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IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman  
Clerk of Supreme Court

THE STATE OF NEVADA,  
  
Petitioner,  
  
vs.  
  
LACY THOMAS,  
  
Respondent,

Case No. 58833

**RESPONDENT'S APPENDIX**

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DISTRICT COURT  
CLARK COUNTY, NEVADA  
CLERK OF THE COURT

THE STATE OF NEVADA

Plaintiff,

vs.

LACY THOMAS,

Defendant.

CASE NO. C-241569

DEPT. NO. 17

Transcript of  
Proceedings

BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

JURY TRIAL - DAY 2

TUESDAY, MARCH 23, 2010

APPEARANCES:

FOR THE PLAINTIFF:

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Chief Deputy District Attorney

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Deputy District Attorney

FOR THE DEFENDANT:

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District Court

TRANSCRIPTION BY:

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1 cross-examination.

2 MR. ALBREGTS: He's taking --

3 THE COURT: Counsel approach.

4 (Off-record bench conference).

5 THE COURT: Ladies and gentlemen, we have to resolve  
6 an issue and also it might be a good time to take a break. So  
7 during this recess it is your duty not to converse among  
8 yourselves or with anyone else on any subject connected with  
9 this case or to read, watch or listen to any report of or  
10 commentary on the trial by any person connected with the trial  
11 or by any medium of information, including without limitation,  
12 newspaper, televisions, radio or the Internet.

13 You are not to form or express an opinion on any  
14 subject connected with this case until this matter submitted to  
15 you. We'll see you back in approximately 10 minutes.

16 (Outside the presence of the jury).

17 THE COURT: Okay, we're outside the presence of the  
18 jury panel. There was an objection to the question when we met  
19 at the bench. Let's put this on the record. Mr. Mitchell, I  
20 know you had -- you had restated your question here at the  
21 bench and like I said, whether or not the microphone picks  
22 everything up, let's put it on the record here.

23 MR. MITCHELL: All right. The form of my question  
24 was a hypothetical, and it was, I believe, proper redirect  
25 examination based on the cross-examination by Mr. Albregts

1 regarding whether or not it was criminal or even wrong to have  
2 entered into a contract with somebody with which you have a  
3 prior acquaintance.

4 I'm trying to point out hypothetically at what point  
5 does it tip over into misconduct with my question. And the  
6 question that I was posing at the moment that I was objected to  
7 was that hypothetically if you enter into a contract with a  
8 friend and it is later shown that the contract benefitted the  
9 organization -- or benefited the friend and not the  
10 organization you represent, would that be classified -- oh, and  
11 you did not disclose that this was a friend, would that be  
12 misconduct?

13 I think I can validly explore that subject area  
14 because defense counsel has explored it at length. If -- if  
15 need be, I can reword the question to ask at what point does  
16 conduct otherwise okay tip into misconduct. But since this  
17 case revolves around this question of whether or not you can  
18 contract with friends or acquaintances and under what  
19 circumstances is, I think this should be delved into validly.

20 THE COURT: Isn't that the -- at least the facts  
21 right now is that he contracted with a friend who's benefit to  
22 the friend and not to the county/UMC, isn't that what has to be  
23 proved in this case?

24 MR. MITCHELL: I -- well, in the misconduct counts  
25 you have to prove that the contract benefited the friend and

1 not the organization. That the contract was entered into for  
2 the purpose of benefitting a friend or Mr. -- or any other  
3 person, it doesn't have to be the friend. But when it was  
4 entered into it for the benefit of somebody besides the  
5 organization represented. So that's what I need to prove on  
6 Counts 6 through 10, yes.

7 But I haven't proven anything, we haven't deduced any  
8 facts on whether or not they were friends. We haven't  
9 introduced facts on whether or not the contract benefited them  
10 more than the organization.

11 THE COURT: Let me pose this question to you just so  
12 I can better understand your position. Using an example of he  
13 contracted someone to do landscaping work. And so it was a  
14 friend of his, he didn't disclose it, and obviously it's a  
15 benefit to the friend who is the landscaping company, and low  
16 and behold the friend does a poor job in mowing the grass.  
17 Isn't that the same as your question here, and if I need to  
18 follow your premise if that Ms. Miller says, yes, then is that  
19 misconduct, that he hired someone that did a poor job, so  
20 therefore it makes it misconduct.

21 Because you said if -- if it doesn't -- if it  
22 benefits the friend, which would benefit the landscaper, it  
23 doesn't benefit the county because the person didn't mow the  
24 grass very well, that's misconduct.

25 MR. MITCHELL: Well, my question goes to the purpose

1 of the contract from the beginning. If the purpose is to  
2 benefit the friend, and the interest of the organization or  
3 disregarded from the beginning with the proposer having no  
4 interest in whether or not the organization is benefited but  
5 only an interest in benefitting the friend, and doesn't  
6 disclose that this is a friend, is is that misconduct?

7 THE COURT: Should the question be more of about not  
8 disclosing it's a friend, benefits the friend with the intent  
9 to harm the organization or harm the county? Because you're  
10 saying not benefit, because it turns out that perhaps  
11 somebody's due diligence was inappropriate and they can't  
12 handle the job, now we've turned into a bad business decision  
13 into misconduct.

14 MR. MITCHELL: Well, my burden is --

15 THE COURT: I don't know. I'm just trying to get a  
16 better handle --

17 MR. MITCHELL: Right, right.

18 THE COURT: -- on your position here.

19 MR. MITCHELL: My burden is not so high as to force  
20 me to -- to -- to prove that -- that -- well, let me phrase it  
21 this way. The -- what I have to show is that the purpose of  
22 the contract was to help the friend. I don't have to prove  
23 that the purpose was to harm the county. I just have to show  
24 that this was for personal benefit of a friend, or somebody,  
25 not -- not to fulfill my job. But this was power that I had



1 that I used to do a favor for a friend, not looking out for the  
2 best interest of my organization, but looking out for the  
3 friend, and using my official capacity to benefit my friend or  
4 somebody else and not the organization I represent.

5 MR. ALBREGTS: Your Honor, he's completely wrong.  
6 What he has to prove is what he plead in the indictment. And  
7 now he's starting to say, well, I don't have prove it was for  
8 the purpose. The indictment specifically says who it was for.  
9 And I can see this coming up in other evidentiary issues when  
10 they start trying to bring in evidence that Orlando Jones --

11 THE COURT: Do you have the indictment?

12 MR. ALBREGTS: -- had a contract with Mr. Thomas's  
13 wife for a completely unrelated business, and they're going to  
14 come in and say that that's what the benefit was for, when  
15 that's not what's alleged in the indictment.

16 MR. MITCHELL: We are not going to deduce any  
17 evidence on that point at all.

18 MR. ALBREGTS: Well, then they're going to have to  
19 redo a chart they gave me, because they gotta chart they said  
20 is going to be a demonstrative evidence lately -- or later, and  
21 it's got that specifically on it. But having -- that's for  
22 another moment.

23 He's gotta prove the four corners. And the question  
24 he asked basically says if this is the hypothetical, Ms.  
25 Miller, counts six through ten are proven, correct? That's

1 what the question comes down to, and that's why it's improper.

2 MR. MITCHELL: That's absolutely not true. I still  
3 haven't proven anything about whether it benefited anybody. I  
4 haven't proven whether or not the best interest of the  
5 organization were ignored. I haven't proven that it was a  
6 friend. I haven't proven any other person. I'm just talking  
7 about the law.

