

**JASON D. LAMM # 018454**  
**Law Office of Jason Lamm**  
**2501 North Seventh Street**  
**Phoenix, AZ 85006-1062**  
**Telephone: (602) 222-9237**  
**Facsimile: (602) 222-2299**  
**Email: jlamm@cyberlawaz.com**

**IN THE SUPERIOR COURT**  
**IN AND FOR THE COUNTY OF MARICOPA**

<b>STATE OF ARIZONA,</b>	)	<b>CR2015-144211-001</b>
	)	
Plaintiff,	)	<b>LESLIE ALLEN MERRITT, JR.'S</b>
	)	<b>PETITION FOR NOTATION OF</b>
<b>vs.</b>	)	<b>CLEARANCE</b>
	)	
<b>LESLIE ALLEN MERRITT, JR.,</b>	)	<b>ORAL ARGUMENT REQUESTED</b>
	)	
Defendant	)	
	)	
	)	
	)	

Leslie Allen Merritt, Jr., through undersigned counsel, pursuant to A.R.S. §13-4051, hereby moves this Court to enter a Notation of Clearance on behalf of Leslie Allen Merritt, Jr. in this matter, and that the Court further order that this case be sealed. For reasons set forth *infra*, Leslie Allen Merritt, Jr. submits that he was wrongfully arrested, indicted, or otherwise charged.

In support of this Petition, Leslie Allen Merritt, Jr. states as follows:

1     A.     Statement of Material Facts

2             1.     On September 18, 2015, Leslie Allen Merritt, Jr. was  
3  
4     arrested without a warrant by the Arizona Department of Public Safety  
5     (DPS) on charges of domestic terrorism, drive by shooting, aggravated  
6     assault, assault, criminal damage, disorderly conduct, and unlawful  
7     discharge of a firearm. Specifically, it was alleged that he shot a  
8     Cadillac Escalade on Saturday, August 29, 2015 at 11:03 a.m.; a tour  
9     bus on August 29, 2015 at 11:05 a.m.; a Kia Sorrento on August 29,  
10    bus on August 29, 2015 at 11:05 a.m.; a Kia Sorrento on August 29,  
11    2015 at approximately 10:00 p.m.; and a BMW on Sunday, August 30,  
12    2015 at approximately 9:45 p.m. Exhibit 1 (Map of Shootings Generated  
13    by DPS)

14  
15             2.     After reviewing the Form 4, the Initial Appearance Court  
16     found probable cause and set a \$1,000,000 cash bond.  
17

18             3.     On September 22, 2015, a Direct Complaint was filed by the  
19     Maricopa County Attorney's Office (MCAO).  
20

21             4.     On September 24, 2015, Leslie Allen Merritt, Jr. was indicted  
22     by a grand jury.

23             5.     In a Memorandum to their Chief Deputy, the Deputy County  
24     Attorneys assigned to the case acknowledged that the case against  
25     Merritt "relies entirely on circumstantial evidence" and that the only  
26

evidence relied on by MCAO when it charged the case was the ballistic conclusions of the DPS Crime Lab. Exhibit 2

B. The facts DPS knew before the arrest could not connect Leslie Merritt with the Freeway Shootings.

(i) DPS fabricated the ballistic evidence.

6. Under DPS' theory supporting probable cause, all the bullets recovered from the four I-10 Freeway Shootings with which Mr. Merritt was charged were fired from a single weapon necessarily available for all the shootings. (Exhibit 3, Form 4, at p.2 ¶ 9). Using a Euclidian axiom,  $A=B=C=D$ , (Exhibit 4, at 34:3-25) to invalidate Merritt's gun from one shooting invalidates the gun's involvement for all the shootings. (Exhibit 5, at 83:15-84:16).

7. Merritt pawned his gun on August 30, 2015, at 5:31 p.m. (Exhibit 4, at 15:10-14; Exhibit 6, at 120:12-15; Exhibit 7, Deposition of Graff, at 30:5-7) ("I have a timestamp and video of the gun being pawned, so I have no doubt that it was in the pawn shop at the time").

