

IN THE SUPREME COURT OF THE STATE OF NEVADA

LACY L. THOMAS,)
)
Petitioner-Defendant,)
)
vs.)
)
EIGHTH JUDICIAL DISTRICT COURT)
of the State of Nevada, in and for Clark)
County; THE HONORABLE MICHAEL)
VILLANI, DISTRICT JUDGE, DEPT. 17,)
)
Respondents,)
)
and)
)
THE STATE OF NEVADA,)
)

Real Party in Interest.)

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**PETITION FOR WRIT OF
MANDAMUS**

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Lacy Thomas is an individual. The following law firms have appeared on behalf of Mr. Thomas: Law Office of Franny Forsman and Daniel J. Albregts, Ltd.

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STATEMENT RE: PRESUMPTIVE ASSIGNMENT
UNDER NRAP 17(b); 21(a)(1)

This matter does not fall in one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b) or 17(b)(8). It is a pretrial writ proceeding but does not challenge a discovery order or an order resolving a motion in limine.

I. INTRODUCTION AND RELIEF SOUGHT

The Theory of Prosecution

This case was brought on an unusual theory of prosecution, and one that has not been pursued by any prosecuting authority in the nation, either federal or state. The indictment charged ten counts, five for Theft and five for Official Misconduct against the former Administrator of the University Medical Center. There are no allegations of kickbacks, of nepotism¹, or that the defendant received any financial gain from a series of contracts which were approved by the County Commission for services to the University Medical Center. The prosecution theory was that if, in retrospect, a jury could find that the contracts were grossly unfavorable to UMC or

¹The State, on occasion, suggested that the vendors were “friends” of Thomas, but did not allege the violation of any rule, regulation or policy prohibiting contracting with acquaintances. Nor did the State prove in the aborted trial, that there was any particular closeness of the vendors to Thomas, other than to allege before the Grand Jury that several of the vendors and Thomas are black and belonged to the same national service fraternity. See Answering Brief in Appeal No. 58833, p. 25-6.

were entered into for the benefit of someone other than the hospital (the vendor), then the crimes of Theft and Official Misconduct were committed.

The Undisclosed Exculpatory Documents

Well before the start of the first trial, the prosecutor in this case was provided numerous documents by the investigating detectives. The documents were notes of meetings and memos prepared by ACS, a vendor, which was the subject of the allegations in Count 1 and Count 6 of the Indictment. The detectives recommended that no charges be brought based on the contract with ACS. When they learned that the prosecutor had decided to charge those counts anyway (Counts 1 and 6), the exculpatory materials were again provided to DDA Scott Mitchell and discussed with him. Yet the documents were not provided to the defense until 9 days into trial and 13 witnesses later, defense counsel was told about the documents by counsel for ACS.²

The Mistrial

The first trial ended after nine days of trial on April 10, 2010 with the declaration of a mistrial due to the failure of the prosecution to disclose the ACS evidence until numerous witnesses had already testified. The court noted the inherent necessity for declaration of the mistrial, “it’s not just where it points in one

²Citations to the Appendix are contained in the discussion of the facts below.

direction that could lead to other areas of inquiry. It could lead to a change of trial tactics...how can we guarantee that they couldn't – all those documents could not have led to other questions by Mr. Albregts?" App Vol. I, 90. "[D]efendant has been substantially prejudiced by the lack of disclosure. The court finds it is impractical and prejudicial to the defense to recall the witnesses...the failure to turn over these documents is a Brady violation. The documents are potentially exculpatory, and at a minute could have led to other areas of inquiry." APP Vol. I, pp. 109-110.

