IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

LACY THOMAS,

Respondent.

CASE NO: 58833

APPELLANT'S OPENING BRIEF

Appeal From Granting of Motion to Dismiss
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUE(S)

1. WHETHER THE DISTRICT COURT'S DISMISSAL OF THE INDICTMENT WAS PROPER GIVEN THE NATURE OF RESPONDENT'S ARGUMENTS IN THE MOTION TO DISMISS
2. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE INDICTMENT FAILED TO PROVIDE SUFFICIENT NOTICE OF THE CHARGES AGAINST RESPONDENT
3. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE THEFT AND OFFICIAL MISCONDUCT STATUTES WERE UNCONSTITUTIONALLY VAGUE AS APPLIED TO RESPONDENT'S CASE

STATEMENT OF THE CASE

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). Appellant's Appendix, vol. 3, 514-521.[1] On February 28, 2008, Thomas was arraigned and pled not guilty. Id. at 522. On March 22, 2010, Thomas proceeded to trial. Id. at 523. On Day 10 of Thomas' trial, April 2, 2010,

[1] Appellant's Appendix hereinafter "AA"

the district court declared a mistrial based on pre-trial discovery issues. Id. at 524-588. On April 8, 2010, the district court reset the trial date to August 2, 2010. Id. at 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. Id. at 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) [2] and 205.0832(1)(b) (Theft),[3] are void for vagueness as applied to Thomas in the 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. Id. at 507-606. The State filed its Opposition to the motion on March 17, 2011, and Thomas filed a Reply Brief on March 28, 2011. Id. at 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. Id. at 672-735; 736-742. The Order held that NRS 205.0832 was vague as applied to Thomas in

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[2] 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…"

[3] 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 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."

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." Id. at 741. The district court asked rhetorically, "under what circumstances will the government file criminal chargers [*sic*] for entering into an ill-conceived contract?" Id. 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." Id.[4] The State filed its timely Notice of Appeal and case statement on July 1, 2011. Id. at 743-747. Thereafter, the State filed a Fast Track Statement on August 29, 2011. Thomas filed a Response on September 19, 2011. The State filed a Reply on October 3, 2011. Subsequently, this Court ordered full briefing on April 13, 2012. The State's Opening Brief follows:

STATEMENT OF THE FACTS

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, vol. 1, 86; 89. Thomas negotiated the first of these contractual relationships with Frasier Systems, a purported consulting firm owned by his close friend Greg Boone. AA, vol. 1, 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

[4] The district court expressly declined to resolve Thomas' 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' motion alleging the Indictment contained redundant, multiplicitous counts.

mother's garage. Id. at 96-98; 108. Thomas negotiated a consulting contract which paid Frasier Systems $50,400.00 in exchange for Boone to essentially regurgitating in a brief PowerPoint presentation information he received from UMC's IT Department. Id. at 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. Id. at 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. Id. at 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). AA, vol. 2, 378.

Thomas negotiated a third contractual relationship with Crystal Communications, a company owned by his close friend and fraternity brother, Martello Pollock. AA, vol. 1, 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. Id. at 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, vol. 1, 113-116; AA, vol. 2, 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, vol.1, 115-116; AA, vol. 2, 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, vol. 1, 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. Id. at 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. Id. at 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. Id. at 129-130.

Thomas also established a contractual relationship with TBL Construction (TBL), a local company owned by Alonzo Barber, who had no prior experience in hospital construction work. Id. at 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. Id. at 130-132. Thomas avoided scrutiny of the contract by paying TBL $35,000.00 under an unauthorized change order added to an existing contract. Id. at 133-134; AA, vol. 2, 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, vol. 1, 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. AA, vol. 2, 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, vol. 1, 17-18, 25-36; AA, vol. 2, 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, vol. 1, 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, vol. 1, 141-142; AA, vol. 2, 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, vol. 1, 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. Id. at 146-153. ACS had no contractual right to such a commission but received it based on Thomas's authorization. AA, vol. 2, 469-472.

