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IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Petitioner,

vs.

LACY THOMAS,  
Respondent,

Case No. 58833

**PETITION FOR REHEARING**

Respondent Lacy Thomas, by and through counsel, Franny A. Forsman and Daniel J. Albregts, petitions the court to reconsider its *en banc* order of September 26, 2013 affirming in part and reversing in part the order of the district court which dismissed the Indictment in this case. This Petition is brought pursuant to NRAP 40.

This Petition is based upon the following grounds: 1) This court overlooked or misapprehended the basis upon which relief was sought and the ground upon which it was granted in the court below; 2) This court affirmed the dismissal of Count 1, yet reversed the dismissal of Count 6 which contained no additional allegations; 3) This court should provide guidance to the lower court and the parties to avoid needless additional litigation and to permit counsel to effectively evaluate and present the case.

1 **I.**  
2 **THE MOTION TO DISMISS WAS NOT BASED UPON LACK OF NOTICE**  
3 **AND THE DISMISSAL WAS NOT BASED ON LACK OF NOTICE**

4 Although the State argued that the dismissal below was based on the failure of  
5 the Indictment to provide sufficient notice,<sup>1</sup> the Motion to Dismiss was not based on  
6 inadequacy of notice and the court’s order dismissing the Indictment was not based  
7 on lack of notice. This court misapprehended the nature of the challenge to the  
8 Indictment and the basis for the decision of the trial court.<sup>2</sup>

9 This court represents on page 1 of the Order that, “Thomas...sought dismissal  
10 of all counts charged in the indictment because they failed to put him on notice of the  
11 specific criminal acts asserted against him. The district court agreed and dismissed  
12 the indictment.” That is not what happened.

13 The Motion to Dismiss which led to dismissal of the Indictment sought relief  
14 as follows:

15 [T]he State believes that a public official commits two crimes when he  
16 enters into duly authorized contracts with anyone if he does so for some  
17 undefined personal purpose. The official need not receive any gain, the  
18 county need not be harmed and there need not be an undisclosed  
19 relationship between the official and the vendor....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.

20 AA, p. 605.

21 ....

22 ....

23 ....

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25 <sup>1</sup>Notice was the State’s secondary argument. The State’s first argument (although not raised  
26 below) was that the challenge was to the “sufficiency of the evidence to sustain the indictment”  
Appellant’s Reply Brief, p. 2.

27 <sup>2</sup>Respondent warned this court about the mischaracterization of the nature of the motion in  
28 his Answering Brief, p. 2.

1 The court's ruling which dismissed the indictment ruled on that prayer for  
2 relief:

3 The indictment, if allowed to stand, would be tantamount to this Court  
4 sanctioning the proposition that if UMC and/or Clark County entered  
5 into an ill-conceived contract that may be more beneficial to a vendor as  
6 opposed to itself that Thomas' conduct is criminal in nature. This Court  
7 does not accept this proposition.  
8 AA, p. 741.

9 The State concedes that the challenge which was made and which was ruled  
10 upon by the trial court was "an [vagueness] as applied challenge to the statutes at  
11 issue in the indictment. Appellant's Reply Brief, p. 10.

12 Because this court chose to follow the State's erroneous characterization of  
13 both the basis of the challenge and the basis of the dismissal, the Order overlooked  
14 the constitutional issues which were raised below and in Answer to the State's appeal.  
15 Those constitutional issues were not inadequate notice but the fact that the conduct  
16 alleged either did not constitute a crime or the criminal statute was vague as applied.

## 17 II.

### 18 **THE ORDER AFFIRMING THE DISMISSAL OF COUNT 1** 19 **AND REVERSING THE DISMISSAL OF COUNT 6** 20 **OVERLOOKS THE FACT THAT BOTH COUNTS** 21 **RELY ON THE SAME ALLEGATIONS**

22 This court concluded that Count 1 of the indictment "failed to provide Thomas  
23 with sufficient notice of all the elements of the criminal acts charged in count one in  
24 order to prepare a defense, holding, "While count one of the indictment included the  
25 relevant dates, the parties and the factual amounts of the contract entered with ACS,  
26 it failed to allege how Thomas's conduct was unlawfully authorized or how his use  
27 of payments to ACS articulate the intended, unlawful purpose when actual work had  
28 been performed under the contract." Order, p. 4. Count 6 of the indictment reads as  
follows:

Defendant did, on or between May, 2005, and January, 2007, 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 direction, or in his

1 official custody, for the private benefit or gain of himself or another, by  
2 doing the acts set forth in Count 1, hereinabove.  
3 AA, p. 518.

3 In reversing the dismissal of Counts 6 through 10, this court asserts in its order  
4 that “counts one to five included allegations that Thomas entered into contracts with  
5 his longtime friends or associates that were ‘grossly unfavorable’ to UMC.” Yet, the  
6 quoted language does not appear anywhere in the indictment. Further, the State  
7 argued to the trial court that the “State does not have to prove that the contract was  
8 unfavorable to UMC.” RA at p. 5. So it is impossible to tell from the Order what  
9 distinguishes the first set of counts from the second in the court’s analysis.

