

1  
2 IN THE SUPREME COURT OF THE STATE OF NEVADA

3 JUAN JOSE LUNA,

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

Respondent.

CASE NO. 82792

Electronically Filed  
Sep 20 2021 08:20 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

7  
8 Appeal from the Fourth Judicial District Court  
County of Elko, State of Nevada  
9 The Honorable Alvin R. Kacin, District Judge

10 **APPELLANT'S OPENING BRIEF**

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1                                   **STATEMENT OF JURISDICTION**

2           The District Court entered its judgment of conviction on March 18, 2021. *Joint*  
3 *Appendix ("JA")* 218. The Appellant filed notice of appeal on April 14, 2021. *JA*  
4 221. Since Appellant filed the notice of appeal within thirty (30) days from the entry  
5 of the written judgment, notice of appeal is timely pursuant to NRAP 4(b)(1)(A).

6           NRS 277.015(3) provides this Court with jurisdiction to review the judgment  
7 of conviction that Juan Jose Luna ("Mr. Luna") now appeals.

8                                   **ROUTING STATEMENT**

9           This case involves a direct appeal from a judgment of conviction based on a  
10 jury verdict. *JA* 218. Pursuant to NRAP 17(b)(2)(A), a judgment of conviction based  
11 on a jury verdict from a Category A felony is exempt from presumptive assignment  
12 to the Nevada Court of Appeals. As such, this case is presumptively assigned to the  
13 Supreme Court's routing discretion. Mr. Luna has no objection to this case being  
14 assigned to the Court of Appeals.

15                                  **STATEMENT OF THE ISSUES**

16           The issues on appeal in the present case are: (1) whether the District Court  
17 erred in holding that Mr. Luna was subject to a lawful detention; (2) whether the  
18 District Court erred in holding that Mr. Luna was subject to a lawful pat down  
19 search; and (3) whether the District Court erred in holding that Mr. Luna's vehicle  
20 was subject to a lawful search.

## STATEMENT OF THE CASE

The State filed the criminal information against Mr. Luna on February 18, 2020, charging him with the following: Count 1: Trafficking in a Schedule 1 Controlled Substance, a Category A Felony; Count 2: Trafficking in a Schedule 1 Controlled Substance, a Category A Felony; and Count 3: Possession of a Controlled Substance, a Category E Felony. *JA* 008. The alleged acts occurred on or about January 19, 2020. *Id.* Mr. Luna filed a Motion to Suppress Evidence for the methamphetamine, drug paraphernalia, and firearms that were illegally obtained on July 10, 2020. *JA* 088. The State opposed the motion on July 20, 2020. *JA* 123. The District Court denied Mr. Luna's Motion to Suppress on August 18, 2020. *JA* 182. The trial commenced on December 15, 2020. After the conclusion of evidence, the jury convicted Mr. Luna on all counts. *JA* 218. On Count 1, Trafficking in a Schedule 1 Controlled Substance, the District Court sentenced Mr. Luna to 10-25 years imprisonment in the Nevada Department of Corrections with credit for four-hundred-and-twenty-two (422) days served; on Count 2, Trafficking in a Schedule 1 Controlled Substance, the District Court sentenced Mr. Luna to 10-25 years imprisonment in the Nevada Department of Corrections with credit for zero (0) days served; and on Count 3, Possession of a Controlled Substance, the District Court sentenced Mr. Luna to 19-48 months imprisonment in the Nevada Department of

1 Corrections with credit for zero (0) days served. *Id.* With all sentences running  
2 concurrently. *Id.*

### 3 STATEMENT OF THE FACTS

4 Around 11:20 p.m. on January 19, 2020, Officer John Trice (“Trice”) of the  
5 Elko County Police Department and Officer Jason Bringhurst (“Bringhurst”) of the  
6 Nevada Highway Patrol were parked in separate cars monitoring the stop sign on US  
7 93 and 6<sup>th</sup> Street in Wells, Nevada. *JA* 37:11-12. Across the parking lot from where  
8 Trice and Bringhurst were parked was the Sinclair (“Petro”) station. During the hour  
9 that Trice and Bringhurst were located in the parking lot, they never noticed an idle  
10 vehicle parked at the Petro. *JA* 38:16-25.

11 At 11:45 p.m., Jacob Elmore (“Mr. Elmore”), a Petro employee, arrived at the  
12 Petro for work. *JA* 154:12:24-25; 155:13:1-19. When Mr. Elmore got to work, the  
13 manager, Jennifer Gardner (“Ms. Gardner”), stated that she had observed a vehicle at  
14 a gas pump for 45 minutes. *Id.* Ms. Gardner made no made contact with the vehicle  
15 prior to Mr. Elmore arriving at work. *JA* 156:17:21-23.

