No. 15-5

In the Supreme Court of the United States

STATE OF NEVADA,
Petitioner,

v.

RALPH TORRES,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

No court has expressed any doubt that Officer Shelley's *Terry* stop of Ralph Torres was supported by reasonable suspicion of underage drinking. And the record is clear that Officer Shelley's concern was not dispelled by merely talking to and observing Torres. The question troubling the courts below was whether, once Torres provided Shelley with an out-of-state ID indicating he was over 21, Shelley was allowed to run it based on his past experience of being given false IDs. That is the first question presented to this Court. The Nevada Supreme Court answered that question in the negative. In a long list of cases presented by the State's petition and *Amici*, other courts of appeal reached the opposite conclusion.

This is an ideal case to address that question. The facts are straightforward: the legitimate basis for the stop is beyond dispute; the short time the stop was extended to run the ID was well within the norm; and like in many cases, the officer ran the ID based on his experience with the proliferation of false IDs, not out of particularized suspicion about *this specific* ID. This case provides this Court the flexibility to broadly or narrowly clarify when running an ID is permitted for a legitimate *Terry* stop.

The second question presented is also well-positioned for review. Torres acknowledged before the Nevada Supreme Court that courts are "split" on this question, and urged the court not to apply *Brown v. Illinois*, 422 U.S. 590 (1975), or the line of lower court cases applying *Brown* in this context. *See United States v. Green*, 111 F.3d 515, 521–23 (7th Cir. 1997). Having succeeded in further fracturing an already deep

conflict, Torres cannot pretend the issue is unripe. This is the right case for this Court's intervention: Officer Shelley's stop was clearly justified and, given his experience of frequently being provided false IDs, as well as the fact that many other courts have allowed ID checks in similar circumstances, his decision to run an unfamiliar ID through dispatch—even if ultimately wrong—was hardly flagrant misconduct.

I. The Court Should Grant Review to Determine Whether Briefly Retaining an ID to Run It Transforms a Lawful *Terry* Stop into an Illegal Seizure.

1. Together, the State and *Amici* provided eighteen cases that conflict with the Nevada Supreme Court's ruling on the first question presented. Pet. 7–11; States' Br. 2–3. Torres responds that "[n]o federal court of appeals would have held" that running his ID "comported with the Fourth Amendment." Opp. 11. That claim is as incredible as it is audacious.

Torres distinguishes *Klaucke* by pointing out that the detainee in that case looked young, was in a college town, was carrying alcohol, and was in an area where students carried "doctored IDs." Opp. 11–12. Here, Torres appeared young, was in a college *and mining* town, smelled of alcohol, and was in a small community where the officer was "frequently being provided 'false I.D.'s.'" Pet. App. 16. When two cases are so similar, law enforcement officers should not have to struggle to identify picayune differences that might change lawful actions to unlawful. If "it was not unreasonable for Officer Daly to quickly verify the license to confirm he had not been handed a fake," *Klaucke v. Daly*, 595 F.3d

20, 25 (1st Cir. 2010), it was not unreasonable for Officer Shelley to do the same.

Torres's only attempt to distinguish *United States v. Soto-Cervantes*, 138 F.3d 1319 (10th Cir. 1998) is a terse observation that "[t]his case does not involve that kind of ID." Opp. 12–13. The basis to check Soto-Cervantes ID (generalized suspicion that it might be fake) had nothing to do the original purpose of the stop (suspected drug activity). 138 F.3d at 1321. But the officers there were justified in detaining an individual for over 20 minutes to verify his ID even though they had no *particularized* suspicion that *that* card was fake. *Id.* at 1323. The only relevant differences here are (1) that the concern about Torres's ID being false directly related to the original basis for the stop (that he might be underage), and (2) that it took much less time to verify Torres's ID.

Torres distinguishes *United States v. Osborn*, 203 F.3d 1176 (9th Cir. 2000) because Osborn "'was not stopped,' * * * 'as he * * * walked about in a public place in a *normal and lawful manner*.'" Opp. 14 (emphasis added and citation omitted). Neither was Torres. He was questioned because he was "swaying and staggering" across a bridge at 12:40 am in the middle of winter, and smelled of alcohol. Pet. App. 15.

As *Amici* explained, many more cases conflict with the Nevada Supreme Court's ruling. In *Schubert v. City of Springfield*, 589 F.3d 496, 499 (1st Cir. 2009), an officer stopped a man he observed with a handgun. After receiving the man's license to carry the handgun—a license "valid on its face"—the officer detained him for "about five minutes" while he attempted to validate the license. *Id.* at 500, 503. The

court rejected the man's "contention that the gun license was valid on its face and therefore the several minute delay during which [the officer] attempted to confirm the validity of the license was unreasonable. *Just as an officer is justified in attempting to confirm the validity of a driver's license*, such a *routine check* is also valid and prudent regarding a gun license." *Id.* at 503 (emphases added). *See also United States v. Burleson*, 657 F.3d 1040, 1047–48 (10th Cir. 2011) (holding that "an officer, during the course of a lawful *Terry* stop of a pedestrian, may obtain that pedestrian's identification and request a warrants check"); *United States v. Young*, 707 F.3d 598, 606 (6th Cir. 2012) (joining "our sister circuits [that] have expressly held that officers do not exceed the scope of a *Terry* stop by running a warrant check, even when the warrant check is unrelated to the crime suspected").

2. Torres distorts the factual record, asserting that "once Officer Shelley came face-to-face" with Torres, it should have dispelled any reasonable suspicion because Torres "was nearly 30 years old." Opp. 10. But the record is clear that when Officer Shelley talked with Torres, it was late at night and Torres had a hood partially obscuring his face. Reply App. 5–6, 12. Shelley "smell[ed] alcohol" and even after talking with Torres still could not tell if he was over 21. *Id.* ("as far as him being over 21, that was not readily apparent").

Torres similarly mischaracterizes the legal record, claiming that the State never argued below that Officer Shelley's actions were justified by reasonable suspicion; it "argu[ed] instead only that Officer Shelley's encounter with respondent was wholly 'consensual.'" Opp. 5. Not true. The State presented "three[]"

alternative arguments in the district court: reasonable suspicion, consensual encounter, and attenuation. Reply App. 11. "The State * * * initially argue[d] that there were specific articulable facts supporting an inference of criminal activity * * *." *Id.* Running the ID was justified by the same reasonable suspicion that justified asking for it because, "it's common practice and procedure to run people's IDs to make sure they're valid." *Id.* at 12–13. Again, in the Nevada Supreme Court, the State argued that "in this case, there are a number of theories under which Officer Shelley's conduct would have been lawful. One of those is that he was operating under reasonable suspicion and that this was a lawful detention." Oral Argument at 14:57, Torres v. State, 341 P.3d 652 (Nev. 2015).[1]

Even if the State had not raised the issue below, it is enough that the Nevada Supreme Court decided it. *See Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 379 (1995) ("even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010) ("'Our practice permits review of an issue not pressed below so long as it has been passed upon'" by lower courts.) (citations and brackets omitted). This Court's statement that it is "a court of review, not first view," Opp. 6 (citing cases), was in cases where the courts below had not addressed the question presented to this Court.