8 THE COURT: Hang on, let me -- I'm just reviewing the  
9 indictment here, the specific allegations.

10 MR. MITCHELL: This would be count six through ten,  
11 Judge.

12 THE COURT: They all -- there we go. They all refer  
13 me back to count one.

14 MR. MITCHELL: Oh, that -- I'm -- well, I can see  
15 right now that there is a typographical error in count seven  
16 through ten that we're going to be moving to amend.

17 THE COURT: That's where they say see count two,  
18 count three? Is that what you're referring to?

19 MR. MITCHELL: Well, let's see, count seven does  
20 refer to count two, and count eight does refer to count three,  
21 count nine refers to count four, count ten refers to count  
22 five. So yeah, that -- that's okay.

23 THE COURT: All right, hang on a second here. One of  
24 the allegations is that these contracts are entered into, it  
25 says under contracts or turned grossly unfavorable to UMC.

1 Shouldn't that be -- I'm still mulling this over here.  
2 Shouldn't that be part of the hypothetical? You're saying it  
3 wasn't to their benefit. I mean, that could be interpreted  
4 various ways. But the allegation here is turns grossly  
5 unfavorable to UMC.

6 MR. MITCHELL: Well, the definition of the crime is  
7 contained within count six through ten, and it is employ or use  
8 money under his official control or direction or in his  
9 official custody for the private benefit or gain of himself or  
10 another. Those are the elements that I have to prove.

11 MR. ALBREGTS: By doing the acts set forth in count  
12 one, or whatever respective count which refers you back to the  
13 count that specifically lists the individuals and the  
14 identities.

15 MR. MITCHELL: That is -- that's notice pleading by  
16 showing which acts fell into in category which are requires  
17 more elements than counts one through five require.

18 MR. ALBREGTS: Notice pleading. Judge, this is a  
19 criminal indictment. We have a right to know exactly --

20 MR. MITCHELL: Exactly.

21 MR. ALBREGTS: -- what --

22 MR. MITCHELL: Which is why I put it in there.

23 THE COURT: Hang on, hang on, just a minute, please.  
24 In count two, Page 3, one and two, you're alleging this  
25 contract that was entered into and it says but there were goods

1 and services never produced, any product or services in return  
2 for said payment. And the allegation is defendant causing  
3 payments to be made in said contract while he knew or should  
4 have known the services were not going to be received. So  
5 that's a very specific allegation. That's not part of your  
6 hypothetical.

7 In count one, you're specifically alleging under --  
8 under contracts or terms grossly unfavorable to UMC. Doesn't  
9 that need to be part of your hypothetical? If all these things  
10 are proved -- but again, we're still getting to the final --  
11 the ultimate decision of the jury. Let me hear from Mr.  
12 Albregts on this.

13 MR. ALBREGTS: That's exactly the point, Judge, is he  
14 -- it's the ultimate determination for the jury to make. And  
15 to pose a hypothetical to a county district attorney who's  
16 going to say, oh, yeah, that would be a law violation I  
17 guarantee is going to be something he's going to argue later on  
18 in the case, which is -- which is completely improper. For him  
19 to have a witness who's an attorney to say oh, yeah, under the  
20 hypothetical, especially when you don't each know if he's going  
21 to prove that stuff.

22 MR. MITCHELL: Judge, I -- I am not asking a question  
23 about counts one through five. And in fact, if I asked it and  
24 I enlarged the hypothetical as the court has suggested, I would  
25 be even --

1 THE COURT: Well, I'm not suggesting. I'm just  
2 saying that -- that there's some factors left out. You're  
3 saying if someone contracts with a friend, doesn't tell it, and  
4 the friend's going to benefit, which is with every contract,  
5 someone gets to do work, they're benefitting, and ultimately it  
6 turns out it wasn't to the benefit of the organization, here  
7 UMC, is that automatically misconduct?

8 And he -- with my example, isn't that -- isn't that  
9 exactly what we -- I mean, you might have here is the contracts  
10 with the landscaping company, they're going to get a job now,  
11 they get money. That's to their benefit. He didn't tell them  
12 that they were friends of his and they do a poor job of  
13 landscaping. So is that misconduct and he's now guilty of a  
14 felony? Is that the question you're asking Ms. Miller?

15 MR. MITCHELL: No, the -- the law --

16 THE COURT: If he knows they're not going to do the  
17 work, if he knows that -- that they are unqualified for the  
18 job, isn't that a different hypothetical? Isn't that what  
19 you're alleging here?

20 MR. MITCHELL: No, I'm alleging that the contract has  
21 as its purpose to benefit not his organization, but the friend.  
22 That's what we're alleging in counts six through ten, that  
23 those are not designed to benefit -- it's not that they just  
24 didn't turn out right, it's that in their initial inception  
25 they were for the benefit of the -- they were, you know, what

1 would be known as kickbacks, or, you know, under the table  
2 friend contracts, where you keep secret that you've got this  
3 are relationship, but you shovel money toward your friend, and  
4 not for the benefit of the organization that you represent, but  
5 for the benefit of the friend. You don't care about the  
6 organization's welfare on this contract. Your primary  
7 objective is to benefit your friend.

8 I could -- I mean, if I were to enlarge my  
9 hypothetical, I would be even more vulnerable to the objection  
10 by Mr. Albregts, that I'm getting too much into the facts of  
11 this case. I don't want to mirror my question to the facts of  
12 this case. I'm trying to keep it as a hypothetical that  
13 doesn't address any specific facts at this point. We haven't  
14 heard any evidence from -- about friendships or any individual  
15 contracts.

16 THE COURT: See, each one of those counts refers us  
17 back to a previous count, because count six refers us to --  
18 count six refers us to one, count two refers us to count two  
19 and so on. And you've -- and then you've alleged -- so you're  
20 saying this is misconduct, but you have to read it with what  
21 you've referred to. Count seven you said he did these things  
22 by doing the acts as set forth in count two. So you're not  
23 giving a complete hypothetical.

24 MR. MITCHELL: Well, that's true, Judge, but I'm not  
25 trying to give a complete hypothetical that mirrors the exact

1 pleading. I'm trying to do the opposite. I'm trying to  
2 narrowly focus my hypothetical so it only addresses one narrow  
3 question. It's only supposed to address the part of those  
4 counts that don't refer back to the original count. That's --  
5 I mean, that's for the protection of the defense. I wanted to  
6 be --

7 MR. ALBREGTS: I -- you know, your Honor, I'll let  
8 Mr. Mitchell know now I'm happy to do the work for the defense.  
9 I don't need the State protecting us, unless he wants to  
10 dismiss the indictment.

11 THE COURT: Okay, well, go ahead, Mr. Albregts.

12 MR. ALBREGTS: Having said that, what he just said  
13 is, Judge, I'm trying to ask what is really an improper  
14 question, but not give enough information so that that somehow  
15 makes the question proper.

16 I mean, the subject matter of the question is proper.  
17 And so he's absolutely right, that if he puts in even more,  
18 then I'd even got a better objection. And so is that what  
19 we're here to do is to -- to ask a question that's not quite  
20 objectionable so that, you know, I can get it in, especially on  
21 this critical point --

22 MR. MITCHELL: Judge, I --

23 MR. ALBREGTS: -- with this witness.

24 MR. MITCHELL: Why was I allowed, then, without  
25 objection, to question her on how public officer misconduct was

1 defined and how Mr. Thomas is defined as a public official. I  
2 mean, she was --

3 MR. ALBREGTS: Because she opens a book and reads a  
4 statute and she's a lawyer trained to do that and she can tell  
5 the jury that's what the statute says.

