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2 IN THE CIRCUIT COURT OF THE STATE OF OREGON
3 FOR THE COUNTY OF MULTNOMAH
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STATE OF OREGON, Plaintiff, vs. THEMBA HASAAN KELLEY, Defendant	Case No.: 19CR53657 BRIEF ON THE MERITS NO. 1 IN SUPPPORT OF DEFENDANT'S MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT: The Gun, The Notes, The Grand Jury Perjury, The SDDA's Misconduct

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13 "(1) Support the Constitution and laws of the United States and of this state: (2) Employ, for the purposes of maintaining the causes confined to the attorney, such means only as are consistent with Truth, and *never seek to mislead the court or jury by any artifice or false statement of law or fact…*"
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16 ORS 9.460 (emphasis added).

17 THE TRUTH

18 Senior Deputy District Attorney Nicole M. Hermann was fully aware at the time of the
19 grand jury, that based upon Wendy Christine Parris' accusation that Themba Hasaan Kelley had
20 a gun in the motel room, (a gun which was alleged to have been used to force kidnap and rape)
21 the GPD S.W.A.T. team made a highly dangerous, weapons out, ready to shoot, arrest of
22 Themba Hasaan Kelley while Wendy Christine Parris *unapologetically* watched from the motel
23 parking lot. Moreover, by the time the grand jury convened on August 19, 2019, SDDA
24 Hermann was fully aware that the physical evidence was completely contrary to the gun-theory.
25 No gun, or anything supporting the existence of a gun was found at any time. Disturbingly,
26 SDDA Hermann was, and still is (almost three years later) fully aware that Wendy Christine
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Parris' material lie, *almost cost Themba Hasaan Kelley his life.*

Still, SDDA Hermann *imperiously* forged ahead to grand jury and repeatedly solicited, supported, and even recklessly supplied gun testimony. *U.S. v. Samango*, 607 F.2d 877 (9th Cir. 1979). Through SDDA Hermann's relentless presentation, the false narrative that erroneously suggests that black men are predisposed for criminal behavior involving guns, violence, manipulation, and abusive sex was subtly implanted into the proceedings. Between the testimony of SDDA Hermann and Wendy Parris, a non-existent gun was mentioned no less than 49 times. This consequently had to have induced racial and cultural bias amongst a deceived more than likely all-white panel of grand jurors. *See Vasquez v Hillery,* 474 U.S. 254 (1986); *State v. Smith*, 4 Or App 261 (1970); *State v. Farokhrany*, 259 Or App 132, 137 (2013).

For the above reasons have *pro se* defendant, Themba Hasaan Kelley, and legal advisor, Westbrook Johnson, devoted a comprehensive and extensive brief to the gun allegation 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.

Tyson Conroy is a Gresham Police Officer who was involved in the high-risk arrest, of Themba Hasaan Kelley at gunpoint. According to Conroy's report, he called Themba Hasaan Kelley on his cell phone and Themba was confused to why they had guns pointed at the motel door. Conroy wrote:

> "As I spoke with Kelley, he asked us why we didn't just knock on the door? <u>I told him Parris told us that he was armed with a gun</u>. He said he did not have a gun and had not had one for 30 years."

Pages 20-21; 121-122 of the GPD Police Report.

THEMBA TOLD THE TRUTH. PARRIS LIED. THERE WAS NO GUN.

On the same day of his arrest, the GPD concluded:

"Based upon a thorough search looking at all hiding locations inside and outside the room, no gun was seized and no-evidence a gun or gun pieces or parts were in Room #208."

"There was no firearm located inside the vehicle and no evidence there was one."

Pages 71-72 GPD Police Reports.

In the "Summary of Investigation" section of the "Probable Cause" sworn warrant affidavit, signed, and reviewed by SDDA Hermann, Detective Anthony Cobb testified:

"The Gresham Police Department is currently investigating a report of a kidnapping and sexual assault that was reported to have occurred during the early morning hours of August 14, 2019. The alleged victim in this case, Wendy Christine Parris reported that a subject (later identified as Themba Hasaan Kelley) held her hostage with a **firearm** and sexually assaulted her in a Motel Room at the Motel 6 located at 18323 Southeast Stark Street located in the City of Gresham, County of Multnomah, State of Oregon.
Also, to search a vehicle driven by Mr. Kelley a 2018 black colored Jeep Renegade with Washington plates that is currently parked in the Motel 6 parking lot."

Pages 38-39 GPD Police Reports.

The gun allegation in various forms permeates the affidavit. For example:

"… an alleged victim reporting to 911 that a suspect sexually assaulted her and held her at **gunpoint** before she was able to leave the motel room and call the police."

"She appeared to be hysterical and stated that she was raped and had a **gun pointed at her.**" Page 40.

"The suspect pulled out a **small caliber black colored semi-automatic weapon** and pointed it at her." *Id.*

"While being forced to give the suspect oral sex, the suspect had **the gun** in his right hand." *Id*.

"Ms. Parris also reported that while being **held at gunpoint** in the bathroom the suspect forced his finger into her vagina as well." *Id*.

"He then told Ms. Parris if she screamed, he would kill her and then pointed **the gun** at

the cat." Page 41.

The sworn warrant affidavit mentioned above was obviously issued with the *primary intent* to locate a gun; none the less, as already noted, the search was fruitless. There was no gun. There was no gun evidence. In fact, on the evening of the arrest, at exactly 11:09 pm, the DDA received the following email from Detective Cobb stating, "We did not locate a gun during any of the searches."

With such a glaring material contraction staring at the DDA regarding the gun, and also the DDA knowing that Themba Hasaan Kelley's alleged criminal history does not include a gun, the DDA had to know that Wendy Parris was lying. Wendy Parris told an entire S.W.A.T team that Themba Hasaan Kelley was inside Room 208 armed with a gun. That allegation was proven to be demonstrably false on the same day of the arrest. None the less, the DDA *maliciously* forged forward; and with no apology presented materially false "gun" testimony to the grand jury anyway.

