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6 Attorney for Defendant

7 **IN THE SUPERIOR COURT**
8 **COUNTY OF SANTA CRUZ, STATE OF ARIZONA**

9 State of Arizona, 10 Plaintiff 11 vs. 12 George Alan Kelly, 13 Defendant	Case Number: CR 23-026 Motion for Review of Magistrate's Probable Cause Determination
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14 Judge: Hon. Thomas Fink

15 COMES NOW the defendant, by and through the undersigned attorney, and hereby
16 respectfully makes this motion for the Superior Court to review the magistrate's probable cause
17 determination. This motion is being made pursuant to Rule 5.5 of the Arizona Rules of Criminal
18 Procedure.
19

20 **Facts**

21 This case involves the defendant, George Alan Kelly, firing warning shots over the heads of
22 armed drug traffickers on his property.

23 Mr. Kelly was eating lunch when he heard a shot fired and saw his horse running. Mr. Kelly
24 and his wife both then observed numerous armed men carrying rifles and large backpacks running
25 through the trees. Mr. Kelly told his wife to stay inside and to stay quiet, and Mr. Kelly called the
26 Border Patrol Ranch Liaison for assistance. Mr. Kelly went to his back porch with his rifle in order to
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1 deter the drug traffickers from approaching his house. One of the members of the group pointed a
2 rifle at Mr. Kelly, and Mr. Kelly responded by firing several warning shots over the heads of the
3 group. Mr. Kelly's shots were fired well over the heads of these people, and Mr. Kelly did not shoot
4 anybody during this incident. The group of traffickers ran away through the desert, and Mr. Kelly
5 called the Ranch Liaison again for assistance. According to the Ranch Liaison, Mr. Kelly made a
6 statement that was inconsistent with his previous report that these men were armed. According to the
7 Ranch Liaison, Mr. Kelly stated that the people were too far away to tell if they were armed.
8

9 However, when the Ranch Liaison relayed this information to the Border Patrol dispatcher
10 (Agent Tursi), the Ranch Liaison reported that Mr. Kelly stated he could not tell whether the shots
11 were fired close by or in the distance. The Ranch Liaison did not report to the Border Patrol
12 dispatcher that Mr. Kelly stated the men were too far away to tell whether they were armed or not.
13

14 In all other statements to law enforcement, Mr. Kelly consistently stated that the men were
15 armed with rifles and carrying large backpacks.

16 Law enforcement responded to the area and searched the area. Law enforcement was not able
17 to locate the men, or anything else on Mr. Kelly's property. After documenting the incident, law
18 enforcement left.
19

20 Later in the day, Mr. Kelly was going to his pasture to check on his horse, and his dogs
21 located the body of a man near a mesquite tree. The body was over 100 yards away from Mr. Kelly's
22 house. The body was that of a man, lying face down, in possession of a camouflage backpack and a
23 two-way radio. The presence of the radio indicated that this person was not a migrant, but a smuggler
24 of some kind (whether of people, drugs, or both). No drugs or weapons were discovered on the body.
25 The body was later identified as a man named Gabriel.
26

27 Mr. Kelly immediately called the Border Patrol Ranch Liaison to request assistance.
28

1 Law enforcement responded to the area and began investigating. Mr. Kelly was interviewed,
2 and law enforcement accused him of shooting Gabriel. Mr. Kelly continued to deny that he had shot
3 at anybody. Law enforcement claimed that Mr. Kelly shooting “at” a person was the same thing as
4 Mr. Kelly shooting “over” a person, and described Mr. Kelly as “changing his story” because he said
5 he shot “over” the people rather than “at” the people.
6

7 Mr. Kelly never admitted that he shot “at” any person. Nevertheless, law enforcement
8 conflated these terms, and claimed in their statement of the offense that Mr. Kelly had admitted to
9 shooting “at” numerous subjects.
10

11 During Mr. Kelly’s interview, he was told his statements did not “add up,” but was not given
12 any opportunity to hear or correct any possibly conflicting statement. Mr. Kelly was told that he
13 needed to “help himself out” by “telling the truth.” Mr. Kelly was told “you shot him,” and he was
14 told that law enforcement was going to do ballistics. Mr. Kelly was told that if the ballistics showed
15 that the shot came from Mr. Kelly’s gun, Mr. Kelly was going to be “in trouble.”
16

17 In spite of this pressure from law enforcement, Mr. Kelly maintained that he did not shoot the
18 individual found on his property.