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[1] *Available at* http://nvcourts.gov/Supreme/Arguments/Recordings/TORRES_(RALPH)_VS__STATE/.

Torres's related argument that the factual record in this case is inadequate to decide this question presented, Opp. 6, is just as baseless. The record is clear that running the ID prolonged the stop by no more than five minutes, plus a few more to confirm the warrants. Opp. 2. It is also clear that Officer Shelley had a generalized suspicion that information on IDs could be false based on "'his experience of frequently being provided "false I.D.'s."'" *Id.* And the record is clear that, beyond this generalized suspicion based on past experience, Officer Shelley had no additional reason specific to this ID to believe it was false. *Id.*

These are all the facts that are needed—indeed, all the facts that are relevant—for this Court to decide this question. These are precisely the type of facts the lower courts regularly use to decide whether running an ID was reasonable. Torres's contention that this Court needs "exact[]" time-frames, Opp. 7, and statistical data on how often a *California* ID is fake "*in downtown Elko*," Nevada, Opp. 8, is as unwarranted as it is unrealistic. Law enforcement officers and lower courts rarely have such precise information, so any constitutional test turning on such minute details would be useless in the real world.[2]

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[2] Torres's speculation that checking the validity of an ID is separate from and may take less time than checking for warrants, Opp. 6–7, is unfounded. When Officer "Shelley ran [Torres's] information through dispatch," Reply App. 9, the system used by all Nevada law enforcement agencies simultaneously checked multiple state and federal databases for outstanding warrants and ID validity, including the FBI's NCIC database, Nevada's DMV records, and (because Torres provided a California ID) California's DMV records. Torres's warrants were returned through the NCIC database. The average time for the FBI to respond to an NCIC

3. Torres's argument that the Nevada Supreme Court could have decided this case on an adequate and independent state ground, Opp. 8–9, is doubly wrong. First, there is no independent state ground. As the State demonstrated in its petition, the Nevada Supreme Court has made clear that Nev. Rev. Stat. § 171.123 is a codification of *Terry*. Pet. 7 n.2. Torres's counsel acknowledged as much in argument before the Nevada Supreme Court. Oral Argument at 29:20. If there were any doubt, it was dispelled by the use of "NRS 171.123(4)" and "Fourth Amendment" interchangeably in the same sentence in the decision below. *See* Pet. 7 n.2 (quoting Pet. App. 9).

In any event, the mere "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines v. Mahin*, 410 U.S. 623, 630–31 (1973). Unless state-court decisions addressing federal law plainly rest on state law, this Court presumes "the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983); *see also Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 150, 152 (1984) ("this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law").

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inquiry is 0.06 seconds. *See* https://www.fbi.gov/news/stories/2010/january/ncic_010410/ncic_010410; http://www.ise.gov/law-enforcement-information-sharing.

4. Lastly, Torres's argument that this Court's recent *Rodriguez* decision needs more time to percolate misidentifies the problem. Opp. 14. In none of the cases on either side of this split—including this case—did the courts even mention, much less rely on, *Rodriguez*. *Rodriguez*'s only relevance to this case is, as the State noted in its petition, the Court's recent reaffirmation that a stop may not be extended beyond the time necessary to complete the stop's "mission." Pet. 14. But that concept hardly originated in *Rodriguez*; it has been around for decades. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (citing cases). *Rodriguez* will not help lower courts in deciding the question in this case: whether or not running an ID is part of that "mission" for a *Terry* stop.

II. This Court Should Grant Review to Determine Whether Discovery of an Arrest Warrant Can Dissipate the Taint of an Unlawful Detention.

The second question presented is like Goldilocks and the Three Bears. Torres says the circuit split is too hot. Opp. 15 ("It is too early to tell"). Strieff, in opposition to the State of Utah's petition presenting the same question, says it is too cold. Opp. 1, *Utah v. Strieff*, No. 14-1373 (U.S. Jun. 30, 2015) (noting this Court has denied other petitions "presenting the same question"). Respectfully, this case is just right for this Court's immediate review.

Torres now calls the Nevada Supreme Court's refusal to apply *Brown*'s attenuation doctrine a mere "theoretical divergence," and is unsure "whether this difference in approach really leads to divergent outcomes." Opp. 15. Torres was more sure in the courts below, when he candidly acknowledged that "the

Supreme Court of the United States has not decided this issue" but "the federal and state courts are split—some circuits and state courts say that the discovery of an outstanding arrest warrant weighs in favor of attenuation, others don't." Oral Argument 00:48. When he urged the courts "not to follow *Green*'s reasoning and apply *Brown* to this case," *id.* at 10:50, presumably it was because he thought application of *Brown* in this case would make more than a "theoretical" difference. Now that it has—and has also in *Utah v. Strieff*, 2015 UT 2, *petition for cert. filed*, No. 14-1373 (May 15, 2015)—his claim that this is merely a theoretical split rings hollow. It is particularly telling that the only circumstances that Torres can think of where the taint of an unlawful detention might be dissipated by discovery of a preexisting arrest warrant under the rule applied in this case are where a detainee either spontaneously volunteers that he has an arrest warrant or gives permission to run a warrant check. Opp. 16. By rejecting the *Green* test and application of the attenuation doctrine in this context, the Nevada Supreme Court *did* effectively apply a categorical rule of exclusion.

Torres also strives to show that the decision would be the same even if the majority rule was applied—because Officer Shelley's detention of Torres was supposedly "flagrant misconduct." Opp. 17–18; 22–23. Again, if Officer Shelley's conduct was really "flagrant," it begs the question why Torres repeatedly urged the courts below *not* to apply *Green*—after all, flagrancy is the key consideration under *Green*. Pet. 17–18. The Nevada courts never questioned that Officer Shelley's initial detention of Torres on suspicion of underage drinking was justified. *See* Pet. App. 9, 15.

As reiterated above, many jurisdictions "have expressly held that officers do not exceed the scope of a *Terry* stop by running a warrant check, even when the warrant check is unrelated to the crime suspected." *Young*, 707 F.3d at 606. Officer Shelley's conduct in this case was nothing close to flagrant misconduct.

