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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: May 14, 2012 TIME: 9:00 a.m. DEPT.: V JUDGE: Hon. Carolyn Ellsworth [Filed and served concurrently with Affidavit of Alexander F. Porter; Writ of Habeas Corpus; Order]

PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS

TO: The Honorable Judge Carolyn Ellsworth of the Eighth Judicial District Court of The State of Nevada, in and for the County of Clark

The Petition of Gary Trafford ("Petitioner"), submitted by Kirk B. Lenhard, Esq, of the law firm of Brownstein Hyatt Farber Schreck, LLP and John C. Hueston, Esq. of the law firm of Irell & Manella LLP, attorneys for the above-captioned individual, respectfully affirms:

1. That Mr. Lenhard is a duly qualified, practicing and licensed attorney in the City of Las Vegas, County of Clark, State of Nevada.

2. That Mr. Hueston is a duly qualified, practicing attorney admitted to practice in the State of California, and that he is also duly licensed *pro hac vice* to practice law in the State of Nevada (*See* Order Granting Motions to Associate Counsel; Order Granting in Part Motion for Release Without Bail or, in the Alternative, to Reduce Bail dated January 4, 2012).

3. That Petitioner makes this application for a Writ of Habeas Corpus because he is constructively imprisoned and restrained by the pendency of the Indictment in this matter; that the place where the Petitioner is constructively imprisoned is in the Clark County Detention Center; that the officer by whom he is constructively imprisoned and restrained is Doug Gillespie, Sheriff.

4. That the constructive imprisonment and restraint of said Petitioner is unlawful in that:

a. The State of Nevada failed to establish probable cause before the grand jury that Gary Trafford committed the crimes alleged in the indictment;

b. The State of Nevada engaged in prosecutorial misconduct before the grand jury;

c. The indictment against Petitioner fails to allege the crimes charged;

d. The indictment fails to allege how Petitioner committed the crimes charged;

e. All counts in the indictment are barred by the statutes of limitations; and

f. Petitioner also joins in the grounds for dismissal raised by co-defendant Gerri Sheppard in her Motion to Dismiss Indictment and/or Specific Counts for Failure to State an Offense and Under Fair Notice Doctrine and Rule of Lenity, Petition for Writ of Habeas Corpus and Motion to Dismiss Indictment, and Motion to Dismiss Indictment as Barred by Applicable Statutes of Limitations.

5. That Petitioner has waived his right to be brought to trial within 60 days.

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6. That Petitioner consents that if the Petition is not decided within 15 days before the date set for trial, the Court may, without notice of hearing, continue the trial indefinitely to a date designated by the Court.

7. That Petitioner personally authorized his aforementioned attorney to commence this action.

WHEREFORE, Petitioner prays that this Honorable Court make an order directing the County of Clark to issue a Writ of Habeas Corpus directed to the said Doug Gillespie, Sheriff, commanding him to bring the Petitioner before your Honor, and return the cause of his imprisonment.

DATED this 9th day of April, 2012.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By:_____

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DECLARATION

KIRK B. LENHARD makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada. I am an attorney hired to represent the Defendant, GARY TRAFFORD, in the instant matter, and I am familiar with the facts and circumstances of this case.

2. I am the attorney of record for Petitioner in the above matter. I have read the foregoing Petition, know the contents thereof, and that the same is true of my own knowledge, except for those matters therein stated on information and belief, and as to those matters, I believe them to be true.

3. Petitioner, GARY TRAFFORD, personally authorizes me to commence this Writ of Habeas Corpus action.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct. (NRS 53.045).

EXECUTED this 9th day of April, 2012

KIRK B. LENHARD

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MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the Petitioner, GARY TRAFFORD, by and through his counsel, KIRK B. LENHARD, of the law firm Brownstein Hyatt Farber Schreck, LLP, and JOHN C. HUESTON, of the law firm Irell & Manella LLP, and submits the following Points and Authorities in Support of Defendant's Petition for a Pretrial Writ of Habeas Corpus and Motion to Dismiss.

I. INTRODUCTION

In its overzealous attempt to make a criminal case against someone connected to Nevada's recent increase in foreclosures, the Nevada Attorney General ("AG") has been sloppy and has overreached. The AG has obtained an indictment against Gary Trafford, a mid-level manager at Lender Processing Services, Inc., that, among other failings, (i) disregards the basic definition of "forgery," (ii) attempts to criminalize conduct that was never intended to be criminal, (iii) reaches back in time many years before the operative statutes of limitations, and (iv) contains inadequate aiding and abetting allegations that are not based on any probable cause. In truth, Trafford's alleged conduct was not criminal; the AG's indictment is facially defective and is the product of prosecutorial misconduct, including fundamentally incorrect legal instructions and inflammatory hearsay presented to the grand jury.

In an attempt to "trump up" the charges against Trafford, the AG has charged Trafford with 102 Class C felony counts based on allegations that "forged" documents were filed with the Clark County Recorder's Office. The 204 other counts in the indictment also allege that documents were "forge[d]." These "forgery" claims are premised on allegations that a notary, Tracy Lawrence, signed Trafford's name on notices of default ("NODs"). In making these claims, however, the AG misunderstands the fundamental definition of "forgery." As a matter of law, "forgery" requires the AG to prove that Lawrence (1) did not have authorization to sign the NODs, and (2) acted with criminal intent to defraud. There was no evidence presented to the grand jury to establish probable cause for either of these essential elements. In fact, the evidence presented established the ***exact opposite***: Lawrence testified that she had authority to sign Trafford's name, and she actually told the prosecutors that because she had such authorization, her conduct did not constitute "forgery." Inexcusably, the prosecutors persisted in their erroneous

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understanding of the law, and actually bullied Lawrence into accepting their incorrect definition of the crime. The allegations of "forgery" are completely baseless.

Stripped of the "forgery" allegations, the only remaining allegedly wrongful conduct is that Lawrence supposedly notarized NODs when Trafford was not physically present before her. But the Class D felony statute charged in the indictment does not criminalize this conduct. And the gross misdemeanor statute was never intended to criminalize the conduct at issue here, where Lawrence and Trafford had been personally acquainted for many years. Both the Secretary of State who proposed the law, and the Nevada legislature that enacted the law, made it clear that the gross misdemeanor statute does not apply if the notary is personally acquainted with the witness: ***"if it's a notary who has known someone for a long time, and if you're not in that presence and they notarize, they are not guilty of a gross misdemeanor."*** Under Nevada law, this clear legislative intent controls, and the conduct alleged in the indictment is not subject to criminal sanctions.

If the foregoing defects in the underlying substantive crimes do not dispose of the claims against Trafford, then the deficiencies in the AG's aiding and abetting theory surely do. The aiding and abetting allegations on all 306 counts are improperly conclusory, and the indictment is actually internally inconsistent on the whether the Class C felony counts are for aiding and abetting, or whether Trafford is being charged as a primary violator. Moreover, the AG presented no evidence to the grand jury to create probable cause that Trafford acted with the intent required for aiding and abetting liability, *i.e.*, that he willfully violated the notary statutes at issue in 204 counts charged in the indictment.

