IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF SEARCH WARRANTS REGARDING SEIZURE OF DOCUMENTS, LAPTOP COMPUTERS, CELLULAR TELEPHONES, AND OTHER DIGITAL STORAGE DEVICES FROM THE PREMISES OF LAS VEGAS BISTRO, LLC AND LITTLE DARLINGS OF LAS VEGAS, LLC	Case No.: 84931-COA
LAS VEGAS BISTRO, LLC D/B/A LARRY FLYNT'S HUSTLER CLUB; AND LITTLE DARLINGS OF LAS VEGAS, LLC, Appellants, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondents.	Appeal from the Eighth Judicial District Court, the Honorable Jerry A. Wiese II Presiding[1]

RESPONDENT'S ANSWERING BRIEF

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[1] The Honorable Judge Linda Bell now presides over the District Court case.

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. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. The Las Vegas Metropolitan Police Department ("LVMPD") is a governmental entity and has no corporate affiliation.

2. LVMPD is represented in the District Court and this Court by the law firm of Marquis Aurbach.

Dated this 18th day of November, 2022.

MARQUIS AURBACH

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I. JURISDICTION AND ROUTING STATEMENT

Due to the lack of a criminal proceeding, the District Court's decision to deny the motion for return of property under NRS 179.085 is a final judgment and appealable. NRAP 3A(b)(1); *Di Bella v. U.S.*, 369 U.S. 121, 131-32, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962) (the motion is appealable when it "is solely for the return of property and is in no way tied to a criminal prosecution *in esse* against the movant").

On July 7, 2022, the Supreme Court issued a Notice of Transfer to Court of Appeals, pursuant NRAP 17(b).

I. ISSUES ON APPEAL

1. **Whether the Instant Case is Moot because the Appellants' Property was Returned.**

2. **Whether the District Court Correctly Denied the Appellants' Request to Unseal the Search Warrant Affidavits.**

3. **Whether the District Court Properly Found that the Officers had Probable Cause to Believe that a Crime had been Committed.**

4. **Whether the District Court Properly Found LVMPD's Retention of the Property was Reasonable Under the Circumstances.**

II. STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

LVMPD's Special Investigations Section (SIS) began an investigation into various Erotic Dance Establishments for the crime of Advancing Prostitution and Living from Earnings of Prostitution. After conducting several covert operations, LVMPD obtained information that entertainers at these establishments were soliciting customers for the purpose of prostitution. LVMPD also obtained other information to believe that that the crimes of Advancing Prostitution and Living from Earnings of Prostitution were occurring at such establishments, including Las Vegas Bistro, LLC d/b/a Larry Flynt's Hustler Club (Hustler Club) and Little Darlings of Las Vegas, LLC (Little Darlings). Based on the information that LVMPD obtained during its covert operations, the Honorable Judge Harmony Letizia and Judge Joseph Sciscento issued search warrants and, for good cause shown, directed the applications of those warrants to be sealed.

After the execution of the search warrants, Hustler and Little Darlings (collectively Appellants) sought to unseal the search warrant applications and quash the warrants on the basis that LVMPD lacked probable cause to obtain the warrants. Appellants further sought the return of all the property that was seized on the same basis, as well as on the basis that the electronic devices seized contained privileged information. Denying the Appellants' requested relief, the District Court found, after an *in camera* review of the search warrant applications and affidavits,

that LVMPD had probable cause to obtain the warrants and good cause existed to maintain the sealing of the applications and affidavits. The District Court further determined that the retention of the property was reasonable under the circumstances, including the fact that LVMPD's criminal investigation remained on-going. With respect to Appellants' concern for the privileged material contained on the devices, the District Court concluded that LVMPD's proposed search protocol was sufficient to protect any alleged privileged material. Appellants appealed the District Court's order.

This Court must affirm the District Court's order denying the request relief in its entirety. First and foremost, the property identified within the Appellants' declarations, including computers and phones, have been returned. Thus, there is no longer a justiciable controversy for this Court as the return of the property renders that portion of the appeal moot.

Second, the District Court properly found that good cause existed to maintain the sealing of the affidavits and applications in support of the search warrants. In so doing, the District Court reviewed the applications and affidavits *in camera* and determined that applications and affidavits contained police procedures and intelligence obtained during LVMPD's investigation that would compromise LVMPD's ability to further investigate the alleged crimes if the sensitive information were released. The District Court further reasoned that

disclosure of such materials may endanger the detectives involved and compromise the identity of various undercover detectives. This Court must give deference to these findings. *Weddell v. H20, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). And, the Appellants cannot demonstrate that the District Court abused its discretion in concluding that unsealing of the applications and affidavits is inappropriate. Accordingly, because Appellants failed to demonstrate good cause to unseal of the applications and affidavits, this Court must affirm the District Court's order.

