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2020 Asia Access to Justice Week CLE Mock Pre-Trial Hearing Event **Packet-Revised**

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Introduction to the BABSEACLE Annual Asia Regional CLE Pre-Trial Hearing Event Packet

The following 2020 CLE Mock Pre-Trial Hearing Event Packet is to be used in preparation for, and to participate in, the Annual Asia Regional CLE Mock Trial Event which will be held virtually between November – early December. This event is a part of the BABSEACLE Annual Access to Justice Week.

The Annual Asia Regional CLE Mock Pre-Trial Hearing is a practical learning experience in which students simulate the practices occurring in a court in a hypothetical jurisdiction. As such, the structure used for the Asia Regional CLE Mock Trial Event will not strictly adhere to a specific country's local procedure, but rather a set of regional and global combined procedures which demonstrate strong Rule of Law, Fair Trial, Access to Justice and Legal Ethic practices.

The annual event involves a mix of Bachelor of Law students who participate from throughout the Asia region, all gathering, learning and working together. Many others also participate, including various members from the Justice Sector.

This case packet will be the same case that is used for the 2020 Asia Regional CLE Mock Trial and therefore should be used by students to prepare and train, so they can more effectively participate in this annual event.

Even if a person is not planning to attend the Regional CLE Mock Trial Event, the Asia Regional CLE Mock Pre-Trial Hearing Packet is also a very useful training resource. We therefore encourage persons to review this packet and use it in ways that will help them become stronger, legal and access to justice advocates.

What is a Pre-Trial Motion and a Pre-Trial Hearing?

Pre-Trial Motions

In the justice system, a case is often decided before the actual trial. A pre-trial motion is simply an application to the Court to hear an argument about an issue before the hearing itself commences. Specifically, advocates can file pre-trial motions in order to exclude evidence from being used during the trial. In criminal trials, pre-trial motions can be filed by prosecutors and/or defence advocates; in civil trials, these motions can be filed by plaintiff advocates and/or defence advocates. There can be many legal reasons why some type of evidence should not be allowed to be used during a trial. The ability to file a pre-trial motion, and have a Court

decide before the actual trial whether some evidence can be used at trial, is a core part of ensuring a fair trial.

Pre-Trial Hearing and Motions to Exclude Evidence

A Pre-Trial Hearing is not the trial itself. It is a hearing where a Court is asked to make a decision on some legal or factual issue before a case goes to trial. Many times at a Pre-Trial Hearing, a Court will hear arguments from prosecutors and defence advocates as to why evidence should, or should not, be allowed to be used at trial. Often during a Pre-Trial Hearing, advocates and prosecutors call witnesses and provide the Court with other type of evidence in order to try to convince the Court that certain evidence should, or should not, be allowed to be used at trial. Prior to a Pre-Trial Hearing being held, advocates and prosecutors file a pre-trial motion asking the Court to either allow or exclude certain type of evidence. If a advocate or prosecutor wants the Court to exclude certain types of evidence, they usually file what is called a Motion to Exclude Evidence.

This case packet contains a Motion to Exclude Evidence that was filed by the Defence advocate in the case of *Zaltanu Public Prosecutions v Eltra Parker*. The motion was filed by the Defence advocate requesting the Court to exclude certain types of evidence from being introduced during the actual trial. Because the Defence filed a Motion to Exclude Evidence, it is now necessary for the Court to have a Pre-Trial Hearing to make a ruling on the motion. This Pre-Trial Hearing takes place before the trial. However, the purpose of the Pre-Trial Hearing is not to decide if the accused in this case, Eltra Parker, is guilty or not guilty of the criminal charges. The only purpose of the Pre-Trial Hearing is to decide whether the evidence that is the subject of the motion can be introduced, or should be excluded, from trial.

During the Pre-Trial Hearing, both the Prosecution and the Defence advocates will try to convince the Court, through both witnesses and documents, that evidence should, or should not, be excluded during the trial. The Prosecution will try to convince the Court that the evidence should be allowed to be used at trial, and the Defence advocates will try to convince the Court the evidence should not be allowed to be used.

Motions to Exclude and Burden of Proof

Even though the Defence Advocate files a Motion to Exclude the burden is on the Prosecution to prove that evidence it wants to admit during the trial was collected in a legal and proper manner. Unlike a criminal trial, where the burden is on the Prosecution to prove an accused is guilty beyond a reasonable doubt, in a Pre-Trial hearing on a Motion to Exclude evidence, the Prosecution's burden of proof to prove the evidence was obtained legally and properly is by a preponderance of evidence, or also known as a balance of probabilities. Under the **preponderance** or **balance of probabilities** standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true. This standard of proof requires proof beyond a reasonable degree of probability. This proof would allow the Court to say it thinks that some is "more probable than not".

This standard is much lower than what is required to prove a person guilty at trial, which is proof beyond a reasonable doubt.

Zaltanu Public Prosecutions

v Eltra Parker

1.0 Scenario

1.1 Statement of Facts

1. Eltra Parker is a 28-year-old transgendered person, who was born in the State of Zaltanu. For the past year, Eltra has been working part-time as a delivery driver for PDP, a courier company, whilst studying Chemical Engineering full-time. Eltra comes from a wealthy background and is very private about his/her¹ sexuality, even to the point of keeping it a secret from his/her family.

2. Eltra has been in a relationship with Daine Carriér for the past two years. Daine is 23 years old, unemployed and loves to party. Daine has one prior conviction for possession of a dangerous drug.

3. As a delivery driver, Eltra is responsible for collecting and delivering various baggies. For some deliveries, payment is required upon delivery. Eltra uses his/her own car for the deliveries, but he/she is required to wear a company uniform with PDP's logo.

4. PDP has been under police surveillance for suspected connections to the drug trade in Zaltanu.

5. On March 1, 2020, Eltra was on a delivery run. Eltra had plans to go to a party after work with Daine, and as such was eager to complete his/her deliveries as promptly as possible. In order to save time, Daine was helping with the deliveries. On his/her way to his/her third delivery of the day, Eltra was directed, by Senior Officer Strait, to stop at a police checkpoint on Pacific Avenue at the crossroad of Aster Road.

