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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff. vs. GARY TRAFFORD GERRI SHEPPARD Defendants.	Case No.: C-11-277573-1 DATE: January 21, 2013 TIME: 9:00 a.m. DEPT.: V JUDGE: Hon. Carolyn Ellsworth [Filed and served concurrently with Affidavit of Kirk B. Lenhard]

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF GARY TRAFFORD'S WRIT OF HABEAS CORPUS AND MOTION TO DISMISS

I. INTRODUCTION

Since the parties submitted their first supplemental briefs last month, Trafford has discovered that the reach of misconduct in this case by the Nevada Attorney General's Office ("AG") extended even further than previously known, as Trafford has learned that the lead prosecutor had a serious, undisclosed, disabling conflict of interest tied directly to Trafford. Specifically, in September 2011, the lead prosecutor received a notice of default ("NOD") identifying ***Trafford's employer*** as the processor of foreclosure documents for ***the lead prosecutor's personal residence***. November 26, 2012 Affidavit of Kirk B. Lenhard ("Lenhard Aff."), Ex. C, Ex. D at 3. Two days later, the AG sent its chief investigator to the home of Tracy Lawrence, where she was threatened with arrest if she did not assist in the AG's attempt to make a case against Trafford. *Id.*, Ex. E at 2. The chief investigator also specifically related that he was "under the gun" from the AG and described the prosecutor as "pissed." *Id.* at 1-2. The lead prosecutor then presented this case, including testimony from Ms. Lawrence, to the grand jury. *See generally* Reporter's Transcript of Grand Jury Proceedings 11/8/2011, Vol. 1 ("Vol. 1"). Ten months after the NOD was filed for the lead prosecutor's home, Attorney General Cortez Masto revealed in an online report that the lead prosecutor had been removed due to a conflict of interest concerning his "personal foreclosure crisis." Lenhard Aff., Ex. C at 2. However, the AG's office never disclosed this conflict to the Court, Trafford or his counsel. Instead, research by the defendants' counsel turned up the lead prosecutor's personal foreclosure documents and exposed the apparent connection between the lead prosecutor's conflict and Trafford's prosecution. *Id.*, Ex. C, Ex. D.

On these facts, it is evident that Trafford is the victim of an overzealous prosecution and unfairly biased grand jury presentation by a prosecutor whose own foreclosure documents were processed by Trafford's employer. Indeed, the law is clear that a prosecution team cannot administer justice or preserve the fairness and impartiality required of grand jury proceedings when its lead team member has a conflict of interest. *See United States v. Gold*, 470 F. Supp. 1336, 1344 (N.D. Ill. 1979). Moreover, the lead prosecutor's conflict rendered him an "unauthorized person in the grand jury room," thus voiding the indictment as a matter of law,

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even ***without*** a showing of prejudice to Trafford. *Id*. at 1346. For this reason alone, the Court should send a strong message to the AG's office that such abusive conduct will never be tolerated by courts in this state, and Trafford's writ of habeas corpus and motion to dismiss should be granted. In the alternative, the Court should at least order an evidentiary hearing to further illuminate the lead prosecutor's conflict of interest.

Even if the lead prosecutor's conflict did not warrant dismissal – which it does – the AG's other inappropriate conduct before the grand jury pushes this case well past the "tipping point" for dismissal. The litany of inadmissible, irrelevant, and inflammatory evidence presented to the grand jury creates a "reasonable probability that the outcome would have been different absent the [prosecutor's] misconduct." *Lay v. State*, 110 Nev. 1189, 1198, 886 P.2d 448, 454 (1994). Although the AG agrees that there is a "tipping point" where its misconduct before the grand jury warrants dismissal – even if the grand jury received sufficient evidence to establish probable cause for the crimes charged – the AG tries to avoid this result by making two unavailing arguments. First, the AG claims that there was nothing improper about its grand jury presentation. But the testimony cited by the Court at the August 27 hearing and described in Trafford's moving papers exposes the inadmissible, irrelevant, and inflammatory evidence presented to the grand jury. Second, while the AG fails to explain much of its inappropriate conduct before the grand jury, the AG claims that certain evidence it presented – although having no connection to any of the NODs at issue in this case – was necessary to describe the crimes charged and to provide "context" to the grand jury. These claims are simply not credible or supported by law. Moreover, the AG's first supplemental brief fails to even address the AG's successful attempts to mislead the grand jury about the definition of "forgery." In sum, each of the AG's multiple instances of improper conduct before the grand jury warrants dismissal of the indictment.

Aside from the numerous conflict of interest and misconduct issues presented by the AG's prosecution of this case, there are at least three reasons the AG is incorrect in its assertion that it can cure the other defects in the indictment by simply calling the allegations of "forged" documents "surplus" and dropping them from the indictment. First, the "forgery" allegations are

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more than mere "surplus"– after all, "forgery" was the legal theory repeatedly presented to the grand jury and the one to which the AG is wedded as a matter of law. Second, to allow the amendment suggested by the AG would impermissibly circumvent the grand jury and violate Trafford's due process rights. This is because it cannot be said that the grand jury found probable cause for the crimes charged based on allegedly "false documents" rather than based on the theory of "forged documents" presented to the grand jury. Third, the AG's proposed amendment would render the indictment impermissibly indefinite for multiple reasons, including that such an amendment would improperly allow the AG to proceed to trial on a theory totally different from the theory propounded in the grand jury proceedings.