The Motions to Dismiss

The defendant filed a Motion to Dismiss based on the double jeopardy bar to a second trial on September 29, 2014, App Vol. I, p. 147. An evidentiary hearing was held on June 20, 2015 to address the reasons for the failure to disclose. The trial court found that the evidence had been provided to the prosecutor by the detectives and that the failure to disclose the evidence constituted a Brady violation. However, the trial court found that the prosecutor's withholding of the evidence was not intentional. Id. The court found that "jeopardy did not attach" to any counts other than Count 1, which was ordered dismissed by this court. The trial court based its decision to deny the Motion to Dismiss on the ground that the conduct of the prosecutor was not intentional and that jeopardy did not attach to

Counts 2-10 because the withheld evidence related primarily to Count 1.

The defendant also filed a Renewed Motion to Dismiss based upon the Failure of the Indictment to State a Crime or, in the alternative, the Unconstitutional Vagueness of the Statutes as applied to this case. The court refused to rule on this Motion finding that this court had impliedly rejected the challenge although this court ruled on a completely different ground in it's Order in the previous appeal taken by the State.

The Petition for Extraordinary Relief

This extraordinary proceeding has been brought on two grounds: 1) the defendant's protection from a second trial on double jeopardy grounds; 2) the duty of the trial court to rule upon motions presented to it and the violation of that duty when the trial court refused to rule on the Motion to Dismiss based on Failure to State a Crime/Unconstitutional Vagueness based upon its erroneous assumption that this court has already decided the issue.

Extraordinary relief is warranted here for two reasons: 1) The prosecutor's failure to disclose exculpatory evidence which was in the possession of the prosecutor himself and which had been brought to his attention by the investigating detectives was inexcusable and constituted "gross negligence" and a second trial is barred under principles of double jeopardy; 2) In the prior State's appeal, this court

did not decide the question of whether the allegations of the indictment constituted a crime or the statutes were unconstitutional as applied to this case and therefore, the defendant is entitled to a ruling on his Motion to Dismiss prior to trial.

Relief Requested

This court should reverse the trial court order denying the Motion to Dismiss based upon double jeopardy grounds. In the alternative, this court should remand the matter to the district and mandate that the trial court rule upon the defendant's motion to dismiss based upon the failure of the indictment to state a crime, or in the alternative, the unconstitutional vagueness of the charging statutes as applied to the alleged conduct.

II. QUESTIONS PRESENTED

1. Whether principles of double jeopardy require the dismissal of the indictment in this case because:

a. The undisputed facts are that the detective provided the evidence at issue to the lead prosecutor and discussed the exculpatory nature of the material with him and the evidence was not provided to the defense until the middle of trial when the defense found out about it from another source and such conduct constitutes gross negligence or inexcusable negligence.

b. Jeopardy attached to all counts of the indictment when the jury was

sworn;

c. The relevance of the exculpatory material to less than all counts has no relevance to the double jeopardy inquiry-only the conduct of the prosecutor in causing the mistrial is relevant.

2. When an Order of this court is completely silent on an issue which was raised, can the trial court assume that the issue was decided anyway and properly refuse to consider that issue when it is raised prior to trial?

III. PROCEDURAL HISTORY

On February 20, 2008, the Grand Jury returned an indictment against Lacy Thomas alleging that he had committed five counts of Theft and five counts of Official Misconduct when he obtained the approval of the Clark County Commission to enter into contracts with five entities. APP Vol. I, p. 1. On March 22, 2010, a jury trial commenced which resulted in the declaration of a mistrial on Day 10 of the trial, April 2, 2010. On June 3, 2011, the trial court dismissed the indictment on the ground that the indictment failed to state a crime. APP Vol. I, p. 158. The State appealed and this court entered an order affirming the dismissal of Count 1 but reversing the dismissal of all other counts on the ground that the indictment provided sufficient notice of the conduct alleged. APP Vol. I, p. 120.

Following remand to the trial court, Defendant filed a Supplemental Motion

to Dismiss on double jeopardy grounds.³ APP Vol. I, p. 147. The State opposed the motion, APP Vol. I, p. 194, and the Defendant filed a Reply, APP Vol. I, p. 203. Defendant also filed a Renewed Motion to Dismiss based on the failure of the indictment to state a crime, or in the alternative, unconstitutional vagueness of the charging statutes as applied to the conduct alleged. APP Vol. I, p. 166.