8. The BMW was shot on August 30, 2015 at about 9:45 p.m., four hours after Merritt pawned his gun. (Exhibit 6, at 120:12-15; 133:7-12; Exhibit 8, Deposition of Falcone, at 95:14-96:13; 155:24-156:4;

1 Exhibit 9, LPR Memo; Exhibit 10, CCTV Report; Exhibit 11, Falcone  
2 Email to Brittany Willis, at p.2; Exhibit 1).

3  
4 9. On September 3, 2015, the BMW (dealership) mechanic  
5 who removed the bullet from the BMW's tire told detectives that the tire  
6 would have leaked immediately and activated the tire pressure  
7 monitoring system within one mile from where the tire was punctured.  
8 (Exhibit 12, Deposition of Warren, at 39:11-16). The tire was not self-  
9 sealing. (Exhibit 13, Deposition of Noedel, at 67:19-23). It was  
10 reasonable to expect it to deflate immediately after being shot. (Exhibit  
11 14, Deposition of Weller, at 77:12-14).

12  
13  
14 10. Because Merritt's gun was in pawn when the BMW was  
15 shot, Merritt's gun is excluded. (*Id.* at 73:24-74:5)

16  
17 11. According to Lucien Haag, a world-renowned expert hired by  
18 MCAO, DPS Criminalist Christopher Kalkowski misidentified Merritt's  
19 gun. (Exhibit 15, at 115:2-20; Exhibit 14, at 73:16-74:11).

20  
21 12. Before arresting Merritt, DPS knew his gun could not be in  
22 two places simultaneously, and if DPS could not reconcile this  
23 discrepancy, the crime lab's opinion is invalidated. (Exhibit 6, at 120:16-  
24 121-5, Exhibit 7, at 42:4-13).

1           13. Without Kalkowski's opinion, DPS conceded probable cause  
2 would not exist, according to Lt. Col. Hunter. (Exhibit 16, Deposition of  
3 Hunter I, at 53:21-54:2.)  
4

5           14. Sgt. Mapp admitted that if DPS could not reconcile the  
6 discrepancy between the timing of the BMW shooting and Merritt's gun  
7 in the pawn shop, there would not be probable cause to arrest Merritt.  
8 (Exhibit 6, at 162:15-164:13).  
9

10           15. Col. Milstead and Lt. Col. Silbert pressured officers to make  
11 an arrest (Exhibit 17, Deposition of Heape, at 68:6-12).  
12

13           16. In the crime lab, Kalkowski "was under pressure to make a  
14 match" between the evidence bullets and Merritt's gun. (Exhibit 18, at  
15 95:15-96:13). Sgt. Mapp directed the crime lab to test Merritt's gun first  
16 (Exhibit 19, at 157:19-158:4), and no other guns were tested. (Exhibit  
17 20, at 43:20-44:19). Kalkowski acknowledged he never directly  
18 compared the bullets from two of the four shootings to a test-fired bullet  
19 from Merritt's gun. (Exhibit 5 at 95:22-96:11; 98:4-14).  
20  
21

22           17. Heape discussed the discrepancy defeating probable cause  
23 to arrest with Hunter, though they disregarded, ignored, and did nothing  
24 to resolve it. (Exhibit 16, at 56:15-57:22).  
25  
26

1           18.   DPS knew the “BMW shooting doesn’t line up” with the crime  
2 lab’s opinion (Exhibit 7, at 65:2-15) and that if the crime lab was right,  
3 the BMW driver was wrong about when the shooting occurred and,  
4 conversely, if the BMW driver was right, then the crime lab was wrong.  
5 (*Id.* at 63:2-64:3; Exhibit 18, at 106:3-12).

6  
7           19.   DPS believed its lab over the BMW driver (Exhibit 6, at  
8 165:8-11), though there was no evidence that the driver was wrong.  
9 (Exhibit 17, at 88:21-89:24; Exhibit 21, Deposition of Baroldy, at 105:16-  
10 106-2). As a result, Milstead, Silbert, Hunter, Heape, and Capt. Pinnow  
11 all participated in the decision to arrest Merritt without a warrant. (Exhibit  
12 22, Deposition of Silbert, 97:2-98:24; Exhibit 17, at 81:10-82:1).

13           (ii)   Before the arrest, DPS had no evidence placing Merritt at  
14 any crime scene.

