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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

* * *


THE STATE OF IDAHO,
Plaintiff, Case No. CV23-00566
vs. Dept. No. 8
BRYAN C. KOHBERGER,
Defendant.

MOTION TO QUASH FOREIGN SUBPOENA

Comes now, KELLI ANNE VILORIA, counsel for BETHANY GRACE FUNKE, and respectfully moves to quash the Foreign Subpoena - Out of State Commission obtained by Evelyn Grosenick, Interim Washoe County Public Defender on behalf of Defendant, BRYAN C. KOHBERGER for preliminary hearing in this case.

This motion is made and based upon the attached Points and Authorities, all papers and pleadings on file herein, and any evidence and argument to be heard on the matter.

DATED this 21st day of April, 2023.

By: 
KELLI ANNE VILORIA, Esq.
Attorney For
BETHANY GRACE FUNKE

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. FACTS**

3 On April 3, 2023, Evelyn Grosenick, Interim Washoe County Public Defender sought and
4 obtained an ex-parte Foreign Subpoena, which was issued April 11, 2023 that purports to require
5 Bethany Grace Funke to appear in the Second Judicial District Court of the State of Idaho, County
6 of Latah on “*June 28, 2023 (sic) at 8:00am and for the duration of the trial or when released by*
7 *the court to testify in the above named case.*” The items provided in support of this subpoena
8 were an ex parte: *Request For Foreign Subpoena – Out Of State Commission which contained*
9 *the following: Certificate of an Idaho Judge To Secure The Attendance Of An Out Of State*
10 *Witness; Ex Parte Motion For Certificate To Secure The Attendance Of An Out Of State Witness;*
11 *and Affidavit In Support Of Motion For Out Of State Service.*

12 The *Affidavit In Support Of Motion For Out Of State Service* further claims that Ms. Funke
13 (who name is repeatedly misspelled) has “information material to the charges against Mr.
14 Kohburger (sic); portions of information Ms. Funke has is exculpatory to the defendant.” These
15 statements are conclusory, without support and there is no further information or detail pertaining
16 to the substance of the testimony, its materiality or the alleged exculpatory information of Ms.
17 Funke or why it would be entertained at preliminary hearing. Moreover, the subpoena was issued
18 by the Clerk of the Court without hearing. No hearing has been set for Ms. Funke to address these
19 concerns. This motion follows.

20 **II. ARGUMENT**

21 **THE COURT SHOULD QUASH THE FOREIGN SUBPOENA ISSUED**
22 **PURPORTING TO COMPEL MS. FUNKE’S ATTENDANCE AT THE IDAHO**
23 **PRELIMINARY HEARING IN THIS CASE**

24 NRS 174.305 through NRS 174.385 governs the issues of a subpoena in criminal court.
25 NRS 174.395 through NRS 174.445 governs the procedure for securing the attendance of a
26 witness for testimony outside of this State. NRS 174.415 in particular addresses the process for
27 summoning of a Nevada witness to testify in another state.

28 Specifically, NRS 174.415(10) requires the Court to “fix a time and place for a hearing”
before it can issue any order directing testimony in another state. This hearing is necessary to
provide a venue where “the judge determines that the witness is material and necessary, that it

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1 will not cause undue hardship to the witness to be compelled to attend and testify in the
2 prosecution or a grand jury investigation in the other state, and that the laws of the state in which
3 the prosecution is pending, or grand jury investigation has commenced or is about to commence
4 (and of any other state through which the witness may be required to pass by ordinary course of
5 travel)....” (emphasis added).

6 Once that procedure is followed and that burden is met, then and only then shall the judge
7 “issue a summons, with a copy of the certificate attached, directing the witness to attend and
8 testify in the court where the prosecution is pending, or where a grand jury investigation has
9 commenced or is about to commence at a time and place specified in the summons. In any such
10 hearing the certificate shall be prima facie evidence of all the facts stated therein.” Id.

11 Moreover, there is no authority for an **Idaho criminal defendant** to summon a Nevada
12 witness to Idaho **for preliminary hearing**. There is also no authority for an Idaho criminal
13 defendant to summon a Nevada witness to an Idaho matter without a hearing and there is no
14 authority to summon a Nevada witness to an Idaho matter without a Nevada Judge making a
15 finding of materiality, necessity and the lack of undue hardship. NRS 174.315 does contemplate
16 a Nevada criminal defendant’s ability to subpoena a witness to appear before a court in Nevada.
17 However, there is also a requirement for a hearing requirement there. Thus, even if that law
18 applied by analysis, no hearing occurred and that important procedural requirement was not met.

19 Additionally, NRS 174.415(1) provides that “if a judge of a court of record in any state
20 which by its laws has made provision for commanding persons within that state to attend and
21 testify in this State certifies under the seal of such court that there is a criminal prosecution
22 pending in such court, or that a grand jury investigation has commenced or is about to commence,
23 that a person being within this State **is a material witness in such prosecution, or grand jury**
24 **investigation**, and that the person’s presence will be required for a specified number of days,
25 upon presentation of such certificate to any judge of a court of record in the county in which
26 such person is such judge shall fix a time and place for a hearing, and shall make an order
27 directing the witness to appear at a time and place certain for the hearing.” (emphasis added)

28 Importantly here, there is no certification by any judge of any a court of record in any state
(Nevada or Idaho) that clearly states Bethany Grace Funke is a material witness in such
prosecution, or grand jury investigation. A close reading of the certification purported to be

1 from a judge, merely states Ms. Funke “may” be a material witness. This insufficient under the
2 law for this foreign subpoena to stand.

3 Lastly, as this Court is well aware, a preliminary hearing is limited to a finding of probable
4 cause, rather than reasonable doubt, which is the evidentiary burden at trial. This is the same
5 standard in both Idaho and Nevada. *See State v. Mantz*, 148 Idaho 303, 307, 222 P.3d 471, 475
6 (Ct. App. 2009); *see also Marcum v. Sheriff* 85 Nev. 175, 451 P.2d 845 (1969) (which
7 specifically holds that a preliminary is not a substitute for trial and the purpose of a preliminary
8 hearing is to determine whether a public offense has been committed and whether there is
9 sufficient cause to believe that the accused committed it.) A preliminary hearing is not meant to
10 become a mini-trial due to its limited purpose in deciding of probable cause. *Id.*

11 Arguably then, even if Ms. Funke possesses exculpatory evidence, which remains
12 unknown, there is no place or reason to present that evidence at a preliminary hearing. A
13 preliminary hearing requires the state to offer competent evidence to support probable cause and
14 convince the magistrate that a trial should be held not the issue of innocence or guilt of the
15 defendant. Exculpatory evidence is an issue for trial, which the documents presented
16 misleadingly suggest the preliminary hearing to be.

17 For all of these reasons, the subpoena served upon Ms. Funke is improper. Accordingly,
18 the Court should quash the subpoena issued purporting to compel Ms. Funke’s attendance at
19 preliminary hearing in this case.

20 **III. CONCLUSION**

21 The Foreign Subpoena was improperly issued. There was no component of the statutes
22 followed in issuing it and the Court should quash the subpoena issued to Ms. Funke now.

23 **AFFIRMATION PURSUANT TO NRS 239B.030**

24 The undersigned does hereby affirm that the preceding document does not contain the
25 social security number of any person.

26 **DATED** this 21st day of April, 2023.

27 VILORIA, OLIPHANT
28 OSTER & AMAN L.L.P.

By: 
KELLI ANNE VILORIA, Esq.

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