16 At about midnight, Mr. Elmore went outside to the passenger side window at  
17 Ms. Gardner’s request. *JA* 155:14:4-11. Ms. Gardner testified that upon Mr.  
18 Elmore’s return, Mr. Elmore stated that he told the passenger inside the vehicle to  
19 move. *JA* 155:14:16-19. After a few minutes Ms. Gardner looked to see if the vehicle  
20 was still at the pump and noticed that there were police officers right across the street.



1 JA 155:15:3-13. After Ms. Gardner got off work, she went across the street to Trice  
2 and Bringhurst to report that a vehicle had been at the gas pump "for a little while"  
3 and did not vacate upon request by an employee. JA 155:15:16-18; 39:2-6. Ms.  
4 Gardner stated the vehicle had been sitting there for about an hour and a half and that  
5 they were "kinda weird, too...we couldn't tell what the driver was doing." JA 183:1-  
6 4. Ms. Gardner "asked [the officers] to please come remove the car from the island."  
7 JA 155:15:16-18. Trice interpreted Ms. Gardner's request of 'I just want them  
8 moved along' to mean that the vehicle "was trespassing and to have them leave the  
9 property" as a whole. JA 157:24:13-19. Ms. Gardner did not want the occupants to  
10 be arrested for trespassing, but simply for them to move off the pump. JA 156:22-  
11 23.

12 Trice and Bringhurst both drove over to the Petro station without police lights  
13 on and parked side-by-side behind the stopped vehicle. JA 39:10-16. Trice then  
14 illuminated the back of the sedan with the patrol vehicle's headlights and white  
15 lights. JA 40:11-22. Trice testified that there were also multiple lit fluorescent bulbs  
16 on the overhead canopy illuminating the area where the vehicle was parked. JA  
17 40:11-22. Trice testified that he ran a routine traffic stop style approach on the  
18 vehicle, which included running the vehicle's Idaho license plate. JA 39:12-13; 41:4-  
19 6. Trice approached the vehicle and noticed that the individual in the driver's seat,  
20 who was eventually identified as Mr. Luna, was in a position that looked like he was

1 sleeping in the seat. *JA* 44:1-3. During the Preliminary Hearing, Trice testified that at  
2 this point of initial approach, he considered himself to have detained Mr. Luna. *JA*  
3 059:7-20.

4 Q: Okay. So when you approach Mr. Luna, upon that approach, Mr.  
Luna's being detained, correct? *JA* 59:15-16.

5 A: You could say that. *JA* 59:17.

6 Q: Okay. I want to know an actual fact. Was he detained? *JA* 59:18-19.

A: Yes. *JA* 59:20.

7 During the detention, Trice knocked on the driver side window then announced  
8 himself to both Mr. Luna and the passenger in the vehicle. *JA* 41:5-7. Mr. Luna rolled  
9 down the window and a brief discussion between Trice and Mr. Luna occurred, during  
10 which Trice asked if Mr. Luna had a driver's license. *JA* 41:25. Mr. Luna stated that  
11 he did not have a driver's license on his person, but provided Trice with an Idaho  
12 identification card which Trice had Elko dispatch run. *JA* 42:1-14. During this time,  
13 Trice testified that Mr. Luna was lethargic and slow to speak and that he believed Mr.  
14 Luna was fatigued and appeared to be sleepy. *JA* 43:9-13.

15 Elko dispatch informed Trice of an outstanding warrant for Mr. Luna and shortly  
16 after mentioned that Mr. Luna had a prior drug history and was known to carry a  
17 weapon. *JA* 44:18-20. Trice then told Mr. Luna to shut off the vehicle, put his hands  
18 on the steering wheel, and step out of the vehicle, where Trice immediately placed Mr.  
19 Luna in handcuffs. *JA* 43:9-24. Mr. Luna was cooperative during the entire procedure.  
20 *JA* 60:21-22. Trice testified that he was unaware of whether Mr. Luna was armed or

1 dangerous at the time. *JA* 60:18-19. Trice performed a pat down search of Mr. Luna  
2 for weapons before obtaining any information regarding the warrant. *JA* 46:24-25;  
3 47:1-7. Trice found what he believed to be a smoking device used for  
4 methamphetamine. *JA* 163:45:19-25.

5 Prior to Mirandizing Mr. Luna, Trice asked Mr. Luna "if that was a meth pipe"  
6 *JA* 48:16-24. After a conversation, Trice stated that he placed Mr. Luna under arrest  
7 for possession of drug paraphernalia. *JA* 49:5-8. Once Trice secured Mr. Luna in the  
8 patrol car, Trice received notice that the warrant for Mr. Luna was active. *JA* 49:15-  
9 19. Trice then searched Mr. Luna's vehicle and found a green bag under the driver's  
10 seat. *JA* 51:20-24. Trice believed the bag smelled of heroin and then opened the bag.  
11 *JA* 52:6-15. Inside the green bag were six smaller bags: one bag of cocaine, one bag  
12 of methamphetamine, and four bags of heroin. *JA* 185:10-13. Trice then subsequently  
13 stopped the search and sealed the vehicle while a search warrant could be obtained.  
14 *JA* 185:14-15.