For any and all of these independent reasons, the indictment should be dismissed.

II. THE LEAD PROSECUTOR PRESENTED THIS CASE TO THE GRAND JURY WHILE OPERATING UNDER A SERIOUS, UNDISCLOSED, DISABLING CONFLICT OF INTEREST

A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern ***impartially*** is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935) (emphasis added). It is therefore a bedrock principle of prosecutorial ethics that a prosecutor must avoid a conflict of interest in the exercise of his duties. ABA Standards of Criminal Justice Relating to the Prosecution Function, Standard 3-1.3(a); *see also id*. Standard 3-1.3(f) ("A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.").

It is a violation of due process for a prosecutor to bring a criminal action while operating under a conflict of interest. *See, e.g., Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) ("[T]he conduct of this prosecuting attorney in attempting at once to serve two masters . . . violates the requirements of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." (citations omitted)); *People v. Zimmer*, 51 N.Y.2d 390, 395-96, 414 N.E.2d 705, 708 (1980) (reversing denial of motion to dismiss indictment due to prosecutor's

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conflict of interest and noting that it was an issue fraught with "due process implications"); *State v. Culbreath*, 30 S.W.3d 309, 318 (Tenn. 2000) (affirming dismissal of indictment due to prosecutorial conflict of interest, a denial of due process). Moreover, "[n]ot only must there be no improper influence exercised, there must be ***no opportunity*** for improper influence on the grand jury." *State v. Hill*, 88 N.M. 216, 219, 539 P.2d 236, 239 (1975) (emphasis in original) (reversing conviction where special prosecutor who presented case to the grand jury had a conflict of interest, which compromised the impartiality of the grand jury proceedings). The law further holds that a prosecutor who makes a presentation to the grand jury while operating under a conflict of interest is an "unauthorized" person before the grand jury. *Gold*, 470 F. Supp. at 1346; *Hill*, 88 N.M. at 219. This means that dismissal of the indictment is required ***even without*** a showing that the defendant was actually prejudiced. *Id.*; *Hill*, 88 N.M. at 219-20 (special prosecutor's conflict of interest meant that prejudice was presumed and did not have to be shown by the defendant).

Here, on top of all of the prosecutorial misconduct described in Trafford's earlier briefing, the defendants recently discovered that the former lead prosecutor in this case, Assistant Chief Deputy Attorney General John Kelleher, was operating under a serious conflict of interest while investigating this case and while making the presentation before the grand jury. That conflict of interest is apparently tied directly to Trafford and his employer. Specifically, the facts known to Trafford at present are these:

- On March 30, 2012, Trafford's counsel sent a letter to Mr. Kelleher, as the lead prosecutor on this case, requesting that the AG honor its obligation to produce certain discovery materials. Lenhard Aff., Ex. A.
- Mr. Kelleher did not respond to the March 30 letter from Trafford's counsel. Instead, on April 16, 2012, Deputy Attorney General Robert Giunta responded and advised that there had been a "re-alignment" in the AG's office and that "Mr. Kelleher is no longer handling this matter." *Id.*, Ex. B. Mr. Giunta's letter did not disclose that Mr. Kelleher had been re-assigned due to a conflict of interest. *Id.*

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- Last month, Trafford's counsel discovered an online report in which Nevada Attorney General Katherine Cortez Masto had revealed in July 2012 that Mr. Kelleher had been removed from his unit not because of a simple "re-alignment" – as the AG had informed Trafford's counsel – but instead due to a conflict of interest. *Id.* ¶ 4, Ex. C at 2. What's more, the report revealed that Mr. Kelleher's conflict of interest was related to his "***personal foreclosure crisis***." *Id.*, Ex. C at 2 ("Cortez Masto ordered the move based on what she called a conflict of interest surrounding Kelleher's personal foreclosure crisis.").
- After learning of the conflict of interest "surrounding Kelleher's personal foreclosure crisis," a search of public records revealed that a notice of default had been filed on Mr. Kelleher's personal home on Tuesday, September 6, 2011. *Id.*, Ex. D at 3. The processing company identified on Mr. Kelleher's NOD is "LSI Title Agency Inc." – Trafford's employer. *Id.*; Vol. 1, at 87:8-21.
- On Thursday, September 8, 2011 – just two days after the NOD on Mr. Kelleher's home was filed – the AG's chief investigator, Todd Grosz, and his partner went to the home of Trafford's colleague, Tracy Lawrence, on "short notice." Lenhard Aff., Ex. E at 1.[1] As soon as he stepped in the door, Mr. Grosz said that he was "under the gun" and was "being pressed" by the AG's office. *Id.* Importantly, Mr. Grosz also told Ms. Lawrence at the outset: "We have a prosecutor who is pissed. He wanted us to hook you up today. … He wanted us to arrest you now." *Id.* at 2. The AG's investigators then proceeded to "interview" Ms. Lawrence for information to use against Trafford. *See generally id.*
- Mr. Kelleher then made his presentation against Trafford to the grand jury, including testimony from Ms. Lawrence. *E.g.,* Vol. 1, at 5:13-16, 118:20-179:1.

[1] Exhibit E is an unofficial transcript intended to accurately reflect the contents of the audio recording that the AG produced in discovery. There should be no dispute about Mr. Grosz's comments captured on the audio recording. Nonetheless, Trafford stands ready to provide the Court with a copy of the audio file at the January 21, 2013 hearing, if requested.

