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-SW00045
JAMES KOSTA, Appellant, vs. THE STATE OF NEVADA, Respondent.	

On Appeal from Decision and Order of the Ninth Judicial District Court, Douglas County, Nevada, the Honorable Thomas W. Gregory, Denying Appellant's Motion For Return Of Property; To Unseal Search Warrant Application; And To Quash Search Warrant, Or In The Alternative For Protective Order

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons as described in NRAP 26.1(a) and must be disclosed. No corporate other entities are nongovernmental parties in this case. These representations are made in order that the judges of this Court may evaluate possible need for disqualification or recusal.

1. James Kosta
   Petitioner/Appellant;

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3. Michael V. Cristalli (Nevada Bar No.: 6266)
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I.

JURISDICTIONAL STATEMENT

A. Basis Of Appellate Jurisdiction

This Court has jurisdiction to review the Order of the District Court denying Appellant's Motion for Return of Property, To Unseal Search Warrant Application; And To Quash Search Warrant, Or In The Alternative For Protective Order ("Appellant's Motion") pursuant to NRS 179.085; NRAP 3A(a) and 3A(b)(1); and *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440 (1994).

NRS 179.085(1) provides, in pertinent part: "A person aggrieved by an unlawful search and seizure or the deprivation of property may move the court having jurisdiction where the property was seized for the return of property…." And pursuant to NRS 179.085(5): "If a motion pursuant to this section is filed when no criminal proceeding is pending, the motion must be treated as a civil complaint seeking equitable relief."

NRAP 3A(a), provides that "[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." And NRAP 3A(b)(1), provides that "an appeal may be taken from…judgments and orders of a district court in a civil action (which Appellant's Motion constitutes under the foregoing authorities) …[constituting] a final judgment

entered in an action or proceeding commenced in the court in which the judgment is rendered."

Pursuant to the foregoing authorities, the Order appealed from in this matter is an appealable "final judgment" for appellate jurisdictional purposes in that Appellant's Motion had been filed in the District Court in the absence of any pending criminal charges arising out of the searches and seizures upon which it was based (no such charges having ever been brought to this day), and because it "dispose[d] of issues presented…and leaves nothing for future consideration of [the] court." *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440 (1994).

B. Timeliness Of Appeal

The District Court entered its Decision and Order denying Appellant's Motion on June 11, 2020. Notice of Appeal was timely filed on July 13, 2020. And in view of this Court's Order Removing From Settlement Program And Reinstating Briefing, entered on June 16, 2021, this Opening brief is likewise timely filed.

II.
ROUTING STATEMENT

Pursuant to NRAP 17(a)(12), this appeal should be retained by this Court in that this case "raise[s] as . . . principal issue[s] . . . question[s] of statewide public importance." Furthermore, pursuant to NRAP 17(a)(11), this case should be retained by this Court in that this case "raise[s] as . . . principal issue[s] . . . question[s] of

first impression involving the United States or Nevada Constitutions or common law."

Specifically, this matter involves the question of whether, due to the nature and breadth of information contained within modern electronic digital devices, the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and Article 1, §§ 8 and 18 of the Constitution of the State of Nevada require that application of the "plain view" doctrine pursuant to the execution of warrants authorizing searches of the contents of such devices be precluded, or in the alternative, conducted by an independent "filtering team" in accordance with a "search protocol" delimiting the breadth of intrusion attendant to the undertaking of such searches both temporally and by subject matter in order to preclude application of, or at minimum, prevent abuses of the "plain view" doctrine.

Secondly, this matter involves the question of whether, consistent with the due process imperatives of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 8(1) of the Constitution of the State of Nevada, a citizen's possessory interest in personal property seized by state officials, absent any related pending criminal charge or meaningful opportunity to be heard in opposition, can be deprived *ad infinitum* or for an indefinite and exceedingly lengthy period of time based upon nothing more than the mere assertion of a law enforcement

officer that a "continuing criminal investigation" is being expeditiously conducted with respect thereto.

Thirdly, this matter involves the question of whether under such circumstances a court's refusal to order the unsealing of an affidavit in support of a search warrant denies a litigant seeking return of property seized pursuant to warrant a meaningful opportunity to review, evaluate, and be heard with respect to the facial sufficiency and sub-facial veracity of the representations contained within the supporting affidavit essential to its establishment of probable cause to justify the searches and seizures authorized by the warrant and in opposition to the continuing deprivation of his property violates the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and Article 1, §§ 8 and 18 of the Constitution of the State of Nevada.

III.

ISSUES PRESENTED FOR REVIEW

A.

WHETHER THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, §§ 8 AND 18 OF THE CONSTITUTION OF THE STATE OF NEVADA REQUIRE THAT SEARCHES OF ELECTRONICALLY STORED INFORMATION BE DELIMITED IN SCOPE SO AS TO PRECLUDE APPLICATION OR MINIMIZE ABUSES OF THE "PLAIN VIEW" DOCTRINE BY INVESTIGATING OFFICERS?