19 Without doing any real forensic investigation, law enforcement decided to arrest Mr. Kelly
20 and charge him with first degree premeditated murder.

21 Search warrants were executed, and shell casings were found on Mr. Kelly’s property near his
22 house (consistent with Mr. Kelly’s statements that he fired warning shots). Mr. Kelly’s rifle was also
23 located. No bullet was found, and therefore no ballistics were accomplished in this case.
24

25 Upon Mr. Kelly’s arrest, this case became highly publicized. The political climate regarding
26 border issues is extremely volatile, and this case has garnered national interest as a result. The public
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28

1 and political nature of this case has compromised the investigation, and details of this case are widely
2 known to the public at large.

3 Under these circumstances, various people claiming to be witnesses to this event have come
4 forward and made statements. Those “witness” statements are highly suspicious, they are given under
5 dubious circumstances, they contradict each other, and they contradict the physical evidence in this
6 case.
7

8 The first person to officially come forward was a person whose initials are R.A.F.G. He was
9 picked up by Border Patrol near Sonoita for alien smuggling on February 8, 2023. Under these
10 circumstances, this person attempted to provide information regarding the homicide. He claimed that
11 Mr. Kelly just randomly started shooting at a group of unarmed migrants without warning. He
12 claimed that Gabriel was the guide for the group, that he had approached the house to get water, and
13 that Mr. Kelly shot him at close range with a rifle. R.A.F.G. also claimed that Mr. Kelly shot a horse.
14 R.A.F.G. claimed that there was a house, and that the body was shot near a gazebo with “writing
15 materials” that were close to the body. R.A.F.G. also claimed that there was a white sedan at the
16 house.
17
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19 The second person to come forward was a person whose initials are D.R.R. He came forward
20 after the family of the deceased person located him and arranged for him to meet with Sheriff
21 Hathaway and Detective Barba in Nogales, Sonora, Mexico.

22 This witness was apparently interviewed for approximately 40 minutes, but only 6 minutes of
23 that interview were recorded. The witness claimed that this happened in an area West of Nogales, and
24 that there was no house in the area. This person claimed that Mr. Kelly just appeared out of nowhere
25 and started shooting. This person claimed that Mr. Kelly shot and killed a horse. This person claimed
26 that this took place near a road used by Border Patrol. This person claimed that after this incident
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1 took place, he ran back into Mexico, and that that took him approximately 10 to 15 minutes. This
2 person claimed that Mr. Kelly shot Gabriel from close range. This person claimed that Gabriel fell
3 down onto his back, and that Gabriel was not a smuggler and was not carrying a radio.

4 This person further claimed that he did not see Mr. Kelly carrying a weapon, but that he saw
5 “something” in Mr. Kelly’s hand. This person claimed that he heard 15 or 16 shots, and that he
6 recognized the shots as coming from an AK-47. At first, this person claimed he had never heard an
7 AK-47 fired prior to the date of this incident. Then, he changed his statement to say that he has heard
8 AK-47 rifles fired every year during the holidays to celebrate. Then, he altered his statement again to
9 claim that he had never personally witnessed AK-47 rifles being fired, but that he had “heard that
10 they do that” on the holidays. Finally, he altered his statement again to claim that he had seen people
11 fire AK-47 rifles on the holidays, but that he himself has never personally carried or fired an AK-47
12 rifle.
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15 When interviewing these “witnesses,” law enforcement never challenged their version of
16 events. Investigators did not ask any follow-up questions regarding a horse, and they did not ask any
17 questions about the multiple inconsistencies with the facts. These witnesses were never confronted
18 the way that Mr. Kelly was confronted in his interview. Nobody warned the witnesses about making
19 false statements to law enforcement. Nobody pressured the witnesses to “tell the truth” to “help
20 yourselves out,” or anything along those lines. Nobody told the witnesses that their statements did not
21 “add up.”
22

23 While Mr. Kelly’s statements were scrutinized and challenged, these “witness” statements
24 were accepted as fact by investigators.
25

26 While the State admits that the witness statements are not consistent with each other or with
27 the physical evidence, the State dismisses the inconsistencies as simply being the result of the
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1 witnesses experiencing a traumatic event. The State also suggests that these witnesses are too
2 “uneducated” to accurately recall events, but that their statements should be believed regardless.