15 After a search warrant was obtained, the vehicle was unsealed and a shotgun  
16 was found in the trunk of the vehicle. *JA* 185:13-15. A jury later convicted Mr. Luna  
17 of two counts of Trafficking in a Schedule 1 Controlled Substance and one count of  
18 Possession of a Controlled Substance. *JA* 218.

19 **SUMMARY OF THE ARGUMENT**  
20

1 The Fourth Amendment of the United States Constitution and Article I,  
2 Section 18 of the Nevada State Constitution prohibit unreasonable searches and  
3 seizures of persons and their houses, papers, and effects. Reasonableness is the  
4 touchstone of the Fourth Amendment, measured in objective terms through close  
5 examination of the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 39  
6 (1996). Trice violated Mr. Luna's Fourth Amendment rights when he illegally seized  
7 Mr. Luna, searched Mr. Luna's person without cause, and unlawfully searched Mr.  
8 Luna's vehicle. Consequently, the District Court committed reversible error by  
9 denying the defense's Motion to Suppress the illegally obtained evidence: the  
10 narcotics, drug paraphernalia, and the firearm.

## 11 ARGUMENT

### 12 **A. Standard of Review**

13 On appeal, a district court's legal conclusions are reviewed de novo while its  
14 factual findings are to be reviewed for clear error. *Somee v. State*, 124 Nev. 434,  
15 441 (2008). A factual finding will be upheld only if it is supported by "substantial  
16 evidence." *State v. Harnish*, 113 Nev. 214, 219 (1997).

### 17 **B. The District Court Committed Reversible Error by Holding that Mr. 18 Luna's Detainment was Lawful.**

19 In its order, the District Court ruled that the initial encounter between Trice  
20 and Mr. Luna was a lawful detention under the Fourth Amendment. *JA* 186:7-9.  
The Fourth Amendment requires search and seizures to be reasonable, which

1 “strikes a balance between the public interest and the individual’s right to personal  
2 security free from arbitrary interference by law officers.” *State v. Rincon*, 122 Nev.  
3 1170 (2006). The District Court emphasized that an officer may stop a person and  
4 conduct a brief investigation when the officer has a reasonable, articulable  
5 suspicion that criminal activity is taking place or about to take place. *JA* 186:10-12.  
6 An individual is considered detained by the police when, in view of all the  
7 circumstances surrounding the incident, a reasonable person would not have  
8 believed they were free to leave. *State v. Stinnett*, 104 Nev. 398, 401 (1988).

9 In this case, Trice, himself, testified that he detained Mr. Luna, prohibiting  
10 him from leaving the scene. *JA* 059:7-20. Regardless of Trice’s believed  
11 detainment, a reasonable person would not have believed they were free to leave in  
12 view of the totality of the circumstances. *State v. Sinnett*, 104 Nev. 398 (1988). He  
13 also testified that Mr. Luna was, in fact, detained: two police vehicles pulled up  
14 behind Mr. Luna’s parked car and approached both sides of the vehicle and began  
15 to question the occupants. *JA* 41:4-7. If “the occupants tried to leave, no doubt  
16 Deputy Trice would have informed them otherwise.” *JA* 126:27-28.

17 The District Court found that the detention was proper as there was  
18 “preponderating evidence that Trice had such a reasonable articulable suspicion”  
19 based on two theories. *JA* 186:7-9;13. First, the District Court found that Mr. Luna  
20 had committed an unlawful trespass on the Petro property under NRS 207.200. *JA*

1 186:10-25. Under the relevant sections of the Nevada trespassing statute, NRS  
2 207.200 states:

3 “(1) Unless a greater penalty is provided pursuant to NRS 200.603,  
4 any person who, under circumstances not amounting to a  
burglary:

5 (a) *Willfully* goes or remains upon any land or in any building  
6 after having been warned by the owner or occupant thereof  
7 not to trespass, is guilty of a misdemeanor. The meaning of  
8 this subsection is not limited by subsections 2 and 4.

9 (2) A sufficient warning against trespassing, within the meaning of  
10 this section, is given by any of the following methods:

11 (e) By the owner or occupant of the land or building making an  
12 oral or written *demand* to any guest to vacate the land or  
13 building” (emphasis added).

14 In its opposition, the State argued there was reasonable suspicion Mr. Luna  
15 violated the Wells trespass code, which has a lower standard to establish  
16 trespassing, and states: any person unlawfully on the land of another who after  
17 verbal or written *communication* by the owner or possessor of the land that the  
18 person is not to enter or remain upon the land continues to be on the land is  
19 considered trespassed. *Wells City Code 7-1-6(H)*, (emphasis added). Further, in its  
20 order, the District Court found that Trice had reasonable, articulable suspicion that  
Mr. Luna committed criminal activity, as it is a misdemeanor for any person to  
*willfully* remain upon the land of another after having been warned by the owner  
not to trespass. *JA187:10-19*.

