEY, ALFRED C

**4/1/2016 7:29:00 AM 48 Hour Probable Cause
Review**

Result: Signing Completed

**PARTIES
PRESENT:**

Judge: Saragosa, Melissa

PROCEEDINGS

Hearings: 4/4/2016 8:30:00 AM: 72 Hour Hearing

Added

Events: Probable Cause Arrest Documents

Probable Cause Found

Bail Stands - Cash or Surety

Amount: \$40,000.00

Counts: 001 - \$40,000.00/\$40,000.00 Per Count

Justice Court, Las Vegas Township
Clark County, Nevada

Court Minutes



L006346035

16F05049X State of Nevada vs. HARVEY, ALFRED C

Lead Atty: Public Defender

4/4/2016 8:30:00 AM Initial Appearance (In
Custody)

Result: Matter Heard

PARTIES
PRESENT: Attorney Leven, Pandora Lynn
Defendant HARVEY, ALFRED C
Judge: Saragosa, Melissa
Prosecutor: Holthus, Mary
Court Reporter: MacDonald, Kit
Court Clerk: Nelson-Moore, Elizabeth

PROCEEDINGS

Attorneys:	Leven, Pandora Lynn	HARVEY, ALFRED C	Added
	Public Defender	HARVEY, ALFRED C	Added
Hearings:	4/18/2016 9:30:00 AM: Preliminary Hearing		Added
Events:	Initial Appearance Completed <i>Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint</i> Public Defender Appointed Motion by Defense for an O.R. Release <i>by Defendant - Motion Denied</i> Bail Stands - Cash or Surety Amount: \$40,000.00 <i>Counts: 001 - \$40,000.00/\$40,000.00 Total Bail</i>		

**Justice Court, Las Vegas Township
Clark County, Nevada**

Department: 04

Court Minutes



L006407038

16F05049X State of Nevada vs. HARVEY, ALFRED C

Lead Atty: Public Defender

4/18/2016 9:30:00 AM Preliminary Hearing (In Custody)

Result: Bound Over

PARTIES PRESENT: Attorney Spells, Jasmin
Defendant HARVEY, ALFRED C

Judge: Saragosa, Melissa

Prosecutor: Schwartz, Bryan

Court Reporter: MacDonald, Kit

Court Clerk: Espinoza, Jose

PROCEEDINGS

Attorneys: **Spells, Jasmin** HARVEY, ALFRED C Added

Events: **Preliminary Hearing Held**

Motion to Exclude Witnesses by State -Motion Granted

States Witnesses:

1- Julian Mu oz- Witness Identified Defendant

State Rests.

Defendant Advised of His Statutory Right to Make a Statement Defendant Waives the Right to a Sworn or Unsworn Statement

Defense Rests

Submitted Without Argument No Argument by State Case Taken Under Advisement

Bound Over to District Court as Charged

Review Date: 4/19/2016

District Court Appearance Date Set

Apr 20 2016 10:00AM: In Custody

Case Closed - Bound Over

Bail Stands - Cash or Surety

Amount: \$40,000.00

Counts: 001 - \$40,000.00/\$40,000.00 Total Bail

Plea/Disp: **001: Robbery, e/dw [50138]**

Disposition: Bound Over to District Court as Charged (PC Found)

Justice Court, Las Vegas Township
Clark County, Nevada

Department: 04

Court Minutes



L006404690

16F05049X State of Nevada vs. HARVEY, ALFRED C

Lead Atty: Public Defender

4/18/2016 9:30:00 AM Preliminary Hearing (In Custody)

Result: Bound Over

PARTIES PRESENT: Attorney Spells, Jasmin
Defendant HARVEY, ALFRED C

Judge: Saragosa, Melissa

Prosecutor: Schwartz, Bryan

Court Reporter: MacDonald, Kit

Court Clerk: Espinoza, Jose

PROCEEDINGS

Attorneys: Spells, Jasmin HARVEY, ALFRED C Added

Events: Preliminary Hearing Held

Motion to Exclude Witnesses by State -Motion Granted

States Witnesses:

1- Julian Muñoz- Witness Identified Defendant

State Rests.

Defendant Advised of His Statutory Right to Make a Statement Defendant Waives the Right to a Sworn or Unsworn Statement

Defense Rests

Submitted Without Argument No Argument by State Case Taken Under Advisement

Bound Over to District Court as Charged

Review Date: 4/19/2016

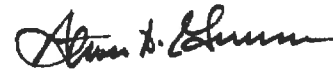
District Court Appearance Date Set

Apr 20 2016 10:00AM; In Custody

Case Closed - Bound Over

Plea/Disp: 001: Robbery, e/dw [50138]

Disposition: Bound Over to District Court as Charged (PC Found)



CLERK OF THE COURT

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
BRYAN SCHWARTZ
Deputy District Attorney
Nevada Bar #013244
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

I.A. 4/20/16
10:00 AM
PD - SPELLS

THE STATE OF NEVADA,
Plaintiff,

-vs-

ALFRED C. HARVEY,
#7013098

Defendant.

CASE NO: C-16-314260-1

DEPT NO: XXIII

INFORMATION

STATE OF NEVADA }
COUNTY OF CLARK } ss.

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:


That ALFRED C. HARVEY, the Defendant(s) above named, having committed the crime of ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138), on or about the 30th day of March, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did willfully, unlawfully, and feloniously take personal property, to-wit: miscellaneous clothing items, from the person of JULIAN MUNOZ, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of JULIAN MUNOZ, with use of a deadly weapon, to-wit: a knife, defendant using force or fear to obtain or retain possession of

///

1 the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate
2 escape.

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

6 BY


7 BRYAN SCHWARTZ
8 Deputy District Attorney
9 Nevada Bar #013244
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1 Names of witnesses known to the District Attorney's Office at the time of filing this
2 Information are as follows:

3 NAME

ADDRESS

4 CUSTODIAN OF RECORDS
5 OR DESIGNEE

Clark County Detention Center,
330 S. Casino Center Blvd., Las Vegas, NV

6 CUSTODIAN OF RECORDS
7 OR DESIGNEE

LVMPD Communications

8 CUSTODIAN OF RECORDS
9 OR DESIGNEE

LVMPD Dispatch

10 CUSTODIAN OF RECORDS
11 OR DESIGNEE

LVMPD Records, 400 S. Martin Luther King Blvd.,
Las Vegas, NV

12 CUSTODIAN OF RECORDS
13 OR DESIGNEE

LVMPD Project Management & Video Bureau

14 HUMPHERYS, T.

LVMPD P#14084

15 MUNOZ, JULIAN

C/O Clark County District Attorney's Office

16 NELSON, R.

LVMPD P#14002

17 RESBERG, E.

LVMPD P#10007

18 WATTS, JOSEPH OR DESIGNEE

Clark County District Attorney's Office-Investigator

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16F05049X /cc/L3
LVMPD EV#1603303003
28 (TK4)



CLERK OF THE COURT

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
JASMIN D SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 384-1969

Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-16-314260-1
)	
v.	)	DEPT. NO. XXIII
)	
ALFRED C. HARVEY,)	
	)	DATE: June 1, 2016
Defendant,	)	TIME: 9:30 a.m.
)	

NOTICE OF MOTION AND MOTION TO COMPEL DISCOVERY

COMES NOW, the Defendant, ALFRED C. HARVEY, by and through JASMIN D SPELLS, Deputy Public Defender and hereby requests that this Court order the State to produce any and all exculpatory or inculpatory evidence in its actual or constructive possession.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 10th day of May, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Jasmin D. Spells
JASMIN D SPELLS, #11635
Deputy Public Defender

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DECLARATION

JASMIN D SPELLS makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender for the Clark County Public Defender's Office appointed to represent Defendant Alfred C. Harvey in the present matter;

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 10th day of May, 2016.

/s/ Jasmin D. Spells

JASMIN D SPELLS

I. LEGAL ARGUMENT

The State must provide to the defense all exculpatory evidence in its actual or constructive possession prior to trial. Failure to do so results in a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution. The rule applies regardless of how the State has chosen to structure its overall discovery process. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Hereinafter this type of exculpatory evidence will be referred to as “Brady material.”

Brady material is that evidence which is 1) material, 2) relevant to guilt or punishment, 3) favorable to the accused, 4) and within the actual or constructive possession of anyone acting on behalf of the State. *Brady*, *supra*.

1. Materiality

When the defense makes a specific request for Brady material and the State does not provide such material, the Nevada Supreme Court has held that there are grounds for reversal of a conviction “if there exists a reasonable possibility that the claimed evidence would have affected the judgment of the trier of fact.” *Roberts v. State*, 110 Nev. 1121, 881 P.2d 1, 5 (1994) See, also, *Jimenez v. State*, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996), and *State v. Bennett*, 119 Nev. 589, 81 P.3d 1, 8 (2003).

Even if a specific request has not been made, reversal is also warranted “if there exists a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Bagley*, 473 U.S. at 682, 685; *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1986). A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome. *Bagley*, 473 U.S. at 678, 685; *Ritchie*, 480 U.S. at 57.” *Roberts*, *supra*, 110 Nev. At 1129.

1 Therefore, absent a specific request for Brady material, anything that might have created a
2 probability that the confidence of the verdict was undermined is considered material. Where a
3 specific request is made, however, anything that creates a reasonable possibility that the evidence
4 might have affected the fact-finder's judgment is material.

5 **2. Relevancy to Guilt or Punishment**

6 Brady material applies not only to evidence which might affect the defendant's guilt, but
7 also includes evidence which could serve to mitigate a defendant's sentence if convicted. Jimenez
8 v. State, 112 Nev. 610, 918 P.2d 687 (1996). An example of this kind of evidence might be where
9 the victim of a robbery who identified the defendant as one of two people who robbed him, also
10 indicated that he tried to keep the co-defendant from injuring him. Although the identification
11 would actually go to establishing the defendant's guilt, it would also be Brady material because it
12 might serve to mitigate the defendant's sentence because of his effort to aid the victim.
13 Essentially, anything which could convince the court to impose something less than a maximum
14 sentence, or rebut alleged aggravating circumstances would be relevant to punishment.
15

16 **3. Favorability to the Accused**

17 The Nevada Supreme Court has spoken directly to what is considered "favorable to the
18 accused" and therefore proper Brady material. In Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d
19 25, 37 (2000) the court stated:
20

21 Due process does not require simply the disclosure of "exculpatory"
22 evidence. Evidence also must be disclosed if it provides grounds
23 for the defense to attack the reliability, thoroughness, and good faith
24 of the police investigation, to impeach the credibility of the state's
25 witnesses, or to bolster the defense case against prosecutorial attacks.
26 Furthermore, "discovery in a criminal case is not limited to investigative
leads or reports that are admissible in evidence." Evidence "need not
have been independently admissible to have been material."

27 (citations omitted). Therefore, Brady material under this standard, would include, but not be
28 limited to, the following examples: forensic testing which was ordered, but not done, or which was
completed but did not inculcate the defendant; criminal records or other evidence concerning

1 State's witnesses which might show their bias (e.g., civil litigation), or otherwise impeach their
2 credibility; evidence that the alleged victim has been the alleged victim of an unusual number of
3 crimes; investigative leads or ordinarily appropriate investigation which were not followed-up on
4 or completed by law enforcement; and, of course, anything which is inconsistent with any prior or
5 present statements of a State's witness, including the failure to previously make a statement which
6 is later made or testified to. Of course, traditionally exculpatory evidence such as that which could
7 show that someone else committed the charged crime or that no crime occurred would also be
8 included as Brady material.

6 **4. Within the Actual or Constructive Possession of Any State Actor.**

7 Based on prior experience, it is anticipated that the prosecution may assert that it has an
8 "open file" policy and that the requested material is not available in its file. This argument is
9 unavailing. In *Strickler v. Green*, supra, 527 U.S. at 283, 119 S.Ct. 1949, the United States
10 Supreme Court explicitly held that a prosecutor's open file policy does not in any way substitute
11 for or diminish the State's obligation to turn over Brady material. The Nevada Supreme Court is
12 in accord. "It is a violation of due process for the prosecutor to withhold exculpatory evidence,
13 and his motive for doing so is immaterial." *Jimenez v. State*, 112 Nev. 610, 618, 918 P.2d 687,
14 692 (1996). Furthermore, "even if the detectives withheld their reports without the prosecutor's
15 knowledge, 'the state attorney is charged with constructive knowledge and possession of evidence
16 withheld by other state agents, such as law enforcement officers.'" *Id.*, 112 Nev. at 620 (citation
17 omitted). Defendant would submit that other state agents such as probation and parole officers,
18 welfare workers, jail personnel, and similar agents of the State are also included in those from
19 whom the prosecution must seek out Brady material.