10 The reasons this court has given for the affirmance of the dismissal of Count  
11 1 apply with equal force to the dismissal of Count 6. The distinction made between  
12 the two counts by this court is confusing and leaves the parties and the lower court  
13 with virtually no basis on which to frame jury instructions, to define the elements of  
14 the crime or to assess the adequacy of the proof.<sup>3</sup>

### 16 III.

#### 17 **RESPONDENT URGES THIS COURT TO PROVIDE GUIDANCE** 18 **REGARDING THE MEANING OF ITS ORDER**

19 If this court determines that it will not revisit the resolution of this appeal and  
20 therefore will not address the issues which were raised and decided below,  
21 Respondent urges this court to clarify its order by answering the following questions:

22 1. As to the Theft counts (2 through 5), must the State prove that the vendors  
23 “never performed any work or delivered a final work-product” in order to prove  
24 Thomas guilty of Theft?

25 2. As to the Misconduct counts, whether provision of contracts to “longtime  
26

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27 <sup>3</sup>The problems with defining the elements of the crime and analyzing the burden of proof are  
28 created by the vagueness of the statutes as applied to the allegations in the indictment but this court  
has chosen not to address that argument.

1 friends or associates” is an element of the crime which must be proven by the State?

2 3. Whether the State must prove that the contracts were “grossly unfavorable”  
3 to UMC at the time that they were approved and executed by the County?

4 4. Whether the term “grossly unfavorable” carries a definition which can be  
5 applied by the fact finder?

6 5. Whether the State must prove that the contracts described in the indictment  
7 were not authorized by the appropriate county staff and elected officials?

8 6. Whether the State must prove that some state law or regulation defines the  
9 nature of the relationship between the contractor and the vendor as prohibited?

10 The questions are asked in order to prevent further needless litigation, the  
11 invitation of error and the expense to the parties in proceeding to retrial of this case  
12 without knowing what the State must prove. Because this court did not address the  
13 problem created by the lack of definition of the crimes in the statutes and the resulting  
14 determination by the trial court that the conduct alleged did not constitute a crime, the  
15 parties are returned to the confusion which existed throughout the first trial as  
16 exemplified by the following exchange:

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

19 MR. MITCHELL: I—well, in the misconduct counts you have to  
20 prove that the contract benefitted the friend and not the organization.  
21 That the contract was entered into for the purpose of benefitting a friend  
22 or Mr. —or any other person, **it doesn't have to be a friend**. But when  
23 it was entered into it for the benefit of somebody besides the  
organization represented. So that's what I need to prove on Counts 6  
24 through 10, yes. ...  
25 RA, p. 3 (emphasis added).

26 When the court asked the prosecutor whether the State was alleging that hiring  
27 a friend who did a bad job is a crime and then followed with whether the crime might  
28 be failure to disclose that the vendor was a friend, the prosecutor responded:

MR. MITCHELL: My burden is not so high as to force me to—to  
prove that —that— well, let me phrase it this way. The —what I have to  
show is that the purpose of the contract was to help the friend. **I don't  
have to prove that the purpose was to harm the county**. I just have

1 to show that this was for personal benefit of a friend, or somebody,  
not—not to fulfill my job.  
2 RA, p. 4-5 (emphasis added).

3 Trying to ascertain what conduct the prosecutor alleges is criminal under the  
4 statutes, the court asked,

5 [i]f he had a strong friendship relationship with one of these individuals,  
to contract for a new phone system, and he gave the best price in the  
6 world and they did the best work possible, is that theft? And is that  
misconduct?  
7 RA, p. 44.

8 The prosecutor responded that it was “if his purpose in entering into the  
9 contract was to confer a private benefit by virtue of his public authority...” and then  
10 confirmed that “private benefit” meant that the vendor got paid. RA, p. 45. The  
11 court asked the prosecutor “if it’s a fair contract and the county gets a good benefit  
12 from the contract, is that misconduct?” The prosecutor answered, “**Whether or not**  
13 **it turns out well for the county is absolutely not the issue.**” RA, p. 45 [emphasis  
14 added].

15 Still struggling with the burden of proof, later in the trial, the court asked:

16 THE COURT: Well, theft, I’m not sure—what is theft? Something for  
nothing?

17 MR. MITCHELL: Theft is causing somebody to be paid  
unnecessarily when the money could have been left  
18 unspent. That’s the theory here. And—and because Mr.  
Thomas entered into the contract, he bound UMC to pay  
19 money that they could have avoided paying....  
20 Trial Transcript- 4/2/10, p. 45-6.

21 In most criminal cases, the elements of the crime are defined in the statute and  
the burden of proof can be ascertained. The parties can, as a result, look at the  
22 discovery and evaluate the case. Defense counsel can give meaningful advice. If the  
23 case goes to trial, the prosecutor can articulate what will fulfill the burden of proof  
24 and the court can determine how the jury is to be instructed. The Nevada statute on  
25 Public Misconduct suffers from the same constitutional problems as the federal  
26 statute did in Skilling v. United States, 130 S.Ct. 2896 (2010). As a result, none of  
27 the essential functions of a fair trial can occur on remand of this case. Here, the  
28

1 State's case has been remanded in the same undefined, confused condition as it  
2  
3 arrived in this court. Due process and our system of criminal justice require more.

4 DATED this 14<sup>th</sup> day of October, 2013.  
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Petition for Rehearing complies with the formatting requirements of NRAP 32(a)(4)-(6) because this petition has been prepared in a proportionally spaced typeface using WordPerfect X4 in size 14 Times New Roman font.

I further certify that this petition complies with the page limitations of NRAP 40 because it does not exceed 10 pages.

Dated this 14<sup>th</sup> day of October, 2013.

/s/ Franny A. Forsman  
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