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,

JAMES KOSTA

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 81509

RESPONDENT'S ANSWERING BRIEF

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

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Jurisdictional Statement

This Court lacks jurisdiction to consider this appeal. Appellant's (hereinafter Kosta) reliance on NRAP 3A(b)(1) to establish the jurisdiction of this Court to hear this appeal is misplaced. The order denying Kosta's motion for return of property is not a final judgment and thus, does not fall within NRAP 3A(b)(1). A final judgment is one, "that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court." *Lee v. GNLV Corp*., 116 Nev. 424, 426 (2000). The district court's order from which Kosta appeals, does not preclude future consideration by the court. The denial of Kosta's motion for the return of property was supported by the uncontested affidavit of the State that there was still a pending investigation involving the subject property. AA 94. In fact, Kosta himself submitted documentation based on his communications with one of the investigators, demonstrating that the investigation is still ongoing. AA 46. The pendency of the investigation is a status subject to change and future review by the lower court.

The Court's lack of jurisdiction to hear this appeal is further supported by the persuasive authority of two recent unpublished opinions of this Court that directly address this issue. "Because no statute or court rule permits an appeal from an order regarding defendant's motion for return of property in a criminal matter, this court lacks jurisdiction to consider this appeal. *Castillo v. State*, 106

Nev. 349, 352, 792 P.2d 1133, 1135 (1990)." *Phillips v. State*, No. 82168, 2021 WL 91096 (unpublished disposition, January 8, 2021). *See also Vonseydewitz v. State*, No. 82193, 2021 WL 150577 (unpublished disposition, February 15, 2021).

Routing Statement

This appeal does not present issues that are required to be heard by the Nevada Supreme Court. Therefore, this Court has discretion whether to hear this case or assign it to the Court of Appeals. NRAP 17.

Statement of the Issues

1. Whether the district court erred in denying the defendant's claim that the Fourth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 18 of the Constitution of the State of Nevada and Nevada Revised Statutes required the district court to unseal the application and affidavit in support of the search warrant issued on July 29, 2019, in this case.
2. Whether the district court abused its discretion in denying Kosta's motion for return of property.
3. Whether the district court erred in denying the defendant's claim that the Fourth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 18 of the Constitution of the State of Nevada and Nevada Revised Statutes require a protective order to limit the scope of execution of the search warrant.

Statement of the Case

On March 16, 2020, Kosta filed in the Ninth Judicial District Court, his 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. Appellant's Appendix (AA) 1[1].

On April 6, 2020, the State filed its opposition to motion for return of property, to unseal search warrant application, and to quash warrant or issue protective order. AA 57.

On April 20, 2020, Kosta filed his reply to the State's opposition. AA 85.

On June 11, 2020, the District Court issued its order denying motion for return of property; to unseal search warrant application; and to quash search warrant, or in the alternative for protective order. AA 92.

On July 13, 2020, Kosta filed his notice of appeal.

On April 12, 2021, Kosta filed a petition for writ of mandamus seeking a hearing to determine various issues related the seized property in this case. AA 107-126.

On May 3, 2021, the State filed its opposition to Kosta's petition for writ of mandamus. AA 127.

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[1] Throughout, leading zeroes are omitted when referencing the appendix page numbers.

On May 28, 2021, the District Court issued its order denying Kosta's petition for writ of mandamus. AA 133.

Kosta did not file a notice of appeal of the District Court's order denying his petition for writ of mandamus.

Statement of Facts

On July 29, 2019, the district court reviewed the search warrant application and affidavit at issue in this case and found that probable cause 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 the district court the same day. AA 93. Further, on July 29, 2019, the State filed an ex parte motion to seal the search warrant affidavit pursuant to NRS 179.045(4). AA 93. The district court issued an order granting the motion to seal the search warrant affidavit. AA 93. The State informed the district court in its opposition brief, that it had reviewed the status of the investigation with the lead investigator and the rationale for sealing the search warrant and affidavit in support of the warrant was still valid and relevant. AA 70-71.

Standard of Review

Motions for return of property are governed by NRS 179.085, which states:

> 1. 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:
>
> (a) The property was illegally seized without warrant;
>
> (b) The warrant is insufficient on its face;
>
> (c) There was not probable cause for believing the existence of the grounds on which the warrant was issued;
>
> (d) The warrant was illegally executed; or
>
> (e) Retention of the property by law enforcement is not reasonable under the totality of the circumstances.
>
> The judge shall receive evidence on any issue of fact necessary to the decision of the motion.
>
> 2. If the motion is granted on a ground set forth in paragraph (a), (b), (c) or (d) of subsection 1, the property must be restored and it must not be admissible evidence at any hearing or trial.
>
> 3. If the motion is granted on the ground set forth in paragraph (e) of subsection 1, the property must be restored, but the court may impose reasonable conditions to protect access to the property and its use in later proceedings.
>
> 4. A motion to suppress evidence on any ground set forth in paragraphs (a) to (d), inclusive, of subsection 1 may also be made in the court where the trial is to be had. The motion must be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.
>
> 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.

