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IN THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH, FARMINGTON DEPARTMENT

THE STATE OF UTAH, Plaintiff, vs. GOOD CLIENT, Defendant.	DEFENDANT’S MOTION IN LIMINE Case No. 123456789 Judge: Good Judge
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Good Client (hereinafter referred to as “**Defendant**”), by and through his counsel of record, Billy McBride, respectfully submits this Motion in Limine (hereinafter referred to as this “**Motion**”) to exclude and limit the presentation of certain improper evidence in the above-entitled matter, including, *but not limited to*, the following:

A. All images and/or other digital evidence(s) presumably found on Defendant’s [Name Brand] computer, [Name Brand] tablet, and [Name Brand] laptop, as a result of the searches performed by Forensics Laboratory from July 22, 2018, to August 20, 2018;

B. all images and/or other digital evidence(s) found on Defendant’s [Name Brand] cellphone, which images and digital evidence(s) were described as, allegedly, “images [of] a female exposing her bare buttocks,” among other things);

C. all images and/or other digital evidence(s) allegedly found on Defendant's [Name Brand] thumb drive, which images were presumably of a female that appeared to be the Complainant;

D. all images and/or other digital evidence(s) reportedly found as a result of the search performed by Forensics Laboratory's computer analyst, which images were described as, allegedly, "over 250 images of apparent child pornography" found on Defendant's [Name Brand] laptop following the search warrant served on Defendant's townhome;

E. all images and/or other digital evidence(s) found as a result of the search performed by Forensics Laboratory's computer analyst, which images were allegedly found on Defendant's [Name Brand] Laptop and allegedly depicted Complainant in a sexually explicit fashion;

F. all images and/or other digital evidence(s) allegedly reported to have been observed by Detective Lewis as described in his August 21, 2019, report, which images were described in the report as "seven images depicting the same girl" in a sexually explicit fashion; and

G. all images and/or other digital evidence(s) that fit within the scope of "improper evidence" as described throughout this Motion.

All the items of evidence above-referenced in ¶¶ A – G are hereinafter referred to as "Improper Evidence" or the "Improper Evidence," and no misconstructions or misinterpretations are to limit the scope and inclusion of all the items of relevant evidence, as specifically described by this Motion and incorporated herewith by this reference.

STATEMENT OF FACTS

The following Statement of Facts details a chronological history of the relevant events that transpired subsequent to the May 4, 2018, report of the alleged victim, A.L.S. (hereinafter referred to as “**Complainant**”), where she made allegations of supposed sexual abuse perpetrated by Defendant against her. Defendant was subsequently charged as a result of Complainant’s report.

1. Immediately following Defendant’s charges, Detective Lewis obtained a search warrant to search Defendant’s residence located in Layton, Utah.
2. After executing the warrant, officers found and confiscated an [Name Brand] Laptop computer from Defendant’s residence.
3. Following this, law enforcement obtained a second search warrant to search Defendant’s second residence located in Payson, Utah.
4. As a result of searching Defendant’s Payson residence, officers found and seized approximately fifteen electronic devices, including phones, laptops, camcorders, thumb drives, and cameras.
5. Most of the electronic devices seized from Defendant’s Payson residence were placed into evidence on May 5, 2018, but they were not *listed* into evidence until May 7, 2018.
6. On May 7, 2018, the [Name Brand] Laptop—which was found as a result of the *first* search warrant—was put into evidence.
7. On May 25, 2018, the police department began withdrawing from evidence items seized from Defendant’s residences, and Detective Lewis proceeded to research each item’s respective serial number.

8. The items, whose respective serial numbers were researched, were a [Name Brand] camcorder, [Name Brand] tablet, [Name Brand] laptop, [Name Brand] laptop, and a [Name Brand] digital camera.

9. When the [Name Brand] tablet was examined and its serial number researched, no documentation was produced as to how the research was performed or if the tablet was ever connected to the internet.

