IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

LACY THOMAS,

Respondent.

CASE NO: 58833

APPELLANT'S REPLY BRIEF

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

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ARGUMENT

I

NRS 174.105 MAY NOT BE INTERPRETED IN SUCH A WAY AS TO RENDER NRS 34.700, NRS 34.710 AND NRS 172.155 MEANINGLESS

Lacy Thomas (hereinafter "Thomas" or "Respondent") waived the grounds supporting his Motion to Dismiss when he failed to challenge the sufficiency of the evidence supporting the Indictment by way of a pre-trial petition for writ of habeas corpus within 21 days of his arraignment in district court. See, NRS 34.700, NRS 34.710, NRS 172.155. In granting an untimely petition for writ of habeas corpus masquerading as a motion to dismiss the district court abused its discretion by acting beyond its jurisdiction. Thomas attempts to escape the consequences of his failure to timely pursue a petition for writ of habeas corpus through erroneous reliance upon the ability of a court to address a failure of jurisdiction at any time. Thomas' proposed construction of NRS 174.105(3) would render NRS 34.700, NRS 34.710 and NRS 172.155 meaningless and as such his self-serving interpretation of NRS 174.105(3) must fail.

The question presented by Thomas' novel view of NRS 174.105(3) is whether the language allowing a district court to address a "lack of jurisdiction or

the failure of an indictment … to charge an offense shall be noticed by the court at any time" can be used to excuse a failure to comply with NRS 34.700, NRS 34.710 and NRS 172.155.[1] NRS 172.155(2) commands that any objection "to the sufficiency of the evidence to sustain the indictment" may only be made "by application for a writ of habeas corpus." NRS 34.710 cautions that "[a] district court shall not consider any pretrial petition for habeas corpus … [b]ased on alleged lack of probable cause or otherwise challenging the court's right or jurisdiction to proceed to the trial of a criminal charge unless a petition is filed in accordance with NRS 34.700." NRS 34.710(1)(a). NRS 34.700 requires that any such challenge be brought within 21 days of arraignment. NRS 34.700(1)(a); Palmer v. Sheriff, 93 Nev. 648, 649, 572 P.2d 218, 218 (1977).

Thomas did not file a pretrial petition for writ of habeas corpus challenging the sufficiency of the evidence supporting the Indictment. Thomas ignored the 21 day deadline of NRS 34.700. Thomas waited until after trial started, a mistrial was declared and a second trial was on the horizon before challenging the sufficiency of the evidence supporting the Indictment. Rather than attempt to establish good cause to waive the 21 day rule as required by NRS 24.700(3), Thomas simply titled his document motion to dismiss. When challenged on his failure to comply with clear statutory requirements Thomas suggested the novel view that NRS 174.105(3) relieved him of any obligations imposed by NRS 34.700, NRS 34.710 and NRS 172.155. The problem at the heart of Thomas' excuse for his failure to comply with the law is that it would render NRS 34.700, NRS 34.710 and NRS 172.155 meaningless.

This Court cannot adopt the self-serving interpretation of NRS 174.105(3) offered by Thomas since to do so would violate the most basic rules of statutory

[1] The question of whether Thomas' Motion to Dismiss factually amounted to an untimely petition for writ of habeas corpus has been clearly demonstrated in the State's Fast Track Statement and Opening Brief and in lieu of restating those arguments the State would merely incorporate them by reference.

construction. This Court has recently stated that the "rules of statutory construction provide that a specific statute takes precedence over a general statute." Weddell v. Stewart, ___ Nev. ____, 261 P.3d 1080 (2011) (citing, SIS v. Miller, 112 Nev. 1112, 1118, 923 P.2d 577, 580 (1996). This Court has also recently stated that "where a general statutory provision and a specific one cover the same subject matter, the specific provision controls." In re Resort at Summerlin Litigation, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006) (footnote omitted). NRS 174.105(3) generally stands for the proposition that a court may consider jurisdictional issues and whether an indictment fails to charge an offense at any time through a motion to dismiss. However, NRS 172.155 specifically requires that any challenge to the sufficiency of the evidence supporting an Indictment must be challenged by way of a pretrial writ of habeas corpus filed in compliance with NRS 34.700 and NRS 34.710.

