IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,	)	
	)	
Appellant,	)	CASE NO. 58833
	)	
vs.	)	
	)	
LACY THOMAS,	)	
	)	
Respondents.	)	
_____	)	

RESPONDENT'S ANSWERING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. LACY THOMAS, Respondent.	)	CASE NO. 58833 **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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No publically held company associated with this corporation;

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Dated this 8th day of August, 2012.

Respectfully Submitted:

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TABLE OF CONTENTS

PAGE

RULE 26.1 DISCLOSURE STATEMENT. i

TABLE OF AUTHORITIES.. v

STATEMENT OF THE ISSUES. 1

STATEMENT OF THE CASE. 1

STATEMENT OF THE FACTS. 2

ARGUMENT.. 3

A. Summary of Argument. 3

B. Applicable Standards of Review. 5

C. The Motion to Dismiss Was Not a Challenge to the Sufficiency of the Evidence to Sustain the Indictment; it Was a Motion to Dismiss Asserting That the Acts Alleged in the Indictment Were Not Crimes. 6

D. State Supreme Courts Find Official Misconduct Statutes Unconstitutionally Vague When Specific Conduct Is Not Set Forth in the Statute. 9

E. The State Court Decisions Cited by the State are "As Applied" Cases and Are Inapplicable Due to the Differences in the Statutes and the Conduct at Issue. 13

F. The United States Supreme Court Limited the Scope of the Federal Official Misconduct Statute to Avoid Invalidating it and Sets Forth the Task of the Court in Analyzing Void-for-Vagueness Challenges. 18

G. The Statutes are Vague Under Nevada Law Void-for-Vagueness in Nevada. 21

H. The Trial Court Properly Construed the Statutes and Determined That the Conduct Alleged Did Not Constitute the Crimes of Theft or Official Misconduct. 27

