Case No. 13-862

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF ESMERALDA

THE STATE OF NEVADA,

Plaintiff,

vs.

[redacted],

Defendant.

_____/

OPPOSITION TO STATE'S MOTION FOR LEAVE OF COURT TO FILE INFORMATION BY AFFIDAVIT

COMES NOW Defendant [redacted], by and through his attorney CHRIS ARABIA, Esq., who submits this opposition to Plaintiff's motion for leave of court to file an information by affidavit. This Opposition is based upon the attached points and authorities, the pleadings and papers on file herein, and the evidence, testimony, and argument to be adduced at hearing.

DATED this 17th day of September, 2013.

CHRISTOPHER R. ARABIA, Esq.
Nevada Bar #9749
601 S. 10th St.
Las Vegas, NV 89101
702.281.4093
Attorney for [redacted]

DECLARATION OF CHRIS ARABIA, Esq. IN LIEU OF AFFIDAVIT AS CONTEMPLATED BY NRS 53.045

I, Chris Arabia, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge:

Declarant is a duly licensed attorney in the State of Nevada and is the appointed attorney for [redacted]

Declarant hereby incorporates the entirety of this opposition and all other filings in the instant case into this declaration, as if fully set forth herein.

EXECUTED this 17th day of September, 2013.

Chris Arabia

POINTS AND AUTHORITIES

STATEMENT OF RELEVANT FACTS

This case arises out of a theoretical welfare check that was actually a warrantless raid on a residence resulting in charges of felony child abuse and felony possession of marijuana with intent to distribute. The felony child abuse charge was so obviously a pretext and so patently ridiculous that the State did not even bother to address it in its motion, so the State's motion should apply only to the drug count.

With respect to the drug count, the only egregious errors are Deputy Kirkland's latest invalid search and the State's insistence on blaming every unsuccessful prosecution on the Honorable Justice of the Peace Colvin.

Deputy Kirkland himself conceded that he did not have legitimate probable cause to believe a crime was in progress:

> Q: Right, but if you don't know whether or not anyone had a marijuana card, how would you know whether or not that was a crime?
> A: I guess you wouldn't know if it was a crime, if they have a marijuana card. (PHT 12).

Kirkland claimed that the purpose of the raid was to do a welfare check. (PHT 11). Kirkland also testified that he smelled burnt marijuana when he was outside the apartment. (PHT 5, 11). Kirkland forced the defendant and other occupants out of the house purportedly to prevent destruction of evidence. (PHT 6). He later obtained a telephonic search warrant. (PHT 7).

Kirkland asserted that while standing outside the apartment, with nothing more than the alleged smell of burnt marijuana, he had evidence of the crime of "destruction of evidence that I was smelling burnt marijuana coming from the apartment." (PHT 12).

[redacted]'s counsel and Kirkland engaged in a long and detailed series of questions regarding the timeline of the raid and the filling out of the search warrant. (PHT 16-19, 21). Kirkland also testified that he recovered 3 items from under the kitchen sink during his searching. (PHT 20).

Kirkland testified that he knocked on the door, [redacted] asked whether Kirkland had a warrant, Kirkland said no, [redacted] declined to open the door, and Kirkland threatened to kick the door in:

> Q: All right. Did you say something to the effect, "Open the door or we're going to kick it in."
> A: Yes, I did. (PHT 22).

Kirkland also claimed that he "didn't need a warrant to stop the destruction of evidence" because he allegedly smelled burnt marijuana. (PHT 23).

Kirkland testified that the child in the residence was not taken for medical treatment and that he was not aware of any medical reports regarding the child and the raid that day. (PHT 24-25).

Having presided over the hearing and assessed the record, the Justice Court found that while the probable cause assertion sounded reasonable "on the surface," in actuality Kirkland "immediately assumed" the smell as giving him probable cause. (PHT 33).

The Justice Court found that "threatening to kick the door in was a little bit unnecessary." (PHT 33).

The Justice Court found that the purported welfare check should have been discussed "at some point since that was the basic reason for being there." (PHT 33).

The Justice Court sustained [redacted]'s objection to the search and everything that resulted therefrom. (PHT 7, 33).

The Justice Court also found no evidence of intent to sell, no reference to the welfare check supposedly justifying the trip to the residence, and no evidence regarding the well-being or treatment of the child at issue in the child abuse charge. Based on all of those findings, the Justice Court declined to bind over defendant [redacted] (PHT 36).

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ARGUMENT

I. JUSTICE COURT DID NOT COMMIT EGREGIOUS ERROR AS CONTEMPLATED BY NRS 173.035(2) AND THE STATE IS CLEARLY ABUSING THE STATUTE FOR AN IMPROPER SECOND CHANCE AT PROSECUTING MR. [redacted] THUS, THIS COURT SHOULD DENY THE STATE'S MOTION

The Nevada Supreme Court has articulated a clear standard for the types of cases that justify the state's use of NRS 173.035(2) to circumvent a discharge by the Justice Court: "That statute contemplates a safeguard against **egregious error** by a magistrate in determining probable cause, not a device to be used by prosecutor to satisfy deficiencies in evidence at a preliminary examination, through affidavit." Cranford v. Smart, 92 Nev. 89, 91, 545 P.2d 1162 (1976). To avoid instances of prosecutors unfairly relying on NRS 173.035(2), the Cranford Court expressly adopted a more exacting standard than the previous "arbitrary or mistaken decision" standard described a mere four years earlier in Ryan v. Eighth Judicial District Court, 88 Nev. 638, 640, 503 P.2d 842 (1972). Subsequent Supreme Court interpretations of NRS 173.035(2) evidently do not define "egregious." According to the Legal Dictionary, egregious means "extremely and conspicuously bad." The World English Dictionary ("outstandingly bad; flagrant") and Dictionary.com ("extraordinary in some bad way; glaring; flagrant") contain similar descriptions of extreme error.