1 Contrary to the State's and the District Court's belief, Mr. Luna was never  
2 provided a warning as required in NRS 207.200(2) or the Wells City Code to  
3 vacate the Petro. Under the relevant subsections of NRS 207.200(2)(e), a sufficient  
4 warning against trespassing can be found through an oral or written *demand* to any  
5 guest to vacate the land or building. (Emphasis added). While *Scott* allows an  
6 owner's employee to trespass a guest, that employee must still make an oral or  
7 written demand or communication for the guest to vacate. *Scott v. State*, 110 Nev.  
8 622 (1994).

9 Ms. Gardner testified that she intended for the vehicle to merely move off  
10 the fuel island and to free up the spot for someone to use the pump. When she sent  
11 Mr. Elmore out to speak with the vehicle's occupants, she did not intend for Mr.  
12 Luna to vacate the entire Petro property. *JA* 155:14:6-7. The request by the Petro  
13 employee was neither an oral demand or communication to vacate the land,  
14 building, or premises as required by NRS 207.200, Wells City Code, or *Scott*.  
15 Instead, this was an invitation for Mr. Luna to stay at the Petro station, but in a  
16 different location on Petro's land.

17 Mr. Elmore's comment was also not directed at Mr. Luna, but rather at the  
18 vehicle's passenger. *JA* 156:14:16-19. Mr. Elmore approached the passenger side  
19 of the vehicle and spoke with the passenger, a blond female. *Id.* Mr. Elmore did not  
20 report that he spoke to the driver, Mr. Luna. *Id.* Ms. Gardner testified that she

1 couldn't see what the driver, Mr. Luna, was doing. *JA* 183:3. Trice testified that  
2 upon approaching the vehicle, the driver, Mr. Luna, appeared to be sleeping. *JA*  
3 44:1-3. Mr. Luna could not have willfully remained on the premises if he was  
4 unaware that an oral demand or communication had ever been made for him to  
5 vacate. Similar to *Virginia v. Moore*, 553 U.S. 164 (2008), Trice should not have  
6 arrested Mr. Luna for trespassing, but rather should have provided Mr. Luna with a  
7 criminal trespass warning and given Mr. Luna the opportunity to vacate the  
8 premises.<sup>1</sup>

9 As stated, Ms. Gardner never wanted Mr. Luna to be arrested for trespassing,  
10 but simply for Mr. Luna to move away from the fuel pump. *JA* 30:22-23; 31:22-23.  
11 It can be inferred by the lack of intention to trespass Mr. Luna that Ms. Gardner nor  
12 Mr. Elmore gave a trespass warning, yet Trice—on his own volition—interpreted  
13 Ms. Gardner's request of "wanting them moved along" to mean that Mr. Luna was  
14 trespassed. *JA* 35:13-19. Absent the oral demand or communication for Mr. Luna  
15 to vacate the premises, Trice did not have reasonable, articulable suspicion that a  
16 crime—trespassing—was being committed. Further, there is a lack of credible  
17 evidence regarding whether Mr. Luna willfully remained at the Petro after being  
18

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19 <sup>1</sup> While it can be argued that Trice had cause to initiate a traffic stop based on the  
20 community caretaking doctrine, that doctrine makes it a duty for police officers to  
"aid drivers who are in distress" which "may arise if a police officer observes  
circumstances indicative of a medical emergency or automotive malfunction. *State*  
*v. Rincon*, 122 Nev. 1170 (2006). That is not applicable here.



1 warned, and Ms. Gardner never intended for a trespass to even occur. Therefore,  
2 Trice did not have the proper foundation to initially detain Mr. Luna for  
3 trespassing pursuant to NRS 207.200, the Wells City Code, or *Scott*.

4 Second, the District Court found that Ms. Gardner's tip provided Trice with  
5 reasonable, articulable suspicion that a crime was occurring, even if the informant  
6 was not credible, as it was corroborated by independent police surveillance. *JA*  
7 197:15-21. In its order, the District Court, erred in its belief as Mr. Luna's case  
8 does not meet the requirements of trespass under NRS 207.200. Even if it did, it  
9 would not have provided Trice with reasonable, articulable suspicion, as Ms.  
10 Gardner's tip was unreliable and uncorroborated by police surveillance.

11 Not only did the District Court believe that this arrest complied with Nevada  
12 law, but the District Court reasoned that a "tip corroborated by independent police  
13 surveillance and information may establish probable cause even where nothing is  
14 known about [the] informant's credibility." *JA* 187:15-21.