Torres's argument that the Nevada Supreme Court decided the attenuation question correctly, Opp. 19–22, needs little response. It has already been rebutted at length. *See* Pet. 15–16, 18, 21–22; States' Br. 9–24. The majority of lower courts that have addressed the issue disagree with Torres. *See* Pet. 17–20. But some agree. Pet. 20–21. It is precisely to address these arguments and resolve this deep disagreement that this Court should grant review.

One particular merits argument does call for an immediate response. Torres claims that "'the only way to deter the police from randomly stopping citizens'" is to do what the Nevada Supreme Court did here: suppress the evidence even if it was obtained as a result of a preexisting arrest warrant. Opp. 21 (citation omitted). That rationale has no applicability here. Officer Shelley did not "randomly stop" Torres; he stopped Torres on reasonable suspicion of underage drinking. This case illustrates that applying the attenuation doctrine to evidence obtained by preexisting warrants *will not* necessarily reward random stops (which would already be addressed by the "flagrancy" factor in *Green*), but *will* prevent unnecessary exclusion of evidence where (as here) the officer acted in good faith. *See also* States' Br. 9–24.

Lastly, Torres argues that "the benefits of deterrence outweigh the costs" in this context, Opp. 21, but never addresses those costs. The high social costs of suppressing evidence in this context are real. *See* States' Br. 22–23. Torres pleaded guilty to a felony, Pet. App. 4–5, but the Nevada Supreme Court's application of the minority rule prevents punishment for that very real crime. That crime was discovered—not because Officer Shelley was randomly stopping anyone—but because he ran an ID to validate information he had reasonable suspicion to check. Given the disarray in the lower courts on attenuation in the context of a preexisting warrant, this Court should step in to clarify whether the real social costs of the minority decision in this case are worth it.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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September 2015

APPENDIX

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APPENDIX 1

IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF ELKO,
BEFORE THE HONORABLE
NANCY PORTER, DISTRICT JUDGE

Case No. CR-FP-08-0000299
Dept. No . 1

[Dated March 27, 2012]

STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
V.	)
	)
RALPH TORRES,	)
	)
Defendant.	)
	)

ROUGH DRAFT TRANSCRIPT OF
PROCEEDINGS
HEARING ON MOTION

Tuesday, March 27, 2012

Elko, Nevada

Transcribed By: Julie Rowan - (775) 745-2327

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A P P E A R A N C E S

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For the Defendant:	ALINA KILPATRICK, ESQ. Elko County Public Defender's Office 571 Idaho Street Elko, NV 89801

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THE COURT: Please be seated.

This is Case No. CR-FP-08-299, State versus Ralph Torres. We have Mr. Torres here, who is in custody, with his attorney, Ms. Kilpatrick. We have Mr. Mills here from the District Attorney's Office. This is the time set for a hearing on the Defendant's motion to suppress evidence and ultimately dismiss.

Is there anything we need to do before we get started?

MS. KILPATRICK: No, I don't believe so, Your Honor.

MR. MILLS: No, Your Honor.

THE COURT: Okay, Mr. Mills.

MR. MILLS: Your Honor, I believe the parties are primarily going to be relying upon the preliminary

hearing transcript and the testimony of Officer Shelley contained therein. However, I do have Officer Shelley called as a witness, and I'd like to ask him a few more questions as pertaining to the pending motion to suppress.

THE COURT: Okay.

MR. MILLS: So I would call Officer Jeremy Shelley.

THE CLERK: Do you solemnly swear the testimony you're about to give in this matter is the

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truth, the whole truth, and nothing but the truth, so help you God?

MR. SHELLEY: Yes.

THE COURT: State your name and spell your last name, please.

THE WITNESS: Jeremy Shelley, S-H-E-L-L-E-Y.

THE COURT: Go ahead, Mr. Mills.

JEREMY SHELLEY

(Sworn as a witness, testified as follows)

DIRECT EXAMINATION

BY MR. MILLS:

Q. Officer Shelley, you previously testified in a preliminary hearing in this case that back on February 10th of 2008 you had an encounter with Ralph Torres at about 12:40 in the morning; is that correct?

A. Yes.

Q. You testified that this encounter -- that you first observed him walking on the 5th Street Bridge?

A. Yes.

Q. You parked your car kind of at the bottom of the bridge in the parking lot of Joe's Market?

A. Yes.

Q. And waited for him to come down before you made contact with him?

A. Yes.

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Q. When you made contact with him, how did you do that?

A. I was standing outside my car. As he walked down the sidewalk, I either asked him to come talk to me, or I asked if I could talk to him.

Q. What was your demeanor like?

A. I think that I was friendly.

Q. Were you behaving aggressively towards him in any way?

A. No.

Q. Were you threatening him?

A. No.

Q. And I believe you testified that the reason that you wanted to make contact with him, you testified at the preliminary hearing that it was -- this male subject you observed was small in stature. He had a hood over his

head obscuring his head and partially obscuring his face so you couldn't get a real good look at him, and that he was swaying and staggering from side-to-side on the sidewalk.

Were those the reasons you decided to make contact with him?

A. Yes.

Q. And I believe you testified that you were concerned, because of the small stature of the subject, that you were unable to determine if he was over the age of 18

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and therefore able to be out past curfew, and also if he was over the age of 21 and therefore able to consume alcohol, as it appeared that he might have been intoxicated; is that correct?

A. Yes.

Q. Now, the question I have for you now, to follow up on that previous testimony, is when you actually made contact with him and got a good look at him, what did you observe about his age, for example? Did he still appear to you to be underage, or was it readily apparent that he was older than the age of 21?

A. It was apparent that he was at least 18, but as far as being over 21, that was not readily apparent.

Q. Did he have kind of a youthful appearance about him -- or yeah, what were his features like? I mean, what led you to believe that he might not have been over the age of 21?

A. He still had the hood on, and unfortunately, I've found that I'm not the best judge of age as I thought I was at one time.

Q. And you mentioned at the prelim, your initial suspicions, based on the swaying and staggering, that this subject appeared that he might have been intoxicated. When you actually made contact with him and spoke to him, did you observe any signs of

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intoxication?

A. I could smell alcohol, but I wouldn't say he was heavily intoxicated.

Q. You were asked in the preliminary hearing by Defense counsel that if Defendant had taken off running, would you have run after him, and you replied yes. Could you explain that answer. Why would you have pursued him and run after him?

A. The way the question was presented, I took it to be during my contact with him after I had run his name through dispatch and been told that he had active felony warrants, that if he had taken off running, would I have pursued him, and that was where my yes answer came from.

Q. Would have been due to the -- at that point, you had knowledge of the warrants, and that's the reason you would have pursued him?

A. Yes.

MR. MILLS: Thank you, I have nothing further.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. KILPATRICK:

Q. As soon as you had knowledge of the warrants, you put him into custody though, right?

A. No.

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Q. Let me backtrack. You had a suspicion of a warrant, and then you waited for it to be confirmed; is that correct?