22 In *Kyles v. Whitley*, supra, the United States Supreme Court made it clear that the
23 prosecutor has an affirmative obligation to obtain Brady material and provide it to the defense,
24 even if the prosecutor is initially unaware of its existence. In so finding, the Supreme Court noted
25 that "[t]he prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its
26 origins to early 20th century strictures against misrepresentation and is of course most prominently
27 associated with this Court's decision in *Brady v. Maryland*. . ." *Id.* 514 U.S. at 432. The *Kyles*
28

1 Court also made it clear that this obligation exists even where the defense does not make a request
2 for such evidence. *Id.*

3 The Kyles Court additionally made the following observations when finding the State had
4 breached its duty to Kyles and discussing the prosecutor's obligations:

5 This in turn means that the individual prosecutor has a duty to learn
6 of any favorable evidence known to the others acting on the govern-
7 ment's behalf in the case, including the police. But whether the
8 prosecutor succeeds or fails in meeting this obligation (whether, that
9 is, a failure to disclose is in good faith or bad faith, the prosecution's
responsibility for failing to disclose known, favorable evidence rising
to a material level of importance is inescapable.

10 The State of Louisiana would prefer an even more lenient rule. It pleads
11 That some of the favorable evidence in issue here was not disclosed
12 even to the prosecutor until after trial, and it suggested below that it
13 should not be held accountable under Bagley and Brady for evidence
14 known only to police investigators and not to the prosecutor. To
15 accommodate the State in this manner would, however, amount to a
16 serious change of course from the Brady line of cases. In the State's
17 favor it may be said that no one doubts that police investigators some-
18 times fail to inform a prosecutor of all they know. But neither is there
19 any serious doubt that *"procedures and regulations can be established*
20 *to carry [the prosecutor's] burden and to insure communication of all*
relevant information on each case to every lawyer who deals with it."
Since then, the prosecutor has the means to discharge the government's
Brady responsibility if he will, any argument for excusing a prosecutor
from disclosing what he does not happen to know about boils down to
a plea to substitute the police for the prosecutor, and even for the courts
themselves, as the *final arbiter's of the government's obligation to*
ensure fair trials.

21 Kyles, *supra*, 514 U.S. at 437,438 (citations and footnotes omitted, emphasis added).

22 There can be little question, therefore, that despite its "open file policy," the prosecution
23 has an affirmative duty to seek out the previously discussed Brady material, regardless of whether
24 such material is in the hands of the prosecutor or in the hands of some other entity acting on behalf
25 of the State.

26
27 Simply put, prosecutors are obligated to provide Defendant with far more than their "open
28 file." Disclosure of discovery materials cannot be limited or restricted to materials in the

1 possession of the District Attorney's Office. The duty of disclosure includes materials in the
2 possession of all state agents connected with the prosecution, including police and other
3 investigative agencies. Kyles v. Whitley, 115 S.Ct. 1555, 1568 (1995); Giglio v. United States,
4 465 U.S. 150, 154 (1963); United States v. Osorio, 929 F.2d 753, 760-62 (1st Cir. 1991); United
5 States v. Butler, 567 F.2d 885, 889, 891 (9th Cir. 1978). This duty is imposed by ethical principles
6 as well as constitutional ones. See American Bar Association, Standards for Criminal Justice,
7 Discovery and Procedure Before Trial, Standard 11-2.1(d), 11-2.2(c), 11-2.4 (2d ed. 1980); id.,
8 The Prosecution Function, Standard 2-3.11(c). Moreover, the State may not lawfully withhold
9 inculpatory materials and information from Defendant simply because it does not intend to present
10 the material or information during its case in chief. State v. Harrington, 9 Nev. 91, 94 (1873);
11 People v. Carter, 312 P.2d 665, 675 (Cal. 1957); People v. Bunyard, 756 P.2d 795, 809 (Cal.
12 1988); NRS 175.141.

13 14 II. DEFENDANT'S SPECIFIC REQUESTS FOR BRADY MATERIAL

15 Accordingly, Defendant hereby requests this Court enter an order compelling the State to
16 exercise due diligence in searching for and disclosing to him and his attorneys any materials and/or
17 information in the State's possession, including materials in the possession of the Las Vegas
18 Metropolitan Police Department, and other state agencies or agents, concerning the following:

- 19 1. Information concerning any expectation¹ of any benefit of any kind to
20 be received, or already received, by any witness presented by the State.²
- 21 2. That the State engage in due diligence in order to adequately comply
22 with NRS 50.095 and disclosure of felony convictions within the last 10
23 years, including but not limited to any material and/or information in
24 the State's possession which relates to specific instances of misconduct

25
26 ¹The law is clear that it is the witness own anticipation of reward, not the intent of the prosecutor, which gives rise to
27 the necessity of disclosure. Moore v. Kemp, 809 F.2d 702, 726, 729-30 (11th Cir.), cert. denied, 481 U.S. 1054
(1987); Duggan v. State, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989).

28 ²Duggan v. State, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989) (understandings merely implied, suggested,
insinuated, or inferred of possible benefit to witness).

of any State witness from which it could be inferred that the person is untruthful and which may be or may lead to admissible evidence.³

3. Any material and/or information in the State's possession from which it could be inferred that any person whom the State calls as a witness at trial has a reputation for untruthfulness or for shifting his own guilt upon other persons which would either be admissible or aid in the discovery of evidence which would be admissible.
4. Any materials and/or information of any nature whatsoever, tangible or intangible, recorded or unrecorded, in the State's possession, custody, or control or the existence of which is either known or through the exercise of due diligence may become known to the State, which would tend to exculpate Defendant of the State's charges, might mitigate the punishment should he be convicted, or would be or may lead to information which would tend to impeach or affect the credibility of a witness anticipated to be presented by the State.⁴
5. Any written minutes or records of testimony, summaries of the substance of any oral statements, or any materials and/or information whatsoever relating to any alleged accomplice who either testified or otherwise made statements or created information which would be exculpatory as to Defendant.
6. Any information concerning an arrest of any other individual for the charged crime⁵ and any information suggesting a possible suspect other than the defendant.⁶
7. Disclosure of any and all statements in the instant case made by any State witness that the State anticipates calling, or by the Defendant, including any inconsistent statements of any named witnesses.

³United States v. Striffler, 851 F.2d 1197, 1201 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989) (information in government witness= confidential probation file)

⁴Norris v. Slayton, 540 F.2d 1241, 1244 (4th Cir. 1976) (report of initial uncertainty of eyewitness identification); Jackson v. Wainwright, 390 F.2d 288, 291-93 (5th Cir. 1968) (prior misidentification by witness); United States v. Beasley, 576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979) (previous statement of key prosecution witness where statement differed from trial testimony with credibility is issue); Carter v. Rafferty, 825 F.2d 1299, 1307-08 (3rd Cir. 1987), cert. denied, 484 U.S. 1011 (1988) (report of lie detector test given to prosecution witness); Suartz v. State, 506 N.W.2d 792, 794-95 (Iowa App. 1993) (evidence of alleged co-perpetrator=s threatening and overbearing nature and impending psychiatric examination of him); People v. Garcia, 17 Cal. App. 4th 1169, 22 Cal. Rptr. 2d 545, 551-52 (1993) (evidence showing state's expert used faulty methodology and made errors in other cases); People v. Wright, 658 N.E.2d 1009, 1012 (1995) (alleged victim=s status as police informer).

⁵Banks v. Reynolds, 54 F.3d 1508, 1518 n.21 (10th Cir. 1995).

⁶Bloodworth v. State, 512 A.2d 1056, 1059-60 (1986).

8. Any and all other materials required to be disclosed by the United States and Nevada Constitutions and the Nevada Revised Statutes.
9. Any and all 911 or 311 calls and CAD related to the subject incident.
10. Any and all police reports generated related to the subject incidents.
11. Any and all radio traffic with MPD dispatch and/or car-to-car radio traffic and/or police car video surveillance related to the subject incident.
12. Any and all photographs taken related to this incident.
13. Any and all requests and/or results of physical or biological evidence.
14. Any and all video surveillance from TJ Maxx on March 30, 2016 concerning this incident.⁷
15. Names and last known address of any and all percipient witnesses known to the State or to law enforcement. This includes the names of any juvenile witnesses in the instant case.⁸

DATED this 10th day of May, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: s/ Jasmin Spells
JASMIN D SPELLS, #11635
Deputy Public Defender

⁷ Mr. Munoz testified at preliminary hearing that he thought the video was turned over to the police. PHT p. 10.

⁸ The current Notice of Witnesses contains the District Attorney's address for the named witnesses. Counsel anticipates that the State will argue that this is due to the nature of the charges alleged, however the defendant argues that by law, at a minimum Counsel is entitled to the last known addresses in order to adequately prepare for trial.

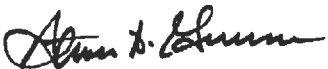
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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing Motion on for hearing before the Court on the 1st day of June, 2016, at 9:30 a.m.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

CERTIFICATE OF ELECTRONIC SERVICE

By: /s/ Erin Prisbrey
An employee of the Clark County Public
Defender's Office



CLERK OF THE COURT

1 RSPN
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 BRYAN SCHWARTZ
6 Deputy District Attorney
7 Nevada Bar #013244
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 ALFRED C. HARVEY,
13 #7013098

14 Defendant.

CASE NO: C-16-314260-1

DEPT NO: XXIII

15 STATE'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL DISCOVERY

16 DATE OF HEARING: JUNE 2, 2016
17 TIME OF HEARING: 9:30 AM

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
19 District Attorney, through BRYAN SCHWARTZ, Deputy District Attorney, and hereby
20 submits the attached Points and Authorities in Response to Defendant's Motion.

21 This response is made and based upon all the papers and pleadings on file herein, the
22 attached points and authorities in support hereof, and oral argument at the time of hearing, if
23 deemed necessary by this Honorable Court.

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1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On April 1, 2016, the State filed a Criminal Complaint against Alfred Harvey
4 (hereinafter "Defendant") charging him with Robbery with Use of a Deadly Weapon. The
5 preliminary hearing was conducted and at the conclusion, the justice court held Defendant to
6 answer these charges in district court. Subsequently, on April 19, 2016, the State filed an
7 Information charging Defendant with the above charges. Defendant pled not guilty, and his
8 jury trial is scheduled for June 20, 2016.

9 On May 10, 2016, Defendant filed the instant motion to compel discovery. The State
10 responds as follows.

11 STATEMENT OF THE FACTS

12 On March 30, 2016, Defendant stole items from TJ Maxx. When loss prevention agent
13 Julian Munoz stopped Defendant and requested the items back, Defendant pulled a knife out
14 and held it over his head in a threatening manner. Defendant then fled from the scene.

15 ARGUMENT

16 I. GENERAL LAW RELATED TO DISCOVERY

17 A. THE COURT CAN ONLY COMPEL "DISCOVERY" UNDER THE
18 NEVADA REVISED STATUTES

19 Under Common Law, a defendant has no right of discovery. State v. Wallace,
20 399 P.2d 909, 97 Ariz. 296 (1965). This, of course, can be superseded by statutory enactment
21 and that is the case in Nevada. Regarding the law of discovery in the State of Nevada, NRS
22 174.235, et. seq. controls. The Nevada Supreme Court has held that even an accused's
23 statement is not constitutionally compelled through pre-trial discovery. Mears v. State, 83
24 Nev. 3, 7, 422 P.2d 230, 232 (1967), Thompson v. State, 93 Nev. 342, 565 P.2d 1011 (1977).

25 In Franklin v. Eighth Judicial District Court, 85 Nev. 401, 402, 455 P.2d 919,
26 919 (1969), the Nevada Supreme Court held that the lower court erred in granting defendant's
27 Motion to Discovery, inspect and copy statements of all persons to be called by the prosecution
28 as witnesses at trial, because NRS 174.245 does not authorize discovery of statements made

1 by State witnesses or perspective State witnesses to agents of the State. Nor does the defendant
2 enjoy a constitutional right to discover them. With regard to the discovery statutes previously
3 alluded to, the Court stated that:

4 "Those provisions (NRS 174.235-174.295) represent the legislative intent with
5 respect to the scope of allowable pre-trial discovery and are not lightly to be
6 disregarded."