Third, the District Court's finding of probable cause is fatal to Appellants' request to quash the warrant and return the property. Probable cause is determined based **facts and circumstances** of a particular case. *State v. McKellips*, 118 Nev. 465, 472, 49 P.3d 655, 660 (2002). In Nevada, a finding of probable cause may be based on only "slight evidence." *See Sheriff, Clark County v. Badillo*, 95 Nev. 593, 594, 600 P.2d 222 (1979). Thus, this Court reviews the District Court's finding of probable cause for an abuse of discretion. The District Court's ruling that probable cause for Advancing Prostitution and Living from Earnings of Prostitution existed within the applications and affidavits was based on the District Court's *in camera* review of the same. Appellants failed to demonstrate how the District Court abused its discretion, and this Court must affirm the District Court's finding. *See Republican Att'ys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 36,

458 P.3d 328, 335 (2020) (recognizing that on *in camera* review, the party must trust the Court's determination).

Fourth, the District Court appropriately rejected Appellants' request to return property so that they could conduct a privilege review. Appellants neglect to cite to any authority under NRS 179.085 that permits them to obtain the return of their property so that they could scrub evidence from such property before allowing law enforcement agencies to conduct a search of the material. And, while Appellants assert that the property contained privileged material, there was no evidence before the Court that specific privileged material did exist on the property. *Superpumper, Inc. v. Leonard , Tr. for Bankr. Est. of Morabito*, 137 Nev. Adv. Op. 43, 495 P.3d 101, 107 (2021) (movant bears the burden as to specific questions or documents, not by making a blanket claim). More importantly, Appellants' request was specifically rejected because LVMPD agreed to a search protocol where it would extract the alleged privileged material based on information Appellants provided to LVMPD. Appellants fail to provide any factual or legal basis as to why the search protocol proposed by LVMPD is insufficient.

In sum, this Court should affirm the District Court's order. Appellants failed to demonstrate good cause to unseal the search warrant applications and affidavits. Furthermore, the evidence before this Court demonstrates probable cause existed

for the issuance of the warrant. Finally, Appellants failed to satisfy their burden that retention of their property is unreasonable under the circumstances.

III. STANDARDS OF REVIEW

A district court's factual findings are reviewed for an abuse of discretion. *In re Guardianship of N.M.*, 131 Nev. 751, 754, 358 P.3d 216, 218 (2015). That is, this Court gives deference to a district court's factual findings and will uphold them so long as they are not clearly erroneous and are supported by substantial evidence. *Weddell v. H20, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Id*. (quoting *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008)). "[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo." *City of Reno v. Reno Gazette–Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

IV. FACTUAL BACKGROUND

A. LVMPD CONDUCTS COVERT OPERATIONS AT THE ESTABLISHMENTS.

LVMPD's SIS has the primary responsibility for the enforcement of all federal, state, county, and city laws concerning privileged and regulated businesses in Clark County and the City of Las Vegas. Appellants' Appendix (AA) 000071, ¶ 5. Privileged licenses include Erotic Dance establishments and Adult Cabaret's.

Id. In particular to the instant case, the crime of Advancing Prostitution and Living from Earnings of Prostitution was being investigated in relation to the Appellants' two establishments. *Id*. at ¶ 6.

SIS has conducted numerous criminal investigations of illicit Erotic Dance businesses. *Id*. ¶ 7. Through these investigations, SIS has become familiar with common ways in which these illicit businesses operate. *Id*. Illicit businesses often post suggestive advertisements on adult-oriented websites and print media. *Id*. Erotic dances are offered for an upfront fee, then, during the dance, an act of prostitution is solicited for an additional fee. *Id*. The dances are often conducted in private rooms; however, some are also done in open areas within view of management, other employees, or other patrons. *Id*. The prostitutes working in these establishments are often victims of sex trafficking and are afraid of cooperating with law enforcement. Normally, an individual directs the activities of the prostitutes. *Id*. at ¶ 8. Monies earned are split between the business and the prostitute. *Id*.

1. <u>The Hustler Club.</u>

In January 2022, SIS learned that entertainers had been soliciting for the purpose prostitution within the establishment. AA000072 at ¶ 9. SIS then advised the Hustler Club that an undercover operation was conducted at their establishment and three females were observed soliciting for the purpose of prostitution. At the

same time, SIS provided Hustler Club with its Advancing Prostitution letter. *Id*. at ¶ 10. The letter advised Hustler Club it needed to contact SIS, via email, of the steps taken to prevent this illegal activity. A manager signed the letter, and a copy was left with her. *Id*. at ¶ 11. In March 2022, SIS conducted additional undercover investigations that lead entertainers to solicit an undercover officer for sex. *Id*. at ¶ 12. Subsequently, SIS advised the Hustler Club of the incident and provided it with another Advancing Prostitution letter. *Id*. at ¶ 13.

2. <u>Little Darlings.</u>

SIS was informed that an individual had been sexually assaulted at Little Darlings sometime in November 2021. AA000073 at ¶ 22. In January, SIS conducted an undercover operation where three entertainers within the establishment were observed soliciting for the purpose of prostitution. *Id*. at ¶ 23. Subsequently, SIS advised Little Darlings of this information and provided it with its Advancing Prostitution letter. *Id*. at ¶ 24. The letter advised they needed to contact SIS, via email, of the steps taken to prevent this illegal activity. *Id*. at ¶ 25. In March 2022, SIS conducted additional undercover investigations that lead entertainers to solicit an undercover officer for sex. *Id*. at ¶ 26. Two of the entertainers were cited for soliciting prostitution and released. *Id*. at ¶ 27. Subsequently, SIS once more advised Little Darlings of the incident and provided it with another Advancing Prostitution letter. The manager at the time advised that

she was aware of the two entertainers being cited and confirmed that the two entertainers were still employed by Little Darlings. *Id*. at ¶ 28.

B. LVMPD PROPERLY OBTAINS AND EXECUTES SEARCH WARRANTS FOR THE ESTABLISHMENTS.

These documented events demonstrate a pattern within the business of an accepted culture involving prostitution. AA000071-75. Based on SIS's investigation, including its covert operations, there was probable cause to support the crimes of Advancing Prostitution and Living from Earnings of a Prostitute at both the Hustler Club and Little Darlings.[2] Accordingly, SIS obtained search warrants for both establishments. AA 000016-28. Due to the nature of the electronic devices seized, LVMPD obtained an additional search warrant to access the electronically stored information, including to image and copy the devices. AA000077-78; *see also* AA000080-84; 000088-91.

