

1 **II. There is no Need for an Evidentiary Hearing Since the Defense Accusations of**
2 **Knowing and Intentional Non-Disclosure of the "Binder" documents is**
3 **Unsupported by any Evidence or Believable Offer of Proof**

4 Defense counsel in her supplemental motion requests that this Court conduct an
5 evidentiary hearing in an attempt to reveal alleged evidence that the State somehow
6 purposefully knew about and withheld evidence that was potentially exculpatory in nature and
7 which ultimately necessitated the mistrial in the instant case. Specifically, on page six (6) of
8 defense counsel's motion, she claims "upon information and belief" that "evidence will be
9 adduced showing that the office of the District Attorney was completely aware of the existence
10 of the documents." Not only is that claim completely unsupported, but it is patently offensive.
11 It is reckless and improper to accuse officers of the court in the instant case of misconduct
12 without any valid basis or grounds for doing so. Defense counsel has not articulated a single
13 fact or piece of evidence to support her claims and her request to have this Court conduct an
14 evidentiary hearing on the issue.

15 The defense is simply attempting to convince this Court to allow the defense leave to
16 engage nothing more than a fishing expedition for information that does not exist. Without a
17 legitimate offer of proof or evidence to show otherwise, the defense request for this Court to
18 grant and conduct an evidentiary hearing should not be granted.

19 **CONCLUSION**

20 The defense in this case moved this Court for a mistrial and was granted the same on
21 April 2, 2010. The Court granted the mistrial based on the proffered belief that a "binder" of
22 information, which was inadvertently not turned over to the defense, potentially contained
23 exculpatory evidence or in the alternative, would lead to additional evidence which might in
24 some way be favorable to the accused. It has been years since the mistrial in the instant case
25 and the defense has yet to show that anything within the binder has proved to be exculpatory
26 or has led to exculpatory evidence.

27 Nowhere in any of the defense's previous motions to dismiss is there even a single
28 reference to a document or page from the "binder" which the defense claims is exculpatory.
29 Furthermore, nowhere in the previously filed motions to dismiss are there any references to

1 any document or documents which the defense was led to by the information contained in the
2 "binder" or that the information was even arguably helpful to the defense.

3 Although the defense would like to make this Court believe that the material in the
4 "binder" was exculpatory and somehow exonerated the defendant, they cannot cite to anything
5 in the "binder" that changes anything in this case or helps the defense in anyway.

6 It should be noted that **the language of COUNTS 1 & 6 were materially different**
7 **from the remaining counts in that there is no allegation that ACS did not perform any**
8 **work.** While it is true that the remaining counts involving the other contracts do make that
9 allegation, the information contained in the "binder" has nothing whatsoever to do with those
10 other contracts.

11 The State submits that in the years since the trial, the concern the Court raised when
12 granting the mistrial (that the information contained in the "binder" might lead to some
13 investigation which might lead to some exculpatory evidence) has not born any fruit. Because
14 the defense actually had the "binder" in its possession and actually was successful in
15 introducing it into evidence at trial, there is no doubt that the defense knew what it contained
16 and there was, therefore, no Brady violation despite the lack of disclosure.

17 While at the time, the Court felt that earlier disclosure of this "binder" may have aided
18 in bolstering the defense. The sheer lack of any exculpatory evidence that has come to light
19 in the past years and the lack of any reference to anything in the defense motions which
20 spawned from the "binder" shows that there is no merit to the defense motions to dismiss
21 based on that information.

22 Furthermore, the Nevada Supreme Court has dismissed COUNT 1 of the indictment.
23 Defendant cannot be retried on that count. The binder at issue here only pertained to COUNT
24 1, therefore, there is no issue of any failed disclosure that arises in relation to the other counts.

25 In the Supreme Court's decision dismissing COUNT 1, they specifically stated that the
26 indictment, pertaining to that count, did not contain any allegation that ACS did not perform
27 work or deliver a final work-product under the terms of the contract. The Supreme Court
28 stated that because there was no such allegation in COUNT 1, as there were in COUNTS 2-5,

1 that Defendant was not provided "sufficient notice of all the elements of the criminal acts
2 charged in COUNT 1 in order to prepare his defense." Supreme Court Order pg. 4.

3 Because the binder is irrelevant to the remaining counts in the indictment, the fact of
4 its disclosure or lack of disclosure is a moot issue since the only count it pertained to was the
5 one on which the State can no longer prosecute Defendant.

6 Finally, the defense also raised the issue of vault evidence which they claimed that they
7 never had access to or which was exculpatory in nature. With regard to the evidence contained
8 at the vault, the defense in one of its motions did provide a list of documents obtained from
9 the vault after the previous trial. The defense, however, had ready access to all of this material
10 prior to the beginning of the trial. The defense, however, only made a limited request to review
11 that evidence.

12 In fact, in the weeks leading up to the trial, defense counsel sent a letter to the State
13 specifically requesting that the State not provide access to the vault evidence earlier than
14 about two weeks prior to trial. This was ostensibly because Defendant had not yet arrived in
15 town for the trial. Once Defendant came to town, however, defense counsel requested that
16 Defendant specifically be given access to the computer evidence contained at the vault. The
17 State did so and Defendant, not defense counsel, subsequently went to the vault to get access
18 to those materials. It became apparent, however, that Defendant could not review the mirror
19 imaged copies of the hard drives which were provided. The State, again in its attempts to
20 provide access to the evidence in the case, arranged for Defendant to go to Las Vegas
21 Metropolitan Police Department Cyber Crimes Unit to obtain accessible copies of that
22 computer data.

23 Defendant was able to gain access to the materials on the computer hard drives he
24 requested as evidenced by the fact that a number of documents which came from those
25 computer materials were actually introduced at trial by defense counsel. As these materials
26 came from the vault and because defense counsel requested specific access to those materials
27 and no others, there is no basis to assert that the State somehow prevented Defendant from
28 access to that evidence.

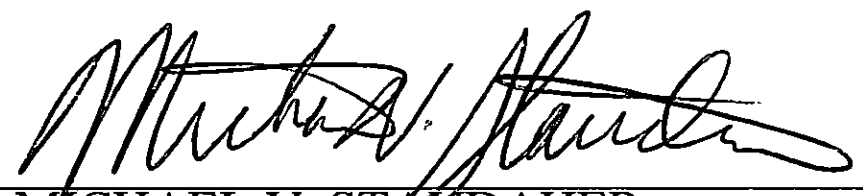
1 Following the trial, however, defense counsel requested a complete review of the
2 materials contained at the vault in the instant matter. The defense made copies of a number
3 of documents at the vault at that time. The State subsequently reviewed the materials that the
4 defense copied from the vault and it became clear to the State that a large portion of those
5 copied documents were not only provided to the defense before trial, but were also introduced
6 into evidence at trial. The defense, therefore, had access to the evidence located at the vault
7 prior to the trial.

8 Based upon the forgoing, there is no basis whatsoever to assert that the State ever acted
9 in bad faith, intentionally tried to prevent the defense from accessing the discovery in this case,
10 intended to provoke a mistrial or otherwise engage in harassment or overreaching. The State
11 respectfully requests, therefore, that the Defendant's Motion to Dismiss, be denied.

12 DATED this 17th day of October, 2014.

13 STEVEN B. WOLFSON
14 Clark County District Attorney
Nevada Bar #1565

15
16 BY


17 MICHAEL V. STAUDAHER
18 Chief District Attorney
19 Nevada Bar #008273
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CERTIFICATE OF SERVICE

I certify that on the 17th day of October, 2014, I e-mailed a copy of the foregoing State's
Opposition To Defendant's Motion To Dismiss, to:

DANIEL ALBREGTS, Esq.
albregs@hotmail.com

FRANNY FORSMAN, Esq.
f.forsman@cox.net

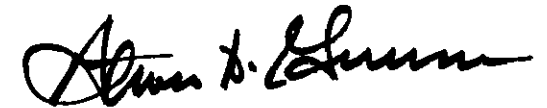
BY



R. JOHNSON

Secretary for the District Attorney's Office

28 rj/M-1



CLERK OF THE COURT

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11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,

15 Plaintiff,

16 vs.

17 LACY L. THOMAS,

18 Defendant.

) CASE NO. C241569
) DEPT. NO. XVII
)
)
)

) HEARING DATE: 11/21/14
) HEARING TIME: 9:30 A.M.
)

19
20 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS**
21 **(DOUBLE JEOPARDY)**

22 COMES NOW, the Defendant, LACY THOMAS, by and through his counsel, DANIEL J.
23 ALBREGTS, and FRANNY FORSMAN and files this reply in support of Motion to Dismiss
24 (Double Jeopardy).
25 ...
26 ...
27 ...
28 ...

1 This reply is made and based upon all the papers and pleadings on file herein, the attached
2 Memorandum of Points and Authorities and Exhibits, together with the oral argument and any
3 testimony which may be adduced at the hearing on this matter.

4 DATED this 24th day of October, 2014.

5 DANIEL J. ALBREGTS, LTD.

6 By: /s/ Daniel J. Albregts
7 DANIEL J. ALBREGTS, ESQ.
Nevada Bar No. 004435

8 LAW OFFICES OF FRANNY FORSMAN, PLLC

9 By: /s/ Franny A. Forsman
10 FRANNY A. FORSMAN
Nevada Bar No. 000014

11 *Attorneys for Defendant THOMAS*

12
13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 Just before the mistrial was declared, the prosecutor represented to this court that the “binder”
15 which was not disclosed to defense counsel was part of a separate investigation of ACS when the
16 investigators were “looking to see if there was some evidence that showed that Mr. Thomas
17 had—had been at either at the behest, or facilitation of ACS, had gone to St. Thomas. That never
18 panned out anything.” Trial Transcript, Day 10, p. 2-3. The prosecutor explained that the detectives
19 “never submitted to [the DA’s] office on ACS,” so the discovery related to ACS was not given to
20 the DA’s office “because it pertained to an ACS investigation that did not go forward.” *Id.* The
21 problem with this explanation is that the contacts made and evidence gathered from ACS principals
22 and their attorney was not a separate investigation; it was a part of the investigation which resulted
23 in the Indictment in this case.

24
25 Robert Mills and Ross Fidler were principals in ACS. They were represented by attorneys
26 Don Campbell and Stanley Hunterton because the FBI (which apparently decided not to pursue this
27 case) and the Metro detectives were seeking information from Mills and Fidler in the “UMC
28

1 investigation.” As explained by Detective Whitely, “The reason why we’re conducting this
2 interview, as you know, is a reference to the UMC investigation.” See Exhibit A. When the
3 detective interviewed Ross Fidler at the offices of attorney Campbell, he was clear that the District
4 Attorney was directing the investigation. When the detective explained that Fidler would not be able
5 to clarify his responses at a later time, Whitely added, “we’re not going to come back a second time
6 and ask you, you know, hey, we asked you at this time here; we found at another later date something
7 that might dispute what you told us. We’re not going to come back and ask you to clarify that. We’re
8 going to submit charges and we’ll arrest you. The District Attorney’s—that’s his stance on this
9 whole case. It’s either all in or all out.” Ex. B. The “binder” which sets forth all of the work
10 performed by ACS to try to bring about a successful result under the contract, was provided to the
11 detectives as part of the criminal investigation in which the District Attorney’s office, both civil and
12 criminal divisions, was heavily involved.

15 The Issue Before the Court

16 The only issue before the Court in this Motion to Dismiss is “whether the prosecutor is
17 responsible for the circumstances which necessitated declaration of a mistrial.” Hylton v. Eighth
18 Judicial Dist. Court of State of Nev., Dept. IV, 743 P.2d 622 (Nev. 1987). See also Melchor-Gloria
19 v. State, 99 Nev. 174, 178 (1983). The issue is not whether there was a *Brady* violation, whether the
20 information was material to Counts 2-10, or whether the defense was prejudiced by the failure of the
21 State to disclose the existence of the binder prepared by ACS during the investigation of ACS. Those
22 issues were decided when the Court declared the mistrial.

23 The issue of manifest necessity arises when it is the State that seeks a mistrial, Hylton, Supra,
24 or when the court declares a mistrial on its own, Glover v. Eighth Judicial Dist. Court, 220 P.3d 684
25 (Nev. 2009)(mistrial caused by actions of defense counsel). That is not the case here.

1 The rule has been most recently articulated in Glover, Id. at 696: A violation of the Double
2 Jeopardy clause is implicated “[w]here the prosecutor ‘is responsible for the circumstances which
3 necessitated declaration of a mistrial. Beck [v. District Court, 939 P.2d 1059, 1060 (Nev.
4 1997)](quoting Hylton...), or guilty of ‘inexcusable negligence,’ Hylton, [Supra at 627].”

5
6 Attorney Don Campbell testified under oath (outside the presence of the jury) that the
7 documents in the binder were documents which had been seized under a search warrant. He was
8 asked to provide copies of those documents to the detectives, which he did. Trial Transcript, Day 9,
9 p. 282. He testified that, “[o]ne of the essential things that they were investigating was the fact that
10 ACS did nothing for the work that they had been paid for. I specifically informed them that that was
11 not true. That we had records to support that and so did they. Id. He also testified that he gave the
12 same documents to “the district attorney in the civil case.” Id. at p. 284. There is confusion in the
13 record whether he is referring to the Civil Division of the District Attorney’s office or outside
14 counsel retained as the representative of the County in the litigation involving ACS. In either event,
15 Metro had the documents and it is likely that the Civil Division of the District Attorney’s office
16 and/or the District Attorney himself was updated on the status of the ACS litigation. Evidence
17 adduced from the various players in that litigation will inform the issue.

18
19 The issue before the Court, then, is a mixed question of law and fact. Were the prosecutors
20 responsible for the circumstances which necessitated the mistrial and did the failure of the
21 prosecutors to disclose the “binder” or ACS material constitute inexcusable negligence?
22

23 The Prosecutors were Responsible for the Circumstances Necessitating the Mistrial
24

25 There is really no dispute that the responsibility for the circumstances necessitating the
26 termination of the trial rests with the prosecutors. The State admits that it failed to disclose the ACS
27 “binder” prepared by ACS and provided to the investigators. See page 3 of Opposition. The State
28

1 argues only that the court was wrong in determining that the failure to disclose was a *Brady* violation
2 and prejudicial.

3 The State's Failure to Disclose the Material Constitutes Inexcusable Negligence
4

5 The undisputed facts are: 1) The investigating agents for the State had possession of the
6 materials at issue long before the trial began; 2) The investigators (Detectives Ford and Whitely) who
7 were conducting a criminal investigation of the defendant and of ACS, were aware of the existence
8 of the materials as their investigation included extensive interviews with ACS principles and
9 cooperation of ACS counsel; 3) ACS was engaged in litigation with Clark County over the contracts
10 which are at issue in this case. The Clark County District Attorney's office represents the county in
11 civil litigation and oversees the work of outside counsel which have been retained to represent the
12 county; 4) the undisclosed documents were provided to the agents of the State by counsel for
13 principals of ACS; 5) the investigation was instigated by the District Attorney, David Roger.

15 Facts which are, or may be, in dispute, are: 1) whether any prosecutor reviewed the materials
16 in the possession of the investigators (See Affidavit of Daniel Albregts, Exhibit C); 2) whether the
17 District Attorney or any Deputy District Attorneys were told by the investigators about the interviews
18 with ACS principals and the documents which were prepared by their counsel; 3) whether prosecutor
19 Mitchell discussed the evidence and interviews of the ACS representatives with the detectives when
20 he made the decision not to charge ACS; 4) whether the District Attorney's office, through the
21 District Attorney, any Deputy District Attorney or County Counsel, knew that the ACS materials
22 were in the possession of the investigators during the settlement of the civil litigation.
23

25 It is important to note that the prosecutors are not absolved from their constitutional
26 obligations merely because they did not have actual possession of materials which should be
27 disclosed. "Because the prosecution is in a unique position to obtain information known to other
28

1 agents of the government, it may not be excused from disclosing what it does not know but could
2 have learned.” United States v. Blanco, 392 F.3d 382, 388 (9th Cir. 2004)(Nevada case in which the
3 prosecutor failed to disclose impeachment information in the possession of the investigating agents).

4
5 Exculpatory evidence cannot be kept out of the hands of the defense just because the
6 prosecutor does not have it, where an investigating agency does. That would
7 undermine Brady by allowing the investigating agency to prevent production by
8 keeping a report out of the prosecutor’s hands until the agency decided the prosecutor
9 ought to have it, and by allowing the prosecutor to tell the investigators not to give
10 him certain materials unless he asked for them.

11 United States v. Zuno-Arce, 44 F.3d 1420, 1427 (9th Cir. 1995)(as quoted in Blanco, Supra.)

12
13 If the evidence shows that the prosecutors failed to review the materials in the possession of
14 the investigators, or to inquire of the investigators what materials were provided to them which
15 directly related to the work performed by ACS under the contracts at issue in Counts 1 and 6, or if
16 it is shown that other members of the District Attorney’s office were aware of the materials, then the
17 legal question is whether the failure to disclose the “binder” was inexcusable negligence.

18
19 Here the prosecutors have inexcusably failed to understand their obligations under the
20 Constitution. Instead of accepting any responsibility for the failure to disclose, prosecutor Mitchell
21 suggested that the court could “scold” the investigating officers. Tr. Day 10, p. 30.

22 An Evidentiary Hearing is Required

23
24 The State complains that the defense has failed to make a proffer which would warrant an
25 evidentiary hearing. In an attempt to gather the facts which would be relevant to the inquiry, the
26 defense made a written request of the prosecutor for evidence in the possession of the District
27 Attorney which related to the knowledge and actions taken by representatives of the County.

28 See attached Exhibit D. To date, the prosecutor has not responded to the request.

29
30 The State has not proffered any facts which refute the factual allegations made here.
31 Accordingly, the Court find that the allegations are undisputed and resolve the legal question based

1 on that finding. However, the State has also not admitted the factual allegations.

2 **CONCLUSION**

3 Throughout the ten days of trial in this case, the State has struggled with an articulation of
4 its theory of culpability. Lacy Thomas' life has been put on hold and nearly destroyed by this strange
5 prosecution. When the State completely fails in its obligation to ascertain whether discoverable
6 evidence exists in the hands of its agents, its negligence is inexcusable and Lacy Thomas should not
7 be required to be placed in jeopardy a second time.
8

9 DATED this 24th day of October, 2014.

10 DANIEL J. ALBREGTS, LTD.

11
12 By: /s/ Daniel J. Albregts
13 DANIEL J. ALBREGTS, ESQ.
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EXHIBIT A

EXHIBIT A

TRANSCRIPTION OF AUDIO TAPE

INTERVIEW OF ROBERT MILLS

Vice President of ACS/HCS

At the Law Offices of Campbell & Williams

700 South Seventh Street

Las Vegas, Nevada

Transcribed by: Karen G. Mell
CCR No. 412

CSR ASSOCIATES OF NEVADA, LLC
LAS VEGAS, NEVADA (702)382-5015

1 DETECTIVE WHITELEY: Melones, spelled
2 M-e-l-o-n-e-s Circle. He can be reached at telephone
3 number 382-5222.

4 Now, Mr. MILLS is being represented by
5 Stanley Hunteerton and also Don Campbell; is that
6 correct?

7 UNRECOGNIZED SPEAKER: (Inaudible).

8 DETECTIVE WHITELEY: Okay. And you are
9 aware that this is a recorded interview, sir?

10 MR. MILLS: Yes, sir.

11 DETECTIVE WHITELEY: And we have your
12 permission to continue?

13 MR. MILLS: Yes, you do.

14 DETECTIVE WHITELEY: Okay. Just for the
15 record, state your name, your date of birth and your
16 job position.

17 MR. MILLS: Robert Mills. 7/16/45, and I'm
18 vice president of ACS/HCS. Health Care Solutions.

19 DETECTIVE WHITELEY: How long have you
20 worked there, sir?

21 MR. MILLS: Been there six years.

22 DETECTIVE WHITELEY: Six years. And how
23 long have you held this current title?

24 MR. MILLS: About six years.

25 DETECTIVE WHITELEY: Okay. The reason why

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(First Tape, Side A)

3 DETECTIVE WHITELEY: This is Detective R. O.
4 Whiteley, I No. 4996, conducting one recorded interview.
5 The date is 1/2 of '07 -- or 2/1 of '07, excuse me.
6 The time is approximately 1400 hours. Location is 700
7 South 7th, which is the building of --

8 MR. CAMPBELL: Campbell & Williams.

9 DETECTIVE WHITELEY: Campbell & Williams, in
10 the interview room.

11 The people present at the interview are
12 myself, Detective R. O. Whiteley, I No. 4996; Detective
13 M. Ford, I No. 5279; Special Agent Vicky Correia with
14 the FBI. Her badge number is 14106. Special Agent
15 Kathleen --

16 SPECIAL AGENT MAGNATICCI: Magnaticci.

17 DETECTIVE WHITELEY: -- Magnaticci with the
18 FBI, and her badge number is 12990. Also present is
19 Attorney Stanley Hunteerton, and his bar number is 1891;
20 Attorney Don Campbell, his bar number is 1216, and
21 Lucinda Martinez.

22 The subject we are interviewing is Bob
23 Mills; date of birth 7/16/45; Social Security No. is
24 479-52-8198. He currently resides at 11607 Mel- --

25 MR. MILLS: Melones.

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1 we're conducting this interview, as you know, is a
2 reference to the UMC investigation. And the questions
3 that we have today are basically going to be
4 surrounding the facts around the UMC investigation.

5 So if you could, if we could just get a
6 brief history of where you went to school and how you
7 got to where it is you are today.

8 MR. MILLS: I went to University of Iowa.

9 DETECTIVE WHITELEY: Okay.

10 MR. MILLS: And graduated from there and
11 then went to work at a company called Medicare Systems
12 Corporation, which is in the health care industry. And
13 from there I left and went to work for a company called
14 EDS, Electronic Data Systems, and I worked with them
15 for a period of time, eight or ten years. Then I went
16 to work for a company called HMS, Health Management
17 Systems, based out of New York. And then I came to
18 ACS -- actually, I came to Superior Consulting
19 Corporation, and then they were bought by ACS.

20 DETECTIVE WHITELEY: Now, how long -- do you
21 know how long Superior has been around?

22 MR. MILLS: Probably since 1984.

23 DETECTIVE WHITELEY: And what is their main
24 function? What's their main business?

25 MR. MILLS: To consult in the hospital, or

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EXHIBIT B

EXHIBIT B

TRANSCRIPTION OF AUDIO TAPE

INTERVIEW OF ROSS FIDLER

Partner of ACS/HCS
At the Law Offices of Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada

Transcribed by: Karen G. Pell
CCR No. 412

CSR ASSOCIATES OF NEVADA, LLC
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1 for sure.

2 MR. FIDLER: He turned that program around.
3 Louisville football was secondary.

4 UNRECOGNIZED SPEAKER: I'm going to tape
5 record this, if you don't mind, sir.

6 DETECTIVE WHITELEY: I'm sure you're aware
7 of the investigation that's going on. Again, there's
8 two sections most important to realize -- there's two
9 sections of the affidavit that everyone's read and
10 everyone's seen. There's an allegation section that
11 started the investigation. Some people came forward
12 with some information, and then there was a
13 corroborate -- nowhere in the corroborate section has
14 it came out that you've given money to Lacey Thomas,
15 you've done this, you've done that, whatever. That's
16 not in the corroborating section as far as the PC for
17 the search warrant. It's in the allegation section.

18 So what we want to do today is, it's a
19 couple different things. Number one, it's a fact
20 finding thing. We have an open book here that we're
21 just writing things in from people that came up in the
22 allegation section, to get their story.

23 Once we get their story -- and to be
24 perfectly honest, we're not going to come back a second
25 time and ask you, you know, hey, we asked you at this

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2 (Audio Tape, Side A)

3 DETECTIVE WHITELEY: -- number?

4 MR. FIDLER: 403-58-4494.

5 DETECTIVE WHITELEY: 4494?

6 MR. FIDLER: Yes, sir.

7 DETECTIVE WHITELEY: You sound like you're a
8 cowboy fan.

9 MR. FIDLER: (INAUDIBLE).

10 DETECTIVE WHITELEY: The way you talk.

11 MR. FIDLER: Oh, no, I'm from Kentucky.

12 DETECTIVE WHITELEY: Oh, U.K., huh?

13 MR. FIDLER: You bet.

14 DETECTIVE WHITELEY: Too bad you just lost
15 your coach.

16 MR. FIDLER: Yeah.

17 DETECTIVE WHITELEY: Where did Bobby go? He
18 took over -- Pitino, Pitino. Not NFL. He took over --
19 Alabama?

20 MR. FIDLER: I'm not sure where he went.

21 DETECTIVE WHITELEY: He took over a big
22 program.

23 MR. FIDLER: Right.

24 DETECTIVE WHITELEY: Too bad because I
25 thought, you know, he did great things at Louisville.

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1 time here; we found at another later date something
2 that might dispute what you told us. We're not going
3 to come back and ask you to clarify that. We're going
4 to submit charges and we'll arrest you. The District
5 Attorney's -- that's his stance on this whole case.
6 It's either all in or all out.

7 If there's issues in regards to the
8 questions that you have knowledge of but maybe I don't
9 word it correctly -- I'm not a hospital director, I
10 don't have 25 years experience in the hospital
11 industry, but if there's issues in regards to a
12 specific incident that you know of and might be helpful
13 to our investigation, we ask you to please just --
14 again, all in, all out.

15 You know, there's only two -- there's no
16 one sitting on the fence in this case because we don't
17 have time. The more that the media runs with this, the
18 more that we see that it shows up in the paper, on the
19 news, the more people calling our phones to bring up
20 something. And honestly, it's at the point now where
21 every tip we get takes us away from our given path that
22 we should be following for a day or three hours or
23 three days, you know, 'til we --

24 (Telephonic Interruption)

25 UNRECOGNIZED SPEAKER: Excuse me. If

CSR ASSOCIATES OF NEVADA, LLC
LAS VEGAS, NEVADA (702)382-5815

EXHIBIT C

EXHIBIT C

AFFIDAVIT OF DANIEL J. ALBREGTS

STATE OF NEVADA)
COUNTY OF CLARK) ss.

DANIEL J. ALBREGTS, being first duly sworn, deposes and says:

1. That I am an attorney duly licensed to practice law in the State of Nevada and, in that capacity, represent Lacy Thomas in these proceedings, have personal knowledge of the facts set forth herein, except as otherwise indicated, and am competent to so testify.

2. I have reviewed the State's Opposition to the Defendant's Motion to Dismiss filed on October 17, 2014 which makes various factual allegations regarding the discovery process in this case.

3. Referenced at page 7 of the State's motion is a letter that I sent to the State allegedly specifically requesting that the State not provide access to the evidence vault earlier than two weeks prior to trial. I have reviewed all of the correspondence that I sent to the State during this time period regarding discovery issues and did not find a letter wherein I requested access to the discovery vault no more than two weeks prior to trial.

4. There were letters sent to the State regarding discovery issues in which I requested that Mr. Thomas be allowed to review his computer hard drive and that that would be done shortly before trial because Mr. Thomas would be traveling to Las Vegas for the trial. However, there is not one letter requesting access to the evidence vault, much less a letter requesting that access only two weeks prior to trial.

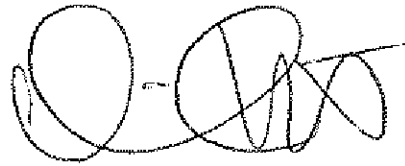
5. That after the mistrial was declared in this case, Mr. Thomas and I traveled to the Las Vegas Metropolitan Police Department Evidence Vault to review the evidence in question. The defense was accompanied by case detective Robert Whitely. During the course of the review of this

...

...

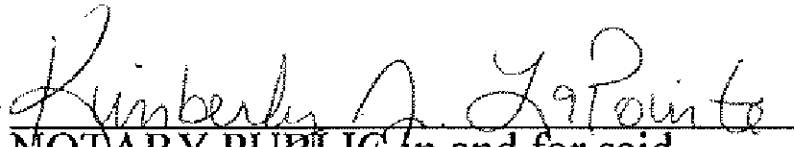
1 material, Whitely specifically stated to us that I was the only attorney in the whole case who had
2 traveled to the evidence vault to review the evidence, including attorneys from the prosecution team.

3 Further, affiant sayeth naught.

4
5 

6 DANIEL J. ALBREGTS

7 SWORN TO AND SUBSCRIBED before me
8 this 24th day of October, 2014.

9 

10 NOTARY PUBLIC in and for said
11 County and State

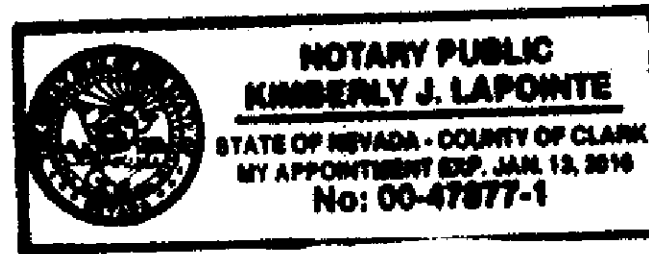


EXHIBIT D

EXHIBIT D

August 26, 2014

VIA EMAIL

Michael V. Staudaher
Deputy District Attorney
michael.staudaher@clarkcountyda.com

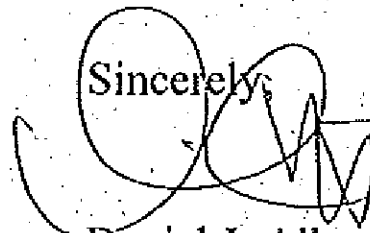
Re: *State of Nevada vs. Lacy L. Thomas*
Case No. C241569

Dear Mr. Staudaher:

I am writing to formally request that you provide me with all Brady evidence in the above-referenced matter, including any documents in the possession of any member in the District Attorney's Office, including but not limited to, Mary Ann Miller and Scott Mitchell, as well as any attorney outside of the office who was working on behalf of the county in defending the ACS lawsuit. These documents should include emails, telephone records, notes of meetings or conferences, memorandums, updates or reports or other communication in any form that set forth knowledge of any agent of the county of the existence of the documents in the possession of the Las Vegas Metropolitan Police Department, the late disclosure of which resulted in the declaration of the mistrial in the original trial. These documents are obviously going to be highly relevant to our motions that will be filed in this matter and I suspect that we will need an evidentiary hearing to hear the testimony of Ms. Miller, Mr. Mitchell, the case detective, and any other witnesses we believe need to be called to substantiate our request to dismiss this case.

Please advise as to when you will be able to provide this information to me as we are currently working on the motions given the deadline at the end of next month. I remain available to discuss this request with you at anytime if you find that necessary. I appreciate your prompt attention to this matter and will look forward to receiving this information.

Sincerely,



Daniel J. Albregts, Esq.

DJA/kl

[Print](#)[Close](#)

Daniel J. Albregts, Ltd. - State of Nevada vs. Lacy Thomas

From: **Kimberly LaPointe** (kjlapointe2@hotmail.com)
Sent: Tue 8/26/14 4:13 PM
To: michael.staudaher@clarkcountyda.com (michael.staudaher@clarkcountyda.com)
Cc: Daniel Albregts (albregts@hotmail.com)
1 attachment
Staudaher.ltr.8.26.14.PDF (323.0 KB)

Mr. Staudaher,

Please see the attached letter from Dan Albregts dated August 26, 2014.

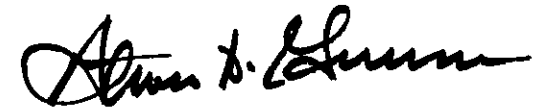
Thank you.

Kimberly LaPointe
Legal Assistant

Daniel J. Albregts, Ltd.

Attorneys at Law
601 S. 10th Street, Suite 202
Las Vegas, Nevada 89101
(702) 474-4004
(702) 474-0739 (Facsimile)
kjlapointe2@hotmail.com

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CLERK OF THE COURT

1 RPLY
2 DANIEL J. ALBREGTS, ESQ.
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6 FRANNY FORSMAN, ESQ.
Nevada Bar No. 000014
7 LAW OFFICES OF FRANNY FORSMAN, PLLC
P.O. Box 43401
8 Las Vegas, Nevada 89116
9 Telephone: (501) 8728
Email: f.forsman@cox.net

10 *Attorneys for Defendant*

11
12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,)	
15 Plaintiff,)	CASE NO. C241569
16 vs.)	DEPT. NO. XVII
17 LACY L. THOMAS,)	
18 Defendant.)	HEARING DATE: 11/21/14
)	HEARING TIME: 9:30 A.M.

19
20 **DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS**
21 **(VAGUENESS/FAILURE TO STATE A CRIME)**

22 COMES NOW, the Defendant, LACY THOMAS, by and through his counsel, DANIEL J.
23 ALBREGTS, and FRANNY FORSMAN and files this reply in support of the defendant's Motion
24 to Dismiss (Vagueness/Failure to State a Crime).

25 ...

26 ...

27 ...

28 ...

1 This reply is made and based upon all the papers and pleadings on file herein, the attached
2 Memorandum of Points and Authorities and Exhibits, together with the oral argument at the hearing
3 on this matter.