ARGUMENT

I
THE DISTRICT COURT'S DISMISSAL OF THE INDICTMENT WAS IMPROPER BASED ON THE ARGUMENTS IN THE MOTION TO DISMISS

In a decision filed on June 3, 2011, the district court dismissed counts 1-10 of the Indictment against Respondent Lacy Thomas ("Thomas") based on a Motion to Dismiss filed by Thomas on February 11, 2011. AA, vol. 3, 597. The relevant Motion to Dismiss was one of three motions filed on February 11, 2011. Id. The Motion to Dismiss at issue in the instant appeal challenged the constitutionality of the Theft and Official Misconduct statutes and whether the Indictment provided sufficient notice of the charges. Id. at 597-605. This Court reviews a district court's decision to grant or deny a Motion to Dismiss for an abuse of discretion. Hill v. State, 124 Nev. 546, 188 P.3d 51, 54 (2008). In this case, the district court abused its discretion is granting the remedy of dismissal of the Indictment.

In the order granting full briefing, this Court asked the State to address whether Thomas' Motion to Dismiss challenged sufficiency of the evidence to sustain the Indictment or whether it challenged the district court's jurisdiction to try the case; whether the motion should have been construed as a pretrial Petition for Writ of Habeas Corpus; and whether the district court was precluded from adjudicating the motion/petition. It is the State's position that the Motion to Dismiss, when read in combination with the district court's Decision Granting Dismissal and arguments made by defense counsel at the hearing on the Motion to Dismiss, argued that the State failed to put Thomas on sufficient notice about the theory the State was proceeding on that made the actions of Thomas criminal in nature. As discussed infra section II, however, Thomas was clearly put on notice of the State's theory. However, the Motion to Dismiss and the Decision of the Motion to Dismiss convoluted several areas of law. It is therefore unclear exactly how the Motion to Dismiss should be interpreted or on what basis the district court granted the Motion. As more fully discussed below, it is the State's position that the Motion to Dismiss could be interpreted as a challenge to the sufficiency of the evidence, but that the Motion is not a challenge to the district court's jurisdiction.

1. The Motion to Dismiss Challenged Sufficiency of the Evidence

There are several indicators in Thomas' Motion to Dismiss, defense counsel's arguments at the hearing on the Motion and the district court's decision on the Motion where it appears that Thomas was challenging the sufficiency of the evidence to support the Theft and Official Misconduct charges.

When discussing why the theft charges of the Indictment should be dismissed, Thomas specifically stated in the Motion that "The language of the Theft statute must mean *under the facts of this case*, that bad decisions become crimes when there is a specific limitation placed on property entrusted to a person and that specific limit is violated. There are no allegations at all that this is what happened. In fact, there was *substantial evidence adduced* that the county

authorized all of the transactions at issue in this case." AA, vol. 3, 603. Additionally, when discussing why the official misconduct charges should be dismissed, Thomas stated in the Motion, "The State has already advised the court that it will not prove that Mr. Thomas received any kickbacks or inappropriate remuneration for the contracts. The State has already advised the court that the benefit received by the recipients was the benefit provided under the contract. The State has already advised the court that it is not required to prove that the county was harmed in any way." Id. In essence, Thomas argued that the district court should grant his Motion to Dismiss the theft charges because all of the contracts at issue in this case were authorized by the County and there was therefore insufficient evidence that he misused property entrusted to him. Thomas also argued that the official misconduct charges should be dismissed because the State failed to provide sufficient evidence that Thomas's received any type of kickback or the hospital was harmed.

This sufficiency type argument was further emphasized by defense counsel during the hearing on the Motion to Dismiss. At multiple times during his argument, defense counsel encouraged the district court to focus on the evidence elicited at the partial trial in order to determine whether there was sufficient evidence to continue the proceedings. Defense counsel was essentially requesting that the judge enter a directed verdict on a trial that had never been completed. For example, when arguing why the Indictment should be dismissed counsel stated:

> For instance, if—well, let me back up. We had testimony at trial from Tom Riley and others that it's not unusual at all to have consultants, and we talked about whether the consultants provide any value is in the eye of the beholder and that it's not unusual to have consultants that you've worked with before or people that you have a relationship with. And so we have all sorts of testimony that those acts aren't on their face illegal. And so we know that there are acts that will cross the line, but the facts of this case, there aren't any of those facts. They don't fit into that because we have a man who is entering into contracts with ACS or the consultants. These are people that have knowledge in the field. These are

> contracts that are vetted. They go through the procedure of the county. The county approves them. The county then approves the pay of these contracts after the work's performed and the invoice is submitted. Where does the crime occur?