B.

WHETHER THE DEPRIVATION FOR AN INDEFINITE AND EXCEEDINGLY LENGTHY PERIOD OF TIME OF A CITIZEN'S POSSESSORY INTEREST IN PERSONAL PROPERTY SEIZED BY STATE OFFICIALS BASED UPON THE MERE ASSERTION THAT A CONTINUING CRIMINAL INVESTIGATION IS BEING CONDUCTED VIOLATES THE DUE PROCESS IMPERATIVES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTION 8(1) OF THE CONSTITUTION OF THE STATE OF NEVADA?

C.

WHETHER, BY REFUSING TO ORDER THE UNSEALING OF THE AFFIDAVIT IN SUPPORT OF THE WARRANT AUTHORIZING A SEARCH OF APPELLANT'S RESIDENCE AND PERSON AND THE SEIZURE OF HIS PROPERTY, THE DISTRICT COURT DENIED APPELLANT A MEANINGFUL OPPORTUNITY TO BE HEARD WITH RESPECT TO THE FACIAL SUFFICIENCY AND SUB-FACIAL VERACITY OF THE SUPPORTING AFFIDAVIT AND THUS CHALLENGE THE CONTINUING DEPRIVATION OF HIS PROPERTY IN VIOLATION OF THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, §§ 8 AND 18 OF THE CONSTITUTION OF THE STATE OF NEVADA?

IV.

STATEMENT OF THE CASE

A. Nature of the Case

Pursuant to the Fourth and Fourteenth Amendments to the Constitution of the United States; Article I, Section 18 of the Constitution of the State of Nevada; Nevada Revised Statutes 179.105, 179.085 and 179.045, Appellant James Kosta filed a Motion for Return of Property; To Unseal Search Warrant Application and

Supporting Affidavit; and to Quash Search Warrant, or in the Alternative, For Protective Order in the District Court. The basis of the Motion was to request an Order from the District Court providing Appellant's counsel with: (1) an opportunity to review and evaluate the facial sufficiency and sub-facial veracity of the representations contained in the affidavit in support of the warrant thereupon issued, authorizing a forthwith search of Appellant's person and residence, and the seizure of certain personal property belonging to him, so as to provide him with a meaningful opportunity to be heard with respect to a challenge to its establishment of probable cause to justify issuance of the warrant; and (2) an Order quashing the warrant should the District Court thereupon find that probable cause was indeed lacking. In the alternative, Appellant requested the District Court to enter a Protective Order establishing execution minimization protocols and requiring that an independent "filtering team" conduct the investigative evaluation of the materials and information seized pursuant to the warrant.

The district court ordered, without a hearing, that Appellant's Motion be denied. This appeal follows.

B. Course of the Proceedings Below

On July 29, 2019, a Search Warrant was issued by the Ninth Judicial District Court, the Honorable Thomas W. Gregory, District Judge, in the matter of "The residence and property located at 1731 Sunset Court, Gardnerville, Nevada 89410,"

authorizing a forthwith search by law enforcement officers of: (1) the residence and property located at that address; and (2) the person of Appellant James Kosta; and further authorizing a forthwith seizure of certain property belonging to him. The application and affidavit submitted in support of the warrant was also thereupon ordered sealed by Judge Gregory pending further order of court.

On March 16, 2020, Appellant Kosta filed his Motion for Return of Property; to Unseal Search Warrant Application; and to Quash Search Warrant, or in the Alternative for Protective Order. And on April 9, 2020, the State filed its Opposition thereto.

C. Disposition Below

On June 11, 2020, the District Court, without conducting a hearing, entered its Order denying Appellant's motion; therein stating, in pertinent part:

> "The Court agrees with the State that the sealing provisions of NRS 179.045 would be meaningless if all that was required to unseal was for a party to assert a naked allegation that the search warrant was unsupported by probable cause. Upon balancing the interests of the State and Kosta and considering the nature of the investigation, Kosta has not demonstrated good cause to unseal the search warrant affidavit. Kosta has not demonstrated that the search warrant was unsupported by probable cause. Kosta is not entitled to the return of seized property pursuant to NRS 179.085(1)(c)."

(AA I, 000093-000094).

On July 13, 2020, Appellant Kosta filed Notice of Appeal.

V.