CONCLUSION. 29

CERTIFICATE OF COMPLIANCE.. 31

CERTIFICATE OF SERVICE. 32

TABLE OF AUTHORITIES

CASES

Arizona v. Ross,
151P.3d 1261, 1265 (Ariz. App. 2007). 28

Colwell v. State,
59 P.3d 463 (2003). 9

Gallego v. State,
23 P.3d 227, 239 (Nev. 2001). 6

Hill v. State,
188 P.3d 51 (Nev. 2008). 5

Houser v. District Court,
345 P.2d 766 (1959). 9

Hughes v. Jorgenson,
50 P.3d 821, 823 (Ariz. 2002). 28

Kolsch v. Curtis,
___ F.Supp.___, 2012 WL 1376975 (D.Nev. 2012). 22

Margraves v. State,
34 S.W. 3d 912 (Tex. Crim. App. 2000). 16

McNally v. United States,
483 U.S. 350 (1987). 19, 20

Nolos v. Holder,
611 F.3d 279 (5th Cir., 2010). 22

Peccole v. McNamee,
267 P.2d 243 (Nev. 1954). 22

People v. Beruman,
638 P.2d 789, 793 (Colo. 1982). 10

People v. Grever,
856 N.E.2d 378 (Ill. 2006). 17

People v. Kleffman,
412 N.E. 2d 1057 (Ill. App. 1980). 17

Skilling v. United States,
130 S.Ct. 2896 (2010). 18, 19, 22, 27

Smith v. District Court,
347 P.2d 52 (1959). 9

State v. Adams,
866 P.2d 1017, 1023 (Kan. 1994). 11

State v. Andersen,
370 N.W. 2d 653 (Minn. App. 1985). 16

State v. Campbell,
113 S.W.3d 9 (Tex. App. 2000). 16

State v. Castaneda,
245 P.3d 550, 553 (Nev. 2010). 4, 5, 21, 24, 27

State v. DeLeo,
356 So.2d 306, 307 (Fl. 1978). 12

State v. Florea,
677 P.2d 698 (Or. 1984). 14

State v. Green,
376 A.2d 424 (Del. Super. Ct. 1977). 17

State v. Heaton,
125 Wash. App. 1035 (Wash. Ct. App. 2005). 15

State v. Jenkins,
469 So.2d 733 (Fl. 1985). 13

State v. Jensen,
681 N.W.2d 230 (Wis. Ct. App. 2004). 15

State v. Lucero,
249 P.3d 1226, 1228 (Nev. 2011). 5

State v. Perez,
464 So.2d 737, 739-40 (La. 1985). 29

State v. Rhodig,
707 P.2d 549 (Nev. 1985). 22

State v. Thompson,
511 P.2d 1043 (Nev. 1973). 22

State v. Wood,
678 P.2d 1238 (Or. App. 1984). 14

United States v. Bass,
404 U.S. 336, 347-49 (1971). 28

United States v. Goyal,
629 F.3d 912, 922 (9th Cir. 2010). 3

United States v. Harriss,
347 U.S. 612, 618 (1954). 20

Walch v. State,
909 P. 1184 (Nev. 1996). 22

STATUTES

CRS 18-8-405. 10

Del. C. 1211.. 17

Fla. Stat. 839.25.. 12

Ill. Rev. Stat. Crim. Code 33-3(c). 17

K.S.A.. 11

La.R.S. 14:134.. 28

Minn. Stat. Ann. 609.43. 16

NRS 34.500. 8

NRS 34.700. 8

NRS 34.710. 8

NRS 172.155. 8

NRS 173.075. 23

NRS 174.075(2).. 8

NRS 174.105(3).. 9

NRS 197.110. . . . . 4, 13

NRS 197.110(2).. 30

NRS 205.0832. 5

NRS 205.0832(1)(b). 30

NRS 281A.400(2). 23

NRS 281A.420.. . . . . 23, 24

NRS 281.481(2)(a). 24

NRS 281.501. 24

ORS 162.415. 14

RCW 9A.80.010. 15

VTCA 39.02. 16

Wis. Stat. Ann 946.12... 15

18 U.S.C. §1346. . . . . 18, 20

OTHER AUTHORITIES

County Fiscal Directive No. 6.. 23

NAC 449.314(5). 23

UMC By-laws. 23

STATEMENT OF THE ISSUES

1. Whether a Motion to Dismiss alleging that the Indictment fails to state a crime must be brought by a writ of habeas corpus?

a. Was the Motion to Dismiss an assertion that the Indictment failed to state a crime or a challenge to the sufficiency of the evidence to sustain the Indictment?

b. Does a claim that a crime has not been charged go to the jurisdiction of the court?

c. If entertaining the Motion to Dismiss was error, was it plain error since it is raised for the first time on appeal?

2. Is the language of the Official Misconduct statute, "uses ....property under the public officer's official control or direction for the private benefit of another" sufficiently clear to warn citizens of what conduct is prohibited and to avoid arbitrary or discriminatory enforcement?

a. Can the statute be construed to avoid constitutional vagueness?

b. Does the conduct alleged in the Indictment constitute a crime if the statute is so construed?

3. Is the language of the Theft statute, "uses the ...property of another person entrusted to him or her or placed in his or her possession for a limited ....use" unconstitutionally vague when applied to the conduct alleged in the Indictment?

a. Can the statute be construed to avoid constitutional vagueness?

b. Does the conduct alleged in the Indictment constitute a crime if the statute is not vague as applied?

STATEMENT OF THE CASE

Respondent will not repeat the procedural history of the case as set forth in

Appellant's Opening Brief. Appellant, however, has mischaracterized the Motion to Dismiss which is at issue in this appeal. The Motion to Dismiss was explicitly labeled: Motion to Dismiss-Failure to State a Crime/Vagueness of the Statute AA p. 600, 603 and not a challenge to the sufficiency of the Indictment to provide notice. See Opening Brief, p.2.

STATEMENT OF THE FACTS

The State relies on testimony adduced before the Grand Jury for its Statement of Facts. For the purposes of the issue before the court, the only facts which are relevant are the procedural facts, the allegations in the Indictment and any stipulations or concessions made by the State with regard to the nature of the charged conduct.

The Indictment itself is found at AA 514-521. The trial court's meticulous recitation of the allegations in the Indictment can be found at AA 737-740. The Indictment alleged theft (Counts 1 through 5) based on allegations that:

- the vendors were managed by friends or associates of Thomas
- the terms of the contracts were grossly unfavorable to UMC
- Thomas sought to modify one contract to increase the return to the vendor[1]
- some services contracted for were not performed when Thomas knew or should have known that the vendor was not in compliance
- some services were not necessary as they could have been performed by

[1]This is the contract that the County ultimately settled for $595,000 in a civil suit brought by the vendor. See footnote 1 to decision at AA 741.

salaried employees
- one company failed to provide a promised report
- one company was not qualified to provide valuable services to UMC

Counts 6-10 of the Indictment (Misconduct by a Public Officer) incorporated by reference the facts from Counts 1-5.

The State conceded at the hearing on the Motion to Dismiss that every contract at issue in the Indictment was approved by "a civil deputy DA...numerous managers or supervisors at UMC and ultimately approved by each and one of our county commissioners." AA 717. There are no allegations that Thomas falsified information or misrepresented any matters to those various approving entities nor does the State allege that Thomas personally benefitted from any action.

ARGUMENT

> This is not the way criminal law is supposed to work. Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal. This is not only because of the dire consequences of a conviction–including disenfranchisement, incarceration and even deportation–but also because criminal law represents the community's sense of the type of behavior that merits the moral condemnation of society....When prosecutors have to stretch the law or the evidence to secure a conviction, as they did here, it can hardly be said that such moral judgment is warranted. Kozinski, J., concurring in United States v. Goyal, 629 F.3d 912, 922 (9th Cir. 2010).

A. Summary of Argument

Vagueness may invalidate a criminal law for either of two independent reasons, [citation omitted]: (1) if it "fails to provide a

> person of ordinary intelligence fair notice of what is prohibited; or (2) if it "is so standardless that it authorizes or encourages seriously discriminatory enforcement.

State v. Castaneda, 245 P.3d 550, 553 (Nev. 2010).