Id. at 710. Defense counsel continued later in his argument and stated:

> Well, Judge, the testimony was clear. The minute that this contract provision to the ACS contract that was at issue to change the baseline and to change a couple of the terms was brought to Mr. Thomas's attention that this isn't how this works, we got to go back to the board, that's what happened. And so the Court's absolutely right. This went through levels of scrutinization and levels of approval just by the very nature such---and that's why they're there so somebody like Mr. Thomas so somebody in his position can't do the things that the State's claiming that ain't going to be able to prove he did or that he had the criminal intent to somehow alter these to the detriment of the county and the benefit of his friends.

Id. at 719. Counsel continued on to discuss how Thomas did not receive a kickback, so the State would not be able to prove Thomas committed these crimes. Id. at 720. Defense counsel's argument could easily be interpreted as challenging not only the evidence presented during the partial trial but, considering that the evidence given at the trial was a more fully expanded version of the evidence given at the grand jury, the argument could be seen as challenging the evidence presented at the grand jury. Defense counsel is arguing that the State failed to prove that Thomas had the criminal intent for Theft or Official Misconduct because all of his contracts were approved by the county board of commissioners.

There is also language in the district court's decision on the Motion to Dismiss that indicate that the court was at least in part granting the Motion because the State failed to provide sufficient evidence of the charges. For example, the district court noted:

> Throughout the pleadings and arguments during the various motions in this matter and based upon the Grand Jury testimony, the State concedes that Thomas has not personally received any private benefit from the contracts in question. Further, they concede that each original contract had to go through a vetting process by Thomas, various staff members at UMC, a Clark County District

> Attorney, and Clark County staff before receiving ultimate approval by the Clark County Commissioners. Also, all invoices submitted by the entities identified in Counts1-V were paid by the county and not by Thomas. The graveman of the charges against Thomas is that he entered into contracts that were unnecessary, overly favorable to the vendors and/or work required under the contracts was not performed. If in fact the contracts were unnecessary, overly favorable to vendors, unperformed and as alleged amounting to theft one would wonder why the vendors/their principals were not charged with theft as co-conspirators.

Id. at 740. The district court, at least in part, took their interpretation of the evidence at the grand jury and/or the partial testimony at trial and concluded that there was insufficient evidence to support the charges. The rhetorical type questions and the elaboration of the facts presented at various stages discussed by the district court could easily be perceived as a dismissal based on sufficiency of the evidence. Based on language in the Motion, the hearing and the district court's order, the Motion could easily be interpreted as challenging the sufficiency of the evidence to support the charges. As such, the district court abused its discretion in granting the Motion as the court had no authority to hear the motion.

NRS 172.155 states, "The defendant may object to the sufficiency of the evidence to sustain the Indictment *only* by application for writ of habeas corpus." (Emphasis added). The statute is very clear that in order to challenge the sufficiency of the evidence to support the Indictment, Thomas would have had to file a pre-trial Petition for Writ of Habeas Corpus. Thomas never filed any pre-trial writ. Therefore, the only way Thomas could challenge the sufficiency of the evidence is if his instant Motion to Dismiss is construed as a pre-trial writ. NRS 174.105(a). Simply because Thomas chooses to title his motion a "Motion to Dismiss" rather than a pretrial Petition for Writ of Habeas Corpus does not change the nature of the sufficiency arguments contained in the Motion.