As seen in the statute, the issues raised in Kosta's motion to return property are identical to those raised in a motion to suppress evidence. A district court's decision to suppress evidence is reviewed by this Court for an abuse of discretion. *Zabeti v. State*, 120 Nev. 530, 535 (2004). Accordingly, this Court should review

the district court's order for an abuse of discretion. Further, the factual findings of the district court are entitled to deference by the Court. *State v. Rincon*, 122 Nev. 1170, 1177 (2006).

Summary of Argument

1. The district court did not abuse its discretion in denying Kosta's claim that the Fourth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 18 of the Constitution of the State of Nevada and Nevada Revised Statutes required the district court to unseal the application and affidavit in support of the search warrant issued on July 29, 2019, in this case. The only legal authority Kosta presented to the district court was that a seizure of property occurred under the relevant constitutional provisions and that a warrant was required. That is uncontested by the State. However, Kosta proffered no legal authority that requires the unsealing of the court records absent a showing of good cause. Kosta further failed to provide any factual allegations to support a showing of good cause.
2. The district court did not abuse its discretion in denying Kosta's motion for return of property allegedly permitting the State to deprive Kosta of his property for an impermissible indefinite and lengthy period of time. First, the claim that the State retained Kosta's property for an impermissible period of time was never raised in the district court and should not be considered in the

first instance in this Court. Further, the State's retention of Kosta's property is in furtherance of a criminal investigation and is reasonable and not in violation of any of Kosta's rights.

3. The district court did not abuse its discretion in denying Kosta's claim that the Fourth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 18 of the Constitution of the State of Nevada and Nevada Revised Statutes require a protective order to limit the scope of execution of the search warrant. There is no authority in the State of Nevada compelling execution of a search warrant in the manner requested by Kosta. Further, the foreign cases cited by Kosta in support of his claims address Fourth Amendment issues that are not present in this case and thus those cases are of limited value here.

Argument

First, as argued above, this Court lacks jurisdiction to consider this appeal. In addition to the authorities and arguments presented above, this Court has stated, "NRAP 3A(b) designates the judgments and orders from which an appeal may be taken, and where no statutory authority to appeal is granted, no right exists." *Taylor Const. Co. v. Hilton Hotels Corp*., 100 Nev. 207, 209 (1984). Therefore, this appeal should be dismissed for lack of jurisdiction.

Next, Kosta asserts in footnote 2 of his argument that this is an action for

equitable relief. It is not. In the proceedings below, Kosta filed a motion for return of property and a petition for writ of mandamus. The motion for return of property was filed on March 16, 2020, and denied by the district court on June 11, 2020. Kosta timely appealed that order on July 13, 2020. Ten months after filing his notice of appeal, Kosta pursued equitable relief by filing a petition for writ of mandamus on April 12, 2021. That petition was denied on May 28, 2021.

Kosta did not file a notice of appeal of the district court's order denying his petition for writ of mandamus. NRAP 4(a)(1) requires that, "a notice of appeal *must be filed **after** entry of a written judgment or order*, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." (Emphasis added). Clearly, Kosta cannot file a notice of appeal of an order and have it apply to any order that might subsequently have been issued. In this case, Kosta had not even requested the equitable relief until 10 months after he filed his notice of appeal on the motion to return property. "An untimely notice of appeal fails to vest jurisdiction in this court." *State v. Sant*, 110 Nev. 748, 749 (1994).

Also, in his opening brief, Kosta alleges violations of the Fifth Amendment to the United States Constitution and Article 1, §8 of the Nevada Constitution. Kosta did not allege these theories in his motion filed in district court. AA 1, 6. Kosta did not raise a Fifth Amendment claim until he filed his reply brief in district

court and he did not raise a claim of a violation of Article 1, §8 of the Nevada Constitution at all in the district court. As the name suggests, reply briefs generally are to answer any matter set forth in the opposing brief, not to raise new legal theories. *Bongiovi v. State*, 122 Nev. 556, fn. 5 (2006). The State did not have the opportunity to brief these theories in the district court, nor did the district court address these theories in its order denying Kosta's motion. AA 94. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, (1981). For these reasons, this Court should not consider Kosta's claims based on the Fifth Amendment to the United States Constitution and Article 1, §8 of the Nevada Constitution.

1. The district court did not abuse its discretion in denying Kosta's claim that the Fourth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 18 of the Constitution of the State of Nevada and Nevada Revised Statutes required the district court to unseal the application and affidavit in support of the search warrant.