STATEMENT OF FACTS

On July 29, 2019, a Search Warrant was issued by the Ninth Judicial District Court, the Honorable Thomas W. Gregory, District Judge, in the matter of "The residence and property located at 1731 Sunset Court, Gardnerville, Nevada 89410," authorizing a forthwith search by law enforcement officers of: (1) the residence and property located at that address; and (2) the person of Appellant James Kosta; and further authorizing a forthwith seizure of certain property belonging to him. (AA I, 018-022; AA I, 024); AA I, 026-035).[1] The application and affidavit submitted in support of the warrant was also ordered sealed by Judge Gregory pending further order of the court. Now more than two years post-search, Appellant Kosta has had no opportunity whatsoever to examine the representations contained therein for either facial sufficiency to establish either probable cause its sub-facial veracity.

According to the warrant, federal Drug Enforcement Administration Agent Miyamoto had demonstrated by affidavit that there was probable cause to believe that evidence of the crimes of Open Murder, a Category A felony, and Importation of a Controlled Substance, a Category B felony, were located on the property or within the residence owned and occupied by Appellant, located at 1731 Sunset Court, Gardnerville, Nevada, and on the person of Appellant Kosta. (AA I, 000018).

[1] References herein to Appellant's Appendix to this Opening Brief are designated "AA."

On July 30, 2019, Appellant Kosta received a Receipt for Property seized pursuant to its execution, describing a total of eighty-one (81) line items seized; some lines describing more than one item that had been taken. (AA I, 000037-000040).

The undersigned counsel for Appellant Kosta thereafter engaged in several e-mail and telephonic communications with Special Agent Miyamoto, the author of the supporting affidavit, (AA I, 000018), regarding the status of the property (AA I, 000037-000040) and the matter of its return. And on September 24, 2019, Agent Miyamoto sent an email to Appellant's counsel arranging for the return of a portion of the seized property. (AA I, 000042-000049). Through the association of Attorney Justin Bustos of the law firm of Dickinson Wright, counsel for Appellant Kosta were able to procure the return thereof. (AA I, 000051).

However, on or about February 18, 2020, Agent Miyamoto represented to Appellant's counsel that, although the items returned were not relevant to any "ongoing investigation," some of the electronic devices that had been seized were; and therefore, were being retained for that purpose by state and federal investigating agencies. (AA I, 000005).

Thus, on or about December 22, 2020, the office of the Douglas County District Attorney advised Appellant's counsel that all property items would be returned to Mr. Kosta except: (1) one thumb drive; (2) one MacBook Pro; and (3)

one external hard drive. (AA I, 000120). These items remain outstanding and are being retained to the day of filing this Opening Brief – 778 days thus far - by the Douglas County Sherriff's Office as "evidence." This despite the assertion of federal and state law enforcement officers that *they cannot access*, and are therefore unaware of, the existence of any purportedly incriminating information contained therein, allegedly due to decoding and encryption issues. (AA I, 000112; AA I, 000120). And accordingly, Appellant Kosta unsuccessfully sought return of his property by motion brought in the lower court.

Thereafter, on April 12, 2021, Appellant Kosta filed a Petition for Writ of Mandamus in the District Court, therein arguing that he was entitled to a determination by the lower court as to whether reasonable and diligent investigative efforts were in fact being made by investigating agencies to justify the continuing deprivation of the remainder of his property. (AA I, 000106-000117). However, on May 28, 2021, the District Court, without a hearing, denied Appellant's Petition. (AA I, 000132-000135).

And now, *nearly two years after the execution of the search warrant*, these items have yet to be returned even though none of the *other* materials seized (consisting of over seventy-eight (78) items of property) have resulted in the initiation of a criminal prosecution for any offense whatsoever.

VI.
SUMMARY OF THE ARGUMENT

Appellant respectfully submits that the District Court erroneously denied his Motion for Return of Property; to Unseal Search Warrant Application; and to Quash Search Warrant, or in the Alternative for Protective Order. On information and belief, Appellant contends that the instant application and supporting affidavit fail to set forth sufficient, truthful facts and circumstances to establish probable cause to justify the seizure and continuing deprivation of his property as required by the above-cited constitutional and statutory authorities; and therefore, that this Court should enter an Order unsealing the Affidavit of Agent Miyamoto so as to enable Appellant's counsel to evaluate the representations contained therein for both facial sufficiency to establish probable cause and for sub-facial veracity, and thereby provide him with a meaningful opportunity to be heard in support of his request that the remainder of his property be returned to him. Said Order can be for attorney's eyes only, if this Court deems that necessary, so long as Appellant's counsel can discuss allegations and pertinent issues with his client to determine whether a challenge to the veracity of the affiant's sworn factual allegations and thereby assail the good faith of the process by which it was obtained and executed.

Further, and in the alternative, Appellant respectfully maintains that this Court should enter a protective order limiting both the temporal and substantive scope of any invasive examination of the information contained within the electronic devices

that remain the subject of continuing deprivation; preclude application of the "plain view" doctrine with respect thereto; require that any such examination be conducted by an independent "filtering team" pursuant to co-extensive execution protocols; and find that any further detention of Appellant's devices will otherwise constitute both a violation of due process and an unlawful "taking" of private property prohibited by the above-cited state and federal constitutional provisions.

