

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,
Plaintiff,

vs.

THEMBA HASAAN KELLEY,
Defendant

Case No.: 19CR53657

BRIEF ON THE MERITS No. 2
IN SUPPORT OF DEFENDANT’S MOTION
TO DISMISS FOR PROSECUTORIAL
MISCONDUCT:

**The State Stole and Destroyed The 7-Eleven
Video Evidence to Cover up a “Second”
Gun Lie**

With all the state mayhem already present in this case regarding the “gun,” one would think there couldn’t possibly be anything else. Unfortunately, that is not the case. SDDA Nicole M. Herman undeniably knew and knows now, that exculpatory video evidence directly related to “the gun,” and even more importantly to the complete exoneration of Themba Hasaan Kelley was taken, seized, stolen and knowingly destroyed by the State and its representatives. This we accuse was done with the deliberate intent to cover up, as well as offer deceitful support, for a “second” gun lie.

The Supreme Court has held that “unless a defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of Due Process.” *Arizona v. Youngblood*, 488 U.S. 51, 58 (1999). The 9th Circuit has further held in *United States v. Sivilla*, “In evaluating the quality of the government's conduct:

‘the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of

1 care for police and prosecutorial functions, and, if the acts were deliberate, whether they
2 were taken in good faith or with reasonable justification **It is relevant also to**
3 **inquire whether the government attorneys prosecuting the case have participated**
4 **in the events leading to loss or destruction of the evidence, for prosecutorial action**
5 **may bear upon existence of a motive to harm the accused.** *United States v. Loud*
6 *Hawk*, 628 F2d 1139, 1152 (9th Cir 1979).”

7 714 F.3d 1168, 1173 (9th Cir 2013).

8 Because there are so many layers of misconduct which pertain to this one material issue
9 and further because the above constitutional requirement laid out by the Supreme Court demands
10 that defendant prove bad faith on behalf of the government, *Pro Se* Defendant, Themba Hasaan
11 Kelley, and Legal Advisor, Westbrook Johnson, have devoted a comprehensive brief to the
12 “stolen video evidence” alone. With confidence in the truth-seeking function of the tribunal, and
13 also with great expectation that our truthful position will be embraced; in excellent faith do we
14 beseech this Court to dismiss this case eternally.

15 The GPD follow-up report on page 529 states:

16 This location (7-11) does not have OPERATIVE OUTDOOR CAMERAS. NO
17 OUTDOOR CCTV was obtained.

18 I seized the DVR from this location in an effort to extract any possible video from the
19 hard drive **and I gave this DVR to Detective Wright for analysis.** I was told the system
20 was inoperative at the time of the incident and no data was available.

21 Above, Detective Turnage begins his report by stating that 7-Eleven “does not have
22 operative out-door-cameras.” Turnage then explains; because 7-Eleven does not have
23 “operative” out-door-cameras, no out-door CCTV (video footage) was obtained.

24 Turnage then provides further explanation to all the above and states, “I seized (took) the
25 DVR from this location (7-Eleven) in an effort to extract any possible video from the
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1 HARDRIVE and **I gave this DVR to Detective Wright for analysis¹**.” Turnage then concludes
2 the [out-door-camera-portion] of his report by stating, “**I was told [assumably and allegedly by**
3 **Detective Wright] the system was inoperative at the time of the incident and no data was**
4 **available.**”

5
6 The State did not *voluntarily* provide the above follow-up report. The report was only
7 written *after* the Defense demanded the 7-Eleven outdoor video-footage. In other words, prior to
8 the “follow-up report” being requested and then written, no other report regarding the 7-Eleven
9 video existed. *That is, the report was written three months after the camera system was taken*
10 *from 7-Eleven. Disturbingly, Turnage’s report does not include the name of the person the state*
11 *seized the camera from.* Turnage’s report doesn’t meet, the “... reasonable standards of care for
12 police or prosecutorial functions ...” *Id.* whatsoever.

13
14 On email sent to the defense on July 22, 2022, the SDDA confirmed, “I have no
15 additional reports and confirmed with GPD that I have all the reports from the system and they
16 have all been discovered.” Again, the only report in existence that was ever written regarding the
17 seizing of the 7-Eleven DVR, was three months after it was taken, and only because the defense
18 requested the 7-Eleven outdoor video evidence.