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These facts show that the lead prosecutor on this case had a clear, actual conflict of interest. Mr. Kelleher's "personal foreclosure crisis" involved a notice of default (the exact same kind of document at issue in this case), and that document linked his "personal foreclosure crisis" directly to Trafford through his employer. Indeed, Mr. Kelleher apparently ramped up pressure on his chief investigator to make a case against Trafford immediately after Trafford's employer filed the NOD. Lenhard Aff., Ex. E at 1. Despite this conflict, the lead prosecutor remained on the case, continued to investigate, presented the case to the grand jury, and obtained the indictment. Although the AG's office months later determined that Mr. Kelleher's conflict of interest was so serious that it warranted his eventual removal from this case, *id*. Ex. C at 2, the damage had already been done. And, incredibly, the AG never advised the Court, Trafford or his counsel of the lead prosecutor's conflict. The AG instead chalked Kelleher's removal up to a simple administrative "re-alignment." *Id*., Ex. B.

In *Gold*, the court addressed the issue of a prosecutor that presented evidence to the grand jury while operating under a conflict of interest.[2] *Gold*, 470 F. Supp. at 1344. The court articulated the fundamental principle that "the Grand Jury exists as an integral part of the Anglo-American jurisprudence for the express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor." *Id*. at 1346. The court also noted that "a prosecutor who presents a case to the grand jury has the obligation of preserving the fairness, impartiality, and lack of bias of this important investigative body." *Id*. As a result, the court held: "Cleary, then, a prosecutor who has a conflict of interest cannot administer justice." *Id*. And "if he labors under [a conflict of interest], he is an unauthorized person in the grand jury room, and the slightest intrusion into a grand jury proceeding by him ***voids any resulting indictment, even without a showing of prejudice***." *Id*. (citations omitted and emphasis added).

[2] *Gold* has been cited with approval on two separate occasions by the Nevada Supreme Court in connection with issues of prosecutorial misconduct. *See Sheriff, Clark County v. Frank*, 103 Nev. 160, 165-66, 734 P.2d 1241, 1245 (1987); *State v. Babayan*, 106 Nev. 155, 167, 787 P.2d 805, 814 (1990).

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Mr. Kelleher's conflict of interest undoubtedly impaired his ability to administer justice and prosecute this case in a fair and impartial manner. Indeed, it appears that Mr. Kelleher may have actually pursued the charges in this case motivated by a desire for retribution against the defendants, who worked for the same company that processed the foreclosure paperwork for Mr. Kelleher's home. *See United States v. Koh*, 199 F.3d 632, 640 (2d Cir. 1999) ("vindictive" prosecution is established where "the prosecutor harbored genuine animus toward the defendant . . . and he would not have been prosecuted except for the animus"); *United States v. Adams*, 870 F.2d 1140, 1145 (6th Cir. 1989) ("[A] prosecution which would not have been initiated but for governmental 'vindictiveness' – a prosecution, that is, which has an 'actual retaliatory motivation' – is constitutionally impermissible."); *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir. 1992) ("[W]e are satisfied that [the defendants] have met their burden of showing either (1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness.") (internal quotation omitted); *see also* Nevada Rule of Professional Conduct 8.4(d) ("It is professional misconduct for a lawyer to ... [e]ngage in conduct that is prejudicial to the administration of justice.")

It is not a stretch to conclude on the known facts that Mr. Kelleher's conflict also likely explains the incredible quantum of inappropriate conduct that occurred before the grand jury. More to the point, on the law, there can be little dispute that Mr. Kelleher's conflict rendered him an unauthorized person in the grand jury room. *Gold*, 470 F. Supp. at 1344. Mr. Kelleher's intrusion into the grand jury proceedings here voids the indictment, even without a showing of prejudice. *See id.* at 1346. Thus, even if Trafford was not prejudiced by the AG's otherwise improper grand jury presentation (which, as explained *infra*, he was), the indictment should be dismissed.

In the alternative, the Court should order an evidentiary hearing to further explore Mr. Kelleher's conflict of interest surrounding his "personal foreclosure crisis." When a defendant raises plausible concerns about a possible prosecutorial conflict – as Trafford has done here – the court has a duty to at least conduct an inquiry into the nature and scope of the conflict. *See Adams*, 870 F.2d at 1146 ("[T]here is enough smoke here . . . to warrant . . . [letting] the

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defendants find out how this unusual prosecution came about."); *Gold*, 470 F. Supp. at 1339 ("serious allegations" of prosecutorial conflict of interest led the court "to conclude that an evidentiary hearing was required"); *Culbreath*, 30 S.W.3d at 311 (noting trial court's "extensive evidentiary hearing" on prosecutorial conflict of interest issues).

III. EVEN ASIDE FROM THE PROSECUTOR'S CONFLICT, THE EVIDENCE HE PRESENTED TO THE GRAND JURY WAS IMPROPER AND WENT WELL BEYOND THE "TIPPING POINT" REQUIRING DISMISSAL

The "tipping point" analysis to determine whether dismissal is warranted here should begin and end with Mr. Kelleher's conflict. The law is clear that such a conflict requires dismissal of the indictment, even without a showing of prejudice to Trafford. *See*, *e.g.*, *Gold*, 470 F. Supp. at 1346; *Hill*, 88 N.M. at 219-20, 539 P.2d at 239-40. Even if Mr. Kelleher had not experienced a "personal foreclosure crisis" creating a disabling conflict of interest, the mountain of other improper, inflammatory, irrelevant, and inadmissible evidence presented to the grand jury pushes this case well past the "tipping point" requiring dismissal.