6. Upon approaching the vehicle, Senior Officer Strait immediately recognised Daine in the passenger seat from a previous arrest. From the outside of the vehicle, Senior Officer Strait saw a packet of cigarettes on the dashboard, two packets of rolling papers on the back seat, an open envelope containing cash in the

¹The use of his/her, he/she and similar gender references through this packet are being used to demonstrate that these roles are gender neutral and can be played by a participant of any gender, and it is not necessary to have a person of a specific gender play any of these roles during the event.

centre console, and an assortment of clip-seal baggies and empty envelopes on the back seat. Senior Officer Strait then asked Eltra if he/she could search the car. Eltra then responded: "Do I need an advocate? How can I get one now?"

7. Senior Officer Strait ignored the question and then asked Eltra and Daine to step out of the vehicle. Eltra and Daine then stepped out of the vehicle and stood on the sidewalk. Senior Officer Strait then called over Officer Momo, who was waiting in their police car, to assist with searching the vehicle. While Officer Momo searched the vehicle, Senior Officer Strait questioned Eltra about where they were going. Senior Officer Strait asked if Eltra had anything illegal in the vehicle. He/she also asked about Eltra's relationship with Daine and how they knew each other and whether Eltra knew Daine was a convicted drug dealer.

8. As a result of the search, the police found various packages held in a crate marked clearly with PDP's branding in the trunk of the car. One of the packages contained an address, but no name. Upon opening the package, the officers found a large baggie containing white powder. This was later confirmed by a laboratory report to be 750g of pure cocaine. The officers also found a black bag with a large amount of money placed next to the crate in the trunk.

9. Officer Momo placed the package containing the alleged cocaine into a duffel bag which was in the trunk of the police car.

10. Senior Officer Strait then conducted a frisk search of both Eltra and Daine. The search found nothing of interest. While they were being frisked, Eltra observed Senior Officer Strait taking the duffel bag to the trunk of the police car, but could not see what he was doing.

11. A third officer arrived at the scene and was just standing around observing what Senior Officer Strait and Officer Momo were doing.

12. Senior Officer Strait then placed Eltra under arrest for drug possession, handcuffed him/her, and directed him/her to a police car. Upon placing Eltra in the car, Senior Officer Strait said, "We got you now". Eltra responded to this statement and said, "What are you talking about? I don't do drugs anymore!"

13. At the police station, Eltra was handcuffed to a bench. He/she saw Officer Momo and the other officer enter the station with the duffel bag. Both officers

went into an unlocked room with the duffel bag and came out a few minutes later not holding anything.

14. Eltra was later charged with possession of a dangerous drug with intent to sell.

15. Eltra was put in a jail interview room. A Defence Advocate was appointed for him/her. The Defence Advocate asked for a private interview room but was told one was not available. Accordingly, the Defence Advocate interviewed Eltra in the interview room. The Defence Advocate asked to be alone in the jail interview room with Eltra, but a plain clothes police officer, Officer Momo, sat just inside the jail interview room and was able to hear the conversation between the Defence Advocate and Eltra.

16. The Defence Advocate filed a Motion to Exclude Evidence arguing: (1) that questioning of Eltra by Senior Officer Strait after he/she requested an Advocate violated Eltra's constitutional and statutory rights; (2) the police violated department policy in handling the evidence and cannot establish a clear chain of evidence; and (3) that the police officer listening to the Defence Advocate's interview and discussion with Eltra violated Eltra's constitutional and statutory rights to counsel and violated Advocate-client privilege.

1.2 The Prosecution (Zaltanu Public Prosecutions)

1.2.1 Witnesses for the Prosecution

1. Senior Officer Strait (Lead Investigating Police Officer)
2. Officer Momo (Zaltanu Jail Police Officer)
3. Abbie Shutro (Evidence Custodian)

1.2.2 The Role of the Prosecutors

In order to proceed to trial, the Prosecution must establish:

1. Drugs were found in the Defendant's possession;
2. Eltra Parker did not request an Advocate in clear and plain language prior to being questioned by the police during the traffic stop;
3. A clear chain of custody of the evidence (narcotics);

4. That there was no expectation of confidentiality between advocate and client when Eltra Parker and his/her Defence Advocate met in the jail interview room.

See the Zaltanu law in section 2.0.

1.3 The Defence

1.3.1 Witnesses for the Defence

1. Eltra Parker (the Defendant)
2. Officer Bent (the Third Officer at the Investigation/Arrest Scene)
3. Ima Yenta (Zaltanu Police Station Office Manager)

1.3.2 The Role of the Defence Advocates

In order to successfully exclude evidence on admissibility grounds, the Defence Advocate must establish:

1. Eltra Parker clearly and plainly asked for an Advocate prior to being questioned by the police during the traffic stop
2. The police are not able to establish a clear chain of custody of the evidence (narcotics);
3. Eltra Parker's rights were violated in that he/she was denied the right to have a confidential conversation with his/her Advocate because the officer was present when he/she was interviewed in the jail interview room by his/her Defence Advocate.

See the Zaltanu law and rules of evidence in section 2.0.

2.0 Witness Statements/Documents

2.1 Prosecution Witness Statement: Senior Officer Strait

1. My name is Senior Officer Strait. I am 48 years old and I have been a member of the Zaltanu Police Force for the past 15 years. I have worked as part of the Traffic Control Unit for the past 8 years and I have conducted numerous traffic checkpoints as part of my job responsibilities. I very much am honoured to be a part of this Traffic Control Unit because I consider drugs to be very bad for our society and I feel that the checkpoints are a great way to help stop the trafficking of drugs.

2. On the 1st of March 2020, I was in charge of operating a traffic checkpoint on the corner of Pacific Avenue and Aster Road. I set up the checkpoint at 10:00 AM in the morning. I set this up because we had received reports of drugs being moved along Pacific Avenue. On that morning, I was accompanied by Officer Momo.

3. Pacific Avenue is about 8 kilometers long. At 11:00 AM, I directed an older model black BMW into the checkpoint. I approached the vehicle and saw two people in the front seats of the vehicle. As I approached the vehicle, I immediately recognised the passenger as Daine Carriér from a previous arrest. I introduced myself to the driver, and then said: "This is a routine police checkpoint stop. Where are you two heading today?" The driver, who introduced himself/herself as Eltra Parker, responded by saying that he/she was out on a delivery run. He/she said he/she worked for a company called PDP.