19
20 “[A] police officer, investigator ... shall take the following actions as soon as possible;
21 (a) **use a department – approved property report to describe the item and the**
22 **circumstances under which it was taken into custody. Ensure that all information**
23 **concerning the owner or finder is included ... the above actions shall be completed**
24 **prior to the end of the employee’s work shift, in which the member took custody of**
25 **the item.**”

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28 ¹ This is a lie that will be explained further in the document.

1 Gresham Police Department Policy 12-1.3.1 Property Impound Procedure.

2 Already do we see the seeds of bad faith being planted into the case by the government.
3 Turnage seized an entire camera system related to a kidnap and rape case and didn't have the
4 good faith to document the name of the person he took the entire camera system from.
5

6 It was Themba Hasaan Kelley (and no one else) who insistently and repeatedly told his
7 Defense Counsel; that that out-door footage would prove unequivocally that Wendy Parris' and
8 SDDA's Hermann's grand jury testimonial-collaboration regarding the *7-11-gun disposal* in-sin-
9 uation; was nothing more than a *state – sanctioned hoax*. Wendy Parris told the GPD SWAT
10 team, that Themba Kelley was inside motel room 208 "armed with a gun." That was found to be
11 a lie, on the same day of the arrest. Five days later at grand jury, and a nonexistent gun was
12 recklessly and maliciously presented 49 times. It was when the gun presentation concluded on
13 the 49th time, that the following testimonial exchange occurred between the SDDA and Wendy
14 Parris:
15

16 SDDA: Okay. Let me check my notes if I can. And you said after you saw the gun at 7-
17 Eleven you never saw it again; is that right?

18 Here above do we clearly see the SDDA concluding the gun presentation by checking her
19 notes, and intentionally condoning and presenting a second gun lie. That is, the SDDA recklessly
20 disregarded the physical evidence; intentionally chose to remain willfully blind to the first gun
21 lie; and further, presented a new theory which was that Wendy Parris last "saw the gun at 7-
22 Eleven." The conversation continues:
23

24 Parris: Right.

25 SDDA: Okay. You didn't see it in the car as you were driving back or anything like
26 that?

27 Above, the SDDA pretends as if she is oblivious to the evidentiary truth, that Wendy
28

1 Parris lied and told the entire GPD SWAT team, that the defendant was inside room 208 “armed
2 with a gun.” What difference should it have made to the SDDA that she “didn’t see it in the car
3 as you were driving back or anything like that,” when Parris had already been found to have lied
4 about the presence of the gun 5 days earlier? The SDDA’s gun presentation is biased to the core.
5

6 The conversation continues;

7 Parris: Hmm. Mm. I don’t know -- I don’t know if he, like, sold it to that guy. I don’t
8 know. I don’t know what happened to that (*indiscernible*).

9 SDDA: Okay. And it sounds like you were kind of focusing on your phone and not --

10 Parris: Right.

11 SDDA: -- really listening to

12 Parris: Yeah.

13 SDDA: -- everything he was saying; is that right?
14

15 Above, Wendy Parris concludes her testimony by saying, that she does not know “what
16 happened to that” gun. On the day of the arrest, she was certain he was in the motel room “armed
17 with a gun.” That was a lie. How dare the SDDA act as if that doesn’t matter, when that lie
18 almost cost the defendant his life.
19

20 It was because of the above testimonial exchange, that the defendant urgently asked
21 Barry Engle to discover the 7-Eleven video footage. The defendant knew if that video was
22 discovered, it would prove the 7-Eleven gun-guessing testimony was merely another lie and the
23 state would have to release him. However, due to the State’s non-sensical excuse cited above;
24 and a deceitful email sent by the SDDA to the Defense Counsel; that critically important video
25 footage was never discovered. With that said: The State’s erroneous claim, that the 7-Eleven
26 outdoor-camera-system was “inoperative” (not working, or functioning properly, etc.) “at the
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1 time” of the alleged incident is non-sense, a lie, fraudulent and un-true.