VII.

ARGUMENT [2]

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[2] This Court reviews a district court's decision granting or denying an equitable remedy for abuse of discretion and deference is not owed to legal error. *Wilson v. Happy Creek, Inc*., 135 Nev. 301, 448 P.3d 1106 (2019). As to whether the facts as found allow for equitable relief, *de novo* review applies. *Id.*

NRAP 3A(a) limits the right of appeal to "part[ies] aggrieved" by a district court's decision. A party is so "aggrieved" where the lower court enters a judgment against that party that "causes a substantial grievance, such as the denial of some personal or property right." *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 303, 300 P.3d 724, 726 (2013) (internal quotation marks omitted). A grievance is "substantial" where "the district court's decision imposes an injustice, or illegal obligation or burden, on the party, or denies the party an equitable or legal right." *In re T.L.*, 133 Nev. 790, 406 P.3d 494 (2017).

Both the United States Supreme Court and this Court have long recognized that equitable relief is available when the moving party does not have an adequate remedy at law and will suffer irreparable injury if equitable relief is denied. *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 381 (1992); *Sherman v. Clark*, 4 Nev. 138 (1868). *See also County of Washoe v. City of Reno*, 77 Nev. 152, 360 P.2d 602, 604 (1961); *State v. Second Judicial District Court*,49 Nev. 145, 241 P. 317, 321-322 (1925).

Here, Appellant Kosta has no adequate remedy at law, and the District Court's denial of equitable relief is a final judgment where, as here, no criminal charges are pending and no meaningful opportunity to be heard has been provided.

A.

THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, §§ 8 AND 18 OF THE CONSTITUTION OF THE STATE OF NEVADA SEARCHES OF ELECTRONICALLY STORED INFORMATION BE DELIMITED IN SCOPE; THEREFORE, THE DISTRICT COURT ERRONEOUSLY DENIED APPELLANT'S MOTION.

The Fourth Amendment to the United States Constitution provides: "The 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 the persons or things to be seized." The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" upon a citizen's person, house, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones*, 565 U.S. 400, 406 (2012).

A "seizure" of property occurs when there is some "meaningful interference with an individual's possessory interests in . . . [some type of] property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (the "agents' assertion of dominion and

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And therefore, Appellant Kosta continues to suffer irreparable injury attributable to the effectively unchallengeable deprivation of property implicated in this case.

control over the package and its contents did constitute a 'seizure,'" 466 U.S. at 120; "the decision by governmental authorities to exert dominion and control over the package for their own purposes clearly constituted a "seizure," *id.* at 122 n. 18). And as the United States Supreme Court pointed out in that case, absent the application of exceptional circumstances, under the Fourth Amendment, a "seizure" requires "a warrant, based on probable cause." *id.* at 122.

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.[3]

Here, the lower court erred in refusing to put in place a protective order imposing necessary protocols to appropriately limit the scope of execution and to require the employment of an independent "filtering team." (AA I, 000004-000014). Thus, it is undisputed that the State retains three items of property seized from

[3] It is well-settled that a state's own judiciary may interpret a state constitutional provision to provide greater protection to its citizenry than its federal counterpart requires as interpreted by the Supreme Court of the United States, and that 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).

Appellant Kosta: (1) one thumb drive; (2) one MacBook Pro; and (3) one external hard drive. (AA I, 000120) – all of which items contain digitally-stored information.

Originally, the United States Supreme Court recognized that the basic purpose of the Fourth Amendment was to safeguard both the privacy and security of citizens against arbitrary invasions by governmental officials. *Carpenter v. United States*, ___U.S. ___, 138 S.Ct. 2206, 2213 (2018). Thus, as the *Carpenter* Court explained: for much of our history, cognizable Fourth Amendment violations were "tied to common-law trespass" and focused on whether the government "obtains information by physically intruding on a constitutionally protected area." *United States v. Jones*, 565 U.S. 400, 406 (2012) .

More recently, however, the Court has acknowledged that "property rights are not the sole measure of Fourth Amendment violations." *Soldal v. Cook County*, 506 U.S. 56, 64, (1992). In the landmark case *Katz v. United States*, 389 U.S. 347, 351 (1967), the Court established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain "expectations of privacy" as well. Accordingly, as conceived by the *Katz* Court, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that private sphere generally qualifies as a search and requires authorization by

judicial warrant supported by probable cause. *Smith v. Maryland,* 442 U.S. 735, 740 (1979).

Therefore, an individual has "standing" to bring a Fourth Amendment challenge if he has either a property interest or a reasonable expectation of privacy in the place or thing searched or seized. *Rakas v. Illinois*, 439 U.S. 128, 138-140 (1978); *United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir. 2007). "This expectation is established where the claimant can show: (1) a subjective expectation of privacy . . . [that is] (2) . . . objectively reasonable."