3 A hearing was held in this case on February 22, 2023 in order to argue for a modification of
4 Mr. Kelly’s conditions of release. At the close of that hearing, the judge scheduled an evidentiary
5 preliminary hearing to be held on February 24, 2023. The defense objected, and indicated that the
6 defense is consulting with experts in order to obtain forensic evidence in this case. The defense
7 requested a continuance of 60 days in order to be able to present expert testimony at the preliminary
8 hearing. The court denied the request for the continuance, stating that the Rules require the
9 preliminary hearing be held within ten days.
10

11 The afternoon prior to the preliminary hearing (on February 23, 2023) the State disclosed for
12 the first time the witness D.R.R. and his recorded statement in Spanish. The State made additional
13 disclosures late in the day, on the day prior to the preliminary hearing. It was impossible for the
14 defense to review all of the late disclosure, or to discuss the disclosure with the defendant. The State
15 also filed a Second Amended Complaint on February 23, 2023. That document changed the charge
16 from first degree murder to second degree murder (an entirely different theory of the case).
17

18 Due to the inability to consult with experts, the drastic change in the charge, and the late
19 disclosure, the defense again requested a continuance of the preliminary hearing. The defense pointed
20 out that it is standard practice for continuances to be granted, and refusing to grant a continuance was
21 a major deviation from the justice court’s long accepted standards of practice.
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23 The justice court summarily denied the defendant’s motion to continue, and provided no
24 reasoning for the court’s decision.
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1 **Law**

2 Rule 5.5 of the Arizona Rules of Criminal Procedure applies to this motion and reads as
3 follows:

- 4 **(a) Grounds.** The superior court may review a magistrate's determination to bind over a
5 defendant only if the defendant files a motion for a new probable cause finding. The court
6 may grant the motion only if the defendant was denied a substantial procedural right or the
7 magistrate's probable cause finding was not supported by credible evidence. If the motion
8 challenges the sufficiency of the evidence supporting the probable cause finding, it must state
9 specifically the ways in which credible evidence was lacking.
10 **(b) Timeliness.** A motion under this rule must be filed no later than 25 days after the
11 preliminary hearing is completed.
12 **(c) Evidence.** A superior court's review of the evidence is limited to the certified transcript
13 and exhibits admitted at the preliminary hearing.
14 **(d) Relief.** If the court grants a motion for a new probable cause finding, the court must
15 remand the action to the magistrate with appropriate instructions. Unless a new preliminary
16 hearing is commenced within 15 days after the remand order is filed, the case must be
17 dismissed.

18 In preliminary hearings, hearsay evidence may be admissible, however there must be
19 reasonable grounds to believe that the declarant will be personally available for trial. Additionally,
20 the probable cause finding must be based on "substantial evidence." Specifically, Rule 5.4 (c) and (d)
21 of the Arizona Rules of Criminal Procedure state the following:

- 22 **(c) Evidence.** A magistrate must base a probable cause finding on substantial evidence, which
23 may include hearsay in the following forms:
24 (1) a written report of an expert witness;
25 (2) documentary evidence, even without foundation, if there is a substantial basis for
26 believing that foundation will be available at trial and the document is otherwise admissible;
27 or
28 (3) a witness's testimony about another person's declarations if such evidence is cumulative or
if there are reasonable grounds to believe that the declarant will be personally available for
trial.
(d) Lack of Probable Cause. The magistrate must dismiss the complaint and discharge the
defendant if a magistrate finds that there is not probable cause to believe that an offense has
been committed or that the defendant committed it.

