IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, Appellant vs. JAMES WALTER DEGRAFFENREID III, DURWARD JAMES HINDLE III, JESSE REED LAW, MICHAEL JAMES MCDONALD, SHAWN MICHAEL MEEHAN, AND EILEEN A. RICE, Respondents.	CASE NO.: 89064

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Elizabeth A. Brown
Clerk of Supreme Court

RESPONDENTS' JOINT RESPONSE TO STATE'S MOTION TO EXPEDITE

I. INTRODUCTION

While it may raise important questions of prosecutorial conduct, this case is not—as the State claims in its Docketing Statement—one of first impression. Instead, the district court properly applied this Court's precedent and mandates—thoroughly set forth in *Guzman v. Second Judicial Dist. Court ("Guzman I")*, 136 Nev. 103 460 P.3d 443 (2020) and *Guzman v. Second Judicial Dist. Court ("Guzman II")*, 496 P.3d 572, 576 (Nev. 2021)—to determine that venue did not lie in the Eighth Judicial District. While the State contends that this Court should reverse the district court's straightforward application of case law, the political nature of the case should not, in fact, sway the Court.

Nor should the Court grant the State's Motion to Expedite Consideration (and Briefing) of this appeal (the "Motion" or "Mot."). While the State is free to file its

Opening Brief as soon as it likes, there is no basis to expedite this appeal. First, even if the district court had not dismissed the case, it would not have gone to trial until January 2025, after the 2024 election. While it is true that deterrence is one of the aims of criminal justice, it is convictions that punish, not reinstating indictments. Thus, the State's request that this Court expedite the appeal to send a message of retribution is improper.

Second, while the State suddenly wants to rush this case along, it waited over three years from the 2020 election to suddenly seek an indictment in December 2023, switching gears after the Attorney General himself publicly stated Respondents' alleged conduct was not criminal under existing Nevada law.[1] While the State may now wish to preserve other options to refile the forgery charge, its own continuing delays in this case are not a basis to rush this Court or to shorten the time Respondents have to respond to the State's Opening Brief.

II. RESPONSE TO PURPORTED FACTS

[1] Last legislative session, Attorney General Ford testified in favor of a bill designed to make the conduct at issue illegal and create harsh punishments for it, publicly stating his view that existing law "did not directly address the conduct in question." *See* Jacob Solis and Gabby Birenbaum, *AG Ford: 'Nothing changed' ahead of decision to charge Nevada fake electors*, The Nevada Independent, December 12, 2023, https://thenevadaindependent.com/article/ag-ford-nothing-changed-ahead-of-decision-to-charge-nevada-fake-electors (last visited August 19, 2024). While Attorney General Ford later tried to downplay his prior concession that Respondents' acts were not criminal, as Respondents explained in their writ petitions below, the charges ultimately filed do not apply. Because the motion to dismiss and joinders thereto were granted, the district court did not rule on the writ petitions.

The underlying alleged facts regarding Respondents' conduct are not relevant. However, the State misrepresents several facts that require correction.

A. Kenneth Chesebro's Communications with Respondents.

The State alleges that Mr. Chesebro asked Mr. DeGraffenreid whether litigation was still pending in Nevada because in his view, the existence of pending litigation was the "only reason to cast alternate elector votes." (Mot., p. 5.) The State further alleges that Mr. Chesebro received no response to his inquiry. These statements are false—the State cites to the Grand Jury Transcripts to support these assertions; however, the State ignores that the extensive briefing in the pretrial petitions for writ of habeas corpus included exculpatory evidence—which the State failed to present to the Clark County Grand Jury—including the many statements of Mr. Chesebro explaining that pending litigation was not necessary for the rationale in submitting contingent elector ballots. The statements from Mr. Chesebro were learned by the State during a video proffer the State conducted with Mr. Chesebro. During the proffer, Mr. Chesebro described legal challenges taking place in Wisconsin, and explained a successful legal challenge in Wisconsin court in July, 2021, related to the 2020 Presidential election. (*See* **Exhibit A**, part 2, at 5:45.)

