IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA Appellant, v. LACY THOMAS, Respondent.	)	Case No. 58833

FAST TRACK STATEMENT

1. Name of party filing this fast track statement: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Judicial district, county, and district court docket number of lower court proceedings:

Eighth Judicial District Court, Clark County, Nevada; Case No. 08C241569

5. Name of judge issuing decision, judgment, or order appeal from:

District Court Judge Michael P. Villani

6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last? 10 days

7. Conviction(s) appealed from: -NA-

8. Sentence for each count: -NA-

9. Date district court announced decision, sentence, or order appealed from: June 3, 2011

10. Date of entry of written judgment or order appealed from: June 3, 2011

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: -NA-

11. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court: -NA-

12. If the time for filing the notice of appeal was tolled by a post-judgment motion,

(a) specify the type of motion, and the date of filing of the motion: -NA-

(b) date of entry of written order resolving motion: -NA-

13. Date notice of appeal filed: July 1, 2011

14. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015, or other:

NRAP 4(b)(1)(B)

15. Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from: NRS 177.015(1)(b)

16. Specify the nature of disposition below, e.g., judgment after bench trial, judgment after jury verdict, judgment upon guilty plea, etc.:

Order granting Defendant's pre-trial motion to dismiss the grand jury indictment.

17. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeal after post-conviction proceedings): -NA-

18. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this

appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants): -NA-

19. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues you intend to raise in this appeal: -NA-

20. Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript):

On February 20, 2008, the State of Nevada charged Respondent Lacy Thomas (Thomas) by Grand Jury Indictment with: Counts 1-5 – Theft (Felony – NRS 205.0832, 205.0835), and Counts 6-10 – Misconduct of a Public Officer (Felony – NRS 197.110). 3 AA 514-521. On February 28, 2008, Thomas was arraigned and pleaded not guilty. 3 AA 522. On March 22, 2010, Thomas proceeded to trial. 3 AA 523. On Day 10 of Thomas's trial, April 2, 2010, the district court declared a mistrial based on pre-trial discovery issues. 3 AA 524-588. On April 8, 2010, the district court reset the trial date to August 2, 2010. 3 AA 589-596.

On February 11, 2011, Thomas filed three motions to dismiss, two of which separately alleged that: (1) trial on the Indictment would violate the Double Jeopardy Clause because the State's failure to turn over discovery caused the April 2, 2010 mistrial; and (2) the Indictment should be dismissed because the State failed to present the previously undisclosed discovery material to the grand jury. 3 AA 607-640. The third motion to dismiss, which is the subject of this appeal, alleged the Indictment should be dismissed because: (1) it was unconstitutionally multiplicitous and redundant in that Counts 1-5 alleging Theft were based on the same conduct underlying Counts 6-10 alleging Official Misconduct; and (2) NRS 197.110(2) (Official Misconduct) [1] and 205.0832(1)(b) (Theft),[2] are void for vagueness as applied to Thomas in the

[1] NRS 197.110(2) provides: "Every public officer who…(2) Employs or uses any person, money or property under the public officer's official control or direction, or in the public officer's official custody, for the private benefit or gain of the public officer or another, is guilty of a category E felony…"

[2] NRS 205.0832(1)(b) provides: "…a person commits theft if, without lawful authority, the person knowingly…Converts, makes an unauthorized transfer of an interest in, or without

Indictment; Thomas alleged he lacked notice that he was committing Theft or Official Misconduct by negotiating grossly one-sided contracts with his friends and associates for which he knew no work would be or was being performed. 3 AA 507-606. The State filed its Opposition to the motion on March 17, 2011, and Thomas filed a Reply brief on March 28, 2011. 3 AA 646-668.