4. I then asked for his/her name and identification. As I inspected his/her's driver's licence, I noticed a packet of cigarettes on the dashboard, an open envelope containing cash in the centre console, rolling papers, clip-seal baggies, and empty envelopes on the back seat. The driver appeared anxious. His/her eyes were bloodshot, and he/she was constantly fidgeting and looking at his/her watch. He/she avoided direct eye contact with me. I informed the driver that I would need to do a search of the vehicle. Parker responded in an aggressive tone: "Why? I have nothing to hide." I replied, saying: "Would you both please step out of the vehicle." Both Parker and Daine Carriér got out of the vehicle. Carriér then walked around to stand beside Parker on the sidewalk. Parker asked: "Do I need an advocate?" He/she then said, "How can I get one now?"

5. I then asked Officer Momo, who was sitting in our police car about 10 meters away, to assist me with the search. Officer Momo and I conducted a search of the vehicle. In the trunk, we observed a crate labelled with PDP's branding, holding various baggies. PDP is the delivery company that Parker works for. Officer Momo and I observed one package that appeared different to all the other packages, as it was marked with an address but no name. Officer Momo and I decided to open the package and found a large self-seal baggie containing white powder. From my past experience, this is the type and size of a baggie drug dealers use to transport one kilogram of cocaine. We also found a black bag containing large amounts of cash in the trunk.

6. About that time, Officer Bent arrived as backup in case we needed assistance at the traffic checkpoint.

7. I then walked over to Parker and Carriér and told them that I needed to do a frisk search. At that time, Officer Momo took the baggie of white powder and walked to the trunk of the police car. I asked both Parker and Carriér if either had any dangerous weapons or illegal substances on their persons that I should be aware of. Both replied: "No." I proceeded to conduct a frisk search: first on Parker, then on Carriér. The search revealed nothing of interest.

8. I asked Parker if the car belonged to him/her. He/she stated: "Yes." I then advised Parker that he/she was under arrest for possession of a dangerous drug with intent to sell. At that time I told the both of them that they had the right not to say anything to us and had the right to have an advocate. After I gave them this warning, I asked why Parker was selling drugs and why he/she was with Carriér who is a convicted drug dealer. Parker said: "I already asked for an advocate and you did not give me one. Why are you arresting me, I don't use drugs anymore."

9. I also detained Carriér. After placing Parker and Carriér in the back of the police car, I went to the trunk to check on Officer Momo. He had placed the baggie containing white powder in an evidence bag and wrote his initials, the date, time, and location of where the evidence was obtained. We then proceeded to take both individuals to the Police Station.

10. When we arrived at the Central Police Station, Officer Momo had to leave on an urgent family matter, so he gave me the evidence to bring to the

evidence room. I then went to the evidence room and brought in the baggie with the white powder.

2.2 Prosecution Witness Statement: Officer Momo

1. My name is Officer Momo. I am 49 years old. I graduated from the Zaltanu Police Academy 28 years ago and as I am approaching retirement. For most of my career, I was assigned to the police station jail.

2. On March 1, 2020, I was on duty at the police station jail. Senior Officer Strait and Officer Momo brought in two individuals. One was Eltra Parker who was booked into the jail and placed in a jail interview room. The other individual was let go.

3. A few hours later, a Defence Advocate arrived at the jail and wanted to speak with Eltra Parker who apparently was his/her client. I asked the desk supervisor in charge of the interview rooms if there was a vacant interview room where the Defence Advocate and his client could meet. The desk supervisor did not check the room reservation log system. However, the desk supervisor told me that she thought there were no available rooms and the first availability would be in about four hours. I told the Defence Advocate if he/she wanted to wait that was fine, but I was unsure when a room would be available. I told the Defence Advocate that if he/she wanted to interview his client, it would have to be in the interview room with a guard present for security.

4. The Defence Advocate made the decision to meet with his/her client in the jail interview room. We then proceeded to the jail interview room where I let the Defence Advocate into the jail interview room and I entered and brought in a chair. I sat in the corner while the Defence Advocate met with Parker. It was standard procedure for me to be in the jail interview room and follows our prison guidelines.

5. When the Defence Advocate originally arrived, I was about to go off shift, but my supervisor asked me to stay to provide security in the jail interview room while the Defence Advocate was there. I was not in uniform, but I had my badge clipped to my belt. I was reading a magazine and not paying much attention to their conversation. However, I did hear Parker say that he/she knew there were drugs in the car, and that he/she and Carrier were going to split the profits from the sale at the party they were going to that night.

2.3 Prosecution Witness Statement: Abbie Shutro

1. My name is Abbie Shutro. I am 38 years old. I am the Evidence Custodian at the Zaltanu Central Police Station. I have been working in this job for 11 years.

2. On March 1, 2020, at approximately 11:00 pm, Senior Officer Strait brought a self-sealed baggie containing a white powder into the Zaltanu Central Police Station. The baggie was not in an evidence container but had Officer Momo's initials on it with a date of March 1, 2020. Senior Officer Strait's initials were not on the baggie so I asked him to write his initials on the baggie before we put the baggie into the evidence locker. After this was done, I signed a receipt for the baggie and proceeded to weigh the baggie. Its weight was 750 grams or three quarters of a kilo.

3. On April 1, 2020, I sent the evidence to our standard laboratory for testing. The contents of the baggie were tested and I received a report on April 5, 2020 that the substance was pure cocaine.

4. I then called Senior Officer Strait and told him the results. When I received the baggie back from the laboratory on April 10, I placed the baggie in an evidence bag and signed my name and added the date and time.

5. It is my job and responsibility to maintain the Evidence Chain of Custody form. With the Evidence Chain of Custody form in this matter, I did notice that Officer Momo's signature was missing. Since that time I have contacted Officer Momo and he has explained to me that he simply forgot to sign the form. I have asked him to come in to sign the form repeatedly but he has not yet done so.

2.4 Defence Witness Statement: Eltra Parker

1. My name is Eltra Parker and I am 28 years old. I have lived in the State of Zaltanu since birth. I am not married, but I live with my partner Daine Carriér. I work part-time as a delivery driver for PDP (a package delivery service). I also am studying Chemical Engineering. I have worked at PDP for one year. As a delivery driver, I collect and deliver various packages. I also collect payments for the deliveries. I am required to wear a uniform when working, and I use my own car to make deliveries.