2 The following report from private investigator Rick Gove provides the proof:

3 At some time over the summer, he [7-Eleven Manager] did not know exactly when, **the**
4 **police came to his store and took the DVR for the exterior [outdoor] cameras and**
5 **told him they would replace it or return it.** They *never* returned it, so the exterior
6 [outdoor] cameras are not operable.

7 According to Gove’s critically important report: The 7-Eleven store manager said that the
8 exterior (outdoor) cameras were “taken” by the police; never “returned” by the police; and
9 because “the police” *never returned* the exterior (outdoor) cameras; 7-Eleven had no *outdoor*
10 video footage to provide Investigator Gove.

11 The Turnage report and the Gove report both agree that the GPD “took” the exterior
12 (outdoor) camera-system. **However, one critically important thing Gove reported that**
13 **Turnage did not; is that the State “NEVER” returned the outdoor camera system. That’s a**
14 **serious problem.** Particularly, because the defense wanted to retrieve it and could not. The last
15 thing they expected was for the 7-Eleven to tell them that the police had not returned the system.
16

17 Turnage claims that he was told (by a GPD employee that *supposedly* analyzed the DVR-
18 hard drive) that the outdoor camera system “itself” was not working properly (AKA inoperable)
19 “during” the alleged incident. Or, alternatively, perhaps Turnage is saying that 7-Eleven told him
20 that. Either way, this is entirely inconsistent with Rick Gove’s report.
21

22 Rick Gove’s report clearly states:

23 They (the GPD) never returned it (the DVR) so the exterior (outdoor) cameras are
24 not operable.

25 In other words, according to the 7-Eleven store manager, the reason the 7-Eleven no
26 longer had “operable” cameras had nothing to do with the system not operating (functioning
27 properly) during the alleged incident as Det. Turnage alleged. The 7-Eleven store manager, said
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1 nothing to Gove about the camera system having operational issues.

2 Rick Gove's report is clear. The reason 7-Eleven no longer had an "operating" outdoor
3 camera system was because the GPD took, seized, and *stole*² it. They took the camera system
4 and "never returned it." Moreover, if the GPD had acted in good faith and documented things in
5 accordance with "established and reasonable standards of care for police and prosecutorial
6 functions." *Sivilla, supra*. This could have all been worked out 3 years ago. Apparently, the state
7 did not want this all worked out 3 years ago.

9 Government lies

10 At a Discovery Hearing, held January 9, 2020, defense counsel Barry Engle testified, that
11 he was confused about who the specific police officer was who took the 7-Eleven camera
12 system. For whatever reason, he could not pin-point, Detective Turnage's direct involvement. At
13 that hearing, Barry Engle and Rick Gove testified the following:

14
15 Rick Gove: "... and [the 7-Eleven store manager] said the exterior footage, the police had
16 come and asked for the entire computer that they had and they took that computer. **[The**
17 **7-Eleven store manager] said that they told him that they would return or replace it,**
18 **but they never** did. And then he said at a later date -- I asked him if anyone had -- any
19 police officers had come and asked them for footage, if that had happened after the police
20 had taken the camera -- or the computer. And [the 7-Eleven store manager] said that had
21 happened ... so ... I don't know if that was the situation where they came for the August
22 12th or 13th footage (the Themba Kelley case), but it -- it seemed to comply with what
23 was in the officer's report."

24 Barry Engle: "In other words, you don't know if the one where they took the device and
25 didn't bring it back was the Kelley matter or the one where they asked for it and the other
26 cops had taken it or if that was completely two different machines? You're not sure?"

27 Rick Gove: "I'm not sure. And the -- the manager didn't -- he didn't have any log
28 information or dates or paperwork to -- to kind of pinpoint the dates on it."

