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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. JESSE REED LAW Defendant.	Case No. C-23-379122-3 Dept. No. XVIII

OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE REPLY

AARON D. FORD, Attorney General for the State of Nevada, by and through Chief Deputy Attorney General, ALISSA C. ENGLER, in the name and by the authority of the State of Nevada, hereby files this OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE REPLY. The State makes and bases this Opposition upon the pleadings and papers on file, the following Memorandum of Points and Authorities, and any oral argument at hearing permitted by the Court.

DATED this 30th day of April, 2024.

Submitted by:
AARON D. FORD
Attorney General

By: /s/ Alissa Engler
ALISSA ENGLER (Bar No. 11940)
Chief Deputy Attorney General

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY

On December 6, 2023, Defendants, Michael J. McDonald, (hereinafter "MCDONALD"), James Walter DeGraffenreid III, (hereinafter "DEGRAFFENREID"), Jesse Reed Law, (hereinafter "LAW"), Duward James Hindle III, (hereinafter "HINDLE"), Shawn Michael Meehan, (hereinafter "MEEHAN"), and Eileen A. Rice, (hereinafter "RICE"), collectively referred to throughout as ("DEFENDANTS") were charged by way of Indictment with the following: one (1) count of Offering False Instrument For Filing Or Record, a category "C" Felony in violation of NRS 239.330 and one (1) count of Uttering Forged Instruments: Forgery, a category "D" Felony in violation of NRS 205.110. On December 18, 2023, Defendants pleaded not guilty and waived their right to a speedy trial within sixty (60) days. A Jury Trial was scheduled to commence on March 11, 2023.

Later, on December 18, 2023, counsel for Defendant McDonald requested an extension of the deadline to file any pre-trial writ, but could not specify what length of time would be required of other counsel.

On January 4, 2024, counsel for Mr. McDonald requested, on behalf of all Defendants, a 30-day extension of the deadline for filing pre-trial writs. The State indicated it could agree to a two-week extension, and the parties filed a stipulation in this Court indicating the same.

On January 16, 2024, counsel for Mr. Law requested a further extension of three weeks, citing the State's failure to make hard drives available to Defendants – notwithstanding the Defendants were already in possession of all materials on the hard drives, notwithstanding the State had agreed to produce drives as it generated them which offer was refused by counsel. The State agreed to a further one-week extension, and a stipulation indicating the same was filed in this Court.

Shortly after filing their Writs, Defendants indicated that they would move to continue the trial date. Again, the State agreed to accommodate the various calendars of counsel. Having conferred with counsel and the Court regarding the earliest availability of all, the present January 13, 2025, date was agreed upon.

Several weeks later, on April 15, 2024, Defendants filed "Joint Motion for Leave to File Reply to State's Return and Response to Petition for Writ of Habeas Corpus (Pre-Trial).

The State opposes the Defendants' motion because it is procedurally infirm in that it is both untimely and the request itself lacks a basis in law. The Defendants request further contains inaccurate information about the State's production of discovery, which the State has provided to Defendants at regular intervals and far in advance of trial.

II. FACTUAL HISTORY

On December 21, 2023 – three days after the arraignment of these Defendants – the State produced approximately 19,000 pages of discovery. On January 18, 2024, the State produced a second round of discovery, consisting largely of the emails of Defendants seized pursuant to lawful search warrants. These materials have been in the possession of Defendants at all times, and Defendants have made no effort at any time to observe their responsibility under the law to provide reciprocal discovery. On February 8, 2024, the State made a third production of discovery.

On March 5, 2024, counsel for Defendant Rice inquired if the State had produced all relevant documents referenced during the interview of Kenneth Chesebro. On March 7, 2024, the undersigned told counsel for Defenant Rice that she was looking into their request and would get back to them at a later date. Mr. Chesebro, through his counsel, had provided multiple productions, with the most recent production in February 2024, after the parties filed their briefing on the Pre-Trial Writ and Motion to Dismiss.

Following a review of the new disclosures by Mr. Chesebro, on March 15, 2024, the State made a fourth production of discovery. Counsel for defense still had questions regarding the Chesebro disclosures, so in an effort to make plain to Defendants what was in the possession of the State, and when, on March 20, 2024, the State made a fifth production of discovery consisting of 504 pages of documents provided by Chesebro to the State prior to grand jury. The State's review makes clear that a portion of these were previously provided in the first production of discovery.

On March 20, 2024, the trial of these Defendants was 299 days away. *Cf.* § NRS 174.285 (requiring discovery be provided not less than 30 days before trial, or as is otherwise reasonable.)

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III. LEGAL ARGUMENT

Defendants argue to this Court that there is no prohibition in the law or Rules of Criminal Procedure against filing a reply in support of their writs. The truthful and accurate statement of the law is that there is no provision in the rules and statutes allowing such a filing.

"The starting point for determining legislative intent is the statute's plain meaning; when a statute 'is clear on its face, a court can not go beyond the statute in determining legislative intent.'" *State v. Lucero*, 127 Nev. 92, 95 (2011), *quoting Robert E. v. Justice Court*, 99 Nev. 443, 445 (1983). Further, "without an explicit grant of authority, we presume the omission to be deliberate." *McNeill v. State*, 132 Nev. 551, 556 (2016), *citing Sheriff v. Andrews*, 128 Nev. 544, 547-48 (2012). Here, not only do the Defendants lack a legal basis for their request, such a request is not customarily practiced or allowed by courts. In addition, the substance of their motion diverges from the subject matter of the writ. Instead of addressing the evidence, Defendants appear to deflect from the evidence of their criminal conduct by giving this Honorable Court erroneous information about the discovery process and communications between parties.