15 However, the District Court's broad interpretation of NRS 171.124 is  
16 irrelevant here because Ms. Gardner's tip was not corroborated by independent  
17 police surveillance. Trice and Bringhurst had been watching the street in front of  
18 the Petro for an hour, but could not articulate how long Mr. Luna's vehicle was  
19 there for. *JA* 38:20-25. Neither Trice or Bringhurst testified at any point that they  
20

1 witnessed a Petro employee approach the vehicle and ask Mr. Luna to vacate the  
2 premises.

3 Generally, a police officer may “detain any person whom the officer  
4 encounters under circumstances which reasonably indicate that the person has  
5 committed, is committing, or is about to commit a crime” *NRS 171.123(1)*; *Terry*  
6 *v. Ohio*, 392 U.S. 1 (1968). In order to detain someone, the officer cannot rely on  
7 an inchoate and unparticularized suspicion or hunch, but rather must have  
8 reasonable, articulable suspicion, consisting of a particularized and objective  
9 justification for suspecting a person of criminal activity. *Terry*, 392 U.S. 1, 27;  
10 *United States v. Arvizu*, 534 U.S. 266 (2002).

11 Contrary to the District Court’s belief, there is no reasonable suspicion to  
12 detain Mr. Luna without the corroborated tip of a reliable informant. To determine  
13 reliability, the Court must look at the totality of the circumstances, including: the  
14 reliability of the informant, whether the information exhibits sufficient indicia of  
15 reliability, whether it is suitably corroborated, and whether it is reliable in its  
16 assertion of illegality, not just in identifying a person. *Illinois v. Gates*, 462 U.S.  
17 213 (1983); *McMorran v. State*, 118 Nev. 379, 387 (2002).

18 An identified citizen informant has a higher level of reliability than an  
19 anonymous informant. *Palmieri v. Clark Cnty.*, 131 Nev. 1028, 1052 (2015). If an  
20 officer has known the informant for a year and received accurate information from

1 the informant on previous occasions, the informant is considered sufficiently  
2 reliable. *Hamilton v. Sheriff, Elko County*, 92 Nev. 591 (1976). In some instances,  
3 courts have considered an informant who identifies themselves as an employee of a  
4 business, but does not provide their name or number, to be reliable, as they  
5 presumably would not falsify information about a crime being committed due to  
6 potential repercussions by their employment. *Edwards v. Cabrera*, 58 F.3d 290,  
7 294 (1995).

8 This case, however, is different than *Edwards*. Ms. Gardner was not  
9 reporting a crime. After Ms. Gardner got off work and approached Trice and  
10 Bringhurst, it was not to report a crime being committed, but simply to ask for  
11 assistance in getting Mr. Luna to move his vehicle to another location at the Petro  
12 station. *JA* 156:22-23; 157:22-23. Ms. Gardner had no reason to believe that her  
13 request, whether true or not, could lead to repercussions by her employer. Ms.  
14 Gardner testified that the occupants of the vehicle were “kinda weird” even though  
15 Ms. Gardner never actually interacted with them. *JA* 156:17:5-6. It is common for  
16 reasonable and prudent individuals to exaggerate the truth when they are put into  
17 uncomfortable situations. It is common for individuals to want to avoid  
18 confrontation with others especially when they are “kinda weird.”

19 In fact, Ms. Gardner never tried to call dispatch when the supposed  
20 suspicious activity first began, or even thirty minutes after, or an hour after. *JA*

1 156:17:21-23. Pursuant to *Palmieri*, Ms. Gardner did not have the requisite detailed  
2 knowledge necessary to be considered a reliable informant. The District Court  
3 incorrectly held that any seizure that took place was constitutional and in  
4 compliance with Nevada law, as Trice—under the totality of the circumstances—  
5 believed that Mr. Luna had committed, was committing, or was about to commit a  
6 crime. *JA* 186:24-25, 187:1-2.

7 It is clear from the facts that Mr. Luna did not trespass under NRS 207.200  
8 nor Well's City Code. Even if the Court decided that Mr. Luna did, in fact trespass,  
9 there was not enough evidence to establish reasonable suspicion of the trespass  
10 without a credible informant or credible information. The detention was a violation  
11 of Mr. Luna's Fourth Amendment rights. Thus, the District Court erred when it  
12 determined that Trice did not violate Mr. Luna's Fourth Amendment rights.

13 **C. The District Court Committed Reversible Error by Holding that Mr.**  
14 **Luna was Subject to a Lawful Pat Down Search.**

15 The District Court ruled that Trice had the authority to frisk Mr. Luna and  
16 recover the pipe because Trice had probable cause to arrest Mr. Luna for trespass.  
17 *JA* 187:22-25. In the alternative, the District Court stated that, had Trice lacked  
18 probable cause for an arrest for trespass, the frisk was still valid under NRS  
19 171.123. *JA* 187:28; 188:1-2. The District Court found that, through the collective  
20 knowledge of all the officers, Trice could infer that Mr. Luna may be armed and  
dangerous. Even if applying the collective knowledge doctrine, Trice still did not

1 have reasonable suspicion to believe that Mr. Luna was presently armed and  
2 dangerous.