An evidentiary hearing was held on the double jeopardy motion at which the two detectives handling the investigation of the case testified.

On September 29, 2015, the trial court entered Findings of Fact, Conclusions of Law and Judgment denying the double jeopardy motion and refusing to rule on the motion addressing failure to state a crime/unconstitutional vagueness. APP Vol. II, p. 426.

IV. THE EVIDENTIARY HEARING ON THE MOTION TO DISMISS

A. Testimony

The evidentiary hearing was scheduled to resolve: 1) whether the prosecutor in the first trial had knowledge of or possession of voluminous materials, the withholding of which caused the mistrial; 2) whether the withholding was intentional or excusably or inexcusably negligent. The lead prosecutor in the first

³This motion was also made prior to the State's appeal but was not ruled upon as the trial court dismissed the indictment and did not need to reach the double jeopardy challenge.

trial (who was removed from the case after the mistrial and was no longer with the District Attorney's office at the time of hearing) did not testify and did not provide a declaration or affidavit explaining his failure to disclose the materials. Three witnesses testified at the evidentiary hearing: 1) Don Campbell, an attorney for vendor ACS, who alerted defendant's counsel to the existence of the materials that he had given to the detectives; 2) defendant called attorney Don Campbell, who provided the materials to the detectives and the detectives who investigated the case.

Don Campbell was the attorney for ACS, the vendor named in Counts 1 and 6. He represented ACS in the investigation being conducted jointly by Las Vegas Metropolitan Police Department and the Federal Bureau of Investigation. The FBI "dropped out rather quickly" from the joint investigation. APP Vol. II, p. 286. The detectives interviewed one of the principals of ACS, Bob Mills, who advised them that "there were a number of documents which would specifically prove the false [sic] of the allegations that had been made by individuals at UMC..." APP Vol. II, p. 289. Detective Whitely asked for the documents and they were provided to him. Id. Campbell testified that during the first trial, he had a conversation with Dan Albregts, counsel for the defendant, and realized that Mr. Albregts had not been given the voluminous documents which he had provided to the investigating

detectives. APP Vol. II, p. 299.

Sgt. Whitely testified that Campbell provided him with two CDs of material. APP Vol. II, p. 326. He testified that he discussed the material that had been given to him but that he did not personally give the CDs to the prosecutor. APP Vol. II, 329-30. Based on the evidence he had gathered, he recommended to the prosecutor that the ACS counts not be charged. APP Vol. II, p. 330. He also testified that he could not recall that any representative from the District Attorney's office went to the evidence vault prior to trial to determine what evidence had been gathered. APP Vol. II, p. 346.

Sgt. Michael Ford, who was Whitely's partner in the investigation, testified that he met with Deputy District Attorney Scott Mitchell "dozens" of times during the course of the investigation. He told the court that during those meetings, he discussed the evidence being gathered, including the withheld ACS documents. He testified that he provided the disc containing the documents to Mr. Mitchell. APP Vol. II, p. 351. Significantly, after the case had been indicted, Sgt. Ford met again with DDA Mitchell when he learned that, against the recommendation of the detectives, the ACS counts had been charged. At that meeting, Sgt. Ford testified, he provided "another binder for ACS...We had created another folder for him because the way--when we found out that he had actually charged ACS in the

indictment, we had a conversation with him in regards to what materials or whatever.” APP Vol. II, p. 355. In response to a question from the court, Ford testified that he gave “the disc relating to the Campbell meeting” to prosecutor Scott Mitchell [prior to the trial]. APP Vol. II, p. 359. Following some back-pedaling during cross-examination by the prosecutor at the evidentiary hearing, Ford re-emphasized that “[e]specially after we found out that they had charged [counts 1 and 6], the DA’s office they—they definitely would have got that information.” APP Vol. II, p. 364.