10. When the [Name Brand] laptop was examined and its serial number researched, no documentation was produced as to how Detective Lewis obtained the laptop's serial number, whether Detective Lewis turned on the laptop, or whether the laptop's Wi-Fi was turned off so as to prevent it from having access to the internet.

11. The [Name Brand] digital camera's serial number was researched despite the serial number having been listed contemporaneously with the booking of the camera; therefore, there was no need to extract the camera from evidence to research its serial number, as the serial number had already been documented.

12. On May 29, 2018, Detective Jones attempted to search the [Name Brand] smartphone obtained from Defendant's property, but his attempts were unsuccessful; however, despite his unsuccessful search attempts, the smartphone was not returned into evidence until eight days later, and no log(s) or report(s) was/were produced as to the status of the smartphone during that eight-day period.

13. On May 29th, 2018, the [Name Brand] Camcorder, thirty-two disks, [Name Brand] laptop, [Name Brand] laptop, [Name Brand] Chromebook, [Name Brand] laptop, [Name Brand]

camera, [Name Brand] digital camera, six thumb drives and one SD card, [Name Brand] phone, and [Name Brand] music player were searched.

14. However, when these items were being searched, Detective Jones documented each item as still being logged into evidence.

15. When the [Name Brand] music player was being searched, the search was not performed by Detective Jones, and Detective Lewis' report does not state by whom the music player was being searched.

16. On June 13, 2018, Detective Lewis reported the following:

I spoke with Det[tective] Jones who reported that he had been able to perform an extraction on the items seized from the search warrant. Through his investigation [] he had not been able to find any evidence to corroborate or refute the testimony provided by Complainant. No further extractions were scheduled to be performed¹

17. In July of 2018, Defendant's counsel was informed by the State that the electronic devices seized from Defendant's residences *had been searched and that nothing of evidentiary value had been found on the electronic devices.*

18. Defendant's counsel then requested that the State either release the electronic devices or, in the alternative, to allow her investigator access to the electronic devices to search for potential exculpatory evidence.

19. Defendant's counsel was told that the State would need additional time to get the request approved.

¹ Exhibit A (Search Warrant Affidavits, Search Warrants, and Officer Reports), at 52.

20. After Detective Lewis booked the electronic devices into evidence, he checked them out over a period of a year to search or review them.

21. On April 17, 2019, the [Name Brand] camcorder was searched—without an active search warrant—presumably in order to verify that the item had been searched and that all the correct information from the device had been listed correctly.

22. The [Name Brand] camera and [Name Brand] digital camera were also searched during this time—without an active search warrant—to presumably verify that the items had been searched and that all the correct information from the devices was listed correctly.

23. On May 30, 2019, another search was performed on the [Name Brand] smartphone, but said search was performed without a valid search warrant.

24. In June of 2019, Defendant’s counsel received information from the State that the electronic devices were never actually searched, and that past reports indicating that the items were searched were erroneous.

25. Therefore, a new search warrant was requested by the State—Search Warrant No. 1234567.

26. On July 18, 2019, Search Warrant No. 1234567 was issued upon Detective Shawn Eric Lewis’ “Affidavit for Search Warrant.”

27. Search Warrant No. 1234567 was issued for the purpose of searching for digital evidence on the following devices: (a) [Name Brand] camera with its associated memory card; (b) [Name Brand] Camcorder video camera; (c) [Name Brand] cellular phone; (d) six thumb drives and one SD card; (e) [Name Brand] music player; (f) [Name Brand] smartphone; (g) [Name Brand] camera and [Name Brand] Camera; (h) [Name Brand] laptop; (i) [Name Brand] Chrome Book

Laptop; (j) [Name Brand] Mini PC laptop; (k) [Name Brand] tablet; (l) [Name Brand] tablet; (m) [Name Brand] laptop; (n) Writable disks (32 count); (o) [Name Brand] Camcorder with memory card; and (p) [Name Brand] smartphone.

