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 MOTION TO TRIAL COURT TO GRANT NEW TRIAL - ORCP 64B (1) (2) ORS 136.535/NAPUE (1.5 HR ORAL ARGUMENT REQUESTED)

ORCP 64B provides: A former Judgment may be set aside and a new trial granted in an action where there has been a trial by jury on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party: B(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial B(2), Misconduct of…prevailing party. (emphasis added). Moreover, the Supreme Court of Oregon has unequivocally ruled, that "the moving party's failure to object to an irregularity does not preclude a trial court from granting the party's motion under ORCP 64B(1). That construction of ORCP 64B(1) also is consistent with other related policies, rules, and statutes that allow courts to remedy errors that may occur during trial." *State v. Ramoz*, 367 Or 670, 698-99, 483 P3d 615, 634 (2021) "[A]n irregularity … could constitute '[m]isconduct' by … the prevailing party under ORCP 64 B(2)." *Ramoz*, 367 Or at 688, 483 P3d at 634 (2021).

The defendant therefore moves the court to grant a new trial due to DDA Brian Davidson's intentional violation of the defendants' rights under OREGON EVIDENCE CODE

103(3); and further because the DDA intentionally violated the defendant's Constitutional Rights under *Napue v. Illinois*, 360 US 264 (1959) by knowingly presenting and/or knowingly not correcting material false testimony at trial. ORCP 64B(1)(2).

THE MISCONDUCT OF THE PREVAILING PARTY IS AS FOLLOWS

On rebuttal closing argument, the DDA intentionally violated OREGON EVIDENCE CODE 103 (3) by suggesting to the jury that Olivia Ordenes had taken a gun out of the motel room to sell for drugs. In other words, to imply to the Jury that that was the reason the police didn't find a gun. The Supreme Court of Oregon states, the Oregon Evidence Code: "deters the suggestion of inadmissible evidence to the jury by any means, including through counsel statements and doesn't somehow authorize that sort of conduct if the trial court gives the jury standard instructions." Cler v. Providence Health System-Oregon, 349 Or.481, 487-88 (2010).

Importantly, Ordenes didn't say anything of the sort when she testified at the Grand Jury or at the trial. In fact, her testimony at both Grand Jury and at trial was known by the DDA to be the exact opposite. For example: On April 12, 2023 (a week before trial), Olivia Ordenes stated the following at Grand Jury: "...when the police showed up...he hid [the gun], underneath the mattress or somewhere in that room. He hid it...".

Importantly, when the DDA had Ordenes testify at Grand Jury, he never asked Ordenes if she had taken a gun out of the room. Nor did the DDA inform the Grand Jury, that he believed that Ordenes had testified falsely. That is, if the DDA thought Ordenes snuck a gun out of the room to sell it for drugs, he obviously didn't believe Themba Kelley hid a gun "underneath the mattress."

This is extremely troubling. DDA Davidson used one prejudicial narrative to indict the defendant; but then at trial, he intentionally contradicted the same prejudicial narrative he used at Grand Jury to indict; and impermissibly used that different prejudicial narrative on rebuttal closing argument to attain a verdict of guilty. Even more troubling is the fact that, this is all related to "a gun" that doesn't even exist. The Supreme Court of Oregon supremely states, "where reversible error is committed during trial it is the duty of the court to grant a new trial... even when prejudicial evidence is admitted without objection." Ramoz 367 Ore.670, 693 citing Bosch 139 Ore.at 153.

Not once in four years of prosecuting the case, did the State ever question Ordenes about taking a gun out of the room. However, on rebuttal closing argument four years later; the DDA inadmissibly transformed his once "credible witness" into a common-criminal who secretly took a gun out of the room in order to sell it for drugs. This was, of course, something Ordenes never said. The Supreme Court of Oregon supremely states, "every litigant is entitled to a fair trial, and this result cannot be achieved if counsel is permitted to make statements to the jury about FACTS NOT TESTIFIED TO BY ANY WITNESS." State v. Manning, 290 Or.app.846, 850 (2018) citing Kuehl v. Hamilton, 136 Or.240 (1930). Its telling that the prosecutor chose to tell the Jury himself that Ordenes took a gun out of the room, as opposed to questioning her about it when she was on the stand.

THE DDA KNOWINGLY PRESENTED MATERIAL FALSE TESTIMONY

It is disturbingly clear, that the paramount reason the DDA contradicted his own witnesses' testimony in the first place, was because he knew Olivia Ordenes's testimony was false. Just as important, is the fact that; the DDA had to know (before trial) that the testimony "...he hid it, underneath the mattress..." would be proved false, as soon as the police testified

that "no gun was found in the motel room". Moreover, because the state was aware as far back as August 14, 2019, that the police had concluded "no gun and no evidence that there was one"; the DDA further knew (even before Grand Jury) that Ordenes would testify falsely.