C. APPELLANTS SEEK TO UNSEAL SEARCH WARRANT APPLICATIONS, QUASH THE WARRANT, AND RETURN OF ITS PROPERTY SO THAT A PRIVILEGE REVIEW COULD BE CONDUCTED.

On April 12, 2022, Appellants' sought relief from the District Court pursuant to NRS 179.085 related to the search warrants that were executed on April 5, 2022. AA000001-49. First, Appellants argued that the search warrants were legally deficient under NRS 179.085 in that there was no probable cause to

[2] *See* Search Warrant Applications and Affidavits provided to this Court *in camera*.

justify the seizure of property. AA000007-8. In turn, the lack of probable cause required the District Court to unseal the search warrant applications and affidavits and quash the warrants. *Id*. Likewise, Appellants contended that the lack of probable cause required the return of its property. *Id*. Notably, Appellants recognized that without the unsealing of the applications and affidavits, it was unable to demonstrate the lack of probable cause. *Id*.

In the alternative, Appellants claimed that certain property contained privileged material, including attorney-client and work-product privileged material. AA000008-11. As such, Appellants urged the District Court to enjoin LVMPD from conducting a search of any property until Appellants could scrub the seized property of all privileged material. *Id*. Notably, Little Darlings failed to identify any specific property that contained privileged material. AA000097-128. The Hustler Club only identified an Apple Laptop (retrieved from a separate suit within the Hustler Club, belonging to Go Best), an Apple Macbook Laptop owned by Ralph James, and the personal cell-phone of Andrea Woods. *Id*.

D. LVMPD IMAGED THE PROPERTY, AND ITS CRIMINAL INVESTIGATIONS CONTINUED.

The subsequent warrants expressly permitted LVMPD, through its Digital Forensic Lab (DFL), to examine and image and copy the electronic devices as part of its search. AA000077-78; *see also* AA000080-84; 000088-91. At the time of the Appellants' filing, DFL had imaged the following property from the Hustler Club:

- White Apple Phone with clear case
- Black iPhone w/ black case
- Blue iPhone w/ clear case
- Black iPhone w/ pink case
- iPad S/N GG8WQ3S3JF8J
- iPad S/N DMPRLA6MH1MK

AA000093-96. Likewise, the following property had been imaged from Little Darlings:

- HP Prop, desktop computer
- Dell OptiPlex 3060 desktop computer
- HP Pro desktop computer
- Black Cell Phone
- Black Apple iPhone
- (3) Lexar 64 GB thumb drives
- (1) SanDisk 32GB thumb drive
- (7) Unknown make thumb drives
- (1) Microsoft thumb drives

Id. While these items had been imaged, DFL was still processing the images. *Id*. DFL articulated that retention of the property was necessary until DFL could confirm that the imaging was successful. *Id*. DFL further explained that the return of the original devices, prior to confirming the successful imaging of the same, could result in a loss of evidence. *Id*.

DFL also possessed three HIKVision DVR Systems from the Hustler Club, which were estimated to contain around 54 TB of data. *Id*. There were also five HIKVision DVR Systems, which were estimated to contain around 120 TB of data in DFL's possession. *Id*. To process this data, DFL needed to purchase additional

equipment, including additional hard drives. No action could be taken regarding the DVR systems until DFL received this equipment. *Id*.

E. LVMPD PROPOSED A SEARCH PROTOCOL.

With respect to the concern of privileged information, LVMPD proposed a search protocol. Previously, DFL had been provided a list of full names, email addresses, and/or phone numbers that would be considered privileged. *Id*. DFL utilized software that can search for these keywords. *Id*. After the search is completed, DFL would review the keyword hits for the provided information. Items relates to those keywords will be redacted. *Id*. The software system then generates a report for the investigative detectives, in this case the Special Investigations Section, to review. *Id*. The investigative detectives would not be privy to the redacted, privileged information. *Id*. Only DFL would see the full extraction of the electronic devices. *Id*. DFL does not participate in the investigation of any alleged criminal acts but merely facilitates the process to allow the detectives to search electronic devices. *Id*.

F. THE DISTRICT COURT'S ORDER DENYING APPELLANTS' REQUESTED RELIEF.

On May 22, 2022, the District Court issued its decision on Appellants' requested relief. AA000147-160. First, after reviewing the search warrant applications and affidavits *in camera*, the District Court correctly determined that there was no good cause to unseal the search warrant materials. AA000157.

Specifically, the District Court found that search warrant affidavits and applications included police procedures and intelligence obtained during LVMPD's investigations. *Id*. And, knowledge of this sensitive information may compromise LVMPD's ability to further investigate the crimes alleged to have been committed, and any ongoing crimes allegedly being committed, relating to this investigation. *Id*. The District Court further reasoned that disclosure of the search warrant applications and affidavits may endanger the detectives involved and compromise the identity of various undercover detectives. *Id*.

Addressing Appellants' request for return of property, the District Court found that probable cause existed for the issuance of the search warrants and that the property seized was not improperly seized. *Id*. In that respect, the District Court rejected Appellants' contention that there was insufficient evidence of prostitution to support the crimes alleged. AA000158. In finding that probable cause existed, the District Court reasoned that the evidence submitted in support of the warrants (i.e., the applications and affidavits) demonstrated that there was probable cause to believe that the crimes of "Advancing Prostitution" and "Living from Earning of Prostitution" were being committed. *Id*. As a result, the District Court further held that the property was legally seized with a warrant, and the warrants appeared to be valid and sufficient on their face. AA000157. Additionally, the District Court ruled that retention of the seized property was not unreasonable under

NRS 179.085(1)(e) because of LVMPD's ongoing investigation. *Id*. The District Court also noted that return of the property so that Appellants could conduct a "privilege review" was not warranted given that LVMPD had expressly agreed to enact a protocol to extract all alleged privileged material prior to providing the fruits of the search to the detectives. *Id*.