NRS 34.710 states: "A district court shall not consider any pretrial petition for habeas corpus: (a) Based on alleged lack of probable cause or otherwise

challenging the court's right to proceed to trial of a criminal charge unless a petition is filed in accordance with NRS 34.700." NRS 34.700 states,

> Except as provided in subsection 3, a pretrial petition for a writ of 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 may not be considered unless:(a) The petition and all supporting documents are filed within 21 days after the first appearance of the accused in the district court…"

In Sheriff v. Jensen, 95 Nev. 595, 600 P.2d 222 (1979) the Nevada Supreme Court held that pretrial petitions for writ of habeas corpus are required to be filed within 21 days of the initial appearance of the accused in district court. The first appearance in district court is the arraignment. Palmer v. Sheriff, 93 Nev. 648, 572 P.2d 218 (1977). In Jensen, this Court held that a petition that was filed 31 days after arraignment was not in compliance with the required time limit. Jensen, 95 Nev. at 595, 600 P.2d at 222. This Court then held, "The requirements of this statute are mandatory, and where, as here, the requirements are not complied with, the petition is neither cognizable below nor reviewable here." Id.

In this case, Thomas was arraigned and pleaded not guilty on February 28, 2008. AA, vol. 3, 522. The Motion to Dismiss was not filed until February 11, 2011. Id. at 597. No other pretrial petition challenging sufficiency was filed during this time. Almost three years had passed between the time Thomas was arraigned and the time he filed the Motion to Dismiss. Thomas failed to file his "Motion to Dismiss" within 21 days of his arraignment nor did he make any type of good cause showing as to why he filed his challenge late. NRS 34.700(3). Therefore, the district court had no authority to hear the Motion. Because the district court improperly entertained the extremely late Motion, the court abused its discretion and the decision of the district court should be reversed.

2. The Motion to Dismiss did not Challenge Jurisdiction

Thomas' Motion to Dismiss did not challenge the jurisdiction of the district court as there has never been any allegation by Thomas that the State failed to

allege any of the material elements of the crime of Theft or Official Misconduct. NRS 174.105(3) states in pertinent part, "Lack of jurisdiction or the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

The Nevada Supreme Court has interpreted a failure of "jurisdiction" to mean that the Indictment fails to charge an essential element of the offense. Houser v. Fourth Judicial Dist. Court, 75 Nev. 465, 345 P.2d 766 (1959). In Houser, this Court held that the district court lacked jurisdiction to proceed with the trial of the defendant because the amended information failed to allege a material element of the crime of grand larceny. Houser, 75 Nev. at 469, 345 P.2d at 768-769. Houser had been charged with Grand Larceny but the amended information failed to allege that the property taken had a value of $100 or more as mandated by the statute. Id. This Court has also interpreted "jurisdiction" to mean that the act charged is not within the statutory definition of a felony. Smith v. First Judicial Dist. Court, 75 Nev. 526, 347 P.2d 526 (1959). In Smith, the State charged the defendant with Burglary but only alleged that he had placed his hand over the open platform body of a truck with intent to commit larceny. Id. This Court held that Burglary required the entering of a structure and because the State failed to allege that defendant entered a structure, the information was not sufficient and the district court lacked jurisdiction. Id.

This case is considerably different from both Houser and Smith. There is no allegation that the State failed to plead a material element of either Theft or Official Misconduct or that the actions by Thomas' alleged by the State do not fall into the statutory definition of a felony. As discussed below, Thomas' primary contention was that the Indictment failed to place him on notice of the State's theory of the case.

The pertinent part of the Theft statute states, "a person commits theft, if without lawful authority, the person knowingly….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." NRS 205.0832. In counts 1-5 of the Indictment, the State listed every element required by the Theft statute. AA, vol. 3, 514-517. In particular the State alleged, "Defendant did…*knowingly*, feloniously and *without lawful authority*, commit theft by *using* the services or property of another person entrusted to him, or placed in his possession of a limited, authorized period or determined or prescribed duration or for a *limited use*….thereby using the services or property *for another use*." Id. Every material element required was pled by the State to support the crime of Theft. In addition, the actual statutes NRS 205.0832 and NRS 205.0835 were listed in the Indictment. Id.