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

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

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, the sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. Data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone. Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception . . . . A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. But those discoveries were likely to be few and far 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 within a particular building.

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

The *Riley* Court further noted that a cell phone search would expose far more to the government than the most exhaustive search of a house because a phone not only contains many sensitive records previously found in the home, but it also contains a vast amount of private information never found in a home in any form. *Id.* at 396-97. Further, the Court observed that it is reasonable to expect that incriminating information will be found on a cellular phone regardless of when the crime occurred, for only an "inexperienced or unimaginative law enforcement officer" could not come up with several reasons to suppose evidence of just about *any* crime could be found on a cell phone. *Id.* at 399 (internal citations omitted) (emphasis added).

Similarly, in *Carpenter v. United States*, ___U.S. ___, 138 S.Ct. 2206 (2018), the Court further held that "the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." Thus, in that case, the Court held that "[g]overnment[ ] seizure of [such] records without obtaining a warrant supported by probable cause violate[s] the Fourth Amendment," (*id.* at 2209), pointing out that "when the Government accesse[s] CSLI from . . . wireless carriers, it invade[s] [a citizen's] . . . reasonable expectation of privacy in the whole of his physical movements." *Id.* at 2219. Again, as it did in *Riley*, the Court

emphasized the "deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach." *Id.* at 2223.

Indeed, search warrants for digital data pose *unique* threats and challenges to Fourth Amendment jurisprudence, as a result of which "settled Fourth Amendment precedent may apply *differently—or not at all*—in the context of digital searches," *United States v. Lustyik*, 57 F. Supp. 3d 213, 229, n.12 (S. D. N.Y. 2014).

Thus, courts have identified the serious risks that digital data searches implicate:

> Broad authorization to examine electronic records ... creates a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant. The problem can be stated very simply: There is no way to be sure exactly what an electronic file contains without somehow examining its contents—either by opening it and looking, using specialized forensic software, keyword searching or some other such technique. But electronic files are generally found on media that also contain thousands or millions of other files among which the sought-after data may be stored or concealed. By necessity, ***government efforts to locate particular files will require examining a great many other files to exclude the possibility that the sought-after data are concealed there***.

In re Search of Google Email Accts. identified in Attachment A, 92 F. Supp. 3d 944, 951 (D. Alaska 2015) (citing *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1176 (9th Cir.2010) (en banc) (per curiam) (overruled in part on other grounds as recognized by *Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018)) (emphasis added).

Therefore, because files containing evidence of a crime may be intermingled with millions of innocuous files, government efforts to locate such information will *necessarily require* examining a great many other files to exclude the mere possibility that the sought-after data are concealed there. *See id.* The risk of the government "happening" upon this information is paramount. Indeed, as explained in *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1176 (9th Cir. 2010): "Once a file is examined . . . the government may claim (as it did in this case) that its contents are in plain view and, if incriminating, the government can keep it," (*id.*), resulting in what the court there characterized as "a breathtaking expansion of the 'plain view' doctrine." 621 F.3d at 1177. "When…the government comes into possession of evidence by circumventing or willfully disregarding limitations in a search warrant, it must not be allowed to benefit from its own wrongdoing by retaining the wrongfully obtained evidence or any fruits thereof." *Id.* at 1174. Thus, the Ninth Circuit determined in that case that the 'plain view' doctrine "*clearly has no application to intermingled private electronic data*." *Id.* (emphasis added). For, as the *en banc* court therein explained: "The process of segregating electronic data that [may be seized] from that which is not must not become a vehicle for the government to gain access to data which it has no probable cause to collect." *Id. Accord e.g., United States v. Galpin*, 720 F.3d 436, 447 (2d Cir. 2013) ("the government may claim that the contents of every file it chose to open were in plain

view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant. There is, thus, a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant. This threat demands a heightened sensitivity to the particularity requirement in the context of digital searches")

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

> To that end, the 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. The procedure might involve, as in this case, a requirement that the 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 computer personnel *will not communicate any information they learn during the segregation process absent further approval of the court*.

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

These judges further pointed out that the process of sorting, segregating, decoding, and otherwise separating data subject to seizure as defined by the search warrant, from all other data, should be "designed to achieve that purpose and that purpose only." *Id.* at F.3d at 1179. Thus, the search protocol should be *designed* to discover data pertaining *only* to that defined within the search warrant and *not* those

pertaining to any other illegality. *Id.* at 1179. To accomplish this task, these judges suggested that issuing magistrates or judges should insist that the government forswear reliance on the plain view doctrine when the government wishes to obtain a warrant to examine electronic/digital data. *Id*. at 1178. And they further suggested that they should also require the government to forswear reliance on *any similar doctrine* that would allow retention of data obtained only because the government was required to segregate data subject to seizure from that which is not. *Id.* "This will ensure that future searches of electronic records do not make a mockery of . . . the Fourth Amendment—by turning all warrants for digital data into general warrants." *Id.* at 1170–71. And, as they emphasized, in the event that the government does not 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*." 621 F.3d at 1178 (internal quotations and citations omitted) (emphasis added).

