IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR MULTNOMAH COUNTY

STATE OF OREGON, Plaintiff, vs. THEMBA HASAAN KELLEY, Defendant	Case No.: 19CR53657 BRIEF ON THE MERITS No. 7 IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR PROSECUTORAL MISCONDUCT Willful Ignorance Gone Wild

WILLFUL IGNORANCE is a subtle prosecutorial space that is intentionally used to conceal misconduct. Enter *Napue*: This classical Supreme Court precedent is designed specifically to constitutionally halt a prosecutor in that attorney's tracks; when that prosecuting attorney intentionally chooses to remain willfully blind. Most appropriately, one of the three axiomatic prongs that has to be established in a successful *Napue* claim is – a prosecutor "knew or should have known" of the material falsity. *Napue v. Illinois*, 360 U.S. 264, 269-271 (1959). In other words, it is a prosecutor's job, position, duty, responsibility, and primary function to search for and "prevailingly" find the truth. The historical *Napue* prong "or should have known," is indirectly, yet simply and sensibly declaring that an oath beholden prosecutor has absolutely no excuse to not "know the truth." "Knowing the truth" could of course include a prosecutor having the admit that the alleged "victim" lied – demonstrably.

Indeed, a prosecutor's primary obligation to "We the People" is to seek, and further, do all in their privileged power to find – and know – the truth. There is no "true" prosecution that is not duty bound to search for truth. "A prosecutor's responsibility and duty to correct what he [or she] knows to be false, and elicit the truth, *Napue*, 360 U.S. at 269-70, requires a prosecutor to

act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and **remaining willfully ignorant of the facts**." *N. Mariana Islands v. Bowie,* 243 F.3d 1109 (9th Cir. 2001) (emphasis added). Because of SDDA Nicole M. Hermann's intentional decision to remain willfully blind and willfully ignorant, *Pro se* Defendant Themba Hasaan Kelley and Legal Advisor, Westbrook Johnson, have devoted a comprehensive brief to the topic of SDDA NICOLE M. HERMANN'S WILLFUL IGNORANCE ALONE. With confidence in the truth-seeking function of the tribunal, and also with great expectation that our truthful position will be embraced; in excellent faith do we beseech the court to dismiss this case eternally.

On November 20th, 2019, at a discovery hearing in front of the Honorable Jerry B. Hodson, Themba Hasaan Kelley's *former* Defense Counsel stated,

> "In regard to claiming that she crawled out of a window in order to escape, and a 24-7 video from multiple angles of that window indicates that didn't happen. That she claims she was held hostage by a gun; that the search of the police officers indicate that didn't happen because no gun was ever found."

Pages 8-9 Nov. 20, 2019, Discovery Hearing Transcript.

In response, SDDA Nicole Hermann states:

> "Obviously, I *strongly* disagree with Mr. Engle's interpretation of the video and other evidence."

Pages 16-17 Nov. 20, 2019, Discovery Hearing Transcript.

Above, the SDDA imperiously and even "strongly" disagreed with the "no gun and no-gun evidence," that her own investigators concluded on an email she received on the day of the arrest at 11:09 p.m.; and also, very clearly reported in the police report. The SDDA also audaciously disagreed with the video footage regarding the "window – jumping" (crawled out of

a window) falsity. But how could she, when, the State's lead investigator was clear at Grand Jury that a cat jumped out the window, not Wendy Parris. Months before the SDDA disagreed with the video evidence, Detective Anthony Cobb testified at grand jury, "The cat actually jumped out the window." Cobb continues: "Just so we're clear about that." Page 67 grand jury transcripts.

Restatement (Third) of the Law Governing Lawyers §120. False Testimony or Evidence. (Am. Law Inst. 2000) (2) If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.

