IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

LACY THOMAS,

Petitioner,

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

Case No. 69074
(Dist. Ct. # 08C241569)

ANSWER TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney, through his Deputy, OFELIA L. MONJE, on behalf of the above-named Respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed November 12, 2015 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 11th day of January, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Ofelia L. Monje*
OFELIA L. MONJE
Deputy District Attorney
Nevada Bar #11663
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUES PRESENTED

1. **Is this Court's Extraordinary Relief Warranted to Prevent a Violation of the Double Jeopardy Clause Where the District Court Found that the Alleged Brady Violation in the Instant Case was Unintentional, Thus Finding that Double Jeopardy Did Not Apply.**

2. **Did the District Court Err in Denying Thomas' Motion to Dismiss—Raising Issues Already Addressed by this Court.**

RELEVANT PROCEDURAL HISTORY

On February 20, 2008, the State charged Lacy L. Thomas ("Thomas") with five (5) counts of Theft (Felony – NRS 205.0832, 205.0835) and five (5) counts of Misconduct of a Public Officer (Felony – NRS 197.110). Petitioner's Appendix ("PA") 1-6. The jury trial commenced on March 22, 2010, and on April 1, 2010, an issue arose regarding records provided to Thomas' counsel from ACS Company's

counsel. PA 9-10. At trial, Thomas attempted to admit a binder containing 580 pages of documents related to the dealings between ACS and UMC Hospital, which he had received during the jury trial. PA 10-52. Following a lengthy exchange, the district court asked the State to come back the following day and provide the court with information regarding any indexes or ledgers the State had in its possession related to the information the State had in its possession. PA 49-51.

Thereafter on April 2, 2010, the State provided the district court with copies of "legends . . . of all the boxes of material that were provided by the police to [the State], in addition to the materials that [the State] had within its office." PA 56. Further, the State represented to the district court that the documents in question had been provided to the Las Vegas Metropolitan Police Department (hereinafter "LVMPD"):

> This -- binder, at least the content of the binder based on my conversation with Detective Ford appears to have been provided to the police. It was part of the investigation initially with ACS in which they were determining whether or not they were going to try and bring, or were going to recommend criminal charges against ACS and any of its affiliates. That investigation didn't go anywhere.
> They felt that because ACS had actually done work at the hospital there wasn't a basis on which to go forward on a submission of counts specifically related to them. So they've never submitted to our office on ACS. They submitted on Mr. Thomas, and the associated discovery related to him, they provided us.
> This was not (sic) provided -- or at least the explanation proffered to me was that it was not provided because it pertained to an ACS investigation that did not go forward. To -- to his knowledge, when he

> went through it, Detective Ford indicated that he didn't think that there was anything in there directly tied to Mr. Thomas that pointed toward his guilt, pointed away from his guilt. It just had to do with ACS and their involvement and work in the hospital.

PA 57.

Following extensive argument by the parties regarding whether the documents in question constituted exculpatory material, Thomas' counsel made an oral "motion to dismiss, and in the alternative, a motion for a mistrial." PA 94. After additional argument from the parties and a short recess, the district court the granted the oral Motion for Mistrial. The district court stated, in relevant part:

> The documents in question for the Motion for Mistrial and/or for Dismissal relate to the failure of the State to turn these documents over to the defense. They're identified as Defendant's Proposed Exhibit G.
>
> ****
>
> We have an issue -- the main issue that's being presented by the defense is the failure to turn over, in particular, the UMC one stop committee meeting minutes, and the steering meeting minutes, which appear to be four page -- four inches or so, if not more, of a three-ring binder.
> The court finds that -- and also, at this point, the Court finds that the documents in question were not part of the original discovery, or any supplemental discovery turned over to defense in this case. They apparently are not in the State's actual possession.
>
> However, they are -- they were in the possession of -- they -- excuse me, these documents are in the possession of Metro and, in fact, were turned over to representatives of the police department on or about February 6th, 2007. There's a letter, which is Court's Exhibit -- letter dated February 6th '07, to Detective Whiteley, who's listed as a witness in it (sic) this case, from Attorney Don Campbell.

> The court finds that defendant has been substantially prejudiced by the lack of disclosure. The court is not making any finding of -- that there was intentional -- is not making a finding of any intentional misconduct by the prosecutors in this case, or by any law enforcement representatives.
>
> The court finds that it is impractical and prejudicial to the defense to recall the witnesses in this case, because it would put the defense in a position of trying to prepare for the recalling of the witnesses, by having to review approximately, appears to be about four or five inches of documents, perhaps hundreds of pages.
>
> The documents in question could lead the defense to other areas of inquiry of their defense, further discovery, further investigation, as well as trial tactics in this case. The question remains as to whether or not the Court should dismiss the counts relating to ACS, which is the documents contained in the binder.
>
> ****
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> The Court finds that 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 by the defense. The court does not make a finding at this time that the lack of disclosure was intentional on behalf of the prosecutors in this case. He, in fact, finds otherwise at this point, that there's no evidence that it was intentional disclosure -- intentional withholding of the documents by the prosecutors.
>
> As I mentioned before, a large portion of the testimony so far is related to ACS. There is undue prejudice to the defendant, two weeks into trial. We can't unring the bell in this particular case. And the Motion to Dismiss is denied. Motion for Mistrial is granted.

PA 107-10.