A. Yes.

Q. And when you -- I had asked you before, and I don't believe -- you said that you couldn't remember, but I'm wondering if after giving reflection, you've come to recollect.

You had testified earlier that at some point in time Sergeant Locuson had arrived. Do you remember when in the spread of the encounter that that happened?

A. It was at the very end.

Q. It was at the very end, okay.

You did not arrest him for public intoxication or anything, like anything alcohol-related did you?

A. No.

Q. Okay. And you're a DRE, aren't you?

A. Yes.

MS. KILPATRICK: That's all I have.

THE COURT: Mr. Mills.

MR. MILLS: I have nothing based on that, Your Honor.

THE COURT: May this witness be excused?

MR. MILLS: He may.

MS. KILPATRICK: Yes.

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THE COURT: You may leave the courthouse, Officer.

MR. SHELLEY: Thank you.

THE COURT: Anything else, Mr. Mills?

MR. MILLS: No, Your Honor.

THE COURT: Argument.

MR. MILLS: How would you like argument to proceed, Your Honor? I believe this is Defense's motion. Would you like them to start with argument or the State?

THE COURT: Well, the State has the burden of proof, correct?

MR. MILLS: I believe so, yeah, okay.

THE COURT: So I'll let you go first.

MR. MILLS: Thank you.

Your Honor, as you've probably read in the preliminary hearing transcript and the facts as recited in our briefs of relying upon the preliminary hearing

transcript, as well as the facts that we've heard, you know, additional supplemental facts that we've heard from Officer Shelley today, what we know about the facts of this case, I mean, it's pretty straightforward and simple that on that evening about 12:30 in the morning of February 10th, Officer Shelley observed a small in stature subject in a staggering and swaying walking on

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the sidewalk on the 5th Street Bridge.

And because of the small stature of the subject, Officer Shelley stated that he was concerned that it might have been an underage individual who may have been consuming alcohol and/or may have been out after curfew. So he simply parked his car at the bottom of the bridge in Joe's parking lot, waited for the subject to come down off the bridge, and he made contact with him. He just testified that this was a pretty casual conversation. He was friendly, he said, not aggressive or threatening in any way.

He testified that, earlier at the preliminary hearing, that he asked for the subject's identification. The subject gave him his identification, and Shelley ran his information through dispatch. And at the preliminary hearing, he stated that he did this from outside his car. He had a handheld radio. The Defendant, he also testified at the preliminary, was also outside of his car, in front of his car. So they were both standing outside in relative proximity to one another while Officer Shelley ran the subject's information through dispatch.

He testified at the preliminary hearing he didn't have his car lights or siren activated. He didn't have his firearm pulled. Essentially, there was

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no real show of force or authority going on here. The suspect was cooperative, voluntarily produced his identification when Officer Shelley asked for it.

And it turned out that there were -- there was an outstanding warrant. Officer Shelley, when he found out about the warrant, eventually arrested the suspect on the warrant. And then upon a search incident to arrest -- and again, the arrest was on the warrant and not related to anything that happened with the original reason for the stop , but the arrest was on the warrant. And pursuant to that search incident to arrest, a firearm was discovered on the subject's person.

Now, as you've read in my brief, the State's argument is threefold. As the Court knows, with respect to contacts between law enforcement agents and citizens, there are three different types of contacts. Of course, there's an arrest, and that obviously implicates the Fourth Amendment when an officer arrests somebody.

But kind of a lesser type of stop where there's not probable cause to arrest and there is no arrest, but there is reasonable suspicion to detain somebody, that's a Terry stop, and that requires reasonable suspicion, of course, when the officer observes specific articulable facts that support an

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inference of some sort of criminal activity, that the person either has engaged in, is engaging in, or is about to engage in.

But then there's a third type of contact between law enforcement agents and members of the general public, and that's a consensual encounter, and courts have universally recognized the concept of a consensual encounter where a law enforcement agent can have contact with a member of the public without implicating the Fourth Amendment at all.

In other words, without even reasonable suspicion, an officer can walk up to someone walking on the sidewalk and say, "Hey, how's it going today, sir? How are you doing?" And furthermore, courts have supported the proposition that an officer, in the context of a consensual encounter, can ask for somebody to produce an identification. There's no problem with that.

So the courts -- or the State's argument is threefold. The State would initially argue that there were specific articulable facts supporting an inference of criminal activity, not a huge inference, but there was -- there are specific facts that Officer Shelley pointed to; the small stature of the individual, the fact that he was swaying as if he might have been

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intoxicated. Those types of facts led him to that initial contact.

THE COURT: That's the basis for the stop, but what are the specific articulable facts for the continued detention?

MR. MILLS: I think we just heard something along those lines, because arguably, as I think the Court's getting at, is after the initial stop and after the subject produces an identification and the officer says -- you know, in his mind, he's like my basis for this stop was my suspicion that this guy may have been underage. Now I'm looking at him -- and actually, he testified he wasn't sure whether -- he's a poor judge of age, and he was still uncertain, after having personal contact with the individual, whether he was over the age of 21, but he did have an identification card that indicated that the individual, I believe, at that time would have been about 30.

And so I guess the question arises, and this may be what you're getting at, is at that point, once the officer confirmed that, you know, this person, in fact, is above the age of 18 and 21, and the criminal activity that he thought may have been happening wasn't happening, at that point, maybe there is no longer reasonable suspicion to further detain the individual.

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The officer -- what I would say to that is that the officer testified at the preliminary hearing that it's common practice and procedure to run people's ID's to make sure they're valid, just to confirm it wasn't an invalid or fake ID, that sort of thing.

THE COURT: Well, that may be their practice, but how is that constitutional?

MR. MILLS: How is it constitutional? Well, I think that the Supreme Court -- and maybe we're edging into the consensual encounter territory here, but I think in the context of a consensual encounter, both the U.S. and the Nevada Supreme Courts -- I think this is kind of a universally-accepted proposition that they can ask for people's identifications.

THE COURT: But then he called it into dispatch. He took the next step. That's my question.

MR. MILLS: He did.

THE COURT: So once he discovered he was over 18 and over 21, why did he need to continue to hold him and call that into dispatch?

MR. MILLS: Well, again, he said that -- just to make sure it was valid because what if it was a fake ID. But even absent that -- and then again, I think we're getting into the consensual encounter argument that maybe he didn't need to. Maybe it was a consensual

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encounter, and he asked -- and it was a voluntary act on the Defendant's part to give him his ID, and Officer Shelley ran his information through dispatch in the context of –

You know , again, if there's no reasonable suspicion at this point, if that's what the Court's finding based on the facts, then it's in the context of a consensual encounter at that point that doesn't implicate the Fourth Amendment.

