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STATE OF NEVADA

Plaintiff,

vs.

TAMARA, and MICHAEL,

Defendants.

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DISTRICT COURT CLARK COUNTY, NEVADA

CASE NO. DEPT. XV

# OMNIBUS MOTION TO SUPPRESS EVIDENCE AND FOR RETURN OF PROPERTY

Hearing Date: ,

Hearing Time: .m.

COME NOW the Defendants, MICHAEL and TAMARA, by and through their attorneys,

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the law firm of , and pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; Article 1, Sections 8 and 18 of the Constitution of the State of Nevada; and NRS 179.085, hereby respectfully request that this Honorable Court order the suppression of any and all alleged contraband, instrumentalities, proceeds or evidence of any offense seized or obtained pursuant to, or subsequently derived as a consequence of, any the following events:

1. The warrantless stop of the Defendants' vehicle by officers of the Henderson Police Department (hereinafter “HPD”) on or about March 4, 2009;
2. The ensuing warrantless detention of the Defendants by HPD officers on or about March 4, 2009;
3. The concomitant custodial questioning of the Defendants by HPD officers on or about

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March 4, 2009;

1. The ensuing warrantless canine “sniff” and physical search of the vehicle and its content by HPD officers on or about March 4, 2009;
2. The ensuing warrantless arrest of the Defendants by HPD officers on or about March 4, 2009;
3. The ensuing, post-arrest incommunicado confinement of the Defendants by officers and employees of the HPD on or about March 4, 2009;
4. The ensuing warrantless entry and search of the interior of the Defendants’ residence by officers of the Las Vegas Metropolitan Police Department (hereinafter “LVMPD”) on or about March 4, 2009;
5. The concomitant warrantless inspection of the contents of the freezer located in the garage of the Defendants’ home by LVMPD officers on or about March 4, 2009;
6. The subsequent re-entry and search of the interior of the Defendants’ residence pursuant to search warrant by LVMPD officers on or about March 4-5, 2009;
7. The subsequent entry and inspection of the contents of the Defendants’ safe deposit facilities pursuant to search warrant and concomitant seizure of property contained therein by LVMPD officers; and
8. The subsequent seizure of the Defendants’ bank accounts pursuant to warrant by LVMPD officers.

Pursuant to constitutional and statutory authorities, the Defendants further respectfully request that this Honorable Court order that any and all property taken pursuant to any of the stated intrusions and/or events, not constituting contraband per se be returned to them.

This motion is made and based upon all pleadings and papers on file herein, the exhibits attached hereto, and the attached Memorandum of Points and Authorities.

Dated this day of , .

2 of 56

# NOTICE OF MOTION

1. TO: THE STATE OF NEVADA; and
2. TO: , ESQ., Chief District Attorney in and for Clark County, Nevada
3. YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned shall
4. bring the above and foregoing OMNIBUS MOTION TO SUPPRESS EVIDENCE AND FOR
5. RETURN OF PROPERTY on for hearing before Department of the above-entitled Court on
6. , , at the hour of o’clock .m. or

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as soon thereafter as counsel may be heard.

Dated this day of , .

# MEMORANDUM OF POINTS AND AUTHORITIES

* 1. **STATEMENT OF FACTS**
     1. **The Initial Investigation**

1. **The Anonymous Tip**

According to HPD Officer, the investigation culminating in the instant prosecution began on March 3, 2009, when he allegedly “received an anonymous tip that a male known only as ‘Tim’ was selling large amounts of marijuana from his residence at the Firenze Apartments located at 5880 Boulder Falls Street #1170, Henderson, Nevada.” See HPD Incident Report dated March 4, 2009, p. 4, hereto attached as Exhibit "A;" Reporter’s Transcript of Proceedings before the Grand Jury, p. 20, hereto attached at Exhibit “B.” As Officer A acknowledged during testimony before the grand jury, the apartment in question was not, nor had it ever been, the residence of either one of the Defendants in this case. Exhibit “B” at 29.

# The “Stake-Out”

According to Officer, at approximately 3:15 pm on March 4, 2009, the following afternoon, together with HPD Officer F, he initiated surveillance of the apartment in question. Within 15 minutes, Officer A allegedly observed a black Honda Ridgeline bearing Nevada

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license plate number LV4K10, and occupied solely by an unidentified male driver1 -- as well as the Defendants’ silver Toyota Camry -- occupied by driver, Michael, and front seat passenger, Tamara -- arrive at the apartment complex and park in front of the garage door bearing the number 1170. Exhibit “A” at 4; Exhibit “B” at 14-15. According to Officer’s report, that garage door then opened. Id. Both drivers, and only the drivers, allegedly exited the respective vehicles, entered the garage in question and allegedly entered the adjacent apartment. Tamara remained seated in the Toyota Camry. Exhibit “A” at 4; Exhibit “B” at 14-15, 27.

According to the Officer, approximately 5 minutes later, he observed Michael, now carrying a black duffel bag, emerge from the open garage. Michael then allegedly placed the bag inside the trunk of the Toyota. Exhibit “A” at 4; Exhibit “B” at 16-17. Officer A “suspected that the bag… may contain marijuana.” Exhibit “B” at 20. HPD Officers A and F thus followed the Defendants as they exited the apartment complex. Exhibit “A” at 4; Exhibit “B” at 17.

# Tangential Mobile Surveillance of the Defendants

Clad in plainclothes and operating an unmarked vehicle, those officers maintained mobile surveillance of the Defendants’ car as Michael drove the Toyota from the Firenze Apartments to Russell Road and then onto southbound U.S. 95, exiting at Auto Show Drive. See Affidavit of Michael, hereto attached as Exhibit "C;" See Affidavit of Tamara, hereto attached as “D;” See HPD Narrative Report dated March 4, 2009, hereto attached as Exhibit “E;” Exhibit “A” at 4; Exhibit “B” at 17. At the far end, the exit ramp in question splits into a “fork” formation at its intersection with Auto Show Drive. See diagrams of Auto Show Drive, hereto attached as Exhibit "F." Thus, motorists desiring to turn left at the end of the exit ramp and enter eastbound Auto Show Drive must do so from its left intersection with that surface road and motorists desiring to turn right at the end of the ramp and enter westbound Auto Show Drive must do so from its right intersection therewith. At both intersections, traffic exiting southbound U.S. 95 is controlled by a stop sign. Furthermore, drivers turning right at that intersection are not confronted by opposing traffic entering the intersection from the opposite side of Auto Show

1 There is no evidence that this individual was the person referred to only as “Tim” by the alleged anonymous tipster.

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Drive. Exhibit "F".

On this occasion, as he approached the end of the Auto Show Drive exit ramp, Michael veered right at the exit ramp “fork,” stopped at the stop sign, and turned right; safely entering westbound Auto Show Drive. Exhibit “A” at 4; Exhibit “B” at 17; Exhibit “C” at 1; Exhibit “D” at 1. As Michael approached the stop sign at the right intersection of the exit ramp and Auto Show Drive, there were no vehicles behind him which were within 100 feet of the Defendants’ vehicle and the turn signal of the vehicle he was driving was operating and indicating his intention to make a right turn. Exhibit “C” at 1.

# The Warrantless Stop of the Defendants’ Vehicle

Michael then proceeded to lawfully drive his vehicle westbound on Auto Show Drive for a distance of several blocks. Just east of the intersection of Auto Show Drive and Gibson Road, in Henderson, Nevada, the HPD officers’ unmarked vehicle pulled up behind the Toyota and, activating emergency flashing lights, the A & F initiated a stop of the Defendants’ car. Exhibit “A” at 4. In response, Michael immediately pulled his vehicle to the right shoulder of westbound Auto Show Drive, parked and turned off the ignition. Exhibit “C” at 5. The officers parked the HPD vehicle directly behind the Defendants car, leaving its flashing emergency lights activated. Exhibit “E” at 1.

# The Ensuing Warrantless Detention of the Defendants

Officer A then exited the HPD vehicle and made contact with the Defendants. According to him, he advised them that the reason he stopped them was because Michael failed to signal his right turn at the intersection of the U.S. 95 exit ramp and Auto Show Drive. However, in contradistinction, Officer A “approached the driver’s window of [the Defendants’] vehicle and told [Michael] that the reason [he] had been stopped was because police were conducting ‘spot checks’ on cars in the area that afternoon;” and “did not claim that . . . [he] had been pulled over

. . . on the basis of any purported traffic offense whatsoever.” Exhibit “C” at 2; Exhibit “D” at 1.

Both driver and passenger were instructed to produce driver’s licenses; and Michael was instructed to also produce the vehicle registration and proof of insurance. Exhibit “B” at 17. Michael – the driver of the Toyota – produced his valid Nevada driver’s license and the valid

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vehicle registration and current proof of insurance for the car as instructed. These documents were retained by the police. According to Officer A, Tammy was unable to locate her driver’s license. Exhibit “A” at 5; Exhibit “B” at 19.

Officer A then proceeded to ask the Defendants a series of questions unrelated to either identified alternative purported purposes of the vehicle stop. Officer A did not proceed with his questioning by first giving the Defendants a Miranda warning. Exhibit “A” at 4; Exhibit “C” at 3; Exhibit “D” at 1. On several intermittent occasions during this period of questioning, Officer A walked away from the Defendants’ car to engage in cellular telephone communications and subsequently returning to resume questioning. Exhibit “C” at 3; Exhibit “D” at 1. According to A, both of the Defendants gave unsatisfactory answers to his questions and appeared “nervous”. Exhibit “A” at 1; Exhibit “B” at 18-19.

Officer A returned to the unmarked HPD vehicle in order to run a “records check” on the defendants and call for a “K-9 unit” to respond to the scene. Exhibit “B” at 19. After "the K-9 unit was called [he and Officer F] then . . . went back to the [Defendants’] vehicle and had Michael and Tamara exit the vehicle and . . . [remain standing] at the front of the [police] vehicle.” Id. at 20; Exhibit “A" at 5; Exhibit “C” at 3; Exhibit “D” at 1; Exhibit “E” at 1. From that point forward, HPD Officers As and F assumed and maintained exclusive dominion, custody and control of, and exclusive access to, the Defendants’ automobile.

“P[ending] the arrival of a K-9 [o]fficer,” As then resumed questioning the Defendants; again without a prior Miranda warning. Exhibit “A” at 5; Exhibit “B” at 20-21. The Defendants advised the officer that they were en route to pick up their six (6) year old daughter Nicole from school. Nevertheless, Officer A forbade Tammy from answering an incoming cellular telephone call from family friend Bernice in order for her to request Bernice to retrieve Nicole in their place, and also refused to call Bernice himself on their behalf to request her assistance. Exhibit “C” at 5.

HPD “K-9” Officer Craig C eventually arrived on the scene and deployed HPD drug detection dog “Carmine” to conduct an investigative “sniff” of the exterior of the Defendants’ car. According to Officer A, “Officer C told [him] the dog had a change of behavior as he

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sniffed the exterior portion of the Toyota Camry’s trunk indicating a positive alert for narcotics.” Exhibit “A” at 5. However, according to Officer C, “he informed Officers F and As” that “Carmine” had purportedly “alerted on the vehicle at the post between the front and rear passenger door by stopping and staring [at] . . . . that spot.” Exhibit “E” at 2.

At no time during the foregoing post-stop period of warrantless detention did Officer A, Officer F, or any other law enforcement officer proceed to prepare a citation for any purported traffic offense nor was any such citation ever issued to Michael.

# The Ensuing Warrantless Canine “Sniff” and Physical Search of the Interior Passenger Compartment of the Defendants’ Vehicle and the Opaque Purse

Officer C proceeded to deploy “Carmine” inside the passenger compartment of the Defendants’ car without a search warrant. Exhibit “E” at 2. According to Officer C, “Carmine” therein “alerted[ed] on a purse that was on the front passenger floorboard [and] on the lower

seam of the back seat.” Exhibit “E” at 2. However, an immediately ensuing, warrantless, physical search revealed that no controlled substance was contained within the purse or secreted anywhere else within the passenger compartment of the Defendants’ car. Exhibit “B” at 29. Officer A has conceded this, but had completely omitted any reference to either of the forgoing false alerts by Officer C’s dog in both his prior grand jury testimony and in his report. Exhibit “A” at 5; Exhibit “B” at 22.

# The Ensuing Warrantless Physical Search of the Trunk of the Defendants’ Vehicle and the Opaque Duffel Bag

Acting once again absent any prior attempt to obtain a search warrant and despite the fact that two previous purported “alerts” by the HPD canine proved to be “false positives,” Officers A and F nevertheless conducted a warrantless, physical search of the trunk of the Defendants’ car and the closed, opaque duffel bag contained inside, allegedly finding a quantity of marijuana contained within the bag. Exhibit “A" at 5; Exhibit “B” at 22; Exhibit “C” at 4; Exhibit “D” at 1.

# The Ensuing Warrantless Arrest of the Defendants

Defendants Michael and Tamara were then formally placed under warrantless arrest and transported to the Henderson Detention Center where they were booked and incarcerated.

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Exhibit “A” at 5; Exhibit “B” at 24; Exhibit “C” at 4. The vehicle and sums of currency found in the pocket and purse of Michael and Tammy, respectively, were seized for forfeiture, which was towed to the HPD seizure lot. Exhibit “A” at 5.

# The Ensuing Deliberate Incommunicado Confinement of the Defendants and False Disavowal Thereof By Officers And Employees Of The Henderson Police Department

For the following several hours, the Defendants were confined at the Henderson Detention Center without any opportunity whatsoever to make contact by telephone with an attorney, a bail bondsman, a family member, a friend, or anyone else in the outside world. Exhibit “C” at 4; Exhibit “D” at 1. During this time, an announcement was made over the in- house public address system warning that any other inmate who made a telephone call on behalf of the Defendants would be punished by placement in solitary confinement and handwritten signs were posted outside each of the respective cells in which the Defendants were placed reading: “DEFENDANTS NO CALLS.” Exhibit “C” at 4; Exhibit “D” at 1. When officers of the LVMPD called later that night to specifically inquire as to whether Michael and Tamara were in custody at that facility, HPD officials falsely denied their custodial status.