On February 11, 2011, Thomas filed 3 Motions to Dismiss—one based on the charging document, the other based on double jeopardy, and the third based on

failure to present exculpatory evidence to the Grand Jury. Respondent's Appendix ("RA") 11-12; 18-27. On March 17, 2011, the State filed its Oppositions to Thomas' Motions. RA 12. On May 12, 2011, Thomas filed, at the direction of the district court, Defendant's Documents and Brief Regarding the Exculpatory Nature of the Documents. RA 12. On May 18, 2011, Thomas filed a Supplemental Brief Regarding the Exculpatory Nature of the Documents. Id. On June 3, 2011, the district court issued its Decision on Motion to Dismiss granting Thomas' Motion to Dismiss as to the entire case on the basis that the Indictment did "not provide Thomas with due process as to what is the criminal act as alleged in the Indictment as defined in NRS 205.0832 and 197.110." RA 28-34. The district court dismissed the Indictment in its entirety. Id.

The State appealed the district court's Decision and filed its Opening Brief on June 8, 2012. RA 35-72. Thomas filed his Answering Brief on August 8, 2012. RA 73-114. On September 26, 2013, the Court issued an Order Affirming in Part, Reversing in Part and Remanding. PA 120-126. On October 14, 2013, Thomas filed a Petition for Rehearing. PA 127-135. The State filed its Answer to Petition for Rehearing on December 3, 2013. PA 136-145. On December 19, 2013, the Court issued an Order Denying Rehearing. PA 146.

On remand, the district court held a status check on May 6, 2014, and raised the Brady issue. RA 115-121. The district court stated:

> And I was reviewing my Court order from back in 2011 and this is from page 6 and it says, based upon the above, referring to the allegations in the indictment, the Court need not address Defendant's argument that the indictment should be dismissed due to the State's failure to provide exculpatory evidence, okay. So I didn't need to rule on it because I ruled on what they alleged was not a crime. The Supreme Court disagreed apparently. And so if we're going to go forward we'll need to set a -- I want some further briefing on that particular issue.
> ****
> And while I have both counsel here some other issues that we can address in 30 days, but I just want to give both sides a heads up. Since I do still need to address the discovery issue, and I'm going to -- I'll invite supplemental briefing in that regard, for both sides the failure to turn over, I think it was 586 pages of discovery, should the Court look at that as negligence on the DA, gross negligence, inexcusable negligence or intentional. And also whichever I'm supposed to look at, how does this apply to the Hilton case which is 743 P2d 622; that a Nevada case.
> ****
> I'd have both parties look at U.S. versus Chapman, it's a Ninth Circuit case out of Las -- Las Vegas . . . . that's 524 Fed3d 1073.

RA 117-119.

The district court gave the parties 30 days to attempt to resolve the case. Id. On July 31, 2014, the district court had an additional status check and set a briefing schedule for additional briefing on the alleged Brady issue. RA 112-123. On September 29, 2014, Thomas filed Defendant's Supplemental Motion to Dismiss and Notice of Need for Evidentiary Hearing. PA 147-165. On this same date, Thomas filed a Renewed Motion to Dismiss Based on Failure of the Indictment to State a Crime, or in the Alternative, Unconstitutional Vagueness of the Statutes. PA 166-188. The State filed its Oppositions to both Motions. PA 189-202. Thomas

replied to both Oppositions. PA 203-33. Further, on March 18, 2015, Thomas filed Exhibit in Support of Motion to Dismiss (Double Jeopardy). PA 234-82.

On May 15, 2015, the district court held an evidentiary hearing. PA 283-367. The district court heard from 3 witnesses: Donald Jude Campbell (attorney for ACS), Robert Whiteley (LVMPD Sergeant, former Detective), and Michael Ford (LVMPD Sergeant, former Detective). Id.

On July 31, 2015, the district court heard arguments on Thomas' Supplemental Motion to Dismiss on the Brady issue and his Renewed Motion to Dismiss Based on Failure of the Indictment to State a Crime, or in the Alternative, Unconstitutional Vagueness of the Statutes. PA 368-425. The district court ultimately ruled and as to the alleged Brady issue, stated, "I'm not convinced that there was any intentional act by the District Attorney to withhold information." PA 398. Further, "[t]he Supreme Court has determined that Count 1 should be dismissed and . . . I also 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. The district court concluded, "[b]ut nevertheless I don't find we rise to the level of -- of the violation of double jeopardy for the -- on this particular matter." PA 399. As to the Renewed Motion to Dismiss Based on Failure of the Indictment to State a Crime, or in the Alternative, Unconstitutional Vagueness of the Statutes, the district court also denied it. PA 422. The district court reasoned

that this Court had already decided the issue on the merits and that Thomas was asking the court to overrule this Court. PA421-22.

On September 29, 2015, the district court filed its Findings of Fact, Conclusions of Law and Order. PA 426-28. On October 29, 2015, Thomas filed the instant Petition for Writ of Mandamus. The State answers as follows.

ARGUMENT
I
LEGAL STANDARD/JURISDICTION

This Court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). This Court may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction. NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; see also Hickey, 105 Nev. at 731, 782 P.2d at 1338. This Court has previously emphasized the "narrow circumstances" under which mandamus or prohibition are available and has cautioned that extraordinary remedies are not a means for routine correction of error. State v. District Court (Riker), 121 Nev. 225, 112 P.3d 1070

(2005). The purpose of a writ of mandamus or prohibition is not simply to correct errors. Id. The petitioner carries "the burden of demonstrating that extraordinary relief is warranted." Pan v. Eighth Jud. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004); see also NRAP 21(a).