Q. <u>And how did you see the gun</u>? Was he just holding it or showing the - -

A. Yeah - -

Q. Okay.

A. I saw it out of my peripheral cause when he pulled the gun, I was like, what the fuck are you doing? And - - But then I didn't see the gun again. <u>And then I guess the guy took the bike</u>. I - - I don't know. And then the girl got in the car.

Grand jury transcripts pages 42-43.

According to the above testimony, Wendy Parris was able to see the gun through her "peripheral." According to the above testimony, after "he pulled the gun" at 7-Eleven, Wendy Parris "never saw the gun again." According to the above testimony, the guy "took the bike," the girl got in the car and they all (Themba, the girl and Wendy Parris) drove back to the motel. In

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short, in the above testimony, the *only* thing Wendy Parris testified that the guy "took" was a bike. Shortly after Wendy Parris gave the above grand jury testimony, her gun-story ending changed significantly.

> Q. Okay Let me check my notes if I can. And you said <u>after you saw the gun at 7-Eleven you never saw it again is that right?</u>
>
> A. Right.
>
> Q. Okay. So, you didn't see it in the car as you were driving back or anything like that?
>
> A. Hmm—mm. I don't know - - I don't know if he, like, sold it to that guy. I don't – I don't know. Yeah. I don't know what happened to that (indiscernible).
>
> Q. Okay. And is sounds like you were kind of focusing on your phone and - - wasn't
>
> A. Right.
>
> Q. Really listening to - -
>
> A. Yeah.
>
> Q. - - Everything he was saying, is that right?
>
> A. Right.

Grand jury transcripts pages 48-49.

Only moments before the above testimony, Wendy Parris testified that "the guy" who was with the girl in the 7-Eleven parking lot, "took the bike." That was all she testified about what **he took**. That was it. The DDA moved on to the next question. That was it on what *he took*. Period. Nevertheless, shortly after Wendy Parris testified that "the guy took the bike," (right in front of the SDDA), her gun story ending *changed significantly*. "The bike" the guy took, instantaneously, became "a gun" that he "may-have" – purchased from Themba Hasaan Kelley. Wendy Parris' spontaneous "testimonial alteration" is then "unapologetically" endorsed by the SDDA. On the one hand, SDDA Hermann appears to trust Wendy Parris' ability to see and hear

what is happening to the gun and that is even – *peripherally*. Grand jury transcripts pages 42-43. On the other hand, when Wendy Parris' gun-story ending changed and was thereby accompanied by an in-direct suggestion for what "may have" happened to the gun, the DDA became selective. Wendy Parris' supposed ability to *see and hear peripherally*, was renounced by the DDA, and swiftly replaced with:

> "… it sounds like you were kind of focusing on your phone and not really listening to everything he was saying, is that right?"

Moreover, it was SDDA Hermann who *solicited* Wendy Parris' false testimony with the improper insinuation, "… and you said after you saw the gun at 7-Eleven you never saw it again is that right?" In leading in this way, the SDDA invited a baseless theory, that subtly suggested what "may have" happened to a gun that was already found not to have existed.

Wendy Parris' testimony, "I don't know if he like, sold it to the guy. I don't - - I don't know…" was simply a response to the SDDA's deceitful question. The SDDA also knew her improper in-sin-uation would not be challenged by any means of cross examination. For this reason, does the Ninth Circuit Court affirmatively state:

> The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in fact may be more severe. The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury, as he might in court.

United States v. Basurto, 497 F.2d 781, 786 (9th Cir 1974).

Because the SDDA's in-SIN-uation was preceded by: "… Okay. Let me check my notes…" It is evident that the SDDA's subornation of perjury was calculated.

> 2020 American Bar Association Model Rules of Professional Conduct, Subsection (1)(a):
> TOPIC 4. Advocates and Evidence.
> Rule 120. False testimony or evidence succinctly states:
> (1) A lawyer may not:
> (a) Knowingly counsel or assist a witness to testify falsely or otherwise to offer false

evidence.

(b) Knowingly make a false statement of fact to the tribunal.
(c) Offer testimony or other evidence as to an issue of fact known by the lawyer to be false.
(d) (Comment) Offer of false testimony or other false evidence. False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is guessing or reciting what the witness has been instructed to say.
(e) Counseling or assisting a witness to offer false testimony or other false evidence. A lawyer may not knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence as to a material issue of fact.

Law Governing Lawyers Model Rules, Standards, Statutes, And State Lawyer Rules of Professionals Conduct, pages 204-208 (2021-2022 ed.).

SDDA Hermann could easily have fact-checked, if she really believed Wendy Parris' *testimonial-alteration*, simply by asking Detective Cobb: "…How much money did Themba Hasaan Kelley have in his possession when he was arrested?" Or the SDDA could have made a quick call to the Multnomah County Jail records department. That 5-minute investigation would have once again proved that Wendy Parris was lying. Themba Hasaan Kelley had $20 cash on his possession when he was arrested. Not any amount of money close to what would have been attained if he had sold a semi-automatic handgun, to "that guy". The SDDA of-course was not going to do any of the above. After all, it was she who solicited and endorsed the perjury. The prosecutorial path of willful ignorance appears to have been the SDDA's preferred mode of conduct. However,

> "When a prosecutor suspects perjury, the prosecutor must at least investigate. The duty to act 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, 1118 (9th Cir. 2001) (Emphasis added).

To be clear, there was no evidence gathered from Themba Hasaan Kelley's cellphone, to confirm a 3:49 AM gun-sell transaction. Further, *the interior of 7-Eleven video cameras confirm*,

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Themba Hasaan Kelley's car was only parked in the 7-Eleven parking lot for exactly 3 minutes and 38 seconds. *See* Page 529 GPD "Follow-Up Report". (Emphasis added). Further, the physical evidence, as well as statements given to the police, clearly confirm that Themba Hasaan Kelley was not connected through social media to Olivia Ordenes or the homeless guy who took the bike. Nor were their phone numbers stored in Themba's phone. They had never met Themba prior to that 7-Eleven parking lot encounter.