28 ² "Steal" vb 1 to take (something) without right and with intent to keep. The Merriam Webster Thesaurus
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FOR PROSECUTORIAL MISCONDUCT - 7

1 The SDDA admittedly communicated with the GPD, months before that January 9th,
2 2020 hearing specifically about the 7-Eleven video investigation. Regarding the above, on an
3 email dated November 26, 2019 she wrote: “I followed up with Detective Cobb and Detective
4 Turnage ...” Had the SDDA wanted to, she could have cleared up Barry Engle’s confusion, by
5 simply telling him that it was Turnage who had taken and also, who had not returned the camera
6 system. Nonetheless, when the testimonial – confusion between Engle and Gove concluded, and
7 the court asked SDDA Hermann if she had anything to say; she only replied, “*I don’t.*”
8

9 Because of the above omission; and also, being told by the SDDA on that above
10 November email, “... specifically, there is no outside cameras ...;” Barry Engle reasonably
11 concluded; that there were no “outside cameras.” That reasonable conclusion has lingered in
12 the back of Barry Engle’s mind for the last 3 years. In fact, on July 29th, 2022, when Legal
13 Advisor, Westbrook Johnson, questioned Barry Engle about his recollection regarding the 7-
14 Eleven camera system; Barry Engle swiftly replied: “... I recall that the state denied it existed
15 at that discovery hearing ...”
16
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18 Three years later, and Barry Engle still believed “specifically, there is no outside
19 cameras.” But there were; “*outside cameras.*” The SDDA told a lie. What she didn’t include in
20 her dishonest email, was the reason “*there is no outside cameras*” was because her own
21 investigator stole the camera system. Disturbingly, on July 22nd, 2022, the SDDA materially
22 contradicted the above, and instead of there not being any “outside cameras;” the SDDA changed
23 that around totally, and 3 years later she now claims,
24

25 “*... I have finally located the 7-Eleven DVR ...*”

26 As if to say, she was oblivious to where it was for the last 3 years, and she is just an
27 innocent bystander in the case, with no ethical and professional obligation to have exact
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1 knowledge regarding potentially exculpatory video evidence, directly related to a kidnap and
2 rape case that *she herself is prosecuting*.

3 **Another government lie**

4 Turnage claimed that the only reason the outdoor camera system was seized, was so the
5 “hard drive” could be analyzed. That wasn’t true either. On August 19th, 2022, Detective Wright
6 reported to PI Simeon Noel Good, that “**he never analyzed or took possession of the 7-Eleven**
7 **DVR for Kelley’s case.**” That of course is the exact opposite of what Turnage documented in his
8 (3 months after the fact) shoddy follow-up report. Turnage’s report, unmistakably states, “**I gave**
9 **this DVR to Detective Wright for analysis.**” Both things can’t be true. Somebody is lying –
10 *again.*

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12
13 The state seized the hard drive; to keep the hard drive. That is obvious, simply *because*
14 *they never returned it*; and further kept the defense confused about its whereabouts for three
15 years. Keeping the hard drive enabled the state to conceal the evidence. Whoever controlled the
16 hard drive, consequently, would also control whatever was or was not on that video footage.
17 After all, the state’s strategy worked. PI Rick Gove tried to recover the 7-Eleven hard drive, but
18 that was impossible. Why? Because the state had already stolen it.

19 **More government dishonesty**

20
21 At grand jury, lead investigator Cobb, gave detailed explanation about every other video
22 location, except for 7-Eleven. For example:

- 23
24 1) **Detective Turnage** went to Laurelhurst Park to locate any video. **Unfortunately, he**
25 **could not find any video that covered that area, so we do not have video from**
26 **Laurelhurst Park.**

27 Grand jury transcripts, pg. 61.

1 Above, Cobb is concise in explaining to the grand jurors, “unfortunately, he
2 (Turnage) could not find any video that covered that area.”

- 3
4 2) The Fred Meyer, which was **a stop that was reported that they went to that night,**
5 **we are still in the process of getting video surveillance.** So, at the moment, we do
6 not have that to show you for grand jury.

7 Above, Cobb is again precise in explaining the status of the Turnage video
8 investigation.

- 9
10 3) And the Shell gas station as well, although **Det. Turnage saw it that they were**
11 **actually there at 8:59 to 9:12 p.m. We just haven’t got it because corporate**
12 **office is involved, and we have to do a subpoena on that.**

13 Above, Cobb once again provides a detailed explanation of the status of the Turnage
14 video investigation.

- 15
16 4) So, the first video that we have to show you is Ventura Park. It’s about 155th and
17 Southeast Stark Street. **Det. Turnage found video surveillance between 9:21 p.m.**
18 **and 11:59 p.m.** What you’re looking at is Ms. Parris’ car coming into the parking lot
19 followed by Mr. Kelley.