# The Subsequent Warrantless Entry and Search of the Interior of the Defendants’ Residence By Officers Of The Las Vegas Metropolitan Police Department.

Meanwhile, at approximately 6:45 P.M. on the afternoon of March 4, 2009, officers of the Las Vegas Metropolitan Police Department (“LVMPD”) had been dispatched to the Defendants’ residence at 10594 Placid Street, Las Vegas, Nevada in response to a call from R.H., a family friend, reporting that Michael and Tammy had most uncharacteristically failed to pick up their minor daughter N from school that afternoon and had not been heard from for several hours. See LVMPD Search Warrant Declaration in support of telephonic search warrant for 10594 Placid Street at 2, hereto attached as Exhibit “G.” As R.H. explained the child had been released by the school to the temporary custody of Bernice, another friend of the Defendants, who was a parentally-designated “emergency contact,” and with whom the Defendants had made plans to have dinner with later that evening. Id. Upon arriving at the Defendants' residence, LVMPD officers received no response to their efforts to make contact with an occupant. They

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neither observed nor heard any indicia that the house was occupied by anyone.

The officers then contacted a neighbor who advised that as of approximately 1:30 P.M. that afternoon, she saw the Defendants’ silver Toyota Camry automobile parked in the driveway of their home. Exhibit “G" at 2. Thus, “officers at the scene . . . thought the[ ] [Defendants] were currently driving their Toyota Camry which bears Nevada license plate 905VSM.” See LVMPD Detective B subsequent written Application and Affidavit for Search Warrant dated March 7, 2009, hereto attached as Exhibit “H.”

The LVMPD officers then contacted the Nevada Highway Patrol (hereinafter “NHP”), the North Las Vegas Police Department (hereinafter “NLVPD”), the HPD; the various valley medical facilities; and the various fire departments of those political subdivisions “in an attempt to locate the Defendants and were unsuccessful.” Exhibit “G” at 3.

At 9:00 P.M., LVMPD officers made a warrantless entry into the Defendants home through a side door into the garage, purportedly in order to conduct a “welfare check” of the interior of the home for Michael and Tammy.2 Id. Those officers allege that, upon entry into the garage, they “immediately smelled the odor of marijuana.” They proceeded by opening one of three closed freezers located in the garage. Exhibit “G” at 3; Exhibit “H” at 5. Inside that freezer, they allegedly “observed approximately twelve large bags of . . . [suspected] marijuana.” The rest of the residence was subsequently checked and neither of the "missing Defendants" was located inside. Id.

The premises were then “frozen” pending application by LVMPD detectives for a telephonic search warrant. Exhibit “G” at 3; Exhibit “H” at 5. According to Detective B, it was only until approximately 1:30 A.M. on the following morning of March 5, 2009 that he “learned [from]… LVMPD Robbery Detectives . . . [that] both Michael and Tamara… were in the custody of the Henderson Police Department” and that such was the reason that the Defendants had failed to pick up their daughter from school. Exhibit “H” at 6. Nevertheless, those facts

2 The garage is attached to and contiguous with the house; communicating with the residence itself via an interior door. See photograph, (attached as Exhibit “I”).

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were not disclosed in Detective B’s subsequent oral application for a telephonic warrant authorizing a nighttime search of the Defendants' residence. Exhibit “G.” The application was approved on March 5, 2009, at 1:48 A.M. by the Honorable T.A., Justice of the Peace for the Township of Las Vegas. See Application approved March 5, 2009, hereto attached as Exhibit “J.”

The execution of that warrant later that morning allegedly resulted in the seizure of a quantity of marijuana from all three (3) freezers located in the Defendants’ garage; a sum of United States currency; suspected records of marijuana sales, documentation pertaining to deposit accounts, documentation pertaining to safety deposit facilities, and two (2) firearms. Exhibit “H” at 5; see also Return of Search, hereto attached as Exhibit “K.”

Based upon yet another, subsequent written Application and Affidavit in Support of Search Warrant dated March 7, 2009, the Honorable T.A. issued a second search warrant for the Defendants’ home. See second application, hereto attached as Exhibit “L.” The warrant was executed later that same day, allegedly resulted in the further seizure of additional “paperwork;” a green watertight bag and a leather notebook. See Return of Search, Hereto attached as Exhibit “M.”

# The Seizure of the Defendants’ Bank Accounts

On March 5, 2009, LVMPD Detective B submitted an Application and Affidavit for Search And Seizure Warrant, requesting authorization to seize currency from and documentation pertaining to, three (3) local bank accounts of the Defendants, the existence of which had been discovered by LVMPD officers pursuant to the previous search conducted at the Defendants’ residence on March 4-5, 2009. See Application and Affidavit, hereto attached as Exhibit "N". Subsequently, a warrant granting such authorization was issued by the Honorable D. M. Mosley, Clark County District Court Judge. See Warrant, hereto attached as Exhibit "O". And upon the execution of that warrant on March 20, 2009 and April 7, 2009, a total of just over $30,000. was seized from the Defendants' accounts. See Returns, hereto attached as Exhibits “P,” “Q,” and “R,” respectively.

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# The Ensuing Invasion of the Defendants’ Safe Deposit Facilities and Seizure of Property Contained

On March 7, 2009, Detective B submitted yet another Application and Affidavit for Search Warrant seeking authorization to seize currency and other valuables from the Defendants’ safe deposit facilities at 24/7 Private Vaults, located at 3110 East Sunset Road, Suite H, Las Vegas, Nevada 89120. See Application, hereto attached as Exhibit “S.” That application was likewise expressly based upon the results of the previous search conducted at the Defendants’ residence on March 4-5, 2009. Id. A warrant granting such authorization was issued that same day by Las Vegas Justice of the Peace A. See Warrant, hereto attached as Exhibit “T.” The execution of that warrant later that day resulted in the seizure of an additional $268,000 in United States currency. See Return, hereto attached as Exhibit “U.”

# ARGUMENT

1. **THE INITIAL STOP AS WELL AS THE POST-STOP DETENTION OF THE DEFENDANTS WAS IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENT PROHIBITIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES, AND THEREFORE, ALL EVIDENCE AND STATEMENTS OBTAINED AS A DIRECT OR DERIVATIVE RESULT MUST BE SUPPRESSED, AND PROPERTY SEIZED AS A RESULT OF SAID VIOLATION, NOT CONSTITUTING CONTRABAND PER SE, MUST BE RETURNED.**

As a threshold matter, as the owners of the silver Toyota Camry stopped and subsequently searched by HPD officers on March 4, 2009, Michael and Tammy clearly have “standing” to challenge those intrusions on state and federal constitutional grounds. Rakas v. Illinois, 439 U.S. 128 (1978); Scott v. State, 110 Nev. 622, 877 P.2d 503, 508 (1994).

# The State Fails to Sustain it Burden of Proving that that Seminal Constitutional Intrusion was Justified Pursuant to a Recognized, Applicable Exception to the Warrantless Searches.

It is a fundamental principle of constitutional jurisprudence, as the Nevada Supreme Court has reiterated time and again, “warrantless searches [and seizures] are presumptively unreasonable under the Fourth Amendment.” *State v. Ruscetta*, 123 Nev. 299 (2007); *Johnson v. State*, 118 Nev. 787, 794 (2002) (“Unreasonable searches and seizures are forbidden under the United States and Nevada Constitutions. And warrantless searches and seizures are presumptively unreasonable”); *Bolin v. State*, 114 Nev. 503, 523 (1998) (“Because both searches

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and seizures must be conducted pursuant to a warrant, any intrusion found lacking such authorization is presumptively unreasonable, subject only to a few well-delineated and established exceptions”); *State v. Burkholder*, 112 Nev. 535, 538 (1996) (“the ‘seizure’ of a person without . . . a warrant is ‘per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions’”). Under the Fourth Amendment, a search or seizure absent a warrant is per se unreasonable, “subject only to a few specifically established and well- delineated exceptions.” *Katz v. United States*, 389 U.S. 347 (1967)

Accordingly, “[where] the State has not conceded the illegality of [a warrantless] search and seizure, it is entitled to an opportunity to establish [at a pretrial evidentiary hearing] that [the particular intrusion] came within one of the exceptions we have recognized to the Fourth Amendment’s prohibition against warrantless searches [and seizures].” *Kimmelman v. Morrison*, 477 U.S. 365, 390-91 (1986). Thus, the burden of justifying any warrantless search or seizure pursuant to one of the recognized exceptions to the warrant requirement always rests upon the prosecution. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *State v. Rincon*, 122 Nev. 1170

(2006).

Further, the Nevada Supreme Court confirms that “Terry and its progeny instruct that law enforcement officers may seize . . . individuals . . . [only if they possess] reasonable suspicion of criminal activity derived from specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion.” State v. Lisenbee, 116 Nev. 1124 (2000); *See also Proferes v. State*, 116 Nev. 1136, 1139 (2000) (“A police officer may stop and detain a suspect for questioning regarding possible criminal behavior… only when the officer has a ‘reasonable, articulable suspicion’ that the [particular] person is engaged or is about to engage in criminal activity”); *Terry v. Ohio*, 392 U.S. 1 (1968). Consistently, NRS 171.123(1) authorizes a peace officer to “detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed or is about to commit a crime.” NRS 171.123(i). Thus, as the Nevada Supreme Court cautions “[t]he detaining officers ‘must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” *Lisenbee* at 1134; (Quoting *United States v. Cortez*, 449 U.S. 411, 417-18

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Understandably, “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. *Lisenbee* at 1128. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [it be concluded] that a ‘seizure’ has occurred.” *Id*. at 1128. As the United States Court of Appeals for the Ninth Circuit has held: “When a law enforcement officer signals a motorist to stop by use of a siren or red light, there has been a seizure which must be justified under the Fourth Amendment.” *United States v. Morrison*, 546 F.2d 319, 320 (9th Cir. 1976). Similarly, “the Fourth Amendment prohibition against unreasonable searches and seizures extends to investigative traffic stops.” *State v. Rincon*, 122 Nev. 1170, 1173 (2006).

The Nevada Supreme Court recognizes that “while there is a compelling public policy interest to [enforce the laws of this state], that interest is not served by allowing a police officer unfettered discretion to stop a driver.” *Rincon* at 1175. To expand on this notion, the Rincon Court explained:

In order for a traffic stop to comply with the Fourth Amendment, there must be, at a minimum, reasonable suspicion to justify the intrusion. Reasonable suspicion . . . require[s] something more than a police officer’s hunch. A law enforcement officer has a reasonable suspicion justifying an investigative stop if there are specific, articulable facts supporting an inference of criminal activity.”

*Id.* at 1173; See also *State v. Lisenbee*, at 1129 (“When looking at the totality of the circumstances before us, we agree with the district court’s finding that the officers had a ‘hunch’ that Lisenbee might be the burglary suspect they were seeking – but it was nothing more than a hunch;” stop held unlawful); *Proferes v. State*, 116 Nev. 1136, 1139 (2000) (“the officers had nothing more than a ‘hunch’ that appellant was engaged in any criminal activity;” stop held unlawful).

3 Furthermore, it is an axiomatic principle of Fourth Amendment jurisprudence that justification under the foregoing standard must attach ***in advance of the seizure***. Thus, as the Nevada Supreme Court cautioned in *State v. Lisenbee*, “***once an individual is seized, no subsequent events or circumstances can retroactively justify the seizure***.” 116 Nev. 1124, 1130; See *State v. Stinnett*, 104 Nev. 398, 401 (1988) (same).

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Here, when HPD officers activated emergency flashing lights in order to stop and seize the Defendants' vehicle on the afternoon of March 4, 2009, they did so absent reasonable suspicion that the Defendants had committed any criminal offense. Therefore, that initial threshold of intrusion in this case was in violation of the federal and state constitutional prohibitions against unreasonable searches and seizures and that all direct or derivative evidence obtained by the police as a result said violation must be suppressed.

# 1. The Initial Stop was Not Justified on the Basis of Reasonable Suspicion that the Defendants were in Possession of Marijuana and the Police Do Not Purport to Claim Otherwise.

As HPD Officer A concedes, he and Officer F followed the Defendants' vehicle because they “suspected that the bag that Michael had [allegedly] put in his trunk may contain marijuana.” Exhibit “B” page 20, lines 9-10. However, as in *Lisenbee,* and *Proferes*, any such suspicion on his part was “nothing more than a “hunch,’” and was not the “reasonable” suspicion based upon “specific, articulable facts” as required to support an investigative vehicle stop and seizure.

It is beyond serious debate that the alleged surveillance observations of the HPD officers at the Firenze Apartments on the afternoon of March 4, 2009 involve activities that were entirely innocuous in and of themselves. There is nothing inherently suspicious about Michael’s retrieval of an article of luggage from the apartment in question despite Officer A’ assertion that “this type of transaction [i]s common for somebody who is buying/selling illicit drugs” Exhibit “A” at

1. The actions allegedly observed by Officer A at the Firenze Apartments are infinitely more common among millions of innocent, law-abiding American citizens.4

Further, the sole source of suspicion attributed to the “stake-out” surveillance observations was an unreliable anonymous tip. In this case, precisely as in *McMorran v. State*, “[t]he only grounds for the officers to suspect criminal activity came from [an] anonymous telephone tip that drugs were being sold from the [location under surveillance].” Similarly, just

4 Officer A concedes that the apartment in question “wasn’t . . . the Defendants’ residence” and “was never the Defendants’. . . residence.” Exhibit “B” page 29, lines 17-18. Nor is there any evidence that the individual who allegedly arrived at that apartment driving a black Honda Ridgeline in tandem with the Defendants’ vehicle was the person allegedly identified by an anonymous tipster as “Tim.”

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as in that case, “[t]he record is bereft of any evidence showing that the tip included information establishing its reliability… there is no indication that [the anonymous caller] explained how he had come by his information.” *McMorran v. State*, 118 Nev. 379, 386 (2002). Thus, "this anonymous tip did not provide reasonable suspicion to detain [the Defendants], let alone probable cause to seize them . . . or to [conduct] a search.” *Id*. at 387.

