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2 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
3 FOR THE COUNTY OF MULTNOMAH  
4

5  
6 STATE OF OREGON,

Case No.: 19CR53657

7  
8 Plaintiff,

9 vs.

AMENDED DECLARATION OF LEGAL  
ADVISOR

10 THEMBA HASAAN KELLEY,

11 Defendant.

12 **DECLARATION**

13 I, Westbrook Johnson, state as follows

- 14  
15 1. I, Westbrook Johnson, have worked as a criminal defense attorney in Multnomah  
16 County for close to a decade and prior to that as a judicial clerk. I have likely  
17 represented over one thousand clients prosecuted by the Multnomah County District  
18 Attorney's Office. I have been Themba Hasaan Kelley's Legal Advisor since March  
19 of 2022. In that capacity I have assisted Themba Kelley by formatting pleadings,  
20 contributing content, subpoenaing necessary documents and records, acting as a  
21 liaison for Themba Kelley to communicate with DDA Nicole M. Hermann and  
22 providing legal counsel when necessary. In that role, I have reviewed copious  
23 transcripts, pleadings, declarations/affidavits of counsel, medical reports, and police  
24 reports. It is my review of the records in Themba Kelley's cases that I rely on in  
25 support my position regarding the issues in his prior and pending cases.  
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28 AMENDED DECLARATION OF LEGAL ADVISOR - 1

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- 1           2. The pending case(s) inexplicably continue to be pursued by the Multnomah County  
2           District Attorney’s Office. I can confidently say *that this case (19CR53657) is truly*  
3           *unique and exceptional*. Never have I seen the Multnomah County District Attorney’s  
4           Office prosecute a case so flawed, a criminal investigation so inept and a witness  
5           whose statements and sworn testimony are so provably false. Since the complaining  
6           witness’s first interaction with law enforcement, beginning with the call to BOEC, her  
7           statements have contradicted themselves, objective facts and even reality. Puzzlingly  
8           the state has forged ahead with their prosecution for more than three years.
- 9           3. The Multnomah County District Attorney’s office is fully cognizant of the issues with  
10           the pending case, with the complaining witness and with the allegations of  
11           prosecutorial misconduct through several hearings, filed pleadings, and reports. Even  
12           after Judge von Ter Stegge stated on the record, “... it does not appear to be a strong  
13           case for the State ...” the government continues their efforts to convict Themba  
14           Kelley. I don’t say this lightly, but the District Attorney’s Office is aware, and has  
15           been, that their sole witness is not credible and yet has continued to defend her in a  
16           way that is unprecedented in my experience.
- 17           4. What is even more uncharacteristic and bizarre is how Themba Kelley has repeatedly  
18           been the target of baseless criminal prosecutions by the Multnomah County District  
19           Attorney’s Office since as far back as 2013. Notably, on August 19, 2014, and  
20           September 8, 2014, prior defense counsel, Barry Engle, briefed and filed two legally  
21           sound memoranda, which were argued on November 3, 2014, in front of the  
22           Honorable Michael Greenlick. DDA Christine Mascal was present for that hearing in  
23           case number 140130106. Mr. Engle explained that Themba Kelley was not convicted

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1 of a sex offense and not required to report as a sex offender. The gist of this argument  
2 is that for a Luring a minor conviction to be a sex crime, the court must indicate the  
3 designation and the findings supporting the designation in the judgment. ORS  
4 167.057 (5)(b). When Themba Kelley was sentenced and a judgment entered on that  
5 charge, the court made no such findings, and the Judgment did not indicate that the  
6 court was designating the charged crime as a sex crime under ORS 163A.005.

7  
8 5. On November 7, 2014, DDA Christine Mascall, ignoring this probability, and with  
9 multiple news reporters present to disseminate this false narrative, stated, “He’s a  
10 narcissist, he’s a sex offender and he’s a drug addict.” The same news organizations  
11 were present when it was made clear that Themba Kelley had never been convicted of  
12 a sexual offense on January 8, 2018. These false statements, among others, have been  
13 the headlines describing Themba Kelley in the media to this day.

