

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE SEARCH
OF THE RESIDENCE AND
PROPERTY LOCATED AT
1731 SUNSET COURT
GARDNERVILLE, NEVADA 89410

Supreme Court No. 81509
District Court Case No. 2019-SW-00045
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Elizabeth A. Brown
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JAMES KOSTA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

APPELLANT'S APPENDIX

BATES NOS. AA001 – AA139

CLARK HILL PLLC

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APPELLANT'S ALPHABETICAL INDEX OF APPENDIX

DOCUMENT	FILING DATE	VOL.	BATES
Affidavit of Service of Order Denying Petition For Writ Of Mandamus	6/09/2021	I	AA000136- AA000139
Ex Parte Motion – to Seal Search Warrant Affidavit	7/29/2019	I	Sealed
Motion – to Enlarge Time	3/19/2020	I	AA000052- AA000056
Motion Of Real Party In Interest James Kosta For Return Of Property; To Unseal Search Warrant Application & Supporting Affidavit; And To Quash Search Warrant, Or In The Alternative, For Protective Order	3/16/2020	I	AA000001- AA000051
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Reply to Opposition to Motion Of Real Party In Interest James Kosta For Return Of Property; To Unseal Search Warrant Application & Supporting Affidavit; And To Quash Search Warrant, Or In The Alternative, For Protective Order	4/20/2020	I	AA000085- AA000091

Return – Search Warrant Return	8/06/2019	I	Sealed
Sealed Document	8/06/2019	I	Sealed
Search and Seizure Warrant - Search Warrant	8/06/2019	I	Sealed

APPELLANT'S CHRONOLOGICAL APPENDIX

DOCUMENT	FILING DATE	VOL	BATES
Ex Parte Motion – to Seal Search Warrant Affidavit	7/29/2019	I	Sealed
Order – Granting Motion to Seal Search Warrant Affidavit	7/29/2019	I	Sealed
Return – Search Warrant Return	8/06/2019	I	Sealed
Sealed Document	8/06/2019	I	Sealed
Search and Seizure Warrant - Search Warrant	8/06/2019	I	Sealed
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Affidavit of Service of Order Denying Petition For Writ Of Mandamus	6/09/2021	I	AA000136-AA000139

DATED this 14th day of September, 2021.

CLARK HILL PLLC

/s/ Dominic P. Gentile

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BOBBIE R. WILLIAMS
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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

IN THE MATTER OF THE SEARCH OF

CASE NO. 19-SW-0045
DEPT.

The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410

HEARING REQUESTED

**MOTION OF REAL PARTY IN INTEREST JAMES KOSTA FOR RETURN OF
PROPERTY; TO UNSEAL SEARCH WARRANT APPLICATION AND SUPPORTING
AFFIDAVIT; AND TO QUASH SEARCH WARRANT, OR IN THE ALTERNATIVE,
FOR PROTECTIVE ORDER**

Hearing Date: _____

Hearing Time: _____

PURSUANT TO the Fourth and Fourteenth Amendments to the Constitution of the United States; Article 1, Section 18 of the Constitution of the State of Nevada; Nevada Revised Statutes ("NRS"), Sections 179.335, 179.105; 179.085, 179.045; and the jurisprudence of *Riley v. California*, 573 U.S. 373 (2014) and its progeny, Movant JAMES KOSTA, Real Party in Interest in the above-entitled matter ("Mr. Kosta," "Movant"), by and through his attorneys, Dominic P.

1 Gentile, Esq., Michael V. Cristalli, Esq., and Vincent Savarese III, Esq., of the law firm of CLARK
2 HILL PLLC, hereby requests that this Court:

3 1. Enter an Order:

4 A. Unsealing the Application and Affidavit of United States Drug Enforcement Agency
5 (DEA) Agent Evan Miyamoto ("the instant Application and Supporting Affidavit") submitted in
6 support of the Search Warrant issued on July 29, 2019 in the matter of "The residence and property
7 located at 1731 Sunset Court, Gardnerville, Nevada 89410" by this Court, the Honorable Thomas
8 W. Gregory, District Judge ("the instant Search Warrant"), authorizing a forthwith search by law
9 enforcement officers of the residence and property located at 1731 Sunset Court, Gardnerville,
10 Nevada 89410, (described in Exhibit A, attached hereto), the person of James Kosta (described in
11 Exhibit B, attached hereto) and further authorizing a forthwith seizure of certain property
12 (described in Exhibit C, attached hereto) belonging to Mr. Kosta, which Search Warrant
13 Application and Supporting Affidavit was sealed by Judge Gregory pending further order of this
14 Court.

15 B. Providing Movant's counsel with an opportunity to review and evaluate the
16 representations contained in the instant Application and Supporting Affidavit and to submit a
17 Supplemental Memorandum of Points and Authorities in support of this Motion with the benefit
18 of such review, regarding Movant's contention, presently based upon information and belief, that
19 the representations contained therein fail to establish probable cause to justify the seizure of
20 Movant's property as referenced in Exhibit D hereto, pursuant to the instant Search Warrant as set
21 forth *infra*;

22 C. Quashing the instant Search Warrant should the Court find, in view of supplemental
23 briefing, that probable cause to seize Movant's property was in fact lacking; and

24 D. Thereupon requiring the return of Movant's property as described in Exhibit D, and
25 before any presentation of any of its content to any judicial officer, grand jury, or other entity or
26 person whomsoever for any purpose whatsoever.

27 In the alternative, Movant respectfully requests that this Court enter a Protective Order:
28

1 A. Textually requiring the execution of any such warrant only by an independent
2 "filtering team" consisting of non-DEA, non-FBI and (non-DSO and non-NSA) law enforcement
3 personnel;

4 B. Textually establishing, approving and imposing co-extensive minimization protocols
5 upon executing personnel with respect to the execution of any such warrant consistent with the
6 foregoing temporal and subject-based limitations;

7 C. Textually precluding application of the "plain view" doctrine by executing personnel
8 with respect to any such warrant; and

9 D. Textually requiring executing personnel to fore swear reliance thereon.

10 THIS MOTION is made and based upon all papers on file in relation hereto; the exhibits
11 appended hereto; the following Memorandum of Points and Authorities; and any evidence and/or
12 argument that the Court may require or allow at hearing.

13 Dated this 13 day of March, 2020.

14 CLARK HILL PLLC

15
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25 *Attorneys for Movant James Kosta, Real Party*
26 *in Interest*
27
28

1
2 **NOTICE OF MOTION**

3 YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the
4 above and foregoing Motion on for hearing before this Court on the ____ day of March, 2020 at
5 the hour of ____ .m. of said day, or as soon thereafter as counsel can be heard in
6 Department No. ____ .

7 Dated this 13 day of March, 2020.

8 
CLARK HILL PLLC

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14
15
16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17
18 1.

19 **STATEMENT OF RELEVANT FACTS**

20 On July 29, 2020 a Search Warrant was issued by this Court, the Honorable Thomas W.
21 Gregory, District Judge, in the matter of "The residence and property located at 1731 Sunset Court,
22 Gardnerville, Nevada 89410, authorizing a forthwith search by law enforcement officers of the
23 residence and property located at 1731 Sunset Court, Gardnerville, Nevada 89410, (described in
24 Exhibit A, attached hereto), the person of James Kosta (described in Exhibit B, attached hereto)
25 and further authorizing a forthwith seizure of certain property (described in Exhibit C, attached
26 hereto) belonging to Mr. Kosta, which Search Warrant Application and Supporting Affidavit was
27 sealed by Judge Gregory pending further order of this Court.

28 And accordingly, the undersigned counsel for Mr. Kosta has not had any opportunity to

1 date to examine the representations contained therein.

2 Counsel for Mr. Kosta has had several e-mail correspondence and telephonic
3 communications with Special Agent Miyamoto, the affiant of the application for the search
4 warrant, regarding the status of the property and its return. On September 24, 2019 Special Agent
5 Miyamoto sent an e-mail to attorney Dominic Gentile regarding the return of said property.
6 Thereafter, counsel for James Kosta, Michael Cristalli, corresponded with SA Miyamoto to
7 arrange for the return of a portion of the seized property. (See Exhibit E, attached hereto). Through
8 the association of attorney Justin Bustos of Dickinson Wright, counsel for James Kosta, Michael
9 Cristalli, arranged the release and exchange of certain property contained in Exhibit D. Special
10 Agent Miyamoto represented that the items returned were not relevant to the investigation,
11 however, some of the devices had been imaged. The items were maintained in their original
12 evidence bags and kept in a locked room at Dickinson Wright. (See Exhibit F, attached hereto).

13 Despite previous representations by SA Miyamoto that the DEA was concluding its
14 investigation, on or about February 18, 2020 counsel for James Kosta, Michael Cristalli, spoke to
15 SA Miyamoto who advised that the remaining property was being treated as evidence and that his
16 agency would remain active in the investigation and that Douglas County would be the lead
17 investigating agency. It was only at this point that the undersigned counsel was made aware that
18 the property seized was being treated as evidence and would not be returned.

19 2.

20 **LEGAL ARGUMENT**

21 **Introduction**

22 The property seized contains a history of Mr. Kosta and his family's life and volumes of
23 information to which a right of privacy attaches, including privileged communications between
24 that person and others. In the absence of probable cause to believe that a crime was committed and
25 that the property seized contains evidence of that crime, the owner of the property and the
26 information it contains is protected from unlawful access to it by others. Further, to the extent that
27 a showing of probable cause is made, it must be limited by time and subject matter. That has not
28

1 been done in this case.

2 I.

3 **THE SEARCH WARRANT APPLICATION AND SUPPORTING AFFIDAVIT DOES**
4 **NOT SET FORTH SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE;**
5 **THEREFORE, THIS COURT SHOULD ENTER AN ORDER UNSEALING THE**
6 **APPLICATION AND AFFIDAVIT; QUASHING THE SEARCH WARRANT; AND**
7 **REQUIRING MOVANT'S PROPERTY BE RETURNED.**

8 The Fourth Amendment to the United States Constitution provides that "[t]he right of the
9 people to be secure in their persons, houses, papers, and effects, against unreasonable searches and
10 seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by
11 Oath or affirmation, and particularly describing the place to be searched and persons or things to
12 be seized." A "seizure" of property occurs when there is some meaningful interference with an
13 individual's possessory interests in . . . [some type of] property. *United States v. Jacobsen*, 466
14 U.S. 109, 113 (1984) (holding at 466 U.S. at 120 that "agents' assertion of dominion and control
15 over the package and its contents did constitute a 'seizure'" and at 122 n. 18 that "the decision by
16 governmental authorities to exert dominion and control over the package for their own purposes
17 clearly constituted a "seizure"). And as the United States Supreme Court pointed out in that case,
18 absent the application of exceptional circumstances, under the Fourth Amendment, a "seizure"
requires "a warrant, based on probable cause." 466 U.S. at 122.

19 The cognate state constitutional counterpart to the Fourth Amendment is embodied in
20 Article 1, Section 18 of the Nevada Constitution. And, like both of those constitutional provisions,
21 NRS 179.045(1) and (6)(a) also provide that warrants authorizing searches or seizures must be
22 based upon a sworn showing of probable cause by affidavit.¹

23 NRS 179.045(4) further provides that "upon a showing of good cause, [a judge or]
24 magistrate may order [such] an affidavit . . . to be sealed. [And that likewise,] [u]pon a showing

25
26 ¹ It is well-settled that a state's own judiciary may interpret a state constitutional provision to
27 provide greater protection to its citizenry than its federal counterpart requires as interpreted by the
28 Supreme Court of the United States, and by statute, a state Legislature may do likewise. *Virginia*
v. Moore, 553 U.S. 164, 171 (2008); *State v. Kincade*, 129 Nev. 953, 956, 317 P.3d 206, 208 (2013)
(en banc); *Osburn v. State*, 118 Nev. 323, 326, 44 P.3d 523, 525 (2002).

1 *of good cause, a court may cause the affidavit . . . to be unsealed*" (emphasis added).

2 Movant respectfully submits, on information and belief, that the instant Application and
3 Supporting Affidavit fails to set forth sufficient facts and circumstances to establish probable cause
4 to justify the seizure of his property more fully described in Exhibit D pursuant to the instant
5 Search Warrant as required by the Fourth Amendment, Article 1, Section 18 of the Nevada
6 Constitution, and NRS 179.045(1) and (6)(a); and therefore, that the instant Search Warrant should
7 be quashed. However, because the instant Application and Supporting Affidavit are currently
8 under seal, Movant respectfully requests that the Court enter an Order unsealing the instant
9 Application and Supporting Affidavit and permit him to preserve this issue for briefing pending
10 an opportunity to evaluate its contents, in recognition that a failure of the necessary probable cause
11 showing constitutes "good cause" upon which to order unsealing within the meaning of NRS
12 179.045(4). For indeed, as NRS 179.085(1)(c), provides: "A person aggrieved by an unlawful
13 search and seizure or the deprivation of property may move the court having jurisdiction where
14 the property was seized for the return of the property on the ground that: There was not probable
15 cause for believing the existence of the grounds on which the warrant was issued." And as NRS
16 179.085(2) further provides: "If the motion is granted on a ground set forth in paragraph . . . (c) . .
17 . of subsection 1 [lack of probable cause], the property must be restored and it must not be
18 admissible evidence at any hearing or trial." *See also*, NRS 179.105 ("If it appears that the property
19 [was] taken . . . [without] probable cause for believing the existence of the grounds on which the
20 warrant was issued . . . [it] *shall* . . . be restored to the person from whom it was taken") (emphasis
21 added).

22 Accordingly, the instant Application and Supporting Affidavit should be ordered unsealed
23 and Movant's counsel be given an opportunity to evaluate the representations contained therein
24 and submit a supplemental memorandum of points and authorities regarding this issue with the
25 benefit of such review. And should the Court find, in view of supplemental briefing, that probable
26 cause to seize Movant's property was indeed lacking, it should thereupon be ordered returned to
27 him forthwith and before any application for a warrant to search its contents is even considered by
28 the Court, and before the examination of any of its internal contents by any law enforcement officer

1 or designee, or the presentation of any of its internal contents to any judicial officer, grand jury, or
2 other entity or person whomsoever for any purpose whatsoever.

3 II.

4 **IN THE ALTERNATIVE, THE COURT SHOULD ENTER A PROTECTIVE ORDER**
5 **LIMITING THE SCOPE OF ANY WARRANT AUTHORIZING AN INVASIVE**
6 **SEARCH OF MOVANT'S PROPERTY; ESTABLISHING CO-EXTENSIVE**
7 **EXECUTION PROTOCOLS; AND PRECLUDING EXECUTION BY INVESTIGATING**
8 **OFFICERS.**

9 As the United States Supreme Court has recognized, the basic purpose of the Fourth
10 Amendment is to safeguard both the privacy and security of citizens against arbitrary invasions by
11 governmental officials. *Carpenter v. United States*, — U.S. —, 138 S.Ct. 2206, 2213, 201
12 L.Ed.2d 507 (2018). Thus, as the *Carpenter Court* explained: for much of our history, cognizable
13 Fourth Amendment violations were “tied to common-law trespass” and focused on whether the
14 government “obtains information by physically intruding on a constitutionally protected area.”
15 *United States v. Jones*, 565 U.S. 400, 405, 406 n. 3 (2012)).

16 More recently, however, the Court has acknowledged that “property rights are not the sole
17 measure of Fourth Amendment violations.” *Soldal v. Cook County*, 506 U.S. 56, 64, (1992). Thus,
18 in *Katz v. United States*, 389 U.S. 347, 351, (1967), the Court established that “the Fourth
19 Amendment protects people, not places,” and expanded our conception of the Amendment to
20 protect certain “expectations of privacy” as well. Accordingly, as conceived by the *Katz* Court
21 concept, when an individual “seeks to preserve something as private,” and his expectation of
22 privacy is “one that society is prepared to recognize as reasonable,” official intrusion into that
23 private sphere generally qualifies as a search and requires authorization by judicial warrant
24 supported by probable cause. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Therefore, an
25 individual has “standing” to bring a Fourth Amendment challenge if he has either a property
26 interest or a reasonable expectation of privacy in the place or thing searched or seized. *Rakas v.*
27 *Illinois*, 439 U.S. 128, 138-140 (1978); *United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir.
28 2007). “This expectation is established where the claimant can show: (1) a subjective expectation
of privacy . . . [that is] (2) . . . objectively reasonable.”

1 In *Riley v. California*, 573 U.S. 373, 386 (2014), the United States Supreme Court “h[e]ld
2 . . . that officers must generally secure a warrant before conducting . . . a search [of the contents of
3 a cellular telephone].” In so doing, the *Riley* Court made the critical observation that “[m]odern
4 cell phones, as a category, implicate privacy concerns far beyond those implicated by the search
5 of a cigarette pack, a wallet, or a purse,” (*id.* at 393), finding that “[c]ell phones differ in both a
6 quantitative and a qualitative sense from other objects,” (*id.*), and pointing out that “[o]ne of the
7 most notable distinguishing features of modern cell phones is their immense storage capacity.”
8 573 U.S. at 386.

9 Indeed, as observed by the Court in *Riley*:

10 The storage capacity of cell phones has several interrelated consequences for
11 privacy. First, a cell phone collects in one place many distinct types of
12 information—an address, a note, a prescription, the sum of an individual’s private
13 life can be reconstructed through a thousand photographs labeled with dates,
14 locations, and descriptions; the same cannot be said of a photograph or two of loved
15 ones tucked into a wallet. Third, the bank statement, a video—that reveal much
16 more in combination than any isolated record. Second, a cell phone’s capacity
17 allows even just one type of information to convey far more than previously
18 possible. data on a phone can date back to the purchase of the phone, or even earlier.
19 A person might carry in his pocket a slip of paper reminding him to call Mr. Jones;
20 he would not carry a record of all his communications with Mr. Jones for the past
21 several months, as would routinely be kept on a phone. Finally, there is an element
22 of pervasiveness that characterizes cell phones but not physical records. Prior to the
23 digital age, people did not typically carry a cache of sensitive personal information
24 with them as they went about their day. Now it is the person who is not carrying a
25 cell phone, with all that it contains, who is the exception A decade ago police
26 officers searching an arrestee might have occasionally stumbled across a highly
27 personal item such as a diary. But those discoveries were likely to be few and far
28 between. Today, by contrast, it is no exaggeration to say that many of the more than
90% of American adults who own a cell phone keep on their person a digital record
of nearly every aspect of their lives—from the mundane to the intimate. Allowing
the police to scrutinize such records on a routine basis is quite different from
allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by
quantity alone, certain types of data are also qualitatively different. An Internet
search and browsing history, for example, can be found on an Internet-enabled
phone and could reveal an individual’s private interests or concerns—perhaps a
search for certain symptoms of disease, coupled with frequent visits to WebMD.
Data on a cell phone can also reveal where a person has been. Historic location
information is a standard feature on many smart phones and can reconstruct
someone’s specific movements down to the minute, not only around town but also

1 within a particular building.

2 573 U.S. at 395-96 (internal citations omitted).

3 Thus, as the *Riley* Court noted:

4 [A] cell phone search would typically expose to the government far *more* than the
5 most exhaustive search of a house: A phone not only contains in digital form many
6 sensitive records previously found in the home; it also contains a broad array of
private information never found in a home in any form.

7 *Id.* at 396-97.

8 Furthermore, as the *Riley* Court observed:

9 In the cell phone context . . . it is reasonable to expect that incriminating information
10 will be found on a phone regardless of *when* the crime occurred It would be a
11 particularly inexperienced or unimaginative law enforcement officer who could not
12 come up with several reasons to suppose evidence of just about *any* crime could be
found on a cell phone.

13 *Id.* at 399 (internal citations omitted) (emphasis added).

14 In *Carpenter v. United States*, — U.S. —, 138 S.Ct. 2206, 2211, 201 L.Ed.2d 507
15 (2018), the Court further held that “the Government conducts a search under the Fourth
16 Amendment when it accesses historical cell phone records that provide a comprehensive chronicle
17 of the user’s past movements.” Thus, in that case, the Court held that “Government[] seizure of
18 [such] records violate[s] the Fourth Amendment [if] they ha[ve] been obtained without a warrant
19 supported by probable cause,” (*id.* at 2212), pointing out that when the Government accesse[s]
20 CSLI from . . . wireless carriers, it invade[s] [a citizen’s] . . . reasonable expectation of privacy in
21 the whole of his physical movements.” *Id.* at 2219. And again, as it had in *Riley*, in reaching its
22 decision in *Carpenter*, the Court emphasized the “deeply revealing nature of CSLI, its depth,
23 breadth, and comprehensive reach.” *Id.* at 2223.

24 Indeed, search warrants for digital data pose unique threats and challenges to Fourth
25 Amendment jurisprudence, as a result of which “settled Fourth Amendment precedent may apply
26 *differently—or not at all*—in the context of digital searches,” *United States v. Lustyik*, 57 F. Supp.
27 3d 213, 229, n.12 (S. D. N.Y. 2014). As the Ninth Circuit has explained: “The problem can be
28

1 stated very simply: There is no way to be sure exactly what an electronic file contains without
2 somehow examining its contents—either by opening it and looking, using specialized forensic
3 software, keyword searching or some other such technique.” *United States v. Comprehensive Drug*
4 *Testing, Inc.*, 621 F.3d 1162, 1176 (9th Cir. 2010) (en banc) (affirming order granting motion to
5 return property). And therefore, because files containing evidence of a crime may be intermingled
6 with millions of innocuous files, “[b]y necessity, government efforts to locate particular files will
7 require examining a great many other files to exclude the possibility that the sought-after data are
8 concealed there.” *Id.* at 1176. And “[o]nce a file is examined . . . the government may claim (as it
9 did in this case) that its contents are in plain view and, if incriminating, the government can keep
10 it,” (*id.*), resulting in what the court characterized as “a breathtaking expansion of the ‘plain view’
11 doctrine.” *Id.* at 1177. Thus, the Ninth Circuit determined in that case that the “‘plain view’
12 doctrine’ . . . clearly has no application to intermingled private electronic data.” *Id.* (emphasis
13 added). For, as the en banc court therein explained: “The process of segregating electronic data
14 that is seizable from that which is not must not become a vehicle for the government to gain access
15 to data which it has no probable cause to collect.” *Id.* Accord e.g., *United States v. Galpin*, 720
16 F.3d 436, 447 (2d Cir. 2013) (“the government may claim that the contents of every file it chose
17 to open were in plain view and, therefore, admissible even if they implicate the defendant in a
18 crime not contemplated by the warrant. There is, thus, a serious risk that every warrant for
19 electronic information will become, in effect, a general warrant, rendering the Fourth Amendment
20 irrelevant. This threat demands a heightened sensitivity to the particularity requirement in the
21 context of digital searches”)

22 Accordingly, as suggested by five of the concurring judges in *Comprehensive Drug*
23 *Testing*:

24 To that end, the warrant application should normally include, or the issuing judicial
25 officer should insert, a *protocol* for preventing agents involved in the investigation
26 from examining or retaining any data other than that for which probable cause is
27 shown. The procedure might involve, as in this case, a requirement that the
28 segregation be done *by specially trained computer personnel who are not involved*
in the investigation. In that case, it should be made clear that *only* those personnel
may examine and segregate the data. The government should also agree that such

1 computer personnel *will not communicate any information they learn during the*
2 *segregation process absent further approval of the court.*

3 621 F.3d at 1179 (Chief Judge Kozinski, with whom judges Kleinfeld, W. Fletcher, Paez and M.
4 Smith joining and concurring) (emphasis added).

5 As those judges pointed out:

6 The process of sorting, segregating, decoding and otherwise separating seizable
7 data (as defined by the warrant) from *all other data* should also be *designed to*
8 *achieve that purpose and that purpose only.* Thus, if the government is allowed to
9 seize information pertaining to ten names, *the search protocol should be designed*
to discover data pertaining to those names only, not to others, and not those
pertaining to other illegality.

10 *Id.* at F.3d at 1179 (emphasis added).

11 Thus, as those judges further suggested:

12 When the government wishes to obtain a warrant to examine a computer hard drive
13 or electronic storage medium to search for certain incriminating files, or when a
14 search for evidence could result in the seizure of a computer, *magistrate judges*
should insist that the government forswear reliance on the plain view doctrine.
15 They should also require the government to forswear reliance on any similar
16 doctrine that would allow retention of data obtained only because the government
17 was required to segregate seizable from non-seizable data. This will ensure that
18 future searches of electronic records do not make a mockery of . . . the Fourth
19 Amendment—by turning all warrants for digital data into general warrants. Maj.
op. at 1170–71. If the government doesn't consent to such a waiver, *the magistrate*
judge should order that the seizable and non-seizable data be separated by an
independent third party under the supervision of the court, or deny the warrant
altogether.”

20 *Id.* at 1178 (internal quotations and citations omitted) (emphasis added).

21 Accordingly, as those judges explained:

22 This guidance can be summed up as follows:

- 23
- 24 1. Magistrate judges should insist that the government waive reliance upon the
25 plain view doctrine in digital evidence cases. Pp. 1177–78 *supra*; see maj. op.
at 1170–71.
 - 26 2. Segregation and redaction of electronic data must be done either by specialized
27 personnel or an independent third party. Pp. 1178–79 *supra*; see maj. op. at
28 1168–70, 1170–72. If the segregation is to be done by government computer
personnel, the government must agree in the warrant application that the
computer personnel will not disclose to the investigators any information other

1 than that which is the target of the warrant.