28. On July 18, 2019, Detective Lewis took the above-referenced devices into Intermountain West RCFL (hereinafter referred to as “RCFL”), where he delivered the devices to Computer Analyst, Michael Cole Thon (hereinafter referred to as “Mr. Cole”).²

29. From July 22, 2019, to August 20, 2019, the devices were searched by RCFL, and information was presumably found on the [Name Brand] computer, [Name Brand] tablet, and [Name Brand] Laptop.

30. On July 31, 2019, 32 writeable disks were removed from evidence by Detective Lewis, and the contents of each disk were searched.

31. The officer’s report stated that there was a valid search warrant at the time allowing them to search the disks, but said search warrant had expired, as it had to be served within ten days of it being issued; the search warrant was served ten days *after* it was issued, therefore making it invalid.

32. On August 1, 2019: (1) the [Name Brand] camcorder was checked-out of evidence by Detective Jones, and Detective Jones searched the camcorder without a valid search warrant, as the search warrant that would have allowed for such a search expired on July 28, 2019; (2) the [Name Brand] camera was removed again by Detective Jones and a third search of said camera was conducted; (3) the [Name Brand] digital camera was again removed from evidence by Detective Jones, and a third search of the device was conducted; (4) the [Name Brand] smartphone

² See Exhibit B (Layton City Police Department Officer Reports), at 6 – 9.

was removed again from evidence by Detective Jones and a third search of the smartphone was conducted; (5) the [Name Brand] music player was released to Detective Jones, and said music player was documented to have been reviewed and searched; however, Detective Jones did not document reviewing this item, and so reasonable doubt arises as to who reviewed and searched the music player and whether the music player was actually reviewed and searched at all; and (6) six thumb drives and one SD card were removed again from evidence by Detective Jones and a third search of the items was conducted.

33. None of the aforementioned items of evidence were once again located.

34. Following this, a second search warrant was drafted at the request of the prosecutor, as Detective Jones allegedly “mixed up the [Name Brand] Smartphone and [Name Brand] cellphone when [he] wrote [his] report; [he] mistakenly reported that [he] wasn’t able to gain access to the smartphone when [instead he] meant to write the cellphone.”³

35. After the search warrant was approved, Detective Jones searched the [Name Brand] Note 4 and the [Name Brand] smartphone, and allegedly found on the [Name Brand] smartphone “images [of] a female exposing her bare buttocks,”⁴ among other things.

36. One of the items listed was a pink scan disk thumb drive allegedly containing multiple pictures of a female that presumably appeared to have been Complainant.

³ Exhibit A, at 55 (stating—verbatim, with mistakes and all if any—that “[i]t should be noted that in my initial supplement, I stated that I had searched the iPhone X and I wasn’t able to gain access to his device. This was a mistake on my part as I mixed up the [] iPhone and Samsung Galaxy when I wrote my report. I mistakenly reported that I wasn’t able to gain access to the iPhone when I meant to write the Samsung Galaxy.”).

⁴ *See id.* (stating—verbatim, with mistakes and all if any—that “I observed duplicate images of a female exposing her bare buttocks.”).

37. On August 14, 2019, at approximately 1:00 p.m., Detective Lewis travelled to Intermountain West RCFL to speak to Mr. Thon regarding Mr. Thon's investigation of the devices.⁵

38. Mr. Thon reported that he had completed searching approximately 40% of the files on the devices.⁶

39. In addition, Mr. Thon reported that he had "found over 250 images of apparent child pornography on the laptop seized via the search warrant served on [Defendant's] Layton Townhome."⁷

40. Among the images, Detective Lewis reportedly found some images that allegedly depicted Complainant in a sexually explicit fashion.⁸

41. In an August 20, 2019, report, a notation by Detective Jones and Detective Lewis stated that several electronic devices had been removed and placed back into evidence during the 15 months the evidence was stored at the Layton Police Department Property and Evidence unit.⁹

42. In the report, Detective Lewis attempted to justify the instances when the electronic devices were removed from evidence to be searched again, but provided no reason as to why said

⁵ See Exhibit B, at 12 (stating that "[o]n 08-14-19 at 1300 hrs., DCA Susan Hunt and I travelled to Intermountain West RCFL to speak to Computer Analyst Michael 'Cole' Thon regarding his investigation of the electronic equipment I'd delivered on 07-18-19 at 1438 hrs.").

