IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

MARGAUX SHANNON ORNELAS,

Respondent.

Docket No. 82751

Appeal from a Grant of a Motion to Suppress
Eighth Judicial District Court, Clark County
The Honorable Erika Ballou, District Judge
Case No. C-19-340051-2

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

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DATED this 30 of August, 2021.

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STATEMENT OF THE CASE

On May 3, 2019, the State filed its Indictment charging Margaux Ornelas and Dustin Lewis with: conspiracy to commit burglary; 4 counts of burglary; grand larceny; and conspiracy to commit burglary. (I Appellant's Appendix [hereinafter "AA"] 1–5.) On February 26, 2021, Mr. Lewis filed a Motion to Suppress Evidence Based on Fourth Amendment Violation and Fruit of the Poisonous Tree Doctrine, (*id.* at 6), to which Ms. Ornelas joined, (*id.* at 80). The district court heard argument on that motion April 5, 2021, at which hearing the court then granted the motion. (*Id.* at 105–11.) The district court filed its Order Granting Dustin Lewis Motion Suppress Evidence Based on Fourth Amendment Violation and Fruit of the Poisonous Tree Doctrine on April 8, 2021. (*Id.* at 112–13.) The State filed its Notice of Appeal on April 9, 2021. (*Id.* at 115.)

STATEMENT OF FACTS

On December 8, 2018, at 10:17 AM, Officer Penney with the Las Vegas Metropolitan Police Department was dispatched to the StorageOne storage facility at 9960 West Flamingo Road to investigate a burglary at unit B-151. (1 AA 18.) He contacted complaining witness Marc Falcone, the unit's renter, who had last been to the unit the previous day. (*Id.*) On the 8th, Mr. Falcone received a phone call from a StorageOne employee saying his unit had been

burglarized. (*Id.* at 19.) Mr. Falcone told officers he was missing 21 wristwatches worth an estimated $2.173 million. (*Id.*) Further investigations revealed that, in addition to unit B-151, units B-145 and B-147 had been burglarized on December 8; and units A-301, A-185, B-148, and B-259 were burglarized on December 6. (*Id.* at 19, 22.) Beyond Mr. Falcone's watches, he reported as missing a Panerai watch brand bag, watch boxes, duffle bag, and a briefcase that also had watches in it. (*Id.* at 20.)

StorageOne video surveillance stills showed two individuals, a white female adult and a white male adult, entering the facility at 3:21 AM on the 8th and leaving again at 4:43 AM, carrying several bags and pushing a wheelchair. (*Id.* at 19.) Detectives canvassed the area and learned from unidentified homeless people that the suspects may be homeless and living near the intersection of Tropicana and Fort Apache, which is approximately two miles from the StorageOne location. (*Id.*) Upon checking past crime reports and field interviews of homeless people in that area, detectives found an interview from July 7, 2018, involving an Annie Bishop and a James Gregg who were homeless and matched the general description of the suspects. (*Id.* at 19–20.) The lead detective compared still shots from StorageOne surveillance to booking photos of Ms. Bishop and Mr. Gregg, determined there were similarities, but could not conclude that they were the burglary suspects due

to the still shots being distant and the faces unclear. (*Id.* at 21.) The detective did determine from surveillance that the suspects were carrying various bags and an apparent chessboard. (*Id.*) Ms. Bishop and Mr. Gregg were never located or charged.

On December 11, 2018, at 6:30 PM, officers re-canvassed the area around StorageOne attempting to locate Ms. Bishop and Mr. Gregg and discovered a tent in a fenced-off desert area east of the StorageOne facility. (*Id.* at 22.) Officers "decided to hop the fence that surrounds the desert area and challenged the tent to see if anyone was inside. There was no answer, so they unzipped the door of the tent to see if anyone was inside." (*Id.* at 22–23.) Upon opening the tent, officers found no one home, but they took the opportunity the unzipped and open tent afforded, looked inside, and saw a wooden chessboard and watch boxes, one of which had "Panerai" written on it. (*Id.* at 23.) Outside the tent, approximately 25 yards east, there was a folded wheelchair. (*Id.*)

Based on the prior investigation and, significantly, the items officers saw inside and outside the tent, a search warrant was sought and obtained. (*Id.* at 33–39.) Officer Shark, in his application, stated he was part of the "Flex" team who saw the tent in the desert, and that officers attempted to make verbal contact with the residents of the tent. (*Id.* at 33:18–34:42,

37:234–40.) Upon opening the tent and looking inside, officers saw the watch boxes, one of which had "Panerai" written on it, and the chessboard they believed was seen on video, while outside was the folded wheelchair. (*Id.* at 37:240–38:250.)