But let's face it; if anyone could flirt with a female at 3:49 in the morning; pick that same female up; purchase that females bike; and also sell a "broke" homeless dude a gun; while at the same time hold a crazy-con-artist, white-girl hostage (with the same gun he "may have" just sold to the homeless dude who was pan-handling for change at the bus-stop); all in an unprecedented, record breaking "BLACK MALE" 3 minutes and 38 seconds; it would have had to have been Themba Hasaan Kelley. After all, he is black.

THE PROSECUTORIAL RACISM IS EVIDENT

According to the W. Haywood Burns Institute for Justice Fairness and Equity 2019, R.E.D. Report (which based its study on data received from the Multnomah County District Attorney's Office), Black adults in Multnomah County were

- 4.9 times more likely as white adults to have a case received and reviewed by the DA's Office.
- 4.8 times more likely as white adults to have a case issued for prosecution.
- 4.7 times more likely to be booked in jail for a felony than white adults.
- And though black adults only make up 6% of Multnomah County's population compared to 74% white adults; in 2019 – black adults were a tragic *8.3* times more likely to be held in jail before their trial date.

Interestingly, Themba Hasaan Kelley was arrested August 14, 2019, the same year the

above R.E.D. report was released.

Four days before Wendy Parris testified to the grand jury, she told the following to Detective Friderich:

> "He was gonna stop at Plaid Pantry to get money cause he was talking about getting money cause he was supposed to be paying this other bitch $200 for her bike or something."

Page 216, lines 14-17 / Friderich Interview.

According to the above statement, Themba Hasaan Kelley "was gonna" get money from Plaid Pantry on their way back to Motel-6. According to the above statement, this "was gonna" happen directly after they "left" the 7-Eleven parking lot. We know that because they picked up the girl at 7-Eleven. According to Wendy Parris' above statement, the $200 that Themba Hasaan Kelley "was gonna" get from the ATM at Plaid Pantry was supposed to "be paying" this other bitch "for her bike." That was it. Detective Friderich moved on to the next question. That was all Wendy Parris said about "money" and who was supposed to be "paying money" and who was supposed to be "getting paid" money. Period.

Wendy Parris doesn't get to come to grand jury a few days later and while *under oath*, change the above around *totally* and more or less say;

> "Ah, Ah, I don't know. I don't - - know. Perhaps he didn't buy a bike; ah, ah, I don't - - know. Maybe he sold the gun to the broke homeless dude instead."

Particularly, when on the day of the arrest, she told an *entire* police department that Themba Hasaan Kelley was in Room 208 armed with a black semi-automatic handgun; and that accusation was found *on the same day* to have been demonstrably false.

Moreover, the Senior Deputy DA doesn't get to *imperiously* look away from such a detrimental contradiction as if she is above the – L.A.W. **She is not above L.A.W. No one is.**

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LOVE. ALWAYS. WINS. THAT'S L.A.W. How dare the SDDA be so intentionally reckless and maliciously willful in a case in which the State is alleging that a black-man has raped a white-woman at gunpoint.

And there is more**.** The first time Parris was questioned about "the gun", it was at 3:55 am. This was during the time that the police were attempting to take Themba into custody. At this time, she specifically told Det. Walden that Themba pulled the gun from a "rear-waist-band." GPD Police report pg.14. Later on, in that same day around 2:15 pm, when questioned a second time by Det. Friderich, she said, "maybe" the gun came from the back of Themba's pants. After saying the gun was pulled from a "rear-waist-band" and then later on saying, that "maybe it came from the back of his pants." Det. Friderich interview pages 125-126. Below, Parris contradicted herself again only 5 days later at Grand Jury...

SDDA Herman: Do you remember where he pulled the gun from or did you see where it came from?

> Parris: NO, I didn't see where it came from. It was just there. Like, it was there and then it wasn't.

Grand Jury transcripts page 21-22.

In a five-day period of time, (not weeks, months, or years), Parris's gun story changed significantly. First, it was pulled from a rear-waistband. Then, only hours later she said, "maybe" it came from the back of his pants. Disturbingly, only 5 days later at Grand Jury she says, "NO, I DIDNT SEE WHERE IT CAME FROM," and also that, " IT WAS JUST THERE AND THEN IT WASNT THERE." (Emphasis added).

And there's more**.** When Parris was first questioned about the gun, she described it perfectly to Det. Walden as being a "semi-automatic" Page 14 GPD Police reports. But then,

hours later, on that same day when asked by detective Det. Friderich if she knew the difference between a "revolver" and a "semi-automatic", her immediate and concise answer was – "NO." Page 126 Friderich report.

The supreme court supremely states:

> "A lie is a lie no matter what its subject and if it's in anyway relevant to the case the district attorney has the responsibility and duty to correct what he [or she] knows to be false and elicit the truth."

Napue v. Illinois, 360 U.S. 264 (1959).

The supreme court supremely states:

> "The most rudimentary of the access to evidence cases impose upon the prosecution is a Constitutional obligation to report to the defendant, and to the court **WHENEVER GOVERNMENT WITNESSES LIE UNDER OATH**."

California v. Trombetta, 467 U.S. 479, 488 (1984).

The 9th Circuit Court so beautifully states in *U.S. v. Basurto*,

> "We base our decision on a long line of cases which recognize the existence of a duty of *good-faith* on the part of the prosecutor with respect to the court, the grand jury, and the defendant. While the facts of this case may not exactly parallel those of the instant case, we hold that their rulings regarding the consequences of a violation of abuse of this prosecutorial duty must be applied where the prosecutor has knowledge that testimony before the grand jury was perjured.

497 F.2d 781 (1974); *See also Mooney v. Holohan*, 294 U.S. 103 (1935); *Giles v. Maryland*, 386 U.S. 66 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Hysler v. Florida*, 315 U.S. 411 (1942); *Pyle v. Kansas*, 317 U.S. 213 (1942).

