IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, Appellant, v. LACY THOMAS, Respondent.	CASE NO: 58833

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and answers the Petition for Rehearing in the above-captioned appeal.

This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 3rd day of December, 2013.

Respecfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar # 006528
Attorney for Respondent

MEMORANDUM
POINTS AND AUTHORITIES

Respondent Lacy Thomas petitions this Court for rehearing to reconsider the Order Affirming in Part, Reversing in Part and Remanding ("Order") the Decision on Motion to Dismiss ("Decision") of the district court to dismiss the Indictment in his case.[1] Respondent contends that this Court overlooked or misapprehended: 1) that the district court's dismissal of the Indictment was not based on lack of notice; and 2) that as Count Six and Count One of the Indictment were based on the same underlying facts, this Court should have upheld the dismissal of Count Six where it upheld the dismissal of Count One. Additionally, Respondent seeks guidance from this Court "regarding the meaning of its order." Pet. 4.

Per NRAP 40(c)(2), this Court considers rehearing only when it has overlooked or misapprehended a material fact or question of law.[2] Bahena v. Goodyear Tire & Rubber Co., 126 Nev. ___, ___, 245 P.3d 1182, 1184 (Nev. 2010). Because Respondent has not actually shown that this Court overlooked or misapprehended any material fact in rendering its decision in the instant matter,

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[1] The State's Answer is based upon this Court's Order Directing Answer to Petition for Rehearing, Case No. 58833, November 22, 2013.

[2] Or that the Court overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal, which Respondent does not contend here. Bahena v. Goodyear Tire & Rubber Co., 245 P.3d 1182, 1184 (Nev. 2010).

and because no basis exists for this Court to offer "guidance" regarding the meaning of its Order, Respondent's Petition for Rehearing must be denied.

I
THIS COURT DID NOT OVERLOOK OR MISAPPREHEND ANY MATERIAL FACT IN CORRECTLY DETERMING THAT THE DISTRICT COURT'S DISMISSAL WAS BASED ON LACK OF NOTICE

Respondent first contends that this Court "misapprehended the nature of the . . . basis for the decision of the trial court[,]" in that "the [district] court's order dismissing the Indictment was not based on lack of notice." Pet. 2. However, this contention is without merit, as it is beyond dispute that the district court based its decision to dismiss Respondent's Indictment on the Indictment's purported lack of notice to Respondent of the charges against him.

In its Decision on Motion to Dismiss, the district court stated:

> [Respondent] challenges the Indictment under a number of legal issues, most notably that the language of the Indictment does not set forth criminal conduct and, therefore, ***does not provide sufficient notice of the charges against him***.

Appellant's Appendix, Volume III, at 740 (emphasis added). The district court then analyzed whether the Indictment was sufficient to put Respondent on notice of the charges against him, quoting language from State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998), to support its analysis. III AA 740-41. Notably, the language the district court quoted is found in a paragraph in Hancock under a heading entitled: "***The original indictment failed to put respondents on notice of the***

charges." Id. at 164, 955 P.2d at 185 (emphasis in original). The district court also analyzed the Indictment by quoting language from this Court's decision in Simpson v. Eighth Judicial District Court, 88 Nev. 654, 503 P.2d 1225 (1972), in which this Court noted that an Indictment:

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

Id. at 660, 503 P.2d at 1229-30; see also III AA 741. In that decision, this Court likewise considered whether such an indefinite Indictment:

> [W]ould allow the prosecutor absolute freedom to change theories at will; [as] it affords ***no notice*** at all of what petitioner may ultimately be required to meet; thus, it denies fundamental rights our legislature intended a definite indictment to secure.

Id. at 661, 503 P.2d at 1230 (emphasis added).

As this Court determined, the statements and law analyzed in the district court's Decision demonstrate that the court's dismissal was, in fact, based on the Indictment's purported lack of notice to Respondent. Now, in his attempt to seek rehearing, Respondent claims this Court "overlooked" or "misapprehended" the basis for the district court's decision. However, as shown supra, the district court clearly articulated the basis upon which it dismissed the Indictment, and that is the basis this Court relied upon in reaching a holding. See Order 1, 5. Respondent further asserts that the State "erroneous[ly] characteriz[ed] . . . the basis of the

dismissal[.]" Pet. 3. The State mischaracterized nothing, but rather endeavored in its appellate pleadings to respond to the basis of the district court's dismissal, which was a finding that the Indictment did not give him notice, was unconstitutionally vague, and did not accord Respondent due process.[3] III AA 741. That the district court did not dismiss Respondent's Indictment in the exact fashion Respondent would have preferred is of no moment. Consequently, as this Court did not overlook or misapprehend the basis for the district court's dismissal for lack of notice, Respondent's first claim fails.