This Court has already adopted this delineation between the boundaries of NRS 174.105(3) and NRS 172.155. This Court has stated that a motion to dismiss is the proper vehicle to challenge the admissibility of evidence before the grand jury on constitutional grounds. Franklin v. State, 89 Nev. 382, 387, 513 P.2d 1252, 1256 (1973) (challenge to introduction of evidence in grand jury proceeding is properly made by motion and not by pretrial writ of habeas corpus); Prescott v. State, 85 Nev. 448, 449, 456 P.2d 450, 450 (1969) (appeal from order denying pretrial petition for writ of habeas corpus did not challenge jurisdiction of the court or the sufficiency of the evidence supporting the indictment but instead attacked the legality of arrest and the admissibility of evidence and as such should have been presented by way of motion). However, "since 1912 it has been recognized that the proper procedure for challenging probable cause for the Indictment is by writ of habeas corpus." Scott v. State, 83 Nev. 468, 470, 434 P.2d 435, 436 (1967) (citing, Shelby v. Sixth Judicial District Court, 82 Nev. 204, 414 P.2d 942, rehearing denied, 82 Nev. 213, 418 P.2d 132 (1966)).

Moreover, Thomas' proposed construction of NRS 174.105(3) would bring about an absurd result by allowing the general rule to emasculate the more specific rule thereby rendering the more specific statutes meaningless. This Court "must construe statutory language to avoid absurd or unreasonable results, and … will avoid any interpretation that renders nugatory part of a statute." Pellegrini v. State, 117 Nev. 860, 874, 34 P.3d 519, 528-29 (2001). This Court recently re-affirmed this principle in In re George J., ___ Nev. ___, ____, 279 P.3d 187, 189 (2012), where this Court resolved "the apparent contradiction between NRS 62B.330 and NRS 62B.335 governing the jurisdiction of juvenile court." In George J. this Court concluded that "NRS 62B.335 only applies to delinquent acts and therefore does not apply to acts that are 'deemed not to be a delinquent act' under NRS 62B.330(3). Thus if the case is excluded from the juvenile court's jurisdiction under NRS 62B.330(3), then the juvenile court does not obtain jurisdiction by virtue of NRS 62B.335." In re George J., ___ Nev. at ___, 279 P.3d at 188-89. This Court reached that conclusion because:

> By its terms, NRS 62B.335(1) only applies to delinquent acts. This terminology is consistent with NRS 62B.330, which provides that the juvenile court has jurisdiction over a child who commits a delinquent act and defines certain acts that are not delinquent acts and therefore are not within the juvenile court's jurisdiction. NRS 62B.335 therefore can never apply to acts that NRS 62B.330(3) "deem[s] not to be a delinquent" because those acts are not within the juvenile court's jurisdiction. Otherwise, NRS 62B.335 would circumvent NRS 62B.330(3) and grant a juvenile court jurisdiction to transfer or dismiss other acts that are deemed not to be delinquent acts under NRS 62B.330(3), such as murder or sexual assault, provided that the requirements set forth in NRS 62B.335(1) are met. Reading NRS 62B.335 in this way would create an absurd result, which this court seeks to avoid. Pellegrini v. State, 117 Nev. 860, 874, 34 P.3d 519, 528-29 (2001) (explaining that this court "construe[s] statutory language to avoid absurd or unreasonable results, and if possible, we will avoid any interpretation that renders nugatory part of a statute"). Therefore, reading NRS 62B.330(3) and NRS 62B.335 in "harmony" with each other, Albios, 122 Nev. at 418, 132 P.3d at 1028 (internal quotations omitted), and "not render[ing] nugatory part of [either] statute," Pellegrini, 117 Nev. at 874, 34 P.3d at 529, we conclude that NRS 62B.335 applies only to cases that are within the juvenile court's jurisdiction under NRS 62B.330. Thus, if the juvenile court lacks jurisdiction pursuant to NRS 62B.330(3), it does not gain then obtain jurisdiction by virtue of NRS 62B.335.

In re George J., ___ Nev. at ___, 279 P.3d at 191.