The district court heard argument on April 28, 2011, and issued a written order on June 3, 2011, which entirely dismissed the Indictment. 3 AA 672-735; 736-742. The order held that NRS 205.0832 was vague as applied to Thomas in the Indictment because it "merely put a person of ordinary intelligence on notice that by entering into an ill-conceived contract they may at a later date be charged with a crime." 3 AA 741. The district court asked rhetorically, "under what circumstances will the government file criminal chargers [*sic*] for entering into an ill-conceived contract?" 3 AA 741. The order further opined that, "[t]he characterization of the crimes charged in the Indictment does nothing more than put Thomas on notice that he/UMC may have entered into an ill conceived contract and that by entering into such a contract, his conduct is now deemed criminal in nature." 3 AA 741.[3] The State filed its timely Notice of Appeal and Case Appeal Statement on July 1, 2011. 3 AA 743-747.

21. Statement of facts. Briefly set forth the facts material to the issue on appeal:

Respondent Lacy Thomas (Thomas) is the former, now terminated, Chief Executive Officer (CEO) of University Medical Center (UMC). This case arises out of contractual relationships Thomas negotiated on behalf of UMC with his close friends and associates from Chicago, Ill. Thomas entered into several of those contractual relationships with close friends who were his college fraternity brothers from Chicago. AA 86; 89. Thomas negotiated the first of these contractual relationships with Frasier Systems, a purported consulting firm owned by

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authorization controls any property of another person, or uses the services or property of another person entrusted to him or her or placed in his or her possession for a limited, authorized period of determined or prescribed duration or for a limited use."

[3] The district court expressly declined to resolve Thomas's separate motions to dismiss alleging a double jeopardy violation and failure to disclose exculpatory evidence. The district court further appears to have declined to consider the portion of Thomas's motion alleging the Indictment contained redundant, multiplicitous counts.

his close friend Greg Boone. AA 96-100. Frasier Systems was established five (5) days after Thomas assumed UMC's CEO position; it had no employees or a current business license, and was headquartered in Boone's mother's garage. AA 96-98; 108. Thomas negotiated a consulting contract which paid Frasier Systems $50,400.00 in exchange for Boone essentially regurgitating in a brief PowerPoint presentation information he received from UMC's IT department. AA 99-101. Thomas then negotiated an additional $286,700.00 contract with Frasier Systems for the creation of a Project Manager's office at UMC, although UMC already had a Project Manager. AA 101-103. But for forwarding to UMC a publicly available rudimentary example of a software program, Boone and Frasier Systems never established a project management office and otherwise performed no meaningful work, despite receiving the full $286,700.00. AA 103-107. Thomas later unsuccessfully attempted, in violation of County policy, to have Frasier Systems awarded a $900,000.00 contract without first putting out a "request for proposals" (bids). 2 AA 378.

Thomas negotiated a third contractual relationship with Crystal Communications, a company owned by his close friend and fraternity brother, Martello Pollock. AA 113-117. Crystal Communications had no employees and was headquartered in a single Chicago office shared with four other companies, including Premier Alliance Management which was owned by another close personal friend of Thomas, Orlando Jones. AA 113-117. The first contract paid Pollock $24,500.00—$500.00 below the threshold amount that would have required County board approval—in exchange for Crystal Communications providing consulting work on UMC's northeast tower project. AA 113-116; 2 AA 446. But for producing a four-page memo regurgitating verbatim facts about UMC's telephone system relayed by UMC IT personnel, Pollock and Crystal Communications never performed any meaningful work under the contract. AA 115-116; 2 AA 470-476. Nevertheless, Thomas negotiated an even larger subsequent contract in which Crystal Communications received $145,550.00 in exchange for a promise to perform the work already promised in the prior contract plus some additional consulting and training work. AA 117-119. Again, Pollock and Crystal Communications performed absolutely no meaningful work, and, when interviewed by detectives, Thomas lied about receiving their

nonexistent work product. AA 119-120. In awarding this contract to Pollock's company, Thomas ignored a drastically lower bid from a highly-qualified local contractor and failed to comply with County contracting procedures. AA 122-123. Finally, Thomas also negotiated and paid $5,100.00 to Orlando Jones for purported consulting work consisting of the same four-page memo referenced above. AA 129-130.