G. LVMPD RETURNED APPELLANTS' PROPERTY THAT IS SUBJECT TO THE APPEAL.

After the District Court denied Appellants' their requested relief, Appellants sought to stay enforcement of the District Court's order pending this appeal. Respondent's Appendix (RA) 001-6. While the District Court denied the request for a stay, it did order the return of property that LVMPD had imaged and was not necessary: (1) to retain for the purpose of the criminal investigation or (2) for purposes of conducting the privilege redaction protocol. *Id*. LVMPD returned the requested computers, tablets, and phones that were subject to the Appellants' motion.[3] RA 007-21.

V. LEGAL ARGUMENT

A. THE APPEAL IS MOOT BECAUSE LVMPD RETURNED THE PROPERTY SUBJECT TO APPELLANTS' REQUEST.

"[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot

[3] LVMPD has not returned the Apple Laptop retrieved from the Go Best Suit as that Laptop is also subject to a separate appeal as a result of conflicting declarations. *See* Court of Appeals Case No. 85082.

questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). "[A] controversy must be present through all stages of the proceeding, and even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). (internal citations omitted).

A moot case may be justiciable "where an issue is capable of repetition, yet will evade review because of the nature of its timing." *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 161, 87 P.3d 521, 524 (2004). The capable-of-repetition yet-evading-review exception applies "only in exceptional situations" where "[t]he challenged action must be too short in its duration to be fully litigated prior to its natural expiration, and a reasonable expectation must exist that the same complaining party will suffer the harm again." *Id*. For the exception to apply, the moot issue must also involve "a matter of widespread importance[.]" *Personhood Nev.*, 126 Nev. at 602, 245 P.3d at 574. The usefulness of the exception is evidenced in situations where "in the absence of such a rule, an important question of law could never be decided because of the nature of its timing." *State v. Washoe Cnty. Pub. Def.*, 105 Nev. 299, 301, 775 P.2d 217, 218 (1989). In other words, the exception's application turns on whether the issue cannot be litigated before it

becomes moot. *See, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602-03 (1982) (explaining that an order excluding the public from attending a criminal rape trial during a victim's testimony that expired at the conclusion of the trial is capable of repetition, yet evading review); *Neb. Press Ass'n v. Stuart*, 427 U.S, 539, 546-47 (1976) (describing how an order prohibiting the press from broadcasting prejudicial confessions before trial that expires once the jury is empaneled is capable of repetition, yet evading review); *In re Guardianship*, 120 Nev. at 161-62, 87 P.3d at 524 (discussing types of issues that are both likely to expire prior to full litigation and are thus capable of repetition, yet evading review).

While not directly on point, this Court's decision in a public records case regarding mootness is instructive. *See Las Vegas Review-Journal v. City of Henderson*, 441 P.3d 546 (May 24, 2019) (unpublished disposition). There, LVRJ made a request for various records from the City of Henderson. *Id*. at *1. The City of Henderson informed LVRJ that a search generated a large universe of records and that a review for privilege and confidentiality would be required before copies of the records could be provided. *Id.* The City of Henderson also asserted it was entitled to charge for the privilege review. *Id.* LVRJ proceeded to file a petition with the court for access to the records. *Id.* During the pendency of the litigation, the City of Henderson agreed to provide copies of the records free of charge, other

than the records contained in the privilege log. *Id*. The district court ultimately denied LVRJ's petition because the City of Henderson provided the records free of charge. *Id.* The Supreme Court affirmed. *Id.*

The Supreme Court concluded that the fee issue became moot once the records were provided free of charge. In support of its decision, the Supreme Court ruled that "so long as the ***records*** in a public records request ***are not produced***, ***the controversy remains ongoing*** and can be litigated." *Id.* at *2 (emphasis added). The Supreme Court also reasoned that because NRS 239.011 already provides for expedited review of public records request denials, LVRJ's claim need not rely on such a rarely used exception. *Id.* (citing *Personhood Nev.*, 26 Nev. at 603, 245 P.3d at 575 (observing that a statute expediting challenges to ballot initiatives generally provides for judicial review before a case becomes moot).

Relying on the reasoning in *Las Vegas Review-Journal v. City of Henderson*, so long as LVMPD retains the property, the controversy remains ongoing and can be litigated. Conversely, when the property is returned, there is no live controversy. And, similar to NRS 239.011, this Court, in *Maiola*, inherently recognized that the purpose and intent of NRS 179.085 was to provide an expeditious method of returning property by motion. *Maiola v. State*, 120 Nev. 671, 678, 99 P.3d 227, 231 (2004). Thus, the expeditious method provided in NRS 179.085 generally ensures judicial review is available before a case becomes

moot. Thus, the exception has no application to matters brought under NRS 179.085.

Here, LVMPD returned the computers, laptops, and phones, with the exception of the laptop taken from the Go Best Suite, to Appellants. These are the items that Appellants asserted expressly contain privileged materials. Appellants do not contend that LVMPD still possesses property that contains privileged material. Accordingly, the Appellants appeal related to the return of property based on the fact that such property contains privileged information is now moot as LVMPD returned the property.