4 DATED this 24th day of October, 2014.

5 DANIEL J. ALBREGTS, LTD.

6 By: /s/ Daniel J. Albregts
7 DANIEL J. ALBREGTS, ESQ.
Nevada Bar No. 004435

8 LAW OFFICES OF FRANNY FORSMAN, PLLC

9 By: /s/ Franny A. Forsman
10 FRANNY A. FORSMAN
Nevada Bar No. 000014

11 *Attorneys for Defendant THOMAS*

12

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 The State has chosen not to brief the substantive issues raised in the Renewed Motion but
15 has taken the position that the issues were addressed by the Nevada Supreme Court in its decision
16 affirming in part and reversing in part this court's decision to dismiss the indictment. The State has
17 failed to recognize the difference between a failure to give adequate notice in an Indictment, on the
18 one hand, and vagueness of a statute or failure to state a crime, on the other.

19 **The Nevada Supreme Court's Decision Addresses only the Sufficiency of the Charging Language**

20 The State, in its appeal of this Court's dismissal of the Indictment, successfully recast the
21 ruling of this Court. The State insisted that the issue decided by this Court "the Indictment's failure
22 to plead sufficient facts to put Thomas on notice of State's theory about what conduct was criminal."
23 State's Opening Brief, Exhibit 1 to Opposition, p. 15. When the Motion to Dismiss was originally
24 filed in this Court, the State misconstrued the argument and actually failed to address either the
25 vagueness of the statute or the failure to state a crime in its Opposition to the Motion to Dismiss. See
26 State's Opposition to Defendant's Motion to Dismiss Based on Alleged Multiplicity, filed March
27 17, 2011.

28 The Nevada Supreme Court addressed only the issue of the adequacy of the charging

1 language and reversed the dismissal of Counts 2-10 only on that ground. The narrow scope of the
2 Order is apparent from its characterization of the issue raised by the Appellant, the State: "The State
3 argues that the indictment sufficiently put Thomas on notice of the specific conduct alleged to
4 constitute theft and misconduct of a public officer because the indictment alleged that Thomas used
5 funds entrusted to him for improper purposes. The State further argues that the indictment provided
6 more notice than is required by due process because the facts underlying the charges were pleaded
7 in detail and discussed at length in the grand jury transcript." Ex. 1, p.2. The problem is that this
8 expression of the issue raised is not the issue raised or decided by this Court. Nevertheless, the case
9 is now back before this Court and neither the constitutional vagueness of the statute issue nor the
10 failure of the facts to state a crime issue has been decided.

11 Further, it is clear that the Nevada Supreme Court was deciding only the sufficiency of the
12 charging language because every citation in the Order on the issue decided is a citation to cases
13 involving only the sufficiency of the Indictment. See Husney v. O'Donnell, 596 P.2d 230, 231 (Nev.
14 1979)(Indictment definite enough); Laney v. State, 466 P.2d 666, 669 (Nev. 1970)(indictment
15 sufficient to apprise accused of nature of offense); Logan v. Warden, 471 P.2d 249, 251 (Nev.
16 1970)(indictment sufficient to provide notice of crime charged to enable defendant to plead or
17 defend); Sheriff v. Levinson, 596 P.2d 232, 233 (Nev. 1979)(indictment contained sufficiently clear
18 statement of facts surrounding to alleged offenses). None of these cases address the issues which
19 were, and are now, raised by the Motion to Dismiss.

20 Nevada's Official Misconduct Statute is Unconstitutionally Vague

21 The Defendant has provided this Court with the approaches taken by many different states
22 in grappling with allegations of misconduct by public officials. The State has not refuted any of the
23 arguments made in that regard.

24 The thrust of the decisions cited in the Renewed Motion is that prosecutorial discretion is not
25 unlimited. The need to require standards in a criminal statute is best expressed by the Florida
26 Supreme Court in State v. DeLeo, 356 So. 2d 306, 307 (Fl. 1978):

27 While some discretion is inherent in prosecutorial decision-making, it cannot be
28 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

1 prosecutorial discretion in any reasonable way. The statute could be used, at best, to
2 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.

3 Id. at 308.

4 The State Should be Required to Proffer Jury Instructions Defining the Elements of the Crime

5 If the State takes the position that the statutes are not vague, either on their face or as applied,
6 then the State should have no difficulty proffering jury instructions defining the conduct which
7 proves a violation of the statute. For instance, for Counts 2-5 (Theft), the State should proffer a jury
8 instruction which tells the jury how to determine whether a contract is "unnecessary." Additionally,
9 the State should proffer an instruction to assist the jury in determining the State's burden with regard
10 to whether it has proved that Thomas was not "authorized" to enter into the contracts. With regard
11 to Counts 6-10, in addition to the definitions necessary from the Theft counts, the State should
12 proffer an instruction defining "private benefit of another" (since there has never been an allegation
13 that Thomas benefitted himself). Does "private benefit of another" simply mean that the vendors got
14 paid?

15 By requiring the State to proffer instructions, the real problem with the statutes, as applied,
16 and, in the case of the Official Misconduct statute, on its face, will be clear. Presumably, the State
17 has already prepared instructions defining its burden and defendant merely asks that those
18 instructions be provided at the hearing on this matter so that the State's theory can be determined and
19 the burden of proof ascertained.

20 The Conduct Alleged Does not Constitute a Crime

21 Again, the State has decided not to provide this Court with any argument on this issue.
22 Instead, it has chosen to take the position that the Nevada Supreme Court did decide the issue even
23 though the issue as articulated in the Supreme Court's Order is not whether the conduct alleged
24 constituted a crime but whether the indictment, along with the Grand Jury testimony was sufficient
25 to put the defendant on notice.

26 Defendant reasserts that the Court was correct the first time. The conduct alleged here simply
27 is not a crime. Entering into contracts for services which are being performed badly by county
28 employees or which don't turn out well is not conduct that can be criminalized. This case presents

1 one of those rare occasions where the Court must intervene to secure justice.

2 DATED this 24th day of October, 2014.

3 DANIEL J. ALBREGTS, LTD.

4 By: /s/ Daniel J. Albregts
5 DANIEL J. ALBREGTS, ESQ.
6 Nevada Bar No. 004435

7 LAW OFFICES OF FRANNY FORSMAN, PLLC

8 By: /s/ Franny A. Forsman
9 FRANNY A. FORSMAN
10 Nevada Bar No. 000014
11 *Attorneys for Defendant THOMAS*

12

13

14 **CERTIFICATE OF SERVICE**

15 The undersigned, an employee of DANIEL J. ALBREGTS, LTD., hereby certifies that on
16 the 24th day of October, 2014, she served a copy of the above and foregoing DEFENDANT'S
17 REPLY IN SUPPORT OF , via Wiznet E-File and Serve to the emails below:

18

19 Michael Staudahe
20 Chief Deputy District Attorney
21 michael.staudahe@clarkcountyda.com

22 Clark County District Attorney's Office
23 pdmotions@clarkcountyda.com

24

25 Kimberly LaPointe
26 An Employee of Daniel J. Albregts, Esq

27

28

EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
LACY L. THOMAS,
Respondent.

No. 58833

FILED

SEP 26 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malone*
DEPUTY CLERK

***ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING***

This is an appeal from a district court order granting respondent's motion to dismiss a 10-count indictment. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The State filed an indictment against respondent Lacy Thomas, the former Chief Executive Officer of University Medical Center (UMC), charging him with five counts of theft, a violation of NRS 205.0832, and five counts of misconduct of a public officer, a violation of NRS 197.110. Thomas pleaded not guilty to each charge and sought dismissal of all counts charged in the indictment because they failed to put him on notice of the specific criminal acts asserted against him. The district court agreed and dismissed the indictment.

The State appeals arguing that the district court erred by finding that the indictment failed to put Thomas on notice of the specified facts that constitute criminal theft and misconduct of a public officer, and that the district court abused its discretion by refusing to allow the State to amend the indictment under NRS 173.095(1).

"We review a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion." *Hill v. State*, 124 Nev.

546, 550, 188 P.3d 51, 54 (2008). We review questions of statutory interpretation and issues involving constitutional challenges de novo. See *State v. Lucero*, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (2011); *West v. State*, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003).

Sufficiency of the indictment

The State argues that the indictment sufficiently put Thomas on notice of the specific conduct alleged to constitute theft and misconduct of a public officer because the indictment alleged that Thomas used funds entrusted to him for improper purposes. The State further argues that the indictment provided more notice than is required by due process because the facts underlying the charges were pleaded in detail and discussed at length in the grand jury transcript.

Under NRS 173.075(1), an indictment “must be a plain, concise and definite written statement of the essential facts constituting the offense charged.” “[The indictment] must be definite enough to prevent the prosecutor from changing the theory of the case, and it must inform the accused of the charge he is required to meet.” *Husney v. O'Donnell*, 95 Nev. 467, 469, 596 P.2d 230, 231 (1979). To provide sufficient notice, “the indictment standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.” *Laney v. State*, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970) (internal quotations omitted); see *Logan v. Warden*, 86 Nev. 511, 514, 471 P.2d 249, 251 (1970) (stating that “the combined information provided by the charging instrument and the [grand jury] transcript” would sufficiently apprise a defendant of the offense charged in order to mount a proper defense). However, an indictment “which alleges the commission of the offense solely in the conclusory language of the statute

is insufficient." *Sheriff v. Levinson*, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979).

Theft, counts one to five

NRS 205.0832(1)(b) provides that

a person commits theft if, without lawful authority, the person knowingly . . . [c]onverts, makes an *unauthorized* transfer of an interest in, or without authorization[,] . . . 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.

(Emphasis added). In all five of the theft counts in the indictment, it is alleged that Thomas used county funds in an *unauthorized* manner and exceeded the county's entrustment for "limited use[s]" by distributing said funds to his personal friends or associates under the guise of legitimate contracts that were "grossly unfavorable" to the county, "unnecessary," and/or "us[ed] the services or property [of UMC] for another use." Specifically, the State explained to the grand jury that it was presenting an embezzlement-type theory of theft, which entails "taking money that is entrusted to you for a particular purpose and using it for other purposes outside that entrustment."

Count one of the indictment specifically references a contract between UMC and Superior Consulting or ACS Company (collectively, ACS) where some, albeit very limited, debt collection work was to be performed. The contract called for the completion of debt collection work that was already being performed by another entity and it is alleged the work was performed poorly by ACS, leading to a decrease in overall debt collection. While count one of the indictment included the relevant dates, the parties, and the factual accounts of the contract entered with ACS, it

failed to allege how Thomas'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. We conclude that the indictment and grand jury transcript failed to provide Thomas with sufficient notice of all the elements of the criminal acts charged in count one in order to prepare his defense. *See Laney*, 86 Nev. at 178, 466 P.2d at 669.

With regard to theft counts two to five, in the indictment and before the grand jury, Thomas is alleged to have entered into contracts on behalf of UMS with Frasier Systems Group, TBL Construction, Premier Alliance Management, LLC, and Crystal Communications, LLC. These companies allegedly provided consulting and supervisory services in the areas of information technology, utilities, landscaping, and telecommunications. However, the State explicitly stated that they never performed any work or delivered a final work-product under the terms of these contracts. Because the State alleged in the indictment and before the grand jury how Thomas engaged in conduct that was unlawfully authorized (i.e. there was no work performed or final work-product provided), we conclude that Thomas was sufficiently put on notice of the criminal acts charged in counts two to five. Accordingly, we reverse the district court's dismissal as to counts two to five; however, we affirm the dismissal of count one.

Misconduct of a public official, counts six to ten

NRS 197.110(2) provides that "[e]very public officer who . . . [e]mploys 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 . . . felony." In counts six to ten of the indictment, the State

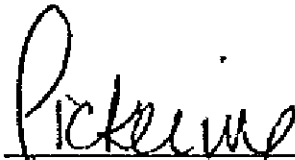
alleges that Thomas, while acting as Chief Executive Officer of UMC, "use[d] money under his official control or direction . . . for the private benefit or gain of himself or another." Despite the fact that each count failed to provide a detailed narrative of the facts as they related to each charge, each count incorporated by reference the facts set forth in theft counts one to five, respectively. And, counts one to five included allegations that Thomas entered into contracts with his longtime friends or associates that were "grossly unfavorable" to UMC. Thus, we conclude that the elements of the offense of misconduct of a public officer as set forth in counts six to ten of the indictment, when considered together with the facts as alleged in counts one to five and the grand jury testimony, put Thomas on sufficient notice of the crimes charged in counts six to ten so that he could mount an adequate defense. *See Logan*, 86 Nev. at 513, 471 P.2d at 251 (establishing that the information in the charging instrument and the grand jury transcript may be sufficient notice). Accordingly, we reverse the district court's dismissal as to counts six to ten.

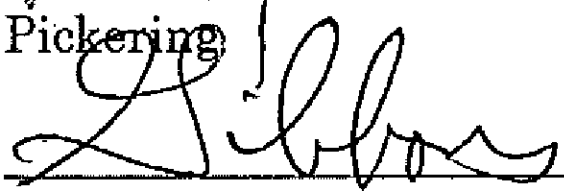
Amendment to count one is not warranted

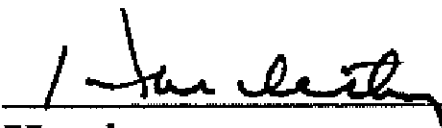
The State contends that the appropriate remedy for inadequate notice in a charging document is amendment, not dismissal. Given our reversal of the district court's order dismissing counts two to ten, the State's request for amendment only applies to count one. NRS 173.095(1) states that "[t]he court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Whether an indictment may be amended is "a determination [wholly] within the district court's discretion." *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

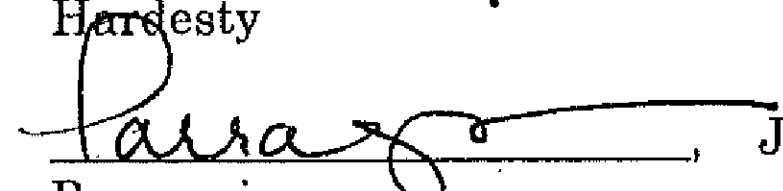
We conclude that the district court did not abuse its discretion in denying the State the right to amend the indictment as to count one because the indictment and grand jury transcript failed to put Thomas on sufficient notice of the charged crime, and the State has failed to show that it can cure the defective allegation. Thus, permitting the State to amend count one would prejudicially affect Thomas's substantial rights.

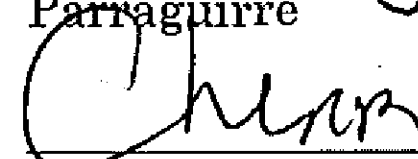
Accordingly, for the reasons set forth above, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹

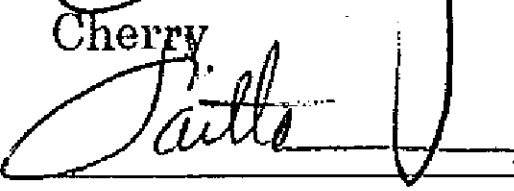

_____, C.J.
Pickering


_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Cherry


_____, J.
Saitta

¹The Honorable Michael Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Hon. Michael Villani, District Judge
Attorney General/Carson City
Clark County District Attorney
Daniel J. Albregts, Ltd.
Franny A. Forsman
Eighth District Court Clerk

1 impact on that these weren't turned over or he didn't obtain
2 these until Monday or Tuesday of this week.

3 MR. MITCHELL: Has the court reviewed those -- those
4 records?

5 THE COURT: Well, no -- I mean, I haven't read every
6 page if that's your question. But my understanding is that
7 there's minutes, weekly minute meeting -- or from weekly
8 meetings, the minutes for those --

9 MR. ALBREGTS: Yes, and --

10 THE COURT: -- meetings.

11 MR. ALBREGTS: -- and just so you're clear, Judge --

12 THE COURT: And I'm assuming it says who was present.

13 MR. ALBREGTS: Absolutely. I can give you an
14 example. And that's this part of the book. That's the
15 majority of the book, Judge. That's the minutes. And every
16 blue piece of paper is -- is a divider of the minutes. So
17 that's how many weekly -- it's two to three times a week. And
18 as I indicated, as I start looking at this, there's references
19 to other people that have testified in the case. Not only
20 Virginia Carr being there, but a meeting with other people, Mr.
21 Walsh.

22 MR. MITCHELL: Judge, I don't see how his stance
23 wouldn't be cured by just admitting the whole binder, and then
24 it's in evidence, the jury will have all the time they want to
25 look through and Mr. Albregts will still have a few more days

1 to look through and whatever point in there helps him, he
2 exploit.

3 THE COURT: Well, also evidence -- exculpatory
4 evidence is also evidence that could lead to other avenues of
5 defense. So --

6 MR. MITCHELL: Well --

7 THE COURT: -- I agree with -- with what you just
8 said, to a point. But it could also lead to other areas of
9 inquiry. And if there's someone in there identified, well,
10 they would go and interview that person and says oh, and
11 besides, John Smith was at that meeting, and then Mr. Albregts
12 would go interview Mr. John Smith.

13 MR. MITCHELL: But this case is not about what was
14 said at any meeting. It is about whether or not a contract was
15 entered into originally before any of these meetings were even
16 held.

17 THE COURT: While they were doing the work.

18 MR. MITCHELL: Huh?

19 THE COURT: I mean, that's part of the whole thing
20 is --

21 MR. MITCHELL: No, Judge, it isn't. I -- I mean, we
22 have not -- we have not attacked the case that way. We have
23 not focused --

24 THE COURT: Well, theft, I'm not sure -- what is
25 theft? Something for nothing?

1 MR. MITCHELL: Theft is causing somebody to be paid
2 unnecessarily when the money could have been left unspent.
3 That's the theory here. And -- and because Mr. Thomas entered
4 into the contract, he bound UMC to pay money that they could
5 have avoided paying. We -- there is no issue in that --
6 everything that's in the binder happens after the event that
7 we're pleading in our -- in our Indictment. It's --

8 THE COURT: Well, Metro had this February '07.

9 MR. MITCHELL: Pardon me?

10 THE COURT: Metro had this February '07, and I can't
11 imagine why, whoever picked this up, either Detective Whiteley
12 or the other Detective, when he picked it up from Mr.
13 Campbell's office, why he didn't run a copy of this for you.

14 MR. MITCHELL: Well, Judge --

15 THE COURT: I mean, I -- I haven't heard -- I mean,
16 why he wouldn't do that. It's all related to this case. And
17 as for you, as the attorney, I'm not -- I don't believe --
18 there's nothing before me saying you two have done anything
19 underhanded.

20 But the bottom line is, he did not provide this to
21 you. And this evidence could lead to other witnesses for Mr.
22 Albregts, could lead to other exculpatory evidence for Mr.
23 Albregts.

24 MR. ALBREGTS: Your Honor, I can tell you --

25 MR. MITCHELL: How -- how could it --

1 MR. ALBREGTS: -- as an officer of the court, as I
2 sit here while this argument is going on and peruse this, now
3 you there's references to Cindy Charyulu working directly with
4 them, take being steps to try to improve things. That's
5 something I didn't have a chance to cross-examine her. Are
6 they really suggesting that in my case I start calling all
7 these people back? And when am I going to have the time to
8 review this? I'm just doing a cursory review.

9 And I can tell you, you know, as an officer of the
10 court, I don't want to be back here in six months trying this
11 over again either after two weeks. But I've got a duty to this
12 man to defend him to the best of my ability best way I know
13 how.

14 And as I'm looking in there, I'm already got -- have
15 in my head a number of ideas of things that wow, we could maybe
16 go this way with it. Get the investigator talking to some of
17 these other people. Maybe I want to call in a couple of the
18 other ACS people who were in these meetings on -- on top of Mr.
19 Fidler and Mr. Mills. I didn't even know about these people.

20 And I'll also tell you, I didn't know the extent to
21 which ACS put out money until I talked to Mr. Campbell and
22 pre-tried and realized there's a place up in Washington? I
23 never mentioned that in my opening statement because I had no
24 idea.

25 MR. MITCHELL: Well, we didn't know either. And

1 it --

2 THE COURT: No, well --

3 MR. MITCHELL: -- it's not in our discovery. It's
4 your discovery.

5 THE COURT: You did because Metro had it.

6 MR. MITCHELL: No, Metro doesn't know anything about
7 a place in Washington.

8 MR. ALBREGTS: I'll guarantee you -- I guarantee you
9 that -- I'll have Mr. Campbell testify, they provided them
10 boxes and boxes of discovery. If you want to go to where Metro
11 is keeping that, they'll be something in there about
12 Washington.

13 MR. MITCHELL: Judge, let me -- let me correct what I
14 said. It's in the --

15 MR. STAUDAHER: That is not true.

16 MR. MITCHELL: -- statements that we provided to them
17 Washington is mentioned. It's in the statements. Mr. Albregts
18 knows that. He's being disingenuous.

19 MR. ALBREGTS: Well, I --

20 MR. MITCHELL: Mr. Mills' statement --

21 THE COURT: Well, hang on.

22 MR. MITCHELL: -- does mention the Washington people.
23 It's in there and he's had that for --

24 MR. STAUDAHER: And your Honor, I will represent as
25 far as from the -- at least the detective I talked to

1 yesterday, which was both, I talked to both Detective Whiteley
2 and Detective Ford. The information that Detective Whiteley
3 had originally asked for was related to tail numbers of planes.
4 The information that was provided by ACS to Detective Ford that
5 he received, he told me was about a three inch stack of
6 material, which is what's contained in that binder.

7 He did not -- I asked him, was there boxes and boxes
8 of material provided, he said no, they don't have that.
9 They've never been provided with boxes and boxes of material.
10 So unless some other detective was involved in this case that
11 we don't know of that wasn't primary to the case, that's the
12 representation from Mr. Ford.

13 Now, before this court would rule, I think, at all on
14 any of this, if it's so pivotal on what is contained in that --
15 in that -- that particular binder, which again, we contend has
16 -- is after the fact. The fact of the contracts and they're
17 entering into, and Mr. Thomas's involvement in the contracts,
18 not the meetings, not the things that happened as a result of
19 the contracts, that that is the issue that is charged in this
20 case.

21 And anything that happens after the fact, cannot be
22 exculpatory by Mr. Thomas unless it directly relates to him.
23 It's -- ACS is not charged. It -- before the court rules on
24 that particular issue, if the court is leaning toward that, I
25 think that at the very least that we bring Detective Ford in

1 here to talk about what he did or did not receive, why he did
2 or did not turn over what he did --

3 THE COURT: Well, we --

4 MR. STAUDAHER: -- so that we are have that before
5 the court.

6 THE COURT: -- all know that one piece of evidence
7 can lead to other pieces of evidence.

8 MR. STAUDAHER: Well, could, your Honor. But he can
9 -- if he looks at this book -- let's adjourn for a day or two
10 or so, so he has a chance to look at it.

11 If he can to the -- before this court and represent
12 that calling back Cindy Charyulu -- we are still in our case in
13 chief. If we call back any of those individuals to give him a
14 fair opportunity to have his -- go at them regarding this
15 material, that cures the issue. He will then have an
16 opportunity to look into it.

17 As far as other ACS people that may or may not have
18 been at a meeting, it is irrelevant to the fact that the
19 contracts were entered into, at least as alleged by the State,
20 to disadvantage the county. It has nothing to do with what
21 happened as a result of the administration of the contracts, or
22 how Ross Fidler or -- or -- excuse me, Ross Fidler or Bob
23 Mills, or any of the ACS people administered what they did,
24 where they were or were not in the hospital.

25 The fact that the contracts as they were entered into

1 it and negotiated and changed by Mr. Thomas disadvantaged the
2 hospital. That is the only --

3 THE COURT: And if there's evidence that the hospital
4 received an advantage, isn't that exculpatory?

5 MR. STAUDAHER: I'm sorry?

6 THE COURT: If there's testimony or evidence that the
7 hospital received an advantage by utilizing ACS, isn't that
8 exculpatory?

9 MR. STAUDAHER: We -- that information is out.
10 It's --

11 THE COURT: Well --

12 MR. STAUDAHER: -- been out from our witnesses and
13 theirs that there were things that were beneficial that were
14 done by the ACS people.

15 But the bottom line that we've always come back to
16 with every other -- all of the witnesses, including ACS's
17 witnesses are that, regardless of any benefit that was
18 conferred by the ACS staff on site, that the bottom line, the
19 dollar amount that was recovered or collected, was not
20 improved. That's the -- that's the issue. It's not whether or
21 not minutes or meetings took place, or things happened or
22 people worked and gave good product, we -- Cindy Charyulu said
23 that on the stand, your Honor.

24 We had witnesses that testified that there was
25 benefit by ACS being there by implementing some of the things

1 that they came to do.

2 THE COURT: Yeah, but if the benefit was
3 inconsequential, isn't that part of your argument, that it was
4 really no -- I mean, just it was so minor of a benefit?

5 MR. STAUDAHER: No, not that it was necessarily minor
6 of a benefit, but it didn't increase the bottom line.

7 MR. ALBREGTS: Your Honor --

8 MR. STAUDAHER: That was the --

9 THE COURT: All right.

10 MR. ALBREGTS: -- and I would suggest we're missing
11 -- or that argument misses the point, which is, there was
12 exculpatory evidence in the case and it wasn't provided.
13 There's a case, United States versus --

14 MR. STAUDAHER: There --

15 MR. ALBREGTS: -- Chapman (phonetic). If I could --

16 MR. MITCHELL: There's no --

17 MR. STAUDAHER: There's no evidence of exculpatory
18 evidence in this case.

19 MR. MITCHELL: No exculpatory --

20 MR. ALBREGTS: If I can -- if I can provide Chapman.
21 This is a case from across the street where Judge Mayhem
22 (phonetic) granted a mistrial when a very, if not, identical,
23 incredibly similar occurrence occurred, where agents didn't
24 provide to the government exculpatory evidence, and the case
25 was -- and it's affirmed by the 9th Circuit that the mistrial

1 and dismissal. Now, dismissal may be for another day, but
2 certainly the mistrial is something that -- that would be
3 warranted.

4 THE COURT: I'm going to come back at 11:10. Cliff,
5 you can tell the jurors something.

6 THE MARSHAL: Just tell them to hold tight.

7 THE COURT: Tell them to go downstairs and have a cup
8 of coffee.

9 THE MARSHAL: I'm going to tell them to meet back
10 here at 11:15 or 11:30?

11 (Court recessed at 10:56 a.m. until 11:25 a.m.)

12 (Outside the presence of the jury).

13 THE COURT: Have the documents or the binder in
14 question been marked?

15 MR. ALBREGTS: It was marked and requested to be
16 admitted and that's when --

17 THE COURT: Is the entire -- what's the entire binder
18 marked as?

19 MR. ALBREGTS: G, I believe. But I will defer to the
20 clerk.

21 THE COURT: Ms. Clerk?

22 THE CLERK: Yes, it's G, that's correct.

23 THE COURT: The documents in question for the Motion
24 for Mistrial and/or for Dismissal relate to the failure of the
25 State to turn these documents over to the defense. They're

1 identified as Defendant's Proposed Exhibit G.

2 Court's Exhibit, whatever next in line is, is a
3 letter on the Campbell & Williams letterhead dated February 6,
4 2007. It is to -- to Detective Whiteley, from Don Campbell
5 regarding the turning over of, it appears to be one set of
6 documents, 577 pages; UMC One Stop committee meeting minutes,
7 steering committee meeting minutes, status of Deloitte & Touche
8 recommendation, Lacy Thomas memorandum to Jeremiah Carroll and
9 Jeremiah P. Carroll, ACS audit.

10 We have an issue -- the main issue that's being
11 presented by the defense is the failure to turn over, in
12 particular, the UMC one stop committee meeting minutes, and the
13 steering meeting minutes, which appear to be four page -- four
14 inches or so, if not more, of a three-ring binder.

15 The court finds that -- and also, at this point, the
16 Court finds that the documents in question were not part of the
17 original discovery, or any supplemental discovery turned over
18 to defense in this case. They apparently are not in the
19 State's actual possession.

20 However, they are -- they were in the possession of
21 -- they -- excuse me, these documents are in the possession of
22 Metro and, in fact, were turned over to representatives of the
23 police department on or about February 6th, 2007. There's a
24 letter, which is Court's Exhibit -- letter dated February 6th,
25 '07, to Detective Whiteley, who's listed as a witness in it

1 this case, from Attorney Don Campbell.

2 The court finds that defendant has been substantially
3 prejudiced by the lack of disclosure. The court is not making
4 any finding of -- that there was intentional -- is not making a
5 finding of any intentional misconduct by the prosecutors in
6 this case, or by any law enforcement representatives.

7 The court finds that it is impractical and
8 prejudicial to the defense to recall the witnesses in this
9 case, because it would put the defense in a position of trying
10 to prepare for the recalling of the witnesses, by having to
11 review approximately, appears to be about four or five inches
12 of documents, perhaps hundreds of pages.

13 The documents in question could lead to the defense
14 to other areas of inquiry of their defense, further discovery,
15 further investigation, as well as trial tactics in this case.
16 The question remains as to whether or not the Court should
17 dismiss the counts relating to ACS, which is the documents
18 contained in the binder.

19 I'm assuming the State's arguing that if the Court
20 dismisses those counts that we should still go forward on the
21 remaining counts.

22 MR. MITCHELL: That's correct, Judge.

23 THE COURT: It seems to the Court the majority of
24 this case so far has been dealing with the issues of the ACS
25 contract, and we are now in our second week of trial. And to

1 merely strike those counts at this time would not solve the
2 issue of prejudice to the defendant.

3 The Court finds that the failure to turn over these
4 documents is a Brady violation. The documents are potentially
5 exculpatory, and at a minute could have led to other areas of
6 inquiry by the defense. The court does not make a finding at
7 this time that the lack of disclosure was intentional on behalf
8 of the prosecutors in this case. He, in fact, finds otherwise
9 at this point, that there's no evidence that it was intentional
10 disclosure -- intentional withholding of the documents by the
11 prosecutors.

12 As I mentioned before, a large portion of the
13 testimony so far is related to ACS. There is undue prejudice
14 to the defendant, two weeks into trial. We can't unring the
15 bell in this particular case.

16 And the Motion to Dismiss is denied. Motion for
17 Mistrial is granted. And we will set this for new trial.
18 We'll set calendar call. And how's everyone's calendar at
19 this point? Let's go ahead and set a new trial date.

20 MR. MITCHELL: Could --

21 MR. ALBREGTS: I would ask that we have a status
22 check for next week. I don't have my calendar with me. I
23 don't know what you're looking at in terms of time. I know
24 what I have short term, but I don't know if you're looking at
25 short term or long term.

1 THE COURT: I would urge counsel -- we'll set this
2 for next Thursday. We urge counsel to call my court clerk
3 perhaps Monday or Tuesday of next week to get some of the dates
4 available, and then each side can confer with one another, see
5 if there's some mutual dates that are available for all
6 parties.

7 THE CLERK: Carol. It would be Carol Donahue
8 (phonetic).

9 THE MARSHAL: Do you want to bring the jury in?

10 THE COURT: Yeah, let's bring the jury in.

11 MR. ALBREGTS: After the jury, I have just a couple
12 issues, if --

13 THE COURT: All right.

14 THE CLERK: 671-0674.

15 MR. ALBREGTS: 0674.

16 THE CLERK: That's Carol.

17 MR. ALBREGTS: And it's Carol, right?

18 THE CLERK: Yes.

19 MR. ALBREGTS: After two weeks you'd think I know
20 that.

21 THE CLERK: Did you get that? (Indiscernible).

22 MR. MITCHELL: 671-0 --

23 THE CLERK: 0674.

24 MR. MITCHELL: Thank you.

25 THE CLERK: Her name's Carol. Carol Donahue.

1 THE COURT: If I didn't already mention this, there
2 may be some argument that court should just dismiss the two
3 counts relating to ACS. However, after two weeks of trial, I
4 think the jury would be so prejudiced by not granting a
5 mistrial at this time.

6 So that's why the court's not going to proceed on the
7 remaining charges. And obviously, Court does not take this
8 lightly, because everyone's time, expense, as well as the
9 jurors and witnesses that's been here for two weeks, so I don't
10 take this lightly.

11 (In the presence of the jury)

12 THE MARSHAL: Officers and member of the court,
13 Department 17 jurors. You may be seated, ladies and gentlemen.
14 Let's make sure our cell phones are turned off, please.

15 THE COURT: Welcome back, ladies and gentlemen. I do
16 apologize for the late start throughout these two weeks. All
17 of you have been very prompt. You'd be amazed on how many
18 trials we have where we have to wait 15 minutes for a straggler
19 and I appreciate all of you coming here promptly.

20 My marshal tells me that you're typically here ten
21 minutes before our start time, which is, I can tell you, is
22 very rare in this courthouse. So I commend all of you for
23 taking your duty very seriously.

24 Because of a legal issue that has arisen, I have
25 granted a mistrial in this case. I can assure -- some of you

1 may feel it was a waste of time. I assure it was not. Any
2 time we have a trial, and you have fine attorneys on both sides
3 and they're fighting for their respective clients, be it the
4 State of Nevada, or Mr. Thomas, it's not a waste of time.
5 However, during trials legal issues come up that require a
6 court to grant a mistrial.