Trafford explained in his first supplemental brief that an indictment should be dismissed when "there is a reasonable probability that the outcome would have been different absent the [prosecutor's] misconduct." Supplemental Brief ISO Gary Trafford's Writ of Habeas Corpus and Motion to Dismiss ("Trafford Supp. Br."), at 11:12-14 (quoting *Lay*, 110 Nev. at 1198 (citation omitted)). In other words, dismissal is appropriate whenever there is a "serious doubt" that the misconduct affected the grand jury's ability to make a proper probable cause determination. *Berardi v. Superior Court*, 149 Cal. App. 4th 476, 494 (Cal. Ct. App. 2007); *see also Sheriff, Clark County v. Frank*, 103 Nev. 160, 165-66, 734 P.2d 1241, 1245 (1987) (affirming grant of petition of writ of habeas corpus due to prosecutorial misconduct). Trafford further explained that this standard applies even if there may have been sufficient evidence presented to the grand jury to establish probable cause for the crimes charged. Trafford Supp. Br. at 10:18-12:17.

In its supplemental brief, the AG agrees that this is the correct legal standard. Supplemental Points and Authorities ISO Return to Defendant Trafford's and Sheppard's Writs of Habeas Corpus ("AG Supp. Br."), at 6:9-11. The AG nonetheless tries to avoid dismissal in

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the face of its improper conduct by making two arguments.[3] First, the AG argues that there is nothing wrong with its presentation to the grand jury of irrelevant and inflammatory evidence that had no connection to a single NOD at issue in this case, there is nothing wrong with the AG's presentation of inadmissible evidence to the grand jury, and there is nothing wrong with the AG's efforts to mislead the grand jury about the correct definition of "forgery." Second, the AG argues that Trafford was not prejudiced by the AG's presentation.

As explained further below, both of the AG's arguments are meritless, and the indictment should be dismissed because there is a "reasonable probability" that the overwhelming amount of illegal evidence and misconduct affected the grand jury's decision to indict Trafford.

A. The AG Presented Improper Evidence To The Grand Jury.

The Court has already recognized that "there appears to be evidence of other bad acts that appear irrelevant and shouldn't come in under Chapter 48, testimony from homeowners that's entirely irrelevant to these charges[.]" August 27, 2012 Hearing Transcript ("Tr.") at 7:37:7. The Court thus specifically asked the parties to brief the following issue: "Is there a tipping point at which improperly-admitted evidence before the grand jury makes it such that the indictment must be dismissed, even though there may be sufficient evidence in front of the grand jury to prove up the crimes that are charged?" *Id.* at 6:24-7:2. Rather than addressing this issue upfront, the AG instead claims that the Court asked the parties to submit supplemental briefing as to whether "the evidence presented to the Grand Jury constitute [sic] unduly prejudicial and irrelevant other bad acts of the defendants." AG Supp. Br. at 2:22-23. This, of course, was ***not*** the issue framed by the Court. Nonetheless, the AG – apparently not wanting to accept responsibility for its inappropriate conduct before the grand jury – spends almost half of its supplemental brief arguing that the Court is mistaken and that there was no improper evidence presented to the grand jury. *Id.* at 3:20-6:3. The AG is wrong.

[3] Of course, because the AG failed to disclose Mr. Kelleher's conflict of interest to the defendants or to the Court, the AG does not address in its first supplemental brief the reasons that conflict warrants dismissal independent of the other misconduct before the grand jury.

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Trafford described in detail in both his moving papers and his first supplemental brief the numerous instances of improper, inflammatory, and irrelevant evidence presented to the grand jury. *See* Trafford's Petition for Writ of Habeas Corpus and Motion to Dismiss ("Trafford Writ"), at 25:18-29:4; Trafford Supp. Br. at 14:11-21:15. Briefly, during its grand jury presentation, the AG:

1) misled the grand jury to believe that Trafford was engaged in the crime of forgery when the AG knew, in fact, that Ms. Lawrence's testimony that she was authorized to sign Trafford's name meant that no such crime could have occurred;

2) presented inadmissible hearsay evidence regarding foreclosures that had no connection to any of the 102 NODs at issue in this case;

3) improperly prevented grand jurors from asking questions that would have revealed exculpatory evidence that the foreclosures were unrelated to the NODs in this case;

4) presented false evidence that notarization errors on certain NODs could render a foreclosure invalid;

5) presented prejudicial testimony from the AG's chief investigator about "robo-signing," which had nothing to do with the NODs in this case;

6) presented prejudicial testimony from the AG's chief investigator about "organized crime" and RICO crimes;

7) presented irrelevant and prejudicial testimony about "servicer-driven defaults" by a servicer that was wholly unrelated to Trafford;

8) intentionally elicited irrelevant and prejudicial testimony about a homeowner being locked out of her home and having personal belongings "stolen," even though those circumstances had nothing to do with the NODs in this case;

9) improperly suggested that anyone, including the grand jurors, could lose title to their home because of notarization errors; and

10) elicited from the AG's chief investigator testimony about "fraudulent" foreclosures, and allowed him to characterize those transactions as "theft," even though the AG

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> knew there was no connection between any "fraudulent" foreclosure and the NODs at issue in this case.