2 3. Warrants and subpoenas must disclose the actual risks of destruction of
3 information as well as prior efforts to seize that information in other judicial
4 fora. Pp. 1178–79 *supra*; see maj. op. at 1167–68, 1175–76.

4 4. The government's search protocol must be designed to uncover only the
5 information for which it has probable cause, and only that information may be
6 examined by the case agents. Pp. 1178–79 *supra*; see maj. op. at 1170–72.

6 5. The government must destroy or, if the recipient may lawfully possess it, return
7 non-responsive data, keeping the issuing magistrate informed about when it has
8 done so and what it has kept. P. 1179 *supra*; see maj. op. at 1172–74.

8 621 F.3d at 1179–80.

9 Like this Motion, *Comprehensive Drug Testing* involved a motion for return of property
10 brought in advance of the filing of any criminal charge. *In the Matter of the Search of Cellular*
11 *Telephones*, No. 14–MJ–8017–DJW, 2014 WL7793690 (D. Kansas 2014) involved a refusal of
12 the court to approve the government's application for a search warrant to inspect the content of
13 several cellular phones.

14 As the court recounted in *Cellular Telephones*, it had likewise denied a series of similar
15 previous government applications for search warrants, having stated in *In re Applications for*
16 *Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts*, 2013 WL
17 4647554 (D.Kan. Aug. 27, 2013) (denying application for search warrant seeking email
18 communications, that “[t]o comport with the Fourth Amendment, the warrants must contain
19 sufficient limits or boundaries so that . . . [executing personnel] reviewing the communications
20 can ascertain which email communications and information the agent is authorized to review,”
21 (2014 WL7793690 at *1), and appl[ying] that same rationale to two cases involving search of cell
22 phones: *In re Search of Nextel Cellular Telephone* (“Cellular”), [No. 14–MJ–8005–DJW, 2014
23 WL 2898262 (D. Kan. June 26, 2014), available at [https://ecf.ksd.uscourts.gov/cgi-](https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2014mj8005-2)
24 [bin/show_public_doc?2014mj8005-2](https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2014mj8005-2)] and *In re Search of Three Cellphones and One Micro–SD*
25 *Card* (“Three Cellphones”)[,] [No. 14–MJ–8013–DJW, 2014 WL 3845157 (D.Kan. Aug. 4,
26 2014), available at https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2014mj8013-2].

27 As the court aptly observed in *Cellular Telephones*, “[n]othing in the Fourth Amendment
28 precludes a magistrate from imposing ex ante warrant conditions to further constitutional

1 objectives such as particularity in a warrant and the least intrusion necessary to accomplish the
2 search.” In cases where this Court has required *ex ante* search protocol, it has been not *in addition*
3 *to* the requirements of the Fourth Amendment, but *in satisfaction of* them.” 2014 WL7793690 at
4 *6 (emphasis in original). Indeed, as the court observed in that case, “*Riley v. California*
5 *support[s] the Court’s request for a search protocol*. Accordingly, the Court denied the
6 government’s application because it violated the probable cause and particularity requirements of
7 the Fourth Amendment,” (2014 WL7793690 at *1), finding that “[f]ailure to [provide a search
8 protocol] . . . “offends the Fourth Amendment because there is no assurance that the permitted
9 invasion of a suspect’s privacy and property are no more than absolutely necessary” . . . [and]
10 ESI, by its nature, makes this task a complicated one.” (emphasis added). *Id.* at *8. *Accord, e.g.,*
11 *United States v. Pedersen*, No. 3:12-cr-00431-HA, 2014 WL 3871197 (D. Oregon 2014); *Antico*
12 *v. Sindt Trucking, Inc.*, 148 So.3d 163 (Fla. App. 2014).

13 And as the en banc court explained in *Comprehensive Drug Testing*, with precise
14 application to the good cause shown for this Motion to be heard on order shortening time, there is
15 a “crucial distinction between [the present procedure and context and the *ex post* review available
16 pursuant to] a motion to suppress and a motion for return of property: *The former is limited by the*
17 *exclusionary rule [with its strictly deterrent rationale, and its exceptions], the latter is not.*” 621
18 F.3d at 1172 (emphasis added). For “[s]uppression applies only to criminal defendants whereas
19 the class of those “aggrieved” [by an unlawful search] can be, as this case illustrates, much
20 broader.” *Id.* at 1173. And although *Comprehensive Drug Testing* involved a motion for return of
21 property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, which “by its plain
22 terms . . . authorizes anyone *aggrieved* by a deprivation of property to seek its return.” 621 F.3d
23 1173 (emphasis added), as pointed out *supra*, the same is true under NRS 179.085.

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CONCLUSION

For all the foregoing reasons, Movant respectfully prays that the Court grant this Motion, together with such further and other relief as the Court deems fair and just in the premises.

Respectfully submitted this 13 day of March, 2020.

CLARK HILL PLLC

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Tel: (702) 862-8300

Attorneys for Movant James Kosta,

Real Party in Interest

CERTIFICATE OF SERVICE

The undersigned, an employee of Clark Hill PLLC, hereby certifies that on the 13th day of March, 2020, I served a copy of the MOTION OF REAL PARTY IN INTEREST JAMES KOSTA TO UNSEAL SEARCH WARRANT APPLICATION AND SUPPORTING AFFIDAVIT; TO QUASH SEARCH WARRANT; AND FOR RETURN OF PROPERTY, OR IN THE ALTERNATIVE, FOR PROTECTIVE ORDER ON ORDER SHORTENING TIME, by electronic means, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Douglas County District Attorney
Criminal Division
1038 Buckeye Road
P.O. Box 218
Minden, Nevada 89423

Special Agent Evan Miyamoto
Drug Enforcement Agency
8790 Double Diamond Parkway
Reno, Nevada 89521


An employee of CLARK HILL PLLC

EXHIBIT “A”

AA000017

RECEIVED

JUL 29 2019

Douglas County
District Court Clerk

IN THE MATTER OF THE SEARCH OF

The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410

STATE OF NEVADA)
COUNTY OF DOUGLAS) ss.

SEARCH WARRANT

THE STATE OF NEVADA:
TO ANY PEACE OFFICER IN THE COUNTY OF DOUGLAS, STATE OF
NEVADA,

Proof by affidavit having been made this date before me by Special Agent Evan Miyamoto of the United States Drug Enforcement Agency, incorporated herein by reference, that there is probable cause to believe that evidence of the crimes of Open Murder, a violation of NRS 200.010 through 200.090, a category A felony, and Import of a Controlled Substance, a violation of NRS 453.321, a category B felony:

Is located in, on, or at 1731 Sunset Court, Gardnerville, Nevada, as more fully described in Attachment A, attached hereto, and on the person of James Kosta, as more fully described in Attachment B, attached hereto.

1
2 The above property and person is believed to conceal items of evidence as described in
3 Attachment C, attached hereto.

4 I find the affidavit establishes probable cause to search and seize the aforementioned
5 person and property.

6 YOU ARE HEREBY COMMANDED to search in the above-described persons, places,
7 and/or vehicles, for the evidence described above and if an such evidence is found there, to seize
8 it, prepare a written inventory of the property and make return before this court within 10 days.

9
10 _____ This warrant may be served between the hours of 7:00 a.m. to 7:00 p.m.

11 ☒ This warrant may be served any hour of the day or night.

12
13 DATED this 29th day of July, 2019.

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15 
16 THOMAS W. GREGORY
17 DISTRICT COURT JUDGE
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Case Number:

DEA Case Number:

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

IN THE MATTER OF THE SEARCH OF

The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410

ATTACHMENT A

DESCRIPTION OF PREMISES TO BE SEARCHED

The property to be searched is a single family dwelling located at 1731 Sunset Court in Gardnerville, Nevada. The property is a tan colored residence with white trim, brown roof, consisting of two floors, attached garage, and surrounded by white fencing. In addition, the property includes a second separate tan colored detached garage structure with white doors, as well as a detached horse stable with four stalls and an enclosed tack room. The property to be searched also includes the search of any locked and unlocked containers and vehicles, within the residence or on the premises where documents, drugs, or electronic devices could be stored, to include but not limited to the following vehicles which are registered to James KOSTA:

1. 2015 Hyundai 4 door sedan bearing Nevada license plate 495ZAX and vin
#KMHGN4JE4FU063309

1 2. 2008 Hyundai wagon bearing Nevada license plate STABL and vin

2 #KM8NU73C78U033330

3 3. 2003 BMW motorcycle bearing Nevada license plate 092270 and vin

4 #WB10557A13ZG37959

5 The following is a picture of the residence:



23 The mother of Gina KOSTA, Linda NORRIS, also resides in a separate stand-alone structure
24 on the premises located at 1731 Sunset Ct., Gardnerville, Nevada 89410. Probable cause does
25 not exist to believe that evidence of the crimes set forth above are to be found within the
26 structure and residence associated with Linda NORRIS. As such, the stand alone structure
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known to be the primary residence of Linda NORRIS is to be excluded from the search of 1731

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Sunset Ct., Gardnerville, Nevada 89410 and may not be searched.

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EXHIBIT “B”

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Case Number:
DEA Case Number:

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

IN THE MATTER OF THE SEARCH OF
The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410

ATTACHMENT B (SEARCH OF A PERSON)

I. Person to Be Searched

The person to be searched is JAMES KOSTA, a male born on August 26, 1974, with brown hair and hazel eyes, approximately 6'5" tall, 225 pounds, including all personal items and containers in his physical possession, on his person, or in areas within his immediate control.

EXHIBIT “C”

AA000025

Case Number:

DEA Case Number:

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

IN THE MATTER OF THE SEARCH OF

The residence and property located at

1731 Sunset Court

Gardnerville, Nevada 89410

ATTACHMENT C

DESCRIPTION OF ITEMS TO BE SEIZED AND SEARCHED

I. The Items to be Seized

A. Evidence, Fruits, and Instrumentalities of the Subject Offenses

The items to be seized from the Subject Premises include the following:

1. Controlled substances, in particular carfentanil, fentanyl, and/or other opioids or other synthetic drugs, and the items commonly associated with the use, distribution, administration, and packaging and sales of controlled substances, including commercial plastic wrap, plastic bags, zip lock bags, personal protective equipment, aerosol sprays, containers, masks, and gloves;
2. Records, documents, files, or materials, in whatever form, including handmade or mechanical form (such as printed, written, handwritten, or typed); photocopies or other photographic form; and electrical, electronic, and magnetic form (such as tapes, cassettes, hard

1 disks, floppy disks, diskettes, compact discs, CD-ROMs, DVDs, optical discs, Zip cartridges,
2 printer buffers, smart cards, or electronic notebooks, or any other electronic storage medium)
3 that constitute or contain evidence, instrumentalities, or fruits of violations of Open Murder, a
4 violation of NRS 200.010 through 200.090, a category A felony, and Import of a Controlled
5 Substance, a violation of NRS 453.321, a category B felony (the "SUBJECT OFFENSES"):

6 3. A Google cellular phone described as a model Pixel 2 XL bearing device IMEI
7 #358035081573390 and assigned telephone number +1-775-224-2599.

8 4. Evidence concerning occupancy, residency or ownership of the Subject
9 Premises, including without limitation, utility and telephone bills, mail envelopes, addressed
10 correspondence, purchase or lease agreements, diaries, statements, identification documents,
11 address books, telephone directories, and keys.

12 5. Evidence concerning the identity or location of, and communications with,
13 customers and co-conspirators, including without limitation, any and all documents, records, or
14 information relating to email accounts used in furtherance of these offenses, mail matter,
15 shipping labels, label-making equipment or software, physical or electronic records or data
16 associated with customer shipping labels, letters, notes, address books, and photographs.

17 6. Evidence reflecting the use of a dark web moniker or handle, or other online
18 monikers or pseudonyms, reflecting the use of vendor or buyer accounts on dark web
19 marketplaces, and communications or writings reflecting patterns or idiosyncrasies associated
20 with those online monikers that may be associated with online chats or communications
21 regarding the SUBJECT OFFENSES.

22 7. Evidence concerning the establishment or management of an online or dark web
23 controlled substance retail business as part of the SUBJECT OFFENSES, including without
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1 limitation, documents and other records relating to the creation or hosting of websites,
2 evidence of dark web or Tor Browser access, merchant accounts for customer transactions,
3 product vendors or sources of supply, invoices, order forms, and communications with co-
4 conspirators and others about any of the aforementioned subjects.

5 8. Any and all records or other items which are evidence of ownership or use of
6 computer equipment found in the Subject Premises, including, but not limited to, sales receipts,
7 bills for internet access, handwritten notes and handwritten notes in computer manuals.

9 9. Evidence concerning the procurement, receipt, storage, or shipping of controlled
10 substances and medications, including without limitation, any access device to a medical
11 facility, documents or cards reflecting employment at or association with a medical facility,
12 opened or unopened packages, packing material, shrink wrap, vacuum sealers, shipping labels,
13 stamps, records relating to the opening or maintenance of post office or UPS boxes, labels or
14 other documents or records bearing any trademark of a medication or pharmaceutical product,
15 and communications with co-conspirators and others about any of the aforementioned subjects.

17 10. Evidence concerning the distribution of controlled substances, including without
18 limitation, customer lists, ledgers, accounts, delivery and payment records, and
19 communications with customers, co-conspirators, and others about any of the aforementioned
20 subjects.

22 11. Evidence concerning financial transactions associated with the operations or
23 proceeds of an online or dark web controlled substance retail business, including without
24 limitation, any paper or digital account opening documents, statements, deposit slips,
25 checkbooks, orders or confirmations of wire transfers, records of any accounts or transactions
26 within the traditional banking or credit systems or via cryptocurrencies such as bitcoin,
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1 cryptocurrency private keys and recovery seeds, packing material or inserts relating to any
2 transactions with any cash-for-bitcoin exchange, and communications with financial services
3 representatives, co-conspirators, or other third parties about any of the aforementioned
4 subjects.

5 12. All copies of income tax returns filed with the Internal Revenue Service (IRS)
6 or the Nevada Department of Taxation.

7 13. Life insurance records for Gina KOSTA, including any payments to any policies
8 covering her or disbursements from any life insurance policies as a result of her death.

9 14. United States currency in excess of \$2,000, cryptocurrency, including but not
10 limited to, bitcoin and stored on electronic and paper wallets or other means, cryptocurrency
11 private keys and recovery seeds, gift cards, cash cards, and records relating to income derived
12 from the transportation, sales, and distribution of controlled substances and expenditures of
13 money and wealth, for example, money orders, wire transfers, cashier's checks and receipts,
14 passbooks, checkbooks, check registers, securities, precious metals, jewelry, antique or modern
15 automobiles, bank statements and other financial instruments, including stocks or bonds in
16 amounts indicative of the proceeds of illicit narcotic trafficking and/or money laundering. It is
17 ordered that all U.S. currency or assets that are seized and that might be subject to asset
18 forfeiture proceedings under Nevada state law or under Title 21, Section 881 et seq of the
19 United States Code be released to the appropriate agency, whether state or federal.
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23 15. Any digital devices or other electronic storage media¹ and/or their components
24 used as a means to commit the SUBJECT OFFENSES, including:
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27 ¹. As used herein, the term "digital device" includes any electronic system or device capable of storing
28 or processing data in digital form, including central processing units; desktop, laptop, notebook, and
tablet computers; computer servers, personal digital assistants; wireless communication devices, such
as mobile or cellular telephones and telephone paging devices, beepers, mobile telephones, and smart

1 a. any digital device or other electronic storage media capable of being
2 used to commit, further, or store evidence or fruits of the offenses listed above;

3 b. any digital devices or other electronic storage media used to facilitate the
4 transmission, creation, display, encoding or storage of data, including word processing
5 equipment, modems, docking stations, monitors, cameras, printers, plotters, encryption
6 devices, and optical scanners;

7 c. any magnetic, electronic or optical storage device capable of storing
8 data, such as floppy disks, hard disks, tapes, CD-ROMs, CD-R, CD-RWs, DVDs,
9 optical disks, printer or memory buffers, smart cards, PC cards, memory calculators,
10 electronic dialers, electronic notebooks, and personal digital assistants;

11 d. any documentation, operating logs and reference manuals regarding the
12 operation of the digital device or other electronic storage media or software;

13 e. any applications, utility programs, compilers, interpreters, and other
14 software used to facilitate direct or indirect communication with the computer
15 hardware, storage devices, or data to be searched;

16 f. any physical keys, encryption devices, dongles and similar physical
17 items that are necessary to gain access to the computer equipment, storage devices or
18 data; and
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24 phones; global positioning satellite devices (GPS); portable media players; digital cameras; digital
25 gaming devices; gaming consoles (including Sony PlayStations and Microsoft Xboxes); peripheral
26 input/output devices, such as keyboards, printers, scanners, plotters, monitors, and drives intended for
27 removable media; related communications devices, such as modems, routers and switches, cables, and
28 connections; storage media, such as hard disk drives, floppy disks, flash drives, memory cards, optical
 disks, and magnetic tapes used to store digital data (excluding analog tapes such as VHS); and
 electronic/digital security devices.

 Also as referenced herein, "electronic storage media" is any physical object upon which electronically
 stored information can be recorded. Examples include hard disks, RAM, flash memory, CD-ROMs,
 DVD-ROMs, and other magnetic or optical media.

1 g. any passwords, password files, test keys, encryption codes or other
2 information necessary to access the computer equipment, storage devices or data.

3 16. For any digital device or other electronic storage media upon which
4 electronically stored information that is called for by this warrant may be contained, or that
5 may contain things otherwise called for by this warrant:

6 a. evidence of who used, owned, or controlled the digital device or other
7 electronic storage media at the time the things described in this warrant were created,
8 edited, or deleted, such as logs, registry entries, configuration files, saved usernames
9 and passwords, documents, browsing history, user profiles, email, email contacts,
10 "chat," instant messaging logs, photographs, and correspondence;

11 b. evidence of software that would allow others to control the digital device
12 or other electronic storage media, such as viruses, Trojan horses, and other forms of
13 malicious software, as well as evidence of the presence or absence of security software
14 designed to detect malicious software;

15 c. evidence of the lack of such malicious software;

16 d. evidence of the attachment to the digital device of other storage devices
17 or similar containers for electronic evidence;

18 e. evidence of counter-forensic programs (and associated data) that are
19 designed to eliminate data from the digital device or other electronic storage media;

20 f. evidence of the times the digital device or other electronic storage media
21 was used;

22 g. passwords, encryption keys, and other access devices that may be
23 necessary to access the digital device or other electronic storage media;

1 h. documentation and manuals that may be necessary to access the digital
2 device or other electronic storage media or to conduct a forensic examination of the
3 digital device or other electronic storage media;

4 i. contextual information necessary to understand the evidence described
5 in this attachment
6

7 17. Records and things evidencing the use of an Internet Protocol (IP) address to
8 communicate with the internet, including:

9 a. routers, modems, and network equipment used to connect computers to
10 the internet;

11 b. records of Internet Protocol addresses used;

12 c. records of internet activity, including firewall logs, caches, browser
13 history and cookies, "bookmarked" or "favorite" web pages, search terms that the user
14 entered into any internet search engine, and records of user-typed web addresses.
15

16 18. Any and all hidden services accounts used in furtherance of the offenses
17 described above, including, but not limited to, Whatsapp, darknet market accounts, associated
18 darknet forum accounts and Tor-based email accounts.
19

20 19. Any and all peer to peer (P2P) cryptocurrency trading platform accounts, with
21 no registered or identified service provider to which legal process may be served, used in
22 furtherance of the offenses described above, including, but not limited to, Coinbase or Helix
23 accounts or bitcoin-otc internet relay chat channel accounts.²
24

25 ² Internet Relay Chat ("IRC") is a decentralized chat system which enables people with an installed
26 client (computer program which sends and receives messages to and from an IRC server via the
27 internet) to join in live discussions with anyone else connected in the same manner. The IRC server
28 ensures that all messages are broadcast to everyone participating in a discussion. There can be many
discussions going on at once; each one is assigned a unique channel. One such channel is #bitcoin-otc,
in which cryptocurrency trades are negotiated and arranged. All transactions that may occur are
conducted directly between counterparties, without any participation or intermediation from the hosts

1 B. Search and Seizure of Electronically Stored Information ("ESI")

2 The items to be seized from the Subject Premises also include any computer devices
3 and storage media that may contain any ESI falling within the categories set forth in Section
4 1.A of this Attachment above, including, but not limited to, desktop and laptop computers,
5 tablets, hard drives, disk drives, modems, thumb drives, personal digital assistants, smart
6 phones, digital cameras, and scanners, as well as routers, modems, and network equipment
7 used to connect to the Internet (the "Subject Devices"). In lieu of seizing any such computer
8 devices or storage media, this warrant also authorizes the copying of such devices or media for
9 later review.
10

11 The items to be seized from the Subject Premises also include:

12 1. Any items or records needed to access the data stored on any seized or copied
13 computer devices or storage media, including but not limited to any physical keys, encryption
14 devices, or records of login credentials, passwords, seed phrases, private encryption keys, or
15 similar information.
16

17 2. Any items or records that may facilitate a forensic examination of the computer
18 devices or storage media, including any hardware or software manuals or other information
19 concerning the configuration of the seized or copied computer devices or storage media.
20

21 3. Any evidence concerning the identities or locations of those persons with access
22 to, control over, or ownership of the seized or copied computer devices or storage media.

23 C. Review of ESI

24 Following seizure of any computer devices and storage media and/or the creation of
25 forensic image copies, law enforcement personnel (which may include, in addition to law
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28 of IRC servers, and therefore no entity to which legal process may be served for accurate subscriber
information, transactional history or account seizure.

1 enforcement officers and agents, attorneys for the government, attorney support staff, agency
2 personnel assisting the government in this investigation, and outside technical experts under
3 government control) are authorized to review the ESI contained therein for information
4 responsive to the warrant. In addition to ESI that falls within the categories set forth in Section
5 I.A of this attachment, responsive information includes the following:

6 • Items, records or information³ regarding who used, owned, or controlled the
7 Subject Devices at the time the ESI subject to this warrant was created, edited, or deleted, such
8 as logs, registry entries, configuration files, saved usernames and passwords, documents,
9 browsing history, user profiles, email, email contacts, "chat" or instant messaging logs,
10 photographs, and correspondence;

11 • Items, records or information regarding the existence (or absence) of software
12 that would allow others to control the computers or electronic storage media subject to this
13 warrant at the time the things described in this warrant were created, edited, or deleted;

14 • Items, records or information regarding the attachment to the computers subject
15 to this warrant of any electronic storage media;

16 • Items, records or information regarding counter-forensic programs (and
17 associated data) designed to eliminate data from the computers or electronic storage media
18 subject to this warrant;

19 • Items, records or information regarding the times the computers or electronic
20 storage media subject to this warrant were used;

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³ As used throughout this document, the terms "records" and "information" includes all forms of creation or storage, including any form of computer or electronic storage (such as hard disks or other media that can store data); any handmade form (such as writing); any mechanical form (such as printing or typing); and any photographic form (such as microfilm, microfiche, prints, slides, negatives, videotapes, motion pictures, or photocopies)

1 terms that the user entered into any Internet search engine, and records of user-typed web
2 addresses, on the computers subject to this warrant.

3 In conducting this review, law enforcement personnel may use various techniques to
4 locate information responsive to the warrant, including, for example:

- 5 • surveying various file "directories" and the individual files they contain
6 (analogous to looking at the outside of a file cabinet for the markings it contains and opening a
7 drawer believed to contain pertinent files);
- 8 • opening or cursorily reading the first few "pages" of such files in order to
9 determine their precise contents;
- 10 • scanning storage areas to discover and possibly recover recently deleted files or
11 deliberately hidden files;
- 12 • performing key word searches through all electronic storage areas to determine
13 whether occurrences of language contained in such storage areas exist that are intimately
14 related to the subject matter of the investigation; and
- 15 • reviewing metadata, system information, configuration files, registry data, and
16 any other information reflecting how, when, and by whom the computer was used.

17 Law enforcement personnel will make reasonable efforts to search only for files,
18 documents, or other ESI within the categories identified in Sections I.A, I.B, and I.C of this
19 Attachment.
20
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23
24 **CERTIFIED COPY**

25 The document to which this certificate is attached is a
26 full, true and correct copy of the original in file and of
27 record in my office.