> [The] law must, at a minimum, delineate the boundaries of unlawful conduct. Some specific conduct must be deemed unlawful so individuals will know what is permissible behavior and what is not. [citation omitted].

Id.

Before invalidating a statute based on vagueness, under the doctrine of constitutional avoidance, this court should attempt to construe the statute first. The court may look to sources outside the statute in order to determine whether fair notice of the boundaries of the prohibited conduct can be ascertained and whether the standards are sufficient to avoid discriminatory enforcement. Id.

The Misconduct statute contains no standards at all and is unconstitutionally vague. If it is construed to avoid that result, the conduct alleged in the Indictment does not constitute a crime under the statute. The provisions of the Theft statute are vague as applied to the conduct alleged in the Indictment. If the statute is construed to avoid the constitutional defect, the conduct alleged in the Indictment is not a crime.

The Statutes

NRS 197.110, **Misconduct of public officer**, provides in pertinent part:

> 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....

NRS 205.0832, **Theft**, provides in pertinent part:

A person commits theft, if, without lawful authority, the person knowingly:

...

(b) 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 placed in his or her possession for a limited, authorized period or determined or prescribed duration or for a limited use.

The trial court carefully reviewed the Indictment, the applicable statutes and case law and determined that the statutes could not constitutionally encompass the conduct alleged in the Indictment. The court properly exercised its role and the decision should be affirmed.

B. Applicable Standards of Review

The interpretation of a statute is reviewed *de novo*. State v. Lucero, 249 P.3d 1226, 1228 (Nev. 2011); a district court's grant or denial of a Motion to dismiss the Indictment is reviewed for abuse of discretion. Hill v. State, 188 P.3d 51 (Nev. 2008); a determination of the constitutionality of a statute is reviewed *de novo.* State v. Casteneda, Supra at 553; failure to object generally precludes appellate review unless the error is plain and the substantial rights of the defendant

[at least when it is the defendant who is raising the issue for the first time on appeal] have been affected. Gallego v. State, 23 P.3d 227, 239 (Nev. 2001).

C. The Motion to Dismiss Was Not a Challenge to the Sufficiency of the Evidence to Sustain the Indictment; it Was a Motion to Dismiss Asserting That the Acts Alleged in the Indictment Were Not Crimes

This court has requested that the parties specifically address whether the Motion to Dismiss should have been treated by the trial court as a Petition for a Writ of Habeas Corpus challenging probable cause for the indictment and then dismissed as untimely. The State argues that the district court must have decided the case based on its review of the evidence presented to the Grand Jury and in the first trial. Further, relying on federal law, which differs from Nevada law, the State argues that even if the Motion was based on an assertion that the indictment failed to state a crime, that is not a challenge to the jurisdiction of the court.

The State Failed to Raise this Issue Below

The trial court has not ruled on this issue because it has been presented for the first time on appeal. Accordingly, it is either waived or subject to plain error review. This court will only review an unpreserved error if it is "plain" (clear under current law) and, if raised on appeal by the defendant, it was prejudicial (affected the substantial rights of the defendant). Gallego v. State, 23 P.3d 227,

239 (2001)[2].

The pleading which contained the Motion to Dismiss titled the subject as follows: Motion to Dismiss-Failure to State a Crime/Vagueness of the Statute. AA, p. 600. The argument on the Motion concluded as follows:

> The conduct which has been alleged simply is not a crime under either statute. If the court disagrees and determines that the statute has been violated, there is no question that that construction of the statute must result in a finding that the statute is unconstitutionally vague and overbroad. In either event, the charges must be dismissed.

AA, p. 605.

The State's Opposition failed to address the constitutional issue in any respect and did not argue that there was sufficient evidence to support the charge. AA, p.641-652. Nor did the State argue that the Motion should be treated as an untimely Writ of Habeas Corpus. There was no error and it certainly was not plain. The State has not shown any prejudice, in any event.

The District Court Determined that the Indictment Failed to State A Crime

The trial court concluded that,

> The Indictment, if allowed to stand, would be tantamount to this Court sanctioning the proposition that if UMC and/or Clark County entered into an ill-conceived contract that may be more beneficial to a vendor as opposed to itself that Thomas' conduct is criminal in

[2]No cases applying the plain error standard of review to the State could be found.

nature. This Court does not accept this proposition.
AA, p. 741.

The Decision on Motion to Dismiss does blur the doctrines of constitutional avoidance, void-for-vagueness and failure to state a crime but there is no question that the District Court was deciding the Motion that was presented and that the court determined that the indictment failed to state a crime as it construed the Nevada statutes.[3]

When a Crime Has Not Been Charged, the Issue May Be Raised at Any Time

The Motion to Dismiss was akin to a Motion to Quash or a Demurrer. NRS 174.075(2) abolished those remedies but provided that the relief should be sought by Motion to Dismiss. While NRS 34.500 allows the court to determine that a statute is unconstitutional "on the return of the writ of habeas corpus," NRS 172.155 provides that it is only an objection to the "sufficiency of the evidence to sustain the indictment" which must be raised by a writ of habeas corpus. The time limit for filing under NRS 34.700 is applicable only to a writ of habeas corpus. NRS 34.710. Finally, "Lack of jurisdiction or the failure of the indictment,

[3]The court, in commenting that Clark County chose not to seek civil remedies against any of the vendors and that one of the vendors named in the indictment successfully sued Clark County for damages on its contract, was careful to note that these facts were not considered in rendering the decision further demonstrating that the court confined itself to determining, as a matter of law, whether a crime had been set forth.

information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the preceding." NRS 174.105(3). All of these statutes were enacted or amended in 1967, evidencing the legislature's intent that challenges to the sufficiency of the evidence to sustain an indictment must be made by a timely-filed writ of habeas corpus. A motion asserting that a crime has not been charged may be made at any time.