The district court did not abuse its discretion because Kosta failed to establish good cause to unseal the affidavit in support of the search warrant. 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. Kosta filed no affidavit as was required by NJDCR 7. AA 94. Rather, through the fallacy of circular reasoning, Kosta argued that the Court should unseal the affidavit so that he might then 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. "Bare" or "naked" claims for relief, unsupported by any specific factual allegations that would, if true, entitle Kosta to relief do not entitle Kosta to an evidentiary hearing or relief. *Hargrove v. State*, 100 Nev. 498, 502 (1984).

Though the burden rested with Kosta to show good cause to unseal the affidavit, the State nevertheless provided the district court with good cause to keep the affidavit sealed. This Court has previously addressed the confidentiality of investigative reports. In *Donrey of Nevada v. Bradshaw*, 106 Nev. 630 (1990), this 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 Kosta's case, the district court had reviewed the affidavit in support of search warrant and determined that sealing was appropriate. The district court also reviewed the uncontested representations contained in the affidavit of counsel that was filed with the State's opposition, AA 70-71. In that affidavit the State asserted that the reasons for sealing the affidavit in the first place were still relevant and the affidavit should remain sealed. The district court determined that Kosta had not met his burden to demonstrate good cause to unseal the search warrant affidavit and that it was still appropriate to keep the search warrant affidavit sealed. AA 94.

NRS 179.045(4) states, "Upon 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 failed to make a showing of good cause to unseal the affidavit in support of search warrant. The State has previously established good cause for sealing the affidavit and showed the justification for sealing the affidavit still remains. The sealing provisions of NRS 179.045 would be rendered meaningless if all that was required to establish good cause to unseal the a search warrant affidavit was for a party to assert a naked allegation that they do not believe probable cause for the search or seizure existed. For these reasons, Kosta's claim that the affidavit in support of search warrant must be unsealed should be dismissed.

2. The district court did not abuse its discretion in denying Kosta's motion for return of property.

In his motion filed in district court, Kosta claimed that there was no probable cause to justify the seizure of his property and therefore the warrant should be quashed. AA 6-8. The State did not dispute that Kosta has a reasonable expectation of privacy but argued that the search was reasonable and that a search warrant was properly obtained in this case. AA 59-60. On appeal, Kosta claims for the first time[2] that the State's retention of the seized property for an indefinite

[2] Kosta did raise this issue in his petition for writ of mandamus filed on April 12, 2021. AA 107, 112. However, as argued above, Kosta has not filed a notice of appeal in that matter.

and lengthy period of time violates his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 8(1) of the Nevada Constitution. This claim was not raised in in Kosta's motion for return of property, it was only raised in his petition for mandamus, the denial of which he did not appeal. This Court, "…generally will not address an issue raised for the first time on appeal." *Durango Fire Prot., Inc. v. Troncoso*, 120 Nev. 658, 661 (2004) (*citing Britz v. Consolidated Casinos Corp*., 87 Nev. 441 (1971). This claim was not briefed in the district court, the State did not have an opportunity to address this claim in the district court, and the district court judge did not have an opportunity to make any factual findings respecting this claim. Therefore, this claim should be denied.

Nevertheless, based on the incomplete record before this Court, Kosta fails to meet his burden of showing that the district court abused its discretion. There is no question that Kosta has a reasonable expectation of privacy in his personal property located in his home. "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 1947, 164 L. Ed. 2d 650 (2006). "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 359, 88 S. Ct. 507, 515, 19 L. Ed. 2d 576 (1967). Under the

Fourth Amendment, "[w]arrantless searches and seizures in a home are presumptively unreasonable." *Howe v. State*, 112 Nev. 458, 463 157 (1996). In this case, however, there is also no dispute that the district court issued a search warrant for the defendant's home. AA 4, 57, 93.

The record indicates that the evidence seized is part of an on-going investigation of the crimes of Open Murder, a violation of NRS 200.010 through NRS 200.090, and Import of a Controlled Substance, a violation of NRS 453.321. AA 5, 18. The crime of murder has no statute of limitation. NRS 171.080. Further, the State has returned almost all of the seized property and retained only what is necessary for the on-going investigation. AA 42-49, 95, 121.

Based on the above, Kosta has not preserved this issue for appeal. Further, Kosta has failed to show that the district court abused its discretion in declining to order the return of his remaining property. For these reasons, Kosta's claim should be dismissed.

3. The district court did not abuse its discretion in denying Kosta's claim that the Fourth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Section 18 of the Constitution of the State of Nevada and Nevada Revised Statutes require a protective order to limit the scope of execution of the search warrant.