Inexplicably, the State did not call either of the prosecutors (Scott Mitchell and Eric Jorgenson) who were handling the case at the time the documents were given to them by the detectives.

B. Argument and Findings

With regard to whether the prosecutors had possession or knowledge of the documents prior to trial, DDA Michael Staudaher argued that he had not been brought into the case until just before trial⁴ and he went through the evidence in the office and did not see the material at issue. He told the court that the “case had a long history, [the material at issue] had ever come to the office at some point and was lost or whatever...” APP Vol. II, p. 384. Staudaher did not represent that either

⁴Staudaher and DDA Scott Mitchell were co-counsel for the State at trial.

DDA Mitchell, his co-counsel at trial or DDA Jorgenson offered any kind of explanation or reason for the failure to turn the documents over to the defense, nor did he argue that he had even spoken to either of them prior to the evidentiary hearing.

It must be noted that the prosecutor's case was in trouble and he knew it when the mistrial was declared. The court repeatedly questioned the prosecutor about his theory of the case and why negotiating an "ill-conceived contract" would constitute a crime without more. See Renewed Motion to Dismiss, APP Vo. I, 170. This is an important factor to consider in double jeopardy jurisprudence. In fact, the failure of the prosecutor to articulate a meaningful theory of criminality resulted in the dismissal of the case by the trial court.

The court recalled that "when the binder came up we had already called 13 or 15 witnesses." The court found that DDA Mitchell's suggestion at the time of the mistrial motion, that all of the witnesses could be recalled was not "workable" because "the witnesses were on notice of the cross examination and perhaps some of the shortcomings of their testimony." APP Vol. II, pp. 397-398. The court found that, "[c]learly there was a Brady violation." APP Vol. II, p. 398 and the court stated, "I'm convinced after evidentiary hearing that the detective did—did give the binder I think he said to Mr. Mitchell." Id. Finally, in its oral rendition of the

findings the court said, “The Supreme Court has determined that Count 1 should be dismissed and so because of that—and I also I don’t find this to be intentional and I don’t see a carryover to the other counts, I’m going to deny the motion on the—for the double jeopardy.” Id.

V. STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

A. Extraordinary Relief is Available

This court has original jurisdiction to issue writs of mandamus and prohibition. Nev. Const. art. 6, §4. A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station or to control a manifest abuse of discretion. State v. Dist. Ct.(Armstrong), 127 Nev. ___, ___, 267 P.3d 777, 779 (2011). The writ is not available if the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170.

The Double Jeopardy Claim

While the court has discretion to consider the merits of the petition, Hickey v. District Court, 105 Nev. 729, 731, 782 P. 2d 1336, 1338 (1989), an appeal from a judgment of conviction “is not adequate to protect the right afforded by the Double Jeopardy Clause--to not be placed twice in jeopardy.” Gonzalez v. District Court, 129 Nev. ___, ___, 298 P.3d 448, 450 (2013).

The Refusal to Rule on the Motion to Dismiss

A trial court has a duty to decide motions which are made before trial unless the court orders the matter deferred. NRS 174.135. Here, the trial court determined that it could not rule on the Motion challenging the failure of the charges to state a crime or, in the alternative, the unconstitutional vagueness of the application of the statutes because it believed that this court had already ruled on the issue. As will be demonstrated below, this court did not rule on the issue and accordingly, the defendant is entitled to a ruling on the Motion to Dismiss. An appeal from a conviction is not an adequate remedy at law as there would be no ruling to review. When a trial court is obligated to rule on an issue, the failure to act constitutes an arbitrary and unreasonable exercise of discretion and extraordinary relief is warranted. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070, 1076 (2005).