A local news article wrote[1], *Multnomah County District Attorney Mike Schmidt is*

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[1] https://pamplinmedia.com/pt/506698-405516-multnomah-da-plans-new-unit-to-aid-wrongfully-convicted (April 28, 2021) Assessed July 7, 2022.

pushing to create a new conviction Integrity Unit that will review and probe cases where police or prosecutor misconduct produced a mockery of justice.

According to DA Schmidt, "Prosecutors must be leaders in ensuring that convictions are the result of fair and transparent processes consistent with the pursuit of justice."

Above Mike Schmidt talks about "convictions," but what about "indictments?" Do his above words not apply to Multnomah County prosecutors that endorse, condone, solicit, and suborn material-lies at grand jury? The Supreme Court and 9th Circuit clearly state; a prosecutor must correct false testimony whenever it appears. But perhaps being "consistent with the pursuit of justice isn't relevant, *when a white woman falsely accuses a black male of a sex-offense*. Or maybe because gun-violence is a serious concern in Portland right now, government misconduct isn't important. If a person is senselessly victimized by gun-violence, that is of course wrong. But is it not just as wrong when a person is unlawfully victimized by the prosecutorial bullets of misconduct? A senseless loss of life is a senseless loss of life. Whether that life rots away in a prison cell, or rots away in a closed casket makes absolutely no difference.

But perhaps, the state believes "fair and transparent processes" are to be negated when the state-itself-has enticed the local media to report allegations that were known by the state to be demonstrably false – days before – those allegations were released to the press. For example, according to one article that was written *directly* after Rod-Underhill's fraudulent press release on August 27, 2019:

> "Kelley used a firearm and physical force to rape the woman and commit other sex crimes. Law enforcement learned that Kelley made several threats to shoot and kill the victim while she was being held captive, court documents allege."

As already stated: the above article was written as a result of Rod Underhill's **UNDER-HANDED** press release; regarding the indictment of Themba Hasaan Kelley. Moreover, this

announcement came 2 weeks after the arrest that was on August 14, 2019.

That is, the state made that malicious announcement; even though by that time, they were thoroughly aware of Wendy Parris' plethora of material false testimony regarding the gun; and also, were equally aware of the vast amount of other relevant material falsities. *See* Briefs on the Merits #2, #3, #4, #5, #6 and #7 in Support of Defendant's Motion to Dismiss for Prosecutorial Misconduct.

With the above said: If DA Mike Schmidt is truly sincere about his office turning a new leaf and is determined to lead an office that will only prosecute with "transparent processes consistent with the pursuit of justice;" he will have no problem *insisting* that the media inform the People of Portland, that the above article and others like it – are absolutely fraudulent. Moreover, because the SUPREME COURT (*Napue*) not only demands that prosecutors correct false testimony, but they also *elicit the truth* regarding that testimony; Schmidt will have no problem demanding that the people be told the following important information.

The SDDA admits she reviewed the police report prior to grand jury. The SDDA admits she used the police report *at* grand jury. Page 33 January 9th, 2020, Discovery Hearing transcripts. Wendy Parris told us (the entire G.P.D. S.W.A.T. team) that you were "armed with a gun" is easily found in that police report. *Id.* at 21. (No gun was found). "She [Wendy Parris] did not have further on the gun" is easily found in that police report. *Id.* at 31. "Olivia (the last person who was with Themba Hasaan Kelley and Wendy Parris) stated she told Themba she did not want to leave her bike and Themba offered her $20 (not $200 as Wendy Parris lied and said to Detective Friderich) to leave her bike. Olivia agreed and entered Themba's vehicle, is easily found in that police report. *Id.* at 18. "Olivia said she never saw a gun with Themba" is easily found in that police report. *Id.* at 19. "Based on a thorough search conducted looking at all hiding

locations inside and outside the room no gun was seized and no evidence a gun or gun pieces or parts were in room #208" is easily found in that police report. *Id.* at 71. "There was no firearm located inside the vehicle and no evidence to indicate there was one" is easily found in that same *exact* police report. What is found "nowhere" in that report is Wendy Christine Parris', "I don't know. I don't know," gun sell fabrication. The absolute only evidence the State had then; and the State has now; regarding the gun; is the erroneous stereotype and negative profile which ridiculously suggest, "He's black. He had to have a gun." And because "he's black and had a gun, he must also be a rapist, right?" The prosecutorial racism is evident. Right???

The Defendant is on record in multiple hearings accusing Prosecutorial Racism (Misconduct) months before Portland's Black Lives Matter movement went global. There is no "race card" pulling going on here. At Themba's arraignment on August 23, 2019, only seven days after being arrested, the following exchange occurred:

> THE HONORABLE STEPHAN ALEXANDER: Mr. Kelley, this is not the best time to address any of the merits of your case. This was simply the arraignment where you get the indictment stating the charges that are against you.
>
> Everything is being recorded, so --
>
> DEFENDANT KELLEY: I understand.
>
> THE COURT: -- it's usually --
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> DEFENDANT KELLEY: I just was simply --
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> THE COURT: -- (indiscernible) --
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> DEFENDANT KELLEY: -- going to say that -- I just wanted to say that I thought that the -- the indictments and the charges were mainly based upon racial discrimination and -- and bias and I've had a repeated experience of that in Multnomah county court rooms. And it's a wonder to me that there's not more watching of African-American male situations where a potential racial bias is concerned knowing the history of the state of Oregon and racism in the -- the criminal justice system. That's just my concern. I just wanted to put that on record hoping that I might have some people watching my situation

a little closer and looking at the history of my situation and seeing repeated racial discrimination and bias towards my situation in Multnomah county court rooms. That's all I want to say."

Below the SDDA takes her mis-con-duct to the next level and supplies gun testimony

SDDA: Okay. And do you remember, was he holding the gun the whole time (in the bathroom), or did he ever put it down?

Parris: *Yeah, he did put it down*. He had it for the first few minutes. And then I don't know what happened to it cause he got my phone, too. And so, I'm - - I don't remember where the gun was.

SDDA: Okay

Parris: I - - I - - it was in there somewhere.

SDDA: Okay. Where was your phone? Do you remember?