This Court has never required that a search protocol be put in place for a search of electronic media. The district court could not have abused his discretion when there is no authority requiring him to implement the search protocols that

Kosta requested. Kosta has put forth, and the State does not dispute, that a seizure has occurred in this case. The State further does not dispute that a warrant authorizing the search and seizure was required and that it had to be supported by a sworn affidavit establishing probable cause. In this case, a warrant supported by a sworn affidavit establishing probable cause was in fact, issued. AA 92-93.

Kosta cites two opinions of the United States Supreme Court, *Riley v. California*, 573 U.S. 373 (2014) and *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206 (2018). Neither of these cases stand for the proposition that the district court was required to issue a search protocol as part of its search warrant. Rather, in these cases the Court discussed in detail the advances in technology and the amount of personal information that is accessible from cell phones and cell phone carriers. *See for example Riley* at 393-397 and *Carpenter* at 2216-2217. *Riley* addressed how the search incident to arrest doctrine applies to modern cell phones. *Riley* at 373. *Carpenter* addressed the applicability of the Fourth Amendment to the government's acquisition of wireless carrier cell-site records that reveal personal location information maintained by a third party. *Carpenter* at 2214. Further, in *Riley*, in lieu of a warrant requirement, the government proposed a rule that would restrict the scope of a cell phone search to those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered. *Riley* at 399. The Court

rejected this and held:

> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.
> …
> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Riley at 401, 403 (*internal citations omitted*). Thus, though the possibility and benefits of a rule restricting the scope of a search were argued, the Supreme Court did not impose this as part of the warrant requirement. The Supreme Court required only that a warrant be obtained. In this case, the State did exactly what was required, obtain a warrant.

Kosta asserts that the Fourth Amendment requires more. Justice Alito, in his opinion concurring in part and concurring in the judgment addressed the wisdom of courts imposing additional requirements as proposed by Kosta and stated:

> In light of these developments, it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.

Riley at 408.

Next, Kosta cites to a number of lower court decisions suggesting that the Fourth Amendment requires the courts to impose a limiting search protocol for searches of digital media. In support, Kosta cites *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc). A decision of the Ninth Circuit Court of Appeals, even an en banc decision, is not binding on the courts of the State of Nevada. *Blanton v. North Las Vegas Municipal Court*, 103 Nev. 623, 633 (1987), *affd*, 489 U.S. 538 (1989); Nev. Const. art 1, sec.2. Further, even the federal courts are not in agreement as to the requirement to implement search protocols for digital search warrants. In *United States v. Lustylk*, 57 F.Supp.3d 213, 229 (S.D.N.Y. 2014), cited by Kosta, the court stated:

> ***The Second Circuit has "not required specific search protocols or minimization undertakings as basic predicates for upholding digital search warrants***." *United States v. Galpin*, 720 F.3d at 451. ***Thus, even assuming the Fourth Amendment requires such protocols—a matter about which courts have disagreed****, see In re a Warrant for All Content and Other Information Associated with the Email Account xxxxxxx@gmail.com Maintained at Premises Controlled By Google, Inc.*, 33 F.Supp.3d 386, 388, 396–97, 2014 WL 3583529, at *1, *8 (S.D.N.Y. July 18, 2014)—in the absence of controlling precedent requiring search protocols, it cannot be said the agents acted in bad faith. *See United States 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), 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.*

(*Emphasis added*).

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. *Id* at 1166-1177

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

Kosta also cites to four unreported orders issued in the United States District Court in Kansas. *In re Cellular Telephones*, No. L4-MJ-8017-DJW, 2014 WL 7793690 (D. Kan. Dec. 30, 2014), *In re Applications for Search Warrants for Info. Associated with Target Email Accounts/Skype Accounts*, Nos. 13–MJ–8163–JPO, 2013 WL 4647554 (D. Kan. Aug. 27, 2013), *In re Nextel Cellular Tel.*, No. 14–MJ–8005–DJW, 2014 WL 2898262 (D. Kan. June 26, 2014), and *In re Search of premises known as Three Cellphones & One Micro-SD Card*, No. L4-MJ-8013-DJW, 2014 WL 3845157 (D. Kan. Aug. 4, 2014). All are orders denying warrant applications for lack of probable cause and/or particularity and a search protocol. All were issued by the same magistrate judge. And, none involved a charge of

murder. Two of the orders involved allegations of drug offenses, an allegation involving stolen property, and the last an allegation of interfering with commerce.

Kosta then suggests that *United States v. Pedersen*, No. 3:12–cr–00431–HA., 2014 WL 3871197 (D. Or. Aug. 6, 2014) and *Antico v. Sindt Trucking, Inc.*, 148 So. 3d 163 (Fla. Dist. Ct. App. 2014) are in accord. *Pederson* did not involve the Fourth Amendment. Rather the issue *Pederson* involved the Sixth Amendment and the use of a filter or taint team to review calls that might contain privileged information and the subsequent failure to provide related discovery. Neither did *Antico* involve the Fourth Amendment. *Antico* involved a wrongful death lawsuit and the balancing of the rules of discovery with the privacy provisions of the Florida State Constitution. Thus, both cases are inapposite to this case.