In addition, all of the counts against Trafford are barred by the applicable statutes of limitations. The AG attempts to circumvent these limitation periods with the conclusory allegation that Trafford acted in a "secretive manner." But this conclusory allegation is insufficient to toll the statutes of limitations, and the AG presented ***absolutely no evidence*** to the grand jury that Trafford ever attempted to conceal his actions in any way.

In the end, the AG's indictment is the result of prosecutorial misconduct, including blatantly incorrect legal instructions and prejudicial hearsay testimony presented to the grand

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jury. The AG failed in its duty to instruct the grand jury on the legal requirements for the crimes charged, and actually misled the grand jury as to the definition of "forgery," causing it to return an indictment without probable cause. The prosecution also offered highly inflammatory and baseless hearsay testimony from its chief investigator that homeowners said they had been wrongfully foreclosed upon as a result of the NODs at issue in this case. But when grand jurors attempted to probe the factual basis for this testimony, the prosecutors improperly precluded any questioning on the subject, thereby preventing the grand jury from learning the truth: that the AG actually had no evidence that homeowners were wrongfully foreclosed upon due to the NODs at issue in this case. The indictment should be dismissed to deter these prosecutorial abuses and to prevent Trafford from being prejudiced by defending against an indictment that was procured by patently wrong legal instructions and improper evidence.

For these, and the additional reasons explained below, the AG's case is fatally defective. Trafford's writ of habeas corpus and motion to dismiss should be granted.[1]

II. BACKGROUND

A. The Evidence Presented To The Grand Jury

The AG presented evidence to the grand jury over two days on November 8 and 15, 2011. The AG presented eleven witnesses, but only one witness testified about the 102 NODs at issue in the counts against Gary Trafford – Tracy Lawrence. Lawrence testified that, with Trafford's permission, she signed the 102 NODs on Trafford's behalf. Reporter's Transcript of Grand Jury Proceedings 11/08/11, Vol. 1 ("Vol. 1"), at 143:21-22, 154:11-18.[2] She also testified that after signing the NODs on Trafford's behalf, she notarized them. *Id.* at 143:21-23. She testified that Trafford was not physically present when she notarized the NODs. *Id.* at 156:11-16. After notarizing the documents, Lawrence testified that she delivered the NODs to a runner who took them to be filed at the Clark County Recorder's Office. *Id.* at 169:8-11.

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[1] To avoid duplicating arguments, Trafford joins in the arguments made by co-defendant Gerri Sheppard in her Petition for Writ of Habeas Corpus and Motion to Dismiss Indictment, Motion to Dismiss Indictment as Barred by Applicable Statutes of Limitations, and Motion to Dismiss Indictment and/or Specific Counts for Failure to State an Offense and Under Fair Notice Doctrine and Rule of Lenity.

[2] The grand jury transcripts are attached as Exhibits 1 and 2 to the Affidavit of Alexander F. Porter ("Porter Affidavit") filed concurrently herewith.

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B. The Allegations In The Indictment

Based on this evidence presented to the grand jury, the AG returned an indictment that alleges 306 criminal counts against Trafford. These 306 counts can be divided into three groups of 102 counts each.

The first set of counts alleges violations of NRS 239.330, a Class C felony (hereinafter the "Class C felony statute"). The introductory paragraph of the indictment says that Trafford is charged as a primary violator on all 102 Class C felony counts. Indictment at 1:24-25. However, in 100 of the specific Class C felony counts, the indictment actually alleges that Trafford is being charged with "AID[ING] & ABET[TING]" liability. *See, e.g., id.* at 14:1-3. All of the Class C felony counts are based on allegations that "forged" documents were filed with the Clark County Recorder's Office. The indictment alleges that the NODs were "forged in that [they] purported to be signed by Defendant Trafford . . . , when in truth and in fact Defendant Trafford did not sign said instrument." *E.g., id.* at 3:15-18.

The second set of counts alleges that Trafford aided and abetted 102 violations of NRS 205.120, a Class D felony (hereinafter the "Class D felony statute"). The indictment alleges that Trafford "planned, directed, or arranged" to have Lawrence "forge" NODs. *E.g., id.* at 4:3-6. It then parrots the statutory language, alleging that Lawrence "willfully certif[ied] falsely that the execution of [the NOD] was acknowledged." *E.g., id.* at 4:6-7.

Finally, in the third set of counts, the indictment alleges that Trafford aided and abetted 102 violations of NRS 240.155, a gross misdemeanor (hereinafter the "gross misdemeanor statute"). Each of these counts also contains the allegation that Trafford "planned, directed, or arranged" to have Lawrence "forge" NODs. *E.g., id.* at 2:19-22. These counts further allege that Lawrence notarized the documents when Trafford "was not in the notary's presence." *E.g., id.* at 2:17.

III. LEGAL STANDARD

Under Nevada law, a pretrial writ of habeas corpus must issue "[w]here the petitioner has been committed or indicted on a criminal charge . . . without reasonable or probable cause." NRS 34.500(7). "NRS 34.500(7) explicitly authorizes discharge from custody or restraint if one is not

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committed upon a criminal charge with reasonable or probable cause." *Shelby v. Sixth Judicial District*, 82 Nev. 204, 207, 414 P.2d 942, 944 (1966). "It is fundamentally unfair to require one to stand trial unless he is committed upon a criminal charge with reasonable or probable cause. No one would suggest that an accused person should be tried for a public offense if there exists no reasonable or probable cause for trial." *Id.* Probable cause exists only when the evidence presented to the grand jury "support[s] a reasonable inference that the defendant committed the crime charged." *Sheriff, Clark County v. Burcham*, 124 Nev. 1247, 1258, 198 P.3d 326, 328 (2008) (en banc) (quotations omitted).

In addition, "[t]he indictment or the information must be a plain, concise and definite written statement of essential facts constituting the offense charged." NRS 173.075(1). This requires that the "indictment, standing alone, must contain: (1) each and every element of the crime charged and (2) the facts showing how the defendant allegedly committed each element of the crime charged." *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998). Nevada courts prohibit indictments that fall short of this standard because such indictments "permit prosecutors to try cases on theories totally different from those propounded earlier, in proceedings before the Grand Jury or magistrate." *Simpson v. Eighth Judicial Dist. Court*, 88 Nev. 654, 660, 503 P. 2d 1225, 1230 (1972); *see also Sheriff, Clark County v. Levinson*, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979) (per curiam) ("[T]he prosecution is required to make a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case.").

IV. ARGUMENT

The AG's presentation to the grand jury fell woefully short of establishing probable cause for the crimes charged: the AG presented absolutely no evidence on certain essential elements of the crimes charged, and in some instances the evidence actually negated elements of the crimes charged. The resulting indictment is also critically flawed: it is internally inconsistent, contains inadequate conclusory allegations, fails to allege essential elements of the crimes charged, and is the result of prosecutorial misconduct before the grand jury. For all these reasons, as explained in

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detail below, Trafford's writ of habeas corpus should be granted and the indictment should be dismissed.