Parris: *With the* gun because later, when he wanted to call my friends to find more bitches, I went looking for my phone and it was in the bathroom.

Grand jury transcript pg. 30-31. (Emphasis added).

According to the above testimony, Themba Hasaan Kelley "put the gun – down in the bathroom." According to the above testimony, Wendy Parris could not recall, where in the bathroom, **"**He put the gun down." According to the above testimony, later (as in after she was allegedly raped), she went looking for her phone and it was in the bathroom, "with the gun". According to the above testimony, *directly* after Parris was allegedly raped and she found her phone, Themba Hasaan Kelley wanted Wendy Parris to "call her friends.[2]"

Shortly after Wendy Parris testified, that *later* – she went looking for her phone and it was

[2] Even the **dumbest criminal** would not have the person they just raped, contact her friends **directly** after it happened. Nonetheless, that **absurdity** is exactly what Wendy Parris alleged and also exactly what DDA Hermann **erroneously claimed** to believe.

in the bathroom with the gun, her testimony regarding the gun's *whereabouts* changed significantly:

> Q: Okay. All right. And so you're in the bathroom and he's saying things to you. At what point does this stop or do you leave the bathroom?
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> A: Hours later. He kept telling me that if I could make him come, that he wouldn't rape me.
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> Q: That he wouldn't what?
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> A: That he wouldn't rape me.
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> Q: Rape you?
>
> A: Yeah, and so then - - I couldn't. I don't know. And so, then he said, "We're going to go out into the bedroom, and that could he trust me to not scream. And I said, "yeah. And we got out there and he told me what he was going to do, that I – AND HE HAD THE GUN AGAIN.

Grand jury transcripts pages 32-33.

According to the above testimony, Wendy Parris, and Themba Hasaan Kelley, left the bathroom and entered the bedroom. According to the above testimony, after they left the bathroom and entered the bedroom; "HE HAD THE GUN AGAIN."

The above material contradiction is evident. If the gun was "put down" in the bathroom, and Parris did not discover that until "later," later; as in "after" she found her phone and thereby "after" she was allegedly raped; Themba Hasaan Kelley could not have had the gun again when they left the bathroom "prior" to the alleged rape. In other words, either the gun was in the bathroom "with the phone," (at that time) or it was in the bedroom with Themba Hasaan Kelley (at that time). The gun obviously could not have been in both places at the same time. As much as the State might want them to; guns do not have the ability to bi-locate. Period.

In that same "he had the gun again" testimony, Wendy Parris testified, "*and then he told*

me shut the fuck up or he's going to fucking kill me, you know, and forget about your fucking cat." Again, if the gun was "left" in the bathroom with the phone, Wendy Parris and "the cat" could not have been *threatened* with the gun "in the bedroom." The gun could not have been in two places at once. Consequently, because Wendy Parris' testimony places the same gun in two places at the same time, common sense and logic dictate; the gun could not have been in either place.

Because Parris gave contradictory testimony regarding the guns whereabouts, this equally means she gave contradictory testimony regarding the rape allegation itself. In other words, if the gun was "put-down in the bathroom" and Wendy Parris did not discover that until "later," obviously a gun "left in the bathroom" could not have been used as a tool to force rape while they were in the bedroom. The gun never existed; the State's own professionals concluded there was no gun and no-gun evidence on the day of the arrest. Wendy Parris' *testimonial blunder* only adds *evidentiary buttress* to that *evidentiary reality*.

The SDDA appears to have noticed Wendy Parris' *testimonial blunder* and presumed (with good reason) that the grand jurors may have as well. Instead of fulfilling her duty to correct it; the SDDA takes her misconduct to another level and corrupts the testimony even more. Below, the SDDA supplies the gun whereabouts testimony in order to repair Wendy Parris' glaring material contradictory testimony.

SDDA: Okay. And did - - at that point, did he get off of you or was he still on top of you?

Parris: He - - he got off me.

SDDA: Okay. And do you recall seeing the gun at that point at all or know where it was?

Parris: I don't know.

SDDA: Okay.

Parris: I don't - -

SDDA: Okay

Parris: know.

SDDA: And had you - - had you seen it OUTSIDE of the bathroom. HE HAD IT WHEN YOU WENT TO THE BED?

Parris: YEAH. BECAUSE HE HAD IT WHEN WE WENT TO GET UP. And then he told me to find my phone.

Page 36, grand jury transcripts.

Contrary to the SDDA's above repeated reply – "okay"; it was absolutely not "okay" for Wendy Parris to have *repeatedly* lost track of the "whereabouts" of a deadly weapon that was alleged to have been used as a tool to force rape. No one would lose track of a gun that was used to threaten their life; particularly if that same gun was "put-down" *directly* in front of them. Remember when Wendy Parris testified, "I saw it the gun out of my peripheral cause when he pulled the gun, I was like what the fuck are you doing?" It appears that her so-called "peripheral-vision" (or even her normal eyesight) wasn't functioning in the bathroom and bedroom, as well as it was "in the front seat" of Themba Hasaan Kelley's vehicle.

At grand jury, Wendy Parris testified that she was sitting on the toilet and that Themba Hasaan Kelley was "directly" in front of her. Grand jury transcripts, page 27. Further, on the day of the arrest, Wendy Parris testified, "I remember the bathroom was so small." Detective Friderich Interview, page 40. If a gun had been truly "put-down" directly in front of Wendy Parris, the only possible place the gun could have been "put-down" is near Parris' own hands and feet. This means the gun would have been **closer** to Wendy Parris' hands and feet than it was to Themba Hasaan Kelley. Parris said he was standing directly in front of her, remember?

And there is more. At grand jury when the SDDA asked Wendy Parris how long they were in the bathroom, Wendy Parris testified, “Oh, God, hour, hours. We were in there for so long, so long.” Grand jury transcripts, page 27. Therefore, if a gun was right in front of Wendy Parris’ hands and feet for “hours”, would the Multnomah County District Attorney’s Office please tell us:

> What is Wendy Parris talking about when she testified, “I don’t remember where the gun was?” Grand-jury transcripts, pages 30-31. Moreover, DA Underhill (or DA Mike Schmidt – which ever you prefer), how in the heck could Wendy Parris have “repeatedly” lost-track of it only mere days later at grand-jury? Those Motel 6 bathrooms are matchbook sized. They are as small as they come. This is not rocket science. At grand jury, Wendy Parris “repeatedly” lost track of the gun, because there was no gun. Period. Moreover, any “competent” prosecutor (who wanted to) would have discerned “all of the above – effortlessly.