> Accordingly, as those judges explained:
>
> 1. Magistrate judges should insist that the government waive reliance upon the plain view doctrine in digital evidence cases. *Id.* at 1177–78; *see* maj. op. at 1170–71.
>
> 2. Segregation and redaction of electronic data must be done either by specialized personnel or an independent third party. *Id*. at 1178–79; *see* maj. op. at 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 than that which is the target of the warrant.

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

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

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

As in the case at bar, *Comprehensive Drug Testing* involved a motion for return of property brought in absence of any criminal charge.

In the Matter of the Search of Cellular Telephones, No. 14–MJ–8017–DJW, 2014 WL7793690 (D. Kansas 2014) involved a refusal of the court to approve the government's application for a search warrant to inspect the content of several cellular phones. The Court explained that it has become a reality that over-seizing is an inherent part of electronic search processes which "requires th[e] Court to exercise greater vigilance in protecting against the danger that the process of identifying seizable electronic evidence could become a vehicle for the government to gain access to a larger pool of data that it has no probable cause to collect." *Id.*

Accordingly, at minimum, in the instant case a search protocol limiting the scope of the search to the scope of the warrant should have been imposed by the District Court to ensure that the execution of the warrant did not exceed the limits of the latter.

Thus, as the court recounted in *Cellular Telephones*, it had likewise denied a series of similar previous government applications for search warrants, having stated in *In re Applications for Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts*, No. 13-MJ-8163-JPO, 2013 WL 4647554 (D. Kan. 2013) (denying application for search warrant seeking email communications): "To comport with the Fourth Amendment, . . . warrants must contain sufficient limits or boundaries so that . . . [executing personnel] reviewing the communications can ascertain which email communications and information the agent is authorized to review." 2014 WL7793690 at *1; *See also In re Search of Nextel Cellular Telephone* ("Cellular"), No. 14-MJ-8005-DJW, 2014 WL 2898262 (D. Kan. 2014); *In re Search of premises known as Three Cellphones & One Micro-SD Card*, No. L4-MJ-8013-DJW, 2014 WL 3845157 (D. Kan. 2014).

As the court aptly observed in *Cellular Telephones*, "[n]othing in the Fourth Amendment *precludes* a magistrate from imposing *ex ante* warrant conditions to further constitutional objectives such as particularity in a warrant and the least intrusion necessary to accomplish the search. In cases where this Court has required

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

And as the *en banc* court explained in *Comprehensive Drug Testing*, there is a "crucial distinction between a motion to suppress and a motion for return of property: *The former is limited by the exclusionary rule [with its strictly deterrent rational, and its exceptions], the latter is not*." 621 F.3d at 1172 (emphasis added). For "[s]uppression applies only to criminal defendants whereas the class of those "aggrieved" [by an unlawful search] can be, as this case illustrates, much broader." *Id*. at 1173. And although *Comprehensive Drug Testing* involved a motion for return of property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, which

"by its plain terms . . . authorizes anyone *aggrieved* by a deprivation of property to seek its return" 621 F.3d 1173 (emphasis added), as pointed out *supra*, *the same is true under NRS 179.085*. Indeed, as the Nevada courts have pointed out, "NRS 179.085 largely mirrors Fed. R. Crim. P. 41(g)[4], and where Nevada statutes track their federal counterparts, federal cases interpreting the federal rules can be instructive as persuasive authority. *In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. 799, 805, 435 P.3d 672, 677 (Nev. App. 2018) (citing *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002)); *Middleton v. State*, 114 Nev. 1089, 1107 & n.4, 968 P.2d 296, 309 & n.4 (1998) (citing federal case law interpreting federal rules of criminal procedure that were "largely equivalent" to Nevada statutes).