14  
15 6. DDA Mascall took this one step further on September 24, 2014, by seeking an  
16 Indictment against Themba Kelley for Failure to Report as a Sex Offender in  
17 14CR21923. What followed was an acquittal and an admonishment by the Honorable  
18 Kathleen Dailey for vindictive prosecution. This statement was off the record, but  
19 confirmed by Themba Kelley’s prior attorney, Lee Wachocki who was present. What  
20 is astonishing is that, without prompting, Mr. Wachocki immediately recalled the case  
21 and the statement almost 9 years later. Nevertheless, almost two years after a judge  
22 ruled that Themba Kelley was not required to report as a sex offender, the District  
23 Attorney’s Office refused to acknowledge that. In July of 2016, KATU news  
24 contacted the Multnomah County District Attorney’s Office for clarification and the  
25 response was we’re “looking into it.” This false designation as a sex offender has  
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AMENDED DECLARATION OF LEGAL ADVISOR - 3

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1 continued to haunt Themba Kelley, including resulting in his discharge from DePaul  
2 treatment center after only 8 days after “there was an anonymous report that the client  
3 did indeed have a history of sex offense charges.”  
4

5 7. Another example is in 16CR46168. In that case, the state and defense attorney, Barry  
6 Engle, agreed to a resolution that took into consideration that Themba Kelley needed  
7 not only substance abuse counseling but also mental health treatment. Dr. Wilson  
8 Kenney has opined that Themba Kelley could not have formed the intent required to  
9 commit the crimes charged. The parties agreed that Themba Kelley would enter a no  
10 contest plea to Attempted Sexual Abuse and sentencing would be set over. Judge  
11 Souede stated “... if your probation has not been revoked by [July 8, 2019], that  
12 Count 3 will be dismissed and no conviction will be entered.” The plea entered  
13 pursuant to ORS 135.432(2). This is after the judge praised the District Attorney’s  
14 Office for being a place “where prosecutors are willing to look at and think seriously  
15 about the implications of mental health. And to look at defendant’s who are charged  
16 with very serious crimes as individual human beings who may be acting because of  
17 illness rather than out of some evil within them.” However, when the parties appeared  
18 ultimately to argue regarding disposition, the state, through DDA Amity Girt, argued  
19 that the agreement in the written plea petition was inconsistent with her expectations  
20 so Themba Kelley opted to withdraw his plea.  
21  
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23  
24 8. Even though the parties agreed that Themba Kelley’s mental health was the driving  
25 force behind the 16CR case, the state continues to seek a conviction on a single count  
26 of attempted sex abuse. The evidence of which hasn’t gotten stronger with age. The  
27 defense will have Dr. Kenney ready to testify. The state’s expert’s report and opinion  
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AMENDED DECLARATION OF LEGAL ADVISOR - 4

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1 are not based on accepted practices in the field of psychology, not supported by  
2 reliable or accurate evidence and not competent. Former defense counsel, Barry  
3 Engle filed a Motion *in limine* that is a scathing review of the report and evaluation  
4 by Dr. Erica Leeper which is infected with inaccuracies, unreliable sources, bias, and  
5 a complete lack of professionalism. The state's own lead investigator, Detective  
6 Clevenger, when Themba Kelley tells him, "There was nothing. There was no -- no --  
7 no -- no nothing[]" will testify that he spoke to the complaining witness and "[t]hat's  
8 what she said." Following this interaction, the detective announces his theory of what  
9 actually happened: "I think you went into the house to get something so you could go  
10 up and you could sell it or trade it for dope, and then ran into her, and then you woke  
11 her up and -- and she was scared, and you were kind of startled, and she started  
12 dialing 911 and you jetted." Yet, the state has not dismissed this case that had been  
13 considered a mental health issue and not a criminal issue per attorney Barry Engle.

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17 9. As a result of the withdrawn plea, the state now has two weak cases to try. On  
18 October 8, 2020, the state sought to join Themba Kelley's cases. Defense counsel  
19 Engle argued that this was an effort to bolster these two weak cases by unfairly  
20 prejudicing Themba Kelley. Judge Moawad denied the state's motion to consolidate  
21 and count 3 is still an open separate case. Themba Kelley has filed several  
22 memoranda in support of a motion to dismiss this case and intends to file additional.  
23 There are several hundreds of pages pointing to what appears to be an insurmountable  
24 set of weaknesses in this case and I cannot conceptualize why they continue to pursue  
25 Themba Kelley in this manner.  
26  
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1 **I hereby declare that the above statement is true to the best of my knowledge and belief,**  
2 **and that I understand it can be used as evidence in court and is subject to penalty for**  
3 **perjury.**

4 DATED: October 16, 2022.


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7 Westbrook Johnson, OSB# 076967  
8 Legal Advisor to Defendant

1 PROOF OF SERVICE

2 The UNDERSIGNED CERTIFIES that an accurate and true copy of the attached  
3 document was served upon the Multnomah County District Attorney's Office by email to DDA  
4 Nicole Hermann's email listed in the bar directory and/or via eFile and Serve (if service  
5 contacts were entered).  
6

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8 Dated this 16 October 2022  
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11 By:   
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13 Westbrook Johnson  
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28 AMENDED DECLARATION OF LEGAL ADVISOR - 7

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