See generally id. In its first supplemental brief, the AG fails to address or even acknowledge most of these instances of wrongful conduct before the grand jury. For example, the AG presented misleading, inadmissible hearsay testimony claiming that borrowers had been foreclosed upon even though they had not missed a mortgage payment. *See* Trafford's Reply ISO Petition for Writ of Habeas Corpus and Motion to Dismiss, at 18 n.9. In fact, no borrower on any of the 102 NODs at issue was wrongfully foreclosed upon, but the AG did not present this exculpatory evidence to the grand jury. Worse still, when the grand jurors attempted to learn this information on their own, the AG cut off questioning and prevented them from learning the truth. Vol. 1, at 102:9-21. Thus, not only did the prosecution fail to present exculpatory evidence, it affirmatively intervened to ***prevent*** the grand jury from discovering this evidence on its own. The AG's first supplemental brief is noticeably silent on this point.[4] And for good reason. As the AG undoubtedly realizes, in *Frank*, the indictment was dismissed under these exact same circumstances, where the prosecution presented inflammatory hearsay, failed to present exculpatory evidence, and improperly cut off grand juror questions.[5] 103 Nev. at 164-66, 743 P.2d at 1244-1245.

[4] The AG acknowledges that "when a grand jury member asked for a specific example of a person who was foreclosed upon but who was not in default, the prosecution stopped that line of inquiry." AG Supp. Br. at 4:27-5:2. But the AG never addresses or explains its failure to allow the exculpatory testimony that would have put the lie to Mr. Grosz's suggestion that the NODs at issue here were connected to wrongful foreclosures on homeowners who were not in default.

[5] The AG attempts in vain to distinguish *Frank* by claiming that "the emphasis in *Frank* was on the failure to provide the exculpatory evidence rather than on the use of inadmissible evidence." AG Supp. Br. at 7:3-5. This is neither helpful to the AG nor accurate. As the AG is forced to admit in the same paragraph of its brief, the court in *Frank* held that the "failure to submit exculpatory evidence, coupled with the substantial body of inadmissible evidence received by the grand jury, clearly destroyed the existence of an independent and informed grand jury and irreparably impaired its function." *Id.* at 7:1-3 (quoting *Frank*, 103 Nev. at 166, 734 P.2d at 1245). As explained herein and in Trafford's other papers, the AG both failed to submit exculpatory evidence and presented inadmissible evidence to the grand jury. Just as in *Frank*, such conduct here "clearly destroyed the existence of an independent and informed grand jury and irreparably impaired its function."

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Notwithstanding the case law favoring dismissal in these circumstances, the AG tries weakly in its supplemental brief to claim that the presentation to the grand jury consisted only of "relevant" evidence that "supported the elements of the charged crimes" and "provided context" to the allegations against Trafford. AG Supp. Br. at 3:28-4:2. The AG thus argues that the law provides that evidence of another act or crime "so closely related" to the charged crime "that an ordinary witness cannot describe the act … without referring to the other act or crime, shall not be excluded." *Id.* at 4:3-8 (quoting NRS 48.035(3)). But the issues in this case are narrow and are limited to the 102 specific NODs charged in the indictment. The AG needed only to present evidence concerning those NODs. Instead, the AG presented a mass of prejudicial testimony from homeowners, the AG's purported "legal expert," and Investigator Grosz, but offers no explanation in its supplemental brief why these witnesses could not address the NODs here or describe the crimes charged "without referring to the other act[s]" that had nothing to do with those NODs.

For example, Mr. Grosz's "suspicions" about robo-signing during his investigation, AG Supp. Br. at 4:16-5:7, are irrelevant to the evidence actually collected during the AG's investigation or the crimes charged. Surely Mr. Grosz could have described the notarizations, signatures, certifications, and filings at issue here without describing his "suspicions" about unproven crimes not charged here, equating foreclosures with "theft," or invoking the specter of "organized crime." Likewise, Ms. Ashjian surely could have "authenticate[d] the signatures she recognized on her foreclosure documents," *id.* at 5:8-15, without the AG eliciting testimony about wrongful foreclosures, "servicer-driven defaults," being locked out of her home, or having personal belongings stolen – particularly when there was no evidence that Ms. Ashjian's foreclosure was the result of anything other than her default on her home loan. And, finally, Ms. Newberry's testimony about "problems she had encountered as a practitioner in this area of law," *id.* at 5:16-20, and Mr. Shaffer's testimony about his difficulties purchasing property insurance, *id.* at 5:20-21, bore no relation to a single one of the NODs at issue here.

The AG further fails to explain how any of the testimony that had no connection to the NODs in this case was necessary for the AG to "present a full and accurate account of the facts

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and circumstances surrounding the commission of the crime." *Id.* at 4:8-9. The simple truth is that all of the improper testimony the AG presented did nothing to make any "fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[6] NRS 48.015.

B. Contrary To Its Claims, The AG Is Not Permitted To Shirk Its Duties And To Present Improper Evidence To The Grand Jury.