Double Jeopardy protects not just against being twice convicted, but of being tried twice for the same offense. Therefore, a writ of prohibition will issue to prevent retrial in violation of a defendant's constitutional right not to be put in jeopardy twice for the same offense. Glover v. District Court, 125 Nev. ___, 220 P.3d 684 (2009) (*citing* Hylton v. Eighth Judicial Dist. Court, 103 Nev. 418, 421, 743 P.2d 622, 624 (1978)). The State agrees that Thomas' first issue, related to whether principles of double jeopardy bar a retrial, sounds in prohibition. However, the State submits that Thomas' second issue, whether the district court erred in denying Thomas' Renewed Motion to Dismiss Based on Failure of the Indictment to State a Crime, or in the Alternative, Unconstitutional Vagueness of the Statutes, is not appropriate for mandamus, as this Court has already ruled on this exact issue. See *supra* Section III.

II
THE DISTRICT COURT DID NOT ERR IN DENYING THOMAS' MOTION TO DISMISS

A. Standard of Review

Whether a prosecutor's conduct constitutes "overreaching" or "harassment" intended to goad a defendant into moving for a mistrial is a factual question to be

resolved by the trial court which must be sustained by this Court unless clearly erroneous. Melchor-Gloria v. State, 99 Nev. 174, 660 P.2d 109 (1983) (citing United States v. Green, 636 F.2d 925, 928 (4th Cir. 1980); United States v. Calderon, 618 F.2d 88, 90 (9th Cir. 1980)).

B. Whether Retrial is Barred by Double Jeopardy

At the outset, the State sets forth that there was no Brady violation and at most, there was a discovery violation. According to NRS 174.235: "at the request of a defendant, the prosecuting attorney shall permit the defendant to inspect and to copy" including but not limited to documents, statements, and examinations. This statute places the duty on the defense to request discovery that is neither exculpatory or inculpatory. Even if this Court finds that it was a Brady violation, the district court properly held that the State did not goad Thomas into moving for a mistrial, thus a retrial is not barred by double jeopardy.

1. There was no Brady violation.

The prosecution must disclose to the defense evidence in its possession that is both favorable to the accused and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196 (1963); Roberts v. State, 110 Nev. 1121, 1127, 881 P.2d 1, 5, (1994). In determining whether evidence is Brady material, the Court should look at the following: "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character

for the defense, and (c) the materiality of the evidence." Moore v. Illinois, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2568 (1972). Federal courts have consistently held that a Brady violation does not result if the defendant, exercising reasonable diligence, could have obtained the information. U.S. v. Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) ("if the means of obtaining the exculpatory evidence has been provided to the defense, the Brady claim fails"); U.S. v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983) (where prosecution disclosed identity of witness, it was within the defendant's knowledge to have ascertained the alleged Brady material); U.S. v. Brown, 582 F.2d 197, 200 (2nd Cir. 1978) (no violation where defendant was aware of essential facts enabling him to take advantage of the exculpatory evidence). See also Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.")

When a discovery order has been violated, NRS 174.295 allows the trial court to "permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such order as it deems just under the circumstances." However, where the State's non-compliance with a discovery order is inadvertent and the court takes appropriate action to protect the defendant against prejudice,

there is no error justifying dismissal of the case. Maginnis v. State, 93 Nev. 173, 176, 561 P.2d 922, 923 (1977); see also Lopez v. State, 105 Nev. 68, 77-79, 769 P.2d 1276 (1989) (defendant's late receipt of reports did not warrant mistrial where defense received documents at same time as prosecution and there was no showing of intentional withholding of the evidence from defendant); Langford v. State, 95 Nev. 631, 635-36, 600 P.2d 231, 234-35 (1979) (absent showing of bad faith by State or unalleviated prejudice to the defendant, trial court properly denied motion for mistrial). In State v. Stiglitz, 94 Nev. 158, 576 P.2d 746 (1978), this Court overturned a trial court's decision to dismiss charges after a showing that the State had violated a discovery order. This Court stated that "the State having in good faith attempted to comply, we deem it an abuse of discretion to dismiss the charges." Id. at 161-62, 576 P.2d at 748. In State v. Tapia, 108 Nev. 494, 498, 835 P.2d 22 (1992), this Court concluded that it was an abuse of discretion for the trial court to dismiss the case based upon a violation of a discovery order when the State was unaware of the document in question until the first day of trial and when it was discovered, the State immediately sent the document to the defendant.

Here, the discovery at issue was a binder[1] that contained, "steering committee meetings . . . the one stop meetings, correspondence, or the forwarding correspondence and the actual ACS rebuttal . . . ." PA 24. The information related

[1] The State has filed a motion to transmit the binder in question—Defense Exhibit G—for this Court's review.

to one entity, ACS, a.k.a. Superior Consulting (hereinafter "ACS"). The only charges related to that entity were, at the time of trial, Counts 1 and 6. PA 01-05. As to the factors the Court should look at to evaluate a Brady claim, there was absolutely no evidence that the documents in question were suppressed by the State after a request by the defense. In fact, the record demonstrates that the existence of these records was a complete surprise to the State. PA 12, 38. This is evidenced throughout the trial transcripts of the jury trial. See PA 09-54, 55-119. Notably, at trial, the defense conceded, "I didn't say I was deprived of it." PA 46. Nothing supporting this necessary factor to establish a Brady violation was elicited during the evidentiary hearing. In fact, one detective testified that he believed the binder in question was "not provided to either the State or the defense attorney." PA 340-41. The other detective indicated that he believed "he would have" provided the documents to the State, but had no recollection of doing so. PA 351, 363.