A. All Counts Are Based On A Fundamental Misunderstanding Of The Definition Of "Forgery"

The AG presented a theory of "forgery" to the grand jury, and returned an indictment that is based on allegedly "forged" documents. But despite this, at no time during the grand jury proceedings did the prosecution ever present evidence to establish probable cause for two essential elements of the crime of forgery: lack of authorization and intent to defraud. In fact, the key witness on the counts against Trafford, Tracy Lawrence, expressly told the prosecution that "forgery" requires lack of authorization, and that she actually had authorization to sign NODs on Trafford's behalf. Instead of stopping to think twice about this common sense definition of "forgery," the prosecution ignored Lawrence's correct explanation of the law and persisted with its ignorance of what constitutes "forgery." As a consequence of the prosecution's fundamental legal error, the AG obtained an indictment without probable cause and returned an indictment that fails to allege required elements of the crimes charged.

1. "Forgery" Requires Lack of Authorization And Intent To Defraud

In order to prove "forgery," the prosecution must prove that the person who signed the name of another did so without authorization. *See Mathews v. Lamb*, 84 Nev. 649, 650, 446 P.2d 651, 652 (1968) (per curiam) ("It is undisputed that lack of authority is an essential element of the corpus delicti of the crime of forgery."). Lack of authorization is an essential element to the crime of forgery under the common law, and in virtually every jurisdiction in the United States. *See, e.g.*, *United States v. Gilbert*, 433 F.2d 1172, 1173 (D.C. Cir. 1970) ("when, as here, a defendant is charged with forging the name of a real or existing person, lack of authority is an essential part of the crime of forgery"); *State v. Jones*, 20 P.2d 614, 617 (Utah 1933) ("It is not forgery for one to write another's name with authority." (citing 2 Bishop's Criminal Law 441, § 572)); *Owen v. People*, 195 P.2d 953, 956 (Colo. 1948) (explaining that the prosecution must prove "that the name was signed by defendant without authority, for if the purported maker authorized the defendant to sign the instrument in his name or if the defendant so signed the

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instrument in an honest belief that such authority existed, no crime is committed"); *People v. Whiteman*, 49 P. 99, 99 (Cal. 1896) (reversing forgery conviction because "[t]he prosecution produced no evidence" that "he had not authorized such use of his name"); *State v. Kozukonis*, 46 A.2d 865, 868 (R.I. 1946) ("It was incumbent on the state to show that Dunn not only did not write his name on the back of the check but also that he did not authorize anyone else to do so."); 36 Am. Jur. 2d, *Forgery* § 13 ("Where authority is given to sign the name of another to a writing, there can be no forgery."). And in Nevada, lack of authorization is an essential element on which the prosecution bears the burden of proof; it is not an affirmative defense. *See Mathews*, 84 Nev. at 650, 446 P.2d at 652 (noting that lack of authority is an "essential element of the corpus delicti of the crime of forgery").[3]

In addition, "forgery" requires criminal intent to defraud. *See Emerson v. State*, 98 Nev. 158, 162, 643 P.2d 1212, 1214 (1982) ("An element of the crime of forgery is the specific intent to damage or defraud"). In the typical "forgery" case, this means signing the name of another (without authorization) in order to obtain property that the defendant has no legal right to. *See Barron v. State*, 105 Nev. 767, 774 n.2, 783 P. 2d 444, 449 (1989) (per curiam) ("An intent to defraud is an intent to deceive another person for the purpose of inducing him to part with property or alter his position to his injury or risk.").

These required elements of the crime of forgery comport with common sense. People sign documents on behalf of others all the time – spouses sign checks on behalf of each other, secretaries sign documents on behalf of their bosses – but they are not risking criminal conviction and incarceration when doing so because they have authorization to sign the other person's name. And even if actual authorization does not exist, if the person has a good faith belief that they have such authorization, then the criminal intent necessary for the crime of "forgery" is absent. *See Owen*, 195 P.2d at 956 (explaining that "if the defendant so signed the instrument in an *honest belief that such authority existed*, no crime is committed" (emphasis added)); 37 C.J.S., *Forgery* §

[3] The term "corpus delicti" is Latin for "body of the crime." Black's Law Dictionary, at 369. "[T]he state bears the burden of proving beyond a reasonable doubt the corpus delicti of the crime and that the defendant committed the crime." *Sheriff, Washoe County v. Middleton*, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996), *cert. denied*, 528 U.S. 927, 120 S. Ct. 322 (1999).

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4 ("[O]ne who makes or alters an instrument in good faith, with the honest belief in his or her authority to do so, is not guilty of forgery. The fact that the authority is in fact insufficient and void is not material." (footnotes omitted)). Moreover, there is no criminal intent to defraud when, as here, a person executes a document for the purpose of enforcing what the person believes to be valid legal rights to property. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 197(2) (2011) (explaining that a defendant lacks intent to defraud "if he honestly but erroneously believes property obtained is his own property or is otherwise property to which he has a lawful right").

In short, the crime of "forgery" is not established by the simple fact that a person signed the name of another. Much more is required, including lack of authorization and a criminal intent to defraud.

2. The AG Presented A Theory Of "Forgery" To The Grand Jury And Returned An Indictment Based On Allegedly "Forged" NODs

The AG's theory before the grand jury was one of "forgery." The prosecutors told the grand jury it would hear evidence of "forged" documents; they asked leading questions of witnesses about "forged" documents; the AG's lead investigator Todd Grosz ("Investigator Grosz") told the grand jury he was investigating "forgery"; and the prosecution's purported "legal expert" testified about the effect of "forgery" on the legal validity of foreclosures in Nevada. All of this testimony reflected the AG's fundamental misunderstanding of the definition of "forgery." The following are a few examples:

- The prosecutor asked: "The documents were fraudulent because the signatures were *forged*?" Investigator Grosz answered: "*Correct*." Vol. 1, at 99:18-20.
- A grand juror asked the prosecutor whether later in the day "you're going to [present evidence that] one of these signatures may be *forged*." The prosecutor responded: "We'll submit evidence that will answer your question sufficiently with Tracy Lawrence who will be testifying later today." *Id.* at 61:10-15.
- Investigator Grosz told the grand jury he was investigating: "*Forgery*, notary fraud." *Id.* at 98:16-18.

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- One witness testified: "I have been made aware that the signatures were ***forged*** on those documents." Reporter's Transcript of Grand Jury Proceedings, 11/15/11, Vol. 2 ("Vol. 2"), at 86:21-22.
- The testimony of the prosecution's purported "legal expert" contained extensive discussion of the effect of "***forgery***" on the validity and legal title of homes in foreclosure. *See, e.g.*, *id.*, at 117:12-15 ("Suppose there has been a foreclosure and then it's deemed not correct because there is a ***forgery*** on the foreclosure . . . ."); *id.* at 119:1-3 ("Let's say they do get a warranty deed from the bank and it later turns out that the title is defective because there was a ***forgery***."); *id.* at 119:11-12 ("What if they're not responsible for the ***forgery***?"); *id.* at 121:5-6 ("With regards to, you know, ***forged*** instruments that are recorded . . . .").