# The Initial Stop was Not Justified on the Basis of a Purported Turn Signal Violation.

The HPD officers claim to have based their initial stop of the Defendants' vehicle on an alleged turn signal violation committed by Michael at the intersection of the I-95 exit ramp and Auto Show Drive.5 To begin with, the Defendants deny the allegation that Michael did not signal his intention to turn right onto Auto Show Drive as his vehicle approached the end of the I-95 exit ramp. Exhibit “C” at 2; Exhibit “D” at 1. At a minimum, their denial of the alleged failure to use turn signal creates question of fact. Thomas v. Las Vegas Metropolitan Police Department, 114 F.3d 1195 (9th Cir. 1997). Michael did signal his intention to turn right onto Auto Show Drive.

Assuming that Michael did not signal his intention to turn right onto Auto Show Drive, no turn signal was required under the circumstances. Subsection 1 of NRS 484.343 (Movement and signals for turning; signal for stopping or decreasing speed) provides, in pertinent part, as follows:

“1. A driver shall not turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety, and then only after . . . giving an appropriate signal if any other vehicle may be affected by such movement.”

NRS 484.343(1). There appear to be no published Nevada Supreme Court opinions interpreting this statutory provision by application to circumstances analogous to those of this case. Accordingly, it is reasonably appropriate to consider and apply case law from other jurisdictions interpreting similar statutes. NRS 484.011; *United States v. Delgado-Hernandez*, 283 Fed Appx.

5 In *Whren v. United States*, 517 U.S. 806 (1996), the United States Supreme Court held that the Fourth Amendment does not prohibit a vehicle stop on the basis of an ***actual*** traffic violation simply because a law enforcement officer also happens to entertain a belief, in the absence of reasonable suspicion, that the vehicle contains contraband.

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493, 499 (9th Cir. 2008) (in the absence of applicable Nevada Supreme Court authority, NRS

484.011 authorizes consideration of similar statutes and case law of other jurisdictions in interpreting Nevada traffic laws).

A California case is particularly instructive. In *People v. Logsden*, the California Court of Appeal had the opportunity to interpret an identical provision, California Vehicle Code, Section 22107, by applying it to similar circumstances as those implicated in the instant case. *People v. Logsden*, 79 Cal. Rptr. 3d 379 (Cal. App. 4 Dist. 2008). That section, like the Nevada statute, provides:

“[No driver] shall turn a vehicle from a direct course . . . upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal . . . in the event any other vehicle may be affected by the movement."

In Logsden, an officer on routine patrol who was following directly behind the defendant’s vehicle in the same lane of a seven-lane boulevard stopped the defendant after observing his car suddenly cross six lanes without signaling, and a post-stop investigation resulted in the defendant’s arrest on a charge of DUI. *Id*. The defendant’s motion to suppress evidence obtained as a result of the stop was denied by the trial court. *Id*. The defendant was convicted, and his conviction was upheld on appeal. *Id*. On review, the Logsden court explained that “a signal is primarily aimed at vehicles behind the car making the [turn]”6 and that “the primary benefit of the signal requirement is for the vehicles to the rear of the signaling vehicle.” *Id*. at 302, 381. However, “a signal is only a prerequisite to a lane change [or other turn] if another motorist could be affected.” *Id*. at 381. Nevertheless, the Court of Appeals rejected the defendant’s argument that no other vehicles could have been affected by his movement across the boulevard and that the stop of his car was therefore unlawful; finding that, irrespective of the lack of any other traffic, the officer’s patrol car “was directly behind Logsden, in the same lane and within 100 feet of him.” *Id*. at 381.

6 As the court pointed out in *Logsden*, “[t]hat even applies to a patrol car, irrespective of the lack of any other traffic.” *Id*. at 381.

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Likewise, the West Virginia Supreme Court considered the application of another similar statute, West Virginia Code, Section 17C-8-8(a), providing that “[n]o person shall so turn any vehicle without giving an appropriate signal . . . in the event any other traffic may be affected by such movement.” *Clower v. West Virginia Department of Motor Vehicles*, 678 S.E. 2d 41, 45 (W.Va. 2009). In that case, a motorist was stopped by a patrol officer for making a right turn without signaling. Id. As in Logsden, a post-stop investigation resulted in his arrest and ultimate conviction on a charge of DUI. *Id*. However, the Clower court overturned the conviction finding that the officer’s patrol car was the only vehicle in the vicinity and was not “affected” by the turn because the patrol vehicle was approximately two blocks behind the defendant’s car. *Id*.

A number of other courts have equally held that similarly-worded state statutory turn signal requirements do not mandate the use of turn signals unless other vehicles could be affected by a motorist’s failure to indicate his intention to turn. See *State v. Ivey*, 633 S.E.2d 459, 461 (N.C. 2006); *Smith v. State ex rel. Department of Public Safety*, 120 P.3d 897, 900 (Okla. Civ. App. Div. 2005); *State v. Malloy*, 453 N.W.2d 243, 245 (Iowa App. 1999); *State v. Eidahl*, 495 N.W.2d 91, 92-93 (S.D. 1993). Courts holding that turn signals are required at all turns have done so on the basis of explicit statutory language so providing. See *United States v. Conway*, 53 Fed. Appx. 872 (10th Cir. 2002) (Kansas code requirement necessitating use of turn signals “regardless of whether there is any traffic moving in front of or behind the vehicle” requires signals in all circumstances); Torres v. State, 2003 WL 68056 (Tex. App. El Paso 2003) (signal required prior to all turns after legislature removed the words “in the event any other traffic may be affected by such movement” from state code); *People v. Rice*, 841 N.Y.S.2d 72 (N.Y. Sup. Ct. 2007).

In this case, the Defendants' vehicle veered right at the exit ramp “fork” and was in a right-turn only lane as it approached the intersection, and therefore, it would be plainly apparent to other motorists that the operator intended to turn right onto Auto Show Drive. The far end of the exit ramp in question splits into a “fork” formation at its intersection with Auto Show Drive. Exhibit "F." Thus, motorists desiring to turn left at the end of the exit ramp and enter eastbound Auto Show Drive must do so from the left-turn only lane at its left intersection with that surface

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road and motorists, like Michael, desiring to turn right at the end of the ramp and enter westbound Auto Show Drive must do so from the right-turn only lane at its right intersection therewith. Accordingly, it would be plainly apparent to other motorists exiting southbound U.S. 95 at Auto Show Drive that the operator of the Defendants' vehicle, having entered the right-turn only lane, intended to turn right into westbound Auto Show Drive. Furthermore, drivers turning right at that intersection are not confronted by opposing traffic entering the intersection from the opposite side of Auto Show Drive. Exhibit "F".

Equally important, as in Clower, is that there were no other vehicles closely following behind the Defendants' vehicle that could have been affected by a right turn by the Defendants onto Auto Show Drive without signaling. Exhibit “C” at 1.7 Indeed, in contradistinction to where the patrol officer who stopped the defendant was directly behind him in the same lane and within 100 feet of the defendant’s car, here, the HPD officers were not on routine patrol, but rather, engaged in mobile surveillance of the Defendants pursuant to an ongoing drug trafficking investigation. The successfully conduct this type of surveillance requires movements to be deftly and inconspicuously by maintaining a sufficient distance between the surveillance vehicle and the subject’s car as to avoid detection. Thus, the alleged turn signal violation, which is disputed by the affidavit of Michael and common sense under the circumstances, is not a valid basis for the initial stop of the Defendants and the resulting post-stop detention.

# Detaining Officers did Not Proceed to Prepare or Otherwise Issue a Traffic Citation to the Defendants for the Alleged Turn Signal Violation.

Illustrative of the susceptibility to disbelief of the allegation that Michael failed to signal his turn is the fact that no citation for such alleged violation was ever issued. Had Defendants' alleged traffic violation been the actual cause for the traffic stop, such evidence would support this contention; yet no citation showing such traffic violation exists. Further, a turning violation still would not give rise to grounds to arrest the Defendants and/or the line of questioning that

7 Neither As’ report nor his grand jury testimony indicates that any vehicle was closely following behind the Defendants’ car.

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followed. Additionally, as to Tammy, she was not the driver of the vehicle and, thus, could not be held accountable for any alleged traffic violation or be susceptible to either a citation or arrest resulting from such citation. Clearly, the initial stop and detention of the Defendants was an exploitation of the predicate unlawful vehicle stop.

# The Officers Proceeded To Conduct An Investigation Exclusively and Entirely Based Upon a Rationale Unrelated to the Identified Reasoning for the Stop.

In *Gama v. State*, officers of an “anti-drug unit” notified the Nevada Highway Patrol (“NHP”) that they were attempting to locate the defendant’s car. As in the case at bar, the anti- drug officers in *Gama* “suspected that Gama’s car might contain illegal drugs, although there is no evidence in the record that the officers had probable cause for a stop.” *Gama v. State*, 112 Nev. 833, 836 (1996). An NHP trooper later spotted the defendant’s vehicle on the highway, and after following the car for 15 minutes, stopped it for speeding in a construction zone. He proceeded to issue a citation to the defendant driver.

The trooper was soon joined on the scene by several anti-drug officers with a trained drug-detecting dog in tow. While "Trooper Gyll was writing the citation,” one of the narcotics officers walked the canine around the exterior of the defendant’s vehicle to sniff for drugs. When the dog thereupon “alerted” to the vehicle, a search of the car was performed, and illegal drugs were found. The defendant was arrested and charged with possession of a controlled substance for sale. The defendant moved to suppress the evidence found pursuant to the search; which motion was denied by the trial court.

The Nevada Supreme Court affirmed the denial of the motion on appeal. Concluding that the seizure and search were reasonable at their inception on the basis of traffic violations observed by the NHP trooper, the Court then address[ed] the issue of whether the conduct of the officers was unreasonable in scope.

The *Gama* Court “conclude[d] that the stop was reasonably related in scope to the circumstances which justified the interference in the first place.” 112 Nev. 833, 837. However, in so doing, the Nevada Supreme Court specifically emphasized that “the narcotics unit, including the drug dog, Cleo, arrived on the scene prior to the time that the citation was

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completed… [and there] was no evidence in the record to indicate that Trooper Gyll was dilatory in issuing the citation.” Id. at 837.

In the case at bar, HPD Officer A concedes that, as in *Gama*, he and Officer F followed the Defendants’ vehicle because they “suspected that the bag that [Michael] had [allegedly] put in his trunk may contain marijuana.” Exhibit “B” at 20. Also as in that case, such suspicion on his part was “nothing more than a “hunch,’” and was not the “reasonable” suspicion based upon “specific, articulable facts” required by the state and federal constitutions to support an investigative vehicle stop and seizure. Rather than issue a citation to Michael for a purported turn signal violation, Michael was detained, questioned and subsequently ARRESTED for alleged “FAILURE TO SIGNAL” in violation of NRS 484.345.

However, Michael was not subject to warrantless custodial arrest for any such minor traffic infraction. Thus the post-stop detention of the Defendants was unlawful. NRS 484.791 (Arrest without warrant for certain offenses). As provided in NRS 484.791, “failure to signal,” in violation of NRS 484.345 is not one of the few, specifically delimited traffic offenses identified for which a law enforcement officer may arrest a person without a warrant in this State.

As the Nevada Supreme Court made abundantly clear in *State v. Bayard*: “Although the Legislature has given officers ‘discretion’ in determining when to issue a citation or make an arrest for a traffic code violation [in all other circumstances], that discretion is not unfettered.”8 *State v. Bayard*, 119 Nev. 241 (2003). *Baynard* is directly on point in the instant case. Here, as in that case, Michael “was cooperative, provided adequate identification, and was not under the influence of alcohol or a controlled substance” and “[t]here is also no indication in the record that Officer [As] claimed a reasonable basis for concluding that [Michael] would not respond to

8Indeed, as our Supreme Court explained in ***Bayard***, *supra*, at note 15: “The ***mandatory*** arrest procedures . . . are invoked when the driver provides insufficient identification or when the officer has reasonable grounds to conclude that the cited driver will not appear in court to respond to the citation or when the individual is charged with driving under the influence. NRS 484 .795(1), (4). The officer's ***discretion*** to formally arrest is implicated when the above mandatory requirements are not met; that is, absent insufficient identification, if there is not a reasonable belief that the cited driver will not appear in court or is under the influence, the officer is statutorily empowered with discretion to arrest or cite the driver.” (Emphasis added).

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a traffic summons in municipal court.” Nor was Officer A confronted in this case with “special circumstances” that “require immediate arrest.” Officer A did not even possess of sufficient objective and articulable facts and circumstances to satisfy the lesser-threshold standard of reasonable suspicion upon which to detain the Defendants for a canine sniff for drugs.

Further, the officer's allegation that the Defendants were "nervous" does not alleviate the constitutional violations in this case. See *People v. Superior Court (Kiefer)*, 91 Cal Rptr. 729(1970); See also *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977) (suspect’s conduct in walking quickly through airport terminal after arrival on flight from known drug distribution center while looking nervously over shoulder at plainclothes agents following him “was entirely consistent with innocent behavior”); *Schulz v. Lamb*, 416 F. Supp. 723 (D. Nev. 1975).

# THE POST-STOP QUESTIONING OF THE DEFENDANTS WAS NOT PRECEDED BY A MIRANDA WARNING AS MANDATED BY MIRANDA V. ARIZONA AND ITS PROGENY, THUS, THE POST-STOP QUESTIONING OCCURRED IN FURTHER VIOLATION OF THE RIGHT AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS AS WELL AS THE RIGHT TO COUNSEL.