20 Grand jury transcripts, pg. 62.

21 Again, Cobb is diligent in providing detailed explanation about the outcome (and
22 status) of the Det. Turnage video investigation.

- 23
24 5) So, the next location is Motel 6, 18323 South East Stark Street. **The CCTV system**
25 **was 47 minutes slow from the time frame on the video, so Det. Turnage**
26 **calculated that. Based on his calculations, it’s 12:06 a.m. that this occurred.**

27 Grand jury transcripts, pg. 62.

1 Once again, Detective Cobb provides a detailed summary of the status of the Turnage
2 video investigation. It therefore stands to reason that Cobb would have taken that same
3 responsible “lead-detective” approach regarding his 7-Eleven video testimony. Particularly
4 because, *the 7-Eleven stop was the most important of them all*. It was in the 7-Eleven parking lot,
5 that Wendy Parris began texting her friend to call 911. It was also at the same 7-Eleven parking
6 lot stop, that they picked up Olivia Ordenes, the only other witness besides Parris who was in the
7 presence of Themba Kelley. The 7-Eleven parking lot was also the stop they went to, directly
8 after Wendy Parris was allegedly raped at gun point. *Finally, it was while in the 7-Eleven*
9 *parking lot, that the SDDA insinuated at grand jury, that Parris “allegedly” last “saw the gun.”*
10 *Again, the 7-Eleven outdoor video location, undoubtedly was the most important of them all.*

13 Nonetheless, when Cobb testified about the 7-Eleven video footage, Turnage wasn’t even
14 mentioned. Nor did Cobb mention absolutely anything Turnage wrote in his highly suspect
15 follow-up report. But in *good-faith*, would not the State have wanted the grand jury to know the
16 following critically important information *if it were true*:

18 “I seized the DVR from this [7-11] location in an effort to extract any possible video
19 from the hard drive and **I gave this DVR to Detective Wright for analysis**. I was told
20 the system was inoperative at the time of the incident and no data was available.”

21 GPD follow-up Report, pg. 529.

22 The above critically important information was *conveniently* and *inexplicably* omitted
23 from the state’s grand jury testimony. Perhaps that is because it is not true. According to
24 Detective Wright, Turnage did not give him the hard drive; nor did he analyze it. Turnage’s lie,
25 contaminates the entire report; and further, the entire 7-Eleven video investigation. The state will
26 of course deny all of it. That doesn’t change the truth.

27 And there is more. In the same November 26, 2019, email that we have already cited,
28

1 SDDA Hermann wrote:

2 “I finally confirmed there is no additional video from 7-11 and *specifically* there is no
3 outside cameras. *On the video evidence CD for 7-11 video there are multiple camera*
4 *angles and the only possible available video that would show any part of what occurred*
5 *in the parking lot, is the camera angle from inside the store that points to the entrance*
6 *doors.”*

7 (Emphasis added).

8 Here is the question we pose to the tribunal. Why wasn't any of the above told to the
9 grand jurors, three months earlier? *If any of the above were true*, that critically important
10 information would have also been *known* before and at grand jury. If it were true, would not the
11 SDDA have wanted the Grand Jurors to know, “*specifically*, there is no outside cameras?” Cobb
12 definitely did not tell the grand jurors, “... the only possible video available that would show
13 any part of what occurred in the parking lot, is the camera angle from inside the store that points
14 to the entrance doors.” Cobb was precisely detailed, and informatively *clear* about the
15 investigative outcomes of every other location. Yet, when it came to the most important of them
16 all, the “lead investigator” didn't mention any of the above from the SDDA or Detective
17 Turnage. Detective Cobb only told the grand jurors;

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19
20 1) “... I've included some video from the 7-Eleven and overlapped the 911 call. This is
21 not the exact time of overlap. It's to give you a reference of what's going on³. It's an
22 approximate estimation, okay? And this occurs about 3:49am at the 7-Eleven.” And 2)
23 “so just to be clear, that was the 7-Eleven, on 162nd and Stark surveillance video.”