In Counts 1-5 of the Indictment, Thomas was alleged to have committed acts of entering into contracts with longtime friends which were grossly unfavorable to UMC, unnecessary and entering into contracts for work that Thomas knew would not be performed and were not performed. Id. There is no dispute that such actions, if true, constitute embezzlement under the statute. Using money entrusted to one for any purpose other then what the money is supposed to be used for constitutes embezzlement. The State alleged that Thomas used money entrusted to him as CEO of UMC without lawful authority by distributing the funds to friends for work that is unnecessary or not performed thereby using the money for some purpose other than what it was supposed to be used for. As the State plead every material element of the Theft statute and the actions plead are within the definition of Theft, neither Houser nor Smith's interpretation of jurisdiction are applicable to this case.

The pertinent portion of the Official Misconduct statute states: "Every public officer who:…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." NRS 197.110. In Counts 6-10 of the Indictment, the State alleged that,

"Defendant…then and there *knowingly*, feloniously and *without legal authority*, which *acting as a public officer* as Chief Executive Officer of University Medical Center, *employ or use money under his official control* or direction, or in his official custody, *for the private benefit or gain of himself or another*…" AA, vol. 3, 517-519. Every material element required was pled by the State to support the crime of Misconduct of Public Officer. In addition, the actual statute NRS 197.110 was listed in the Indictment. Id. at 514.

As noted above, Thomas, CEO of UMC, was charged with distributing money to his friends through contracts with UMC that were unnecessary, grossly unfavorable to UMC and for work that Thomas knew would not be done. Such conduct falls squarely within the definition of the Official Misconduct statute as Thomas was using UMC money under his control to distribute money to his friends constituting a benefit to another. As the State plead every material element of the Official Misconduct statute and the actions plead are within the definition of said statute, neither Houser nor Smith's interpretation of jurisdiction are applicable to this case. As the Motion to Dismiss cannot be interpreted as a challenge to jurisdiction as interpreted by this Court, the district court abused its discretion is dismissing the Indictment on a jurisdiction basis.

However, even if this Court were to find that the Indictment failed to allege a material element of the offense or failed to set forth acts that constituted a felony, any potential errors do not involve jurisdiction. Therefore, if the district court granted the Motion based on lack of "jurisdiction" because of alleged errors in the Indictment, such dismissal was a clear abuse of discretion.

In U.S v. Cotton, the United States Supreme Court held that the term "jurisdiction" means "the courts' statutory or constitutional *power* to adjudicate a case." U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The Court held that "defects in an indictment do not deprive a court of its power to adjudicate a case."

Cotton, 535 U.S. at 630, 122 S.Ct. 1785.[5] See also U.S. v. Carr, 303 F.3d 539, 543 (4th Cir. 2002)(the Indictment's failure to allege an essential element of the offense and failure to charge a federal crime did not deprive the district court of jurisdiction to adjudicate Carr's case); U.S. v. Prentiss, 256 F.3d 971 (10th Cir. 2001). Even if this Court were to find that the Motion to Dismiss alleged that the State failed to plead a material element of the crime or failed to allege acts that constituted a felony, such challenges were not challenges to the district court's jurisdiction. Therefore, if the district court dismissed the Indictment based on failure of jurisdiction, such dismissal was in error because any alleged problems with the Indictment did not require a dismissal. In so much as the district court may have dismissed based on a jurisdiction defect, such action was a clear abuse of discretion as it is contrary to established law.

II
THE DISTRICT COURT ERRED IN FINDING THAT THE INDICTMENT FAILED TO PLACE RESPONDENT ON NOTICE OF THE CHARGES AGAINST HIM

It is the State's position that the Motion to Dismiss challenged the Indictment's failure to plead sufficient facts to put Thomas on notice of the State's theory about what conduct was criminal. In the Motion to Dismiss, Thomas specifically questioned what theory the prosecution was proceeding on that made his actions criminal. AA, vol. 3, 600. In essence Thomas argued that the Indictment failed to put him on notice of what alleged actions constituted "using" funds entrusted to him for an improper purpose. Id. at 601. At the hearing on the Motion to Dismiss defense counsel argued:

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[5] In so holding, the Supreme Court relied upon Lamar v. United States, 240 U.S. 60, 36 S.Ct. 255 (1916) which held that an Indictment that does not charge a crime against the United States is not a jurisdictional defect but goes only to the merits of the case. The Court also relied upon United States v. Williams, 341 U.S. 58, 66, 71 S.Ct. 595 (1951) which held "[that the fact] that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the Indictment.".