The AG never addresses the inflammatory nature of the testimony it presented about "robo-signing," "organized crime" and the like, or the AG's burden to police itself and exercise "extra caution" before the grand jury. *See* Tr. at 7:8-14. Nor does the AG offer any analysis balancing the effect of such testimony and improper conduct against the AG's claimed "entitlement" to provide "context" to the allegations against Trafford. In his first supplemental brief, Trafford explained that it is precisely the inflammatory nature of the inadmissible and irrelevant testimony presented, the repeated presentation of such improper testimony, and the AG's failure to take seriously its responsibility to exercise caution before the grand jury that result in the level of prejudice warranting dismissal here. Trafford thus exhaustively described the reasons that the "reasonable probability" standard is satisfied and the AG's grand jury presentation surpassed the "tipping point" requiring dismissal. Trafford Supp. Br. at 12:18-21:15. Those points will not be repeated in detail here. In sum, though:

The grand jury's probable cause determination was impaired by the failure of the AG to provide an accurate definition of the offense charged in the indictment.[7] *See United States v. Cerullo*, No. 05-cr-1190, 2007 U.S. Dist. LEXIS 101282, at *9-12 (S.D. Cal. Sept. 7, 2007) (dismissing indictment due to prosecutor providing incorrect legal definition to grand jury). Here,

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[6] In any event, under Nevada law, "the 'complete story of the crime' doctrine must be construed narrowly," so the AG's argument in this regard similarly fails. *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005).

[7] The AG suggests that dismissal is only appropriate in circumstances where there was exculpatory evidence that was not presented to the grand jury. AG Supp. Br. at 6:22-7:5. However, the AG cites no authority – and we are aware of none – holding that dismissal is limited only to cases involving exculpatory evidence. In any event, as described, *supra*, the AG did, in fact, fail to present exculpatory evidence to the grand jury.

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the AG repeatedly equated the mere act of signing the name of another person with "forgery," even though the AG should have known and advised the grand jury that Ms. Lawrence's testimony that she was authorized to sign for Trafford meant that there could be no crime of forgery. And when Ms. Lawrence provided the correct definition, the prosecution bullied her into deferring to its erroneous definition. Vol. 1, at 154:16-18 (Lawrence: "Well, the fact that he gave me permission I don't consider it forgery, but I guess like I said legally that's probably the definition."). The grand jury was clearly influenced by this erroneous definition. *See* Reporter's Transcript of Grand Jury Proceedings 11/15/2011, Vol. 2 ("Vol. 2"), at 117:9-119:12 (grand jury questions focusing on effects of forged documents on properties' title). If the AG had not affirmatively misled the grand jury about the definition of "forgery," there is a reasonable probability that the grand jury would not have issued an indictment premised on the allegation that Trafford was involved with forgery of the 102 NODs. Indeed, since the AG's theory of "forgery" is alleged in every single count in the indictment, there is "serious doubt" that this improper legal definition impaired the grand jury's ability to make an informed probable cause determination.

Moreover, it is undisputed that "[t]he prosecutor is under a duty not to inflame or otherwise improperly influence the grand jury's ability to evaluate the evidence independently and impartially." *Lane v. Second Judicial Dist. Court*, 104 Nev. 427, 441, 760 P.2d 1245, 1254 (1988) (citation omitted). Here, the sheer weight and numerous instances in which irrelevant-but-inflammatory evidence was presented to the grand jury creates a "reasonable probability" that the grand jury's decision to indict was the result of such inflammatory material.

Rather than engaging in a balancing analysis or assessing its conduct against the controlling legal standard, and despite the numerous instances of improper conduct before the grand jury, the AG asserts simply that the grand jury looked beyond all of the inflammatory evidence and that its decision to indict Trafford "was not the result of any alleged misconduct[.]" AG Supp. Br. at 7:6-7. This bald conclusion is not supported by the record. To the contrary, the AG's assertion is belied by the grand jury transcripts, which show that the grand jurors were in fact influenced by the prosecution's misconduct. The following are just a few examples of

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questions by grand jurors that show they were in fact focused on the AG's erroneous "forgery" theory, and were improperly influenced by the AG's inflammatory and misleading evidence:

> "I presume later you're going to, one of these signatures may be ***forged***; is that correct?" Vol. 1, at 61:10-11 (emphasis added).
>
> "Did anyone ever say to you that you need to ***forge*** this signature to make it look like Gerri's signature[?] . . . ***Did they use the word forge or forgery***?" Vol. 2, at 49:22-24, 50:2 (emphases added).
>
> "Does this lawsuit clock in the thousands of documents that were submitted and recorded, does that now deem all of those deeds have a cloud on the title; is it a clouded title then?" Vol. 2, at 120:5-8.

The prosecution made a presentation to the grand jury that improperly influenced the grand jury and impaired its ability to make an appropriate probable cause determination. Under these circumstances, given the extensive misconduct that occurred before the grand jury, there is "serious doubt" that the AG's misconduct affected the grand jury's probable cause determination, and the indictment should be dismissed. *Berardi*, 149 Cal. App. 4th at 494.