B. Principles of Double Jeopardy Bar a Second Trial

The Reasoning of the Trial Court

The trial court found that the “binder” of evidence which caused the mistrial of the case was exculpatory, that the “binder” was given to the District Attorney’s office by the police and that the “binder” was not disclosed until the middle of trial. APP Vol. II, p. 427. The judge set forth two reasons why double jeopardy did not

bar a retrial of the defendant: 1) the failure to disclose was not intentional. Id. 2) because Count 1 was dismissed by this court, “there was no carryover to the other counts so jeopardy did not attach to those counts.” Id.

Disregard of Applicable Law

The trial court failed to apply applicable law when it determined that double jeopardy would only bar retrial if the conduct of the prosecutor was intentional. The trial court ignored the standards developed by this court under the Nevada constitution which do not restrict relief to only those cases in which the prosecutor has acted intentionally. Where a district court disregards applicable law “or decided an issue by applying clearly incorrect legal standards, extraordinary relief is likely warranted.” State v. District Court (Riker) Id., at 112 P.3d 1075-6.

1. The Applicable Law

Intentional Misconduct is not Required in Nevada

The Fifth Amendment to the United States Constitution and the identical provision in the Nevada Constitution preclude putting a defendant twice in jeopardy for the same offense. U.S Const. amend. V; Nev. Const. art. 1§8. As a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. Arizona v. Washington, 434 U.S. 497, 505 (1978). Retrial is not automatically barred when a criminal proceeding is terminated

without finally resolving the merits of the charges against the accused except when the actions of the government are responsible for the termination of the proceedings.

In Oregon v. Kennedy, 456 U.S. 667, 673 (1982), the court discussed why an election to terminate a trial does not necessarily operate as a renunciation of waiver of the Double Jeopardy bar:

We have recognized, however, that there would be great difficulty in applying such a rule where the prosecutor's actions giving rise to the motion for mistrial were done "in order to goad the [defendant] into requesting a mistrial"...In such a case, the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances.

Nevada and a number of other states have determined that the Kennedy standard is too restrictive and have extended the exception under their State Constitutions. The rule in Nevada is that the trial court must make a two part inquiry: 1) First, the court must determine whether there was "manifest necessity" for the declaration of mistrial or the result was required by the "ends of justice" 2) the court then must determine "whether the prosecutor is responsible for the circumstances which necessitated declaration of a mistrial." Hylton v. Eighth Judicial Dist. Court of State of Nev., Dept. IV, 743 P.2d 622 (Nev. 1987). See also Melchor-Gloria v. State, 99 Nev. 174, 178 (1983) (noting that, when the defense seeks a motion for mistrial, an exception to the

general rule that the mistrial removes any double jeopardy bars to reprosecution arises where “the prosecutor intended to provoke a mistrial or otherwise engaged in ‘overreaching’ or ‘harassment’”). The “manifest necessity” analysis does not apply when the defendant moves for mistrial. Rudin v. State, 86 P.3d 572, 586 (Nev. 2004). So this court need only address the second part of the inquiry-whether the prosecutor was responsible for the circumstances which caused the trial to abort.

In Hylton, this court determined that the necessity for a mistrial was not “manifest” as the record was inadequate. The Supreme Court addressed the second part of the inquiry: whether the prosecutor was responsible for bringing about the need for declaration of a mistrial. The court examined the conduct of the prosecutor to determine whether the conduct of the prosecutor was “‘excusable’ negligence or ‘inexcusable’” negligence.” Id. at 743 P.2d 627. The mistrial in Hylton resulted when the prosecutor called a witness who had previously been represented by the defendant’s counsel, despite the fact that the prosecutor was aware of the potential conflict of interest. When the witness took the stand, he claimed a Fifth Amendment privilege which was denied by the trial court, and then defense counsel raised the conflict of interest problem which would interfere with his client’s Sixth Amendment rights due to the difficulties presented in cross-examination. The prosecutor moved for a mistrial, which was granted. The Supreme Court, in assessing whether the

prosecutor's negligence was "excusable" or "inexcusable," considered the reasons proffered by the State—"the trial prosecutor 'didn't perceive the problem in that [sixth amendment] context,'" and "a 'communication breakdown' within the district attorney's office.'" Id. at 624. This court found,

Although the prosecutor was subjectively unaware of the substantive ramifications of calling a witness who could invoke an attorney-client privilege on cross-examination, we cannot accept such an error of judgment as "excusable" when weighed against the defendant's constitutional right to be free from repeated attempts to convict him of the alleged offenses.