2. On the March 1, 2020, I drove my black BMW to work with Daine. We arrived at PDP's warehouse and Daine remained in the car. As usual, I collected the crate containing packages, and I looked through the manifest. The manifest contains the serial number of each package and a corresponding address. I then placed the crate in the trunk of the car, and as usual, I did not inspect the contents of the crate.

3. I was on the third delivery run driving along Pacific Avenue when I was directed by a police officer to pull over at a traffic checkpoint. Senior Officer Strait who made me stop said: "This is a routine police checkpoint stop. Where are you two heading today?" I then responded: "I am on a delivery run." All the meanwhile, Senior Officer Strait was crouching up and down to look throughout the car. Senior Officer Strait then asked for my identification and I handed over my driver's licence.

4. As Senior Officer Strait inspected my licence, he/she leaned over and then asked if the officers could conduct a search of the car. I responded: "Why? I have nothing to hide." Senior Officer Strait then stepped back and (in a serious tone) asked Daine and me to step out of the car. I asked: "Do I need an advocate; how can I get one now?" Senior Officer Strait then called over Officer Momo to assist with conducting the search.

5. As Daine and I stood waiting on the sidewalk, Senior Officer Strait and Officer Momo searched my car. After looking through the car, they opened the trunk and searched that. I could not see exactly what they were doing as Daine and I were standing near the front of the car. However, they seemed to take particular interest in what they found. I saw Senior Officer Strait hand one of the baggies, as

well as my black bag, to Officer Momo. I saw Officer Momo walk to the trunk of the police car with the package, but did not see what he/she was doing.

6. Senior Officer Strait frisked both me and Daine. Senior Officer Strait then told me I was under arrest for drug possession with intent to sell.” Senior Officer Strait then said: “I don’t know why you people are doing drugs.” I yelled: “I don’t do drugs anymore.” Daine was also detained. We were both put in the police car and taken to the police station. I was never informed that I had the right to a advocate or that I did not have to say anything.

7. At the police station, I again asked for an Advocate. I was anxious to meet with an Advocate because I needed to have my packages delivered and the money delivered to PDP. I did not want to lose my job. When my Advocate finally arrived, I wanted to speak with him/her very badly. When I was told that no room was available and I had to meet in my interview room, I was frantic and did not even think about the guard being present. The guard said he/she was there for security. I did not consider that his/her presence would waive my Advocate-client privilege, because I did not feel I had a choice on where or when I could meet with my Advocate. I thought my conversation with my advocate was private and confidential.

8. I never told my Defence Advocate that Daine and I were going to sell drugs or split any money from the sale of drugs. I told my Defence Advocate that I don’t do drugs.

9. I know that they said my eyes were bloodshot when I was pulled over but this is because I was up most of the night before studying for an upcoming university exam.

2.5 Defence Witness Statement: Ima Yenta

1. My name is Ima Yenta. I am 53 years old. I am currently employed as the office manager at the Zaltanu Central Police Station.

2. On the 1st of March 2020, I saw Eltra Parker being brought into the jail in handcuffs. After being booked, the handcuffs were removed and he/she was put in a interview room in the area we call the jail.

3. One of my duties is to supervise those persons who manage the interview rooms where advocates and clients can meet to discuss their cases in private.

4. In scheduling interview rooms it is not possible to know how long a room will be used when an Advocate is interviewing his/her client but most interviews take between 45 minutes to 1 hour.

5. A few hours after Parker was placed in the jail interview room, his/her Defence Advocate arrived and wanted to speak to Parker. The officer supervisor in charge of the interview rooms told Officer Momo that there were no private interview rooms available for several hours and if he/she wanted to interview his/her client sooner, it would have to be in the jail interview room with a guard present for security reasons.

6. When I heard the supervisor tell Office Momo this, I told Officer Momo that I believed there were interview rooms available, or there may be an interview room available soon, and that he should check. I believed there was an interview room that would be available soon because one of the rooms had an Advocate meeting with a client for almost one hour already. However, Officer Momo told me that he was very busy and he believed that the supervisor was correct.

7. After Eltra Parker was interviewed I went back to check the interview log book and I confirmed that there was an interview room that became available 15 minutes after the interview with Eltra Parker began.

2.6 Defence Witness Statement: Former Officer Bent

1. My name is Bib Bent. I am 34 years old and I worked as a police officer for nine years for the Zaltanu Police Force. I no longer work with the Zaltanu Police Force. My last day at the police department was May 15, 2020. They will tell you that I was fired for drinking on the job but the truth is that I quit working there because I saw many improper things that they did during case investigations that were then being covered up. I did not want any part of that.








2. On March 1, 2020, I was on duty and received a call to proceed to a traffic checkpoint to provide backup to two officers who had stopped a vehicle.

3. I arrived at the checkpoint and got out of my car. I saw Senior Officer Strait interviewing two individuals and he/she then proceeded to frisk them. I do not recall Senior Officer Strait ever informing either of the two individuals that they had the right to a advocate or that they did not have to speak with him/her. However, I cannot say 100% that I listened to the entire conversation.

4. At the same time, I saw Office Momo take what appeared to be a large plastic baggie to the trunk of his/her police car. He/she opened the truck and spent at least 5 minutes there before closing the trunk and walking back towards Senior Officer Strait.

5. I could not see what Officer Momo was doing at the trunk of the police car, but it seemed odd to me that he/she needed to spend that much time to log evidence and put the evidence into the trunk of the car.

2.7 CHAIN OF CUSTODY FORM

Description of Evidence				
Item #	Quantity	Description		
1	750 grams	White power in plastic zip baggie		
CHAIN OF CUSTODY				
ITEM #	Date/Time	Released By:	Received By:	Location/Comments
1	March 1 st 2020 11:30am	Crane Momo Badge Number: 45664	Treble Strait Badge Number: 23354 	Zaltanu Central Police Office Reason: Evidence submission
1	March 1 st , 2020 11:00pm	Treble Strait Badge Number: 23354 	Abbie Shutro Badge Number: 1174 	Zaltanu Central Police Office Reason: Evidence submission
1	April 1 st 2020	Abbie Shutro Badge Number: 1174 	Zemma Grit 	Zaltanu Central Police Office Reason: Evidence testing
1	April 10 th 2020 5:35pm	Bemma Pay Badge Number: 01293 	Abbie Shutro Badge Number: 1174 	Zaltanu Central Police Office Reason: Return from evidence testing

2.8 MOTION TO EXCLUDE

COUNTRY OF ZALTANU

IN THE PROVINCIAL COURT

PUBLIC PROSECUTIONS

CAUSE NO. 2020-67983

vs.