7 So I hope none of you feel that it was a waste of
8 time. It was a very interesting case. You had fine attorneys
9 on both sides presenting this. I think all of us were lucky to
10 have these attorneys present this case. Unfortunately, we're
11 not able to go any further. This trial has to be reset at a
12 later date with a new jury. We can't have you come back five
13 months from now and resume.

14 And so, again, please do not -- I hope you don't take
15 this as a waste of time, because like I said, it was -- again,
16 it was not a waste of time for you.

17 And like I said, it was an interesting case and you
18 saw some interesting legal issues. And I just feel compelled
19 under the circumstance to grant a mistrial.

20 And so with my personal thanks to all of you,
21 appreciate your service during this these last two weeks. The
22 marshal will escort downstairs to the jury commissioner's
23 chambers where they will process you out. You'll get paid for
24 your service. And you can probably read in the paper tomorrow
25 as to what happened, a little bit more information.

1 But again, you do have my thanks. I hope none of you
2 think it was a waste of time. As you can tell, we had some
3 fine attorneys presenting each side here. I hope all of you
4 found your service here was rewarding. And I hope this doesn't
5 put a sour taste in your mouth, and I hope you're willing to
6 come back for some other trial, be it a civil or criminal case.

7 And I can tell you that I have noticed that all of
8 you have been very attentive throughout this trial. Oftentimes
9 we catch a juror or two nodding off. But all of you took your
10 duty here very seriously. And all of us appreciate your
11 service. You are excused. Thank you very much. The marshal
12 will escort you out.

13 (Jury excused at 11:38 a.m.)

14 (Outside the presence of the jury).

15 THE COURT: Mr. Albregts.

16 MR. ALBREGTS: All your Honor, would the court
17 consider exonerating Mr. Thomas's bond? He has spent over --
18 close to \$70,000 in bond fees. You've heard a lot of the
19 evidence, and while I'm certain the State feels strongly about
20 their case, Mr. Thomas isn't going anywhere. He's made every
21 appearance. And frankly, to have to keep spending that money
22 is -- is detrimental to his defense. And I think an OR would
23 be warranted.

24 THE COURT: State.

25 MR. MITCHELL: We'll submit it.

1 THE COURT: All right. Mr. Thomas, you are placed on
2 you own recognizance release at this time. Please make sure
3 you appear at all scheduled court appearances that your
4 appearance require that.

5 THE DEFENDANT: Thank you.

6 THE COURT: All right.

7 THE DEFENDANT: Thank you, your Honor.

8 THE COURT: And we will come back on Tuesday -- next
9 Tuesday. Did we already give that date?

10 MR. ALBREGTS: I thought it was Thursday.

11 THE CLERK: Thursday.

12 THE COURT: I'm sorry, next Thursday.

13 THE CLERK: Yes.

14 THE COURT: I would urge counsel to meet, or at least
15 call over the phone to compare your respective calendars before
16 Thursday, so you have a couple dates in mind so we can give you
17 a trial date as soon as possible. I do want to have this case
18 resolved this year. And I will try to squeeze you in as soon
19 as possible.

20 MR. STAUDAHER: When you say as soon as possible,
21 your Honor, how -- what kind of a time frame are we looking at?

22 THE COURT: I don't know if I have any death penalty
23 cases, but I -- I have a stack starting August 2nd. The death
24 penalty obviously would take priority. Wait, I do have a list
25 here. Do you have that -- there should be a list there.

1 THE CLERK: Yes.

2 THE COURT: Mr. Mitchell and Mr. Staudaher, do you
3 know on this State v. Paye (phonetic) and Bye (phonetic), I
4 know you're not handling that, I don't know if you've heard
5 that of throughout the office. That's the one that it was at a
6 club, a night club, it's a death penalty case.

7 THE CLERK: Paye Paye.

8 THE COURT: Paye Paye and Bye.

9 MR. STAUDAHER: I don't.

10 MR. MITCHELL: Yeah, I'm not familiar.

11 THE COURT: Let me just give you that number so you
12 can see who's handling it. That's August --

13 THE CLERK: It's DiGacomo (indiscernible).

14 THE COURT: Oh, okay. Is it --

15 THE CLERK: (Indiscernible).

16 THE COURT: And that's set for August 16th.

17 MR. STAUDAHER: I think we should plan a three week
18 window --

19 THE COURT: Right, we'll definitely --

20 MR. STAUDAHER: -- for this trial.

21 THE COURT: We have a -- we have a death penalty case
22 August 30th. I'm just give you that case. The name is State
23 versus Valerio, V-a-l-e-r-i-o and that's -- oh, it's just a
24 penalty phase from 1986. So that's going to have priority.
25 Like I said, I've got a death penalty case, State versus Herb

1 (phonetic) and Malone McCarty (phonetic) on October 11. I have
2 two -- another death penalty case that same week, State versus
3 Coleman (phonetic).

4 MR. MITCHELL: There were -- were there three
5 defendants on the first one you just said before Coleman?

6 THE CLERK: Two.

7 THE COURT: Two defendants. It's Paye and Bye.

8 MR. MITCHELL: I thought there was one Herb, Malone.

9 THE CLERK: Oh, that's (indiscernible).

10 THE COURT: Oh, it's -- it's Herb, Malone, McCarty
11 but one's out. So it's just Malone and McCarty, which is the
12 October 11 death penalty case.

13 MR. MITCHELL: Okay.

14 THE COURT: And that is listed as four to six weeks.
15 And my understanding is that, you can check with your office,
16 but my understanding that is going -- that is definitely going
17 -- we had to block off a month and a half for that trial. And
18 if counsel are free to just come forward and check with my
19 clerk, I've got the -- my calendar here of -- it's color coded
20 for the criminal stack. So you can see if your calendars match
21 each other and we'll see what we have. But if you want to come
22 forward.

23 MR. ALBREGTS: Well, Judge, I -- I don't have my
24 calendar so I don't know that I can --

25 THE COURT: You want to write down some of the --

1 MR. ALBREGTS: Oh, okay.

2 THE COURT: There's stacks. They go by four week
3 blocks. Anything else?

4 MR. MITCHELL: I believe Mr. Albregts had something.

5 THE COURT: You had something Mr. Albregts?

6 MR. ALBREGTS: No, we did it. It was the bail issue.

7 THE COURT: Oh, okay. Anything else?

8 MR. ALBREGTS: No.

9 THE COURT: All right, we're adjourned.

10 (Court adjourned at 11:43 a.m.)

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DATE

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
LACY L. THOMAS,
Respondent.

No. 58833

FILED

SEP 26 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

***ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING***

This is an appeal from a district court order granting respondent's motion to dismiss a 10-count indictment. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The State filed an indictment against respondent Lacy Thomas, the former Chief Executive Officer of University Medical Center (UMC), charging him with five counts of theft, a violation of NRS 205.0832, and five counts of misconduct of a public officer, a violation of NRS 197.110. Thomas pleaded not guilty to each charge and sought dismissal of all counts charged in the indictment because they failed to put him on notice of the specific criminal acts asserted against him. The district court agreed and dismissed the indictment.

The State appeals arguing that the district court erred by finding that the indictment failed to put Thomas on notice of the specified facts that constitute criminal theft and misconduct of a public officer, and that the district court abused its discretion by refusing to allow the State to amend the indictment under NRS 173.095(1).

"We review a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion." *Hill v. State*, 124 Nev.

546, 550, 188 P.3d 51, 54 (2008). We review questions of statutory interpretation and issues involving constitutional challenges de novo. *See State v. Lucero*, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (2011); *West v. State*, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003).

Sufficiency of the indictment

The State argues that the indictment sufficiently put Thomas on notice of the specific conduct alleged to constitute theft and misconduct of a public officer because the indictment alleged that Thomas used funds entrusted to him for improper purposes. The State further argues that the indictment provided more notice than is required by due process because the facts underlying the charges were pleaded in detail and discussed at length in the grand jury transcript.

Under NRS 173.075(1), an indictment “must be a plain, concise and definite written statement of the essential facts constituting the offense charged.” “[The indictment] must be definite enough to prevent the prosecutor from changing the theory of the case, and it must inform the accused of the charge he is required to meet.” *Husney v. O'Donnell*, 95 Nev. 467, 469, 596 P.2d 230, 231 (1979). To provide sufficient notice, “the indictment standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.” *Laney v. State*, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970) (internal quotations omitted); *see Logan v. Warden*, 86 Nev. 511, 514, 471 P.2d 249, 251 (1970) (stating that “the combined information provided by the charging instrument and the [grand jury] transcript” would sufficiently apprise a defendant of the offense charged in order to mount a proper defense). However, an indictment “which alleges the commission of the offense solely in the conclusory language of the statute

is insufficient.” *Sheriff v. Levinson*, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979).

Theft, counts one to five

NRS 205.0832(1)(b) provides that

a person commits theft if, without lawful authority, the person knowingly . . . [c]onverts, makes an *unauthorized* transfer of an interest in, or without authorization[,] . . . 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.

(Emphasis added). In all five of the theft counts in the indictment, it is alleged that Thomas used county funds in an *unauthorized* manner and exceeded the county’s entrustment for “limited use[s]” by distributing said funds to his personal friends or associates under the guise of legitimate contracts that were “grossly unfavorable” to the county, “unnecessary,” and/or “us[ed] the services or property [of UMC] for another use.” Specifically, the State explained to the grand jury that it was presenting an embezzlement-type theory of theft, which entails “taking money that is entrusted to you for a particular purpose and using it for other purposes outside that entrustment.”

Count one of the indictment specifically references a contract between UMC and Superior Consulting or ACS Company (collectively, ACS) where some, albeit very limited, debt collection work was to be performed. The contract called for the completion of debt collection work that was already being performed by another entity and it is alleged the work was performed poorly by ACS, leading to a decrease in overall debt collection. While count one of the indictment included the relevant dates, the parties, and the factual accounts of the contract entered with ACS, it

failed to allege how Thomas'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. We conclude that the indictment and grand jury transcript failed to provide Thomas with sufficient notice of all the elements of the criminal acts charged in count one in order to prepare his defense. *See Laney*, 86 Nev. at 178, 466 P.2d at 669.

With regard to theft counts two to five, in the indictment and before the grand jury, Thomas is alleged to have entered into contracts on behalf of UMS with Frasier Systems Group, TBL Construction, Premier Alliance Management, LLC, and Crystal Communications, LLC. These companies allegedly provided consulting and supervisory services in the areas of information technology, utilities, landscaping, and telecommunications. However, the State explicitly stated that they never performed any work or delivered a final work-product under the terms of these contracts. Because the State alleged in the indictment and before the grand jury how Thomas engaged in conduct that was unlawfully authorized (i.e. there was no work performed or final work-product provided), we conclude that Thomas was sufficiently put on notice of the criminal acts charged in counts two to five. Accordingly, we reverse the district court's dismissal as to counts two to five; however, we affirm the dismissal of count one.

Misconduct of a public official, counts six to ten

NRS 197.110(2) provides that "[e]very public officer who . . . [e]mploys 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 . . . felony." In counts six to ten of the indictment, the State

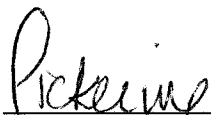
alleges that Thomas, while acting as Chief Executive Officer of UMC, “use[d] money under his official control or direction . . . for the private benefit or gain of himself or another.” Despite the fact that each count failed to provide a detailed narrative of the facts as they related to each charge, each count incorporated by reference the facts set forth in theft counts one to five, respectively. And, counts one to five included allegations that Thomas entered into contracts with his longtime friends or associates that were “grossly unfavorable” to UMC. Thus, we conclude that the elements of the offense of misconduct of a public officer as set forth in counts six to ten of the indictment, when considered together with the facts as alleged in counts one to five and the grand jury testimony, put Thomas on sufficient notice of the crimes charged in counts six to ten so that he could mount an adequate defense. *See Logan*, 86 Nev. at 513, 471 P.2d at 251 (establishing that the information in the charging instrument and the grand jury transcript may be sufficient notice). Accordingly, we reverse the district court’s dismissal as to counts six to ten.

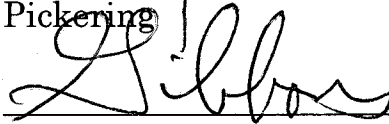
Amendment to count one is not warranted

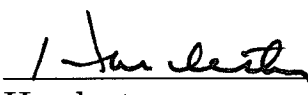
The State contends that the appropriate remedy for inadequate notice in a charging document is amendment, not dismissal. Given our reversal of the district court’s order dismissing counts two to ten, the State’s request for amendment only applies to count one. NRS 173.095(1) states that “[t]he court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” Whether an indictment may be amended is “a determination [wholly] within the district court’s discretion.” *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

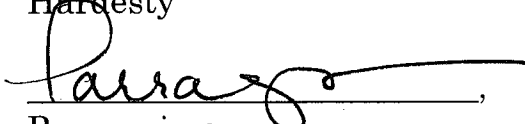
We conclude that the district court did not abuse its discretion in denying the State the right to amend the indictment as to count one because the indictment and grand jury transcript failed to put Thomas on sufficient notice of the charged crime, and the State has failed to show that it can cure the defective allegation. Thus, permitting the State to amend count one would prejudicially affect Thomas's substantial rights.

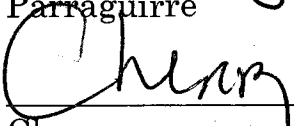
Accordingly, for the reasons set forth above, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹

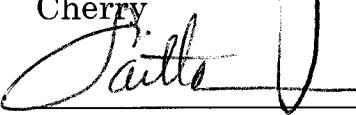

_____, C.J.
Pickering


_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Cherry


_____, J.
Saitta

¹The Honorable Michael Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.



cc: Hon. Michael Villani, District Judge
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Clark County District Attorney
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Electronically Filed
Oct 14 2013 04:10 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

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,¹ 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.²

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

25 AA, p. 605.

26

27

28

25 ¹Notice 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"
27 Appellant's Reply Brief, p. 2.

28 ²Respondent warned this court about the mischaracterization of the nature of the motion in
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.

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

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

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

27 ³The 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
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
through 10, yes. ...
23 RA, p. 3 (emphasis added).

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

27 MR. MITCHELL: My burden is not so high as to force me to—to—
28 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,
2 not—not to fulfill my job.
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,
6 to contract for a new phone system, and he gave the best price in the
7 world and they did the best work possible, is that theft? And is that
misconduct?
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
18 unnecessarily when the money could have been left
19 unspent. That’s the theory here. And—and because Mr.
Thomas entered into the contract, he bound UMC to pay
money that they could have avoided paying....
Trial Transcript- 4/2/10, p. 45-6.

20
21 In most criminal cases, the elements of the crime are defined in the statute and
22 the burden of proof can be ascertained. The parties can, as a result, look at the
23 discovery and evaluate the case. Defense counsel can give meaningful advice. If the
24 case goes to trial, the prosecutor can articulate what will fulfill the burden of proof
25 and the court can determine how the jury is to be instructed. The Nevada statute on
26 Public Misconduct suffers from the same constitutional problems as the federal
27 statute did in Skilling v. United States, 130 S.Ct. 2896 (2010). As a result, none of
28 the essential functions of a fair trial can occur on remand of this case. Here, the

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 14th day of October, 2013.
5

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15 *Attorneys for Respondent THOMAS*
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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 14th day of October, 2013.

/s/ Franny A. Forsman
Nevada Bar No. 000014

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I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 14, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

STEVEN S. OWENS
Chief Deputy District Attorney

FRANNY A. FORSMAN, ESQ.
Counsel for Respondent

By: /s/ Franny A. Forsman

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

LACY THOMAS,

Respondent.

Electronically Filed
Dec 03 2013 04:02 p.m.
Tracie K. Lindeman
Clerk of Supreme Court
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.

Respectfully 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,

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 DETERMINING 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 DETERMINING 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 attendant 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 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,

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

BY /s/ Jonathan E. VanBoskerck
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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.

Respectfully submitted,

STEVEN B. WOLFSON
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Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*

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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:

CATHERINE CORTEZ MASTO
Nevada Attorney General

DANIEL J. ALBREGTS, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

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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P.O. Box 43401
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BY /s/ eileen davis
Employee, District Attorney's Office

JEV/Matthew Walker/ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
LACY L. THOMAS,
Respondent.

No. 58833

FILED

DEC 19 2013

ORDER DENYING REHEARING

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY K. Malone
DEPUTY CLERK

Rehearing denied. NRAP 40(c).

It is so ORDERED.¹

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

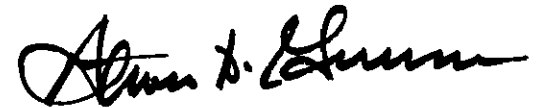
Parraguirre, J.
Parraguirre

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Hon. Michael Villani, District Judge
Attorney General/Carson City
Clark County District Attorney
Daniel J. Albregts, Ltd.
Franny A. Forsman
Eighth District Court Clerk

¹ The Honorable Michael Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.



CLERK OF THE COURT

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13 *Attorneys for Defendant*

14
15 **DISTRICT COURT**
16
17 **CLARK COUNTY, NEVADA**

18 THE STATE OF NEVADA,
19
20 Plaintiff,

21 vs.

22 LACY L. THOMAS,
23
24 Defendant.

) CASE NO. C241569
) DEPT. NO. XVII
)
)
)
)

) **HEARING DATE: 11/21/14**
) **HEARING TIME: 9:30 A.M.**
)

25
26 **DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS**
27 **AND NOTICE OF NEED FOR EVIDENTIARY HEARING**
28

COMES NOW, the Defendant, LACY THOMAS, by and through his counsel, DANIEL J. ALBREGTS, and FRANNY FORSMAN and files this supplement requesting the Court dismiss the Indictment in this case on the ground that retrial of this defendant will violate the constitutional prohibition against double jeopardy.

...

...

...

1 This supplement is made and based upon all the papers and pleadings on file herein, the
2 transcript of the trial which resulted in a mistrial and the attached Memorandum of Points and
3 Authorities, and any oral argument this Court may allow.

4 DATED this 26th day of September, 2014.

5 DANIEL J. ALBREGTS, LTD.

6 By: /s/ Daniel J. Albregts
7 DANIEL J. ALBREGTS, ESQ.
8 Nevada Bar No. 004435

9 LAW OFFICES OF FRANNY FORSMAN, PLLC

10 By: /s/ Franny A. Forsman
11 FRANNY A. FORSMAN
12 Nevada Bar No. 000014

Attorneys for Defendant THOMAS

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. FACTUAL SUMMARY**

15 On February 08, 2008, the Clark County District Attorney filed an indictment against Lacy
16 Thomas (hereinafter "Mr. Thomas"). The indictment alleges five counts of fraud in violation of
17 NRS 205.0832 and five counts of misconduct of a public officer in violation of NRS 197.110. The
18 offenses precipitating the charges relate to five professional services contracts entered into during
19 Mr. Thomas' tenure as Chief Executive Officer of University Medical Center, from November 2003
20 to January 2007. Mr. Thomas pled not guilty to each of the ten charges and the case was scheduled
21 for trial.
22

23 Mr. Thomas' trial began on March 23, 2010. Following eight and a half days of testimony
24 from witnesses called by the State, defendant's counsel became aware of numerous documents in
25 the possession of the State which had not been disclosed to defense counsel. The prosecution
26 initially objected to the admission of a binder of records presented during the testimony of Ross
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1 Fiddler, vice-president of ACS. Tr. Day 9, p. 269. The ensuing discussion concerning admission of
2 the binder revealed Las Vegas Metropolitan Police Department Detectives' failed to turn over certain
3 evidence to defense counsel. Tr. Day 9, pgs. 302-308. Deputy District Attorney Michael Staudaher
4 stated the reason for this failure was "that it was not provided because Detective Ford indicated that
5 he didn't think there was anything that directly tied to Mr. Thomas....[i]t just had to do with ACS
6 and their involvement and work in the hospital." Tr. Day 10, p. 3. In turn, the court pointed out that
7 it "at least appears that some of the materials in binder relate to these weekly meetings showing that
8 ACS did work...but it at least identifies that it wasn't a bogus contract." Tr. Day 10, p. 4. The court
9 noted the inherent necessity for declaration of the mistrial, "it's not just where it points in one
10 direction that could lead to other areas of inquiry. It could lead to a change of trial tactics...how can
11 we guarantee that they couldn't – all those documents could not have led to other questions by Mr.
12 Albregts?" Tr. Day 10, p. 36. "[D]efendant has been substantially prejudiced by the lack of
13 disclosure. The court finds it is impractical and prejudicial to the defense to recall the
14 witnesses...the failure to turn over these documents is a Brady violation. The documents are
15 potentially exculpatory, and at a minute could have led to other areas of inquiry." Tr. Day 10, pgs.
16 55-56.

20 The potentially exculpatory nature of this undisclosed evidence, coupled with its importance
21 in leading to other areas of inquiry, forced defense counsel to orally move to dismiss the case, or in
22 the alternative for a declaration of mistrial. The court granted the motion for mistrial noting, "the
23 Court finds that the failure to turn over these documents is a Brady violation...[t]here is undue
24 prejudice to the defendant, two weeks into trial. We can't unring the bell in this particular case." Tr.
25 Day 10, p.56. Subsequently, the impaneled jury was excused.

27 Following the mistrial of the case, several motions were filed by the defense including a
28

1 Motion to Dismiss based on the violation of defendant's right not to be placed in jeopardy twice. The
2 court dismissed the case based upon the failure of the Indictment to set forth a crime¹ and an appeal
3 followed to the Nevada Supreme Court. (See attached Exhibit A)
4

5 **II. LEGAL ARGUMENT**

6 The Fifth Amendment to the United States Constitution precludes putting a defendant twice
7 in jeopardy for the same offense. U.S Const. amend. V; Nev. Const. art. 1§8. As a general rule, the
8 prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. Arizona
9 v. Washington, 434 U.S. 497, 505 (1978). Retrial is not automatically barred when a criminal
10 proceeding is terminated without finally resolving the merits of the charges against the accused
11 except when the actions of the government are responsible for the termination of the proceedings.
12 In Oregon v. Kennedy, 456 U.S. 667, 673 (1982), the court discussed why an election to terminate
13 a trial does not necessarily operate as a renunciation of waiver of the Double Jeopardy bar:
14

15 We have recognized, however, that there would be great difficulty in applying such a rule
16 where the prosecutor's actions giving rise to the motion for mistrial were done "in order
17 to goad the [defendant] into requesting a mistrial"...In such a case, the defendant's
18 valued right to complete his trial before the first jury would be a hollow shell if the
inevitable motion for mistrial were held to prevent a later invocation of the bar of double
jeopardy in all circumstances.

19 The rule in Nevada is that the trial court must make a two part inquiry: 1) First, the court
20 must determine whether there was "manifest necessity" for the declaration of mistrial or the result
21 was required by the "ends of justice/" 2) the court then must determine "whether the prosecutor is
22 responsible for the circumstances which necessitated declaration of a mistrial." Hylton v. Eighth
23 Judicial Dist. Court of State of Nev., Dept. IV, 743 P.2d 622 (Nev. 1987). See also Melchor-Gloria
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27 ¹Although the Motion to Dismiss which was granted was based on the failure of the
28 Indictment to set forth a crime, the Nevada Supreme Court decided a different issue-that the
Indictment provided sufficient notice- and reversed the dismissal of all counts except Count 1.

1 *v. State*, 99 Nev. 174, 178 (1983) (noting that, when the defense seeks a motion for mistrial, an
2 exception to the general rule that the mistrial removes any double jeopardy bars to reprosecution
3 arises where “the prosecutor intended to provoke a mistrial or otherwise engaged in ‘overreaching’
4 or ‘harassment’”). When a prosecutor has moved for mistrial (as in *Hylton*), double jeopardy bars
5 retrial unless the declaration was “dictated by manifest necessity or the ends of justice.” Even if
6 manifest necessity is found, retrial is barred where a “prosecutor is responsible for the circumstances
7 which necessitated declaration of a mistrial.” *Rudin v. State*, 86 P.3d 572, 586 (Nev. 2004), quoting
8 *Hylton*. When, as here, where a defendant is forced to move for mistrial, the manifest necessity
9 standard does not apply. *Rudin*, *Supra*, at 586. So this court need only address the second part of the
10 inquiry-whether the prosecutor was responsible for the circumstances which caused the trial to abort.
11

12
13 In *Hylton*, the Nevada Supreme Court determined that the necessity for a mistrial was not
14 “manifest” as the record was inadequate. The Supreme Court addressed the second part of the
15 inquiry : whether the prosecutor was responsible for bringing about the need for declaration of a
16 mistrial. The court examined the conduct of the prosecutor to determine whether the conduct of the
17 prosecutor was “‘excusable’ negligence or ‘inexcusable’” negligence.” *Id.* at 743 P.2d 627. The
18 mistrial in *Hylton* resulted when the prosecutor called a witness who had previously been represented
19 by the defendant’s counsel, despite the fact that the prosecutor was aware of the potential conflict
20 of interest. When the witness took the stand, he claimed a Fifth Amendment privilege which was
21 denied by the trial court, and then defense counsel raised the conflict of interest problem which
22 would interfere with his client’s Sixth Amendment rights due to the difficulties presented in cross-
23 examination. The prosecutor moved for a mistrial, which was granted. The Supreme Court, in
24 assessing whether the prosecutor’s negligence was “excusable” or “inexcusable,” considered the
25 reasons proffered by the State-“the trial prosecutor ‘didn’t perceive the problem in that [sixth
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1 amendment] context;” and “a ‘communication breakdown’ within the district attorney’s office.”

2 Id. at 624. The Supreme Court found.

3 Although the prosecutor was subjectively unaware of the substantive ramifications
4 of calling a witness who could invoke an attorney-client privilege on cross-
5 examination, we cannot accept such an error of judgment as “excusable” when
6 weighed against the defendant’s constitutional right to be free from repeated attempts
to convict him of the alleged offenses.

7 Id. at 627.

8 So the court must proceed to the second step to determine whether the prosecutor’s conduct
9 caused the mistrial and if so, whether it was intentional or negligent. Under the Nevada standard, if
10 the conduct was negligent, the court must determine whether it was “excusable” or “inexcusable.”

11
12 **A. Prosecutorial Responsibility for Mistrial**

13 There is no real question that the prosecution was responsible for the circumstances which
14 necessitated declaration of mistrial in Mr. Thomas’ case. The prosecution was in undisputed
15 possession of potentially exculpatory evidence which was never disclosed to defense counsel.

16 The prosecution repeatedly stated they never reviewed any of the documents in question²;
17 however, this failure to fully review the necessary documents is tantamount to directly withholding
18 evidence from both the defense and grand jury. *United States v. Blanco*, 392 F.3d 382 (2004). In
19 fact, the law is quite clear on the subject. See *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th
20 Cir. 1995)(“Exculpatory evidence cannot be kept out of the hands of the defense just because the
21 prosecutor does not have it, where an investigating agency does.”); *Carriger v. Stewart*, 132 F.3d
22 463, 480 (9th Cir. 1997)(en banc) (“Because the prosecution is in a unique position to obtain
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26 ²Upon information and belief, counsel for defendant asserts that evidence will be adduced
27 at an evidentiary hearing showing that the office of the District Attorney was completely aware of
28 the existence of the documents and that the lead detective on the case was fully knowledgeable of
the existence and contents of the documents.

1 information known to other agents of the government, it may not be excused from disclosing what
2 it does not know but could have learned.”).

3 Here, Las Vegas Metropolitan Police Department Detectives purportedly made evidentiary
4 decisions of relevancy without the assistance of the prosecution. Notwithstanding these decisions,
5 the impetus lies with the prosecution to fully review all requisite materials and, if necessary, provide
6 them to defense counsel. This was never done. The failure is inexcusable and was the sole reason
7 for the mistrial. This fact is inescapable and the responsibility for the necessitated declaration of
8 mistrial lies squarely with the prosecution.
9

10 **B. Dismissal is an Appropriate Remedy under the Court’s Supervisory Authority**

11 In a federal case tried in the District of Nevada, an Indictment was dismissed under the trial
12 court’s supervisory authority based on the failure of the prosecutor to disclose, until three weeks into
13 trial, 650 pages of material relevant to several of the witnesses who had testified in the trial. The
14 court found that the conduct of the prosecutor was “flagrant” and in “bad faith” and dismissed the
15 case, finding that the government should not be permitted “to try out its case identifying any
16 problem area[s] and then correct those problems in a retrial.” *United States v. Chapman*, 524 F.3d
17 1073, 1080 (9th Cir. 2008). The Ninth Circuit affirmed the dismissal, finding that the trial court did
18 not abuse its discretion in utilizing its supervisory authority. The Circuit court held that a trial court
19 can dismiss an indictment under its supervisory powers only when the defendant “suffers ‘substantial
20 prejudice.’” *Id.* at 1087. The Circuit upheld the trial court’s reasoning that because a number of
21 witnesses had testified and been impeached, it would be unfair to allow the government a second
22 chance to strengthen its case. *Id.* Finding that the trial court was “in the best position to evaluate the
23 strength of the prosecution’s case and to gauge the prejudicial effect of a retrial,” *Id.* the decision of
24 the trial court was affirmed. Here, the State had considerable difficulty in articulating its theory and
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1 considerable difficulty in finding proof of criminality. It should not be permitted to try again when
2 the case did not go to verdict because of the prosecutor's conduct.

3 In determining that dismissal was an appropriate sanction, the Ninth Circuit also approved
4 the consideration of the government's unwillingness to take responsibility for the failure to disclose.
5 All of those factors are present here and for the same reasons, this court should exercise its discretion
6 and dismiss the Indictment.
7

8 **C. An Evidentiary Hearing is Required**

9 Unless the State admits that its conduct was intentional or inexcusable, an evidentiary hearing
10 is required as disputed issues of fact exist. The extent to which the office of the District Attorney
11 knew that the documents in the possession of the investigating detective contained evidence which
12 this court has already determined was subject to disclosure under *Brady* and its progeny is a critical
13 factual issue in the second part of the *Hylton* inquiry.³ The following disputed factual issues⁴ require
14 an evidentiary hearing:

- 15 • Whether the office of the District Attorney, including its civil division, was aware that the
16 documents evidencing the substantial work performed on the contracts which were the
17 subject of Counts 1 and 6?
- 18 • Whether any private counsel retained by the County, and acting as its agent, in the litigation
19 involving those contracts was aware of the existence of the documents?
- 20 • Whether counsel for the vendors in those contracts communicated with any agent of the
21 District Attorney's office about those documents?

23 ³Counsel for defendant expects that the State will attempt to argue that the material was not
24 exculpatory or that it was not material, particularly to the counts based on other contracts. The Brady
25 issue has already been decided; the mistrial has already been granted. The issue before this court is
26 not whether the defendant was prejudiced by the failure to disclose but whether the mistrial, now that
it has been granted, forecloses a second trial of defendant due to the role of the prosecutor in causing
the mistrial.

27 ⁴The witnesses to be called are mostly adverse to defendant and it is likely that additional
28 disputed factual issues will arise when they are called.

1 • What steps did the trial prosecutors take to review the evidence which was in the possession
2 of the investigating detective to assure that the defendant's constitutional rights were
3 protected and that a mistrial would not be precipitated?

4 "District courts are required to conduct evidentiary hearings only when a substantial claim
5 is presented and there are disputed issues of material fact that will affect the outcome of the
6 [motion]." *United States v. Curlin*, 638 F.3d 562, 564 (7th Cir. 2011) quoted with approval in *Cortes*
7 *v. State*, 260 P.3d 184, 187 (Nev. 2011). This court is vested with broad discretion to determine
8 factual issues such as whether negligence is "excusable" or "inexcusable." However, to make those
9 factual determinations (unless the State concedes the facts), the court must base its findings on
10 evidence. Accordingly, defendant should be provided the opportunity to present evidence on the
11 factual issues raised here.

12 **III. CONCLUSION**

13 This case is a startling example of the reason that the constitution prohibits multiple trials
14 of a defendant when the termination of a previous trial was caused by the conduct of the prosecution.
15 The impact of serial trials, the accompanying delay, the expenses and impact on the life of the
16 defendant are all considerations which underlie the double jeopardy protection. When the State fails
17 to assure that constitutionally-mandated disclosures are made and a trial is terminated, the State is
18 not free to try again. Accordingly, the double jeopardy clause bars Mr. Thomas' retrial. Based on
19 the foregoing reasons, it is respectfully requested that this Court grant Defendant's Motion to
20 Dismiss based on the constitutional prohibition against double jeopardy.

21 DATED this 26th day of September, 2014.

22 DANIEL J. ALBREGTS, LTD.

23 By: /s/ Daniel J. Albregts
24 DANIEL J. ALBREGTS, ESQ.
Nevada Bar No. 004435

25 LAW OFFICES OF FRANNY FORSMAN, PLLC

26 By: /s/ Franny A. Forsman
27 FRANNY A. FORSMAN
Nevada Bar No. 000014
28 *Attorneys for Defendant THOMAS*

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CERTIFICATE OF SERVICE

The undersigned, an employee of DANIEL J. ALBREGTS, LTD., hereby certifies that on the 29th day of September, 2014, she served a copy of the above and foregoing DEFENDANT’S SUPPLEMENTAL MOTION TO DISMISS AND NOTICE OF NEED FOR EVIDENTIARY HEARING, via Wiznet E-File and Serve to the emails below:

Michael Staudahe
Chief Deputy District Attorney
michael.staudahe@clarkcountyda.com

Clark County District Attorney’s Office
pdmotions@clarkcountyda.com

Kimberly LaPointe
An Employee of Daniel J. Albregts, Esq

EXHIBIT A

EXHIBIT A

1 DECN
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4 **DISTRICT COURT**
5 **CLARK COUNTY, NEVADA**

6 STATE OF NEVADA

7 Plaintiff,

8 vs.