6 MR. MITCHELL: Well, that's --

7 MR. ALBREGTS: But when you start getting into a  
8 hypothetical it sounds awfully like what he's alleging in the  
9 -- in the indictment and says -- which they've heard, by the  
10 way, when your clerk read yesterday, and says if all facts are  
11 true, is a person guilty. It's just it is so obviously  
12 improper.

13 MR. MITCHELL: If I --

14 THE COURT: Mr. Mitchell, doesn't the jury -- if we  
15 look at count one and count six --

16 MR. MITCHELL: Right.

17 THE COURT: -- which count six refers to count one.

18 MR. MITCHELL: Right.

19 THE COURT: Doesn't the jury have to find that this  
20 contract -- and I'm referring to Page 2, line 7. That the  
21 contract entered into with ACS, or Superior Consulting, were  
22 under -- the contracts or terms were grossly unfavorable to  
23 UMC. Don't you have to -- to find -- to find Mr. Thomas guilty  
24 of counts one and six, you have to prove that fact, correct?

25 MR. MITCHELL: I don't -- I don't believe I do,



1 Judge. I believe for count six I've got to just prove what the  
2 law requires under that statute. The reason it refers back to  
3 count one is not to attach additional elements to the crime,  
4 but just to outline the conduct that constituted this other  
5 crime that is plead in count six.

6 I still only have to prove the elements of misconduct  
7 can of a public official.

8 MR. ALBREGTS: He has -- he has to prove what he  
9 plead and what he brought to the grand jury because we've been  
10 preparing a defense for the last three years based upon this  
11 indictment.

12 And now he's going to come in and say well, just  
13 because I referred back to the substantive count that outlines  
14 the individual, that outlines the acts and outlines the  
15 criminal intent in Mr. Thomas, but we don't need to do that for  
16 the last five counts, that's -- that's -- that's laughable.

17 MR. MITCHELL: Well --

18 THE COURT: Mr. Mitchell, each one of the six, seven  
19 (indiscernible) two and ten there all refers -- you're saying  
20 by doing these acts as referred to in counts one through, I  
21 think it's five, or what have you.

22 And see, you're -- you're bringing this out, you're  
23 saying here on count seven -- count six it says, without legal  
24 authority the CEO of UMC employed, or under his direction or  
25 physical custody for private benefit or -- or gain or to

1 himself or to another. So let's do it for the facts here, that  
2 he as CEO for UMC employed another for -- for a gain for the  
3 other. That in and of itself, is that a crime?

4 So he employs someone else, not himself and where  
5 that other person gets a financial gain. Is that in and of  
6 itself the crime?

7 MR. MITCHELL: That's how the crime is defined in  
8 statute, yes, it is.

9 THE COURT: Then why did you say, by doing the acts  
10 as set forth in count one because --

11 MR. MITCHELL: Well --

12 THE COURT: -- this is a notice -- you have to place  
13 the defendant on --

14 MR. STAUDAHER: Your Honor, true --

15 THE COURT: -- and you're saying --

16 MR. MITCHELL: Which is what I'm --

17 THE COURT: -- we're putting him on notice. If you  
18 did these things as identified in count six and we're going to  
19 -- and count one, that's what we're charging you with.

20 MR. MITCHELL: Right, and that -- that is the notice  
21 that is being provided. Now, if -- this is the point that I  
22 will concede here, is that if the court, or if it should more  
23 properly say, by and then setting forth by entering into a  
24 contract with ACS, with superior ACS, that was for the benefit  
25 of -- of Superior and not for the benefit of the county, then

1 that would -- that would apparently address the court's  
2 concerns.

3 But I am not adding elements to the crime that I have  
4 to -- to prove. I'm just setting forth those set of facts that  
5 -- that constituted the contract that was entered into that  
6 benefited somebody else instead of the organization. So --

7 MR. ALBREGTS: That's exactly the point, actually, we  
8 can agree on something, I guess. It's not adding a legal  
9 element, but he's placed us on notice what the actions that Mr.  
10 Thomas committed were criminal. That what he did. And he says  
11 specifically these are the things you did, Mr. Thomas that were  
12 criminal. And here we are one witness in, opening statements  
13 and we've said those acts weren't criminal.

14 And now he wants to completely backtrack and say oh,  
15 I don't have to prove any of that stuff and I want to ask a  
16 hypothetical question of my colleague and have her say yeah,  
17 that would be -- that would be it.

18 He's asking you to have Maryanne Miller usurp your  
19 position as providing the law to this jury. That's what the  
20 issue becomes, Judge. I probably should have objected that  
21 clearly, and we wouldn't have had this 20 minute discussion,  
22 but that's what he's asking.

23 MR. MITCHELL: I -- I beg to differ. I mean, I --  
24 when Mr. Albregts was letting me ask those exact questions on  
25 the law in direct examination and when he was asking those same

1 questions in cross, I don't think he was usurping the Court's  
2 authority or function.

3 MR. ALBREGTS: That mischaracterizes what I asked him  
4 in nature of her answers, Judge.

5 MR. MITCHELL: You did ask what was legal and what  
6 wasn't legal. Whether or not it was legal to -- to enter into  
7 a contract with a -- with an acquaintance.

8 THE COURT: Mr. Mitchell, let's -- let me look at  
9 count two, which is count seven as well.

10 MR. MITCHELL: All right.

11 THE COURT: The allegation in count two is that they  
12 hired Frazier Systems. And then on Page 3, line 2 it says they  
13 were hired to do certain work, but they never produced any  
14 product or service in return for said payment. And it said the  
15 defendant causing payments to be made on said contract while he  
16 knew or should have known that services were not going to be  
17 received, okay.

18 You're saying that -- and maybe I'm misunderstanding  
19 what you're saying here, is that as long as you prove the  
20 allegations of count seven but not count two, that's  
21 sufficient?

22 MR. STAUDAHER: Yeah, absolutely.

23 MR. MITCHELL: That that would be sufficient for a --

24 MR. STAUDAHER: (Indiscernible).

25 MR. MITCHELL: -- conviction on count seven.

1 MR. STAUDAHER: We don't have to -- we're not  
2 required to prove any element of the crime in the -- in the  
3 respective count that it refers to. It just gives the frame  
4 work by which the factual basis for each count, because they're  
5 plead as individual generic counts with reference back to the  
6 theft count that they refer to.

7 The facts and the actual entity is what is at stake  
8 here for each one of those counts. Did he enter in as a public  
9 official, conduct himself in such a way that he benefited  
10 someone else by the contract that he entered into, as opposed  
11 to the contract being a theft.

12 If the jury came back and found under -- under any of  
13 these theft counts that the dollar amount, for example, was  
14 less than \$2,500, and they came back and said, okay, you  
15 haven't met that element, that is not an element contained in  
16 any of the public misconduct counts.

17 The only misconduct, or elements in the public -- or  
18 the public misconduct counts are those which are contained for  
19 each one of them. They -- they refer only factually back to  
20 the theft counts to give a basis for the conduct that was  
21 taking place, which was misconduct, essentially. Not that  
22 those -- we have to prove theft in order to prove misconduct.

23 MR. ALBREGTS: That's --

24 MR. STAUDAHER: You can have misconduct, and I think  
25 if Ms. -- Ms. Miller was asked the question, what would

1 constitute misconduct, as far as -- as far as the hypothetical  
2 that Mr. -- Mr. Mitchell gave, or even the questions that  
3 defense counsel asked. She was asked by defense counsel  
4 directly, specifically, if you gave a contract or something to  
5 that effect or took somebody out to lunch or benefited them,  
6 would that be misconduct or would that be --

7 MR. ALBREGTS: But that's not what I asked --

8 MR. STAUDAHER: -- illegal.

9 THE COURT: Hang on.

10 MR. ALBREGTS: -- Judge. I asked if -- is is it  
11 illegal simply to give a contract to somebody you work with  
12 (indiscernible).

