

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

LACY THOMAS,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND  
FOR CLARK COUNTY; THE  
HONORABLE MICHAEL VILLANI,  
DISTRICT JUDGE, DEPT. 17

Respondents,

and

THE STATE OF NEVADA

Real Party In Interest

Electronically Filed  
Feb 16 2016 12:31 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

CASE NO: 69074

**RESPONDENT'S AMENDED APPENDIX  
Vol. 1**

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Counsel for Appellant

Counsel for Respondent

## INDEX

| <u>Document</u>                                                                      | <u>Vol.</u> | <u>Page No.</u> |
|--------------------------------------------------------------------------------------|-------------|-----------------|
| Answering Brief filed in Sup. Ct. Case No. 58833<br>on 2/2/12.....                   | Vol. I      | 73-114          |
| Decision on Motion to Dismiss in<br>Case No. 08C241569, filed 6/3/11.....            | Vol. 1      | 28-34           |
| Minutes from Court Date 3/8/10<br>In Case No. 08C241569.....                         | Vol. 1      | 16-17           |
| Minutes from Court Date 7/31/14.....                                                 | Vol. 1      | 122-123         |
| Motion to Dismiss in Case No. 08C241569<br>Filed 2/11/11 .....                       | Vol. 1      | 18-27           |
| Opening Brief filed in Sup. Ct. Case No. 58833<br>On 6/8/12.....                     | Vol. 1      | 35-72           |
| Register of Actions for Case No. 08C241569<br>State of Nevada v. Lacy L. Thomas..... | Vol. 1      | 1-15            |
| Transcripts in Case No/ 08C241569 from 5/6/14.....                                   | Vol. 1      | 115-121         |
| Defense Exhibit G Binder Part 1 .....                                                | Vol. 2      | 124-332         |
| Defense Exhibit G Binder Part 2 .....                                                | Vol. 3      | 333-541         |
| Defense Exhibit G Binder Part 3. ....                                                | Vol. 4      | 542-751         |

## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 16, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

FRANNY FORSMAN, ESQ.  
DANIEL J. ALBREGTS, ESQ.  
Counsels for Appellant

OFELIA L. MONJE  
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:

JUDGE MICHAEL VILLANI  
Eighth Judicial District Court, Dept. 17  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89101

BY /s/ E. Davis  
Employee, District Attorney's Office

OLM//ed

# REGISTER OF ACTIONS

CASE NO. 08C241569

The State of Nevada vs Lacy L Thomas

§  
§  
§  
§  
§  
§  
§  
§

Case Type: Felony/Gross  
Misdemeanor  
Date Filed: 02/20/2008  
Location: Department 2  
Cross-Reference Case  
Number: C241569  
Defendant's Scope ID #: 2576662  
Lower Court Case Number: 07GJ00094  
Supreme Court No.: 58833

## PARTY INFORMATION

|           |                 |                                                                   |
|-----------|-----------------|-------------------------------------------------------------------|
| Defendant | Thomas, Lacy L  | Lead Attorneys<br>Daniel J. Albregts<br>Retained<br>7024744004(W) |
| Plaintiff | State of Nevada | Steven B Wolfson<br>702-671-2700(W)                               |

## CHARGE INFORMATION

| Charges: Thomas, Lacy L           | Statute  | Level  | Date       |
|-----------------------------------|----------|--------|------------|
| 1. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 1. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 2. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 2. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 3. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 3. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 4. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 4. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 5. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 5. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 6. MISCONDUCT OF PUBLIC OFFICER.  | 197.110  | Felony | 01/01/1900 |
| 7. MISCONDUCT OF PUBLIC OFFICER.  | 197.110  | Felony | 01/01/1900 |
| 8. MISCONDUCT OF PUBLIC OFFICER.  | 197.110  | Felony | 01/01/1900 |
| 9. MISCONDUCT OF PUBLIC OFFICER.  | 197.110  | Felony | 01/01/1900 |
| 10. MISCONDUCT OF PUBLIC OFFICER. | 197.110  | Felony | 01/01/1900 |

## EVENTS & ORDERS OF THE COURT

| DISPOSITIONS

RA 000001

|            |                                                                                                                                                                                                       |
|------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>1. ACTIONS WHICH CONSTITUTE THEFT<br>Not Guilty                                                                                                               |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>1. THEFT-PENALTIES<br>Not Guilty                                                                                                                              |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>2. ACTIONS WHICH CONSTITUTE THEFT<br>Not Guilty                                                                                                               |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>2. THEFT-PENALTIES<br>Not Guilty                                                                                                                              |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>3. ACTIONS WHICH CONSTITUTE THEFT<br>Not Guilty                                                                                                               |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>3. THEFT-PENALTIES<br>Not Guilty                                                                                                                              |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>4. ACTIONS WHICH CONSTITUTE THEFT<br>Not Guilty                                                                                                               |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>4. THEFT-PENALTIES<br>Not Guilty                                                                                                                              |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>5. ACTIONS WHICH CONSTITUTE THEFT<br>Not Guilty                                                                                                               |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>5. THEFT-PENALTIES<br>Not Guilty                                                                                                                              |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>6. MISCONDUCT OF PUBLIC OFFICER.<br>Not Guilty                                                                                                                |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>7. MISCONDUCT OF PUBLIC OFFICER.<br>Not Guilty                                                                                                                |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>8. MISCONDUCT OF PUBLIC OFFICER.<br>Not Guilty                                                                                                                |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>9. MISCONDUCT OF PUBLIC OFFICER.<br>Not Guilty                                                                                                                |
| 01/01/1900 | (Judicial Officer: User, Conversion)<br>10. MISCONDUCT OF PUBLIC OFFICER.<br>Not Guilty                                                                                                               |
|            | <b>OTHER EVENTS AND HEARINGS</b>                                                                                                                                                                      |
| 02/20/2008 | <u>Indictment</u><br>(GRAND JURY) INDICTMENT Fee \$0.00<br>08C2415690001.tif pages                                                                                                                    |
| 02/20/2008 | <u>Hearing</u><br>GRAND JURY INDICTMENT<br>08C2415690002.tif pages                                                                                                                                    |
| 02/20/2008 | <u>Hearing</u><br>INITIAL ARRAIGNMENT<br>08C2415690003.tif pages                                                                                                                                      |
| 02/20/2008 | <u>Warrant</u><br>INDICTMENT WARRANT<br>08C2415690004.tif pages                                                                                                                                       |
| 02/20/2008 | <b>Grand Jury Indictment (11:30 AM) ()</b><br>GRAND JURY INDICTMENT Court Clerk: Denise Trujillo Reporter/Recorder: Richard Kangas Heard By: David Barker<br><u>Parties Present</u><br><u>Minutes</u> |
| 02/21/2008 | Result: Matter Heard<br><u>Reporters Transcript</u><br>REPORTER'S TRANSCRIPT OF PROCEEDINGS - GRAND JURY VOLUME 1<br>08C2415690005.tif pages                                                          |

02/21/2008 **Reporters Transcript**  
REPORTER'S TRANSCRIPT OF PROCEEDINGS - GRAND JURY VOLUME 2  
08C2415690006.tif pages

02/21/2008 **Reporters Transcript**  
REPORTER'S TRANSCRIPT OF PROCEEDINGS - GRAND JURY VOLUME 3  
08C2415690007.tif pages

02/21/2008 **Reporters Transcript**  
REPORTER'S TRANSCRIPT OF PROCEEDINGS - GRAND JURY VOLUME 4  
08C2415690008.tif pages

02/25/2008 **Reporters Transcript**  
REPORTER'S TRANSCRIPT GRAND JURY INDICTMENT  
08C2415690009.tif pages

02/26/2008 **Motion**  
DEFT'S MOTION FOR O.R. OR IN THE ALTERNATIVE BOND REDUCTION  
08C2415690011.tif pages

02/26/2008 **Media Request and Order**  
MEDIA REQUEST AND ORDER  
08C2415690015.tif pages

02/26/2008 **Media Request and Order**  
MEDIA REQUEST TO COURT PROCEEDINGS  
08C2415690016.tif pages

02/26/2008 **Media Request and Order**  
MEDIA REQUEST AND ORDER  
08C2415690017.tif pages

02/28/2008 **Motion**  
ALL PENDING MOTIONS 2-28-08  
08C2415690012.tif pages

02/28/2008 **Response**  
STATES RESPONSE TO DEFENDANTS MTN FOR RELEASE ON OWN RECOGNIZANCE OR IN THE  
ALTERNATIVE MOTION FOR BOND REDUCTION THE ALTERNATIVE MOTION FOR BOND REDUCTION  
08C2415690018.tif pages

02/28/2008 **Initial Arraignment** (8:00 AM) ()  
INITIAL ARRAIGNMENT Heard By: Michael Villani

Result: Matter Heard

02/28/2008 **Motion for Own Recognizance Release/Settng Reasonable Bail** (8:00 AM) ()  
DEFT'S MOTION FOR O.R. OR IN THE ALTERNATIVE BOND REDUCTION Heard By: Michael Villani

Result: Matter Continued

02/28/2008 **All Pending Motions** (8:00 AM) ()  
ALL PENDING MOTIONS 2-28-08 Court Clerk: Kristen Brown Relief Clerk: Dana Cooper/dc Reporter/Recorder:  
Michelle Ramsey Heard By: Michael Villani

**Parties Present**

**Minutes**

Result: Matter Heard

02/29/2008 **Bond**  
BAIL BOND #FCS500-249956 \$175,000.00

08C2415690019.tif pages

02/29/2008 **Bond**  
BAIL BOND #FCS250-247823 \$175,000.00

08C2415690020.tif pages

02/29/2008 **Motion for Own Recognizance Release/Settng Reasonable Bail** (8:00 AM) ()  
DEFT'S MOTION FOR O.R. OR IN THE ALTERNATIVE BOND REDUCTION Court Clerk: Roshonda Mayfield  
Reporter/Recorder: Debbie Winn Heard By: Michael Villani

**Parties Present**

**Minutes**

Result: Matter Continued

03/14/2008 **Motion**  
STATES MTN RQSTING TWO OR THREE DAY CONT/07  
08C2415690021.tif pages

03/19/2008 **Request**

UNOPPOSED MOTION TO CONTINUE THE TIME WITHIN WHICH TO FILE A WRIT OF HABEAS CORPUS AD PROSEQUENDUM CORPUS AD PROSEQUENDUM

08C2415690025.tif pages  
03/20/2008 **Hearing**  
STATUS CHECK: WRIT OF HABEAS CORPUS CORPUS  
08C2415690022.tif pages  
03/20/2008 **Motion** (8:15 AM) ()  
STATES MTN RQSTING TWO OR THREE DAY CONT/07 Court Clerk: Kristen Brown Relief Clerk: Dana Cooper/dc  
Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes  
  
Result: Matter Heard  
04/01/2008 **Acknowledgment**  
WRITTEN ACKNOWLEDGEMENT  
  
08C2415690026.tif pages  
04/07/2008 **Motion**  
ALBREGT'S MTN TO DISQUALIFY ATTORNEY /11  
08C2415690027.tif pages  
04/17/2008 **Motion to Disqualify Attorney** (8:00 AM) ()  
ALBREGT'S MTN TO DISQUALIFY ATTORNEY /11 Court Clerk: Kristen Brown Reporter/Recorder: Michelle Ramsey  
Heard By: Villani, Michael  
Minutes  
  
