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 REPLY BRIEF

CLARK HILL
Michael V. Cristalli (NSB: 6266)
Vincent Savarese III (NSB: 2467)
Dominic P. Gentile (NBS: 1923)
Gia N. Marina (NSB: 15276)
3800 Howard Hughes Parkway #500
Las Vegas, Nevada 89169
Tel: (702) 862-8300
Attorneys for Appellant, James Kosta

DOUGLAS COUNTY DISTRICT ATTORNEY'S OFFICE
Erik A. Levin (NSB: 6719)
P.O. Box 218
Minden, Nevada 89423
Tel: (775) 782-9800
Attorney for Respondent, State of Nevada

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

ARGUMENT

A.

The Order Of The District Court Denying Appellant's Motion For Return Of Property Constitutes A "Final Order".

The State asserts that this Court lacks jurisdiction to consider this appeal for want of an appealable determination by the lower court within the meaning of NRAP 3A(b). Respondent's Answering Brief, pp. V, 7. That regulation provides:

> "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:
> . . . .
> (3) An ***order granting or refusing to grant an injunction*** or dissolving or refusing to dissolve an injunction [in an equitable civil action]."

Thus, Nevada Revised Statutes ("NRS") 179.085 (Motions for Return of Property and to Suppress Evidence) provides, in pertinent part:

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

Nevada follows the federal practice in treating a motion for return of property which is filed absent the pendency of any criminal charge related thereto as an equitable action for injunctive relief. *See e.g., Ramsden v. United States*, 2 F.3d 322, 324–25 (9th Cir. 1993); *United States v. Martinson*, 809 F.2d 1364, 1366–67 (9th Cir.1987). See *Maiola v. State*, 82 P.3d 38, 39 (Nev.), *opinion withdrawn and superseded on reh'g*, 120 Nev. 671, 99 P.3d 227 (2004) ("We conclude that the district court has *equitable jurisdiction* to adjudicate Maiola's NRS 179.085 motion"). And, accordingly, pursuant to the above-quoted textual provisions of NRS 179.085 the order of a district court denying such a motion filed under such circumstances is indeed an "appealable determination" within the meaning of the above-quoted provision of NRAP3A(b)(3) providing for the appealability of "*an order granting or refusing to grant an injunction*" in a civil action for equitable relief.

The State asserts that this Court lacks jurisdiction to consider this appeal because "[t]he order denying Kosta's motion for return of property is not a final *judgment* and thus, does not fall within NRAP 3A(b)(1)". However, in doing so, the State completely ignores the appealability of "orders" short of final Judgment such as are implicated in the matter at bar as set forth *supra*.

The State argues that "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," and – without explication – that "the pendency of the investigation is a status subject to change and future review by the lower court. AA 94 (emphasis added). But it is plainly not a possible future *investigation* – but, rather, it is the disposition of the *issues determined* in the order or judgment in question that is the appropriate yardstick.

Respondent claims that "the Court's lack of jurisdiction to hear this appeal is further supported by the persuasive authority of two recent unpublished dispositions of this Court that directly address this issue" – whereas in fact they do not. *See* Respondent's Answering Brief, pp. 1-2. Accordingly, the Respondent cites *Castillo v State,* 106 Nev. 349, 349, 352, 792 P.2d 1133, 1135 (1990);" *Phillips v. State*, No. 82168, 2021 WL 91096 (unpublished disposition, January 8, 2021); and *Vonseydewitz v. State,* No. 82193, 2021 WL 150577 (unpublished disposition, February 15, 2021) – each of which stands for the inapposite proposition that "no statute or court rule permits an appeal [*by the accused*] from an order regarding defendant's motion for return of property *in a criminal matter*" (emphasis added). This is not a criminal case. And none exists.

Here Appellant's Motion was filed in the district court in the absence of *any* pending criminal charges; must be treated as a civil action for equitable relief; and the Order of the lower court denying relief disposes of all issues presented and leaves nothing for future consideration.

B.

This Court May Adjudicate Appellant's Due Process Arguments.

Respondent alleges that Appellant Kosta's argument pertaining to violations of the Fifth Amendment to the United States Constitution and Article 1, section 8 of the Nevada Constitution should not be considered for failure to raise the issues in the district court. *See* Respondent's Answering Brief, p. 8-9. This argument is in direct contravention to the jurisprudence of both this Court and that of the Supreme Court of the United States.