Likewise, several other circuits have approved the imposition of textually limited protocols with respect to searches of digitally stored information, and have pointed out that if digital evidence is discovered that does not relate to seizures authorized by a search warrant, a second warrant may be needed in order for the officers to further search and seize those unrelated files. *See U.S. v. Triplett*, 684

[4] Fed. R. Crim. P. 41 was amended in 2002 "as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." *United States v. Albinson*, 356 F.3d 278, 279 n.1 (3d Cir. 2004) (internal quotation marks and citation omitted). What was formerly Fed. R. Crim. P. 41(e) became Fed. R. Crim. P. 41(g), but the rule itself stayed largely the same. *Id.*

F.3d 500, 506 (5th Cir. 2012); *U.S. v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001) ("when officers come across relevant computer files intermingled with irrelevant computer files, they 'may seal or hold' the computer pending 'approval by a magistrate of the conditions and limitations on a further search' of the computer"); *U.S. v. Carey*, 172 F.3d 1268, 1275 (10th Cir. 1999); *U.S. v. Turner*, 169 F.3d 84, 87-89 (1st Cir. 1999); *U.S. v. Winn*, 79 F. Supp. 3d 904 (S.D. Ill. 2015); *U.S. v. Kaechele*, 466 F. Supp. 2d 868, 886-87 (E.D. Mich. 2006) ("*Carey* requires that the Government be mindful in searching a computer of the scope of the authorization conferred by a warrant, with additional authorization needed in the event that an inadvertent discovery suggests a basis for a different line of investigation").

Accordingly, Appellant Kosta respectfully submits that the District Court should have entered a protective order both temporally and substantively limiting the scope of any warrant authorizing an invasive search of Mr. Kosta's detained electronic devices; imposing co-extensive execution protocols; and precluding execution by the investigating officers.

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B.

THE DEPRIVATION FOR AN INDEFINITE AND LENGTHY PERIOD OF TIME OF A CITIZEN'S POSSESSORY INTEREST IN PERSONAL PROPERTY, ABSENT ANY RELATED PENDING CRIMINAL CHARGE AND WITHOUT A MEANINGFUL OPPORTUNITY TO BE HEARD IN OPPOSITION, BASED UPON THE MERE ASSERTION THAT A CONTINUING CRIMINAL INVESTIGATION IS BEING CONDUCTED, VIOLATES THE DUE PROCESS IMPERATIVES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, SECTION 8(1) OF THE CONSTITUTION OF THE STATE OF NEVADA; AND THEREFORE, THE DISTRICT COURT ERRONEOUSLY DENIED APPELLANT'S MOTION.

It is axiomatic 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) ("a person from whom property is seized is *presumed* to have the right to its return, and the Government has the burden of demonstrating that it has legitimate reason to retain property….") (emphasis added); *United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008) ("When 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…[t]he 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") (emphasis added); *United States v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008). Indeed, several courts have indicated that the burden also shifts if the government has held property for an extended period of time and does not begin a prosecution.

See Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15, 16 (7th Cir. 1978) (eighteen months); *Application of J. W. Schonfeld, Ltd*., 460 F. Supp. 332, 336 (E.D. Va. 1978) (five months); *Robinson v. United States*, 734 F.2d 735, 737 (11th Cir. 1984) (unreasonably long retention without instituting forfeiture proceedings can constitute due process violation); *Offs. of Lakeside Non-Ferrous Metals, Inc. v. United States*, 679 F.2d 778 (9th Cir. 1982) (rights of owner become more critical the longer the government retains property).

Accordingly, the government must justify its continued possession of the property and rebut the *presumption* that it ought to be returned to its owner by proving a "legitimate reason" for retaining the property that is "reasonable under all of the circumstances." *United States v. Kaczynski*, 416 F.3d 971, 974 (9th Cir. 2005) ("[T]he government has the burden of showing that it has a legitimate reason to retain the property") (emphasis added); *Ramsden v. United States*, 2 F.3d 322, 326 (9th Cir.1993) (explaining that "reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property"). The Advisory Committee's Note to Fed. R. Crim. P. 41, to which appropriate weight should be given in interpreting must the rule itself, confirms that the "reasonableness" standard applies to the return of computer files on electronic storage devices. *United States v. Bainbridge*, 746 F.3d 943, 947 (9th Cir.2014). *See* Fed. R. Crim. P. 41, Advisory Committee's Note to 2009 Amendment ("Rule 41(g) ... provides a process for the

'person aggrieved' to seek an order from the court for a return of the property, including storage media or electronically stored information, under reasonable circumstances").

Thus, NRS 179.085(1)(c), provides: "A person aggrieved by an unlawful search and seizure or the deprivation of property may move the court having jurisdiction where the property was seized for the return of the property on the ground that: There was not probable cause for believing the existence of the grounds on which the warrant was issued." And as NRS 179.085(2) further provides: "If the motion is granted on a ground set forth in paragraph . . . (c) . . . of subsection 1 [lack of probable cause], the property *must be restored* and it must not be admissible evidence at any hearing or trial." (Emphasis added.) *See also* NRS 179.105 ("If it appears that the property [was] taken . . . [without] probable cause for believing the existence of the grounds on which the warrant was issued . . . [it] *shall . . . be restored* to the person from whom it was taken") (emphasis added).

In finding that an ongoing search of the contents of those devices was *already in progress*, and that Appellant's Motion was therefore purportedly "untimely," the lower court's reasoning in refusing to interpose the protective order requested by Appellant fails to take the foregoing authorities into account and is otherwise untenable.