Result: Matter Continued  
04/23/2008 **Response**  
STATES RESPONSE TO MOTION TO DISQUALIFY THE DISTRICT ATTORNEYS OFFICE  
08C2415690028.tif pages  
05/01/2008 **Motion to Disqualify Attorney** (8:00 AM) ()  
ALBREGT'S MTN TO DISQUALIFY ATTORNEY /11 Court Clerk: Kristen Brown Reporter/Recorder: Michelle Ramsey  
Heard By: Villani, Michael  
Parties Present  
Minutes  
  
Result: Matter Continued  
05/07/2008 **Reply**  
DEFENDANTS REPLY TO THE STATES RESPONSE TO THE MOTION TO DISQUALIFY THE DISTRICT  
ATTORNEYS OFFICE DISTRICT ATTORNEYS OFFICE  
  
08C2415690029.tif pages  
05/15/2008 **Hearing**  
EVIDENTIARY HEARING: DISQUALIFY D.A.'S OFFICE  
08C2415690030.tif pages  
05/15/2008 **Motion to Disqualify Attorney** (8:00 AM) ()  
ALBREGT'S MTN TO DISQUALIFY ATTORNEY /11 Relief Clerk: Tia Everett/te Reporter/Recorder: Michelle Ramsey  
Heard By: Michael Villani  
Parties Present  
Minutes  
  
Result: Matter Heard  
05/30/2008 **Request**  
MOTION TO VACATE THE HEARING ON THE WRIT  
  
08C2415690031.tif pages  
06/10/2008 **Status Check** (8:00 AM) ()  
STATUS CHECK: WRIT OF HABEAS CORPUS CORPUS Court Clerk: Kristen Brown Reporter/Recorder: Michelle  
Ramsey Heard By: Michael Villani  
Parties Present  
Minutes  
  
Result: Matter Heard

06/16/2008 **Evidentiary Hearing** (10:00 AM) ()  
*EVIDENTIARY HEARING: DISQUALIFY D.A.'S OFFICE Court Clerk: Kristen Brown Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani*  
Parties Present  
Minutes

06/19/2008 Result: Denied  
**Order**  
 ORDER  
 08C2415690032.tif pages

07/01/2008 **Reporters Transcript**  
 REPORTER'S TRANSCRIPT EVIDENTIARY HEARING  
 08C2415690033.tif pages

07/02/2008 **Request**  
 MOTION TO RECONSIDER THE COURTS ORDER DENYING DEFENDANTS MOTION TODISQUALIFY THE DISTRICT ATTORNEYS OFFICE AND DENYING A BRIEF EVIDENTIARY HEARING TO FURTHER SUPPLEMENT THE RECORD IN THIS CASE DISQUALIFY THE DISTRICT ATTORNEYS OFFICE AND DENYING A BRIEF EVIDENTIARY HEARING TO FURTHER SUPPLEMENT THE RECORD IN THIS CASE

07/22/2008 08C2415690034.tif pages  
**Motion**  
 DEFT'S MTN TO RECONSIDER /13  
 08C2415690035.tif pages

08/01/2008 **Opposition**  
 OPPOSITION TO AMENDED MOTION TO RECONSIDER THE COURTS ORDER DENYINGDEFENDANTS MOTION TO DISQUALIFY THE DISTRICT ATTORNEYS OFFICE AND DENYING A BRIEF EVIDENTIARY HEARING TO FURTHER SUPPLEMENT THE RECORD IN THIS CASE DEFENDANTS MOTION TO DISQUALIFY THE DISTRICT ATTORNEYS OFFICE AND DENYING A BRIEF EVIDENTIARY HEARING TO FURTHER SUPPLEMENT THE RECORD IN THIS CASE  
 08C2415690036.tif pages

08/05/2008 **Motion to Reconsider** (8:00 AM) ()  
 DEFT'S MTN TO RECONSIDER /13 Court Clerk: Kristen Brown Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

08/26/2008 Result: Denied  
**Order**  
 ORDER DENYING AMENDED MTN TO RECONSIDER THE COURTS ORDER DENYING DEFTS MTNHEARING TO FURTHER SUPPLEMENT THE RECORD IN THIS CASE TO DISQUALIFY THE DISTRICT ATTORNEYS OFFICE AND DENYING A BRIEF EVIDENTIARY HEARING TO FURTHER SUPPLEMENT THE RECORD IN THIS CASE TO DISQUALIFY THE DISTRICT ATTORNEYS OFFICE AND DENYING A BRIEF EVIDENTIARY  
 08C2415690037.tif pages

09/02/2008 **CANCELED Calendar Call** (8:00 AM) ()  
 Vacated

09/08/2008 Result: Vacate  
**CANCELED Jury Trial** (10:00 AM) ()  
 Vacated

11/05/2008 Result: Vacate  
**Hearing**  
 DA'S REQUEST STATUS CHECK /TRIAL SETTING  
 08C2415690038.tif pages

11/13/2008 **Request** (8:00 AM) ()  
 DA'S REQUEST STATUS CHECK /TRIAL SETTING Court Clerk: Kristen Brown Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

11/18/2008 Result: Matter Heard  
**Acknowledgment**  
 WRITTEN ACKNOWLEDGEMENT  
 08C2415690041.tif pages



11/25/2008 **CANCELED Calendar Call (8:00 AM) ()**  
*Vacated*

Result: Vacate

12/01/2008 **CANCELED Jury Trial (10:00 AM) ()**  
*Vacated*

Result: Vacate

03/06/2009 **Hearing**  
**MINUTE ORDER RE: TRIAL DATES**  
08C2415690042.tif pages

03/06/2009 **Minute Order (11:00 AM) ()**  
**MINUTE ORDER RE: TRIAL DATES** Court Clerk: Kristen Brown Heard By: Michael Villani  
Parties Present  
Minutes

Result: Matter Heard

05/13/2009 **Motion**  
**DEFT'S MTN FOR O.R. RELEASE/20**  
08C2415690045.tif pages

05/18/2009 **Opposition**  
**OPPOSITION TO MTN FOR RELEASE ON OWN RECOGNIZANCE**  
08C2415690046.tif pages

05/19/2009 **Motion for Own Recognizance Release/Setting Reasonable Bail (8:00 AM) ()**  
**DEFT'S MTN FOR O.R. RELEASE/20** Court Clerk: Kristen Brown Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

Result: Matter Continued

05/26/2009 **Motion for Own Recognizance Release/Setting Reasonable Bail (8:00 AM) ()**  
**DEFT'S MTN FOR O.R. RELEASE/20** Court Clerk: Kristen Brown Relief Clerk: Michele Tucker/mlt Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

Result: Matter Continued

05/28/2009 **Motion for Own Recognizance Release/Setting Reasonable Bail (8:00 AM) ()**  
**DEFT'S MTN FOR O.R. RELEASE/20** Court Clerk: Kristen Brown Relief Clerk: Michele Tucker/mlt Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

Result: Denied

06/04/2009 **Order**  
**ORDER**

08C2415690047.tif pages

06/09/2009 **Bond**  
**BAIL BOND #AS100-118876 \$100,000.00**  
08C2415690048.tif pages

07/07/2009 **CANCELED Calendar Call (8:00 AM) ()**  
*Vacated*

Result: Vacate

07/13/2009 **CANCELED Jury Trial (10:00 AM) ()**  
*Vacated*

Result: Vacate

11/18/2009 **Notice of Witnesses and/or Expert Witnesses**  
**NOTICE OF WITNESSES AND/OR EXPERT WITNESSES**  
08C2415690049.tif pages

11/20/2009 **Notice of Witnesses and/or Expert Witnesses**  
**AMENDED NOTICE OF WITNESSES**  
08C2415690050.tif pages

11/24/2009 **Hearing**  
**STATUS CHECK: DISCOVERY**  
08C2415690051.tif pages

11/24/2009 **Hearing**  
**DA'S REQUEST RESET TRIAL DATE**  
08C2415690054.tif pages

11/24/2009 **Media Request and Order**  
**MEDIA REQUEST AND ORDER FOR CAMERA ACCESS TO COURT PROCEEDINGS**  
08C2415690055.tif pages

11/24/2009 **Calendar Call (8:00 AM) ()**  
**CALENDAR CALL** Court Clerk: Kristen Brown Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

11/30/2009 Result: Matter Heard  
**CANCELED Jury Trial (10:00 AM) ()**  
Vacated

12/03/2009 Result: Vacate  
**Request (8:00 AM) ()**  
**DA'S REQUEST RESET TRIAL DATE** Relief Clerk: REBECCA FOSTER Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

01/07/2010 Result: Matter Heard  
**Status Check (8:15 AM) ()**  
**STATUS CHECK: DISCOVERY** Relief Clerk: Tia Everett/te Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

02/10/2010 Result: Matter Heard  
**Media Request and Order**  
**MEDIA REQUEST AND ORDER FOR CAMERA ACCESS TO COURT PROCEEDINGS**  
08C2415690056.tif pages

02/25/2010 **Motion**  
**MOTION TO SUBMIT JURY QUESTIONNAIRE**  
08C2415690057.tif pages

03/02/2010 **Receipt of Copy**  
**RECEIPT OF COPY**  
08C2415690058.tif pages

03/09/2010 **Motion (8:15 AM) ()**  
**MOTION TO SUBMIT JURY QUESTIONNAIRE** Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

03/15/2010 Result: Granted  
**Notice of Witnesses and/or Expert Witnesses**  
**NOTICE OF WITNESSES AND/OR EXPERT WITNESSES**  
08C2415690060.tif pages

03/15/2010 **Notice of Witnesses and/or Expert Witnesses**  
**SUPPLEMENTAL NOTICE OF WITNESSES**  
08C2415690061.tif pages

03/16/2010 **Notice of Witnesses and/or Expert Witnesses**  
**SUPPLEMENTAL NOTICE OF WITNESSES**  
08C2415690063.tif pages

03/16/2010 **CANCELED Calendar Call (8:15 AM) ()**

Vacated

03/18/2010 Result: Vacate  
**Calendar Call** (8:15 AM) ()  
 CALENDAR CALL Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

03/22/2010 Result: Matter Heard  
**Jury Trial** (10:00 AM) ()  
 TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

03/23/2010 Result: Matter Continued  
**Media Request and Order**  
 MEDIA REQUEST AND ORDER FOR CAMERA ACCESS TO COURT PROCEEDINGS  
 08C2415690065.tif pages

03/23/2010 **Jury List**  
 DISTRICT COURT JURY LIST  
 08C2415690066.tif pages

03/23/2010 **Notice**  
 NOTIFICATION OF MEDIA REQUEST  
 08C2415690067.tif pages

03/23/2010 **Jury Trial** (10:00 AM) ()  
 TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

03/24/2010 Result: Matter Continued  
**Brief**  
 BRIEF IN SUPPORT OF THE STATE PROCEEDING ON EACH COUNT IN THE INDICTMENT AS A SEPARATE CHARGE NOT REQUIRING PROOF BEYOND A REASONABLE DOUBT OF ANY RELATED CHARGE AND IN THE ALTERNATIVE MOTION TO AMEND INDICTMENT PURSUANT TO NRS 173.095 AND 173.085 SEPARATE CHARGE NOT REQUIRING PROOF BEYOND A REASONABLE DOUBT OF ANY RELATED CHARGE AND IN THE ALTERNATIVE MOTION TO AMEND INDICTMENT PURSUANT TO NRS 173.095 AND 173.085  
 08C2415690068.tif pages