Further, the records were not relevant, thus they were not favorable to the defense—the second Brady factor. See NRS 48.015 ([R]elevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."). Count 1 never alleged that ACS did "little to no work" as Thomas' attorney consistently alleged during trial and at the evidentiary

hearing. PA 01-02 (Thomas' attorney, "that ACS didn't do any work" . . . . "that ACS didn't do anything")[2]. In fact, the records in question, were prepared specifically to rebut an allegation that ACS had done no work; however, these were not the formal criminal charges alleged against Thomas related to ACS.[3]

Count 1 alleged that Thomas committed Theft pursuant to NRS 205.0832, 205.0835 by entering into a contract with ACS, a company run by "longtime friends or associates" of Thomas, for ACS to collect money owed to UMC under "contracts or terms grossly unfavorable" to UMC, whereby UMC was obligated to pay ACS for collecting work already being performed by an agency of Clark County and could not terminate said contract for a lengthy period of time

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[2] Thomas' attorney, "And I would point out, Judge, that the theme of the prosecution in this case has been and continues to be the lack of deliverables in written form, thereby evidencing no work done by the consultant, so." PA 036. "[W]e certainly have the right to rebut the claim that ACS didn't accomplish anything, *didn't do anything* . . . ." PA 073 (emphasis added). See also defense's counsel's argument at PA 372, "the State alleges that Lacy Thomas was hiring people *that were doing no work*, that were coming and just taking money and running . . . this would give me ample argument to show how that them was not correct, that ACS was doing work . . . ." (Emphasis added).

[3] Don Campbell testified that the records were a response to an allegation that ACS "did nothing" for the work that they had been paid to do. PA 022. The accomplishments were an ACS record created specifically to rebut the allegations that ACS had done nothing and it was created by Jerome Carroll. Id. ACS and its attorneys "were dealing with the notion that ACS did nothing when, in fact, they had all these people out there, they conducted all these meetings." PA 023. Don Campbell testified at the evidentiary hearing that the documents were prepared in response to an allegation that ACS was not providing services. PA 296.

regardless of whether ACS was successful in increasing the collection of UMC's debt. Id. In the alternative or in addition to, by allowing ACS to sell valuable accounts receivable to a third party for an unreasonably low price and by charging a high commission for said sale, and after learning that debt collection had decreased under the direction of ACS, modifying the contract to greatly increase the amount of money UMC paid to ACS for debt collection services, thereby using the services or property for another use. Id. Count 6 alleged, again only as to ACS, that Thomas while acting as a public officer as Chief Executive Officer of UMC, employ or use money under his official control or direction, or in his official custody, "for the private benefit or gain of himself or another," by doing the acts set forth in Count 1. PA004-05.

Documents related to the fact that ACS did work were not favorable to the defense since the State never alleged that ACS did no work. The record demonstrates a fundamental misunderstanding by the defense as to the actual charges related to ACS against Thomas. The State attempted repeatedly to direct the court to the actual charging document to support this point. The State reminded the district court that the State had never alleged that ACS did no work, in fact, the State was willing to stipulate that work was done by ACS. PA 29. The allegation, as stated in the Indictment, was that the "contracts were grossly unfavorable to UMC." Id. Further, the record demonstrates that the district court did not review

the entirety of the records prior to ruling that there was a discovery violation.[4] Thus, there was never a proper assessment regarding whether the evidence was actually favorable to the defense and the materiality of that evidence—the third required factor. Unfortunately, at the subsequent evidentiary hearing in July 2015, the district court did not allow the State to make inquiry on this point. As a result of this Court's order in Supreme Court Case No. 58833, Count 1 in the Indictment has since been dismissed.

In addition, any discovery violation was harmless as the defense, through their own efforts, obtained the information prior to verdict and could have presented it at trial. See Jones v. State, 113 Nev. 454, 471, 937 P.2d 55, 65-66 (1997). Further, the discovery in question applied to only two of the counts charged in the Indictment, and was not in any way related to the entities or activity charged in the other eight counts.

The defense cannot shift its own obligation for due diligence and investigation to the State. In Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331(1998), this Court held that "Brady does not require the State to disclose evidence which is available to the defendant form other sources, including diligent

[4] The State asked the district court to look at the binder before ruling. PA 034. On Friday, April 10, 2010, the day the district court granted the mistrial, it had not reviewed the entirety of the documents. PA 058, PA 068. The district court again repeated that it had not "seen all of [the documents] in that binder there." PA 087. In fact, the district court admitted, after the State inquired, that it had not read the entirety of the binder. PA 098.

investigation by the defense." In that case, Steese had knowledge of certain collect telephone calls he allegedly made to a State's witness and through diligent investigation could have obtained the phone records independently from the third party phone company. Therefore, this Court held that the State did not violate Brady by failing to provide the phone records to the defense.