⁶ See *id.* (reporting—verbatim, with mistakes and all if any—that "Cole said that he'd completed about 40% of the many files on the systems that I'd given him . . .").

⁷ *Id.*

⁸ See *id.* (reporting—verbatim, with mistakes and all if any—that "[t]he image depicted a light skinned female with medium colored hair pulled into a bun style . . . Although blurry, I could recognize what I believed was Alleged Victim.").

⁹ See *id.* at 3 – 9.

electronic devices were to be searched; there were neither follow-ups nor justifications for most of the electronic devices as to why they were removed from evidence and subsequently searched.¹⁰

43. In his August 21, 2019, report, Detective Lewis reported to have observed “seven images depicting the same girl”¹¹ in a sexually explicit fashion.

44. On August 27, 2019, Defendant’s counsel finally received the discovery she had requested on several occasions as of June 8, 2018.

45. Said discovery request was to request all evidence in possession of the State, or law enforcement acting on behalf of the state; the discovery request was ongoing.

46. The day of August 27, 2019, was the first time that Defendant’s counsel received a copy of all the search warrants, affidavits, supplemental reports, and documentation related to the search of Defendant’s electronic devices that were seized more than *fourteen* months prior.

ARGUMENT

I. Defendant has a strong standing to move the Court to exclude and limit the presentation of the Improper Evidence in the above-entitled matter, due to the improper handling of the electronic devices from which said evidence was gathered by the Layton Police Department, as well as due to chain of custody issues regarding the electronic devices and evidence gathered therefrom.

According to the Verified Affidavit of Private Investigator (attached hereto as “Exhibit C”), an investigator hired by Defendant’s counsel, “[t]here are several discrepancies noted in the

¹⁰ See *id.*

¹¹ Exhibit B, at 13.

police report involving evidence handling, processing evidence, and reviewing evidence.”¹² Ms.

Investigator goes on to explain that,

After Detective Lewis booked the items received into evidence, he checked them out over a period of a year to ‘search or review’ these items of evidence. [The] Layton Police Evidence Policy and Procedure Manual states [that] “[e]ach person receiving property will make the appropriate entry to document the chain of evidence. Temporary release of property to officer for investigative purpose, or for court, shall be noted in the records management system, stating the date, time and to whom released The return of the property should be recorder in the records management system, indicating date, time and the person who returned the property.” This is Layton Police Department Policy and Procedure 804.6.3 Status of Property.¹³

Furthermore, Ms. Investigator declares that,

No information regarding the chain of custody was completed until defense attorney Jeanne Campbell asked for such evidence.¹⁴ It is not procedure to continually check items out of evidence for brief periods of time and then check them back into evidence with no clear documentation. There is also a discrepancy noted between the detectives and the evidence technician on dates and times these items of evidence were removed or searched at evidence. Further, the term “search” is not defined, nor is there an explanation as to who, or why, the search was conducted. And the conclusions were not documented.¹⁵

Finally, Ms. Investigator concludes with:

When Detective Lewis and Detective Jones used the term “searched,” it is not documented as to how this was performed or what they [] observe[d]; even if it was not relevant to a criminal charge, what is found could also be important to an objective investigation. Also, documenting a year later as to even searching the device is of concern as there are many cases a detective can handle during this time and trying to recall an incident from a year ago could result in improperly documenting what was located.

¹² Verified Affidavit of Kelly J. Shafto (attached as “Exhibit C” hereto), ¶ 12.

¹³ *Id.* at ¶ 14.

¹⁴ *Id.* at ¶ 15.

¹⁵ *Id.* at ¶ 16.