The Fifth Amendment of the United States Constitution provides that “no person….shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend V. Police interrogation of a suspect in custody threatens the exercise of the Fifth Amendment privilege. *Miranda v. Arizona* established a safeguard to this privilege by mandating that a criminal defendant must be warned that he has the right to remain silent prior to being subjected to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

Custody is defined as either a formal arrest or a restraint on freedom to a degree associated with arrest. *Id*. When a person has not been formally arrested, the inquiry then becomes based on the totality of the circumstances; “how a reasonable man in the suspect’s position would have understood the situation.” *Alward v. State*, 112 Nev. 141, 154 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). In looking at the totality of the circumstances, the Court should look to several factors: (1) site of the interrogation; (2) whether the interrogation was focused on the subject; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.

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*Alward* at 154-55. In determining whether the indicia of arrest are present one look should look to whether the suspect was told the questioning was voluntary or that he was free to leave, whether the atmosphere of questioning was police dominated, whether the police used strong- arm tactics or deception during questioning and whether the police actually arrested the suspect at the termination of questioning*. State v. Taylor*, 114 Nev. 1071, 1082 n.1 (1998).

In a custodial interrogation, law enforcement must convey Miranda’s essential message to suspects and procedures must be “at least as effective in apprising the accused persons of their right of silence and in assuring a continuous opportunity to exercise it. *Miranda* at 467. In *Dewey*

*v. State*, 169 P.3d 1149 (2007), the court held that the police scrupulously honored defendant's right to remain silent as they repeatedly reminded her of her right to stop the interview at any time.

Once Miranda warnings have been given, and a suspect waives these rights, there must be a determination that the waiver was valid. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). There are several factors commonly considered in this determination, including the suspect’s familiarity with the criminal justice system9 and his or her physical and mental condition. *Mincey*

*v. Ariz*., 437 U.S. 385, 399-400 (1978). Importantly, courts in other jurisdiction have found that an incriminating statement may not be used to establish probable cause unless there is no indication of trickery or coercion on the officer's part. *U.S v. Morales*, 788 F.2d 883, 883 (2d Cir. 1986).

The facts in this case indicate that a Miranda warning was required before the Officer A questioned the Defendants in furtherance of his criminal investigation. Officer A advised that the reason he stopped Michael was because he had turned right at the intersection of the U.S. 95 exit ramp and Auto Show Drive without first signaling his intention to do so. However, this is contradicted by Michael, who asserts that Officer A “approached the driver’s window of [the Defendants’] vehicle and told [Michael] that the reason [he] had been stopped was because police were conducting ‘spot checks’ on cars in the area that afternoon" and “did not claim that .

9 See *U.S. v. Williams*, 291 F.3d 1180, 1190 (9th Cir. 2002)(overruled on other grounds) holding that waiver valid in part because defendant had prior experience with the criminal justice system.

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. . [he] had been pulled over . . . on the basis of any purported traffic offense whatsoever.” Exhibit “C” at 2; Exhibit “D” at 1.

Nevertheless, regardless of the reason why Officer A stopped the Defendants, the purpose of his questioning has completely unrelated to the alternative purposes and pursuant to his initial investigation at the Firenze Apartments. Officer A began by requesting the driver's license of not only Michael, but also Tammy, a mere passenger in the vehicle. He then proceeded to ask them a series of questions having no bearing on either one of the identified purposes, but actually in furtherance of his unreasonable hunch that the duffle bag Michael placed in the vehicle contained a controlled substance. Essentially, and without a reasonable basis, Officer A and his partner made the Defendants the target of their investigation in connection with the surveillance at the Firenze Apartments. Likewise, given that Officer A already knew were the Defendants were coming from, in light of the fact that he had purposely followed them, his line of questioning was further deceptive in regards to questions he already knew the answers to. *Morales* at 883. Thus, the officers' sole motive as to the nature of the questions asked, including where they were coming from and what they had been doing, were exclusively to gather incriminating evidence in support of the anonymous tip that drugs were being sold at the Firenze Apartments.

Furthermore, it is evident that the Defendants were not free to leave during this interrogation. The location of the incident is not an area commonly traveled by pedestrians, thus, their movement was made very inconvenient. Shortly after Officer A became dissatisfied with the Defendants' answers, Officers A and F assumed and maintained exclusive dominion, custody and control of, and exclusive access to, their automobile. This factor makes their inability to leave freely more obvious. Also telling of the Defendants custodial status is the fact that even after the Defendants advised the officer that they were en route to pick up their daughter Nicole from school, Officer A not only forbade them from answering an incoming cellular telephone call from family friend, Bernice, but also refused to call Bernice himself to request her assistance. Exhibit “C” at 5. Like the Defendants, any other reasonable person under these very circumstances would have felt subject to the officers' control and will.

Despite the fact that neither of the Defendants were free to leave, Officer A questioned

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them without first advising the Defendants of their Miranda rights. Exhibit “A” at 4; Exhibit “B” at 17-19; Exhibit “C” at 3; Exhibit “D” at 1. At the very least, from the instant that Officer A became dissatisfied with the answers to his questions, a Miranda warning was compulsory given the evident target of his investigation to find controlled substances and clear focus of his true intentions. Accordingly, the factual evidence supports a finding that the Defendants were in the midst of a custodial investigation at the inception of the traffic stop and long before the canine unit arrived. Nevertheless, no Miranda warning was given during these events in violation of the Defendants' constitutional right. Thus, any evidence arising from the Defendants' illegal questioning, directly or indirectly, must be suppressed.

# THE CANINE “SNIFF” OF THE INTERIOR PASSENGER COMPARTMENT AND THE TRUNK OF THE VEHICLE AS WELL AS DUFFLE BAG FOUND INSIDE AND THE RESULTING ARREST OF THE DEFENDANTS WAS IN VIOLATION OF THE PROHIBITIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS, THUS, ALL EVIDENCE SEIZED OR OBTAINED AS A DIRECT OR DERIVATIVE RESULT OF SAID VIOLATION MUST BE SUPPRESSED.

In *United States v. Place*, the United States Supreme Court categorized the sniff of the narcotics-seeking dog as “sui generis” under the Fourth Amendment and held it was not a search. *United States v. Place*, 462 U.S. 696, 707 (1983). This classification rested "not only upon the limited nature of the intrusion, but on a further premise that experience has shown to be untenable, the assumption that trained sniffing dogs do not err." *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). To this point, the Court reevaluated its determination in Place, categorizing the that the use of a sniff dog can be a search, and recognized that:

What [it] ha[s] learned about the fallibility of dogs in the years since Place was decided would itself be reason to call for reconsidering Place's decision against treating the intentional use of a trained dog as a search. The portent of this very case, however, adds insistence to the call, for an uncritical adherence to Place would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks; if a sniff is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely unless it is treated as a search. [The Court] should not wait for these developments to occur before rethinking Place's analysis, which invites such untoward consequences.

Id. at 410-11.

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Furthermore, the Court recognized the unreliability that can arise from such searches:

The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy… See, e.g., *United States v. Kennedy*, 131 F.3d 1371, 1378 (C.A.10 1997) (describing a dog that had a 71% accuracy

rate); *United States v. Scarborough*, 128 F.3d 1373, 1378, n. 3 (C.A.10 1997) (describing a dog that erroneously alerted 4 times out of 19 while working for the postal service and 8% of the time over its entire career); *United States v. Limares*, 269 F.3d 794, 797 (C.A.7 2001) (accepting as reliable a dog that gave false positives between 7% and 38% of the time); *Laime v. State*, 347 Ark. 142, 159, 60

S.W.3d 464, 476 (2001) (speaking of a dog that made between 10 and 50 errors);

*United States v. $242,484.00*, 351 F.3d 499, 511 (C.A.11 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert “is of little value”), vacated on other grounds by rehearing en banc, 357 F.3d 1225 (C.A.11 2004); *United States v. Carr*, 25 F.3d 1194, 1214-1217 (C.A.3

1994) (Becker, J., concurring in part and dissenting in part) (“[A] substantial portion of United States currency ... is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence”). Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are “generally reliable” shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search… In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times.

Once the dog's fallibility is recognized, however, that ends the justification claimed in Place for treating the sniff as sui generis under the Fourth Amendment.

*Id*. at 411-13. Based on the Court's observations, where the dog alerts and contraband is found, the issue is generally the reasonableness of the search based on the reliability of the dog's alerts in determining whether the police had probable cause to search or not.

In *Katz v. United States*, 389 U.S. 347 (1967), the United States Supreme Court pronounced the principle that the Fourth Amendment only prohibits unreasonable official interference with reasonable expectations of privacy. Therefore, as the Nevada Supreme Court has explained, although the use of a drug-detecting canine to conduct a “sniff” of the exterior of a motor vehicle “[i]s not a ‘search’ for Fourth Amendment purposes” subject to the warrant and probable cause requirements, *Gama v. State*, 112 Nev. 833, 837 (1996), the deployment of a drug dog within the interior of a vehicle is such an intrusion*. Latham v. State*, 97 Nev. 279 (1981).

Further, the Nevada Supreme Court recognizes that "a search with canines conducted without some preknowledge or reasonably strong suspicion that contraband is to be found in particular location is a constitutionally impermissible invasion of the suspect's reasonably

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expectation of privacy and consequently a violation of the Fourth Amendment." *Latham v. State*, 97 Nev. 279, 781 (1981); citing *People v. Evans*, 65 Cal.App.3d 924 (1977). In Latham v. State, the defendant challenged his conviction alleging an unreasonable exploratory search. In that case, a canine investigation of defendant's vehicle was initiated after law enforcement received an anonymous tip that he would be carrying a controlled substance in his vehicle at a certain time. *Id*. Subsequently, the police located the defendant's vehicle. *Id*. After the dog indicated that the vehicle may contain controlled substances, officers proceeded by obtaining a search warrant. *Id*. In determining whether an "indiscriminate canine exploratory search" occurred, the Court found that, although not mentioned in the affidavit in support of the search warrant, the affidavit indicated that "the dog was used as corroboration of the suspicions or preknowledge of the police" because prior to the use of the narcotic detection dog, there was a suspicion that "controlled substances were located within [the defendant's] '1976 Dodge van, orange in color, bearing" a specific Nevada license plate. *Id*. at 281.

Here, the apparent unreliability of the dog's alerts fails to support the notion that officers had probable cause to conduct this search. Furthermore, as a warrantless “search” within the meaning of the state and federal constitutions, the deployment of HPD drug detecting canine “Carmine” inside the interior passenger compartment of the Defendants’ vehicle was presumptively unreasonable. *Johnson v. State*, 118 Nev. 787 (2002); *Bolin v. State*, 114 Nev. 503

(1998).

# The False Positive Alerts by the Dog at Issue Indicate that Reliability in the Alerts was Destroyed, thus, Failing to Sustain a Finding of Probable Cause to Search the Defendants' vehicle.

Here, the mere conduct of the dog during the search of the Defendants' vehicle defeats a finding of probable cause based on the unreliability of the dog's investigative sniffing abilities. Absent any attempt to first seek a search warrant pursuant to NRS 179.045, Officer C proceeded to deploy “Carmine” inside the passenger compartment of the defendants’ car. Exhibit “E” at 2. According to Officer A, “Officer C told [him] the dog had a change of behavior as he sniffed the exterior portion of the Toyota Camry’s trunk indicating a positive alert for narcotics.” Exhibit “A” at 5. However, according to Officer C, “he informed Officers F and A” that “Carmine” had

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purportedly “alerted on the vehicle at the post between the front and rear passenger door by stopping and staring [at] . . . . that spot.” Exhibit “E” at 2. Officer C also asserted that the “Carmine” therein “alerted[ed] on a purse that was on the front passenger floorboard [and]

on the lower seam of the back seat.” Exhibit “E” at 2. Nevertheless, the unlawful search of these areas revealed that "no controlled substance was in fact contained within the purse in question or secreted anywhere else within the passenger compartment of the Defendants’ car. Exhibit “B” at 29. Officer A conceded to this fact but "not until confronted with a specific question during his testimony before the grand jury, having completely omitted any reference to either of the forgoing false alerts by Officer C’s dog in both his prior grand jury testimony and in his report. Exhibit “A” at. 5.

Acting once again absent any prior attempt to obtain a search warrant and despite the fact that two previous purported “alerts” by the HPD canine proved to be “false positives,” notwithstanding the actual failure of “Carmine” to in fact even allegedly alert to an exterior “sniff” of the trunk of the Camry (contrary to the false representation of Officer A),10 Officers A and F conducted a warrantless, physical search of the trunk of the Defendants' car and the closed, opaque duffel bag contained inside, allegedly finding a quantity of marijuana contained within the bag. Exhibit “A” at 5; Exhibit “B” at 22; Exhibit “C” at 4; Exhibit “D” at 1.

Nevertheless, the dog at issue in this matter essentially gave false positives on 2 out of 3 occasions; an inaccuracy of more than 60%. Accordingly, there is no logical basis showing even a reasonable suspicion that drugs would be located inside the vehicle. The existence of, not one, but two false positives immediately before the search of the trunk should have placed the officers on notice of the fact that the dog sniffs were highly untrustworthy. Such vulnerable results cannot rationally support a finding of probable cause to search the trunk or any part of the Defendants' vehicle.

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10 *Contrast*, Exhibit “A” page 5, paragraph 4; Exhibit “E” page 1, paragraph 8 – page 2, paragraph 1.

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# No Other Factors Give Rise to A Finding of Probable Cause to Justify the Warrantless Search by the Dog.

Even more damaging to the State's case is the fact that the Henderson Police Department initiated a search with canines "without some preknowledge or reasonably strong suspicion that contraband is to be found" in the Defendants' vehicle. *Latham* at 781 (1981). Unlike *Latham v. State*, police officers did not receive any tip whatsoever indicating that the Defendants were in possession of a controlled substance or that their vehicle was involved in such activity nor were they provided with other details or descriptions in any way identifying the Defendants, individually and collectively. Also, unlike *Latham* where the tip directly involved the defendant and his vehicle, the unreliable tip in this case did not in any manner involve the Defendants' vehicle, their residence, their identification or any other descriptions that could reasonably show any connection between themselves and the alleged existing contraband. Likewise, the Defendants conduct during the apartment surveillance was complete innocuous and brief. The Defendants conduct during the traffic stop also fails to indicate any guilt of mind from the Defendants.