Here, the record indicates that Thomas and his defense attorney could have accessed the binder information themselves had they contacted the detectives or LMVPD directly. In fact, Thomas took advantage of this very discovery avenue to gain access to and obtain a copy of Thomas' computer hard drive prior to trial and subsequently used documents from the hard drive during trial. PA 50. LVMPD has a policy of allowing defense counsel access to the evidence vault and computer files. PA 337. When an officer or detective receives a request to look at vault evidence or case files, LVMPD allows access to that information. PA 338. Detective Whitely testified that he did not believe that the binder in question was provided to the State or the defense attorney, but that any documents not provided to either side were still accessible. PA 340-41. In fact, Detective Whitely also testified that defense counsel, *prior* to trial, made a request for access to specific computer related evidence and Thomas himself went to the vault and obtained those digital records. PA 341-43 (emphasis added). Thomas later introduced documents and emails from that computer evidence during trial. PA 343.

In addition, as evidenced by the testimony of Don Campbell both during trial and at the evidentiary hearing, Thomas was fully aware of the litigation and allegations between ACS and the county, which were ongoing prior to the beginning of trial. PA 24, 291; see also RA 16-17, minutes the instant case from March 8, 2010, which demonstrate that Thomas' counsel had knowledge of the civil litigation *prior* to the commencement of trial. Thomas could have at any time, through his own efforts, reviewed the litigation documents, which included the binder at issue in this appeal. PA 302-03. In fact, it was by contacting and discussing those very issues with counsel for ACS during trial that Thomas obtained the binder, which he later successfully moved into evidence. PA 66-67.

Thus, by either contacting counsel for ACS prior to trial or by simply asking for access to the ACS materials from LVMPD, Thomas could have obtained these documents himself and cannot now shift his own obligation for due diligence and investigation to the State. In fact, it was by exercising his own due diligence that Thomas was able to obtain the binder and introduce it into evidence.

Notably, nothing at the evidentiary hearing or submitted by Thomas supports in any way his contention that there was anything exculpatory in the binder. Furthermore, since the State never alleged that ACS did no work, the binder, which only supported the fact that representatives of ACS were working at UMC, the State submits that the binder is not exculpatory. As such, the State sets forth,

therefore, that there was no Brady violation and at most, there was a discovery violation.[5]

2. The district court was not clearly erroneous when it ruled that the State did not goad Thomas into moving for a mistrial.

Even if there was a Brady violation, however, the district court was not clearly erroneous when it ruled that the State did not goad Thomas into moving for a mistrial. If a case ends "after jeopardy attaches but before the jury reaches a verdict, a defendant may be tried again for the same crime . . . in two circumstances: (1) if he consents to the [mistrial]; or (2) if the district court determines that the mistrial was required by 'manifest necessity.'" Glover, 125 Nev. at 709; 220 P.3d at 696 (*citing* United States v. Chapman, 524 F.3d 1073, 1081 (9th Cir. 2008). "As a general rule, a defendant's motion for, or consent to, a mistrial removes any double jeopardy bar to reprosecution." Melchor-Gloria, 99 Nev. at 178, 660 P.2d at 111. An exception to this rule "applies in those cases in which the prosecutor *intended* to provoke a mistrial or otherwise engaged in 'overreaching' or 'harassment.'" Id. at 178, 660 P.2d at 112 (emphasis added). However, such overreaching or harassment, "even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent *intent* on the part of the

[5] The State has maintained this position throughout this case. The State argued this at the initial jury trial, opposed this point following the mistrial, and again argued this at the evidentiary hearing.

prosecutor to subvert the protections afforded by the Double Jeopardy Clause." Id. (*citing* Oregon v. Kennedy, 456 U.S. 667, 675-76, 102 S. Ct. 2083 (1982)) (emphasis added). Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion. Oregon v. Kennedy, 456 U.S. at 676.

Thomas cites to Hylton v. Eighth Judicial Dist. Court, 103 Nev. 418, 421, 743 P.2d 622, 624 (1978) for his proposition that double jeopardy bars a retrial after a mistrial is caused due to prosecutorial misconduct even if it is not intentional, but instead due to inexcusable negligence or overreaching or harassment. That case dealt with the State calling a witness who was the defense attorney's former client. Id. at 420. Months before the trial, the court told the State to provide a better indication of whether or not they were going to use that particular witness. Id. Thus, in Hylton, it was clear that the prosecutor was on notice that he needed to put the court and defense counsel on notice if he intended to call the former client as a witness. Id. Several inquiries were made and defense counsel told the court that if the witness was called there would be an issue with him asserting his attorney-client privilege. Id. After the State filed an amended information and listed the former client as a prospective witness and certified the State's efforts to compel the witness to testify, defense counsel had concerns

regarding the witness. Id. This, and the fact that the defendant indicated he wanted to hire a different attorney, prompted defense counsel to file a motion to continue the trial. Id. The prosecutor opposed defense counsel's motion to continue to address the issue with the witness and indicated to the court that defense counsel's relationship with the "potential witness" did not pose a problem for the State. Id. The motion was denied and at calendar call, the prosecutor did not mention his intent to call the former client as a witness and merely commented that he was attempting to compel a certain witness to attend trial. Id. At no time prior to trial did the prosecutor's office advise defense counsel that it planned to call the witness in question. Id. The State called the witness during trial and the defense explained the difficulties in cross examining his former client. Id. at 421. At this point the State moved for a mistrial as the witness would be "primary" for the trial. Id.