During the processing of the tent and surrounding area, latent prints were recovered from various items including the chessboard, a coin holder, a blue bag, and a red jewelry cleaner jar, all from inside the tent. (*Id.* at 23.) Additionally, the wheelchair handles were swabbed for DNA. (*Id.*) Ms. Ornelas's prints came back on the chessboard, while Mr. Lewis's prints came back on the coin holder, blue bag, and red jewelry cleaner jar. (*Id.* at 27.) It was based on the recovery of these prints that the lead detective on the case made a forensic request for the prints recovered from the StorageOne facility to be matched against them, while a comparison of the prints of Mr. Faulkner, Ms. Bishop and Mr. Gregg was also requested. (*Id.* at 28.)

Later the night of the 11th, after the property from the tent and the surrounding area was impounded, officers returned to the campsite for the ostensible purpose of searching for Officer Shark's lost cell phone. (*Id.* at 23–24.) They discovered that the scene had been disturbed since their earlier departure. (*Id.* at 24.) While at the campsite, they heard an alarm sound from inside the StorageOne facility, but did not locate any suspects inside. (*Id.*)

Instead, officers saw a black Lincoln Navigator parked nearby. (*Id.*) Officers sealed the vehicle and towed it to a secured lot, anticipating searching it the following day. (*Id.*) In the nearby Chevron gas station parking lot, officers saw two black male adults get into a silver Nissan Altima with a Lyft sticker and drive away, but did not investigate them at that time. (*Id.*)

On December 12th at 1:02 AM, a "Chris Jones" called to report a robbery at 9920 West Flamingo Road, the Chevron station just east of the StorageOne facility. (*Id.*) The caller reported two homeless men with a handgun and a sawed-off shotgun took his phone and wallet and escaped in a silver Nissan Altima with a Lyft sticker. (*Id.* at 24–25.) The caller than said he was now at his home at the Eagle Trace Apartments, 5370 East Craig Road. (*Id.* at 25.) The Lincoln Navigator, notably, had a parking tag for the same apartment complex. (*Id.*) Surveillance video from the StorageOne facility showed the same white male adult from the prior video, as well as the black male adults from the Nissan Altima, on the StorageOne property that evening. (*Id.*)

Officers identified one of the black male adults as Tyree Faulkner and interviewed him. (*Id.* at 25–26.) He would later admit to fabricating the robbery he reported, and admitted he was with his cousin who knew a white homeless couple who paid them five hundred dollars to drive them around; the homeless woman had tried to sell a watch, but decided against it. (*Id.* at

26–27.) Later, the homeless man offered Mr. Faulkner and his cousin each one thousand dollars to drive them around. (*Id.* at 27.) They then went to the StorageOne facility where the homeless man used a pair of bolt cutters to cut the hasp of a lock on a unit. (*Id.*)

A search warrant for the Lincoln Navigator issued based on the information Mr. Faulkner provided, the prior investigation, and notably, a "bag of clothing sitting on the ground to the rear of the Navigator" that officers recognized as one of the bags seen in the desert area near the tent. (*Id.* at 58.) Upon searching the Navigator, officers found two watches. (*Id.* at 63.)

Later investigation revealed that Ms. Ornelas was in downtown Las Vegas at the Fun City Mostel at 2233 South Las Vegas Boulevard. (*Id.* at 28.) On December 14, she was taken into custody, and an application was made for a search warrant for her hotel room and her DNA. (*Id.* at 69–74.) The applying detective referred to the search of the tent and the items recovered inside such as the watch boxes, chessboard, coin holder and bags. (*Id.* at 72:159–70.) The applicant then told the judge that latent prints were recovered from the tent property that returned to Ms. Ornelas and Mr. Lewis. (*Id.* at 72:186-89.) That search warrant application was granted and among the numerous items seized and listed on the return were three watches determined to belong to Mr. Falcone. (*Id.* at 78.)