15           20.   DPS had no evidence to place Merritt at any shooting scene.  
16 (Exhibit 21, at 65:3-9; Exhibit 17, at 100:1-5; Exhibit 18, at 116:8-11;  
17 Exhibit 23, Deposition of Pinnow, at 57:4-8)

18           21.   Cell phone tower analysis conducted by the Federal Bureau  
19 of Investigation “corroborate[d] the defendant’s alibi” and proved his  
20 innocence. (Exhibit 2, at 1).

1           22. Leslie Merritt was a lawful owner and possessor of a firearm.  
2 (Exhibit 24, at 91:8-13)  
3

4           23. His firearm is one of about 286,000 similarly manufactured  
5 Hi-Point C-9s. (*Id.* at 79:7-15)  
6

7           24. DPS knew that “all the facts and circumstances in a case”  
8 need to be looked at to determine probable cause (Exhibit 6, at 37:23-  
9 38:1), though they consciously disregarded numerous facts which  
10 negated it. (Exhibit 25, at pp. 9-12). “DPS should have paused to  
11 reconcile the discrepancy between the crime lab’s opinion and the facts  
12 of the investigation before arresting Merritt.” (*Id.* at 11-12)  
13

14           25. Reasonable police officers would not believe there was  
15 probable cause to arrest Merritt (Exhibit 20, Deposition of Clark, at  
16 153:23-154:1; Exhibit 26, Deposition of DeCastro, at 90:14-93:1). DPS  
17 should have tried to interview Merritt before arresting him (Exhibit 25, at  
18 p.12 ¶4).  
19  
20

21 C. Facts known to DPS after the arrest could not connect Leslie  
22 Merritt with the Freeway Shootings.

23           (i) After the arrest, the ballistic evidence was independently  
24 discredited.

25           26. Three independent ballistic experts microscopically looked at  
26 the evidence, and all concluded there were insufficient markings to

1 constitute an identification, as claimed by Kalkowski. (Exhibit 27, at  
2 79:14-80:23; Exhibit 15, at 94:20-24).

3  
4 27. Their conclusions are “mutually exclusive from the  
5 conclusion reached by the DPS Lab in this case....” (Exhibit 27, at 127:  
6 5-16; Exhibit 15, at 72:12-17 (both conclusions can’t be right)).

7  
8 28. There is no indication, microscopically, that the test-fired  
9 bullets from Merritt’s gun were fired through the same firearm as the  
10 evidence bullets (Exhibit 27, at 8:9-13).

11  
12 29. Lucien Haag quantified the odds that all three independent  
13 experts coming to an incorrect conclusion is "unreasonable"  
14 approximately 1 in 1.6 million (Exhibit 15, at 102:24-103:3).

15  
16 30. Kalkowski knew that by rendering his opinion, Merritt would  
17 likely be arrested (Exhibit 5, at 165:5-11). But he made a conscious  
18 choice to misalign reference points between test-fired and evidentiary  
19 bullets and to use insufficient magnification when documenting the  
20 purported identification (Exhibit 27, at 107:2-5; 112:20-113:6). Lining up  
21 the points and increasing the magnification may have demonstrated that  
22 the identification was erroneous (Id. at 106:22-107:1).

23  
24  
25 31. “[J]ust because the [DPS] lab is accredited, doesn’t mean  
26 that it can’t make a mistake.” (Exhibit 28, at 66:4-5). “[J]ust because the

1 lab is accredited does not mean that their practices are all actually  
2 compliant with the processes.” (Exhibit 29, at 59:3-5)

3  
4 32. DPS policies required Kalkowski to document the purported  
5 identification between the evidentiary bullets and test-fired bullets from  
6 Merritt’s gun with a photograph, though he failed to do so (Exhibit 28, at  
7 30:16-23).

8  
9 33. An independent expert hired by DPS could not find *even a*  
10 *single photo* from Kalkowski’s file documenting the purported  
11 identification (*Id.* at 31:5-11).

12  
13 D. DPS fabricated evidence and withheld exculpatory evidence.

14 34. After Merritt’s arrest, DPS Detectives Falcone and Baroldy  
15 interrogated Plaintiff and lied to him, claiming they had photos and  
16 videos of him committing the shootings (Exhibit 8, at 112:8-18). No such  
17 photos or videos exist (*Id.*, at 112:15-18).