Thomas also established a contractual relationship with TBL Construction (TBL), a local company owned by Alonzo Barber, which had no prior experience in hospital construction work. AA 130-132. Thomas engaged TBL as a contractor to "supervise" utility installation at the northeast tower and landscaping, which was identical to work already being performed by a different contractor under an existing contract. AA 130-132. Thomas avoided scrutiny of the contract by paying TBL $35,000.00 under an unauthorized change order added to an existing contract. AA 133-134; 2 AA 410-411.

Thomas negotiated a fifth contractual relationship with Superior Consulting, a Chicago-based company in which Thomas's good friend, Bob Mills, was a principal owner; Superior Consultants was later acquired by Affiliated Computer Services (ACS). AA 87-88. Thomas negotiated a contract in which Superior/ACS would perform revenue (debt) collection activities already being performed by UMC, which actually resulted in a $6 million reduction of UMC collection totals in the contract's first year. 2 AA 456-457. Additionally, when ACS was not making sufficient collections to profit on the contract, Thomas, unilaterally without County authorization, executed an "administrative clarification," which caused ACS's collection totals to be artificially inflated by an additional $48.9 million dollars; this additional revenue consisted of social service reimbursements already being received by UMC and requiring no collection effort. AA 17-18, 25-36; 2 AA 392-393. That "clarification," which would have yielded ACS a $6.8 million windfall for continuing to do the same ineffective job, was rejected when properly put before the County board. AA 143. Thomas nevertheless succeeded in negotiating two additional modifications solely for the purpose of enriching ACS by lowering the baseline for it to collect a 25% commission on the collections and ensuring ACS a $25,000.00 flat payment each month (including retroactively for pre-modification months), despite ACS's eight

consecutive months of substandard collections. AA 141-142; 2 AA 474-476. Thomas's only rationale for these modifications was he wanted ACS to make more money for performing its pre-existing contractual obligations. AA 141-142. Finally, Thomas arranged for ACS to receive a $1 million commission merely for recommending that UMC sell some of its "bad debt" to a debt collection agency. AA 146-153. ACS had no contractual right to such a commission but received it based on Thomas's authorization. 2 AA 469-472.

22. Issues on appeal. State concisely the principal issue(s) in this appeal:

I. The District Court Lacked Jurisdiction to Adjudicate Thomas's Untimely Motion to Dismiss

The district court lacked jurisdiction to adjudicate Thomas's motion to dismiss and its order dismissing the Indictment is thus void. Although styled a "motion to dismiss," Thomas's petition is still governed by NRS 34.710, which provides that "[a] district court shall not consider any pretrial petition for habeas corpus…based on alleged lack of probable cause or *otherwise challenging the court's right or jurisdiction to proceed to the trial of a criminal charge* unless a petition is filed in accordance with NRS 34.700" (emphasis added). NRS 34.700 specifically states that a district court "may not" consider a petition unless, "[t]he petition and all supporting documents are filed within 21 days after the first appearance of the accused in district court." NRS 34.700(1)(a).

Thomas first appeared in district court on February 28, 2008, when he was arraigned on the Indictment. Approximately three years later, on February 11, 2011, Thomas for the first time decided to challenge the Indictment as providing insufficient notice and being unconstitutionally vague. Thus, at the time of the motion's filing, the district court had long since lost jurisdiction to adjudicate it. In Sheriff v. Jensen, 95 Nev. 595, 600 P.2d 222 (1979), the defendant was arraigned on May 21, 1979, and filed a pre-trial petition for a writ of habeas corpus on June 21, 1979, thirty-one (31) days after his arraignment. Id. at 596, 600 P.2d at 223. The district court granted the defendant's pretrial petition and the State appealed to this Court. Id. The Court reversed the district court's order because the petitioner failed to comply with the statute's strict "mandatory" filing deadline, which rendered his petition not "cognizable" before the district court. Id. The Court reversed the order and remanded the case to the district court with

instructions to deny the petition. Id; see also Sheriff v. Toston, 93 Nev. 394, 566 P.2d 411 (1977).