These factors hardly support a finding of probable cause or even a reasonable suspicion that criminal activity was under way. Equally distinction in this case from *Latham*, is the fact that the police officers in this case never once made any attempts to obtain a search warrant pursuant to their "alleged suspicion." This is likely the case because it would have likely been challenging for a Judge to find probable cause for the search of the Defendants' vehicle based on 1) a unreliable anonymous tip of possible drugs being located at the Firenze Apartment No. 1170, 2) a mere 15 minute observation of the premise, 3) Michael carrying a piece of luggage out of the apartment and into his vehicle and 4) the unremarkable behavior of the Defendants throughout this ordeal. Without a doubt, the facts in this case demonstrate an "an unreasonable exploratory search."

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1. of 56

# IV. THE POST-ARREST INCOMMUNICADO INCARCERATION OF THE DEFENDANTS WAS IN VIOLATION OF THEIR RIGHT TO FREEDOM OF

1. **EXPRESSION GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS, NRS** 171.153 AND 199.460**, THUS, ALL EVIDENCE SEIZED OR OBTAINED AS A**
2. **DIRECT OR DERIVATIVE RESULT OF SAID VIOLATION MUST BE SUPPRESSED.**
3. NRS 171.153 (Right of person arrested to make telephone calls) provides, in pertinent
4. part, as follows:
5. “1. Any person arrested has the right to make a reasonable number of completed telephone calls from the police station or
6. other place at which he is booked immediately after he is booked .

. . .

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2. A reasonable number of calls must include one completed call to a friend or bail agent and one completed call to an attorney.” (Emphasis added.)

Moreover, NRS 199.460 (Extortion of confession; refusing accused communication with attorney or friends) – a criminal statute -- further provides, in pertinent part, as follows:

“1. An officer or person having the custody and control of the body or liberty of any person under arrest shall not refuse permission to the arrested person to communicate at reasonable times and intervals with his friends or with an attorney . . . .

2. A person violating the provisions of this section shall be punished:

(c) Where the only offense is to refuse permission to the arrested person to communicate with his friends or with an attorney, for a misdemeanor.” (Emphasis added.)

In the case at bar, following their arrest on drug charges by HPD officers, Michael and Tammy were transported to the Henderson Detention Center and booked. For a number of hours, both of them were confined at that facility without any opportunity whatsoever to make contact by telephone with an attorney, a bail bondsman, a family member, a friend, or anyone else in the outside world. Exhibit “C” at 4; Exhibit “D” at 1. During that period of incommunicado confinement, handwritten signs were posted outside each of the respective cells in which the Defendants were placed reading: “DEFENDANT NO CALLS,” and an announcement was made over the in-house public address system warning that any other inmate who made a telephone call on behalf of either of the Defendants would be punished by placement in solitary confinement. Exhibit “C” at 4; Exhibit “D” at 1. When officers of the

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LVMPD called the Henderson Detention Center during that period of time to specifically inquire as to whether Michael and Tamara Defendants’ were in custody at that facility, HPD officials falsely denied their custodial status.

In view of the above-quoted statutory provisions, their post-arrest incommunicado confinement at the hands of the HPD was nothing less than a criminal violation of their statutory rights under Nevada law. Moreover, the same was also a federal constitutional violation of both their First Amendment right to freedom of expression and their Fourteenth Amendment right to due process of law. For as the United States Court of Appeals for the Ninth Circuit specifically held, “the state right to a post-booking telephone call creates a liberty interest protected by the Fourteenth Amendment of the United States Constitution.” *Carlo v. City of Chino*, 105 F.3d 493, 495 (9th Cir. 1997).

In *Carlo v. City of Chino*, the plaintiff was arrested for driving while under the influence of alcohol and taken to a jail in San Bernardino County, California, where she was booked and held without opportunity to use a telephone. *Carlo v. City of Chino*, 105 F.3d 493, 495 (9th Cir. 1997).

She filed a section 1983 action alleging that her civil rights were violated when officials at the jail prevented her from making a phone call. At trial, a jury found that jail officials had deprived Carlo of a constitutional right by denying her the opportunity to make a telephone call (a right provided for by state law), and awarded Carlo damages. The Ninth Circuit, in reinstating the verdict, held that jail officials violated the arrestee’s Fourteenth Amendment right to procedural due process. The Court pointed out that “the Constitution provides an arrestee with an independent right under the Fourteenth Amendment to communicate with the outside world." Id. at 496. (Citing *Procunier v. Martinez*, 416 U.S. 396, 418-419 (1974) and *Feeley v. Sampson*, 570

F.2d 364, 373 (1st Cir. 1978)).

However, as the *Carlo* court further explained, the statutory right to immediate post- booking telephone access at issue in that case, identical to NRS 171.153 and 199.460, implicated an important liberty interest protected by the due process clause of the Fourteenth Amendment:

Section 851.5 of the California Penal Code provides [in pertinent

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part] [that] . . . [i]mmediately upon being booked an arrested person has the right to make at least three completed telephone calls to three of the following: (1) An attorney of [her] choice

or, if [she] has no funds, the public defender or other attorney assigned by the court to assist indigents[;] . . . . (2) A bail bondsman[;] [and] (3) A relative or other person. [Subsection] (c) [mandates that] [t]hese telephone calls shall be given immediately upon request, or as soon as practicable. [And] any public officer or employee who willfully deprives an arrested person of any right granted by th[at] section is guilty of a misdemeanor. Cal. Penal Code § 851.5 (1985). This section clearly establishes Carlo's right to place telephone calls under state law While the right to use

a telephone may not per se rise to the level of a liberty interest protected by the procedural mandate of the Fourteenth Amendment, the right of an arrestee not to be held incommunicado involves a substantial liberty interest….

It is clear that once a liberty interest has been found, federal law rather than state law dictates how much process is due. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)… We hold that the process provided by the California statute… is sufficient to satisfy constitutional due process.

*Id*. at 496-97. The Court concluded that "holding an arrestee incommunicado is a restraint atypical of post-arrest detention." *Id*. at 500.

The combined effect of NRS Sections 171.153 and 199.460 is clearly to create identical rights and remedies under Nevada state law. And therefore, as in the Carlo case: “The right to a telephone call, as detailed [there]in… constitutes a liberty interest recognized by the due process clause of the Fourteenth Amendment.” *Id*. at 502.

Here, the Defendants' incommunicado confinement at the Henderson Detention Center was not only an independent violation of their constitutional and statutory rights in and of itself, but further their unconstitutional and otherwise illegal incommunicado confinement at that facility constitutes both an exploitation of the preceding unlawful stop, detention and vehicle search undertaken by HPD Officers on the afternoon of March 4, 2009 and a direct and un- attenuated link between those predicate illegalities and the warrantless invasion of the Defendants’ Las Vegas residence by officers of the LVMPD later that night.

Thus, their unconstitutional and otherwise illegal incommunicado confinement by the HPD was clearly the direct and proximate cause of their inability to advise their friends of their contemporaneous custodial status and that had their right to immediate telephone access been

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honored, there would have been no arguable basis whatsoever for LVMPD officers to enter their home in order to conduct a purported “welfare check” pursuant to the “emergency aid” exception to the warrant requirement. The fact that the HPD further falsely denied that the Defendants’ were in custody at the Henderson Detention Center in response to the specific inquiry of LVMPD officers before they undertook that warrantless residential entry and search establishes that causal.

Accordingly, even assuming that the subsequent warrantless entry and search of the Defendants' home by officers of the LVMPD later that night was independently lawful, all evidence seized or derived as a result thereof must nonetheless be suppressed as the fruits of the antecedent unlawful stop, detention and vehicle search undertaken by HPD officers earlier that afternoon. See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975).

# THE INITIAL WARRANTLESS ENTRY AND SEARCH OF THE INTERIOR OF THE DEFENDANTS’ RESIDENCE AND THE WARRANTLESS INSPECTION OF THE CONTENTS OF THE CLOSED FREEZER LOCATED INSIDE THE GARAGE CANNOT BE SUSTAINED PURSUANT TO THE “EMERGENCY AID” EXCEPTION AND, THUS, WERE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRING SUPPRESSION OF EVIDENCE.

The Fourth Amendment to the Constitution of the United States provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” It is made binding upon the states by and through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). Likewise, Article 1, Section 18 of the Constitution of the State of Nevada provides that “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by Oath or Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized.”

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Evidence seized or subsequently derived by law enforcement authorities as a result of any violation of the above-quoted state and federal constitutional provisions is not admissible in a criminal prosecution against any person having standing to object thereto. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975).

# Defendants Have Standing.

As a threshold matter, it is obviously beyond dispute that, as the owners and residents of their Placid Street home, the Defendants have standing to challenge official intrusions upon their reasonable and legitimate privacy interests. *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978).

# The Adjacent Garage Is An Integral Part Of The Defendants' Dwelling House; In Which They Enjoy A Coextensive, Reasonable And Legitimate Expectation Of Privacy.

It is equally clear that their reasonable and legitimate expectation of privacy with respect to the confines of their home extends to the interior of the adjacent and contiguous garage, which communicates with the house via an interior door into the kitchen. See photographs, hereto attached as Exhibits “C’ and “D.” Indeed, as the federal court explained in *Coffin v. Brandau*, 2008 W.L. 2950117 (M.D. Fla. 2008):

The Coffins’ garage is attached to the house itself, and it holds their cars, motorcycles, and other household items that are typically kept in a garage. Unless the garage door is up, no passerby can see into the garage. . . .[T]he Coffins treated the garage as part of their home, and certainly its location and construction as an attachment to the house with an interior door into the kitchen could not be considered anything other than part of the dwelling unit. For all intents and purposes, the Coffins’ garage is unequivocally part of their dwelling unit with the expectation of privacy afforded one’s home. *Id*. at 5.11

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11 *Coffin*, like the case at bar, involved a warrantless entry and search of a private residence and the garage attached thereto, purportedly undertaken pursuant to the “emergency aid” exception to the warrant requirement. However, the federal district court held in that case – as Defendants respectfully urge this Court to hold in the case at bar – that “**there is no indication that any person was in imminent physical danger or that an emergency situation existed at the time the deputies entered the [defendants’] garage. No circumstances prevented the deputies from obtaining a warrant should they have desired to obtain one . . . . There simply is no testimony supporting a finding of exigent circumstances at the time the deputies entered the garage in this case**.” *Coffin, supra* at 6. (Emphasis added.)

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# The Initial Entry And Search Of The Defendants’ Residence And Inspection Of The Contents Of The Closed Freezer Located In The Garage Attached Were Without Judicial Authorization And Were Presumptively Unlawful Per Se.

As the United States Supreme Court has made abundantly clear time and again, “[i]t is a ‘basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.’” *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

(Quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004); *Payton v. New York*, 445 U.S. 573, 586 (1980).) Indeed, as the Payton Court explained, the unauthorized physical invasion of the home is the “chief evil” against which the Fourth Amendment protects. *Payton* at 585. Thus, “warrants are generally required to search a person’s home . . . unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978). Accordingly, the prosecution bears the burden of proving that any such warrantless intrusion is justified under one of the few recognized, well and narrowly delineated, exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Hannon v. State of Nevada*, 125 Nev. 207 P.3d 344, 346 (Nev. 2009) (“Warrantless home entries, the chief evil against which the Fourth Amendment protects, are presumptively unreasonable unless justified by a well-delineated exception, such as when exigent circumstances exist”).

# The Initial Warrantless Entry And Search Of The Defendants’ Residence Cannot Be Sustained Pursuant To The “Emergency Aid” Exception.

In the case at bar, the state may claim that the initial warrantless entry and search of the interior of the Defendants’ residence and the further warrantless intrusion into the closed freezer located in the garage were justified pursuant to the “emergency aid” exception to the warrant requirement. See *Brigham City v. Stuart*, 547 U.S. 398 (2006).

In *Brigham City*, the United States Supreme Court explained that “[o]ne exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury,” (*Id*. at 403); holding that “police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury,” (*Id*. at 390), in order “to render

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emergency assistance to an injured occupant or to protect an occupant from imminent injury.” Id. at 403. Thus, the *Brigham City* Court upheld the warrantless police entry of a private dwelling in order to quell an ongoing “melee” among a group of raucous party-goers and sanctioned the admission at the participants’ subsequent trial on criminal charges of evidence discovered in plain view within the house.

However, in the recent case of *Hannon v. State of Nevada*, the Nevada Supreme Court distinguished the facts of *Brigham City*, refusing to apply the “emergency aid” exception on the facts before it, emphasized that a valid warrantless entry of a private residence under that rubric may not be based upon mere speculation, but may only be undertaken on the basis of objective evidence that an occupant is indeed in need of immediate assistance. *Hannon v. State of Nevada*, 207 P.3d 344 (2009).

In *Hannon*, during the afternoon hours, police responded to “a possible domestic disturbance” at the appellant’s residence following a 911 call from a neighbor reporting that they had overheard “yelling and screaming [and] thumping against the walls” emanating from within Hannon’s apartment. *Id*. at 345. In response to the officers’ knock, Hannon’s girlfriend “answered the door red-faced, crying, and breathing hard.” *Id*. at 345. Through the partially- opened door the officers were also able to see Hannon in the background. They observed him to “appear[ ] to be flushed and ‘angry.’” *Id*. In response to their inquiries, the girlfriend told the officers that she and Hannon had had a verbal argument; but assured them that neither she nor Hannon were injured, and that there was no one else inside the apartment but the two of them.

The officers requested to come inside the apartment “to check everybody’s welfare and make sure everybody was okay.” *Id*. at 345. However, both Hannon and his girlfriend each denied them permission to enter the residence. Nevertheless, the officers pushed the door further open and crossed the threshold. Hannon ran into the kitchen and threw a dark bag into a cupboard. Once inside the apartment, the officers conducted a protective sweep of the residence and observed marijuana and associated paraphernalia in plain view on the living room table and kitchen counter. The officers then announced their intention to seek a search warrant. Hannon offered to allow them to search the kitchen cupboard if they would forego the more extensive

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intrusion of executing a warrant. The officers then retrieved the bag from the cupboard, which was later determined to contain marijuana.