Further, Nevada law is clear that the failure to charge a crime is jurisdictional. Houser v. District Court, 345 P.2d 766 (1959); Smith v. District Court, 347 P. 2d 52 (1959). A trial court's lack of jurisdiction can be raised at any time, even for the first time on appeal. Colwell v. State, 59 P.3d 463 (2003). This could be the only just rule.

D. State Supreme Courts Find Official Misconduct Statutes Unconstitutionally Vague When Specific Conduct Is Not Set Forth in the Statute

The State's Opening Brief asserts to this court that "numerous" courts have "uniformly found [official misconduct] statutes not unconstitutionally vague." Opening Brief, p. 24. In fact, at least three state Supreme Courts have determined that their official misconduct statutes were void, not as applied, but simply void as unconstitutionally vague. The language of the invalidated statutes was significantly more explicit and definite as to the prohibited conduct than the

language in Nevada's statute.

Colorado

The Statute

CRS 18-8-405 provides that a public official is guilty of official misconduct if he "knowingly, arbitrarily and capriciously": a) "refrains from performing a duty imposed by law or clearly inherent in the nature of his office; b) violates any statute or lawfully adopted rule or regulation relating to his office."

The Holding

The Supreme Court of Colorado found that the first phrase (refrains from performing a duty imposed by law) constitutional because it refers to the "omission to perform a duty prescribed by [statute, administrative regulation, or judicial pronouncement defining mandatory duties]." The second phrase (clearly inherent in the nature of the office) however, was determined to be void because,

> it provides no readily ascertainable standards by which one's conduct may be measured. The legislature has failed to define that phrase and it is totally without parameters for the determination of guilt or innocence, thus allowing the exercise of unbridled discretion by the police, judge, and jury.

People v. Beruman, 638 P.2d 789, 793 (Colo. 1982).

The court proceeded to examine the indictment and determined that the indictment was deficient because it failed to apprise the defendant of the source (statute, rule) of the duty which is alleged to have been violated and the conviction

was reversed.

Kansas

The Statute

K.S.A. 21-2302 provided that a public official who "willfully and maliciously commit[s] an act of oppression, partiality, misconduct or abuse of authority.." is guilty of official misconduct.

The Holding

The Kansas Supreme Court determined that because "there is a complete absence of any link with recognized behavioral standards" in the statute, "on its face [it] is susceptible to arbitrary and discriminating interpretation and application by those charged with responsibility for enforcing it." The court further found that,

> "misconduct" as a standard of conduct is "so vague that persons of common intelligence must necessarily guess at its meaning an differ as to its application." [citations omitted]...Nor are we persuaded by the State's argument that the words "oppression," "partiality," "misconduct," or "abuse of authority" are commonly understood and therefore not vague...The terms are not adjectives which modify, limit or quantify the act or conduct prohibited. Instead, each of these terms constitutes conduct which is prohibited. Nor are they terms which have been considered and defined by numerous appellate court decisions. We find such unlimiting terms necessarily require persons of ordinary intelligence to guess at what acts constitute "official misconduct" and differ as to their application.

State v. Adams, 866 P.2d 1017, 1023 (Kan. 1994).

The court affirmed the district court's ruling that the language in the statute was too indefinite to serve as a warning and affirmed the dismissal of the charge.

Florida

Florida has examined its official misconduct statute on two occasions and invalidated two sections of the statute as unconstitutionally vague.

The Statute

Fla. Stat. 839.25 provides that a public servant commits Official Misconduct when, with "corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another," commits the following acts: "(a) knowingly refraining, or causing another to refrain from performing a duty imposed upon him by law... (c) knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office."[4]

The Holdings

In State v. DeLeo, 356 So. 2d 306, 307 (Fl. 1978), the Florida Supreme Court addressed a void-for-vagueness challenge to sec.(c) and held that even though "corrupt intent" requires that the act be "done with knowledge that the act is wrongful and with improper motive," "[t]his standard is too vague to give men

[4]The entire statute was subsequently repealed so the language of the statute is drawn from the cases which address the sections.

of common intelligence sufficient warning of what is corrupt and outlawed, therefore by statute." The court went further, though, and held,

> While some discretion is inherent in prosecutorial decision-making, it cannot be without bounds. The crime defined by the statute, knowing violations of any statute, rule or regulations for an improper motive, is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse judicial process for political purposes. We find it susceptible to arbitrary application because of its "catch-all" nature.