> And at the end of the day, the question becomes what is the conduct that's criminal? What did Lacy Thomas do in the procurement of these contracts that commits a crime under a theft theory or under a misconduct theory? And I, to this day, still don't know what it is…And so the question becomes what conduct is criminal? And that's why in that motion we're saying that number one, the case should be dismissed because there isn't any conduct that's a crime…And how can you put somebody on notice? And that's what the motion speaks to, Judge. That's the where is the crime…And I would say that unless the State can tell you what crime is being committed here, what act constitutes the crime, then the charges must be dismissed…there isn't a crime committed because a crime hasn't been alleged…

Id. at 709-713. In response the State argued that the Indictment pled sufficient facts to put Thomas on notice. Id. at 716. The district court clarified that the Motion to Dismiss challenged the notice requirement when it stated in the Decision on the Motion, "Thomas challenges the Indictment under a number of legal issues, most notably that the language of the Indictment does not set forth criminal conduct and, therefore, does not provide sufficient notice of the charges against him." Id. at 740. The district court eventually held that, "This court finds that the indictment does not provide Thomas with due process as to what is a criminal act as alleged in the indictment and as defined in NRS 205.0832 and 197.110". Id. at 742. It is apparent that both defense counsel and the district court interpreted this Motion to Dismiss as a challenge to the notice requirement of Indictment. The district court's dismissal of the Indictment on this basis was a clear abuse of discretion.

While the denying or granting of a motion to dismiss is reviewed for abuse of discretion, "we review de novo whether the charging document complied with constitutional requirements." West v. State, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003). The Indictment in this case pled more than sufficient facts to apprise Thomas of his specific conduct alleged to constitute Theft and Misconduct.

A. Standard for Sufficiency of Indictment

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."; see also West, 119 Nev. at 419, 75 P.3d at 814. "A charging document should provide a statement of the acts constituting the offense in ordinary and concise language as to enable a person of common understanding to know what is intended." Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985). "To satisfy this requirement, 'the [charging document] standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so he may adequately prepare a defense." Hildago v. District Ct., 124 Nev. 330, 339, 184 P.3d 369, 375 (2008). The Indictment must be definite enough to prevent the prosecutor from changing the theory of the case. Husney v. O'Donnell, 95 Nev. 467, 596 P.2d 230 (1979). The Hildago Court, addressing the factual specificity necessary in a Notice of Intent to Seek the Death Penalty, analogized it to the specificity necessary in a charging document and in so doing found that "the State is not required to include exhaustively detailed factual allegations…the notice of intent must provide a simple, clear recitation of the critical facts supporting the alleged aggravator." Hildago, 124 Nev. at 339, 184 P.3d at 375. The same is true for an Indictment; the State need only provide the critical facts supporting the charge.

> The accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constructional right to due process.

Simpson v. District Ct., 88 Nev. 654, 660, 503 P.2d 1225, 1229-30 (1973). The State is not required to allege each and every fact that will be proven at trial. The test is not whether the document could have been made more definite or certain but simply if the elements of the offense have been alleged with enough specificity to inform the accused of the charges such that he may prepare a defense. Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970).

This Court has further explained other requirements of the Information or Indictment. "The charging document should also contain, when possible a description of the means by which the defendant committed the offense" or a statement that the method is unknown. Spagnola, 101 Nev. at 514, 706 P.2d at 844. In Spagnola, each count of the charging document alleged that the defendant obtained money under false pretenses with the intent to defraud by obtaining payment in a specific amount by means of submitting duplicate travel expense claims with regard to certain specified patients and each count delineated the month during which the act occurred. Id. Based on this information, this Court found that a sufficient statement of the acts was provided and the defendant had adequate notice of the theory of guilt on which the State would rely. Id.[6]