Following his arrest, Hannon filed a motion to suppress. At the evidentiary hearing, the officers admitted that they “didn’t have evidence” that another occupant may have been inside who needed emergency assistance, they “just had suspicions.” *Id*. at 345. Citing “[the girlfriend’s] distressed appearance, the nature of the 911 call, and [the] [o]fficer[‘s] experience and training in domestic violence situations,” the trial court concluded that there was “objective information” to justify the warrantless entry and denied Hannon’s motion to suppress.

Our Supreme Court reversed, distinguishing the facts of *Brigham City*, *supra,* and held that “there was no objectively reasonable basis to believe that the two occupants or any undisclosed third party may have been in danger inside" [Hannon’s apartment]. *Id*. at 345. As the Hannon Court explained:

First, unlike *Brigham City*, which involved actual violence as well as the clear threat "that the violence . . . was just beginning," Officer Friberg did not witness, let alone overhear, sounds of an altercation when he arrived. Tellingly, because there was therefore no apparent need for swift action, see *Huffman*, 461 F.3d at 785;

*U.S. v. Holloway*, 290 F.3d 1331, 1334 (11th Cir. 2002), instead of entering and announcing his presence, Officer Friberg casually knocked on Hannon's front door.

Second, unlike in *Brigham City*, in which the officers witnessed the attack and the victim spitting blood, although Robinson was crying, Hannon appeared "angry," and both were flushed and breathing heavily, neither exhibited observable signs of injury. Moreover, when asked by Officer Friberg, both responded that they were unharmed. Thus, even if there was initial reason to believe that Hannon or Robinson may have been injured, Officer Friberg's concerns should have been allayed after interviewing Hannon and Robinson at the door.

Additionally, in contrast to *Brigham City*, where other partygoers were seen inside and surrounding the house, 547 U.S. at 406, no similar indicia existed to believe that a third person was inside Hannon's apartment, a point with which Officer Friberg agreed by admitting that while he suspected that another person might have been inside, "[he] didn't have evidence"…

Given the above, we conclude that Officer Friberg lacked an objectively reasonable basis to believe that there was an immediate need to protect the occupants of Hannon's apartment, real or

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suspected. Because the initial warrantless entry into Hannon's apartment was unlawful, we conclude that the marijuana recovered during the subsequent search was illegally seized.

*Id*. at 347-48. (Emphasis added.)

Accordingly, the resolution of the instant Motion is clearly governed by Hannon and that, as in that case, the State’s invocation of the “emergency aid” exception must be rejected. For, as in *Hannon*, there is no objective evidence that any occupant of the Defendants’ Placid Street home was in immediate need of emergency assistance.

It is undisputed that, at the time of the initial warrantless entry into the Defendants’ home, their minor daughter Nicole was elsewhere, safely in the authorized temporary custody of a specifically-designated family friend. Secondly, police were possessed of no objective evidence -- as required by Hannon – which anyone was even inside the residence at the time of their initial warrantless entry. Indeed, the house was quiet and police observed no indicia of occupancy whatsoever.

Likewise, there was, in fact, objective evidence that neither of the Defendants was within the residence. Before making their initial warrantless entry into the defendants’ home, the police were aware that Michael and Tammy had made plans to have dinner with Bernice that evening. Exhibit “A” at 2. Before the warrantless intrusion, officers were also well aware that the couples’ silver Toyota Camry -- which had been parked in the driveway as of 1:30 P.M. that afternoon – was gone. Id. page 2, paragraph 4. Thus, as Detective B expressly admits in his second search warrant application for that residence: “Officers at the scene . . . thought the[ ] [Defendants] were currently driving their Toyota Camry.” Exhibit “B” page 3, paragraph 4. (Emphasis added.)

Moreover, even assuming that either or both of the defendants were inside the house at the time, there was absolutely no evidence whatsoever that any potential occupant of the residence was contemporaneously in need of immediate emergency assistance for any reason. Thus, in the instant case, as in *Letcher v. Town of Merrillville*, 2008 WL 2074144, 7 (N.D. Ind. 2008),“the officers’ argument that an individual’s safety may have been at risk is entirely speculative.” Furthermore, “[i]t’s true that nothing absolutely prevented th[i]s[ ] possibilit[y],

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but [it] w[as] no more than [a] hypothetical possibilit[y], not an apparent urgency that justified making what would have been an unreasonable search . . . under other circumstances.” *United States v. Risner*, 2008 WL 3263406, 2 (N.D. Ind. 2008); *Gibson v. State of Alaska*, 205 P.3d 352, 356 (Alaska App. 2009) (“In order to enter a home based upon the emergency aid exception . . . the State must show true necessity – that is, an imminent and substantial threat to life, health, or property At the time the police entered the trailer, there was no sign that there was anyone

inside”); *Rivera v. Leto*, 2008 WL 5762103, 4 (S.D.N.Y. 2008) (“A warrantless entry is not objectively reasonable where it is based on mere surmise, [as opposed to] . . . objective facts reasonably suggesting that an actual emergency involving human safety then existed Even

in the context of a child’s safety, the mere possibility of danger does not make it objectively reasonable to believe that the circumstances were exigent”).

Even assuming arguendo that there was cause for concern about the Defendants’ contemporaneous well-being at some location -- as the United States Court of Appeals for the Ninth Circuit specifically held in *Martin v. City of Oceanside*, 360 F.3d 1078, 1081-82 (9th Cir. 2004), cert. denied, 543 U.S. 817 (2004): “There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.” (Emphasis added.)

However, as the court observed in *People v. Seminoff*, 159 Cal. App. 4th 518, 529 (Cal. App. 4 Dist., 2008): “To be sure, an unanswered knock on the door is not enough to justify a warrantless police entrance, even if the officer has a general suspicion there is someone inside that might need help.” (Emphasis added.) Indeed, in this case, as in *United States v. Bridges*, 2008 WL 2433801 (N.D. W. Va. 2008), there is a wholesale absence of the type of location- specific evidence that would objectively justify a reasonable belief that the Defendants were in contemporaneous danger within their home. Thus, as the Bridges court explained, with direct application to the circumstances of the case at bar:

For the Fourth Amendment to mean anything, it must mean that the government may not enter a private home, absent consent, unless it has a warrant or exigent circumstances exist. Had someone been crying, or had the officers truly heard yelling, one might argue the presence of an exigent circumstance. Had Bridges

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or his son been injured, perhaps one could claim an exigent circumstance. Had the officers observed broken furniture, glass or blood on the floor in the living room, had there been a fire, or had the officers seen a weapon or drugs before they pushed the door open, the government could argue the presence of exigent circumstances. None of these circumstances existed when [the police] entered and searched Bridges residence, however. There was simply no evidence of domestic violence or some other exigent circumstance that justified their entry.

*Bridges*, at 9- 10. Moreover, as the *Bridges* court went on to further specifically hold – with precise application to the instant case – “[b]ecause the initial [warrantless] search of the defendant’s residence where marijuana was first discovered was unconstitutional, the subsequent search pursuant to a warrant must be suppressed as the fruit of the poisonous tree.” Id. at 10 (citing Missouri v. Seibert, 542 U.S. 600 (2004).

Here, as in *Modrell v. Hayden*, 636 F.Supp. 2d 545, 551 (W.D. Ky. 2009), the police “had no reason to believe that anyone in . . . [the] residence was in danger;” and therefore, “did not have an objectively reasonable basis for believing that entering . . . [the] residence without a warrant was necessary to protect or preserve life or avoid serious injury. . . .” Accordingly, here, as in that case, “[t]here is no evidence that indicates that there would have been real immediate and serious consequences if [the police] had postponed entering . . . [the] residence and waited outside for [a] warrant.” *Id*. at 553. A fortiori in the case at bar, where – without making any interim effort whatsoever to seek judicial authorization by warrant -- officers had already waited outside Defendants’ residence for SEVERAL HOURS!

# The Actions Of The Police Belie Any Actual Apprehension On Their Part That Any Occupant Of The Defendants’ Residence Was In Immediate Need Of Emergency Aid.

In *Hannon*, the Nevada Supreme Court observed that “[t]ellingly, because there was therefore no apparent need for swift action, instead of entering and announcing [their] presence (as occurred in *Brigham City*), [o]fficer[s] . . . casually knocked on Hannon’s front door.” *Hannon*, 207 P.3d at 347. (Emphasis added.) A fortiori in the case at bar where the police waited around outside the Defendants’ home for hours; interviewing the neighbors; contacting medical facilities and other state agencies; and even waiting until an aerial “fly-over” of the area in search of the Defendants’ silver Toyota Camry was conducted – which they actually believed

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the Defendants were then out driving around in – before undertaking their initial entry into the Defendants’ home.12

# A Warrantless Police Intrusion Into A Private Residence May Not Be Predicated Upon A Purported Exigency That Is Itself Attributable To State Action.

Finally, Defendants respectfully submit that the state may not predicate a hypothesis of exigency upon circumstances generated by the police themselves; particularly where, as Defendants respectfully submit in this case, those circumstances (i.e. the unlawful stop and search of the Defendants’ vehicle; the unlawful arrest of the Defendants; and the incommunicado imprisonment of the Defendants by officers of the HPD) were deliberately generated in violation of the Defendants’ constitutional rights. *People v. Seminoff*, *supra*, 159 Cal App. 4th 518, 71 Cal. Rptr. 3d 582, par. 51 (Cal. App. Dist. 4 01/29/2008) (Police are not allowed to create their own emergency to justify a warrantless entry).

Owing to the clear potential for bad faith police abuse in such circumstances, the prohibition against judicial recognition of exigent circumstances that have been self-generated by the police must be scrupulously imposed in the case at bar. For, as the court instructed in *Burton*

*v. State of Oklahoma*, 204 P.3d 772, 776 (Okla. Crim. App. 2009): “To justify a warrantless entry to conduct a protective sweep, ‘[t]he suspicion of danger must be clear and reasonable in light of all surrounding circumstances [because] [o]fficers of the law are not given free reign to conduct sweep searches on the PRETENSE that a dangerous situation might be imminent.” (Quoting *United States v. Tabor*, 722 F.2d 596, 598 (10th Cir. 1983). Yet, absent the prohibition against judicial recognition of police-generated exigencies, just such a “pretense” of exigency can be deliberately manufactured by unscrupulous law enforcement officers who are willing to work together to create the very circumstances that the state now purports to rely upon on to justify the warrantless searches and seizures that have been conducted in the case at bar, by

12 This is not to suggest by any means that in this case the police cynically availed themselves of the “emergency aid” exception in order to conduct a warrantless invasion of the Defendants’ home in bad faith. But the fact remains that, as the court pointed out in *United States v. Bridges***,** 2008 WL 2433881, 9 (N.D. W. Va. 2008), “good intentions by police officers alone are insufficient to render a search constitutional.”

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simply coordinating the warrantless arrest and subsequent incommunicado detention of the target of an investigation on “trumped up” charges by officers of one law enforcement agency, while officers of another agency conduct a warrantless search of his residence and the independent repositories contained therein on the hypothesis that he is a “missing person” who might possibly be in danger therein.

# The State’s Purported Reliance Upon The “Emergency Aid” Exception Is Based Upon Speculation, Conjecture And Surmise Rather Than Objective, Location-Specific Evidence.

As a threshold matter, because a person has a greater expectation of privacy in his home than elsewhere, courts must closely scrutinize any warrantless entry into or search of a residence. Thus, as our Nevada Supreme Court pointed out in Hannon: “Warrantless home entries [are] the chief evil against which the Fourth Amendment protects”). *Hannon at 346; Payton v. New York*,

445. The state purports to justify the warrantless invasion of the Defendants’ Placid Street residence in the case at bar as follows:

“[I]n the instant case, the police were unable to make contact with the Defendants. Friends of the couple became concerned after they failed to pick their young child up from school and had not been heard from. They also did not keep nor cancel dinner plans they hed made and confirmed earlier in the day. This was so out of couple for the couple, that friends alerted the police, who, also concerned, exhausted all other means, to include contacting other law enforcement agencies and medical facilities, in an attempt to locate the Defendants, prior to making entry into their residence. By the time officers entered the residence, the Defendants had been missing for some six hours.

. . . [N]either Michael nor Tamara answered the door and advised officers that they were fine.” State’s Response and Opposition page 6, line 22 – page 7, line 4.

However, there is no “missing persons” exception to the warrant requirement; and that the “emergency aid” exception is not applied on the basis of a “process of elimination.” Rather, the applicable case law amply demonstrates that the “emergency aid” exception at issue here requires objective, location-specific evidence that persons in dire jeopardy and in need of immediate assistance are currently on the premises to be searched. Therefore, under the parameters of that very specifically-delineated exception to the warrant requirement, the fact that they were unable to locate the Defendants elsewhere did not provide police with justification to

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undertake an unauthorized invasion of the privacy of their home.

Indeed, in this case, the police found that the Defendants’ house was dark and quiet and observed no indicia of occupancy whatsoever. See e.g., *Gibson v. State of Alaska*, 205 P.3d 352, 356 (Alaska App. 2009) (“At the time the police entered . . . , there was no sign that there was anyone inside”). Moreover, before making their initial warrantless entry into the defendants’ home, the police were well aware that Defendants had made plans to be out that evening and that the couples’ silver Toyota Camry, which had been parked in the driveway of their home as of 1:30 P.M. that afternoon, was no longer in the driveway. *Id*. at 2. As Detective B expressly admits, “Officers at the scene . . . thought the[ ] [Defendants] were currently driving their Toyota Camry.” Exhibit “B” at 3. It is questionable whether the Officers had cause to believe that either of the Defendants were even in the house. Thus, the warrantless entry into the Defendants' home violated the Fourth Amendment.