As a natural consequence of the AG's theory of "forgery" presented to the grand jury, the resulting indictment is based on allegations that documents were "forged." The Class C felony counts allege that "forged" documents were filed with the Clark County Recorder's Office. These counts allege that the NODs were "forged" because Lawrence signed them on Trafford's behalf: "Said document was ***forged*** in that it purported to be signed by Defendant TRAFFORD, as the agent for the beneficiary of the property listed in said instrument, when in truth and in fact Defendant TRAFFORD did not sign said instrument, as Defendant TRAFFORD well knew." *E.g.*, Indictment at 3:15-19. The Class D felony and gross misdemeanor counts also allege that Trafford instructed Lawrence to "***forge***" documents. *E.g.*, *id.* at 2:22, 4:6.

3. The AG Failed To Present Evidence To The Grand Jury On Two Essential Elements Of "Forgery"

Although the AG's case is based on a theory of "forgery," the evidence presented to the grand jury failed to establish two essential elements of forgery: lack of authorization and intent to defraud. There was no evidence presented to the grand jury that Lawrence lacked authorization when she allegedly signed the 102 NODs on Trafford's behalf. In fact, the evidence presented to the grand jury established the ***exact opposite***. During her testimony to the grand jury Lawrence testified she had authorization to sign NODs on Trafford's behalf:

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Prosecutor: Basically would it be fair to say *forging* [Trafford's] name?

Lawrence: Well, ***I don't consider it that since he told me to***, but I guess legally if that's what you want to call it.

Prosecutor: What would you call it if you were to sign someone else's name?

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***.

Vol. 1, at 154:9-18 (emphasis added).[4]

Lawrence thus clearly explained to the prosecutor that Trafford "told [her] to" sign his name and that Trafford "gave [her] permission." In addition, she went further and actually explained to the prosecutor that, as a legal matter, her conduct did not constitute "forgery" *precisely because* she had authorization to sign Trafford's name. The prosecutor failed to recognize the common sense accuracy of Lawrence's explanation. He instead persisted with his misunderstanding of the basic definition of "forgery," and actually coerced Lawrence into deferring to his erroneous definition of what constitutes "forgery."

But the AG's failure to establish probable cause for "forgery" did not end with its failure on the element of lack of authorization. The AG also failed to present any evidence to establish that Lawrence acted with the requisite intent to defraud. As an employee of Lender Processing Services, Inc., Lawrence worked for a company that had the legal right to initiate foreclosure proceedings against borrowers in default on their mortgages. The AG did not present any evidence to show that Lawrence was executing the NODs for any reason other than to enforce what she believed to be valid legal rights. *See* LAFAVE § 197(2) (explaining that a defendant "lacks the intent to defraud, if he honestly but erroneously believes property obtained is his own property or is otherwise property to which he has a lawful right"). As a result, there was

[4] The testimony of other notaries before the grand jury similarly established that they had authorization to sign documents on behalf of Gerri Sheppard. Shaw was asked whether "you were directed in each of those instances to sign Gerri Sheppard's name and to sign it with your notary stamp?" Shaw answered: "Yes." Vol. 1, at 78:7-10. Bloecker was asked whether "with regard to every document that was recorded you got specific authorization?" Bloecker answered: "Yes." Vol. 2, at 32:14-19.

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absolutely no evidence that Lawrence acted with the criminal intent to defraud that is required for the crime of "forgery."

In short, the AG failed to present evidence necessary to establish that Lawrence lacked authorization to sign Trafford's name and that she acted with intent to defraud. The indictment similarly fails to allege these two elements of the crime. The Class C felony counts, and all allegations that Trafford directed Lawrence to "forge" documents in the Class D felony and gross misdemeanor counts, should therefore be dismissed. *See Skinner v. Sheriff, Clark County*, 93 Nev. 340, 566 P.2d 80 (1977) (reversing trial court's denial of defendant's writ of habeas corpus because insufficient evidence was produced to establish probable cause for essential element of crime); *Hulse v. Sheriff, Clark County*, 88 Nev. 393, 400-01, 498 P.2d 1317, 1321-22 (1972) (reversing denial of petition for writ of habeas corpus because there was insufficient evidence presented to magistrate at preliminary examination of unlawful intent, an "essential element of proof" for the crime); *Ex Parte Rovnianek*, 41 Nev. 141, 144, 168 P. 327, 328 (1917) ("[I]f the indictment does not allege every substantial element of the crime in question, no crime is in fact charged, and hence the petitioner should be discharged from [custody].").

B. The Indictment Does Not Adequately Allege A Violation Of The Class D Felony Statute

When the baseless "forgery" allegations are removed from indictment, it is unclear how the AG contends the Class D felony statute was violated, if at all. The Class D felony statute prohibits a notary from "willfully certif[ying] falsely that the execution of the instrument was acknowledged by any party thereto." NRS 205.120. The indictment in this case mimics the statutory language almost verbatim alleging in each of the 102 Class D felony counts that Lawrence "willfully certif[ied] falsely that the execution of this instrument was acknowledged." *E.g.*, Indictment at 4:6-7.

This allegation is entirely conclusory and provides no factual detail about how the Class D felony statute was violated. The indictment does not identify what, if any, aspect of the NODs were false. And it does not set forth any factual allegations that would explain *how* the NODs were false in any respect. *See State v. Hancock*, 114 Nev. at 164, 955 P.2d at 185 (an indictment

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must allege "facts showing *how* the defendant allegedly committed each element of the crime charged" (emphasis added)). The indictment merely contains a threadbare allegation that repeats the language of the statute, but provides no explanation for how the statute was violated. This allegation alone is insufficient, as it does not give Trafford notice of the charges against him. *See Sheriff, Clark County v. Standal*, 95 Nev. 914, 916-17, 604 P.2d 111, 112 (1979) (per curiam) ("[W]here the statutory language is conclusory, allegations phrased solely in such language are insufficient."); *Levinson*, 95 Nev. at 437, 596 P.2d at 233 ("[W]e have held that an information which alleges the commission of the offense solely in the conclusory language of the statute is insufficient."); *cf.*, *Sheriff, Clark County v. Blasko*, 98 Nev. 327, 329, 647 P.2d 371, 373 (1982) ("An accusation must include such a description of the acts alleged to have been committed as will enable the accused to defend against the accusation.").

Nor does an examination of the grand jury proceedings shed any light on how the AG contends the Class D felony statute was violated.[5] The AG did not explain its theory on the Class D felony statute to the grand jury – it merely read the text of statute to the grand jury. *See* Vol. 1, at 8:19-9:2. If required to guess as to the AG's theory, the only possibility is that Lawrence certified Trafford was physically present when she notarized the NODs. On its face, however, the Class D felony statute does not address the issue of notarizing a document outside the physical presence of the witness.

In short, the indictment merely parrots the conclusory statutory language, and, as a result, fails to adequately allege violations of the Class D felony statute. These 102 counts should therefore be dismissed in their entirety.