13 THE COURT: I think that's what you asked -- that you  
14 knew.

15 MR. STAUDAHER: Correct.

16 MR. ALBREGTS: And that's it. And to answer Mr.  
17 Staudaher now, that he apparently is taking over the argument,  
18 he'd be absolutely correct. If they would have put a period  
19 after "another", the word "another" and wouldn't have added the  
20 words "by doing the acts set forth in count four". The power  
21 of the State is that they get to draft these indictments and  
22 take evidence to grand jury without anybody there, without  
23 cross-examination and try to prove what they've got on the  
24 indictment. And when they chose to plead it that way, they  
25 have to live with that decision.

1 MR. STAUDAHER: There's --

2 MR. ALBREGTS: And now that we've prepared this, they  
3 can't come --

4 THE COURT: First let --

5 MR. ALBREGTS: -- back and say no, we don't have to  
6 do that.

7 THE COURT: First off, we're going to have one person  
8 for State argue. Who's it going to be?

9 MR. STAUDAHER: I'm sorry.

10 THE COURT: No, it doesn't matter. I don't -- I  
11 mean, who is it going to be? Because I don't want to have --

12 MR. MITCHELL: It will be me.

13 THE COURT: Okay, thank you.

14 MR. MITCHELL: All right.

15 THE COURT: Because in those misconduct counts, you  
16 specifically allege, by doing the acts as set forth in counts  
17 two, three, four, et cetera. So you're saying you've committed  
18 misconduct by doing a, b and everything in counts two, three,  
19 four, representatively. I mean, that -- I'm reading it word  
20 for word.

21 MR. MITCHELL: I --

22 THE COURT: By doing the acts set forth in count two,  
23 count three, et cetera. You're saying you commit misconduct if  
24 you did part of what's alleged here and the acts of count two?  
25 I'm not saying -- I mean, and maybe you can prove he did the

1 acts of count two as well.

2 MR. MITCHELL: And we -- we will try to. Obviously,  
3 though, defense counsel and we both will be telling the jury  
4 that they can find the defendant guilty of some of these counts  
5 and not find him guilty of all of them. These counts are  
6 severable from the first five counts. Despite the reference to  
7 facts contained in another count, I still don't have any  
8 heightened burden to prove two sets of facts. I only have to  
9 prove one set of facts with those first -- with those second  
10 five counts.

11 Now, if -- if -- if we didn't have any allegation of  
12 what facts we were relying on, if we just said that they  
13 knowingly did this, the criticism would be, and the objection  
14 would be, and the writ would be to the effect that this was no  
15 notice of what he did because all it says is he -- he entered  
16 into a private -- or a contract that benefited somebody  
17 privately, and it doesn't flush out any facts that refer to  
18 this.

19 So we did refer to the facts that we're talking about  
20 that -- that constituted this separate crime with separate  
21 elements. Now, if -- if the court is ruling that in order to  
22 get a -- I mean, if the court were to rule that in order to get  
23 a conviction on count six or seven or eight or nine or ten, we  
24 have to prove all of the facts of counts one, two, three, four  
25 or five that correspond, I would think that would be an



1 incorrect ruling on the law. And in any event, I would move to  
2 amend the Complaint to reword it with one sentence that just  
3 says by entering into a contract that --

4 THE COURT: Well with, and the allegation is --

5 MR. MITCHELL: -- by entering into --

6 THE COURT: -- without legal authority. That's part  
7 of the allegation here, by entering into a contract without  
8 legal authority.

9 MR. MITCHELL: Well, that's the allegations in counts  
10 one through five.

11 THE COURT: No, I'm reading it from counts six, seven  
12 and eight. It's the second line of each count.

13 MR. MITCHELL: Okay, right, that's true.

14 THE COURT: So you're saying, Mr. Mitchell, when you  
15 -- when your allegation says did on -- I'm referring to count  
16 the six. Did on or between May and January '05/'07 knowingly,  
17 feloniously without legal authority while acting as a -- the  
18 CEO hire someone for their benefit by doing the acts as set  
19 forth in count one, you don't have to prove count one?

20 MR. MITCHELL: That's correct, I don't have to prove  
21 -- I don't have to get a guilty verdict on count one to get a  
22 guilty verdict on count six.

23 THE COURT: Then why are you alleging by doing the  
24 acts as set forth in count one? I mean, that's pretty specific  
25 that you're -- you committed misconduct by doing the acts as

1 set forth in count one.

2 MR. MITCHELL: I'm alleging them so that they will  
3 know which contract this allegation refers to. But I could --  
4 I could prove that the contract was entered into and that the  
5 purpose of it was to benefit a friend without proving that it  
6 was a theft. I could prove that there was no wrongful taking  
7 of money or misappropriation of money in terms of violating the  
8 authority of its entrustment. But I could show with those same  
9 facts that this was with an illegal purpose to benefit a  
10 friend, which the law prohibits.

11 And the -- and the law doesn't require me to show  
12 that it's profitable or that anybody is stealing money. I just  
13 have to show that it was conferred with a wrongful purpose to  
14 prove those last six counts or last five counts.

15 THE COURT: On count seven you're -- which refers to  
16 count two, you're alleging that he knew or should have known  
17 that they were not going to perform the work.

18 MR. MITCHELL: In count two we're alleging that.

19 THE COURT: Right, which relates to count seven.

20 MR. MITCHELL: Right. But count seven, like counts  
21 five through ten -- or six through ten, don't have additional  
22 elements. It's just a -- it is referring to the actual facts  
23 that -- like I said, if --

24 THE COURT: Well, haven't you put the defense on  
25 notice this is what we're accusing you did -- if you -- that

1 you did these things in count one, and therefore you're guilty  
2 of misconduct in count six? I mean, that's what you've alleged  
3 here by doing the acts. I can't be any more clearer than that.  
4 You committed misconduct by doing the acts as set forth in  
5 count one comma here and above. Because, I mean, doesn't that  
6 -- isn't that what you put the defense on notice, that defend  
7 on these allegations?

8 MR. MITCHELL: Judge, I think -- I think the nature  
9 of this criticism is that we have used a shorthand that is too  
10 short. In other words, what we should have said in say count  
11 six -- or let's use count seven. What we should have said is,  
12 for the private benefit or gain of himself or another by doing  
13 -- by entering into a contract with and then Crystal  
14 Communications for the private benefit of Crystal  
15 Communications.

16 But instead of saying -- or for Frazier Systems. But  
17 instead of saying by entering into a contract with Frazier  
18 Systems for the private benefit of Frazier systems, we said by  
19 doing the acts set forth in count two, which is the Frazier  
20 Systems count.

21 So maybe we have used too short of a shorthand. But  
22 that should not be -- that should not be a legal impediment to  
23 us proceeding on these count six through ten without -- without  
24 having to also prove counts one through five to qualify for a  
25 conviction or counts six through ten. Those counts are

1 completely independent. They can be proven with -- with facts  
2 that actually don't depend on any finding in count -- counts  
3 one through five being found to exist by the jury.

4 THE COURT: Isn't it every contract that Mr. Lacy  
5 signed off on for the benefit of the party they contract with  
6 because they were going to get paid? Whether it's for toilet  
7 paper or --

8 MR. MITCHELL: No, it's -- it is the -- Judge, the  
9 law here is that it's for the private benefit, and it's a  
10 public official conferring a private benefit. And those are  
11 the terms of art that are used in the statute, that a public  
12 official does something in his public capacity for the private  
13 benefit of somebody.