When *constitutional* questions are raised on appeal, this Court may always address them. *McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983) (citing *Dias v. State,* 95 Nev. 710, 601 P.2d 706 (1979); *Hardison v. State,* 84 Nev. 125, 437 P.2d 868 (1968)). Indeed, *constitutional* challenges will be considered, *even when raised for the first time on appeal. Levingston v. Washoe Cty. By & Through Sheriff of Washoe Cty.*, 112 Nev. 479 (1996), *opinion modified on reh'g,* 114 Nev. 306 (1998). *See Blackledge v. Perry*, 417 U.S. 21 (1974); *Menna v. New York*, 423 U.S. 61 (1975) (even where a defendant has pleaded guilty to charged crimes, he may nevertheless raise on appeal any constitutional claim that does not depend on challenging his factual guilt). As this Court observed in *Levingston, supra*: "This opportunity is necessary because the privilege of bringing every law to the test of the constitution belongs to the humblest citizen, who owes no obedience

to any legislative act, which transcends constitutional limits." 112 Nev. at 482 (internal citations omitted). Accordingly, Appellant's claims pursuant to the Fifth Amendment to the United States Constitution and Article I, section 8 of the Nevada Constitution should be considered by this Court.

C.

The Order Of The Lower Court Denying Appellant's Motion For Return Of Property Deprives Appellant A Meaningful Opportunity To Be Heard And Is A Deprivation Of Appellant's Property Without Due Process Of Law.

It is axiomatic that "[t]he United States Constitution provides that "[n]o State shall ... deprive any person of ... property [ ] without due process of law." The Nevada Constitution also provides that "[n]o person shall be deprived of ... property[ ] without due process of law." Thus the imperative of Due Process requires notice and a meaningful opportunity to be heard before the government may deprive any person of his or her property. *Maiola v. State*, 82 P.3d 38, 40 (Nev. 2004), *opinion withdrawn and superseded on reh'g,* 120 Nev. 671, 99 P.3d 227 (2004). *Accord,* Nev. Const. art 1, § 8(5). *Levingston v. Washoe Cty. By & Through Sheriff of Washoe Cty.*, 112 Nev. 479 (1996), *opinion modified on reh'g,* 114 Nev. 306 (1998).

Respondent argues that Appellant has failed to establish "good cause," as required by NRS 179.045(4), to have the affidavit in support of the search warrant unsealed, accusing the Appellant of a fishing expedition. *See* Answering Brief, p. 10. However, Appellant counters that the continued sealing of the search warrant

affidavit *ad infinitum* is unjustified and permits the government to retain his property without further process or to challenge either the facial sufficiency or sub-facial veracity of the probable cause showing purportedly made therein.

Respondent argues that the district court had good cause to keep the affidavit sealed, relying upon the authority of *Donrey of Nevada v. Bradshaw*, 106 Nev. 630 (1990) and *Donrey and Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 878 (2011) to support that criminal investigative reports should remain confidential. *See* Answering Brief, pp. 10-11. However, the foregoing authority is not persuasive and inapplicable to the case at bar, in that those cases deal with public records requests and the balancing between public policy and privacy which is not relevant to the analysis of probable cause in a search and seizure case such as this.

Indeed, in *Donrey of Nevada v. Bradshaw*, opposing the dismissal of charges pursuant to a plea bargain, the Reno Police Department undertook an investigation of the circumstances of the dismissal, preparing a written report. *Id.* at 631. The report, which concluded there was no evidence of criminal wrongdoing, was sent to the City Attorney's office, District Attorney, and a municipal judge, which thereafter refused to release a copy of the report to petitioners. 106 Nev. at 631. Instituting a balancing test weighing privacy or law enforcement policy justifications for nondisclosure against the general policy in favor of open government, the Court

ruled there were no public policy considerations present in order to justify the withholding of investigative information. *Id.* at 635-36.

In *Donrey and Reno Newspapers, Inc. v. Gibbons*, Reno Newspapers sought email communications between Governor Gibbons and ten individuals pursuant to the Nevada Public Records Act. The Court, recognizing the foundation for analyzing claims of confidentiality made in response to public records requests it established in *Bradshaw*, and thereafter expounded in *DR Partners v. Board of County Commissioners*, 116 Nev. 616 (2000), ruled that a requesting party is entitled to a log unless the state entity withholding the records demonstrates that the requesting party has sufficient information to meaningfully contest the claim of confidentiality without a log. 127 Nev. at 882-83. Thus, if the Respondent asks this Court to apply the progeny of *Gibbons*, the Court must adopt its own reasoning to apply to Kosta: "[I]t is anomalous and inequitable to deny the requesting party basic information about the withheld records, thereby relegating it to advocating from a nebulous position where it is powerless to contest a claim of confidentiality." *Id.* at 882 (internal citations omitted). Appellant Kosta is left in the same nebulous position being denied access to the search warrant application and supporting affidavit in order to challenge the assertions contained therein.