The Supreme Court of Oregon supremely states:

> “Any lawyers involvement in activity that includes the lawyer’s direct misrepresentation or deception runs counter to the fundamental tenet of lawyer honestly and personal integrity.”

In Re Gatti, 330 Or 517, 532 (2000).

Furthermore, an “oath-bound” prosecutor cannot ever be justified in telling a complaining witness, “HE HAD IT WHEN YOU WENT TO THE BED,” when that complaining witness is alleging kidnap, sodomy, and rape at “gun-point.” When is it *ever* okay for a prosecutor to ask a complaining witness such a critically important/leading question; and then, at the same time, *answer* that leading question for that witness? It was the prosecutor and no one else that put *that lie* into the Wendy Parris’ *lying mouth*. The SDDA said, “He had it when” and Wendy Parris echoed, “Yeah, he had it when” right back to the SDDA. Clearly, SDDA Hermann noticed a glaring material contradiction in Wendy Parris’ gun *whereabouts/rape allegation* testimony. Instead of fulfilling her constitutional duty and *correcting it*;” SDDA Hermann *corrupted it* even

more and supplied the testimony. *Napue, supra.*

In *Stirone v. United States*, the U.S. Supreme Court Supremely stated:

> "**The right to have a grand jury make a charge on its own judgment is a substantial right which cannot be taken away**."

361 U.S. 212 (1960). "Supplying – testimony" at grand jury was forbidden by the Ninth Circuit Court in *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979). The Ninth Circuit Court succinctly stated:

> "Although Granat [the State's witness] was cooperative, his testimony was deceiving. Whether the consequences of drugs or otherwise, Granat's [the State's witness] answers to the prosecutor's leading questions were vague and contradictory.
> He was trying to please and agree to anything. For example:
>
> Q: Can you put a date on this trip?
> A: Late January, March.
> Q: January 25th
> A: Yes, as good as any.
>
> Sometimes he answered "no" or that he couldn't recall, but throughout the questioning, it was the prosecutor who actually "supplied" the testimony. "Neither by depriving the grand jury of its opportunity to evaluate the credibility of witnesses nor by making prejudicial remarks to sway the grand jury may the prosecutor deny the Defendant this substantial right".

See U.S. v. Gallo, 394 F. Supp 310, 314 (1975).

This and other factors enabled the Ninth Circuit Court to dismiss the indictment. The Ninth Circuit Court ruled, "The grand jury in this instance was 'overreached' and that a line must be drawn beyond which a prosecutor's control over a cooperative grand jury may not extend." Telling a complaining witness the last place that witness allegedly "saw a gun," after that witness has repeatedly contradicted herself, and that witness has been found to have lied about the presence of a gun on the same day of the arrest – is about as "over-reaching" as it gets. As if black-males don't have enough negative profiles and stereotypes to overcome, without

“oath-bound” prosecuting attorneys *imposing* those unjust images onto them at grand jury.

Eric Baumer, Ph.D. Department of Sociology and Criminology, Pennsylvania State University writes:

> “At least in America, race has a subjective history and meaning associated with stereotypes and biases that are at times and places closely linked – both explicitly and unconsciously – to crime, fear, anxiety, disorder and ultimately a yearning for more laws, stepped-up enforcement, and harsher sanctions that are felt disproportionately by BLACK Americans.”

At grand jury, it appears that the “Multnomah County District Attorney’s Office” resolved to portray Themba Hasaan Kelley (in both the local-media and the courtroom) as a manipulative, arm-breaking, gun-packing, black-male thug, rapist, who lives to prey on vulnerable, pure, lily-white, up-standing, homeless, cat-loving, Caucasian – middle aged females; who simply want to be left alone so they can smoke meth, shoot up heroin and *allegedly* do laundry at 1:00 am in the morning at Motel 6. *See* grand jury transcripts page 18.

Appropriately, the Oregon Court Of Appeals in *State v. Farokhrany* has enforced strict and uncompromising guidelines regarding a prosecutor’s incitement of racial and ethnic bias in a proceeding. 259 Or App 132 (2013). The court beautifully states the following:

> "Prosecutor's forensic misconduct may be generally defined as any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in the manner prescribed by law. It commonly involves an appeal to the jurors' prejudices, fears, or notions of popular sentiment by presenting to them inadmissible evidence; or urging them to make inferences not based on the evidence; or to disregard the evidence altogether and base their determination on wholly irrelevant factors. The jury may also be encouraged to disregard the weighing process prescribed by law and substitute one more favorable to the state, or otherwise to misapprehend its functions.”

Id. at 137, *citing State v. Smith*, 4 Or App 261, 264 (1970).

> “The premise underlying the CONSTITUTIONAL RIGHT to an “impartial jury” guarantee in Article 1, SECTION 11, of the OREGON CONSTITUTION is indifference by jurors to matters of race and religion.”

Id. (Emphasis added).

"In the end," the Court states, "regardless of the prosecutor's motivation *** a "Court simply cannot tolerate conduct, blatant or subtle, that even borders on an attempt to introduce, any stage of the trial, issues of racial, ethnic, or religious bias." *Id.*

Because the above Oregon Court of Appeals strict guidelines are harmoniously aligned with the uncompromising and death-less principles of our beloved Constitution, those strict guidelines are certainly and of course applicable to grand jury proceedings.