14 And the statute doesn't flesh it out more than that.  
15 That -- I mean, that's understood apparently to be enough  
16 because that's the way the statute is worded, that a public  
17 official uses his public capacity to benefit privately somebody  
18 else, and not in contra distinction to the organization that he  
19 publicly represents.

20 It is the statute that would be used if a county  
21 commissioner, for example, awards a contract at the airport for  
22 concessions to somebody that is a friend of theirs, and they  
23 use their county position to do that, that's the exact same  
24 statute that would be used. It's using public power to confer  
25 pry benefits.

1 THE COURT: Mr. Albregts?

2 MR. ALBREGTS: Well, that may be the statute, but how  
3 he plead it, and that's his choice and his choice alone, that's  
4 not how it's plead. And he has to live in the bed he made, and  
5 he has to prove what he plead. And I absolutely, the first  
6 thing when I sat down with this indictment, I still have it  
7 here because it's used as a benchmark more our preparation in  
8 our defense, is an outline of each of the counts. And he has  
9 told myself and Mr. Thomas that the public misconduct that you  
10 committed was what you did in that other count. That's what he  
11 said.

12 And so we're defending his actions in those other  
13 counts to say, number one, not only did he not steal the money,  
14 he didn't commit any misconduct by committing the acts that  
15 they're alleging. So all of this talk about what the statute  
16 is and how we might want to plead it, or now we're going to ask  
17 to amend it, which I might add parenthetically is something  
18 that this court cannot let them do. That is a completely  
19 material alteration of the charging document. He absolutely  
20 has to prove what he plead. And that's how he did it.

21 THE COURT: So, Mr. Mitchell, under -- I know it's an  
22 older case -- Baron (phonetic) and some of the newer cases on  
23 putting the defense on notice of what they're being charged  
24 with, I mean, haven't you done that here by you allege you did  
25 the acts as set forth in count two, and now you're saying we

1 don't have are to prove that he did the acts in count two. But  
2 you've put them on notice for two years that's what you're  
3 alleging is their misconduct.

4 MR. MITCHELL: I -- I have to show that he entered  
5 into a contract as set forth in count two. I don't have to  
6 allege that --

7 THE COURT: No, it says by doing the acts --

8 MR. MITCHELL: Right.

9 THE COURT: -- plural.

10 MR. MITCHELL: But -- but the acts --

11 THE COURT: As set forth in count two. And count two  
12 says that he knew or should have known that they were not going  
13 to do the work.

14 MR. MITCHELL: But it isn't an element of the crime,  
15 Judge. I don't -- I don't have -- I don't have double the  
16 elements to prove in counts five -- or excuse me, counts six  
17 through ten. I still have a finite set of elements, we --

18 MR. ALBREGTS: Your Honor --

19 MR. MITCHELL: If -- if --

20 THE COURT: Go ahead.

21 MR. MITCHELL: If before the Baron pleading existed  
22 as a concept I had plead this, I would have been able to get  
23 away with pleading very cryptic language that didn't give any  
24 notice at all. But because of Baron, we tried -- we're  
25 supposed to refer to the facts that -- that we're talking

1 about.

2           So we've referred to the facts that we're talking  
3 about. But as Mr. Staudaher pointed out, and I adopt that  
4 point, that if we don't prove that a theft took place, but we  
5 do show that a contract was entered into with Crystal  
6 Communications to benefit a friend, those facts being set forth  
7 in count -- the count that pertains to Crystal Communications,  
8 even if they don't think count two was a crime, that doesn't  
9 mean they can't find him guilty of count six.

10           THE COURT: But in the misconduct counts you're not  
11 alleging that they were friends or associates, unless you --

12           MR. MITCHELL: No --

13           THE COURT: -- incorporate --

14           MR. MITCHELL: -- because the --

15           THE COURT: -- the previous counts.

16           MR. MITCHELL: Because the statute doesn't require me  
17 to. I don't -- I don't have to prove that they're a friend. I  
18 just have to prove that he -- that he used his public capacity  
19 to benefit somebody privately instead of the entity that he  
20 represents publicly.

21           THE COURT: And what is the private benefit? I mean,  
22 you contract where someone, they have to do -- I'll use my  
23 example of landscaping, and they do landscaping and they do a  
24 darn good job. Is that misconduct?

25           MR. MITCHELL: Of course not, because the --

1 THE COURT: Well, that's what you're telling me here.

2 MR. MITCHELL: No, no.

3 THE COURT: Reading here, on or between whatever  
4 without legal authority -- well, that's an issue here. He's a  
5 public -- he's a CEO of UMC, employs or uses money under -- as  
6 a CEO for the benefit of the landscaping company, and you're  
7 saying basically say period, don't add the previous count?

8 MR. MITCHELL: Right, Judge. Your landscaping  
9 example, with all due respect, doesn't work here because good  
10 landscaping benefits the hospital, too. You have an interest  
11 in providing good landscaping for the hospital, but we're  
12 alleging --

13 THE COURT: Where are the alleged in the misconduct  
14 counts that it was not to the benefit of UMC.

15 MR. ALBREGTS: The answer to that is by --

16 MR. MITCHELL: By alleging --

17 MR. ALBREGTS: -- referring back to the other counts.

18 MR. MITCHELL: No, by alleging for the private  
19 benefit or gain of himself or another, that language right  
20 there, for the private benefit or gain of himself or another,  
21 which is --

22 THE COURT: So what's the private benefit that the  
23 landscaper's getting? He's getting paid, he's getting money,  
24 he can hire people, and he has -- and he has a job. Isn't that  
25 his -- I mean, what's the private benefit? How are you



1 defining that?

2 MR. MITCHELL: The private benefit is to the  
3 exclusion of the public benefit. In other words --

4 THE COURT: Is there a definition of that in either  
5 case law or statute?

6 MR. MITCHELL: Well, I have used the statutory  
7 language in my pleading. I mean, that's the same statutory  
8 language that -- that we read in the statute books. It's --

9 THE COURT: Well, it doesn't define private benefit.

10 MR. MITCHELL: Right, it doesn't define private  
11 benefit. But it -- it makes obvious that it is contra  
12 distinguishing public benefit from private benefit.

13 THE COURT: You know what, I need to hear more on  
14 this. Let's get the jury in. We'll -- I'll excuse them for  
15 the day and then we'll come back tomorrow, but I don't think we  
16 can -- I need to hear more on this, but I don't want the jury  
17 sitting out for the next --

18 MR. ALBREGTS: I was -- I was going to suggest that.  
19 Two things before we do that, Judge. Number one, I can see,  
20 and I presume the court can that this isn't going to be your  
21 average instruction case. And so to the extent the State can  
22 get me what they're proposing the sooner the better so that we  
23 can try to resolve those as quickly as possible.

24 My second concern is not even withstanding this  
25 lengthy argument on a very important issue, the way that first

1 witness examination went, just the examination of how long it  
2 took, I'm not sure we're going to get done in a week and a  
3 half, but I'll just throw that out there for the Court's --

4 THE COURT: All right.

5 MR. ALBREGTS: -- consideration.

6 THE COURT: All right, let's get the jury in and I'll  
7 excuse them for the day.

8 (In the presence of the jury).

9 THE MARSHAL: Officers and members of the court,  
10 Department 17 jurors.

11 THE COURT: Ladies and gentlemen, thank you for your  
12 patience here. There are some matters that the court needs to  
13 resolve before we go any further, and I hate to have jurors sit  
14 out there for a long period of time. As -- as a former juror,  
15 I know it's not always convenient for you, so we're going to  
16 adjourn for the evening. It's not -- it's only 4:40 right now.  
17 So we're going to adjourn early today. We'll see you back at  
18 10:00 o'clock in the morning.