B. The Indictment in this Case was Sufficient

The district court clearly erred in dismissing the Indictment based on a theory that it failed to plead sufficient facts to place Thomas on notice of the State's theory. Counts 1-5 of the Indictment all allege that 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. AA, vol. 3, 514-517. 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

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[6] See also Benigas v. State, 95 Nev. 358, 594 P.2d 724 (1979)("Count one of the challenged indictments charged embezzlement as follows: (Defendants) did then and there willfully, unlawfully and feloniously embezzle $100.00, or more, lawful money of the United States, or the equivalent thereof, to-wit: gaming chips, the property of . . . Hotel . . . in the following manner . . . Defendants, as agents and employees of . . . Hotel, being entrusted with gaming chips for the purpose of conducting gaming activities, to-wit: baccarat, did appropriate and use said chips for purposes other than that for which the same was entrusted With intent to steal the same and defraud the owner thereof. (Emphasis added.)…. Indictments, as these before us, which set out statements of the acts constituting the offenses in such a manner as to inform the accused with reasonable certainty of the specific offense with which he is charged are sufficient.")

completely "unnecessary" and would never be or was not being performed. Id. For example, Count 2 of the Indictment read as follows:

> Defendant did, on or between December, 2004, and December 2006, then and there knowingly, feloniously, and without lawful authority, commit theft by using the services or property of another person entrusted to him, or placed in his possession of a limited authorized period of determined or prescribed duration or for a limited use, having value of $2500.00 or more, lawful money of the United States, belonging to University Medical Center and/or Clark County, Nevada, in the following manner, to wit: by the Defendant, while employed as the Chief Executive Officer at said university Medical Center, entering into contracts with Frasier Systems Group, a company owned by Gregory Boone, a friend of said Defendant, whereby said Frasier Systems Group was paid with University Medical Center funds to plan and implement a project manager's office for University Medical Center projects but never produced any product or services in return for said payment, and said Defendant causing payments to be made on said contract while he knew or should have known that services were not being received as contracted for under said contract and said contract was unnecessary in that University Medical Center already had available, free of charge, the services of a project manager's office run by Clark County, thereby using the service or property for another use.

Id. at 515-516. The Indictment clearly pled sufficient facts for Thomas to know what allegations he had to defend against. Thomas knew that he had to defend against the allegations that the contracts were unnecessary, highly unfavorable to UMC, the work was never completed under the made contracts and Thomas paid money under the contracts knowing that no work was done. The State is not required to plead every single fact that they plan to prove at trial. All that is required is a definite statement sufficient to enable a defendant to know what they must defend against and a description of how the crime occurred if possible. The issue is not whether the State will be successful on these charges if presented to a jury but whether Thomas knew based on the face of the Indictment what he must defend against. The same applies to the Official Misconduct charges 6-10 of the Indictment. For example, Count 7 reads:

> Defendant did, on or between December, 2004 and December, 2006, then and there knowingly, feloniously, and without legal authority, while acting as a public officer as Chief Executive Officer of University Medical Center, employ or use money under his official control or direction, or in his official custody for the private benefit or gain of himself or another, by doing the acts set forth in Count 2, hereinabove.

Id. at 518. Again, Thomas had sufficient notice that he would have to defend against the allegation that while acting as a public officer, he used money under his control to give beneficial contracts for work that was unnecessary and not being performed in order to benefit his friends. In both the Theft charges and the Official Misconduct charges, the Indictment clearly listed every element of the crime and gave a specific factual description in each count of how Thomas violated the statute. Those allegations were clearly sufficient under Nevada's notice pleading standard. See Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985). The sufficiency of the Indictment is to be determined by practical rather than technical considerations, Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970). As pointed out in the Statement of Facts, the facts underlying the charges were pled in extensive detail and were thoroughly detailed in the grand jury transcript which was more than sufficient for Thomas to put on a spirited defense in the first trial on the Indictment.[7] As the Indictment provided even more than what is required by notice and due process, the district court erred in dismissing the Indictment.