Nevertheless, even knowing before trial (and before Grand Jury) that Ordenes would testify falsely, DDA DAVIDSON KNOWINGLY PRESENTED THAT MATERIAL FALSE TESTIMONY ANYWAY. Moreover, after knowingly presenting material false testimony, the DDA knowingly contradicted the testimony with an inadmissible statement proving he had to know the testimony was false. "...the prosecutor was aware that [Ordenes's testimony] was erroneous...More importantly, by asserting [on closing argument Ordenes took a gun out of the room for drugs] the prosecutor was mischaracterizing the evidence. The prosecutor's misconduct violates the basic tenet of *Napue v. Illinois*, 360 US 264, 269 (1959), which prohibits "soliciting false evidence" and requires the prosecution to not "allow [] it to go uncorrected when it appears," *Dow v. Virga*, 729 F3d 1041 (9th Cir. 2013) (emphasis added).

Relevant to the above, is a testimonial exchange between the Court and the state that occurred at a previous *Napue* hearing as follows:

THE COURT: What I'm asking is: What's the difference between this case, as it exists, and the complaining witness coming to you and saying... "I lied about the firearm?".

Ms. Hermann: I think the caselaw [regarding *Napue*], mostly cited by Mr. Kelley, is circumstances like where the person has come forward - - either the witness themselves or someone close to the witness that has *a different statement*... [emphasis added]

Above, the state says because Wendy Parris, (and now even Olivia Ordenes) or someone close to them didn't come forward and say they "lied about the firearm" (to use the Courts words); the defendants' *Napue* claim (in those instances) should not prevail. That is, according to the state, a prevailing *Napue* claim should include "either the witness themselves or someone close to the witness that has a different statement…".

In this instance, both those suggested *Napue* requirements have been met as follows:

1. Ordenes told multiple officers on the day of the arrest, "there was no gun" (see police report pgs 19 & 34). She also said, she heard something fall off the table and didn't know if it was a gun or a ashtray. Four years later, she gave a "different statement" and testified at both (Grand Jury and trial) that he "hid the gun" in the room. 2. The state was aware of those above contradictory "different statements," before they put her on the stand. 3. She further told the state four years later, that the gun he hid in the room, had "…a barrel…". That is, she claimed that the gun was a "revolver". 4. That "different statement" is contradicted by Wendy Parris who said four years earlier that the gun was a "semi-automatic". 5.The state was aware of every last one of those "different statements"; yet, the DDA still pretended to believe he didn't know her testimony was false. 6. The police testimony, that "all hiding locations" were searched and no gun was found in the room, also qualifies as "someone… having… a different statement…" 7. The state was aware (for the last four years) that the police testimony would prove Ordenes's testimony to be false, yet they disregarded that critically important "different statement" and put her on the stand anyway. 8. MOST IMPORTANTLY, it was DDA Brian Davidson and no one else, that made a

contradictory "different statement" on rebuttal closing argument that proves he knew Olivia Ordenes's testimony was false. There is no other reason for the DDA to have materially contradicted his own presentation unless he knew the testimony, unless he knew "he hid the gun in the room" was false. The "different statement" from the DDA on rebuttal closing argument that "Ordenes snuck a gun out of the room for drugs" proves a *Napue* Violation occurred. He could not have hid the gun in the room, if she took the gun out of the room. The DDA knew that Ordenes would testify falsely at both Grand Jury and trial before he put her on the stand. 9. OLIVIA ORDENES, has come forward (post trial) and admitted that she never saw a gun in the room with Themba Kelley. This of course further means, that she could not have snuck a gun out of the room for money and drugs as the DDA fallaciously told the Jury on rebuttal closing argument.

A defendant's *Napue* claim will succeed when (1) the testimony was false; (2) the prosecutor knew or should have known that the testimony was false; and (3) the false testimony was material. Materiality is satisfied when there is "any reasonable likelihood that the false testimony could have affected the judgment of the Jury". Napue v. Illinois, 360 US 264 (1959). The mere fact, that the prosecutor intentionally contradicted the testimony proves that he knew it was false. The mere fact, that the prosecutor intentionally contradicted the false testimony, further proves he believed the testimony "affected the judgment of the Jury." *Napue, Supra.* Olivia Ordenes's post trial recanting statement further proves that the prosecutor knows the testimony is false.

The State's case undoubtedly relies heavily upon the threat of a gun being the "forcible compulsion that bears some casual relationship to the sexual contact." State v. Marshall, 350 Or. 208 (2011). However, without any concrete evidence confirming the existence of a gun, the State could not prove (beyond a reasonable doubt) that a gun caused the sexual contact that resulted in sodomy and rape (see Jury Instructions pgs. 17, 18 and 21).