7 Id. at 402-03, 455 P.2d at 919. From the aforementioned, it is clear that Nevada's discovery
8 statutes are to be strictly construed and adhered to since no Common Law right of discovery
9 existed. It should, therefore, also be clear that the defendant's motion, so far as it exceeds the
10 requirements of NRS 174.235, et. seq., must be denied.

11 NRS 174.235 outlines what discovery is to be provided by the State of Nevada.
12 It includes:

13 1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the
14 request of a defendant, the prosecuting attorney shall permit the defendant to
inspect and to copy or photograph any:

15 (a) Written or recorded statements or confessions made by the defendant, or
16 any written or recorded statements made by a witness the prosecuting attorney
17 intends to call during the case in chief of the State, or copies thereof, within the
possession, custody or control of the State, the existence of which is known, or
by the exercise of due diligence may become known, to the prosecuting attorney;

18 (b) Results or reports of physical or mental examinations, scientific tests or
19 scientific experiments made in connection with the particular case, or copies
thereof, within the possession, custody or control of the State, the existence of
20 which is known, or by the exercise of due diligence may become known, to the
prosecuting attorney; and

21 (c) Books, papers, documents, tangible objects, or copies thereof, which the
22 prosecuting attorney intends to introduce during the case in chief of the State
and which are within the possession, custody or control of the State, the
23 existence of which is known, or by the exercise of due diligence may become
known, to the prosecuting attorney.

24 The statute makes clear the defense is not entitled to any internal report,
25 document or memorandum prepared by the State in connection with the investigation or
26 prosecution of the case. NRS 174.235(2)(a). Nor is the defense entitled to any report or
27 document that is privileged.

28 ///

II. BRADY MATERIAL AND ITS PROGENY

A. BRADY AND ITS PROGENY DOES NOT AUTHORIZE THE COURT TO ORDER DISCOVERY. THEY ARE REMEDIES IF THE STATE FAILS TO DISCLOSE AN ITEM WHICH IS FOUND TO HAVE BEEN REQUIRED TO BE DISCLOSED POST TRIAL.

The State has an obligation to disclose exculpatory evidence pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972), requires that certain impeaching material be disclosed as well. The rule of Brady v. Maryland, 373 U.S. 83 (1963), which requires the State to disclose to the defendant exculpatory evidence, is founded on the constitutional requirement of a fair trial. However, Brady is not a rule of discovery. As the Supreme Court held in Weatherford v. Bursy, 429 U.S. 545, 559, 97 S. Ct. 837, 846 (1977):

There is no general constitutional right to discovery in a criminal case, and Brady did not create one... 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded...' Wardius v. Oregon, 412 U.S. 470, 474, 93 S. Ct. 2208, 2212, 37 L.Ed.2d 82 (1973).

In addition, Brady does not require the State to conduct trial preparation and investigation on behalf of the defense. The obligation is to produce exculpatory information which the defense would not be able to obtain itself through an ordinary exercise of diligence.

While defense attorneys routinely claim they need to be provided the information in order to conduct the investigation to determine if there is any exculpatory information, that is simply not the law. In the Ninth Circuit, the obligation for the prosecution to examine information is triggered by a defense request with no requirement that the defense make a showing that the information is likely to contain helpful information. United States v. Henthorn, 931 F.2d 29, 31 (9th Cir. 1990) (holding that the "government is incorrect in its assertion it is the defendant's burden to make an initial showing of materiality," rather the "obligation to examine the files arises by virtue of making a demand for their production"); United States v. Santiago, 46 F.3d 885, 895 (9th Cir. 1995) ("[u]nder Henthorn, the government has a duty, upon defendant's request for production, to inspect for material information the personnel records of federal law enforcement officers who will testify at trial, regardless of

whether the defense has made a showing of materiality”) accord Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996)(requiring materiality before a review of a police officer’s personnel file.).

B. THE STATE MAKES THE DETERMINATION AT ITS OWN PERIL IF IT WILL DISCLOSE THE INFORMATION, NOT THE DEFENSE OR THE COURT

This, of course, does not mean that files are produced for the defense. Henthorn explains that following that examination, “the files need not be furnished to the defendant or the court unless they contain information that is or may be material to the defendant’s case.”

Id. Thus, the only time disclosure is required is if the State finds information that qualifies as Brady material. If the prosecutor is unsure, the information should be provided to the court for review. As the court explained:

We stated that the government must ‘disclose information favorable to the defense that meets the appropriate standard of materiality If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in camera inspection and evaluation. . . .’ As we noted in Cadet, the government has a duty to examine personnel files upon a defendant’s request for their production.

Id. at 30-31 (internal citation omitted). Despite this procedure, Defendant’s routinely request the Court to order production of information to them, or to the Court. It is not the Court’s responsibility under the Constitution. It is the prosecution’s responsibility.

Moreover, Brady and its progeny are remedies post trial for the prosecution’s failure to perform its responsibility. Brady does not support the defense’s request to conduct an investigation independent of the prosecution, or to ensure the prosecution completes its duty.

III. TIMING OF DISCLOSURES

A. TRUE BRADY MATERIAL

Traditionally, Brady material is information which indicates that Defendant did not commit the crime, or his sentence should be less based upon culpability. The State’s duty under Brady is ongoing. When reviewing cases on appeal, however, courts rule on allegations

1 of tardy Brady disclosures based on the facts surrounding the disclosure and if the alleged
2 Brady information was used in the trial. The Ninth Circuit has recognized that “Brady does
3 not necessarily require that the prosecution turn over exculpatory material before trial. To
4 escape the Brady sanction, disclosure ‘must be made at a time when [the] disclosure would be
5 of value to the accused.’” United States v. Gordon, 844 F.2d 1397, 1403 (9th Cir. 1988). With
6 this precedent, the Ninth Circuit has typically found no prejudice when alleged Brady
7 information was disclosed at some point before trial. Notwithstanding, whenever the State is
8 in possession of true Brady material, it is the practice of the undersigned to immediately turn
9 over such information.

10 B. IMPEACHMENT MATERIAL

11 From Brady, the Court, through a line of cases related to the credibility of
12 testifying witnesses, established rules and requirements for impeachment material, or Giglio
13 material. The right to impeach witnesses is based on the Confrontation Clause of the
14 constitution. The United States Supreme Court has held that the Confrontation Clause is not
15 “a constitutionally compelled right of pretrial discovery.” Pennsylvania v. Ritchie, 480 U.S.
16 39, 52, 107 S. Ct. 989, 999 (1987). Instead, the right to confrontation is a trial right, “designed
17 to prevent improper restrictions on the types of questions that defense counsel may ask during
18 cross-examination.” It “does not include the power to require the pretrial disclosure of any
19 and all information that might be useful in contradicting unfavorable testimony.” It guarantees
20 the opportunity for effective cross-examination, “not cross-examination that is effective in
21 whatever way, and to whatever extent the defense might wish.” Id. at 53, 107 S. Ct. 999, *citing*
22 Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985).

23 Almost universally, courts have held that there is no Giglio obligation if the
24 witness does not testify.¹ See United States v. Green, 178 F.3d 1099, 1109 (10th Cir. 1999)
25 (holding that Giglio did not apply when the government “did not ever call” its confidential
26 informant as a witness); United States v. Mullins, 22 F.3d 1365, 1372 (6th Cir. 1994) (finding
27 “no authority that the government must disclose promises of immunity made to individuals

28 ¹ The exception to this rule is where the witness will not testify, but the witness’ hearsay statement will be admitted, then the witness’ credibility may be in issue. See United States v. Jackson, 345 F.3d 59, 70-71 (2nd Cir. 2003).

1 the government does not have testify at trial,” and holding that a grant of immunity could not
2 be “favorable to the accused” as impeachment evidence because the government did not call
3 [the witness] and, thus, there was no one to impeach”); see also United States v. Pena, 949
4 F.2d 751, 758-59 (5th Cir. 1991) (impeachment evidence regarding a non-testifying witness is
5 an insufficient basis upon which to grant a new trial); United States v. Storey, 956 F. Supp.
6 934, 942 (D. Kan. 1997) (holding that while impeachment evidence falls within the Brady rule,
7 “[s]uch evidence as it pertains to an informant, however is only discoverable if the informant
8 testifies”); Kowalczyk v. United States, 936 F. Supp. 1127, 1149 (E.D.N.Y. 1996) (holding
9 that “[t]he Government was not obligated to produce the Janis arrest record, assuming the
10 prosecution was in possession of such information, as Janis was not a witness at trial”); United
11 States v. Hill, 799 F. Supp. 86, 90 (D. Kan. 1992), (denying defense request for any
12 information which could be used to impeach non-witnesses); United States v. Villareal, 752
13 F. Supp. 851, 853 (N.D. Ill. 1991) (holding that “[a]s for statements by government witnesses
14 that qualify as impeachment materials, the government is under no obligation to disclose this
15 information before trial,” and that “the government is under no obligation at any time to
16 provide impeachment evidence for non-witnesses”); United States v. Coggs, 752 F. Supp. 848,
17 849, (N.D. Ill. 1990) (holding that the government is not required to produce impeachment
18 evidence impacting non-witnesses, reasoning that “[r]equiring that the government provide
19 impeachment evidence for non-witnesses will not further the interest sought to be served by
20 Giglio-allowing for a meaningful determination of witness credibility”). Finally, evidence of
21 impeachment of a witness need not be disclosed until the witness testifies. United States v.
22 Rinn, 586 F.2d 113 (9th Cir. 1978) (“[S]ince information concerning “favors or deals” merely
23 goes to the credibility of the witness, it need not be disclosed prior to the witness
24 testifying.”). Thus, unless the witness is going to testify, there is no basis to disclose any
25 impeachment material.

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1 IV. THE STATE'S RESPONSES TO DEFENDANT'S REQUESTS IN THE
2 INSTANT MATTER

3 1. Information concerning any expectation of any benefit of any kind to be received,
4 or already received, by any witness presented by the State

5 Pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the State is obligated to disclose to
6 the defendant "evidence favorable to an accused...where the evidence is material either to
7 guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S.
8 at 87. This includes any evidence that would indicate that a witness is biased in favor of the
9 prosecution because of promises, rewards or inducements made to the witness by the State or
10 its investigative agents, whether explicit or implicit. See Giglio v. United States, 405 U.S. 150
11 (1972) (holding that an Assistant United States Attorney's promise to a witness that he would
12 not be prosecuted if he testified for the prosecution is relevant to the witness's credibility and
13 should have been disclosed to the defendant); United States v. Bagley, 473 U.S. 667, 683-84
14 (1985) (wherein the Court used the terms "promises of reward" and "inducements" to refer to
15 a prosecutor's disclosure obligation under Giglio); Jimenez v. State, 112 Nev. 610, 622, 918
16 P.2d 687, 695 (1996) ("it is equally clear that facts which imply an agreement would also bear
17 on [a witness's] credibility and would have to be disclosed." (quoting United States v. Shaffer,
18 789 F.2d 682, 688 (9th Cir. 1986))).

19 Further, NRS 50.225(1)(a) entitles witnesses "attending the courts of this State in any
20 criminal case... in obedience to a subpoena... [t]o be paid a fee of \$25 for each day's
21 attendance, including Sundays and holidays." Witnesses are also entitled to "mileage
22 reimbursement," NRS 50.225(1)(b) and a per diem allowance, NRS 50.225(2). Additionally,
23 witnesses residing outside the jurisdiction of the Court are "entitled to reimbursement for the
24 actual and necessary expenses for going to and returning from the place where the court is
25 held." NRS 50.225(3). The State is not aware of any compensation outside of the statutory
26 witness fees in this case.

27 ///

28 ///

1 2. That the State engage in due diligence in order to adequately comply with NRS
2 50.095 and disclosure of felony conviction within the last 10 years, including but not
3 limited to any material and/or information in the State's possession which relates to
4 specific instances of misconduct of any State witness from which it could be inferred that
5 the person is untruthful and which may be or may lead to admissible evidence

6 This is not a specific request. The State acknowledges that under NRS 50.095, evidence
7 that a witness has been convicted of a crime (if it is punishable by more than one year) is
8 admissible to impeach the credibility of that witness. Evidence of the conviction may be
9 admissible if a period of ten years has not passed from the date of release of the witness from
10 confinement or the expiration of the period of his parole, probation or sentence, whichever is
11 the later date. See NRS 50.095(1)(2). Nonetheless, that statute does not make admissible a
12 witness' prior arrests that did not result in a conviction or an arrest and conviction of a crime
13 that is merely a misdemeanor, or their juvenile record.