B. THE DISTRICT COURT CORRECTLY DETERMINED CONTINUED SEALING OF THE APPLICATIONS AND AFFIDAVITS WAS WARRANTED.

In Nevada, a search warrant may issue only on affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuing the warrant. NRS 179.045(1). 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. *Id*. Upon a showing of good cause, the magistrate may order an affidavit be sealed. NRS 179.045(3). The unsealing of the affidavit must also be based on good cause. *Id*.

Appellants provide no basis to unseal the applications. Rightfully so, Appellants recognize that a review of the actual applications and affidavits is necessary to determine whether good cause exists to unseal the materials. Despite the fact that a neutral magistrate already determined that probable cause existed for the warrants, the appropriate remedy, undoubtedly, was for the District Court to review the sealed materials and make a determination as to whether the materials were should be unsealed. While Appellants may be at a disadvantage, that in and of itself does not require unsealing of the applications and affidavits. The Supreme Court has rejected similar arguments in the past and noted that the party must "trust th[e] Court's determination." *See Republican Att'ys Gen. Ass'n v. Las Vegas Metro. Police Dep't*, 136 Nev. 28, 36, 458 P.3d 328, 335 (2020). Thus, the "disadvantage" claimed by the Appellants cannot establish good cause to unseal the search warrant applications in this case.

"It is within the district court's discretion to decide whether to seal an affidavit made in support of a warrant." *Bodden v. State*, 2010 Nev. LEXIS 107, at *5 (Feb. 1, 2010) (unreported),[4] *citing Matter of Searches of Semtex Indus. Corp*., 876 F. Supp. 426, 429 (E.D.N.Y. 1995). "The propriety of sealing search warrant documents turns on the government's need for secrecy…." *Id*. The District Court did not abuse its discretion when it ruled that there was no good cause to unseal the

[4] There do not appear to be any reported cases in Nevada on what constitutes "good cause."

applications and affidavits. Below, LVMPD demonstrated that the information contained in the search warrant applications related to an ongoing criminal investigation. As such, it would have been detrimental to reveal the contents of the application and affidavits. AA000071-75; 000147-160. LVMPD further contended, and the District Court agreed, that search warrant affidavits and applications include police procedures and intelligence obtained during LVMPD's investigations. *Id*. And, knowledge of this sensitive information may compromise LVMPD's ability to further investigate the crimes alleged to have been committed, and any ongoing crimes allegedly being committed, relating to this investigation. *Id*. The District Court further reasoned that disclosure of the search warrant applications and affidavits may endanger the detectives involved and compromise the identity of various undercover detectives. *Id*.

Appellants assert that unsealing is proper because all the conduct occurred in the past and that the unsealing will not impact the investigation of past events. Notably, Appellants' assertion is not supported by any facts or authority. While the covert operations described were certainly relevant and played a part in obtaining the warrant, such conduct was not the sole basis of the warrant. As demonstrated in the lower court, and by the search warrant materials themselves, the remaining aspects of the investigation are confidential in nature and would be detrimental to the investigation if revealed.

On the other hand, it is well established that the on-going criminal investigation serves as a compelling reason against disclosure of the search warrant materials. The Ninth Circuit has clearly recognized that there is no established qualified right of access to search warrant proceedings and materials while a criminal investigation remains ongoing. *Times Mirror Co. v. U.S.*, 873 F.2d 1210 (9th Cir. 1989).[5]. There is no doubt that the issuance of search warrants has traditionally been carried out in secret, and normally, a search warrant is issued after an ex parte application by the government and an *in camera* consideration by a judge or magistrate. *Id.* at 1213-14.

There are several compelling reasons for maintaining the secrecy of warrant proceedings and materials. As the *Times Mirror* court discussed, the experience of history implies a judgment that warrant proceedings and materials should not be accessible to the public, at least while a pre-indictment investigation is still ongoing as in these cases. *Id.* at 1214. It follows that the information disclosed to the magistrate in support of the warrant request is entitled to the same confidentiality accorded other aspects of the criminal investigation. *Id.* Both the magistrate in granting the original sealing order and the district court in reviewing such orders have necessarily been highly deferential to the government's

[5] LVMPD recognizes that the Ninth Circuit Court of Appeals decisions are not binding on this Court. Nonetheless, such holdings are more persuasive than decisions from other circuit courts.

determination that a given investigation requires secrecy and that warrant materials be kept under seal. *Id.*

In addition, the *Times Mirror* court recognized that although the public has an interest in warrant proceedings, which can enhance the quality and safeguard the integrity of the fact-finding purpose, the criminal investigatory process gravely outweighs such interests. *Id.* at 1215. The court further explained that the criminal investigatory process would be harmed by public access. *Id.* Finally, the court described its concern with individual privacy rights associated with search warrant materials. *Id.* at 1216. For example, persons who prove to be innocent are frequently the subjects of government investigations. *Id.* A search warrant affidavit may supply only the barest details of the government's reasons for believing that an individual may be engaging in criminal activity. *Id.* Nonetheless, the issuance of a warrant-even on this minimal information-may indicate to the public that government officials have reason to believe that persons named in the search warrant have engaged in criminal activity. *Id.* Moreover, persons named in the warrant papers will have no forum in which to exonerate themselves if the warrant materials are made public before indictments are returned. *Id*. Thus, possible injury to privacy interests is another factor weighing against public access to warrant materials during the pre-indictment stage of an investigation. *Id.* In sum, while public access would doubtless have some positive effect by increasing the flow of

information to the public about the workings of the government and by deterring judicial and law enforcement officers from abusing the warrant process, the incremental value in public access is slight compared to the government's interest in secrecy at this stage of the investigation. *Id.* at 1218.