The State provided the district court with information sufficient to support a finding of probable cause to search for evidence of the crime of Open Murder, a violation of NRS 200.010 through NRS 200.090, a category A felony. The search for evidence of open murder may understandably encompass a broader spectrum of evidence than for drug or theft offenses. A search for evidence of motive and intent when the suspect and victim are related by marriage, necessarily will include a search for a variety of files containing personal and private information. The district court found probable cause for just such a search and the warrant issued in this matter should not now be altered.

Kosta cites to additional cases claiming, "several other circuits have approved the imposition of textually limited protocols with respect to searches of digitally stored information, and have pointed 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." Appellants Opening Brief at 26. While the discovery of evidence not related to an original warrant may indeed require a second warrant to continue a search, that is not an issue in this case. Nothing has been presented in the course of the proceedings below that any evidence beyond that authorized in the original warrant has been located by the government. Further, in *United States v. Triplett*, 684 F.3d 500 (5th Cir. 2012); *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001), both relied upon by Kosta, the appellate courts upheld the validity of the warrants at issue and the evidence obtained therefrom *without* the imposition of any court ordered search protocols.

In *United Sates v. Winn*, 79 F.Supp.3d 904 (S.D. Ill. 2015), the defendant was alleged to have been, "using his cell phone to photograph or videotape a group of thirteen and fourteen-year-old girls in their swimsuits without their permission." *Id*. at 909. The warrant at issue, "authorized the seizure of "any or all files" contained on the cell phone and its memory card that "constitute[d] evidence of the offense of [Public Indecency 720 ILCS 5/11–30]," including, but not limited to, the

calendar, phonebook, contacts, SMS messages, MMS messages, emails, pictures, videos, images, ringtones, audio files, all call logs, installed application data, GPS information, WIFI information, internet history and usage, any system files, and any delated data (Docs. 22–2, 22–3)." *Id*. at 919 (*footnote omitted*). However, the court found that, "[b]ased on the complaint supporting the search warrant, there was probable cause to believe that only two categories of data could possibly be evidence of the crime: photos and videos." *Id*. at 919. Further, "the warrant was not as particular as could be reasonably expected given the nature of the crime and the information the police possessed." *Id*. at 920. For these reasons the court found the warrant was overbroad in violation of the Fourth Amendment. *Id*. at 922. In this case, Kosta did not challenge the warrant for overbreadth in district court and that argument is not presented on appeal either. Nevertheless, in this case the warrant described the particularity of the data to be seized in 10 pages attached to the warrant. AA 26-35. For these reasons, *Winn* is inapposite.

In *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), detectives searching a computer pursuant to a warrant authorizing a search for indicia of drug activity, found a photo constituting child pornography and then continued to search for, and found additional child pornography without securing a second warrant. Understandably, the court found the government exceeded the scope of the warrant. *Id*. at 1276. Similarly, *United States v. Turner*, 169 F.3d 84 involved the

search of computer files depicting child pornography beyond the scope of the consent granted by the defendant. As a result the evidence was suppressed.

United States v. Kaechele, 466 F. Supp 2d 868 (E.D. Mich. 2006), similarly involved issues of facial overbreadth and specificity of the warrant that have not been raised in this litigation. Most notably, in *none* of the aforementioned six cases relied upon by Kosta, did the court require the imposition of textually limited protocols as urged by Kosta.

Conclusion

The order denying Kosta's motion for return of property is not a final judgment and thus, does not fall within NRAP 3A(b)(1). Because no statute or court rule permits an appeal from an order denying defendant's motion for return of property, this court lacks jurisdiction to consider this appeal.

The State provided the district court with information from which the Court ordered the affidavit in support of search warrant be sealed. The district court found that the reasons for sealing the affidavit remain valid. The factual findings of the district court are entitled to deference and Kosta has failed to meet his burden of showing that the district court abused its discretion.

Kosta has failed to meet his burden of showing that the district court abused its discretion in denying Kosta's motion for return of property. Further, Kosta's claim that the State retained his property for an impermissible period of time was

never raised in the district court and should not be considered in the first instance in this Court. In any case, the State's retention of Kosta's property is in furtherance of a criminal investigation and is reasonable and not in violation of any of Kosta's rights.

Kosta has failed to meet his burden of showing that the district court abused its discretion in denying Kosta's request to issue a protective order to limit the scope of execution of the search warrant. No authority has been provided that required the court to amend the search warrant in this matter to include a screening process or particular search protocol.