Id. at 308.

In State v. Jenkins, 469 So.2d 733 (Fl. 1985) the Florida Supreme Court held that section (a) of the statute suffered from the "same vulnerability to arbitrary application" as had previously been determined to apply to section (c) and affirmed the dismissal of official misconduct charges.[5]

E. The State Court Decisions Cited by the State Are "As Applied" Cases and Are Inapplicable Due to the Differences in the Statutes and the Conduct at Issue

While decisions which apply vagueness jurisprudence to terms of a statute are helpful in resolving the issue presented here, cases which merely apply a statute which is different from NRS 197.110 to conduct which is different from the

[5]Concurring Justice Overton suggested that the legislature revisit the statute and limit its application to "statutorily- or constitutionally-defined duties of the particular offices."

conduct alleged in this case, are not very instructive.[6] The cases cited by the State in the Opening Brief are summarized below:

STATE	STATUTE	CASE CITED BY STATE/ CONDUCT AT ISSUE	HOLDING & OTHER CASES
Oregon	ORS 162.415- "with intent to obtain a benefit or harm another" knowingly fails to perform a duty imposed by law or an act constituting an unauthorized exercise of official duties.	State v. Florea, 677 P.2d 698 (Or. 1984) Conduct at issue: Sheriff took seized weapons for his own use. State v. Wood, 678 P.2d 1238 (Or. App. 1984) Conduct at issue: County Comm. intentionally withheld information about value of land, causing the county to lose money on transaction.	Held: Court determined that there was no issue that the conduct was unauthorized and therefore statute was not vague as applied. Held: conduct harming county was a known violation of duty and couldn't have been negligent or merely unwise. "Negligent performance of an official function" is best regulated by civil service procedures and election alternatives."

[6]The cases from Illinois and Delaware actually affirm dismissals of the indictments based on the failure to state a crime and support Respondent's position as that is what the lower court did here.

Wisconsin	Wis. Stat. Ann. 946.12-official exercises discretionary power in a manner inconsistent with duties and with intent to obtain dishonest advantage for the officer or employee or another	State v. Jensen, 681 N.W.2d 230 (Wis. Ct. App. 2004) Conduct at issue: use of state employees to work on personal political activities.	Source of the duty was ascertained from conflict of interest statute (no gain for official, family, or organization with which he is associated); explicit prohibition on use of office for political advantage and prior communication regarding prohibited conduct.
Washington	RCW 9A.80.010- "with the intent to obtain a benefit or to deprive another person of a right/privilege" official commits an unauthorized act under color of law or refrains from duty imposed by law.	State v. Heaton, 125 Wash. App. 1035 (Wash. Ct. App. 2005) **Unpublished and not precedential per RCWA 206.040**. Conduct at issue: stealing property from detained suspect by police officer	Conviction reversed based on instructional error. "Heaton's taking money from a citizen during a traffic stop without legal justification [was] a clear violation of both [police] standards and the law."

Texas	VTCA 39.02 (39.01 at time of decision)-"with intent to obtain a benefit or with intent to harm or defraud another" intentionally violates a law relating to employment or "misuses government property"	Margraves v. State, 34 S.W. 3d 912 (Tex.Crim. App. 2000) conduct at issue: Chair of Board of Regents used university airplane to attend son's graduation:	Held: determination must be made on a "case by case" basis and a public official who "charges the state for personal trips" cannot complain that the conduct prohibited is unclear. See State v. Campbell, 113 S.W. 3d 9 (Tex. App. 2000) Held: when the benefit or harm is not apparent from the face of the indictment, manner and means must be alleged specifically to avoid unconstitutionality. Dismissal of indictment proper. See State v. Goldsberry, 14 S.W. 3d 770 (Tex. Ct. App. 2000)-"When statutory language is not completely descriptive, an indictment based on statutory language is not sufficient."
Minnesota	Minn.Stat. Ann. 609.43-official does an act knowing it is in excess of lawful authority or is forbidden by law	State v. Andersen, 370 N.W. 2d 653 (Minn. App. 1985) Conduct at issue: Mayor threatened citizen and interfered with investigation of her threats	Held: Ordinary citizen could understand that threats and interference with investigation were illegal and in excess of mayoral authority.

Illinois	Ill. Rev. Stat., Crim. Code 33-3(c)-official, with intent to obtain personal advantage for himself or another, performs an act in excess of his authority.	People v. Kleffman, 412 N.E. 2d 1057 (Ill. App. 1980) Conduct at issue: township supervisor failed to disclose wife's indebtedness for township-paid nursing home costs on annual disclosure statement.	Held: Laws setting forth duties of official did not require disclosure, dismissal proper. Further, those counts which did not allege a violation of a specific statute were insufficient. Criminal liability cannot be based on a "breach of common law fiduciary duty" See People v. Grever, 856 N.E.2d 378 (Ill. 2006): "an indictment [for official misconduct] must, at a minimum, allege facts that would show defendant violated an identifiable statute, rule, regulation or [code]."
Delaware	Del. C. 1211-official "intending to obtain personal benefit or to cause harm to another person" "refrains from performing a duty which is imposed by law or is clearly inherent in the nature of the office"	State v. Green, 376 A.2d 424 (Del. Super. Ct. 1977) Conduct at issue: State Bank Commissioner received loans from banks he regulated.	Held: *mens rea* requirement (personal benefit/harm) renders statute constitutional but indictment properly dismissed because allegations of "unspecified conflict of interest or other ethical standards" failed to charge an offense.