NRS 34.700(3) creates the sole exception to the mandatory twenty-one (21) day filing period; time for filing the petition may be extended on a showing of good cause. In Thomas's case, however, no extension was ever requested or granted, and, in any event, Thomas elected to proceed to trial without attempting to file a pre-trial petition. Had he even attempted to establish grounds for an extension, Thomas could not meet the good cause standard because the arguments underlying his motion were perfectly available to him at the time of his arraignment. Finally, for purposes of assessing the district court's lack of jurisdiction, it is immaterial that Thomas restyled his pre-trial petition claims as a "motion to dismiss." The use of alternative nomenclature does not change the nature of Thomas's challenges to the Indictment nor does it excuse the almost three-year delay in challenging the Indictment. Cf. Edwards v. State, 112 Nev. 704, 708 n.2, 918 P.2d 321, 325 n.2 (1996).

II. The District Court Committed a Legal Error and Abused Its Discretion in Concluding the Theft and Official Misconduct Statutes are Unconstitutionally Vague as Applied to Thomas in the Indictment

A. Standard for Determining Whether a Criminal Statute is Void for Vagueness As-Applied

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983); see also State v. Castaneda, 126 Nev. ---, 245 P.3d 550 (2010). When the challenge is vagueness "as-applied," there is a two-part test: a court must first determine whether the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited' and then consider whether the law 'provide[s] explicit standards for those who apply [it]." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299 (1972) (footnote omitted)); see also Gentile v. State Bar of Nev., 501 U.S. 1030, 1050, 111 S.Ct. 2720, 2732 (1991); Vill. of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498, 102 S.Ct. 1186, 1193 (1982). The two prongs of the as-applied vagueness test are independent and not conjunctive; a

defendant may demonstrate a statute's unconstitutional vagueness based on either prong. Castaneda, 245 P.3d at 553 n.1. The Nevada Supreme Court has determined that "a statute will be deemed to give sufficient notice of proscribed conduct when, viewing the context of the entire statute, the words used have a well-settled and ordinarily understood meaning." Nelson v. State, 123 Nev. 534, 540-41 (2007).

Because the Court presumes that statutes are constitutional, a party challenging the statute has the burden of making "a clear showing of invalidity." Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). The U.S. Supreme Court has held that a defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others ... [a] court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." Village of Hoffman Estates, 455 U.S. at 495, 102 S.Ct. at 1191 (citation omitted). The mere fact that hypothetical "close cases" can be envisioned does not render a statute unconstitutionally vague as-applied. U.S. v. Williams, 553 U.S. 285, 305-306, 128 S.Ct. 1830, 1846 (2008). "Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." Id. (citing In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068 (1970)). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." Id.[4]

B. The District Court's Vagueness Analysis Was Clearly Erroneous Because the Scope of Thomas's Contracting Authority and Permissible Uses of County Property Is Readily Ascertainable from Sources of Law Outside the Theft and Misconduct Statutes

There are laws and other readily available sources from which a person of ordinary intelligence can determine whether Thomas's negotiation of the contracts with his friends transgressed the limits on his authority as CEO, i.e., whether he committed Theft and Official

[4] A constitutional vagueness challenge to a criminal statute is reviewed de novo. See, e.g., U.S. v. Zhi Yong Guo, 634 F.3d 1119, 1121 (9th Cir. 2011) (citing U.S. v. Purdy, 264 F.3d 809, 811 (9th Cir. 2001)).

Misconduct by disposing of County funds in pursuit of unauthorized purposes exceeding their limited entrusted use. Numerous other state courts have considered identical vagueness challenges to their official misconduct and theft statutes and uniformly rejected those challenges after determining it is possible for an official—and his jury—to ascertain the limits of his authority. It may be that a jury determines Thomas's negotiation of grossly one-sided contracts fell within the legitimate ambit of his authority as UMC CEO, but such a determination will have everything to do with the *sufficiency* of the State's evidence, and *nothing* to do with any purported vagueness in applying the Theft or Misconduct statutes. By mistaking his own view of the sufficiency of the evidence for an as-applied vagueness problem, the trial judge clearly committed a legal error in dismissing the Indictment. By a cursory review of Thomas's employment duties and powers as provided in the Nevada Revised Statutes and Administrative Code, the statutorily incorporated UMC bylaws, and Thomas's employment contract, a reasonable person would be on notice that Thomas's transfer of County wealth to his friends and associates through grossly one-sided, pretextual contracts was an unauthorized act constituting Theft and Official Misconduct.