03/24/2010 **Jury Trial** (9:45 AM) ()  
 TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

03/25/2010 Result: Matter Continued  
**Jury Trial** (8:30 AM) ()  
 TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

03/26/2010 Result: Matter Continued  
**Jury Trial** (11:30 AM) ()  
 TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

03/29/2010 Result: Matter Continued  
**Brief**  
 BRIEF IN OPPOSITION TO THE STATE PROCEEDING ON EACH COUNT IN THE INDICTMENT AS A SEPARATE CHARGE NOT REQUIRING PROOF BEYOND A REASONABLE DOUBT OF ANY RELATED CHARGE AND OPPOSITION TO THE STATES REQUEST TO AMEND THE INDICTMENT PURSUANT TO NRS 173.095 AND 173.085 INDICTMENT AS A SEPARATE CHARGE NOT REQUIRING PROOF BEYOND A REASONABLE DOUBT

RA 000008

OF ANY RELATED CHARGE AND OPPOSITION TO THE STATES REQUEST TO AMEND THE INDICTMENT  
PURSUANT TO NRS 173.095 AND 173.085

03/29/2010 08C2415690070.tif pages  
**Jury Trial** (9:45 AM) ()  
TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Debra Winn Heard By: Villani, Michael  
Parties Present  
Minutes

03/30/2010 Result: Matter Continued  
**Reporters Transcript**  
REPORTER'S TRANSCRIPT OF PROCEEDINGS PORTION OF JURY TRIAL DAY 5 CROSS EXAM OF BILL  
ANDREWS OF BILL ANDREWS  
08C2415690069.tif pages

03/30/2010 **Jury Trial** (10:00 AM) ()  
TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

03/31/2010 Result: Matter Continued  
**Reporters Transcript**  
REPORTER'S CORRECTED TRANSCRIPT OF PROCEEDINGS TO CORRECT RECORDING MALFUNCTION -  
PORTION OF JURY TRIAL DAY 5 - CROSS-EXAMINATION OF BILL ANDREWS - HEARD 03-26-10 MALFUNCTION  
- PORTION OF JURY TRIAL DAY 5 - CROSS-EXAMINATION OF BILL ANDREWS - HEARD 03-26-10  
08C2415690073.tif pages

03/31/2010 **Jury Trial** (10:00 AM) ()  
TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

04/01/2010 Result: Matter Continued  
**Jury Trial** (9:30 AM) ()  
TRIAL BY JURY (FIRM) Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Villani, Michael  
Parties Present  
Minutes

04/02/2010 Result: Matter Continued  
**Hearing**  
STATUS CHECK: RESET TRIAL DATE  
08C2415690071.tif pages

04/02/2010 **Jury Trial** (9:30 AM) ()  
TRIAL BY JURY (FIRM) Relief Clerk: Susan Jovanovich /sj Reporter/Recorder: Michelle Ramsey Heard By: Michael  
Villani  
Parties Present  
Minutes

04/08/2010 Result: Matter Heard  
**Hearing**  
STATUS CHECK: DISCOVERY  
08C2415690076.tif pages

04/08/2010 **Hearing**  
HEARING: MOTION TO DISMISS \*(VJ 05-04-10)  
08C2415690077.tif pages

04/08/2010 **Status Check** (8:15 AM) ()  
STATUS CHECK: RESET TRIAL DATE Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By:  
Michael Villani  
Parties Present  
Minutes

04/28/2010 Result: Matter Heard  
**Media Request and Order**

RA 000009

05/04/2010 **MEDIA REQUEST AND ORDER**  
08C2415690078.tif pages  
**Hearing**  
**STATUS CHECK: DISCOVERY**  
08C2415690079.tif pages

05/04/2010 **Status Check (8:15 AM) ()**  
**STATUS CHECK: DISCOVERY** Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

05/27/2010 Result: Matter Heard  
**Ex Parte**  
**EX PARTE APPLICATION**

06/01/2010 08C2415690080.tif pages  
**Status Check (8:15 AM) ()**  
**STATUS CHECK: DISCOVERY** Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

06/15/2010 Result: Matter Heard  
**Filed Under Seal**  
**FILED UNDER SEAL - EX PARTE ORDER**

07/01/2010 08C2415690081.tif pages  
**Hearing**  
**STATES REQUEST STATUS CHECK TO RESET THE TRIAL**  
08C2415690082.tif pages

07/02/2010 **CANCELED Hearing (9:00 AM) ()**  
Vacated

07/06/2010 Result: Vacate  
**Request (8:15 AM) ()**  
**STATES REQUEST STATUS CHECK TO RESET THE TRIAL** Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani  
Parties Present  
Minutes

07/27/2010 Result: Matter Heard  
**CANCELED Calendar Call (8:15 AM) ()**  
Vacated

08/02/2010 Result: Vacate  
**CANCELED Jury Trial (10:00 AM) ()**  
Vacated

08/09/2010 Result: Vacate  
**Transcript of Proceedings**  
Transcript of Proceedings - Jury Trial Day 10 - Heard 04-02-10

08/09/2010 **Transcript of Proceedings**  
Transcript of Proceedings - Jury Trial Day 9 - Heard 04-01-10

08/09/2010 **Transcript of Proceedings**  
Transcript of Proceedings - Jury Trial Day 8 - Heard 03-31-10

08/09/2010 **Transcript of Proceedings**  
Transcript of Proceedings - Jury Trial Day 7 - Heard 03-30-10

08/09/2010 **Transcript of Proceedings**  
Transcript of Proceedings - Jury Trial Day 6 - Heard 03-29-10

08/09/2010 **Transcript of Proceedings**  
Transcript of Proceedings - Jury Trial Day 5 - Partial Transcript - Excluding Cross-Examination of Bill Andrews - Heard 03-26-10

08/09/2010 **Transcript of Proceedings**  
Transcript of Proceedings - Jury Trial Day 4 - Heard 03-25-10

08/09/2010 Transcript of Proceedings  
*Transcript of Proceedings - Jury Trial Day 3 - Heard 03-24-10*

08/09/2010 Transcript of Proceedings  
*Transcript of Proceedings - Jury Trial Day 2 - Heard 03-23-10*

08/09/2010 Transcript of Proceedings  
*Transcript of Proceedings - Jury Trial Day 1 - Partial Transcript - Excludes Jury Voir Dire - Heard 03-22-10*

08/09/2010 Recorders Transcript of Hearing  
*Recorder's Transcript of Hearing Re: Status Check; Discovery - Heard 05-04-2010*

12/09/2010 Status Check (8:15 AM) (Judicial Officer Villani, Michael)  
*Trial Setting*  
Minutes

12/22/2010 Result: Matter Heard  
Motion  
*Motion to Expunge Lis Pendens*

12/28/2010 CANCELED **Calendar Call** (8:15 AM) (Judicial Officer Villani, Michael)  
*Vacated - per Judge*  
*12/28/2010 Reset by Court to 12/28/2010*

01/03/2011 CANCELED **Jury Trial** (10:00 AM) (Judicial Officer Villani, Michael)  
*Vacated - per Judge*

01/04/2011 Status Check (8:15 AM) (Judicial Officer Villani, Michael)  
*New Trial Date*  
Minutes

01/06/2011 Result: Matter Heard  
Opposition to Motion  
*Opposition to Defendant, Lacy L. Thomas' Motion to Expunge Lis Pendens*

01/11/2011 Motion (8:15 AM) (Judicial Officer Villani, Michael)  
*Def't.'s Motion to Expunge Lis Pendens*  
Minutes

01/14/2011 Result: Deferred Ruling  
Decision (3:00 AM) (Judicial Officer Villani, Michael)  
*Def't.'s Motion to Expunge Lis Pendens*  
Minutes

02/02/2011 Result: Decision Made  
Supplement  
*Defendant's Supplement to its Previously Filed Motion to Expunge Lis Pendens*

02/02/2011 Supplement to Opposition  
*Respondents' Supplement to its Previously Filed Opposition to Defendant, Lacy L. Thomas' Motion to Expunge Lis Pendens*

02/04/2011 Decision (3:00 AM) (Judicial Officer Villani, Michael)  
*Defendant's Motion to Expunge Lis Pendens*  
Minutes

02/11/2011 Result: Denied  
Motion to Dismiss  
*Motion to Dismiss*

02/11/2011 Motion to Dismiss  
*Defendant's Motion to Dismiss (Double Jeopardy)*

02/11/2011 Motion to Dismiss  
*Defendant's Motion to Dismiss the Indictment (Failure to Present Exculpatory Evidence)*

02/22/2011 Motion to Dismiss (8:15 AM) (Judicial Officer Villani, Michael)  
02/22/2011, 04/28/2011, 05/31/2011  
DEFT'S MOTION TO DISMISS (DOUBLE JEOPARDY)...DEFT'S MOTION TO DISMISS THE INDICTMENT (FAILURE TO PRESENT EXULPATORY EVIDENCE)...DEFT'S MOTION TO DISMISS

02/22/2011 Motion to Dismiss (8:15 AM) (Judicial Officer Villani, Michael)

02/22/2011, 04/28/2011, 05/31/2011  
*Defendant's Motion to Dismiss (Double Jeopardy)*

02/22/2011 **Motion to Dismiss** (8:15 AM) (Judicial Officer Villani, Michael)  
02/22/2011, 04/28/2011, 05/31/2011  
*Defendant's Motion to Dismiss the Indictment (Failure to Present Exculpatory Evidence)*

02/22/2011 **All Pending Motions** (8:15 AM) (Judicial Officer Villani, Michael)  
DEFT'S MOTION TO DISMISS (DOUBLE JEOPARDY)...DEFT'S MOTION TO DISMISS THE INDICTMENT (FAILURE TO PRESENT EXULPATORY EVIDENCE)...DEFT'S MOTION TO  
Parties Present  
Minutes

03/17/2011 **Result: Matter Heard**  
Opposition  
*State's Combined Opposition to Defendant's Motions to Dismiss Based on Double Jeopardy and Alleged Failure to Provide Exculpatory Evidence*

03/17/2011 Opposition  
*State's Opposition to Defendant's Motion to Dismiss Based on Alleged Multiplicity*

03/28/2011 Reply to Motion  
*Defendant's Reply to State's Opposition to Motion to Dismiss*

03/28/2011 Reply to Opposition  
*Defendant's Reply to State's Combined Opposition to the Defendant's Motion to Dismiss Based on Double Jeopardy and Failure to Present Exculpatory Evidence to the Grand Jury*

04/07/2011 **Status Check** (8:15 AM) (Judicial Officer Villani, Michael)  
*At Court's Request*  
Minutes

04/12/2011 **Result: Matter Heard**  
Receipt of Copy  
*Receipt of Copy*

04/28/2011 **CANCELED Argument** (10:00 AM) (Judicial Officer Villani, Michael)  
*Vacated*

04/28/2011 **All Pending Motions** (10:00 AM) (Judicial Officer Villani, Michael)  
Minutes

05/12/2011 **Result: Matter Heard**  
Brief  
*Defendant's Documents And Brief Regarding The Exculpatory Nature Of The Documents*