The Court held that the mistrial was not manifestly necessary and went on to address the second inquiry, whether the prosecutor was "in some way responsible" for the circumstances which gave rise to any possible necessity to declare a mistrial. Id. at 424. The Court found that because the prosecutor was responsible, thus even if the mistrial had been manifestly necessary, the Court would grant the writ on grounds of the prosecutor's role in bringing about any need for a mistrial. Id. The Court focused on the fact that the prosecutor had "adequate warning," the trial court had specifically requested that the prosecutor forewarn the court of their

intent to call the former client, and the fact that the prosecutor had opposed the motion to continue. Id. at 425. All of these things evince that the prosecutor had notice that his actions could cause a mistrial and intentionally acted in a way to cause the mistrial. Further, the Court noted that the prosecutor opposed the motion for a continuance for the defendant to secure new counsel, instead of supporting the motion, which would have led to the appointment of new counsel and would have avoided the potential for a mistrial. Id. Again, this is an intentional act when the prosecutor was on specific notice. Hylton focuses on the adequate warning the prosecutor had and the intentional acts of the prosecutor.

In contrast, in Melchor-Gloria, the trial court declared a mistrial shortly after trial commenced. 99 Nev. at 178, 660 P.2d at 111. In that case, a tape-recorded interrogation of the defendant was inadmissible because a second translation revealed incomplete Miranda rights had been given. In preparing for his opening statement, the prosecutor did not review the portion of the transcript which contained the Miranda warnings. Id. at 177-78. Prior to trial, both counsel met in chambers to discuss the deficiencies in the Miranda warnings. Id. at 177. The defense counsel came away from that meeting with the understanding that an agreement had been reached to the effect that the issue of the admissibility of the defendant's statements would be dealt with in an appropriate hearing. Id. In his opening statement, the prosecutor referred to the potentially inadmissible

statements. Id. The defense counsel objected, but the prosecutor successfully argued to overrule the objection. Id. The defendant's statements were subsequently suppressed, and on defense motion, a mistrial without prejudice to the prosecution was declared. Id. at 178. The Court found "that the trial court's finding that the prosecutor did not *intentionally* engage in overreaching or harassment" was not clearly erroneous. Id. at 179.

The State submits that the dispositive question in this case is whether the district court's conclusion that the prosecutor's conduct under the circumstances of the instant case did not constitute "overreaching" or "harassment" *intended* to goad Thomas into moving for a mistrial is clearly erroneous and an arbitrary and capricious exercise of discretion as to warrant extraordinary relief. The burden is on Thomas to prove that the prosecutor had the intent to goad the defense into moving for a mistrial. For all the reasons below, Thomas has not, and cannot, show that the State had the intent to overreach and cause a mistrial nor that the district's court's determination was clearly erroneous under the circumstances.

Nothing in the records supports that the prosecutors in the instant case had any knowledge that the documents existed, let alone, that they had any notice or warning that failure to provide them would result in a mistrial, unlike the prosecutor in Hylton. During the initial trial when Thomas attempted to admit the records, the State had no knowledge of the binder in question and denied that

LVMPD had provided these records to the State. The State repeatedly stated to the district court that the records came from the defense and that this was the first the State had seen them. There was no notice to the prosecutors such as there was in Hylton. In fact, the following day, the State provided the district court with documentation to support its contention that the records were not in its actual possession. PA 56. Further, the State provided the district court with an explanation from the detectives as to why these records had not been provided to the State. PA 57. As far as the State knew, these records were not provided to the State because the detectives did not deem them relevant to the charges against Thomas. The records were obtained by defense counsel from ACS after detectives requested certain information. The State did not have any immediate knowledge or recollection of these records—which were relevant to only two of the numerous charges against Thomas. Thus, at the time of the trial, the State did not goad Thomas into moving for a mistrial.

Similar to the prosecutor in Melchor-Gloria, there was no intent to provoke a mistrial. The State was genuinely surprised by the content of the records. The State vehemently opposed Thomas' oral motion to dismiss, and in the alternative, a motion for a mistrial and repeatedly told the district court that it was in fact Thomas who had provided the documents to the State. Additionally, the State proposed alternatives to the mistrial. The State proposed admitting the entire

binder with the understanding that defense counsel would still have had a few more days to go through it. PA 98-99. Also, defense could recall any witnesses. These are hardly the actions of prosecutors that wanted to provoke a mistrial. The State wanted to proceed with the trial and did not want the mistrial.

In the instant case, at the evidentiary hearing, the district court heard testimony from Detective Ford who indicated that "he would have" provided the documents to the State. PA 351. Detective Ford had no recollection of providing the documents to the State. PA 363. However, he indicated that the State would have received the information once he found out that the State elected to proceed on the charges related to ACS. PA 364. Additionally, by all indications, there was voluminous documentation in this case. PA 332, 359. Again, the State indicated at trial that the materials were not in its actual possession and given the amount of discovery in this matter and the fact that Detective Ford had no actual recollection of providing the materials in question to the State, it is certainly possible that the State did not actually obtain physical possession the documents in question. This is supported by the State's genuine surprise at trial regarding the documents and the strong opposition to the mistrial. Nothing in the record supports the notion that the State overreached or harassed with the intent of goading Thomas into asking for a mistrial. As such, the district court was not clearly erroneous when it concluded that the prosecutor's conduct under the circumstances of the instant case did not

constitute "overreaching" or "harassment" *intended* to goad Thomas into moving for a mistrial. The writ must be denied.