19 So during this evening recess, it is your duty not to  
20 converse among yourselves or with anyone else on any subject  
21 connected with this case or to read, watch or listen to any  
22 report over commentary on the trial by any person connected  
23 with the trial or by any medium of information, including  
24 without limitation, newspaper, television, radio or the  
25 Internet. You are not to form or express an opinion on any

1 subject connected with this case until this matter is submitted  
2 to you.

3 Ladies and gentlemen, I can see when I give that  
4 admonishment all of you are -- listen very carefully and you're  
5 very attentive. Most jurors don't. And you're going to hear  
6 it many more times, but I appreciate it. And also, we want you  
7 to follow that admonishment as well, and I'm assuming all of  
8 you have. So again, we will see you back at 10:00. Please  
9 have a good evening.

10 (Outside the presence of the jury)

11 THE COURT: All right, we're outside the presence of  
12 the jury panel. State, let me make sure I understand your  
13 argument is that you do not on count seven, for example, you do  
14 not have to -- it's your position that you do not have to prove  
15 anything that's alleged in count two?

16 MR. MITCHELL: I don't have to prove anything in  
17 particular in count two. I don't have to prove any set of  
18 facts. I don't have to prove -- I certainly do not prove all  
19 of the facts. I have to do -- I do have to prove the elements  
20 of count seven. And I'm going to have to show some facts that  
21 support the elements of count seven. But I don't have to show  
22 all of the facts that I've alleged in count two. And --

23 THE COURT: And so you have to show some of the facts  
24 you've alleged in count two, is that what you're saying?

25 MR. MITCHELL: I have -- I have to show some facts,

1 yes. And to provide notice to which body of facts I'm going to  
2 have to show, that's why I put by doing the acts set forth in  
3 count two. But the law absolutely --

4 THE COURT: Well, you've alleged maybe 10, 15 facts  
5 in --

6 MR. MITCHELL: Right.

7 THE COURT: -- those counts, so which -- I mean, what  
8 is Mr. Thomas on notice to defend?

9 MR. MITCHELL: He is --

10 THE COURT: Which facts are you saying you're going  
11 to prove against him?

12 MR. MITCHELL: The ones that are required to prove  
13 the elements of the crime of misconduct of a public officer,  
14 I'm going to have to show that while acting as a public  
15 officer, as chief executive officer of University Medical  
16 Center, that he did use money under his control or direction  
17 and in his official custody for the private benefit or gain of  
18 himself or another. That's what I've got to show.

19 Now, if I just left it like that, which is the  
20 statutory language, I would not be providing any notice of  
21 which facts that I'm going to draw upon to support that  
22 allegation. So we referred back to the body of facts.

23 But here's -- here's a suggestion for curing this,  
24 and it would be by doing some of the acts set forth in count  
25 two here and above, because that provides a factual basis which

1 facts I'm going to draw from. But -- but I certainly do not  
2 have to prove every fact alleged in count seven, because they  
3 are not elements of the crime.

4 THE COURT: Okay, well, maybe you misunderstood my  
5 question, or maybe I misunderstood your answer. Count seven,  
6 how does that put Mr. Thomas on notice of what acts as set  
7 forth in count two he is to defend against? Because you're  
8 telling me I can prove -- I have to prove some of them. Which  
9 ones? I mean, how does he know what he's supposed to defend  
10 against?

11 MR. MITCHELL: Because Judge, he has --

12 THE COURT: I mean, you're the one that drafted this.  
13 It says by doing the acts, plural, not one of the acts, some of  
14 the acts, you're saying by doing the acts as set forth in count  
15 two.

16 MR. MITCHELL: Right, Judge. That -- that more than  
17 puts him on notice that I am referring back to the -- the count  
18 two contract with Greg Boon and Frazier Systems. That by  
19 entering into a contract with Greg Boon and Frazier Systems, he  
20 was conferring a private benefit in his public capacity on  
21 another. That's -- and without lawful authority.

22 And so again, it's -- I mean, this is a matter of --  
23 of law. I -- by -- by alleging facts, you don't have to -- you  
24 don't have -- you're not supposed to assume the burden of  
25 increasing the elements that you have to -- to charge. I mean,

1 I could have in the olden days left it with an a period after  
2 the word "another", and that would have been sufficient. But  
3 we've been told that we need to refer to some facts to support  
4 that, so we put in the facts that -- that pertain to this  
5 count.

6 But it shouldn't be used against us as somehow  
7 increasing our burden that now we cannot get a conviction on  
8 six without getting a conviction on one. And we can't get a  
9 conviction on seven without getting a conviction on two.

10 The jury has the option of finding in count two  
11 whether or not any money was stolen under the definition of a  
12 theft, without finding that there was misconduct of a public  
13 official. And they also have the option of finding in count  
14 seven that there was misconduct in entering into a contract,  
15 but it -- but that misconduct didn't constitute theft, it just  
16 -- it just constituted misconduct of a public official.

17 THE COURT: Anything further, Mr. Albregts?

18 MR. ALBREGTS: Yeah, a couple things, Judge. And you  
19 know, it's beyond ridiculous that you would say, well, in the  
20 olden days we wouldn't have had to give the defendant his  
21 Miranda rights. But since that stupid little Miranda decision  
22 we now have to do that. The law is the law as it is now. And  
23 the Court's recognized that. And we've been placed on notice.

24 Mr. Mitchell is confusing elements with facts.  
25 There's no increase in the elements. The elements are the

1 elements that define a -- a law, and the things they have to  
2 prove legally to prove a crime.

3 But they're always in every indictment, in every  
4 complaint they're always wedded with some facts. Whether it's  
5 the theft was committed by and burglary were committed by  
6 walking into the bank and walking out with the money, and they  
7 name the bank and they -- and they tell you it's over a certain  
8 amount. And those are facts they have to prove.

9 Or a murder, to wit, and then they outline the some  
10 of the facts to put the defendant on notice that when you shot  
11 John Doe and he died, and you did it with premeditation and  
12 aforethought, that's what we're going to prove.

13 And so he decided to draft his indictment this way.  
14 He decided to place Mr. Thomas and I on notice by saying the  
15 misconduct occurred when you did the things, and like you  
16 pointed out, not one of the things, not a couple of the things,  
17 the things all listed in each count that it refers to. That's  
18 what he wedded himself to prove. That's what he said, I'm  
19 going to take this to trial and prove it beyond a reasonable  
20 doubt.

21 And now he's back pedaling and saying well, I  
22 wouldn't have done it that way if the law was still like it was  
23 in the old days. Or if I would have done it that way, he would  
24 have done a writ. All of that's irrelevant. This is what he  
25 did. This is his indictment. This is what he says he's going

1 to prove. And when he refers back to it, he has to live with  
2 it.

3 THE COURT: All right, I'm going to direct counsel to  
4 provide the court with any authority supporting their argument  
5 here. Feel free to -- you may not have time to prepare any  
6 brief. Feel free to fax my office any relevant case law and  
7 please, if it's a 20 page case, and we're only dealing with a  
8 couple pages, just send those pages with the name of the case,  
9 et cetera, and put some brackets on the case law.

10 And, you know, the issues here as far as what, if  
11 anything, Mr. Mitchell, on count six through ten, whether or  
12 not you have to establish one of the allegations, or all of the  
13 allegations of the counts that you refer to, or even if you  
14 have to establish any of those allegations. So I'm giving you  
15 a three way option here. If you have some case law. And Mr.  
16 Albregts, you'll do the, I guess, the opposite case law if you  
17 can find that.