05/18/2011 Supplemental  
*Defendant's Supplemental Brief Regarding the Exculpatory Nature of the Documents*

05/27/2011 Reply  
*State's Reply To Defendant's Documents And Brief Regarding The Exculpatory Nature Of The Documents*

06/03/2011 Decision  
*Decision On Motion To Dismiss*

06/14/2011 **CANCELED Calendar Call** (8:15 AM) (Judicial Officer Gates, Lee A.)  
*Vacated - per Judge*

06/20/2011 **CANCELED Jury Trial** (1:00 PM) (Judicial Officer Villani, Michael)  
*Vacated - per Judge*

06/28/2011 Order

06/29/2011 Receipt  
*Receipt Of Exhibits*

07/01/2011 Notice of Appeal (criminal)

07/01/2011 Request  
*Request for Rough Draft Transcript*

07/01/2011 **Case Appeal Statement**

07/15/2011 **Transcript of Proceedings**  
*Transcript Re: All Pending Motions - Heard 04/28/2011*

07/15/2011 **Recorders Transcript of Hearing**  
*Recorders Rough Draft Transcript of Hearing Re: Status Check: At Court's Request - Heard 04/07/2011*

07/15/2011 **Recorders Transcript of Hearing**  
*Recorders Rough Draft Transcript of Hearing Re: All Pending Motions - Heard 02/22/2011*

07/15/2011 **Recorders Transcript of Hearing**  
*Recorders Rough Draft Transcript of Hearing Re: Status Check: Reset Trial Date - Heard 04/08/2010*

01/17/2014 **NV Supreme Court Clerks Certificate/Judgment - Affd/Rev Part**  
*Nevada Supreme Court Clerk's Certificate Judgment - Affirmed in Part, Reversed in Part and Remand; Rehearing Denied*

03/20/2014 **Status Check** (8:15 AM) (Judicial Officer Villani, Michael)  
**03/20/2014, 05/06/2014, 07/08/2014, 07/31/2014**  
*Status Check: Nv Supreme Court Remand to Reset Trial Date*  
**Parties Present**  
**Minutes**  
*06/10/2014 Reset by Court to 07/08/2014*  
 Result: Matter Continued

05/07/2014 **Recorders Transcript of Hearing**  
*Transcript of Proceedings Re: Status Check: NV Supreme Court Remand to Reset Trial Date may 6, 2014*

08/07/2014 **Acknowledgment**  
*Written Acknowledgment*

09/26/2014 **Notice**  
*Notice of Entry of Appearance*

09/29/2014 **Supplemental**  
*Defendant's Supplemental Motion to Dismiss and Notice of Need for Evidentiary Hearing*

09/29/2014 **Motion to Dismiss**  
*Renewed Motion to Dismiss Based on Failure of the Indictment to State a Crime or in the Alternative, Unconstitutional Vagueness of the Statutes*

10/08/2014 **Opposition**  
*State's Opposition to Defendant's Motion to Dismiss Based on Failure of the Indictment to State a Crime or in the Alternative, Unconstitutional Vagueness of the Statutes*

10/09/2014 **Motion to Dismiss** (8:15 AM) (Judicial Officer Villani, Michael)  
**10/09/2014, 01/16/2015**  
*Renewed Motion to Dismiss Based on Failure of the Indictment to State a Crime or in the Alternative, Unconstitutional Vagueness of the Statutes*  
**Minutes**  
*11/21/2014 Reset by Court to 01/16/2015*  
 Result: Matter Continued

10/16/2014 **Receipt of Copy**  
*Receipt of Copy*

10/17/2014 **Opposition**  
*State's Opposition To Defendant's Motion To Dismiss*

10/24/2014 **Reply**  
*Defendant's Reply in Support of Motion to Dismiss (Double Jeopardy)*

10/24/2014 **Reply**  
*Reply in Support of Motion to Dismiss (Vagueness/Failure to State a Crime)*

12/29/2014 **Motion to Compel**  
*Motion for Order Compelling Disclosure of Documents*

01/06/2015 **Order Shortening Time**  
*Motion and Order for Order Shortening Time*



01/08/2015 **Motion for Order** (8:15 AM) (Judicial Officer Villani, Michael)  
*Motion for Order Compelling Disclosure of Documents*  
Minutes  
01/15/2015 Reset by Court to 01/08/2015  
Result: Matter Heard

01/16/2015 **Motion to Dismiss** (9:30 AM) (Judicial Officer Villani, Michael)  
*Motion to Dismiss the Indictment (Failure to Present Exculpatory Evidence)*  
11/21/2014 Reset by Court to 01/16/2015  
Result: Off Calendar

01/16/2015 **All Pending Motions** (9:30 AM) (Judicial Officer Villani, Michael)  
*Deft.'s Motion to Dismiss the Indictment (Failure to Present Exculpatory Evidence) . . . Deft.'s Renewed Motion to Dismiss Based on Failure of the Indictment to State a Crime or, in the Alternative, Unconstitutional Vagueness of the Statutes . . . Evidentiary Hearing: Motion for Order Compelling Disclosure of Documents*  
Minutes  
Result: Matter Heard

01/27/2015 **Stipulation and Order**  
*Stipulation and Order Continuing Evidentiary Hearing*

03/02/2015 **Stipulation and Order**  
*Stipulation*

03/02/2015 **Order**  
*Order*

03/03/2015 **Status Check** (8:30 AM) (Judicial Officer Villani, Michael)  
*Status Check: Calendal Call (Special Setting)*  
Minutes  
Result: Off Calendar

03/09/2015 **CANCELED Jury Trial** (9:00 AM) (Judicial Officer Villani, Michael)  
*Vacated*

03/18/2015 **Exhibits**  
*Exhibit in Support of Motion to Dismiss (Double Jeopardy)*

05/15/2015 **Evidentiary Hearing** (9:30 AM) (Judicial Officer Villani, Michael)  
*Evidentiary Hearing: Motion for Order Compelling Disclosure of Documents*  
Minutes  
01/16/2015 Reset by Court to 03/20/2015  
03/20/2015 Reset by Court to 05/15/2015  
Result: Matter Heard

06/30/2015 **Recorders Transcript of Hearing**  
*Transcript of Proceedings Re: Evidentiary Hearing: Defendant's Motion for Order Compelling Disclosure of Documents May 15, 2015*

07/31/2015 **Argument** (9:30 AM) (Judicial Officer Villani, Michael)  
*Argument: Supplemental Motion to Dismiss (Double Jeopardy) . . . Renewed Motion to Dismiss Based on Failure of Indictment to State a Crime or, in the Alternative, Unconstitutional Vagueness of the Statutes . . . Motion for Order Compelling Disclosure of Documents*  
Minutes  
Result: Matter Heard

08/17/2015 **Order**  
*Order for Transcript*

08/18/2015 **Recorders Transcript of Hearing**  
*Transcript of Proceedings Re Argument Supplemental Motion to Dismiss Double Jeopardy Renewed Motion to Dismiss Based on Failure of Indictment to State a Crime, or in the Alternative Unconstitutional Vagueness of the Statutes Motion to Compel July 31, 2015*

08/20/2015 **Minute Order** (8:30 AM) (Judicial Officer Villani, Michael)  
Minutes  
Result: Minute Order - No Hearing Held

09/02/2015 Minute Order (3:00 PM) (Judicial Officer Herndon, Douglas W.)  
Minutes

09/10/2015 Result: Minute Order - No Hearing Held  
Status Check (8:30 AM) (Judicial Officer Villani, Michael)  
*Status Check: Order (07/31/15)*  
Minutes

09/10/2015 Result: Matter Continued  
Notice  
*Notice of Department Reassignment*

09/29/2015 Finding of Fact and Conclusions of Law  
*Findings of Fact, Conclusions of Law and Order*

10/16/2015 Minute Order (4:30 PM) (Judicial Officer Scotti, Richard F.)  
Minutes

10/20/2015 Result: Minute Order - No Hearing Held  
CANCELED Calendar Call (8:30 AM) (Judicial Officer Bixler, James)  
*Vacated - per Judge*

10/26/2015 CANCELED Jury Trial (9:00 AM) (Judicial Officer Villani, Michael)  
*Vacated - per Judge*

11/05/2015 Status Check (9:00 AM) (Judicial Officer Scotti, Richard F.)  
Parties Present  
Minutes

12/10/2015 Result: Matter Heard  
Request (9:00 AM) (Judicial Officer Scotti, Richard F.)  
*State's Request Re: Status Check Jury Trial*  
Parties Present  
Minutes

02/02/2016 Result: Set Status Check  
CANCELED Calendar Call (8:30 AM) (Judicial Officer Scotti, Richard F.)  
*Vacated*  
*02/02/2016 Reset by Court to 02/02/2016*

02/08/2016 CANCELED Jury Trial - FIRM (9:30 AM) (Judicial Officer Scotti, Richard F.)  
*Vacated*  
*02/08/2016 Reset by Court to 02/08/2016*

02/18/2016 Status Check: Trial Setting (9:00 AM) (Judicial Officer Scotti, Richard F.)



CALENDAR CALL Court Clerk: Carol Donahoo Reporter/Recorder: Michelle Ramsey Heard By: Michael Villani

**Minutes**

03/18/2010 8:15 AM

- Court informed counsel Deft. Thomas' trial will begin on Monday at 10:00 a.m. Colloquy regarding the Jury Questionnaire and trial procedure; the trial is expected to last two (2) to three (3) weeks. Mr. Albrechts advised there was a settlement in the related Civil case between ACS Consultant Company (ACS) and the University Medical Center; said case involves two (2) of the criminal accounts in this case. Mr. Albrechts would like a copy of the settlement documents. Mr. Mitchell advised the settlement is not complete yet as ACS is disputing some of the language in the final documents. Court directed Mr. Mitchell to provide Mr. Albrechts a copy of the documents as soon as they become available. BOND 03/22/10 10:00 AM JURY TRAIL

Parties Present

Return to Register of Actions

RA 000017

FILED

FEB 11 2011

*John J. Blum*  
CLERK OF COURT

1 0056  
2 DANIEL J. ALBREGTS, ESQ.  
3 Nevada Bar No. 004435  
4 DANIEL J. ALBREGTS, LTD.  
5 601 S. Tenth Street, Suite 202  
6 Las Vegas, Nevada 89101  
7 (702) 474-4004  
8 Attorney for Defendant

9 DISTRICT COURT  
10 CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,

12 Plaintiff,

13 vs.

14 LACY L. THOMAS,

15 Defendant.

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

16 MOTION TO DISMISS

17 The defendant, LACY L. THOMAS, by and through his attorney, DANIEL J. ALBREGTS,  
18 ESQ., hereby files this Motion to Dismiss. This motion is based upon the attached Memorandum  
19 of Points and Authorities, all of the pleadings and papers on file herein, the evidentiary hearing  
20 which may be necessary for the determination of this motion, and further argument at the hearing  
21 this Court will schedule on this issue.

22 DATED this 11 day of February, 2011.

23 DANIEL J. ALBREGTS, LTD.

24 By: *[Signature]*

25 Daniel J. Albregts, Esq.  
26 Nevada Bar No. 004435  
27 601 S. Tenth Street, Suite 202  
28 Las Vegas, Nevada 89101  
(702) 474-4004  
Attorney for Defendant

08C241569  
MDSM  
Motion to Dismiss  
1229855



RECEIVED

FEB 11 2011

CLERK OF THE COURT

RA 000018

**A**

Dated this 11<sup>th</sup> day of February, 2011.