3. The non-mandatory authority cited by Thomas does not aid the Court.

There is no need for this Court to review authority from other jurisdictions provided by Thomas as this Court's mandatory authority provides sufficient guidance to deny the instant writ. Regardless, this non-mandatory authority does not assist Thomas. Thomas cites to State v. Rogan, 91 Haw. 405, 984 P.2d 1231 (Haw. 1999), which specifically dealt with prosecutorial misconduct. The prosecutor, during rebuttal argument stated, in relevant part, that finding "some black, military guy on top of your daughter is "every mother's nightmare. Id. at 411, 984 P.2d at 1237. The Supreme Court of Hawai'i held:

> [U]nder the double jeopardy clause of article I, section 10 of the Hawai'i Constitution, that reprosecution of a defendant after a mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the prosecutorial misconduct is so egregious that, from an objective standpoint, it clearly denied a defendant his or her right to a fair trial. In other words, we hold 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.

Id. at 423, 984 P.2d at 1248. In the instant matter, it cannot be said that a discovery violation involving a binder that the prosecutors had no knowledge of was "so egregious" that it denied Thomas of his right to a fair trial. Again, this binder contained information as to only two of the counts charged in the Indictment, and

was not in any way related to the entities or activity charged in the other eight counts. In the instant matter, there was not prosecutorial misconduct that can be deemed "so egregious" that Thomas did not receive a fair trial.

Similarly, Pool v. Superior Court, 139 Ariz. 98, 108-09, 677 P.2d 261 (1984) also involves egregious prosecutorial misconduct and does not aid Thomas. There, the Supreme Court of Arizona held that jeopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted on motion of defendant or declared by the court under the following conditions:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; *and*
> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, 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*
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Id. These factors are not present in the instant matter for all the aforementioned reasons.

The same can be said of the authority from New Mexico and Michigan. "Retrial is barred under Article II, Section 15, of the New Mexico Constitution, when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, *and* if the official knows that the conduct is improper and prejudicial, *and* if the official

either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal." State v. Breit, 930 P.2d 792, 803, 122 N.M. 655, 666 (N.M. 1996) (emphasis added); see also People v. Dawson, 154 Mich. App. 260, 397 N.W.2d 277 (Mich. App. 1986) (The court adopted the three-part test in Pool, 139 Ariz. At 108-09, 677 P.2d 261, as the appropriate standard for determining whether retrial is barred by the double jeopardy clause. The court found that the prosecutorial conduct in question was "so egregiously improper that [the court could] only infer that the prosecutor consciously engaged in conduct which he knew to be improper, and that he did so with indifference, if not a specific intent, to create unfair prejudice. At best, the purpose appears to be to prejudice the jury and obtain a conviction no matter what the danger of mistrial or reversal.").

Similarly, State v. Zwicker, 151 N.H. 179, 855 A.2d 415 (N.H. 2004) does not aid Thomas. The Supreme Court of New Hampshire concluded that the Double Jeopardy Clause did not bar retrial. Id. at 188, 855 A.2d at 424. The defendant's first trial ended in a mistrial without prejudice after an officer testified that he found the defendant's identification from the Concord prison. Id. at 183, 855 A.2d at 420. At the defendant's retrial, a different officer testified that the defendant was "going to Rockingham Street, or to maybe see his probation officer." Id. at 184, 855 A.2d at 420. The trial court again granted a mistrial and dismissed the case without prejudice. Id. The Supreme Court of New Hampshire

reviewed pertinent law[6] and noted that in an analysis to determine whether double jeopardy bars retrial, a "defendant has a difficult burden to meet". Id. at 188, 855 A.2d at 424. Noting that the relevant inquiry is whether the government engaged in intentional misconduct, gross negligence, or that the government intended to provoke him into seeking a mistrial. Here, similarly, the record does not support

[6] Generally, when a defendant's request for a mistrial is granted, a retrial on the same charge is not barred by double jeopardy. State v. Duhamel, 128 N.H. 199, 202, 512 A.2d 420 (1986). On the other hand, when, by reason of prosecutorial or judicial overreaching that is intended either to provoke the defendant "into requesting a mistrial or to prejudice his prospects for an acquittal," United States v. Dinitz, 424 U.S. 600, 611, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1976), the defendant requests and obtains a mistrial, the Double Jeopardy Clause prohibits a retrial. State v. Scarlett, 121 N.H. 37, 39, 426 A.2d 25 (1981). To establish prosecutorial overreaching, 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. Lake, 125 N.H. 820, 823, 485 A.2d 1048 (1984). Therefore, a retrial is permitted unless the defendant, by conduct and design of the State, has been painted into a corner leaving a motion for mistrial as the only reasonable means of avoiding becoming a victim of unlawful tactics or inadmissible evidence. State v. Montella, 135 N.H. 698, 700, 610 A.2d 351 (1992). Whether the prosecution so intended is a matter of fact to be decided by the trial court. Duhamel, 128 N.H. at 203.