Likewise, in Chiara v. Belaustegui, 86 Nev. 856, 477 P.2d 857 (1970), this Court rejected a similar attempt to misuse NRCP Rule 59 as a vehicle to escape the specific requirements of another rule:

> Rule 60(b) of the Nevada Rules of Civil Procedure sets forth the manner in which a court may relieve a party who has been served and has defaulted. It requires such a party, upon proper motion, to show the reason for the default, i.e., mistake, inadvertence, surprise, or excusable neglect. Appellants concede that a 60(b) motion was available to them.
>
> On the other hand, Rule 59(e) provides an opportunity, within a severely limited time, to seek correction at the trial court level of an erroneous order or judgment, thereby initially avoiding the time and expense of appeal. Rule 59(e) provides the remedy that, where the issues have been litigated and resolved, a motion may be made to alter or amend a judgment. Such a motion might proper to alter a judgment of dismissal without prejudice to a dismissal with prejudice and vice versa; to include an award of costs; or to change the time and conditions of the payment of a master.
>
> As a policy matter, we believe that a defendant against whom a default judgment has been entered should not be relieved of that default judgment without demonstrating the reason why it should be set aside. To rule otherwise would emasculate Rule 60(b), for any party who had been defaulted could, within 10 days after notice of such default, file a 59(e) motion to alter or amend the judgment without asserting any reason why he should be relieved of the default.

Chiara v. Belaustegui, 86 Nev. 856, 858-59, 477 P.2d 857, 858 (1970)(footnotes omitted).

To construe NRS 174.105(3) as suggested by Thomas would render NRS 34.700, NRS 34.710 and NRS 172.155 meaningless. Any disgruntled defendant could challenge the sufficiency of the evidence supporting a charging document at any time simply by filing a motion to dismiss under NRS 174.105(3) without regard to the mandatory policy of the Nevada Legislature that any objection "to the sufficiency of the evidence to sustain the Indictment [be made] only by application for a writ of habeas corpus." NRS 172.155(2). Any disgruntled defendant could also ignore the timing requirements of NRS 34.700 simply by changing the title of the document challenging the sufficiency of the evidence supporting the charging document. The only way to read NRS 34.700, NRS 34.710, NRS 172.155 and NRS 174.105 in a harmonious fashion is to reaffirm this Court's prior holding that "the proper procedure for challenging probable cause for the indictment is by writ

of habeas corpus." Scott v. State, 83 Nev. 468, 470, 434 P.2d 435, 436 (1967) (citing, Shelby v. Sixth Judicial District Court, 82 Nev. 204, 414 P.2d 942, rehearing denied, 82 Nev. 213, 418 P.2d 132 (1966)).

Thomas attempts to escape the logical application of the rules of statutory construction by complaining that any error was waived by the State's failure to proffer the specific argument below. This Court faced a similar argument In re George J. where it was argued that "the issue of which statute governs is not properly raised because the State did not raise the issue in a cross-appeal." In re George J., ___ Nev. at ___, 279 P.3d at 189, footnote 2. This Court rejected the argument because "regardless of whether the State properly raised the issue, this Court can sua sponte consider jurisdictional issues." Id. Furthermore, this Court has held that "[t]he ability of this court to consider relevant issues sua sponte in order to prevent plain error is well established … Such is the case where a statute which is clearly controlling was not applied by the trial court" Bradley v. Romero, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986). This is so because issues of jurisdiction and a failure by a judicial officer to apply a clearly controlling statute transcend the outcome of any particular case and relate to the question of whether or not a court has the authority to exercise power over a case. This Court must consider this issue not merely because the district court erroneously dismissed the charges against Thomas but because the actions of the district court went beyond the authority invested in the district court by the Legislature.

Regardless of whether the issue was raised below or which standard of review applies, the reality of the matter before this Court is that the district court exceeded its jurisdiction by ignoring the requirements of NRS 34.700, NRS 34.710 and NRS 172.155. NRS 172.155(2) is not permissive when it limits the ability to object to the sufficiency of the evidence supporting an Indictment to a petition for a writ of habeas corpus. The Legislature's decision to limit the jurisdiction of the courts such that "[a] district court shall not consider any pretrial petition for habeas

corpus … [b]ased on alleged lack of probable cause … unless a petition is filed in accordance with NRS 34.700[,]" is not advisory. NRS 34.710(1)(a). Likewise, the 21 day time limit imposed by NRS 34.700 is not a guideline. A district court that ignores these mandatory statutory provisions acts outside the authority granted by statute and as such the error is plain and is an abuse of discretion.