Moreover, this matter does not involve investigative *reports*. Rather, it concerns *constitutionally required affidavits in support of the issuance of a search*

warrant – which is quite a different matter entirely. Thus, courts have routinely recognized that individuals whose property is the subject of a search and detention pursuant to a warrant *do* have a constitutional right of pre-indictment access to search warrant materials, including the supporting affidavit. *See In re Search Warrants Issued on April 26, 2004,* 353 F.Supp.2d 584, 591 (2004) (affirming the magistrate's order and recognizing "a search subject's pre-indictment Fourth Amendment right to inspect the probable cause affidavit."); *In re Search Warrant for 2934 Anderson Morris Road,* 48 F.Supp.2d 1082, 1083 (N.D.Ohio 1999) ("[A] person whose property has been seized pursuant to a search warrant has a right under the Warrant Clause of the Fourth Amendment to inspect and copy the affidavit upon which the warrant was issued."); *Up North Plastics, Inc.,* 940 F.Supp. 229, 232 (1996) (denying government's pre-indictment motion to keep in place a previously entered order sealing the supporting affidavit); *In re Search Warrants Issued August 29, 1994,* 889 F.Supp. 296, 299 (S.D. Ohio 1995) (granting a pre-indictment motion to unseal search warrant materials, stating "the Fourth Amendment right...includes the right to examine the affidavit that supports a warrant after the search has been conducted and a return has been filed"); *see also In the Matter of Searches of Semtex Industrial Corporation,* 876 F.Supp. 426, 429 (E.D.N.Y.1995) (observing in response to a motion to unseal a warrant affidavit that such materials may not be sealed indefinitely pending the government's decision to seek an indictment); *Matter*

of Wag–Aero, Inc., 796 F.Supp. 394, 395 (E.D.Wisc.1992) (vacating sealing order upon finding that the search target's due process rights would be violated by continued sealing of the supporting affidavit).

Whereas in the present context there may *never* be any criminal charge brought, absent this reasoning private property could be retained by government *forever* without any showing whatsoever of constitutional justification.

Some courts have recognized that where a compelling governmental interest is demonstrated requiring that search warrant materials be kept under seal, pre-indictment access may sometimes be denied. *In re Searches & Seizures*, No. 08-SW-0361 DAD, 2008 WL 5411772, at *4 (E.D. Cal. Dec. 19, 2008). However, in order to prevent the property owner from inspecting the contents of a supporting affidavit, "the government must demonstrate to the court that a *compelling government interest* requires the materials to be kept under seal and that *there is no less restrictive means, such as redaction, capable of serving that interest*." *Id.* (citing *United States v. Oliver*, 208 F.3d 211 (4th Cir. 2000)). Here the government merely offers the tepid observation that unsealing of the supporting affidavits in this case would "prematurely reveal its' theory of the case and the direction of the investigation, thereby likely obstructing that investigation in its early stages."[1] This does not

[1] It is difficult to characterize this as an "early stage" on the facts of this case, given the search is over two years old.

suffice to meet the prosecution's burden of demonstrating a compelling government interest in continued sealing. *See In re Search Warrants Issued on April 26, 2004,* 353 F.Supp.2d at 591–92; *Up North Plastics, Inc.,* 940 F.Supp. at 233–34; *Wag–Aero, Inc.,* 796 F.Supp. at 395; *United States v. Wei Seng Phua*, No. 2:14-CR-00249-APG, 2015 WL 1281603, at *3 (D. Nev. Mar. 20, 2015)(not reported) ("[T]he government's unsupported statement that disclosure…'might possibly jeopardize the investigation' and that the government's 'right to secrecy far outweighs the public right to know' do not support maintaining the applications and warrants under seal."). And thus, the State's same bare assertion that a criminal investigation is ongoing[2] is insufficient here.

Indeed, concerns regarding prolonged investigations by the government in terms of sealing search warrants and affidavits was specifically noted by the court in *The Offices of Lakeside Non–Ferrous Metal, Inc. v. United States*, 679 F.2d 778 (9th Cir.1982), wherein the Internal Revenue Service seized books and records from the appellant's business offices pursuant to warrant and held those materials for over eleven months. 679 F.2d at 779. While the Ninth Circuit affirmed the district court's denial of the appellant's motion to unseal the search warrant affidavit, or in the alternative, for the return of seized property, it observed:

> [T]he Government has the obligation to conduct its investigation with diligence, for under any other interpretation the Government, having all

[2] *See* Answering Brief, p. 14.

> of its evidence under seal, might be inclined to delay proceedings, rather than expedite them. We affirm the trial court's rulings on the motion, but note that it should exercise its continuing jurisdiction to ensure that the Government's investigation proceeds with diligence and to protect the rights of the appellant, which become more critical with the passage of time.

679 F.2d at 779-80.

Further, in denying (without prejudice) a pre-indictment motion to unseal a search warrant affidavit and continuing the sealed status for only an additional sixty days, the Court in *In the Matter of the Search of a Residence*, 121 F.R.D. 78, 80 (E.D.Wisc.1988) noted:

> The court has now reviewed the supplemental affidavit and finds that it contains good cause to continue the sealing order. [ ] Notwithstanding, the petitioners should not be kept in the dark any longer than is necessary. After all, it was their residence and business that was searched. ***They have a right to know what information is contained in the applications in order to determine whether or not they wish to pursue a return of the seized property***. Therefore, after balancing the competing interests of the parties, this court will extend the sealing order for a limited period of time.