14 Nevada case law and NRS 50.085(3) also permit questioning of a witness in relation to
15 arrests/convictions for crimes not amounting to felonies which bear on the honesty or
16 truthfulness of a witness. See Butler v. State, 120 Nev. 879, 890-91, 102 P.3d 71 (2004) ("This
17 court has held that NRS 50.085(3) permits impeaching a witness on cross-examination with
18 questions about specific acts as long as the impeachment pertains to truthfulness or
19 untruthfulness...[but] if the witness denies a specific act on cross-examination, the State may
20 not introduce extrinsic evidence to the contrary.") However, no statute or case law in the
21 jurisdiction permits unlimited questioning of a witness in regard to his/her criminal
22 background beyond that permitted by NRS 50.095 and 50.085(3). Furthermore, records
23 pertaining to juveniles are sealed and not discoverable.

24 In light of the above-cited legal authority, in the event that the State learns that one of
25 its testifying witnesses has a felony conviction or an arrest/conviction for a crime bearing on
26 honesty or truthfulness, such evidence will be disclosed. The State objects to Defendant's
27 requests for information which extends beyond the ambit of the State's burden as outlined by
28 case law and statute. Should the State learn of any criminal proceeding that may bear on bias,
interest and motive, that fact will also be disclosed.

///

1 3. Any material and/or information in the State's possession from which it could be
2 inferred that any person whom the State calls as a witness at trial has a reputation for
3 untruthfulness or for shifting his own guilt upon other persons which would either be
admissible or aid in the discovery of evidence which would be admissible

4 Same response as Section 2.

5 4. Any materials and/or information of any nature whatsoever, tangible or
6 intangible, recorded or unrecorded, in the State's possession, custody or control or the
7 existence of which is either known or through the exercise of due diligence may become
8 known to the State, which would tend to exculpate Defendant of the State's charges,
might mitigate the punishment should he be convicted, or would be or may lead to
information which would tend to impeach or affect the credibility of a witness anticipated
to be presented by the State

9 The State objects to this request as being vague, overbroad, and compound.
10 Additionally, portions of the request fall outside the scope of the State's obligations under
11 NRS 174.235, as well as Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States,
12 405 U.S. 150 (1972). To the extent that the request and its multiple subparts fall within the
13 State's obligations under 174.235, Brady and Giglio, they are not specific requests.

14 NRS 174.235 provides:

15 1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the
16 request of a defendant, the prosecuting attorney shall permit the defendant to
inspect and to copy or photograph any:

17 (a) **Written or recorded statements or confessions made by the**
18 **defendant**, or any written or recorded statements made by a witness the
19 prosecuting attorney intends to call during the case in chief of the State, or copies
thereof, within the possession, custody or control of the State, the existence of
which is known, or by the exercise of due diligence may become known, to the
prosecuting attorney;

20 (b) Results or reports of physical or mental examinations, scientific tests or
21 scientific experiments made in connection with the particular case, or copies
22 thereof, within the possession, custody or control of the State, the existence of
which is known, or by the exercise of due diligence may become known, to the
prosecuting attorney; and

23 (c) Books, papers, documents, tangible objects, or copies thereof, which the
24 prosecuting attorney intends to introduce during the case in chief of the State
25 and which are within the possession, custody or control of the State, the
existence of which is known, or by the exercise of due diligence may become
known, to the prosecuting attorney.

26 2. The defendant is not entitled, pursuant to the provisions of this section,
27 to the discovery or inspection of:

28 ///

1 (a) An internal report, document or memorandum that is prepared by or on
2 behalf of the prosecuting attorney in connection with the investigation or
prosecution of the case.

3 (b) A statement, report, book, paper, document, tangible object or any other
4 type of item or information that is privileged or protected from disclosure or
inspection pursuant to the Constitution or laws of this state or the Constitution
5 of the United States.

6 3. The provisions of this section are not intended to affect any obligation
7 placed upon the prosecuting attorney by the Constitution of this state or the
Constitution of the United States to disclose exculpatory evidence to the
defendant.

8 (Emphasis added).

9 Brady places upon the State an obligation to produce exculpatory evidence. Giglio requires
10 that the State disclose certain impeaching material as well.

11 In other words, even in the absence of a motion the State is obligated to turn over the
12 information requested that falls within the State's obligations under 174.235, Brady and
13 Giglio. For example, non-exculpatory oral statements are not covered by the statutes or Brady
14 and its progeny. Defendant has made many requests within the instant request without
15 providing any indication that the defense has performed any investigation or discovered that
16 the material actually exists and the State has failed to turn it over. The State asks that this
17 request be clarified by the defense to address what specific discovery Defendant believes he
18 is missing. In the absence of such a clarification the State asks that the request be denied as it
19 fails to state a specific request.

20 **5. Any written minutes or records of testimony, summaries of the substance of any**
21 **oral statements, or any materials and/or information whatsoever relating to any alleged**
22 **accomplice who either testified or otherwise made statements or created information**
which would be exculpatory as to Defendant

23 Same as response to Section 4.

24 **6. Any information concerning an arrest of any other individual for the charged**
25 **crime and any information suggesting a possible suspect other than the Defendant**

26 This is not a specific request. The State is not aware of any such information. If the
27 defense has additional information regarding specific items the State possesses and refuses to
28 turn over, the State requests that the defense provide these details to the State.

1 7. Disclosure of any and all statements in the instant case made by any State witness
2 that the State anticipates calling, or by the Defendant, including any inconsistent
statements of any named witnesses.

3 While the State usually voluntarily provides all written or recorded statements of
4 witnesses, except those protected as confidential, the State's decision to over include discovery
5 does not expand the nature of those items subject to mandatory disclosure by court order based
6 upon statutory or constitutional authority. The State objects to this request as being vague,
7 overbroad, and compound. Additionally, portions of the request fall outside the scope of the
8 State's obligations under NRS 174.235, as well as Brady v. Maryland, 373 U.S. 83 (1963)
9 and Giglio v. United States, 405 U.S. 150 (1972). To the extent that the request and its multiple
10 subparts fall within the State's obligations under 174.235, Brady and Giglio, they are not
11 specific requests.

12 NRS 174.235 provides:

13 1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the
14 request of a defendant, the prosecuting attorney shall permit the defendant to
inspect and to copy or photograph any:

15 (a) Written or recorded statements or confessions made by the defendant, or
16 **any written or recorded statements made by a witness the prosecuting**
17 **attorney intends to call during the case in chief of the State**, or copies thereof,
within the possession, custody or control of the State, the existence of which is
known, or by the exercise of due diligence may become known, to the
prosecuting attorney;

18 (b) Results or reports of physical or mental examinations, scientific tests or
19 scientific experiments made in connection with the particular case, or copies
20 thereof, within the possession, custody or control of the State, the existence of
which is known, or by the exercise of due diligence may become known, to the
prosecuting attorney; and

21 (c) Books, papers, documents, tangible objects, or copies thereof, which the
22 prosecuting attorney intends to introduce during the case in chief of the State
23 and which are within the possession, custody or control of the State, the
existence of which is known, or by the exercise of due diligence may become
known, to the prosecuting attorney.

24 2. The defendant is not entitled, pursuant to the provisions of this section,
25 to the discovery or inspection of:

26 (a) An internal report, document or memorandum that is prepared by or on
27 behalf of the prosecuting attorney in connection with the investigation or
prosecution of the case.

28 ///

1 (b) A statement, report, book, paper, document, tangible object or any other
2 type of item or information that is privileged or protected from disclosure or
3 inspection pursuant to the Constitution or laws of this state or the Constitution
4 of the United States.

5 3. The provisions of this section are not intended to affect any obligation
6 placed upon the prosecuting attorney by the Constitution of this state or the
7 Constitution of the United States to disclose exculpatory evidence to the
8 defendant.

9 (Emphasis added).

10 Brady places upon the State an obligation to produce exculpatory evidence. Giglio
11 requires that the State disclose certain impeaching material as well.

12 In other words, even in the absence of a motion the State is obligated to turn over the
13 information requested that falls within the State's obligations under 174.235, Brady and
14 Giglio. Defendant has made many sub-requests within the instant request without providing
15 any indication that the defense has performed any investigation or discovered that the material
16 actually exists and the State has failed to turn it over. The State asks that this request be
17 clarified by the defense to address what specific discovery Defendant believes he is missing.
18 In the absence of such a clarification the State asks that the request be denied as it fails to state
19 a specific request.

20 Giglio, governs what impeachment the State must provide. The State asks the Court to
21 hold it to that constitutional standard. Defendant's request is worded in an overbroad manner
22 to encompass immaterial statements about which the State has no knowledge.

23 Defendant's instant request has no bounds and no limits as to materiality nor whether
24 or not the witness will testify. The State will comply with NRS 174.235 and has provided
25 "any written or recorded statements made by a witness the prosecuting attorney intends to call
26 during the case in chief of the State, or copies thereof, within the possession, custody or control
27 of the State, the existence of which is known, or by the exercise of due diligence may become
28 known, to the prosecuting attorney." Further, Brady does not impose upon the State an
obligation "to disclose evidence which is available to the defendant from other sources,
including diligent investigation by the defense." Steese v. State, 114 Nev. 479, 495, 960 P.2d
321, 331 (1998). The defense is capable of conducting its own pretrial conferences with

witnesses, where the defense can inquire as to any change to the witnesses' expected testimony that differs from the statements given to police. This request should be denied.

8. Any and all other materials required to be disclosed by the United States and Nevada Constitutions and the Nevada Revised Statutes.

This is not a specific request. The defense does not need a court order for the State to comply with its discovery obligation -- the State is already held to this standard and there are sanctions in place for non-compliance. This request is overbroad, unnecessary, and certainly not "specific."

9. Any and all 911 or 311 calls, CAD and Event Search reports related to the subject incident.

The State has no objection to this request. The State has subpoenaed these documents and will provide them to defense counsel once they are received.

10. Any and all police reports generated related to the subject incident.

The State has no objection to this request. The State has subpoenaed these documents and will provide them to defense counsel once they are received.

11. Any and all radio traffic with MPD dispatch and/or car-to-car radio traffic and/or police car video surveillance related to the subject incident.

The State is not in possession of the requested information, and there has been no showing by the defense of the materiality of this information. Moreover, LVMPD does not have "police car video surveillance" to the State's knowledge. If the defense would like the requested information, they should subpoena the records themselves.

12. Any and all photographs taken related to this incident.

Defense requests all photographs taken in this case. To obtain these, the defense needs to issue a subpoena to the Las Vegas Metropolitan Police Department and the Clark County Medical Examiners Office. The State is not obligated to obtain these items for the defense. Pursuant to NRS 174.235(1)(c), the State is only obligated to provide to the defense, those photographs which it will seek to admit during its case in chief. Because this request exceeds the requirements of NRS 174.235, the State objects.

1 **13. Any and all requests and/or results of physical or biological evidence.**

2 Defendant's request is overbroad. NRS 174.235 (1) (b) provides for discovery of
3 scientific data. It requires the State to allow the defense to inspect and copy results of physical
4 or mental examinations, scientific experiments made in conjunction with the case in the
5 custody or control of the State or which could become known to the State by an exercise in
6 due diligence. The State asks the Court to adhere to the statute and order the State to comply
7 with the law as provided by statute rather than Defendant's overbroad request.

8 **14. Any and all video surveillance from TJ Maxx on March 30, 2016 concerning this**
9 **incident.**

10 The State has no objection to this request. The State has subpoenaed the surveillance
11 and will provide them to defense counsel once it is received.

12 **15. Names and last known address of any and all percipient witnesses known to the**
13 **State or to law enforcement. This includes the names of any juvenile witnesses in the**
14 **instant case.**

15 The State objects to this request. NRS 174.234 provides the law regarding notice of
16 witnesses. It provides that both sides must disclose witness names and addresses they intend
17 to call in their case-in-chief not less than 5 judicial days before trial. See NRS 174.234 (1) (a)
18 (2). The State intends to comply with NRS 174.234. The State is under no obligation to provide
19 any information regarding witnesses, even percipient witnesses, that it has no intention of
20 calling at trial.

21 **CONCLUSION**

22 Pursuant to NRS 174.234 and NRS 174.245, the State specifically requests that the
23 defense honor their reciprocal discovery obligations and provide contact information for any
24 witnesses they intend to call, as well as copies of any and all discovery they intend to utilize
25 and/or intend to admit in the defense of Defendant. The State further requests that the defense
26 provide access to of those portions of the defense file that are related to the defense of
27 Defendant for copying and inspection consistent with NRS 174.245.