II
THE OFFICIAL MISCONDUCT AND THEFT STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO THOMAS

The district court's adoption of Respondent's as applied vagueness challenge to NRS 205.0835 (Theft) and NRS 197.110 (Official Misconduct) amounts to nothing more substantive than a mere repackaging of Thomas' untimely attack upon the sufficiency of the evidence supporting the Indictment. At each point in the analysis the district court focuses not on the elements of the offense as they could be applied to the facts of the case but instead upon the lower court's view of the prosecution's theory and the evidence supporting it. Regardless of what the district court thought of the State's theory and the ability to prove up that theory, an unfavorable view of the prosecution's theory and evidence simply does not amount to constitutional infirmity.[2]

The parties are agreed that the touchstone of the analysis of this claim must be this Court's opinion in State v. Castaneda, 126 Nev. ___, 245 P.3d 550 (2010).[3] The test for unconstitutional vagueness requires consideration of two independent factors:

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[2] The issue of constitutional vagueness was more than sufficiently briefed in the State's Fast Track Statement and Opening Brief and in lieu of restating those arguments the State would merely incorporate them by reference. The State will attempt to limit the instant argument to addressing specific arguments made in Respondent's Answering Brief.

[3] In light of this agreement, Respondent's praise for the district court's analysis is somewhat puzzling since the district court order finding unconstitutional vagueness only mentions Castaneda once and in no way tracks the analytical framework of Castaneda.

> "Vagueness may invalidate a criminal law for either of two independent reasons," Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999): (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." Holder v. Humanitarian Law Project, 561 U.S. ---, ---, 130 S.Ct. 2705, 2718, 177 L.Ed.2d 355 (2010) (quoting, Williams, 553 U.S. at 304, 128 S.Ct. 1830.

Castaneda, 126 Nev. at ___, 245 P.3d at 553 (footnote omitted).

Rather than addressing the application of these specific factors by the district court, Respondent offers an attack on the quality of the State's briefing. Thomas is almost totally silent on the issue of whether the Official Misconduct and Theft statutes fail to provide a person of ordinary intelligence fair notice of what is prohibited. While Thomas challenges some of the citations offered by the State and offers some citations of his own, he never addresses why the Official Misconduct and Theft statutes allegedly fail to provide Thomas fair notice of what is prohibited. The district court summarized the elements of the Theft statute as follows:

> NRS 205.0832 provides in relevant part the following elements:
>
> a) without lawful authority, [a] person knowingly;
>
> c) 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.

Appellant's Appendix (A.A.), Vol. 3, p. 736-37.

The district court order set forth the elements of Official Misconduct as follows:

> NRS 197.110 provides in relevant part the following elements:
>
> b. Every public officer who
>
> c. 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,
>
> d. for the private benefit or gain of the public officer or another,

A.A., Vol. 3, p. 739-40.

While this Court has never construed the specific portions of the statutes at issue, it has reviewed other portions of the Theft and Official Misconduct statutes and found those similar elements to be more than understandable. In Watson v. State, 110 Nev. 43, 45, 867 P.2d 400, 402 (1994), this Court faced a challenge to the sufficiency of the evidence under a different section of the Theft statute and concisely summarized the elements of the statute in language that any person of ordinary intelligence would understand: "[u]nder NRS 205.0832(3), part of Nevada's general Theft statute, the state must prove that a person knowingly caused the unlawful transfer of property or services through a misrepresentation." Likewise, the section of the Theft statute at issue here is equally understandable to the person of ordinary intelligence. NRS 205.0832(1)(b) requires that a person; 1) converts, 2) the property or services of another, 3) entrusted or placed in his possession, 4) for a predetermined period of time or a limited use. The elements are clear and their application to Thomas is not a question of vagueness since Thomas is clearly aware that the "gravamen" of the charge is that he abused his position to unjustly enrich his friends.

The same can be said of the district court's analysis of the Official Misconduct statute. In State v. Rhodig, 101 Nev. 608, 610-11, 707 P.2d 549, 550-51 (1985), this Court faced a challenge to the sufficiency of the evidence under a different section of the Official Misconduct statute and concisely summarized the elements of the statute in language that any person of ordinary intelligence would understand: "(1) at the time of the commission of the offense, defendant was a public officer, (2) defendant asked for or received compensation for an official service which he did not actually perform, and (3) defendant acted with the knowledge that he was asking for or receiving compensation for an official service which he did not actually render." Likewise, the section of the Official Misconduct statute at issue here is equally understandable to the person of ordinary

intelligence. NRS 197.110(2) requires that; 1) a public officer, 2) employs or uses, 3) any resource, 4) under his or her control, 5) in his or her official capacity, 6) for the gain or benefit of, 7) the public officer or another. The elements are clear and their application to Thomas is not a question of vagueness since Thomas is clearly aware that the "gravamen" of the charge is that he abused his position to unjustly enrich his friends.