The reality is the State has produced more than 20,000 pages of documents, in addition to gigabytes of data. Of that, the largest part was rendered to Defendants before the (several times extended) deadline for the filing of pre-trial Writs. There is no basis in law for the filing of a Reply, let alone one so late in time, or one which adds nothing of merit to the arguments presented in the underlying Pre-Trial Writ.

This Court should refuse to grant leave to file the Reply.

A. <u>An analysis of the substance of their argument demonstrates the emails referred to in Defendants' Motion are not exculpatory.</u>

Even seen in the light most favorable to Defendants – in other words, assuming, arguendo, the farcical arguments they advance regarding the truthfulness of the testimony of Mr. Chesebro– the documents referred to in Defendants' Motion still do not amount to anything more than impeachment evidence for a *petit* jury to consider at trial:

> And in any event, our review of the grand jury transcripts provided with the petition reveals slight or marginal evidence as required for a finding of probable cause. *Sheriff v. Hodes.* 96 Nev. 184, 186, 606 P.2d 178, 180

> (1980) ("The finding of probable cause may be based on slight, even 'marginal' evidence." (quoting *Perkins v. Sheriff,* 92 Nev. 180, 181, 547 P.2d 312, 312 (1976))); *see also Sheriff v. Burcham,* 124 Nev. 1247, ——, 198 P.3d 326, 333 (2008) (explaining that the State need only present sufficient evidence to the grand jury " 'to support a reasonable inference' " that the defendant committed the crime charged" (quoting *Hodes,* 96 Nev. at 186, 606 P.2d at 180)). Second, Sutton has not demonstrated that the State failed to present exculpatory evidence in violation of NRS 172.145(2), which requires the prosecutor to present "any evidence which will explain away the charge" if the prosecutor is aware of the evidence. In particular, the allegedly exculpatory evidence primarily concerns prior inconsistent statements by the alleged victim and another grand jury witness and impeachment evidence involving a witness' intoxication at the time of the incident. Such evidence, however, does not have a tendency to "explain away the charge" as contemplated by NRS 172.145(2). *Lav v. State.* 110 Nev. 1189, 1198, 886 P.2d 448, 453 (1994). And Sutton fails to explain the circumstances surrounding his alleged denial of wrongdoing or how his denial tended to explain away the charges in this case. *Cf. Ostman v. District Court,* 107 Nev. 563, 816 P.2d 458 (1991) (holding that where only witness to testify before grand jury was the victim, who was the defendant's girlfriend, failure to present defendant's statement to police that sexual conduct with victim was consensual violated NRS 172.145(2)). Accordingly, we conclude that Sutton has not demonstrated that the district court manifestly abused its discretion or exceeded its jurisdiction in denying his pretrial habeas petition on this ground. *See* NRS 34.160; NRS 34.320; *Round Hill Gen. Imp. Dist. v. Newman,* 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981)."

Sutton v. Eighth Jud. Dist. Ct. of State, 126 Nev. 761, 367 P.3d 825 (2010).

> In *Lay v. State,* this court stated that a prosecutor must disclose all exculpatory evidence (evidence that "'will explain away the charge'") to a grand jury. 110 Nev. 1189, 1197, 886 P.2d 448, 453 (1994) (quoting NRS 172.145). Evidence that impeaches a witness's credibility is generally not considered exculpatory. *See id.* at 1198, 886 P.2d 448, 886 P.2d at 453–54.

It is well-settled that only evidence which "will explain away the charge" is exculpatory. Impeachment evidence is not exculpatory evidence. It is a matter for the trier of fact to consider in evaluating how to weigh the evidence and determine guilt.

Similarly, to the extent that Defendants are suggesting Chesebro's advice to them is relevant to their guilt because he acted as their attorney, that is also a matter for consideration by the trier of fact – in other words, not a matter appropriately resolved at this stage of the proceedings. *Adler v. State*, 95 Nev. 339, 346 (1979) ("[R]eliance on advice of counsel 'is not regarded as a separate and distinct defense, but rather as a circumstance indicating good faith which the trier of fact is entitled to consider on the issue of fraudulent intent.'" *Quoting Bisno v. U.S.*, 299 F.2d 711, 719 (9th Cir. 1961); *U.S. v. Powell*, 513 F.2d 1249 (8th Cir. 1975).

"No one can willfully and knowingly violate the law and be insulated from the consequences by claiming that he followed the advice of counsel." *Adler v. State*, 95 Nev. 339, 346 (1979), *citing Williamson v. U.S.*, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278 (1908).

Further, to whatever extent Defendants intend to raise any advice that Mr. Chesebro or other attorneys purportedly offered them, Defendants have their own disclosure obligations under NRS § 174.245 that they have so far failed to honor.

IV. CONCLUSION

There is no basis in law which allows the filing of the Reply proposed by Defendants. Further, and in any event, the arguments raised in the proposed Reply have no merit. The State has complied in all respects with its obligations under the law to timely provide discovery to Defendants, and complied in all respects with its obligation to provide exculpatory evidence to the grand jury.

The Court should deny Defendants' Motion for Leave to File a Reply.

DATED this 30th day of April, 2024.

Submitted by:

AARON D. FORD
Attorney General

By: /s/ Alissa Engler
ALISSA ENGLER
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on April 30, 2024, I filed the **OPPOSITION TO DEFENDANTS MOTION TO DISMISS** via this Court's electronic filing system. The following parties are registered with this Court's EFS and will be served electronically.

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