F. The United States Supreme Court Limited the Scope of the Federal Official Misconduct Statute to Avoid Invalidating it and Sets Forth the Task of the Court in Analyzing Void-for-Vagueness Challenges

Although the State's Opening Brief contains a survey of state law decisions (not including the cases listed above) and a discussion of federal decisions on the issue presented, the State does not address the recent and most significant constitutional decision on public corruption from the U.S. Supreme Court- Skilling v. United States, 130 S.Ct. 2896 (2010). Skilling not only addresses the problems inherent in statutes seeking to criminalize violations of fiduciary duties but it is the most recent description of how a court should approach a void-for-vagueness challenge.

Skilling was charged under 18 U.S.C. §1346 with "honest-services" fraud. Under the federal statutes, a crime is committed when the mail or wires are used in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." §1346 defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."While Skilling was a corporate executive with responsibilities to his shareholders, the "honest services" fraud statute has been the primary source for the prosecution of public corruption and official misconduct of both state and federal officials.

The court's process in evaluating Skilling's claim of void-for-vagueness is instructive in evaluating the approach taken by the district court here. First, the court traced the history of the "honest services" fraud statute. This was important in Skilling because a prior decision of the Supreme Court in McNally v. United States, 483 U.S. 350 (1987) limited the scope of the wire fraud statute to property harm. §1346 was enacted in response to McNally and purported to extend the statute to crimes which deprived citizens of their right to honest services. Skilling urged the court to find the statute void on its face on the ground that it failed to satisfy due process. Skilling alleged that the statute failed to "define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." Skilling, Supra, at 2927.

Second, based on the doctrine of constitutional avoidance, the court decided that the statute should be construed rather than invalidated. The court described its approach: "It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction." Id. at 2929. "'[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague....And if this general class of offenses can be made constitutionally definite

by a reasonable construction of the statute, this Court is under a duty to give the statute that construction.'" quoting United States v. Harriss, 347 U.S. 612, 618 (1954). The majority determined that the statute should be construed to only apply to that conduct which was criminalized before the decision in McNally-bribes and kickbacks. Without that limitation, the court reasoned, the statute "would encounter a vagueness shoal." Id. at 2907.

Having limited the statute to conduct which had been the subject of numerous judicial decisions defining the boundaries of the intended crime, the court rejected the government's argument that the statute should be extended to "undisclosed self-dealing by a public official or private employee." f.n. 44 at 2933, finding that there were too many questions unanswered as to what conduct would be criminal.

Third, the court looked to the allegations contained in the charges against Skilling to determine whether the alleged conduct constituted a violation of the newly-construed §1346. The court determined that the allegations did not constitute a crime.

In a strongly-worded dissent, Justice Scalia argues that the statute should simply be voided not construed because the statute "fails to define the conduct it prohibits." He details the pre-McNally cases finds that there was no agreement as

to the nature or source of the obligation at issue-whether the source must find itself in law or in "general principles, such as the 'obligations of loyalty and fidelity' that inhere in the 'employment relationship.'" As a result, in Scalia's opinion, the statute cannot be salvaged because there is no "ascertainable standard of guilt." Id. at 2936.

G. The Statutes are Vague Under Nevada Law
Void-for-Vagueness in Nevada

State v.Casteneda, 245 P.3d 550 (Nev. 2010) sets forth a clear and practical approach to assessing a void-for-vagueness challenge. The State agrees that Casteneda sets forth the rule. The court held,

> Vagueness may invalidate a criminal law for either of two independent reasons," [citation omitted]: (1) if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) if it "is so standardless that it authorizes or encourages seriously discriminatory enforcement.

State v. Castaneda, 245 P.3d 550, 553 (Nev. 2010).

> [The] law must, at a minimum, delineate the boundaries of unlawful conduct. Some specific conduct must be deemed unlawful so individuals will know what is permissible behavior and what is not. [citation omitted].

Id.

In Casteneda, the court first set forth the allegations against the defendant (exposure of genitals in public), then traced the history and application of the Indecent Exposure statute, applied the void-for-vagueness standards to the statute

and determined that the statute could be construed rather than invalidated. The court focused on the term "person" as it was used in the statute-"exposure of his or her person"-and found extensive support in common law and judicial decisions for a definition of the term as meaning "genitals." So, as in Skilling, because the conduct of the defendant fell clearly within the commonly-held and published definition, the statute was not vague. The court construed the statute to be limited to "genitals or anus" and not "buttocks" disregarding surplusage in the charging document and avoiding the vagueness shoal.