9 LACY L. THOMAS,

10 Defendant.
11

CASE NO.: 08C241569

DEPT. NO.: XVII

12
13 **DECISION ON MOTION TO DISMISS**
14

15 On February 8, 2008, an Indictment was filed against Lacy L. Thomas. The Indictment
16 alleges five counts of Theft in violation of NRS 205.0832 and five counts of Misconduct of a Public
17 Officer in violation of NRS 197.110. The alleged offenses underlying the charges relate to five
18 professional services contracts entered into while Thomas served as CEO of University Medical
19 Center (hereinafter referred to as "UMC"). Mr. Thomas pled not guilty to each of the ten charges.

20 Hearings were held before this Court on April 28, 2011 and May 31, 2011, in the above
21 referenced matter with Daniel Albregts, Esq. appearing on behalf of Defendant Lacy Thomas and
22 Assistant District Attorney Chris Owens along with Chief Deputy District Attorney Michael
23 Staudaher representing the State of Nevada. Following arguments of counsel, the Court took this
24 matter under advisement and now renders its decision herein:

25 Thomas was charged with five counts of Theft as outlined in NRS 205.0832. NRS 205.0832
26 provides in relevant part the following elements:

- 27 a) without lawful authority, [a] person knowingly;
28 c) uses the services or property of another person entrusted to him or her or placed in his or

MICHAEL P. VILLANI
DISTRICT JUDGE
DEPARTMENT XVII

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her possession for a limited, authorized period of determined or prescribed duration or for a limited use.

The State alleges that Thomas knowingly, feloniously, and without lawful authority, committed theft by using the services or property of another person entrusted to him, or placed in his possession of a limited, authorized period of determined or prescribed duration or for a limited use, having a value of \$2,500.00 or more, lawful money of the United States, belonging to University Medical Center and/or Clark County, Nevada. Specifically, it is alleged that Thomas committed thefts in the following manner:

Count I

- a) while employed as Chief Executive Officer at said University Medical Center;
- b) entering into a contract with Superior Consulting and/or ACS Company;
- c) a company run by longtime friends or associates of Defendant;
- d) for Superior Consulting and/or ACS to collect money owed to University Medical Center
- e) under contracts or terms grossly unfavorable to said University Medical Center;
- f) whereby University Medical Center was obligated to pay said Superior Consulting and/or ACS for collection work already being performed by an agency of Clark County;
- g) and could not terminate said contract for a lengthy period of time regardless of whether Superior Consulting and/or ACS was successfully increasing the collection of University Medical Center's debt;
- h) and/or by allowing Superior Consulting and/or ACS to sell valuable accounts receivable to a third party for an unreasonably low price and to charge a high commission for said sale,
- i) after learning that debt collection had decreased under the direction of Superior Consulting and/or ACS;
- j) modifying the contract to greatly increase the amount of money University Medical Center paid said Superior Consulting and/or ACS for said debt collection services;
- k) thereby using the services or property for another use.

Count II

- a) while employed as Chief Executive Officer at said University Medical Center,
- b) entered into contracts with Frasier Systems Group,
- c) a company owned by Gregory Boone, a friend of said Defendant,
- d) whereby said Frasier Systems Group was paid with University Medical Center funds to plan and implement a project manager's office for University Medical Center projects but never produced any product or services in return for said payment,
- e) and said Defendant causing payments to be made on said contract
- f) while he knew or should have known that services were not being received as contracted for under said contract
- g) and said contract was unnecessary in that University Medical Center already had available, free of charge, the services of a project manager's office run by Clark County,
- h) thereby using the services or property for another use.

Count III

- a) while employed as Chief Executive Officer at said University Medical Center,
- b) entered into a contract with TBL Construction, on behalf of University Medical Center
- c) whereby said TBL Construction was paid by University Medical Center to oversee the installation of the landscaping and electrical feed to University Medical Center Northeast Tower project under construction;
- d) Defendant knowing at the time of entering into said contract that the electrical feed and landscaping work was already covered and provided for in a separate contract with the general contractor of said project,
- e) and that said general contractor was already being paid to do said work,
- f) and that the said TBL Construction would not be doing any work pursuant to said contract with University Medical Center,
- g) and that said contract was unnecessary, thereby using the services or property for another use.

Count IV

- a) while employed as Chief Executive Officer at said University Medical Center, committed theft
- b) by paying University Medical Center funds to Premier Alliance Management, LLC,
- c) a company owned by Orlando Jones, a friend of Defendant, after said Premier Alliance Management LLC
- d) agreed to analyze and report on planning, priorities and communications systems at University Medical Center,
- e) in return for which said Premier Alliance Management[,] LLC provided no report or analysis to University Medical Center,
- f) and none was requested or required by Defendant in return for said money paid,
- g) thereby using the services or property for another use.

Count V

- a) while employed as Chief Executive Officer at said University Medical Center,
- b) committed theft by entering into a contract with Crystal Communications[,] LLC,
- c) a company owned and operated by Orlando Jones and Martello Pollock, friends of the Defendant,
- d) to pay Crystal Communications, LLC, to oversee the selection and installation of the best telecommunications equipment available for the University Medical Center Northeast Tower project,
- e) and Defendant thereafter paying said Crystal Communications, LLC,
- f) without said company being qualified or capable of providing services valuable to University Medical Center,
- g) and said company thereafter failing to provide a valuable service pursuant to said contract,
- h) thereby using the property of University Medical Center for another use.

Thomas was charged with five counts of Misconduct of a Public Officer as outlined in NRS 197.110. NRS 197.110 provides in relevant part the following elements:

- 1 b. Every public officer who
2
3 c. employs or uses any person, money or property under the public officer's
4 official control or direction, or in the public officer's official custody,
5 d. for the private benefit or gain of the public officer or another,

6 The State alleges that Thomas knowingly, feloniously, and without legal authority, while acting
7 as a public officer as Chief Executive Officer of University Medical Center, employed or used
8 money under his official control or direction, or in his official custody, for the private benefit or gain
9 of himself or another, and thereby committed five counts of misconduct of a public officer by doing
10 the acts set forth in counts one through five.

11 Throughout the pleadings and arguments during the various motions in this matter and based
12 upon the Grand Jury testimony, the State concedes that Thomas has not personally received any
13 private benefit from the contracts in question. Further, they concede that each original contract had
14 to go through a vetting process by Thomas, various staff members of UMC, a Clark County District
15 Attorney, and Clark County staff before receiving ultimate approval by the Clark County
16 Commissioners. Also, all invoices submitted by the entities identified in Counts I-V were paid by
17 the County and not by Thomas.

18 The gravamen of the charges against Thomas is that he entered into contracts that were
19 unnecessary, overly favorable to the vendors and/or that the work required under the contracts was
20 not performed. If in fact the contracts were unnecessary, overly favorable to the vendors,
21 unperformed and as alleged amounting to theft one would wonder why the vendors/their principals
22 were not charged with theft as co-conspirators.

23 Thomas challenges the Indictment under a number of legal issues, most notably that the
24 language of the Indictment does not set forth criminal conduct and, therefore, does not provide
25 sufficient notice of the charges against him.

26 NRS 173.075 provides in part that an indictment "must be a plain, concise, definite written
27 statement of the essential facts constituting the offense charged." Within the four corners of an
28 Indictment it "must contain: (1) each and every element of the crime charged and (2) the facts

1 showing how the defendant allegedly committed each element of the crime charged." *State v.*
2 *Hancock*, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998).

3 In *Simpson v. District Court*, 88 Nev. 654, 503 P.2d 1225 (1973), the Court stated that

4 Whether at common law or under statute, the accusation must
5 include a characterization of the crime and such description of the
6 particular act alleged to have been committed by the accused as will
7 enable him to defend against the accusation, and the description of
8 the offense must be sufficiently full and complete to accord to the
9 accused his constitutional right to due process of law. *Id.* at 164.

10 NRS 205.0832 as applied to the factual allegations as in the Indictment, merely put a person
11 of ordinary intelligence on notice that by entering into an ill-conceived contract they may at a later
12 date be charged with a crime. Further, the question must be asked: under what circumstances will
13 the government file criminal chargers for entering into an ill-conceived contract? See, *State v.*
14 *Castenada*, 126 Nev Adv. Op. 45, 245 P.3d 550, 553 (2010). The characterization of the crimes
15 charged in the Indictment does nothing more than put Thomas on notice that he/UMC may have
16 entered into an ill conceived contract and that by entering into such a contract, his conduct is now
17 deemed criminal in nature. The Indictment, if allowed to stand, would be tantamount to this Court
18 sanctioning the proposition that if UMC and/or Clark County entered into an ill-conceived contract
19 that may be more beneficial to a vendor as opposed to itself that Thomas' conduct is criminal in
20 nature. This Court does not accept this proposition.¹

21 Since Counts 6 – 10 identify allegations of misconduct by a public officer by referencing
22 Counts 1 – 5 which are unconstitutionally vague, Counts 6 – 10 must be dismissed as well.

23 Based upon the above, the Court need not address Defendant's argument that the Indictment
24 should be dismissed due to the State's failure to provide exculpatory evidence to the Grand Jury.

25 ¹ It is interesting to note that Clark County did not file a civil suit against any of the contracted parties identified in
26 Counts 1 - 5 of the Indictment for their alleged breach of contract or for entering into an allegedly fraudulent
27 contract. Rather ACS Consultant Co., Inc. filed suit against UMC. See Case A537042. Ultimately, UMC settled with
28 ACS for the amount of \$595,000.00. These facts are extrinsic to this matter and were not considered by the Court in
rendering its decision herein.

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CONCLUSION

In the final analyses this Court is asked to make a determination that crimes of Theft and Misconduct of a Public Officer are alleged within constitutional guidelines. Based upon the above, this Court finds that the Indictment does not provide Thomas with due process as to what is a criminal act as alleged in the Indictment and as defined in NRS 205.0832 and 197.110.

For the foregoing reasons, the Court Orders, the Motion to Dismiss is Granted and the Indictment dismissed. Any bond posted by Thomas is hereby exonerated.

DATED this 2 day of June, 2011.



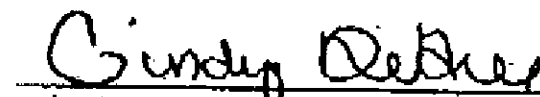
MICHAEL P. VILLANI
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date signed, a copy of this document was faxed to the attorneys as follows:

Christopher Owens, Asst District Attorney and Michael Staudaer, Chief Dep District Atty
Fax: 702-477-2956

Daniel J. Albregts, Esq.
Fax: 702-474-0739



Cindy DeGree, Judicial Executive Assistant

MICHAEL P. VILLANI
DISTRICT JUDGE
DEPARTMENT XVII

Eighth Judicial District Court

Honorable Michael P. Villani
District Court Judge, Department 17
200 Lewis Ave
Las Vegas, NV 89155
Tel: (702) 671-4469 Fax: (702) 671-4468

FAX COVER SHEET

Facsimile

TO: Christopher Owens 702-477-2956
Asst District Attorney
Michael Staudaer
Chief Deputy District Attorney

TO: Daniel J. Albregts, Esq. 702-474-0739

FROM: Cindy DeGree, Judicial Executive Assistant

RE: C241569/St v Lacy Thomas

DATE: June 2, 2011

Transmitting total number of 7 pages, including cover sheet.

COMMENTS: Decision

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10 *Attorneys for Defendant*

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

VS.

LACY L. THOMAS,
Defendant

CASE NO. C241569
DEPT. NO. XVII

HEARING DATE: _____
HEARING TIME: _____

**RENEWED MOTION TO DISMISS BASED ON FAILURE OF THE INDICTMENT
TO STATE A CRIME OR IN THE ALTERNATIVE,
UNCONSTITUTIONAL VAGUENESS OF THE STATUTES**

COMES NOW, the Defendant, LACY THOMAS, by and through his counsel, DANIEL J. ALBREGTS, and FRANNY FORSMAN and moves the court to dismiss the Indictment in this case on the ground that Indictment fails to state a crime, or in the alternative, if a crime is set forth, the statutes under which the charge is brought are unconstitutionally vague.

• • •

• • •

• • •

1 This Motion is made and based upon all the papers and pleadings on file herein, the transcript
2 of the trial which resulted in a mistrial and the attached Memorandum of Points and Authorities, and
3 any oral argument this Court may allow.

4 DATED this 26th day of September, 2014.

5 DANIEL J. ALBREGTS, LTD.

6 By: /s/ Daniel J. Albregts
7 DANIEL J. ALBREGTS, ESQ.
8 Nevada Bar No. 004435
9 601 S. Tenth Street, Suite 202
Las Vegas, Nevada 89101
(702) 474-4004

10 LAW OFFICES OF FRANNY FORSMAN, PLLC

11 By: /s/ Franny A. Forsman
12 FRANNY A. FORSMAN
13 Nevada Bar No. 000014
14 P.O. Box 43401
Las Vegas, Nevada 89116
(702) 501-8728

15 *Attorneys for Defendant THOMAS*

16 **NOTICE OF MOTION**

17 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and
18 foregoing Motion on for hearing before the above entitled court on the 09 day of
19 OCTOBER, 2014, at 8:15A.m. in Department XVII of said court.

20 DATED this 26th day of September, 2014.

21 DANIEL J. ALBREGTS, LTD.

22 By: /s/ Daniel J. Albregts
23 DANIEL J. ALBREGTS, ESQ.
24 Nevada Bar No. 004435

25 LAW OFFICES OF FRANNY FORSMAN, PLLC

26 By: /s/ Franny A. Forsman
27 FRANNY A. FORSMAN
28 Nevada Bar No. 000014

Attorneys for Defendant THOMAS

1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **IN SUPPORT OF MOTION TO DISMISS**

3 Summary of Argument

4 During the Grand Jury presentment, a Grand Juror asked the question that is at issue here:
5 “ — it poses a question I can’t answer regarding the law that maybe you could help, and that’s really
6 the point at which professional incompetency resulting in shoddy work product crosses the line into
7 criminal activity.” Tr. 1/22/08, p. 152. The State’s response was to turn to the language of the Theft
8 and Misconduct statutes.

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

14 *The Statutes*

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

16 Every public officer who:

17 ...
18 2. Employs or uses any person, money or property under the public officer’s
19 official control or direction, or in the public officer’s official custody, for the private
20 benefit or gain of the public officer or another is guilty of a category E felony....

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

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

24 ...
25 (b) Converts, makes an unauthorized transfer of an interest in, or
26 without authorization controls any property of another person, or uses the services
27 or property of another person entrusted to him or placed in his or her possession for
28 a limited, authorized period or determined or prescribed duration or for a limited use.

The Conduct Alleged in the Indictment

In this court’s previous order of dismissal, the allegations of the Indictment are detailed. The

1 Indictment alleged theft (Counts 1¹ through 5) based on allegations that:

- 2 • the vendors were managed by friends or associates of Thomas
- 3 • the terms of the contracts were grossly unfavorable to UMC
- 4 • Thomas sought to modify one contract to increase the return to the vendor²
- 5 • some services contracted for were not performed when Thomas knew or should have known
- 6 • that the vendor was not in compliance
- 7 • some services were not necessary as they could have been performed by salaried employees
- 8 • one company failed to provide a promised report
- 9 • one company was not qualified to provide valuable services to UMC

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

12 The Nevada Supreme Court did not address this court's previous ruling that the conduct
13 alleged did not constitute a crime, therefore that issue is raised again here. The argument addressed
14 in this Motion is that the conduct which is alleged in the Indictment does not constitute a crime under
15 the Theft or Official Misconduct statutes. If the conduct does constitute a crime under those statutes,
16 then the statutes are unconstitutionally vague.

17 Because this case has been partially tried and because the prosecutor has attempted repeatedly
18 to set forth his theory of prosecution, this court is in a position to determine whether, if the State
19 proves what it says it will prove, a crime has been committed. In examining the statute to determine
20 the elements of the offense, it will become clear that the particular subsection of the Theft statute
21 charged here and the Misconduct statute are so vague, that application to the facts of this case would
22 be unconstitutional.

23 **A. THE CONDUCT ALLEGED DOES NOT CONSTITUTE A CRIME**

24 **The State's Theory of Prosecution**

25 The State has alleged that the defendant did something criminal in carrying out his duties on
26 behalf of the University Medical Center. The State's theory is that he committed both Theft and
27 Misconduct when he contracted with various entities to provide services to UMC. The problem in
28

26 ¹ Count 1 has been dismissed as a result of the Supreme Court decision. See attached Exhibit
27 A.

28 ²This is the contract that the County ultimately settled for \$595,000 in a civil suit brought by
the vendor.

1 trying to determine when the conduct alleged here becomes criminal is obvious in the dialogue
2 between the court and the prosecutor at the prior trial:

3 THE COURT: Isn't that the —at least the facts right now is that he contracted
4 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?

5 MR. MITCHELL: I—well, in the misconduct counts you have to prove that the
6 contract benefitted the friend and not the organization. That the contract was entered
7 into for the purpose of benefitting a friend or Mr. —or any other person, it doesn't
have to be a friend. But when 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
through 10, yes. ...

8 TT, 3/23/10, p. 145.

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

12 MR. MITCHELL: My burden is not so high as to force me to—to— prove that
13 —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 to show that this was for personal benefit of a friend, or
somebody, not—not to fulfill my job.

14 TT, 3/23/10, p. 146.

15 Still trying to tie down the proof required to constitute a crime, the court suggested that if
16 hiring someone who couldn't handle the job is criminal, the statute would turn a bad business
17 decision into a felony. TT, 3/23/10, p. 146. The court commented that every contract benefits the
18 person receiving payment under the contract, TT, 3/23/10, p. 151.

19 Finally, the court asked the prosecutor if, under his theory of misconduct, the terms of the
20 contract had to be unfavorable to UMC. The prosecutor responded, "I don't believe I do."

21 So, as to the Misconduct counts at least, the State believes that a public official is guilty of
22 a crime when he receives approval from the county to contract with anyone and the State believes
23 that he didn't have the county's best interest in mind. The State need not prove that the county was
24 harmed, the State need not prove any relationship between the accused (or a lack of disclosure of any
25 relationship) and the other contracting party, the State need not prove that the accused received
26 anything for the contract, the State need not prove that the vendor was not qualified or did a bad job.

27 ***Theft***

28 Since the question of criminality in both statutes turns on the term "use" or "uses" the court

1 must instruct the jury what that means in the context of this case. We know that the prosecutor
2 doesn't think that it means that he wasn't authorized to use the money since elaborate procedures
3 and approval processes were conducted before the contracts were executed or paid. We know that
4 the prosecutor doesn't believe that it means that the "use" of the property is unlawful because he was
5 contracting with friends or that he failed to disclose some relationship.

6 This court can interpret the language of the statute in order to define the elements of the
7 crime and properly instruct the jury. The language of subsection (b) of the Theft statute must mean,
8 under the facts of this case, that bad business decisions become crimes when there is a specific
9 limitation placed on property entrusted to a person and that specific limit is violated. There are no
10 allegations at all that that is what happened. In fact, there was substantial evidence adduced that the
11 county authorized all of the transactions at issue in this case.

12 ***Misconduct***

13 The State has already advised the court that it will not prove that Mr. Thomas received any
14 kickbacks or other inappropriate remuneration for the contracts. The State has already advised the
15 court that the benefit received by the recipients was the benefit provided under the contract. The
16 State has already advised the court that it is not required to prove that the county was harmed in any
17 way.

18 The court must interpret this statute to determine when entering into authorized contracts
19 becomes "using" county money for the "private benefit" of another.³ Certainly if a public official
20 provided money to a real estate developer to build a public golf course, for instance, and the money
21 was used for a private development, that might be a crime under the statute. However, there are no
22 allegations here that the authorization given to Mr. Thomas for use of the money was different than
23 what the money was used for. Instead, the State argues that a crime is committed when a public
24

25 ³The issue has been further muddled by the determination of the Nevada Supreme Court that
26 Count 1 should be dismissed because there had been *actual* work performed under the ACS contract.
27 See Exhibit A, p. 4. The Supreme Court would not clarify what it meant by that dismissal when
28 requested by counsel for defendant. It appears that the court determined that the crime would not be
committed if actual work was performed under the contract. The State should be required by this
court to proffer whether it will prove that no work was performed on the remaining counts.

1 official enters into a contract which is for the personal benefit of someone else even if the county is
2 not harmed. (See quotes above). That is not a crime under this statute.

3 **B. IF THE CONDUCT CONSTITUTES A CRIME UNDER THESE**
4 **STATUTES, THEN THE STATUTES ARE UNCONSTITUTIONALLY**
5 **VAGUE**

6 Official Misconduct statutes have been challenged successfully on constitutional grounds in
7 many jurisdictions. At least three state Supreme Courts have determined that their official
8 misconduct statutes were void, not as applied, but simply void as unconstitutionally vague. The
9 language of the invalidated statutes was significantly more explicit and definite as to the prohibited
conduct than the language in Nevada's statute.

10 Colorado

11 *The Statute*

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

16 *The Holding*

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

22 it provides no readily ascertainable standards by which one's conduct may be
23 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.

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

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

1 Kansas

2 *The Statute*

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

5 *The Holding*

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

9 The court further found that,

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

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

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

23 Florida

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

26 *The Statute*

27 Fla. Stat. 839.25 provides that a public servant commits Official Misconduct when, with
28 “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

1 or lawfully adopted regulation or rule relating to his office.”⁴

2 *The Holdings*

3 In State v. DeLeo, 356 So. 2d 306, 307 (Fl. 1978), the Florida Supreme Court addressed a
4 void-for-vagueness challenge to sec.(c) and held that even though “corrupt intent” requires that the
5 act be “done with knowledge that the act is wrongful and with improper motive,” “[t]his standard
6 is too vague to give men of common intelligence sufficient warning of what is corrupt and outlawed,
7 therefore by statute.” The court went further, though, and held,

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

15 Id. at 308.

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

19 The United States Supreme Court Limited the Scope of the Federal Official Misconduct Statute to 20 Avoid Invalidating it and Sets Forth the Task of the Court in Analyzing Void-for-Vagueness 21 Challenges

22 The United States Supreme Court tackled the question of a vague Public Corruption statute
23 in Skilling v. United States, 130 S.Ct. 2896 (2010). Skilling not only addresses the problems
24 inherent in statutes seeking to criminalize violations of fiduciary duties but it is the most recent
25 description of how a court should approach a void-for-vagueness challenge.

26 Skilling was charged under 18 U.S.C. §1346 with “honest-services” fraud. Under the federal
27 statutes, a crime is committed when the mail or wires are used in furtherance of “any scheme or
28 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

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

1 corporate executive with responsibilities to his shareholders, the “honest services” fraud statute has
2 been the primary source for the prosecution of public corruption and official misconduct of both state
3 and federal officials.

4 The court’s process in evaluating Skilling’s claim of void-for-vagueness is instructive in
5 evaluating the issues raised here. First, the court traced the history of the “honest services” fraud
6 statute. This was important in Skilling because a prior decision of the Supreme Court in McNally
7 v. United States, 483 U.S. 350 (1987) limited the scope of the wire fraud statute to property harm.
8 §1346 was enacted in response to McNally and purported to extend the statute to crimes which
9 deprived citizens of their right to honest services. Skilling urged the court to find the statute void on
10 its face on the ground that it failed to satisfy due process. Skilling alleged that the statute failed to
11 “define the criminal offense [1] with sufficient definiteness that ordinary people can understand what
12 conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory
13 enforcement.” Skilling, Supra, at 2927.

14 Second, based on the doctrine of constitutional avoidance, the court decided that the statute
15 should be construed rather than invalidated. The court described its approach: “It has long been our
16 practice, however, before striking a federal statute as impermissibly vague, to consider whether the
17 prescription is amenable to a limiting construction.” Id. at 2929. “[I]f the general class of offenses
18 to which the statute is directed is plainly within its terms, the statute will not be struck down as
19 vague....And if this general class of offenses can be made constitutionally definite by a reasonable
20 construction of the statute, this Court is under a duty to give the statute that construction.” quoting
21 United States v. Harriss, 347 U.S. 612, 618 (1954). The majority determined that the statute should
22 be construed to only apply to that conduct which was criminalized before the decision in McNally-
23 bribes and kickbacks. Without that limitation, the court reasoned, the statute “would encounter a
24 vagueness shoal.” Id. at 2907.

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

1 conduct would be criminal.

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

5 In a strongly-worded dissent, Justice Scalia argues that the statute should simply be voided
6 not construed because the statute “fails to define the conduct it prohibits.” He details the pre-
7 McNally cases finds that there was no agreement as to the nature or source of the obligation at issue-
8 whether the source must find itself in law or in “general principles, such as the ‘obligations of loyalty
9 and fidelity’ that inhere in the ‘employment relationship.’” As a result, in Scalia’s opinion, the statute
10 cannot be salvaged because there is no “ascertainable standard of guilt.” Id. at 2936.

11 Accordingly, Counts 2 through 5 should be dismissed using the Skilling analysis. The statute
12 is vague if it is applied to this conduct (no kickbacks, no enrichment at all). To salvage the
13 constitutionality of the statute, the court can simply determine that the conduct does not constitute
14 a crime as the Supreme Court did.

15 The Statutes are Vague Under Nevada Law

16 State v. Casteneda, 245 P.3d 550 (Nev. 2010) sets forth a clear and practical approach to the
17 issue raised here. In Casteneda, the court first set forth the allegations against the defendant
18 (exposure of genitals in public), then traced the history and application of the Indecent Exposure
19 statute, applied the void-for-vagueness standards to the statute and determined that the statute could
20 be construed rather than invalidated. The court focused on the term “person” as it was used in the
21 statute-“exposure of his or her person”-and found extensive support in common law and judicial
22 decisions for a definition of the term as meaning “genitals.” So, as in Skilling, because the conduct
23 of the defendant fell clearly within the commonly-held and published definition, the statute was not
24 vague. The court construed the statute to be limited to “genitals or anus” and not “buttocks”
25 disregarding surplusage in the charging document and avoiding the vagueness shoal.

26 Lack of Other Sources for a Definition of the Criminal Conduct

27 There are no judicial decisions or provisions of Common Law in which negotiating contracts
28 which are authorized but later deemed unfavorable or unnecessary is criminal conduct under either

1 the Theft statute or the Official Misconduct statute.⁵ There are no decisions in Nevada or any other
2 jurisdiction in which a prosecutor has used such a novel theory of criminality.

3 **C. THIS COURT’S PREVIOUS DISMISSAL BASED ON FAILURE TO**
4 **STATE A CRIME WAS A CORRECT ANALYSIS OF THE ISSUE**
5 **AND DISMISSAL ON THAT GROUND IS STILL APPROPRIATE**

6 Because the Nevada Supreme Court construed the issue in the manner that the State
7 presented it-inadequate notice-the issue of failure to state a crime was not addressed by the Supreme
8 Court. It is raised again here because dismissal on this ground is appropriate and just.

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

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

20 Arizona

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

- 23 • “A court should not ‘expand the definition of ‘conflict of interest’ in a criminal prosecution
24 to include conduct that does not clearly fall within the plain meaning of the statute...as that
25 meaning may be ascertained from the language of the statute, the interpretation of the statute

26 ⁵The Official Misconduct statute has been applied to bribes and gratuities, Peccole v.
27 McNamee, 267 P.2d 243 (Nev. 1954); State v. Thompson, 511 P.2d 1043 (Nev. 1973); State v.
28 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).

1 by the courts of this state, or the statute's legislative history.” Arizona v. Ross, 151 P.3d
2 1261, 1265 (Ariz. App. 2007), quoting Hughes v. Jorgenson, 50 P.3d 821, 823 (Ariz. 2002).
3 “[I]f ‘a statute is susceptible to more than one interpretation,...doubt should be resolved in
4 favor of the defendant.’” Id.
5 “[A] criminal conflict of interest does not exist merely because a public officer acts in a way
6 that appears to be a conflict in the eyes of the public or prosecutors. The specific terms of the
7 statute control.” Id.
8 “[T]o violate the conflict of interest statute, a public official must have a non-speculative,
9 non-remote pecuniary or proprietary interest in the decision at issue. Hughes v. Jorgenson,
10 50 P.3d 821, 824 (Ariz. 2002).
11 “Finally, and dispositively, this court will not define the edges of meanings of terms in a
12 statute in a criminal prosecution.” Id. at 825, citing United States v. Bass, 404 U.S. 336, 347-
13 49 (1971). Id.

14 Louisiana

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

21 The issue is presented with a Motion to Quash. The court then must “accept as true the facts
22 contained in the bill of information and in the bills of particulars, and determine as a matter of law
23 and from the face of the pleadings, whether a crime has been charged....The question of factual guilt
24 or innocence of the offense is not raised by the motion to quash.” State v. Perez, 464 So. 2d 737,
25 739-40 (La. 1985).

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

28 [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.

29 CONCLUSION

30 This is not the way criminal law is supposed to work. Civil law often covers conduct
31 that falls in a gray area of arguable legality. But criminal law should clearly separate
32 conduct that is criminal from conduct that is legal. This is not only because of the
33 dire consequences of a conviction—including disenfranchisement, incarceration and
34 even deportation—but also because criminal law represents the community's sense of
35 the type of behavior that merits the moral condemnation of society....When
36 prosecutors have to stretch the law or the evidence to secure a conviction, as they did

1 here, it can hardly be said that such moral judgment is warranted.
2 Kozinski, J., concurring in United States v. Goyal, 629 F.3d 912, 922 (9th Cir. 2010).

3 Few cases will present an issue of vagueness as substantial as this one. The prosecutor
4 brought what appears to be the first prosecution of a public official based on allegations of ill-
5 conceived contracting in the country. It appears that no other prosecution of this kind of conduct has
6 been brought under the various official misconduct statutes. The Nevada statutes cannot be saved
7 by history, judicial interpretations or definitions, other statutes, administrative rules or by-laws.

8 NRS 197.110(2) is simply not salvageable-it is beached on the "vagueness shoal." NRS
9 205.0832(1)(b) is vague as applied to the conduct in this case. If both statutes are construed instead
10 of voided, then they must be construed to mean that the conduct in this Indictment simply is not
11 criminal. Any other result would deprive Lacy Thomas of his right to due process.

12 DATED this 26th day of September, 2014.

13 DANIEL J. ALBREGTS, LTD.

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EXHIBIT A

EXHIBIT A

IN THE SUPREME COURT, OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
LACY L. THOMAS,
Respondent.

No. 58833

FILED

SEP 26 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Malone
DEPUTY CLERK

***ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING***

This is an appeal from a district court order granting respondent's motion to dismiss a 10-count indictment. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The State filed an indictment against respondent Lacy Thomas, the former Chief Executive Officer of University Medical Center (UMC), charging him with five counts of theft, a violation of NRS 205.0832, and five counts of misconduct of a public officer, a violation of NRS 197.110. Thomas pleaded not guilty to each charge and sought dismissal of all counts charged in the indictment because they failed to put him on notice of the specific criminal acts asserted against him. The district court agreed and dismissed the indictment.

The State appeals arguing that the district court erred by finding that the indictment failed to put Thomas on notice of the specified facts that constitute criminal theft and misconduct of a public officer, and that the district court abused its discretion by refusing to allow the State to amend the indictment under NRS 173.095(1).

"We review a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion." *Hill v. State*, 124 Nev.

546, 550, 188 P.3d 51, 54 (2008). We review questions of statutory interpretation and issues involving constitutional challenges de novo. See *State v. Lucero*, 127 Nev. ___, ___, 249 P.3d 1226, 1228 (2011); *West v. State*, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003).

Sufficiency of the indictment

The State argues that the indictment sufficiently put Thomas on notice of the specific conduct alleged to constitute theft and misconduct of a public officer because the indictment alleged that Thomas used funds entrusted to him for improper purposes. The State further argues that the indictment provided more notice than is required by due process because the facts underlying the charges were pleaded in detail and discussed at length in the grand jury transcript.

Under NRS 173.075(1), an indictment “must be a plain, concise and definite written statement of the essential facts constituting the offense charged.” “[The indictment] must be definite enough to prevent the prosecutor from changing the theory of the case, and it must inform the accused of the charge he is required to meet.” *Husney v. O'Donnell*, 95 Nev. 467, 469, 596 P.2d 230, 231 (1979). To provide sufficient notice, “the indictment standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.” *Laney v. State*, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970) (internal quotations omitted); see *Logan v. Warden*, 86 Nev. 511, 514, 471 P.2d 249, 251 (1970) (stating that “the combined information provided by the charging instrument and the [grand jury] transcript” would sufficiently apprise a defendant of the offense charged in order to mount a proper defense). However, an indictment “which alleges the commission of the offense solely in the conclusory language of the statute

is insufficient." *Sheriff v. Levinson*, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979).