28 DATE July 29, 2019

BOBBIE R. WILLIAMS Clerk of Court
of the State of Nevada, in and for the County of Douglas,

By [Signature] Deputy

EXHIBIT “D”

AA000036

UNITED STATE DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
RECEIPT FOR PROPERTY

Case ID: 343A-LV-3120191On (date) 7/30/2019

item(s) listed below were:

- ☒ Collected/Seized
☐ Received From
☐ Returned To
☐ Released To

(Name) James Kosta(Street Address) 1731 Sunset Court Gardnerville, NV(City) GARDNERVILLE, NV**Description of Item(s):**1 - Samsung SSD S/N S1D9NSADC13208X2 - My Passport HDDS/N WX11E23TN3773 - 2 Goolge Fi - no SIMsS/N 894932005082218886FS/N 8949320005104420122F4 - Orico Blck 5GB HDD Enclosure5 - Orico Type C HDD 5GB (Silver)6 - Blk Mini Station Model HD-PZS/N: 855478250069437 - Various SIM Cards, Anker Thumb Drive, Plugable USB 3.08 - Corsair GB (Blk) Thumb Drive Huawei, Thumb Drive, Blk I Pod9 - 2 Go Pros Black10 - Various Thumb Drives11 - Casio 10.1 Mega Pixels Silver Camera12 - Blue Samsung Cell Phone with Gold Back Cover13 - Black Cell Phone14 - Ultra 2.0 GB Ultra Compact Flash15 - Nexus Huawei Cell Phone16 - iPad Serial F6QR902BG5YM17 - Various SIM Cards, Anker Thumb Drive, PNY 256GB Memory Card

AA000037

UNITED STATE DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION**RECEIPT FOR PROPERTY**

18 - Purple Cover MacBook Pro
S/N C02NP5WWG3QC, model A1398 and charger

19 - CL Marshall Images Flash Drive

20 - SD Card

21 - Pilot's flight log & paper booklet labeled Comcast

22 - Yellow Notepad

23 - Trip Itinerary April 2019

24 - Journals of Gina Kosta (Jornal)

25 - Black Journal 2
2018 Gina Kosta

26 - X-Box Hard Drive
05210058856945

27 - iPad 32 GB - Silver
Serial DKVGK09HDKPJ

28 - Blackberry
IMEI 861831004593642

29 - Black Motorola Phone
Model XT1992-6 Type M373B

30 - Diary

31 - Letter from Gina

32 - ASUS Zen Watch
SN ECNZC000574498

33 - Fenix 58 S/N 5BG003922

34 - Server Tray

35 - Silver Tray

36 - Silver Tray

37 - Laptop Dell 00196-170-145-786

38 - Used needles

39 - SD Cards

40 - SD Card

41 - 2 Hard Drives
SN: WYG1A31P9559
Z8LB10WYCR

AA000038

UNITED STATE DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
RECEIPT FOR PROPERTY

42 - 6 Jump Drives

43 - Hard Drive

S/N Z5007AJA

44 - Hard Drive

S/N K43BT852BE2E

45 - Black Dell laptop w/cable

SN-00144-562-129-888

46 - Box of hard drives

47 - Cell Phone Samsung Black

48 - Cell phone

49 - iPad w/cable

50 - CPU Unit - Synology

51 - CPU Unit Black w/handle

52 - Personal storage Maxtor

300GB S/n: A80SHF9E

53 - Maxtor Personal Storage S/N:Y2PC7CDE

54 - Hard Drive (SSD) and jump drive

55 - Dell Laptop

Service Tag 3Y6VH31

56 - Black CPU Unit Fractal

57 - 3 Journals

58 - Black Laptop with Cable

59 - 3 Journals

60 - Speck Cell Phone

61 - Misc journals and paperwork

62 - Jump drives

63 - External discs - compact flash

64 - Insurance Policies

Gina's Med records

65 - Financial Statements & Misc Document / Indicia

66 - Black Corsair GTX Thumb drive

67 - Mini iPad w blue/tan cover

AA000039

UNITED STATE DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
RECEIPT FOR PROPERTY

68 - Garmin Watch
S/N 35G118703

69 - Files containing death cert & other insurance paperwork. misc paperwork

70 - Google Pixel 2 (Blk)
IMEI 358035081573390

71 - Lexar Thum

72 - Image of HDD Device
S/N: 11147157021300102

73 - Image of Kosta's Google Pixel 2 Phone

74 - 2 Sets of keys w/ Do Not Duplicate

75 - Lexar flash drive labeled "ghost" Drive 3

76 - 2 Drive external RAID enclosure

77 - Black server

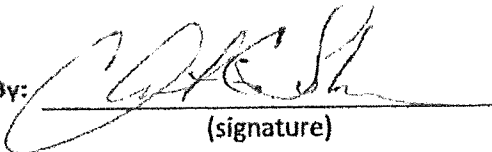
78 - Transcend 16GB SD Card

79 - Dark blue vial w/ black top stopper

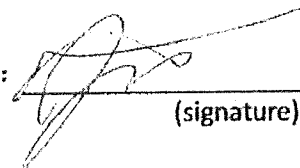
80 - Dark Gray Razer Model # RZ-09-0239 laptop

81 - Dark blue vial w/black topper sealed. Labeled Alexis Smart Brain Drops

Received By:


(signature)

Received From:


(signature)

Printed Name/Title:

Christine Tobias / FBI

Printed Name/Title:

James Koste

AA000040

EXHIBIT “E”

AA000041

Cristalli, Michael

From: Justin J. Bustos <JBustos@dickinson-wright.com>
Sent: Friday, December 13, 2019 4:28 PM
To: Miyamoto, Evan I.
Cc: Cristalli, Michael; Hernandez, Andrew; Cindy S. Grinstead
Subject: RE: EXTERNAL: RE: James Kosta Property
Attachments: Item 10.jpg; Bag Inside Item 10.jpg

[External Message]

Agent Miyamoto,

Thank-you for the detailed response. After reading your response, my staff and I conducted a secondary inspection of all the property. The inventory list identifies "FBI Item #10: Misc" directly above the item I could not locate. Upon inspecting Item #10 closer, it appears that there is a smaller plastic bag located inside item #10. The smaller plastic bag appears to have usb drives, SD cards, and micro SD cards. These devices are consistent with the description of the "evidence bag" I asked about in my December 12, 2019, e-mail.

I have attached a photo of Item 10 and a photo of the bag inside of Item 10. Is the smaller plastic the "evidence bag" identified in the inventory list?

Thank you,

Justin

Justin J. Bustos Member

100 West Liberty Street Phone 775-343-7503
Suite 940 Fax 844-670-6009
Reno NV 89501-1991 Email JBustos@dickinsonwright.com

[Profile](#) [V-Card](#)

DICKINSON WRIGHT

ARIZONA CALIFORNIA COLORADO CONNECTICUT ILLINOIS INDIANA KANSAS MISSOURI NEVADA NEW YORK NEW JERSEY NEW MEXICO NORTH CAROLINA NORTH DAKOTA OREGON TEXAS VIRGINIA WASHINGTON WISCONSIN

From: Miyamoto, Evan I. <Evan.I.Miyamoto@usdoj.gov>
Sent: Friday, December 13, 2019 3:09 PM
To: Justin J. Bustos <JBustos@dickinson-wright.com>
Cc: Cristalli, Michael <mcristalli@clarkhill.com>; Hernandez, Andrew <Andrew.Hernandez@usdoj.gov>; Cindy S. Grinstead <CGrinstead@dickinson-wright.com>
Subject: RE: EXTERNAL: RE: James Kosta Property

Mr. Bustos,

Hi, that item should be in your custody. When we spoke in the lobby, what I was trying to explain was that there may be additional items within the evidence bags, rather than missing items from the DEA-12 receipt log.

So here's the process that we followed when compiling the list and ensuring the best documentation. While you were in the lobby, TFO Andrew Hernandez and I placed all of the items on a desk in one pile. He picked up each individual evidence bag or item and I compiled the DEA-12 receipt list from the items. He would pick up an exhibit, read off any label number or description of the exhibit, and then I typed the description into the DEA-12 receipt form. Once the item description was typed into the form, he then placed the exhibit into the cart that was next to our desk. We did this for each exhibit, one by one. Upon completion of placing all exhibits into the cart, we then immediately printed the DEA-12 receipt forms and then wheeled the cart out to you in the lobby with the printed forms, which was just feet away from where we were compiling the list. You were then with us as we wheeled the cart down to your truck as the items were loaded inside your vehicle.

When I explained that there may be a discrepancy in the number of items, I was referring specifically to the evidence bag you highlighted that contained 19 miscellaneous USB drives, SD cards, and micro SD cards. This particular bag had multiple small micro SD cards, and since we didn't want to break the seals on the bags, we did our best to count the number of micro SD cards within (they're about the size of a cell phone sim card). Because we didn't break the seal, we had to manipulate the small micro SD cards through the plastic evidence bag, however since they moved around and stacked on top of each other, there was the possibility, for example, that 2 micro SD cards could have been stuck together, but we could only see or count 1. They're so thin that it was difficult for us to determine whether two were stacked on top of each other or stuck together through the plastic. So my fear was that there may have been, for example, 20 items in that bag, rather than 19 that we could see or manipulate through the plastic.

Please double check that the evidence bag didn't fall into the seat spaces or floorboards of your vehicle, or that it wasn't lost after you took custody, as there is no logical explanation of how an entire evidence bag is missing from the list that we compiled from the items that we placed into the cart. Once we handed off the evidence items to you at your vehicle, our cart was empty. We also returned back into our office with the empty cart through the same path that we took when going to your vehicle, and no evidence bags had fallen out of the cart.



Evan Miyamoto

Special Agent
Drug Enforcement Administration
Reno, Nevada Resident Office
Ofc: +1 (571) 387-6274
Mobile: +1 (775) 691-5048
Email: evan.i.miyamoto@usdoj.gov

From: Justin J. Bustos <JBustos@dickinson-wright.com>

Sent: Thursday, December 12, 2019 2:19 PM

To: Miyamoto, Evan I. <EIMiyamoto@dea.usdoj.gov>

Cc: Cristalli, Michael <mcristalli@clarkhill.com>; Cindy S. Grinstead <CGrinstead@dickinson-wright.com>

Subject: RE: EXTERNAL: RE: James Kosta Property

Agent Miyamoto,

I have gone through the property I received from you. The only item I could not locate is highlighted on the attached. Please let me know if you still have that item.

Thank you,

Justin

Justin J. Bustos Member

100 West Liberty Street Phone 775-343-7503
Suite 940
Reno NV 89501-1991 Fax 844-670-6009
[Profile](#) [V-Card](#) Email JBustos@dickinsonwright.com

DICKINSON WRIGHT

ARIZONA CALIFORNIA FLORIDA ILLINOIS INDIANA KANSAS MICHIGAN NEVADA OHIO
PENNSYLVANIA TEXAS VIRGINIA WISCONSIN WYOMING

From: Miyamoto, Evan I. <Evan.I.Miyamoto@usdoj.gov>
Sent: Friday, December 6, 2019 3:01 PM
To: Justin J. Bustos <JBustos@dickinson-wright.com>
Cc: Cristalli, Michael <mcristalli@clarkhill.com>; Cindy S. Grinstead <CGrinstead@dickinson-wright.com>
Subject: Re: EXTERNAL: RE: James Kosta Property

Sounds good. I'll see you then.

Sent from my iPhone

On Dec 6, 2019, at 2:32 PM, Justin J. Bustos <JBustos@dickinson-wright.com> wrote:

Next Wednesday works for me. How about 9:30 a.m.?

Thanks,

Justin

Justin J. Bustos Member

100 West Liberty Street
Suite 940
Reno NV 89501-1991
<<http://www.dickinson-wright.com/our-people/justin-j-bustos>>
<image5d910e.JPG>
<http://www.dickinson-wright.com/~vcf/Justin_J_Bustos.vcf>
<image7f1dca.JPG>

Phone 775-343-7503
Fax 844-670-6009
Email JBustos@dickinsonwright.com

<image004728.JPG>

From: Miyamoto, Evan I. <Evan.I.Miyamoto@usdoj.gov>
Sent: Friday, December 6, 2019 1:18 PM
To: Justin J. Bustos <JBustos@dickinson-wright.com>
Cc: Cristalli, Michael <mcristalli@ClarkHill.com>
Subject: EXTERNAL: RE: James Kosta Property

Mr. Bustos,

Are you available to meet on Wednesday, December 11, 2019 at our DEA Office? I'm currently available anytime on Wednesday if that works for you.

Our address is 8790 Double Diamond Pkwy Reno, NV 89521.

<image001.gif>
Evan Miyamoto
Special Agent
Drug Enforcement Administration
Reno, Nevada Resident Office
Ofc: +1 (571) 387-6274
Mobile: +1 (775) 691-5048
Email: evan.i.miyamoto@usdoj.gov<<mailto:evan.i.miyamoto@usdoj.gov>>

From: Cristalli, Michael <mcristalli@ClarkHill.com<<mailto:mcristalli@ClarkHill.com>>>
Sent: Tuesday, December 3, 2019 12:32 PM
To: Miyamoto, Evan I. <EIMiyamoto@dea.usdoj.gov<<mailto:EIMiyamoto@dea.usdoj.gov>>>
Cc: jbustos@dickinsonwright.com<<mailto:jbustos@dickinsonwright.com>>
Subject: RE: James Kosta Property

Agent Miyamoto,

I have included Mr. Bustos in this e mail as he will be supporting me with the turn over of the property as well as other matters specific to the investigation. Please let us know a date and location to take receipt of the property.

Thank you

Michael Cristalli
Member

CLARK HILL PLLC
3800 Howard Hughes Parkway, Suite 500 | Las Vegas, Nevada 89169
(702) 697-7510 (direct) | (702) 862-8400 (fax)
mcristalli@ClarkHill.com<<mailto:mcristalli@ClarkHill.com>> | www.clarkhill.com<<http://www.clarkhill.com>>
From: Cristalli, Michael <mcristalli@ClarkHill.com<<mailto:mcristalli@ClarkHill.com>>>
Sent: Wednesday, November 20, 2019 4:11 PM
To: Miyamoto, Evan I. <Evan.I.Miyamoto@usdoj.gov<<mailto:Evan.I.Miyamoto@usdoj.gov>>>
Subject: RE: James Kosta Property

Agent Miyamoto

I am sorry I could not coordinate for the turnover of property this week. I have associated Justin Bustos from Dickenson and Wright in Reno to assist. He will be prepared to take possession of the property next week. I will coordinate with you and Justin on Monday to confirm a date and time. Thank you for your patience.

Michael Cristalli
Member

CLARK HILL PLLC

3800 Howard Hughes Parkway, Suite 500 | Las Vegas, Nevada 89169

(702) 697-7510 (direct) | (702) 862-8400 (fax)

mcristalli@ClarkHill.com<<mailto:mcristalli@ClarkHill.com>> | www.clarkhill.com<<http://www.clarkhill.com/>>

From: Miyamoto, Evan I. <Evan.I.Miyamoto@usdoj.gov<<mailto:Evan.I.Miyamoto@usdoj.gov>>>

Sent: Monday, November 18, 2019 1:07 PM

To: Cristalli, Michael <mcristalli@ClarkHill.com<<mailto:mcristalli@ClarkHill.com>>>

Subject: RE: James Kosta Property

[External Message]

Mr. Cristalli,

Just wanted to follow up again with you regarding Mr. Kosta's digital devices that are available for return to him. I'm actually going to be in his neck of the woods tomorrow. Would it be preferential if I just hand deliver these items to him, and he can maintain them so that the chain of custody is directly back to him? If you deem it necessary to have these devices independently analyzed by one of your experts, then he can set them aside and get them to you at your convenience?

I apologize for having to keep bringing this up, but we really need to make some space in our vault. Again, these are items that have been identified as either containing data that is outside the scope of our search, or having data that is not pertinent to our investigation. We've had these devices for almost 4 months now and I'm sure he would appreciate it if we got these back to him in a timely manner.

Thanks again,

<image001.gif>

Evan Miyamoto

Special Agent

Drug Enforcement Administration

Reno, Nevada Resident Office

Ofc: +1 (571) 387-6274

Mobile: +1 (775) 691-5048

Email: evan.i.miyamoto@usdoj.gov<<mailto:evan.i.miyamoto@usdoj.gov>>

From: Cristalli, Michael <mcristalli@ClarkHill.com<<mailto:mcristalli@ClarkHill.com>>>

Sent: Monday, October 28, 2019 11:00 AM

To: Miyamoto, Evan I. <EIMiyamoto@dea.usdoj.gov<<mailto:EIMiyamoto@dea.usdoj.gov>>>

Subject: RE: James Kosta Property

Agent Miyamoto

Yes. I will coordinate with you later today.

Michael Cristalli
Member

CLARK HILL PLLC
3800 Howard Hughes Parkway, Suite 500 | Las Vegas, Nevada 89169
(702) 697-7510 (direct) | (702) 862-8400 (fax)
mcristalli@ClarkHill.com<<mailto:mcristalli@ClarkHill.com>> | www.clarkhill.com<<http://www.clarkhill.com>>
From: Miyamoto, Evan I. [<mailto:Evan.I.Miyamoto@usdoj.gov>]
Sent: Friday, October 25, 2019 5:49 PM
To: Cristalli, Michael
Subject: RE: James Kosta Property

[External Message]

Mr. Cristalli,

Just wanted to follow up with you to see if you were able to make arrangements with anybody here in Reno to take possession of Mr. Kosta's property.

Thanks again,

<image001.gif>
Evan Miyamoto
Special Agent
Drug Enforcement Administration
Reno, Nevada Resident Office
Ofc: +1 (571) 387-6274
Mobile: +1 (775) 691-5048
Email: evan.i.miyamoto@usdoj.gov<<mailto:evan.i.miyamoto@usdoj.gov>>

From: Cristalli, Michael <mcristalli@ClarkHill.com<<mailto:mcristalli@ClarkHill.com>>>
Sent: Tuesday, October 1, 2019 11:53 AM
To: Gentile, Dominic <dgentile@ClarkHill.com<<mailto:dgentile@ClarkHill.com>>>; Miyamoto, Evan I. <EIMiyamoto@dea.usdoj.gov<<mailto:EIMiyamoto@dea.usdoj.gov>>>
Subject: RE: James Kosta Property

Special Agent Miyamoto,

I have tried to reach you by phone regarding the above matter. Please contact me at your convenience to discuss the return of the property.

Thank you

Michael Cristalli
Member

CLARK HILL PLLC
3800 Howard Hughes Parkway, Suite 500 | Las Vegas, Nevada 89169
(702) 697-7510 (direct) | (702) 862-8400 (fax)
meristalli@ClarkHill.com<<mailto:meristalli@ClarkHill.com>> | www.clarkhill.com<<http://www.clarkhill.com/>>
From: Gentile, Dominic
Sent: Saturday, September 28, 2019 1:43 PM
To: Miyamoto, Evan I.
Cc: Cristalli, Michael
Subject: RE: James Kosta Property

Special Agent Miyamoto, my partner, Michael Cristalli, will be in communication with you this week. I have been immersed in a project and wasn't able to respond.

Dominic Gentile
Member

CLARK HILL PLLC
3800 Howard Hughes Parkway, Suite 500 | Las Vegas, Nevada 89169
(702) 697-7508 (direct) | (702) 862-8400 (fax)
dgentile@ClarkHill.com<<mailto:dgentile@ClarkHill.com>> | www.clarkhill.com<<http://www.clarkhill.com/>>
From: Miyamoto, Evan I. [<mailto:Evan.I.Miyamoto@usdoj.gov>]
Sent: Tuesday, September 24, 2019 10:08 AM
To: Gentile, Dominic
Subject: James Kosta Property

[External Message]

Mr. Gentile,

I'm one of the investigators assisting Douglas County Sheriff's Office ref. the search warrant that was conducted at Mr. James Kosta's residence in Gardnerville, Nevada. I have a number of digital items that were taken during the search warrant, that we no longer need to maintain. Do you have a partner located here in Reno that I could transfer these items to, for return to Mr. Kosta? Or do you mind if I contact your client directly and arrange a day and time to return these items to him? Please advise how you'd prefer me to proceed.

Thanks in advance,

<image001.gif>
Evan Miyamoto
Special Agent
Drug Enforcement Administration
Reno, Nevada Resident Office
Ofc: +1 (775) 327-8925
Mobile: +1 (775) 691-5048
Email: evan.i.miyamoto@usdoj.gov<<mailto:evan.i.miyamoto@usdoj.gov>>

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Neither this transmission nor any attachment shall be deemed for any purpose to be a "signature" or "signed" under any electronic transmission acts, unless otherwise specifically stated herein. Thank you.

EXHIBIT “F”

AA000050

RECEIPT FOR CASH OR OTHER ITEMS

TO: (Name, Title, Address (Including ZIP CODE), if applicable)

SA Evan Miyamoto
8790 Double Diamond Pkwy
Reno, NV 89521

FILE NO.

RA-19-0051

G-DEP IDENTIFIER

FILE TITLE

KOSTA, James

DATE

12-11-2019

DIVISION/DISTRICT OFFICE

LAED/Reno RO

I hereby acknowledge receipt of the following described cash or other item(s), which was given into my custody by the above named individual.

AMOUNT or QUANTITY	DESCRIPTION OF ITEM(S)	PURPOSE (If Applicable)
1	FBI Item #51: Black CPU tower label NZXT	RETURN TO JAMES KOSTA
11	Misc. connector/power cables	
2	FBI Items #35 & #36: Silver server trays	
2	Boxes containing 44 total misc. hard drives	
1	FBI Item #6: Black ministration model	
	HD-P2. Serial 85547825006943	
1	FBI Item #9: Black Go Pro Camera w/case	
1	FBI Item #78: Transcend 16gb SD card	
1	FBI Item #10: Misc	
1	Evidence bag containing 19 total USB drives, SD cards, and micro SD cards	
1	FBI Item #11: Cascio 10.1 mp camera	
1	FBI Item #1: Samsung SSD S1D99SADC13208X	
1	FBI Item #52: Maxtor Hard Drive 300gb	
1	FBI Item #48: Tmobile Cell Phone	

RECEIVED BY (Signature)

WITNESSED BY (Signature)

NAME AND TITLE (Print or Type)

John Busts Attorney

NAME AND TITLE (Print or Type)

1 Case No. 19-SW-0045

2 DA 19-1483L

RECEIVED

MAR 19 2020

Douglas County
District Court Clerk

FILED

2020 MAR 19 PM 2:10

BOBBIE R. WILLIAMS
CLERK

BY **A. NEWTON** DEPUTY

6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

8
9 IN THE MATTER OF THE SEARCH OF /

10 The residence and property located at /
11 1731 Sunset Court /
12 Gardnerville, Nevada 89410 /

MOTION TO ENLARGE TIME

13 The State of Nevada, by and through the Douglas County District Attorney's Office,
14 moves this Court for an order enlarging the time for the State to respond to the Motion of Real
15 Party in Interest James Kosta for Return of Property; to Unseal Search Warrant Application
16 and Supporting Affidavit; and to Quash Search Warrant, or in the Alternative for Protective
17 Order, that was filed in the above case number. This motion is based on the following points
18 and authorities and the attached affidavit of counsel.

19 NJDCR 10(a) states, "All applications for extensions of time shall be made by motion
20 before the time expires for the response to a motion to be filed, and upon five (5) days' notice
21 to all parties and to the Judge who shall set the motions for early hearing."

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

AA000052

1 Pursuant to NJDCR 10(a) and the accompanying affidavit, the State requests an
2 extension of time up to and including April 13, 2020, within which to respond to the Real Party
3 in Interest's motion.

4
5 DATED this 19 day of March, 2020.

6 MARK B. JACKSON
7 DISTRICT ATTORNEY

8
9 By: 

Erik A. Levin
Chief Deputy District Attorney
Post Office Box 218
Minden, Nevada 89423
(775)782-9800

Case No. 19-SW-0045

DA 19-1483L

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

IN THE MATTER OF THE SEARCH OF /
/

The residence and property located at /
1731 Sunset Court /
Gardnerville, Nevada 89410 /
/

AFFIDAVIT

STATE OF NEVADA)
: ss.
COUNTY OF DOUGLAS)

I, Erik A. Levin, being duly sworn, state the following under penalty of perjury:

I am the Chief Deputy District Attorney with the Douglas County District Attorney's Office.

The District Attorney's Office involvement with the issuance of the subject warrant was previously handled by Richard Casper, Esq., who is no longer with the Douglas County District Attorney's Office.

This matter is still under investigation by law enforcement and as such, has not had a prosecutor actively involved in the case.

The certificate of service for the instant motion indicates it was served on the Douglas County District Attorney Office by electronic means and U.S. mail on the 13th day of March, 2020.

I have looked and been unable to locate any electronic receipt of the instant motion. The mailed copy was received on March 16, 2020.

AA000054

1 With the filing of the instant motion, I am in the process of familiarizing myself with
2 the status of the case and the evidence that was seized pursuant to the subject warrant. I am in
3 the process of contacting law enforcement and determining the State's response to the relief
4 sought, including which items of evidence the State will oppose returning and which items the
5 State will not oppose returning to the real party in interest. Law enforcement in this case is
6 multi-jurisdictional and includes both local and federal agencies.

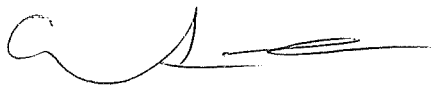
7 I am attempting to accomplish the above while managing a staff of attorneys in an
8 environment in which both the Governor of the State of Nevada and the Douglas County Board
9 of County Commissioners have declared states of emergency in response to the presence of the
10 COVID-19 virus.

11 In addition, the Ninth Judicial District Court, East Fork Justice Court, and Tahoe
12 Justice Court, have issued Administrative Order 20-01, also in response to the presence of the
13 COVID-19 virus. This order has drastically affected Court and prosecution operations, with
14 changes to procedures in the various courts and within the District Attorney's Office occurring
15 almost daily. These changes have demanded additional time in my supervisory role.

16 The State believes the time requested is needed to adequately respond to the instant
17 motion.

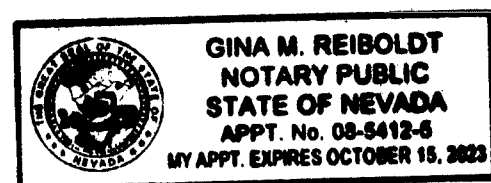
18 This motion is made in good faith and not for the purpose of delay.