By: DANIEL J. ALBREGTS, ESQ.  
Nevada Bar No. 004435

**I. MOTION TO DISMISS, OR FOR OTHER APPROPRIATE RELIEF: MULTIPLICITY**

The Indictment in this case contains 10 Counts. The first five counts allege that the defendant committed Theft pursuant to NRS 205.0832. The second five counts allege that the defendant is guilty of Misconduct of a Public Officer pursuant to NRS 197.110. There are no factual allegations in Counts 6 through 10. Instead, the State alleged that the conduct in each of the first five counts constitutes both Theft in those counts and Misconduct of a Public Official in the last five counts. At the prior trial of this case, the State agreed that the acts in Counts 1 through 5 constitute the crimes charged in Counts 1 through 5 (Theft) and also constitute the crimes alleged in Counts 6 through 10 (Misconduct of a Public Officer):

MR. MITCHELL: Well, that's true, Judge...  
TT, 3/23/10, p. 152.

28 | . .

1                    **B. Nevada Law Prohibits the Proliferation of Charges in this Manner**

2                    In Albitre v. State, 738 P.2d 1307, 1309 (Nev. 1987), the defendant was charged and  
3 convicted of two counts of causing the death of another by driving a vehicle while intoxicated, two  
4 counts of involuntary manslaughter and two counts of causing the death of another by reckless  
5 driving. The Nevada Supreme Court found that "the gravamen of all the charges is that Albitre  
6 proximately caused the death of two persons by operating a vehicle in a reckless and unsafe manner  
7 due to her intoxication." Id. The court then held that, "the Legislature never intended to permit the  
8 State to proliferate charges as to one course of conduct by adorning it with chameleonic attire." Id.

9                    That is exactly what has happened here. The Grand Jury indicted based on evidence of one  
10 course of conduct and then produced an indictment which took the one course of conduct and called  
11 it Theft in Counts 1 through 5 and Misconduct in Counts 6 through 10.

12                   The State has not charged Theft and Misconduct as alternatives. Rather, it seeks convictions  
13 on all 10 counts.

14                   In Nevada, even if separate charges do not violate the Double Jeopardy clause under  
15 Blockburger v. United States, 52 S. Ct. 180 (1932), multiple charges for a single offense must pass  
16 the "redundancy test" as defined by the Nevada Supreme Court.

17                   Quoting State of Nevada v. District Court, 994 P.2d 692, 698 (Nev. 2000) the court in  
18 Salazar v. State, 70 P. 2d 749, 751 (Nev. 2003) set forth the test:

19                   The issue is whether the gravamen of the charged offenses is the same such that it  
20 can be said that the legislature did not intend multiple convictions. "[R]edundancy  
21 does not, of necessity arise when a defendant is convicted of numerous charges  
22 arising from a single act [citations omitted]. The question is whether the material or  
significant part of each charge is the same even if the offenses are not the same. Thus,  
where a defendant is convicted of two offenses, that, as charged, punish the exact  
same illegal act, the convictions are redundant.

23                   The Salazar court found that under the facts of that case,

24                   [T]he gravamen of both the battery with use of a deadly weapon with substantial  
25 bodily harm and mayhem with use of a deadly weapon offenses are the same and,  
26 therefore, Salazar's convictions for battery and mayhem are redundant. The gravamen  
27 of the battery offense, as charged, is that Salazar cut Clark and he suffered substantial  
28 harm, which was the nerve damage. The gravamen of the mayhem offense, as  
charged, is that Salazar cut Clark and suffered permanent nerve damage. Both arise  
from and punish the same illegal act—cutting Clark with a box cutter.

Id.

1 *The Gravamen of the Theft and Misconduct Offenses is the Same*

2 Here the test is easy to apply. The indictment alleges exactly the same conduct as constituting  
3 Theft and Misconduct. It is not easy to ascertain what the State alleges is illegal about the acts  
4 alleged, however, See argument infra.

5 *The Remedy Should be an Order Requiring Election of Offenses*

6 The Nevada Supreme Court has not clarified the nature of the remedy when redundancy is  
7 found. In Albitre, Supra at 1309, the court vacated the redundant convictions but mentioned that a  
8 jury instruction limiting the number of convictions would be appropriate.<sup>1</sup> In Salazar, Supra the  
9 redundant convictions were vacated without comment. This case presents an additional problem in  
10 fashioning the appropriate remedy due to the manner in which the Indictment was drafted. It would  
11 be impossible for the jury to separate the offenses as they are advised by the Indictment that the same  
12 conduct constitutes both crimes. Accordingly, the remedy in this case must be to require the  
13 prosecutor to elect between the offenses charged.

14 **II. MOTION TO DISMISS-FAILURE TO STATE A**  
15 **CRIME/VAGUENESS OF THE STATUTE**

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

22 **A. The State's Theory of Prosecution**

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

27 \_\_\_\_\_  
28 <sup>1</sup> This is a curious comment in that when instructional error is found, the remedy is a new  
trial not dismissal of charges.



1 between the court and the prosecutor at the prior trial:

2 THE COURT: Isn't that the—at least the facts right now is that he contracted  
3 with a friend who's benefit to the friend and not to the county/UMC, isn't that what  
4 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  
8 have to be a friend. But when it was entered into it for the benefit of somebody  
9 besides the organization represented. So that's what I need to prove on Counts 6  
10 through 10, yes. ...

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

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

15 MR. MITCHELL: My burden is not so high as to force me to—to prove that  
16 —that— well, let me phrase it this way. The —what I have to show is that the purpose  
17 of the contract was to help the friend. I don't have to prove that the purpose was to  
18 harm the county. I just have to show that this was for personal benefit of a friend, or  
19 somebody, not—not to fulfill my job.

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

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

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

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

The conduct alleged here is either not a crime at all, or the statutes as applied to this case are  
unconstitutionally vague.

28

1 **B. The Statutes**

2 *The Theft Statute*

3 The Grand Jury was instructed that the offense charged was contained in NRS  
4 205.0832(b)(1). Tr. Gr. J., 2/12/08, p. 5.

5 NRS 205.0832(1)(b) provides:

6 ...a person commits theft if, without lawful authority, the person knowingly:

7 ...  
8 (b) converts, makes an unauthorized transfer of an interest in, or without  
9 authorization controls any property of another person, or **uses** the services or property  
10 of another person entrusted to him or her or placed in his or her possession for a  
11 limited, authorized period of determined or prescribed duration or for a limited **use**.

12 When a Grand Juror asked what was "the point at which professional incompetency resulting  
13 in a shoddy work product crosses the line into criminal activity." Tr. Gr. J., 1/22/08, p. 152. The  
14 prosecutor responded, "the legal theory behind the pleadings in Counts 1 through 5 is the word  
15 entrustment, whether or not money given or allowed to be disposed of by Lacy Thomas was **used**  
16 for the purpose that he was hired to use it for.

17 So it is clear that the portion of the statute which was charged here is, "uses the...property of  
18 another person entrusted to him...for a limited, authorized period of determined or prescribed  
19 duration or for a limited use." In other words, theft is committed when a person **uses** property that  
20 has been entrusted to him for a limited purpose.

21 *The Misconduct Statute*

22 NRS 197.110(2) provides:

23 Every public officer who:

24 ...  
25 (2) Employs or **uses** any person, money or property under the public officer's  
26 official control or direction, or in the public officer's official custody, for the private  
27 benefit or gain of the public officer or another.

28 The prosecutor explained what this meant to the Grand Jury: "And then the next five counts  
relate back to the first five counts but they go directly to the question of whether or not he was **using**  
funds assigned to him to govern at UMC for the private enrichment of himself or some other  
person." Tr. Gr. J., 1/22/08, p. 153.

So Misconduct occurs when a public officer uses public funds for the private benefit of

1 another (since there is no allegation that Thomas gained a benefit) and that private benefit can  
2 include merely getting paid under the contract.

3 **C. Failure to State a Crime**

4 ***Theft***

5 Since the question of criminality in both statutes turns on the term "use" or "uses" the court  
6 must instruct the jury what that means in the context of this case. We know that the prosecutor  
7 doesn't think that it means that he wasn't authorized to use the money since elaborate procedures  
8 and approval processes were conducted before the contracts were executed or paid. We know that  
9 the prosecutor doesn't believe that it means that the "use" of the property is unlawful because he was  
10 contracting with friends or that he failed to disclose some relationship.

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

17 ***Misconduct***

18 The State has already advised the court that it will not prove that Mr. Thomas received any  
19 kickbacks or other inappropriate remuneration for the contracts. The State has already advised the  
20 court that the benefit received by the recipients was the benefit provided under the contract. The  
21 State has already advised the court that it is not required to prove that the county was harmed in any  
22 way.

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

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 **D. Unconstitutional Vagueness**

4 If the court determines that the statutes at issue in this case can be interpreted in a way that  
5 the meaning is clear and provides a standard of conduct so that individuals will know what behavior  
6 is permissible, then it should do so and measure the allegations in the Indictment against that  
7 standard. This is called the doctrine of "constitutional avoidance." "[W]hen the language of a statute  
8 admits of two constructions, one of which would render it constitutional and valid and the other  
9 unconstitutional and void, that construction should be adopted which will save the statute." State v.  
10 Castaneda, \_\_\_ P.3d \_\_\_, 126 Nev. Adv. Op. 45, 2010 WL 4812947, \*1 (Nev. 2010). The State had  
11 such difficulty defining the conduct that is unlawful under the statutes when queried by the court,  
12 it is difficult to venture how the State construes the statute as applied to the conduct in this case.  
13 Nevertheless, the construction given the statute by the State to the Grand Jury and to the trial court  
14 violates the due process provisions of the Fifth and Fourteenth Amendments.

15 "Vagueness may invalidate a criminal law for either of two independent reasons,"  
16 [citation omitted]: (1) if it "fails to provide a person of ordinary intelligence fair  
17 notice of what is prohibited; or (2) if it "is so standardless that it authorizes or  
18 encourages seriously discriminatory enforcement."  
19 State v. Castaneda, Id. at \*2.

20 [The] law must, at a minimum, delineate the boundaries of unlawful conduct. Some  
21 specific conduct must be deemed unlawful so individuals will know what is  
22 permissible behavior and what is not. [citation omitted] A law that leaves the  
23 determination of whether conduct is criminal to a purely subjective determination,  
24 such as what might "annoy" a minor or "manifest" an "illegal purpose," is "Vague,  
25 not in the sense that it requires a person to conform his conduct to an imprecise but  
26 comprehensible normative standard but rather in the sense that no standard of  
27 conduct is specified at all."

28 Id.

#### 3 **E. Construction of the Statutes**

4 In construing the federal "honest services" statute, the U.S. Supreme Court avoided finding  
5 the statute unconstitutionally vague by limiting the statute to conduct which had been clearly defined  
6 by courts—"kickbacks" and finding that all the other conduct which prosecutors had attempted to  
7 scoop up into the statute could not be criminalized. Skilling v. United States, 130 S.Ct. 2896 (2010).