Theft, counts one to five

NRS 205.0832(1)(b) provides that

a person commits theft if, without lawful authority, the person knowingly . . . [c]onverts, makes an *unauthorized* transfer of an interest in, or without authorization[,] . . . 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.

(Emphasis added). In all five of the theft counts in the indictment, it is alleged that Thomas used county funds in an *unauthorized* manner and exceeded the county's entrustment for "limited use[s]" by distributing said funds to his personal friends or associates under the guise of legitimate contracts that were "grossly unfavorable" to the county, "unnecessary," and/or "us[ed] the services or property [of UMC] for another use." Specifically, the State explained to the grand jury that it was presenting an embezzlement-type theory of theft, which entails "taking money that is entrusted to you for a particular purpose and using it for other purposes outside that entrustment."

Count one of the indictment specifically references a contract between UMC and Superior Consulting or ACS Company (collectively, ACS) where some, albeit very limited, debt collection work was to be performed. The contract called for the completion of debt collection work that was already being performed by another entity and it is alleged the work was performed poorly by ACS, leading to a decrease in overall debt collection. While count one of the indictment included the relevant dates, the parties, and the factual accounts of the contract entered with ACS, it

failed to allege how Thomas'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. We conclude that the indictment and grand jury transcript failed to provide Thomas with sufficient notice of all the elements of the criminal acts charged in count one in order to prepare his defense. See *Laney*, 86 Nev. at 178, 466 P.2d at 669.

With regard to theft counts two to five, in the indictment and before the grand jury, Thomas is alleged to have entered into contracts on behalf of UMS with Frasier Systems Group, TBL Construction, Premier Alliance Management, LLC, and Crystal Communications, LLC. These companies allegedly provided consulting and supervisory services in the areas of information technology, utilities, landscaping, and telecommunications. However, the State explicitly stated that they never performed any work or delivered a final work-product under the terms of these contracts. Because the State alleged in the indictment and before the grand jury how Thomas engaged in conduct that was unlawfully authorized (i.e. there was no work performed or final work-product provided), we conclude that Thomas was sufficiently put on notice of the criminal acts charged in counts two to five. Accordingly, we reverse the district court's dismissal as to counts two to five; however, we affirm the dismissal of count one.

Misconduct of a public official, counts six to ten

NRS 197.110(2) provides that "[e]very public officer who . . . [e]mploys 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 . . . felony." In counts six to ten of the indictment, the State

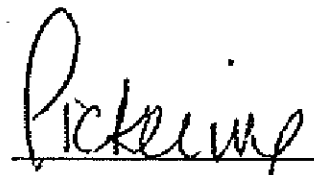
alleges that Thomas, while acting as Chief Executive Officer of UMC, "use[d] money under his official control or direction . . . for the private benefit or gain of himself or another." Despite the fact that each count failed to provide a detailed narrative of the facts as they related to each charge, each count incorporated by reference the facts set forth in theft counts one to five, respectively. And, counts one to five included allegations that Thomas entered into contracts with his longtime friends or associates that were "grossly unfavorable" to UMC. Thus, we conclude that the elements of the offense of misconduct of a public officer as set forth in counts six to ten of the indictment, when considered together with the facts as alleged in counts one to five and the grand jury testimony, put Thomas on sufficient notice of the crimes charged in counts six to ten so that he could mount an adequate defense. *See Logan*, 86 Nev. at 513, 471 P.2d at 251 (establishing that the information in the charging instrument and the grand jury transcript may be sufficient notice). Accordingly, we reverse the district court's dismissal as to counts six to ten.


Amendment to count one is not warranted

The State contends that the appropriate remedy for inadequate notice in a charging document is amendment, not dismissal. Given our reversal of the district court's order dismissing counts two to ten, the State's request for amendment only applies to count one. NRS 173.095(1) states that "[t]he court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Whether an indictment may be amended is "a determination [wholly] within the district court's discretion." *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

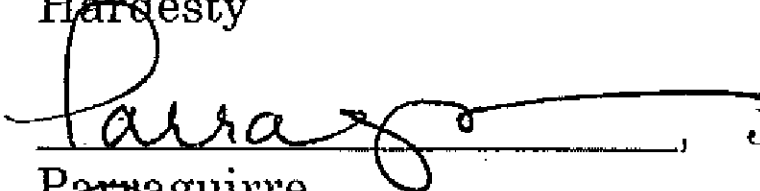
We conclude that the district court did not abuse its discretion in denying the State the right to amend the indictment as to count one because the indictment and grand jury transcript failed to put Thomas on sufficient notice of the charged crime, and the State has failed to show that it can cure the defective allegation. Thus, permitting the State to amend count one would prejudicially affect Thomas's substantial rights.

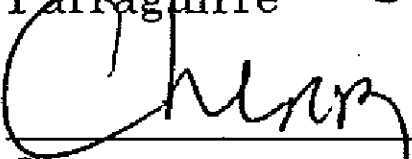
Accordingly, for the reasons set forth above, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹

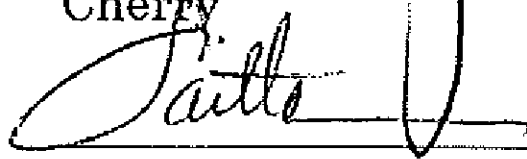

_____, C.J.
Pickering


_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Cherry


_____, J.
Saitta

¹The Honorable Michael Douglas, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Hon. Michael Villani, District Judge
Attorney General/Carson City
Clark County District Attorney
Daniel J. Albregts, Ltd.
Franny A. Forsman
Eighth District Court Clerk

1 **OPPS**
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DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 LACY L. THOMAS,
13 #2676662

14 Defendant.

CASE NO: 08C241569

DEPT NO: XVII

15 **STATE'S OPPOSITION TO DEFENDANT'S RENEWED MOTION TO DISMISS**
16 **BASED ON FAILURE OF THE INDICTMENT TO STATE A CRIME OR IN THE**
17 **ALTERNATIVE, UNCONSTITUTIONAL VAGUENESS OF THE STATUTES**

18 DATE OF HEARING: OCTOBER 9, 2014
19 TIME OF HEARING: 8:15 A.M.

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
21 District Attorney, through MICHAEL V. STAUDAHER, Chief Deputy District Attorney, and
22 hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To
23 Dismiss Based On Failure Of The Indictment To State A Crime Or In The Alternative,
24 Unconstitutional Vagueness Of The Statutes.

25 This Opposition is made and based upon all the papers and pleadings on file herein, the
26 attached points and authorities in support hereof, and oral argument at the time of hearing, if
27 deemed necessary by this Honorable Court.

28 //

//

1 POINTS AND AUTHORITIES

2 ARGUMENT

3 It should be noted from the outset that Defendant's renewed motion before this Court
4 is essentially a rehash of the exact arguments he raised to the Nevada Supreme Court in his
5 answering brief to the State's appeal of this Court's granting of Defendant's motion to dismiss.
6 In fact, Defendant essentially cut and pasted the entirety of his argument from his answering
7 brief and has presented it to this Court as a renewed motion to dismiss. The State has,
8 therefore, provided copies of both its opening brief, as well as its reply brief to the Nevada
9 Supreme Court which specifically address the legal issues raised in the instant motion. The
10 State incorporates the arguments raised in its opening and reply briefs by reference here. See
11 Exhibits 1 and 2. The State specifically refers this Court to pages 21-30 of Exhibit 1 and to
12 pages 7-18 of Exhibit 2.

13 Despite the fact that the Nevada Supreme Court overturned this Court's dismissal of all
14 but count one of the Indictment in an *en banc* decision, Defendant petitioned the Supreme
15 Court for a rehearing. In Defendant's petition, he again made his vagueness and
16 unconstitutionality argument and asserted that the Court had "misapprehended the nature of
17 the challenge to the Indictment." See Exhibit 3. The State was ordered by the Court to answer
18 Defendant's petition and in doing so again pointed out that district court had dismissed the
19 case because the Indictment did not give Defendant the required notice, was unconstitutionally
20 vague and did not afford him due process. See Exhibit 4, pg. 5. The Nevada Supreme Court
21 considered the arguments concerning unconstitutionality and vagueness once again and
22 declined to revisit its ruling. See Exhibit 5.

23 Defendant's arguments concerning the unconstitutionality and vagueness of the statutes
24 as applied to Defendant clearly found no support by the Court. Also, the Court's order in this
25 case specifically addressed the issue of notice, which the State asserts goes hand in hand with
26 definiteness of the criminal charges and the alleged conduct. In fact, it was essentially the
27 vagueness issue that the Nevada Supreme Court used as its basis to affirm this Court's
28 dismissal of count one of the Indictment. The Court specifically stated that count one of the

1 Indictment "failed to allege how Thomas's conduct was unlawfully authorized or how his use
2 of payments to ACS articulate the intended, unlawful purpose when *actual* work had been
3 performed under the contract." See Exhibit 6, pg. 4. To assert, therefore, that the vagueness
4 argument is separate and apart from a notice analysis does not apply in the instant case.

5 . It is the State's position that the Nevada Supreme Court did address Defendant's
6 vagueness argument in its ruling on the notice issue. It is clear, therefore, that the Nevada
7 Supreme Court discounted that vagueness and constitutional argument raised by Defendant in
8 his answering brief and again in his petition for rehearing. As such, there is no basis by which
9 to raise this issue again in the district court.

10 **CONCLUSION**

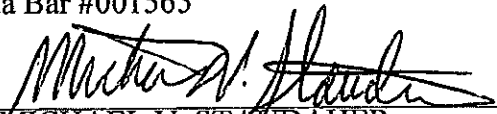
11 Based upon the forgoing, the State respectfully requests that the Defendant's Motion
12 to Dismiss, be denied.

13 DATED this 8th day of October, 2014.

14 Respectfully submitted,

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

18 BY


19 MICHAEL V. STAUDAHER
20 Chief Deputy District Attorney
21 Nevada Bar #008273

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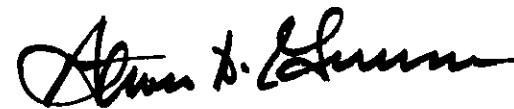
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DANIEL ALBREGTS, ESQ.
FAX #474-0739
E-Mail: albregts@hotmail.com


Secretary for the District Attorney's Office

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EXHIBIT “1”



CLERK OF THE COURT

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10 (702) 671- 2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,)

11 Plaintiff,)

12 -vs-)

13 LACY L. THOMAS,)

14 Defendant.)

CASE NO. 08C241569

DEPT NO. XVII

15
16 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

17 DATE OF HEARING: NOVEMBER 21, 2014

18 TIME OF HEARING: 9:30 A.M.

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney,
20 through MICHAEL V. STAUDAHER, Chief Deputy District Attorney, and files this
21 Opposition to Defendant's Motion to Dismiss.

22 This Opposition is made and based upon all the papers and pleadings on file herein, the
23 attached points and authorities in support hereof, and oral argument at the time of hearing, if
24 deemed necessary by this Honorable Court.

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1 POINTS AND AUTHORITIES

2 ARGUMENT

3 Despite the fact that the State had constructive possession of the infamous "binder"
4 and did not provide said binder to defense counsel, the defense was able to and did obtain it
5 without the help of the police through their own investigation and did, in fact, possess it at the
6 time of trial. Clearly, because defense counsel ultimately introduced the "binder" at trial,
7 defense counsel was able to review and understand its contents prior to its admission. To
8 illustrate this fact, the State refers this Court to that section of the day nine (9) trial transcript
9 where defense counsel attempted to admit the "binder" materials as a defense exhibit at trial.
10 Defense counsel specifically argued that the State should have anticipated that the defense
11 would try to introduce these materials. Trial Transcript (T.T.) Day 9, pg. 271. Defense counsel
12 went on to argue that the State should not be prejudiced by the introduction of these materials
13 since they has previously been provided to the police.

14 MR. ALBRECHTS: And so while I certainly understand that
15 seeing that (the binder) in the last couple of days **might make it a**
16 **little more difficult for Mr. Mitchell to cross-examine**, he
17 should have completely foreseen that we would be bringing this
18 issue up to refute the claim, as most of his witnesses did, that ACS
19 didn't do anything.

20 Id. (emphasis added)

21 What ensued thereafter was a discussion of where the documents had come from and
22 how defense counsel had obtained them. Nowhere in the exchange did defense counsel ever
23 claim that he was prejudiced by the lack of earlier access to the documents. Nowhere in the
24 transcript, on day nine of trial, did defense counsel ever claim or even argue that there was a
25 Brady violation or that the State had somehow deprived defense counsel of the documents.
26 Nowhere in the transcript did defense counsel ever make any request for a mistrial. In fact,
27 defense counsel's position was just the opposite as evidenced by the following exchange.

28 MR. MITCHELL: Judge, I'm puzzled because the defense did
have this stuff. In fact, they provided it in the first place. So how
can they say that they were deprived of it when they provided it?

//

1 MR. ALBREGTS: I didn't say I was deprived of it.

2 Id. at pg. 306 (emphasis added)

3 The State has never tried to prevent defense counsel's access to any discovery in this
4 case. While it is true that the State did not forward the notebook binder that was in police
5 possession, it is disingenuous to suggest that defense counsel was ever denied access to the
6 binder since they actually possessed it at the time of trial. Ultimately, despite the fact that the
7 materials in the binder were not produced by the State to the defense, the defense was non-
8 the-less able to and did obtain said documents through their own independent efforts. There
9 was, therefore, no Brady violation and no prejudice to Defendant because of the lack of
10 disclosure of the binder.

11 **I. Defendant Thomas is not Precluded from Being Retried in the Instant**
12 **Matter Because he Requested the Mistrial, There was no Finding By the**
13 **Court that the State Intended to Provoke the Mistrial or Acted in Bad Faith**
and Because the Findings of the Court in Granting the Defense Motion
Constituted Manifest Necessity

14 In defense counsel's initial motion for dismissal based on double jeopardy, the defense
15 acknowledged that the Court made sufficient findings to constitute a mistrial on the grounds
16 of manifest necessity. In defense counsel's supplemental motion, however, defense counsel
17 now appears to be making the unsupported and unfounded accusation that the State's conduct
18 was flagrant and that the State acted in bad faith in the instant matter, therefore, the case should
19 be dismissed.

20 In one of the most recent Nevada Supreme Court cases addressing this very issue, the
21 Court held that a mistrial declared on the grounds of manifest necessity, does not constitute
22 double jeopardy and does not bar the retrial of a defendant. Glover V. Eighth Judicial Dist.
23 Court of State ex rel. County of Clark, 220 P.3d 684 (2009) at 689,696-97, 701. In addition,
24 the Court delineated the two (2) circumstances where a defendant may be retried for the same
25 crime after jeopardy attaches when no verdict is reached by the jury: First, when the defendant
26 requests or consents to the mistrial; or Second, when the court finds that manifest necessity
27 requires the declaration of a mistrial. Id. at 676, quoting United States V. Chapman, 524 F.
28 3d 1073, 1081 (9th Cir. 2008). The Court also went on to state that there is "no mechanical

1 rule by which to calculate 'manifest necessity'" and that the analysis rests in a finding that the
2 trial court "exercised 'sound discretion' in declaring a mistrial." Id. at 697.

3 The Court, in addressing the deference to be given a trial court in reviewing a finding
4 of manifest necessity, stated that strict scrutiny is required to protect against bad faith actions
5 on the part of the government or actions intended to provoke a mistrial where the prosecution
6 is responsible for the situation necessitating the mistrial. Id. at 696-97.

7 In the instant matter, the defense in its initial motion acknowledged that there was a
8 reasonable finding of manifest necessity on the part of the Court in declaring the mistrial. In
9 addition, the defense actually requested that the Court declare a mistrial, therefore, under
10 Glover, both of the circumstances delineated by the Court were met. It should be noted that
11 Glover only requires that one of the two circumstances be met for a defendant to be retried
12 without violating double jeopardy.

13 The only legitimate argument available to the defense, therefore, is that the actions of
14 the State either directly or constructively were done in bad faith or were intended to provoke
15 a mistrial. Although nowhere in the defense's initial motion was there such a claim or charge,
16 in the defense's supplemental motion they now appear to be making that assertion. It should
17 be noted that when this Court declared the mistrial in instant case, the Court made specific
18 findings that there was no intentional misconduct on the part of the State. In addition, the
19 Court did not make any finding that the State intended to provoke a mistrial. Trial Transcript
20 (TT), Day 10, pgs 55-56.

21 The court is not making a finding of - that there was intentional - is not
22 making a finding of any intentional misconduct by the prosecutors in this
23 case, or by any law enforcement representatives. . . . The court does not
24 make a finding at this time that the lack of disclosure was intentional on
25 behalf of the prosecutors in this case. He, in fact, finds otherwise at this
26 point, that there's no evidence that it was intentional disclosure -
27 intentional withholding of the documents by the prosecutors. Id.

28 The State submits, therefore, that there is no basis for this Court to grant the defense
motion to dismiss on the grounds that there was a violation of double jeopardy.

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1 MR. MITCHELL: Well, the point is the court has heard
2 the testimony and the witnesses have not said that ACS did not
3 do work. No witness has said that. They haven't even
4 approached that. The whole point of any reference to the
5 number of ACS employees on site has been to rebut the point
6 being made by the defense that they had so much initial cash
7 invested into this that -- that the only fair way to make up
8 for that initial cash investment would be to make the contract
9 favorable to them. So we're trying to show that the cash
10 investment up front of ACS was not as great as the defense
11 witnesses are saying it was.

12 And you heard the defense witnesses, that number just
13 keeps flying upward. Now's it up to -- it's in the 40s of
14 people that were working on this ACS due diligence and then
15 working full time on this contract.

16 So the only reference to numbers of people and amount
17 of work has been to rebut that defense point. But no witness
18 has said -- and I challenge the court or -- well, not the
19 court, but I challenge Counsel to back up his assertion that I
20 said in opening statement that ACS did no work. I did not make
21 that point and we have not made that point. We can't --

22 THE COURT: Well, you've alleged here in count one
23 ACS was hired for collection work already being performed by an
24 agency of Clark County.

25 MR. MITCHELL: Correct.

1 THE COURT: And also --

2 MR. MITCHELL: Correct. Which is --

3 THE COURT: And it says also for -- and could not
4 terminate the contract for a period of time regardless of
5 whether Superior Consulting or ACS was successfully increasing
6 the collection of University Medical Center's debt.

7 MR. MITCHELL: Exactly.

8 THE COURT: Don't some of these documents show these
9 various meetings, they were taking action to increase the
10 collections.

11 MR. MITCHELL: But -- but they were not succeeding
12 and the -- the contract married --

13 THE COURT: Yeah, but why are these -- are they being
14 withheld from the defense?

15 MR. MITCHELL: They're not, Judge. They have them.
16 They -- they proffered that exhibit and it's coming in and the
17 court has ruled that it's coming. They've had it, they're the
18 ones that provided it to us in the first place and the police
19 didn't give it to the DAs because they didn't think it was
20 relevant. They didn't think ACS had done anything wrong.

21 So what have we done wrong here? We got this from
22 the defense. They had it all along. Nothing's been withheld.
23 And it -- it doesn't bear on the point that we're alleging.

24 We're -- like I said, we're -- we're saying that when
25 you enter into a contract that doesn't allow -- doesn't allow

1 the hospital to get out and forces the hospital to pay money on
2 the contract, which is what all the evidence has shown, it's
3 been directed to that point, not to the quantity of work.

4 In fact, the State's witnesses have established all
5 the meeting with Ross Fidler and -- and other ACS personnel.
6 We've made it clear that ACS is on site working.

7 MR. ALBREGTS: I --

8 MR. MITCHELL: And for Counsel to talk about gall and
9 -- and always demagog these issues as if we're guilty of some
10 gross misconduct, it's offensive to me. I mean, we haven't
11 done anything wrong. We have -- we have plead the case and --
12 and presented evidence in a consistent manner to show the
13 unfavorability of the contract, not the body of work. And
14 we've withheld no evidence.

15 MR. ALBREGTS: Your Honor, you've -- you've listened
16 to the evidence. You know, you've been here for ten days, too.
17 I mean, you -- I'll let your memory guide your decision, but,
18 you know, I don't know how he can stand up with a straight face
19 and say that that hasn't been a part of the theme in their
20 case. I got this by the grace of Don Campbell.

21 THE COURT: When -- when did you receive those
22 documents?

23 MR. ALBREGTS: At the beginning of this week when I
24 pre-tried my witnesses. And of course, they're represented so
25 I had to pre-try with Mr. Campbell. And when Mr. Campbell and

1 I privately before the pretrial were discussing the case and
2 discussing my defense and discussing what the prosecution was
3 saying, he said, wait a minute, don't -- haven't you seen these
4 things? And I said, seen what? And he said there's minutes
5 and there's presentations. He said, I got boxes of stuff. So
6 he -- he didn't have to do this.

7 We went back to his -- this is Monday night at 8:30
8 at a hotel where we're meeting pre-trying witnesses and he goes
9 back to his office and starts digging this stuff up. And the
10 next Tuesday I come back and this is after trial and it's
11 sitting on my desk.

12 And I start going through it. And this is all as
13 we're hearing testimony that ACS -- I mean, you heard -- you
14 heard two or three of these witnesses. I don't have my witness
15 notes, but I'll guarantee you what they were saying ACS, we
16 hardly ever saw any -- maybe one or two people.

17 I mean, and the numbers haven't gone up, Judge. The
18 numbers are what the number -- witnesses testified yesterday.
19 They've been the same since the testimony. So to
20 mischaracterize and say oh, they've been going up, they've been
21 going up. They've been going up because the UMC witnesses
22 said, I only saw one or two there.

23 MR. MITCHELL: They haven't said one or two.

24 THE COURT: Hang on, one at a time.

25 MR. MITCHELL: Nobody has said --

1 THE COURT: One at a time. One at a time.

2 MR. ALBREGTS: Well, that's why I say let your memory
3 be the guide. But this clearly needs to come in, and I also
4 need to make a for the record about the accomplishments list as
5 well.

6 THE COURT: Well, I've already said the -- those two
7 exhibits are coming in. The one stop committee meeting minutes
8 and the steering committee meeting minutes. I already said
9 that yesterday.

10 MR. ALBREGTS: There's two other things in there.
11 One is the graph of the cash receipts and that --

12 THE COURT: I haven't seen them. I mean, that hasn't
13 really been brought to my attention.

14 MR. ALBREGTS: Well, it's -- as I said, it's this.
15 And it's one page and it's simply, you know, if that's not a
16 business record, I don't know what a business record is.

17 MR. MITCHELL: And we haven't contended that it
18 isn't.

19 MR. ALBREGTS: So I would presume that will come in.

20 THE COURT: This is created by whom? By --

21 MR. ALBREGTS: By Mr. Fidler. It was generated
22 during the course of their work to see how the cash was --
23 there -- if you remember, Judge, it's that cash that comes in
24 literally dollars at a time as people are paying co-pays or as
25 people are paying for treatments that are elective that might

1 be covering by insurance.

2 THE COURT: When was this created or generated?

3 MR. ALBREGTS: My belief is contemporaneous with the
4 work they were doing at the hospital at the time. I don't know
5 if there's a date on that. Sometimes there's a date.

6 THE COURT: I don't see a date.

7 MR. ALBREGTS: And I can ask Mr. Fidler that when
8 he's back on the witness stand.

9 THE COURT: And you believe that he would have
10 provided this to UMC during some presentation?

11 MR. ALBREGTS: Yeah. I would presume during these
12 meetings. And I don't recall if he talked about that yesterday
13 when he testified.

14 THE COURT: What -- what else are you seeking to
15 admit?

16 MR. ALBREGTS: And I'm seeking to introduce the list
17 of accomplishments and here's why. In doing a little really
18 Hornbook research and I'd have to log my colleague, Mr.
19 Campbell, for helping me on this issue.

20 You know, the rationale for the business records
21 exception, Judge, is -- is the motive of a business to be
22 accurate with the records. It's a lot like when you talk to
23 your doctor, that hearsay exception. The law recognizes that
24 there's truth in those statements and that's why there's an
25 exception.

1 The regularity of the business practice breeds habits
2 of precision. There's usually systematic checking on the
3 business records. And so business records have long been an
4 exception to a hearsay rule. Judge, there's all sorts of cases
5 that give example of what business records are. Bless you.
6 For instance, as we talked about minutes of -- of corporate
7 meetings are forms of business records.

8 There's -- I mean, there's cases that say notes from
9 meetings can be business records. There's a case out of the
10 Eighth Circuit that says a baggage tag could be a business
11 record.

12 And so he testified that there was what Jerry Carroll
13 termed an audit on the ACS contract. And as a part of that
14 audit, there were allegations that ACS wasn't doing any work,
15 they weren't getting any bang for their buck, they were
16 recreating work that could have been done by UMC.

17 And as a result of that, in the regular course of
18 business, Mr. Fidler said to his staff, all right, everybody,
19 we're going challenged on what we're doing, everybody come
20 together and tell me in all the different departments where the
21 improvements and the accomplishments that we've made. And that
22 staff put together that list of accomplishments. That's why
23 when he testified yesterday that he didn't necessarily have
24 expertise on every area, that's because in other areas people
25 were providing him that information.

1 And so it was clearly created as a business record
2 during the ordinary course of business to refute Mr. Carroll's
3 audit. And you heard Mr. Carroll's testimony. He said to me,
4 "Well, we could -- we could show a couple accomplishments that
5 -- that I could prove, but we listed the ones on the back in
6 their response because, you know, I couldn't prove that those
7 were accomplishments or not." We now heard that never went out
8 and asked anybody about it. That it really brings into
9 question whether it was an audit.

10 And I think clearly to rebut his testimony we have
11 the right to throw that in as a business record and the DA can
12 argue that that's no better than Carroll or whatever they want
13 to argue in terms of the credibility of, but as to the
14 admissibility of it, it should come in.

15 If the court's not going to let it in, I would ask
16 that it be made as a -- as a defense proffered and rejected for
17 the purposes of appeal and --

18 THE COURT: Any other items?

19 MR. ALBREGTS: No, that's the only other four --
20 that's the four things that are in that binder. And if I could
21 take that chart so I can close the binder, unless you need it,
22 Judge.

23 THE COURT: So it's the chart and what was the other
24 item, just so we're clear.

25 MR. ALBREGTS: The list of -- there's the chart --

1 THE COURT: Oh, that list there, okay, sort of a
2 summary list.

3 MR. ALBREGTS: Right.

4 MR. MITCHELL: Your Honor, in response to that
5 argument. By his own admission and by his own argument, Mr.
6 Albregts has just showed the court why that can't come in
7 because a business record to come in has to be a -- and -- a
8 record of the regularly conducted activity of the business.

9 And Mr. Albregts acknowledged in his argument that
10 this was done on a one-time basis to respond to an audit by
11 Jerry Carroll. It's not a regularly conducted activity of the
12 business to keep track of the claimed accomplishments of the
13 employees.

14 Plus, it's hearsay upon hearsay. It's -- it is
15 completely immune from any cross-examination because this is
16 the claims of nameless people that I don't identify by look
17 being at this list of accomplishments. I have no way of
18 probing the variety of anything being claimed there.

19 So for those two reasons, we would argue that that's
20 not admissible.

21 THE COURT: Mr. Albregts, on the issue of the list of
22 accomplishments, that's -- I'm more concerned about that one
23 right now. As far as we did all these -- I think you said it's
24 eight to ten pages?

25 MR. ALBREGTS: Yeah.

1 THE COURT: Why that a business record? Wasn't that
2 created -- I mean, I'm not -- I'm not clear on -- is that
3 created just for this litigation? Was it created --

4 MR. ALBREGTS: No, it was created in response to the
5 audit that Jerry Carroll testified about into ACS. Mr. Fidler
6 testified that they were notified clearly on direct yesterday,
7 he said, "We were notified that the auditor was doing on audit
8 on our work, and so we wanted to respond to the audit on our
9 work and everybody got together and said this is the stuff
10 we're doing, these are the accomplishments."

11 I mean, it's not something that I'm bringing in just
12 to bring in because they're -- you know, we're showing -- I
13 mean, this was questioned by the county's own auditor who the
14 State is relying onto say this is a bad contract. That's why
15 it's criminal.

16 MR. MITCHELL: None of this --

17 MR. ALBREGTS: So -- so we certainly have are a right
18 to rebut the claim that ACS didn't accomplish anything, didn't
19 do anything, and that's why it's a bad contract that somehow
20 rises to the level of a criminal act.

21 MR. MITCHELL: Judge, I don't think it's true that
22 the county was questioning the list of accomplishments. They
23 were looking at the dollars and cents. They were looking at --

24 THE COURT: Well, you want it to make sure you're
25 getting the bang for your buck, I mean, to put it bluntly.

1 MR. ALBREGTS: It's all tied together.

2 MR. MITCHELL: Well --

3 MR. ALBREGTS: There's no way you can divorce that.

4 MR. MITCHELL: The county --

5 THE COURT: Now, was this -- this list, as you call
6 it, list of accomplishments, was that turned over to UMC or is
7 that just a compilation --

8 MR. ALBREGTS: No, that --

9 THE COURT: -- of the things.

10 MR. ALBREGTS: That -- that was turned over -- that
11 was turned over to Jerry Carroll. And he acknowledged on the
12 witness stand that he received a list of accomplishments, but
13 he could only confirm two or three and that's why he only put
14 two or three in the body of his report.

15 THE COURT: Mr. Mitchell or Mr. Staudaher.

16 MR. MITCHELL: Well --

17 THE COURT: Well, my main concern -- I'm going to
18 tell you, my main concern here is why -- why some -- the things
19 in the binder weren't turned over. And I'm not saying there
20 was any evil motive by either one of you gentlemen. Scott, I
21 think we started in the DA's Office together.

22 MR. MITCHELL: Well, not quite.

23 THE COURT: So I've never had -- I don't think you
24 have a reputation.

25 MR. MITCHELL: Thank you.

1 THE COURT: But -- and whether it was a snafu with
2 Metro, one of the detectives, but it appears the detective had
3 all that information and you're -- and what I'm hearing from
4 you is well, he determined it wasn't relevant to this. Any
5 time -- if -- the whole issue is they didn't do any work or --
6 or they did --

7 MR. STAUDAHER: No.

8 THE COURT: -- such little work and they were
9 overpaid.

10 MR. STAUDAHER: No, that's not the contention at all,
11 your Honor. You keep going to that, but it is not --

12 THE COURT: Well, here it is. I'm reading it right
13 here.

14 MR. STAUDAHER: -- in that issue.

15 THE COURT: It says Page 2 that, referring to ACS, "A
16 contract to collect money owed to UMC under contracts returned
17 grossly unfavorable to UMC."

18 MR. STAUDAHER: That's correct. That has nothing to
19 do with the --

20 THE COURT: Well, if it's grossly unfavorable, it
21 means you're doing a \$10 job --

22 MR. STAUDAHER: No.

23 THE COURT: -- for a hundred dollars.

24 MR. STAUDAHER: The grossly unfavorable --

25 MR. MITCHELL: No, it's the terms of the contract

1 (indiscernible).

2 MR. STAUDAHER: The grossly unfavorable in this case,
3 I mean, just look at what happened with the administrative
4 clarification. It's a clear example. You've got -- you've got
5 a contract with a baseline, however it was set, at twenty-nine
6 and a half million dollars.

7 The administrative clarification, which does not have
8 to go before the board changes materially the contract to add
9 in funds that were explicitly excluded from the contract. That
10 by itself raised the baseline, or would have raised the
11 baseline artificially to 33 -- \$34,000,000, according to Mr.
12 Carroll.

13 That would have meant that those -- under those terms
14 of the administrative clarification that Mr. Thomas entered
15 into, just that issue would have allowed ACS to collect on
16 amounts above twenty-nine and a half million dollars, which we
17 know, if they add the terms in, are going to give them up to 33
18 -- \$34,000,000.

19 They would have gotten 25 percent of that amount.
20 Paying millions of dollars to them is grossly unfavorable to
21 UMC. Especially since the explicit terms of the contract that
22 Superior itself proffered and wrot,e, clearly excluded those
23 funds. That whole process is the gross unfavorability of how
24 the contract was proffered and administered by Mr. Thomas, by
25 his direct hand.

1 That is the basis of the allegation in that
2 particular count. There is not a single allegation that says
3 that they did no work, or that they did little work in that
4 particular count. There is an allegation that --

5 THE COURT: Well, saying it's grossly unfavorable --

6 MR. STAUDAHER: Yes.

7 THE COURT: -- means you're paying a hundred dollars
8 for a \$10 job.

9 MR. STAUDAHER: No.

10 MR. MITCHELL: No, no.

11 MR. STAUDAHER: It did not mean that. I --

12 THE COURT: What's grossly unfavorable? What --
13 what's --

14 MR. STAUDAHER: What grossly unfavorable is just what
15 I said, that all of a sudden under the contract they're able to
16 count certain amounts of money to get to a baseline. Anything
17 above the baseline they get 25 percent. So if they can bring
18 in through an administrative clarification something that
19 alters that contract and allows that baseline to be
20 artificially breached because they now get to count additional
21 money, that is clearly unfavorable, at least the State argues
22 and believes that that's unfavorable to the county because the
23 county now is going to have to pay a couple of million dollars
24 in commissions to ACS, where they would not have had the
25 contract been administered even under its original terms.