Therefore, all the discrepancies exposed by Ms. Investigator as to the police's handling of the evidence, processing of the evidence, and reviewing of the evidence, compel the conclusion that the evidence was not handled properly by law enforcement; thusly, this establishes reasonable doubt as to the reliability of the evidence, and presenting said evidence in this case would unduly prejudice the case. WHEREFORE, the evidence should be excluded pursuant to Rule 403 of the Utah Rules of Evidence on the grounds that the evidence's "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [and] misleading the jury"

Furthermore, the Layton Police Department's improper handling of the evidence caused issues with the chain of custody of said evidence. Utah Code § 24-2-103 states that,

The agency responsible for maintaining the property shall (a) hold all the seized property in safe custody until it can be disposed of as provided in this title, and (b) maintain a record of the property that includes (i) *a detailed inventory of all property seized*, (ii) the name of the person from whom it was seized, and (iii) the agency's case number (emphasis added).

The Layton Police Department failed to maintain "a detailed inventory of all the property seized" as required by Utah Code § 24-2-103(b)(i); indeed, there only exists a very basic record of where the electronic devices were located while in the custody of the Layton Police Department, and, as reflected in the Statement of Facts and in the relevant sections of Ms. Investigator's affidavit hereinabove, there were instances where *no* record was made as to the location, status, or what evidence was gathered (if any) from certain electronic devices. Therefore, there are clear and significant deficiencies in the chain of custody of the property seized from Defendant, which causes the evidence gathered as a result of searching said property to become unreliable and unduly prejudicial to Defendant and his case. Indeed, with no record made as to the location, status, or

what evidence was gathered (if any) from certain electronic devices, it is impossible to ascertain the reliability of the evidence gathered from said electronic devices, and it cannot be proven beyond a reasonable doubt that said evidence did not become *tainted, corrupt, or even fabricated*. The probative value of the Improper Evidence is, therefore, significantly outweighed by its prejudicial effect on the case, and the Court should reasonably find itself compelled to exclude it entirely.

In *Jensen vs. DeLand*,¹⁶ Plaintiff appealed the dismissal of his petition for a writ of habeas corpus for a criminal case in which he was convicted of aggravated robbery.¹⁷ Among other things, Plaintiff complained that the prosecutor “entered evidence without a proper showing of chain of custody.”¹⁸ The court in this matter, finding that there was an inadequate record, remanded the case to the district court for an evidentiary hearing.¹⁹ Therefore, as there exist significant chain of custody issues in the present case due to the Layton Police Department maintaining inadequate records of Defendant’s seized property, the Court should exclude and limit the presentation of the Improper Evidence gathered therefrom.

II. Defendant has standing to move the Court to exclude and limit the presentation of the Improper Evidence in the above-entitled matter, due to the prosecutor’s breach of his/her prosecutorial duties.

¹⁶ 795 P.2d 619, (Utah 1990).

¹⁷ See *State vs. Jensen*, 727 P.2d 201 (Utah 1986).

¹⁸ *Jensen*, 795 P.2d 619.

¹⁹ See *id.* at 621 (stating—verbatim, with mistakes and all if any—that “[i]t is impossible for us now to adequately review plaintiff’s sixteen claims of ineffectiveness without an adequate record We therefore remand to the district court for an evidentiary hearing on this issue alone . . .”).