ELTRA PARKER

Defendant.

MOTION TO EXCLUDE EVIDENCE

The Defendant requests the Court to exclude all property seized by the arresting officers, all observations made by the arresting officers, and all statements made by the Defendant, and in support thereof says:

1. That the Defendant is charged with Possession of cocaine with Intent to Sell or Distribute.
2. That on March 1, 2020, police officers, and Senior Officer Strait in particular, continued to question and interrogate the Defendant after the Defendant requested a Defence Advocate.
3. That on March 1, 2020, at the police station, the Defendant was denied the right to privileged communication with his/her Defence Advocate because Defendant and his/her Defence Advocate were told that the interview had to be conducted in the jail interview room with a guard present.
4. That the chain of custody of the evidence was tainted in that the procedures for chain of custody were not followed.
5. That any information from the Defendant's statements are illegally obtained because:
 - a. The Defendant clearly asked for a Defence Advocate and the police officer continued to question him/her.
 - b. The Defendant was denied his right to privileged Advocate-client communication by being required to be interviewed by his Defence Advocate with a police guard present.
 - c. The police failed to follow procedures for handling evidence and the chain of custody was broken.
 - d. The Zaltanus laws relied upon in this motion are:
 - i. Articles II, III, IV and V of the Zaltanus Constitution;

- ii. Section 590AA – Zaltanu Criminal Code;
- iii. Section 881.12- Zaltanu Criminal Code; and
- iv. Section 745.05- Zaltanu Criminal Code.

The Defendant requests the Court to make the following orders:

- (a) Exclude from use as evidence in the trial of this cause any statements made by Defendant Eltra Parker after he/she requested a Defence Advocate.
- (b) Exclude from use in the trial of this cause all testimony relating statements made during the interview of Defendant Eltra Parker by his/her Defence Advocate in the jail interview room which was overheard by the jail officer.
- (c) Exclude from use in the trial of this cause all evidence seized from the vehicle as the chain of evidence has been broken and official procedures for the collection, transport, storage, and use of the evidence have not been followed.

Respectfully submitted,
Liberty for All



Advocate
Zaltanu Bar Number-908933434
Submitted: July 1st, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been provided to all parties herein by first class mail, postage prepaid on July 1st, 2020

Liberty for All

A handwritten signature in black ink, appearing to be 'N. J. K.', written over a horizontal line.

3.0 Applicable Law

3.1 Charge Against Eltra Parker

“Eltra Parker is charged with possession of a controlled substance with the intent to sell, in that on 1 March 2020, Parker was in possession of pure cocaine in an amount of one (1) kilogram in violation of Section 881.12 of the Zaltanu Criminal Code.”

3.1.1 State of Zaltanu Legal Provisions

Section 881.12 of the Zaltanu Criminal Code states:

Except as authorized by law, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.

Section 745.05 of the Zaltanu Criminal Code states:

Chain of Custody

A. Definitions

1. Chain-of-custody is the ability to give an accurate accounting in a court of law as to the manner in which evidence was acquired, maintained, transported, examined, etc., by whom, when, where, and for what purpose.
2. The procedure to establish chain of custody begins at the crime scene. A forensics investigator carefully studies the scene and takes photographs and detailed notes for each piece of evidence found. These notes should include details relating to:
 - The location of evidence (item);
 - The time and date the item was recovered;
 - A description of the item;
 - The condition of the item;
 - Any unique markings on the item recovered.

B. Designated Evidence Custodian

1. Each police department shall designate one person at its police station's evidence depository as the "Evidence Custodian." This person will control the storage of the evidence, document all access to it, and be able to testify in court as to the condition, security, and custody of the evidence.

2. A written record (“Chain-of-Custody Form”) shall be made of the receipt or release of any potential evidence and should include a detailed description of the potential evidence.
3. The original Chain-of-Custody Form shall be maintained at the facility that generated it during its handling of the evidence.

C. Handling of Evidence

1. Evidence shall be maintained in a secure (locked) location and in a manner that will not alter the physical properties of the evidence (temperature, light, moisture, cross contamination, etc.)
2. Access to the facility in which the evidence is stored shall be strictly controlled and limited only to those with a legitimate interest in the evidence.
3. There shall be strict accountability of everyone who accesses the evidence and the Chain-of-Custody Form shall be amended whenever the evidence is removed from the evidence storage facility, regardless of the reason.
4. The Chain-of-Custody Form shall identify (by name, badge number, & signature) any person accessing, inspecting, reviewing or removing the evidence from the evidence storage facility, as well as the time, date, and purpose of the access, inspection, review or removal.

Article II of the Zaltanu Constitution states:

All citizens charged in a criminal proceeding have the right to be represented by an Advocate and to have effective representation. If the defendant cannot afford an Advocate, the Court shall appoint one without charge.

Article III of the Zaltanu Constitution states:

In criminal cases, citizens have a right to be represented by a advocate/advocate. Citizens may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.

Communications between a citizen and his/her advocate/advocate are confidential. Citizens have the right to privacy in their communications with their advocate/advocate and to have their confidential information preserved by their advocate to the extent required by law.

Article IV of the Zaltanu Constitution states:

All persons in Zaltanu have a right to be secure against unreasonable searches and seizures. Evidence seized in violation of this rule shall be subject to

exclusion.

Article V of the Zaltanu Constitution states:

All persons in Zaltanu have a right from being forced to incriminate themselves. Evidence seized in violation of this rule shall be subject to exclusion.

Section 148B of the Zaltanu Criminal Code states:

All persons who are placed in custody, or who are being detained and are not free to leave by a police officer, must be informed they have the right to a advocate, they have the right to remain silent, and any statement they make can be used as evidence. Evidence seized in violation of this rule shall be subject to exclusion.