8 Here, both the Theft statute and the Misconduct statutes depend upon the construction of the

1 word "use." With regard to the Misconduct statute, the State construes the term "private enrichment"  
2 of another to mean payment under a duly authorized contract. In order to survive a vagueness or  
3 overbreadth challenge, the term must set forth the conduct which constitutes unlawful use of the  
4 county funds so that individuals will know when the line between bad business decisions or shoddy  
5 work and criminal conduct has been crossed.

6 That line cannot be delineated here. The State has been unable, so far, to advise the Grand  
7 Jury or the court of the standards which should be applied by law enforcement in defining the  
8 conduct. Both prongs of the vagueness analysis are at issue here. The construction of the statutes by  
9 the State fails to provide fair notice of what is prohibited and is so standardless that it authorizes  
10 seriously discriminatory enforcement.

### 11 III. CONCLUSION

12 The State has made its theory clear to the Grand Jury and to this court. First, the State seeks  
13 to convict Mr. Thomas for the same conduct under two different statutes. This it is not permitted to  
14 do under Nevada's redundancy doctrine. Second, the State believes that a public official commits  
15 two crimes when he enters into duly authorized contracts with anyone if he does so for some  
16 undefined personal purpose. The official need not receive any gain, the county need not be harmed  
17 and there need not be an undisclosed relationship<sup>2</sup> between the official and the vendor.

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

22 DATED this 11 day of February, 2011.

23 DANIEL J. ALBREGTS, LTD.

24 By: 

25 Daniel J. Albregts, Esq.  
Attorney for Defendant

26  
27 <sup>2</sup> Even if there were allegations of an undisclosed relationship, the Skilling case suggests that  
28 the Nevada version of the "honest services" statute (this Misconduct statute) could not survive a  
constitutional challenge if this were the conduct criminalized.

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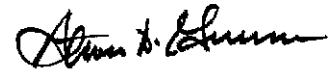
**RECEIPT** of the foregoing **Motion to Dismiss** is hereby acknowledged this \_\_\_\_ day of  
February, 2011.

DAVID J.J. ROGER  
CLARK COUNTY DISTRICT ATTORNEY

By: \_\_\_\_\_  
200 Lewis Avenue  
Las Vegas, NV 89101

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DISTRICT COURT  
CLARK COUNTY, NEVADA

STATE OF NEVADA

Plaintiff,

vs.

LACY L. THOMAS,

Defendant.

CASE NO.: 08C241569

DEPT. NO.: XVII

DECISION ON MOTION TO DISMISS

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

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

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

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

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CLERK OF THE COURT

MICHAEL P. VILLANI  
DISTRICT JUDGE  
DEPARTMENT XVII

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.

1                   **Count IV**

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

13                   **Count V**

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

26          Thomas was charged with five counts of Misconduct of a Public Officer as outlined in NRS

27          197.110. NRS 197.110 provides in relevant part the following elements:

28

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

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

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

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

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

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

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.<sup>1</sup>

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 <sup>1</sup> 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.

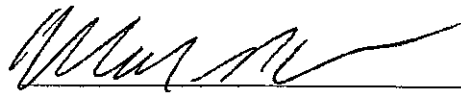
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**CONCLUSION**

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.



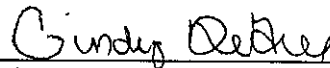
MICHAEL P. VILLANI  
DISTRICT COURT JUDGE

**CERTIFICATE OF SERVICE**

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

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Daniel J. Albregts, Esq.  
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Cindy DeGree, Judicial Executive Assistant

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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5 THE STATE OF NEVADA,

6 Appellant,

7 v.

8 LACY THOMAS,

9 Respondent.

CASE NO:

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Clerk of Supreme Court

10  
11 **APPELLANT'S OPENING BRIEF**

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

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**TABLE OF CONTENTS**

|                                                                                                                                                             |                                     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|
| TABLE OF AUTHORITIES .....                                                                                                                                  | ii                                  |
| STATEMENT OF THE ISSUE(S).....                                                                                                                              | 1                                   |
| STATEMENT OF THE CASE.....                                                                                                                                  | 1                                   |
| STATEMENT OF THE FACTS .....                                                                                                                                | 3                                   |
| ARGUMENT .....                                                                                                                                              | 6                                   |
| I.    THE DISTRICT COURT'S DISMISSAL OF THE<br>INDICTMENT WAS IMPROPER BASED ON THE<br>ARGUMENTS IN THE MOTION TO DISMISS.....                              | 6                                   |
| II.   THE DISTRICT COURT ERRED IN FINDING THAT THE<br>INDICTMENT FAILED TO PLACE RESPONDENT ON<br>NOTICE OF THE CHARGES AGAINST HIM .....                   | 15                                  |
| III.  THE DISTRICT COURT IMPROPERLY RULED THAT THE<br>THEFT AND OFFICIAL MISCONDUCT STATUTES WERE<br>UNCONSTITUTIONALLY VAGUE AS APPLIED TO<br>THOMAS ..... | 21                                  |
| CONCLUSION .....                                                                                                                                            | 30                                  |
| CERTIFICATE OF COMPLIANCE.....                                                                                                                              | <b>Error! Bookmark not defined.</b> |
| CERTIFICATE OF SERVICE .....                                                                                                                                | 32                                  |

## TABLE OF AUTHORITIES

Page Number:

### Cases

|                                                                                                |            |
|------------------------------------------------------------------------------------------------|------------|
| <u>Benigas v. State,</u><br>95 Nev. 358, 594 P.2d 724 (1979).....                              | 18         |
| <u>Gentile v. State Bar of Nev.,</u><br>501 U.S. 1030, 1050, 111 S.Ct. 2720, 2732 (1991) ..... | 22         |
| <u>Grayned v. City of Rockford,</u><br>408 U.S. 104, 108, 92 S.Ct. 2294, 2299 (1972) .....     | 22         |
| <u>Hildago v. District Ct.,</u><br>124 Nev. 330, 339, 184 P.3d 369, 375 (2008) .....           | 17         |
| <u>Hill v. State,</u><br>124 Nev. 546, 188 P.3d 51, 54 (2008).....                             | 6          |
| <u>Houser v. Fourth Judicial Dist. Court,</u><br>75 Nev. 465, 345 P.2d 766 (1959).....         | 12, 13, 14 |
| <u>Husney v. O'Donnell,</u><br>95 Nev. 467, 596 P.2d 230 (1979).....                           | 17         |
| <u>In re Winship,</u><br>397 U.S. 358, 363, 90 S.Ct. 1068 (1970) .....                         | 23         |
| <u>Kolender v. Lawson,</u><br>461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983) .....             | 22         |
| <u>Lamar v. United States,</u><br>240 U.S. 60, 36 S.Ct. 255 (1916) .....                       | 15         |
| <u>Laney v. State,</u><br>86 Nev. 173, 178, 466 P.2d 666, 669 (1970).....                      | 17, 20     |
| <u>Laster v. State,</u><br>275 S.W.3d 512 (Tex. Crim. App. 2009) .....                         | 27         |
| <u>Logan v. Warden,</u><br>86 Nev. 511, 513, 471 P.2d 249, 251 (1970).....                     | 20         |
| <u>Margraves v. State,</u><br>34 S.W.3d 912, 921-922 (Tex. Crim. App. 2000).....               | 27, 28     |
| <u>Nelson v. State,</u><br>123 Nev. 534, 540-41 (2007).....                                    | 22         |
| <u>Palmer v. Sheriff,</u><br>93 Nev. 648, 572 P.2d 218 (1977).....                             | 11         |



|    |                                                                                                                        |            |
|----|------------------------------------------------------------------------------------------------------------------------|------------|
| 1  | <u>People v. Kleffman,</u>                                                                                             |            |
| 2  | 90 Ill.App.3d 1, 3-5, 412 N.E.2d 1057, 1059-1061 (Ill. Ct. App. 1980).....                                             | 27         |
| 3  | <u>Sheriff v. Jensen,</u>                                                                                              |            |
| 4  | 95 Nev. 595, 600 P.2d 222 (1979).....                                                                                  | 11, 25     |
| 5  | <u>Sheriff v. Spagnola,</u>                                                                                            |            |
| 6  | 101 Nev. 508, 514, 706 P.2d 840, 844 (1985) .....                                                                      | 17, 18, 20 |
| 7  | <u>Silvar v. Dist. Ct.,</u>                                                                                            |            |
| 8  | 122 Nev. 289, 292, 129 P.3d 682, 684 (2006) .....                                                                      | 23         |
| 9  | <u>Simpson v. District Court,</u>                                                                                      |            |
| 10 | 88 Nev. 654, 503 P.2d 1225 (1972).....                                                                                 | 20         |
| 11 | <u>Simpson v. District Ct.,</u>                                                                                        |            |
| 12 | 88 Nev. 654, 660, 503 P.2d 1225, 1229-30 (1973).....                                                                   | 17         |
| 13 | <u>Smith v. First Judicial Dist. Court,</u>                                                                            |            |
| 14 | 75 Nev. 526, 347 P.2d 526 (1959).....                                                                                  | 12, 13, 14 |
| 15 | <u>State v. Andersen,</u>                                                                                              |            |
| 16 | 370 N.W.2d 653 (Minn. Ct. App. 1985) .....                                                                             | 27         |
| 17 | <u>State v. Castaneda,</u>                                                                                             |            |
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| 15 | NRS 34.700 .....                                              | 11               |
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| 17 | NRS 34.710 .....                                              | 10               |
| 18 | NRS 172.155.....                                              | 10               |
| 19 | NRS 173.075(1) .....                                          | 16               |
| 20 | NRS 173.095(1) .....                                          | 21               |
| 21 | NRS 174.105(a) .....                                          | 10               |
| 22 | NRS 197.110.....                                              | 1, 2, 13, 14     |
| 23 | NRS 205.0832.....                                             | 1, 2, 13, 16, 22 |
| 24 | NRS 205.0832(1)(b).....                                       | 27               |
| 25 | NRS 205.0835 .....                                            | 13               |
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**Other Authorities**

|    |                                                   |    |
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| 3  | Alaska Stat. § 11.46.620 .....                    | 27 |
| 4  | Haw. Rev. Stat. § 708-874 .....                   | 27 |
| 5  | Ind. Code § 35-43-5-3(3) .....                    | 27 |
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| 8  | Nevada Administrative Code (NAC) 449.314(5) ..... | 28 |
| 9  | Or. Rev. Stat. § 165.095 .....                    | 28 |
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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3  
4  
5 THE STATE OF NEVADA,

CASE NO: 58833

6 Appellant,

7 v.