3 Warrantless searches are, per se, unreasonable, subject only to a few  
4 specifically established and well-delineated exceptions. *Hughes v. State*, 116 Nev.  
5 975, 979 (2000). The District Court relied on *State v. Greenwald*, 109 Nev. 808,  
6 810 (1993), when finding that Trice had the “authority to search incident to arrest  
7 derives from need to disarm and prevent any evidence from being concealed or  
8 destroyed.” *JA* 187:27-28. The United States Supreme Court justified such  
9 authority to ensure the officer’s safety and to preserve evidence on the suspect’s  
10 person for later use at trial. *United States v. Robinson*, 414 U.S. 218, 234 (1973).

11 If Trice was arresting Mr. Luna for trespass, what evidence was Trice  
12 looking for to safeguard for later use at trial? An officer may search an individual  
13 if the officer had reasonable grounds to believe that the individual was armed and  
14 dangerous. *Terry*, 392 U.S. 1; *NRS 171.1232*. Such reasonable belief must be based  
15 on specific articulable facts that warrant the search and seizure. *Somee v. State*, 124  
16 Nev. 434 (2008). The officer need not be absolutely certain the individual is  
17 armed, but whether a reasonably prudent man in the circumstances would believe  
18 that their safety or that of others was in danger. *Rice v. State*, 113 Nev. 425, 430  
19 (1997).

1 The District Court cited five instances which would provide Trice with a  
2 reasonable belief based on specific articulable facts that Mr. Luna was armed and  
3 dangerous: 1) Trice saw evidence of narcotics; 2) Trice supposedly saw Mr. Luna  
4 reach forward; 3) Trice was informed that Mr. Luna “likely” had a warrant and  
5 showed cautions for violence; 4) Trice was told Mr. Luna was known to carry a  
6 firearm; 5) the passenger was removed from the vehicle. *JA* 188:12-22.

7 Having been armed in the past does not establish that the detainee poses a  
8 *present* physical threat. *United States v. Bailey*, 743 F.3d 322, 340 (2nd Cir. 2014).  
9 Just because Trice “suspects everybody is armed and dangerous until [he] knows  
10 otherwise” does not amount to reasonable suspicion. *JA* 163:45:7-8. Nonetheless,  
11 while those five instances may have initially provided Trice with reasonable belief  
12 to allow a frisk under *Terry*, Trice exceeded that authority when he handcuffed Mr.  
13 Luna.

14 Additionally, Trice exceeded the scope of *Terry*. The District Court found “it  
15 matters not that Trice testified at the suppression hearing that he did not believe  
16 [Mr.] Luna was armed and dangerous when the frisk occurred.” *JA* 188:10-11. The  
17 District Court also held that, based on an objective standard of all the present  
18 officer’s knowledge, it could be inferred that Mr. Luna was armed and dangerous.  
19 *JA* 188.

1           Only on *[some occasions]* is an otherwise valid frisk is objectionable  
2 because the suspect was first placed in handcuffs. *See Cortes v. State* 127 Nev. 505  
3 (2011) (showing reasonableness as the defendant had a knife on his lap); *See Scott*  
4 *v. State*, 110 Nev. 622 (1994) (showing reasonableness after the officer found a  
5 firearm in the vehicle). However, depending on the totality of the circumstances, a  
6 frisk can become an arrest when: 1) looking at how much the defendant's liberty  
7 was restricted and whether a reasonable person would have felt free to leave; and  
8 2) the justification for the use of such tactics, looking at whether the officer had  
9 sufficient basis to fear for his safety to warrant the intrusiveness of the action  
10 taken. *Kelly v. State*, 401 P.3d 211, 9 (2017).

11           In support of its findings, the Court cited *Cortes v. State*, 127 Nev. 505, 511  
12 (2011), which is a case where reasonable suspicion was met as a furtive defendant  
13 defied orders to keep his hands in sight. *Id.* at 508. Unlike *Cortes*, Mr. Luna was  
14 not furtive and did not disobey orders to keep his hands where Trice could see  
15 them. Mr. Luna had fully complied when Trice demanded he put his keys on the  
16 dash, place his hands on the steering wheel, and to get out of the vehicle.

17           This was not an occasion where handcuffs were necessary or where  
18 handcuffing was the least intrusive means to protect against the potential threat of  
19 harm. *Bailey*, 743 F.3d 322. Trice was able to see into Mr. Luna's vehicle and did  
20 not observe any weapons. Before the search, Trice had securely restrained Mr.