19
20 DATED this 19th day of March, 2020.

21
22 
23 Erik A. Levin
Chief Deputy District Attorney

24 SUBSCRIBED and SWORN to before me by
25 Erik A. Levin, this 19th day of March, 2020.

26 
27 NOTARY PUBLIC
28



AA000055

1 Case No. 19-CR-045

2 DA 19-1483L

3
4
5
6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

8
9 IN THE MATTER OF THE SEARCH OF /
10 The residence and property located at /
11 1731 Sunset Court /
12 Gardnerville, Nevada 89410 /
//

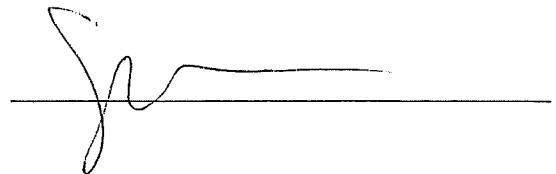
CERTIFICATE OF SERVICE

13 I certify that I am an employee of the District Attorney for Douglas County, Nevada, and that I
14 deposited for delivery with U.S. Mail, a true copy of the Motion to Enlarge Time, addressed to:

15 Clark Hill, PLLC
16 Dominic P. Gentile
17 Michael Cristalli
18 Vincent Savarese III
19 3800 Howard Hughes Parkway, Suite 500
20 Las Vegas, Nevada 89169

21 DATED this 19th day of March, 2020.

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APR - 6 2020

Douglas County
District Court Clerk

FILED

2020 APR -6 PM 3: 35

BOBBIE R. WILLIAMS
CLERK

[Signature] DEPUTY

Case No. 19-SW-0045

Dept. No. II

DA Case No. 19-1483L

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

IN THE MATTER OF THE SEARCH OF

The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410,

**OPPOSITION TO MOTION FOR RETURN
OF PROPERTY, TO UNSEAL SEARCH
WARRANT APPLICATION, AND TO
QUASH WARRANT OR ISSUE
PROTECTIVE ORDER**

Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

The State of Nevada, by and through Erik A. Levin, Chief Deputy District Attorney, of the Douglas County District Attorney's Office, opposes real party in interest's motion, except as otherwise noted herein. This opposition is based on the following points and authorities.

Relevant Facts

On July 29, 2019, this Court reviewed the affidavit of Special Agent Evan Miyamoto of the United States Drug Enforcement Agency and found that probable cause exists to believe that evidence of the crimes of Open Murder, a violation of NRS 200.010 through NRS 200.090, a category A felony, and Import of a Controlled Substance, a violation of NRS 453.321, a category B felony, existed as documented on the search warrant signed by this Court the same day. Further, on July 29, 2019, Douglas County Chief Deputy District attorney Richard Casper filed an ex parte motion to seal the search warrant affidavit. On July 29, 2019, this Court issued an order granting the motion to seal the search warrant affidavit.

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The affidavit in support of search warrant should not be unsealed or disclosed to counsel for Kosta.

In support of his request to unseal the affidavit in support of search warrant, Kosta cites to NRS 179.045(4) which states, “[u]pon a showing of good cause, the magistrate may order an affidavit or a recording of an oral statement given pursuant to this section to be sealed. Upon a showing of good cause, a court may cause the affidavit or recording to be unsealed.” Kosta then submits, “on information and belief, that the instant Application and Supporting Affidavit fails to set forth sufficient facts and circumstances to establish probable cause to justify the seizure of his property...” In support of his statement, Kosta provides this Court with absolutely nothing. Rather, through the fallacy of circular reasoning, Kosta asks this Court to unseal the instant affidavit so that he might attempt to find therein the support for his unsupported premise that probable cause for the search and seizure did not exist. NRS 179.045(4) allows the unsealing of the affidavit for “good cause,” not to indulge the movant’s fishing expedition.

While Kosta has failed to present or allege any facts supporting good cause to unseal the search warrant affidavit, good cause remains to keep the affidavit sealed. In *Donrey of Nevada v. Bradshaw*, 106 Nev. 630 (1990), the Supreme Court addressed the confidentiality of criminal investigative reports. The Court determined that a balancing test of the interests involved should be utilized to determine if disclosure is appropriate. *Id.* at 635-636. In *Donrey*, the Court found that, “[t]here [was] no pending or anticipated criminal proceeding; there [was] no confidential sources or investigative techniques to protect; there [was] no possibility of denying someone a fair trial; and there [was] no potential jeopardy to law enforcement personnel.” *Id.* at 636. As a result, the Court ordered disclosure of the police investigative report. *Id.*

By contrast, the anticipation or pendency of criminal proceedings as well as disclosure of investigative techniques are factors that provide good cause for keeping information regarding a pending criminal investigation sealed and confidential. *See Donrey and Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878 (2011). In this case,

1 the Court has reviewed the affidavit in support of search warrant and determined that
2 sealing is appropriate. As shown both in the State's July 29, 2019, ex parte motion to
3 seal the search warrant affidavit and the affidavit of counsel attached hereto as Exhibit 1,
4 keeping the affidavit in support of search warrant sealed is imperative and required in the
5 interests of justice.

6 Kosta has failed to make a showing of good cause to unseal the affidavit in
7 support of search warrant. The State has previously established good cause for sealing
8 the affidavit and has shown reasons for sealing the affidavit still remain. The sealing
9 provisions of NRS 179.045 would be rendered meaningless if all that was required to
10 unseal a search warrant affidavit was for a party to assert a naked allegation that they do
11 not believe probable cause for the search or seizure existed. For these reasons, Kosta's
12 request to unseal the affidavit in support of search warrant should be denied.

13 **This Court should not amend the search warrant issued on July 29, 2019.**

14 In his motion, Kosta spends considerable time arguing that he has a legitimate
15 expectation of privacy in the digital information that was seized in this case and
16 therefore, he is afforded protections under the Fourth Amendment of the United States
17 Constitution. In support, Kosta cites to *Carpenter v. United States*, 585 U.S. ___, 138
18 S.Ct. 2206 (2018), *United States v. Jones*, 565 U.S. 400 (2012), *Soldal v. Cook County*,
19 506 U.S. 56 (1992), *Katz v. United States*, 389 U.S. 347 (1967), *Smith v. Maryland*, 442
20 U.S. 735 (1979), *Rakas v. Illinois*, 439 U.S. 128 (1978), *United States v. Ziegler*, 474
21 F.3d 1184 (9th Cir. 2007), and *Riley v. California*, 573 U.S. 373 (2014),

22 There is no question that Kosta has a legitimate expectation of privacy in the
23 items seized in this case. This is supported by each of the above cases. However, that is
24 the limit of the applicability of the above cases to the circumstances of this case. Each of
25 the above cases involved a *warrantless* search. With the exception of *Rakas*, the above
26 cases found Fourth Amendment violations because no warrant was obtained. In *Rakas*,
27
28

1 the defendants were found not to have a legitimate expectation of privacy in the area and
2 property that was searched.

3 By contrast, in this case law enforcement recognized Kosta's Fourth Amendment
4 protections and obtained a search warrant supported by an affidavit that supported
5 probable cause that one or more crimes were committed and that there was probable
6 cause to believe that evidence of the crimes could be found in the property searched.
7 This is exactly the procedure the above cases support to be compliant with the Fourth
8 Amendment.

9 Kosta next suggests that this Court order some sort of protective search protocol
10 of the seized items. In support, Kosta cites *United States v. Comprehensive Drug*
11 *Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc). A decision of the Ninth Circuit
12 Court of Appeals, even an en banc decision, is not binding on the courts of the State of
13 Nevada. *Blanton v. North Las Vegas Municipal Court*, 103 Nev. 623, 633 (1987), *affd*,
14 489 U.S. 538 (1989); Nev. Const. art 1, sec.2. Further, even the federal courts are not in
15 agreement as to the requirement to implement search protocols for digital search
16 warrants. In *United States v. Lustylk*, 57 F.Supp.3d 213, 229 (S.D.N.Y. 2014), the court
17 stated:

18 *The Second Circuit has "not required specific search protocols or*
19 *minimization undertakings as basic predicates for upholding digital*
20 *search warrants." United States v. Galpin*, 720 F.3d at 451. *Thus, even*
21 *assuming the Fourth Amendment requires such protocols—a matter*
22 *about which courts have disagreed, see In re a Warrant for All Content*
23 *and Other Information Associated with the Email Account*
24 *xxxxxxx@gmail.com Maintained at Premises Controlled By Google, Inc.*,
25 *33 F.Supp.3d 386, 388, 396–97, 2014 WL 3583529, at *1, *8 (S.D.N.Y.*
26 *July 18, 2014)—in the absence of controlling precedent requiring search*
27 *protocols, it cannot be said the agents acted in bad faith. See United States*
28 *v. Clark*, 638 F.3d 89, 105 (2d Cir.2011) (exclusionary rule does not apply
"where the need for specificity in a warrant ... was not yet settled or was
otherwise ambiguous"); *United States v. Buck*, 813 F.2d 588, 593 (2d
Cir.1987) (when "the law [is] unsettled" as to warrant requirements, "a
reasonably well-trained police officer could not be expected to know that
the warrant ... violated the Fourth Amendment").

(Emphasis added.) In *Wellington v. Daza*, 2018 WL 2694461, at *10 (D.N.M. June 5, 2018) (unreported)¹, the court stated:

Despite the recognition of the protocols in *Potts*, the Tenth Circuit does not follow other courts that have required warrants to have limiting protocols for computer searches. *See generally, United States v. Christie*, 717 F.3d 1156, 1166 (10th Cir. 2013) (“[I]t is unrealistic to expect a warrant to prospectively restrict the scope of a search by directory, filename or extension or to attempt to structure search methods—that process must remain dynamic.”) (quoting *United States v. Burgess*, 576 F.3d 1078, 1093 (10th Cir. 2009)). Under the standards set out by the Tenth Circuit, this warrant’s lack of specific search protocols for computer data does not violate the Fourth Amendment.

While this court may consider the reasoning of the court in *Comprehensive Drug Testing, Inc.* in deciding the issues herein, a review of that case shows a concern for Fourth Amendment protection against issues that are not present in this case. *Comprehensive Drug Testing, Inc.* involved the investigation of Bay Area Lab Cooperative (Balco) and the suspected use of steroids by professional baseball players. *Comprehensive Drug Testing, Inc.*, 621 F.3d at 1166. The government had secured a search warrant for the test records of ten players for whom they had established probable cause, “however, the government seized and promptly reviewed the drug testing records for hundreds of players in Major League Baseball (and a great many other people).” *Id.* Throughout its opinion, the court repeatedly emphasizes its concern for the Fourth Amendment protections of the hundreds of other individuals who had their records seized and for whom the government did not have probable cause to seize those records:

- “...the warrant was limited to the records of the ten players as to whom the government had probable cause. When the warrant was executed, however, the government seized and promptly reviewed the drug testing records for hundreds of players in Major League Baseball (and a great many other people).” *Id.* at 1166.

¹ Cited pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1. A copy of the decision is attached as Exhibit 2.

- 1 • "...Judge Cooper concluded that the government's actions displayed a callous
2 disregard for the rights of third parties, viz., those players as to whom the
3 government did not already have probable cause and who could suffer dire
4 personal and professional consequences from a disclosure of their test
5 results." *Id.* at 1167.
- 6 • "Brushing aside an offer by on-site CDT personnel to provide all information
7 pertaining to the ten identified baseball players, the government copied from
8 CDT's computer what the parties have called the "Tracey Directory" which
9 contained, in Judge Cooper's words, "information and test results involving
10 hundreds of other baseball players and athletes engaged in other professional
11 sports." *Id.* at 1169.
- 12 • "Judge Cooper also found that, in conducting the seizure in the manner it did,
13 "[t]he Government demonstrated a callous disregard for the rights of those
14 persons whose records were seized and searched outside the warrant." *Id.* at
15 1169-1170.
- 16 • "Like Judges Cooper and Illston, Judge Mahan determined that "[t]he
17 government callously disregarded the affected players' constitutional rights."
18 Judge Mahan also concluded that the government "unreasonab[ly] ... refuse[d]
19 to follow the procedures set forth in *United States v. Tamura* ... upon learning
20 that drug-testing records for the ten athletes named in the original April 8
21 warrants executed at Quest and at [CDT] were intermingled with records for
22 other athletes not named in those warrants." *Id.* at 1170 (internal quotes
23 omitted).
- 24 • "The government had no such independent basis to retain the test results of
25 other than the ten players specified in the warrant." *Id.* at 1171.
- 26 • "The sequence of events supports the suspicion that representations in the
27 warrant about the necessity for broad authority to seize materials were
28

1 designed to give the government access to the full list of professional baseball
2 players and their confidential drug testing records.” *Id.* at 1172.

- 3 • “This case well illustrates both the challenges faced by modern law
4 enforcement in retrieving information it needs to pursue and prosecute
5 wrongdoers, and the threat to the privacy of innocent parties from a vigorous
6 criminal investigation.” *Id.* at 1175.
- 7 • “Seizure of, for example, Google’s email servers to look for a few
8 incriminating messages could jeopardize the privacy of millions.” *Id.* at 1176.
- 9 • “Here, for example, the Tracey Directory contained a huge number of drug
10 testing records, not only of the ten players for whom the government had
11 probable cause but hundreds of other professional baseball players, thirteen
12 other sports organizations, three unrelated sporting competitions, and a non-
13 sports business entity—thousands of files in all, reflecting the test results of an
14 unknown number of people, most having no relationship to professional
15 baseball except that they had the bad luck of having their test results stored on
16 the same computer as the baseball players.” *Id.* at 1177.
- 17 • “Government intrusions into large private databases thus have the potential to
18 expose exceedingly sensitive information about countless individuals not
19 implicated in any criminal activity, who might not even know that the
20 information about them has been seized and thus can do nothing to protect
21 their privacy.” *Id.* at 1177.

22 The facts in the instant case are unlike those in *Comprehensive Drug Testing*. In
23 *Comprehensive Drug Testing*, the search and seizure was of property and information of
24 a third party provider that included information of hundreds of other people for whom the
25 government did not possess probable cause for a search. It was the third party testing
26 entity and the additional athletes through their representative who sought return of the
27 seized property for which they had an expectation of privacy. The case did not involve
28 the ten players for whom the government had probable cause. In the instant case, all the

1 property seized was from the person or residence of Kosta and was supported by probable
2 cause.

3 Kosta also cites to four unreported orders issued in the United States District
4 Court in Kansas. *In re Cellular Telephones*, 2014 WL 7793690 (D. Kan. Dec. 30, 2014),
5 *In re Applications for Search Warrants for Info. Associated with Target Email*
6 *Accounts/Skype Accounts*, 2013 WL 4647554 (D. Kan. Aug. 27, 2013), *In re Nextel*
7 *Cellular Tel.*, 2014 WL 2898262 (D. Kan. June 26, 2014), and *In re Search of premises*
8 *known as Three Cellphones & One Micro-SD Card*, No. L4-MJ-8013-DJW, 2014 WL
9 3845157 (D. Kan. Aug. 4, 2014). All are orders denying warrant applications for lack of
10 probable cause and/or particularity and a search protocol. All were issued by the same
11 magistrate judge. And, none involved a charge of murder. Two of the orders involved
12 allegations of drug offenses, an allegation involving stolen property, and the last an
13 allegation of interfering with commerce. Kosta then suggests that *United States v.*
14 *Pedersen*, 2014 WL 3871197 (D. Or. Aug. 6, 2014) and *Antico v. Sindt Trucking, Inc.*,
15 148 So. 3d 163 (Fla. Dist. Ct. App. 2014) are in accord. *Pederson* did not involve the
16 Fourth Amendment. Rather the issue *Pederson* involved the Sixth Amendment and the
17 use of a filter or taint team to review calls that might contain privileged information and
18 the subsequent failure to provide related discovery. Neither did *Antico* involve the Fourth
19 Amendment. *Antico* involved a wrongful death lawsuit and the balancing of the rules of
20 discovery with the privacy provisions of the Florida State Constitution.

21 In this case, however, as indicated on the search warrant, the State has provided
22 the Court with information sufficient to support a finding of probable cause to search for
23 evidence of the crime of Open Murder, a violation of NRS 200.010 through NRS
24 200.090, a category A felony. The search for evidence of open murder may
25 understandably encompasses a broader spectrum evidence than for drug or theft offenses.
26 A search for evidence of motive and intent when the suspect and victim are related by
27 marriage, necessarily will include a search for a variety of files containing personal and
28

1 private information. This Court has found probable cause for just such a search and the
2 warrant issued in this matter should not now be altered.

3
4 **Return of evidence.**

5 Below is a list of evidence that was seized in execution of the search warrant in
6 this matter:

7 *One (1) Garmin Fenix 58 smart watch (white in color) with serial number*
8 *5BG003922.*

9 *One (1) Samsung cell phone with gold back cover.*

10 *One (1) Asus Zen Watch with serial number ECNZC000574498.*

11 *One (1) Garmin watch with serial number 35G118703.*

12 *One (1) MacBook Pro with serial number C02NP5WWG3QC.*

13 *One (1) Black Corsair GTX Thumbdrive*

14 *One (1) Computer server tray*

15 *One (1) hard drive with serial number Z5007AJA.*

16 *Three (3) hard drives.*

17 *Two (2) cavalry hard drives.*

18 *One (1) Corsair thumb drive, one (1) black ipod, and one (1) Huawei thumb*
19 *drive.*

20 *Four (4) SD cards.*

21 *One (1) Passport HDD with serial number WX11E23TN377*

22 *Three (3) thumb drives.*

23 *One (1) black computer server with serial number RC902XBKK921191000618.*

24 *One (1) thumb drive.*

25 *One (1) SD card*

26 *One (1) two drive external raid drive*

27 *One (1) max store personal storage.*

28 *One (1) SD card.*

- 1 One (1) My passport hard drive with serial number WX11E23TN377.
- 2 One (1) Orico Black 5gb hard drive.
- 3 One (1) Orico type C 5gb silver hard drive.
- 4 One (1) Dark grey Razer laptop model #RZ-09-0239.
- 5 One (1) Dell Laptop with service tag 3Y6VH31.
- 6 One (1) Synology CPU unit.
- 7 One (1) SD card and five (5) sim cards.
- 8 Two (2) sim cards and four (4) SD cards
- 9 Two (2) external SD cards and one (1) sim card.
- 10 One (1) Google Pixel 2 cellular telephone (black in color), with IMEI
- 11 358035081573390.
- 12 One (1) Google Pixel cell phone
- 13 One (1) Google Pixel 2XL
- 14 One (1) Apple iPad with cable.
- 15 One (1) mini Apple iPad with blue/tan cover.
- 16 One (1) Apple iPad (silver in color) with serial number DKVVGK09HDKPJ.
- 17 One go pro with battery and housing.
- 18 One (1) Apple iPad with serial number F6QR902BG5YM.
- 19 One (1) Black Motorola Cell Phone Model XT1992-6 Type M373B.
- 20 One (1) Blackberry cell phone with IMEI 861831004593642.
- 21 One (1) Samsung cell phone (black in color).
- 22 One (1) Nexus Huawei cellular telephone.
- 23 One (1) Apple iPhone w/Speck case.
- 24 One (1) mirror image of server from room O.
- 25 One (1) mirror image of dell laptop from room L.
- 26 One (1) mirror image of unbranded desktop from room L.
- 27 One (1) imaged copy of HDD Device with serial number 11147157021300102.
- 28

1 **One hard drive w/mirror image of Samsung Galaxy S8 plus with IMEI**
2 **357751083711306**

3 **One (1) mirror image of desktop computer from room L.**

4 **One (1) mirror image of MSI laptop from room L.**

5 **One (1) mirror image of server from room O.**

6 The **Bold** items have previously been returned to Kosta. The *italicized* items the
7 State is prepared to return to Kosta. The remaining five items are still being searched
8 pursuant to the warrant issued in this case.

9
10 **Conclusion**

11 The State has previously provided this Court with information from which the
12 Court ordered the affidavit in support of search warrant sealed. The reasons for sealing
13 remain valid. Kosta has failed to make a showing of good cause to unseal the affidavit in
14 support of search warrant. For these reasons, Kosta's request to unseal the affidavit in
15 support of search warrant should be denied.

16 No authority has been provided that requires or compels this Court to amend the
17 search warrant in this matter to include a screening process or particular search protocol.
18 The cases cited by Kosta for such protocols are not binding on this Court and raise issues
19 that are different or not present in this case. Further, the search has been completed on
20 most of the items that were seized in this case.

21 Pursuant to the search warrant issued in this matter, the State seized
22 approximately sixty items of evidence, primarily consisting of electronic items and digital
23 media. The State has returned or is prepared to return all but five of those items. The
24 remaining five items are still being investigated pursuant to the search warrant and should
25 not be returned to Kosta at this time.

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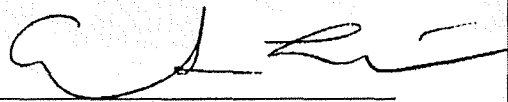
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DATED this 6 day of April, 2020.

MARK B. JACKSON
DISTRICT ATTORNEY

By: 
Erik A. Levin
Chief Deputy District Attorney
Post Office Box 218
Minden, Nevada 89423
(775)782-9800

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Exhibit 1

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Case No. 19-SW-0045

Dept. No. II

DA Case No. 19-1483L

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

IN THE MATTER OF THE SEARCH OF

The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410,

AFFIDAVIT

STATE OF NEVADA)
 : ss.
COUNTY OF DOUGLAS)

I, Erik A. Levin, being duly sworn, state the following under penalty of perjury:

I am Chief Deputy District Attorney with the Douglas County District Attorney's
Office and am the assigned prosecutor in the captioned matter.

I have reviewed the ex parte motion to seal search warrant affidavit filed by Richard B.
Casper in this matter on July 29, 2019.

I have discussed the status of this case with lead investigator Ryan Young or the
Douglas County Sheriff's Office.

I have also discussed the rationale for sealing the search warrant affidavit as set forth in
the July 29, 2019, motion to seal with Investigator Young.

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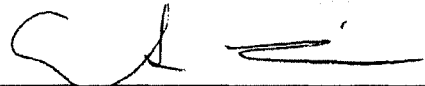
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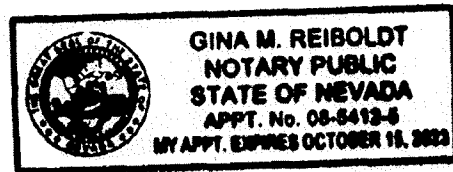
1 Based on my discussions with Investigator Young, the reasons for sealing the affidavit
2 as presented in the July 29, 2019, motion are still valid and relevant as of this date.

3 DATED this 6 day of April, 2020.

4
5 
6 Erik A. Levin
Chief deputy District Attorney

7 SUBSCRIBED and SWORN to before me by
8 Erik A. Levin, this 6th day of April, 2020.

9
10 NOTARY PUBLIC 



11
12 Douglas County District Attorney
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Exhibit 2

AA000072

2018 WL 2694461

Only the Westlaw citation is currently available.
United States District Court, D. New Mexico.

David WELLINGTON, Plaintiff,

v.

Fernando DAZA, Special Agent Marshall,
Special Agent Hand, Unknown Name
Doe 1, Unknown Name Doe 2, Unknown
Name Doe 3, Unknown Name Doe 4,
and Unknown Name Doe 5, Defendants.

No. 17 CV 00732 JAP/LF

Filed 06/05/2018

Attorneys and Law Firms

David Wellington, Albuquerque, NM, for Plaintiff.

Brandon Fyffe, Erin Langenwaller, United States Attorneys
Office, Albuquerque, NM, for Defendants.

MEMORANDUM OPINION AND ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

JAMES A. PARKER, SENIOR UNITED STATES
DISTRICT JUDGE

*1 In PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. No. 40) (Motion), Plaintiff David Wellington asks the Court to hold as a matter of law that a search warrant authorizing the search of his residence was facially invalid. Plaintiff also asks the Court to rule that Defendant Fernando Daza may not assert qualified immunity from Plaintiff's claims under 42 U.S.C. § 1983 for violations of the First and Fourth Amendments. See COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES (Doc. No. 1). Since the undisputed evidence of record does not establish that Defendant Daza violated Plaintiff's First and Fourth Amendment rights, the Court will deny the Motion.

I. STANDARD OF REVIEW

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.

P. 56(a). When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The party seeking summary judgment bears the initial burden of "show[ing] that there is an absence of evidence to support the nonmoving party's case." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991) (internal quotation marks omitted). Once the movant meets this burden, Rule 56 requires the opposing party to designate specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In considering a motion for summary judgment, the Court must "determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate factfinder, to sustain her claim." *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1195 (10th Cir. 2002).

When the issue of qualified immunity is raised, the court analyzes a motion for summary judgment differently. "The doctrine of qualified immunity protects public or government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Once qualified immunity is raised, the plaintiff bears the burden of satisfying a "strict two-part test." *McBeth v. Himes*, 598 F.3d 708, 716 (10th Cir. 2010) (citation omitted). The plaintiff must establish that 1) the defendant violated a constitutional right and 2) the right was clearly established at the time of the defendant's conduct. *Courtney v. Oklahoma ex rel., Dep't of Pub. Safety*, 722 F.3d 1216, 1222 (10th Cir. 2013). "If the plaintiff fails to satisfy either part of this two-part inquiry, the court must grant the defendant qualified immunity." *Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1244 (10th Cir. 2008) (quotations omitted). But, if the plaintiff succeeds in carrying his two-part burden, the burden shifts to the defendant to show there are no remaining material issues of fact that would defeat qualified immunity. *Estate of Booker v. Gomez*, 745 F.3d 405, 412 (10th Cir. 2014).