Id. at 627.

So it is clear that in Nevada, prosecutorial misconduct which is not intentional but is inexcusably negligent, or constitutes overreaching or harassment will support a determination that a second trial is barred by double jeopardy.

The reasons that Nevada and other states have determined that the interests of justice require a more flexible standard under their state constitutions is explained by the Supreme Court of Hawaii:

Recognizing the inadequacy of the specific intent test set forth in Kennedy in ensuring double jeopardy protection against retrial as a result of prosecutorial misconduct, a growing number of jurisdictions have rejected the Kennedy standard and have shifted the focus of inquiry away from the prosecutor's specific intent.

State v. Rogan, 984 P.2d 1231, 1246 (Hawaii, 1999).

The Hawaii Supreme Court noted the dissent in Oregon v. Kennedy by Justice

Stevens. Justice Stevens sets forth the impossibility of proving a prosecutor's subjective intent and finds that, "the court's subjective intent standard would eviscerate the exception [to the general rule that retrial after reversal on appeal is not barred by double jeopardy]. Kennedy, Supra, at 456 U.S. 688, 102 S.Ct. 2083 (Stevens, J., concurring). The rule in Hawaii is that, "reprosecution is barred where, in the face of egregious prosecutorial misconduct, it cannot be said beyond a reasonable doubt that the defendant received a fair trial." Rogan, Supra, at 1249.

Other states agree with Nevada and apply a more meaningful standard to the determination of whether retrial is barred. The rule in New Hampshire is, "To establish prosecutorial overreaching [sufficient to bar retrial] the defendant must show that the government through gross negligence or intentional misconduct, caused aggravated circumstances to develop that severely prejudiced the defendant." State v. Zwicker, 855 A.2d 415, 423(N.H., 2004). In Pool v. Superior Court, 677 P. 2d 261, 271 (Ariz. 1984), the Arizona Supreme Court expressed its disagreement with the intent standard in Kennedy, holding that discerning the subjective intent of the prosecutor would be too difficult to determine. The rule in Arizona is that the conduct must be taken as a whole and "amount to intentional conduct" which he "pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." Id. at 271-2. Recognizing that a growing number of states have rejected or expanded the

intent standard in Kennedy, the New Mexico Supreme Court adopted a “willful disregard” standard for measuring when prosecutorial misconduct would bar a retrial. “‘Willful disregard’ is a more precise term, emphasizing that the prosecutor is actually aware, or is presumed to be aware, of the potential consequences of his or her actions. The term connotes a conscious and purposeful decision by the prosecutor to dismiss any concern that his or her conduct may lead to mistrial or reversal. ” State v. Breit, 930 P.2d 792, 803 (N.M. 1996). See People v. Dawson, 397 N.W.2d 277 (Mich. App. 1986)(retrial barred when the actions of the prosecutor “taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal” and the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.)

Nevada’s rule clearly does not require that the defendant prove the prosecutor’s subjective intent in order to invoke the protections of the double jeopardy clause. Where, as here, the prosecution chooses to remain silent on the reasons for its failure to disclose evidence which the court found to be in the possession of the prosecuting attorney and exculpatory, there can be only one conclusion: the negligence was inexcusable.