On January 9, 2019, the lead detective received a report on prints recovered from StorageOne indicating Mr. Lewis's handprint and Ms. Ornelas's thumbprint were found on the outside wall of unit B-145. (*Id.* at 30.) According to the lead detective, "That now placed both Lewis and Ornelas at the scene of the original burglaries to Blutman, Rodrigue and Falcone's units." (*Id.*) Based on this new development, officers began a search for Mr. Lewis which led to his mother's address and Mr. Lewis's arrest for a parole violation. (*Id.*)

The lead detective then interviewed Mr. Lewis about various aspects of this case, including the mode of the burglaries, the handprint found at StorageOne, the tent and the items seized from it, and the fingerprints found there. (*Id.* at 30–31.) While Mr. Lewis denied involvement in these burglaries and made no admissions of guilt, the lead detective repeatedly accused him of lying, offered to lessen his term of incarceration if Mr. Lewis would return the watches, and generally made comments meant to elicit an admission. (*Id.* at 31.) At one point, the detective asked Mr. Lewis who had the watches and Mr. Lewis said to talk with Ms. Ornelas. (*Id.*) After the interview, the detective re-booked Mr. Lewis for the instant offenses. (*Id.*)

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SUMMARY OF THE ARGUMENT

The district court did not err when it granted Mr. Lewis's motion to suppress. The district court adopted by reference the facts related in Mr. Lewis's motion to suppress. Ms. Ornelas had a legitimate expectation of privacy in the tent as she was a co-owner of the tent, and she indicated as much by joining in Mr. Lewis's motion; she had both a subjective and objective expectation of privacy in that tent, the former supported by Nevada case law and the latter supported by public policy. The district court furthermore did not err in suppressing the wheelchair, either as a sanction or as fruit of the poisonous tree.

The district court has broad discretion to craft sanctions for egregious conduct by a party to an action, sometimes even arising to dismissal of an action, so the district court's order suppressing all tangentially-related evidence to the search was not an abuse of discretion.

ARGUMENT ON THE ISSUES

I. The District Court Did Not Err in Granting the Motion to Suppress Because Ms. Ornelas Did Have a Legitimate Expectation of Privacy in the Tent and Surrounding Area.

The district court's factual findings were made by adopting by reference the factual statements made in Mr. Lewis's motion to suppress, and therefore the district court did in fact make sufficient factual findings to sup-

port its order. Lastly, Ms. Ornelas did have a legitimate expectation of privacy in the area where the evidence was found. For these reasons, the district court's order should be upheld.

A. Standard of Review

Ms. Ornelas concedes that the State has stated the correct standard of review: this is a mixed question of law and fact warranting de novo review of the legal questions, but reviewing the district court's factual findings for sufficient evidence. (*See* Appellant's Opening Br. 12–13.) Where the State fails in its analysis is that the district court's order adopted the factual information within the suppression motion, and so did make factual findings. (I AA 112 ("[T]hat based on the pleadings, argument of counsel on April 5, 2021, prior argument made in court, and good cause shown, it is hereby ordered suppressed . . . ." (emphasis removed)).) For that reason, this Court should give deference to the district court's factual determinations as stated in the motion to suppress, (*see* I AA 8–12), and adopted in the order granting that motion.

B. Ms. Ornelas Had a Legitimate Expectation of Privacy in the Tent.

The State cites to *State v. Taylor*, 114 Nev. 1071, 968 P.2d 315 (1998), for the proposition that a legitimate expectation of privacy requires both a subjective expectation of privacy in the place searched or items seized and

that the privacy expectation be one that society is prepared to recognize as reasonable.

When Ms. Ornelas joined in Mr. Lewis's motion, she adopted his arguments in whole. It was apparent to the district court judge that she had asserted her Fourth Amendment rights in the tent, and had Mr. Lewis withdrawn his motion for whatever reason, Ms. Ornelas would have proceeded with litigating the merits thereof.

1. Ms. Ornelas Had a Subjective Expectation of Privacy in the Tent and Surrounding Area.

As co-occupant of a tent, Ms. Ornelas had a subjective expectation of privacy in that tent. The State ignores controlling Nevada law that establishes as much, instead attempting to bury it in another section of its argument.

A person has a subjective expectation of privacy in a tent and its contents where that person manifests such expectation, such as by leaving it closed. *Alward v. State*, 112 Nev. 141, 150, 912 P.2d 243, 249 (1996), *overruled on other grounds by Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005); *see also United States v. Gooch*, 6 F.3d 673, 676 (9th Cir. 1993). The Fourth Amendment "protects people, not places." *Gooch*, 6 F.3d at 676-77 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). "Simply because [the defendant] camped on land [owned by another] does not diminish his expectation of privacy." *Alward*, 112 Nev. at 150, 912 P.2d at 249. Warrantless

searches of tents, therefore, violate the Fourth Amendment. *Id.* (relied on by, *e.g.*, *Haley v. State*, 696 N.E.2d 98, 101 (Ind. 1998); *State v. Pulse*, 925 P.2d 797, 813 (Hi. 1996)).