Section 590AA – Zaltanu Criminal Code states:

If the Prosecution has presented an indictment before a court against a person, a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial or any pre-trial hearing. The party may request the court to decide questions of law, including the admissibility of evidence, and any step that must be taken if any evidence is not to be admitted.

ZALTANU JAIL RULES and GUIDELINES

Rule 134.1 Rules regarding Advocate interviews.

A. All incarcerated persons are entitled to be represented by an Advocate representing them in the criminal case for which they are incarcerated.

B. Advocates may meet with their clients during normal business hours. For visits outside of business hours, visits must be approved by the shift supervisor to ensure safety and security.

C. Except as provided in (D) below, to the extent possible, taking into account staffing, facility availability and shift changes, Advocate visits shall be conducted in a private room to allow the conversations to be covered by the Advocate-client privilege. If there is no private room available, the Advocate will be given the choice of waiting for a room to become available or meeting with his client in the jail interview room subject to the restrictions in (D) below.

D. Exceptions to C, above are:

- (i) prisoner is violent or exhibiting violent or erratic behavior;
- (ii) the prisoner is under the influence of alcohol, illegal drugs, or pharmaceuticals sufficient to make his/her behavior unpredictable;

- (iii) the prisoner is a flight risk;
- (iv) if there is no private room available, the Advocate may interview the client in the jail interview room with a guard being present in the interview room to ensure safety and security.

3.2 Zaltanu Pre-Trial Hearing Procedure & Rules of Evidences

3.2.1 Steps and Time in the Pre-Trial Hearing

The **pre-trial hearing** is an application brought by the Defence for the purposes of having evidence of the prosecution **excluded from trial**.

Note the roles of the counsel for the prosecution and Defence must be equally divided. That is, time must be evenly distributed between examination-in-chief and cross-examination.

Process:

The following are an outline of the steps in the CLE Mock Pre-Trial Hearing.

1. Several Judges will preside over the proceedings. However, one Judge will be selected as the Presiding Judge to control the proceedings.
2. JUDGE'S CLERK: "Everybody stand-up."
3. JUDGES: Judges enter the courtroom.
4. PRESIDING JUDGE: Asks both sides "are you ready?"
5. JUDGE: Asks if the prosecution is ready to proceed with the hearing to establish its burden to submit the evidence.
6. PROSECUTOR: Answers "We are ready to proceed, your honor".
7. JUDGE: Instructs PROSECUTOR 1 to proceed and give their opening statement.
8. PROSECUTOR 1: Gives opening statement. **(no more than 10 minutes)**
9. JUDGE: Instructs the DEFENCE ADVOCATE 1 to give their opening statement.
10. DEFENCE ADVOCATE 1: Gives opening statement. **(no more than 10 minutes)**
11. PROSECUTOR: Calls first witness (Senior Officer Strait).
12. JUDGE: Administers oath and witness agrees to oath
13. PROSECUTOR: Examination-in-chief of Senior Officer Strait. **(no more than 10 minutes)**
14. DEFENCE ADVOCATE: Cross-examination of Senior Officer Strait. **(no more than 10 minutes)**
15. PROSECUTOR: Opportunity for re-examination. **(no more than 5 minutes)**
16. PROSECUTOR: Calls second witness (Officer Momo).
17. JUDGE: Administers oath.
18. PROSECUTOR: Examination-in-chief of Officer Momo. **(no more than 10 minutes)**
19. DEFENCE ADVOCATE: Cross-examination of Officer Momo. **(no more than 10 minutes)**

20. PROSECUTOR: Opportunity for re-examination. **(no more than 3 minutes)**
21. PROSECUTOR: Calls third witness (Abbie Shutro).
22. JUDGE: Administers oath.
23. PROSECUTOR: Examination-in-chief of Abbie Shutro. **(no more than 10 minutes)**
24. DEFENCE ADVOCATE: Cross-examination of Abbie Shutro. **(no more than 10 minutes)**
25. PROSECUTOR: Opportunity for re-examination. **(no more than 5 minutes)**
26. DEFENCE ADVOCATE: Calls first witness (Defendant - Eltra Parker).
27. JUDGE: Administers oath.
28. DEFENCE ADVOCATE: Examination-in-chief of Eltra Parker. **(no more than 10 minutes)**
29. PROSECUTION: Cross-examination of Eltra Parker. **(no more than 10 minutes)**
30. DEFENCE ADVOCATE: Opportunity for re-examination. **(no more than 5 minutes)**
31. DEFENCE ADVOCATE: Calls second witness (Ima Yenta).
32. JUDGE: Administers oath.
33. DEFENCE ADVOCATE: Examination-in-chief of Ima Yenta. **(no more than 10 minutes)**
34. PROSECUTION: Cross-examination of Ima Yenta. **(no more than 10 minutes)**
35. DEFENCE ADVOCATE: Opportunity for re-examination. **(no more than 5 minutes)**
36. DEFENCE ADVOCATE: Calls third witness (Officer Bent).
37. JUDGE: Administers oath.
38. DEFENCE ADVOCATE: Examination-in-chief of Officer Bent. **(no more than 10 minutes)**
39. PROSECUTION: Cross-examination of Officer Bent. **(no more than 10 minutes)**
40. DEFENCE ADVOCATE: Opportunity for re-examination. **(no more than 5 minutes)**
41. PROSECUTION: Closing argument. **(no more than 10 minutes)**
42. DEFENCE: Closing argument. **(no more than 10 minutes)**
43. JUDGE'S CLERK: "Everybody stand-up."
44. JUDGES: Judges leave the room to make a decision on which team was the strongest according to the points evaluation.
45. JUDGE'S CLERK: "Everybody stand-up."

46. JUDGES: Judges return to the room and give their decisions on which team was the strongest according to the points evaluation. Judges provide constructive feedback to each participant.

The team with the most judges voting for it advances to the next round CLE Mock Pre-Trial Hearing team participants.

The Prosecution/Plaintiff team shall consist of:

- 1st Prosecutor
- 2nd Prosecutor
- 3 witnesses (Officer Strait, Officer Momo, Abbie Shutro)

The Defence team shall consist of:

- 1st Advocate
- 2nd Advocate
- 3 witnesses (Eltra Parker, Ima Yenta, Former Officer Bent)

3.2.2 Burdens and Standards of Proof

The trial judge determines the admissibility of any evidence according to the rules of evidence. In determining whether evidence will be excluded at a subsequent trial, the prosecution must prove its case on the balance of probabilities.