1 In a preliminary hearing, a defendant has the right to make an offer of proof, and the justice
2 court must allow the defense to present its evidence. Specifically, Rule 5.3(a)(4) states the following:

3 (4) *Offer of Proof.* If the magistrate rules that there is probable cause, the defendant may make
4 a specific offer of proof to the contrary, including the identities of witnesses who would
5 testify or produce the offered evidence. The magistrate must allow the defendant to present
6 the offered evidence, unless the magistrate determines that, even if true, the evidence would
7 be insufficient to rebut the probable cause finding.

8 The right to make an offer of proof is a substantial procedural right specifically afforded to
9 the defense by the Rules of Criminal Procedure.

10 11 **Argument**

12 ***Defendant was denied a substantial procedural right***

13 Mr. Kelly was denied a substantial procedural right when the justice court denied his motion
14 for a continuance.

15 Mr. Kelly was arraigned on the charge of second degree murder for the first time mere
16 moments before a preliminary hearing was held. The second amended complaint (changing the first
17 degree murder charge to second degree murder) was filed the day prior to the preliminary hearing,
18 and significantly changed the theory of the case. The defense had prepared to cross examine
19 witnesses and present a defense based on the original first degree murder charge.
20

21 Changing the charge at the last moment prejudiced the defense because the defense was not
22 afforded adequate notice of the charge to be defended against. This lack of notice deprived Mr. Kelly
23 of his basic right to due process.
24

25 Refusing to allow the defense time to consult with experts and provide a proffer also denied
26 the defense a substantial procedural right. Mr. Kelly is conferring with experts regarding this case,
27 and expects to be able to at least present a reconstruction of the shooting. This evidence is going to be
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1 crucial to Mr. Kelly’s defense, and can certainly counter the State’s evidence at the probable cause
2 level.

3 ***Probable cause finding not supported by credible evidence***

4 The evidence presented by the State at the preliminary hearing was not credible.

5
6 The evidence conclusively demonstrated a bias in the investigation against Mr. Kelly. Law
7 enforcement officials scrutinized Mr. Kelly’s statements, accused him of shooting the deceased, told
8 him he would be “in trouble” and that he needed to “help himself out.” The State argued that Mr.
9 Kelly’s statements were “all over the place.”

10 At the same time, investigators never confronted other witnesses on their numerous
11 inconsistencies, or on their possible motivations for coming forward.

12
13 The witness, R.A.F.G., stated that Gabriel was the guide (this contradicted the witness
14 D.R.R.), and he stated that Mr. Kelly had shot a horse (this contradicted the physical evidence).
15 R.A.F.G. suggested that Mr. Kelly shot Gabriel near his house at very close range (this is
16 contradicted by the location of the body, over 100 yards away from Mr. Kelly’s house and from any
17 shell casings). R.A.F.G. stated that there was a white sedan on the property (this contradicts the
18 physical evidence, because the only cars on the property were a truck and an SUV). The witness
19 stated that this shooting took place just 2 or 3 days before he was interviewed, and then he changed
20 his statement and said it took place 8-10 days before he was interviewed (in the first instance he was
21 wrong, in the second instance he was correct).

22
23 Witness D.R.R. came forward because Gabriel’s family found him and arranged for him to
24 meet with the Sheriff. Detective Barba testified that D.R.R. was interviewed by him and Sheriff
25 Hathaway for 30 to 40 minutes, but the State only provided a 6 minute video recording of the
26 interview.
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1 Witness D.R.R. stated that this took place near Washington Camp (an area far to the East of
2 Mr. Kelly's property), and he also stated that this took place West of Nogales (Mr. Kelly's property is
3 East of Nogales). The witness stated that Gabriel was not the guide (contradicting witness R.A.F.G.)
4 and that Gabriel did not carry a radio (contradicting the physical evidence). Witness D.R.R. stated
5 that he saw Mr. Kelly shoot and kill a horse (contradicting the physical evidence). Witness D.R.R.
6 stated that he had never heard an AK-47 prior to the incident, but that he recognized the sound
7 because he had heard it prior to the incident. He stated that he heard AK-47 rifles fired on the
8 holidays, but then stated he never personally witnessed that, but then stated that he had personally
9 witnessed that every New Year's (contradicting himself repeatedly). Witness D.R.R. stated that he
10 crossed the border once with Gabriel earlier in the day, then ran back into Mexico when a Patrol
11 spotted him, and then crossed back into Mexico later in the day. Then, he contradicted himself again
12 and stated that he only crossed the border one time before encountering Mr. Kelly.