1 That what happened subsequent to the entering of the
2 contract is what's at issue here. The administrative
3 clarification is one issue. Then the amendments that follow
4 are others. The fact that there was no termination clause and
5 how much money would have to be attained before the termination
6 could occur, even in that situation are all terms that are
7 grossly unfavorable to UMC that were negotiated by UMC, and Mr.
8 Thomas who was involved with that, we allege, and that those
9 terms by themselves are what we're terming grossly unfavorable.

10 Not that because -- or that because ACS did a \$10 job
11 instead of a hundred dollar job. That somehow or another there
12 are number of employees or the amount of work is involved.
13 None of that is alleged. None of that is contained in the
14 Information and -- or excuse me, the Indictment and we have not
15 argued that.

16 MR. ALBREGTS: Judge, they've elicited testimony
17 again and again about the lack of effort and work ACS was
18 performing.

19 MR. STAUDAHER: Not true.

20 THE COURT: No, one at a time, please.

21 MR. MITCHELL: I apologize.

22 MR. ALBREGTS: Just taking a cooling off for a
23 second.

24 THE COURT: All right.

25 MR. ALBREGTS: They've alleged time and again through

1 witnesses that ACS is not doing any work and that's part and
2 parcel of their argument. What I hear now is a change in the
3 argument, that the terms were grossly unfavorable.

4 And then they argue, Judge, oh, well, there was this
5 administrative amendment and it could have cost the county
6 millions. Well, the evidence is uncontroverted that it didn't.
7 It didn't even come close to going through. It was immediately
8 pulled. And then they said that there's all sorts of
9 amendments to the contract that UMC negotiated that Lacey
10 Thomas was involved with.

11 Well, the evidence is uncontroverted that other
12 people were involved in the negotiation of the contract as
13 well. That other people suggested things like the termination
14 clause, baseline adjustments, adding the \$25,000 flat fee.
15 None of those people are charged. And all of those contracts
16 were proved by their office, yet, they want to say oh, our
17 office doesn't approve only for form -- I mean, I sit and
18 listen and think am I the only one hearing this going around in
19 a circle? I mean, where is the criminal activity if it isn't
20 because ACS wasn't doing work?

21 And as the court completely and correctly
22 characterized, a hundred dollar contract for \$10 -- \$10 work.
23 I -- it just --

24 MR. MITCHELL: If Mr. -- oh, I'm sorry, are you done?
25 I'm -- if not, I'll -- I'll wait.

1 MR. ALBREGTS: Well, and I guess at this stage I'm --
2 I'm not sure what we're arguing about, because the court's
3 already ruled two or three of that comes in, and the question
4 becomes whether the fourth comes in.

5 And I say again, that I've got the report that full
6 Carroll cited. It's got an appendix that has a couple six
7 lists of things and it goes to -- to rebut his claim that
8 that's all there was that wasn't substantiated that shows that
9 that's what there was and it was substantiated.

10 And it also rebuts the claims of all of their
11 witnesses who were saying ACS wasn't doing anything, ACS wasn't
12 doing anything. And, you know, I could go back and get my
13 trial notes, but I tell you, Walsh, Clayburn (phonetic) or
14 Claypool, George Stevens, there was the woman --

15 THE DEFENDANT: (Indiscernible).

16 MR. ALBREGTS: No, not her. It was the other one.

17 THE DEFENDANT: (Indiscernible).

18 MR. ALBREGTS: Yeah, Virginia Carr. I mean, all of
19 these people testified along those lines.

20 MR. MITCHELL: Judge, I challenge Mr. Albregts to
21 point to any specific testimony by any witness that ACS wasn't
22 doing work. That -- it's not in the record and if it --

23 THE COURT: Yeah, I mean, but isn't your theory that
24 they did ten cents of work and they got paid a dollar?

25 MR. STAUDAHHER: No.

1 MR. MITCHELL: No.

2 MR. ALBREGTS: Not anymore.

3 MR. MITCHELL: It's not. I've said --

4 THE COURT: Well --

5 MR. MITCHELL: We've said over again, that is not our
6 theory. And in fact, if you look at the whole context of this
7 case, there is no company that Mr. -- that Mr. Thomas
8 contracted with charged here. Because my charging decision in
9 the beginning was that you can expect that a company that's in
10 the business of making money is going to enter into a contract
11 that is favorable to it and they're going to try it to make
12 money off the contract.

13 You can't charge somebody criminally for -- for
14 trying to make money when they're in the business of making
15 money. So we're not alleging ACS did anything wrong. We
16 honestly are not alleging that ACS did anything wrong. But
17 when we start hearing --

18 THE COURT: Well, you've alleged here that ACS was
19 doing work that other people were already performing.

20 MR. MITCHELL: That is true.

21 THE COURT: That sounds wrong to me.

22 MR. MITCHELL: ACS is admitting that. They -- they
23 -- they were coming in to oversee work that's already been done
24 an make it for efficient. That -- that that is -- that's
25 absolutely true and ACS -- well, Mr. Thomas does not contend

1 otherwise. That -- that was the --

2 MR. ALBREGTS: That's not true at all.

3 MR. MITCHELL: Well --

4 MR. ALBREGTS: Mr. Thomas completely contends
5 otherwis,e, because the reason ACS was doing the work is
6 because UMC wasn't. They -- they weren't capable, they
7 wouldn't do it and they wouldn't make the changes necessary,
8 and that's what ACS was doing. That's what Fidler and Mills
9 testified to.

10 MR. MITCHELL: And this --

11 MR. ALBREGTS: They testified to the fact that they
12 couldn't even get them to do it during the course of their
13 work.

14 THE COURT: Well, the issue is that these documents
15 are related to this case. I mean, that -- no one -- I mean, no
16 one's going to convince otherwise. They're related to this
17 case.

18 MR. MITCHELL: They are related to the case --

19 THE COURT: And --

20 MR. MITCHELL: -- peripherally.

21 THE COURT: -- whether directly peripheral. It's not
22 up to Metro to decide whether or not to turn them over to you,
23 or to Mr. Albregts. That's for a court to decide. But he
24 needs to turn them over to you, and then under discovery you
25 turn them over to Mr. Albregts.

1 And if there -- I mean, it's not so far fetched to
2 say that these documents could no way assist the defense in
3 presenting their case. And if there's a possibility that they
4 could assist in their defense, they should have been turned
5 over.

6 It's not for the DA -- and it's just -- I don't --
7 I'm not saying you were trying to hold the ball, Mr. Mitchell,
8 either as Metro or -- or someone else. Again, maybe it's -- I
9 don't know if it's innocent. Hopefully it wasn't intentional,
10 but the bottom line is, they apparently weren't turned over to
11 you --

12 MR. MITCHELL: Correct.

13 THE COURT: -- which in turn they weren't turned over
14 to Mr. -- Mr. Albregts. And as you know, one piece of evidence
15 can lead ten different directions. Obviously, that's what
16 Metro calls leads. You get one lead and it can lead you
17 someplace else.

18 MR. MITCHELL: I -- I understand, Judge. I just
19 think that the court needs to remember that the records came
20 from the defense.

21 THE COURT: Well --

22 MR. MITCHELL: They --

23 THE COURT: -- he got them Monday of this week and
24 they've been in existence since February 6th, 2007.

25 MR. MITCHELL: And he is now able to introduce them,

1 because he had more notice of them than we did. So, I mean, I
2 -- I don't see him suffering any harm because now he gets to
3 proffer them and the court has ruled that they're coming in.

4 If the court wants to bring Metro in here and scold
5 them for their decision to not give them to us, I -- you know,
6 that's -- that's a peripheral matter. But I -- I think as far
7 as the evidence is concerned in this trial, since they're
8 coming in, I perceive that the defense has suffered no
9 prejudice here. In fact, they're getting to use these things
10 that we haven't seen until now, so.

11 MR. ALBREGTS: Your Honor, I think --

12 THE COURT: Well -- well, hang on. If Mr. Albregts
13 received these, assuming this last Monday --

14 MR. ALBREGTS: Tuesday.

15 THE COURT: Tuesday.

16 MR. ALBREGTS: I learned about them Monday.

17 THE COURT: Okay.

18 MR. ALBREGTS: Received them Tuesday.

19 THE COURT: All right. So three days ago, four days
20 ago. How can I say, how can you say that perhaps his trial
21 strategy might not have changed in some direction, that his
22 opening statement may have been changed in some direction, that
23 this evidence couldn't have led to other witnesses or led to
24 other evidence in.

25 MR. MITCHELL: Well, Judge the way I --

1 THE COURT: I mean, how -- how can I be sure of that?
2 How can you be sure of that?

3 Well, the way I can be sure of it is because I heard
4 his opening statement, and he said exactly what those records
5 are being offered to prove. He said that what the State has
6 accused Mr. Thomas of is completely false, that -- that ACS did
7 work, that all the other entities that we've mentioned in our
8 Indictment that they did work, that the contracts made sense to
9 enter into them.

10 And -- and the defense has been consistently the same
11 throughout and so what this -- what these records purport to
12 prove is exactly very same thing that Mr. Albregts already said
13 in his opening statement. And Mr. Albregts has not made the
14 allegation here, that these provide anything different than
15 what he's been contending all along.

16 THE COURT: Yeah, but could -- how could he have
17 confronted all the witnesses that testified the first week with
18 documents that he didn't have?

19 MR. ALBREGTS: Your Honor, that's just -- that's
20 exactly the point.

21 MR. MITCHELL: No.

22 MR. ALBREGTS: And -- and, you know, had I had those
23 -- I mean, those documents came up because Mr. Campbell and I
24 were discussing what the witnesses were saying about ACS.
25 Before we were pre-trying these witnesses, he -- he was asking

1 me about the case and about the witnesses, and I was saying,
2 well they're coming in. You know, they're saying that ACS
3 wasn't doing anything, that, you know -- and that's where he
4 said I've got this information.

5 So of course, my opening was a generic denial that
6 ACS was doing the work and -- and trying to do the work and the
7 revenue and everything else.

8 But I would have loved to cross-examine Virginia
9 Carr. I would have loved to are cross-examined Jerry Carroll.
10 I would have loved to have are cross-examined Walsh and
11 Claypool and all the people that said that this was a horrible
12 contract and these people didn't know what they were doing or
13 we can do it better, and I couldn't.

14 And I am going to make a motion to dismiss the case
15 based upon Metro not turning this over. There's a 9th Circuit
16 case, I believe in the last year, on this very same issue,
17 where the investigating agency didn't turn the material over to
18 the prosecutor for whatever reason, and because the prosecutor
19 is impugned with the -- the Metro, and they are their agents,
20 they are required to do that.

21 And while I'm not casting dispersion on these two
22 prosecutors for doing something intentionally, their agent did
23 something intentionally. They decided that this wasn't
24 exculpatory.

25 And so I believe clearly I've been harmed. I would

1 have been able to cross-examine witnesses. And I don't know
2 that my theory would have changed because frankly, in the three
3 days I've had them or four days, I haven't had a chance to soak
4 it in.

5 THE COURT: Mr. Mitchell --

6 MR. ALBREGTS: That's -- let --

7 THE COURT: -- with documents that are -- I haven't
8 seen all of them in that binder there. Couldn't Mr. Albregts
9 have confronted Ms. Valentine with some of those documents
10 during cross-examination?

11 MR. MITCHELL: Of course, not Judge. She was not a
12 party to those meetings that those documents have to do with.
13 I mean, you couldn't confront Virginia Carr or Jerry Carroll or
14 any of those witnesses with those, because they weren't in
15 those meetings. They would have are no knowledge of the
16 meetings.

17 THE COURT: Well, couldn't he have asked were you --

18 MR. MITCHELL: And --

19 THE COURT: Maybe they did have knowledge. Couldn't
20 he have asked, "Ms. Valentine, were you aware that 27
21 recommendations were made by ACS?" "No, I wasn't aware."
22 "Have you seen these documents before?" "No, I haven't.

23 MR. MITCHELL: Judge -- Judge, Virginia Valentine
24 said --

25 THE COURT: I'm just using her as an example want.

1 MR. MITCHELL: She said nothing about ACS in her
2 testimony. She didn't -- I mean, she didn't say that they
3 didn't do work. She -- she made no mention of that. That was
4 not the gist of her -- nobody has said that, that -- and I
5 mean, I don't even know what we're arguing about here if --

6 THE COURT: We're arguing about that these weren't
7 turned over and Mr. -- by -- for the grace of God, Mr. Albregts
8 received these four days ago from Mr. Campbell. If Mr.
9 Campbell would have been on vacation, Mr. Albregts wouldn't
10 have these documents.

11 MR. ALBREGTS: And your Honor, can I point something
12 out?

13 MR. MITCHELL: Judge --

14 MR. ALBREGTS: I'm looking at meeting minutes July
15 15th. Attendees, Virginia Carr. July 19th, attendees,
16 Virginia Carr.

17 MR. MITCHELL: She testified to those meetings.
18 Those meetings she testified to.

19 MR. ALBREGTS: Virginia Carr.

20 THE COURT: If she testified to the meetings, Mr.
21 Albregts could have -- could have cross-examined her, "Well,
22 wasn't this stated in the meeting," did -- or "Did you say this
23 in the meeting?" Without knowledge of those documents, how
24 could he cross-examine her with that -- without that
25 information?

1 MR. MITCHELL: Judge, is Mr. Albregts contending --
2 and I want him to say on the record --

3 THE COURT: Well --

4 MR. MITCHELL: -- is he contending that there is an
5 exculpatory evidence in this -- in this -- any -- in any -- on
6 any page of that binder? And if so, would he point to it.

7 THE COURT: Well, the -- the issue is that could --
8 is it -- a, is it exculpatory or could it lead to exculpatory
9 evidence? As you know in a defense case, every inconsistency
10 that an attorney can prove with a witness, is a factor in their
11 favor.

12 MR. MITCHELL: Judge, it's like we're trying ACS
13 here. I mean, it's not exculpatory for Mr. --

14 THE COURT: No, I'm trying --

15 MR. MITCHELL: -- Thomas.

16 THE COURT: -- it should have been turned over. I'm
17 not saying you hid it in your -- in your back -- in your
18 drawer.

19 MR. MITCHELL: I know --

20 THE COURT: I'm saying that it wasn't -- Metro had
21 this, and I'm assuming because I've known you for a long time
22 and I would be shocked if you ever withheld anything.

23 MR. MITCHELL: I did not withhold it.

24 THE COURT: That's what I'm saying. I said I
25 would --

1 MR. MITCHELL: I understand.

2 THE COURT: -- be shocked. But what happened is,
3 Metro had these documents and didn't turn them over to you.
4 And you admit that.

5 MR. MITCHELL: I do admit that.

6 THE COURT: And as you know, evidence -- a piece of
7 evidence can lead to another piece of evidence. And that's the
8 issue. Whether or not there's a smoking gun here of -- that
9 Virginia Valentine did something sinister, is irrelevant,
10 because if evidence could lead to other exculpatory evidence,
11 that should have been turned over by Metro to you.

12 And I'm sure you, knowing you, would have turned that
13 over to Mr. Albregts. And -- and you don't know when a piece
14 of evidence could lead to other areas of inquiry by Mr.
15 Albregts in his investigation.

16 So it's not just where it points in one direction
17 that could lead to other areas of inquiry. It could lead to
18 change of trial tactics, I don't know. And that's my concern
19 is that, here we are in the second week of trial -- again, I'm
20 not saying you did anything sinister -- but they -- he did not
21 have these. And how do -- how can we guarantee that they
22 couldn't -- all those documents could not have led to other
23 questions by Mr. Albregts?

24 MR. MITCHELL: Well, Judge --

25 THE COURT: I mean, can you guarantee that?

1 MR. MITCHELL: No. What I can guarantee is that --
2 that he has suffered no prejudice because he can still bring
3 back anybody he wants and -- and cross-examine them on them
4 now. I mean, he can bring the issue, he can raise the issue,
5 he can argue the issue. And to make a motion to dismiss, we're
6 only talking about two counts in the indictment anyway. You
7 know, this has nothing to do with Crystal Communications, it
8 has nothing to do with Frazier, nothing to do with TBL, nothing
9 to do with Premiere Alliance.

10 But what is the -- I want him to say what is the --

11 THE COURT: Well --

12 MR. MITCHELL: -- issue that he's missed out on?

13 He's contending that -- that what? I mean --

14 THE COURT: The issue is they should have been turned
15 over, and I've been a prosecutor and defense attorney. As you
16 know, you can one piece of evidence and it can lead you in many
17 directions.

18 MR. MITCHELL: I acknowledge that, Judge. I -- but
19 remember they --

20 THE COURT: And if you found out that -- I can't even
21 think of an example, but if you found out that oh, my God, the
22 witness has testified for Mr. Lacy and low and behold Mr. Lacy
23 loaned a million dollars, well, that's something you would want
24 to know about.

25 MR. ALBREGTS: Your Honor, a couple other issues, if

1 I may. I haven't had the opportunity to look at that notebook
2 like I would preparing for trial. And I'd like to think that
3 in the ten days we've been in here the court -- you could say a
4 lot of things about me, but the one thing you couldn't say is
5 that I haven't looked at all the documents that I have, I
6 haven't studied them, I haven't used them.

7 This book as I even look at it cursory -- in a
8 cursory manner -- I am seeing things in there that might lead
9 to other investigation, it might lead to other issues. Things
10 that are discussed in the minutes of these meetings. I mean,
11 Mike Walsh is referenced in it. And just as I looked there for
12 a few minutes, Mike Walsh, others who were doing things with
13 ACS, interacting, is if there that might have led me to other
14 places.

15 Just as importantly, this is a grand jury issue.
16 When you read the grand jury transcripts, they are rife with
17 people alleging that it was a horrible contract, they weren't
18 doing anything, I don't even remember seeing anybody there.
19 This is exculpatory that should have been brought before the
20 grand jury.

21 We might not even have been here. And to say this
22 it's only two counts, it permeates the case. ACS was the
23 initial reason to begin the investigation, because they thought
24 Mr. Thomas flew on their corporate jet to the Bahamas and then
25 gave him a million dollar contract.

1 So it permeates everything in the case, and it goes
2 to the core of the beginning of the investigation through the
3 grand jury to now. And the only way, the only way Metro is
4 ever going to change this is for somebody to send them a
5 message. And your Honor, it would take huge courage, no
6 doubt --

7 MR. MITCHELL: Oh, --

8 MR. ALBREGTS: -- but --

9 MR. MITCHELL: This is an appeal to the --

10 THE COURT: Yeah.

11 MR. MITCHELL: -- emotions of the court. This is
12 improper.

13 THE COURT: I've -- I've been in practice 20
14 something years and --

15 MR. ALBREGTS: If I thought I could influence you --

16 THE COURT: Yeah.

17 MR. ALBREGTS: -- that way, I'd do it all the time.

18 MR. MITCHELL: Well --

19 MR. ALBREGTS: The fact of the matter is, Judge --

20 THE COURT: You can talk about a puppy and that's not
21 going to change my opinion, okay.

22 MR. ALBREGTS: But the fact of the matter is, Judge,
23 that's the only way the message is going to be received by
24 Metro, is for somebody to say you can't keep doing this.
25 You've got to give the stuff to the DAs, they are the lawyers,

1 they are the ones that make decisions under the case law and
2 what needs to be turned over.

3 And like you said, in my experience in recent years
4 most of the DAs will say, come over and look at everything I
5 got. But you know what, that doesn't do us any good if they
6 don't have everything. And so that's why I make my motion and
7 I agree --

8 THE COURT: And what's your -- your motion for
9 mistrial?

10 MR. ALBREGTS: Motion to dismiss, and in the
11 alternative a motion for a mistrial.

12 THE COURT: Okay.

13 MR. MITCHELL: Judge, it would be -- it would make
14 more sense if he was making a motion to dismiss counts one and
15 six, which deal with ACS.

16 MR. ALBREGTS: What if I find something in there that
17 -- that they're -- that they said, you know, IT, we need Greg
18 Boon who's really good at IT to come in here and work with our
19 billing systems? I mean, that could lead me on a whole other
20 -- because we know from the testimony already that it's all
21 intertwined. The IT and IS problems are directly related to
22 the computer -- or to the billing problems.

23 And so I don't know that I might find a minute in
24 there that says that Virginia Carr said that Greg Boon's doing
25 a great job, I'll go talk to him. I mean, I don't -- I haven't

1 had time to see if that's in there.

2 THE COURT: Mr. Mitchell, if we go to trial on the --
3 on a murder case and we charge someone killing with John Smith
4 and John Doe, and low and behold say, well, forget about John
5 Doe, we're only going to go forward on John Smith, isn't the
6 defense prejudiced? Because you have said now he committed
7 five acts of theft and plus, you know, the accompanying
8 charges of misconduct of a public officer. But we're only
9 going to go forward on two of them now.

10 Has the jury been prejudiced?

11 MR. MITCHELL: No, not in the least because --

12 THE COURT: I don't want to try this again.

13 MR. MITCHELL: Nor do I. No, Judge, I mean, I think
14 that -- I mean, I'm responding to a whole bunch of different
15 things at -- at one time right now.

16 THE COURT: Well, the key is I -- it wasn't turned
17 over.

18 MR. MITCHELL: Judge, it was turned over from them to
19 us to the -- when I say us, I mean the -- the -- the police. I
20 mean, it's -- it was -- it was stuff --

21 THE COURT: No, I heard Mr. Albregts say he received
22 this on Monday or Tuesday.

23 MR. MITCHELL: That's true. But -- but where did it
24 come from? It came from ACS, so ACS had it all along. And the
25 police got it from ACS. So --

1 THE COURT: Mr. Thomas is not ACS.

2 MR. MITCHELL: I --

3 THE COURT: The police -- the police --

4 MR. MITCHELL: And that's -- and that's my argument.

5 THE COURT: -- is the State of Nevada.

6 MR. MITCHELL: And that's my argument. If we were
7 trying ACS here, this -- this allegation would make sense. But
8 we're not trying ACS. We're not -- we're not even remotely
9 trying ACS. We're trying Mr. Thomas for what he did with
10 relationship to ACS, the way he dealt with them.

11 So this is exculpatory potentially, although Mr.
12 Albregts hasn't alleged anything in particular that's
13 exculpatory in there, but it's potentially exculpatory if ACS
14 is accused of something.

15 All the body of law that concerns exculpatory
16 evidence concerns evidence of the defendant being be not guilty
17 of something. But this doesn't show that the --

18 THE COURT: But it also says or could lead to other
19 evidence.

20 MR. MITCHELL: Right, and -- and if -- if that's the
21 claim here, then Mr. Albregts ought to be allowed to read
22 through that binder and say this leads me in some other
23 direction and I need to pursue this and, of course, we wouldn't
24 oppose that.

25 MR. ALBREGTS: So much time do I get to do that? Two

1 weeks? A month? I mean, it's substantially material. I mean,
2 that's another reason for -- for at the very least granting a
3 motion for mistrial so that I can take a look at this and
4 figure out how and what I might to with it.

5 This is the same thing that happened in November,
6 Judge. The same thing, where Mr. Staudaher and I are preparing
7 for trial and we both look at the reports and say, you know
8 what, there's gotta be something else here that we don't are
9 have.

10 And low and behold, Metro turns over 400, 500 pages
11 of transcripts of documents and guess what, three of those are
12 going to be witnesses of mine that I would have never known
13 about. And that's -- this is the same exact thing.

14 How many times are we going to do this? This is not
15 the administration of justice. This frustrates the courts, it
16 frustrates everything. And at the very least I ought to be
17 granted a mistrial, if the court's not inclined to dismiss.
18 And if I'm granted a mistrial, we can brief the issue of
19 dismissal.

20 MR. MITCHELL: Judge, well --

21 THE COURT: The last arguments I'm going to take it
22 under advisement. Go in my office for about 15 minutes.

23 MR. MITCHELL: Could I ask what the court is going to
24 take under advisement specifically?

25 THE COURT: He has a motion for a mistrial. And the

1 can't cross-examine. There's -- there's a whole bunch of
2 people talking, and now we're going to accept as true
3 everything everybody says in the meeting. That's -- that --
4 those are too specific. General records that the meeting was
5 held are perfectly admissible.

6 MR. ALBREGTS: Your Honor --

7 THE COURT: Well, then -- then every corporate
8 minutes would just be full of black marks of redaction because
9 during shareholders meetings --

10 MR. MITCHELL: Well, they certainly --

11 THE COURT: -- or Board of directors meetings people
12 are talking. They're discussing conjure, they're discussing
13 buying up another company.

14 MR. MITCHELL: Well --

15 THE COURT: So what would be left in the minutes?

16 MR. MITCHELL: -- they wouldn't even -- they wouldn't
17 be redacted because they couldn't be admitted in the first
18 place, because they would be -- they would be subject to the
19 same -- the same objection that I'm making here. So you would
20 have to have people that were in the meeting taking the witness
21 stand and -- and swearing under oath that what they said was
22 true, or what they said is true.

23 So business records couldn't be used for that
24 purpose.

25 THE COURT: Mr. Albregts.

1 MR. ALBREGTS: Your Honor, business records are
2 Hornbook (phonetic) law quintessential -- or corporate minutes
3 are Hornbook law, quintessential business records, just like
4 the Court acknowledged. And they're rife with hearsay.
5 They're Board of directors talking about things, you know,
6 arguing, discussing whatever. And they come in. You're mixing
7 -- he's mixing up rules and -- and policy considerations behind
8 these rules of evidence.

9 If it's a business record and the foundation is laid,
10 it comes in. It's not hearsay by rule for hundreds of years --

11 MR. MITCHELL: No, Judge --

12 MR. ALBREGTS: -- of jurisprudence.

13 MR. MITCHELL: -- let me give a good example. Let's
14 say in this --

15 THE COURT: Make it your best one, because I'm
16 about --

17 MR. MITCHELL: Okay.

18 THE COURT: -- to rule on this.

19 MR. MITCHELL: All right.

20 MR. ALBREGTS: Thank you.

21 MR. MITCHELL: Okay. Will the Court -- will the
22 Court look through the binder before it -- before it rules? I
23 -- I just request that.

24 THE COURT: I'm only -- we're only talking about
25 minutes right now.

1 MR. MITCHELL: Okay.

2 THE COURT: Just two sets of minutes.

3 MR. MITCHELL: All right. All right. Okay.

4 THE COURT: Which are item two of the letter and
5 item --

6 MR. MITCHELL: Okay.

7 THE COURT: -- one of the letter.

8 MR. MITCHELL: Let's suppose that the business
9 records contain a statement by somebody in a meeting that Joe
10 Blow raped Suzie Harris, and that comes in because somebody
11 wrote down that somebody said that, that Joe Blow raped Suzie
12 Harris.

13 Well, now we've got in evidence a statement made in a
14 meeting unsworn to, uncross-examinable, and now it's before the
15 jury just because it was said in a meeting where a record was
16 kept.

17 That is -- that's the basis of my objection here.
18 That is not subject to cross-examination. But if it says
19 various topics were discussed, including Joe Blow's
20 relationship with Suzie Harris, now I have no objection,
21 because that is a valid way to keep a record of something and
22 it doesn't assert a fact that is subject to any
23 cross-examination.

24 I mean, I -- it's -- it's -- it's an okay fact. If
25 is a way of keeping records. But you can't extend the business

1 records exception to actually prove the matter that's actually
2 said, only that it was said.

3 THE COURT: That's -- all right, Mr. Albregts,
4 anything further?

5 MR. ALBREGTS: No. Your Honor, I want to make clear,
6 though, on something just so -- so you know. The one section
7 were contemporaneous Power Point presentation that were
8 presented to the steering committee. So I -- I, you know, I
9 want to (indiscernible).

10 THE COURT: I'm sorry, say that again.

11 MR. ALBREGTS: They're Power Point presentations that
12 were presented to the steering committee during the course of
13 those meetings. So they were records contemporaneously created
14 for the purposes of showing the steering committee what they
15 were doing on a weekly basis.

16 THE COURT: Similar to the Power Points in the IT
17 department?

18 MR. ALBREGTS: Yes.

19 THE COURT: That were admitted into evidence?

20 MR. ALBREGTS: Yes. And I would point out, Judge,
21 that the theme of the prosecution in this case has been and
22 continues to be the lack of deliverables in written form,
23 thereby evidencing no work being done by the consultant, so.

24 MR. MITCHELL: That isn't our allegation in count one
25 or count six, though, that pertain to ACS.

1 THE COURT: Well, I -- I think under the business
2 record exception, the minutes are coming in, which are items
3 one and two. I don't really -- I'm not -- I don't know what
4 three, four and five are, so I can't --

5 MR. ALBREGTS: They're not there. That's --

6 THE COURT: No, on here.

7 MR. ALBREGTS: -- just the --

8 THE COURT: So this is just the letter. Okay, that's
9 it.

10 MR. ALBREGTS: That's just the letter --

11 THE COURT: Okay.

12 MR. ALBREGTS: -- evidencing among other things --

13 THE COURT: Okay.

14 MR. ALBREGTS: -- that's what was provided.

15 THE COURT: And Mr. Mitchell, I don't -- I think I
16 would -- I'm assuming that you're going to have a very he cursh
17 (phonetic) phone call with Detective Whiteley tonight when you
18 leave to say, "Why in the hell didn't you giving me all these
19 documents that you've had for three years." I don't mean to
20 swear, but, I mean, that's what I would probably do if I was a
21 DA like -- there's 400 or 5, 600 documents here. Why didn't
22 you turn these over to me?

23 MR. MITCHELL: Well --

24 THE COURT: Or, is Mr. Campbell lying and you didn't
25 get these?

1 MR. MITCHELL: No, I assume that Mr. Campbell is
2 telling the complete truth, Judge. But I think I can also
3 answer for Mr. Whiteley, that those wouldn't have been turned
4 over because they were deemed irrelevant. And I -- I -- I do
5 deem them to be irrelevant, too. I think that --

6 THE COURT: Well, are they turned over to the
7 defense?

8 MR. ALBREGTS: That's funny. I deem them
9 exculpatory.

10 THE COURT: Okay. So did you get these, just so I --
11 did you get these from Mr. Whiteley?

12 MR. MITCHELL: No, I've never seen them. I --

13 THE COURT: Not this letter, but did you get these
14 documents from Mr. Whiteley?

15 MR. MITCHELL: Judge, I -- I did not. Whether or not
16 Metro has them, I honestly do not know. I have -- I have never
17 seen those. I have never heard of their existence. Mr.
18 Staudaher I don't think knows any more than I do want.

19 MR. STAUDAHER: I don't -- I don't know whether we
20 have gotten them or not, Your Honor. I can't say one way or
21 the other. I --

22 THE COURT: And it seems to me -- I mean, these could
23 be --

24 MR. STAUDAHER: They don't look familiar to me.

25 THE COURT: -- exculpatory. I mean, if -- if these

1 weren't -- these didn't come in on the civil action, these
2 could be -- the minutes could be -- I mean, what's information
3 that could be gathered from the minutes could lead to
4 exculpatory evidence. And seems to me that Mr. -- Detective
5 Whiteley would be under duty --

6 MR. STAUDAHER: If --

7 THE COURT: -- to turn these over to you.

8 MR. STAUDAHER: The information we got that we --
9 that we -- we recently got was when we were preparing the case,
10 we had Detective Whiteley bring over the stuff from Metro that
11 he had. Contained in four boxes. Counsel and I met in a room.
12 We were -- there was basically a legend of each one of those
13 items. Now, if they're individual items within that binder
14 that were contained within those four boxes --

15 THE COURT: No, about the minutes? Let's just deal
16 with minutes.

17 MR. STAUDAHER: I don't know for sure. I haven't --

18 THE COURT: Because the minutes are going to --

19 MR. STAUDAHER: -- gone back to look at
20 (indiscernible).

21 THE COURT: -- say, I'm assuming, Ross Fidler's going
22 to say, I was there, and Joe and Fred and Mary and someone else
23 from the IT department, someone else from the billing
24 department was there, which could be witnesses this Mr.
25 Albregts could call in this case, could go out and interview,

1 could provide exculpatory evidence.

2 And you're saying that you don't know that Detective
3 Whiteley gave you these minutes. But for the grace of God,
4 they came out in this it civil case. But I'm very concerned
5 that a detective with Metro received minutes regarding this
6 case, regarding alleged work that was or was not performed, and
7 you don't have them, and they weren't turned over to Mr.
8 Albregts.

9 MR. STAUDAHER: The only way I can -- and I -- I want
10 to address that issue, Your Honor. The only way I'll be able
11 to determine that is if I had -- if I knew exactly what was
12 contained in that binder.

13 THE COURT: Well, we're talking about the minutes.

14 MR. STAUDAHER: Okay.

15 THE COURT: That's all I'm talking about.

16 MR. STAUDAHER: The minutes.

17 THE COURT: Did you guys get a stack of steering
18 committee meeting minutes and one stop committee meeting
19 minutes?