1 Luna—if Mr. Luna had a weapon, he would not have been able to grab it. Mr.  
2 Luna did not try to flee and was not violent. It is evident that Mr. Luna did not  
3 pose a threat to Trice at the time of the search. Looking at the totality of the  
4 circumstances, this was not an instance where Trice had to disarm or prevent any  
5 evidence from being destroyed by Mr. Luna. By placing Mr. Luna in handcuffs,  
6 Trice completed a de facto arrest which requires probable cause that a crime was  
7 committed. *Kelly*, 402 p.3d at 9; *State v. McKellips*, 118 Nev. 465, 471 (2002).  
8 Since Mr. Luna was not trespassing, there was no probable cause that a crime had  
9 been committed and Trice, therefore, exceeded the scope of a *Terry* frisk.

10 Finally, the State argued that, in the alternative, the search of Mr. Luna  
11 would “clearly” fall under the search-incident to arrest for possession of  
12 methamphetamine, as a search incident to arrest may precede the actual arrest so  
13 long as the arrest occurs shortly thereafter. *Rawlings v. Kentucky*, 100 S. Ct. 2556,  
14 2564 (1980).

15 The State’s representation of *Rawlings* however is incomplete. The Court in  
16 *Rawlings* stated that if a defendant admits to ownership over a controlled  
17 substance, and then a search occurs, the search is legal as incident to the formal  
18 arrest, despite the fact that the challenged search slightly preceded the arrest. *Id.*  
19 The Court reasoned that the police had probable cause to arrest the defendant  
20 immediately upon his admission of ownership. *Id.*



1 Mr. Luna's case is substantially different than *Rawlings*, as Mr. Luna did not  
2 admit to having any illegal substances prior to being searched. Additionally, no  
3 illegal substances were found on Mr. Luna's person, but rather in the vehicle,  
4 invalidating the supposed probable cause the District Court claimed allowed Trice  
5 to perform a search of Mr. Luna's person. Up to that point, Mr. Luna had been  
6 illegally detained, and Trice did not have the authority to search Mr. Luna based on  
7 an arrest for trespass, an arrest for possession, or under *Terry*. Nonetheless, Trice  
8 continued to perform an unlawful search on Mr. Luna without any legal footing to  
9 do so. The District Court, therefore, reversible error when it determined that Trice  
10 did not unlawfully pat down Mr. Luna.

11 **D. The District Court erred in ruling that the purported search of the**  
12 **vehicle was Constitutional.**

13 In its order, the District Court held that Bringhurst and Trice had  
14 probable cause to enter and search the sedan once they saw foil and  
15 hypodermic devices on the passenger's lap. *JA* 189:21-22 Even without a  
16 warrant, the Court cited to the plain-view doctrine as permitting the search.  
17 *JA* 189:25-26. However, warrantless searches are, *per se*, unreasonable,  
18 absent a few well delineated exceptions. *Camacho v. State*, 119 Nev. 395, 399  
19 (2003). Incident to a lawful arrest, a warrantless search of an automobile is,  
20 however, permissible with both probable cause and exigent circumstances. *Id.*  
at 400. This authority to perform a vehicle search incident to arrest is derived

1 from “the need to disarm and prevent any evidence from being concealed or  
2 destroyed.” *State v. Nye*, 468 P.3d 369, 371 (2020). The mobility of an  
3 automobile as well as the propensity for a suspect to cause harm to officers  
4 have been historically analyzed as exigent circumstances which warrant a  
5 practical necessity to perform a warrantless search on a vehicle. *Camacho*,  
6 119 Nev. at 400; *Arizona v. Grant*, 556 U.S. 332, 346 (2009) (discussing the  
7 circumstances of the suspect being unable to reach weapons or conceal  
8 evidence as prohibiting a warrantless vehicle search).

9       The instant case is hardly different than the aforementioned cases. Mr.  
10 Luna was, by Trice’s own account, considered detained the moment that Trice  
11 contacted him. *JA* 059:7-20. Once Mr. Luna was eventually out of the vehicle  
12 and handcuffed, he no longer posed a threat to the officers. He was then placed  
13 in the back of the patrol vehicle and remained there for the continuance of the  
14 on-site investigation. Trice did not initiate a search of the vehicle until after  
15 Mr. Luna was detained in the locked patrol car, and after the arrest warrant  
16 returned as active.

17       The District Court stated that the circumstantial evidence demonstrated  
18 the sedan was readily mobile. *JA* 189:5-6. This Court has delivered several  
19 opinions in which the position and circumstances of the Defendant play a  
20 crucial role in the mobility of the vehicle. In *Camacho*, for example, the Court

1 concluded that, because police planned to seize Camacho's vehicle and  
2 Camacho was handcuffed at the time of search, it was extremely unlikely that  
3 he could have destroyed or concealed evidence, reached for a weapon, or that  
4 a third party could have removed evidence from within. 119 Nev. at 401.  
5 Absent exigent circumstances, the search was, therefore, impermissible  
6 without a warrant. *Id.* Similarly, in *State v. Nye*, the search in question  
7 occurred "after officers arrested Nye, secured her inside a patrol car, put her  
8 backpack in the trunk, and took her to jail. Thus, at the time of the search, Nye  
9 did not pose a threat to officer safety, nor was there an immediate need to  
10 preserve evidence." 468 P. 3d 369, 371 (2020). While the black sedan Mr.  
11 Luna was found in was drivable, if the vehicle was mobile at all, it was not  
12 going to be at the hands of Mr. Luna: it was going to be at the whim of a tow  
13 truck. This is not in line with the intended definition of "mobile" under these  
14 circumstances.