3.2.3 Relevance of Evidence

Before a party can introduce an item of evidence at trial, it must be relevant. Where the relevance of evidence is not obvious, a party introducing it must explain how it is relevant. Irrelevant evidence is inadmissible.

Evidence can be directly relevant, or indirectly relevant:

- **Directly Relevant:** if it makes a fact of the case MORE or LESS likely.
- **Indirectly Relevant:** if it affects the probative value of the *direct evidence* and thus the accuracy of the other facts/evidence.

Test: Does the evidence carry you forward in proving or disproving the occasion in issue? Where the effect of the evidence is so ambiguous that it could not rationally affect the judging of the fact in issue, the evidence is irrelevant.

In order to be relevant, evidence must:

1. Directly or indirectly relate to the existence or non-existence of a fact in issue in the trial; or

2. Be relevant to a party's disposition in the alleged crime.

Note: evidence may become more or less relevant depending on circumstances and surrounding information.

Example:

QUESTION: What did you eat for lunch on the morning of the accident?

OBJECTION: I object, your honor. What the witness ate for lunch is not relevant to circumstances surrounding the accident.

POSSIBLE RESPONSE: Your honor, there is evidence that the witness attended a business meeting at which alcohol was served before the accident. This evidence goes to whether the witness was affected by alcohol at the time of the accident.

3.2.4 Probative Value of Evidence

The Court must refuse to admit evidence if its probative value is substantially outweighed by the risk that the evidence might:

1. Be unfairly prejudicial to the accused;
2. Be misleading or confusing; or
3. Result in an undue waste of time.

Probative value refers to the weight that should be placed on the particular piece of evidence.

Where there are **inconsistencies in evidence**, the fact finder must compare and weight up the probative value of each piece of evidence and decide which set of facts are more likely to be accurate.

3.2.5 Right to Silence

The accused has a right to silence. This right exists before and during the trial. The right of the accused to raise this Defence exists regardless of whether he/she chooses to remain silent upon arrest.

No adverse inferences can be drawn from the accused's choice to exercise their right to silence.

Where the accused was not cautioned as to their right to silence and was subsequently manipulated, coerced or elicited into making an admission to their

detriment, the Court must determine the admissibility of the evidence in accordance with the illegality provisions in 2.2.6.

3.2.6 Illegally Obtained Evidence

The Court must, on application from the defendant, exclude evidence where it has been illegally or improperly obtained. Once the defendant has raised an assertion of illegality, the prosecution must establish that the evidence was legally obtained and is admissible on the balance of probabilities. In determining whether the evidence has been illegally or improperly obtained, the Court must weigh the competing public interests in convicting those who commit criminal offences and in protecting the individual from unlawful and unfair treatment. The Court must consider:

1. Whether there was a deliberate or reckless disregard for the law;
2. Whether the illegality was a result of a mistake;
3. Whether the illegality impacts the reliability and probative value of the evidence;
4. How easy it would have been to comply with the law; and
5. The nature of the offence.

The abovementioned indicia should not be considered in isolation. For example, the fact that the charged offence is serious will not automatically result in the admissibility of illegally obtained evidence. All indicia must be considered to assist the Court in determining whether the aid of an unlawful or improper act to obtain the evidence was at too high of a price.

3.2.7 Hearsay Evidence

Hearsay is defined as an out-of-court statement, made in court, to prove the truth of the matter asserted. The out-of-court statement may be spoken, written, or made through other forms of communication (e.g., hand gestures).

The **rationale** for finding hearsay inadmissible is because:

- it is unreliable;
- it is not made under oath;
- it does not involve reporting a direct observation;
- it cannot be cross-examined;

- it is impossible to determine the statement maker's demeanour and body language;
- it is impossible for the factfinder to determine whether the evidence is believable.

However, there are many **exceptions** to the hearsay rule. If an exception is established, the out-of-court statement is admissible.

Exceptions to hearsay include:

- Where the out-of-court statement does not go towards proving the truth of the matter asserted, rather it **proves some other fact**.
- Where the out-of-court statement was made by a person who had **personal knowledge** of the asserted fact and it is the best evidence available (first-hand hearsay).
- Where the out-of-court statement is used as **original evidence** to prove the person's **state of mind, intention, motive or plans**.

For example, an out-of-court statement saying 'I want ice-cream' is acceptable as evidence of the intention to go buy ice-cream. It is not, however, used as evidence to prove that the person was at the ice-cream shop.

- Where the out-of-court statement was an **admission** (something that can be used to incriminate the defendant) or a **confession** (admitting to having committed the crime). The rationale behind this exception is that a reasonable person would not admit to a fact hurting his or her interest unless it were true. Note, however, that an out-of-court admission:

- Must be free and voluntary. Here the Court must consider whether the defendant's will was overborne by external pressure. For example:
 - Any inducements, threats, trickery, violence; or oppressive, inhuman or degrading conduct;
 - Persistent questioning;

- The defendant's capacity to resist improper pressure; and
- The defendant's age, intelligence, maturity, self-sufficiency, mental or psychological health, and physical health.
- Must not be unfair on the defendant (e.g., he/she were cautioned and understood his/her right to silence prior to making the admission); and
- Must not be illegally obtained (see the above indicia in 2.2.6).

3.2.8 Character Evidence

Generally, evidence of the defendant's character cannot be brought out in trial, unless the defendant first raises evidence of their good character.

Example:

DEFENDANT: "I am not the sort of person who goes around stealing other people's wallets."

As the defendant has raised his/her good character, the Prosecution may cross-examine the defendant on his/her bad character.

PROSECUTOR: "You gave evidence that you were not the sort of person who stole people's wallets, but it's true that you have previous convictions for theft, isn't it?"

If the defendant had not previously raised His/her good character, the Defence could object to this question on the basis of improper character evidence. However, since the Defence raised good character as an issue, the Prosecutor's question is proper and should be allowed.

3.2.9 Prior Inconsistent Statements

An advocate in cross-examination may test the reliability of a witness's evidence by highlighting contradictions with a prior inconsistent statement. Note: in some circumstances, a witness may be honest but mistaken.