The Conduct of the Clark County District Attorney in this Case is Part of an Inexcusable Pattern

The inexcusable nature of the conduct here is demonstrated by the findings of U.S. District Judge David Hagen who examined a series of death penalty cases in which the failure to disclose Brady or Giglio material resulted in findings by various Nevada courts of prosecutorial withholding of evidence. The federal judge found that,

no institutional procedure exist by means of which Metro assures that all Kyles material in its possession is forwarded to the CCDA's office for review. Further, the CCDA's office apparently lacks institutional procedure or policy by means of which it is required to disclose.
APP Vol. II, p. 246.

The September 1, 2004 Order from Judge Hagen was filed in this proceeding and served on the District Attorney. Yet, the prosecutor made no suggestion that any policies had been adopted by the time of Petitioner's trial and it is apparent that either no policies have yet been adopted or that the DDAs who received the exculpatory material from the detectives were not following any constitutional policy requiring disclosure.

C. The Trial Court Had Jurisdiction to Rule on the Motion to Dismiss

Jeopardy Attaches to All Counts When the Jury is Sworn

In denying the Motion to Dismiss based on Failure to State a Crime/Unconstitutionality of Statutes, the trial court ruled, "because the Nevada Supreme Court determined that Count 1 of the original indictment should be dismissed

and also because there was no intention to withhold any evidence by the State, that there is no carryover to the other counts so jeopardy did not attach to those counts.” APP Vol. II, p. 427. This finding evidences a fundamental misunderstanding of double jeopardy principles. When the declaration of a mistrial was necessitated by the actions of the prosecutor, it doesn’t matter whether the misconduct affected less than all the counts. It is the defendant’s protection against multiple trials which is at issue, not the impact of the misconduct on less than all counts. The court determined at the time of declaring a mistrial that the effects of the failure to disclose could not be cured by anything short of a mistrial of all counts. Accordingly, whether the misconduct impacted only 2 of 10 counts is simply not relevant to the inquiry.

Of course, jeopardy attached to all counts when the jury was sworn. Hanley v. State, 83 Nev. 461, 465, 434 P. 2d 440, 442 (1967). The finding by the trial court that because the conduct was not subjectively intentional and the misconduct was directed at only Count 1, jeopardy didn’t attach to the remaining counts is simply wrong. Jeopardy attached to all counts when the jury was sworn—this fact does not change because one count was dismissed. When the trial court bases its decision “on an incorrect interpretation or application of controlling legal authority, we conclude that extraordinary relief in the form of a writ of mandamus is appropriate. Gonzalez, *Supra*, at 298 P.3d 450.

“Law of the Case” Does not Apply and the Trial Court was Required to Entertain the Motion to Dismiss

The district court made the following ruling,

THE COURT FURTHER FINDS THAT the Nevada Supreme Court has previously determined that Defendant was sufficiently put on notice of the criminal acts charged in the remaining counts of the Indictment. The court assumes that the Nevada Supreme Court considered the arguments made Defendant in the briefs and Motion for Reconsideration and therefore this court is without authority to consider the Defendant’s Renewed Motion to Dismiss Based on Failure to State a Crime, or in the alternative, Unconstitutional Vagueness of the Statutes.

APP Vol. II p. 427.

The court appears to have found that it did not have jurisdiction to resolve the motion because the issue had been previously decided by this court. In other words, this court determined the law of the case in its decision in Appeal No. 58833. A review of that decision, APP Vol. I, 120, however, reveals that this court did not decide the question raised in the previous motion (whether the indictment stated a crime or whether the charging statutes were unconstitutionally vague as applied to this case), but rather decided a different question (whether the defendant was put on sufficient notice of the acts alleged).

The “law-of-the-case” doctrine does not apply to issues which have not been decided by a higher court. “Normally, ‘for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication.’” Recontrust Co. v. Zhang, 130 Nev. ___, 317 P. 3d 814, 818 (2014).