Mr. Chesebro explained that there was precedent for alternate electors voting, as this was the procedure that took place in Hawaii during the 1960 presidential election between Kennedy and Nixon. Mr. Chesebro discussed many times during

the recorded proffer that he believed that the Trump campaign might have beyond January 6th to win litigation based on a disagreement about the meaning of the 12th Amendment to the United States Constitution. He explained that the Senate could cause a test case to go to the United States Supreme Court that could cause a delay in the counting of the electoral votes. (*See, e.g.,* **Ex. A**, part 2 at 19:53; *id.* part 4, at 46:00.) Mr. Chesebro discussed his conversations with individuals from the Trump campaign including Justin Clark, Mike Roman, Boris Epshteyn, Rudy Giuliani, Josh Findlay, Judge Troupis, and Matt Morgan regarding Nevada and whether Nevada Republican electors should vote absent a current legal challenge; however, no Nevada electors were involved in these discussions, and Mr. Chesebro never informed the Nevada electors that they should not vote if there is no ongoing legal challenge. (*Id.*, part 2 at 43:00.) Mr. Chesebro discussed his response to an email about attorney Jesse Binnall's legal challenge in Nevada and wondered if he was "planning on filing a cert petition." (*Id.*, part 2 at 1:04.)

Likewise, an email from Mr. Chesebro dated December 11, 2020 (addressed to various members of the Trump campaign: Joshua Findlay; Justin Clark; Matthew Morgan; Jason Miller; Nick Trainer; and Boris Epshteyn) discusses whether Nevada had litigation pending in December, 2020, prior to the ceremony held by the Republican Electors on December 14, 2020. (**Exhibit B**.) In this email Mr. Chesebro, commenting on the Nevada Supreme Court rejecting the Trump campaign

appeal on December 8, 2020, opines, "it seems plausible for Nevada to seek cert. in the Supreme Court on the same basis on which Jack Wilenchick apparently plans to seek cert. from the AZ Sup. Ct. Dismissal." (*Id.*) The email further states: "[P]erhaps there is a plan to file for cert. from the Nevada decision." (*Id*.)

Mr. Chesebro again discusses the alternate electors in an email to "Judge" Troupis dated December 8, 2020. (**Exhibit C**.) He explicitly states that "[c]ourt challenges pending on Jan. 6 really not necessary" and that, "I think having the electors send in alternate slates of votes on Dec. 14 can pay huge dividends **even if there is no litigation pending on Jan. 6**...." (*Id.* (emphasis in original).)

Additionally, while the State alleges that Mr. Chesebro received no response from Mr. DeGraffenreid to his inquiry about whether litigation was still pending in Nevada, Mr. DeGraffenreid did directly reply to Mr. Chesebro by email stating: "Hi Ken, Forwarding your question on the lawsuit to our lead attorney, Jessee Binnall, copied on this email, as he is most up to date on the situation with our state level case in Nevada." (*See* **Exhibit D**.)

B. Mailing to U.S. District Court.

The State alleges in its rendition of the "facts" that the U.S. District Court in Las Vegas received the alternate elector documents in Las Vegas; while the documents were inadvertently mailed to Judge Du in Las Vegas, the mailing was not received and opened in Las Vegas because Judge Du's chambers are located in Reno,

Nevada. This was explained and demonstrated in the Petitions for Pretrial Writ in district court with exculpatory evidence that the State failed to present to the Clark County Grand Jury.