For the above reasons, the order of the district court should be affirmed.

DATED this 21st day of October, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this 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 brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 6,070 words; or

[X] Does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate 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 of the transcript or appendix where the matter relied on is to be found. 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 21st day of October, 2021.

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ADDENDUM

Relevant Parts of Statutes and Rules Relied Upon

NRS 171.080 No statute of limitation for murder, sexual assault arising out of same facts and circumstances as murder or terrorism. There is no limitation of the time within which a prosecution for:

1. Murder, or a sexual assault arising out of the same facts and circumstances as a murder, must be commenced. It may be commenced at any time after the death of the person killed.

2. A violation of NRS 202.445 must be commenced. It may be commenced at any time after the violation is committed.

[1911 Cr. Prac. § 71; RL § 6921; NCL § 10719] — (NRS A 2003, 2952; 2019, 464)

NRS 179.045 Issuance and contents; sealing information upon which warrant is based; time for serving warrant.

1. A search warrant may issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant or as provided in subsection 3. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the magistrate shall issue a warrant identifying the property and naming or describing the person or place to be searched.

2. Secure electronic transmission may be used for the submission of an application and affidavit required by subsection 1, and for the issuance of a search warrant by a magistrate. The Nevada Supreme Court may adopt rules not inconsistent with the laws of this State to carry out the provisions of this subsection.

3. In lieu of the affidavit required by subsection 1, the magistrate may take an oral statement given under oath, which must be recorded in the presence of the magistrate or in the magistrate's immediate vicinity by a certified court reporter or by electronic means, transcribed, certified by the reporter if the reporter recorded it, and certified by the magistrate. The statement must be filed with the clerk of the court.

4. Upon 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.

5. After a magistrate has issued a search warrant, whether it is based on an affidavit or an oral statement given under oath, the magistrate may orally authorize a peace officer to sign the name of the magistrate on a duplicate original warrant. A duplicate original search warrant shall be deemed to be a search warrant. It must be returned to the magistrate who authorized the signing of it. The magistrate shall endorse his or her name and enter the date on the warrant when it is returned. Any failure of the magistrate to make such an endorsement and entry does not in itself invalidate the warrant.

6. The warrant must be directed to a peace officer in the county where the warrant is to be executed. It must:

(a) State the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof; or

(b) Incorporate by reference the affidavit or oral statement upon which it is based.

 The warrant must command the officer to search forthwith the person or place named for the property specified.

7. The warrant must direct that it be served between the hours of 7 a.m. and 7 p.m., unless the magistrate, upon a showing of good cause therefor, inserts a direction that it be served at any time.

8. The warrant must designate the magistrate to whom it is to be returned.

9. As used in this section, "secure electronic transmission" means the sending of information from one computer system to another computer system in such a manner as to ensure that:

(a) No person other than the intended recipient receives the information;

(b) The identity of the sender of the information can be authenticated; and

(c) The information which is received by the intended recipient is identical to the information that was sent.

(Added to NRS by 1967, 1459; A 1975, 39; 1981, 1652; 1993, 1412; 1997, 741; 2015, 2487)

NRS 179.085 Motions for return of property and to suppress evidence.

1. 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:

(a) The property was illegally seized without warrant;

(b) The warrant is insufficient on its face;

(c) There was not probable cause for believing the existence of the grounds on which the warrant was issued;

(d) The warrant was illegally executed; or

(e) Retention of the property by law enforcement is not reasonable under the totality of the circumstances.

 The judge shall receive evidence on any issue of fact necessary to the decision of the motion.

2. If the motion is granted on a ground set forth in paragraph (a), (b), (c) or (d) of subsection 1, the property must be restored and it must not be admissible evidence at any hearing or trial.

3. If the motion is granted on the ground set forth in paragraph (e) of subsection 1, the property must be restored, but the court may impose reasonable conditions to protect access to the property and its use in later proceedings.

4. A motion to suppress evidence on any ground set forth in paragraphs (a) to (d), inclusive, of subsection 1 may also be made in the court where the trial is to be had. The motion must be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

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.

(Added to NRS by 1967, 1460; A 2015, 405)

NRS 200.010 "Murder" defined. Murder is the unlawful killing of a human being:

1. With malice aforethought, either express or implied;

2. Caused by a controlled substance which was sold, given, traded or otherwise made available to a person in violation of chapter 453 of NRS; or

3. Caused by a violation of NRS 453.3325.

 The unlawful killing may be effected by any of the various means by which death may be occasioned.

[1911 C&P § 119; RL § 6384; NCL § 10066] — (NRS A 1983, 512; 1985, 1598; 1989, 589; 2005, 1059)

NRS 200.020 Malice: Express and implied defined.