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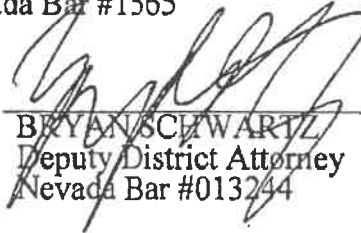
1 Based upon the foregoing, this Honorable Court should GRANT in part and DENY in
2 part Defendant's Motion to Compel Discovery, and GRANT the State's limited request for
3 discovery.

4 DATED this 1st day of June, 2016.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #1565

9 BY



10 BRYAN SCHWARTZ
11 Deputy District Attorney
12 Nevada Bar #013244

13 CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

14 I hereby certify that service of State's Response To Defendant's Motion To Compel
15 Discovery, was made this 1st day of June, 2016, by electronic filing to:

16 JASMIN SPELLS, Deputy Public Defender
17 TO: lillyjd@ClarkCountyNV.gov

18
19 BY:


20 C. Cintola
21 Employee of the District Attorney's Office
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28 BS/cc/L3


CLERK OF THE COURT

1 NOTC
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 BRYAN SCHWARTZ
6 Deputy District Attorney
7 Nevada Bar #013244
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10
11 Plaintiff,

11 -vs-

CASE NO: C-16-314260-1

12 ALFRED C. HARVEY,
13 #7013098

DEPT NO: XXIII

14 Defendant.

15 NOTICE OF INTENT TO SEEK PUNISHMENT AS
16 A HABITUAL CRIMINAL

17 TO: ALFRED C. HARVEY, Defendant; and

18 TO: JASMIN SPELLS, DEPUTY PUBLIC DEFENDER, Counsel of Record:

19 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that pursuant to NRS
20 207.010, the STATE OF NEVADA will seek punishment of Defendant ALFRED C.
21 HARVEY, as a habitual criminal in the event of a felony conviction in the above-entitled
22 action.

23 That in the event of a felony conviction in the above-entitled action, the STATE OF
24 NEVADA will ask the court to sentence Defendant ALFRED C. HARVEY as a habitual
25 criminal based upon the following felony convictions, to-wit:

26 1. That in 2000, the Defendant was convicted in the State of California, for
27 the crime of Appropriate Lost Property (felony).
28

1 2. That in 2001, the Defendant was convicted in the State of California, for
2 the crime of Evade Police Officer (felony).

3 3. That in 2004, the Defendant was convicted in the State of California, for
4 the crime of Grand Theft from Person (felony).

5 4. That in 2004, the Defendant was convicted in the State of California, for
6 the crime of Receive Stolen Property (felony).

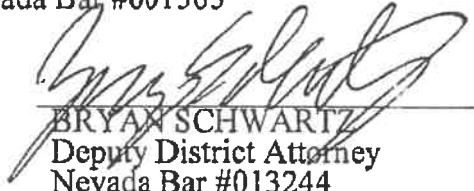
7 5. That in 2006, the Defendant was convicted in the State of California, for
8 the crime of Receive Stolen Property (felony).

9 6. That in 2007, the Defendant was convicted in the State of California, for
10 the crime of Evade Police Officer (felony).

11 7. That in 2012, the Defendant was convicted in the State of California, for
12 the crime of Evade Police Officer (felony).

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

16 BY

17 
18 BRYAN SCHWARTZ
19 Deputy District Attorney
20 Nevada Bar #013244
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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I hereby certify that service of Notice Of Intent To Seek Punishment As A Habitual Criminal, was made this 10th day of June, 2016, by electronic filing to:

JASMIN SPELLS, Deputy Public Defender
TO: lillyjd@ClarkCountyNV.gov

BY:



C. Cintola
Employee of the District Attorney's Office

cc/L3



CLERK OF THE COURT

NWEW
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
BRYAN SCHWARTZ
Deputy District Attorney
Nevada Bar #013244
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ALFRED C. HARVEY,
#7013098

Defendant.

CASE NO: C-16-314260-1

DEPT NO: XXIII

NOTICE OF WITNESSES
[NRS 174.234(1)(a)]

TO: ALFRED C. HARVEY, Defendant; and

TO: JASMIN SPELLS, DEPUTY PUBLIC DEFENDER, Counsel of Record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the STATE OF
NEVADA intends to call the following witnesses in its case in chief:

<u>NAME</u>	<u>ADDRESS</u>
CUSTODIAN OF RECORDS OR DESIGNEE	Clark County Detention Center, 330 S. Casino Center Blvd., Las Vegas, NV
CUSTODIAN OF RECORDS OR DESIGNEE	LVMPD Communications
CUSTODIAN OF RECORDS OR DESIGNEE	LVMPD Dispatch

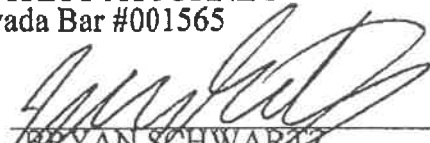
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1	CUSTODIAN OF RECORDS	LVMPD Records, 400 S. Martin Luther King Blvd.,
2	OR DESIGNEE	Las Vegas, NV
3	CUSTODIAN OF RECORDS	LVMPD Project Management & Video Bureau
4	OR DESIGNEE	
5	CUSTODIAN OF RECORDS	Arizona DMV
6	OR DESIGNEE	
7	CUSTODIAN OF RECORDS	TJ Maxx, 4640 W. Sahara Ave., Las Vegas, NV
8	OR DESIGNEE	
9	APPEL, ERROL	C/O Clark County District Attorney's Office
10	BILYEU, R.	LVMPD P#7524
11	BRAMBLE, SHAWN	TJ Maxx, 4640 W. Sahara Ave., Las Vegas, NV
12	HEINDEL, E.	LVMPD P#5606
13	HUMPHERY, T.	LVMPD P#14084
14	LOPEZ-ROSENDE, F.	LVMPD P#8864
15	MUNOZ, JULIAN	C/O Clark County District Attorney's Office
16	NELSON, R.	LVMPD P#14002
17	RESBERG, E.	LVMPD P#10007
18	RUMERY, F.	LVMPD P#5817
19	VELASQUEZ, A.	LVMPD P#8444
20	WATTS, JOSEPH OR DESIGNEE	Clark County District Attorney's Office-Investigator
21	WILLSON, W.	LVMPD P#5274
22	///	
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1 These witnesses are in addition to those witnesses endorsed on the Information or
2 Indictment and any other witness for which a separate Notice of Witnesses and/or Expert
3 Witnesses has been filed.

4 STEVEN B. WOLFSON
5 DISTRICT ATTORNEY
6 Nevada Bar #001565

7 BY



8 BRYAN SCHWARTZ
9 Deputy District Attorney
10 Nevada Bar #013244

11 CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

12 I hereby certify that service of Notice of Witnesses, was made this 13th day of June,
13 2016, by electronic filing to:

14 JASMIN SPELLS, Deputy Public Defender
15 TO: lillyjd@ClarkCountyNV.gov

16
17 BY:


18 C. Cintola
19 Employee of the District Attorney's Office

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CLERK OF THE COURT

NOTC
PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Lillyjd@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-16-314260-1
)	
v.	)	DEPT. NO. XXIII
)	
ALFRED C. HARVEY,)	
)	
Defendant,)	

DEFENDANT'S NOTICE OF WITNESSES, PURSUANT TO NRS 174.234

TO: CLARK COUNTY DISTRICT ATTORNEY:

You, and each of you, will please take notice that the Defendant, ALFRED C. HARVEY, intends to call the following witness in his case in chief:

<u>NAME</u>	<u>ADDRESS</u>
Doug S Henke, Investigator or Designee	Clark County Public Defender's Office
Harvey, Tara	3955 Swenson #170 LVN, 89119

The Defendant reserves the right to call any and all witnesses identified by any other party to this action.

DATED this 14th day of June, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Jasmin Spells
JASMIN D. SPELLS, #11635
Deputy Public Defender

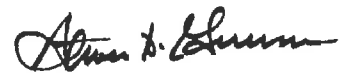
CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and forgoing NOTICE was served via electronic e-filing to the Clark County District Attorney's Office at motions@clarkcountydade.com on this 14th day of June, 2016.

By: /s/ Erin Prisbrey

An employee of the
Clark County Public Defender's Office

Case Name: Alfred C. Harvey
Case No.: C-16-314260-1
Dept. No.: District Court, Department XXIII


CLERK OF THE COURT

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Lillyjd@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
	)	CASE NO. C-16-314260-1
Plaintiff,)	
	)	DEPT. NO. XXIII
v.)	
	)	DATE: October 31, 2016
ALFRED C. HARVEY,	)	TIME: 9:30 a.m.
)	
Defendant,)	

**MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A CURATIVE JURY
INSTRUCTION ON THE STATE'S FAILURE TO GATHER OR PRESERVE MATERIAL
EVIDENCE**

COMES NOW, the Defendant, ALFRED C. HARVEY, by and through JASMIN D. SPELLS, Deputy Public Defender and hereby dismiss the charges against Alfred Harvey for the State's failure to gather and preserve material evidence, or in the alternative, for a jury instruction that the evidence not gathered or preserved would have been favorable to the Defendant.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 19th day of October, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Jasmin Spells
JASMIN D. SPELLS, #11635
Deputy Public Defender

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1 **MEMORANDUM OF POINTS AND AUTHORITES**

2 **STATEMENT OF RELEVANT FACTS**

3 Mr. Harvey, the Defendant in the instant case is charged by way of Information with one
4 count of Robbery with use of a Deadly Weapon, to wit a knife. The Honorable Judge Saragosa
5 held a preliminary hearing on April 18, 2016. At the preliminary hearing, the State called one
6 witness, Mr. Julian Munoz.

7 Mr. Munoz testified that on March 30, 2016, he came into contact with Mr. Harvey outside
8 a TJ Maxx store. [Preliminary Hearing Transcript, (April 18, 2016) (attached hereto as Exhibit A)
9 “PHT” pp. 5, 7]. Mr. Munoz stated that he saw Mr. Harvey take items from the store without
10 paying. PHT pp. 6-7. When Mr. Munoz confronted Mr. Harvey outside, he states that Mr. Harvey
11 pulled a knife out of his left pocket and held it over his head. PHT p. 8. Mr. Munoz further testified
12 that Mr. Harvey left the store in a white U-haul van. *Id.*

13 Per the police report, officers were given plate information for said U-haul truck. *See*
14 Declaration of Arrest, attached hereto as Exhibit B. A LVMPD air unit located this van and
15 conducted a stop. *Id.* Mr. Harvey was taken into custody. *Id.* Officers conducted an inventory
16 search of the van. *Id.* There is no reference to a knife or any weapons being found or impounded.
17 *See* both B: Declaration of Arrest and Exhibit C: Impound Report (attached hereto).

18 In investigating the instant case, the Defense reached out to the security officers at TJ
19 Maxx. It is the defense’s belief that the officer(s) took video surveillance and/or photographs of the
20 alleged perpetrator on the day in question. The officers involved in this case did impound store
21 video surveillance from TJ Maxx but did not impound any photographs or video from the security
22 officer(s)’s phone. *See* Exhibit C. Upon inquiring with the State, the defense was informed that no
23 additional videos exist. Upon information and belief, the defense contends that these photographs
24 and/or video have been deleted and are no longer available.

25 Mr. Harvey has entered a plea of not guilty and this case is currently set for trial on
26 November 7, 2016.

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LEGAL ARGUMENT

THE OFFICERS FAILED TO COLLECT MATERIAL EVIDENCE IN THIS CASE.

The Nevada Supreme Court has adopted a two-part test for analyzing the failure to gather evidence. "The first part requires that the defense show that the evidence was 'material' meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). The second part of the test applies if the evidence is material. "[T]hen the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case." Id.

A. The Evidence Is Clearly Material.

Robbery requires that one's actions be forceful, violent or place a person in fear of injury. Any evidence that would tend to show the existence or non-existence of this required element is material to the case. Moreover, Mr. Harvey is charged with Robbery with a Deadly Weapon, to wit a knife. Thus, any evidence having the ability to show the presence or absence of a knife or any other weapon is fundamentally material.