Enter Olivia Ordenes: Unlike Parris, who said a gun was in the room with Themba Kelley, and five days later, changed that to "I don't know what happened to it."; Olivia Ordenes, conclusively testified at both Grand Jury and trial that the gun's last-destination was in the motel room with Themba Kelley. Moreover, because Ordenes was in the motel room with Themba Kelley when the police surrounded the room with guns, her testimony gave a most-needed support to Parris's very weak witness credibility. Relevant to the above is the following statement made by DDA Brian Davidson on rebuttal closing argument:

> "*Let's talk about…. why you should believe Wendy Parris…* I wouldn't ask you to believe her unless her accounts were corroborated by other evidence. So, let's talk about the gun. Wendy Parris says there a gun. While I guess, you could be like 'Yeah. That's just Wendy Parris saying there's a gun.' The problem here for Mr. Kelley is that Olivia Ordenes also says there is a gun… What possible reason does Olivia Ordenes have to make it up? She doesn't have one. And that's a real problem for Mr. Kelley…"

Directly after the prosecutor made the above prejudicially false statement about "the gun", he made another prejudicially false statement about "the gun" as follows:

"...*And what happened to the gun?* I think there's a pretty good chance that Ms. Ordenes walked it out of the room. Ms. Ordenes at the time was a drug addict. She was living on the streets... that's where these guns are circulated on the streets amongst drug addicts. I can certainly see a situation where Mr. Kelley very much not wanting to be caught with a gun, gave Ms. Ordenes the gun to walk out of the room because Ms. Ordenes wasn't a suspect. If anything considered potentially a hostage. They weren't going to frisk her. And I think it's very likely she walked out of there with that gun."

Regarding the DDA falsely telling the jury on rebuttal closing argument that Themba Kelley's next "target" to sexually violate was Olivia Ordenes, the DDA prejudicially stated the following:

"Mr. Kelly violated Wendy Parris for hours.... And she wasn't able to provide [climax] for him... that's why he wanted another bitch and he got one... Ms. Ordenes... another target... Another object to... satisfy... his sexual objective..." -- *DDA Brian Scott Davidson*

The court made it clear to both parties at the 104 hearing, that Ms. Ordenes was not to testify about anything sexual that allegedly occurred between she and Themba Kelley as follows:

"...this is inadmissible... it's prejudicial impact will outweigh its probated value... it has a great risk of distracting the jury from the central task in this case. So this evidence about the sexual interaction between the defendant and Ms. Ordenes is not admissible."

Knowing the above, the DDA still found a way to prejudice the defendant by inadmissibly telling the jury Themba Kelley: "...wanted another bitch... Ms. Ordenes... another target... Another objective... to... satisfy... his sexual objective..." What's worse, is that the DDA knew that was false. In fact, on April 4, 2023, in the presence of several State representatives including Mr. Davidson, Ordenes clearly stated, "...the sexual contact that occurred between she and Mr. Kelley was consensual. She did not feel he forced himself on her and felt she could leave at any time she wanted." At grand jury, Ordenes even testified that she agreeably returned to the motel to have a threesome and while in the motel she further testified that she was turned on "a little bit."

On rebuttal closing argument, the DDA did not have one shred of evidence to support that Ordenes was "another target." In fact, he even had clear and convincing evidence to unequivocally confirm the exact opposite. Nonetheless, Mr. Davidson still presented the materially false evidence to the jury anyway.

The Supreme Court Supremely States:

"First, its established that a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment, Mooney v. Holohan, 29U.S.103; Pyles v. Kansas, 317U.S.213... The same result obtains when the State, although not soliciting false evidence, allows it go uncorrected when it appears. Alcorta v. Texas, 355U.S.28...The principle that a state may not knowingly use false evidence, including false testimony to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The Jurys estimate of the truthfulness and reliability of a given witness may well be determinative of

guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendants life or liberty may depend…A lie is a lie, no matter what its subject, and, if it is any way relevant to the case, the district attorney has a responsibility and duty to correct what he knows to be false and elicit the truth…"

Napae V. Illinois 360 U.S.264, 268

The Supreme Court of Oregon Supremely States:

"The legislative intent to allow trial courts broad authority is evident in the fact that ORCP 64(B) sets a broad range of "causes" authorizing a court to grant a new trial on motion of a party. It is also evident in the fact that ORCP 64(G) does not limit the causes on which the court can act when it does so on its own initiative. When an "irregularity in the proceedings of the court " denies a party a fair trial, the legislature has an interest in granting trial courts authority to remedy that wrong; parties and our Judicial system benefit when the costs and delay occasioned by appeal or post-conviction proceedings can be avoided. We conclude, therefore, that the legislature intended that trial courts have authority under ORCP 64B(1) to grant a new trial where an irregularity prevented the moving party from having a fair trial, even when the moving party doesn't object to the irregularity during trial…" State v. Ramoz 367Ore.670,699 (2021) "[A]n irregularity… could constitute [m]isconduct…by… the prevailing party under ORCP64B(2) Ramoz, 367Or. at 688, 483 P.3d at 634 (2021).