The defendant has a difficult burden to meet. For instance, even when a prosecutor referred to the defendant as a "crook" while questioning a witness, the United States Supreme Court found that the statement did not amount to prosecutorial overreaching sufficient to prohibit retrial. Oregon v. Kennedy, 456 U.S. 667, 669, 679, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982). The Supreme Court noted that "only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Id. at 676.

that the State engaged in any intentional misconduct, gross negligence, or that the State intended to provoke Thomas into seeking a mistrial.

Further, to the extent that Thomas includes a 2004 order from a federal court, the State is unclear exactly what bearing this has on the instant matter. The district court was not clearly erroneous when it ruled that the State did not goad Thomas into moving for a mistrial. Double Jeopardy does not bar Thomas retrial and prohibition is not warranted.

III
THE DISTRICT COURT PROPERLY DENIED THOMAS' RENEEWED MOTION TO DISMISS THE INDICTMENT GIVEN THAT THIS COURT HAS ALREADY RULED ON THIS EXACT ISSUE

In this section of his mandamus petition, Thomas re-raises an issue that he raised for the first time nearly five years ago, ***after*** the August 2010 jury trial ended in a mistrial and well after the time for a pre-trial habeas petition had already expired (Thomas never filed a pre-trial habeas petition). Whether the issue can be re-raised many years later and then entertained by way of mandamus with this Court requires a firm understanding of the procedural history involving this issue.

In his Motion to Dismiss filed on February 11, 2011, Thomas made the very same argument that he renewed years later in another motion to dismiss, namely that the Indictment failed to state a crime and that the Theft and Misconduct statutes were unconstitutionally vague. RA 21-26. That first Motion to Dismiss was granted by Judge Villani in a written Decision prepared by the court itself and

filed on June 3, 2011, which the State appealed. RA 28-34. Despite Judge Villani's belief many years later that his prior Decision was "crystal clear," PA 421, the State appealed that Decision and noted in its Opening Brief that Judge Villani had "convoluted several areas of law" and that the basis for his decision was not entirely clear. RA 47. Among the various possible grounds for dismissal, the State addressed in its Opening Brief whether the indictment failed to state a crime and whether the Theft and Official Misconduct statutes were unconstitutionally vague. RA 51-55, 61-69. Central to the State's argument was that such issues could not be entertained in a belated motion to dismiss following a mistrial and had to be raised instead in a timely pre-trial habeas petition. Id. Thomas never filed a pre-trial habeas petition. Id. This Court issued its Order Affirming in Part and Reversing in Part on September 26, 2013, which did not specifically address every issue raised by the parties as is common in appeals. PA 120-126. Concerned that this Court had overlooked or misinterpreted the issues in the appeal, Thomas filed a Petition for Rehearing again referencing the issues of failure to state a crime and unconstitutionally vague statutes. PA 136-145. This Court denied rehearing without further comment. PA 146.

Against this procedural backdrop, fast forward to September 29, 2014, when Thomas filed below a "renewed" motion to dismiss which gives rise to the instant mandamus proceeding. PA 166-188. That renewed motion to dismiss raised the

very same issues as in the motion to dismiss from February 11, 2011, regarding the failure to state a crime and statutory vagueness. In fact, in its Opposition to the renewed motion, the State pointed out that "Defendant essentially cut and pasted the entirety of his argument from his answering brief and has presented it to this Court as a renewed motion to dismiss." PA 190. The point is well-taken. Compare PA 168-188 to RA 73-114. In denying the renewed motion to dismiss, Judge Villani reasoned that "by the Supreme Court deciding the matter in a way they did as well as by denying the motion for consideration (sic), I believe that they took into consideration the arguments today," and that Thomas was in effect asking Judge Villani to overrule the Nevada Supreme Court. PA 421.

Now challenging that decision by way of mandamus, Thomas maintains that the issues are not controlled by law of the case and that Judge Villani was required to grant the motion to dismiss. But "law of the case" is an inaccurate characterization of Judge Villani's ruling which contains no such language. Judge Villani simply held that he had previously granted the motion to dismiss but that the Nevada Supreme Court, with full understanding of the issues raised, decided to reverse that decision. Furthermore, Judge Villani did not "refuse to rule" on the renewed motion to dismiss, rather he "denied" it. PA 421 ("I'm going to ***deny*** the motion at this point"); see also PA 428. Characterizing Judge Villani's ruling as a "refusal to rule" is a veiled attempt to invoke this Court's mandamus authority.

Also pertinent to this issue is EDCR 2.24 which provides that "No motion once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard . . . ." The renewed motion to dismiss violated this court rule. Judge Villani was not obligated to again rule the same way upon the same issues he had previously heard and disposed of in 2011. Obtaining a "renewed" ruling from Judge Villani was simply a strategic device to get these same issues before this Court again for reconsideration. This is yet another attempt by Thomas to obtain a ruling from this Court on issues he believes were overlooked or misunderstood in the prior appeal. Thomas was indicted in 2008 and it has now been seven years without the case being tried to completion. Thomas should not be allowed to compound that delay by seeking an extraordinary pre-trial ruling on issues he has twice raised in district court and previously presented to this Court in the prior appeal. As Judge Villani has not acted in excess of his jurisdiction nor refused to rule on the renewed motion to dismiss, mandamus is unwarranted.

CONCLUSION

WHEREFORE, the State respectfully requests that the mandamus petition be denied.

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/ / /

Dated this 11th day of January, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 11, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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OLM//ed