Regardless, the magnitude of error necessary for proper resort to NRS 173.035(2) is indisputably great; remarkably, the State has resorted to 173.035(2) even though the Justice Court clearly did not err in discharging [redacted] (*had* the Justice Court erred in the instant

case, everyday errors, minor errors, and arguable errors of a magistrate would simply not suffice).

The State has evidently confused "egregious error" with "all decisions it dislikes." This serial abuse of the egregious error codicil is inefficient, inapt - outrageous.

A.

THE NEVADA SUPREME COURT IN HOWE v. STATE RULED THAT THE SMELL OF BURNT MARIJUANA DOES *NOT* JUSTIFY A WARRANTLESS, NO-CONSENT ENTRY INTO A RESIDENCE BECAUSE THE SMELL OF BURNT MARIJUANA DOES *NOT* CREATE THE EXIGENT CIRCUMSTANCE OF DESTRUCTION OF EVIDENCE

The Nevada Supreme Court has ruled that the smell of burnt marijuana does not constitute the exigent circumstances required to justify a warrantless search of a residence without consent. Basing a belief in the imminent elimination of evidence merely on the smell of burnt marijuana is "not reasonable." Howe v. State, 112 Nev. 459, 467 (1996).

In Howe, an officer standing outside a residence "detected the odor of burning marijuana." Id. at 461. The police's no-consent entry into the home was "to prevent the destruction of critical evidence" allegedly present, in that case marijuana. Id. at 462.

Looking at the five factors used to analyze exigency based on destruction of evidence, the Supreme Court found no urgency because there was "no objectively reasonable belief that the marijuana was actually about to be destroyed." Id. at 467. There was also no evidence of danger in guarding the area. Finally, the defendant's mere knowledge that the police are present and the susceptibility

of marijuana to destruction do not create exigency absent the required reasonable belief in imminent destruction. Id. at 468. The illegal entry fatally tainted subsequent consent. Id. at 469. The illegal entry was a violation of Howe's "right to privacy in the sanctuary of his home." Id. at 468.

Based on Howe, the police's warrantless entry in the instant case was clearly invalid. Deputy Kirkland claimed that he could smell burnt marijuana, just as was the case in Howe. With nothing more, Kirkland forced his way into the residence without consent or a warrant based on a generic concern about the possibility of evidence being destroyed, just as was the case in Howe.[1] The entry was invalid, just as in Howe. The invalid entry irreparably tainted any subsequent consent to enter, just as in Howe. Just as in Howe, the illegal entry into [redacted]'s residence was a violation of [redacted]'s "right to privacy in the sanctuary of his home."

The Justice Court disallowed evidence gathered through Kirkland's highly invalid invasion of [redacted]'s home, a violation that defiled the Fourth Amendment. Such a decision is absolutely not an egregious error.

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[1]When an armed agent of the state threatens to kick in the door, the defendant's decision to grant access is not consensual except perhaps in the overly literal world of Deputy Kirkland.

B.

THE MERE PRESENCE OF MARIJUANA BY ITSELF IS NOT PROBABLE CAUSE OF A CRIME IN NEVADA BECAUSE THE POSSESSION OF MARIJUANA IS LEGAL IN SOME CIRCUMSTANCES; FOR ITS ASSERTION TO THE CONTRARY, THE STATE CITED HOWE, A CASE DECIDED PRIOR TO THE LEGALIZATION OF MARIJUANA IN SOME CIRCUMSTANCES

The legislature legalized marijuana under some circumstances in 2001. NRS 453A.200. The State cites Howe for the proposition that smell alone constitutes probable cause; Howe was decided in 1996, a time prior to the 2001 legalization. In fact, Howe is silent on the issue of medical marijuana.

As Deputy Kirkland himself conceded, he had no idea whether there was probable cause of a crime (after allegedly smelling marijuana) when he knocked on the door. (PHT 12).

Regardless, the search in Howe was invalidated under factual circumstances very similar to those of the instant case. (See Part A above).

II. CONCLUSION

For the reasons presented above, this Court must deny the state's motion and deny leave to file an information by affidavit.

DATED this 17th day of September, 2013.

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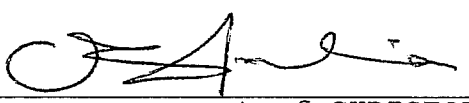
CERTIFICATE OF SERVICE

I certify that I am an employee or agent of CHRISTOPHER R. ARABIA, Attorney at Law, and that on the 17th day of September, 2013, I served the foregoing **DEFENDANT'S OPPOSITION** by hand-delivering and/or emailing and/or faxing and/or mailing first-class postage prepaid, copies to the following parties(s) at the following address(es): Esmeralda DA's Office, Courthouse, Goldfield, NV 89013



an employee or agent of CHRISTOPHER R. ARABIA