1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

2. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

[1911 C&P § 120; A 1915, 67; 1919 RL § 6385; NCL § 10067]

NRS 200.030 Degrees of murder; penalties.

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099;

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody;

(d) Committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person; or

(e) Committed in the perpetration or attempted perpetration of an act of terrorism.

2. Murder of the second degree is all other kinds of murder.

3. The jury before whom any person indicted for murder is tried shall, if they find the person guilty thereof, designate by their verdict whether the person is guilty of murder of the first or second degree.

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances, unless a court has made a finding pursuant to NRS 174.098 that the defendant is a person with an intellectual disability and has stricken the notice of intent to seek the death penalty; or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

 A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

5. A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

6. As used in this section:

(a) "Act of terrorism" has the meaning ascribed to it in NRS 202.4415;

(b) "Child abuse" means physical injury of a nonaccidental nature to a child under the age of 18 years;

(c) "School bus" has the meaning ascribed to it in NRS 483.160;

(d) "Sexual abuse of a child" means any of the acts described in NRS 432B.100; and

(e) "Sexual molestation" means any willful and lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.

[1911 C&P § 121; A 1915, 67; 1919, 468; 1947, 302; 1943 NCL § 10068] — (NRS A 1957, 330; 1959, 781; 1960, 399; 1961, 235, 486; 1967, 467, 1470; 1973, 1803; 1975, 1580; 1977, 864, 1541, 1627; 1989, 865, 1451; 1995, 257, 1181; 1999, 1335; 2003, 770, 2944; 2007, 74; 2013, 689)

NRS 200.033 Circumstances aggravating first degree murder. The only circumstances by which murder of the first degree may be aggravated are:

1. The murder was committed by a person under sentence of imprisonment.

2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of:

(a) Another murder and the provisions of subsection 12 do not otherwise apply to that other murder; or

(b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony.

 For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.

4. The murder was committed while the person was engaged, alone or with others, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered; or

(b) Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

6. The murder was committed by a person, for himself or herself or another, to receive money or any other thing of monetary value.

7. The murder was committed upon a peace officer or firefighter who was killed while engaged in the performance of his or her official duty or because of an act performed in his or her official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or firefighter. For the purposes of this subsection, "peace officer" means:

(a) An employee of the Department of Corrections who does not exercise general control over offenders imprisoned within the institutions and facilities of the Department, but whose normal duties require the employee to come into contact with those offenders when carrying out the duties prescribed by the Director of the Department.

(b) Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, when carrying out those powers.

8. The murder involved torture or the mutilation of the victim.

9. The murder was committed upon one or more persons at random and without apparent motive.

10. The murder was committed upon a person less than 14 years of age.

11. The murder was committed upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability, sexual orientation or gender identity or expression of that person.

12. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

13. The person, alone or with others, subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder. For the purposes of this subsection:

(a) "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his or her conduct, including, but not limited to, conditions in which the person knows or reasonably should know that the victim is dead.

(b) "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

14. The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

15. The murder was committed with the intent to commit, cause, aid, further or conceal an act of terrorism. For the purposes of this subsection, "act of terrorism" has the meaning ascribed to it in NRS 202.4415.

(Added to NRS by 1977, 1542; A 1981, 521, 2011; 1983, 286; 1985, 1979; 1989, 1451; 1993, 76; 1995, 2, 138, 1490, 2705; 1997, 1293; 1999, 1336; 2001 Special Session, 229; 2003, 2945; 2005, 317; 2017, 1065)

NRS 200.035 Circumstances mitigating first degree murder. Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:

1. The defendant has no significant history of prior criminal activity.
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's criminal conduct or consented to the act.
4. The defendant was an accomplice in a murder committed by another person and the defendant's participation in the murder was relatively minor.
5. The defendant acted under duress or under the domination of another person.
6. The youth of the defendant at the time of the crime.
7. Any other mitigating circumstance.

(Added to NRS by 1977, 1543)

NRS 200.040 "Manslaughter" defined.

1. Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation.
2. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.
3. Manslaughter does not include vehicular manslaughter as described in NRS 484B.657.

[1911 C&P § 122; RL § 6387; NCL § 10069] — (NRS A 1983, 1014; 1995, 1725; 2005, 79)

NRS 200.050 "Voluntary manslaughter" defined.

1. In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.
2. Voluntary manslaughter does not include vehicular manslaughter as described in NRS 484B.657.

[1911 C&P § 123; RL § 6388; NCL § 10070] — (NRS A 2005, 79)

NRS 200.060 When killing punished as murder. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

[1911 C&P § 124; RL § 6389; NCL § 10071]

NRS 200.070 "Involuntary manslaughter" defined.