II
THIS COURT DID NOT OVERLOOK OR MISAPPREHEND ANY MATERIAL FACT IN CORRECTLY DETERMING THAT RESPONDENT COULD BE CHARGED WITH COUNT SIX OF THE INDICTMENT

Respondent next contends that this Court overlooked the fact that Count One and Count Six relied on the same facts, and claims this Court should have upheld the dismissal of Count Six where it upheld the dismissal of Count One. Pet. 3-4. However, as this Court correctly noted, Counts One and Six charged two different crimes, with two different sets of elements. See generally Order 3-5. As this Court did not misapprehend or overlook that fact, Respondent's claim is without merit.

This Court specifically analyzed Count One of the Indictment with respect to the facts of Respondent's alleged crime and the attendent elements of theft under

[3] As opposed to a finding that the statutes were unconstitutionally vague as-applied, which Respondent alleged. III AA 604.

NRS 205.832. This Court noted that theft requires that an "unauthorized" transfer of property of another, and that the Indictment "failed to allege how [Respondent's] conduct was unlawfully authorized or how his use of payments to ACS articulate the intended, unlawful purpose when *actual* work had been performed under the contract." Order 3-4 (emphasis in original). This Court then analyzed counts six through ten charging Respondent with misconduct of a public official under NRS 197.110, which only requires that a public officer use property under his official control or direction for some type of private gain. This Court found that the Indictment's "allegations that [Respondent] entered into contracts with his longtime friends or associates that were 'grossly unfavorable' to UMC" sufficient to put Respondent on notice of counts six through ten. Order 5.

Respondent's claim that this Court must have overlooked or misapprehended the fact that both counts rely on the same factual allegations is erroneous. Notably, authorization is not an element of misconduct of a public official; such misuse of property could be authorized and still violate NRS 197.110. As to Count One, this Court held that the State failed to articulate, in a manner sufficient to put Respondent on notice of that charge, how his use of property was unauthorized. Additionally, this Court noted that entering UMC into "grossly unfavorable" contracts was another manner in which Respondent had notice of the allegations

supporting Count Six.[4]

Respondent likewise claims that it "is impossible to tell from the Order what distinguishes the first set of counts from the second in the court's analysis." Pet. 4. Again, the counts rested on two separate statutes with two different sets of elements: counts one through five rested on the charge of Theft, and counts six through ten rested on the charge of Misconduct of a Public Official. Accordingly, Respondent's contention that this distinction is confusing is spurious, and his claim that this Court overlooked or misapprehended that fact is without merit.

III
NO BASIS EXISTS FOR THIS COURT TO PROVIDE "GUIDANCE REGARDING THE MEANING OF ITS ORDER"

Respondent also asks this Court to clarify its Order by answering certain narrow questions outlined in the third part of his Petition. However, it is well-established that this Court "will not render advisory opinions on moot or abstract questions. Decisions may be rendered only where actual controversies exist." Applebaum v. Applebaum, 97 Nev. 11, 12, 621 P.2d 1110 (1981); Nev. Const. art 6, § 4. Additionally, a petition for rehearing is not the appropriate vehicle for any

[4] Respondent also claims that this Court's observation that "counts one to five included allegations that [he] entered into contracts with his longtimes friends or associates that were 'grossly unfavorable' to UMC" contains language that "does not appear anywhere in the indictment." Pet 4. However, the term "grossly unfavorable" and the attendant allegations very clearly appear on page 2, line 7 of the Indictment. III AA 515.

such request. Rehearing is limited to consideration of whether "the court has has overlooked or misapprehended a material fact in the record or a material question of law in the case, or . . . has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2)(A) & (B). None of Respondent's questions formed the basis of the district court's dismissal of the State's Indictment, the appellate briefing by either party, or this Court's Order. Where a ground for relief was not considered by the district court below, "it need not be considered by this court." Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). Any such prayer for relief here by Respondent would more appropriately be resolved by pre-trial procedures in the district court, and need not be considered by this Court.

Dated this 3rd day of December, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration or answer 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 it 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 petition complies with the page or type-volume limitations of NRAP 40 or 40A because it is either proportionately spaced, has a typeface of 14 points or more and contains 1,612 words and does not exceed 10 pages.

Dated this 3rd day of December, 2013.

Respecfully 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 December 3, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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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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BY */s/ eileen davis*
Employee, District Attorney's Office

JEV/Matthew Walker/ed