3.2.10 Tendency Evidence & Previous Convictions

Generally, evidence must not be led to prove that a person has a tenancy to act in a particular way or has a particular state of mind. The rationale behind the tendency rule is that the Court must consider evidence in relation to the case before it.

Tendency evidence is highly prejudicial to the defendant and may result, for example in him/her being punished again for prior convictions.

The Court nonetheless may allow the tendency evidence if the probative value of the evidence outweighs the risk of the evidence being “highly prejudicial.” .

3.2.11 Opinion Evidence

A witness is not usually allowed to give their opinion in evidence. An opinion is a conclusion or view formed by a witness based on something that he/she have observed or experienced. It is not for the witness, but rather the fact finder, to form these conclusions. The rule against opinion evidence assists the Court to objectively assess all of the facts and draw its own objective conclusions. If a witness testifies about their opinion, it may confuse or mislead the Court.

Example:

A witness cannot give evidence that the defendant was angry. Rather, the witness must describe what he/she saw (e.g., the defendant spoke loudly, was red in the face and was shaking his/her fist.)

Exceptions:

Opinion evidence may nonetheless be led if:

- The topic is something that ordinary people are knowledgeable about (e.g., the age someone appears to be);
- The opinion of a witness is relevant to a fact in issue (e.g., self-Defence); or
- The opinion of a qualified expert with training, study or experience in the area is required to explain and give meaning to the evidence.

3.2.12 Contested Evidence must be Put to the Witness

An advocate must cross-examine a witness on all aspects of the witness’s evidence that the advocate disputes.

In particular, the advocate must ask the witness to comment on the alternative version of events that the advocate’s case relies on.

3.2.13 Questions in Examination-in-Chief v. Cross-Examination:

At trial, both the prosecution and Defence counsel have an opportunity to call witnesses. The advocate calling a witness must only ask open-ended questions which require the witness to explain in their own words what happened. This process is called “examination-in-chief.” During the examination-in-chief, the advocate may ask closed or leading questions for preliminary matters only. If the matter is not preliminary and the advocate calling the witness asks leading questions, the other advocate should object. The purpose of this rule is to ensure that the witness gives an accurate account of events and is not misled by leading questions.

After the advocate concludes the examination-in-chief, the other party’s advocate will have the opportunity to cross-examine the witness. During cross-examination, the advocate should only ask leading or closed questions that can generally be answered with yes, no or I don’t know. If the advocate asks open-ended questions, then he/she gives the witness an opportunity to say too much.

Examples:

OPEN-ENDED QUESTIONS (used in Examination-in-Chief): “What did you do on Saturday the 13th of March?” This question is open-ended because it invites the witness to explain in his/her own words what he/she did on the 13th of March.

LEADING QUESTIONS (used in Cross Examination): “Is it true that you went to Zoe in Yellow on Saturday the 13th of March?” This question is leading because it generally forces the witness to answer yes or no.

3.2.14 Direct speech

Conversation must be recited as it occurred in direct speech and not summarized by the witness.

Where an objection is based on indirect speech, the witness must convert the evidence to direct speech.

Example:

CORRECT: Brian said to me: “Could you please drive?”

INCORRECT: Brian asked me to drive.

3.2.15 Double Questions/Compound Questions

A double (or compound question) is one in which two questions are contained in one question. Advocates should object to double questions being asked of the witness. This is to ensure clarity as to which question the witness is answering.

Example:

DOUBLE QUESTION: Is it true that the weather was warm and sunny on Friday?

This is considered a double question because the advocate is really asking two questions – “Was it warm on Friday?” and “Was it sunny on Friday?” The witness may not be able to answer this question with a simple “yes” or “no.” For example, if it were cold and sunny, the answer to the first part of the question would be “no”, while the answer to the second part of the question would be “yes.”

3.2.16 Harassment of the Witness

While advocates in cross-examination are permitted to ask questions to test the witness’s credibility, the Court must forbid any question which appears intended to insult, offend or annoy a witness. Indecent and scandalous questions are also forbidden. Where an advocate appears to harass a witness, the other advocate should object.

3.2.17 Admission of Exhibits into Evidence

During the trial the advocates may want to admit certain types of evidence, such as documents, police reports, photographs, and other things for the court to review. Doing this requires a step-by-step procedure which includes the following:

1. Pre-mark the exhibit;
2. Show it to opposing counsel;
3. Show it to the witness;
4. Ask the right foundational questions (see below the foundational questions);
5. Ask the court to admit the exhibit (see below for magic terminology);
6. Let the clerk mark the exhibit into evidence.

Foundational Questions:

Business Record Documents:

You should ask the following questions in order to establish the foundation for business record documents to be admitted into evidence:

- I am showing you what has been marked as Exhibit “A” for identification. Do you recognize this document? (The witness will reply “yes.”)
- What is this document? (The witness will reply: “It is a business record relating to [topic]”)
- Was this business record kept in the normal course of business?
- Was the business record made at or near the time of the event it records?
- Was the business record made by, or from information given by, a person with knowledge acting in the regular course of business?

Move the business record into evidence.

Photographs:

You should ask the following questions in order to establish the foundation for photographs to be admitted into evidence:

- I am showing you what has been marked as Exhibit “B” for identification. Do you recognize what is shown in this photograph?
- Are you familiar with the scene (person, product, etc.) portrayed in this photograph?
- How are you familiar with the scene portrayed in the photograph?
- Does the scene portrayed in the photograph fairly and accurately represent the scene as you remember it on (date in question)?

Move the photograph into evidence.

Diagrams:

You should ask the following questions in order to establish the foundation for diagrams to be admitted into evidence:

- I am showing you what has been marked as Exhibit “C” for identification. Are you familiar with the area located at 16th Street and 12th Avenue in Dade County, Florida?
- How are you familiar with this area?
- Based on your familiarity with the area, can you tell us whether the scene depicted in this diagram fairly and accurately represents the area as you recall it on the date in question?

Move the diagram into evidence.

Tangible Objects:

You should ask the following questions in order to establish the foundation for tangible objects to be admitted into evidence:

- I am showing you what has been marked as Exhibit “D” for identification. Do you recognize what I am showing you?
- Do you know what this object looked like on the relevant date?
- Does this object appear in the same or substantially same condition as when you saw it on the relevant date?

Move the tangible object into evidence.