II. BACKGROUND

A. Stay of this Case

*2 In this *Bivens*¹ action, Plaintiff claims that a search of his residence under a search warrant procured and executed by agents of the United States Internal Revenue Service (IRS) violated the First and Fourth Amendments of the

United States Constitution. During the search, agents seized computers, electronic devices, electronic data, financial and legal documents, correspondence, tax literature, and a safe. Plaintiff alleges that Defendant Daza,² a Special Agent with the IRS Criminal Division (IRS CD), violated his constitutional rights because the search was based on a facially invalid, overbroad search warrant. (Compl. (Doc. No. 1) ¶ 18.)

On January 24, 2018, the Court granted Defendants' motion to stay this proceeding to allow the government to pursue its criminal investigation of Plaintiff and others. ORDER GRANTING DEFENDANTS' MOTION TO STAY TIME TO ANSWER AND TO STAY LITIGATION (Doc. No. 28). In the stay motion, Defendants asserted that a criminal investigation was initiated because the IRS believed Plaintiff was using "a variety of third party entities, including trusts and other entities, in furtherance of tax evasion." (Mot. (Doc. No. 17) at 2.) The Court granted a stay until April 1, 2018 but ordered Defendants to file a status report on March 1, 2018. In the status report (Doc. No. 36), Defendants renewed the request for a stay of six months or until the criminal investigation is completed. In his response to the status report, Plaintiff asked the Court not to extend the stay and to allow him to discover the identity of unknown Defendants so Plaintiff could serve those Defendants.

The stay ended on April 1, 2018. *Id.* This Motion was filed on April 6, 2018. On April 9, 2018, the Court held a hearing and ordered Defendants to respond to the Motion. *See* DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. No. 43). Plaintiff has filed a Reply brief. *See* PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PARTIAL SUMMARY JUDGMENT MOTION (Doc. No. 44).

B. Issuance of the Warrant; Motion for Return of Property On March 10, 2017, Magistrate Judge William P. Lynch issued the warrant in Case No. 17-mr-0186 (Warrant Case). On March 14, 2017, IRS agents executed the warrant and a warrant return was filed on March 16, 2017 containing an inventory of items seized from Plaintiff's residence. (Warrant Case Doc. No. 3). On March 20, 2017, Magistrate Judge Karen B. Molzen granted Defendants' motion to seal the warrant application and affidavit. (Warrant Case Doc. Nos. 4 & 5.)

On April 18, 2017, Plaintiff filed a Motion for Return of Property Seized Under Warrant (Warrant Case Doc. No. 6). *See* Fed. R. Crim. P. 41(g). On October 10, 2017, Magistrate Judge Jerry H. Ritter denied the motion without prejudice for lack of jurisdiction to allow Plaintiff to file a civil action for return of his property or to amend the Complaint in this case. (Warrant Case Doc. No. 14.) Plaintiff appealed Magistrate Judge Ritter's ruling to the Tenth Circuit Court of Appeals, but the appeal was dismissed for lack of jurisdiction. *In the Matter of the Search of 2124 Altura Verde Ln. NE, Albuquerque, NM 87110, Wellington v. United States*, Case No. 17-2205 (10th Cir. Jan. 8, 2018).

Instead of filing a civil action or amending the Complaint, Plaintiff filed a motion to consolidate the Warrant Case with this case. Defendants responded that on February 20, 2018, all of Plaintiff's property had been returned; therefore, the motion had become moot. Finding that the Warrant Case and this case are "dissimilar in purpose and procedure" and that the issue had become moot, the Court denied the motion to consolidate. MEMORANDUM OPINION AND ORDER (Doc. No. 38).

C. Causes of Action

*3 In Plaintiff's FIRST CAUSE OF ACTION (Compl. ¶¶ 46–50), he claims that Defendant Daza and other agents, "collectively agreed to willfully and wantonly ... pursue a search and invasion of plaintiff's privacy and seizure of property they knew would be unlawful." (*Id.* ¶ 47.) Plaintiff further alleges that all Defendants "conducted a general search and seizure, seizing items regardless of whether they were listed in the warrant or not." (*Id.* ¶ 48.) As a result, Plaintiff alleges that the Defendants willfully "violated his Fourth Amendment right to be free from unreasonable searches and seizures, and agreed and conspired with each other to do so." (*Id.* ¶ 49.)

In his SECOND CAUSE OF ACTION (Compl. ¶¶ 51–54), Plaintiff alleges that the seizure of his "computer/electronic records not only violated the Fourth Amendment, but even Fed. R. Crim. P. 41 itself." (Compl. ¶ 52.) Plaintiff alleges that Defendant Daza "caused the electronic records to be copied for a later unrestricted search for anything at all." (*Id.* ¶ 53.) Plaintiff claims that the Defendants willfully "violated plaintiff's Fourth Amendment right to be free of unreasonable searches and seizures by seizing the electronic equipment and intend on continuing to violate the right by copying

the electronic data for their later unrestricted browsing for absolutely anything at all.” (*Id.* ¶ 54.)³

In the FIFTH CAUSE OF ACTION, Plaintiff claims that Defendant Daza and the other defendants “collectively agreed to wilfully (sic) and wantonly disregard any such limitations, and to search for and seize publications based solely on their content and ideas they expressed. The defendants obtained a warrant which contained language they knew left it entirely to the discretion of the searching agents what was to be seized, and they treated it like a general warrant.” (*Id.* ¶ 60.) According to Plaintiff, Defendants’ actions were done “in plain and clear violation of First Amendment protected Free Speech and Press constitutional limitations.” (*Id.* ¶ 61.) Plaintiff claims that Defendant Daza has retained the materials “in order (at least in part) [to] engage in censorship of the materials.... [i]n plain and clear violation of the First Amendment Free Speech and Press constitutional limitations.” (*Id.* ¶ 62.)

In his SIXTH CAUSE OF ACTION (Compl. ¶¶ 63–65), Plaintiff alleges that the Defendants collectively agreed to willfully and wantonly “disregard any such limitations and search for and seize any and all information about plaintiff’s ‘contacts’ and people he may know, regardless of purpose. This included family, friends, acquaintances, political affiliations, and anyone plaintiff might know for any purpose.” (*Id.* ¶ 64.) In addition, Plaintiff claims that “defendants obtained and executed a warrant which contained language they knew was not anywhere near narrow enough to comply with the precision required by the First Amendment when Associational rights are involved. They then treated it like a general warrant, seized whatever they liked, and turned over the seized items to defendant Daza.” (*Id.* ¶ 65.)

D. WARRANT

1. Undisputed Material Facts

*4 The SEARCH AND SEIZURE WARRANT (warrant) states “[a]n application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the ... District of New Mexico See Attachment A.” Attachment A contains a legal description of the residence, describes the residence by color, and has pictures of the residence. (Compl. Ex. A, Attachment A.) In the warrant, Magistrate Judge Lynch found “that the affidavit(s), or any recorded testimony, establish probable

cause to search and seize the person or property described above [in Attachment A], and that such a search will reveal ... the property to be seized [described in] Attachment B.” (*Id.*)

Attachment B contains an in outline of items subject to seizure:

I. Items to be Seized.

The following items, records, documents, files or materials, in whatever form, including handmade or mechanical form (such as printed, written, handwritten, or types); photocopies ... electronic, and magnetic form (such as tapes, cassettes, hard disks, floppy disks, diskettes, compact discs, CD-ROMs, DVDs, optical discs, Zip cartridges, printer buffers, smart cards, flash drives, external and internal hard drives, or electronic notebooks, or any other storage medium, are to be seized and searched for the evidence, fruits and instrumentalities of crimes relating to violations of 26 U.S.C. § 7201 (Attempt to Evade Taxes)⁴ and 18 U.S.C. § 371 (Conspiracy [to Defraud the United States]),⁵ for the time-period of January 1, 2005, through the present, to specifically include:

1. Books and records pertaining to National Business Services, New Mexico Limited Liability Companies (NM LLCs), Stacy Underwood, David Wellington, Jerry Schrock, Michelle Schrock or associated companies/parties;

a) Originals and copies of all income tax returns and their associated forms, work papers, information sheets and taxpayer records.

b) Business income and expense records such as receipt books, journals, ledgers, billing records and invoices, and receipts, deposit slips, cancelled checks, bank statements, payroll records, cash receipts and cash expense journals, worksheets, schedules, cashier checks, money orders, investment accounts, financial statements, income statements, balances (sic) sheets, trial balances, accounting records, records of purchases and revenues received, and payroll records.

c) Bank, financial institution, and investment account records, checkbooks, statements, deposit slips, canceled checks, cashier’s checks, loan records,

financial statements, credit reports, records of wire transfer, and keys to safe-deposit boxes.

d) Documents constituting, listing or describing domestic trusts, limited liability companies (LLCs) or other foreign entities created on behalf of any of the above mentioned individuals or businesses, including articles of incorporation, articles of organization, operating agreements, certificates or licenses of incorporation, bylaws, corporate resolutions, trust agreements, lists of directors, officers, managers or trustees and abstracts of memoranda.

e) Correspondence between the above mentioned individuals or businesses, and accountants, bookkeepers or other business associates. Address books, phone books, personal calendars, daily planners, journals, itineraries, rolodex indices and contact lists.

f) All copies of Internal Revenue Service publications and documents, including correspondence, manuals, and notices.

g) Tax defier paraphernalia⁶ to include books, instruction manuals, and how to pamphlets.

h) Checks, cashiers (sic) checks, money orders and/or wire transfers.

i) Safes and keys to safe deposit boxes, documents related to safe deposit boxes.

j) Any passwords, password files, test keys, encryption codes or other information necessary to access the computer equipment, storage devices or data.

***5** 2. For any computer, computer hard drive, or other physical object upon which electronic data can be recorded (hereinafter, "COMPUTER") that is called for under paragraph 1 of this attachment:

a) Evidence of who used, owned, or controlled the COMPUTER at the time the things described in this warrant were created, edited, or deleted, such as logs, registry entries, configuration files, saved usernames and passwords, documents, and browsing history, user profiles, email, email contacts, "chat," instant messaging logs, photographs and correspondence;

b) Evidence of software that would allow others to control the COMPUTER, such as viruses, Trojan horses, and other forms of malicious software, as well as evidence of the presence or absence of security software designed to detect malicious software;

c) Evidence of the lack of such malicious software;

d) Evidence of the attachment to the COMPUTER of other storage devices or similar containers for electronic evidence;

e) Evidence of counter-forensic programs (and associated data) that are designed to eliminate data from the COMPUTER;

f) Evidence of the times the COMPUTER was used;

g) Passwords, encryption keys, and other access devices that may be necessary to access the COMPUTER;

h) Documentation and manuals that may be necessary to access the COMPUTER or conduct an examination of the COMPUTER;

i) Contextual information necessary to understand the evidence described in this attachment;

j) Computer software which may have been used to create, access, modify or to otherwise interact with the stored files. Computer software is digital information which can be interpreted by a computer and any of its related components to direct the way they work. It commonly includes the operating systems, applications (like word-processing, graphics, or spreadsheet programs, utilities, compilers, interpreters, and communications programs;

k) Any peripheral equipment used to facilitate the transmission, creation, display, encoding or storage of records, including word processing equipment, modems, docking stations, monitors, printers, plotters, encryption devices, and optical scanners.

(Compl. Ex. A, Attachment B.)

***6** In part II, the warrant defined "Records," "Documents," and "Information" as including

all of the foregoing items of evidence in whatever form and by whatever means they may have been created or stored, including any form of computer or electronic storage (such as hard disks or other media that can store data); any handmade form (such as writing, drawing, painting); any mechanical form (such as printing or typing); and any photographic form (such as microfilm, microfiche, prints, slides, negatives, videotapes, motion pictures, photocopies).

(*Id.*)

On the morning of March 14, 2017, agents from the IRS arrived at Plaintiff's residence and executed the warrant. (Mot. UMF 5.) Numerous items, including computers, an iPad, several flash-drive data storage devices, documents, and tax publications were seized. (*Id.*) An Inventory Listing of All Items Seized at Search Warrant Site (Inventory) signed by Defendant Daza, was filed in Case No. 17 MR 186 (Doc. No. 3). The Inventory listed items seized at Plaintiff's residence: legal documents, Prime Marsa LLC documents, data extrusion from a cell phone, iPad, Dell computers, Sandisks, thumb drives, laptop, 2 electronic tablets, hard drives, research on tax law, promotional materials, booklets, form letters to the IRS, documents related to National Business Services, LLC, W2 High Plains, Bioenergy LLC, bank deposit slips and checks, LLC incorporation documents for Arrowhead Properties, Point Blank Teaching, New Age System LLC, Northern Lights Leasing (sic), Mortgage Freedom Group, Big Dipper Properties, client letters, website set up notes, abusive tax promotions disc, client court files, Pueblo Bonito records, note pad with possible client names, ABC Holding Trust Documents, Correspondence with clients (Ozark Pure Trust, Solutus, LLC, LG Kendrick, LLC), Power of Attorney signed by Monica Wellington, correspondence to Fannie Mae questioning authority, court documents between Wellington and mortgage company, Safe, information for operating agreements, ledger, diary, emails, and printouts of purchases. (*Id.*)

2. Disputed Material Facts

The government disputes Plaintiff's assertions about Defendant Daza's application for the search warrant, the motion to seal the warrant application and affidavit, and whether the warrant had the affidavit attached to it when it was executed. Although the government concedes that Defendant Daza applied for the warrant and submitted an affidavit to Magistrate Judge Lynch, the government disputes Plaintiff's allegation that Defendant Daza filed the motion to seal the affidavit. Defendants dispute Plaintiff's allegation that Defendant Daza "reviewed the warrant, without the affidavit, and despite his knowledge the warrant would be facially deficient without the affidavit, decided it should be executed anyway, and arranged with others for its execution." (Mot. at 3 (citing Compl.).) The Court takes judicial notice of the docket in the Warrant Case that shows the warrant was executed and the Inventory filed before the motion to seal the affidavit was filed. Based on this record, there is a material factual dispute over whether the warrant and the affidavit were combined into one document when the warrant was executed because Plaintiff presented no admissible evidence establishing his allegation that the warrant was executed without the affidavit.⁷

III. DISCUSSION

A. Fourth Amendment

*7 The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause ... and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. A search warrant must meet two requirements: first, it must be supported by probable cause, and second, it must describe with particularity "the place to be searched, and the persons or things to be seized." *United States v. Russian*, 848 F.3d 1239, 1244 (10th Cir. 2017) (quoting *Groh v. Ramirez*, 540 U.S. 551, 557 (2004)). "Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *United States v. SDI Future Health, Inc.*, 568 F.3d 684, 702 (9th Cir. 2009). Courts addressing whether a warrant is supported by probable cause must consider the supporting affidavit regardless of its incorporation into the warrant. *United States v. Cooper*, 654 F.3d 1104, 1124 (10th Cir. 2011) ("In determining whether a search warrant is supported by probable cause, this court

reviews the sufficiency of the affidavit upon which a warrant is issued by looking at the totality of the circumstances and simply ensuring that the magistrate had a substantial basis for concluding that probable cause existed.” (quotations omitted).

To survive a challenge to its particularity “[a] warrant need not necessarily survive a hyper-technical sentence diagramming and comply with the best practices of Strunk & White to satisfy the particularity requirement. But it should enable the searcher to reasonably ascertain and identify the things authorized to be seized.” *United States v. Burke*, 633 F.3d 984, 992 (10th Cir. 2011). However, the particularity requirement “must be applied with a practical margin of flexibility, depending on the type of property to be seized, and ... a description of property will be acceptable if it is as specific as the circumstances and nature of the activity under investigation permit.” *United States v. Wuagneux*, 683 F.2d 1343, 1349 (11th Cir. 1982) (collecting cases that interpret particularity in the context of fraud investigations). Reading the warrant with practical flexibility entails an awareness of the difficulty of piecing together the “paper puzzle.” *Id.* at 1349 & n. 4.

To decide whether a warrant is sufficiently particular, “[t]he fourth amendment requires that the government describe the items to be seized with as much specificity as the government’s knowledge and circumstances allow[.]” *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988) (internal quotation marks omitted). And, “the particularity of an affidavit may cure an overbroad warrant.” *Id.* at 603. An affidavit may cure an overbroad warrant, “but only where the affidavit and the search warrant ... can be reasonably said to constitute one document[.]” *Id.* (emphasis added). To constitute one document, the affidavit and the search warrant must be physically connected, and the warrant must expressly incorporate the affidavit by reference. *Id.*

I. Plaintiff’s Probable Cause Challenge

Although the Plaintiff primarily attacks the particularity of this warrant, he also argues that the warrant exceeds the probable cause that may have been established through the application and affidavit. The government argues that the Court cannot make that determination because the sealed affidavit is not available in this record. Therefore, to the extent Plaintiff asks for summary judgment on this basis, the Court will deny the Motion without prejudice.

2. Particularity of the Warrant May Be Cured by the Affidavit

Plaintiff argues that the warrant does not meet the particularity required by the Fourth Amendment, and even if the affidavit was unsealed, the Court cannot consider it to cure any defect in the warrant. Plaintiff avers that “no affidavit accompanied the warrant at the time of execution,” but that statement assumes facts that are not supported with admissible evidence. (Mot. at 6.) At the time of the search, Plaintiff received a copy of the warrant, Attachments A and B, and an inventory of items seized. Plaintiff asserts that because the copy of the warrant given to him at the search did not have the affidavit attached to it, the Court cannot consider the affidavit in a particularity analysis. But, the Tenth Circuit recently rejected a similar argument: “the plain language of the Fourth Amendment requires us to focus solely on the warrant as issued to police rather than any copy given to the person or persons targeted by the search.” *United States v. Pulliam*, 748 F.3d 967, 972–73 (10th Cir. 2014) (rejecting argument that warrant lacked particularity because copy of warrant given to defendant omitted the attachment). Therefore, even though Plaintiff did not receive both the warrant and an attached affidavit at the time of the search, the Court may be able to consider the affidavit if the Court later finds that the warrant in the custody of the agents who did the search had the affidavit attached to it. *Id.*

3. Plaintiff’s Facial Particularity Challenge

*8 Defendant Daza argues that the Court should deny the Motion regardless of whether the affidavit was attached because the structure and the language of Attachments A and B show that this warrant is itself sufficiently particular. Similarly, Plaintiff asks the Court to rule on the particularity of this warrant without the affidavit, and he compares this warrant to cases in which warrants that had no attached affidavits were found insufficiently particular. For example, Plaintiff cites *Leary*, in which the Tenth Circuit analyzed a warrant that had only two limitations: (1) a list containing all types of business records; and (2) a proviso stating the documents had to relate to “the purchase, sale and illegal exportation of materials in violation of federal export laws.” 846 F.2d at 601. The Tenth Circuit held that neither the general reference to federal export laws nor the generic list of business documents sufficiently limited the scope of the

search warrant. *Id.* at 601–603. The government argued that the warrant affidavit cured the defects in the warrant because it recited in detail “the [defendant’s] purchase and attempted export of a Micro-tel Precision Attenuation Measurement Receiver ... to the People’s Republic of China” without a proper license via a “series of ‘front’ companies in Hong Kong.” *Id.* at 594. The Court rejected that argument because there was no evidence that the affidavit was “physically connected” to the warrant, and the warrant did not “expressly refer to the affidavit and incorporate it by reference using suitable words of reference.” *Id.* at 603. Therefore, the Tenth Circuit concluded that the warrant was deficient without the curative effect of the affidavit.

The Tenth Circuit likened the warrant in *Leary* to the warrant found insufficient in *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985). *Id.* at 601. The warrant in *Voss* authorized agents to seize documents and records “[a]ll of which are evidence of violations of Title 18, United States Code, Section 371.” 774 F.2d at 405. In *Voss*, the Tenth Circuit concluded that the conspiracy statute did not constitute “a constitutionally adequate particularization of the items to be seized.” *Id.*

Plaintiff argues that this warrant, like each warrant in *Leary* and *Voss*, merely refers to very broad statutes, followed by a “laundry list of generic common financial documents.” (Mot. at 7.) However, this warrant is worded much differently. This warrant limited the seizure to all books and records pertaining to “National Business Services, New Mexico Limited Liability Companies (NMLLCs), Stacy Underwood, David Wellington, Jerry Schrock, Michelle Schrock or associated companies/parties.” This qualification sentence along with the reference to the tax evasion and conspiracy statutes provide the particularity absent in *Leary* and *Voss*.

Plaintiff also likens this warrant to cases discussed in *Leary*: *United States v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982) and *Rickert v. Sweeney*, 813 F.2d 907, 908–09 (8th Cir. 1987). In *Cardwell*, the Ninth Circuit found a warrant impermissibly broad because it allowed a search and seizure of appellants’ business papers that were the instrumentality or evidence of violations of the general tax evasion statute. 680 F.2d at 77. The Ninth Circuit disapproved of the warrant’s broad description of records: checks, journals, ledgers, etc. and its lack of any date or subject matter limitation. *Id.* at 78–79. In *Rickert*, the Eighth Circuit found that the warrant lacked sufficient particularity because it broadly described all business records that “are instrumental means and evidence of the commission of offenses in violation of” the general

conspiracy and general tax evasion statutes. 813 F.2d at 908. The IRS agents who executed the warrant confiscated every business record located on the premises. *Id.*

Here, the warrant’s language and structure sets it apart from the cases cited by Plaintiff. Under this warrant, agents could seize an item only if it was (1) evidence, fruit, or an instrumentality of a violation of 26 U.S.C. § 7201 and 18 U.S.C. § 371, for the time period of January 1, 2005 through the present;⁸ and (2) associated with National Business Systems, certain individuals, New Mexico LLCs, or related entities; and (3) located in the Plaintiff’s residence. *United States v. Brooks*, 427 F.3d 1246, 1252 (10th Cir. 2005) (finding that a warrant’s limiting language should be applied through natural reading of sentence within context of the warrant). The Court finds that this warrant satisfies the particularity requirement of the Fourth Amendment because it seeks materials related to certain crimes, over a certain time period, that relate to certain individuals and entities. Thus, this warrant proves sufficient restriction, considering the crimes under investigation. *United States v. Welch*, 291 Fed.Appx. 193, 203 (10th Cir. 2008) (finding that a search and seizure of “computers” was sufficiently contained within the context of the search warrant which directed agents to search for evidence of drug manufacturing). In *Leary*, the court concluded that the warrant made merely an “unadorned reference to a broad federal statute,” and authorized the seizure of “virtually every document that one might expect to find in a ... company’s office” which included documents with no connection to the criminal activity at issue. 846 F.2d at 602. In contrast, this warrant and its lengthy description provide sufficient guidance to the agents executing it, and the Court cannot find that as a matter of law Plaintiff’s Fourth Amendment rights were violated. Therefore, the Court will deny the Motion as to Plaintiff’s First Cause of Action.

4. Search for Electronic Records

*9 “The modern development of the personal computer and its ability to store and intermingle a huge array of one’s personal papers in a single place increases law enforcement’s ability to conduct a wide-ranging search into a person’s private affairs, and accordingly makes the particularity requirement that much more important.” *United States v. Riccardi*, 405 F.3d 852, 863 (10th Cir. 2005) (finding that warrant authorizing general search of computer was invalid because it permitted officers to search anything “from child pornography to tax returns to private correspondence”). With

respect to computer searches, the Tenth Circuit has held that the particularity requirement of the Fourth Amendment demands that “[o]fficers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant.” *United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001). At the same time, the Tenth Circuit has recognized that a computer search “may be as extensive as reasonably required to locate the items described in the warrant.” *United States v. Grimmer*, 439 F.3d 1263, 1270 (10th Cir. 2006) (quoting *United States v. Wuagneux*, 683 F.2d at 1352). Moreover, the Tenth Circuit has adopted a “somewhat forgiving stance” in analyzing particularity challenges to search warrants involving computers. *Grimmer*, 439 F.3d at 1269. See *infra*, *United States v. Potts*, 586 F.3d 823, 833 (10th Cir. 2009).

In the Second Cause of Action, Plaintiff contends that the warrant gave a general authorization to seize any computer or related equipment without any restrictions or limitations. (Mot. at 13.) Again, the structure of Attachment B limits the seizure to computer equipment and electronic data that are evidence of tax evasion and conspiracy. According to Plaintiff, the Tenth Circuit requires more specificity. Plaintiff points to *United States v. Otero*, where the court found that although the warrant limited physical items to specific crimes against specific victims, the paragraphs of the warrant related to the seizure of computer data did not refer to those particular limitations. 563 F.3d 1127, 1132–33 (10th Cir. 2009). The court stated that “the presence of limitations in each of the first five paragraphs but absence in the second four suggests that the computer searches are *not* subject to those limitations.” *Id.* at 1133. The court concluded that even when read in the context of the overall warrant, “the paragraphs authorizing the computer search were subject to no affirmative limitations.” *Id.* This warrant does not suffer from the same infirmity because the overall statutory limitations limit the seizure of computer equipment and data.