20 MR. STAUDAHER: I -- I do not know at this point. I
21 could go back and look at the legends of each one of the boxes
22 that was contained that Metro brought over. I -- I wasn't
23 looking for that item specifically. It doesn't come to mind as
24 an item that we've received or that was contained in the
25 materials, so I don't know. We can't answer that question.

1 THE COURT: Because we've had testimony about
2 steering committee meetings, right?

3 MR. STAUDAHER: I don't know that -- in our case.

4 THE COURT: No, I think there was -- no, we've had
5 testimony of steering committee meetings. We've had testimony
6 that we've had meetings, we met once a week, or every two weeks
7 and we called all these people in.

8 MR. MITCHELL: Just now. I -- just now. I don't
9 think it's come in before now.

10 THE COURT: No, I thought one of the other witnesses
11 did talk about there was some meetings at --

12 MR. STAUDAHER: Well, meetings, yeah.

13 THE COURT: -- that were called.

14 MR. STAUDAHER: There's been meeting testimony, but
15 we don't know what kind of meetings and there's -- I don't
16 recall the names steering committee meetings.

17 MR. ALBREGTS: I believe Virginia Carr and Mike Walsh
18 and Blaine Claypool. I mean, I would have to go back and look
19 at my notes. And -- and -- while I have the floor for two
20 seconds, a couple things. First of all, it wasn't for the
21 grace of God, it was close. It was the grace of Don Campbell.

22 THE COURT: Okay.

23 MR. ALBREGTS: And in preparing, discussing it with
24 him, he asked, had I been provided information such as this,
25 and I told him I hadn't. And so he and I began working, and he

1 was kind enough as a fellow lawyer and one who sometimes does
2 criminal defense to provide it.

3 But Judge, I think this is a trend, and let me tell
4 you why. And let me also preface this with saying, I'm not
5 accusing these two prosecutors of being involved in this,
6 because I -- I know what happened in November.

7 But if you remember in November, we came in and I had
8 said to Mr. Staudaher as we were preparing, there's got to be
9 more statements. You know, there are other people I know were
10 involved. Mr. Staudaher went back to Whiteley or Ford and came
11 back with a -- a stack of statements from other people that the
12 detectives hadn't given them, they hadn't seen. And what came
13 out --

14 THE COURT: And didn't someone bring those into
15 Court?

16 MR. ALBREGTS: What's that?

17 THE COURT: Didn't someone bring a stack materials
18 into Court? Like showing this is what we just got or this
19 is --

20 MR. ALBREGTS: No, I don't think I brought the stack
21 in.

22 THE COURT: Okay.

23 MR. ALBREGTS: But you took my representations and
24 Mr. Staudaher indicated that that's what he had just given me.
25 And there were three or four witnesses that I'm not calling

1 that I didn't know about.

2 And so my point is, this is a pattern apparently of
3 Detectives Whiteley and Ford of not providing stuff that they
4 deem is irrelevant because they're not defense attorneys.

5 MR. STAUDAHER: Now, I must say on that point,
6 Detectives Whiteley and Ford, I don't know if they provided
7 stuff initially. This is -- we are not the prosecutors that
8 had this case at the beginning. They very easily could have
9 provided stuff that got lost in our office. We tried to
10 rectify that situation by providing information to Mr. Albregts
11 later on. And I did bring -- provide him legends of all this
12 stuff.

13 Now, I don't know if there Albregts has looked at the
14 legends and compared them to what's inside the binder --

15 THE COURT: Do the legends talk about these minutes?

16 MR. ALBREGTS: I don't believe so, but it's been a
17 couple weeks, and a long couple weeks since I looked at them.
18 But let me point out that I believe Mr. Mitchell has been the
19 head of the fraud unit for -- since the inception of this
20 investigation. Now, you know, I could be wrong, but my
21 recollection is he's been on this since the day it was
22 assigned.

23 MR. STAUDAHER: Well, I know there was another deputy
24 involved that had some of the records initially. So I -- we
25 had to -- we had to get records back from Metro for some things

1 that were misplaced. So I don't know what was contained, if
2 they brought something over or not.

3 MR. ALBREGTS: And I will point out that while that
4 matters to the extent that these two individual prosecutors
5 didn't do anything that is unethical or untoward, they're all a
6 part of the same prosecutor's office, Judge. And they all --
7 they're interchangeable, as judges often say when they want to
8 prosecutor to hear a case so they can get it done. They're all
9 a part of that same office.

10 MR. MITCHELL: But is -- is -- is --

11 THE COURT: All right, now, I've already ruled on the
12 minutes. I don't know anything else about these other -- I
13 mean, what else is in the -- the binder. But I need to know if
14 the ledger -- just so I'm clear, you -- you were -- you
15 received a ledger or index --

16 MR. STAUDAHER: Yes.

17 THE COURT: -- from Detective Whiteley?

18 MR. STAUDAHER: He brought over four bankers boxes
19 were full of material. It was predominantly custodian of
20 records productions from these -- all these various things that
21 we've testified to, bank records, all these things. Each
22 box --

23 THE COURT: Well, I'm talking about ACS here.

24 MR. STAUDAHER: Each box contained a legend. I did
25 not go through them to look for minutes of this particular

1 item, so I have no idea.

2 THE COURT: No, because the -- the index -- so you're
3 saying there's -- perhaps there's a box for ACS box?

4 MR. STAUDAHER: No, it's just four boxes. Mr.
5 Albregts saw them when they were laid out.

6 THE COURT: Well, didn't he break them up? I mean,
7 it's -- I mean, I hope he wouldn't mix them up for you guys.

8 MR. ALBREGTS: No, he --

9 (Indiscernible over-talking).

10 MR. STAUDAHER: The way they were kept. I didn't --
11 I didn't mess them up. I arranged them. They're still in
12 exact same order, because Mr. Albregts and I talked about
13 whether or not he wanted specific portions of those produced or
14 not produced. And by and large we -- we decided that we
15 wouldn't be contesting issues of if there had been a custodian
16 of records, or they did a grand jury subpoena for records per
17 se.

18 THE COURT: Okay. This legend --

19 MR. STAUDAHER: But I did not --

20 THE COURT: Are we calling it a legend or what are we
21 calling it?

22 MR. STAUDAHER: Well, I don't know. It's basically a
23 legend. When I say a legend, I mean it's basically a
24 spreadsheet that identifies the items contained --

25 THE COURT: Okay.

1 MR. STAUDAHER: -- within the box.

2 THE COURT: Okay. I don't need to see your work
3 product. But if he prepared a spreadsheet of what documents
4 were turned over to you, you need to bring that into Court
5 tomorrow and please highlight the section that says he gave you
6 steering committee -- steering committee meeting minutes and
7 one stop committee meeting minutes. And if it's not in the
8 legend, you need to have him here at 9:30.

9 MR. STAUDAHER: He is out of -- he's in New Jersey.

10 THE COURT: How about Mr. -- Detective Ford? I don't
11 know if he'll know or not, but --

12 MR. STAUDAHER: Okay.

13 THE COURT: -- it seemed like they were working side
14 by side.

15 MR. MITCHELL: Judge, I'm puzzled because the defense
16 did have this stuff. In fact, they provided it in the first
17 place. So how can they say that they were deprived of it when
18 they provided it?

19 MR. ALBREGTS: I didn't say I was deprived of it.

20 THE COURT: He didn't say he was. My --

21 MR. ALBREGTS: Well --

22 THE COURT: I am concerned as the judge her,e, in any
23 case, that Metro is not turning documents over to you, okay,
24 that relate to a case.

25 And I'm concerned if by error or omission, innocent

1 error or omission, that they weren't turned over from you to
2 this -- to defense. I think any judge in this courthouse would
3 be concerned about that, and I think all of you would be
4 concerned about that if you're not getting everything from
5 Metro.

6 And as you know, what have I been saying for every
7 new trial that I'm setting? You guys may have been in here.
8 What do I tell everybody?

9 MR. ALBREGTS: Get together, make sure --

10 THE COURT: Two months before.

11 MR. ALBREGTS: -- that you have all your discovery.

12 THE COURT: Meet with the DA and the detective. I
13 order that now as -- I'm the only judge that does that, because
14 I've had too many cases at calendar call, Judge, we're missing
15 Page 5 of the report, we don't have the disk. And so that's
16 why -- I'm sure both of you've heard that, Mr. Albregts heard
17 it. Every case now. I never forget.

18 MR. STAUDAHNER: And I -- and I will say that the
19 records that were provided last time were referenced in the
20 police report. So it wasn't like there was any clandestine
21 hiding by the police of any records. I mean, the interviews
22 were mentioned as having been done. The fact that --

23 THE COURT: No, but if he has these minutes, okay, if
24 he gave them -- or he didn't give those to you, and as I said
25 just by luck, Mr. Campbell and Mr. Albregts work together, we'd

1 be in trouble here if we find out a month from now that there
2 were minutes that he had that he didn't give to you. I'm sure
3 you'd be concerned because maybe the minutes are going to help
4 you, and you'll have a stronger case.

5 MR. MITCHELL: We would not make a stink if it
6 happened a month after the trial that we found out. I mean, we
7 wouldn't --

8 THE COURT: I'm sure defense would.

9 MR. MITCHELL: Yeah. We -- well --

10 MR. ALBREGTS: Well, it depends what happens.

11 MR. MITCHELL: So, the Court is inquiring into this
12 matter just as a matter of general concern and not because of
13 any bearing it has on a motion before the Court or --

14 THE COURT: No, there's no motion to dismiss or
15 anything.

16 MR. MITCHELL: Okay.

17 THE COURT: I didn't hear one.

18 MR. MITCHELL: All right, I know, but I mean an
19 evidentiary ruling on what comes in I mean.

20 THE COURT: No, because --

21 MR. MITCHELL: The Court's made its ruling.

22 THE COURT: -- I'm allowing the minutes to come in.

23 I don't know about anything else that's in the binder. We

24 haven't argued about -- I mean, if they're all minutes, then --

25 but I'm not going to allow Mr. Fidler to -- I'm not going to

1 allow his typed reports saying, these are all the good things
2 we did. He can testify, if he knows, if he has personal
3 knowledge, this is what I did, or my company did, and I have
4 knowledge of it, in all these departments.

5 MR. ALBREGTS: My direct will be a little longer than
6 anticipated, but that's what we'll do.

7 THE COURT: I mean, no, I mean, if he knows, lay the
8 foundation. What did you -- you know, what did you guys do in
9 this department? But I do want to have that legend, index,
10 whatever you --

11 MR. STAUDAHER: I'll make a copy -- just like I made
12 copies for Counsel, I'll make copies for the Court. The Court
13 can look at them. I will review them. But out of abundance of
14 caution, in case I miss it, it's misidentified as something
15 else, I'll provide the entire legend of all the boxes that I
16 have to the Court.

17 THE COURT: And Mr. Albregts, before you spoke with
18 Mr. Campbell, did you have through discovery the status on
19 Deloitte & Touche recommendations?

20 MR. ALBREGTS: No.

21 THE COURT: Did you have Lacy Thomas memorandum to
22 Jeremiah Carroll?

23 MR. ALBREGTS: I don't believe so. Not -- but I will
24 say this, I think we were able to get it off of the computer
25 once the hard drive was copied for us.

1 THE COURT: Okay. And how about Jeremiah Carroll ACS
2 audit?

3 MR. MITCHELL: That's --

4 MR. ALBREGTS: Yeah, we have -- we have that.

5 THE COURT: Part of discovery?

6 MR. ALBREGTS: Right.

7 THE COURT: Okay.

8 MR. ALBREGTS: Again, when I say part of discovery, I
9 -- I think I had requested a copy of the hard drive of Mr.
10 Thomas and UMC's computers, and that's where we uncovered it.
11 In fact, I can tell you that Mr. Thomas has been painstakingly
12 going through that computer every night providing me these
13 documents. It wasn't provided in any form other than on a
14 disk, but they did do that after I asked.

15 THE COURT: All right.

16 MR. CAMPBELL: And Your Honor, so you're clear, I
17 don't want any misconception left with anyone in the courtroom.
18 With respect to the list of accomplishments, that is part of
19 the response to Carroll that became -- that was ACS's work
20 product that they produced as their business record, then given
21 to Mr. Carroll. It is a -- in fact, it's a public record now
22 in the county.

23 MR. ALBREGTS: And if you recall, Judge, Mr. Carroll
24 testified on cross-examination that in his audit report there
25 was a list of some accomplishments that he could verify. But

1 at the end on an appendix was a bunch of accomplishments, and
2 he couldn't verify them one way or the other. And so he
3 clearly references that. And I think Mr. Campbell's right,
4 it's in the public record.

5 MR. MITCHELL: Which is equally available to both
6 parties.

7 MR. ALBREGTS: Well, which makes it admissible. You
8 know, beyond that question, it makes it admissible.

9 THE COURT: Well, we'll talk about that tomorrow.

10 MR. MITCHELL: Well, it has to be relevant.

11 THE COURT: I'm tired. Everyone else is tired. But
12 I do want -- if there's a ledger, I want that brought into
13 Court one way or the other to say, these documents are -- these
14 minutes, the minutes.

15 MR. MITCHELL: Will the Court later entertain a
16 motion to redact portions that may be --

17 THE COURT: No, the minutes are coming in as is. I
18 mean, you can say what -- you can argue. I mean, there's --
19 what someone said in the minutes. There's no one there to
20 verify anything, but they're in the minutes. Just like -- Mr.
21 Mitchell, at least once a month I'm dealing with issues with
22 corporate minutes. I've never had this issue. No, because --

23 MR. MITCHELL: Well --

24 THE COURT: -- they just -- they come in. They're
25 corporate minutes assuming they're authenticate.

1 MR. MITCHELL: But what -- but what are they minutes
2 of, Judge? Aren't they minutes of the fact that we held a
3 meeting and we discussed --

4 THE COURT: Well, I don't think they go into what the
5 discussions were, what Joe said, what Fred said and Mary said
6 and this is a vote and -- all right. Unfortunately, I have
7 this -- these two calendars tomorrow.

8 I mean, I volunteered, but -- we're off the record,
9 Michelle, but.

10 (Court recessed at 6:48 p.m., until Friday,
11 April 2, 2010, at 9:55 a.m.)
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Barbara McQuillen	45	67	77/81	80

DEFENDANT'S WITNESSES:

Robert Mills	82	165	229	
Ross Fidler	235			
Don Campbell	281*			

(*Outside presence of jury)

* * * * *

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

Donna L. Quinn
CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

LACY THOMAS,

Defendant.

CASE NO. C-241569

DEPT. NO. 17

**Transcript of
Proceedings**

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

JURY TRIAL - DAY 10

FRIDAY, APRIL 2, 2010

APPEARANCES:

FOR THE PLAINTIFF:

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Chief Deputy District Attorney

MICHAEL STAUDAHER, ESQ.
Deputy District Attorney

FOR THE DEFENDANT:

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Las Vegas, NV 89101

COURT RECORDER:

MICHELLE RAMSEY
District Court

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produced by transcription service.

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1 LAS VEGAS, NEVADA, FRIDAY, APRIL 2, 2010, AT 9:55 A.M.

2 (Outside the presence of the jury).

3 THE COURT: We had some issues at the close of last
4 night regarding some documents.

5 MR. STAUDAHER: Oh, I guess (indiscernible).

6 THE COURT: Is that you?

7 MR. STAUDAHER: Yeah. Sorry. Your Honor, this is
8 the information that was -- that I obtained last night after
9 the court asked us to do some investigation.

10 I went ahead and I -- I brought these up here anyway.
11 These were the legends that I referred to of all the boxes of
12 material that were provided by the police to us, in addition to
13 the materials that we had within our office.

14 I've reviewed those. In addition to reviewing those,
15 I went through all of the boxes myself. I'm -- tried to look
16 at anything that remotely looked like the binder that we have
17 before us. That was not provided us, per se, in this case.

18 Now, I also talked to both Detectives Ford and
19 Whiteley on this matter. Detective Whiteley, although his -- I
20 guess, the document was -- that Counsel provided was directed
21 to him, he did not actually receive that. That came to
22 Detective Ford.

23 They apparently at the time were looking primarily
24 tail numbers of planes or whatever looking to see if there was
25 some evidence that showed that Mr. Thomas had -- had been at

1 either the behest, or facilitation of ACS, had gone to St.
2 Thomas. That never panned out anything.

3 This -- this binder, at least the content of the
4 binder based on my conversation with Detective Ford appears to
5 have been provided to the police. It was part of the
6 investigation initially with ACS in which they were determining
7 whether or not they were going to try and bring, or were going
8 to recommend criminal charges against ACS and any of its
9 affiliates. That investigation didn't go anywhere.

10 They felt that because ACS had actually done work at
11 the hospital there wasn't basis on which to go forward on a
12 submission of counts specifically related to them. So they've
13 never submitted to our office on ACS. They submitted on Mr.
14 Thomas, and the associated discovery related to him, they
15 provided to us.

16 This was no provided -- or at least the explanation
17 was proffered to me was that it was not provided because it
18 pertained to an ACS investigation that did not go forward. To
19 -- to his knowledge, when he went through it, Detective Ford
20 indicated that he didn't think that there was anything in there
21 that directly tied to Mr. Thomas that pointed toward his guilt,
22 pointed away from his guilt. It just had to do with ACS and
23 their involvement and work in the hospital.

24 Because they had received that and it showed that
25 there was work done in the hospital by that entity, they never

1 proffered charges against them to our office, or at least asked
2 our office to prosecute them. That's the state of affairs.

3 Detective Ford is going to actually be here to
4 testify. He can be cross-examined by Counsel. Again, when I
5 talked to Detective Ford, he was going to be bringing a copy of
6 that by my office, if I needed it, to look at. I don't know if
7 Counsel is going to represent that there's anything exculpatory
8 in there. But according to Detective Ford, he didn't see
9 anything that was at issue. So that's the state of affairs
10 with regard to discovery.

11 THE COURT: Well, doesn't some of them -- I mean, I
12 haven't gone through the whole binder yet, but at least appears
13 that some of the materials in the binder relate to these weekly
14 meetings showing that ACS did work, whether it was -- had value
15 or not, who knows --

16 MR. STAUDAHER: Certainly.

17 THE COURT: -- but it at least identifies that it
18 wasn't just a bogus contract.

19 MR. STAUDAHER: Well, no, and that's why they -- we
20 have not charged it as a bogus contract. The only -- the
21 charging document basically says that the contract terms were
22 grossly unfavorable to UMC Hospital, not that there was no
23 contract or no work was performed. And the police never
24 submitted for charges related to ACS and the fact that there
25 was no contract done. They didn't submit for charges on some

1 of the other individuals as well.

2 But as far as ACS was concerned, there was evidence
3 that showed that they did work, as -- as the court has seen by
4 this binder that said -- that Lacy -- meetings in the hospital
5 that they had people present on site, that they were doing some
6 sort of supervisory work. But because of that, there were no
7 charges, at least proffered against them by -- from the police
8 to the DA's Office.

9 Because of that, that information was not included
10 because it did not directly tie to Mr. Thomas's actions within
11 the hospital. That's at least the rationale by which the police
12 had. The police investigate a lot of things in cases. They
13 don't necessarily -- if they had gone to New York and looked at
14 somebody related to another entity within the group, that
15 information might not come forward because it wasn't related.
16 It was a dead end.

17 They proffered the submission packet to our office
18 based on what they feel the evidence shows and what they feel
19 the crimes potentially are so that we can decide what to
20 charge. So as far as that's concerned, unless there was
21 something exculpatory in that item, I -- I absolutely agree
22 that the defense has an absolute right to anything exculpatory
23 regardless of what investigation it comes from. But it's not
24 my belief or knowledge at this point that that book contains
25 any of that type of information.

1 MR. MITCHELL: And Judge, I can add a little bit to
2 this since I was the -- the person that made the charging
3 decision. And it is true that Metro did not believe Mr. Thomas
4 or ACS was guilty of any wrongdoing that was chargeable. Their
5 report, of course, was a broad report that contained a lot of
6 information about ACS, but it -- it had information about a lot
7 of things in there. They did not think there was anything
8 there worth pursuing either with respect to Mr. Thomas or ACS.

9 They -- they did think that there was something there
10 with respect to Bill Taylor, for example. And I disagreed
11 there because I -- I didn't there was evidence on that point,
12 that showed wrongdoing, but made the decision based on the --
13 the administrative clarification actions of Mr. Thomas to -- to
14 include the ACS stuff.

15 The police didn't anticipate that -- that I would go
16 in that direction with that pleading, and so -- and of course,
17 we're not charging ACS and we're not charging Mr. Thomas with
18 wrongdoing in -- in hiring a company that did no work. That is
19 not our theory at all. We -- we know they did work.

20 THE COURT: Well, count one, doesn't count one deal
21 with ACS?

22 MR. STAUDAHER: It does.

23 MR. MITCHELL: It does, but it --

24 MR. STAUDAHER: It does not relate -- I'm sorry.

25 MR. MITCHELL: It turns -- it speaks in terms of the

1 unfavorability of the contract to begin with, not -- not that
2 ACS didn't do work.

3 THE COURT: Well --

4 MR. ALBREGTS: Your Honor, I --

5 THE COURT: -- if we have documents showing numerous
6 meetings and discussions about, I'm with ACS, about increasing
7 the collectibles and the income, doesn't that relate to count
8 one?

9 MR. MITCHELL: It is certainly on the subject of
10 count one, but it -- it -- it doesn't deal with the -- it
11 doesn't deal with the issue of whether or not they did work.
12 That -- I mean --

13 THE COURT: Well, it -- I thought there was some
14 documents showing we had all these meetings, a lot of items
15 were discussed --

16 MR. MITCHELL: Yeah, that -- that does have to do
17 with that issue. But it doesn't have to do with entering
18 into a contract with unfavorable terms. I mean, that's all
19 after the fact.

20 Our -- our pleading deals with the entering into a
21 contract with these people, not with -- not with the body of
22 work that they did, but just that the terms were unfavorable to
23 UMC, because UMC was going to have to pay money that it
24 shouldn't have to pay. It doesn't deal with quality of work or
25 quantity of work. Just contractual issues.

1 MR. ALBREGTS: Well, you know, there's a number of
2 different levels of issues here, your Honor. One that comes to
3 mind initially to me is the gall that I feel for the
4 prosecution putting on any number of witnesses to say that ACS
5 didn't do anything, we barely saw anybody there for ACS, they
6 weren't doing anything that we couldn't do.

7 I mean, we've had two weeks of testimony, and we've
8 probably had a handful of witnesses who argued that very thing.

9 And now -- and I'd like to get a transcript of Mr.
10 Mitchell's opening statemen,t, because I -- I bet you anything
11 that -- that there's references to the fact that ACS wasn't
12 doing any work and that's why it was an unfavorable contract.
13 They're alleging a theft that basically Mr. Thomas misused
14 county funds by entering into a bad contract with a group that
15 didn't do any work or the work could have been done.

16 And so to come back here now on the tenth day of
17 trial and say it's not an issue about whether they did work, we
18 believe they did work, well, how does he rationalize asking
19 questions of his own witnesses that -- about the work that ACS
20 didn't do?

21 MR. MITCHELL: Judge, I --

22 MR. ALBREGTS: To say it's not exculpatory when it
23 goes against what these witnesses are testifying, completely
24 misses the -- I mean, I don't know how you can miss that point.
25 I mean, sometimes I'm asked to respond to an argument and I

1 stand up and I think what do I respond to? It is so obvious
2 that this is exculpatory material. Not only does it contradict
3 their own witnesses, which impunes their credibility, which
4 turns them into liars, it shows that ACS was down their doing
5 their due diligence under the contract.

6 And at what stage does a bad contract become
7 criminal? And now we have, I presume a Metro detective who's
8 going to answer me honestly on Monday when I say to him you
9 didn't think you had enough evidence to charge to Mr. Thomas
10 with the ACS case, did you?

11 They had it. They have their detective making a -- a
12 quantitative and qualitative decision about what's exculpatory
13 evidence. That's utterly ridiculous. And there's a bigger
14 concern about what Metro's doing in their investigations and
15 not providing to -- to the DA's Office.

16 MR. MITCHELL: Judge --

17 MR. ALBREGTS: And so, you know, I stand here almost
18 speechless that -- that I've gotta come up with something to
19 respond to this to say that it's not exculpatory. You heard
20 their witnesses about ACS.

21 MR. MITCHELL: Judge, I'm speechless, too. I'm
22 speechless that Counsel raises his voice, gesticulates a lot --

23 THE COURT: Well, let's --

24 MR. MITCHELL: Well --

25 THE COURT: -- let's move on from that because --

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Electronically Filed
Oct 29 2015 02:16 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

LACY THOMAS,)	
)	Case No. 69074
Petitioner,)	
)	
vs.)	
)	
THE STATE OF NEVADA,)	
)	
Respondent,)	

PETITIONER’S APPENDIX
Volume I

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FILED

FEB 20 12 20 PM '08

C. S. Mitchell
CLERK OF THE COURT

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,)

11 Plaintiff,)

12 -vs-)

13 LACY L. THOMAS,)

14 Defendant(s).)
15
16
17

Case No. C241569
Dept. No. XVII

INDICTMENT

18 STATE OF NEVADA }
19 COUNTY OF CLARK } ss.

20 The Defendant(s) above named, LACY L. THOMAS, accused by the Clark County
21 Grand Jury of the crime(s) of THEFT (Felony - NRS 205.0832, 205.0835); and
22 MISCONDUCT OF A PUBLIC OFFICER (Felony - NRS 197.110), committed at and
23 within the County of Clark, State of Nevada, on or between September, 2004, and January,
24 2007, as follows:

25 COUNT I - THEFT

26 Defendant did, on or between May, 2005, and January, 2007, then and there
27 knowingly, feloniously, and without lawful authority, commit theft by using the services or
28 property of another person entrusted to him, or placed in his possession of a limited,

000001

1 authorized period of determined or prescribed duration or for a limited use, having a value of
2 \$2500.00 or more, lawful money of the United States, belonging to University Medical
3 Center and/or Clark County, Clark County, Nevada, in the following manner, to-wit: by the
4 Defendant, while employed as Chief Executive Officer at said University Medical Center,
5 entering into a contract with Superior Consulting and/or ACS Company, a company run by
6 longtime friends or associates of Defendant, for Superior Consulting and/or ACS to collect
7 money owed to University Medical Center under contracts or terms grossly unfavorable to
8 said University Medical Center, whereby University Medical Center was obligated to pay
9 said Superior Consulting and/or ACS for collection work already being performed by an
10 agency of Clark County and could not terminate said contract for a lengthy period of time
11 regardless of whether Superior Consulting and/or ACS was successfully increasing the
12 collection of University Medical Center's debt, and/or by allowing Superior Consulting
13 and/or ACS to sell valuable accounts receivable to a third party for an unreasonably low
14 price and to charge a high commission for said sale, and after learning that debt collection
15 had decreased under the direction of Superior Consulting and/or ACS, modifying the
16 contract to greatly increase the amount of money University Medical Center paid said
17 Superior Consulting and/or ACS for said debt collection services, thereby using the services
18 or property for another use.

19 COUNT 2 – THEFT

20 Defendant did, on or between December, 2004, and December, 2006, then and there
21 knowingly, feloniously, and without lawful authority, commit theft by using the services or
22 property of another person entrusted to him, or placed in his possession of a limited,
23 authorized period of determined or prescribed duration or for a limited use, having a value of
24 \$2500.00 or more, lawful money of the United States, belonging to University Medical
25 Center and/or Clark County, Clark County, Nevada, in the following manner, to-wit: by the
26 Defendant, while employed as Chief Executive Officer at said University Medical Center,
27 entering into contracts with Frasier Systems Group, a company owned by Gregory Boone, a
28 friend of said Defendant, whereby said Frasier Systems Group was paid with University

1 Medical Center funds to plan and implement a project manager's office for University
2 Medical Center projects but never produced any product or services in return for said
3 payment, and said Defendant causing payments to be made on said contract while he knew
4 or should have known that services were not being received as contracted for under said
5 contract and said contract was unnecessary in that University Medical Center already had
6 available, free of charge, the services of a project manager's office run by Clark County,
7 thereby using the services or property for another use.

8 COUNT 3 – THEFT

9 Defendant did, on or between September, 2004, and December, 2006, then and there
10 knowingly, feloniously, and without lawful authority, commit theft by using the services or
11 property of another person entrusted to him, or placed in his possession of a limited,
12 authorized period of determined or prescribed duration or for a limited use, having a value of
13 \$2500.00 or more, lawful money of the United States, belonging to University Medical
14 Center and/or Clark County, Clark County, Nevada, in the following manner, to-wit: by the
15 Defendant, while employed as Chief Executive Officer at said University Medical Center,
16 entering into a contract with TBL Construction, on behalf of University Medical Center
17 whereby said TBL Construction was paid by University Medical Center to oversee the
18 installation of the landscaping and electrical feed to University Medical Center Northeast
19 Tower project under construction; Defendant knowing at the time of entering into said
20 contract that the electrical feed and landscaping work was already covered and provided for
21 in a separate contract with the general contractor of said project, and that said general
22 contractor was already being paid to do said work, and that the said TBL Construction would
23 not be doing any work pursuant to said contract with University Medical Center, and that
24 said contract was unnecessary, thereby using the services or property for another use.

25 COUNT 4 – THEFT

26 Defendant did, on or about April, 2005, then and there knowingly, feloniously, and
27 without lawful authority, commit theft by using the services or property of another person
28 entrusted to him, or placed in his possession of a limited, authorized period of determined or

1 prescribed duration or for a limited use, having a value of \$2500.00 or more, lawful money
2 of the United States, belonging to University Medical Center and/or Clark County, Clark
3 County, Nevada, in the following manner, to-wit: by the Defendant, while employed as
4 Chief Executive Officer at said University Medical Center, by paying University Medical
5 Center funds to Premier Alliance Management, LLC, a company owned by Orlando Jones, a
6 friend of Defendant, after said Premier Alliance Management LLC agreed to analyze and
7 report on planning, priorities and communications systems at University Medical Center, in
8 return for which said Premier Alliance Management LLC provided no report or analysis to
9 University Medical Center, and none was requested or required by Defendant in return for
10 said money paid, thereby using the services or property for another use.

11 COUNT 5 – THEFT

12 Defendant did, on or between June 2005 and December, 2006, then and there
13 knowingly, feloniously, and without lawful authority, commit theft by using the services or
14 property of another person entrusted to him, or placed in his possession of a limited,
15 authorized period of determined or prescribed duration or for a limited use, having a value of
16 \$2500.00 or more, lawful money of the United States, belonging to University Medical
17 Center and/or Clark County, Clark County, Nevada, in the following manner, to-wit: by the
18 Defendant, while employed as Chief Executive Officer at said University Medical Center,
19 entering into a contract with Crystal Communications LLC, a company owned and operated
20 by Orlando Jones and Martello Pollock, friends of the Defendant, to pay Crystal
21 Communications, LLC, to oversee the selection and installation of the best
22 telecommunications equipment available for the University Medical Center Northeast Tower
23 project, and Defendant thereafter paying said Crystal Communications, LLC, without said
24 company being qualified or capable of providing services valuable to University Medical
25 Center, and said company thereafter failing to provide a valuable service pursuant to said
26 contract, thereby using the property of University Medical Center for another use.

27 COUNT 6 – MISCONDUCT OF A PUBLIC OFFICER

28 Defendant did, on or between May, 2005, and January, 2007, then and there

1 knowingly, feloniously, and without legal authority, while acting as a public officer as Chief
2 Executive Officer of University Medical Center, employ or use money under his official
3 control or direction, or in his official custody, for the private benefit or gain of himself or
4 another, by doing the acts set forth in Count 1, hereinabove.

5 COUNT 7 – MISCONDUCT OF A PUBLIC OFFICER

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

11 COUNT 8 – MISCONDUCT OF A PUBLIC OFFICER

12 Defendant did, on or between September, 2004, and December, 2006, then and there
13 knowingly, feloniously, and without legal authority, while acting as a public officer as Chief
14 Executive Officer of University Medical Center, employ or use money under his official
15 control or direction, or in his official custody, for the private benefit or gain of himself or
16 another, by doing the acts set forth in Count 3, hereinabove.

17 COUNT 9 – MISCONDUCT OF A PUBLIC OFFICER

18 Defendant did, on or about April, 2005, then and there knowingly, feloniously, and
19 without legal authority, while acting as a public officer as Chief Executive Officer of
20 University Medical Center, employ or use money under his official control or direction, or in
21 his official custody, for the private benefit or gain of himself or another, by doing the acts set
22 forth in Count 4, hereinabove.

23 COUNT 10 – MISCONDUCT OF A PUBLIC OFFICER

24 Defendant did, on or between June, 2005, and December, 2006, then and there
25 knowingly, feloniously, and without legal authority, while acting as a public officer as Chief

26 //

27 //


28 //

1 Executive Officer of University Medical Center, employ or use money under his official
2 control or direction, or in his official custody, for the private benefit or gain of himself or
3 another, by doing the acts set forth in Count 5, hereinabove.