8 LACY THOMAS,

9 Respondent.

10 **APPELLANT'S OPENING BRIEF**

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

13 **STATEMENT OF THE ISSUE(S)**

- 14 1. WHETHER THE DISTRICT COURT'S DISMISSAL OF THE  
15 INDICTMENT WAS PROPER GIVEN THE NATURE OF  
16 RESPONDENT'S ARGUMENTS IN THE MOTION TO DISMISS  
17 2. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE  
18 INDICTMENT FAILED TO PROVIDE SUFFICIENT NOTICE OF THE  
19 CHARGES AGAINST RESPONDENT  
20 3. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE  
21 THEFT AND OFFICIAL MISCONDUCT STATUTES WERE  
22 UNCONSTITUTIONALLY VAGUE AS APPLIED TO RESPONDENT'S  
23 CASE

24 **STATEMENT OF THE CASE**

25 On February 20, 2008, the State of Nevada charged Respondent Lacy  
26 Thomas ("Thomas") by Grand Jury Indictment with: Counts 1-5 – Theft (Felony –  
27 NRS 205.0832, 205.0835), and Counts 6-10 – Misconduct of a Public Officer  
28 (Felony – NRS 197.110). Appellant's Appendix, vol. 3, 514-521.<sup>1</sup> On February 28,  
2008, Thomas was arraigned and pled not guilty. Id. at 522. On March 22, 2010,  
Thomas proceeded to trial. Id. at 523. On Day 10 of Thomas' trial, April 2, 2010,

<sup>1</sup> Appellant's Appendix hereinafter "AA"

1 the district court declared a mistrial based on pre-trial discovery issues. Id. at 524-  
2 588. On April 8, 2010, the district court reset the trial date to August 2, 2010. Id. at  
3 589-596.

4 On February 11, 2011, Thomas filed three motions to dismiss, two of which  
5 separately alleged that: (1) Trial on the Indictment would violate the Double  
6 Jeopardy Clause because the State's failure to turn over discovery caused the April  
7 2, 2010 mistrial; and (2) The Indictment should be dismissed because the State  
8 failed to present the previously undisclosed discovery material to the grand jury.  
9 Id. at 607-640. The third motion to dismiss, which is the subject of this appeal,  
10 alleged the Indictment should be dismissed because: (1) It was unconstitutionally  
11 multiplicitous and redundant in that Counts 1-5 alleging Theft were based on the  
12 same conduct underlying Counts 6-10 alleging Official Misconduct; and (2) NRS  
13 197.110(2) (Official Misconduct) <sup>2</sup> and 205.0832(1)(b) (Theft),<sup>3</sup> are void for  
14 vagueness as applied to Thomas in the Indictment; Thomas alleged he lacked  
15 notice that he was committing Theft or Official Misconduct by negotiating grossly  
16 one-sided contracts with his friends and associates for which he knew no work  
17 would be or was being performed. Id. at 507-606. The State filed its Opposition to  
18 the motion on March 17, 2011, and Thomas filed a Reply Brief on March 28, 2011.  
19 Id. at 646-668.

20 The district court heard argument on April 28, 2011, and issued a written  
21 order on June 3, 2011, which entirely dismissed the Indictment. Id. at 672-735;  
22 736-742. The Order held that NRS 205.0832 was vague as applied to Thomas in  
23

24 <sup>2</sup> NRS 197.110(2) provides: "Every public officer who...(2) Employs or uses any  
25 person, money or property under the public officer's official control or direction,  
26 or in the public officer's official custody, for the private benefit or gain of the  
27 public officer or another, is guilty of a category E felony..."

28 <sup>3</sup> NRS 205.0832(1)(b) provides: "...a person commits theft if, without lawful  
authority, the person knowingly...Converts, makes an unauthorized transfer of an  
interest in, or without authorization controls any property of another person, or  
uses the services or property of another person entrusted to him or her or placed in  
his or her possession for a limited, authorized period of determined or prescribed  
duration or for a limited use."

1 the Indictment because it “merely put a person of ordinary intelligence on notice  
2 that by entering into an ill-conceived contract they may at a later date be charged  
3 with a crime.” Id. at 741. The district court asked rhetorically, “under what  
4 circumstances will the government file criminal chargers [*sic*] for entering into an  
5 ill-conceived contract?” Id. The order further opined that, “[t]he characterization of  
6 the crimes charged in the Indictment does nothing more than put Thomas on notice  
7 that he/UMC may have entered into an ill conceived contract and that by entering  
8 into such a contract, his conduct is now deemed criminal in nature.” Id.<sup>4</sup> The State  
9 filed its timely Notice of Appeal and case statement on July 1, 2011. Id. at 743-  
10 747. Thereafter, the State filed a Fast Track Statement on August 29, 2011.  
11 Thomas filed a Response on September 19, 2011. The State filed a Reply on  
12 October 3, 2011. Subsequently, this Court ordered full briefing on April 13, 2012.  
13 The State’s Opening Brief follows:

14 **STATEMENT OF THE FACTS**

15 Respondent Lacy Thomas (“Thomas”) is the former, now terminated, Chief  
16 Executive Officer (CEO) of University Medical Center (UMC). This case arises  
17 out of contractual relationships Thomas negotiated on behalf of UMC with his  
18 close friends and associates from Chicago, Ill. Thomas entered into several of  
19 those contractual relationships with close friends who were his college fraternity  
20 brothers from Chicago. AA, vol. 1, 86; 89. Thomas negotiated the first of these  
21 contractual relationships with Frasier Systems, a purported consulting firm owned  
22 by his close friend Greg Boone. AA, vol. 1, 96-100. Frasier Systems was  
23 established five (5) days after Thomas assumed UMC’s CEO position; it had no  
24 employees or a current business license, and was headquartered in Boone’s  
25

26 <sup>4</sup> The district court expressly declined to resolve Thomas’ separate motions to  
27 dismiss alleging a double jeopardy violation and failure to disclose exculpatory  
28 evidence. The district court further appears to have declined to consider the portion  
of Thomas’ motion alleging the Indictment contained redundant, multiplicitous  
counts.

1 mother's garage. Id. at 96-98; 108. Thomas negotiated a consulting contract which  
2 paid Frasier Systems \$50,400.00 in exchange for Boone to essentially regurgitating  
3 in a brief PowerPoint presentation information he received from UMC's IT  
4 Department. Id. at 99-101. Thomas then negotiated an additional \$286,700.00  
5 contract with Frasier Systems for the creation of a project manager's office at  
6 UMC, although UMC already had a project manager. Id. at 101-103. But for  
7 forwarding to UMC a publicly available rudimentary example of a software  
8 program, Boone and Frasier Systems never established a project management  
9 office and otherwise performed no meaningful work, despite receiving the full  
10 \$286,700.00. Id. at 103-107. Thomas later unsuccessfully attempted, in violation of  
11 County policy, to have Frasier Systems awarded a \$900,000.00 contract without  
12 first putting out a "request for proposals" (bids). AA, vol. 2, 378.

13 Thomas negotiated a third contractual relationship with Crystal  
14 Communications, a company owned by his close friend and fraternity brother,  
15 Martello Pollock. AA, vol. 1, 113-117. Crystal Communications had no employees  
16 and was headquartered in a single Chicago office shared with four other  
17 companies, including Premier Alliance Management which was owned by another  
18 close personal friend of Thomas, Orlando Jones. Id. at 113-117. The first contract  
19 paid Pollock \$24,500.00—\$500.00 below the threshold amount that would have  
20 required County board approval—in exchange for Crystal Communications  
21 providing consulting work on UMC's northeast tower project. AA, vol. 1, 113-116;  
22 AA, vol. 2, 446. But for producing a four-page memo regurgitating verbatim facts  
23 about UMC's telephone system relayed by UMC IT personnel, Pollock and Crystal  
24 Communications never performed any meaningful work under the contract. AA,  
25 vol.1, 115-116; AA, vol. 2, 470-476. Nevertheless, Thomas negotiated an even  
26 larger subsequent contract in which Crystal Communications received \$145,550.00  
27 in exchange for a promise to perform the work already promised in the prior  
28 contract plus some additional consulting and training work. AA, vol. 1, 117-119.

1 Again, Pollock and Crystal Communications performed absolutely no meaningful  
2 work, and, when interviewed by detectives, Thomas lied about receiving their  
3 nonexistent work product. Id. at 119-120. In awarding this contract to Pollock's  
4 company, Thomas ignored a drastically lower bid from a highly-qualified local  
5 contractor and failed to comply with County contracting procedures. Id. at 122-  
6 123. Finally, Thomas also negotiated and paid \$5,100.00 to Orlando Jones for  
7 purported consulting work consisting of the same four-page memo referenced  
8 above. Id. at 129-130.

9 Thomas also established a contractual relationship with TBL Construction  
10 (TBL), a local company owned by Alonzo Barber, who had no prior experience in  
11 hospital construction work. Id. at 130-132. Thomas engaged TBL as a contractor to  
12 "supervise" utility installation at the northeast tower and landscaping, which was  
13 identical to work already being performed by a different contractor under an  
14 existing contract. Id. at 130-132. Thomas avoided scrutiny of the contract by  
15 paying TBL \$35,000.00 under an unauthorized change order added to an existing  
16 contract. Id. at 133-134; AA, vol. 2, 410-411.

17 Thomas negotiated a fifth contractual relationship with Superior Consulting,  
18 a Chicago-based company in which Thomas's good friend, Bob Mills, was a  
19 principal owner; Superior Consultants was later acquired by Affiliated Computer  
20 Services (ACS). AA, vol. 1, 87-88. Thomas negotiated a contract in which  
21 Superior/ACS would perform revenue (debt) collection activities already being  
22 performed by UMC, which actually resulted in a \$6 million reduction of UMC  
23 collection totals in the contract's first year. AA, vol. 2, 456-457. Additionally,  
24 when ACS was not making sufficient collections to profit on the contract, Thomas,  
25 unilaterally without County authorization, executed an "administrative  
26 clarification," which caused ACS's collection totals to be artificially inflated by an  
27 additional \$48.9 million dollars; this additional revenue consisted of social service  
28 reimbursements already being received by UMC and requiring no collection effort.



1 AA, vol. 1, 17-18, 25-36; AA, vol. 2, 392-393. That “clarification,” which would  
2 have yielded ACS a \$6.8 million windfall for continuing to do the same ineffective  
3 job, was rejected when properly put before the County board. AA, vol. 1, 143.  
4 Thomas nevertheless succeeded in negotiating two additional modifications solely  
5 for the purpose of enriching ACS by lowering the baseline for it to collect a 25%  
6 commission on the collections and ensuring ACS a \$25,000.00 flat payment each  
7 month (including retroactively for pre-modification months), despite ACS’s eight  
8 consecutive months of substandard collections. AA, vol. 1, 141-142; AA, vol. 2,  
9 474-476. Thomas’s only rationale for these modifications was he wanted ACS to  
10 make more money for performing its pre-existing contractual obligations. AA, vol.  
11 1, 141-142. Finally, Thomas arranged for ACS to receive a \$1 million commission  
12 merely for recommending that UMC sell some of its “bad debt” to a debt  
13 collection agency. Id. at 146-153. ACS had no contractual right to such a  
14 commission but received it based on Thomas’s authorization. AA, vol. 2, 469-472.

## 15 ARGUMENT

### 16 I

#### 17 **THE DISTRICT COURT’S DISMISSAL OF THE INDICTMENT** 18 **WAS IMPROPER BASED ON THE ARGUMENTS** 19 **IN THE MOTION TO DISMISS**

20 In a decision filed on June 3, 2011, the district court dismissed counts 1-10  
21 of the Indictment against Respondent Lacy Thomas (“Thomas”) based on a Motion  
22 to Dismiss filed by Thomas on February 11, 2011. AA, vol. 3, 597. The relevant  
23 Motion to Dismiss was one of three motions filed on February 11, 2011. Id. The  
24 Motion to Dismiss at issue in the instant appeal challenged the constitutionality of  
25 the Theft and Official Misconduct statutes and whether the Indictment provided  
26 sufficient notice of the charges. Id. at 597-605. This Court reviews a district court’s  
27 decision to grant or deny a Motion to Dismiss for an abuse of discretion. Hill v.  
28 State, 124 Nev. 546, 188 P.3d 51, 54 (2008). In this case, the district court abused  
its discretion in granting the remedy of dismissal of the Indictment.