18 MR. MITCHELL: Judge, may I inquire about something?  
19 This all began as an objection to a question that I was asking  
20 on recross (sic). And now it -- it seems to be like a motion  
21 to dismiss that we're arguing.

22 THE COURT: Well, it wasn't an objection, but it  
23 wasn't an objection to a questio,n, because the objection was  
24 that to a certain extent it's an improper question. Secondly,  
25 perhaps I'm putting words in Mr. Albregts' mouth, perhaps it



1 was an incomplete hypothetical as well. And so I think -- is  
2 that correct, Mr. Albregts.

3 MR. ALBREGTS: It is, but I think what has happened  
4 in this discourse is that we've gotten to a bigger issue that  
5 we're obviously disagreeing about what the instructions are  
6 going to be. And so in that sense, I think it is important,  
7 which I think the court recognizes by spending so much time on  
8 it.

9 MR. MITCHELL: Well, maybe we're -- maybe we don't  
10 need to brief this. If we're only arguing about what the  
11 instructions are going to be, is the court inquiring whether  
12 the court is going to be able to legally instruct the jury that  
13 they can find the defendant guilty of one of the last five  
14 counts without finding him guilty of one of the first five  
15 counts?

16 THE COURT: Well, right now, the first matter is I'm  
17 going to sustain the objection to the question to Ms. Miller,  
18 because for various reasons. The second -- second area is now  
19 that's popped up which is part and parcel in the objection is  
20 where I had mentioned as far as what does the State have to  
21 prove in counts six through ten?

22 MR. MITCHELL: I am in agreement with Mr. Mitchell to  
23 the extent that if -- if -- I know he's not agreeing with the  
24 sustaining of the objection, but if the court is going to  
25 sustain the objection, we could just come back, finish his

1 redirect of Ms. Miller. That would, though, give the parties a  
2 little more additional time to look at the bigger issue that we  
3 wouldn't necessarily have to research that tonight to keep  
4 moving on with the trial.

5 THE COURT: And there won't be any objection -- I  
6 mean, the Court's going to allow you to recall Ms. Miller after  
7 we resolve this legal issue.

8 MR. ALBREGTS: If -- yeah, if I need to.

9 THE COURT: Right.

10 MR. ALBREGTS: I mean, I appreciate that.

11 THE COURT: No, I mean for the State. I mean, they  
12 have the right --

13 MR. ALBREGTS: Oh, yeah, yeah, of course.

14 THE COURT: Because we're not getting into those  
15 areas -- you're not going to be allow to ask her at this time,  
16 is that misconduct if he does a, b and c, at this point. I  
17 mean, we'll go through this further legal argument, and if you  
18 need to, I'll -- I'm going to allow you to recall her if I rule  
19 that you are allowed to ask that question, okay.

20 MR. ALBREGTS: So are we okay, then, perhaps taking a  
21 couple -- because I -- you know, honestly, I mean, I'll -- if I  
22 got to stay up until 2:00 and wake up at 4:00, I will to get  
23 the research done. But if we have a little more time, if we  
24 can move on with the --

25 THE COURT: All right. That's what we'll do, we'll

1 just go on with -- do you have other questions for her, I'm  
2 assuming?

3 MR. MITCHELL: Yeah, and I could -- I -- I mean, I --  
4 I would be content if we were done. I could reword the  
5 question so that I don't think it would offend either side to  
6 say what constitutes misconduct. And if the court doesn't want  
7 me to even ask that question --

8 THE COURT: Well, won't that be a jury instruction  
9 that defines misconduct?

10 MR. MITCHELL: Well, and if that's what the court  
11 believes, then we can drop the whole matter and -- and go to  
12 the next witness.

13 MR. ALBREGTS: I'm all --

14 THE COURT: Well, let's see --

15 MR. ALBREGTS: I'm all for that.

16 THE COURT: All right, let's do that, but counsel  
17 needs to start looking in the books or the computer.

18 MR. ALBREGTS: First thing -- old school. First  
19 thing I'll do back at the office is get this started, Judge.

20 THE COURT: Okay. So you can finish up, but we're in  
21 the going to have you ask any hypotheticals if you're in this  
22 -- in this regard as you've asked, okay. There might be  
23 another hypothetical that may be appropriate at this point.  
24 Again, you're free to recall her if I rule that your question  
25 is proper. So I'm not tying your hands in that regard.

1 MR. MITCHELL: Is it to the nature of the  
2 hypothetical, or is it to the fact that it goes to the ultimate  
3 question --

4 THE COURT: Yes.

5 MR. MITCHELL: -- that it's --

6 THE COURT: Okay.

7 MR. MITCHELL: Since the court -- okay, so the court  
8 is going to rule on the law, so there shouldn't be any  
9 questions to her -- anymore questions about what's legal and  
10 what isn't?

11 THE COURT: Correct.

12 MR. MITCHELL: Okay.

13 THE COURT: Well, no, also the hypothetical, which is  
14 pretty much trying to mirror one of the counts here.

15 MR. MITCHELL: Right.

16 THE COURT: I mean, I think that was your intent,  
17 which I can understand why you'd want to do that.

18 MR. MITCHELL: Well --

19 MR. STAUDAHER: Your Honor, could I just ask a point  
20 of clarification --

21 THE COURT: Sure.

22 MR. STAUDAHER: -- because I'll be doing closing.

23 THE COURT: All right.

24 MR. STAUDAHER: At least the first closing, and I  
25 don't want to get into an area that I don't want to -- or that

1 I'm concerned about.

2           The concern that I have at this point with what the  
3 court has just ruled is if Mr. Mitchell is precluded from at  
4 least asking in response to Mr. Albregts' question about, okay,  
5 it's not illegal to do this, to do x, it's not illegal to do y,  
6 it's not illegal to do whatever, and he had -- he had a series  
7 of questions like that.

8           If Mr. Mitchell is not asked -- be allowed to ask  
9 well, when would doing x be illegal, be considered illegal,  
10 when would doing y be considered illegal? I mean, at that  
11 point he's not proffering any kind of a hypothetical. But the  
12 concern I have, though, is that if we leave it at this, it  
13 allows Mr. Albregts to get up and argue, well, you heard it out  
14 of the mouth of -- of Maryanne Miller that this conduct is not  
15 illegal. So therefore, you cannot come back with -- with a  
16 verdict of -- of guilty because he/she said it was basically  
17 legal conduct.

18           There's been no -- there's been no rebuttal allowed  
19 on that issue. No re -- redirect to further define what she  
20 meant, because she wanted -- or when she was talking about it,  
21 she said well, under most circumstances or -- or she gave some  
22 sort of the caveat, or some sort of exclusion to what she was  
23 talking about.

24           So I think he should be allowed to at least explore  
25 that with her, or on the conversely, if the court doesn't want

1 to do that, then Mr. Albregts should not be allowed to argue  
2 that in his closing argument.

3 THE COURT: Well, I said first off for now you can't  
4 ask that question of Ms. Miller, and I said --

5 MR. STAUDAHER: Okay.

6 THE COURT: -- until we resolve this legal issue. So  
7 I'm not -- we're not done with it. I wish we were, but we're  
8 not.

9 MR. ALBREGTS: Well, and -- and let me just say this.  
10 I can't even begin to tell you what my closing's going to sound  
11 like. Although, apparently it's going to sound like the end of  
12 my opening. But I can't really foresee that I'm going to make  
13 a big deal out of that comment, or that -- those three or four  
14 questions I asked and say to the jury that alone. That's  
15 just --

16 THE COURT: And I think your questions were in and of  
17 itself going to lunch with someone, is that misconduct. She  
18 says, well, not under some -- or some circumstances.