At the April 28, 2011, hearing on all motions the defense specifically conceded that it was not challenging the constitutionality of the Theft or Official Misconduct statutes but was instead offering an as applied constitutional challenge. A.A., Vol. 3, p. 718-19. At this same hearing the State clearly informed the lower court that what made the facts before the court criminal was the fact that Thomas abused his position to unjustly enrich his friends, that his conduct went beyond bumbling by a public official and became criminal conduct through his manipulation of the contracting process for the purpose of enriching his friends. A.A., Vol. 3, p. 713-16. Instead of focusing in on the narrow issues relating to Thomas' abuse of the process the district court focused on disclosures made by the State that the district court apparently perceived as weakening the State's case. The district court noted that "the State concedes that Thomas has not personally received any private benefit from the contracts in question." A.A., Vol. 3, p. 740. The district court also pointed out that the State "concede[s] that each original contract had to go through a vetting process by Thomas, various staff members of UMC, a Clark County District Attorney, and Clark County staff before receiving ultimate approval[.]" Id.[4] The district court went on to summarize its view of the State's case:

[4] While the order claims that the state made this concession the transcript of the hearing indicates that the court admitted it was making an assumption and the prosecutor specifically told the court that he would not make that assumption. A.A., Vol. 3, p. 716-17.

> The 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 contract was not performed. If the contracts were unnecessary, overly favorable to the vendors, unperformed and as alleged amounting to theft one would wonder why the vendors/their principals were not charged with theft as co-conspirators.

A.A., Vol. 3, p. 740.

The district court's order is void of any application of the facts of the case to the elements of the offense relevant to the question of whether the Theft and Official Misconduct statutes fail "to provide a person of ordinary intelligence fair notice of what is prohibited[.]" Castaneda, 126 Nev. at ___, 245 P.3d at 553. Rather than engaging in an analysis of the elements of the offenses, the history of the language defining the elements and an application of that statutory context to the facts of this case, the district court offered nothing more than a summation of the court's evaluation of the strength of the State's case. The district court ultimately concluded that "[t]he 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 nature. This Court doers not accept this proposition." A.A., Vol. 3, p. 741. Rather than explaining this conclusion in light of the elements of the statute or the relevant facts of the case the district court opted to drop a footnote pointing out that "[i]t is interesting to note that Clark County did not file a civil suit against any of the contracted parties identified in Counts 1 - 5 of the Indictment for their alleged breach of contract or for entering into an allegedly fraudulent contract. Rather ACS … filed suit against UMC … [and] UMC settled with ACS for the amount of $595,000.00." A.A., Vol. 3, p. 741. The district court went on to offer a disclaimer of questionable value by claiming that "[t]hese facts are extrinsic to this matter and were not considered by the Court in rendering its decision[.]" Id.

This is not the analysis required by Castaneda and it does not address the question of fair notice. Respondent attempts to distract this Court from

consideration of the record made by the district court by attacking the State's reliance on precedent "which merely apply a statute which is different from NRS 197.110 to conduct which is different from the conduct alleged in this case[.]" Respondent's Answering Brief (A.B.), p. 13-14. Respondent than directs this Court's attention to Skilling v. U.S., ___ U.S. ___, 130 S.Ct. 2896 (2010), where the United States Supreme Court entertained a vagueness challenge to a statute extremely dissimilar to either the Theft or Official Misconduct statutes:

In full, the honest-services statute stated:

> "For the purposes of th[e] chapter [of the United States Code that prohibits, inter alia, mail fraud, § 1341, and wire fraud, §1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." §1346.

Skilling, ___ U.S. at ___, 130 S.Ct. at 2927.

While involving facts substantially different from those at hand and a statute that is extremely dissimilar to the one before this Court, Skilling did find the above statute constitutionally defective and saved the statute by construing "§1346 [as] criminalize[ing] only the bribe-and-kickback core of the pre-McNally case law." Id. at ___, 130 S.Ct. at 2931 (footnote omitted). Skilling settled the question under the federal statute of whether the "intangible right of honest services" language found in §1346 was limited only to bribe and kickback cases or would include "another category of proscribed conduct: undisclosed self-dealing by a public official or private employee – i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty. Id. at ___, 130 S.Ct. at 2932 (citation and quotation marks omitted). In McNally v. U.S., 483 U.S. 350, 107 S.Ct. 2875 (1987), the Supreme Court had attempted to take the federal court system completely out of the business of policing "intangible right of honest services":

> "Rather than constru[ing] the statutes in a manner that leaves its outer boundaries ambiguous and *involves the Federal Government in setting standards of disclosure and good government for local and state officials*," we read the statute "as limited in scope to the protection of property rights." Id. at 360, 107 S.Ct. 2875. "If Congress desires to go further," we stated, "it must speak more clearly.." Ibid.