The prosecution in this case failed to respond to the discovery requests of Defendant's counsel in a manner that satisfies the requirements of Rule 16 of the Utah Rules of Criminal Procedure, which states that "[t]he prosecutor shall make all disclosures *as soon as practicable* following the filing of charges and before the defendant is required to plead. The prosecution has a continuing duty to make disclosures." As aforementioned in ¶ 28 of the Statement of Facts hereinabove, Defendant's counsel served Defendant's discovery requests upon the prosecution on June 8, 2018, but Defendant's counsel did not receive the requested information until August 27, 2019—14 months and 19 days after serving Defendant's initial discovery requests upon the prosecution. Reason compels the conclusion that the "as soon as practicable" clause of Rule 16 of the Utah Rules of Criminal Procedure describes a time period which *most certainly* is less than the 14 months and 19 days it took the prosecution to respond to Defendant's discovery requests; indeed, a reasonable person *could not* argue that the soonest "*practicable*" time for the prosecution to respond to Defendant's discovery requests was 14 months and 19 days after said discovery requests were served; indeed, there *must* have been a sooner *practicable* time available to the prosecution to respond to Defendant's discovery requests. This, therefore, compels the conclusion that the prosecution's delay in responding to Defendant's discovery requests was deliberate and, thusly, clearly violates its prosecutorial duties.

Rule 16 of the Utah Rules of Criminal Procedure further states that "[i]f . . . a party has failed to comply with this rule, the court may order . . . to permit the discovery or inspection, grant a continuance, or *prohibit the party from introducing evidence . . .*" (emphasis added). Wherefore, Defendant has strong standing to move the court to specifically "prohibit the [prosecution] from introducing" the Improper Evidence in this matter.

III. Defendant has standing to move the Court to exclude and limit the presentation of the Improper Evidence in the above-entitled matter, due the Layton Police Department's unreasonable retention of Defendant's seized property outside of the scope of the warrant, which, according to *United States vs. Ganius*,²⁰ constitutes a violation of Defendant's Fourth Amendment rights.

In *United States vs. Ganius*, the Second Circuit held that the government's retention of files outside the scope of a warrant from lawfully imaged hard drives for over two and a half years violated the Fourth Amendment.²¹ Likewise, the Layton Police Department's retention of Defendant's seized property compels the conclusion that they too violated the Fourth Amendment, as said property was retained for the vast majority of the time without a valid warrant. As stated in ¶ 12 of the Statement of Facts hereinabove, Defendant's counsel was informed, by the State itself, in July of 2018 that the electronic devices seized from Defendant's residences had been searched and that nothing of evidentiary value has been found. Notwithstanding, the electronic devices remained in the custody of the Layton Police Department, where they still remain as of the date of this Motion. After failing to find anything of evidentiary value on Defendant's electronic devices in July of 2018, the Layton Police Department should have returned said devices into the rightful ownership of Defendant; however, they instead kept the seized property in their custody despite there being no compelling justification to do so, constituting a prima facie case of a *wholly unreasonable* seizure of property for an *unreasonably* and *unduly* prolonged length of time. For

²⁰ 755 F.3d 125 (2d Cir. 2014).

²¹ *See id.* at 141 (concluding—verbatim, with mistakes and all if any—that “the Government violated Ganius's Fourth Amendment rights by seizing and indefinitely retaining non-responsive computer records, and then searching them when it later developed probable cause.”).

such violation of Defendant's constitutionally protected Fourth Amendment rights, therefore, the Improper Evidence obtained as a result should be suppressed and excluded.

CONCLUSION

Pursuant to the foregoing facts and arguments presented, Defendant has strong standing to move the Court to exclude and limit the presentation of the Improper Evidence, due to (1) the improper handling of the electronic devices from which the evidence was gathered by the Layton Police Department; (2) the chain of custody issues regarding the electronic devices and evidence gathered therefrom; (3) the prosecutor's breach of his/her prosecutorial duties; and (4) the Layton Police Department's unreasonable retention of Defendant's seized property outside of the scope of the warrant.

WHEREFORE, considering the foregoing factors and arguments presented, it is evident that the Improper Evidence must be excluded, and its presentation limited, from the case; therefore, Defendant hereby respectfully moves the Court to exclude and limit the presentation of said Improper Evidence.

DATED November 11, 2019.

Altioem Legal Services, PLLC

/s/ Billy McBride
Billy McBride,
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2019, I caused to be served, via electronic filing, a true and correct copy of the foregoing upon:

Davis County Attorney's Office

/s/ Billy McBride