> Though it cannot be secured by a deadbolt and can be entered by those who respect not others, the thin walls of a tent nonetheless are notice of its occupant's claim to privacy unless consent to enter be asked and given. One should be free to depart the campsite for the day's adventure without fear of this expectation of privacy being violated. Whether of short or longer term duration, one's occupation of a tent is entitled to equivalent protection from unreasonable government intrusion as that afforded to homes or hotel rooms.

People v. Schafer, 946 P.2d 938, 944 (Colo. 1997) (citing *Alward*, 112 Nev. at 150, 912 P.2d at 249).

In *United States v. Sandoval*, 200 F.3d 659 (9th Cir. 2000), the Ninth Circuit drew from and bolstered *Gooch*, 6 F.3d 673 (1993), which is still the lead case on Fourth Amendment law in that circuit. The named defendant, Sandoval, was one of eighteen indicted for marijuana growing and conspiracy. *Id.* at 660. At issue was one of the sixteen grow sites: a "makeshift tent" that was closed on all sides, located illegally on BLM land, containing a medicine bottle with Mr. Sandoval's name on it, linking him to the tent and other items of evidentiary value. *Id.* The tent was searched and seized without a

warrant, and the trial court denied a motion to suppress, reasoning that because the tent was illegally on BLM land, the defendant could not have reasonably expected to keep the tent private from intrusion. *Id.* However, the Ninth Circuit reversed, stating the defendant did have a reasonable expectation of privacy:

> First, the tent was located in an area that was heavily covered by vegetation and virtually impenetrable. Second, the makeshift tent was closed on all four sides, and the bottle could not be seen from outside. Third, Sandoval left a prescription medicine bottle inside the tent; a person who lacked a subjective expectation of privacy would likely not leave such an item lying around. The government counters that Sandoval could not have had a subjective expectation of privacy because he was growing marijuana illegally and was not authorized to camp on BLM land. However, **we have previously rejected the argument that a person lacks a subjective expectation of privacy simply because he is engaged in illegal activity or could have expected the police to intrude on his privacy.** *See United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993). According to this view, no lawbreaker would have a subjective expectation of privacy in any place because the expectation of arrest is always imminent.

Id. at 660. (quotes omitted) (emphasis added). Like the defendant in *Sandoval*, Ms. Ornelas showed a subjective expectation of privacy in her home, the tent, by keeping it zipped up and closed to outsiders. *See also Alward v. State*, 112 Nev. 141, 150 (defendant "had a subjective expectation of privacy in the tent and its contents . . . manifested . . . by leaving the tent . . . closed.").

What the State neglects to consider in its argument that "[z]ipping the tent closed did little to prevent others from accessing the items therein," (AOB 15), is that while the Fourth Amendment affords little protection against the criminal activity of private individuals, that is also not what it was designed to protect against: it protects private individuals from state and federal governmental action. The State's argument here must fail.

2. Ms. Ornelas Had an Objectively Reasonable Expectation of Privacy in the Tent and Surrounding Area.

The State argues without any supporting evidence that Ms. Ornelas and Mr. Lewis were trespassing. (AOB 16–17.) Without any citation to the record in support, this argument must fail. *See* NRAP 28(e), (j). Assuming arguendo that they were trespassing, there is still a reasonable expectation of privacy to be had. The Ninth Circuit stated as much in *Sandoval*, holding that the defendant's privacy expectation was objectively reasonable as well:

> In *LaDuke v. Nelson*, we held that a person can have an objectively reasonable expectation of privacy in a tent on private property. In *Gooch*, we extended that holding to find a reasonable expectation of privacy in a tent on a public campground. Here, the tent was located on BLM land, not on a public campground, and it is unclear whether Sandoval had permission to be there. However, **we do not believe the reasonableness of Sandoval's expectation of privacy turns on whether he had permission to camp on public land.**

200 F.3d at 660–61 (citations and footnotes omitted) (emphasis added). This language from *Sandoval* makes clear that Fourth Amendment analysis regarding whether a person has a reasonable expectation of privacy in their tent does not depend on where the tent is, be it private or public land, or whether it was pitched legally or illegally.