In finding the State's Indictment unconstitutionally vague, the district court committed a legal error by ignoring the charging documents allegation that Thomas committed Theft by entering into contracts "knowingly" and "without legal authority" that exceeded the "limited use" for which he was entrusted to use County funds. Only by ignoring—and omitting from its order—those aspects of the charging document, could the district court rationally conclude the Indictment "does nothing more than put Thomas on notice that he/UMC may have entered into an ill conceived contract." 3 AA 741. Clearly, if Thomas can persuade a jury that he merely negotiated some bad contracts while acting within the authorized scope of his powers, he would be entitled to an acquittal. But the Indictment alleges that he was *not authorized* to enter into the types of contracts formed with his friends and close associates, and their negotiation exceeded the "limited use" for which Thomas was entrusted to commit County funds.

Numerous courts have considered vagueness challenges to their official misconduct statutes by defendant's like Thomas who are charged with using public property for personal

use; these courts have uniformly found the statutes not unconstitutionally vague because the scope of a public official's authority to use state property is readily ascertainable from other sources, such as statutes, regulations, ethical guidelines, and employment contracts. In State v. Florea, 296 Or. 500, 677 P.2d 698 (Or. 1984), the Oregon Supreme Court considered and rejected a vagueness challenge very similar to Thomas's. Like Thomas, the Florea defendant, had been charged with Official Misconduct in the First Degree and Theft. The defendant challenged as void for vagueness the official misconduct statute, which provided: "A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit or to harm another…He knowingly performs an act constituting an unauthorized exercise in his official duties." Id. at 502, 677 P.2d at 700. The Oregon Supreme Court considered whether the statute was vague, focusing on its use of the term "unauthorized," and concluded: "Even though a question of a public servant's authority may be one of first impression in a court, it is governed by sources of law and delegated authorization outside the criminal code itself, sources to which a public official in any event must turn in order properly to understand his or her job. If there is vagueness, it does not lie in [the official misconduct statute]." Id. at 504, 677 P.2d at 701.

Similarly, in State v. Jensen, 272 Wis.2d 707, 681 N.W.2d 230 (Wis. Ct. App. 2004), aff'd, 279 Wis.2d 220, 694 N.W.2d 56 (Wis. 2005), defendants challenged as void for vagueness Wisconsin's official misconduct statute, Wis. Stat. Ann. § 946.12(3), which establishes a crime where an official "exercises a discretionary power in a manner inconsistent with the duties of the officer[] or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another[.]" The Jensen defendants, who were charged with using state resources for partisan political campaigning, complained that the statute was unconstitutionally vague because it did not "adequately delineate[] the duty each defendant allegedly violated," and further permitted "prosecutors to apply or create their own subjective theories, standards and interpretations of the statute." Id. at 720-721, 681 N.W.2d at 236. Applying the dual-prong vagueness test, the appellate court rejected that analysis, determining the defendant-officials' duties were readily ascertainable from applicable statutes, legislative

rules and guidelines, and employee handbooks. Among others, the court pointed in particular to a statutorily codified ethical rule providing: "No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the *private benefit* of himself or herself or his or her immediate family, or for an organization with which he or she is associated." Id. at 724-725, 681 N.W.2d at 238 (emphasis added). Thus, the court concluded, a reasonable person was on notice regarding the prohibited nature of the defendants' conduct and the statute was not vague. Id.

Likewise, in State v. Heaton, 125 Wash.App. 1035, 2005 WL 289938 (Wash. Ct. App. 2005), a Washington appellate court rejected an identical vagueness challenge to that state's official misconduct law. The court held that: "[p]eople of common intelligence can understand the meaning of the statute, which prohibits 'official misconduct,' namely, that a public servant violates the law if he or she [] (1) performs an unauthorized act under color of law...." Id. at 2. And it further explained that the statute was not vague as applied because laws defining the defendant-police officer's authorized duties provided an objective standard for measuring whether his actions amounted to official misconduct. Id. The court emphasized that vagueness is not demonstrated merely because the statute's application requires a subjective determination of whether the official's conduct was authorized. Id.