In fact, let us further be reminded that the Ninth Circuit Court in *Basurto* distinctly states; that uncorrected testimony may in fact be "more severe" at grand jury, because "the defendant has no effective means to cross-examining or rebutting" the introduction of inappropriate testimony "given before the grand jury, as he might in court." *Supra*. Obviously, because SDDA Herman's presentation at grand jury was loaded with subtle and even blatant bias; it's apparent that her ongoing strategy is to "attempt to introduce" this form of forensic-misconduct at a trial. This prosecutorial corruption cannot be allowed to proceed.

According to an extremely relevant article published by the American Bar Association: "The presumption of innocence, not expressly enumerated in the US Constitution, comes from the Bill of Rights. The general theory is that every defendant charged with a crime is presumed innocent until proven guilty beyond a reasonable doubt. However, by *PRECONCEIVED NOTION* a man of color accused of rape, by a white woman, is presumed guilty beyond a reasonable doubt." Hale Chelsea and Megan Matt, The Intersection of Race and Rape Viewed Through The Prism of a Modern Day Emmett Till American Bar Association (2019) (emphasis added).

At grand jury, SDDA Hermann's inflammatory presentation was reckless, malicious,

racist, and unfounded. No gun was found. None the less, the SDDA insisted on intentionally "planting" a gun into the trusting minds of the grand jury anyway. This undoubtedly had to have appealed to the jurors' "prejudices, fears, or notions of popular sentiment" regarding well-known societal biases unjustly associated primarily with Black men. *State v. Smith, supra.* A gun. A rape. A thug. A womanizer. A gun, etc. etc. Between the SDDA and Wendy Parris, a *non-existent* gun was mentioned no less than 39 times at grand jury. For example:

> Q: "Okay, and do you remember, was he holding the gun the whole time, or did he ever put it down? Do you recall?" Page 30.
>
> Q: "Okay, And do you recall seeing the gun at the point at all or know where it was?" Page 36.
>
> Q: "And had you - - had you seen it outside the bathroom? He had it when you went to the bed?" Page 36.
>
> Q: "Okay. All right. And when you left the room, do you know if he had the gun or did you see the gun at all at that point?" Page 40.
>
> Q: "And how did you see the gun? Was he just holding it or showing the guy?" Page 42.
>
> Q: "Okay. Okay. Let me just check my notes if I can. And you said after you saw the gun at 7-Eleven, you never saw it again, is that right?" Pages 48-49.

Grand jury transcripts.

At grand jury, SDDA Hermann concluded her gun-presentation by checking "my notes." This of course means that the SDDA's presentation was intentional, pre-meditated and thoroughly calculated. Moreover, when the SDDA checked her "notes" and said, "After you saw the gun at the 7-Eleven, you never saw it again; is that right?" The SDDA subtly invited a *baseless* explanation for why no gun was ever found. Two days later at the subsequent grand jury, the SDDA was aware that Detective Cobb would testify,"[w]e did not find any gun in the room. We then searched his vehicle, which there was no gun found inside the vehicle as well.

Grand jury transcripts, Page 84. At the same subsequent proceeding, the SDDA was also aware that Tyson Conroy would testify: "[Defendant] claimed he didn't do anything wrong and was - - and were wondering why we had multiple officers outside the motel room with our guns out. I told him, you know, WE WERE TOLD THAT HE WAS ARMED WITH A HANDGUN, which is why we just didn't go knock on the door because that would be unsafe for us to do so. So, he mentioned how he never had a handgun and that he hadn't had a gun in 30 years." (Emphasis added).

Because of SDDA Hermann's and Wendy Parris' testimonial collaboration, "And you said after you saw the gun at 7-Eleven, you never saw it again, is that right?" And further – "I don't know if he, like, sold it to that guy," the grand jurors had no reason to question Cobb and Conroy's testimony. *Nor were they going to question the above government testimony after having "a gun" repeatedly and relentlessly presented to them 49 times by a public official they "assumed" they could trust.* The fact that the SDDA concluded her gun presentation checking "her notes", and the fact that the *solicitation* that followed induced an *insidious* explanation from the State's witness is very troubling.

Disturbingly, according to SDDA Nicole M. Hermann "THOSE NOTES NEVER EXISTED." At a discovery hearing on January 9th, 2020, in front of Judge Cheryl Albrecht, specifically requested by Themba Hasaan Kelley's Defense to discover "the notes." The SDDA audaciously, defiantly, and repeatedly, went on record and denied that those "notes" ever existed. (Quotes taken from January 9th, 2020, Discovery Hearing)

> SDDA Hermann: "To be clear, I didn't take any notes of her testimony or regarding her testimony and I did - - I have not taken any notes of any other statements that she has made at any other time that I have spoken with her." Pages 32-33.

> SDDA Hermann: "I can tell the court I did not take any notes or come into the grand jury

> with any notes, any handwritten notes that I had taken or typed notes or anything else. I had the police reports and that is it." Page 33.
>
> SDDA Hermann: "I think I made it clear in my response and my email to him - - I did not take any notes about her testimony, regarding her testimony, that has anything to do with her testimony or any statements that she has made." Page 34.

According to SDDA Hermann, "the notes" she was referencing at the grand jury, were nothing more than a few "high-lighted items" on a police report. As quoted below.

Quotes taken from January 9, 2020, Discovery hearing:

> The Court: And - - and your indication is that, at most, you had no notes - - no written notes, but you were looking at items that were highlighted.
>
> SDDA Hermann: Yes, that's correct.
>
> The Court: Okay.
>
> SDDA Herman: The police reports.
>
> The Court: The police report. And - -
>
> SDDA Herman: Or some of them.

Transcripts pages 45-46.

When SDDA Hermann went on record in front of Judge Albrecht and repeatedly declared that *she did not take or use any notes* at grand jury, that was obviously a material lie, false, dishonest, artificial, etc.. After all, it was the SDDA herself who said, "Let me check my notes if I can." The Merriam-Webster Thesaurus had the following to say about the "notes":

> NOTE – D: A usually brief written reminder < I'll make a note to myself so I don't forget to pick up some milk on the way home. > Syn – memo, memorandum, notions
> Rel – memoir, minutes, report; line; document, writing
> A message on paper from one person or group to another.