The court affirmed its *Times Mirror* decision decades later and held that a common law right of access applies to warrant materials *after* an investigation has ended. *U.S. v. Business of Custer Battlefield Museum and Store*, 658 F.3d 1188, 1192 (9th Cir. 2011) (emphasis added). In support of its decision, the Ninth Circuit recognized that warrant applications proceedings are highly secret in nature and have historically been closed to the press and public. *Id.* at 1193 (citation omitted).

While good cause is not defined, courts have held that disclosure of warrant materials is only appropriate if the movant can demonstrate a threshold showing that disclosure would serve the ends of justice. *Id.* (citing *Berry v. Dep't. of Justice*, 733 F.2d 1313, 1352 (9th Cir. 1984). Whether disclosure is warranted in a given case requires the court to balance the need for disclosure against the reasons for confidentiality. *U.S. Indus., Inc. v. United States Dist. Court*, 345 F.2d 18, 21 (9th Cir. 1965). In the absence of an absolute prohibition against disclosure, an exercise of judicial discretion is manifestly required to determine whether such a need exists. *Id.*

The District Court appropriately exercised its discretion in determining that LVMPD's interest in confidentiality clearly outweighs Appellants' concern that the warrants may be facially invalid or illegally executed. As explained in *Times Mirror*, public access to search warrant materials gravely impedes the criminal investigatory process. Moreover, the warrant process is a confidential, *ex parte* process. While the public does have an interest in ensuring the quality and safeguarding the fact-finding process, it is not entitled to cart blanche access into governmental investigations. For example, such access would reveal investigative techniques used by law enforcement. Furthermore, other safeguards are in place to ensure the government's execution of the warrants was lawful, such as 42 U.S.C. §1983 lawsuits. Finally, privacy interests of others that may be named in search warrant materials also serve as a compelling interest in favor of confidentiality. As such, the governmental need for confidentiality of an on-going criminal investigation outweighed the Appellants' need to know whether there was probable cause for the warrant. More importantly, the District Court appropriately reviewed the materials *in camera* in reaching its decision. This Court must affirm the lower court's ruling upon review of materials in conjunction with the District Court's findings that unsealing was not warranted.

Finally, sealing the search warrant materials in the entirety is the less restrictive means due to the active investigation. Although the Eighth Circuit Court

of Appeals determined that the public had a First Amendment qualified right to search warrant materials, it nonetheless determined that the government demonstrated that restricting public access to these documents served a compelling interest because of the on-going investigation. *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988) ("*Gunn*"). The court further explained that the documents describe in considerable detail the nature, scope, and direction of the government's investigation and the individuals and specific projects involved. *Id.* Many of the specific allegations in the documents are supported by verbatim excerpts of telephone conversations obtained through court-authorized electronic surveillance or information obtained from confidential informants or both. *Id.* There is a substantial probability that the government's on-going investigation would be severely compromised if the sealed documents were released. *Id.* The court also determined that line-by-line redaction was not practicable. *Id.*

It is apparent that courts have recognized a general exception to disclosing search warrant materials that concern an active criminal investigation. As established by *Gunn*, complete confidentiality is the less restrictive means during an active criminal investigation due to substantial probability that disclosure would compromise and impede the investigation. In sum, the Court must affirm the

District Court's order demonstrating that there was no good cause established by Appellants to unseal the search warrant applications and affidavits.

C. THE DISTRICT COURT CORRECTLY FOUND THAT PROBABLE CAUSE EXISTED, RESULTING IN THE DENIAL OF QUASHING THE WARRANT.

The focus of Appellants' relief is the claim that LVMPD lacked probable cause for the two crimes being investigated—Living from Earnings of a Prostitute and Advancing Prostitution. And, instead, LVMPD only had probable cause of solicitation. Appellants, however, misunderstand, and quite frankly ignore, the probable cause standard. Probable cause "exists when police have reasonably trustworthy information of **facts and circumstances** that are sufficient in themselves to warrant a person of reasonable caution to believe that [a crime] has been ... committed …." *State v. McKellips*, 118 Nev. 465, 472, 49 P.3d 655, 660 (2002). In Nevada, a finding of probable cause may be based on only "slight evidence." *See Sheriff, Clark County v. Badillo*, 95 Nev. 593, 594, 600 P.2d 222 (1979) (finding probable cause despite conflicting witness testimony when one of the witnesses identified the respondent as one of the perpetrators). Thus, the issue of probable cause is one of facts and circumstances, as articulated in the search warrant application, and not a legal issue. Accordingly, this Court gives deference to the District Court's determination of probable cause.

In drawing a distinction between solicitation and prostitution, Appellants contend that there can be no evidence of prostitution as the undercover officers merely witnessed solicitation. To the contrary, the applications and affidavits in support of the search warrants identify facts and circumstances to establish that probable cause exists for Advancing Prostitution and Living from the Earnings of a Prostitute. While the information currently known to Appellants is that undercover officers were solicited, that is not to say there lacks evidence to support probable cause for the act of prostitution within the search warrant materials. Other than speculation and conjecture, Appellants provide no basis, either now or below, to quash the warrant for lack of probable cause. Appellants fail to challenge any other aspect of the crimes and cannot demonstrate how the District Court abused its discretion after review of the materials *in camera*. Understandably, the District Court could not identify the specific facts that support the alleged crimes due to the sealing of the materials and sensitive nature of the facts. Accordingly, upon this Court's *in camera* review of the search warrant materials, it must affirm the District Court's decision. And, the affirmance of probable cause by this Court is fatal to Appellants' request to quash the warrants and return of property under NRS 179.085(1)(c).

