IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

Appeal From Order Granting Defendant's Motion to Dismiss the Indictment in District Court Case No. 08C241569 Eighth Judicial District Court, Clark County

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ARGUMENT

I

THE STATE'S JURISDICTIONAL CHALLENGE TO THE DISTRICT COURT ADJUDICATING THOMAS'S UNTIMELY MOTION TO DISMISS IS NOT SUBJECT TO WAIVER, AND NRS 34.700;710 CLEARLY ENCOMPASS THOMAS'S MOTION

Lacy Thomas, hereinafter "Thomas", tries to justify the untimeliness of his motion to dismiss—and the district court's resulting lack of jurisdiction—by claiming NRS 34.700 only applies to pre-trial motions challenging the sufficiency of a grand jury's probable cause determination. The statute's plain text, however, precludes that interpretation because it substantively encompasses pleadings challenging an "alleged lack of probable cause *or otherwise challenging the court's right or jurisdiction to proceed to the trial*…" NRS 34.700(1) (emphasis added). Moreover, in Palmer v. Sheriff, 93 Nev. 648, 649, 572 P.2d 218 (1977), where the Court emphasized the inflexibility of the 21 day filing period, the defendant's petition, like Thomas's motion, "challenged the validity of the [charging document.]" Id. at 649, 572 P.2d at 218. Clearly the statute was designed to avoid precisely this situation where a defendant goes months—indeed, in

Thomas's case, over a year—before finally challenging the district court's right to proceed on the charging document.[1]

II
THOMAS CONCEDES THE OFFICIAL MISCONDUCT AND THEFT STATUTES ARE NOT VAGUE AS APPLIED TO HIM AND HIS WAIVER ARGUMENT IS MERITLESS

In his response, Thomas simply ignores the State's numerous authorities demonstrating why the Indictment's allegations of official misconduct and theft are not unconstitutionally vague. See Fast Track Statement (FTS) at 10:27-14:23. Rather than concentrate on the merits, Thomas claims only plain error review applies because "the State chose not to oppose the constitutional challenges [] Thomas [made] in the trial court." Respondent's Fast Track Response (FTR) 6:7-11. His argument is meritless. The State is clearly not, for the first time on appeal, arguing that the Indictment is not unconstitutionally vague. While focusing primarily on the Indictment's statutory sufficiency in terms of notice pleading, the State's opposition concluded that "[b]ecause the Indictment is sufficiently detailed, it provides more than is required by *both* notice *and due process*, and therefore, there is no basis to dismiss the Indictment on the grounds of insufficiency or lack of notice." 3 AA 659:7-9 (emphasis added).[2]

That is enough in itself, but the district court's errors were also preserved at oral argument. The State specifically refuted Thomas's vagueness analysis during argument on the motion, pointing out that the Indictment was not vague because it was founded on allegations that Thomas exercised his contracting authority without "the appropriate approvals," and he was using "different mechanisms for circumventing [County approval processes] so that he could benefit his friends by breaking the rules. In other words, he was trying to run outside the system…He's circumventing [the limits on] his authority." 3 AA 715:5-8. That is exactly the point raised in the State's appeal: that the Indictment is not vague because it alleges Thomas exceeded the County's limited entrustment to

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[1] Insofar as Thomas claims this challenge was not preserved for appeal, it is fully reviewable on a de novo basis because the district court exceeded its subject matter jurisdiction in hearing the motion to dismiss. See U.S. v. Cotton, 535 U.S. 625, 630 (2002). And, in any event, the error is plain.

[2] Thomas appears to imply that his vagueness argument was based on the Sixth Amendment. See FTR 6:7-11. His motion to dismiss and reply brief never mentioned the Sixth Amendment but relied only on Fifth Amendment due process. 3 AA 604-13-15. This Court has observed that "'[v]agueness doctrine is an outgrowth…of the Due Process Clause[s] of the Fifth' and Fourteenth Amendments to the United States Constitution." State v. Castaneda, 245 P.3d 550 (2010) (citation omitted).

commit its funds through his contracting authority. FTS 9:20-14:23. And the State also argued that the mens rea element and the allegation of Thomas's intent to transfer County funds for the benefit of another rendered Indictment not vague, which, again, is one of the salient points raised on appeal. 3 AA 715:9-13; 716:5-20. Although the State opposed Thomas's vagueness argument in its written opposition, thus preserving it for appeal, even had it raised an opposition for the first time only at oral argument, those grounds of appeal are preserved.[3] And the raising of new authorities on appeal certainly is no indicator of waiver below.[4] Preservation of appellate issues does not require ritualistic incantations.[5] It was sufficient that an opposition was filed or oral argument made which put the trial court on notice of the general principles on which Thomas's motion should be denied. [6]

Aside from his meritless waiver argument, Thomas complains the Indictment did not specifically reference the individual statutes, regulations, ethics codes, and policies from which the limits of his authority are ascertainable. This argument only makes sense if Thomas assumes his own conclusion that the State's entire case had to be pleaded in great particularity in the Indictment, and he ignores the small avalanche of caselaw in the State's brief, which clarifies that those specific sources of authority are matters to be presented *at trial as evidence*, *not pleaded in the indictment*. FTS 9:20-14:23. If the precise sources of a public officials' authority had to be pleaded in the Indictment in order to avoid vagueness, those numerous authorities might have mentioned that requirement somewhere. None of them do; indeed, they hold the opposite. See FTS 9:20-14:23. Thomas also argues the State failed to present grand jury evidence that he acted without authorization. He overlooks the State's citation in its brief to several such significant moments during the grand jury presentation. See FTS 14:1-16. Additionally, the grand jury was presented with evidence that Thomas repeatedly refused to comply with statutory constraints on the expenditure of County UMC funds, and angrily informed the District Attorney Civil Division attorneys that their job was to help him "find a way around the statutes or to get out of the way." 1