C. The Gross Misdemeanor Statute Does Not Apply Because Lawrence Was Personally Acquainted With Trafford

The indictment alleges in the 102 gross misdemeanor counts that Lawrence notarized NODs when Trafford was not physically present before her. *E.g.*, Indictment at 2:17. But the legislative history behind this statute shows that it was never intended to apply in a case such as

[5] And even if it did, it could not cure the defective indictment. *See Simpson*, 88 Nev. at 660, 503 P.2d at 1230 (rejecting argument that "a definite indictment is unnecessary in this case, because petitioner has access to the transcript of proceedings before the Grand Jury").

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this one, where Lawrence and Trafford were personally acquainted and had worked together for many years.

In testimony before the Nevada legislature in 2005, when NRS 240.155 was enacted, the sponsor of the bill from the Secretary of State's Office and the Nevada legislature made it expressly clear that it is not a crime to notarize a document outside the presence of the witness if the notary is personally acquainted with the witness. During discussion of the bill, Assemblyman John Carpenter asked:

> "Say a person wants to lease some property from my wife and me. They send a document on Friday afternoon by Federal Express. They want this document back by Wednesday of the next week so they can take it to their boss to have it approved. There is a person that has been notarizing my signature for 20 years and works in an attorney's office. We try to find him over the weekend, and he is not around. ***So I sign the document, and my wife takes it down to the notary. He notarizes it Monday morning, even though I'm in Carson City. Under this scenario, would the notary and myself be committing any gross misdemeanor?***"

Nevada Assembly Committee on Judiciary, Minutes of May 5, 2005, at 13 (emphasis added).[6] The official from the Secretary of State's Office, Renee Parker, responded:

> "***No. Because we do have situations where you are known to the notary, they can notarize your signature if they have been notarizing it for years.*** Section 1 is a person who is not in the presence of the notary public or unknown to the notary public. So in the circumstance of the notary public who has never notarized your signature, they would be committing a gross misdemeanor. ***In circumstances of someone you are known to, they would not be [committing a gross misdemeanor].***"

Id. (emphasis added). Thus, in response to the Assemblyman's question, the sponsor of the bill, Renee Parker from the Secretary of State's Office, expressly established that it would *not* be a

[6] Relevant excerpts from the legislative history of NRS 240.155 are attached as Exhibits 3 and 4 to the Porter Affidavit.

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gross misdemeanor to notarize a document outside the presence of the witness if the notary and the witness are personally acquainted.

And the legislative history does not end there. In testimony two weeks later, Assemblyman Carpenter again made this point clear for the official record:

> "***We need to make it part of the record that if it's a notary who has known someone for a long time, and if you're not in that presence and they notarize, they are not guilty of a gross misdemeanor.*** Ms. Parker stated that at the hearing, but I think it needs to be made part of the record so that does not happen. ***Very often you need to have something notarized, and maybe you can't be right there at the same time. If he or she has known you for a long time, it should be no problem.***"

Nevada Assembly Committee on Judiciary, Minutes of May 18, 2005, at 26 (emphasis added). This statement of legislative intent could not be more clear: NRS 240.155 does not apply when the notary is personally acquainted with the witness. And that is precisely what the evidence presented to the grand jury established: Trafford and Lawrence knew each other personally and had worked together for many years. *See, e.g.*, Vol. 1, at 129:18-22.

A court interpreting a Nevada statute is required to give effect to this unambiguous legislative intent. *See Anthony Lee R. v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997) ("Generally, when the words in a statute are clear on their face, they should be given their plain meaning unless such a reading violates the spirit of the act. . . . When the words of a statute clearly contradict the legislature's intent, the intent of the legislature will predominate[.]"); *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986) ("The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute. This intent will prevail over the literal sense of the words." (citation omitted)).

Thus, the evidence presented to the grand jury does not constitute a violation of the gross misdemeanor statute, and these 102 counts should be dismissed.

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D. The AG's Aiding And Abetting Theory Is Improperly Pled And Is Not Based On Probable Cause

Separately and independently, the indictment should be dismissed in its entirety because the AG's theory of aiding and abetting liability on all counts is fatally flawed. The allegations of aiding and abetting in the indictment on all counts are improperly conclusory, and with respect to the Class C felony counts, the allegations are actually internally inconsistent. Moreover, there was no evidence presented to the grand jury that Trafford intended to violate the notary statutes at issue in this case, and thus, there was no probable cause that Trafford acted with the intent necessary for aiding and abetting on the Class D and gross misdemeanor counts.

1. The Aiding And Abetting Allegations Are Inconsistent and Impermissibly Conclusory

Nevada law imposes a heightened pleading standard on allegations of aiding and abetting liability: "where the prosecution seeks to establish a defendant's guilt on a theory of aiding and abetting, the indictment should *specifically allege* the defendant aided and abetted, and should provide additional information as to the *specific acts* constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense." *Barren v. State*, 99 Nev. 661, 668, 669 P.2d 725, 730 (1983) (emphasis added). The indictment here falls far short of meeting this standard on all 306 counts.

The indictment contains no allegations that would specify how Trafford allegedly aided and abetted alleged violations of the Class C felony statute. In fact, the allegations of aiding and abetting on the Class C felony counts are inconsistent, and, as a result, it is unclear whether Trafford is being charged with aiding and abetting liability or as a primary violator on these counts. The introductory paragraph of the indictment says that Trafford is being charged as a primary violator on all 102 Class C felony counts: "TRAFFORD . . . has committed the offenses of . . . OFFERING FALSE INSTRUMENTS FOR FILING OR RECORDING; a category C felony in violation of NRS 239.330." Indictment at 1:21-25. Count 2 and Count 605 of the indictment also do not allege aiding and abetting liability, indicating that Trafford is being charged as a primary violator. *See id.* at 3:5-7, 438:1-3. However, in the remaining 100 Class C

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felony counts, the indictment alleges "AID & ABET." *E.g.*, *id.* at 14:1-3. Thus, the indictment is inconsistent: on the one hand, it alleges that all 102 counts against Trafford are for primary violations of the Class C felony statute; but at the same time, in 100 of the specific counts, the indictment actually alleges "AID[ING] & ABET[TING]" liability.[7]

As a result of this inconsistency on the Class C felony counts, the indictment is impermissibly indefinite and does not give Trafford adequate notice of the charges against him so that he can prepare his defense on these counts. *See Simpson*, 88 Nev. at 660, 503 P.2d at 1229 ("[A]n indictment is deficient unless it 'sufficiently apprises the defendant of what he must be prepared to meet.' . . . [A]n indefinite indictment not only deprives a defendant of such notice, but in effect allows a prosecutor or court to usurp the function of the Grand Jury." (quoting *Russell v. United States*, 369 U.S. 749, 763, 82 S. Ct. 1038, 1047 (1962))). Trafford should not be required to guess as to the AG's theory of liability against him on the Class C felony counts, the most serious counts in the indictment. *See id.* at 660-61, 503 P.2d at 1230 ("[W]e may [not] countenance an indefinite indictment whenever we feel a defendant might glean the prosecutor's theory of means from whatever evidence he presented to show probable cause.").