Skilling, ___ U.S. at ___, 130 S.Ct. at 2927 (quoting, McNally v. U.S., 483 U.S. 350, 107 S.Ct. 2875 (1987)) (emphasis added).

Apparently Congress did not share the Supreme Court's federalism concerns because it immediately amended the statute to overrule McNally and include the intangible right of honest services in the statute. Id. The Skilling Court then limited the federal statute to only the bribe and kickback line of pre-McNally cases. Id. at ___, 130 S.Ct. at 2932. The Court reached that conclusion, at least in part, because "[w]hile the honest-services cases preceding McNally dominantly and consistently applied the fraud statute to bribery and kickback schemes … there was considerable disarray over the statute's application to conduct outside that category." Id. at ___, 130 S.Ct. at 2931.

While the State would agree with Respondent that Skilling involved the same vagueness test as this Court applied in Castaneda, the relevance of Skilling to the matter at bar ends there. The Skilling Court was concerned with issues of federalism that are not relevant here and was faced with a confusing and contradictory body of precedent that would not only fail "to provide a person of ordinary intelligence fair notice of whit is prohibited," Castaneda, 126 Nev. at ___, 245 P.3d at 553 (citation and quotation mark omitted), but would actively confuse any individual trying to determine what is prohibited. Nevada's Theft and Official Misconduct statutes are not burden by an extensive body of confusing and contradictory case law. The language of the Theft and Official Misconduct statutes do not come with the history of the language at issue in Skilling. Ultimately, Skilling is a red herring of little relevance to the instant litigation.

What is relevant is the analytical framework of Castaneda. There is no constitutional vagueness if the words of a statute have a well settled and ordinarily understood meaning or if the words of a statute are made clear by reference to the

common law or other outside sources. Castaneda, 126 Nev. at ___, 245 P.3d at 553-54. The problem with applying the analytical framework here is that the district court never specified what words or statutory phrases were problematic when applied to the facts of the case. Instead the district court discussed the weaknesses it perceived in the State's case. The matter in which the district court disposed of this manner leaves this Court with no meaningful record from which to work. Any analysis similar to that undertaken by this Court in Castaneda is frustrated by the fact that the district court did not address the language of the statutes or the application of that language to the facts before it. The district court primarily seemed concerned with the idea that the "gravamen" of the charges against Thomas was whether his contracting amounted to incompetence or criminal abuse of his position to enrich his friends, such a concern shares more in common with a sufficiency of the evidence or motion for judgment of acquittal analysis than it does with a constitutional vagueness analysis.

However, in order to pursue the vagueness analysis required by Castaneda the State will assume that the district court's vagueness concerns relate to the sufficiency of the evidence / motion for judgment of acquittal record made by the district court. If there is any language from either statute relevant to that concern it must be the "conversion" element of the Theft statute and the "private benefit or gain of the public officer or another" element of the Official Misconduct statute. As to the conversion element of the Theft statute, conversion is a word of ordinary understanding. Black's Law Dictionary defines conversion as:

> An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's right. Any unauthorized act which deprives an owner of his property permanently or for an indefinite time. Unauthorized and wrongful exercise of dominion and control over another's personal property, to exclusion of or inconsistent with rights of owner.

Black's Law Dictionary 332 (6th ed. 1990). Conversion essentially means to use the property of another in an unauthorized manner. Counts 1 – 5 of the Indictment clearly set forth conduct consistent with Thomas using the property of UMC in an unauthorized manner. Whether the "gravamen" of that charge reached the level of proof necessary for a conviction is not relevant to a vagueness analysis. Thomas was given fair notice that he could be held accountable under the Theft statute for converting the resources of UMC to his own purposes.