15 By the time a search warrant was issued, officers had already collected  
16 most of the crucial evidence from the vehicle—the narcotics. Mr. Luna's  
17 detainment rendered him a non-threat to officers and there were no exigent  
18 circumstances in which "the need to disarm and prevent any evidence from  
19  
20

1 being concealed or destroyed”<sup>1</sup> was permissible without a warrant,  
2 particularly considering that a warrant was eventually issued.

3 Across the board, it is true that “the rationales underlying the  
4 automobile exception are specific to the nature of a vehicle.” *Collins v.*  
5 *Virginia*, 138 S. Ct. 1663, 1672 (2018). Although *State v. Lloyd* held that “our  
6 state constitution compels no different automobile exception to its warrant  
7 requirement than the Fourth Amendment does,”<sup>2</sup> what the constitution of both  
8 the State of Nevada and the U.S. clearly state is that warrantless searches and  
9 seizures are *per se* unreasonable. The plain reading of the Constitution,  
10 therefore, closely aligns with the reasoning in *Collins*<sup>3</sup>, indicating that a  
11 factual inquiry into the circumstances of a warrantless vehicle search is  
12 required to ensure that a person’s constitutional rights are not violated.

13 The facts clearly illustrate that a warrantless search was performed of  
14 the vehicle and, pursuant to the Fourth Amendment, warrantless searches and  
15 seizures are *per se* unreasonable. Absent any exigent circumstances inspiring  
16 reasonable belief that Mr. Luna could have damaged evidence or been a  
17  
18

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19 <sup>1</sup> *State v. Nye*, 468 P.3d 369, 371 (2020).

20 <sup>2</sup> *State v. Lloyd*, 129 Nev. 739, 745 (2013).

<sup>3</sup> 138 S. Ct. 1663, 1672 (2018)

1 danger to officers, the warrantless search of the vehicle violated Mr. Luna's  
2 constitutional rights.

3 **E. The District Court Committed Reversible Error by Denying the**  
4 **Suppression of Evidence Discovered as the Result of the Unlawful**  
5 **Detainment and Search of Person.**

6 In its order, the District Court found that the State did not seek the admission  
7 of evidence seized in violation of the Fourth Amendment of the United States  
8 Constitution and the Nevada Constitution. *JA* 109:7-12. However, evidence that is  
9 gathered as the result of law enforcement's unlawful actions constitute an unlawful  
10 seizure and is inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).  
11 The Court developed that exclusionary rule as a remedy designed to safeguard the  
12 rights of individuals under the Fourth Amendment by deterring unlawful conduct  
13 by law enforcement. *Id.* at 485.

14 As mentioned above, Trice lacked reasonable suspicion to initially detain  
15 Mr. Luna for trespassing. Any evidence obtained after that point should be  
16 inadmissible. However, if this Court does find that Trice did have reasonable  
17 suspicion, Trice did not have cause to search Mr. Luna's person. Any evidence  
18 obtained from the unlawful search of Mr. Luna should be excluded.

19 **CONCLUSION**

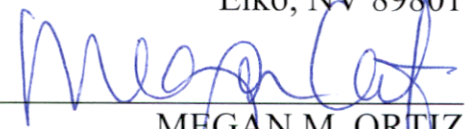
20 Mr. Luna's detainment was illegal from the onset. Pursuant to NRS 171.123,  
a detainment requires a reasonable belief that Mr. Luna had committed, was

1 committing, or was about to commit a crime. Under both the Nevada statute and  
2 Wells City Code, trespass requires some type of warning for the guest to vacate the  
3 premises, which Mr. Luna did not receive. Trice did not have evidence to support  
4 reasonable, articulable suspicion that Mr. Luna had committed a trespass at the  
5 Petro, as Ms. Gardner did not intend to trespass Mr. Luna, is not a credible  
6 informant, and lacked credible information. For those reasons, the initial  
7 detainment, the search of Mr. Luna's person, and the arrest are all unlawful under  
8 the Fourth Amendment.

9 The warrantless search of Mr. Luna's vehicle is also unlawful under the  
10 Fourth Amendment. There were no exigent circumstances present that would  
11 permit a warrantless search of Mr. Luna's vehicle. Based on the foregoing, Mr.  
12 Luna is entitled to suppression of the evidence obtained from the warrantless  
13 search and seizure under the exclusionary rule.

14 DATED this 16 day of September, 2021.

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1 **CERTIFICATE OF COMPLIANCE**

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1 reference to the page and volume number, if any, of the transcript or appendix  
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