The aiding and abetting allegations on the Class D and gross misdemeanor counts are fatally flawed as well because they are entirely conclusory and do not contain any factual allegations that would explain how Trafford aided and abetted Lawrence's violations of these statutes. In the Class D counts, the indictment alleges that Trafford "planned, directed, and arranged" to have Lawrence "forge and willfully certify falsely that the execution of this instrument was acknowledged." Indictment at 4:3-7. The gross misdemeanor counts are similarly conclusory, alleging that Trafford "planned, directed, and arranged" to have Lawrence "forge and notarize his signature" when Trafford was not physically present. *E.g.*, *id.* at 2:20-26.

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[7] This inconsistency is not resolved by looking at the substantive allegations in the individual Class C felony counts. All 102 Class C felony counts contain identical boilerplate allegations with respect to how Trafford allegedly violated the statute. The counts all allege that Trafford committed the alleged conduct of filing of an allegedly "forged" document with the Clark County Recorder's Office "either directly or through an agent or employee." *E.g.*, *id.* at 3:11-13. This language is ambiguous: on the one hand, it could be interpreted as alleging that Trafford filed the "forged" documents "directly"; on the other hand, it could be interpreted as alleging that Trafford aided and abetted the actions of an "agent or employee."

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That is the entirety of the allegations of aiding and abetting – the indictment is entirely devoid of any factual allegations of what Trafford allegedly did to "plan," "direct," or "arrange" for Lawrence to violate these statutes. Nevada law is clear that conclusory allegations such as these are wholly insufficient to plead aiding and abetting liability. *See Lane v. Torvinen*, 97 Nev. 121, 123, 624 P.2d 1385, 1386 (1981) ("[A]n indictment alleging that a defendant aided and abetted the commission of a crime must provide information as to the acts performed by the defendant. Conclusory allegations are insufficient."); *Standal*, 95 Nev. at 916, 604 P.2d at 112 (rejecting "conclusory" aiding and abetting allegation that "fail[ed] to give defendant the slightest information as to the acts she performed which make her guilty of a crime").

The AG's failure to allege any facts to support its allegations of aiding and abetting liability, or to even specify whether it is pursuing a theory of aiding and abetting liability on the Class C felony counts, requires dismissal of all counts in the indictment.

2. The AG Presented To The Grand Jury That Trafford Aided And Abetted The Class D And Gross Misdemeanor Counts

In order to be held liable as an aider and abettor, the government must prove that the person acted with the criminal mental state required for the underlying crime. *See Ford v. State*, __ Nev. __, 262 P.3d 1123, 1127 (2011) (aiding and abetting liability requires that "the aider and abettor 'knowingly aid[ ] the other person with the intent that the other person commit the charged crime.'" (quoting *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) (per curiam)). Here, the class D and gross misdemeanor statutes prohibit only "willful" violations of these statutes. *See* NRS 205.120 & 240.155. And "willful" conduct necessarily requires "conscious awareness of a wrongful act." *Robey v. State*, 96 Nev. 459, 461, 611 P.2d 209, 210 (1980) (per curiam). Thus, in order to create probable cause for aiding and abetting liability, the AG was required to present evidence to the grand jury that Trafford knew the manner in which Lawrence was notarizing the NODs was legally improper, and that he nevertheless intended to violate the law. *See Bryan v. United States*, 524 U.S. 184, 191-92, 118 S. Ct. 1939, 1945 (1998) ("In other words, in order to establish a 'willful' violation of a statute, the Government must

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prove that the defendant acted with knowledge that his conduct was unlawful." (quotations omitted)).

The AG utterly failed to meet this burden of presenting evidence to the grand jury to create probable cause that Trafford acted with this requisite intent. The Class D felony and the gross misdemeanor statutes regulate the manner in which notaries should notarize documents. But there was no evidence presented to the grand jury that Trafford was a notary (he was not), or that he ever received training on what was required under Nevada law to properly notarize legal documents. Nor was there any evidence presented to the grand jury that anyone, including the notary who allegedly notarized the documents (Tracy Lawrence), ever told Trafford that the manner in which the documents were being notarized ran afoul of Nevada law. In order for there to be probable cause for a crime, the evidence must tilt toward guilt. *See Graves v. Sheriff, Clark County*, 88 Nev. 436, 439, 498 P.2d 1324, 1326 (1972) ("Probable cause requires that the evidence be weighed toward guilt, though there may be room for doubt."). Here there was no evidence presented to the grand jury that Trafford ever acted with intent to violate the law, which is required for aiding and abetting a notary's "willful" violation of these notary statutes. Given this absence of probable cause, Trafford's writ should be granted on the 204 Class D and gross misdemeanor counts.

E. All Counts In The Indictment Are Barred By The Statutes Of Limitations

The 102 NODs at issue in the counts against Trafford were signed, notarized, and filed with the Clark County Recorder's Office between December 2, 2005, and November 12, 2008. *See* Indictment at 22 (earliest count); 171 (latest count). The AG obtained the indictment in this case on November 15, 2011, more than three years after the latest conduct at issue in the case. *Id.* at 439. Thus, all 306 counts are barred by the applicable statutes of limitations. *See* NRS 171.085(2) (three year statute of limitations for felonies); NRS 171.090 (two year statute of limitations for gross misdemeanors).[8]

[8] The statute of limitations for "forgery" is four years. *See* NRS 171.085(1). As explained *supra*, however, the "forgery" allegations in the indictment are entirely baseless. In the event that the Court finds that the AG has somehow properly asserted "forgery" claims, then all the felony "forgery" charges in the indictment before November 15, 2007 would be barred by the four-year statute of limitations. The felony counts alleged against Trafford before November 15, 2007, are

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The AG attempts to circumvent the statutes of limitations in this case with the boilerplate allegation repeated in each of the 306 counts that "[t]hese actions were performed in a ***secretive manner*** in order that the false documents be given full legal effect and that this criminal activity not be discovered." *E.g.*, Indictment at 2:26-3:1 (emphasis added). The brief of Defendant Sheppard explains in detail why this allegation is insufficient to allow the AG to avoid the applicable statutes of limitations – Trafford joins fully in those arguments.

In addition to the pleading defects identified in Sheppard's brief, there was no probable cause for the "secretive manner" allegations against Trafford, since the AG failed to present ***any evidence*** to the grand jury to establish that Trafford attempted to keep anything secret in any way, much less in a "deliberately surreptitious manner" as required under Nevada law to toll the statute of limitations. *See State v. Quinn*, 117 Nev. 709, 714, 30 P.3d 1117, 1121 (2001) (quotations omitted).

In sum, the indictment's rote "secretive manner" allegation does not allow the AG to toll the statute of limitations indefinitely. And there was simply no evidence presented to the grand jury to support the AG's baseless allegation that Trafford attempted to conceal any conduct. Thus, all 306 counts alleged in the indictment should be dismissed as barred by the statute of limitations.

F. The Prosecution Engaged In Misconduct By Presenting Deceptive Legal Instructions And Prejudicial Evidence To The Grand Jury

Trafford joins in the arguments made by Defendant Sheppard in her brief explaining why the indictment should be dismissed in its entirety due to the prosecution's misconduct before the grand jury. Trafford writes separately to address the two most egregious instances of misconduct, both of which independently justify dismissal of the indictment.