121 F.R.D. 78 at 80. The significance of the considerable passage of time here cannot be overstated. Now more than two years post-search, Appellant has had no opportunity to examine the representations contained in the search warrant or supporting affidavit for either facial sufficiency or sub-facial veracity. (AA I, 000090). And as a practical matter, how can one demonstrate that the contents of a constitutionally-required document are either facially insufficient or sub-facially disingenuous without knowing what the contents are? This places the burden of

demonstrating "constitutional clairvoyance" upon the one seeking return of property seized by the government.

D.

A Protective Order Should Have Been Entered To Limit The Scope Of Execution Of The Search Warrant.

In denying Appellant the right to access the supporting affidavit, he has been stymied by the lower court for lack of remedy. *United States v. Jones*, 132 S.Ct. 945 (2012) and *Riley v. California*, 134 S.Ct. 2473 (2014) highlight the concerns of the United States Supreme Court regarding emerging technologies vis-a-vis the Fourth Amendment and read together, *Jones* and *Riley* explain why search protocols in that context are necessary. *See In re Cellular Telephones*, No. L4-MJ-8017-DJW, 2014 WL 7793690, at *3 (D. Kan. Dec. 30, 2014)(not reported)("*Jones* and *Riley* explain why a search protocol is necessary and bolster this Court's interpretation of the Fourth Amendment's particularity requirement").

> With technological developments moving at such a rapid pace, Supreme Court precedent is and will inevitably continue to be absent with regard to many issues district courts encounter. As a result, an observable gap has arisen between the well-established rules lower courts have and the ones they need in the realm of technology. Courts cannot, however, allow the existence of that gap to infiltrate their decisions in a way that compromises the integrity and objectives of the Fourth Amendment....The danger...is that courts will rely on inapt analogical reasoning and outdated precedent to reach their decisions. To avoid this potential pitfall, courts must be aware of the danger and strive to avoid it by resisting the temptation to rationalize the application of ill-fitting precedent to circumstances.

In re Cellular Telephones, No. L4-MJ-8017-DJW, 2014 WL 7793690, at *4 (D. Kan. Dec. 30, 2014)(not reported). The government must give the issuing court some indication of how the search is intended to proceed. *See Matter of Black iPhone 4,* 27 F. Supp. 3d 74, 79–80 (D.D.C. 2014) ("Will all of these devices be imaged?....Will a dedicated computer forensics team perform the search...or will the investigating officers be directly involved? What procedures will be used to avoid viewing material that is not within the scope of the warrant?....These types of issues must be addressed.").

CONCLUSION

THEREFORE, for the foregoing reasons, as well as those outlined in the Opening Brief, Appellant JAMES KOSTA respectfully prays that this Honorable Court: (1) vacate the Decision and Order of the District Court denying his Motion 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 and thereby acquire a meaningful opportunity to challenge the same; (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; together with such other and further relief as the Court deems fair and just in the premises.

DATED this 22nd day of November, 2021.

CLARK HILL PLLC

MICHAEL V. CRISTALLI
Nevada Bar No. 6266
VINCENT SAVARESE III
Nevada Bar No. 2467
DOMINIC P. GENTILE
Nevada Bar No. 1923
GIA N. MARINA
Nevada Bar No. 15276
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
Tel: (702) 862-8300
Attorneys for Appellant James Kosta

CERTIFICATE OF COMPLIANCE

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

This reply 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 reply brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it is proportionally spaced, has a typeface of 14 points or more, and contains 3,278 words, and does not exceed the 15-page limit.

Finally, I hereby certify that I have read this rely 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.

//

//

//

//

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 22nd day of November, 2021.

CLARK HILL PLLC

MICHAEL V. CRISTALLI
Nevada Bar No. 6266
VINCENT SAVARESE III
Nevada Bar No. 2467
DOMINIC P. GENTILE
Nevada Bar No. 1923
GIA N. MARINA
Nevada Bar No. 15276
3800 Howard Hughes Parkway, Suite 500
Las Vegas, Nevada 89169
Tel: (702) 862-8300
Attorneys for Appellant James Kosta

CERTIFICATE OF SERVICE

I certify that on the 22nd day of November, 2021, I served a copy of this completed Reply Brief upon all counsel of records:

- ❑ By personally serving it upon him/her; or
- **X** By email and 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.)

Douglas County District Attorney
Erik A. Levin, Esq.
P.O. Box 218
Minden, Nevada 89423

An employee of Clark Hill PLLC