The State goes on to argue that society does not recognize a trespasser's right to privacy. (AOB 17–21.) What the State does not acknowledge is that this limited holding would deny Fourth Amendment protections to an entire swath of the population: the homeless. Without the right to exist anywhere, where does the Fourth Amendment begin to protect the citizenry? Or is this a right reserved to the landed gentry?

Despite the State's protestations, society is prepared to recognize that an erected tent, sealed against the elements and prying eyes, creates a privacy interest. Common sense dictates as much; common decency requires the same.

C. The District Court Did Not Err in Suppressing the Evidence from the Tent's Surroundings.

The State argues that "[t]he exclusionary rule only allows for the exclusion of evidence that was obtained in violation of the Fourth Amendment," and cites to *Mapp v. Ohio*, 367 U.S. 643 (1961), for this proposition. (AOB 27.) The State misrepresents *Mapp*, as that case does not hold anything of

the sort; instead, *Mapp* holds that the exclusionary rule is applicable to State as well as federal actions. *Mapp*, 367 U.S. at 654–55. There is nothing in the case law to indicate that a district court may not sanction the State for bad faith on the part of the police, which is what happened here:

> THE COURT: But here's the thing. If we don't know it from the police report, then the police didn't know it at the time. They would have put it in the police report. And so that means that they had objective expectation of privacy on a zipped tent. The police report clearly states that they unzipped the tent.
>
> MR. STANTON: That's correct. But, Judge, I don't think the police report is going to address the ongoing trespass because that was not the focus of their investigation as they wrote up the report.
>
> THE COURT: But it should have been when they knew that they had to have done something to get that search warrant, when they knew they had to have done something to be able to unzip that tent. If they didn't write that in their police report, then bad on them and they need to be trained better. . . .

(I AA 108:9–24.)

It is for that reason that the suppression order is as broad as it is; the Court was acting to sanction the State for the bad faith of its officers. *See infra* section II.

Secondly, though not correctly listed in the order, it is stated by the investigating officers in the search warrant application that the wheelchair

would not have been discovered absent the search of the tent and a subsequent canvassing of the area. (*Id.* at 38:248–50.) The wheelchair should perhaps more correctly have been suppressed as fruit of the poisonous tree, but this error is harmless, as the outcome is the same in either event: suppression. In either case, the district court did not err by suppressing the wheelchair.

II. The District Court Did Not Err by Suppressing All Incriminating Evidence.

As noted in section I(C), *supra*, the district court was acting within its discretion to sanction the State for the bad faith of its officers by ordering suppression of all tangentially-related material. *Cf.* NRS 174.295 (granting the district court authority to enter sanctions against the state for discovery violations, including suppression). Accordingly, this Court must look to whether the district court abused its discretion in doing so. *See Langford v. State*, 95 Nev. 631, 635, 600 P.2d 231, 234 (1979).

Here, the district court took what steps were appropriate given what it found: that the State's agents had acted in bad faith when they committed an exceptionally egregious Fourth Amendment violation. Outright dismissal of a case can be warranted if a discovery violation is egregious enough. *See, e.g.*, *United States v. Bundy*, 968 F.3d 1019, 1031 (9th Cir. 2020); *People v.*

Moore, 50 Cal. App. 3d 989, 123 Cal. Rptr. 837 (Ct. App. 1975). Accordingly, Ms. Ornelas would ask this Court to affirm the order of the district court.

CONCLUSION

This Court has often taken a broader view of the protections offered by the Fourth Amendment and its analogue, Article I, section 18 of the Nevada Constitution. *See Cortes v. State*, 127 Nev. 505, 514, 260 P.3d 184, 191 (2011). For these reasons, Ms. Ornelas would ask that the Court affirm the order of the district court.

DATED this 30 of August, 2021.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

I certify that I have read this brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief is typed in 14-point Georgia font using Microsoft Word, is 24 pages and 4883 words long, and complies with the typeface and -style requirements of NRAP 32(a)(4)-(6), as well as the page length requirements of NRAP 32(a)(7)(A). I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure and/or subsequent orders of this Court and with NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by a reference to a 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 30 of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30 of August, 2021, I served this document on the following:

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AFFIRMATION

Pursuant to NRS 239B.030, this document contains no social security numbers.

/s/ Michael A. Troiano	8-30-21
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