In Daniels, the Las Vegas Metropolitan Police Department and University Medical Center were accused of failing to collect blood evidence, which may or may not have proved that Daniels was under the influence of PCP during a robbery/murder. After adopting the two-prong test described above, the Court proceeded to find that whether or not the blood evidence could have prevented Daniels' conviction was pure speculation. Daniels was arrested 6 hours after the alleged ingestion of PCP and Daniels' expert testified that PCP can only be detected in the blood for a "few" hours. If the blood evidence did indicate the presence of PCP, it would be mere speculation that Daniels had ingested it before the shooting.

By contrast, the issues in this case are: (1) Whether Mr. Harvey is the individual who committed the alleged offense, (2) If Mr. Harvey is the actual perpetrator, whether Mr. Harvey used any force, violence, or fear of injury to the security officer(s) and (3) if numbers 2 and 3 are met, whether Mr. Harvey had a weapon. Surely there can be no doubt that videotape evidence of the alleged incident would have proven beyond doubt whether Mr. Harvey committed the offense;

1 whether or not the actions constitute robbery and whether or not there was a weapon present.
2 Additionally, photographs could also prove beyond a reasonable doubt whether Mr. Harvey was
3 the actual perpetrator. It is also possible that photographs could depict the presence of a knife or
4 weapon if it existed and the demeanor of the individual. It is clear that having the video and/or
5 photograph evidence at trial could lead to a different result than not having it.¹ Therefore, both the
6 video and photographs at issue are undeniably material to this case.

7 **B. Defendant's Remedy: The Failure to Collect the Videotape and/or**
8 **Photographs Was Done in Bad Faith, or At a Minimum Gross Negligence.**

9 "When mere negligence is involved, no sanctions are imposed, but the defendant can still
10 examine the prosecution's witnesses about the investigative deficiencies." Daniels, 114 Nev. at
11 267; *citing* State v. Ware, 881 P.2d 679, 685-86 (N.M. 1994); United States v. Bagley, 473 U.S.
12 667 (1985). "When gross negligence is involved, the defense is entitled to a presumption that the
13 evidence would have been unfavorable to the State. Id. In cases of bad faith, we conclude that
14 dismissal of the charges may be an available remedy based upon an evaluation of the case as a
15 whole." Id.

16 Bad faith is generally characterized by an intentional act, including an intentional failure to
17 meet an obligation or duty. Gross negligence is a lower standard than bad faith. When an officer
18 acts "directly contrary to standard police investigatory procedure", the Court may find the officers
19 actions to be grossly negligent and "instruct the jury that it can infer that the material evidence not
20 gathered from the crime scene would be unfavorable to the State. State v. Ware, 881 P.2d 679,
21 685-86 (N.M. 1994) *citing* State v. McGill, 324 N.W. 2d 378, 379 (Minn. 1982). The Nevada
22 Supreme Court has consistently distinguished the concepts of ordinary or gross negligence from
23 the concepts of willful or wanton misconduct. Davies v. Butler, 95 Nev. 763, 771 (1979). "Gross
24 negligence is manifestly a smaller amount of watchfulness and circumspection than the
25 circumstances require of a prudent man. But it falls short of being such reckless disregard of
26 probable consequences as is equivalent to a willful and intentional wrong." Id. quoting Hart v.

27
28 ¹ This motion discusses the video and/or photos taken by the security officer's on a cell phone. It is the defense's
contention that these recordings and/or photographs were taken outside of the store and would show more than the TJ
Maxx video surveillance would, as the store video surveillance does not show any of the alleged confrontation.

1 Kline, 61 Nev. 96, 101, 116 P.2d 672, 674 (1941). “Ordinary and gross negligence differ in degree
2 of inattention, while both differ in kind from willful and intentional conduct which is or ought to
3 be known to have a tendency to injury.” Id.

4 It is customary/ standard practice for officers to impound evidence that is material to the
5 case or has some evidentiary value. In the instant case, it is the Defendant’s contention that the
6 security officers took video and/or photographs of the perpetrator on the date in question. The
7 officers in the instant case did not impound any data from the security officer’s phones. *See*
8 Exhibit C. The officers did, however impound video surveillance from TJ Maxx. The video
9 surveillance illustrates what happened inside of the store, whereas video and/or photographs would
10 have depicted what happened outside of the store. The allegation is that the alleged robbery
11 occurred outside the TJ Maxx store.

12 The police report is void of any indication that the officers reviewed the photos and/or
13 video on the security officer’s phone. It is clear, that these photos and/or video were not
14 impounded. The photographs and video are both exculpatory to the defense. There was never a
15 weapon found on Mr. Harvey’s person or in the U-Haul vehicle that officers inventoried. The
16 video would show that there was no knife involved. Photographs could potentially show the
17 absence of a weapon. The photographs also have obvious evidentiary value given the error rate in
18 mis-identifications. Furthermore, the photographs would also show the demeanor of each party
19 involved. Here, the officers were careless in preserving this key piece of evidence. The defense
20 contends that this deliberate failure not only meets the requirements of gross negligence, but
21 actually amounts to bad faith.

22 The officers here were not novice officer(s), but were duly trained; one of the officers
23 having approximately 7 years experience on the date of this offense. Moreover, the fact that the
24 officers impounded the TJ Maxx surveillance indicates that they were trained in impound evidence
25 with evidentiary value. The failure this material evidence amounts to more than simple negligence.
26 Therefore, if this Court rejects the argument that this case should be dismissed for bad faith, then
27 the Court should find that gross negligence has occurred and grant the Defense a curative jury
28 instruction.

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YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the above and foregoing MOTION on for hearing before the Court on the 31st day of October, 2016, at 9:30 a.m.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

CERTIFICATE OF ELECTRONIC SERVICE

By: /s/Kristina Byrd
An employee of the
Clark County Public Defender's Office


CLERK OF THE COURT

PHILIP J. KOHN, PUBLIC DEFENDER
NEVADA BAR NO. 0556
JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
NEVADA BAR NO. 11635
PUBLIC DEFENDERS OFFICE
309 South Third Street, Suite 226
Las Vegas, Nevada 89155
Telephone: (702) 455-4685
Facsimile: (702) 455-5112
Lillyjd@clarkcountynv.gov
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,	)	CASE NO. C-16-314260-1
)	
v.	)	DEPT. NO. XXIII
)	
ALFRED C. HARVEY,)	
	)	DATE: October 31, 2016
Defendant,	)	TIME: 9:30 a.m.

**ADDENDUM TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR A
CURATIVE JURY INSTRUCTION ON THE STATE'S FAILURE TO GATHER OR
PRESERVE MATERIAL EVIDENCE**

COMES NOW, the Defendant, ALFRED C. HARVEY, by and through JASMIN D. SPELLS, Deputy Public Defender and hereby dismiss the charges against Alfred Harvey for the State's failure to gather and preserve material evidence, or in the alternative, for a jury instruction that the evidence not gathered or preserved would have been favorable to the Defendant.

This Motion is made and based upon all the papers and pleadings on file herein, the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

DATED this 21th day of October, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Jasmin Spells
JASMIN D. SPELLS, #11635
Deputy Public Defender

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1 MEMORANDUM OF POINTS AND AUTHORITES

2 STATEMENT OF RELEVANT FACTS

3 Mr. Harvey, the Defendant in the instant case is charged by way of Information with one
4 count of Robbery with use of a Deadly Weapon, to wit a knife. The Honorable Judge Saragosa
5 held a preliminary hearing on April 18, 2016. At the preliminary hearing, the State called one
6 witness, Mr. Julian Munoz.

7 Mr. Munoz testified that on March 30, 2016, he came into contact with Mr. Harvey outside
8 a TJ Maxx store. [Preliminary Hearing Transcript, (April 18, 2016) (attached hereto as Exhibit A)
9 "PHT" pp. 5, 7]. Mr. Munoz stated that he saw Mr. Harvey take items from the store without
10 paying. PHT pp. 6-7. When Mr. Munoz confronted Mr. Harvey outside, he states that Mr. Harvey
11 pulled a knife out of his left pocket and held it over his head. PHT p. 8. Mr. Munoz further testified
12 that Mr. Harvey left the store in a white U-haul van. *Id.*

13 Per the police report, officers were given plate information for said U-haul truck. *See*
14 Declaration of Arrest, attached hereto as Exhibit B. A LVMPD air unit located this van and
15 conducted a stop. *Id.* Mr. Harvey was taken into custody. *Id.* Officers conducted an inventory
16 search of the van. *Id.* There is no reference to a knife or any weapons being found or impounded.
17 *See* both B: Declaration of Arrest and Exhibit C: Impound Report (attached hereto).

18 In investigating the instant case, the Defense reached out to the security officers at TJ
19 Maxx. It is the defense's belief that the officer(s) took video surveillance and/or photographs of the
20 alleged perpetrator on the day in question. The officers involved in this case did impound store
21 video surveillance from TJ Maxx but did not impound any photographs or video from the security
22 officer(s)'s phone. *See* Exhibit C. Upon inquiring with the State, the defense was informed that no
23 additional videos exist. Upon information and belief, the defense contends that these photographs
24 and/or video have been deleted and are no longer available.

25 Mr. Harvey has entered a plea of not guilty and this case is currently set for trial on
26 November 7, 2016.

27 ///

28 ///

LEGAL ARGUMENT

THE OFFICERS FAILED TO COLLECT MATERIAL EVIDENCE IN THIS CASE.

The Nevada Supreme Court has adopted a two-part test for analyzing the failure to gather evidence. "The first part requires that the defense show that the evidence was 'material' meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). The second part of the test applies if the evidence is material. "[T]hen the court must determine whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case." Id.

A. The Evidence Is Clearly Material.

Robbery requires that one's actions be forceful, violent or place a person in fear of injury. Any evidence that would tend to show the existence or non-existence of this required element is material to the case. Moreover, Mr. Harvey is charged with Robbery with a Deadly Weapon, to wit a knife. Thus, any evidence having the ability to show the presence or absence of a knife or any other weapon is fundamentally material.

In Daniels, the Las Vegas Metropolitan Police Department and University Medical Center were accused of failing to collect blood evidence, which may or may not have proved that Daniels was under the influence of PCP during a robbery/murder. After adopting the two-prong test described above, the Court proceeded to find that whether or not the blood evidence could have prevented Daniels' conviction was pure speculation. Daniels was arrested 6 hours after the alleged ingestion of PCP and Daniels' expert testified that PCP can only be detected in the blood for a "few" hours. If the blood evidence did indicate the presence of PCP, it would be mere speculation that Daniels had ingested it before the shooting.

By contrast, the issues in this case are: (1) Whether Mr. Harvey is the individual who committed the alleged offense, (2) If Mr. Harvey is the actual perpetrator, whether Mr. Harvey used any force, violence, or fear of injury to the security officer(s) and (3) if numbers 2 and 3 are met, whether Mr. Harvey had a weapon. Surely there can be no doubt that videotape evidence of the alleged incident would have proven beyond doubt whether Mr. Harvey committed the offense.

1 whether or not the actions constitute robbery and whether or not there was a weapon present.
2 Additionally, photographs could also prove beyond a reasonable doubt whether Mr. Harvey was
3 the actual perpetrator. It is also possible that photographs could depict the presence of a knife or
4 weapon if it existed and the demeanor of the individual. It is clear that having the video and/or
5 photograph evidence at trial could lead to a different result than not having it.¹ Therefore, both the
6 video and photographs at issue are undeniably material to this case.

7 **B. Defendant's Remedy: The Failure to Collect the Videotape and/or**
8 **Photographs Was Done in Bad Faith, or At a Minimum Gross Negligence.**

9 "When mere negligence is involved, no sanctions are imposed, but the defendant can still
10 examine the prosecution's witnesses about the investigative deficiencies." Daniels, 114 Nev. at
11 267; citing State v. Ware, 881 P.2d 679, 685-86 (N.M. 1994); United States v. Bagley, 473 U.S.
12 667 (1985). "When gross negligence is involved, the defense is entitled to a presumption that the
13 evidence would have been unfavorable to the State. Id. In cases of bad faith, we conclude that
14 dismissal of the charges may be an available remedy based upon an evaluation of the case as a
15 whole." Id.

16 Bad faith is generally characterized by an intentional act, including an intentional failure to
17 meet an obligation or duty. Gross negligence is a lower standard than bad faith. When an officer
18 acts "directly contrary to standard police investigatory procedure", the Court may find the officers
19 actions to be grossly negligent and "instruct the jury that it can infer that the material evidence not
20 gathered from the crime scene would be unfavorable to the State. State v. Ware, 881 P.2d 679,
21 685-86 (N.M. 1994) citing State v. McGill, 324 N.W. 2d 378, 379 (Minn. 1982). The Nevada
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23 the concepts of willful or wanton misconduct. Davies v. Butler, 95 Nev. 763, 771 (1979). "Gross
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26 probable consequences as is equivalent to a willful and intentional wrong." Id. quoting Hart v.