THE COURT: Okay.

MR. MILLS: And that's the second argument basically.

And as it is kind of a universally-accepted proposition that officers can, in the context of a consensual encounter, can request somebody's identification, the question at some point arises, well, at what point does the detention -- or the retention of that identification, at what point does that convert it from a consensual encounter into a Terry stop?

And cases have addressed that particular issue. I don't think Nevada has addressed cases dealing with the particular facts of this case. So I looked in other jurisdictions. I found this case out of Florida, this Golphin case, where it says the interpretive case law supports the trial court's determination here that

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in light of the totality of the circumstances involved, Golphin's encounter with the police was consensual in nature and did not mature into a seizure on the facts presented simply by virtue of Officer Doemer retaining and using Golphin's identification to conduct a warrants check.

Given due deference to the historical facts found by the trial court, the totality of the circumstances in this case demonstrates the police officers approached a group of men in a casual manner without the use of sirens, lights, or weapons. You know, the same thing in this case. Officer Shelley approached in a casual manner without the use of lights or weapons.

The officer engaged Golphin in a casual manner, requested his identification, which he voluntarily

provided, and conducted a warrants check in Golphin's presence while continuing to talk in a polite manner. It's very consistent with the facts of this case, the facts of that case are. This is not a case in which Golphin was summoned to the presence of the multiple officers, isolated by them in any way, or encountered in any way that would communicate that he was not free to go, so on and so forth.

So there are cases out there. I think I

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found another one. This Paynter case is out of, I believe it was Colorado . It held that Paynter was not subjected to a Fourth Amendment seizure when, while sitting in a parked car, he was approached by a police officer who asked for his identification and then ran a warrants check when Paynter provided the officer with identification. Again, another case holding still in a context of a consensual encounter.

And then the third argument, as you'll see in my brief, and this may be the strongest argument, because you can set aside the fact that there may have been -- there may not have been reasonable suspicion, or even if the Court finds that this was not -- you know, there was no reasonable suspicion, and it wasn't a consensual encounter, even with those findings, case courts have pretty much --

You know, Nevada hasn't addressed this issue, but all of the other cases that I found and other courts that have addressed this issue of whether that warrant, the existence of that outstanding warrant constitutes an independent intervening circumstance sufficient to undo the taint of whatever alleged constitutional

violation there was have found that the existence of an outstanding warrant pretty much does. I mean, it's a separate issue. It's separate and apart from whatever

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improper stop there may have been or improper detention there may have been. And that Golphin case addressed that issue.

The California case, you might take a look at that. I've included a quote from it, but if you look at that case, it goes -- there's a lot more analysis in that. And, in fact, there's a string cite. And that's what may be helpful. There's a string cite to all of the other jurisdictions that have pretty much universally held -- upheld this proposition.

But basically, you know, even if the encounter had constituted a seizure, suppression of the evidence discovered during this search of Golphin would not have been required. And this is all coming out of two U.S. Supreme Court cases, all these State cases that are adopting this principal are relying upon Wong Sun and Brown.

Wong Sun is the fruit of the poisonous tree case out of the Supreme Court where the Supreme Court said not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. It says, whether the High Court has concluded that in such a situation, the issue to be determined is whether granting establishment of the primary illegality, the evidence to which instant

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objection is made, has been come at by exploitation of that illegality, or instead by means sufficiently distinguishable to be purged of the primary taint.

There's three factors the courts have looked at. You know, kind of coupling together Wong Sun and the other U.S. Supreme Court case Brown, the courts have established three factors, and these basically come out of Brown. But the three factors to look at are the time elapsed between the illegality and the acquisition of the evidence, the second factor is the presence of intervening circumstances, and three, the purpose and flagrancy of the official misconduct.

And then applying those factors in this case or in a previous Florida case, Frieson, here's how the analysis played out. The officer stopped Frieson's vehicle for a cracked taillight and failure to use a turn signal. It turned out to be an improper stop basically. And a subsequent identification check indicated that there was an outstanding warrant in Frieson's name. So, again, very similar to this case, you know, a stop or a detention, you know, if the Court finds that there was a detention in this case and not a mere consensual encounter. But then a subsequent check for warrants and the finding -- or a running of the identification and finding of warrant.

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The search incident to arrest revealed the firearm. Again, exact same thing in this case. You know, the contact with the subject, asked for identification, run the information, finding of a warrant, search incident

to arrest on the warrant, and then the discovery of a firearm.

And then the brief amount -- the Court talks about the first factor, the amount of time. The brief amount of time that elapsed between the illegal stop and the arrest of respondent weighs against finding the search attenuated but this factor is not dispositive.

In turning to the next factor, the outstanding arrest warrant was an intervening circumstance that weighs in favor of the firearm found in a search incident to the outstanding arrest warrant. And then the court says crucially the search was incident to the outstanding warrant and not incident to the illegal stop.

The outstanding arrest warrant was a judicial order directing the arrest of a respondent whenever the respondent was located. As Judge Gross noted -- or Judge Gross noted, a warrant indicates the existence of criminal conduct separate from the conduct that occurred at the time of the illegal traffic stop. The illegality of the stop does not affect the continuing required

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enforcement of the court's order that respondent be arrested.

And then the third factor is basically whether it's in bad faith or not, the extent of official misconduct. The third factor in the Brown analysis, which is whether the purpose and the flagrancy of the official misconduct in making the illegal stop outweighs the intervening cause of the outstanding arrest warrant so that the

taint of the illegal stop is so onerous that any evidence discovered following the stop must be suppressed.

That third prong is necessary because otherwise under this -- these courts' holdings and under the holding in Brown, officers could just, in bad faith, pull people over just for the heck of it, for no reason whatsoever. In bad faith pull people over and run their information as a fishing expedition to look for warrants.

So there is a bad faith prong, that as long as it was in good faith, even if the stop or the detention turned out to be unlawful, as long as it wasn't egregiously, egregious official misconduct or in bad faith, then that warrant would constitute an intervening circumstance sufficient to undo the taint of the detention.

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And then the quote from the California case, People v. Brendlin, case law from other state and Federal courts uniformly holds the discovery of an outstanding arrest warrant prior to a search incident to arrest constitutes an intervening circumstance that may, and in the absence of bad faith, or, you know, flagrant police misconduct, will attenuate the taint of the antecedent unlawful stop. So, Your Honor, that's the third argument.

So if the Court, you know, working through that analysis finds that no reasonable suspicion, furthermore, not a consensual encounter, this third argument is a very strong one. It seems to be pretty universally -- the courts that have addressed this issue have held that the existence of that outstanding warrant is an intervening circumstance, and absent

bad faith on the part of the law enforcement agent, that undoes the taint of whatever improper stop or detention there was. It's just an independent -- I mean, that warrant exists independent of the fact -- or the facts surrounding whatever the stop was.