18  
19 35. Merritt protested his innocence throughout the interview  
20 (Exhibit 21, at 122:20-123:5). Merritt repeatedly demanded to take a  
21 polygraph to prove his innocence, though Falcone refused to allow him  
22 to do so for reasons he could not recall or explain (*Id.* at 117:22-123:20).

23  
24 36. On September 21, 2015, Falcone lied under oath in a  
25 probable cause affidavit when he avowed that the gun was not in pawn  
26

1 at the time of all the shootings. He later testified; however, the gun was  
2 in pawn when the BMW was shot (Exhibit 3; Exhibit 8, at 163:24-164:4).  
3

4 37. "But for Falcone's false statements and suppression of  
5 exculpatory information in his probable cause statement, [the court]  
6 could not have found probable cause and would likely release Merritt  
7 from custody immediately." (Exhibit 25, at p.13 ¶ 6).  
8

9 38. Recognizing Merritt's gun was in a pawn shop when the  
10 BMW was shot, Pinnow conferred with Heape and directed detectives to  
11 re-interview the driver, Alfred Hackbarth. (Exhibit 23, at 170:25-171:10;  
12 Exhibit 4, at 36:21-24 ("the issue that we had the timeline issue with, and  
13 the media pressure with the changing of the timeline, and the timeline  
14 not matching up."))  
15  
16

17 39. On September 22, 2015, Hackbarth told detectives "he had  
18 no known issues with his tires when he drove and parked at the airport  
19 on the morning of August 27, 2015" and "he was sure the tire pressure  
20 lights were not on when he parked at the airport." He stated, "it was  
21 impossible for a bullet to strike his vehicle as it was parked in the  
22 parking garage based on where he had parked." His tire pressures all  
23 remained consistent until after he left the airport on August 30, 2015,  
24  
25  
26

1 when only his left front tire pressure rapidly dropped (Exhibit 30,  
2 Deposition of Warren, at Exhibit 5).

3  
4 40. Hackbarth's statements "debunked the entire DPS forensic  
5 testing because the four shots could not have come from Mr. Merritt's  
6 gun as the gun was not in his possession after 5:31 p.m. on August 30,  
7 2015." (Exhibit 31, at p.4 ¶8). DPS intentionally suppressed those  
8 statements from prosecutors, and ostensibly Merritt, for five months.  
9  
10 See ¶57, *infra*.

11  
12 41. On September 22, 2015, Baroldy, on behalf of DPS, swore  
13 in the Direct Complaint that the BMW shooting occurred on or between  
14 August 27, 2015, and August 30, 2015 (Exhibit 32, Deposition of Leiter,  
15 at 119:7-23).

16  
17 42. DPS had no evidence, however, that the BMW shooting  
18 likely occurred on August 27, 2015 (Exhibit 21, at 163:5-8), August 28,  
19 2015 (*Id.* at 162:23 - 163:4; Exhibit 23, at 217:9-11), August 29, 2015  
20 (Exhibit 21, at 162:18-22; Exhibit 23, at 217:13-17), or before  
21 Hackbarth's car left the Sky Harbor garage on August 30, 2015 (Exhibit  
22 21, at 163:12-14; Exhibit 23, at 217:25 -218:3).

23  
24  
25 43. In the September 24, 2015 grand jury indictment, and  
26 relevant to the BMW, it charged Plaintiff with Drive-By Shooting and

1 Endangerment, alleged to have occurred on or between August 22,  
2 2015 and August 27, 2015 (Exhibit 32, at 119:7-23).

3  
4 44. DPS, however, had no evidence that the BMW shooting  
5 occurred on August 22, 2015 (Exhibit 6, at 181: 3-4; Exhibit 23, at 240:7-  
6 10), August 23, 2015 (Exhibit 6, at 181:1-2; Exhibit 23, at 240:12-17),  
7 August 24, 2015 (Exhibit 6, at 180:24-25; Exhibit 23, at 240:18-23),  
8 August 25, 2015 (Exhibit 6, at 180:22-23; Exhibit 23, at 241:16-20),  
9 August 26, 2015 (Exhibit 6, at 180:20-22; Exhibit 23, at 241:22-242:1),  
10 or August 27, 2015 (Exhibit 23, at 242:10-13).