And numerous other courts have come to the same conclusion as to their official misconduct statutes penalizing an official's unauthorized use of state property. See, e.g., Margraves v. State, 34 S.W.3d 912, 921-922 (Tex. Crim. App. 2000) (official misconduct statute providing that "a public servant [may] use government property only in ways that are authorized" not unconstitutionally vague as applied to official who used state airplane to travel to son's graduation, despite pretext of business purpose), abrogated on unrelated grounds by Laster v. State, 275 S.W.3d 512 (Tex. Crim. App. 2009); State v. Andersen, 370 N.W.2d 653 (Minn. Ct. App. 1985) (official misconduct statute's criminalization of actions in excess of mayor's "lawful authority" not vague because bounds of that authority can be ascertained);

People v. Kleffman, 90 Ill.App.3d 1, 3-5, 412 N.E.2d 1057, 1059-1061 (Ill. Ct. App. 1980);[5] Further, inclusion of a knowledge mens rea element prevents the misconduct statute from being vague. See State v. Green, 376 A.2d 424, 427 (Del. Super. Ct. 1977) (citations omitted); accord State v. Wood, 67 Or.App. 218, 223-224, 678 P.2d 1238, 1241-1242 (Or. Ct. App. 1984).[6] Finally, NRS 205.0832(1)(b) is analogous to an offense known in other jurisdictions as "misapplication of entrusted property," and in those jurisdictions, as far as the State can tell, the offense has never been held to be vague as applied or facially void for vagueness. See, e.g., N.J. Stat. Ann. § 2C:21-15; N.D. Cent. Code § 12.1-23-07; Alaska Stat. § 11.46.620; Ind. Code § 35-43-5-3(3); 18 Pa. Cons. Stat. Ann. § 4113; Ala. Code 1975 § 13A-9-51; Haw. Rev. Stat. § 708-874; Or. Rev. Stat. § 165.095.[7] Because "it would be impossible for the Legislature to specifically describe in the statute every possible act that would amount to criminal misuse of government property[,]" Margraves, 34 S.W.3d at 921, a statute is not vague merely because other sources must be consulted in determining if the official's conduct was authorized or exceeded the bounds of a limited entrustment.

In Thomas's case, there is a rich array of sources from which a reasonable person could ascertain the scope of Thomas's contracting authority and whether the contracts at issue exceeded the limited use for which County funds were entrusted to him. One example is NRS 281A.400(2), which provides that an official cannot use his office for purposes of benefiting a

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[5] (official misconduct statute prohibiting action "in excess of lawful authority" for "personal advantage" not vague because derives meaning from a set of rules not contained in the statute; "This court is not prepared to hold that the lawful authority of the public officers and employees of this State is so poorly defined that, as a general thing, public officials are unable to determine the propriety of their actions…[T]hat exceptional cases may arise where opinions might differ does not render [the statute] unconstitutional.").

[6] (official misconduct statute not unconstitutionally vague where "the State must prove that the defendant knew that he was refraining from performing a duty which is clearly inherent in the nature of his office[,]…[and] intend[ed] to obtain a personal benefit or to cause harm to another person. Where the State must prove that a defendant acted with this knowledge and intent, the definition of the offense is not unconstitutionally vague.").

[7] Cf. also State v. Ferrari, 398 So.2d 804, 807 (Fla. 1981) (criminal embezzlement statute penalizing misappropriation of construction funds not void for vagueness because definition of statutory terms could be derived from Florida's version of the U.C.C.); State v. Sylvester, 516 N.W.2d 845, 848-850 (Iowa 1994) (no vagueness in applying theft statute to embezzlement within a partnership because Uniform Partnership Act definition of trustee responsibilities made theft statute applicable).