In *Mink v. Knox*, another case cited by Plaintiff, the court found that the warrant allowed agents to seize all computer equipment in the subject’s house without any mention of any particular crime to which they might be related, essentially authorizing a “general exploratory rummaging” through the subject’s belongings for any unspecified “criminal offense.” 613 F.3d 995, 1011 (10th Cir. 2010). Unlike the warrants in *Otero* and *Mink*, this warrant limits the search to electronic data related to the crime of tax evasion and conspiracy.

Plaintiff further argues that due to the inherent comingling of so much information in one place, many courts have required warrants to spell out protocols for searchers to follow when examining those items. See, e.g., *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010). In that case, the Ninth Circuit approved of a requirement that warrants specifically state methods for searchers of data from computers: a “warrant application should normally include, or the issuing judicial officer should insert, a protocol for preventing agents involved in the investigation from examining or retaining any data other than that for which probable cause is shown.” *Id.* at 1167.

Plaintiff points to a Tenth Circuit case that recognized the use of such protocols. In *United States v. Potts*, the court approved of computer search protocols in an Addendum to the warrant which set out

*10 a procedure for searching the computer and related equipment by listing “techniques” that may be used. In its first subparagraph, the addendum refers to “surveying” file directories and individual files in language that appears to limit the “survey” to the names or labels attached to directories and files.

586 F.3d at 834. Despite the recognition of the protocols in *Potts*, the Tenth Circuit does not follow other courts that have required warrants to have limiting protocols for computer searches. See generally, *United States v. Christie*, 717 F.3d 1156, 1166 (10th Cir. 2013) (“[I]t is unrealistic to expect a warrant to prospectively restrict the scope of a search by directory, filename or extension or to attempt to structure search methods—that process must remain dynamic.”) (quoting *United States v. Burgess*, 576 F.3d 1078, 1093 (10th Cir. 2009)). Under the standards set out by the Tenth Circuit, this warrant’s lack of specific search protocols for computer data does not violate the Fourth Amendment.

Plaintiff next argues that the warrant impermissibly allowed the seizure of computer “peripheral equipment” such as modems, docking stations, monitors, printers, plotters, encryption devices, and optical scanners, “that could not possibly contain any information.” (Mot. at 14.) This argument has no support in the record, and no evidence

is presented showing that these devices could not possibly contain information related to tax evasion and conspiracy. Thus, the Court will not grant Plaintiff summary judgment on his Second Cause of Action.

B. First Amendment

The First Amendment protects a person's right of association, and privacy in one's associations is an important aspect of that right. *Roberts v. United States Jaycees*, 468 U.S. 609, 622–23 (1984). See *NAACP v. Alabama*, 357 U.S. 449, 458–59 (1958) (allowing association to protect its members' names from exposure to state authorities). The First Amendment also protects individuals from seizure of written materials that espouse politically unpopular beliefs. *Voss*, 774 F.3d at 405. In *Voss*, the Tenth Circuit Court found that an “all records” warrant, which placed no limitation on the documents to be seized, and which resulted in the seizure of items including copies of *The Federalist Papers*, violated both the First and Fourth Amendments. The court determined that if materials sought to be seized are protected by the First Amendment, “the requirements of the Fourth Amendment must be applied with ‘scrupulous exactitude.’” *Id.* (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) and *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

Plaintiff argues that the warrant impermissibly allowed agents to seize records, such as address books, phone books, rolodex indices and contact lists, and to discover information about other “companies/parties” merely because they “associated” with the listed individuals and entities (Mot. at 8–9.) According to Plaintiff, this broad language violated his right to privacy in his personal associations and had “a ‘chilling effect’ on the freedom to associate.” (Mot. at 9.) Plaintiff further maintains that when a search warrant implicates associational rights, it is facially overbroad if not narrowed with “scrupulous exactitude.” (*Id.*) (citing *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958); *NAACP v. Button*, 371 U.S. 415, 428–29 (1963); *Voss*, 774 F.2d at 405; and *National Commodity and Barter Ass’n v. Archer*, 31 F.3d 1521 (10th Cir. 1994)).

*11 Plaintiff fails to recognize the warrant's limitation that all seized items must be evidence of tax evasion and conspiracy. Thus, the warrant does not impermissibly violate First Amendment freedom to associate because the First Amendment does not prevent a search for items that “tend to prove conspirators' associations with each other or other concrete legal violations.” *Voss* 774 F.2d at 408 (Logan, J., concurring).

Plaintiff argues this warrant suffers from another defect found in the *Voss* warrants, which authorized the seizure of all books, records or documents relating to the services and membership lists of the National Commodities and Barter Association (NCBA). *Id.* at 403, 406. In *Voss*, the warrant affidavit described an undercover investigation of the NCBA by IRS agents who believed the organization conducted “financial transactions on behalf of its clients in a manner designed to avoid detection by the IRS.” *Id.* at 403. The Tenth Circuit ruled that the warrant was supported by probable cause because it alleged a scheme of tax fraud; however, the warrant did not meet the particularity requirement because it allowed seizure of NCBA membership lists and records unrelated to tax fraud. “[T]he bulk of the warrant ... authorized government agents to rummage through all of the NCBA's customer files, bank records, employee records, precious metal records, marketing and promotional literature, and more seeking information pertaining to any federal crime.” *Id.* at 405. The court also found that the warrants' violation of the particularity requirement was “made even more egregious by the fact that the search at issue implicated free speech and associational rights.... The search warrant authorized the seizure of indicia of membership in or association with the NCBA as well as books expressing a particular political ideology.” *Id.* The court concluded that the bulk of the warrant allowed the seizure of evidence “whether or not related to tax fraud[.]” *Id.* at 406.

The undisputed facts in this case set it apart from *Voss*. All items seized under this warrant had to be related to tax evasion and conspiracy. This warrant did not allow “the indiscriminate search and seizure of information relating to anyone's association with anyone else—for any reason[.]” (Mot. at 10.) The warrant also did not allow the seizure of address books etc. to find out the identity of “absolutely anyone.” (*Id.*) Nor did the warrant seek to find out the identities of all persons who had associated with Plaintiff for any reason. Instead, the warrant limited its reach to certain persons and types of entities related to those persons who agents had probable cause to believe were engaged in tax evasion and conspiracy. Moreover, Plaintiff did not present evidence that National Business Services is an association that, like the NCBA, espoused political ideals and whose members and records of activities are protected by the First Amendment.

Plaintiff further argues that this search warrant impermissibly allowed the government to seize items, such as books, on the basis of their content. “[T]he constitutional requirement that

warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things are books and the basis for their seizure is the ideas they contain.' " *Voss*, 774 F.2d at 405 (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)). However, this warrant allowed seizure of books and printed material related to tax evasion and conspiracy, and those are instrumentalities of crime that the government is allowed to seize under a valid warrant. *Id.* at 408 (Logan, J., concurring). Plaintiff argues that the reference to "tax defier paraphernalia" "to include instruction manuals, and how to pamphlets" allows the confiscation of items beyond instrumentalities of crime. Again, the structure of the warrant limits the meaning of tax defier paraphernalia (see *supra* note 6) to items evincing crimes. The items listed in the warrant were not identified by their expressive political or ideological content, but by their propensity to aid those who sought to evade taxes. As such, they are not protected by the First Amendment. *Pleasant v. Lovell*, 876 F.2d 787, 790 (10th Cir. 1989) (stating that speech advocating or instructing members how to evade taxes was not protected speech). See *United States v. Goff*, 677 F.Supp.1526, 1540 (D. Utah 1987) (finding that a warrant's reference to financial records and commercial documents was qualified by reference to statute and did not allow the seizure of "First Amendment material"). See also *Frisby v. United States*, 79 F.3d 29, 31-32 (6th Cir. 1996) (finding that the First Amendment did not protect pamphlets and publications expressing defendant's "anti-tax" political beliefs and stating, "the fact that some of the seized property is expressive written material does not insulate it from government seizure where there is, as here, probable cause to believe that it was used to facilitate criminal activity"); *United States v. Stelten*, 867 F.2d 446, 450 (8th Cir. 1989).⁹ The Court finds that "tax defier paraphernalia" in the context of this warrant did not allow the seizure of items that were protected speech. Thus, the Court will deny the Motion as to Plaintiff's Fifth and Sixth Causes of Action.

C. Qualified Immunity

*12 Plaintiff argues that since the undisputed evidence establishes that Defendant Daza violated clearly established

constitutional rights, he should not be protected by qualified immunity from Plaintiff's claims. Plaintiff's argument fails because the Court has found that the warrant meets the particularity requirement of the Fourth Amendment and does not infringe upon Plaintiff's First Amendment rights. As for the assertion that the warrant is overbroad, i.e. that it exceeds the scope of probable cause, the Court cannot rule without examining the warrant affidavit. Moreover, two of the Defendants, Marshall and Hand have not yet been served although the United States has agreed to accept service on their behalf. (Resp. at 23.) In short, Plaintiff's argument that Defendant Daza is not entitled qualified immunity either fails or is premature.

D. Stay

In the Response, Defendant Daza asks the Court to re-impose the stay of proceedings in this case pending resolution of the criminal investigation; however, if the Court orders this case to proceed, Defendant Daza asks that he be allowed 30 days from the date of this ruling to file an answer, a responsive pleading, or a motion. (Resp. at 24.) Plaintiff counters that Defendant Daza should be required to respond to the Complaint and the case should be allowed to proceed, especially since unknown Defendants still remain unidentified and Defendants Marshall and Hand should be served. (Reply at 2.) It is appropriate for the government to answer the Complaint, or to file a responsive pleading or motion, within 30 days of the date of entry of this MEMORANDUM OPINION AND ORDER. Thus, a stay will not be imposed at this time.

IT IS ORDERED that PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. No. 40) is denied and Defendant Daza must file a responsive pleading or motion by July 5, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 2694461

Footnotes

- 1 See *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing that damages are available under 42 U.S.C. § 1983 for claims against federal law enforcement officials).
- 2 To date, Plaintiff has only served Defendant Daza with the summons and Complaint.
- 3 In the THIRD CAUSE OF ACTION (Compl. ¶¶ 55-56), Plaintiff contends that the agents who executed the warrant unreasonably patted him down for weapons in violation of plaintiff's right to be free of unreasonable searches. In the

FOURTH CAUSE OF ACTION (Compl. ¶¶ 57–58), Plaintiff accuses the executing agents of restricting his liberty to move about as he wished in violation of his Fourth Amendment rights. (*Id.*) Since the Third and Fourth Causes of Action do not involve the validity of the warrant, they are not subject to the Motion.

4 "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony[.]" 26 U.S.C.A. § 7201.

5 "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned[.]" 18 U.S.C.A. § 371.

6 In the Motion, Plaintiff argues that the concept of "tax defier paraphernalia" is a vague, undefined term and therefore, what is seized under this description was left "solely to the executing agent's discretion." (Mot. at 10.) The Court disagrees. The word "defier" is defined as "one that defies." See <https://www.merriam-webster.com/dictionary/defier?src=search-dict-hed> (last visited on May 14, 2018). The term "paraphernalia" is defined as "personal belongings" or "articles of equipment." <https://www.merriam-webster.com/dictionary/paraphernalia> (last visited May 14, 2018). In the warrant's outline, "tax defier paraphernalia" is under the general heading of items related to tax evasion or conspiracy and under the subheading of "[b]ooks and records pertaining to National Business Services, New Mexico Limited Liability Companies, Stacy Underwood, David Wellington, Jerry Schrock, Michelle Schrock or associated companies/parties[.]" (Compl. Ex. A, Attachment B.) Therefore, an agent's discretion to seize tax defier paraphernalia, that is articles about defying tax laws, is limited first by the two criminal statutes and by the subheading listing specific individuals and types of entities.

7 Defendant Daza's affidavit is attached to the Response and states,

I wrote the warrant application, warrant, attachments to the warrant and the affidavit in support of the warrant. The affidavit in support of the warrant was based on my personal knowledge, my review of documents and other evidence, and my conversations with other law enforcement officers. Before presenting the search warrant application to the Honorable William P. Lynch, the affidavit was reviewed by the Assistant United States Attorney (AUSA) on the case, by an IRS Criminal Tax Attorney, and by IRA-CI management. The affidavit was provided to the United States Magistrate Judge for review. I relied in good faith on the review of the attorneys and the judge. I believe the warrant to be valid as authorized by Judge Lynch.

(Resp. (Doc. No. 43-2).)

Plaintiff argues that "Defendant Daza's failure to state in his declaration whether or not the affidavit was available" should be subject to a negative inference. In other words, Plaintiff asks the Court to find as an undisputed fact that Defendant Daza's affidavit did not accompany the warrant at the time of execution. However, the Court disagrees. Because Defendant Daza did not accompany the agents who searched Plaintiff's residence, he would not have the personal knowledge necessary to so testify. Thus, the Court will not grant Plaintiff the favorable inference he seeks.

8 Plaintiff argues that this date limitation is unconstitutionally broad since the statute of limitations for tax evasion is six years and for conspiracy three years. However, Plaintiff has not cited, nor has the Court found, case law holding that search warrants must be limited to the statutory limitations period. Plaintiff has cited *Matter of Search of Kitty's East*, 905 F.2d 1367, 1375 (10th Cir. 1990) (finding that date restriction in a warrant was not unreasonable because it was tied to the statute of limitations). In that case, the Tenth Circuit ruled that the trial court erred in ruling that a warrant was overbroad because the warrant was tied to the statute of limitations for some of the crimes under investigation.

Moreover, Plaintiff argues without case law citation that the warrant impermissibly allowed a search of all New Mexico limited liability companies and other "associated companies/parties." In a later paragraph the warrant qualifies its reach to "[d]ocuments constituting, listing or describing domestic trusts, limited liability companies (LLCs) or other foreign entities created on behalf of any of the above mentioned individuals or businesses." (Warrant at 2 ¶ 1.1.c.) An agent questioning what documents should be seized for certain entities need only to read the later paragraph's limitation to avoid a general sweep of irrelevant documents. And, under the preamble paragraph of the warrant, any such documents must be related to the crimes of tax evasion and conspiracy. Plaintiff's argument fails to persuade that this warrant lacks particularity.

9 The court in *Stellen* held that the seizure of documents related to a member of the NCBA contained proof of the way in which the member used the NCBA's financial services to conceal income. The court concluded that this type of business record in no way resembles "indicia of membership," because its evidentiary value was independent of the association it demonstrated. *United States v. Stellen*, 867 F.2d at 451.

Case No. 19-SW-0045
Dept. No. II
DA Case No. 19-1483L

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

IN THE MATTER OF THE SEARCH OF

The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410,

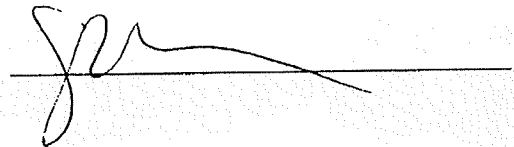
CERTIFICATE OF SERVICE

I certify that I am an employee of the District Attorney for Douglas County, Nevada,
and that I deposited for delivery a true copy of Opposition To Motion For Return Of Property,
To Unseal Search Warrant Application, And To Quash Warrant Or Issue Protective Order,
addressed to:

Dominic P. Gentile, Esq.
Michael V. Cristalli, Esq.
Vincent Savarese III, Esq.
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169

- ☒ U.S. Mail
☒ Reno/Carson Messenger
☐ Hand Delivery
☐ By placing a copy in the pick-up folder in the District Attorney's Office.

DATED this 6th day of April, 2020.



Douglas County District Attorney
Post Office Box 218
Minden, Nevada 89423
(775) 782-9800 Fax (775) 782-9807

AA000084

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Attorneys for Movant James Kostas, Real Party in Interest

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Douglas County
District Court Clerk

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2020 APR 20 AM 10:44

BOBBIE R. WILLIAMS
CLERK

[Signature] DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

IN THE MATTER OF THE SEARCH OF

CASE NO. 19-SW-0045
DEPT. 2

The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410

HEARING REQUESTED

**REPLY TO OPPOSITION TO MOTION OF REAL PARTY IN INTEREST JAMES
KOSTA FOR RETURN OF PROPERTY; TO UNSEAL SEARCH WARRANT
APPLICATION AND SUPPORTING AFFIDAVIT; AND TO QUASH SEARCH
WARRANT, OR IN THE ALTERNATIVE, FOR PROTECTIVE ORDER**

Hearing Date: _____

Hearing Time: _____

Movant JAMES KOSTA, Real Party in Interest in the above-entitled matter ("Mr. Kosta," "Movant"), by and through his attorneys, Dominic P. Gentile, Esq., Michael V. Cristalli, Esq., and Vincent Savarese III, Esq., of the law firm of CLARK HILL PLLC, hereby replies to the State of Nevada's Opposition to Motion of Real Party in Interest James Kosta for Return of Property; to Unseal Search Warrant Applicant and Supporting Affidavit; and to Quash Search Warrant, or in

1 the Alternative, for Protective Order

2 THIS REPLY is made and based upon all papers on file in relation hereto; the exhibits
3 appended hereto; the following Memorandum of Points and Authorities; and any evidence and/or
4 argument that the Court may require or allow at hearing.

5 Dated this 16th day of April, 2020.

6 CLARK HILL PLLC

7  #6170
8 DOMINIC P. GENTILE

9 Nevada Bar No. 1923

10 MICHAEL V. CRISTALLI

11 Nevada Bar No. 6266

12 VINCENT SAVARESE III

13 Nevada Bar No. 2467

14 3800 Howard Hughes Parkway, Suite 500

Las Vegas, Nevada 89169

15 Tel: (702) 862-8300

*Attorneys for Movant James Kosta, Real Party
in Interest*

16 MEMORANDUM OF POINTS AND AUTHORITIES

17 1.

18 STATEMENT OF RELEVANT FACTS

19 The first sentence of the States opposition under Relevant Facts asserts that "On July 29,
20 2019, this Court reviewed the affidavit of Special Agent Evan Miyamoto of the United States
21 Drug Enforcement Agency and found that probable cause exists to believe that evidence of the
22 crimes of Open Murder, a violation of NRS 200.010 through NRS 200.090, a category A felony,
23 and Import of a Controlled Substance, a violation of NRS 453.321, a category B felony, existed
24 as documented on the search warrant signed by the same day." The fact that the States
25 opposition refers to the DEA and their investigation suggests that the evidence in support of the
26 affidavit was specific to drug activity and that the inclusion of a murder investigation was
27 without an evidentiary basis. In fact, the Search Warrant is absent of any evidence relating to
28 murder. All references within the Search Warrant are specific to drug activities. The State is

1 using the DEA investigation to go on a fishing expedition to expand the scope of the warrant to
2 include a murder investigation without the requisite probable cause.

3
4 **2.**

5 **LEGAL ARGUMENT**

6 At the threshold, Mr. Kosta relies upon the arguments set out in the Motion for Return of
7 Property, with particular emphasis on the jurisprudence of *Riley v. California*, 573 U.S. 373 (2014)
8 and *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc).

9 In Its Opposition, the state argues that Kosta fails to establish good cause to have the
10 affidavit unsealed. In citing to NRS 179.045(4) in arguing that “good cause” has not been
11 established the State accuses the movant of a fishing expedition. In truth the inclusion of open
12 murder in the search warrant is an overreach requiring a review of the affidavit in support of the
13 search warrant to challenge its veracity. The State through the association with the DEA has seized
14 substantial electronic property from Mr. Kosta without proper independent oversight.

15 The State in its opposition relies upon *Donrey of Nevada v. Bradshaw*, 106 Nev. 630
16 (1990), wherein the court determined that a balancing test of interests should be used in
17 determining disclosure of a criminal investigation in a public records request. The court weighed
18 certain factors and ordered the disclosure of the investigative reports. The State in its opposition
19 argued that the case sub judice is distinguishable from *Bradshaw* citing *Donrey and Reno*
20 *Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878 (2011). Both the *Bradshaw* case and the *Gibbons*
21 case are inapplicable to this case in that they deal with public records requests and the balancing
22 between public policy and privacy. Neither are relevant to the analysis of probable cause in a
23 search and seizure as is the case at hand.

24 Thus, the sophistry here is patent in the Opposition that James Kosta has the burden of
25 establishing the lack of probable cause but cannot have access to – even under a lawyer’s eyes-
26 only basis – the Application for the Search Warrant in which the demonstration of probable cause
27 must reside. Neither cases cited by the State reach the constitutional questions of fourth
28 amendment protections and probable cause mandates. The Constitution of the United States of
America and the State of Nevada do not permit the seizure and retention of a citizen’s property

1 without the existence of probable cause to believe a crime has been committed and that evidence
2 of that crime will likely be found in the place to be searched. This is not a public records request
3 against a right of privacy.

4 And general assertions that unsealing of an affidavit supporting a search warrant would
5 prematurely reveal an investigative theory or direction which would, in turn, result in its
6 obstruction, which are present in all investigations, are insufficient to meet the States burden to
7 demonstrate a compelling interest in continuing the sealing. *In re Searches and Seizures*, 2008
8 WL 5411772. A person whose property has been seized pursuant to a search warrant have a pre
9 indictment right of access to search warrant materials, including supporting affidavits, grounded
10 in constitutional guarantees of freedom from unreasonable searches and seizures. *In re Search*
11 *Warrants Issued on April 26, 2004*, 353 F.Supp.2d at 591 (affirming the magistrate's order and
12 recognizing "a search subject's pre-indictment Fourth Amendment right to inspect the probable
13 cause affidavit."); *In re Search Warrant for 2934 Anderson Morris Road*, 48 F.Supp.2d 1082, 1083
14 (N.D.Ohio 1999) ("Generally, a person whose property has been seized pursuant to a search
15 warrant has a right under the Warrant Clause of the Fourth Amendment to inspect and copy the
16 affidavit upon which the warrant was issued.); *Up North Plastics, Inc.*, 940 F.Supp at 232 (denying
17 government's pre-indictment motion to keep in place a previously entered order sealing the
18 affidavit in support of a search warrant); *In re Search Warrant Issued August 29, 1994*, 889 F.Supp.
19 at 299 (granting a home and business owner's pre-indictment motion to unseal search warrant
20 materials, stating "the Fourth Amendment right to be free of unreasonable searches and seizures
21 includes the right to examine the affidavit that supports a warrant after the search has been
22 conducted and a return has been filed") *Matter of Wag-Aero, Inc.*, 796 F.Supp. 394, 395
23 (E.D.Wisc. 1992) (vacating sealing order upon finding that the search target's due process rights
24 would be violated by continued sealing of the supporting affidavit).

25 Moreover, neither the Due Process Clauses of the Fifth and Fourteenth Amendment to the
26 Constitution of the United States of America and Article 1 sec. 18 of the Constitution of the State
27 of Nevada do not have an "it's okay for a while" exception to the principle that one cannot be
28 deprived of property without due process. NRS 179.085 provides that where an aggrieved person

1 is seeking the return of property on the grounds that it was seized without probable cause, the
2 “process that is due” is to allow him to make that challenge in accordance with the plain text of
3 that statute. NRS 179.045(4) is supportive of James Kosta’s position. That it permits a district
4 court to exercise its discretion to unseal an affidavit where “good cause” is demonstrated is
5 conceded by the State. NRS 179.085, which although perhaps originally inspired by various
6 iterations over time of Federal Rule of Criminal Procedure 41, is *sui generis*. If the burden is upon
7 one seeking return of their property to come forward with some proof of illegality of the search
8 when it is pursuant to a warrant, what better “good cause” could exist than the result of sealing
9 depriving one of that opportunity?

10 All these constitutional rights and protections are fallacious empty promises where the
11 challenger is deprived of the fundamental tool for challenging probable cause. Were this property
12 seized without a warrant – and therefore no existing Application which to seal – with no criminal
13 charges in being, surely NRS 179.085 would not foreclose an evidentiary hearing to challenge
14 whether the seizing government operatives had probable cause to act in such a manner. In a
15 warrantless seizure, the burden is on the government to establish probable cause, but they have
16 access to the proof. They may be able to assert an informant privilege as to the source’s identity,
17 but certainly not the information upon which they formulated probable cause.

18 Why, then, should it be different when there is a warrant? Recognizing that the Movant
19 has the burden of proof to challenge the existence of probable cause, what justification can be put
20 forth to deny him access to the proof – the Application itself? Further, if NRS 179.045 permits
21 this court to totally unseal the application and the affidavits supporting the issuance of the search
22 warrant, surely it doesn’t foreclose this court to enter an order unsealing the Application(s) for the
23 Search Warrants and handing over a version that redacts from its face any information that might
24 identify confidential State sources or informants or others that the State may deem in need of
25 protection. Setting aside their credibility and reliability, it is the facts themselves that form the
26 basis of probable cause. Thus, it is access to the facts which are needed, not the sources. Such an
27 order would balance the investigations needs with those of Mr. Kosta.

28 ...

CONCLUSION

The Search Warrant for the contents of electronic devices, due to its absence of terms excluding investigative agents from viewing all that the forensic technician views, invites the investigative detectives to rummage through the contents in every application on each device or hardware, find something outside the scope of the warrant and then seek the application of the plain view doctrine. In light thereof, the warrant is fatally overbroad in its scope and should be quashed or, at a minimum, narrowed by this court by way of a protective order to protect James Kosta from illegal search and deprivation of his right of privacy without due process of law. As good cause exists for an opportunity for James Kosta to examine the facts upon which the affidavit for the search warrant relied in order to support his motion, it should be unsealed and provided to him.