It is particularly telling that the state expressly reveals its misapprehension of the applicable legal standard of the “emergency aid exception” by stating that LVMPD officers conducted their warrantless entry and search of the Defendants’ residence “to make sure the Defendants’’s [sic] were NOT inside the home and in need of assistance.” State’s Response and Opposition page 12, lines 13-14.

Furthermore, the cases relied upon by the State in support of the proposition that warrantless entry into a home as part of a welfare check is valid if no one answers the door and there are other facts that explain why someone would not be able to answer the door, are readily distinguishable from the case at bar on their facts. In *United States v. Black*, 482 F.3d 1035 (9th Cir. 2007), police responded to the defendant’s apartment after his live-in girlfriend called 911; reported that she had fled the premises after her armed boyfriend had beat her up that morning; and advised that she was going to return to the residence to retrieve her belongings. When no one answered the door upon their arrival, officers made entry believing that the girlfriend could have been badly injured inside the apartment. Here, in contradistinction, there was no such associated report of violence or other potentially injurious occurrence whatsoever at the Defendants’ home.

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Likewise, in *Murdock v. Stout*, 54 F.3d 1437 (9th Cir. 1995), an eyewitness reported to police that he observed someone running from a house; and, when police arrived at the location in response, the rear sliding door was open; and, although the interior lights and television were on, no one responded to their shouts. However, in the case at bar, there was no such on-site evidence of occupancy and foul play. Here, as in *Modrell v. Hayden*, 636 F.Supp. 2d 545, 553 (W.D. Ky. 2009), the police “had no reason to believe that anyone in . . . [the] residence was in danger;” and therefore, “did not have an objectively reasonable basis for believing that entering .

. . [the] residence without a warrant was necessary to protect or preserve life or avoid serious injury. . . .” A *fortiori* in this case, where – without making any interim effort whatsoever to seek judicial authorization by warrant -- officers had already waited outside Defendants’ residence for several hours! Here, as in *State v. Harnisch*, 113 Nev. 214, 222 (Nev. 1997), “there was no compelling need for official action, i.e., “exigent circumstances,” which would have authorized a warrantless search because there was no emergency and [Defendants] W[ERE] . . . IN POLICE CUSTODY AT THE TIME THE SEARCH WAS CONDUCTED.”

# A Prolonged Lapse Of Time Does Not Enhance – But Rather, Diminishes -- Applicability Of The “Emergency Aid” Exception.

In *Hannon*, the Nevada Supreme Court observed that “[t]ellingly, because there was therefore no apparent need for swift action, instead of entering and announcing [their] presence (as occurred in *Brigham City*), [o]fficer[s] . . . casually knocked on Hannon’s front door.” *Hannon*, at 347. This observation obtains a fortiori in the case at bar, where it is undisputed that the police waited for several hours before undertaking their initial warrantless entry into the Defendants’ home; during which interval they made no effort whatsoever to seek a judicial warrant. See State’s Response and Opposition page 7, lines 1-2 (“By the time officers entered the residence, the Defendants had been missing for some six hours”).

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# The State Entirely Fails To Address Defendants’ Argument That The “Emergency Aid” Exception Is Precluded In This Case By The Prohibition Against Judicial Recognition Of Police-Generated “Exigencies.”

As the court instructed in *Burton v. State of Oklahoma*, 204 P.3d 772, 776 (Okla. Crim. App. 2009): “To justify a warrantless entry to conduct a protective sweep, ‘[t]he suspicion of danger must be clear and reasonable in light of all surrounding circumstances [because] [o]fficers of the law are not given free reign to conduct sweep searches on the pretense that a dangerous situation might be imminent.” (Quoting *United States v. Tabor*, 722 F.2d 596, 598 (10th Cir. 1983). The Defendants reassert that “Exigent circumstances will not justify a warrantless search if they are the likely consequences of the Government’s own actions or inactions.” (Emphasis added.) See *People v. Seminoff*, *supra*, 159 Cal App. 4th 518, (Cal. App. 4 Dist. 2008) (“the police are not allowed to [create] their own emergency to justify a warrantless entry”); *United States v. Howard*, 106 F.3d 70, 78 (5th Cir. 1997); *United States v. Aquino*, 836 F.2d 1268, 1272 (10th Cir. 1988); *United States v. Webster*, 750 F.2d 307, 327 (5th Cir. 1984),

cert. denied, 471 U.S. 1106 (1985); *United States v. Roselli*, 506 F.2d 627, 629-31 (7th Cir.

1974); *United States v. Curran*, 498 F.2d 30, 34 (9th Cir. 1974); *People v. Foskey*, 529 N.E. 2d

1158, 1161 ((Ill. App. Ct. 1988), aff’d, 554 N.E.2d 192 (Ill. 1990); *State v. Hutchins*, 561 A.2d

1142, 1148-49 (N.J. 1989).

However, the State makes no endeavor whatsoever to respond to the argument, set forth in the Defendants’ Motion to Suppress and for Return of Property, that – whereas the silent absence of Michael and Tammy upon which the initial warrantless entry and search of their home was predicated was in fact attributable exclusively to the fact that they were in the unlawful, contemporaneous, incommunicado custody of other law enforcement officers of the State of Nevada – just such a police-generated “exigency” obtains in this case; precluding the state’s invocation of the “emergency aid exception” to the warrant requirement to justify the initial warrantless invasion of the Defendants’ home. See Exhibits “G” and “H.”

The potential implications of the State’s failure to offer any corresponding response to this argument is particularly troubling. For, although the State expressly concedes that, in truth

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and in fact, “the Defendants were in the custody of the HPD” at the time, (State’s Response and Opposition page 4, lines 16-17), the state also represents that, before undertaking their initial warrantless entry and search of the Defendants’ residence, “[i]n an attempt to locate the Defendants [sic] . . . officers requested that police dispatch check with various law enforcement agencies, to include the Henderson Police Department (HPD) . . . in an attempt to get information as to the couples [sic] whereabouts . . . . [and] [a]ll inquiries met with negative results.” State’s Response and Opposition page 3, lines 12-17. Further, as the state expressly concedes, LVMPD officers would not have undertaken the unlawful, warrantless entry and search of the Defendants' home had they been aware of that fact, and had it not been for the fact that HPD officers falsely represented to their fellow law enforcement officers – in response to an affirmative, pre-entry inquiry – that HPD had not had contact with the Defendants that day and had no knowledge of their whereabouts. Nor would the unlawful, warrantless entry and search of the Defendants' home have been undertaken by LVMPD had it not been for the fact that HPD officers refused the Defendants' requests to telephone the F.M. School, or to call Bernice, or Michelle to have them pick their daughter up after school. They were held in custody incommunicado from the time of their arrest at approximately 3:00 P.M. on the afternoon of march 4, until late that night.

# THE INITIAL WARRANTLESS ENTRY AND SEARCH OF THE DEFENDANTS’ RESIDENCE CANNOT BE SUSTAINED ON THE BASIS OF THE PURPORTED THIRD-PARTY “CONSENT” OF THEIR EIGHT-YEAR-OLD DAUGHTER.

* 1. **The Defendants’ Minor Child Had Neither Actual nor Apparent Authority to Consent to an Official Warrantless Intrusion Upon the Privacy of her Family’s Residence.**

As the Nevada Supreme Court explained: “a warrantless search is valid if the police acquire consent from a cohabitant who possesses common authority over the property to be searched.” *Casteel v. State*, 122 Nev. 356 (Nev. 2006) (Citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)). And, although it appears that our Supreme Court has never had occasion to rule on the specific issue of whether or not a child as young as the Defendants’ daughter Nicole can legally grant consent to an invasion of her parents’ privacy interests in the family home, the California Supreme Court – reflecting the clear consensus of state and federal jurisprudence –

* 1. of 56

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has.13 Thus, as that court explained under circumstances precisely analogous to those of the instant case in People of the State of *California v. Jacobs*, 43 Cal. 3d 472, 481-82 (Cal. 1987):

The Attorney General contends the evidence shows that the officers reasonably believed a child just under 12 years of age . . . had reached an age of sufficient discretion to consent to a cursory police search of the family home for the purpose of determining if her parent was there.

We disagree [The evidence does not] support a finding that the

eleven-year-old child had actual authority to permit adult strangers to enter and search the home. Minor children . . . do not have coequal dominion over the family home… The common sense of the matter is that the parent has not surrendered his privacy of

place . . . to the discretion of the child; rather, the latter [has]

privacy of place . . . in the discretion of the former. Other courts that have considered the authority, or capacity, of a minor child to consent to a police entry of the family home generally have refused to uphold the admissibility of evidence found therein in a criminal action against the parent. The reasoning of these cases is sound: a child cannot waive the privacy rights of her parents [T]he

evidence . . . viewed most favorably to the prosecution, does not support a finding that Gretchen had the actual or apparent authority to permit even a superficial survey of the rooms of the house.

Jacobs is, of course, distinguishable from the facts and circumstances of the case at bar only by the fact that the Defendants’ daughter Nicole is even younger than was the minor daughter of the defendant in Jacobs. See *United States v. Guiterrez-Hermosillo*, 142 F.3d 1225 (10th Cir. 1998) involved a child of fourteen, and *United States v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990) involved “children twelve and fourteen years of age [who] routinely were left in exclusive control of the house"). Accordingly, the sound reasoning and policy articulated in Jacobs obtains in the instant case. Here, Nicole is only eight. The evidence as the State concedes shows that her parents “would never leave Nicole alone.” The Defendants were also known to be "over protective.” See Exhibit "A" at 3.

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13 The Nevada Supreme Court has often noted the historical consistency “in the jurisprudence of this state and its sister state, California.” *Craigo v. Circus-Circus Enterprises*, 106 Nev. 1, 29(Nev. 1990).

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# The Adult Friend Of The Defendants’ Family, Michelle Beck, Does Not Even Arguably Possess Either Actual Or Apparent Authority To Consent To A Warrantless Search Of The Defendants’ Home.

Even assuming that the Defendants’ eight-year-old child was legally capable of legally permitting the police to conduct a warrantless invasion of her parents’ privacy interests in the family home, the fact of the matter is that the evidence shows that the Defendants’ daughter actually provided the lock code to the side door to their garage – not to the police – but to Michelle, a close adult friend of the Defendants’ family. It was Michelle – outside of Nicole's presence – who turned the code over to the officers. Affidavit of Michelle (attached as Exhibit “V”). Because Michelle was not a “cohabitant” of the Defendants’ residence, and possessed no authority over the premises whatsoever, she clearly did not have either actual or apparent authority to thereby grant police consent to conduct a warrantless entry and search of the Defendant’s home. *Casteel v. State*, *supra*, 122 Nev. 356, 360 (Nev. 2006) (“A warrantless search is valid if the police obtain consent from a cohabitant who possesses common authority over the property to be searched”). See also, *Illinois v. Rodriguez*, *supra*, 497 U.S. 177, 181 (1990).

# EVEN ASSUMING THAT THE INITIAL WARRANTLESS ENTRY INTO THE DEFENDANTS’ RESIDENCE WAS PERMISSIBLE PURSUANT TO THE “EMERGENCY AID” DOCTRINE, THE FOLLOWING, WARRANTLESS INSPECTION OF THE CLOSED FREEZER INSIDE THE ATTACHED GARAGE WAS A FURTHER INTRUSION IN EXCESS OF THE PERMISSIBLE SCOPE OF THAT EXCEPTION TO THE WARRANT REQUIREMENT.

* 1. **The Inspection Of The Contents Of The Freezer Was Beyond The Scope Of A Reasonable, Cursory “Protective Sweep” Of The Residence.**

The immediate inspection of the contents of the freezer in their garage was inconsistent with the reasonable conduct of a protective sweep of the interior of the house in search of occupants in need of help. It was, thus, a further intrusion upon the Defendants' Fourth Amendment rights beyond the scope of the “emergency aid” exception to the warrant requirement.

The United States Supreme Court has made it abundantly clear that in the duration and scope of a warrantless search based upon any hypothesis of exigent circumstances must be “strictly circumscribed by the exigencies which justify its initiation.” *Terry v. Ohio*, 392 U.S. 1,

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26 (1968), See also *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). Accordingly, “if [an] entry is justified by the emergency aid doctrine, a search [is] also justified, but only to the extent reasonably necessary to render emergency assistance*.” State of Ohio v. White, 175 Ohio App. 3d 302, 313 (Ohio App. 9 Dist. 2008). Tierney* v. Davidson, 133 F.3d 189, 197-98 (2d Cir. 1998) (“The officer’s post-entry conduct must be carefully limited to achieving the objective which justified the entry – the officer may do no more than is reasonably necessary to ascertain whether someone is in need of assistance and to provide that assistance”) (emphasis added); *Rivera v. Leto*, *supra*, No. 04 Civ. 7072, par. 39 (S.D.N.Y. 11/25/2008) (same).

Here, the police do not claim to have been pursuing any such objective in undertaking the further warrantless inspection of the contents of the closed freezer inside the Defendants' garage, by virtue of which greater threshold of intrusion they allegedly achieved their initial discovery of marijuana inside the Defendants' home. Rather, they assert that they purportedly conducted that further “container search” because the freezer was a large enough repository for someone to “hide” in. Exhibit “A” page 3, paragraph 2. (Emphasis added.)

However, such an intrusion was in violation of constitutional safeguard because such a search is only appropriate where police have a reasonable belief based on articulable facts that the residence contains persons posing a threat to the officers or others. (Quoting *Maryland v. Buie*, 494 U.S. 325, 336 (1990) (“Th[is] type of search . . . is decidedly not automati[c], but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the . . . scene”). Even assuming arguendo that the police were possessed of ample objective evidence that the Defendants were in danger within their home – a proposition that Defendants categorically reject, “[t]he officers had no indication [whatsoever] . . . that anyone else was in the house.”

Accordingly, the alleged discovery of marijuana pursuant to the further warrantless inspection of the contents of the garage freezer was undeniably unlawful.

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# The Inspection Of The Contents Of The Freezer Was A Criminal- Investigative Search.