Counts 16, 18, 19, 21, 28, 30, 31, 33, 34, 36, 40, 42, 43, 45, 46, 48, 49, 51, 52, 54, 55, 57, 58, 60, 61, 63, 64, 66, 67, 69, 133, 135, 136, 138, 139, 141, 142, 144, 145, 147, 148, 150, 151, 153, 154, 156, 157, 159, 160, 162, 163, 165, 235, 237, 239, 240, 241, 243, 244, 246, 247, 249, 250, 252, 253, 255, 256, 258, 259, 261, 262, 264, 265, 267, 268, 270, 271, 273, 274, 276, 277, 279, 280, 282, 283, 285, 286, 288, 289, 291, 292, 294, 295, 297, 298, 300, 301, 303, 304, 306, 307, 309, 310, 312, 313, 315, 316, 318, 319, 321, 322, 324, 325, 327, 604, and 606.

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1. The Prosecution Actively Misled The Grand Jury On The Definition Of "Forgery"

First, the AG's fundamental misunderstanding of the basic definition of "forgery" actively misled the grand jury and critically tainted the integrity of the grand jury proceedings. As explained in detail previously, not only did the prosecutor fail to instruct the grand jury on the correct definition of "forgery," it coerced the key witness, Tracy Lawrence, into believing that the authorization that she had received to sign Trafford's name was irrelevant to the issue of "forgery." Vol. 1, at 154:6-18 ("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.*" (emphasis added)). In so doing, the prosecutors failed in their essential duty of properly informing the grand jury as to the legal requirements for the crimes charged. *See State v. Babayan*, 106 Nev. 155, 170, 787 P.2d 805, 816 (1990) (per curiam) ("It is incumbent on prosecutors who make presentations before grand juries to be adequately informed of the facts and to have conducted sufficient legal research to enable them to properly inform the grand jury on the law.").

This misconduct was affirmatively misleading, and deceived the grand jury on what was required to establish probable cause for "forgery." The grand jury's confusion was manifest throughout the proceedings. Early in the proceedings, one grand juror was examining an NOD, and in trying to make sense of the AG's theory, asked the prosecutor: "I presume later you're going to, one of these signatures may be forged; is that correct?" Vol. 1, at 61:10-12. The prosecutor responded: "We'll submit evidence that will answer your question sufficiently with Tracy Lawrence who will be testifying later today." *Id.* at 61:13-15. But when Lawrence testified, the prosecution did not accurately instruct the grand jury as to the definition of "forgery"; instead, it misled the grand jury when it strong-armed Lawrence into accepting its erroneous position that lack of authorization was irrelevant to the crime of "forgery."

Later in the proceedings, with the confusion mounting, another grand juror asked questions in an attempt to determine why the signatures were "forged." The grand juror asked Jennifer Bloecker whether she was ever told to "forge" a document: "Did they use the word forge or forgery?" Vol. 2, at 50:2. Bloecker responded: "I don't remember. I'm sorry, it was so long

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ago." *Id.* at 50:3-4. Struggling for some kind of explanation for why the signatures were improper, the grand juror followed up: "Did you ever trace the signature, hold a piece of paper up to a glass and another piece of paper and trace over it at all, to anyone's signature?" *Id.* at 50:5-7. Bloecker again responded: "I honestly do not remember if someone told me to or not." *Id.* at 50:10-11. The grand juror was clearly trying to understand why the signatures were "forged," as opposed to innocently signed on another person's behalf.

The prosecutors never attempted to rectify this confusion by telling the grand jury that a signature is not forged if the person has authorization. Instead, the prosecution gave the grand jury the exact opposite incorrect legal definition, and therefore affirmatively deceived the grand jury on the central component of its case. The grand jury was clearly confused and misled; the prosecution's misconduct requires that the indictment be dismissed. *See United States v. Wright*, 667 F.2d 793, 796 (9th Cir. 1982) (explaining that an indictment will be dismissed for improper legal instructions when "the conduct of the prosecuting attorney was flagrant to the point that the grand jury was 'deceived' in some significant way"); *United States v. Peralta*, 763 F. Supp. 14, 20-21 (S.D.N.Y. 1991) (dismissing indictment where prosecutor did not "merely fail to instruct the grand jury on a question of applicable law," but rather "relied on . . . misleading statements of the meaning of" a legal term central to the government's case).[9]

2. The Prosecution Offered Prejudicial Hearsay Testimony And Then Improperly Prevented The Grand Jury From Learning The Truth

The second instance of egregious prosecutorial misconduct occurred when the AG's chief investigator offered extremely inflammatory and baseless hearsay evidence to the grand jury, and then the prosecutors improperly prevented the grand jury from learning the truth. During his testimony, Investigator Grosz said that "we've had individuals who said I was never late in my

[9] In the wake of the recent nationwide increase in foreclosures, other prosecutors in the offices of attorneys general in other states have pursued a similar misunderstanding of the law of "forgery." Two assistant attorneys general from Florida were fired for pursuing the same kind of baseless "forgery" claims that the Nevada AG pursues here. In a recently published report, the Inspector General of Florida confirmed that the terminations were justified in light of the prosecutors' failure to understand the fundamental definition of "forgery." Report of Inquiry Number 12312, at 78 (facts "did not support a violation of the legal definition of forgery"), available at: http://miamiherald.typepad.com/files/cfo-ig-report-on-bondi.pdf.

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payments but yet my house has been foreclosed on." Vol. 1, at 100:17-19. Investigator Grosz's testimony constituted hearsay: statements from homeowners that they had been wrongfully foreclosed upon. *See Stephans v. State*, __ Nev. __, 262 P.3d 727, 731 (2011) ("hearsay [is] an out-of-court statement offered in evidence to prove the truth of the matter asserted" (quotations omitted)). Presentation of this testimony to the grand jury was a violation of NRS 172.135(2): "The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."

In this case, it is hard to imagine anything more prejudicial than Investigator Grosz's testimony that homeowners said they had been foreclosed upon even though they were not in default on their mortgage payments. Indeed, when the grand jury transcripts were leaked to the press soon after the indictment was filed in this case, this excerpt of Investigator Grosz's hearsay testimony was featured prominently in local Las Vegas media coverage.[10] The highly inflammatory nature of this hearsay evidence requires that the indictment be dismissed. *See Sheriff, Clark County v. Frank*, 103 Nev. 160, 165, 734 P. 2d 1241, 1245 (1987) (per curiam) (dismissing indictment where prosecution presented "highly inflammatory hearsay evidence"); *Lane v. Second Judicial Dist. Court, Washoe County*, 104 Nev. 427, 446, 760 P.2d 1245, 1257 (dismissing indictment for violation of NRS 172.135 where evidence "was highly inflammatory . . . hearsay evidence").