24
25 ³ Cobb testified that “he included some video from the 7-Eleven ... to give you a reference of what is going on.” The
26 “camera angle from inside the store” that the SDDA referred to in her email, doesn't reference anything about
27 what's going on *during the incident*. It only shows you a reflection of the defendant's vehicle on the 7-Eleven
28 “entrance doors.” Cobb cannot be talking about the same video the SDDA is talking about. If he was, he would have
said something more like, “so just to be clear, *the only possible available video that would show any part of what*
occurred in the parking lot, is the camera angle from inside the store ...” But he doesn't say that. He only said, “...
to be clear, that was the 7-Eleven on 162nd and Stark surveillance video.” *Somebody is lying.*

1 Cobb’s grand jury testimony only, gives a firm impression that the 7-Eleven camera
2 system was working just fine. That of course materially contradicts both Turnage’s follow-up
3 report and the SDDA’s November email. Moreover, because Turnage did not follow GPD’s own
4 policy 1201.3.1 and “[u]se a Department approved property report to describe the item and
5 circumstances under which [the 7-Eleven camera system] was taken into custody.” Nor did he
6 “[e]nsure that all information concerning the owner or finder” was included. Nor did Turnage
7 “... note any significant damage to the item...” And finally, because the “above actions ...” were
8 not “... completed prior to the end of the employee’s work shift in which the member took
9 custody of the item ...” (or were they ever completed for that matter); the weight of evidence to
10 support the bad faith allegation toward the above material contradictions from Turnage and
11 SDDA Hermann is increased substantially.

14 According to the 7-Eleven camera receipt, Turnage seized the camera system on August
15 14th, 2019, the same day Themba Kelley was arrested. That was several days before grand jury.
16 If any of the above information from the SDDA or Turnage were true, that information
17 undoubtedly would have been known before grand jury. So why hide it from the grand jury?
18 Why not disclose the truth? Perhaps because it’s not true. Moreover, it was the defense that
19 needed to be fed those lies months later, not the grand jury.

21 The SDDA absolutely knew how critically important the 7-Eleven video evidence was to
22 this case. After all, it was she herself who solicited the grand jury testimony of Wendy Parris that
23 she last “saw the gun at 7-Eleven.” In other words, the SDDA had to be aware, that it was the 7-
24 Eleven video *alone* that could have proven or disproven the SDDA’s testimonial solicitation. The
25 7-Eleven stop, was the most important of them all. *Pretending for 3 long years, that she has been*
26 *oblivious to the whereabouts of the camera system; the only thing in existence that could have*

1 *proved or disproved her fraudulent theory is insulting.*

2 It was the SDDA alone who called Cobb to testify. It was the SDDA alone that received
3 the conclusive email from Detective Cobb at 11:09 pm on the day of the arrest, which was “*we*
4 *did not locate a gun during any of the searches.*” It further was the SDDA who unequivocally
5 knew that complaining witness Wendy Parris told an entire police department that Themba
6 Kelley was inside of room 208, armed with a gun, and that allegation was “specifically” proved
7 to be false on that same day. *This means it was the SDDA alone that needed an evidentiary alibi*
8 *for why no gun was found, in order to justify an indictment.* The SDDA and no one else
9 relentlessly and repeatedly prejudiced the defendant, by presenting a “gun lie” 49 malicious
10 times. Disturbingly, it also was the SDDA who “checked her notes” and very cunningly placed
11 the last destination of the gun at the 7-Eleven 162nd and Stark parking lot. That is, it was the
12 SDDA who pushed a subtle grand jury gun lie, to cover up an already existing gun lie, that was
13 known on the day of the arrest by *everyone involved in the case.* Peculiarly, months after the
14 SDDA presents a lie to coverup a lie, the only video in existence that could debunk that lie, “just
15 happens” to be undiscoverable, with the baseless excuse being - “*specifically, there is no outside*
16 *cameras.*” *That too was a lie.* There were outside cameras. 3 years later, the SDDA stated, “*I*
17 *have finally located the 7-Eleven DVR.*”

18 The 9th Circuit case of *United States v. Sivilla*, affirmatively states the following, “In
19 order for destruction of evidence to rise to the level of a Constitutional violation, a party must
20 make two showings. 714 F.3d 1168, 1172 (2013). First – that the government acted in bad faith,
21 the presence or absence of which “turns on the government’s knowledge of apparent exculpatory
22 value of the evidence at the time it was lost or destroyed.” *United States v. Cooper*, 983 F.2d
23 928, 931 (9th Cir. 1993). (Citing *Arizona v. Youngblood*, 488 U.S. 51, 56-57 (1988)). Second –

1 that the missing evidence is “of such a nature that the defendant would be unable to obtain
2 comparable evidence by other reasonably available means.” *California v. Trombetta*, 467 U.S.
3 479, 489 (1984); *Cooper*, 983 F.2d at 931.