The fact that the inspection of the contents of the freezer was immediately preceded by the officers’ alleged conspicuous detection of the odor of marijuana shows that that further intrusion was, in truth and in fact, a criminal-investigative search conducted outside the ambit of the “emergency aid” exception. Thus, as the Supreme Judicial Court of Massachusetts instructed in *Commonwealth v. Peters*, 905 N.E.2d 1111, 1117 (Mass. 2009), in the performance of a “protective sweep” pursuant to the “emergency aid” exception, “[e]vidence in plain view may be seized, but the sweep may not be expanded into a general search for evidence of criminal activity.” Accordingly, the conduct of the warrantless “container search” of the garage freezer in the case at bar was in fact undertaken in pursuit of the source of the odor of marijuana allegedly detected immediately prior thereto; and therefore, was a further threshold of tangential, criminal- investigative intrusion that cannot be sustained under the “emergency aid” exception.

# The State’s Purported Rationale For The Freezer Search Is Unreasonable In View Of The Totality Of The Circumstances; And Therefore, The Scope Of The Warrantless Intrusion Cannot Be Justified Under The “Emergency Aid Exception”.

As the United States Supreme Court made abundantly, the duration and scope of a warrantless search based upon any hypothesis of exigent circumstances must be “strictly circumscribed by the exigencies which justify its initiation.” *Terry* at 26. See also *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). As the courts in the cases presented have specifically considered the matter, the limited scope of warrantless residential intrusion permitted pursuant to the “emergency aid exception” precludes the admissibility of contraband discovered pursuant to inspections of the contents of independent repositories of personal effects. *Alford v. Pousak*, 2009 WL 1299568, 11 (E.D. Mich. 2009) (“the search of the Alford residence exceeded the scope of a reasonable investigation. While a brief search of the premises might be justified . . . , the scope of the search . . . , including a search of . . . closets . . . appears to exceed the scope of what is justified by the exigent circumstances”).

Here, the police had originally asserted that they nevertheless conducted a warrantless “container search” of the Defendants’ freezer immediately upon gaining initial entry into the

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garage in which it was located -- by virtue of which greater threshold of intrusion they achieved their first alleged discovery of marijuana on the premises -- because the freezer was a large enough for someone to “hide” in. See Exhibit "A". Nevertheless, such a search is only appropriate ‘where police have a reasonable belief based on articulable facts that the residence contains persons posing a threat to the officers or others.

The state now contends that the police undertook the further intrusion of the instant freezer search because that container could have contained a “body.” State’s Response and Opposition page 3, line 25; page 9, line 21. To the extent that the use of that term references a human cadaver, the “emergency aid exception” is patently inapposite. To the extent that the term “body” purports to reference a live human being after six hours of containment in a deep freezer, in view of applicable medical principles, the state’s new rationale defies credibility to say the least, and is so inconsistent with the reasonable and logical hierarchy of priorities in the conduct a true “emergency aid” search as to be objectively unreasonable.

The fact that, according to the police themselves, the immediate warrantless inspection of the contents of the freezer was conspicuously preceded by their alleged detection of the odor of marijuana inside the Defendants’ garage shows that the far more reasonable inference under the totality of the circumstances is that that further intrusion was, in truth and in fact, an unlawful, tangential, warrantless, criminal-investigative container search for contraband conducted outside the ambit of the “emergency aid” exception.

# ALL EVIDENCE TAKEN UNDER THE SEARCH WARRANTS SUBSEQUENTLY ISSUED, AND ANY EVIDENCE DERIVED AS A RESULT OF THE ENSUING INVESTIGATIVE EXPLOITATION IS TAINTED BY THE INITIAL UNLAWFUL WARRANTLESS ENTRY AND SEARCH OF THE DEFENDANTS' RESIDENCE AND THE FURTHER UNLAWFUL WARRANTLESS INSPECTION OF THE CLOSED FREEZER; AND THEREFORE, MUST BE SUPPRESSED.

By facile application of the “fruit of the poisonous tree” doctrine, a direct and un- attenuated trail of Fourth Amendment “taint” leads directly from the unlawful warrantless entry of their home and the further unlawful warrantless inspection of the contents of their garage freezer to the subsequent search warrants issued by this Court and District Judge M. – pursuant to applications and supporting affidavits in each instance which are textually predicated upon the

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alleged initial discovery of marijuana in that very freezer. The execution of these warrants resulted not only in the alleged discovery of each and every item of alleged contraband and other evidence and testimony that the state intends to introduce against the Defendants at trial, but also in the wholesale seizure of their monetary assets.

# THE “INEVITABLE DISCOVERY” EXCEPTION TO THE EXCLUSIONARY RULE IS INAPPLICABLE IN THIS CASE.

The Nevada Supreme Court has instructed that “for plain view observations to be admissible [or to contribute to a showing of probable cause in support of the issuance of a search warrant], the plain view doctrine requires, among other things, that the officer be lawfully present at the point of observation.” *Hayes v. State*, 106 Nev. 543, 549 (Nev. 08/21/1990*). See also, Shum v. State*, 97 Nev. 15, 17-18 (Nev. 1981) (“under the facts of this case, we can find no justification for the deputy’s entrance into Shum’s vehicle. . . .Without such justification, the deputy had no right to enter the car, and his discovery of the controlled substances cannot be justified under the “plain view” exception to the Fourth Amendment warrant requirement”). *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) Further, as the Ninth Circuit plainly put it in: “to qualify as an instance of plain view, the officer must be rightfully present at the place and time that he sees the goods.” *United States v. Curran*, 498 F.2d 30, 33 (9th Cir. 1974).

Moreover, the same prerequisite applies to the derivative concept of “plain smell” which the state also attempts to invoke in the case at bar:

The government touches upon the theory sometimes advanced that the courts should acknowledge a “plain smell” concept analogous to that of plain sight. The smell of marijuana has been held to be a fact establishing probable cause. However, before the officer could rely upon his smelling marijuana as probable cause, he would have to justify his presence at the place . . . where he detected the odor, just as he would have to justify his presence at the place from which he saw the contraband in order to rely on the doctrine of plain view. In either case, in addition, he would have to justify entering the house without obtaining a warrant. (Citations omitted.) *Id*. at 34.

Thus, because the warrantless entry of the police into their garage was itself unlawful ab initio – as set forth supra -- the concepts of “plain view” and “plain smell” are both unavailing to the prosecution in the case at bar. It is undisputed that the police did not achieve a physical

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position from which to either observe the freezers contained in the garage; determine that two of them were locked;14 and smell the alleged odor of marijuana in proximity until they undertook that predicate constitutional illegality. Accordingly, this aspect of the State’s hypothesis of inevitable discovery is precluded by predicate constitutional illegality and is consequently untenable.

Similarly, the Henderson Police Department would not have lawfully acquired the evidence at issue. As one jurisdiction notes:

Jurisdictions which recognize the doctrine caution that courts may not, under the guise of inevitable discovery, admit tainted evidence after launching a speculative inquiry into what might or could have occurred . . . . The significance of the word “would” cannot be overemphasized. It is not enough to show that evidence “might” or “could” have been otherwise obtained. Once the illegal act is shown to have been in fact the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it would have acquired the evidence IN ANY EVENT.

*Williams v. State of Maryland*, 372 Md. 386, 423 (Md. 2002).

Thus, where, as here, the prosecution asserts that illegally acquired evidence would inevitably have been lawfully obtained pursuant to a search warrant issued on the basis of an independent source of untainted probable cause, a court may apply the inevitable discovery rule, but ONLY “when it has a high level of confidence that the warrant in fact would have been issued and that the specific evidence in question would have been obtained by lawful means.” *United States v. Cunningham*, 413 F.3d 1199, 1203 (10th Cir. 2005). In this case, the state hardly demonstrates the necessary “INEVITABILITY” required under that standard. Likewise, the Ninth Circuit, has specifically rejected any application of the state’s hypothesis of inevitable discovery in this case; holding that the inevitable discovery doctrine does not “merely because . .

. officers had probable cause and could have inevitably obtained a warrant.” *United States v. Reilly*, 224 F.3d 986, 995 (9th Cir. 2000).

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14 In view of the high price of groceries nowadays, Defendants also question the probative value of the fact that two of their freezers were locked.

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Further, to the extent that the State’s hypothesis of inevitable discovery is predicated upon the allegation that, at the time of their arrest on the afternoon of March 4, 2009 police officers, the Defendants “were in possession of a large amount of marijuana,” (State’s Response and Opposition page 12, lines 19-20), and the assertion that the discovery would have inexorably resulted in the issuance of a warrant pursuant to the application of HPD authorizing a search of the Defendants’ Las Vegas home, the prosecution implicitly presupposes that the warrantless vehicle stop, protracted post-stop detention, and eventual warrantless search of the trunk of their automobile -- by which that marijuana was allegedly discovered -- were lawful. And the state asks this Court to do the same.

However, as the state expressly acknowledges: “The Supreme Court of the United States has found that ‘searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.’” State’s Response and Opposition page 5, lines 13-16. (Quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) and citing *State v. Taylor*, 114 Nev. 1071, 1078-79 (1998).) It is certainly beyond dispute that the burden of justifying any such warrantless search or seizure pursuant to one of those exceptions rests upon the State. Notably “warrantless searches [and seizures] are presumptively unreasonable under the Fourth Amendment [and Article 1, Section 18 of the Constitution of the State of Nevada].” *State v. Ruscetta*, 123 Nev. 299 (2007) (en banc). See also *Johnson v. State*, 118 Nev. 787, 794 (2002) (en banc) (“Unreasonable searches and seizures are forbidden under the United States and Nevada Constitutions. And warrantless searches and seizures are presumptively unreasonable.”)

The State expressly acknowledges that arrests and seizures must both be based on probable cause; however, beyond serious debate that the retrieval of a piece of luggage by a non- resident from a multi-occupant dwelling in which police “believe”15 that someone selling drugs

15 In this case, precisely as in *Mc Morran v. State*, 118 Nev. 379, 386 (Nev. 2002), “[t]he only grounds for the officers to suspect criminal activity came from [an] **anonymous telephone tip** that drugs were being sold from the [location under surveillance].” And here, just as in that case, “[**t]he record is bereft of any evidence showing that the tip included information establishing its reliability There is no indication that [the anonymous caller] explained how he had**

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resides does not establish probable cause to conduct a subsequent warrantless search of the vehicle in which that luggage is thereupon placed pursuant to the “automobile exception” to the Fourth Amendment warrant requirement in order to seize that luggage and search its contents. State v. *Harnisch*, 113 Nev. 214, 222-23 (Nev. 1997) (“the ‘automobile exception’ to the warrant requirement does not apply in this case. For the automobile exception to apply . . . there must be probable cause to believe that criminal evidence was located in the vehicle”). Inasmuch as the State does not claim that either of the Defendants consented to a search of their car, or assert that any other recognized exception applies under the circumstances, this aspect of the State’s hypothesis of inevitable discovery is likewise precluded by predicate constitutional illegality and is also therefore untenable.

Even assuming that the warrantless search of the vehicle was lawful, and that Marijuana allegedly discovered would have provided independent probable cause for the issuance of a search warrant for their home, and notwithstanding ample opportunity to obtain a search warrant, the warrantless entry and search of those premises later that night was improper. As the United States Court of Appeals for the Ninth Circuit admonished in *United States v. Reilly*, 224 F.3d 986, 995 (9th Cir. 2000:

To excuse the failure to obtain a warrant merely because . . . officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement of the fourth amendment.

This contention has been echoed with approval in *United States v. Boatwright*, 822 F.2d 862 (9th Cir. 1987), and *United States v. Mejia*, 69 F.3d 309 (9th Cir. 1995). As this court explained in *Mejia*, it “has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant. 69 F.3d at 320. Hence, the district court committed clear error in applying the inevitable discovery doctrine based on the agents’ actual but unexercised opportunity to secure a search warrant.

Other federal courts of appeal require the police to have at least affirmatively initiated the formal warrant process in order for the inevitable discovery doctrine to apply to a warrantless

(continued)

**come by his information**.” *Id.* Thus, as the Nevada Supreme Court held in that case – with direct applicability to the case at bar: “***We conclude that this anonymous tip did not provide reasonable suspicion to detain [the defendants], let alone probable cause to seize them . . . or to [conduct] a search***. . . .” *Id.*

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search. See e.g., *United States v. Virden*, 488 F.3d 1317 (11th Cir. 2007); *United States v. Cunningham*, 413 F.3d 1199 (10th Cir. 2005); *United States v. Cabassa*, 62 F.3d 470 (2d Cir. 1995). *Shum v. State*, 97 Nev. 15, (Nev. 1981) (No arrangements had been made to tow the vehicle Thus, the evidence would not have inevitably been discovered in plain view during

a subsequent lawful inventory search).

Finally, this Court should, in any event, reject the state’s attempt to excuse the unlawful, warrantless residential invasion by virtue of which the evidence hereby challenged was actually acquired on the basis of speculation that the Henderson Police Department might have obtained it lawfully had the illegal intrusion of the Las Vegas officers not occurred, when it was the HPD itself which proximately caused the illegal seizure of that evidence by LVMPD. The record is abundantly clear that had HPD not held the Defendants incommunicado at the Henderson Detention Center following their arrest on the afternoon of March 4, 2009 until late that night, and had HPD not falsely denied knowledge of their post-arrest whereabouts in response to the specific intervening inquiry of Las Vegas Metropolitan Police Department officers prior to their warrantless entry and search of the Defendants’ home, that illegal police intrusion would never have occurred in the first place.

# CONCLUSION

WHEREFORE, for all the foregoing reasons, Defendants Michael and Tamara respectfully pray that this Honorable court grant the Omnibus Motion To Suppress Evidence And For Return Of Property and for such further and other relief as the Court deems mete and just in the premises.

Dated this day of , .

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# CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the day of , , she served a copy of the OMNIBUS MOTION TO SUPPRESS EVIDENCE AND FOR RETURN OF PROPERTY, by facsimile and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Chief Deputy District Attorney Regional Justice Center

200 Lewis Avenue

Las Vegas, Nevada 89155 Facsimile No.:

56 of 56