D. THE DISTRICT COURT CORRECTLY FOUND THAT RETENTION OF APPELLANTS' PROPERTY WAS REASONABLE UNDER THE CIRCUMSTANCES.

Appellants argue that even if probable cause existed, return of the property under NRS 179.085(1)(e) is necessary because the property contains privileged material. The District Court correctly determined that LVMPD's retention of the property is not unreasonable under the circumstances, and, on appeal, Appellants cannot demonstrate how the District Court abused its discretion.

1. Appellants Cannot Demonstrate that Retention of the Property was Unreasonable.

Return of seized property is governed by NRS 179.085, which provides:

> **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.

"[T]he moving party [Appellants] bears the initial burden to show that the government's retention of his or her property is facially unreasonable under the totality of all of the circumstances that then exist." *Las Vegas Metro. Police Dep't v. Anderson (In re 12067 Oakland Hills, Las Vegas)*, --- Nev. ---, 435 P.3d 672, 678 (2018). To meet this burden, Appellants could, for example, present evidence that the property is no longer needed as evidence, that no charges have been filed, or that the "criminal case has been completely resolved, either through a trial or a guilty plea, because such a resolution suggests that any criminal investigation is likely over." *Id.*

Anderson cites to federal law. Nevada's return of property statute, codified at NRS 179.085, mirrors Fed. R. Crim. P. 41(g). Under federal law, it is clear that a law enforcement agency has the right to take temporary custody of property which is or may contain evidence of a crime. A motion for return of property is properly denied if the government's need for the property continues. *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993), *citing United States v. U.S. Currency Amounting to Sum of $20,294.00 More or Less*, 1495 F. Supp. 147, 150 (E.D.N.Y. 1980). If property has evidentiary value, and it is legally seized, it need not be returned until its evidentiary value has been exhausted. *Id.* The court has the duty to return the contested property *once the government's need for it has ended.*

United States v. Martinson, 809 F.2d 1364, 1370 (9th Cir. 1987), *citing United States v. Wilson*, 540 F.2d 1100, 1103-04 (D.C. Cir. 1976); *$20,294.00, supra*; *United States v. Totaro*, 468 F.Supp. 1045, 1048 (D. Md. 1979).

Appellants neglected to satisfy its initial burden below. Even Appellants did not dispute that there was an on-going investigation. AA000008 ("unsealing them will in no way impact the investigation . . ."). The request for the property to be returned should end there. "If the movant fails to meet this initial burden, nothing more is required and the motion may be denied even if the government produces no evidence in response." *Id*.

Only if Appellants had met this initial burden would the burden then shift to LVMPD. For the sake of argument, LVMPD satisfied its burden, which *Anderson* holds can be done in "several ways," including by "show[ing] that the property was related to an ongoing criminal investigation." *Id*. LVMPD must do so with "more than a naked assertion of counsel." *Id*.

Here, LVMPD submitted a declaration of Detective Chavez regarding the ongoing and active investigation and Supervisor Zachary Johnson regarding the status of the searches and the ability to return some of the devices once imaging has been completed and vetted. AA000071-75; 000093-96. In addition to this evidence, the District Court appropriately relied on its *in camera* review of the

search warrant materials in reaching the determination that LVMPD's investigation remains on-going, warranting the retention of property.

LVMPD acknowledges in other cases that at some point, the length of time that property is being held can become problematic. The *Anderson* Court recognized something like this when it stated that the moving party can meet its initial burden by demonstrating that "no charges have been filed even after the government has had **more than enough time** to conduct its investigation." *Id*. at 678 (emphasis added). For this proposition, the *Anderson* Court cited *Mr. Lucky Messenger Serv., Inc. v. United States*, 587 F.2d 15, 17 (7th Cir. 1978). In *Mr. Lucky Messenger*, the Court was faced with a motion to return property that had been seized 17 months prior yet no charges had been filed. The Court provided the following factors that should be addressed when deciding whether the length of time is too long to be constitutional:

> The critical inquiry then is whether the Government has an *adequate justification* for withholding the plaintiff's $65,000 for over seventeen months without bringing any charges against the plaintiff. The Government, of course, is not required to secure an indictment immediately after it seizes property pursuant to a grand jury investigation. But if no charges are filed for nearly one and one-half years after the property was seized, and the Government is unable to present evidence justifying such a delay, constitutional violations emerge which would seem on equitable principles to mandate that the property be returned…
>
> * * *

> . . . [O]ther factors a court should consider . . . are whether the plaintiff has an individual interest in and need for the material whose return it seeks; whether it would be irreparably injured by denial of the return of the property; and whether it has an adequate remedy at law for redress of its grievance.

Id. at 17 (citations omitted and emphasis added).

While not specifically addressed by Appellants, it is important to note that there is a lack of evidence of any irreparable injury. And, a declaration from counsel merely stating that the property has attorney-client privilege or accountant-client privilege, is not enough. AA000012-14. Even the subsequent declarations attempt to claim blanket privileges are insufficient. AA000118-128.

Nevertheless, Appellants' interpretation of NRS 179.105 is wrong and entirely contrary to the plain language of the statute. In that respect, Appellants rely on NRS 179.105 for the notion that attorney-client privilege protects materials that are otherwise subject to a warrant. NRS 179.105 provides:

> All property or things taken on a warrant must be retained in an officer's custody, subject to the order of the court to which the officer is required to return the proceedings before the officer, or of any other court in which the offense in respect to which the property or things are taken is triable. If it appears that the property taken is not the same as that described in the warrant, that there is no probable cause for believing the existence of the grounds on which the warrant was issued **or that the property is determined pursuant to NRS 179.11518 to be subject to the attorney-client privilege**, the magistrate shall cause it to be restored to the person from whom it was taken. However, no search warrant shall be quashed by any magistrate or judge within this State nor shall any evidence based upon a search warrant be suppressed in any criminal action or proceeding because of

> mere technical irregularities which do not affect the substantial rights of the accused.