Prior to presenting the case to the Clark County Grand Jury, the State interviewed Debra Kempi, Clerk for the U.S. District Court of Nevada.[2] During her interview, Ms. Kempi stated that she is located in Reno and she discussed the process for sorting and receiving mail. If a document is received by the clerk's office addressed to a judge, it is forwarded to that judge's chambers unopened unless it is clearly related to a case with a case number. If mail is received in Las Vegas, and is addressed to Judge Du (the then Chief of the U.S. District Court for the District of Nevada) it is re-routed to her in Reno. (*See* **Ex. E** at 6:03.)[3]

Ms. Kempi was asked about documents received by certified mail from Michael McDonald. (**Ex. E** at 7:45.) Ms. Kempi stated that the mailing was received in Las Vegas and re-routed by either inter-office mail or brought up to Reno by someone and then delivered, unopened, to Judge Du's chambers in Reno. (*Id.* at 14:35.) The mailing from Mr. McDonald was then put in the vault; the outer envelope was opened by Judge Du's chambers (in Reno), but the inner envelopes

[2] This interview has not been transcribed, but its audio is designated as **Exhibit E** and will be transmitted to this court on a thumb drive.

[3] When asked if the documents related to the electoral college are filed, registered, or recorded by the Court, Ms. Kempi stated that the documents are not filed or recorded; they are only stored in a vault at the court. (**Ex. E at** 6:27.)

containing the signed documents were not opened by the Court until they received a call from the Attorney General's Office. (*Id.* at 15:50.)

III. ARGUMENT

A. Legal Standard

NRAP 2 requires a showing of "good cause" before expediting a case. As detailed below, the State fails to establish good cause. Good cause does not lie in every case and deviation from this Court's rules is the exception, not the norm. *See, e.g, Cty. Comm'srs v. Las Vegas Disc. Golf*, 110 Nev. 567, 568 n.3, 875 P.2d 1045, 1046 (1994) (expediting appeal where County estimated damages delays would be extremely high, and cause other harm).While it does not appear that this Court has specifically defined "good cause" in the context of NRAP 2 and motions to expedite appeals, it is axiomatic that a party's own delays can never constitute good cause in any context; if a party could demonstrate good cause based on impediments created by the party's own inaction, NRCP 4(i)'s requirements would be meaningless.

Thus, actual and sufficient reason must be demonstrated. Black's Law Dictionary defines "good cause" as, "[a] legally sufficient reason. Good cause is often the burden placed on a litigant to show why a request should be granted or an action excused," and is synonymous with the terms "good cause shown; just cause; lawful cause; [and] sufficient cause." *Good Cause, Black's Law Dictionary* (11th ed. 2019). *Cf. Torremoro v. Eighth Judicial Dist. Court of Nev.*, 512 P.3d 765, 769 (Nev.

2022) (explaining, in the context of modifications to a scheduling, a party must show good cause—and, thus, diligence); *cf, Moseley v. Eighth Judicial Dist. Court of Nev*., 124 Nev. 654, 668 n.66, 188 P.3d 1136, 1146, fn 66 (2008) (citing *State v. Williams*, 120 Nev. 473, 477, 93 P.3d 1258, 1260 (2004).) (in NRCP 6(2) context, explaining "[g]ood cause generally is established when it is shown that the circumstances causing the failure to act are beyond the individual's control.")

Wanting to get a decision from this Court on a question of no political import, *i.e.*, whether venue lies in the Eighth Judicial District, before an election for political reasons, after delaying filing charges for years, does not meet this standard.

B. The State's Own Delay Does Not Constitute Good Cause.

The State does not and cannot establish good cause. Far from "leaving no stone unturned" as the State claims it has done in handling the charges against Respondents, the State first took the position that existing law did not criminalize the conduct at issue and then, just before the applicable statutes of limitations ran, suddenly sought an indictment in Clark County, a jurisdiction where venue does not lie.

C. Deterrence Does Not Support Expediting.

The merits of the underlying allegations and the Court's view of the Respondents' conduct have no bearing on the technical question at the heart of the appeal: whether the district court properly applied this Court's precedents to the

facts in evaluating venue. Thus, the State's request to expedite the appeal in the hopes it can prevail, swiftly reinstate the indictment, and send a deterrent message to Respondents before the 2024 election is highly improper, and certainly does not establish good cause to expedite. In short, this Court should decide the appeal on the merits, and not be swayed by the State's request that it sends a message. Deterrence comes into play when the Legislature enacts criminal statutes and when a convicted defendant is sentenced[4], not when this Court evaluates venue.