There Are No Other Sources to Supply the Definition Lacking in the Statutes

The State's Opening Brief does not point to one judicial decision or provision of Common Law in which negotiating contracts which are authorized but later deemed unfavorable or unnecessary is criminal conduct under either the Theft statute or the Official Misconduct statute.[7] There are no decisions in Nevada and neither party has cited to a decision elsewhere in which a prosecutor has used such a novel theory of criminality.

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[7]The Official Misconduct statute has been applied to bribes and gratuities, Peccole v. McNamee, 267 P.2d 243 (Nev. 1954); State v. Thompson, 511 P.2d 1043 (Nev. 1973); State v. Rhodig, 707 P.2d 549 (Nev. 1985). Subsection (1)(b) of the Theft statute has been applied to embezzlement from the entrusted accounts of a ward, Walch v. State, 909 P. 1184 (Nev. 1996); and classic embezzlement of employer's property, Kolsch v. Curtis, ___ F.Supp.___ , 2012 WL 1376975 (D.Nev. 2012); Nolos v. Holder, 611 F.3d 279 (5th Cir., 2010).

The prosecutor argues for the first time on appeal that certain ethical statutes and rules provide the missing definitions of the culpable conduct. There are three problems with this newly-created theory: 1) the statutes do not apply to the charged conduct; 2) the Grand Jury was never asked to determine if those statutes were violated; 3) the conduct in some cases is so general that it would not provide any more standards than the statute; 4) there is no reference to the statutes or rules which the State now contends were violated in the Indictment as required by NRS 173.075.

The "rich array of sources from which a reasonable person could ascertain the scope of Thomas' contracting authority and whether the contracts at issue exceeded the limited use for which County funds were entrusted to him" (Opening Brief, p. 28) are: NRS 281A.400(2); 281A.420; County Fiscal Directive No. 6; NAC 449.314(5); UMC's By-laws and his employment contract.

NRS 281A.400(2) prohibits a public officer or employee from using his position to secure

> unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee has a commitment in a private capacity to the interests of that person.

There has never been any allegation that Thomas had a significant pecuniary

interest in any of the entities or transactions so the State must be referring to the phrase "commitment in a private capacity to the interests of that person." The current version of that statute was not enacted until after the acts alleged in the Indictment. The earlier version was NRS 281.481(2)(a) referred the reader to NRS 281.501 for the definition of this commitment. NRS 281.501 during the applicable time period[8] was a disclosure requirement and did not provide any definition of what a commitment in a private capacity is but did provide a presumption that it would not be applicable "where the resulting benefit or detriment accruing to him or to the other persons to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group." Since the State has never alleged that this statute was violated, or that Thomas had the kind of undefined commitment that is referenced in the statute, it is impossible to know what conduct he is alleged to have committed that violates this statute. These references hardly provide the kind of standards which this court in Casteneda found to cure the lacks in the statute.

Finally, the State resorts to the general duties of the hospital administrator as defined by the by-laws of UMC as a source for the definition of the criminal conduct. The by-laws are not available from the internet cite provided in the

[8]The relevant provisions of NRS 281.501 are now found in NRS 281A.420.

Opening Brief. Accepting the State's representation that the bylaws require that the UMC director operate the hospital "effectively" by "conserving physical and financial assets" the by-law adds little to the discussion of where to find the standard which converts poor management into a crime. References to the employment contract suffer from the same problem. The State alleges that the by-laws require that the director bring all matters requiring Board of Commissioner approval to the Board and refers the court to AA, p. 42-45, 48 for testimony before the Grand Jury that he violated that by-law. Those record references reveal that the former County Manager did not get along with Thomas and her primary complaint was that Thomas believed that his position was an independent position and that he frequently attempted to go to the Board without her approval. Her term was "insubordinate." The State did not allege in the Indictment that insubordination constitutes a crime.

The second prong of the void-for-vagueness analysis requires the court to determine whether the standards are sufficient to avoid the risk of arbitrary or discriminatory enforcement. The danger of discriminatory enforcement is illustrated by a disturbing series of questions to the investigator before the Grand Jury. The State refers to this exchange in support of its argument that the vendors were "close friends" and "college fraternity brothers." The use of race in proving

this point is offensive and indicative of the danger of discriminatory prosecution under a vague statute. The "college fraternity" the State references is actually Alpha Phi Alpha, a national service organization. Its members have included Martin Luther King Jr., Justice Thurgood Marshall, Duke Ellington and Jesse Owens among thousands of other men dedicated to education and service. See http:/www.alpha-phi-alpha.com.

The State refers this court to the Grand Jury record which demonstrates how the prosecutor deliberately injected race into the Grand Jury proceeding:

> Q. Did you also look into whether or not the heads of those companies were acquainted with Lacy Thomas?
> A. ...we found out that the majority of the people involved with those companies were all...fraternity members with Lacy Thomas in a fraternity known as Alpha Phi Alpha. So we found out that they were all from the same fraternity and **all black males** all from Chicago...
> ....
> Q. But of the companies and ties that you investigated, [Ross Fidler and Bob Mills] were the only two exceptions to the general rule of being fraternity brothers and **black males** from Chicago; is that right?
> A. That's correct.
> Q. Lacy Thomas is a **black male** himself?
> A. Yes, sir.
> Q. The nature of that fraternity, is it exclusively for **blacks** or do you know?
> A. I believe it is exclusive for **blacks**.