In another discovery hearing that occurred three months later, Themba Hasaan Kelley's former Defense Counsel stated:

> "That just strikes me as being hanging out there in a way that really needed to be corrected and wasn't. OK, and it wasn't broken or injured before you got into the motel?
>
> Answer: No.
>
> Okay, and it wasn't broken or injured before you got into that motel?
>
> Answer: No.
>
> Which the medical reports that I got from the prosecutor's office clearly indicate that it was broken or injured before she got into the motel room and that it was calcified over, and it was from a car accident and it's - - it was all right there in a situation where **it seems implausible that that wasn't well-known to every-body involved in the case.**

Pages 12-13 Nov. 20, 2019, Discovery Hearing Transcript.

Below, the SDDA responds:

> "Obviously, Mr. Engle and I have very different opinions about whether or not the witness is truthful in her testimony, we obviously have very different opinions of the facts of this case."

Pages 33-34 Nov. 20, 2019, Discovery Hearing Transcript.

On pages 44-45 of that same hearing, the SDDA imperiously, arrogantly, and willfully

forged forward,

> "I also disagree with his recitation about what the medical records say. Well and let me add, if he wants to file a motion for - - Prosecutorial Mis-con-duct, he can do that and I can address that because that sounds like what he's saying here. And that's fine and we go down that route."

Above, SDDA Hermann disagreed with:

1. Wendy Parris' demonstrably false grand jury testimony needing to be corrected by the state.
2. Counsel Engle's simple "recitation" of the medical records regarding the arm and "obviously" the accusation of "Prosecutorial Mis-con-duct."

And very interestingly last,

3. The SDDA's "very-own" recitation of the medical records regarding the arm, only 2-months prior at the November 20, 2019, Discovery Hearing that she "obviously" forgot about. At that hearing, the SDDA succinctly stated:

> "I have no objection to records from the broken arm. I can tell you that in the medical records that we do have, she [Wendy Parris] says that the car accident happened in the last year …
>
> That's - - there - - the only incident I can find - - I've just been - - going through these as we've been sitting here, and the only mention of it is a note from a Dr. Kaplan that says he asked her about the imaging findings once he saw the calcification. And she reported the arm was broken in a car-crash that happened in the last year … I don't have any objection to those records. **I do agree that they would be relevant to the argument and to the notation in the medical records about the issue with the broken arm. So, to that point, I have no objection.**"

Nov. 20, 2019, Discovery Hearing Transcript.

Having recited the above so succinctly, how can the SDDA only 2-months later also have recited,

> "I also disagree with his (Counsel Engle's) recitation about what the medical records say."

In other words, at the November 2019 hearing, the SDDA recited "verbatim" the exact same medical record that Barry Engle quoted from. In fact, the SDDA's "recitation" is even clearer than Barry Engle's. Moreover, the SDDA also said, that she had "no objections" to those records; and further stated, "I do agree they would be relevant to the argument."

The SDDA can't come into a hearing 2-months later and *imperiously* disagree with her "own words;" now that she realizes the issue of prosecutorial mis-con-duct is "relevant to the argument." That's *willful - ignorance* exposed. Even further, that's the SDDA Nicole M. HERMANN'S willful ignorance - *gone wild*. The Supreme Court of Oregon Supremely states: "In order for a defendant's [prosecutor] ignorance to be deliberate or willful, the defendant [prosecutor] must have been presented with facts that put him or [her] on notice that criminal activity is probably afoot, and then the defendant [prosecutor] must have failed to investigate those facts thereby deliberately declining to verify or discover criminal activity." *U.S. v. Barnhart*, 979 F.2d 647, 651-52 (1992) *cited in In re Albrecht*, 33 Or 520, 550-51 (2002).

This case must be terminated eternally. Ameena

Themba Hasaan Kelley
Pro se Defendant

Westbrook Johnson
Legal Advisor to defendant
westbrook@lawofficeofwestbrookjohnson.com

PROOF OF SERVICE

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

Dated this 26 July 2022

By: _____
Westbrook Johnson