While the defendant attempted to convince this court that the underlying decision of the district court had been misconstrued by this court⁵, See Petition for Rehearing, at APP Vol. I, p. 127 this court's denial of rehearing and silence in all other regards cannot be construed as "necessary implication." Had the court examined the issue which is presented in the Motion to Dismiss and rejected it, it would have stated that it had examined the other issues raised and found them to be without merit as it has done in many appeals.

The law-of-the-case doctrine does not apply to an issue which was not decided in the previous appeal by the State. The trial court had jurisdiction to decide the issue and the refusal to rule warrants mandamus relief.

VI. CONCLUSION

The defendant's protection against double jeopardy has been treated quite cavalierly here. The trial court found that the evidence was exculpatory, was in the possession of the prosecutor and that the withholding of the evidence caused the mistrial. The prosecutor did not disclose the evidence until a third party alerted the defense to its existence. Detective Ford testified that he discussed the evidence and its exculpatory nature on several occasions with DDA Scott Mitchell. The trial court's

⁵The trial court did not believe that it had dismissed the case in its previous ruling based on lack of notice, the issue decided by this court. "...it was crystal clear to me that I never said the--that the allegations were unclear. I said the allegations in my opinion did not constitute a crime..." See APP Vol. II, p. 421.

focus on the subjective intent of the prosecutor rather than whether the conduct was excusable, ignores Nevada law. Moreover, the pattern of the Clark County District Attorney's office in failing to disclose exculpatory evidence has been is long-established and there is no excuse for continuing the pattern to the detriment of the defendant's constitutional protections.

[R]egardless of the prosecutorial motive, the defendant suffers severe deprivation of his rights. Constitutional rights are to be protected irrespective of the motive or intent of the actor whose conduct has occasioned an infringement of them.

Ponsoldt, James F., *When Guilt Should be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause After Oregon v. Kennedy*, 69 Cornell L.Rev. 76, 98 (1983).

It is time that this court makes clear that a prosecutor cannot place a defendant in jeopardy and fail to carry out his constitutional obligations, only to be allowed to try the defendant again when he can take another at the witnesses. This case exemplifies the policy concerns underlying the double jeopardy protection. Lacy Thomas should not have to suffer further harassment, expense or the inevitable impacts of pending criminal charges when the prosecutor inexcusably caused the interruption of the first trial. If relief is not granted in this case, the double jeopardy protections of the state and federal constitution will be rendered meaningless.

If the court determines that there was no double jeopardy violation, the case should be remanded with instructions that the trial court rule on the Motion to Dismiss

based on Failure to State a Crime or, in the alternative, Unconstitutional Vagueness of the statutes.

Dated this 27th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this PETITION FOR WRIT OF MANDAMUS, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of October, 2015.

FRANNY FORSMAN, ESQ.

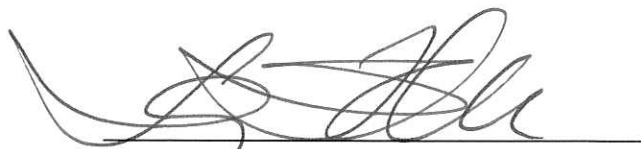
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VERIFICATION

I, Franny Forsman, declare:

1. I am an attorney with the Law Office of Franny Forsman, PLLC, counsel of record for Petitioner-Defendant Lacy Thomas.
2. I verify that I have read the foregoing PETITION FOR WRIT OF MANDAMUS; that the same is true to my own knowledge, except for matters therein stated on information and belief, and as to those matters, I believe them to be true.
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of October, 2015, in Clark County, Nevada.



Franny Forsman

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Daniel J. Albregts, Ltd.; that, in accordance herewith and on the 29th day of October, 2015, I caused a copy of the PETITION FOR WRIT OF MANDAMUS, to be delivered, in a sealed envelope, on the date and to the addressee(s) shown below (as indicated below):

VIA HAND DELIVERY

The Honorable Michael Villani
Eighth Judicial District Court, Dept. XVII
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Chief Deputy District Attorney
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/s/ Kimberly LaPointe
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