And the State would request that the Court deny the motion to suppress for those reasons.

Thank you.

THE COURT: Ms. Kilpatrick.

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MS. KILPATRICK: Thank you, Your Honor.

I wanted to make clear to the Court that I was searching for a statute on my phone. These things are a lot smarter than they used to be.

This is what I was looking for, because in my recollection, and I had thought about this walking over here too, the State of Nevada actually has codified somewhere something to the effect of an officer can walk up to a person for no reason and ask for ID as long as they're, you know, like not in their homes. I think that's post-9/11 legislation.

What we have here is an interesting stop because it goes from reasonable suspicion to no suspicion back up again. Now, I said in my brief that I do believe that the initial questioning or Terry-type detention of Mr. Torres was unreasonable because, I mean, that way anybody that's short and wearing a hood could, you know, could be stopped walking around at night.

And that would just -- that would run afoul of the Fourth Amendment and just produce an obscene result. I mean, I can't tell from over here if you're a juvenile or not so I'm going to call you over, but that's not as egregious as the rest of it. So I'm not going to focus on that particular part of it.

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A fact of note is that after -- well, the first fact of note that is interesting from today is the way the encounter commenced. Now, in the preliminary hearing transcript, Officer Shelley said that he didn't remember how he contacted him, like exactly what he said. And what was interesting about what Officer Shelley said this morning was, "I asked him to talk to me," or "asked him if I could talk to him."

Those are two very distinct phrases that invoke very different and distinct responses by the Court. "I asked him to come talk to me," or "I asked if I could talk to him." "I asked if I could talk to him," the latter is a voluntary encounter, the former is not. And Officer Shelley said he didn't remember how, at the prelim, how this encounter commenced.

But what we do know is -- I mean, Officer Shelley is on duty. He's on patrol. He sees Mr. Torres walking across the bridge, and he pulls into the parking lot to -- for the purpose of stopping his travel. This is an interesting distinction between the Golphin case too that the State cited.

In the Golphin case, the case out of Florida upon which the State largely relies, law enforcement was conducting field interviews in areas of high volume for prostitution. The law enforcement officers in Daytona

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Beach came up to a group of men, they're not moving, they were just standing around, and questioned them to do field interviews.

Hugely different from what happened here to the extent that Officer Shelley -- or now Deputy Shelley, Officer Shelley actually arrested his travels, you know, said -- you know, got in front of him. Whether he actually physically got in front of him or not, he was waiting at the bottom of the bridge, and that was the direction that Mr. Torres was traveling, which is an interesting fact to note.

Now, both parties in both briefs quoted Lisenbee, and I don't know if it's Lisenbee or Lisenbee, but I'm just going to call it Lisenbee for the sake of argument.

MR. MILLS: It's Lisenbee.

MS. KILPATRICK: It's Lisenbee. Lisenbee, thank you, Lisenbee. Lisenbee, which is a Nevada case, says a physical force or show of authority. He's in a marked vehicle, and I believe the officers in Golphin weren't. I think they just came up in plain clothes.

So Officer Shelley is in a marked vehicle in his uniform. Shows authority by asking him to come talk to me or asking if I could talk to him. And that's why Torres -- that's the first reason why Torres felt like

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he was not free to leave.

Now, originally, whether or not this Court considers the original encounter of "Hey, come over here," or

"Hey, can I talk to you" lawful and within the context of the Fourth Amendment and that it passes constitutional muster, that really isn't the question, because the question proceeds, as the Court has already pointed out, what happens next? Was that lawful? And the answer is no.

We have the issue of an ID that came out in the prelim and that also came out in the briefs. The officer took Mr. Torres' ID and ran it, and he said it's his habit to keep it. Now, interestingly, Shelley said that it's his habit, it's common practice to run ID's to make sure they're fake. We don't have any evidence, any testimony whatsoever, that there was anything suspicious about that ID, anything to say that there was any sort of discrepancy between what Mr. Torres liked and the individual in the ID.

And Officer Shelley admitted during the prelim, on page 13 -- or excuse me, on page 14, that it was his practice to run ID's to make sure they check out, not anyone else's. Interestingly, in his statement, he said that it was EPD practice, but on the stand at prelim, he said it was his own. So he's doing

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this out of his own volition.

And that goes into another issue, intent, the officer's intent. The officer's intent to detain someone is actually part of the totality of the circumstances, as was discussed in the Defense's brief. So the officer intended to detain him, he did detain him, and Mr. Torres wasn't free to leave.

And we also go back to this ID issue, the fact that Officer Shelley kept the ID, the Ninth and Tenth Circuits, Your Honor, have said that that actually turns a consensual encounter into a seizure. And I cited those cases in my brief. So that's a huge issue, okay.

Then we go back to Golphin, upon which the State relies, okay. And I brought out the factual differences that Golphin wasn't moving, he was standing in a group. Officer Shelley came up to Torres while he was moving. It's interesting when reading Golphin to distinguish what exactly it's trying to say versus its dicta because Golphin actually said Golphin did not preserve, and we have not been asked to separately consider, and indeed, do not decide whether or not Golphin, after consensually and voluntarily producing identification, specifically consented to Officer Doemer using that identification in his presence to conduct a

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warrants check or how the lack of any such consent might impact the analysis in this case.

Golphin did not argue below that any consent implied by the production of his identification extended only to the examination of its validity, which was undermined or eviscerated when the officer used his identification for the further purpose of conducting a warrants check. Circumstances may exist in which an officer's conduct exceeds the scope of consent that reasonably can be implied by the act of handing over one's identification, and such circumstances may indicate that a seizure has occurred. That is not, however, the issue before the Court.

So we have to -- when we look at the Golphin case, we have to really parcel through it because there's a lot of meaty stuff in there, but we have to really parcel through it to figure out exactly what it's addressing and what it's just talking about because it's interesting stuff. And we also cannot forget that Golphin is not binding upon this Court.

Now, Golphin also distinguished Mendenhall and Royer, both of which are U.S. Supreme Court cases. And in finding that what happened with Mr. Golphin, past constitutional muster, it distinguished the facts of Golphin between Mendenhall and Royer.

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In Mendenhall, two justices determined that no seizure had occurred because the events evolved on a public concourse. The agents did not wear uniforms or display weapons. The agents did not summon Mendenhall to their presence. Well, the agent was wearing a uniform, Officer Shelley was wearing a uniform, and it looks like Officer Shelley summoned Mr. Torres to his presence.

In Royer, however, the High Court reached the opposite conclusion. A plurality of the United States Supreme Court rejected the State's assertion that the entire encounter was consensual stating, asking for and examining Royer's ticket and driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics and asked him to accompany, asked him to accompany them to the police room while retaining his ticket and driver's license and without indicating any -- without

indicating in any way that he was free to depart, Royer was effectively seized.

