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Tracie K. Lindeman  
Clerk of Supreme Court

9  
10 IN THE SUPREME COURT OF THE STATE OF NEVADA

11 THE STATE OF NEVADA, )

12 Petitioner, )

13 vs. )

14 LACY THOMAS, )

15 Respondent, )

Case No. 58833

16 **RESPONDENT’S NOTICE OF SUPPLEMENTAL AUTHORITIES**

17 (Oral Argument: January 7, 2013)

18 Pursuant to NRAP 31(e), Respondent files the following notice of supplemental authorities  
19 and citations to the record. This appeal is scheduled for oral argument on January 7, 2013.

20 The State is Estopped from Contending that the Motion to Dismiss was Untimely

21 The State does not contend that it challenged the timeliness of the Motion to Dismiss below.  
22 The State suggests that this court should entertain the issue under plain error review. However, the  
23 State, through its affirmative conduct, invited the court to entertain the motion on its merits and  
24 therefore is estopped from contending on appeal that there was a procedural bar.

25 At the hearing on the Motion to Dismiss, while contending that other motions which had  
26 been filed were time-barred, Deputy District Attorney Owens stated, “...other motions in here to the  
27 statute and stuff that of course would be—could be addressed still that wouldn’t be barred.” Mr.

28 . . .

1 Owens was referring to the motion challenging the constitutionality of the application of the criminal  
2 statutes to the alleged conduct.

3 The doctrine of “invited error” embodies the principle that a party will not be heard  
4 to complain on appeal of errors which he himself induced or provoked the court or  
5 the opposite party to commit....In most cases application of the doctrine has been  
6 based on affirmative conduct.  
7 Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994); Rhyne v. State, 118 Nev. 1, 38  
8 P.3c 163, 168 (2002).

9 The State’s Positions on Construction of the Statutes

10 The State was repeatedly asked by the court during the trial of this case to delineate the  
11 conduct which constituted a crime. After the first witness testified, the court asked the prosecutor  
12 to delineate what must be proved by the State to support a conviction. The prosecutor responded:

13 MR. MITCHELL: I–well, in the misconduct counts you have  
14 to prove that the contract benefitted the friend and not the  
15 organization. That the contract was entered into for the purpose of  
16 benefitting a friend or Mr. –or any other person, it doesn’t have to be  
17 a friend. But when it was entered into it for the benefit of somebody  
18 besides the organization represented. So that’s what I need to prove  
19 on Counts 6 through 10, yes. ...  
20 TT, 3/23/10, p. 145.

21 MR. MITCHELL: Because the statute doesn’t require me to  
22 [allege or prove that the vendors were associates or friends]. I don’t  
23 –I don’t have to prove that they’re a friend...”  
24 TT, 3/23/10, p. 169.

25 When the court asked the prosecutor whether the failure to disclose the relationship was part  
26 of the proof required, the prosecutor responded:

27 MR. MITCHELL: My burden is not so high as to force me  
28 to–to– prove that –that– well, let me phrase it this way. The –what I  
29 have to show is that the purpose of the contract was to help the friend.  
30 I don’t have to prove that the purpose was to harm the county. I just  
31 have to show that this was for personal benefit of a friend, or  
32 somebody, not–not to fulfill my job.  
33 TT, 3/23/10, p. 146.

34 Still struggling with the question of what conduct the prosecutor alleges is criminal under the  
35 statutes, the court asked,

36 [i]f he had a strong friendship relationship with one of these individuals, to contract  
37 for a new phone system, and he gave the best price in the world and they did the best

1 work possible, is that theft? And is that misconduct?  
TT, 3/23/10, p. 185.

2 The prosecutor responded that it was “if his purpose in entering into the contract was to  
3 confer a private benefit by virtue of his public authority...” and then confirmed that “private benefit”  
4 meant that the vendor got paid. TT, 3/23/10, p. 185.

5 Then the court asked the prosecutor “if it’s a fair contract and the county gets a good benefit  
6 from the contract, is that misconduct?” The prosecutor answered, “**Whether or not it turns out well**  
7 **for the county is absolutely not the issue.**” TT, 3/23/10, p. 186 [emphasis added]

8 After 10 days of trial, just before a mistrial was declared due to a *Brady* violation, the court  
9 asked specifically about the application of the Theft statute to the conduct alleged in this case,  
10

11 THE COURT: Well, theft, I’m not sure—what is theft?  
Something for nothing?

12 MR. MITCHELL: Theft is causing somebody to be paid  
unnecessarily when the money could have been left unspent. That’s  
13 the theory here. And—and because Mr. Thomas entered into the  
contract, he bound UMC to pay money that they could have avoided  
paying....

14 TT, 4/2/10, p. 45-6.

15 DATED this 31<sup>st</sup> day of Deceber, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 31, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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