Turning to the "private benefit or gain of the public officer or another" element of the Official Misconduct statute, the words here are also words of common understanding. The relevant meaning of "private" is "[a]ffecting or belonging to private individuals, as distinct from the public generally. Not official; not clothed with office." Black's Law Dictionary 1195 (6th ed. 1990). Benefit means "[a]dvantage; profit; fruit; privilege; gain; interest." Black's Law Dictionary 158 (6th ed. 1990). Gain similarly means "[p]rofits; winnings; increment of value." Black's Law Dictionary 678 (6th ed. 1990). NRS 193.019 clearly defines a public officer in words of common understanding in such a fashion as to clearly notice Thomas that he would be considered a public employee under the Official Misconduct statute. Another is also a word of common understanding that means "[a]dditional. Distinct or different." Black's Law Dictionary 91 (6th ed. 1990). These words clearly put Thomas on notice that he was subject to prosecution if he used is public position for the private gain of his friends.

The second independent factor for consideration under Castaneda is whether the statute "is so standardless that it authorizes or encourages seriously discriminatory enforcement." Castaneda, 126 Nev. at ___, 245 P.3d at 553. The district court's order limits discussion of this element to a one sentence rhetorical question: "Further, the question must be asked: under what circumstances will the government file criminal charges for entering into ill-conceived contracts?" A.A.,

Vol. 3, p. 741. Thomas attempts to distract from the district court's failure to analyze this factor by unfairly playing the race card. Thomas suggests the prosecution used the fact that Thomas is black in order to convince the grand jury to find probable cause. A.B., p. 25-26. Putting the small and selective portion of the transcript reproduced by Thomas in context demonstrates that Respondent's particular race was irrelevant and that race was mentioned only because it was one factor among many connecting Thomas to the people behind the companies benefited by Respondent's abuse of his position:

> Q And when you were looking at those companies what were you trying to find?
>
> A Well, we were trying to find several different things. We were trying to find, number one, what they had in common which was … their place or origin, they were all from Chicago, we were also trying to find whether or not they were an actual service provider company, meaning a company that actually provided a service rather than a consulting company. What we found is the majority of those companies that received these contracts were all consulting companies meaning that they really didn't do the work, they just talked about doing the work.
>
> Q Did you also look into whether or not the heads of those companies were acquainted with Lacy Thomas?
>
> A Yes, sir, we did. That was one of the more difficult things for us to do. But we worked that for probably a couple of months and we found out that the majority of the people involved with those companies were all from, fraternity members with Lacy Thomas in a fraternity known as Alpha Pi Alpha. So we found out that they were all from the same fraternity and all black males and all from Chicago.

A.A., Vol. I, p. 86.

Despite Respondent's attempt to misuse the fact of his race, the transcript points to no other possible conclusion than that the police were looking for patterns and connections between Thomas and the companies he abused his position to benefit. Respondent speculates that "[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 organization and tied to the race of the target of the investigation." A.B., p. 26-27. Respondent's baseless and

offensive accusations amount to nothing more substantive than an attempt to misuse the fact that Thomas happens to be black as a means to influence this Court to reach a result other than it normally would have if Thomas did not happen to be a minority. The police were looking for commonalities, not skin pigmentation, and if they discovered the connection to support probable cause in the form of membership in an organization that was made up of people exclusively of one race, one ethic group, one religious faith, one sexual orientation, one political viewpoint or any other common denominator that information would have been shared with the members of the grand jury.

The record before this Court simply does not support the district court's finding of as applied unconstitutional vagueness. Thomas had notice of what conduct was prohibited and the language of the Theft and Misconduct statutes are no more vague then any criminal statute designed to fit the nearly unlimited ways people break the law. Thomas pitched his vagueness argument to the district court in terms of a sufficiency of the evidence / motion for judgment of acquittal argument. A.A., Vol. 3, p. 708-13. It is clear from the record that the district court was concerned with the evidentiary sufficiency of the State's case and not constitutional issues. Respondent has repeatedly cited to the question of a grand juror asking where is the "point at which professional incompetency resulting in shoddy work product crosses the line into criminal activity." A.A., p. 313. The only way to answer that question is to allow this case to go to trial, to allow a jury to look at the facts and the law and tell us where that line is in this case. The only way to build a body of precedent that will provide the judicial gloss to refine these statutes is to allow this matter to go to trial and come before this Court complete with a full record.

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WHEREFORE, the State respectfully requests that the district court's order dismissing the instant matter be reversed.

Dated this 27th day of August, 2012.

Respectfully submitted,

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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 7,000 words or does not exceed 15 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 27th day of August, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 27, 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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JEV//ed