The warrant was issued on July 29, 2019, almost nine months ago. Mr. Kosta has a constitutional right to his property. At the very least he is entitled to a review of the evidence supporting its seizure and an opportunity to challenge its sufficiency.

Respectfully submitted this 16th day of April, 2020.

CLARK HILL PLLC


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Tel: (702) 862-8300

Attorneys for Movant James Kosta,

Real Party in Interest

1 **CERTIFICATE OF SERVICE**

2 The undersigned, an employee of Clark Hill PLLC, hereby certifies that on the 16th day of
3 April, 2020, I served a copy of the **REPLY IN OPPOSITION TO MOTION OF REAL PARTY**
4 **IN INTEREST JAMES KOSTA TO UNSEAL SEARCH WARRANT APPLICATION AND**
5 **SUPPORTING AFFIDAVIT; TO QUASH SEARCH WARRANT; AND FOR RETURN OF**
6 **PROPERTY, OR IN THE ALTERNATIVE, FOR PROTECTIVE ORDER ON ORDER**
7 **SHORTENING TIME**, by electronic means, and by placing said copy in an envelope, postage
8 fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

9 Douglas County District Attorney
10 Criminal Division
11 1038 Buckeye Road
12 P.O. Box 218
13 Minden, Nevada 89423

Special Agent Evan Miyamoto
Drug Enforcement Agency
8790 Double Diamond Parkway
Reno, Nevada 89521

14 
15 An employee of CLARK HILL PLLC
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JUN 11 2020

FILED

Case No. 2019-SW-00045

Dept. No. II

Douglas County
District Court Clerk

2020 JUN 11 AM 10:51

BOBBIE R. WILLIAMS
CLERK

A. NEWTON
BY DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

IN THE MATTER OF THE SEARCH OF

The residence and property
located at 1731 Court
Gardnerville, NV 89410

ORDER DENYING MOTION FOR RETURN
OF PROPERTY; TO UNSEAL SEARCH
WARRANT APPLICATION; AND TO QUASH
SEARCH WARRANT, OR IN THE
ALTERNATIVE FOR PROTETIVE ORDER

THIS MATTER comes before the Court on the Motion of Real
Party in Interest James Kosta for Return of Property; to Unseal
Search Warrant Application and Supporting Affidavit; and to Quash
Search Warrant, or in the Alternative, for Protective Order filed
on March 16, 2020. The State filed an opposition on April 6,
2020.¹ Real Party in Interest, James Kosta ("Kosta") filed a
reply on April 20, 2020.

A hearing is unnecessary to the determination of the motion
given Kosta's failure to allege sufficient facts warranting the
taking of evidence and oral argument would not be of assistance to
the Court. NRS 179.085(1); NJDC(e). Good cause appearing, the
Court denies Kosta's requests for relief as follows:

¹ On March 19, 2020, the State filed a Motion to Enlarge Time seeking an
extension of its time to file an opposition. The Motion to Enlarge Time was
unopposed.

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1 Kosta's motion is not supported by affidavit. NJDCR 7.

2 The criminal investigation remains active and no arrests have
3 been made.

4 Discussion

5 Motions for the return of property must be premised on at
6 least one of the five grounds enumerated in NRS 179.085. Kosta
7 alleges that the search warrant was not supported by probable
8 cause. NRS 179.085(1)(c). Kosta does not supply any basis for
9 his claim, which is unsupported by affidavit or other evidence.
10 Instead, Kosta requests that the Court unseal the search warrant
11 affidavit in hopes of revealing that the search warrant was
12 deficient.

13 Once a search warrant affidavit is sealed, it may be unsealed
14 by a court "upon a showing of good cause." NRS 179.045(4). The
15 only cause suggested by Kosta is his curiosity as to what is
16 contained in the search warrant affidavit. Kosta ignores the
17 State's representation that the criminal investigation remains
18 pending and that the good cause to seal the search warrant
19 affidavit has not dissipated. The State's representations are
20 supported by affidavit and are uncontested by Kosta.

21 The Court agrees with the State that the sealing provisions
22 of NRS 179.045 would be meaningless if all that was required to
23 unseal was for a party to assert a naked allegation that the
24 search warrant was unsupported by probable cause. Upon balancing
25 the interests of the State and Kosta and considering the nature of
26 the investigation, Kosta has not demonstrated good cause to unseal
27 the search warrant affidavit. Kosta has not demonstrated that the
28 search warrant was unsupported by probable cause. Kosta is not

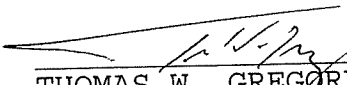
1 entitled to the return of seized property pursuant to NRS
2 179.085(1)(c). Kosta has not supplied any basis to quash the
3 search warrant.

4 As alternative relief, Kosta asks the Court modify the search
5 warrant to alter the manner by which remaining searches of seized
6 property may be conducted. Kosta does not attack the search
7 methodology employed by the State thus far. Kosta does not raise
8 any specific concerns for any specific evidence remaining to be
9 searched.

10 Per the State, the government seized approximately sixty-four
11 items, fifty-nine of which the State is prepared to return to
12 Kosta. Approximately five items "are still being searched
13 pursuant to the warrant issued in this case", indicating to the
14 Court that a search of the remaining items is already underway.
15 State's *Opposition*, p. 11. Kosta's request is untimely and is
16 unsupported by Nevada precedent.

17 **IT HEREBY ORDERED** that the *Motion of Real Party in Interest*
18 *James Kosta for Return of Property; to Unseal Search Warrant*
19 *Application and Supporting Affidavit; and to Quash Search Warrant,*
20 *or in the Alternative, for Protective Order* is **DENIED**.

21 DATED this 11th day of June, 2020.

22
23
24 
25 THOMAS W. GREGORY
26 DISTRICT JUDGE
27

1 Copies served by mail on June 11th, 2020, addressed to:

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5 Clark Hill PLC

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Thomas M. Gregory

District Judge

Ninth Judicial District Court

P.O. Box 218

Elko, Nevada 89423



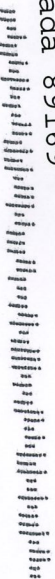
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JUL 13 2020

Douglas County
District Court Clerk

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DONALD R. WILLIAMS
A. NEWTON

BY: [Signature] DEPUTY

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Attorneys for Movant/Appellant James Kosta, Real Party in Interest

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

IN THE MATTER OF THE SEARCH OF

CASE NO. 2019-SW-00045
DEPT. 2

The residence and property located at
1731 Sunset Court
Gardnerville, Nevada 89410

**MOVANT/APPELLANT JAMES KOSTA, REAL PARTY IN INTEREST NOTICE OF
APPEAL OF ORDER DENYING MOTION FOR RETURN OF PROPERTY; TO
UNSEAL SEARCH WARRANT APPLICATION; AND TO QUASH SEARCH
WARRANT, OR IN THE ALTERNATIVE FOR PROTECTIVE ORDER**

TO: ALL PARTIES.

NOTICE IS HEREBY GIVEN that Movant/Appellant James Kosta, Real Party in
Interest, by and through the law firm of Clark Hill PLC, hereby appeals to the Supreme Court of
Nevada from the Order entered on June 11, 2020, by the Ninth Judicial District Court, Douglas
County, Nevada, Movant/Appellant's Denying Motion for Return of Property; to Unseal Search

...

...

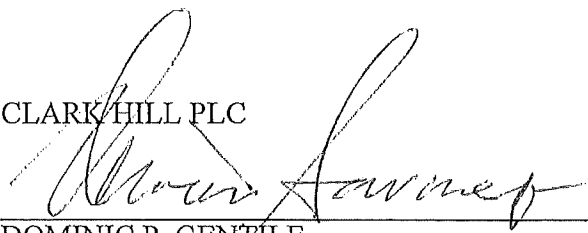
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AA000098

1 Warrant Application; and to Quash Search Warrant, or in the Alternative for Protective Order,
2 attached hereto as **Exhibit "1"**.

3 DATED this 10 day of July, 2020.

4 CLARK HILL PLC

5 
6 DOMINIC P. GENTILE

7 Nevada Bar No. 1923

8 MICHAEL V. CRISTALLI

9 Nevada Bar No. 6266

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12 3800 Howard Hughes Parkway, Suite 500

13 Las Vegas, Nevada 89169

14 Tel: (702) 862-8300

15 *Attorneys for Movant/Appellant James Kosta,*
16 *Real Party in Interest*

1 CERTIFICATE OF SERVICE

2 The undersigned, an employee of Clark Hill PLC, hereby certifies that on the
3 10 day of July, 2020, I served a copy of the MOVANT/APPELLANT JAMES
4 KOSTA, REAL PARTY IN INTEREST NOTICE OF APPEAL OF ORDER DENYING
5 MOTION FOR RETURN OF PROPERTY; TO UNSEAL SEARCH WARRANT
6 APPLICATION; AND TO QUASH SEARCH WARRANT, OR IN THE ALTERNATIVE
7 FOR PROTECTIVE ORDER, by electronic means, and by placing said copy in an envelope,
8 postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

9 Douglas County District Attorney
10 Criminal Division
1038 Buckeye Road
11 P.O. Box 218
Minden, Nevada 89423
12 Facsimile: (775) 782-9807

Special Agent Evan Miyamoto
Drug Enforcement Agency
8790 Double Diamond Parkway
Reno, Nevada 89521

13
14 
An employee of CLARK HILL PLC
15
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EXHIBIT 1

EXHIBIT 1

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JUN 11 2020

FILED

1 Case No. 2019-SW-00045

2 Dept. No. II

Douglas County
District Court Clerk

2020 JUN 11 AM 10:51

BOBBIE R. WILLIAMS
CLERK

A. NEWTON
BY DEPUTY

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5
6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF DOUGLAS
8

9 IN THE MATTER OF THE SEARCH OF
10

11 The residence and property
12 located at 1731 Court
13 Gardnerville, NV 89410
14

ORDER DENYING MOTION FOR RETURN
OF PROPERTY; TO UNSEAL SEARCH
WARRANT APPLICATION; AND TO QUASH
SEARCH WARRANT, OR IN THE
ALTERNATIVE FOR PROTETIVE ORDER

15 THIS MATTER comes before the Court on the Motion of Real
16 Party in Interest James Kosta for Return of Property; to Unseal
17 Search Warrant Application and Supporting Affidavit; and to Quash
18 Search Warrant, or in the Alternative, for Protective Order filed
19 on March 16, 2020. The State filed an opposition on April 6,
20 2020.¹ Real Party in Interest, James Kosta ("Kosta") filed a
21 reply on April 20, 2020.

22 A hearing is unnecessary to the determination of the motion
23 given Kosta's failure to allege sufficient facts warranting the
24 taking of evidence and oral argument would not be of assistance to
25 the Court. NRS 179.085(1); NJDC(e). Good cause appearing, the
26 Court denies Kosta's requests for relief as follows:
27

28 ¹ On March 19, 2020, the State filed a Motion to Enlarge Time seeking an
extension of its time to file an opposition. The Motion to Enlarge Time was
unopposed.

1 Procedural and Factual Background

2 On July 29, 2019, the Court issued a search warrant upon
3 review of a search warrant application/affidavit. The face of the
4 search warrant indicates a finding of probable cause to believe
5 that evidence of the crimes of Open Murder, a category A felony,
6 and Import of a Controlled Substance, a category B felony, was
7 located at a specific residence and/or on Kosta's person.

8 On the same day, the State filed an *Ex Parte Motion to Seal*
9 *Search Warrant Affidavit* pursuant to NRS 179.045(4). The State
10 alleged good cause to seal the search warrant affidavit as
11 follows:

12 The Affidavit details an ongoing investigation,
13 including ongoing police tactics related to that
14 investigation, which may or may not result in
15 charges being brought against an individual, and
16 the release of the information in the warrant and
17 affidavit may compromise this ongoing
18 investigation. Public disclosures of the
19 information contained in the affidavit in support
20 of the search warrant at this time would seriously
21 jeopardize the ongoing investigation, provide an
opportunity to destroy evidence, change patterns
of behavior, notify confederates, or allow
confederates to flee or continue flight from
prosecution. Furthermore, this investigation may
result in applications for additional search
warrants to be executed at other locations in the
near future.

22 *Ex Parte Motion to Search Warrant Affidavit*, p. 1. The Court
23 entered an *Order Granting Motion to Seal Search Warrant Affidavit*.
24 A *Search Warrant Return* was filed on August 6, 2019.

25 On March 16, 2020, Kosta filed the pending *Motion of Real*
26 *Party in Interest James Kosta for Return of Property; to Unseal*
27 *Search Warrant Application and Supporting Affidavit; and to Quash*
28 *Search Warrant, or in the Alternative, for Protective Order.*

1 Kosta's motion is not supported by affidavit. NJDCR 7.

2 The criminal investigation remains active and no arrests have
3 been made.

4 Discussion

5 Motions for the return of property must be premised on at
6 least one of the five grounds enumerated in NRS 179.085. Kosta
7 alleges that the search warrant was not supported by probable
8 cause. NRS 179.085(1)(c). Kosta does not supply any basis for
9 his claim, which is unsupported by affidavit or other evidence.
10 Instead, Kosta requests that the Court unseal the search warrant
11 affidavit in hopes of revealing that the search warrant was
12 deficient.

13 Once a search warrant affidavit is sealed, it may be unsealed
14 by a court "upon a showing of good cause." NRS 179.045(4). The
15 only cause suggested by Kosta is his curiosity as to what is
16 contained in the search warrant affidavit. Kosta ignores the
17 State's representation that the criminal investigation remains
18 pending and that the good cause to seal the search warrant
19 affidavit has not dissipated. The State's representations are
20 supported by affidavit and are uncontested by Kosta.

21 The Court agrees with the State that the sealing provisions
22 of NRS 179.045 would be meaningless if all that was required to
23 unseal was for a party to assert a naked allegation that the
24 search warrant was unsupported by probable cause. Upon balancing
25 the interests of the State and Kosta and considering the nature of
26 the investigation, Kosta has not demonstrated good cause to unseal
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28 search warrant was unsupported by probable cause. Kosta is not

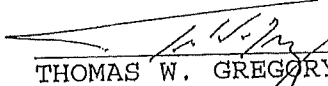
1 entitled to the return of seized property pursuant to NRS
2 179.085(1)(c). Kosta has not supplied any basis to quash the
3 search warrant.

4 As alternative relief, Kosta asks the Court modify the search
5 warrant to alter the manner by which remaining searches of seized
6 property may be conducted. Kosta does not attack the search
7 methodology employed by the State thus far. Kosta does not raise
8 any specific concerns for any specific evidence remaining to be
9 searched.

10 Per the State, the government seized approximately sixty-four
11 items, fifty-nine of which the State is prepared to return to
12 Kosta. Approximately five items "are still being searched
13 pursuant to the warrant issued in this case", indicating to the
14 Court that a search of the remaining items is already underway.
15 State's *Opposition*, p. 11. Kosta's request is untimely and is
16 unsupported by Nevada precedent.

17 IT HEREBY ORDERED that the *Motion of Real Party in Interest*
18 *James Kosta for Return of Property; to Unseal Search Warrant*
19 *Application and Supporting Affidavit; and to Quash Search Warrant,*
20 *or in the Alternative, for Protective Order* is DENIED.

21 DATED this 11th day of June, 2020.

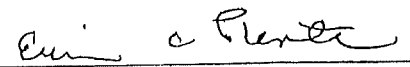
22
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24 
25 THOMAS W. GREGORY
26 DISTRICT JUDGE
27

28
THOMAS W. GREGORY
DISTRICT JUDGE
NINTH JUDICIAL
DISTRICT COURT
P.O. BOX 218
MINDEN, NV 89423

1 Copies served by mail on June 11th, 2020, addressed to:

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THOMAS W. GREGORY
DISTRICT JUDGE
NINTH JUDICIAL
DISTRICT COURT
P.O. BOX 218
MINDEN, NV 89423

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

District Court Clerk

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IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

BOBBIE R. WILLIAMS
CLERK

JAMES KOSTA,

CASE NO.

DEPT.

BY W. Williams DEPUTY

Petitioner,

District Court Case No.: 2019-SW-00045

Department No. 2

vs.

IN THE MATTER OF THE SEARCH OF

The Residence and Property located at 1731
Sunset Court, Gardnerville, Nevada 89410,

Real Party in Interest.

PETITION FOR WRIT OF MANDAMUS

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ATTORNEY'S OFFICE
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Attorneys for Petitioner, James Kosta

Attorney for Respondent

AA000107

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Rules

Fed.R.Crim.P. 41 5

INTRODUCTION AND RELIEF SOUGHT.

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and persons or things to be seized.” The cognate state constitutional counterpart to the Fourth Amendment is embodied in Article 1, Section 18 of the Nevada Constitution. And, like both of those constitutional provisions, NRS 179.045(1) and (6)(a) also provide that warrants authorizing searches or seizures must be based upon a sworn showing of probable cause by affidavit.

A seizure of property occurs when there is some meaningful interference with an individual’s possessory interest in the property. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). It is an undeniable fact that, that seizure of property pursuant to a criminal investigation must be *reasonable*. See *United States v. Martinson*, 809 F.2d 1364 (9th Cir. 1987) (“Person from whom property is seized is presumed to have right to its return, and Government has burden of demonstrating that it has legitimate reason to retain property....”); see also *United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008) (“[W]hen the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or ... the government has abandoned its investigation, the burden of proof changes. The person from whom the property is seized is presumed to have a right to its return, and the government has the burden of demonstrating that it has a legitimate reason to retain the property.” The “government must justify its continued possession of the property....”)

Here, nearly two years since the execution of the search warrant, the Douglas County Sheriff’s office, working in conjunction with the Drug Enforcement Administration, is refusing to release three electronic items of property, which along with the other 78 items have not produced the fruits necessary to bring forth criminal prosecution. The retention of such property must be based on a reasonableness and must demonstrate that steps are being taken and the investigation has not been abandoned. One must question “how long is too long?” when the

1 government has thus far not justified its retention of seized property. Thus, Petitioner seeks the
2 following relief pursuant to this Writ:

3 1. A hearing:

- 4 a. to determine the status of the alleged investigation;
5 b. To determine the reasonableness of the continued retention of Petitioner's property;
6 c. To determine specific steps are being taken to examine the property and ensure the
7 return of Petitioner's property upon conclusion of the investigation

8 **JURISDICTION**

9 Petitioner has no plain, speedy, and adequate remedy at law as no Nevada statute or rule
10 provides for an automatic hearing to determine the status or viability of the pending criminal
11 investigation wherein Petitioner's property is still being withheld. Thus, the proper mode of review
12 is by an original writ petition. *Pengilly v. Rancho Santa Fe Homeowners Assoc.*, 116 Nev. 646,
13 647 (Nev. 2000). A writ of mandamus is available to compel the performance of an act that the
14 law requires as a duty resulting from an office, trust, or station or to control an arbitrary or
15 capricious exercise of discretion or a manifest abuse of discretion. See NRS 34.160; *Int'l Game*
16 *Tech., Inc. v. Second. Judicial Dist. Court*, 124 Nev. 193, 197 (Nev. 2008); *Round Hill Gen.*
17 *Improvement Dist. v. Newman*, 97 Nev. 601, 603-04 (Nev. 1981).

18 **ISSUE PRESENTED**

19 **Whether the Respondent has the right to indefinitely withhold seized property for**
20 **purposes of a pending criminal investigation without demonstrating the**
21 **reasonableness of retaining the property or demonstrating that the investigation has**
22 **not been abandoned.**

23 **PROCEDURAL HISTORY AND RELEVANT FACTS**

24 As previously pled, on July 29, 2019 a Search Warrant was issued by this Court, the
25 Honorable Thomas W. Gregory, District Judge, in the matter of "The residence and property
26 located at 1731 Sunset Court, Gardnerville, Nevada 89410, authorizing a forthwith search by law
27 enforcement officers of the residence and property located at 1731 Sunset Court, Gardnerville,
28 Nevada 89410, the person of James Kosta and further authorizing a forthwith seizure of certain

1 property belonging to Mr. Kosta, which Search Warrant Application and Supporting Affidavit was
2 sealed by Judge Gregory pending further order of this Court.

3 On or about March 16, 2020, Counsel for Mr. Kosta filed a Motion of Real Party in Interest
4 James Kosta for Return of Property; to Unseal Search Warrant Application and Supporting
5 Affidavit; and to Quash Search Warrant, or in the Alternative, for Protective Order. This Honorable
6 Court filed its Order Denying Mr. Kosta's Motion on June 11, 2020. This matter is currently
7 pending before the Nevada Supreme Court.

8 Subsequent to the above-referenced filed motions, on December 22, 2020, Assistant
9 District Attorney Levin advised that all property items would be returned to Mr. Kosta except: (1)
10 one thumb drive; (2) one Macbook Pro; and (3) one external hard drive. *See Exhibit A, 12/22/20*
11 *Email Exchange*. While these items remain outstanding and retained by the Douglas County
12 Sheriff's Office through the DEA or an affiliated Federal Agency, it was alluded to Petitioner's
13 counsel, Mr. Cristalli, that there were issues with decoding and encryption of the remaining items.
14 Now, nearly two years after the execution of the search warrant, not only have these items not been
15 returned absent the fact that exceedingly over seventy-eight (78) items of property seized have not
16 produced the fruits necessary to bring forth criminal prosecution, but there is no way to ascertain
17 the status of the remaining items. Petitioner asserts that the "pending criminal investigation," as
18 given for reason to not return property has been abandoned. Thus, it must necessarily be
19 determined whether steps are being taken in the alleged investigation to ensure the reasonableness
20 of the continued withholding of property from Petitioner.

21 WHY THE WRIT SHOULD ISSUE

22 I. Petitioner Has A Right To Determine Whether Reasonable Efforts Are Being 23 Made To Either Advance The Criminal Investigation Or Return The Seized 24 Property.

25 The Fourth Amendment to the United States Constitution provides that "[t]he right of the
26 people to be secure in their persons, houses, papers, and effects, against unreasonable searches and
27 seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by
28 Oath or affirmation, and particularly describing the place to be searched and persons or things to

1 be seized.” A “seizure” of property occurs when there is some meaningful interference with an
2 individual's possessory interests in . . . [some type of] property. *United States v. Jacobsen*, 466
3 U.S. 109, 113 (1984).

4 Generally, a Motion for Return of Seized Property under Rule 41 is used to seek the return
5 of seized property after an indictment has been issued. *Ramsden v. United States*, 2 F.3d 322, 324–
6 25 (9th Cir. 1993) (citing *Black Hills Institute v. Dept. of Justice*, 967 F.2d 1237, 1239 (8th
7 Cir.1992)). Nonetheless, district courts have the power to entertain motions to return property
8 seized by the government when there are no criminal proceedings pending against the movant.
9 *United States v. Martinson*, 809 F.2d 1364, 1366–67 (9th Cir.1987). These motions are treated as
10 civil equitable proceedings. *Ramsden v. United States*, 2 F.3d 322, 324–25 (9th Cir. 1993). In
11 *Ramsden*, the Court utilized the four factors enumerated in *Richey v. Smith*, 515 F.2d 1239 (5th
12 Cir.1975) to consider a preindictment Rule 41 motion, which are as follows: (1) whether the
13 Government displayed a callous disregard for the constitutional rights of the movant; (2) whether
14 the movant has an individual interest in and need for the property he wants returned; (3) whether
15 the movant would be irreparably injured by denying return of the property; and (4) whether the
16 movant has an adequate remedy at law for the redress of his grievance. *Id.* at 1243–44. Here,
17 Petitioner recognizes that this Court no longer has jurisdiction regarding the return of his property.
18 Thus, the relief requested by the Petitioner is one that places the burden on the Douglas County
19 Sheriff's Office to demonstrate why is it reasonable to withhold Petitioner's property absent
20 criminal charges. Accordingly, these factors will not be addressed before this Court.

21 “When the property in question is no longer needed for evidentiary purposes, either
22 because trial is complete, the defendant has pleaded guilty, or ... the government has abandoned
23 its investigation...[t]he person from whom the property is seized is presumed to have a right to its
24 return, and the government has the burden of demonstrating that it has a legitimate reason to retain
25 the property.” *United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008). Accordingly, the
26 government must *justify* its continued possession of the property. *Id.* The government must rebut
27 the presumption that property ought to be returned by proving a “legitimate reason” for retaining
28

1 the property that is "reasonable [] under all of the circumstances." *See United States v. Kaczynski*,
2 416 F.3d 971, 974 (9th Cir.2005) ("[T]he government has the burden of showing that it has a
3 legitimate reason to retain the property."); *Ramsden v. United States*, 2 F.3d 322, 326 (9th
4 Cir.1993) (explaining that "reasonableness under all of the circumstances must be the test when a
5 person seeks to obtain the return of property."). The Advisory Committee's Note to Rule 41, to
6 which we give "weight in interpreting the Federal Rules of Criminal Procedure," *United States v.*
7 *Bainbridge*, 746 F.3d 943, 947 (9th Cir.2014), confirms the "reasonableness" standard applies to
8 the return of computer files on electronic storage devices, *see* Fed.R.Crim.P. 41, Advisory
9 Committee's Note to 2009 Amendment ("Rule 41(g) ... provides a process for the 'person
10 aggrieved' to seek an order from the court for a return of the property, including storage media or
11 electronically stored information, under reasonable circumstances."). Indeed, if legitimate interests
12 can be satisfied even if property is returned, continued retention would be unreasonable. *Matter of*
13 *Prop. Seized from ICS Cutting Tools, Inc.*, 163 F.R.D. 292 (E.D. Wis. 1995).