1. Except under the circumstances provided in NRS 484B.550 and 484B.653, involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.
2. Involuntary manslaughter does not include vehicular manslaughter as described in NRS 484B.657.

[1911 C&P § 125; RL § 6390; NCL § 10072] — (NRS A 1981, 867; 1983, 1014; 1995, 1726; 2005, 79)

NRS 200.080 Punishment for voluntary manslaughter. A person convicted of the crime of voluntary manslaughter is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000.

[1911 C&P § 126; A 1937, 103; 1931 NCL § 10073] — (NRS A 1979, 1424; 1995, 1182)

NRS 200.090 Punishment for involuntary manslaughter. A person convicted of involuntary manslaughter is guilty of a category D felony and shall be punished as provided in NRS 193.130.

[1911 C&P § 126 1/2; added 1937, 103; 1931 NCL § 10073.01] — (NRS A 1967, 468; 1995, 1182)

NRS 453.321 Offer, attempt or commission of unauthorized act relating to controlled or counterfeit substance unlawful; penalties; prohibition against probation or suspension of sentence for certain repeat offenders. [Effective through June 30, 2020.]

1. Except as authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to:

(a) Import, transport, sell, exchange, barter, supply, prescribe, dispense, give away or administer a controlled or counterfeit substance;

(b) Manufacture or compound a counterfeit substance; or

(c) Offer or attempt to do any act set forth in paragraph (a) or (b).

2. Unless a greater penalty is provided in NRS 453.333 or 453.334, if a person violates subsection 1 and the controlled substance is classified in schedule I or II, the person is guilty of a category B felony and shall be punished:

(a) For the first offense, by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $20,000.

(b) For a second offense, or if, in the case of a first conviction under this subsection, the offender has previously been convicted of an offense under this section or of any offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to an offense under this section, by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $20,000.

(c) For a third or subsequent offense, or if the offender has previously been convicted two or more times under this section or of any offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to an offense under this section, by imprisonment in the state prison for a minimum term of not less than 3 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $20,000 for each offense.

3. The court shall not grant probation to or suspend the sentence of a person convicted under subsection 2 and punishable pursuant to paragraph (b) or (c) of subsection 2.

4. Unless a greater penalty is provided in NRS 453.333 or 453.334, if a person violates subsection 1, and the controlled substance is classified in schedule III, IV or V, the person shall be punished:

(a) For the first offense, for a category C felony as provided in NRS 193.130.

(b) For a second offense, or if, in the case of a first conviction of violating this subsection, the offender has previously been convicted of violating this section or of any offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to a violation of this section, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $15,000.

(c) For a third or subsequent offense, or if the offender has previously been convicted two or more times of violating this section or of any offense under the laws of the United States or any state, territory or district which, if committed in this State, would amount to a violation of this section, for a category B felony by imprisonment in the state prison for a minimum term of not less than 3 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $20,000 for each offense.

5. The court shall not grant probation to or suspend the sentence of a person convicted under subsection 4 and punishable pursuant to paragraph (b) or (c) of subsection 4.

(Added to NRS by 1971, 2018; A 1973, 1213, 1372; 1977, 1411; 1979, 1471, 1667; 1981, 739; 1983, 510; 1995, 1281; 1999, 2637)

Rule 7. Affidavits on motions.

(a) Factual contentions involved in any pretrial or post-trial motion must be initially presented and heard upon affidavits, depositions, answers to interrogatories, or admissions.

(b) Each affidavit shall identify the affiant, the party on whose behalf it is submitted, and the motion or application to which it pertains, and must be served and filed with the motion, opposition, or reply to which it relates.

(c) Affidavits must contain only factual, evidentiary matter, conform with the requirements of NRCP 56(c), and avoid mere general conclusions or arguments. Affidavits substantially defective in these respects may be stricken, wholly or in part.

[Amended; effective January 1, 2020.]

RULE 3A. CIVIL ACTIONS: STANDING TO APPEAL; APPEALABLE DETERMINATIONS

(a) Standing to Appeal. 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.

(b) Appealable Determinations. An appeal may be taken from the following judgments and orders of a district court in a civil action:

(1) A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

RULE 4. APPEAL — WHEN TAKEN

(a) Appeals in Civil Cases.

(1) Time and Location for Filing a Notice of Appeal. In a civil case in which an appeal is permitted by law from a district court, the notice of appeal required by Rule 3 shall be filed with the district court clerk. Except as provided in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. If an applicable statute provides that a notice of appeal must be filed within a different time period, the notice of appeal required by these Rules must be filed within the time period established by the statute.

[As amended; effective January 20, 2015.]

CERTIFICATE OF SERVICE

I hereby certify that this document, **RESPONDENT'S ANSWERING BRIEF**, was filed electronically with the Nevada Supreme Court on the 21st day of October, 2021. Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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