AA, p. 86, 89 [emphasis added].

A review of Grand Jury transcripts in Nevada would likely reveal that presumptions of criminality have not been suggested based on membership in the

Kiwanis Club, the Benevolent and Protective Order of Elks, or a religious service group and tied to the race of the target of the investigation.

H. The Trial Court Properly Construed the Statutes and Determined That the Conduct Alleged Did Not Constitute the Crimes of Theft or Official Misconduct

The analytical framework laid out in Skilling and adopted in Casteneda was followed by the trial court here. The court first examined the language of the statutes charged in the Indictment. Then it carefully identified the conduct which was alleged in the indictment. The court determined based on that examination that "[t]he gravamen of the charges against Thomas is that he entered into contracts that were unnecessary, overly favorable to the vendors and/or that the work required under the contracts was not performed." AA, p. 740. The court, looking to Casteneda, determined that the crimes of Theft and Official Misconduct are not committed by the conduct which was alleged in the Indictment. In other words, the Indictment failed to state a crime and must be dismissed.

Other state courts have been faced with similar tasks and have adopted rules for the assessment of this kind of constitutional challenge.

Arizona

Arizona has interpreted the statutes which criminalize conduct of public officials on several occasions. The Arizona courts have applied the following

rules:

- "A court should not 'expand the definition of 'conflict of interest' in a criminal prosecution to include conduct that does not clearly fall within the plain meaning of the statute...as that meaning may be ascertained from the language of the statute, the interpretation of the statute by the courts of this state, or the statute's legislative history.'" Arizona v. Ross, 151 P.3d 1261, 1265 (Ariz. App. 2007), quoting Hughes v. Jorgenson, 50 P.3d 821, 823 (Ariz. 2002).
- "[I]f 'a statute is susceptible to more than one interpretation,...doubt should be resolved in favor of the defendant.'"Id.
- "[A] criminal conflict of interest does not exist merely because a public officer acts in a way that appears to be a conflict in the eyes of the public or prosecutors. The specific terms of the statute control." Id.
- "[T]o violate the conflict of interest statute, a public official must have a non-speculative, non-remote pecuniary or proprietary interest in the decision at issue. Hughes v. Jorgenson, 50 P.3d 821, 824 (Ariz. 2002).
- "Finally, and dispositively, this court will not define the edges of meanings of terms in a statute in a criminal prosecution." Id. at 825, citing United States v. Bass, 404 U.S. 336, 347-49 (1971). Id.

Louisiana

Louisiana has also dealt with a number of official misconduct prosecutions and has developed a process for addressing the question of whether the official may be prosecuted under its statutes. La.R.S. 14:134 provides that malfeasance in office is committed when a public officer or employee: 1) intentionally refuses or fails to perform any duty lawfully required of him; 2) intentionally performs any duty in an unlawful manner; or 3) knowingly permits any other officer or employee to violate sections 1) or 2).

The issue is presented with a Motion to Quash. The court then must "accept

as true the facts contained in the bill of information and in the bills of particulars, and determine as a matter of law and from the face of the pleadings, whether a crime has been charged....The question of factual guilt or innocence of the offense is not raised by the motion to quash." State v. Perez, 464 So. 2d 737, 739-40 (La. 1985).

The Louisiana Supreme Court examined the phrase "any duty lawfully required of him" in the official misconduct statute and determined that,

> [t]he duty must be expressly imposed by law upon the official because the official is entitled to know exactly what conduct is expected of him in his official capacity and what conduct will subject him to criminal charges.

Id. at 740.

CONCLUSION

During the Grand Jury presentment, a Grand Juror asked the question that is at issue in this appeal: " — it poses a question I can't answer regarding the law that maybe you could help, and that's really the point at which professional incompetency resulting in shoddy work product crosses the line into criminal activity." AA 313. The State's response was to turn to the language of the Theft and Misconduct statutes. Those statutes don't answer the question. Few cases will present an issue of vagueness as substantial as this one. The prosecutor brought what appears to be the first prosecution of a public official for ill-conceived

contracting in the country. Citations to the as-applied decisions in other states simply highlight the fact that no other prosecution of this kind of conduct has been brought under the various official misconduct statutes. The statutes cannot be saved by history, judicial interpretations or definitions, other statutes, administrative rules or by-laws.

NRS 197.110(2) is simply not salvageable-it is beached on the "vagueness shoal." NRS 205.0832(1)(b) is vague as applied to the conduct in this case. If both statutes are construed instead of voided, then they must be construed to mean that the conduct in this Indictment simply is not criminal. Any other result would deprive Lacy Thomas of his right to due process.

DATED this 8th day of August, 2012.

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CERTIFICATE OF COMPLIANCE

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 Word Perfect X4 in size 14 Times New Roman font.

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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 6,973 words; or

[ ] Does not exceed __ pages.

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 the 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 August, 2012.

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CERTIFICATE OF SERVICE

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

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