14 On July 30, 2019, Mr. Kosta received a Receipt for Property seized in execution of the
15 search warrant at his residence for a total of eighty-one (81) line items seized; some lines
16 representing more than one item being taken. *See* Exhibit B, Receipt of Property. Since,
17 approximately seventy-eight line items have been returned to Mr. Kosta. Three electronic items
18 remain in the possession of the Douglas County Sherriff's Office, which are subject to encryption
19 and decoding.

20 While it has been asserted that Petitioner's property is being withheld "pending criminal
21 investigation," the necessary question to ask is, "how long is too long?" In nearly two years, over
22 seventy-eight (78) items of property have agreed to be returned to Mr. Kosta as not being related,
23 or more appropriately, *not producing the fruits necessary* to bring forth criminal prosecution.
24 While the three remaining items of property, electronic in nature, may be subject to issues with
25 encryption and decoding, it does not and should not allow for the indefinite hold of Petitioner's
26 property for the State with the assistance of government agencies to engage in a fishing expedition
27 in hopes of eventually finding evidence to justify the unsupported Application for Search Warrant
28 and the continuation of a fruitless investigation. While Petitioner does not, by way of this Writ,

1 ask for relief in way of the property being returned as the Court no longer retains jurisdiction over
2 that matter, Petitioner asserts that the new facts established (that the State, with the assistance of
3 government agencies, are unable to access the retained property), the burden is on the Douglas
4 County Sherriff's Office to demonstrate that the continued retention of Petitioner's property is
5 reasonable and the investigation has not since been abandoned; to demonstrate that actionable
6 steps are being taken to access the property seized demonstrating an ongoing investigation.
7 Without this determination, Agents will necessarily be engaged in a fishing expedition in an
8 attempt to secure probable cause to bring forth criminal charges in which it has been unable to do
9 thus far in exceedingly two years and in reviewing approximately seventy-eight items of property
10 seized from Mr. Kosta.

11 CONCLUSION

12 The record conclusively establishes that Mr. Kosta has a right to determine whether
13 reasonable steps are being taken to demonstrate an ongoing pending investigation in which his
14 property is reasonably being retained. Based on the assertion that there is a pending criminal
15 investigation, the property has not been returned to Mr. Kosta. Accordingly, it is requested that
16 this petition be granted and a writ of mandamus issued directing the Douglas County Sherriff's
17 Office and/or Drug Enforcement Administration to demonstrate the steps they have taken to further
18 their investigation in order to determine whether the continued withholding of property is
19 reasonable and justified.

20 RESPECTFULLY SUBMITTED this 12 day of April, 2021.

21 CLARK HILL PLLC

22
23 MICHAEL V. CRISTALLI

24 Nevada Bar No. 6266

25 GIA N. MARINA

26 Nevada Bar No. 15276

27 3800 Howard Hughes Parkway, Suite 500

28 Las Vegas, Nevada 89169

Tel: (702) 862-8300

*Attorneys for Petitioner James Kosta, Real
Party in Interest*

VERIFICATION

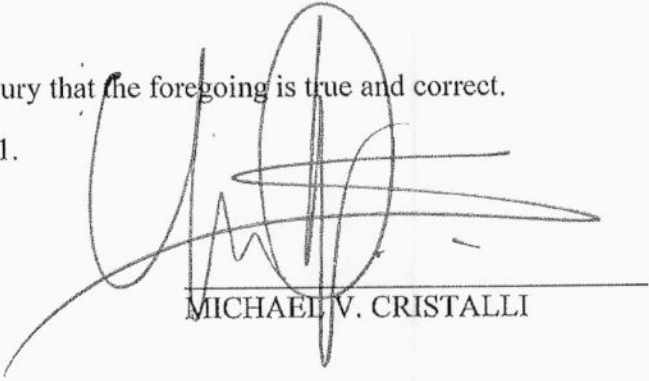
STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Michael V. Cristalli, being first duly sworn, deposes and says:

1. I am the lead counsel for the Petitioner in this instant matter and make this Verification pursuant to NRAP 21(a)(5); I have read the foregoing PETITION FOR WRIT OF MANDAMUS and know the contents thereof; and that same are true of my own knowledge except for those matters therein stated upon information and belief, and as to those matters I believe the same to be true.

2. I declare under penalty of perjury that the foregoing is true and correct.

DATED this 11 day of April 2021.


MICHAEL V. CRISTALLI

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

SUBSCRIBED and SWORN (or affirmed) to before me
this 12th day of April, 2021.

by Michael V. Cristalli
(print name of signer)

NOTARY PUBLIC in and for said
COUNTY and STATE

My Commission Expires: 03-24-2023

My Commission Number: 99-54067-1

NOTARY SEAL



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An employee of CLARK HILL PLLC

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INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION OF EXHIBIT	PAGE NUMBER
A.	12/22/20 Email Exchange Between Michael Cristalli and SA Erik Levin	
B.	Receipt of Property	

EXHIBIT A

EXHIBIT A

Marina, Gia N.

Subject: Kosta Exhibits

From: Levin, Erik <elevin@douglas.nv.gov>

Sent: Tuesday, December 22, 2020 11:22 AM

To: Cristalli, Michael <mcristalli@ClarkHill.com>; carolynaworrell@gmail.com

Subject: RE: Kosta Property Return

[External Message]

Sorry for the delay,

On the list of unreturned items,

We are prepared to return all items except the thumb drive, MacBook, and external hard drive. Some items need to be retrieved from the DEA but Inv. Young believes he will have the items available by mid-January.

On the list of Consumable items,

Those items will be destroyed.

On the items obtained from Linda Norris' separate residence, those were not obtained pursuant to a warrant but with the consent of Ms. Norris.

Erik A. Levin
Chief Deputy District Attorney
Douglas County, Nevada
(775)782-9800

From: Cristalli, Michael <mcristalli@ClarkHill.com>

Sent: Friday, December 18, 2020 11:23 AM

To: Levin, Erik <elevin@douglas.nv.gov>; carolynaworrell@gmail.com

Subject: RE: Kosta Property Return

Erik

You advised that we should hear something this week. It is Friday. The last communication from you was last Friday. Please advise.

Thank you

Michael Cristalli
Member

CLARK HILL PLLC
3800 Howard Hughes Parkway, Suite 600 | Las Vegas, Nevada 89169
(702) 697-7510 (direct) | (702) 862-8400 (fax)
mcristalli@ClarkHill.com | www.clarkhill.com

EXHIBIT B

EXHIBIT B

UNITED STATE DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
RECEIPT FOR PROPERTY

Case ID: 343A-LV-3120191On (date) 7/30/2019

Item(s) listed below were:

- ☒ Collected/Seized
☐ Received From
☐ Returned To
☐ Released To

(Name) James Kosta(Street Address) 1731 Sunset Court Gardnerville, NV(City) GARDNERVILLE, NV

Description of Item(s):

1 - Samsung SSD S/N S1D9NSADC13208X2 - My Passport HDD
S/N WX11E23TN3773 - 2 Goolge Fi - no SIMs
S/N 894932005082218886F
S/N 8949320005104420122F4 - Orico Blck 5GB HDD Enclosure5 - Orico Type C HDD 5GB (Silver)6 - Blk Mini Station Model HD-PZ
S/N: 855478250069437 - Various SIM Cards, Anker Thumb Drive, Plugable USB 3.08 - Corsair GB (Blk) Thumb Drive Huawei, Thumb Drive, Blk iPod9 - 2 Go Pros Black10 - Various Thumb Drives11 - Casio 10.1 Mega Pixels Silver Camera12 - Blue Samsung Cell Phone with Gold Back Cover13 - Black Cell Phone14 - Ultra 2.0 GB Ultra Compact Flash15 - Nexus Huawei Cell Phone16 - iPad Serial F6QR902BG5YM17 - Various SIM Cards, Anker Thumb Drive, PNY 256GB Memory Card

AA000123

UNITED STATE DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION**RECEIPT FOR PROPERTY**

18 - Purple Cover MacBook Pro
S/N C02NP5WWG3QC, model A1398 and charger

19 - CL Marshall Images Flash Drive

20 - SD Card

21 - Pilot's flight log & paper booklet labeled Comcast

22 - Yellow Notepad

23 - Trip Itinerary April 2019

24 - Journals of Gina Kosta (Jornal)

25 - Black Journal 2

2018 Gina Kosta

26 - X-Box Hard Drive

05210058856945

27 - iPad 32 GB - Silver

Serial DKVGK09HDKPJ

28 - Blackberry

IMEI 861831004593642

29 - Black Motorola Phone

Model XT1992-6 Type M373B

30 - Diary

31 - Letter from Gina

32 - ASUS Zen Watch

SN ECNZC000574498

33 - Fenix 58 S/N 5BG003922

34 - Server Tray

35 - Silver Tray

36 - Silver Tray

37 - Laptop Dell 00196-170-145-786

38 - Used needles

39 - SD Cards

40 - SD Card

41 - 2 Hard Drives

SN: WXG1A31P9559

Z8LB10WYCR

AA000124

UNITED STATE DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
RECEIPT FOR PROPERTY

42 - 6 Jump Drives
43 - Hard Drive
S/N Z5007AJA
44 - Hard Drive
S/N K43BT852BE2E
45 - Black Dell laptop w/cable
SN-00144-562-129-888
46 - Box of hard drives
47 - Cell Phone Samsung Black
48 - Cell phone
49 - iPad w/cable
50 - CPU Unit - Synology
51 - CPU Unit Black w/handle
52 - Personal storage Maxtor
300GB S/n: A80SHF9E
53 - Maxtor Personal Storage S/N:Y2PC7CDE
54 - Hard Drive (SSD) and jump drive
55 - Dell Laptop
Service Tag 3Y6VH31
56 - Black CPU Unit Fractal
57 - 3 Journals
58 - Black Laptop with Cable
59 - 3 Journals
60 - Speck Cell Phone
61 - Misc journals and paperwork
62 - Jump drives
63 - External discs - compact flash
64 - Insurance Policies
Gina's Med records
65 - Financial Statements & Misc Document / Indicia
66 - Black Corsair GTX Thumb drive
67 - Mini iPad w blue/tan cover

AA000125

UNITED STATE DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
RECEIPT FOR PROPERTY

68 - Garmin Watch
S/N 35G118703

69 - Files containing death cert & other insurance paperwork. misc paperwork

70 - Google Pixel 2 (Blk)
IMEI 358035081573390

71 - Lexar Thumb

72 - Image of HDD Device
S/N: 11147157021300102

73 - Image of Kosta's Google Pixel 2 Phone

74 - 2 Sets of keys w/ Do Not Duplicate

75 - Lexar flash drive labeled "ghost" Drive 3

76 - 2 Drive external RAID enclosure

77 - Black server

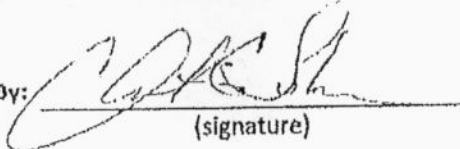
78 - Transcend 16GB SD Card

79 - Dark blue vial w/ black top stopper

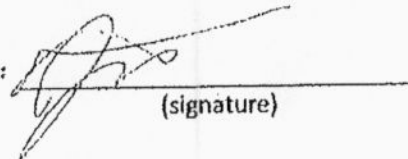
80 - Dark Gray Razer Model # RZ-09-0239 laptop

81 - Dark blue vial w/black topper sealed. Labeled Alexis Smart Brain Drops

Received By:


(signature)

Received From:


(signature)

Printed Name/Title:

Christine Tabares / FBI

Printed Name/Title:

James Kosta

AA000126

Case No. 19-SW-0045

DA 19-1483L

RECEIVED

MAY 03 2021

Douglas County
District Court Clerk

FILED

2021 MAY -3 AM 2:11

BOBBIE R. WILLIAMS
CLERK

BY  DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

JAMES KOSTA,

Petitioner

v.

OPPOSITION TO PETITION FOR
WRIT OF MANDAMUS

IN THE MATTER OF THE SEARCH OF

The Residence and Property located at 1731
Sunset Court, Gardnerville, Nevada 89410

The State of Nevada, by and through Erik A. Levin, Chief Deputy District Attorney,
Douglas County District Attorney's Office, opposes petitioner James Kosta's petition for writ
of mandamus. This motion is based on the following points and authorities.

Petitioner is seeking a writ of mandamus to compel a hearing. At the hearing,
Petitioner seeks, "a. to determine the status of the alleged investigation; b. [t]o determine the
reasonableness of the continued retention of Petitioner's property; c. [t]o determine specific
steps are being taken to examine the property and ensure the return of Petitioner's property
upon conclusion of the investigation." There is no legal or factual basis for issuance of a writ
in this case.

A writ of mandamus may be issued to compel the performance of an act which the law
especially enjoins as a duty resulting from an office, or to compel the admission of a party to
the use and enjoyment of a right or office to which the party is entitled and from which the
party is unlawfully precluded by such inferior tribunal. NRS 34.160. *City of Las Vegas v.*
Eighth Judicial District Court ex rel Clark County, 124 Nev. 540 (2008). A writ of mandamus

1 shall be issued in all cases where there is not a plain, speedy and adequate remedy in the
2 ordinary course of law. NRS 34.170. A writ of mandamus shall be issued upon affidavit, on
3 the application of the party beneficially interested. *Id.* The courts have complete discretion to
4 determine whether to consider writs of mandamus, because writs of mandamus are
5 extraordinary remedies. *See Smith v. District Court*, 107 Nev. 674, 677 (1991). Writs of
6 mandamus are not appropriate if the petitioner has a "plain, speedy and adequate remedy in the
7 ordinary course of law." NRS 34.170, NRS 34.330. NRS 34.160 relating to writs of
8 mandamus states:

9 The writ may be issued by the Supreme Court, the Court of Appeals, a
10 district court or a judge of the district court, to compel the performance of
11 an act which the law especially enjoins as a duty resulting from an office,
12 trust or station; or to compel the admission of a party to the use and
13 enjoyment of a right or office to which the party is entitled and from
14 which the party is unlawfully precluded by such inferior tribunal,
15 corporation, board or person. When issued by a district court or a judge of
16 the district court it shall be made returnable before the district court.

17 Petitioner fails to cite to a single legal authority that compels a hearing, that compels
18 the State to inform him of the status of its investigation, that compels the State to defend the
19 reasonableness of its continued investigation and detention of property upon request of
20 Petitioner, or that compels the State to inform Petitioner of the specific steps being taken to
21 examine the seized property. Instead, Petitioner cites to a number of federal cases addressing
22 federal application of Federal Rule of Criminal Procedure (FRCP) 41(g)¹. FRCP 1(a)(1) states,
23 "[t]hese rules govern the procedure in all criminal proceedings in the United States district
24 courts, the United States courts of appeals, and the Supreme Court of the United States."
25 While FRCP 1(a)(2) states, "[w]hen a rule so states, it applies to a proceeding before a state or
26 local judicial officer," no such provision is included with FRCP 41(g). Further, though they
27 may be instructive, none of the federal court decisions cited by petitioner are binding on this
28 Court and, therefore, cannot form a basis to compel the State to do any of the actions alleged
29 by Petitioner. *Blanton v. North Las Vegas Mun. Court*, 103 Nev. 623, 633 (1987).

¹ Formerly FRCP 41(e).

1 To be clear, Petitioner is not even seeking return of the seized property in question. *See*
2 Petition at 5-6. Petitioner is seeking a hearing to require the State to disclose to Petitioner
3 details of its investigation. Petitioner cites no legal authority compelling the State to do this
4 and therefore mandamus is not an appropriate remedy.

5 Ultimately, Petitioner is seeking to obtain the return of seized property. Petitioner has a
6 plain, speedy and adequate remedy in the ordinary course of law through the authority of NRS
7 179.085. Petitioner filed such a motion in March 2020. The motion was denied and, as
8 petitioner acknowledges, that decision is on appeal in the Nevada Supreme Court. An adverse
9 decision on a motion filed pursuant to NRS 179.085 does not provide grounds for an
10 extraordinary writ.

11 **Conclusion**

12 Mandamus is an extraordinary remedy issued to compel the performance of an act
13 which the law especially enjoins as a duty resulting from an office. Petitioner has cited no
14 authority compelling the performance of the acts he seeks to have the State perform. Further,
15 Petitioner has, and has utilized, a plain, speedy and adequate remedy in the ordinary course of
16 law under NRS 179.085. Therefore, the petition in this matter should be denied.

17
18 DATED this 2 day of May, 2021.

19 MARK B. JACKSON
20 DISTRICT ATTORNEY

21 By: 

22 Erik A. Levin
23 Chief Deputy District Attorney
24 Post Office Box 218
25 Minden, Nevada 89423
26 (775)782-9800
27
28

Case No. 19-SW-0045

DA 19-1483L

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN THE COUNTY OF DOUGLAS, STATE OF NEVADA

JAMES KOSTA,

Petitioner

v.

CERTIFICATE OF SERVICE

IN THE MATTER OF THE SEARCH OF

The Residence and Property located at 1731
Sunset Court, Gardnerville, Nevada 89410

I certify that I am an employee of the District Attorney for Douglas County,
Nevada, and that I deposited for delivery with U.S. Mail, a true copy of the
opposition to petition for writ of mandamus, addressed to:

Clark Hill, PLLC
Michael V. Cristalli
Gia N. Marina
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169

DATED this 3rd day of May, 2021.



Case No. 2019-SW-00045

Dept. No. II

RECEIVED

APR 20 2021

Douglas County
District Court Clerk

FILED

2021 APR 20 PM 4:30

BOBBIE R. WILLIAMS
CLERK

C. WALKER
BY _____ DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

JAMES KOSTA,

Petitioner,

vs.

ORDER SETTING TIME TO OBJECT
AND/OR ANSWER

IN THE MATTER OF THE SEARCH OF

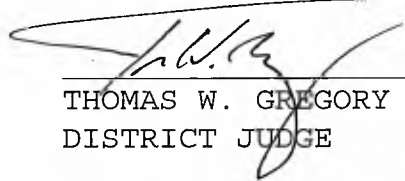
The Residence and Property
located at 1731 Sunset Court,
Gardnerville, Nevada 89410,

Respondent.

Petitioner filed a *Petition for Writ of Mandamus* on April 12,
2021. Respondent shall have until May 12, 2021 to file any
objection and/or answer.

IT IS SO ORDERED.

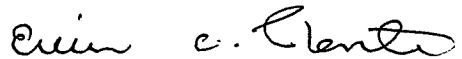
DATED this 20th day of April, 2021.


THOMAS W. GREGORY
DISTRICT JUDGE

Copies served by mail/ hand delivery on April 20th, 2021,
addressed to:

Michael V. Cristalli, Esq.
Gia N. Marina, Esq.
3800 Howard Hughes Parkway,
Suite 500
Las Vegas Nevada, 89169
(mail)

Erik A. Levin, Esq.
Douglas County District
Attorney's Office
P.O. Box 218
Minden, Nevada 89423
(hand delivery)


Erin C. Plante

RECEIVED

MAY 28 2021

FILED

Case No. 2019-SW-00045

Douglas County
District Court Clerk

Dept. No. II

2021 MAY 28 PM 4:07

DORRIS R. WILLIAMS
CLERK

C. WALKER
DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

JAMES KOSTA,

Petitioner,

vs.

ORDER DENYING PETITION
FOR WRIT OF MANDAMUS

IN THE MATTER OF THE SEARCH OF
The Residence and Property
located at 1731 Sunset Court,
Gardnerville, Nevada 89410,

Real Party in Interest.

THIS MATTER comes before the Court on Petitioner's *Petition for Writ of Mandamus* filed on April 12, 2021. Due to the availability of a plain, speedy and adequate remedy at law, the Court denies extraordinary relief.

A writ of mandate may be issued by a district court to compel the performance of an act which the law especially enjoins as a duty resulting from an office. NRS 34.160. "The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170.

Here, Petitioner's property was seized during execution of a search warrant in 2019. Criminal charges have not been filed. Petitioner seeks a writ of mandamus compelling a hearing to determine the status of the investigation, the reasonableness of

1 the continued retention of his property and to determine specific
2 steps are being taken to examine the property and ensure its
3 return to Petitioner. *Petition*, p. 2, lines 307.

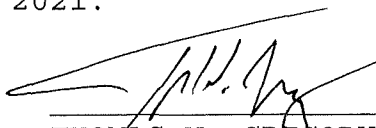
4 Petitioner posits that extraordinary relief is necessary
5 because "there is no plain, speedy, and adequate remedy at law as
6 no Nevada statute or rule provides for an automatic hearing to
7 determine the status or viability of the pending criminal
8 investigation wherein Petitioner's property is still being
9 withheld." *Petition*, p. 2, lines 9-11.

10 The Court disagrees. A person aggrieved by the deprivation
11 of property may move for the return of the property on the ground
12 that "retention of the property by law enforcement is not
13 reasonable under the totality of the circumstances." NRS
14 179.085(1)(e). Such a motion requires the court to "receive any
15 evidence on any issue of fact necessary to the decision of the
16 motion." NRS 179.085(1). The procedure to be employed for
17 receiving evidence and/or having a hearing pursuant to an NRS
18 179.085(1)(e) motion is set out in *In re Execution of Search*
19 *Warrants*, 134 Nev. 799, 800, 804-808 (COA 2018). Because the law
20 provides a plain, speedy and adequate remedy, extraordinary relief
21 is not warranted.

22 Good cause appearing, Petitioner's *Petition for Writ of*
23 *Mandamus* is denied.

24 IT IS SO ORDERED.

25 DATED this 28th day of May, 2021.

26
27
28


THOMAS W. GREGORY
DISTRICT JUDGE

1 Copies served by mail/hand delivery on May 28th, 2021, addressed
2 to:

3 Michael V. Cristalli, Esq.
4 Gia N. Marina, Esq.
5 3800 Howard Hughes Parkway,
6 Suite 500
7 Las Vegas Nevada, 89169
8 (mail)

Erik A. Levin, Esq.
Douglas County District
Attorney's Office
P.O. Box 218
Minden, Nevada 89423
(hand delivery)

Erin C. Plante
Erin C. Plante

RECEIVED

JUN 09 2021

FILED
AFFIDAVIT OF SERVICE

2021 JUN -9 PM 3:09

Douglas County
District Court Clerk

STATE OF NEVADA

) BOBBIE R. WILLIAMS
CLERK

) *[Signature]* CASE NO. 2019-SW-00045

COUNTY OF DOUGLAS

Kristin Wilfert, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Douglas County, and not a party to the within action. This affiant's business address is Post Office Box 218, Minden, NV 89423.

That affiant served the attached ORDER DENYING PETITION FOR WRIT OF MANDAMUS, by placing said document in envelopes addressed to: Michael V. Cristalli, Esq., Gia N. Marina, Esq., 3800 Howard Hughes Parkway, Suite 500, Las Vegas, NV 89169; Douglas County District Attorney, P.O. Box 218, Minden, NV 89423 (hand delivered), which envelopes were then sealed and postage fully prepaid thereon, and thereafter was on June 9, 2021 deposited in the United States mail at Minden, Nevada.

That there is a delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

[Signature]
BOBBIE WILLIAMS, Clerk of the Court

By: *[Signature]*

Court Operations Specialist

RECEIVED

MAY 28 2021

FILED

Case No. 2019-SW-00045

Dept. No. II

Douglas County
District Court Clerk

2021 MAY 28 PM 4:07

DOUGLAS WILLIAMS
CLERK

BY *W. Williams* DEPUTY

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF DOUGLAS

JAMES KOSTA,

Petitioner,

vs.

ORDER DENYING PETITION
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IN THE MATTER OF THE SEARCH OF
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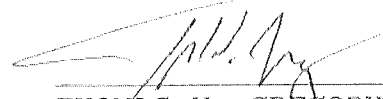
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6 no Nevada statute or rule provides for an automatic hearing to
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8 investigation wherein Petitioner's property is still being
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18 179.085(1)(e) motion is set out in *In re Execution of Search*
19 *Warrants*, 134 Nev. 799, 800, 804-808 (COA 2018). Because the law
20 provides a plain, speedy and adequate remedy, extraordinary relief
21 is not warranted.

22 Good cause appearing, Petitioner's *Petition for Writ of*
23 *Mandamus* is denied.

24 IT IS SO ORDERED.

25 DATED this 28th day of May, 2021.

26
27 
28 THOMAS W. GREGORY
DISTRICT JUDGE

1 Copies served by mail/hand delivery on May 28th, 2021, addressed
2 to:

3 Michael V. Cristalli, Esq.
4 Gia N. Marina, Esq.
5 3800 Howard Hughes Parkway,
6 Suite 500
7 Las Vegas Nevada, 89169
8 (mail)

Erik A. Levin, Esq.
Douglas County District
Attorney's Office
P.O. Box 218
Minden, Nevada 89423
(hand delivery)

Erin C. Plante
Erin C. Plante

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original in file and of record in my office.

DATE 6/1/2021

BOBBIE R. WILLIAMS Clerk of Court
of the State of Nevada, in and for the County of Douglas,

By [Signature] Deputy