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Maxx video surveillance would, as the store video surveillance does not show any of the alleged confrontation.

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2 of inattention, while both differ in kind from willful and intentional conduct which is or ought to
3 be known to have a tendency to injury." Id.

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5 case or has some evidentiary value. In the instant case, it is the Defendant's contention that the
6 security officers took video and/or photographs of the perpetrator on the date in question. The
7 officers in the instant case did not impound any data from the security officer's phones. *See*
8 Exhibit C. The officers did, however impound video surveillance from TJ Maxx. The video
9 surveillance illustrates what happened inside of the store, whereas video and/or photographs would
10 have depicted what happened outside of the store. The allegation is that the alleged robbery
11 occurred outside the TJ Maxx store.

12 The police report is void of any indication that the officers reviewed the photos and/or
13 video on the security officer's phone. It is clear, that these photos and/or video were not
14 impounded. The photographs and video are both exculpatory to the defense. There was never a
15 weapon found on Mr. Harvey's person or in the U-Haul vehicle that officers inventoried. The
16 video would show that there was no knife involved. Photographs could potentially show the
17 absence of a weapon. The photographs also have obvious evidentiary value given the error rate in
18 mis-identifications. Furthermore, the photographs would also show the demeanor of each party
19 involved. Here, the officers were careless in preserving this key piece of evidence. The defense
20 contends that this deliberate failure not only meets the requirements of gross negligence, but
21 actually amounts to bad faith.

22 The officers here were not novice officer(s), but were duly trained; one of the officers
23 having approximately 7 years experience on the date of this offense. Moreover, the fact that the
24 officers impounded the TJ Maxx surveillance indicates that they were trained in impound evidence
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EXHIBIT A

Exhibit A

See PHT – Pages 2-24

EXHIBIT B

DECLARATION OF ARREST

"Click here to add/edit Event# and ID# on all pages"

Event #: 180330-3003

I.D. #: 7013098

"PRINT"

True Name: HARVEY, ALFRED Date of Arrest: 03-30-16 Time of Arrest: 1624

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:

Other Charges:

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with the Las Vegas Metropolitan Police Department, Clark County, Nevada, being so employed for a period of 6 YEARS 11 MONTHS.

That I learned the following facts and circumstances which lead me to believe that the above named subject committed (or was committing) the offense(s) of ROBBERY WDW at the location of 4640 W SAHARA, and that the offense(s) occurred at approximately 1621 hours on the 30 day of MARCH, 2016, in the:

☐ County of Clark☒ City of Las Vegas

DETAILS FOR PROBABLE CAUSE:

On 03-30-16, at approximately 1635 hours, I Officer R. Nelson P# 14002 working as marked patrol unit 3U56 was dispatched to TJ Maxx located at 4640 W Sahara reference a Robbery. Details stated that a male threatened a worker with a knife and left with merchandise.

Upon arrival I made contact with Julian Munoz who works in Loss Prevention for TJ Maxx. Munoz stated that he observed a black male adult wearing a blue dress shirt, blue blazer, and shorts in the children's department who was later identified as Alfred Harvey. Harvey began selecting multiple items very rapidly with no regard to price or size. Harvey then entered the Men's department where Munoz observed him conceal two wallets among multiple other items inside his blazer. Harvey then entered the fragrance department where he selected face cream and multiple other items before exiting the store and passing all points of sale. Munoz approached Harvey and identified himself as Loss Prevention for TJ Maxx. Munoz asked for the unpaid items back and Harvey handed him two wallets. Munoz then asked Harvey to step back inside the store and Harvey refused. Munoz asked again because he did not want to conduct business in front of Harvey's children. At this time Harvey pulled out a knife with a black handle and a blade approximately 4 inches long. Harvey held the knife over his head in a threatening manner and stated to Munoz "we're not doing this today". Munoz immediately felt threatened and feared for his life so he backed off and watched Harvey from a distance.

Munoz could still see items concealed Harvey's blazer and observed him getting in the drivers seat of a UHaul van bearing AZ tag AG55084. The van drove west through the parking lot and north on Decatur. At this time LVMPD air unit spotted the van bearing AZ tag AG55084 turn eastbound Charleston from Decatur then southbound on Vista where Patrol Officer T. Humphreys P#14084 located the van at 1312 Vista and took Harvey into custody. At 1715 hours a Show-Up

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are misdemeanor).

Declarant must sign all page(s)
with an original signature.

R. NELSON

Print Declarant's Name

Declarant's Signature

P#

CONTINUATION REPORT

Event #: 160330-3003

ID#: 7013098

was conducted and Munoz identified Harvey 100 percent being the male who stole from the store and threatened him with the knife.

When Officer Humphreys took Harvey into custody, Harvey was in possession of a silver wallet which contained two counterfeit \$100 bills along with a paper with multiple credit card numbers along with pin numbers to those credit cards.

During inventory of the Uhaul van due to it being towed, Officer Resberg, P# 10007 located multiple credit cards with multiple persons names inside the drivers side door. Officer Resberg also located a wallet, face mask lotion, women's lotion and perfume all with TJ Maxx tags on them in the front of the van stuffed in between the drivers seat and console. All TJ Maxx items were impounded as evidence and the credit cards, counterfeit money and paper containing credit card numbers and pins were given to Detective Heindel P#5606 with Fraud and Forgery for further follow up.

Based on the above facts and circumstances of Harvey stealing items from the TJ Maxx, producing a knife and raising it over his head in a threatening manner when confronted by Munoz causing Munoz to feel threatened and fear for his life, Harvey was placed under arrest for Robbery with a deadly weapon and transported to CCDC where he was booked.

Declarant must sign all page(s)
with an original signature.

R. NELSON

Print Declarant's Name

Declarant's Signature

1402

P#

EXHIBIT C

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
PROPERTY REPORT

Date of LVMPD Possession 03/30/16	Time of LVMPD Possession NOV	Page(s) 1 OF 1
Event # 160330-3003		

Incident # 160330-3003

EVIDENCE
☒ Felony ☐ Gross Misd ☐ Misdemeanor
 List Other Related Event #'s (if any):

☐ **NO EVIDENTIARY VALUE:**
☐ No Owner Identified
☐ Destroy
☐ Return To DMV

☐ **SAFEKEEPING**
 Must provide Owner Info in
 Persons Section AND Identify
 Owner # for each Item Listed

FIREARM IMPOUNDED DUE TO:
☐ Temporary Protective Order (TPO)
☐ Extended Order of Protection

Impounding Officer (Print Name):
R. R. NELSON
 Supervisor Approving (Signature):
[Signature]

Unit
3056
 P# / Initials
R140020
 Unit
513
 P# / Initials
R7524B

Task Force Officers from Other Jurisdictions:
 PRINT LVMPD SGT Name & P#

PERSONS - (S)USPECT / (V)ICTIM / (O)WNER / (F)INDER

SGOOD VOFO #	Last Name	First Name, MI	DOB	Phone #	Charge(s)
1	HARVEY	ALFRED	12-19-76		ROBBERY WDW
Street Address City State Zip Code Arrest Date ID#					
<u>3955 SWANSON LAS VEGAS NV 89119 03-30-16 7013078</u>					
SGOOD VOFO #	Last Name	First Name, MI	DOB	Phone #	Charge(s)
Street Address City State Zip Code Arrest Date ID#					
SGOOD VOFO #	Last Name	First Name, MI	DOB	Phone #	Charge(s)
Street Address City State Zip Code Arrest Date ID#					

FIELD RELEASE ONLY	Released Item(s) #	By Officer P# & Initials	Date Released	Released to Owner (Above Person) #	Owner's Signature
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(Relating to Impound)
VIDEO OF HARVEY STEALING ITEMS FROM JT MAXX

PKG #	ITEM #	OWNER #	Make or Brand	MODEL	COLOR	Serial # / OAN State & Gov. Issued ID #'s	Qty.	PROPERTY DESCRIPTION	
								*If Firearms MUST list:	1) Barrel Length 2) Country Made/Importer 3) Caliber 4) Action Type (S/A, Auto, Bolt, Revolver, Etc.)
2	8	1					1	DVD	

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
PROPERTY REPORT

Date of LVMPD Possession	Time of LVMPD Possession	Page(s)
3/30/16	1600	1 OF 1
Event # 1 6 6 3 3 0 = 3 6 0 3		

Incident: ROBBERY W/O

☒ EVIDENCE
☐ Felony ☐ Gross Misd ☐ Misdemeanor
 List Other Related Event #'s (if any):

☐ NO EVIDENTIARY Value:
☐ No Owner Identified
☐ Destroy
☐ Return To DMV

☐ SAFEKEEPING
 Must provide Owner info in Persons Section AND identify Owner # for each item listed

FIREARM IMPOUNDED DUE TO:
☐ Temporary Protective Order (TPO)
☐ Extended Order of Protection

Impounding Officer (Print Name): <u>T. HARTMAN</u>	Unit: <u>3013</u>	P# / Initials: <u>T14084 H</u>	Task Force Officers from Other Jurisdictions: PRINT LVMPD SGT Name & P#
Supervisor Approving (Signature): <u>[Signature]</u>	Unit: <u>722</u>	P# / Initials: <u>R7325P</u>	

PERSONS - (S)USPECT / (V)ICTIM / (O)WNER / (F)INDER

SV OD VD FO #	Last Name	First Name, MI	DOB	Phone #	Charge(s)
1	HARVEY	ALFRED	12/19/76		ROBBERY W/O
Street Address		City	State	Zip Code	Arrest Date
3955 SW Edison #170		LV	NV	89119	3/30/16
ID#	7013098				

SV OD VD FO #	Last Name	First Name, MI	DOB	Phone #	Charge(s)
Street Address		City	State	Zip Code	Arrest Date
ID#					

SV OD VD FO #	Last Name	First Name, MI	DOB	Phone #	Charge(s)
Street Address		City	State	Zip Code	Arrest Date
ID#					

FIELD RELEASE ONLY	Released Item(s) #	By Officer P# & Initials	Date Released	Released to Owner (Above Person) #	Owner's Signature
--------------------	--------------------	--------------------------	---------------	------------------------------------	-------------------

(Relating to Impound) ALL ITEMS BELOW WERE FOUND INSIDE A UNIL
W/IN THAT THE SUSPECT WAS DRIVING. ALL ITEMS ARE RELATED
TO THE ROBBERY W/O AND OTHER CHARGES PENDING AGAINST
THE SUSPECT.

PKG #	ITEM #	OWNER #	Make or Brand	MODEL	COLOR	Serial # / OAN State & Gov. Issued ID #'s	Qty.	PROPERTY DESCRIPTION	
								* Weapons MUST list:	1) Barrel Length 2) Country/Made/Importer 3) Caliber 4) Action Type (S/A, Auto, Bolt, Revolver, Etc.)
	1			BLUE	BLUE		1	BLUE SPORTS COAT	
	2			BLACK	BLACK		1	KENWOOD RADIO W/ MISC	
	3						1	FACIAL LOTION	
	4						1	BLACK LEATHER WALLET	
	5						1	WOMEN'S PERFUME	
	6						1	WOMEN'S PERFUME	
	7						1	BAG OF SEVERAL MISC METAL	
								ANTI-TRUST TAGS.	

LVMPD 07-A (Rev. 0712) ↑ Corresponds to # Listed in PERSONS section (Suspect / Victim / Owner / Finder)

Distribution: White: Records/Onbase | Yellow: Evidence Vault | Pink: Citizen


CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER
2 NEVADA BAR NO. 0556
3 JASMIN D. SPELLS, DEPUTY PUBLIC DEFENDER
4 NEVADA BAR NO. 11635
5 **PUBLIC DEFENDERS OFFICE**
6 309 South Third Street, Suite 226
7 Las Vegas, Nevada 89155
8 Telephone: (702) 455-4685
9 Facsimile: (702) 455-5112
10 Lillyjd@clarkcountynv.gov
11 Attorneys for Defendant

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,)

10 Plaintiff,)

11 v.)

12 ALFRED C. HARVEY,)

13 Defendant,)

CASE NO. C-16-314260-1

DEPT. NO. XXIII

DATE: November 2, 2016
TIME: 9:30 a.m.