19 MR. ALBREGTS: Right. I mean, I think she made it  
20 clear that not --

21 THE COURT: And she qualified her answer.

22 MR. ALBREGTS: And she qualified it completely.  
23 She's a lawyer.

24 MR. MITCHELL: With an acquaintance, though. That --  
25 and friends are acquaintances. Excuse me. And that's why --

1 that's why it was a (indiscernible) question on the law  
2 because --

3 MR. ALBREGTS: My defense is not based upon that  
4 nuance. I think that's obvious.

5 MR. MITCHELL: But the jury doesn't know that.  
6 That's -- that's our point.

7 THE COURT: If Mr. Thomas retained -- and let's  
8 assume he had a friendship relationship with these people, and  
9 that's for the jury to decide. If he had a strong friendship  
10 relationship with one of these individuals, to contract for a  
11 new phone system, and he gave the best price in the world and  
12 they did the best work possible, is that theft? And is that  
13 misconduct?

14 MR. STAUDAHER: Well --

15 MR. MITCHELL: It's -- it's if -- if his purpose in  
16 entering into the contract was to confer a private benefit by  
17 virtue of his public authority, then that is misconduct.

18 THE COURT: Private benefit meaning they get paid?

19 MR. MITCHELL: Huh?

20 THE COURT: Private benefit meaning they get paid?

21 MR. MITCHELL: Yes. I mean, if that's what his  
22 intent was, and I -- I've got to -- I do have to prove his  
23 intent here. I've got to prove that he intentionally conferred  
24 a private conduct to the exclusion of his public duty,  
25 something that was not in the public interest of the

1 organization that he represented, but was solely in the private  
2 interest that -- that --

3 THE COURT: Is it the public interest if he entered  
4 into a contract that was a good price and good product?

5 MR. MITCHELL: Well, according to the law on this  
6 point, if his purpose is to benefit a friend, it doesn't really  
7 matter whether or not it also happens to benefit the -- the  
8 organization he represents. It's -- it's what his intent is  
9 when he awards the contract. Just to go back to the airport  
10 concession.

11 THE COURT: Well, let me interrupt you here. I mean,  
12 under what circumstance would Mr. Thomas enter into a contract  
13 and the -- the party he contracts with has to do a \$100,000 of  
14 work and there's \$50,000 of materials and the rest is labor,  
15 and he contracts with this person for \$30,000, is he still --  
16 is he still performing misconduct?

17 MR. MITCHELL: Well, Judge --

18 THE COURT: I mean, if it's a fair contract -- if  
19 it's a fair contract and the county gets a good benefit from  
20 the contract, is that misconduct?

21 MR. MITCHELL: Whether or not it turns out well for  
22 the county is absolutely not the issue.

23 THE COURT: That's all I wanted to hear. I wanted to  
24 hear your position.

25 MR. MITCHELL: Okay, okay.



1 THE COURT: So if they get a great deal and a great  
2 product, but it's his neighbor, he has now committed  
3 misconduct?

4 MR. MITCHELL: Yes, Judge. And here's -- and here's  
5 the -- here's the reason why. I mean, if it -- if -- see, what  
6 the statute addresses is not giving other people a fair chance.  
7 And it is using public power for private benefit. So if -- and  
8 this actually came before the Board of County Commissioners  
9 several times in recent years where it was determined that  
10 commissioners were granting concession contracts to people out  
11 at the airport.

12 Now, those concessions were probably making a lot of  
13 money for the county, but the fact had been that the concession  
14 contract was awarded to somebody who was a friend and the  
15 friendship wasn't disclosed.

16 So even though it benefited the county, that was  
17 completely irrelevant. What was illegal about that was that  
18 they had chosen the friend based on the friendship. Whereas,  
19 some other person may have been able to do just as good a job,  
20 but the friend got the benefit of the contract because they  
21 were a friend.

22 So how it -- how it all turns out, it doesn't really  
23 matter on counts six through ten. And the law that determines  
24 whether or not you're doing it for a friend or not generally  
25 focuses on whether or not you disclose that it's a friend, and

1 whether or not your purpose is to reward somebody because of  
2 the friendship, which is unfair to other people.

3 And those who elect the public official or select the  
4 public official want to know why they're doing what they're  
5 doing even if -- even if it benefits the organization as a -- I  
6 mean, as a consequence of the job being done well, still it's  
7 wrong to award people contracts for their benefit as opposed to  
8 the benefit of somebody else that would like to also have a  
9 chance at that contract.

10 So that's why I say that the -- the landscaping  
11 contract that you're talking about, it could be the best  
12 landscaping in the world and it could really look nice on the  
13 county's lawns, but if he gave it to his friend because it was  
14 his friend, and to the exclusion of other people who would have  
15 liked to mow that lawn, that is -- that's misconduct of a  
16 public official.

17 MR. ALBREGTS: Your Honor, it clearly can't be.  
18 First of all, the airport concession is a completely different  
19 situation because that's something that has to go to the board,  
20 do -- go through all those machinations --

21 MR. MITCHELL: So does this.

22 MR. ALBREGTS: -- and everybody should have the  
23 right. Most of the contracts we're talking about, no one can  
24 say that somebody else would have the right to the \$5,100  
25 contract. That's something that he as a CEO has every right to

1 do. And same with a couple of the other contracts that were  
2 below the 25,000.

3 And so I completely disagree when he -- when he cut  
4 to the chase and said to you, yes, and you said that was the  
5 answer I was waiting for. I -- I don't agree. I think it's --  
6 I don't think that's enough for a crime under this. It can't  
7 be.

8 THE COURT: All right, we'll argue this further. I  
9 look forward to it. We'll see everybody at 10:00 for  
10 resumption of Ms. Miller's testimony.

11 MR. ALBREGTS: Witnesses and then we'll -- okay.

12 THE MARSHAL: Should we have counsel here a few  
13 minutes early, Judge?

14 THE COURT: Not unless there's any other legal issue,  
15 we can just go straight into her testimony, and we're just  
16 going to stay away from these issues, and she's -- she's  
17 subject to be recalled.

18 MR. ALBREGTS: I think we actually discussed it, and  
19 of course, Mr. Mitchell can certainly change his mind, but I  
20 think we -- I indicated I don't have any recross. So if he  
21 doesn't have any need for her, I don't have any need for her,  
22 and she can go do what she's going to do. And if we need her  
23 back, we can call her back, so.

24 THE COURT: Well, it's up to you, Counsel, if you're  
25 going to ask any further questions.

1 THE MARSHAL: I think the jury had questions.

2 THE COURT: That's right, she might -- they may have  
3 had questions, so --

4 MR. ALBREGTS: (Indiscernible) I always forget about  
5 that.

6 THE COURT: So if we can just have counsel at ten  
7 minutes 'til, and then we'll go from there. Let's try to get  
8 caught up next -- tomorrow, so we're going to get a full day in  
9 tomorrow, okay. All right.

10 THE MARSHAL: The Court's in recess.

11 (The court recessed at 5:08 p.m., until Wednesday,  
12 March 24, 2010, at 10:00 a.m.)

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<u>NAME</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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PLAINTIFF'S WITNESSES:

Maryanne Miller	97	127	140
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EXHIBITS

<u>DESCRIPTION:</u>	<u>ADMITTED</u>
Exhibit 2 - Mr. Thomas's Employment Agreement . . . . .	106

CERTIFICATION

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