11  
12  
13 45. DPS acquired no new evidence, nor was there a change in  
14 the investigation “between the 22nd and the morning of the 24th that  
15 would have changed the date range” between the Complaint and  
16 Indictment (Exhibit 6, at 179:1-5). DPS cannot explain the changing  
17 timeline (Exhibit 23, at 248:22-249:9; Exhibit 6, at 178:17-25).

18  
19 46. Baroldy perjured himself before the grand jury, testifying the  
20 BMW driver stated the shooting of his car “could have happened at the  
21 airport terminal” when the driver stated it was “impossible” for this to  
22 have occurred (Exhibit 33, partial Grand Jury Transcript, at 41:22-42:6;  
23 Exhibit 30). Baroldy also testified that “[e]verything was consistent that it  
24 could have happened on the 27th on the way to the airport” (Exhibit 33,  
25  
26

1 at 73:20-25), though the BMW driver explicitly told detectives he had no  
2 problems with his car on the way to the airport (Exhibit 34, at 47:21-  
3 48:1).

4  
5 47. Baroldy further perjured himself when he testified it was a  
6 “definite possibility” that the bullet could have lodged in the BMW’s tire at  
7 some unknown point in time before Merritt’s gun was in pawn (Exhibit  
8 33, at 45:20-46:3) and then become dislodged, resulting in a dramatic  
9 air pressure loss after the gun was pawned. The BMW driver told  
10 detectives this was “highly unlikely” (Exhibit 12, at 94-95:12-3). DPS did  
11 not test or examine the tire to see if this was even possible (Exhibit 19,  
12 at 63:15-22) and, in the history of science, such an occurrence is  
13 unprecedented (Exhibit 13, at 169:12-20).

14  
15  
16  
17 48. Given Baroldy’s intentionally false testimony, the grand jury’s  
18 determination of probable cause was tainted and inaccurate (Exhibit 20,  
19 at 154:7-16).

20  
21 49. Prosecutors want to know all exculpatory evidence available  
22 to law enforcement when deciding whether to charge someone with a  
23 crime (Exhibit 35, Deposition of Supreme Court Justice Montgomery, at  
24 17:23-18:6).

1           50. When the police withhold exculpatory material, prosecutors  
2 can charge innocent people with crimes (*Id.*, at 24:8-17). Witnesses  
3 should share exculpatory evidence with the prosecutor presenting the  
4 case to the grand jury (*Id.*, at 32:21-33:3). “Reasonable prosecutors with  
5 knowledge of all of the true, actual, and exculpatory evidence that  
6 existed against Mr. Merritt likely would have pursued no criminal  
7 charges against him, or upon learning of such information, would have  
8 immediately moved to dismiss any pending charges.” (Exhibit 31, at  
9 p.4).

10  
11  
12  
13           51. Police officers who write reports, and their supervisors who  
14 review them, must include and disclose all known exculpatory  
15 information (Exhibit 26, at 17:4-10).

16  
17           52. Heape, Pinnow, Hunter, and Mapp, in their roles as  
18 supervisors, each reviewed and approved the investigative report before  
19 it was sent to prosecutors, though the report concealed the known  
20 exculpatory material. Each knew the evidence indicated Merritt’s  
21 innocence but failed to correct the report (Exhibit 25, at p.15 ¶10).

22  
23           53. These actions of “suppressing inculpatory evidence and  
24 suppressing exculpatory evidence were a cause of Mr. Merritt’s arrest,  
25  
26

1 incarceration, and prosecution.” (Exhibit 31 at p.4, Section C ¶5; Exhibit  
2 36, Deposition of Mathew, at 24:14-27).

3  
4 54. DPS policy requires the written report of the BMW driver’s  
5 second interview, dated September 22, 2015 (Exhibit 30), to be turned  
6 over to prosecutors within five days (Exhibit 8, at 150:11-16), though  
7 DPS did not disclose it to prosecutors until February 25 or February 26,  
8 2016 - five months later (Exhibit 37, Deposition of Trevino, at 56:17 -  
9 57:22). Merritt’s counsel received it on February 29, 2016 (Exhibit 38). It  
10 was clearly exculpatory (Exhibit 4, at 40:18-21).