(emphasis added). Under NRS 179.11518, a district attorney or the Attorney General is required to review the property for attorney-client privilege if the search warrant was issued pursuant to NRS 179.11514. NRS 179.11514 expressly applies to search warrants issued and executed upon an attorney engaged in the practice of law. Thus, the attorney-client provision within NRS 179.105 has no application here because LVMPD did not seize property from an attorney engaged in the practice of law. Other than NRS 179.11518, Appellants cite to no authority for the position that such material must be returned to the Appellants, despite the property being subject to a search warrant. Even the statutory provision relied upon by the Appellants requires a review of the material by the district attorney or Attorney General. Certainly, nothing within NRS Chapter 179 can be read to require the property to be returned to the owner so that they can conduct their own privilege review and extract evidence from the property. Simply put, Appellants cannot demonstrate that return of the property, under these circumstances, is necessary.

In contrast, LVMPD demonstrated a justification for not being able to return the electronic devices. The electronic devices were needed to complete an ongoing criminal investigation, which had only just begun. This investigation is complex and could take several months to complete. The warrants themselves recognize that such time was necessary. It is common that this process could take many months.

In sum, the District Court properly found that LVMPD's retention of the seized property was not unreasonable under the circumstances.

2. Appellants Failed to Provide Sufficient Evidence that the Property Contained Privileged Information.

Assuming that this Court finds that NRS 179.105 would apply to Appellants, the record before this Court lacks sufficient evidence that the property contained privileged material. Appellants provided nothing more than scant evidence that the property contains privileged material. The declarations submitted below do nothing more than merely state that the property has attorney-client privilege or accountant-client privilege, which is not enough. Moreover, some of declarations do nothing more than baldly assert devices—not necessarily belonging to the Hustler Club—contain privileged material.

Courts recognize that the movant bears the burden of establishing that the seized property contains privileged material. *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992). There, the court required the corporation to submit a privilege log regarding the material that was alleged to be privileged. *Id.* A log should identify: (a) the attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated. *Id.* (citation omitted).

Without this information, Appellants cannot satisfy their burden that the information contained in *all* devices is privileged material. The privilege log is necessary as there is an exception to privileges, including the crime-fraud exception. *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933); 8 John H. Wigmore, Evidence § 2298 (McNaughton Rev.1961 and Supp.1991). *In United States v. Zolin*, 491 U.S. 554, 565, 109 S.Ct. 2619, 2627, 105 L.Ed.2d 469 (1989), the Supreme Court held that *in camera* review of privileged information may be used to establish whether the crime-fraud exception applies. Along the same lines, the Nevada Supreme Court has made clear that a blanket invocation of any privilege, as asserted by Appellants, is insufficient to support the assertion that material is privileged. *Superpumper, Inc. v. Leonard, Tr. for Bankr. Est. of Morabito*, 137 Nev. Adv. Op. 43, 495 P.3d 101, 107 (2021) (movant bears the burden as to specific questions or documents, not by making a blanket claim). Thus, Appellants failed to demonstrate that the property in question contains privileged material.

3. There is No Authority that Permits Appellants to Conduct a Privilege Review Prior to LVMPD Conducting a Search.

With no legal basis, Appellants ask that the evidence be returned so that they can scrub the devices of all evidence and then return the cleaned property to LVMPD to conduct a search. Many courts have rejected protocols in searching through electronic devices and through electronically stored information due to the

difficult nature of the same. *See United States v. Mann*, 592 F.3d 779, 785 (7th Cir. 2010) (finding the attempt "overbroad"); *see also United States v. Burgess*, 576 F.3d 1078, 1092-94 (10th Cir. 2009) (despite efforts to establish search protocols for computer drives to limit "overseizures," given the capacity of a computer to store and intermingle vast amounts of data, at bottom "there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders"); *United States v. Richards*, 659 F.3d 527, 539-540 (6th Cir. 2011) (same); *United States v. Stabile*, 633 F.3d 219, 239-240 & n.13 (3d Cir. 2011) (same).

In sum, there is no legal basis—statutory, constitutional, or otherwise—that allows this Court to alter an already-issued warrant by mandating a particular protocol to conduct the search. And, even though there is no legal basis to mandate a protocol, the evidence before the Court is that a protocol is in place. The warrants themselves do limit the scope of the search to evidence of a certain crime from certain dates. LVMPD further demonstrated that a separate section, DFL, conducts the search and provides only evidence within the scope of the warrant to SIS. Privileged material, like attorney-client communications or accountant-client communications is screened if information is provided to LVMPD. Thus, even if there were a legal basis to mandate a protocol, which there is not, no other protocol is needed.

The Constitution requires that searches be reasonable and that penalties would apply for constitutional violations, like a motion to suppress pursuant to NRS 179.085 or a civil rights lawsuit under 42 U.S.C. §1983. The law is well-established in this area, balancing the rights of suspects with the rights of victims to obtain justice. Here, there is no clearly established right to an electronic device search protocol, and even if there were, and even if LVMPD did not follow it, the remedy would not be seeking alteration, or even the quashing, of an already-issued search warrant.

VI. CONCLUSION

Based on the foregoing, LVMPD asks that the Court affirm the District Court's decision in its entirety.

Dated this 18th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

1. 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 proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that 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:

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3. Finally, I hereby 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 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 18th day of November, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENT'S ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 18th day of November 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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