IV. THE AG CANNOT AMEND THE INDICTMENT TO STRIKE ITS PRIMARY LEGAL THEORY AS MERE "SURPLUS" AND SHIFT TO A NEW THEORY OF THE CASE

Putting aside for the sake of argument Mr. Kelleher's disabling conflict and a grand jury presentation permeated with improper testimony, Trafford has explained the reasons that the AG cannot simply amend the indictment to resolve its other defects. As a last ditch effort, the AG attempts to save the indictment by suggesting that it could strike the allegation in every one of the 102 Class C felony counts that the NODs at issue were "forged." AG Supp. Br. 15 7:19-9:13. The AG argues that its allegations of "forgery" are "surplus" or "excess language," and proposes that the AG should be allowed to shift gears and instead proceed on a theory that the NODs in this case were allegedly "false." *Id.* The AG, however, offers little to further illuminate its argument, and instead effectively repeats itself by baldly concluding that "in instances where an amendment is made in order to remove surplus language within the factual allegations, the Court has found the analysis as to whether there is resulting prejudice a simple one." *Id.* at 8:18-20. This conclusion is offered without explanation as to why the allegations at the center of the AG's

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theory are "surplus language." The AG further claims without elaboration or analysis that "it strains credulity to argue that the striking of [the forgery] language could possibly prejudice" Trafford's rights. *Id.* at 9:10-11. Finally, the AG argues that its proposed amendment should be allowed because Trafford has supposedly "been notified as to the charges against" him. *Id.* at 9:9.

While the AG may want to wish away the theory it presented to the grand jury and embedded repeatedly throughout the indictment, for the numerous reasons explained below, the AG cannot so easily escape its flawed indictment.

A. The Allegations That The AG Now Seeks To Strike Were Central To The AG's Grand Jury Presentation, Not Mere "Surplus."

The allegations of "forged" documents in the Class C felony counts are not mere "surplus" or "excess language." *Butler v. United States*, 20 F.2d 570, 573 (8th Cir. 1927) ("[W]here words are employed in an indictment which are descriptive of the identity of that which is legally essential to the charge in the indictment, such words cannot be stricken out as surplusage."). Such unsupported labels are belied by the AG's presentation to the grand jury, where the AG elected to proceed on a theory of "forged" documents. *See* Trafford Supp. Br. at 6:5-7:19 (describing in detail the numerous instances in which the AG presented a theory of "forgery" to the grand jury); *see also generally* Vol. 1, Vol. 2 (using the term "forge" or its derivatives more than two dozen times). Indeed, the State expressly confirmed to the grand jury – without qualification or correction by the AG – that the State's legal theory is that Trafford's signatures were "forged." Vol. 1, at 99:18-20. After confirming this theory to the grand jury, it issued an indictment that – not surprisingly – recites this as the theory of the crimes charged. *See* Tr. at 6:10-18 (the Court noting that the indictment alleges in each of the 102 Class C felony counts that the documents were "forged").

The AG's attempt to shift from a fundamental theory presented to the grand jury readily distinguishes this case from the three authorities on which the AG relies. *See* AG Supp. Br. at 8:3-28. Neither *DePasquale v. State*, 106 Nev. 843, 803 P.2d 218 (1990) or *Viray v. State*, 121 Nev. 159, 111 P.3d 1079 (2005) suggest that an amendment to an indictment should be permitted to change the fundamental theory presented to the grand jury and described in the indictment.

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Instead, as the Nevada Supreme Court has made clear, *DePasquale* permitted an amendment to correct a "minor clerical error." *State v. Hancock*, 114 Nev. 161, 167-68, 955 P.2d 183, 187 (1998). Likewise, as the AG's own brief makes clear, *Viray* involved an amendment simply to correct "a transposition of peripheral facts." AG Supp. Br. at 8:26-28. Here, there is no "clerical error" and there is no "transposition of peripheral facts." Rather, this is a case of the AG premising its prosecution on supposed bad acts that the Court and defendants have exposed as not a crime at all, and the AG seeking to amend around those central facts. Tr. at 6:19 (the Court correctly noting, as a matter of law, there can be no forgery here because Ms. Lawrence was purportedly authorized to sign Trafford's name on the NODs at issue).

The third case on which the AG relies, *Shannon v. State*, 105 Nev. 782, 783 P.2d 942 (1989) is equally unavailing, as it also involved the transposition of facts and, more importantly, did not involve a grand jury at all. In that case, there was no presentation to a grand jury to consider in the amendment analysis because the charging instrument for which amendment was sought was an information, not an indictment. *See* AG Supp. Br. at 8:21-28 (admitting that both *Shannon* and *Viray* concerned "an information to be amended"); *see also Hancock*, 114 Nev. at 168, 955 P.2d at 187 (distinguishing case because "a criminal information, rather than an indictment by the grand jury, was at issue"). Here, by contrast, the issue is that the AG presented one theory to the grand jury and now seeks to circumvent the grand jury process and charge a different theory than the one on which the grand jury acted.

B. As A Matter Of Law, Trafford Will Suffer Prejudice If The AG Is Permitted To Pursue A Different Legal Theory Than It Presented To The Grand Jury.

The distinctions between this case and the cases on which the AG relies are critical, because the Nevada Supreme Court has explained that a shift in legal theories ***before the grand jury*** is not blindly permitted as a matter of law. Specifically, the Court made clear that when an amendment "materially alter[s] the criminal indictment," it is a violation of the defendant's due process rights to allow the amendment if "it cannot be said that the grand jury found probable cause" for the new theory presented by the amendment. *Hancock,* 114 Nev. at 168, 955 P.2d at

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187 (because "an indictment may be found ***only*** upon the concurrence of 12 or more jurors," the amendment must be supported by probable cause) (emphasis in original).