As noted above, even if the district court had not dismissed the indictment, the charges would not have been resolved before the 2024 election. Any deterrence effect comes into play if and only if the Respondents are convicted; thus, expediting the appeal now does not provide any opportunity for any deterrence before the 2024 election, contrary to the State's argument.

Likewise—particularly considering the State's delays—the Court should not indulge the State's request to expedite this appeal so it can preserve its option to refile in the proper venue should this Court affirm—rather than exercising it now. Not only are there other infirmities with the State's case (addressed in defendants' writ petitions), it is not certain a jury will convict Respondents if the case ever goes

[4] Indeed, the case the State cites discusses deterrence in the context of evaluating a criminal sentence imposed by a district court, not evaluating venue. *Allred v. State*, 120 Nev. 410, 421, 92 P.3d 1246, 1253-54 (2004) ("The district court considered the facts of the case, including the criminal justice system's goals of deterrence, rehabilitation, and punishment…").

to trial—which again, cannot occur before the November election in any case. Even if there were a possibility of a jury trial before November—in Clark County or elsewhere—the recent Electoral Count Reform and Presidential Transition Improvement Act of 2022 (the "Act") changes the process for voting and the transmission and counting of electoral ballots and precludes similar conduct to the alleged conduct of defendants at issue in the indictment[5]. *See, generally*, S. 4573 - 117th Congress (2021-2022).

Further, its curious arguments about tolling[6] notwithstanding, the State cannot simply rely on its own continuing delays to justify treating this case as an emergency to maintain the option to file elsewhere. In short, as detailed further above, the facts that the State delayed seeking an indictment and that it continues to pursue charges in Clark County are not reasons to make this case an emergency for everyone else. Simply put, the State does not have the right to now expedite in the hopes of pursuing the case in its preferred venue, and it does not cite any authority for the novel proposition that a criminal appeal should be expedited on facts like

[5] Most centrally, the Act places each state's governor in charge of submitting the certificate of ascertainment (§ 5(a)(1)), precluding competing slates. Thus, the question of whether persons can send in alternate slates of electors while challenging election results is entirely moot.

[6] The State's tolling arguments are not properly before the Court and whether it can make any such arguments are a question, if at all, for another day. However, so the record is clear, the State's reliance on *Hibu Inc. v. Plotkin Fin., Inc*., 722 F. App'x 625, 627 (9th Cir. 2018) is baseless; that case addressed equitable tolling of civil claims under California state law, not tolling of criminal claims under Nevada law.

this.

While the State endeavors to distract the Court with the political nature of its prosecution and the facts of the case, there is no principled reason to treat it as different from other criminal cases.

IV. CONCLUSION

While Respondents are duty bound to address the inaccuracies in the State's Motion, at the end of the day, the parties do not greatly differ. The Court should allow the State to expedite its appeal by filing its Opening Brief as soon as it is able. Should the State file its Opening Brief on September 4, 2024, Respondents' Answering Brief due dates should not be expedited or shortened, and should simply be set in accordance with this Court's rules.

DATED this 21st day of August 2024.

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INDEX OF EXHIBITS

Exhibit	Description of Exhibit
A	Proffer Video of Kenneth Chesebro (to be submitted in five parts via thumb drive).
B	December 11, 2020, Email from Kenneth Chesebro to Trump Campaign
C	December 8, 2020, Email from Kenneth Chesebro to Judge Troupis
D	December 11, 2020, Email from James DeGraffenreid to Kenneth Chesebro
E	Audio interview of Debra Kempi (to be submitted via thumb drive)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENTS' JOINT RESPONSE TO STATE'S MOTION TO EXPEDITE was filed electronically with the Nevada Supreme Court on the 21st day of August, 2024. Electronic service of the foregoing document shall be made in accordance with the Master Service List.

/s/ Leo S. Wolpert
Employee of McLetchie Law