14
15 **MOTION TO SUPPRESS SHOW-UP IDENTIFICATION AND SUBSEQUENT IN-**
16 **COURT IDENTIFICATION**

17 COMES NOW, the Defendant, ALFRED C. HARVEY, by and through JASMIN
18 D. SPELLS, Deputy Public Defender and hereby moves to suppress the show-up identification
19 line-up done in this case due to it unreliable and prejudicial, and to suppress any subsequent in-
20 court identifications made as tainted by the show-up identification, and to bar any future in-court
21 identification of Defendant as unreliable.

22 This Motion is made and based upon all the papers and pleadings on file herein, the
23 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

24 DATED this 21st day of October, 2016.

25 PHILIP J. KOHN
26 CLARK COUNTY PUBLIC DEFENDER

27 By: /s/ Jasmin Spells
28 JASMIN D. SPELLS, #11635
Deputy Public Defender

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DECLARATION

JASMIN D. SPELLS makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender for the Clark County Public Defender's Office appointed to represent Defendant Alfred C. Harvey in the present matter;

2. I am more than 18 years of age and am competent to testify as to the matters stated herein. I am familiar with the procedural history of the case and the substantive allegations made by The State of Nevada. I also have personal knowledge of the facts stated herein or I have been informed of these facts and believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 21st day of October, 2016.

/s/ Jasmin Spells
JASMIN D. SPELLS

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF RELEVANT FACTS

Mr. Harvey, the Defendant in the instant case is charged by way of Information with one count of Robbery with use of a Deadly Weapon, to wit a knife. The Honorable Judge Saragosa held a preliminary hearing on April 18, 2016. At the preliminary hearing, the State called one witness, Mr. Julian Munoz.

Mr. Munoz testified that on March 30, 2016, he came into contact with Mr. Harvey outside a TJ Maxx store. [Preliminary Hearing Transcript, (April 18, 2016) (attached hereto as Exhibit A) "PHT" pp. 5, 7]. Mr. Munoz stated that he saw Mr. Harvey take items from the store without paying on CCTV (closed circuit television); PHT pp. 6-7, 9. When Mr. Munoz confronted Mr. Harvey outside, he states that Mr. Harvey pulled a knife out of his left pocket and held it over his head. PHT p. 8. Based upon the testimony, it appears that this was a short encounter. *See generally* PHT Mr. Munoz further testified that Mr. Harvey left the store in a white U-Haul van, *Id.*

Per the police report, officers were given plate information for said U-Haul truck. *See* Declaration of Arrest, (attached hereto as Exhibit B). A LVMPD air unit located this van and conducted a stop. *Id.* Mr. Harvey was taken into custody. *Id.* Officers conducted an inventory search of the van. *Id.* There is no reference to a knife or any weapons being found or impounded. *See* both B: Declaration of Arrest and Exhibit C: Impound Report (attached hereto).

Officer Nelson was dispatched to the TJ Maxx at approximately 1635 hours. *See* Declaration of Arrest. Mr. Munoz described the suspect as being a Black male, wearing a hat, blue dress shirt, black blazer and dark shorts. *See* Voluntary Statement (attached hereto as Exhibit D). Mr. Munoz failed to mention any descriptors for weight, height, or eye color. He did not include any information about unique marks like piercings or tattoos. Additionally, Mr. Munoz failed to

1 mention anything regarding the individual's skin tone or hair descriptors. The police report is void
2 of any indication that Mr. Harvey was wearing these clothes upon coming into contact with
3 officers. Mr. Munoz Show-Up Witness Instructions statement is also devoid of this information.
4 See Show-Up Witness Instructions, (attached hereto as Exhibit E).

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6 Officers conducted show-up identification with security officer Munoz at approximately
7 1715. See Declaration of Arrest. During the show-up identification, Mr. Harvey was handcuffed
8 and surrounded by two police officers. PHT pp. 15-16. Mr. Munoz remained in rear of a patrol car
9 during the show-up identification. *Id.* Mr. Munoz was approximately 30-40 feet from Mr. Harvey
10 during the show-up. PHT p. 16. There were not any other suspects presented in this show-up
11 identification. See generally PHT. Although Mr. Munoz was given a document titled Show-Up
12 Witness Instructions, he was not given the document before he made a positive identification. PHT
13 pp. 17, 19. Mr. Munoz wrote that he was 100% sure the identification was correct. See Show-Up
14 Witness Instructions. Approximately forty minutes passed from when officers were initially
15 dispatched to the show-up identification taking place. See Declaration of Arrest.

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18 Subsequently, Mr. Munoz identified Mr. Harvey at a preliminary hearing heard by the
19 Honorable Judge Saragosa. Mr. Munoz had an opportunity to view Mr. Harvey in the courtroom.
20 Upon information and belief Mr. Munoz specifically saw Mr. Harvey standing up in the jury box
21 as his name was called and he walked over to counsel table. PHT pp. 4, 14. Mr. Harvey was
22 handcuffed and dressed in jail clothing. PHT p. 5.

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24 Mr. Harvey has entered a plea of not guilty and this case is currently set for trial on
25 November 7, 2016.

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LEGAL ARGUMENT

I. MR. HARVEY'S DUE PROCESS RIGHT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION EIGHTEEN OF THE NEVADA CONSTITUTION WERE VIOLATED BY THE SUGGESTIVE IDENTIFICATION PROCEDURE.

Erroneous eyewitness identifications are the third leading cause of wrongful convictions following only false testimony and the influence of community outrage. H. Bedau & M. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21, 57-61 (1987) (of all the innocent people convicted, 55 percent of the cases were caused by witness error; 16 percent involved good faith eyewitness identification). See *State v. Henderson*, 208 N.J. 208 (2011) (discusses various studies regarding misidentifications).

A pretrial identification is a critical stage of the prosecutorial process and must comport with the Fifth and Fourteenth Amendments to the U.S. Constitution, which guarantee the right to due process. *Mason v. Braithwaite*, 432 U.S. 98, 113 (1977) (acknowledging that due process requires basic fairness in this area); *Stovall v. Denno*, 388 U.S. 293, 301 (1967) (recognizing that procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification runs afoul of due process). Citing these decisions, the Nevada Supreme Court held that an identification denies a defendant due process if, when considering the totality of circumstances, the identification is 1) unnecessarily suggestive and 2) conducive to irreparable mistaken identification. *Jones v. State*, 95 Nev. 613, 617; 600 P.2d 247, 250 (1978); see also *Gehrke v. State*, 96 Nev. 581, 584; 613 P.2d 1029 (1980) citing *Stovall v. Denno*, 388 U.S. at 301-02.

A pretrial identification that is unnecessarily suggestive may be admitted only if the identification evidence is reliable. *Gehrke*, 96 Nev. at 584. When determining reliability, a court should weigh the following factors against the effect of the suggestive procedures:

- (1) the witness' opportunity to view the criminal act at the time of the crime;

- (2) the witness' degree of attention;
- (3) the accuracy of the prior description of the criminal;
- (4) the level of certainty demonstrated at the confrontation; and
- (5) the time between the crime and the confrontation.

Gehrke, 96 Nev. at 584, citing *Neil v. Biggers*, 409 U.S. 188 (1972).

In the instant case, the *Gehrke* factors are in our favor. Here, according to the testimony on file, it appears that the interaction between Mr. Munoz and Mr. Harvey was very brief. Thus, Defense would argue that Mr. Munoz did not have an adequate opportunity to view the suspect, because any viewing while the individual was in the store was done through closed circuit television. Here, Mr. Munoz did not illustrate a strong degree of attention. Mr. Munoz indicated that he saw a Black male adult wearing a hat, a blue dress shirt, a black blazer and shorts. Outside of a clothing description, there was no information to indicate what the individual looked like. Clothing descriptors do not explain what a person looks like. Because the police report is devoid of what Mr. Harvey was wearing upon coming into contact with officers, factor 3 cannot be considered. Although Mr. Munoz indicated 100% certainty, it does not change the fact that it was a show-up identification which is inherently suggestive. Moreover, Mr. Munoz was 30-40 feet away during the identification and seated in the rear of a car, arguably with a view that was partially obstructed. Here there was approximately a 40 min time gap between when dispatch was called and the show-up identification took place. An evidentiary hearing is needed to flesh out this time line more.

II. SHOW-UP IDENTIFICATIONS ARE INHERENTLY SUGGESTIVE AND PREJUDICIAL.

A show-up "is inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender." *Taylor v. State*, 132 Nev. Adv. Op. 27, 371 P.3d 1036, 1044 (2016), *reh'g denied* (June 10, 2016), *reconsideration en banc denied* (July 14, 2016) *citing*

1 *Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979). When exigent circumstances are
2 present, the court has ruled that there may be a need for a prompt identification. *See Gehrke*, 96
3 Nev. at 584 n. 2, 613 P.2d at 1030 n. 2. Examples of exigencies sufficient to justify a show-up
4 include: (1) ensuring fresher memory, *Jones*, 95 Nev. at 617, 600 P.2d at 250; (2) exonerating
5 innocent people by making prompt identifications, *Id.*; and (3) ensuring that those committing
6 serious or dangerous felonies are swiftly apprehended, *Banks v. State*, 94 Nev. 90, 95, 575 P.2d
7 592, 595 (1978). Even in exigent circumstances, the show-up identification must be reliable.
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9 *Taylor v. State*, 132 Nev. Adv. Op. 27, 371 P.3d 1036, 1044 (2016), *reh'g denied* (June 10, 2016),
10 *reconsideration en banc denied* (July 14, 2016) *citing Jones*, 95 Nev. at 617, 600 P.2d at 250.
11 Where exigencies such as these are absent, however, show-ups are not justified. *See Gehrke*, 96
12 Nev. at 584, 613 P.2d at 1030. *Taylor v. State*, 132 Nev. Adv. Op. 27, 371 P.3d 1036, 1044 (2016),
13 *reh'g denied* (June 10, 2016), *reconsideration en banc denied* (July 14, 2016).

14 Arguably here, there were no exigent circumstances and thus a show-up identification was not
15 justified. Even though the allegations include a weapon, there was never any indication that the
16 weapon was used in an actual attempt to harm anyone. Additionally, the weapon at issue has been
17 described as a pocket knife. Here, a show-up identification was not warranted. Even if the court
18 finds that there were exigent circumstances, the show-up identification is not reliable and is highly
19 prejudicial.
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1 **III. THE COURT MUST SUPPRESS THE PRETRIAL IDENTIFICATION AND ANY**
2 **SUBSEQUENT IDENTIFICATION BECAUSE IT IS NOT RELIABLE.**

3 Additionally, any in-court identification of the defendant in this matter should be
4 suppressed. In-court identifications, which follow a violative pretrial identification, need to be
5 shown to be reliable separate from the improper pretrial identification. *U.S. v. Wade*, 388 U.S. 218
6 (1966). *See also, Simmons v. U.S.*, 390 U.S. 377 (1968) for the proposition that identification
7 procedures that are so suggestive that they give rise to a substantial likelihood of misidentification
8 violative a defendant's due process rights. There is a concern that when the witness identifies the
9 person at trial it is because of the earlier suggestive pretrial identification, rather than on the
10 witness's observations at the time of the alleged crime. The danger is that the identification in
11 court may be only a confirmation of the earlier identification, rather than a product of independent
12 recollection from the time of the alleged offense. *U.S. v. Robertson*, 19 F.3d 1318 (10th Cir.,
13 1994).

14 Without some proof that the in-court identification is based on observations made prior to
15 the pretrial identification, the in-court identification must be suppressed. It seems highly unlikely
16 that any in-court identification would be independent from the show-up identification.
17 Furthermore, here the witness had an opportunity to view Mr. Harvey in the courtroom in the jury
18 box prior to the preliminary hearing stage. It is not difficult to point out the only person in
19 handcuffs seated at counsel table during a hearing. Moreover, a defendant stands upon his name
20 being called in the courtroom, giving the witness another opportunity to view the named defense in
21 the case. Witnesses understand which case they are there to testify for. Thus, here Mr. Munoz
22 would have had and arguably did have the opportunity to view Mr. Harvey multiples during the
23 morning of the hearing, prior to the on record identification. Therefore, the initial identification,
24 the preliminary hearing identification, and any identification at trial must be suppressed.
25 the preliminary hearing identification, and any identification at trial must be suppressed.
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27 the preliminary hearing identification, and any identification at trial must be suppressed.
28 the preliminary hearing identification, and any identification at trial must be suppressed.