How the court allowed SDDA Hermann to insult the common-sense intelligence of the tribunal by declaring that "those notes" were merely "highlighted items" on a police report is

beyond the scope of reasoning; particularly, when such a serious matter was at hand.

There was no gun. There was no gun evidence. Furthermore, because the SDDA followed "checking her notes" with a deliberate "in-sin-uation" designated to offer a reason for why no gun was found/ it's apparent that those "notes" were "permeated" with mis-con-duct. That further substantiates why SDDA Hermann did not want those notes to be discovered and also; why she erroneously, imperiously, and repeatedly denied that they even existed. Interestingly, at grand jury the SDDA checked "the notes" she claimed did not exist – *a second time*.

> SDDA Hermann: Okay. All right. Does anyone else have any questions while I check my notes?

Page 54 grand jury transcripts.

THE UNITED STATES SUPREME COURT SUPREMELY STATES:

> "The prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosure will serve to justify trust in the prosecutor as the *representative*… of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Kyles v. Whitley, 514 U.S. 419 (1995), *citing U.S. v. Agurs*, 427 U.S. 97, 108 (1976); *Berger v. United States*, 295 U.S. 78 (1935).

If those notes were only highlighted items on a police report; why was the SDDA so resistant to turn that over? Moreover, how could the SDDA have only been referencing highlighted items on a police report, when she testified, "and you said after you saw the gun at 7-eleven, you never saw it again; is that right?" When that evidence, statement, declaration, information etc. is absolutely found *nowhere* in the entire police report.

The SDDA's mis-con-duct, con-doned the testimony of a con-victed con-artist. Wendy Christine Parris' criminal history is saturated with convictions dating back to the 1990s. Those convictions, all involve deception, dishonesty, fraud, manipulation, and violence. After being

convicted on new charges she committed on January 14 and January 25, 2020, she is "currently" serving a 100-month (8 years) sentence at Coffee Creek Correctional Facility. With multiple thefts, multiple forgeries, several identity thefts, car-theft, burglary, a child abuse conviction; and also, an elder abuse infraction on her work-history record; the SDDA's presentation is Constitutionally insulting to all truth seekers everywhere.

And there's more. On the morning that Wendy Parris lied and said that Themba Hasaan Kelley was in room 208 armed with a gun, she was due at a mandatory court appointment facing a 2-year jail sentence if she failed to appear. SDDA Hermann was well aware of this *before*, *during* and *after* the grand jury. In fact, on the morning of the arrest August 14, 2019, Wendy Parris told the following to Detective Friderich.

> A: I had an appointment for intake for treatment in Vancouver and all - - The whole legal crap stuff at 8:30.
>
> Q: Mm-humm.
>
> A: And then an apartment - -
>
> Q: 8:30 p.m. or 8:30
>
> A: am
>
> Q: - - a.m. today?
>
> A: for today
>
> Q: Okay
>
> A: And so, I was gonna go stay the night at a friend's house to make sure that I made it because my car was - - 'cause I was late - - I was late yesterday for my - - yeah, ALL BAD, JUDGE NOT HAPPY.

Friderich Interview, page 70.

At grand jury Wendy Parris testified to this:

> "…And it was getting late, and I had an appointment for an assessment the next morning in Vancouver."

Grand jury transcripts.

And last: The below text message reveals Wendy Parris' actual ***state of mind*** regarding her concern for going to jail. This text was sent on the same day she met Themba Hasaan Kelley:

> "I'm completely freaking out! … I'm supposed to be in court in Vancouver… If I don't make this court date I go to jail."

Wendy Parris' phone extraction 2019-08-13. Again, Wendy Parris was ordered by that same court to attend a mandatory appointment the next day; only a few hours after she called the police on Themba Hasaan Kelley.

As SDDA Hermann was condoning, endorsing, and soliciting Wendy Parris' perjury at grand jury, she was fully aware of all the above. In other words, any competent prosecutor would have easily connected Wendy Parris' materially false testimony with her not wanting to go to jail. That is, of course if they wanted to. Even worse than the above is the SDDAs *reckless disregard* of Parris's gun lie, almost costing a Black Oregonian his life. With all the gun violence happening in Portland right now how dare any government official falsely accuse someone of doing something heinous with a gun.

At grand jury, the SDDA's presentation was unfounded.

More than just not correcting false testimony, the SDDA induced, solicited and was the *suborner* of perjured testimony. *See Napue*, 30 U.S. at 269.; *Limone v. U.S.*, 497 F. Supp 2d 143 (1st Cir. 2007). More than just inducing, soliciting, and *suborning* false testimony, the SDDA took things to the next level and supplied false testimony. *U.S. v. Samango*, 607 F.2d 877 (1979) *; Berger, supra*. Wendy Parris lost track of the gun.

The SDDA replied: "<u>HE HAD IT WHEN YOU WENT TO THE BED</u>"

*** IN CONCLUSION ***

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he [or she] is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilty shall not escape or innocence suffer. He [or she] may prosecute with earnestness and vigor – indeed, he should do so. But, while he [or she] may strike hard blows, he [or she] is not at liberty to strike foul ones. *It is much his duty to refrain from improper methods calculated to produce a wrongful conviction (or indictment for that matter) as it is to use every legitimate means to bring about a just one*. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. *Consequently, improper suggestions, in-sin-uations, and, especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none*." *Berger v. United States*, *Supra.* (Emphasis added).

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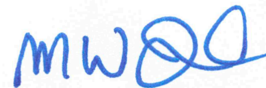
AMEENA * THIS CASE MUST BE TERMINATED ETERNALLY * AMEENA

Dated this 7 August 2022.

Themba Hasaan Kelley
Pro se defendant

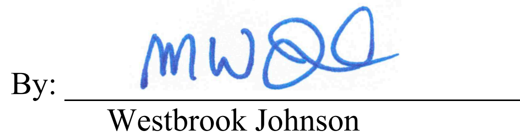


Westbrook Johnson, OSB# 076967
Legal advisor to defendant
westbrook@lawofficeofwestbrookjohnson.com

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

Dated this 7 August 2022

By: 

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