Here, the AG proposes to materially alter the indictment by switching its theory of the case from one based on "forged" documents to one based on "false" documents. Each of those theories requires fundamentally different elements of proof. *See United States v. Merklinge*r, 16 F.3d 670, 677 (6th Cir. 1994) (finding that an offense concerning "forged" documents and an offense concerning "false statements" are "entirely separate" offenses); *Jones v. State*, 290 Ga. App. 490, 495, 659 S.E.2d 875, 879-880 (Ga. Ct. App. 2008) (explaining why "forgery" and "false writing" require proof of different elements). The AG, however, has not even attempted to show that the grand jury found probable cause for a theory based on "false" documents, as opposed to the theory of "forged" documents that was repeatedly presented to the grand jury. Instead, the AG asks this Court to disregard the grand jury presentation and to allow the AG to fashion its own charges without grand jury authority to charge Trafford based on a new theory. To do so would violate Trafford's due process rights, and would be precisely the result the Nevada Supreme Court has cautioned against. *Hancock*, 114 Nev. at 168, 955 P.2d at 187; *see also Simpson v. Eighth Judicial Dist. Court*, 88 Nev. 654, 660, 503 P.2d 1225, 1230 (1972) ("[A] fundamental vice of indefinite charges is that they permit prosecutors to try cases on theories totally different from those propounded earlier, in proceedings before the Grand Jury or magistrate.").

The AG's bald contention that Trafford would not be prejudiced by the proposed amendment is also unsupported. *See Hancock,* 114 Nev. at 167, 955 P.2d at 187. Indeed, the AG's position is once again at odds with the Supreme Court: In *Hancock*, the Supreme Court found that an amendment to the indictment would cause the defendants to suffer prejudice because they "had already filed petitions for writs of habeas corpus in response to the original indictments, [and] they would be prejudiced if the State was allowed to amend the indictment prior to the issuance of a decision on those petitions." *Id*. The same is true here. Trafford filed a writ of habeas corpus identifying the precise flaw in the AG's indictment (and corresponding grand jury presentation) that the AG now seeks to avoid by amendment. Thus, the AG's

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proposed amendment would prejudice Trafford not only because it would allow the AG to circumvent the grand jury and pursue a theory for which it may not have found probable cause, but also because amendment would allow the AG to impermissibly avoid a decision on Trafford's pending writ petition. The Nevada Supreme Court has made clear that neither result is allowed under the law. *Id*. at 167-68, 955 P.2d at 187.

C. The AG's Proposed Amendment Would Render The Indictment Impermissibly Indefinite.

The AG's final argument is that the indictment and proposed amendment are adequate because they supposedly put Trafford on notice of the charges against him. AG Supp. Br. at 9:9-10. However, as explained in Trafford's first supplemental brief, the purpose of a definite indictment is not just to put the defendant on notice of the charges against him, but also to prevent the prosecution from trying "cases on theories totally different from those propounded earlier, in proceedings before the Grand Jury." *Simpson*, 88 Nev. at 660, 503 P.2d at 1230. That impermissible result is precisely what the AG is attempting to obtain here.

The AG's proposed amendment would render the indictment indefinite for the additional reason that, without the allegation after the "to-wit" clause, the indictment would not contain the necessary allegation of the "means" by which the crime was allegedly committed. *See Barren v. State*, 99 Nev. 661, 667, 669 P.2d 725, 729 (1983) (the indictment must allege the "means by which the offense was accomplished, or to show that such means are unknown" (citing NRS 173.075(2)). Further, without the allegation after the "to-wit" clause, the indictment merely alleges that the NODs were "false and/or forged," but this "and/or" allegation would also render the indictment impermissibly indefinite. *See Sheriff, Clark County v. Morris*, 99 Nev. 109, 119-20, 659 P.2d 852, 860 (1983) (finding an indictment insufficient where it used "and/or" to describe alternative theories of murder without providing further factual support); *Lane v. State*, 110 Nev. 1156, 1174 n.2, 881 P.2d 1358, 1371 n.2 (1994) (Springer, J., dissenting in part) ("Absent a statute providing otherwise, it is fatal for an indictment or information to charge disjunctively in the words of the statute, if the disjunctive renders it uncertain as to which

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alternative is intended.") (quoting 2 *Wharton's Criminal Procedure*, § 266 at 131 (Charles E. Torcia, ed.; 13th ed. 1990) (alteration omitted)).

For each of these independent reasons, it is clear that the law prohibits the AG from amending the indictment as it proposes to do. The AG's proposal should be rejected.

V. CONCLUSION

For all of the foregoing reasons, as well as the reasons described in Trafford's writ, motion, and first supplemental brief, Trafford's writ of habeas corpus and motion to dismiss should be granted.

DATED this 26th day of November, 2012.

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NOTICE

TO: CATHERINE CORTEZ MASTO, ESQ., Attorney General, Attorney for Plaintiff, State of Nevada:

YOU WILL PLEASE TAKE NOTICE that the foregoing PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS will be heard on the 21th day of January, 2013 at 9:00 a.m. in the District Court, Department No. V.

DATED this 26th day of November, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of November, 2012, and pursuant to NRCP 5(b), I caused a true and correct copy of the foregoing **SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF GARY TRAFFORD'S WRIT OF HABEAS CORPUS AND MOTION TO DISMISS**, to be served via Hand-Delivery, to the following:

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