So the only way that the State can get around the big problem that they have with the continued detention from running warrants is to say that this was a consensual encounter, and this was not a consensual

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encounter. It's a totality test. The good thing about a totality test is while there are suggestive lists, there's not an exhaustive list. The Court has the discretion to look at the entire circumstances and figure out in light of the entire circumstances whether or not Mr. Torres, as a reasonable human being, would have felt free to leave. And, Your Honor, in light of all the circumstances he wasn't.

Now , the State is also hoping that this warrant is going to act like some sort of pixie dust and say that it's an intervening circumstance that all of a sudden makes everything okay, but it's not. Because in order to do that, in order to say that the warrant is an intervening circumstance that basically rescues the case from illegality, there has to be good faith on the part of the officer, and it has to look like they weren't doing anything, by way of example, like profiling.

That was somewhat discussed in Golphin too, that -- the Supreme Court of Florida said that since the officers were conducting field interviews, they weren't targeting any one particular person, that, you know, what they were supposed to do was go out into the public in this particular area and talk to people, but there was no indication of any bad faith or profiling on their part, okay.

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My client has chosen his head and other parts of his body to express his constitutional rights to free speech, Your Honor. By virtue of looking at him, I am going to say that this detention was made in bad faith and was, in fact, made for no other purpose than profiling him.

THE COURT: But he still has his hood on.

MS. KILPATRICK: Yes, Your Honor, but even when -- can I ask him to stand up, Your Honor?

THE COURT: You want your client to be an exhibit?

MS. KILPATRICK: Yes, I would like the Court to look at him. Stand up, Ralph.

Even if he had his hands in his pockets and everything, he's got tattoos on his head, on his face, on his neck. And I apologize, I didn't get a color booking photo -- you can sit down now, Ralph -- but I did attach a booking photo to my motion to suppress so that the Court could get an idea of what's really going on here.

I would submit, Your Honor, that if this had been the average white, non-tatted minor walking down the street from one house to another, that he would not have been detained. And that is a huge point here.

THE COURT: But there's no evidence of that,

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that the officer did this.

MS. KILPATRICK: But the problem is there's no evidence -- there's no evidence that what the officer did was even remotely lawful either. He said he ran -- he

detained Mr. Torres and ran his -- and ran his ID without being able to attribute or say that there was anything wrong with the ID because of his own personal practice. It wasn't even a Department practice.

If it had been a Department practice, then maybe the officer could say, well, you know, this is what everyone does in all situations, okay, but he said this was his own personal practice because he got fake ID's.

THE COURT: But that's not saying that he continued this detention because the Defendant is Hispanic with tattoos on his face and his head and his neck.

MS. KILPATRICK: Your Honor, that's the only reasonable conclusion given the fact that this was so incredibly arbitrary on the part of the officer. It leaves nothing -- it leaves no other conclusion because of the complete arbitrary nature of this. The officer could not point to any other reason to detain him, nothing, other than it's my own personal practice that I run him for warrants.

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So when you have -- I'm saying that we have a bad faith prong here for this detention because of the -- because there was no legitimate reason to detain him that the officer could point to, none. And once you rise to that level, Your Honor, the fruit of the poisonous tree becomes your only remedy.

Where there is a close -- and this is from Dunaway. The State cited Brown, which was a U.S. case from the 70's, and Dunaway v. New York, which is 442 U.S. 200,

came not too long after it. It's also an attenuation case. Interestingly, the law regarding attenuation really comes from motions to suppress statements to, you know, see if there's any sort of intervening circumstance that could make the statement lawful. So a lot of the law in this area is not going to be about tangible evidence, it's going to be about statements, but the principle still applies.

And Dunaway said when there is a close causal connection between the illegal seizure and the confession -- and here it would be the finding of the gun -- not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

Basically what Dunaway is saying is we can't

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allow the exception to drown out the rule because we have to remember the purpose of the exception. And there was no purpose in Mr. Torres' continued detention.

So first off, Your Honor, this was not a consensual encounter. The totality of the circumstances does not lead one to that conclusion. And the circumstances are different from the Golphin case. And the Frieson case that the State cited that was cited by Golphin is also only a Florida case.

Secondly, Your Honor, if we're talking about attenuation and we're talking about an intervening circumstance, this warrant doesn't come down as an intervening circumstance to say, hey, everything's cool

now, you had a warrant. There was no reason to believe that.

And granted, you know, he wasn't -- you know, he didn't have to hang around for hours to find out that warrant, or you know, perhaps only a couple minutes, as is reflected by the preliminary hearing transcript. But the intervening circumstance and the detection of this gun are back-to-back, okay. And I think logically speaking, in order to have the intervening circumstance remove the taint of the illegality, the intervening circumstance has to be around long enough to set the -- to like press a reset button. And that didn't happen

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here.

The length of the detention occurred illegally. It wasn't that -- not that there's any case law to say this. This is more for the purposes of illustration, but when you think about it on a time spectrum, the receiving of the ID and saying, okay, you're fine, you're obviously almost 30 years old, and detaining him illegally without any reason, reasonable suspicion at all, that took more time than the, okay, you have a warrant, I've confirmed it, you're under arrest, oh, there's a gun.

Because Mr. Torres said as soon as Officer Shelley confirmed the warrants, he said, okay, man, don't freak out, I have a gun. Just letting you know it's in here. So there wasn't enough time really for the intervening circumstance to intervene to take away the taint of the illegal seizure.

THE COURT: How else would an officer discover a warrant, though, other than if the Defendant said, hey, I've got a warrant?

MS. KILPATRICK: There are lots of ways to discover a warrant that are legal. By way of example, traffic stops constantly. I think we've heard in the context of DUI's or -- in those contexts, whenever you have, I think -- of course, the State could object to me

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saying this because it's not within -- it's not in front of the evidence before the Court, but I think all of us have enough experience to know that, and to practically concede that when an officer takes an ID for a traffic stop and is writing citations, that's practically automatic is --

THE COURT: That's my point . That's the only way they're going to discover it is to call it in.

MS. KILPATRICK: Right, but that doesn't -- but in those contexts it doesn't exceed the length of the stop. This is actually something that's before the Court, before the Nevada Court now is -- and it was actually out of this Court. It was a weird case. It was like an auto stop case where Trooper Pickers found drugs, but we had argued below that the detention, because he was going to let him go, that the detention exceeded what he was going to do because he said he was just going to let him go but then he kept him.