Although this highly inflammatory evidence alone mandates dismissal, the prosecutorial misconduct that occurred next leaves no doubt that dismissal is warranted here. When Investigator Grosz offered this prejudicial testimony, the prosecution clearly should have told the grand jury the truth: that the AG had no evidence that any homeowner had been wrongfully foreclosed upon, and that all of the NODs at issue in this case were issued to homeowners that were in default on their mortgages. *See Napue v. Illinois*, 360 U.S. 264, 270, 79 S. Ct. 1173,

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[10] *See, e.g.*, Marissa Mike & Phillip Moyer, Massive foreclosure fraud's scope revealed by transcripts, Dec. 8, 2011 ("According to the investigator, some of the forged documents contained information that had not been verified by those signing them. This sometimes led to the wrongful foreclosure of houses because of the inaccuracies."), available at: http://www.mynews3.com/mostpopular/story/Massive-foreclosure-frauds-scope-revealed-by/Jj-a3x51MkiKX0oSstzSUQ.cspx.

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1177 (1959) (a prosecutor "has the responsibility and duty to correct what he knows to be false and elicit the truth" (quotations omitted)); *cf.* NRS 172.145(2) ("If the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury.").

However, instead of telling the grand jury the truth, the AG compounded the error further and took affirmative steps to prevent the grand jury from learning the truth. After Investigator Grosz offered his inflammatory hearsay testimony, a grand juror asked Investigator Grosz to identify a specific instance where a borrower had been wrongfully foreclosed upon: "Can you give us an example of someone who was foreclosed on that really was not in default?" *Id.* at 102:5-6. Surprised at actually being asked to identify an instance where a borrower was actually wrongfully foreclosed upon, and stumbling for a response, Investigator Grosz asked whether the grand juror wanted an example of a borrower "[b]y name?" *Id.* at 102:7. The grand juror said yes, by name if possible: "Possibly. If so." *Id.* at 102:8.

At that point, before Investigator Grosz could respond, the prosecutors interrupted and prevented Investigator Grosz from answering the grand juror's question. Grasping for a justification to preclude the grand juror's line of questioning, the first prosecutor said:

> [Investigator Grosz], actually I hate to do this, but I don't think that's something we can get into. I don't want to get into – it's really not relevant to what we're talking about. It's kind of an interesting area but it's really not relevant to the charges that we've brought here today, specific incidents, unless – you'll look in the evidence, you'll take a look at them, but absent that we really shouldn't get into that area of questioning.

Id. at 102:9-17. The other prosecutor chimed in as well with another rationalization for preventing Investigator Grosz from answering the question: "We want to make sure that we stick to the evidence that we're submitting and not get into hearsay evidence or something that is not actually part of this case." *Id.* at 102:18-21. Faced with this effort by the prosecutors to preclude this line of inquiry, the grand juror gave up on his question. *Id.* at 102:22.

By preventing the grand jury from asking questions of Investigator Grosz regarding the basis for his earlier hearsay testimony, the prosecutors impermissibly impaired the grand jury's

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independence and prevented it from carrying out its essential truth-seeking function. *See Babayan,* 106 Nev. at 170, 787 P.2d at 816 (noting that prosecutor's act of "curtailing relevant questioning" from grand jurors improperly "impaired [the grand jury's] independence"). If allowed to question Investigator Grosz, the grand juror likely would have discovered that the AG had no evidence that any homeowner had ever been wrongfully foreclosed upon as a result of the NODs in this case. But because of the prosecutors' insistence that no questions should be allowed on this issue, the grand jury was prevented from learning this truth, and Investigator Grosz's highly inflammatory and prejudicial hearsay testimony was allowed to stand unchallenged. The presentation of hearsay testimony alone violated NRS 172.135(2), and the subsequent prosecutorial misconduct critically impaired the grand jury's essential truth-seeking function. *See Lane,* 104 Nev. at 441, 760 P.2d at 1254 ("In presenting a case to a grand jury, a prosecutor . . . must scrupulously refrain from words or conduct that will . . . tend to influence the jurors in their judgment." (quoting *Franklin v. State,* 89 Nev. 382, 386, 513 P.2d 1252, 1255 (1973)).

The Nevada Supreme Court's decision in *Frank* is directly on point here. *See* 103 Nev. at 165, 724 P.2d at 1244. In that case, the prosecution allowed "witnesses to present inadmissible and highly inflammatory hearsay evidence." *Id.* The prosecution also "actively discouraged the grand jury from receiving and exploring evidence of the prior false accusations" that could have explained away the inflammatory allegations. *Id.* In one instance, when the testifying detective began to respond to a grand juror's question, the prosecutor "interrupted the testimony, stated that he did not believe this evidence was relevant, and asked the grand jury to disregard it." *Id.* at 162. The court found that "the actions of the deputy district attorney, coupled with the admission of hearsay evidence . . . , irreparably impaired the proper performance of the grand jury's mission to pursue its investigation independently of the prosecuting attorney." *Id.* The Nevada Supreme Court therefore found that dismissal of the indictment was proper. *Id.* at 166.

So too here. The AG allowed its chief investigator to offer highly inflammatory and inadmissible hearsay evidence that homeowners said they had been wrongfully foreclosed upon. Then, when a grand juror attempted to discover the basis for this improper hearsay statement, the

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prosecution interrupted the investigator's response, and thus, actively prevented the grand jury from fulfilling its essential role to question the witness in order to determine whether the hearsay statement had any basis in fact. As in *Frank*, this prosecutorial misconduct calls for dismissal of the indictment.

3. The Indictment Should Be Dismissed With Prejudice, Or, In The Alternative, Without Prejudice

In light of the misconduct that occurred before the grand jury in this case, the indictment should be dismissed with prejudice. Dismissal of an indictment is warranted "to eliminate prejudice to a defendant and to curb the prosecutorial excesses of a [prosecutor]." *Babayan*, 106 Nev. at 173, 787 P.2d at 818. And "dismissal *with prejudice* . . . is most appropriate upon a finding of aggravated circumstances and only after a balancing of its deterrent objectives with the interest of society in prosecuting those who violate the laws." *Id.* (emphasis in original). The Court should dismiss the indictment with prejudice here to deter the AG's pursuit of the case without regard to the fundamental definition of the crimes charged and to deter the use of improper tactics before the grand jury. Moreover, society has no interest in pursuing a case against Trafford who, as explained *supra*, has committed no crime – there is no probable cause for "forgery," no probable cause that Trafford aided and abetted any alleged violations of the notary statutes at issue in this case, and all 306 counts are barred by the statutes of limitations.

However, in the event that the Court disagrees that dismissal should be with prejudice, Trafford respectfully requests that the Court dismiss the indictment without prejudice, so, at the very least, the AG will be required to attempt to obtain a valid indictment without misleading the grand jury as to the definition of the crimes charged, and without resorting to the other improper tactics before the grand jury detailed in the briefs of both Trafford and Sheppard. *See Frank*, 103 Nev. at 166, 734 P.2d at 1245 (approving of dismissal without prejudice where "respondent's petition specifically requested the district court to issue a writ of habeas corpus with leave for the state to proceed anew in a proper fashion").

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V. CONCLUSION

For all the foregoing reasons, Gary Trafford's writ of habeas corpus and motion to dismiss should be granted.

DATED this 9th day of April, 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 14th day of May, 2012 at 9:00 a.m. in the District Court, Department No. V.

DATED this 9th day of April, 2012.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of April, 2012, and pursuant to NRCP 5(b), I served a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS**, to be served, via Hand Delivery, in a sealed envelope, addressed to the following:

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