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. Simpson v. District Court, 88 Nev. 654, 503 P.2d 1225 (1972). The appropriate remedy for inadequate notice in a charging document is amendment, not dismissal. "The court may permit an indictment or information to

[7] To determine an Indictment's adequacy of notice, the court considers the pleadings and the transcript of the grand jury session together. Logan v. Warden, 86 Nev. 511, 513, 471 P.2d 249, 251 (1970).

be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. NRS 173.095(1). In Viray, the State was permitted to change its theory of lewdness during trial by amending the charging document to allege that the victim was forced to massage the defendant's legs instead of that the defendant massaged the victim's legs because the defendant's substantial rights were not prejudiced and the charges remained the same. Viray v. State, 121 Nev. 159, 111 P.3d 1079 (2005). Although the State contends it alleged sufficient facts to give notice of its theory, to the extent the district court disagreed the court erred in dismissing the Indictment altogether because deficient notice is not a fatal defect.

III
THE DISTRICT COURT IMPROPERLY RULED THAT THE THEFT AND OFFICIAL MISCONDUCT STATUTES WERE UNCONSTITUTIONALLY VAGUE AS APPLIED TO THOMAS

The language utilized in the Motion to Dismiss, at the hearing and by the district court also implies that the district court in part granted the Motion to Dismiss because the Theft and Official Misconduct statutes were unconstitutionally vague when applied to Thomas' case. This ruling was a clear abuse of discretion. In the Motion to Dismiss, Thomas specifically claimed that the Theft and Misconduct statutes, as applied to his case were unconstitutionally vague. AA, vol. 3, 601. At the hearing, defense counsel argued:

> And so the question becomes what conduct is criminal? And that's why in that motion we're saying that…and number two, a citizen isn't able to look at this and say all right, what I've done—I know there's a right path and I know there's a wrong path and I'm going to choose the wrong path and commit the crime….And that's what this motion speaks to judge. That's the where is the crime and if there is a crime, it's void for vagueness because it gives the prosecution such discretion and power to say well, we're going to charge one person in this case, but we wont charge them where there's other bad contracts. And that's exactly the heart of the constitutional issues that it gives the State too much discretion. It doesn't put a citizen on notice of when their activities and actions become criminal…

Id. at 709-711. In its decision on the Motion, the district court specifically stated, "NRS 205.0832 as applied to the factual allegations as in the Indictment, 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." Id. at 741. From this language it appears the district court at least in part dismissed the Indictment because the statutes as applied were unconstitutionally vague. This was clear error.

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. Adv. Op. 45, 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.[8]

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' negotiation of the contracts with his friends transgressed the limits on his authority as CEO, i.e., whether he committed Theft and Official 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

[8] 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 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' 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' employment duties and powers as provided in the Nevada Revised Statutes and Administrative Code, the statutorily incorporated UMC bylaws, and Thomas' 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." AA, vol. 3, 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. Id. at 514-519.

Numerous courts have considered vagueness challenges to their official misconduct statutes by defendants 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 (1984), the Oregon Supreme Court considered and rejected a vagueness challenge very similar to Thomas'. 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 (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. The court 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.

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).[9] 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).[10] 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. §

[9] (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.").

[10] (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.").

165.095.[11] 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 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, vol. 1, 52-53 (testimony that Thomas failed to ever follow County's Fiscal Directive No. 6 prescribing mandatory public contract bid process); AA, vol. 2, 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).[12] Moreover, the bylaws require the CEO to perform his responsibilities in a fashion and provide

[11] 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).

[12] Available http://agenda.co.clark.nv.us/sirepub/cache/0/tua44j45mbmaom451gfxl545/23574081620111019419 08.PDF

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, vol. 1, 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, vol. 1, 73-82. In light of these many sources delineating the scope of Thomas' 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.

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. 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 AA, vol. 3, 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. As there was no proper basis for dismissing the Indictment, the district court erred and the decision should be reversed.

CONCLUSION

Wherefore, the State respectfully requests that this Honorable Court REVERSE the district court's granting of Respondent's Motion to Dismiss.

Dated this 8th day of June, 2012.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains no more than 14,000 words or does not exceed 30 pages.
3. **Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 8th day of June, 2012.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 8, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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