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[3] See e.g., Boracchian v. Biomet, Inc., 348 Fed.Appx. 269, 270-271 (9th Cir. 2009).
[4] See, e.g., Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748 (7th Cir. 2010).
[5] See Nelson v. Adams, USA, Inc., 529 U.S. 460, 469, 120 S.Ct. 1579, 1586 (2000).
[6] An appellate court can always consider new purely legal issues on appeal. Exxon Shipping Co. v. Baker, 554 U.S. 471, 487, 128 S.Ct. 2605, 2618 (2008).

AA 70. He openly flouted his statutory duties to provide County Manager Virginia Valentine mandated reporting on UMC's finances, disregarded County financial policies and procedures, and repeatedly attempted with some success to circumvent County approval procedures for contracts in excess of $25,000.00. 1 AA 43-45, 2 AA 413-415. In direct contravention of County procedures, he executed a $35,000.00 unauthorized change order to pay for work already contracted for, burying the order in a mountain of paperwork. 1 AA 133-134; 2 AA 410-411. And despite being expressly warned by UMC's COO that the contract with ACS was siphoning off large amounts of County resources with no corresponding benefit, Thomas vigorously applied himself to ensuring ACS's contract became *even more* lucrative regardless of any benefit to UMC. 1 AA 17-18, 25-36, 174-175; 2 AA 392-393. The Indictment was clearly not unconstitutionally vague, and it more than sufficiently put Thomas on notice of the prosecution case he would have to (*and did*) meet at trial.

III
WITHOUT ANY LEGAL BASIS, THOMAS ESSENTIALLY ASKS THIS COURT TO REQUIRE THE STATE TO PLEAD ITS TRIAL EVIDENCE IN THE INDICTMENT

Thomas has failed to find any meaningful response to the State's authorities showing that, in order to provide sufficient notice, an official misconduct-theft Indictment need not specifically refer to the underlying statutes, ethics rules, and regulations that constrain the official's authority. Instead, Thomas grasps for the federal criminal copyright analysis in U.S. v. The, 535 F.3d 511 (6th Cir. 2008). Thomas looks so far afield for supporting caselaw because every jurisdiction to consider his precise challenge has found it lacks merit. FTS 9:20-14:23. Cursory review reveals The does not say what Thomas purports it to say and is otherwise distinguishable. First, The recognized an Indictment is not always required to plead a specific statute, even for 18 U.S.C. § 545, which textually includes as an offense element that the defendant acted "contrary to law." The, 535 F.3d at 517 (noting Indictment must list specific copyright act provision violated "*or* at least 'some fact or facts showing that the [merchandise was] imported or brought in contrary to some law[.]'" (emphasis added) (quoting Olais-Castro v. U.S., 416 F.2d 1155 (9th Cir. 1969)). That in The's specific case, the statute should have been pleaded in the Indictment does not mean that in Thomas's and other (even § 545) cases it must also be pleaded. See State v. Jensen, 272 Wis.2d 707, 755-758, 681 N.W.2d 230, 253-254 (Wis. Ct. App. 2004); cf. also U.S. v. Lazarenko, 564 F.3d 1026, 1033-1034 (9th Cir. 2009).

Moreover, The is distinguishable because the theft and official misconduct offenses do not contain a "contrary to law" element. Thomas's idiosyncratic view of Indictment sufficiency would lead to the absurd result of requiring every employee-theft Indictment to provide a bill of particulars enumerating the defendant's relevant employment contract terms and any tangentially applicable statutes, regulations, and miscellaneous sources of employee duties.

As already pointed out in the Fast Track Statement, the facts underlying Thomas's Theft and Official Misconduct offenses are pleaded in extensive detail and were thoroughly detailed in the grand jury transcript, which was more than sufficient for him to put on a spirited defense in the first trial on the Indictment.[7] Those specific allegations prevent him from being retried on any future allegation of Theft, Official Misconduct, or any other crime arising out of his actions in relation to those specific contracts.[8] Thomas's response does nothing to rehabilitate the district court's erroneous analysis of the Indictment. And it does not dispel the clear implication that the district court's order was a substitute for dismissing based on the alleged Brady violation Thomas never managed to prove, despite ample months of opportunity and effort.

WHEREFORE, the State respectfully requests that the district court's granting of the motion to dismiss be reversed and the case be remanded with instructions to reinstate the Indictment.

Dated this 3rd day of October, 2011.

Respectfully submitted,

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BY */s/ Steven S. Owens*
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[7] To determine an indictment's adequacy of notice, the Court considers the pleading and transcript of the grand jury session together. Logan v. Warden, 86 Nev. 511, 513, 471 P.2d 249, 251 (1970).

[8] U.S. v. Morrison, 536 F.2d 286 (9th Cir. 1976), does not support Thomas's argument because, in Morrison, the indictment wholly omitted an allegation of criminal intent. See U.S. v. Ross, 206 F.3d 896, 899-900 (9th Cir. 2000) (distinguishing Morrison); U.S. v. Davis, 336 F.3d 920 (9th Cir. 2003).

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 3, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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