11  
12  
13 (i) Honeypot Website

14 55. The supervisory detective, Sgt. Mapp, testified no evidence  
15 from the Honey Pot website linked Merritt to the freeway shootings.  
16 (Exhibit 6, at 61: 8-19) This information was exculpatory and not  
17 disclosed to Merritt’s criminal defense attorneys (Exhibit 31, at p.4 ¶8).

18  
19 (ii) License Plate Readers (LPR’s)

20 56. The LPR’s never detected Merritt’s vehicle near the scene of  
21 any shooting (Exhibit 17, at 97:13-14; Exhibit 18, at 107:16-18). During  
22 discovery and in response to a specific defense request, Sgt. Mapp told  
23 Deputy County Attorney Losicco that DPS did not use LPR’s in the  
24 Freeway Shooter Investigation (Exhibit 39, Deposition of Losicco, at  
25  
26

1 123:6-10). Mapp's statement was an outright lie (See Exhibit 1; Exhibit  
2 17, at 97:1-3).

3  
4 57. The LPR records should have been turned over to the  
5 County Attorney's office (Exhibit 6, at 97:19-98-11; 100:2-4). They were  
6 clearly exculpatory (*Id.*, at 98:14-15; Exhibit 17, at 97:15-20; See Exhibit  
7 31, at p.4 ¶8). Had the prosecutors received any LPR-related  
8 information from DPS, they would have "of course" been turned over to  
9 the defense (Exhibit 39, at 93:2-9).

10  
11 (iii) Pole cameras

12  
13 58. Pole cameras were used by DPS as part of this investigation  
14 (Exhibit 32, at 173:23-174:3), though it withheld the data from  
15 prosecutors and Merritt's criminal defense attorneys. *Id.* at 173:5-8. That  
16 data was also exculpatory (Exhibit 36, at 24:14-17; Exhibit 31, at p.4 ¶8).

17  
18 Conclusion

19 Merritt has clearly demonstrated that he was wrongfully arrested  
20 and indicted in this case. The only evidence supporting his arrest was  
21 ballistics testing, though that testing was in direct and mutually-exclusive  
22 conflict with a plethora of undisputed evidence such that the ballistics  
23 testing, both logically and factually, had to be wrong.  
24  
25  
26

1 By his own admission, Falcone lied in the probable cause affidavit  
2 presented to the Initial Appearance Court when he said that Merritt's gun  
3 was not in pawn at the time of all of the shootings with which he was  
4 charged. In fact, it was not – and law enforcement had clear and  
5 unambiguous proof that it was in a pawnshop at the time of the BMW  
6 shooting. Falcone had to lie as this reality negated the DPS crime lab's  
7 findings.  
8

9  
10 Baroldy further lied to a grand jury to secure an indictment. He  
11 deliberately presented a statement attributed to the BMW driver when, in  
12 fact, the driver's statement was the opposite of what Baroldy said it  
13 was. To conceal this fraud, DPS withheld the police report containing  
14 the driver's true statements from prosecutors for some five months. The  
15 result was that Merritt could not challenge the grand jury proceedings on  
16 this basis as the underlying evidence was hidden from them.  
17

18  
19 The lies did not end there. Sgt. Mapp told a bold-face lie to  
20 prosecutors that LPR's were not used in this case. In fact, well prior to  
21 Merritt's arrest Mapp knew that they were and that the data collected  
22 was highly exculpatory. As outlined above, this is just some of the  
23 exculpatory evidence that police withheld from prosecutors and the  
24 defense.  
25  
26

The sum total of the lies by law enforcement in this case – the lie in the probable cause affidavit, the lies before the grand jury, and the lies to prosecutors about the existence of exculpatory evidence and the concealment thereof – resulted in the wrongful arrest, charging, and indictment of Leslie Merritt. A Notation of Clearance is wholly warranted in the interests of justice.

Respectfully submitted this 17<sup>th</sup> day of January, 2020.

**/s/ Jason D. Lamm**

Jason D. Lamm

Attorney for Leslie Allen Merritt, Jr.

Original e-filed copies  
provided electronically this  
same date to:

Judge Warren Granville  
Maricopa County Superior Court

Commissioner William Wingard  
Maricopa County Superior Court

Edward Leiter, Esq.  
Deputy County Attorney

By: /s/ Kathryn A. Miller