4
5 Courts must balance ‘the quality of the Government's conduct’ against ‘the degree of
6 prejudice to the accused,’ where the government bears the burden of justifying its conduct and
7 the accused of demonstrating prejudice. *Id.* at 1152.” *Sivilla*, 714 F.3d at 1173.

8 The 9th Circuit continues, “In evaluating the quality of the government's conduct:

9
10 “[T]he court should inquire whether the evidence was lost or destroyed while in its
11 custody, whether the Government acted in disregard for the interests of the accused,
12 whether it was negligent in failing to adhere to established and reasonable standards of
13 care for police and prosecutorial functions, and, if the acts were deliberate, whether they
14 were taken in good faith or with reasonable justification It is relevant also to inquire
15 whether the government attorneys prosecuting the case have participated in the events
16 leading to loss or destruction of the evidence, for prosecutorial action may bear upon
17 existence of a MOTIVE TO HARM THE ACCUSED. *Loud Hawk*, 628 F.2d at 1152.”

18 *Id.* (Emphasis added).

19 The proof speaks for itself. 1). Because the state *unapologetically* stole the entire 7-
20 Eleven camera system: *Bad faith is proven*. 2). Because the state said absolutely nothing at grand
21 jury, regarding anything Detective Turnage or SDDA reported 3 months after the camera system
22 was taken: *Bad faith was proven*. 3). Because the state did not follow its own policy 12-1.3.1,
23 and write a report on August 14, 2019, the day they seized the camera system: *Bad faith is*
24 *proven*. 4). Because the state did not write a “follow-up” report, until the defense requested the
25 7-Eleven video footage: *Bad faith is proven*. 5). Because the state did not report the truth, that it
26 did not return the camera-system to 7-Eleven: *Bad faith is proven*. 6). Because Detective
27 Turnage’s statement “*I gave this DVR to Detective Wright for analysis*” materially contradicts
28 Detective Wright, who said “*he never analyzed or took possession of the 7-Eleven DVR for*


1 *Kelley's case:* " *Bad faith is proven.* 7). Because the state's grand jury testimony regarding the 7-
2 Eleven video location, led the defense to believe there were no concerning issues regarding the
3 7-Eleven video-footage: *Bad faith is proven.* 8). Because the state did not inform the defense
4 about the "corrosion of the [7-Eleven] camera motherboard and some ink or writing on the main
5 motherboard" until 3 years after the state seized the camera: *Bad faith is proven.* That is (3 years
6 after the fact) the defense has no way of knowing when, or how the *corrosion* occurred.
7 Moreover, because it wasn't until July 22nd, 2022, that the state finally admitted that they
8 possessed the 7-Eleven DVR; the defense did not have the time, or resources to have a specialist
9 investigate the cause of the corrosion, prior to the Motion to Dismiss hearing for prosecutorial
10 misconduct. 9). Finally and most importantly: Because the SDDA led Barry Engle to believe,
11 "specifically, there is no outside cameras," only to materially contradict that statement three
12 years later by saying "I have finally located the 7-Eleven DVR:" *Bad faith is proven - again.*

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15 This case is thoroughly corrupt and beyond excusable explanation. This case must be
16 terminated eternally.

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18 Ameena.

19 Dated this 26th day of September 2022


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22 _____
23 Themba Hasaan Kelley
24 *Pro se* defendant

25 
26 _____
27 Westbrook Johnson, OSB# 076967
28 Legal advisor to defendant
westbrook@lawofficeofwestbrookjohnson.com

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
4 SDDA Nicole Hermann's email listed in the bar directory and/or via eFile and Serve (if service
5 contacts were entered).
6

7
8 Dated this 26 September 2022
9

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11 By: 
12 _____
13 Westbrook Johnson
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