4 DATED this 20th day of February, 2008.

5
6 DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

7
8
9 BY


SCOTT S. MITCHELL
Chief Deputy District Attorney
Nevada Bar #000346

10
11 ENDORSEMENT: A True Bill

12
13 
14 Foreperson, Clark County Grand Jury
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1 Names of witnesses testifying before the Grand Jury:

2 ✓ CARROLL, JERMAH, CPA, DIRECTOR, CLARK COUNTY AUDIT DEPT., C/O
3 CCDA, 200 LEWIS AVENUE, LVN 89101

4 ✓ VALENTINE, VIRGINIA, CLARK COUNTY MANAGER

5 ✓ MARY ANNE MILLER, DEPUTY DISTRICT ATTORNEY, CIVIL DIVISION

6 ✓ FORD, MICHAEL, LVMPD P#5279

7 ✓ CLAYPOOL, D. BLAINE, CHIEF EXECUTIVE OFFICER, UNIVERSITY OF NEVADA,
8 SCHOOL OF MEDICINE

9 ✓ WALSH, MICHAEL, DIRECTOR OF ADMINISTRATION, SOUTHERN NEVADA
10 HEALTH DISTRICT

11 ✓ FINGER, EDWARD, COUNTY COMPTROLLER

12 ✓ MYERS, H. LEE, UMC SUPPORT SERVICES

13 ✓ MALCOLM JOHN ERNEST MCKINLEY, UMC, DIRECTOR OF INFORMATION
14 SYSTEMS

15 ✓ CALUYA, CHRIS, VICE PRESIDENT CLARK-SULLIVAN CONSTRUCTORS

16 ✓ WHITELEY, ROBERT, LVMPD P#4996

17 ✓ STEVENS, GEORGE, CHIEF FINANCIAL OFFICER, CLARK COUNTY

18 ✓ REILLY, THOMAS, C/O CCDA, 200 LEWIS AVE., LVN 89101

19 ✓ HARRIS, QUINCY, NETWORKS WEST, PRESIDENT

20 ✓ ANDREWS, WILLIAM, INTERNAL AUDIT, UMC

21 Additional witnesses known to the District Attorney at the time of filing this Indictment:

22 ~~GOE, DANIEL, LVMPD P#4552~~ *Det*

23 ✓ SAMPSON, NANCY, LVMPD P#4627

24 ROTH, CHRISTOPHER, FORMER DIRECTOR OF PLANNING AND OPERATIONS,
25 UNIVERSITY MEDICAL CENTER

26 ✓ HAIGHT, DON, UMC EXECUTIVE DIRECTOR FOR CONTRACT MANAGEMENT

27 ✓ NORTH CUTT, DOUG, UMC, CHIEF INFORMATION OFFICER

28 ✓ STEVENS, FLOYD, UMC COMPTROLLER

✓ HAYES, MICHAEL, UMC MANAGEMENT ANALYSIS

✓ MC ELHONE, JOHN II, UMC, DIRECTOR OF CONSTRUCTION

1 ✓ THREATT, LORI, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

2 ✓ ESPINOZA, JOHN, UMC DIRECTOR OF EMPLOYEE SERVICES

3 ✓ McQUILLEN, BARBARA, UMC SENIOR CONTRACTS ADMINISTRATOR

4 ✓ HARPER, JEAN, UMC EXECUTIVE SECRETARY

5 MILES, BOB, DIRECTOR OF MATERIAL MANAGEMENT - M.C.U.

6 MOSS, THERESA, UMC PURCHASING AGENT

7 GRUIDL, NADINE, UMC SENIOR PURCHASING - Crystal - Ref. in reports

8 ✓ GARR, VIRGINIA, UMC, DIRECTOR OF ELIGIBILITY

9 ✓ HARRIS, RONALD, FORMER TBL CO-OWNER

10 TAYLOR'S CONSULTING, WILLIAM TAYLOR, PRESIDENT, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

11 GREAT LAKES MEDICAID, JAMES A. KNEPPER, PRESIDENT, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

12 ✓ FRASIER SYSTEMS GROUP, GREGORY A. BOONE, PRESIDENT, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

13 ✓ SUPERIOR CONSULTANT COMPANY, ROBERT J. MILLS, VICE PRESIDENT, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

14 RISK MANAGEMENT SOLUTIONS OF AMERICA, BENNIE JONES, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

15 ✓ CRYSTAL COMMUNICATIONS TECHNOLOGIES CORPORATION, MARTELLO POLLOCK, PRESIDENT, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

16 CRYSTAL COMMUNICATIONS TECHNOLOGIES CORPORATION, ORLAND JONES, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

17 ✓ ALLIANCE HEALTH SERVICES, VELMA BUTLER, PRESIDENT C/O CCDA, 200 LEWIS AVENUE, LVN 89101

18 ✓ FAMILY GUIDANCE CENTERS INC; HENRENE THOMAS, PRINCIPAL, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

19 NETWORKS WEST COMMUNICATIONS

20 07AGJ094A/ts
21 LVMPD 0611211263

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DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

THE STATE OF NEVADA,

Scott S. Mitchell
Plaintiff,
vs.

LACY THOMAS,

Defendant.

CASE NO. C-241569

DEPT. NO. 17

**Transcript of
Proceedings**

BEFORE THE HONORABLE MICHAEL VILLANI, DISTRICT COURT JUDGE

JURY TRIAL - DAY 9

THURSDAY, APRIL 1, 2010

APPEARANCES:

FOR THE PLAINTIFF:

SCOTT S. MITCHELL, ESQ.
Chief Deputy District Attorney

MICHAEL STAUDAHER, ESQ.
Deputy District Attorney

FOR THE DEFENDANT:

DANIEL J. ALBREGTS, ESQ.
601 S. 10th St., Suite 202
Las Vegas, NV 89101

COURT RECORDER:

MICHELLE RAMSEY
District Court

TRANSCRIPTION BY:

VERBATIM DIGITAL REPORTING, LLC
Littleton, CO 80120
(303) 798-0890

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

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1 with the trial or by any medium of information, including
2 without limitation, newspaper, television, radio or the
3 Internet. You are not to form or express an opinion on any
4 subject connected with this case until this matter is submitted
5 to you. Please have a good evening.

6 We'll see you back at 10:00.

7 (Outside the presence of the jury).

8 THE COURT: All right, we're outside the presence of
9 the jury panel. Just so I'm clear on this, Mr. Albregts, are
10 you saying that at some point a Metro officer asked Mr. Fidler
11 to present to them what ACS did under these contracts?

12 MR. ALBREGTS: My understanding -- and Mr. Campbell's
13 here and I don't know if the Court wants to invite him to -- to
14 tell the exact procedure. But my understanding is, Metro
15 served a search warrant, and an extremely all encompassing
16 search warrant on ACS, including things like the flight log for
17 the chairman's private plane to see if Mr. Thomas had been
18 flown to Aruba or anything else.

19 In response to that subpoena, ACS apparently produced
20 thousands of pages of documents as it relates to the UMC
21 transaction and the business with UMC, among other documents.

22 My understanding further is that at some stage after
23 that, as Metro was going through the documents, they contacted
24 Mr. Campbell's office and/or Mr. Pisinelli's (phonetic) office,
25 who's also handling the civil matter, and requested

1 clarification for some of the documents that they couldn't
2 locate, they couldn't figure out.

3 And so my understanding is their offices assisted
4 Metro in doing that. And this was among other things, some of
5 the documentation that was provided, because as the Court
6 knows, the allegations are that ACS was given the contract in
7 exchange for favors from Mr. Thomas, that ACS didn't do any
8 work, that ACS shouldn't have been paid and that it could --
9 and that the work that they did could have been duplicated.

10 And this was presented in response to those
11 allegations to say, we were doing work, we were creating
12 records of that work as we went along, and that's what this is.

13 My further understanding is that not only was that
14 provided to Metro, but it was provided as discovery in the
15 civil case, which is the exact same issue that we're here
16 today. That civil case is against the county. So the county
17 not only had it through Metro, the county had it through the
18 civil case.

19 And so while I certainly understand that seeing that
20 in the last couple of days might make it a little more
21 difficult for Mr. Mitchell to cross-examine, he should have
22 completely foreseen that we would be bringing this issue up to
23 refute the claim, as most of his witnesses did, that ACS didn't
24 do anything.

25 THE COURT: And these records were turned over to

1 Metro?

2 MR. ALBREGTS: As far as I know. And Mr. Campbell's
3 here and can -- can -- can tell you when and the circumstances.

4 MR. MITCHELL: So can't the witness tell us? I mean,
5 that's --

6 THE COURT: Okay, so your objection is what, Mr. --
7 Mr. Mitchell?

8 MR. MITCHELL: Well --

9 THE COURT: So would you agree that besides the
10 summary and maybe the summary sheet, but let's deal with the
11 records in the binder.

12 MR. MITCHELL: Okay. Which -- which --

13 THE COURT: Are you -- are you -- do you agree that
14 those were turned over to Metro?

15 MR. MITCHELL: No, I don't. I do not. And I -- I
16 have no sworn testimony to that effect. I have no knowledge of
17 that effect. I'm not -- and I -- I think -- I will say that I
18 it's completely I are relevant anyway .

19 Because whether or not we had access is not the same
20 question as to whether or not it's admissible. And so -- but
21 no, I've never even heard of that exhibit. I've never seen it
22 until a few minutes ago. I haven't had a chance to look
23 through it, nor has the Court.

24 And I would compare that -- I used a bad analogy at
25 the bench, but here's one that I think is right on all fours.

1 I submit into evidence -- I proffer into evidence a binder that
2 is Bill Andrews' product from going around interviewing people
3 at the hospital, and asking them what accomplishments they
4 have. And then one employee says, "I successfully proved Lacy
5 Thomas guilty of the crimes that Metro's charging him with."
6 Another employee says, "I successfully showed that ACS, you
7 know, had some relationship with -- with Lacy Thomas."

8 And everybody can say whatever they want, and then
9 because the hospital keeps a record of what everybody says was
10 their accomplishment, I now introduce that in evidence and say,
11 "This a business record. I'm offering it for the truth of the
12 matter asserted in those records."

13 That -- that isn't what a business record is. It's a
14 record of a regularly conducted activity that the hospital is
15 in the business of doing.

16 THE COURT: Or ACS is in the business of doing?

17 MR. MITCHELL: Right, right. And -- and to say that
18 going around asking employees what -- of your own company what
19 accomplishments they think they have, and then keeping a record
20 of that and saying, Well, this is a business record so I should
21 offer it for the truth of the matter asserted, in their
22 statements, I mean, that's -- that's the biggest stretch. I
23 can't imagine a bigger stretch than that.

24 And I reiterate, I haven't had a chance to even look
25 through that binder yet.

1 MR. ALBREGTS: Your Honor, I presented to the Court a
2 letter from Mr. Campbell. The record should reflect that Mr.
3 Campbell is here. Mr. Campbell is absolutely willing as an
4 officer of the Court, or as a sworn testimony, whatever the
5 Court would like, to explain what happens.

6 But the letter's pretty self-explanatory. It says,
7 Dear Detective Whiteley, enclosed with this letter is bate
8 stamped of nearly 580 pages of stuff, including the UMC one
9 stop committee meeting minutes, steering committee meeting
10 minutes, status on the Deloitte & Touche recommendation, Lacy
11 Thomas memorandum to Jeremiah Carroll, and Jeremiah Carroll
12 audit.

13 I suggest to the Court that attached to Lacy Thomas's
14 memorandum is the list of accomplishments, all that have been
15 in possession of Mr. Mitchell's agent for over three years.

16 THE COURT: Why -- why didn't you ask Detective
17 Whiteley -- maybe it's a tactical decision -- did you receive
18 all these documents and did he, you know, review them, did he
19 try to confirm what's identified in the documents?

20 MR. ALBREGTS: Because I was going to ask Detective
21 Ford those issues.

22 MR. MITCHELL: How did you even know that Ford was
23 going to take the stand?

24 MR. ALBREGTS: Because you told me two days ago that
25 he was going to take the stand.

1 MR. MITCHELL: And you -- and you said that you
2 wanted to stipulate to what he was going to say, or -- to keep
3 him off the stand.

4 MR. ALBREGTS: You know, Judge, I don't know that
5 anybody has any right to question tactical decisions --

6 THE COURT: All right, no, I understand.

7 MR. ALBREGTS: -- of defense counsel in the course of
8 his case.

9 MR. MITCHELL: Judge, the -- the binder obviously,
10 it's got records kept by UMC. This is an ACS witness, not an
11 UMC witness. It's got steering committee meeting minutes,
12 which are UMC minutes.

13 MR. ALBREGTS: Judge, I don't want to interrupt, but
14 they're not. They're -- he testified that ACS generated these.
15 ACS set up the meetings. ACS provided this information to UMC,
16 but they're ACS records. There's no doubt. In fact, Metro got
17 them from ACS. They didn't get them from UMC. It wasn't a
18 search at UMC that got the records, it was a search warrant at
19 ACS that got the records.

20 MR. MITCHELL: Okay, well, is Counsel vouching for
21 the truth of the matter asserted in every statement in a
22 steering committee meeting minute?

23 THE COURT: You don't need to do -- in a business
24 record it's -- it's a record -- it's kept in ordinary course of
25 the business, and there's going to be hearsay in business

1 records. There's going to be statements that perhaps everyone
2 doesn't agree upon. And there's always hearsay statements in
3 business records. I mean, you're going to have an audit
4 report, for example, where someone told them they made a
5 million dollars last year. But that's -- the audit report is
6 still a business record.

7 MR. MITCHELL: And I would never object to an audit
8 report, because that's clearly something kept in the regular
9 cost of business. But to -- to say that -- for -- well,
10 steering committee meeting minutes. Apparently there's
11 something said by somebody in that steering committee meeting
12 that can't be cross-examined at all. I mean, it's -- because
13 somebody wrote down with a somebody said, doesn't make -- it's
14 still hearsay. It's -- it doesn't make it a business record
15 just because somebody wrote down what somebody said.

16 And -- and Deloitte & Touche recommendations, the
17 status on that. I mean --

18 MR. ALBREGTS: Your Honor, he's focusing on things in
19 the letter that -- those aren't in the binder. If he would
20 have listened to the witness testimony, the --

21 THE COURT: Okay, what's in the binder? Because
22 there's -- there's five items listed in this letter. Which
23 items are in the binder?

24 MR. ALBREGTS: The testimony was clear that the items
25 in the binder are the -- the -- the accomplishment list that

1 was provided to Jerry Carroll that he didn't necessarily
2 apparently care to follow up on.

3 The billing information, which is a chart, Your
4 Honor, that is -- that clearly is kept in the ordinary course
5 of business that talks about the cash collections.

6 The steering committee meeting Power Point
7 presentations which were prepared in the ordinary course of
8 business and prepare for the purposes of debriefing UMC
9 officials.

10 The one -- and the one step minutes, which were
11 prepared contemporaneously within a day of those meetings and
12 -- and used during the course of the ordinary course of
13 business in those meetings.

14 And -- and I find it astonishing that the State, who
15 is different than any other attorney in the system, because
16 they have a duty to the citizens and a duty to justice, would
17 bring evidence that comes in and says, ACS did nothing, and
18 then turn around and say that shouldn't come in to refute it,
19 and on some objection that -- that makes no sense whatsoever
20 and has no legal basis.

21 I've laid the foundation for the business records and
22 if he wants we'll go through them tomorrow morning and I'll
23 have Mr. Fidler testify to the accomplishments and I'll take
24 that out.

25 MR. MITCHELL: Judge --

1 THE COURT: Mr. Mitchell.

2 MR. MITCHELL: -- as Court is aware, our Complaint
3 does not say ACS did nothing. We -- we don't come close to
4 that -- that allegation.

5 THE COURT: Well, you -- well, you've called a lot of
6 witnesses that basically said, we've got two Power Points or we
7 -- they -- we didn't see them, we didn't see anything -- I'm
8 sorry, not the Power Points. That was on the -- the IT
9 department. But we've had witnesses say they really didn't do
10 anything, they didn't get any bang for -- I'm going to put it
11 bluntly -- they didn't get a bang for buck.

12 MR. MITCHELL: And those were live witnesses that
13 were fully subject to cross-examination. This is not a live
14 witness and it's not subject to cross-examination. There's no
15 way I can go through a binder of that size and talk to the
16 people that are making the assertions in that binder and
17 cross-examine them. It's --

18 MR. ALBREGTS: The assertions in the binder are made
19 by Mr. Fidler. He's the one that conducted the meetings. He's
20 the one that reviewed the minutes. He can be cross-examined
21 about it.

22 MR. MITCHELL: All he's --

23 THE COURT: And didn't Metro give these to you?

24 MR. MITCHELL: No, Judge. Of course not. I mean --

25 THE COURT: Why -- why wouldn't they? I mean --

1 MR. MITCHELL: I don't know that Metro -- I can't
2 answer for that. I can't even acknowledge that they received
3 it. I mean, Mr. Campbell says it was turned over to them. It
4 is not as if Metro and the -- this is using it in a civil
5 litigation, right? I mean, this is some sort of an exhibit in
6 a civil litigation?

7 MR. ALBREGTS: That's not --

8 THE COURT: Well --

9 MR. ALBREGTS: That's not --

10 THE COURT: Well, I always thought if Metro has it,
11 the DA has it.

12 MR. MITCHELL: Well --

13 THE COURT: I mean, if they -- if they have a record
14 exculpatory on a particular matter and they don't turn it over,
15 it's held against your office, right?

16 MR. MITCHELL: Yes, it is.

17 THE COURT: Okay, because if Metro -- and basically
18 the State has -- the State agency, the law enforcement has it,
19 you have it.

20 MR. MITCHELL: Very true. Very true. That's the
21 construction of the law. Nevertheless, if we turn --

22 THE COURT: So if Metro -- you're saying Metro he has
23 it in a civil case, it doesn't count that they have it in a
24 criminal case?

25 Well, apparently the assertion's being made that

1 Metro didn't have it in a civil case. It was turned over to
2 them as part of this case.

3 Be that as it may, and I -- I can't speak to it
4 because I don't know. But I know that I haven't had an
5 adequate chance to look through it, and neither has the Court.
6 And that if -- if we're going to introduce minutes and prove
7 the truth of the matter asserted in the statements that the
8 minutes are taken of, that -- that makes it impossible to
9 cross-examine those assertions.

10 I mean, we -- we cannot -- the Cook County discussion
11 of the Crystal Communications contract came in not to prove
12 that any one of those commissioners was speaking to the truth,
13 but it came in prove that Lacy Thomas had gone to bat to -- for
14 Martello Pollock. So --

15 MR. ALBREGTS: And didn't or shouldn't have gone to
16 bat for him because he dressed down by the county commission.
17 How is that not for the truth of the matter asserted?

18 And more importantly, Judge, as -- accompanying this
19 letter are the documents you requested during your interview of
20 Mr. Robert Mills. Detective Whiteley asked for these. Nobody
21 sent Mr. Campbell a letter back saying, "We never asked for
22 these things, we don't want them."

23 They wanted a road map based upon their interview and
24 that's what they got. And they've had it for three years and
25 going on two months now.

1 THE COURT: What are the items, the bate stamp, you
2 know, 02 to 579?

3 MR. ALBREGTS: I don't -- it's Mr. Campbell's letter.

4 MR. CAMPBELL: I can respond to it for --

5 THE COURT: Why don't you come up, Mr. Campbell. For
6 the record, attorney Don Campbell's present in Court.

7 THE MARSHAL: Do you want to swear him in?

8 MR. CAMPBELL: Your Honor, here's what happened.

9 THE COURT: No, it's --

10 MR. CAMPBELL: What happened is --

11 MR. MITCHELL: Judge, should this be sworn testimony,
12 Judge?

13 MR. CAMPBELL: I'll be happy to be sworn.

14 THE COURT: All right, we'll swear him in.

15 MR. ALBREGTS: Why, Your Honor?

16 THE MARSHAL: Mr. Campbell, if you'll raise your
17 right hand, please, sir.

18 DON CAMPBELL, DEFENDANT'S WITNESS, SWORN

19 THE CLERK: Thank you.

20 THE COURT: Go ahead. Mr. Campbell.

21 Your Honor, this is what -- what occurred.

22 Las Vegas Metropolitan Police Department wanted to
23 better view Mr. Mills and they wanted to interview Mr. Fidler.
24 They asked if we would arrange that rather than compel them to
25 fly pack to Chicago, or to Denver, wherever they happened to be

1 at the time. I said that I would arrange that, and I did so.

2 They conducted pre-interviews with both me, Stan
3 Hutterton (phonetic) and the witnesses. One of the essential
4 things that they were investigating was the fact that they had
5 received numerous allegations to the effect that ACS did
6 nothing for the work that they had been paid for. I
7 specifically informed them that that was not true. That we had
8 records to support that and so did they.

9 They asked what those records were, and I said, "It's
10 the ones you took in the search warrant." They interviewed my
11 clients. For example, with respect to this particular -- the
12 accomplishments, that was an ACS record created while they were
13 agents of the UMC, while they were UMC's agents, created to
14 rebut the allegations that they had done nothing by Mr. Jerome
15 Carroll (phonetic), who I think was the auditor.

16 These were all ACS records created at the time that
17 they were involved in doing all the things that they said they
18 were doing.

19 We also provided this to the -- the FBI or -- or the
20 FBI asked if we had them, and we say we -- we did. Metro
21 apparently had difficulty going through all records because
22 they have taken literally, you know, hundreds of thousands of
23 records.

24 They asked if we could produce immediately these
25 records of ACS, and we did so immediately. I know that they

1 were delivered because you'll see, Your Honor, we actually
2 hand-delivered them, all right. I subsequently had a
3 conversation with either Mr. Ford or Mr. Whiteley, I couldn't
4 remember, where they asked for additional materials. We -- we
5 -- we supplied those.

6 I subsequently had a third conversation where they
7 confirmed that they had gotten the other ones, and then asked
8 for additional materials and we provided those as well. And I
9 have all confirming letters on -- on that.

10 And these are all -- I can attest that these are all
11 books and records of UCS (sic) that were compiled, because that
12 was the seminal thing this they were dealing with, was the
13 notion that this company this done nothing when, in fact, they
14 had all these people out there, they conducted all these
15 meetings, and we could demonstrate who was at the meetings.

16 So that's why they were particularly interested in
17 the steering committee meetings, as well as the one stop
18 minutes to confirm that these had, in fact, taken place, that
19 we had employees on premises. They did not know that prior to
20 that time.

21 Mr. Hutterton likewise was -- was with me when we had
22 these conversations with the Metropolitan Police Department.

23 THE COURT: All right, thank you, Mr. Campbell.

24 MR. MITCHELL: Could I ask Mr. Campbell what's in the
25 binder just --

1 THE COURT: Yeah, just -- can you give us an overview
2 of what's -- I haven't seen it, Mr. Campbell, so I don't know.

3 MR. CAMPBELL: Yes, there's steering committee
4 meetings. They are all the one stop meetings, and they are the
5 -- the correspondence, or the forwarding correspondence and the
6 actual ACS rebuttal to the -- the false allegations that were
7 lodged by Mr. Carroll. Those were created by ACS at the time
8 that -- that they were employed and under contract.

9 And Your Honor, not only did they have those from the
10 search warrant, but not only do we give them in this case, but
11 we also gave them to the district attorney in the civil case as
12 well. All right. And the civil case is the one that, I think
13 you know, Judge Gonzalez (phonetic) ruled in favor of summary
14 judgment in our favor.

15 MR. MITCHELL: Judge, in the civil case, the firm
16 that handled the case for the DA's Office -- I mean, we didn't
17 have DA litigators in that case. We had Rawlings, Olson and
18 Cannon, I think, that -- that handled the case for us. We
19 didn't -- I mean, they hired outside counsel to handle that
20 case and they were no DA litigators in the case.

21 But my -- my objection is at that the foundation is
22 not sufficient to get this in, and it contains hearsay, because
23 the business records exception is narrowly defined and it -- it
24 can't include just a record of what accomplishments your people
25 say they have accomplished.

1 THE COURT: Well, let's deal with the steering
2 committee minutes, which is what -- I think the witnesses have
3 testified that they're on a weekly or bi-weekly basis, where
4 they met with a group of people and they discussed how are we
5 doing, with an are with we going to do next week.

6 If there are minutes of the meeting and they're kept
7 by ACS, if you want to call it in the ordinary course of
8 business, why don't those come in? I -- I -- and we're not
9 dealing with the list of, this is our accomplishments.

10 MR. MITCHELL: Okay.

11 THE COURT: I understand that. So let's separate
12 arguments.

13 MR. MITCHELL: Excellent. Okay. If the minutes say
14 something like, this topic was discussed, I have no problem
15 with them. I mean, that -- that doesn't make them inadmissible
16 if that's all it's asserting.

17 But if it's got something like, ACS discussed how
18 much money it was making for the -- the hospital, or something
19 like that, if it's an assertion of fact -- of a fact in issue
20 here, I can't just stipulate to the admissibility of something
21 like that.

22 If it's only a record that we had a discussion and
23 this is what the topic was, that proves that ACS was at a
24 meeting taking minutes and I have no problem.

25 But I'm -- I'm faced with the prospect of a whole

1 bunch of statements, hundreds apparently, coming in that can't
2 be cross-examined. All sorts of people are talking in these
3 meetings. And if those minutes show everything that was said
4 and it's being offered for the truth of the matter asserted,
5 it's backdoor way of getting something in that isn't sworn to
6 by anybody.

7 Ross Fidler can swear that these are -- are records,
8 but he can't swear that any of those statements in there are
9 true.

10 MR. ALBREGTS: Your Honor, with all due respect,
11 Counsel is completely convoluting the argument. The --

12 MR. MITCHELL: Well --

13 MR. ALBREGTS: -- the --

14 MR. MITCHELL: -- I don't --

15 MR. ALBREGTS: As the Court has indicated, hearsay is
16 in business records all the time. That's not the issue. The
17 issue is, it's the foundation laid that it's a record kept in
18 the ordinary course of business, and the rules of evidence
19 allow that a certain manner of credibility that allows it to
20 come in.

21 That's no different than their -- you know, the fact
22 that he tries to distinguish the Cook County Board minutes is
23 just utterly unbelievable to me, because it's the same thing.
24 There's hearsay in there, and I guarantee you in closing
25 argument they're going to say, "This man recommended that

1 company and that company lost Cook County millions of dollars."

2 I mean --

3 MR. MITCHELL: Well, that --

4 MR. ALBREGTS: -- the fact of the matter is is it's a
5 business record. It -- we laid the foundation for the business
6 record. It comes in.

7 MR. MITCHELL: Judge, I'm glad that Mr. Albregts used
8 that example, because in the Clark -- in the Cook County
9 commission hearing records that were introduced, we are not
10 trying to prove the truth of the matter asserted. We're trying
11 to prove that what was said was actually false.

12 It wasn't offered for the truth of the matter
13 asserted. We're not saying that we agree with Lacy Thomas's
14 assessment of -- of -- of Crystal Communications. We're
15 offering that record to show that Lacy Thomas was there
16 vouching for Martello Pollock, whether what he said we disagree
17 with.

18 So it -- that is not an example of hearsay, because
19 it that is to be offered for the truth of the matter asserted
20 in the statement itself.

21 MR. ALBREGTS: You can't call Lacy Thomas a liar like
22 they want to when he told the detectives that he did good work
23 in Chicago. That's what he told the detectives. And now
24 they're going to have the -- now they're going to say, he told
25 the detectives they did good work in Chicago, but look at these

1 minutes. He's lying to the detectives.

2 MR. MITCHELL: We're not trying to do that.

3 THE COURT: What was the purpose of that document?

4 MR. MITCHELL: Which one, the Clark -- the Cook --

5 THE COURT: The city council meeting. I don't know
6 if it's county or city council meeting.

7 MR. MITCHELL: It was to show that Mr. Thomas was
8 vouching for Martello Pollock in a situation where he was under
9 criticism. And what Mr. -- what Mr. --

10 THE COURT: Well, you asked the detective, didn't
11 you, or detective stated they were complaining about the work
12 they did and then on cross, I think he had said well, wasn't
13 there some good statements about what they did.

14 MR. MITCHELL: No, it wasn't -- it wasn't on cross.
15 That came out in direct, that there were good statements about
16 what he did, too. And so we -- we didn't have any way of
17 knowing or proving who was speaking the truth. All we were
18 trying to show is that the records show that Mr. Thomas was
19 present, and that he was speaking on behalf of Martello
20 Pollock.

21 THE COURT: But --

22 MR. MITCHELL: If we were trying to show that
23 Martello Pollock had no responsibility for those -- for those
24 phones, then they -- then we would be offering Mr. Thomas's
25 statement to show the truth of the matter of what he said. But

1 that isn't why we offered it. It -- you know, a document can
2 have hearsay statements in it if you're using it for one
3 purpose, but they're not hearsay if you're using it for a
4 different purpose. It has nothing to do with the truth of the
5 matter asserted in Mr. Thomas's statements.

6 So we don't -- we're not trying to prove, and we will
7 not argue, I promise, that what any commissioner asserted in
8 Cook County was true. We're just trying to show that these
9 guys have been friends for a long time and Mr. Thomas goes to
10 bat for Martello Pollock.

11 And if he was trying to offer this to show that ACS
12 is on site doing work, we will stipulate to that. Our
13 Complaint only says that the terms of the contract were grossly
14 unfavorable to UMC. That's our allegation. Not that ACS did
15 no work. We stipulate that they did work.

16 MR. ALBREGTS: And they weren't grossly unfavorable,
17 because of all of the benefit that they received as a result of
18 this work. And I also want to point out it's not an
19 information. It's an Indictment.

20 THE COURT: Indictment.

21 MR. ALBREGTS: And that's why the other issue is so
22 important to not lose that distinction.

23 THE COURT: Well, doesn't this go to -- because your
24 allegation is that this contract was unfavorable to UMC because
25 ACS (a), didn't do anything, or that (b), they did a terrible

1 jo, or they were unqualified, correct?

2 MR. MITCHELL: Not that they were unqualified. It
3 is --

4 THE COURT: Or they didn't do anything for their
5 work.

6 MR. MITCHELL: It was just that the financial
7 arrangements up-front were not favorable to UMC. That they --
8 because of the agreement, and Mr. Thomas's involvement with
9 that contract throughout the life of the contract, money was
10 wasted that should not have been wasted. It's -- there's no
11 allegation that ACS wasn't working. We --

12 THE COURT: Well, how was money wasted assuming -- I
13 have no idea -- assuming ACS turned a lot of things around,
14 made a lot of changes that assisted the hospital? So how is --
15 isn't that relevant to the charge?

16 MR. MITCHELL: It -- Judge, like I said, if they're
17 just trying to show that they did a lot of work, and that they
18 claim they made a lot of accomplishments, they can have a
19 witness on the stand who can say, this is what we feel we did.
20 And I have no objection to that kind of testimony.

21 And -- but -- but to answer the other most
22 fundamental question, what the Court just proposed is closing
23 argument material. I mean, of course, they can argue that.
24 That's what we expect them to argue.

25 And the evidence should only come in on that point,

1 is whether or not they -- they were a good deal, whether they
2 did work for their money, whether or not it was -- it was
3 favorable to the hospital. That's all that we argue about.
4 But again, I -- the -- how can I effectively cross-examine a
5 statement made in a meeting by somebody not on the witness who
6 is asserting --

7 THE COURT: Well, isn't that like if this was a civil
8 case, a corporation case, wouldn't we have corporate minutes
9 being admitted?

10 MR. MITCHELL: It -- they only get admitted if
11 they're offered for the proper purpose. It -- it would depend
12 on if they're trying to show what was discussed, then they do
13 come in because that's a valid way to keep --

14 THE COURT: Well, I mean, aren't these going to --
15 I'm assuming, I haven't read them. Aren't these going to
16 discuss this is what we did yesterday and this is what we're
17 planning to do tomorrow?

18 MR. MITCHELL: Except they have more than that. They
19 have minutes of what people said. If they were general minutes
20 that said, We had a meeting and it was three hours and there
21 were 18 people present and they all spoke on a subject, we
22 could not object to their admission.

23 But when they're also being offered so that
24 everything that was said in the meeting also comes in, that's
25 just -- that's hearsay. That is not a business record that --

1 that qualifies under that exception. If it's facts and
2 figures, if it's like business records are usually figures.
3 They're usually numbers. How much money you were making,
4 meetings being held, personnel records. Those are all valid
5 business record exceptions. But not -- not for the content of
6 conversations if you're what you're trying to prove is what
7 somebody said in a conversation is true.

8 THE COURT: So if it was a Board of -- it says,
9 Meetings called, Board of Director called the meeting to order,
10 the president of the Board said we need to contract with, you
11 know, IBM because we had a good deal with them, that doesn't
12 come in?

13 MR. MITCHELL: It comes in if you're trying to prove
14 that IBM was discussed in the meeting. It -- that -- because
15 it does prove that. And there's no assertion of fact in that
16 that you could find objectionable. But a minute of a meeting
17 or minutes of a meeting, if -- you know, if somebody is saying
18 something that is an assertion of fact, and you're trying to
19 prove that what that person said was true just by introducing
20 evidence that they said it, that's not fair. That's -- that is
21 something that can't be cross-examined.

22 So if -- if they want to get into the fact that we
23 held all these meetings, I would stipulate that that was done,
24 but I -- I've got to read the records, and I assume that they
25 have specific conversations that are recorded there that I