Thus, according to the lower court:

> "Per the State, the government seized approximately sixty-four items, fifty-nine of which the State is prepared to return to Kosta. Approximately five items 'are still being searched pursuant to the warrant issued in this case,' ***indicating to the Court*** that a search of the remaining items is ***already underway***. . .. [And, for that reason,] Kosta's request is untimely and is unsupported by Nevada precedent."

(AA I, 000104) (Citing the State's Opposition to Appellant's Motion at p. 11) (Emphasis added.).

However, even assuming *arguendo* that a search of Appellant's remaining devices was in fact "already underway," Appellant respectfully submits that there is no authority for the proposition that judicial intervention to impose appropriate search protocols with respect thereto is thereby foreclosed, and the lower court cites none. Indeed, the fact that criminal charges have not been filed to this day, despite the extreme, two (2) year duration of the State's "fruitless" retention of the subject devices to date, itself militates against the integrity of the above-quoted, unwarranted *presupposition* of the lower court. *United States v. Martinson,* 809 F.2d 1364, 1369 (9th Cir. 1987) (recognizing that the burden of justification is upon the government if it has retained property for an extended period without filing charges). Which unfounded presupposition of the lower court is further blatantly belied by the clearly inconsistent affirmative assertions of both federal and state law enforcement officers that the search of the devices in question has been *delayed* because they cannot even

access information contained therein, *allegedly due to decoding and encryption issues*. (AA I, 000112; AA I, 000120).

C.

BY REFUSING TO ORDER THE UNSEALING OF THE AFFIDAVIT IN SUPPORT OF THE WARRANT AUTHORIZING A SEARCH OF APPELLANT'S RESIDENCE AND PERSON AND THE SEIZURE OF HIS PROPERTY, THE DISTRICT COURT DENIED APPELLANT A MEANINGFUL OPPORTUNITY TO BE HEARD WITH RESPECT TO THE FACIAL SUFFICIENCY AND SUB-FACIAL VERACITY OF THE SUPPORTING AFFIDAVIT AND THUS CHALLENGE THE CONTINUING DEPRIVATION OF HIS PROPERTY IN VIOLATION OF THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 1, §§ 8 AND 18 OF THE CONSTITUTION OF THE STATE OF NEVADA.

NRS 179.045(4) provides: "upon a showing of good cause, [a judge or] magistrate may order an affidavit [in support of a search and/or seizure warrant] . . . to be sealed. [And that likewise,] [u]pon a showing of good cause, a court may cause the affidavit . . . to be *unsealed*" (emphasis added).

Appellant Kosta maintains that the supporting affidavit in this case must be unsealed in order to provide him with a *meaningful* opportunity to be heard with respect to the reasonableness of the State's ongoing deprivation in this case. And as a result of the denial of such relief by the lower court, Mr. Kosta is now left with no recourse to challenge the seizure and retention of his property for over two (2) years to date. And accordingly, the State's continuing retention of his property has clearly become unreasonable under all the foregoing authorities. And the fact that Appellant

Kosta is otherwise "hamstrung" in his ability to demonstrate either the facial insufficiency or sub-facial veracity of the supporting affidavit constitutes "good cause" upon which to order its unsealing within the meaning of NRS 179.045(4) in order to, at long last, enable him to demonstrate the unreasonableness of that ongoing deprivation of property.

VIII.

CONCLUSION

THEREFORE, for the foregoing reasons, Appellant JAMES KOSTA respectfully prays that this Honorable Court: (1) vacate the Decision and Order of the District Court denying his Motion For Return Of Property; To Unseal Search Warrant Application; And To Quash Search Warrant, Or In The Alternative For Protective Order and remand this matter to the District Court directing the unsealing of the Application and Supporting Affidavit in order that Appellant Kosta may evaluate the contents thereof for both facial sufficiency and sub-facial veracity and thereby acquire a meaningful opportunity to challenge the same by supplemental briefing if necessary; (2) order that the instant warrant thereupon be quashed upon a finding that the supporting affidavit is legally insufficient on any applicable grounds; or (3) in the alternative, that the temporal and substantive scope of its execution be appropriately limited with respect to the items yet retained by investigating authorities remaining seized items as set forth *supra*; together with

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such other and further relief as the Court deems fair and just in the premises.

DATED this 14th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This opening brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman style, and a 14-font size.

I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains 9,981 words, and does not exceed the 30-page limit, starting from the statement of the case.

Finally, I hereby certify that I have read this opening brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

Dated this 14th day of September, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of September, 2021, I served a copy of this completed Opening Brief upon all counsel of records:

- ❑ By personally serving it upon him/her; or
- **X** By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attached a separate sheet with the addresses.)

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