person with whom he maintains a personal relationship. Similarly, NRS 281A.420 creates an official's duty to disclose certain personal relationships, and County policies create an official's duty to put out projects for competitive bidding. AA 52-53 (testimony that Thomas failed to ever follow County's Fiscal Directive No. 6 prescribing mandatory public contract bid process); 2 AA 368-378. Additionally, Nevada Administrative Code (NAC) 449.314(5) provides that "[t]he chief executive officer of a hospital is responsible for operating the hospital in accordance with the authority conferred on him by the governing body." Thus incorporated, the UMC bylaws provide that its CEO shall establish "internal controls to effectively operate the organization by…*conserving* physical and *financial assets*." UMC Bylaws, art. 3 § 1 (emphasis added).[8] Moreover, the bylaws require the CEO to perform his responsibilities in a fashion and provide reporting that enables the County board "to properly discharge its functions and responsibilities," and to "bring all matters requiring Board approval to the Board at its regularly scheduled meetings." Id.; cf. AA 42-45, 48 (Thomas's failure to comply with this latter rule). Further, Thomas's employment contract with the County contained terms and conditions governing the authorized scope of his use of County resources, and required him to maximize the financial benefit to the County when exercising his contracting authority. See AA 73-82. In light of these many sources delineating the scope of Thomas's authorization to dispose of County property, it cannot be said that the Theft and Misconduct statutes as applied to him do not have "a meaning sufficiently precise for a man of average intelligence to 'reasonably understand that his contemplated conduct is proscribed.'" U.S. v. Mazurie, 419 U.S. 544, 553, 95 S.Ct. 710, 715-716 (1975). The district court clearly erred in failing to acknowledge these numerous sources of Thomas's authority and instead summarily dismissing the entire Indictment as unconstitutionally vague.

III. The District Court Committed a Legal Error and Abused Its Discretion in Deciding the Indictment Failed to Plead Adequate Facts Under NRS 173.075

Although citing to legal rules governing adequate notice pleading in a charging document, the

[8] Available at http://agenda.co.clark.nv.us/sirepub/cache/0/tua44j45mbmaom451gfxl545/235740816201110194 1908.PDF

district court's order actually dismissed the Indictment based on a constitutional vagueness analysis. It is clearly apparent, nevertheless, that the Indictment pleaded more than sufficient facts to apprise Thomas of his specific conduct alleged to constitute Theft and Misconduct. NRS 173.075(1) provides that "[t]he indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged." The district court clearly erred and abused its discretion in dismissing the Indictment based on a theory that it pleaded insufficient facts to place Thomas on notice of the State's theory of how he violated NRS 205.0832(1)(b). The Indictment's Counts 1-5 all allege Thomas used County funds in unauthorized fashion and exceeded the County's entrustment for "limited use[s]" by funneling them to his friends or associates under the pretext of legitimate contracts. The Indictment identified the specific contracts, counterparties, and bases on which the contracts were not authorized, e.g., they were "grossly unfavorable" to the County or for work Thomas knew was completely "unnecessary" and would never be or was not being performed. Those allegations were clearly sufficient under Nevada's notice pleading standard. See Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (Nev. 1985); Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (Nev. 1970). Finally, even if the Indictment suffered from some notice pleading defect, the district court abused its discretion in summarily dismissing it, rather than ordering an amendment.

Rather than an appropriate application of constitutional vagueness principles, the district court's ruling was tantamount to entry of a directed verdict based on the trial judge's view of the sufficiency of the evidence produced at the first trial. The trial judge was likely influenced by his own memory and impression of that evidence, which is not a proper consideration in undertaking a constitutional vagueness analysis of an Indictment yet to be tried to final conclusion before a jury. And it is also clear that, although the court offered him fourteen (14) months to demonstrate a purported withholding of exculpatory Brady material, Thomas failed to make such a showing, see generally 3 AA 589-596, 672-734; dismissing the Indictment based on a tenuous vagueness analysis appears to have served as a substitute pretext for dismissing the action.

VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

Dated this 29th day of August, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 29, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINCE CORTEZ MASTO
Nevada Attorney General

DANIEL J. ALBREGTS, ESQ.
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BY */s/ eileen davis*
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SSO/J. Patrick Burns/ed