Several months before the trial, the defendant informed the Court (at the special hearings for prosecutorial misconduct) that if it didn't deal with "the cancer of Justice that had become apparent;" it would only allow "the cancer to grow". United States v. Basurto, 497F.2d 781, at 785. Unsurprisingly, the above is exactly what has happened. DDA Brian Davidsons cancerous

"gun" presentation at trial, only enabled the disease of falsity to continue to grow. For example: (1.) The Jury was led to believe "...after he started to flash the gun the cops knocked." That was false. (2.) The same Jury was led to believe, "...the cops knocked, and then he put it... underneath the mattress or somewhere in the room. He hid it." That was false. (3.) On the DDA's rebuttal closing argument, that same Jury was also led to believe, that Olivia Ordenes, also snuck a gun out the room for drugs. That was false. Not only is that false, but the State didn't present one shred of evidence at trial to substantiate it. (4.) The Jury was further led to believe on rebuttal closing argument, that a distorted, shadowy and speculative picture was "consistent" with Ms. Parris's testimony.

The DDA could not have possibly believed that the picture was "consistent" with Ms. Parris's testimony. At trial, Ms. Parris unequivocally testified that, "I saw the bulge [of a gun] in the back of his pants." when they left the motel room to go to 7-Eleven; not the "front of his pants" as the state's picture erroneously alleged. She further testified that she saw him pull the gun "from the back of his pants" when they were at the 7-Eleven; not the "front of his pants" as the State's picture erroneously alleged. In fact, not once in the entire case has Parris ever said she saw a gun in the "front" of his pants, as the following statements will prove:

1. "Wendy said Themba produced a hand gun from his back waist-band." (pg.14 police report)

2. After allegedly being pulled back in from the window, she further alleged the gun was pulled "...from behind him... or... the back of his pants...". (pg.125 Lindsey interview)

3. Even when his pants were "on the ground", she alleged he put the gun "...in the back of his pants." (pg. 165 Lindsey interview)

4. When leaving to 7-Eleven, she told the police she "...saw it (the gun)... in the back of his pants." (pg. 187 Lindsey interview)

5. She then said, when they "...got to the 7-Eleven... he pulled it (the gun) out the back of his pants." (pg. 187 Lindsey interview)

As proven above, every statement Parris ever made in the entire case (including her trial testimony), places "the gun" in the "back" of his pants; not the "front" of his pants as the state's picture alleged. Still, on rebuttal closing argument, the DDA falsely told the Jury that the picture was "consistent" with Ms. Parris's testimony, knowing that was not the truth.

CONCLUSION

Everything DDA Brian Davidson said on his rebuttal closing argument to prove the existence of a non-existent gun was false. Moreover, it is emphatically, conclusively and supremely controlled by the Supreme Court of Oregon that "Where reversible error is committed during trial it is the duty of the court to grant, a new trial... even when prejudicial evidence is admitted without objection." State v. Ramoz 367 Ore. 670 693 (2021) citing Bosch, 139 Ore at 153.

With that said; the gun as an element of force was the central theme of the State's case and the jury was fed material lies about it. The Defendant could not have possibly received a fair trial. Under ORCP 64B (1), the Supreme Court of Oregon gives the trial court authority "to grant a new trial where an irregularity prevented the moving party from having a fair trial, even when the moving party does not object to the irregularity during trial... when the court chooses to take responsibility for an irregularity that deprived a defendant of a fair trial, we conclude that the

legislature did not intend to preclude the court from providing an immediate remedy." State v. Ramoz 367Ore. 670, 699 (2021).

The defendant therefore reasonably moves the Court to grant a new-trial due to the State's intentional violation of the defendant's rights protected under OREGON EVIDENCE CODE 103(3); and further because the state intentionally violated the defendant's Constitutional Rights protected under Napue v. Illinois, 360 U.S. 264 (1959) by knowingly presenting and/or knowingly not correcting material false testimony at both Grand Jury and trial. A trial "...court has authority to grant a new trial when unpreserved irregularity denied the moving party a fair trial." State v. Ramoz 367.Ore. 670, 693 (2021). The defendant must be granted a new-trial. ORCP 64B(1)(2)

AMEENA MARE

DECLARATION OF DEFENDANT

I hereby declare that the information in this motion is true to the best of my knowledge and belief, and that I understand it can be used as evidence in court and is subject to penalty for perjury.

DATED: June 26, 2023.

Themba Hasaan Kelley

Themba Hasaan Kelley

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 Brian Scott Davidson's email listed in the bar directory and/or via eFile and Serve (if service contacts were entered).

DATED: June 26, 2023.

Themba Hasaan Kelley

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