15 Witness D.R.R. stated that there was no house in the area of the shooting, that there was a
16 road used by Border Patrol in the area, that Gabriel fell onto his back after he was shot, that Mr. Kelly
17 shot Gabriel from close range, and that Mr. Kelly fired 15 to 16 shots. All of these statements are
18 directly contradicted by the physical evidence. This took place by Mr. Kelly's house, there is no road
19 near where the body was located, Gabriel's body was found on its stomach, the shot was not fired
20 from close range, and less than ten shell casings were recovered.

22 Witness D.R.R. stated that it took him 10 to 15 minutes to return to Mexico after the shooting
23 took place. Mr. Kelly's property is approximately two miles as the crow flies from the border, and the
24 terrain is such that it is impossible for someone to get across the border in 10 or 15 minutes on foot
25 through the desert.
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1 Detectives never questioned any of these major inconsistencies and inaccuracies in the
2 witness statements. The State, while asserting that Mr. Kelly's statements were "all over the place,"
3 seemed to have no problem accepting the witness testimony as being factually accurate.

4 Additionally, Detective Bunting testified that he stood in the area where the shell casings were
5 found (near the back of Mr. Kelly's residence), and Detective Barba stood where the body was
6 located. From Detective Bunting's position, he could barely see Detective Barba through the trees.
7 Had Detective Barba been wearing camouflage, it would be even harder for him to be seen. Detective
8 Bunting testified that the distance, plus the lack of a clear line of sight, made it a very difficult shot to
9 take with any sort of weapon.
10

11 Based on the evidence presented at the preliminary hearing, it is inconceivable that Mr. Kelly
12 shot and killed Gabriel.
13

14 The more likely conclusion was that Gabriel was shot by someone else while Mr. Kelly was
15 eating lunch, and Mr. Kelly heard the fatal shot before seeing the armed traffickers running through
16 the trees.
17

18 The uncontroverted evidence at the preliminary hearing established that Mr. Kelly's property
19 is a high crime area, and that traffic in that area has increased. The uncontroverted evidence
20 established that drug traffickers use that area, are usually armed, and are commonly armed with AK-
21 47 rifles. The uncontroverted evidence also established that drug traffickers carry weapons in order to
22 violently defend their drugs against other groups who are out there to steal the drugs.
23

24 Gabriel was almost certainly a victim of an armed encounter between these traffickers, and
25 the evidence presented at the preliminary hearing clearly established that possibility. Detectives never
26 investigated that possibility, and it appears they dismissed it off hand early on in this case. The
27 evidence established that the investigation in this case was tainted by bias from the very beginning. It
28

1 never even occurred to detectives to investigate an alternate theory of their case. Detectives decided
2 early on that Mr. Kelly was guilty, and did whatever they could in order to confirm their own
3 conclusions.

4
5
6 **Conclusion**

7 For the foregoing reasons, the defendant respectfully requests that the Court review the
8 magistrate's finding of probable cause.

9 The defense is in the process of obtaining certified transcripts of the preliminary hearing, and
10 will provide those as they become available. The defense reserves the right to supplement or correct
11 this motion when the transcripts are available.

12 The defense respectfully requests permission to exceed the page limit for this motion.

13
14
15 RESPECTFULLY SUBMITTED this 3 day of March month, 2023.

16
17
18 /s/ Brenna Larkin
19 Brenna Larkin, Attorney for Defendant

20 Copies of the foregoing
21 Sent/delivered this 3 day of March month, 2023 to:

22 Kimberly Hunley
23 Deputy County Attorney
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