And then Judge Memeo said it doesn't matter because I find that there was reasonable suspicion to detain him for the warrant or -- I found that there was reasonable -- or probable cause for the warrant because

the dog hit even though the Defendant was detained outside the scope of Terry to get the dog there. Anyway, we'll see what the Court does with that, but

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it's the same sort of argument.

If the officer is running a warrants check and that does not exceed the length of the initial stop, as in by, you know, way of most illustrative example, an auto stop , okay. You know, you go check, make sure this person's license is valid, can you run it for warrants. That doesn't exceed the length of how long the person is sitting there on the side of the road to get their ticket. This does because there's no other person for him to be -- there's no other reason for him to be standing on the side of the road with Officer Shelley. That's where you have the differentiation.

So if you -- and there's a reason why we don't have cops just like, you know, coming up to people and saying, "Hey, can I check you for warrants? Can I check you for warrants? Can I check you for warrants?" There has to be a reason to do that. And if the cops want to do that while they're waiting for something else to happen, that's when it does happen. That's when the cases that we see come before this Court happen and when we see warrants actually get verified is when someone's waiting on the side of the road for their speeding ticket.

That's not what we have here. Had this been an auto stop, had this been an auto stop, had this

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warrant been found while Officer Shelley was writing him a ticket, I don't think I'd have an issue. But that's not what we have here. And if law enforcement actually is, you know, going to check for warrants in trying to find somebody, that's different. It's not like Officer Shelley was out there looking specifically for Mr. Torres. He had no idea until then.

And the thing is is if we allow conduct like this, then what's going to happen is every person that's stopped on the street walking, which is so much different from driving, I mean, we could -- how long are we going to be on the side of the road? And this occurred -- what month did this occur in -- in February. How long are we going to be on the side of the road in the cold in February waiting for them to check things out?

So this was not a consensual encounter, Your Honor. This exceeded the scope of the purpose of the detention. The purpose of the detention was to see if he was of age. He was. There was nothing to say that he wasn't. And the totality of the circumstances surrounding this case mandate that the evidence gets suppressed. And because this is a dispositive motion, should the Court decide to suppress the evidence, we would ask that the case be dismissed.

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THE COURT: Okay. Mr . Mills, you get the last word.

MR. MILLS: Yes, Your Honor.

Just briefly, I want to respond to the insinuation that this was in bad faith. The State would request that the Court disregard that argument, as it's not totally, completely unsupported by the evidence we heard at the preliminary hearing or from the officer today to insinuate that the -- and outright accuse the officer of being racist and prejudiced against people with tattoos . None of that came into evidence. We don't have any evidence of that whatsoever.

And that, of course, goes to the issue of the fruit of the poisonous tree analysis where you've got -- and, again, this is a pretty much universally-accepted proposition, you know, growing out of Wong Sun and Brown from the U.S. Supreme Court. States have applied this three-pronged analysis to determine whether --

And again, the cases that have done so in Golphin and in that California case, those cases are, you know, pretty close on point where it's a situation where there was a stop, which the Court found there wasn't -- you know, it was a tainted stop. There was not reasonable suspicion for it or whatever. But as a result of that stop, the officer ran somebody's ID,

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found a warrant, arrested him on the warrant, conducted a search incident to arrest, found a firearm or found some drugs or something, pretty similar to what we have here.

And the courts have universally applied that three-step analysis to determine whether that warrant is an intervening circumstance, and they found that it is, absent bad faith. So that's the only thing that would

save that analysis, from the Defendant's standpoint, is bad faith, and that's why she's arguing this. But we have no evidence of that whatsoever. That never came out. It was never even addressed. It only came up in argument. It's totally unsupported by the evidence.

This stop was not in bad faith. Officer Shelley was out late at night, 12:40 in the morning. He sees a person small in stature, kind of staggering, stumbling, as if they're intoxicated. It's totally reasonable to go up and make contact with an individual under those circumstances.

And even if the Court finds that there wasn't reasonable suspicion or further finds that there was a sufficient show of force or authority that converted this from a consensual encounter into a detention, even if the Court makes those findings, there's simply no evidence that this was done in bad faith. It simply was

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not.

And the State will submit it on the arguments.

THE COURT: I've got a question for you.

MR. MILLS: Sure.

THE COURT: This is what I'm trying to wrap my mind around. I've read your documents. I haven't read any of the cases you've cited yet. But for the stop and the detention, the warrant would not have been discovered. So I'm trying to figure out in my mind how that becomes an intervening circumstance. It seems like it's just part of the whole chain of what's going on.

MR. MILLS: Well, Your Honor, I'll read to you from the U.S. Supreme Court. The but-for analysis that you just used that language, they said that doesn't matter. They said –

THE COURT: What case is that in?

MR. MILLS: This is Wong Sun. This is a quote from Wong Sun. The U.S. Supreme Court has stated that not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police.

So the U.S. Supreme Court said the but-for analysis because it -- I see the point you're making, and that's the point they address there is, well, you

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could make the argument that but for this -- assuming arguendo that this was an unlawful stop, but for that unlawful stop he never would have ran the check on the warrants, and the warrant never would have been discovered, and he never would have found the firearm.

So you apply that but-for analysis, and sure, but for that unlawful stop, the firearm never would have been found. But the U.S. Supreme Court said that's not the analysis to apply. The United States Supreme Court has stated that not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. And that's where they go on to talk about the prong test. That's the analysis you apply.

THE COURT: All right.

MR. MILLS: Thank you.

MS. KILPATRICK: Your Honor, I would just -- I'd like to give you a cite. It's very -- it's a recent case. It's Herring --

THE COURT: What's the name?

MS. KILPATRICK: Herring v. U.S., it's United States Supreme Court, 555 U.S. 135. And the -- it was talking just about what Mr. Mills was talking about was to the extent of like the but-for analysis. But it's an interesting case in that it talks about what happens

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when there's something that's accidental. And this was the case where -- like there was a warrant notation like accidentally -- like the guy satisfied his warrant and whatnot, but the warrant got left in their computer, and he got arrested, and then stuff was found.

But the court distinguished Herring because it was -- this was like a completely innocent, like not anything overt. This was like a complete like data entry problem, as opposed to an overaction on the officer's part. And there's a difference between the two. And I think that Herring is an interesting case to look at for that particular proposition.

Thank you.

THE COURT: Okay, thank you. The matter will be under advisement.

MR. MILLS: Thank you.

(Whereupon, proceeding concluded)

STATE OF NEVADA)
) ss.
COUNTY OF CARSON)

I, Julie Rowan, Transcriptionist for the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko, have transcribed the proceedings held in Department 1 of the above-entitled Court on March 27, 2012.

The foregoing is a true and correct transcript, to the best of my ability, from the electronic sound recording of the proceedings held the above-entitled matter.

DATED: This 6th day of November, 2012.

/s/ Julie Rowan
Julie Rowan