1 In the order granting full briefing, this Court asked the State to address  
2 whether Thomas' Motion to Dismiss challenged sufficiency of the evidence to  
3 sustain the Indictment or whether it challenged the district court's jurisdiction to  
4 try the case; whether the motion should have been construed as a pretrial Petition  
5 for Writ of Habeas Corpus; and whether the district court was precluded from  
6 adjudicating the motion/petition. It is the State's position that the Motion to  
7 Dismiss, when read in combination with the district court's Decision Granting  
8 Dismissal and arguments made by defense counsel at the hearing on the Motion to  
9 Dismiss, argued that the State failed to put Thomas on sufficient notice about the  
10 theory the State was proceeding on that made the actions of Thomas criminal in  
11 nature. As discussed infra section II, however, Thomas was clearly put on notice of  
12 the State's theory. However, the Motion to Dismiss and the Decision of the Motion  
13 to Dismiss convoluted several areas of law. It is therefore unclear exactly how the  
14 Motion to Dismiss should be interpreted or on what basis the district court granted  
15 the Motion. As more fully discussed below, it is the State's position that the  
16 Motion to Dismiss could be interpreted as a challenge to the sufficiency of the  
17 evidence, but that the Motion is not a challenge to the district court's jurisdiction.

18 1. The Motion to Dismiss Challenged Sufficiency of the Evidence

19 There are several indicators in Thomas' Motion to Dismiss, defense  
20 counsel's arguments at the hearing on the Motion and the district court's decision  
21 on the Motion where it appears that Thomas was challenging the sufficiency of the  
22 evidence to support the Theft and Official Misconduct charges.

23 When discussing why the theft charges of the Indictment should be  
24 dismissed, Thomas specifically stated in the Motion that "The language of the  
25 Theft statute must mean *under the facts of this case*, that bad decisions become  
26 crimes when there is a specific limitation placed on property entrusted to a person  
27 and that specific limit is violated. There are no allegations at all that this is what  
28 happened. In fact, there was *substantial evidence adduced* that the county

1 authorized all of the transactions at issue in this case.” AA, vol. 3, 603.  
2 Additionally, when discussing why the official misconduct charges should be  
3 dismissed, Thomas stated in the Motion, “The State has already advised the court  
4 that it will not prove that Mr. Thomas received any kickbacks or inappropriate  
5 remuneration for the contracts. The State has already advised the court that the  
6 benefit received by the recipients was the benefit provided under the contract. The  
7 State has already advised the court that it is not required to prove that the county  
8 was harmed in any way.” Id. In essence, Thomas argued that the district court  
9 should grant his Motion to Dismiss the theft charges because all of the contracts at  
10 issue in this case were authorized by the County and there was therefore  
11 insufficient evidence that he misused property entrusted to him. Thomas also  
12 argued that the official misconduct charges should be dismissed because the State  
13 failed to provide sufficient evidence that Thomas’s received any type of kickback  
14 or the hospital was harmed.

15 This sufficiency type argument was further emphasized by defense counsel  
16 during the hearing on the Motion to Dismiss. At multiple times during his  
17 argument, defense counsel encouraged the district court to focus on the evidence  
18 elicited at the partial trial in order to determine whether there was sufficient  
19 evidence to continue the proceedings. Defense counsel was essentially requesting  
20 that the judge enter a directed verdict on a trial that had never been completed. For  
21 example, when arguing why the Indictment should be dismissed counsel stated:

22 For instance, if—well, let me back up. We had testimony  
23 at trial from Tom Riley and others that it’s not unusual at  
24 all to have consultants, and we talked about whether the  
25 consultants provide any value is in the eye of the  
26 beholder and that it’s not unusual to have consultants that  
27 you’ve worked with before or people that you have a  
28 relationship with. And so we have all sorts of testimony  
that those acts aren’t on their face illegal. And so we  
know that there are acts that will cross the line, but the  
facts of this case, there aren’t any of those facts. They  
don’t fit into that because we have a man who is entering  
into contracts with ACS or the consultants. These are  
people that have knowledge in the field. These are

contracts that are vetted. They go through the procedure of the county. The county approves them. The county then approves the pay of these contracts after the work's performed and the invoice is submitted. Where does the crime occur?

Id. at 710. Defense counsel continued later in his argument and stated:

Well, Judge, the testimony was clear. The minute that this contract provision to the ACS contract that was at issue to change the baseline and to change a couple of the terms was brought to Mr. Thomas's attention that this isn't how this works, we got to go back to the board, that's what happened. And so the Court's absolutely right. This went through levels of scrutinization and levels of approval just by the very nature such---and that's why they're there so somebody like Mr. Thomas so somebody in his position can't do the things that the State's claiming that ain't going to be able to prove he did or that he had the criminal intent to somehow alter these to the detriment of the county and the benefit of his friends.

Id. at 719. Counsel continued on to discuss how Thomas did not receive a kickback, so the State would not be able to prove Thomas committed these crimes.

Id. at 720. Defense counsel's argument could easily be interpreted as challenging not only the evidence presented during the partial trial but, considering that the evidence given at the trial was a more fully expanded version of the evidence given at the grand jury, the argument could be seen as challenging the evidence presented at the grand jury. Defense counsel is arguing that the State failed to prove that Thomas had the criminal intent for Theft or Official Misconduct because all of his contracts were approved by the county board of commissioners.

There is also language in the district court's decision on the Motion to Dismiss that indicate that the court was at least in part granting the Motion because the State failed to provide sufficient evidence of the charges. For example, the district court noted:

Throughout the pleadings and arguments during the various motions in this matter and based upon the Grand Jury testimony, the State concedes that Thomas has not personally received any private benefit from the contracts in question. Further, they concede that each original contract had to go through a vetting process by Thomas, various staff members at UMC, a Clark County District

1 Attorney, and Clark County staff before receiving  
2 ultimate approval by the Clark County Commissioners.  
3 Also, all invoices submitted by the entities identified in  
4 Counts 1-V were paid by the county and not by Thomas.  
5 The gravamen of the charges against Thomas is that he  
6 entered into contracts that were unnecessary, overly  
7 favorable to the vendors and/or work required under the  
8 contracts was not performed. If in fact the contracts were  
9 unnecessary, overly favorable to vendors, unperformed  
10 and as alleged amounting to theft one would wonder why  
11 the vendors/their principals were not charged with theft  
12 as co-conspirators.

13 Id. at 740. The district court, at least in part, took their interpretation of the  
14 evidence at the grand jury and/or the partial testimony at trial and concluded that  
15 there was insufficient evidence to support the charges. The rhetorical type  
16 questions and the elaboration of the facts presented at various stages discussed by  
17 the district court could easily be perceived as a dismissal based on sufficiency of  
18 the evidence. Based on language in the Motion, the hearing and the district court's  
19 order, the Motion could easily be interpreted as challenging the sufficiency of the  
20 evidence to support the charges. As such, the district court abused its discretion in  
21 granting the Motion as the court had no authority to hear the motion.

22 NRS 172.155 states, "The defendant may object to the sufficiency of the  
23 evidence to sustain the Indictment *only* by application for writ of habeas corpus."  
24 (Emphasis added). The statute is very clear that in order to challenge the  
25 sufficiency of the evidence to support the Indictment, Thomas would have had to  
26 file a pre-trial Petition for Writ of Habeas Corpus. Thomas never filed any pre-trial  
27 writ. Therefore, the only way Thomas could challenge the sufficiency of the  
28 evidence is if his instant Motion to Dismiss is construed as a pre-trial writ. NRS  
174.105(a). Simply because Thomas chooses to title his motion a "Motion to  
Dismiss" rather than a pretrial Petition for Writ of Habeas Corpus does not change  
the nature of the sufficiency arguments contained in the Motion.

NRS 34.710 states: "A district court shall not consider any pretrial petition  
for habeas corpus: (a) Based on alleged lack of probable cause or otherwise

1 challenging the court's right to proceed to trial of a criminal charge unless a  
2 petition is filed in accordance with NRS 34.700." NRS 34.700 states,

3 Except as provided in subsection 3, a pretrial petition for  
4 a writ of habeas corpus based on alleged lack of probable  
5 cause or otherwise challenging the court's right or  
6 jurisdiction to proceed to the trial of a criminal charge  
may not be considered unless:(a) The petition and all  
supporting documents are filed within 21 days after the  
first appearance of the accused in the district court..."

7 In Sheriff v. Jensen, 95 Nev. 595, 600 P.2d 222 (1979) the Nevada Supreme Court  
8 held that pretrial petitions for writ of habeas corpus are required to be filed within  
9 21 days of the initial appearance of the accused in district court. The first  
10 appearance in district court is the arraignment. Palmer v. Sheriff, 93 Nev. 648, 572  
11 P.2d 218 (1977). In Jensen, this Court held that a petition that was filed 31 days  
12 after arraignment was not in compliance with the required time limit. Jensen, 95  
13 Nev. at 595, 600 P.2d at 222. This Court then held, "The requirements of this  
14 statute are mandatory, and where, as here, the requirements are not complied with,  
15 the petition is neither cognizable below nor reviewable here." Id.

16 In this case, Thomas was arraigned and pleaded not guilty on February 28,  
17 2008. AA, vol. 3, 522. The Motion to Dismiss was not filed until February 11,  
18 2011. Id. at 597. No other pretrial petition challenging sufficiency was filed during  
19 this time. Almost three years had passed between the time Thomas was arraigned  
20 and the time he filed the Motion to Dismiss. Thomas failed to file his "Motion to  
21 Dismiss" within 21 days of his arraignment nor did he make any type of good  
22 cause showing as to why he filed his challenge late. NRS 34.700(3). Therefore, the  
23 district court had no authority to hear the Motion. Because the district court  
24 improperly entertained the extremely late Motion, the court abused its discretion  
25 and the decision of the district court should be reversed.

26 2. The Motion to Dismiss did not Challenge Jurisdiction

27 Thomas' Motion to Dismiss did not challenge the jurisdiction of the district  
28 court as there has never been any allegation by Thomas that the State failed to

1 allege any of the material elements of the crime of Theft or Official Misconduct.  
2 NRS 174.105(3) states in pertinent part, "Lack of jurisdiction or the failure of the  
3 indictment, information or complaint to charge an offense shall be noticed by the  
4 court at any time during the pendency of the proceeding."

5 The Nevada Supreme Court has interpreted a failure of "jurisdiction" to  
6 mean that the Indictment fails to charge an essential element of the offense. Houser  
7 v. Fourth Judicial Dist. Court, 75 Nev. 465, 345 P.2d 766 (1959). In Houser, this  
8 Court held that the district court lacked jurisdiction to proceed with the trial of the  
9 defendant because the amended information failed to allege a material element of  
10 the crime of grand larceny. Houser, 75 Nev. at 469, 345 P.2d at 768-769. Houser  
11 had been charged with Grand Larceny but the amended information failed to allege  
12 that the property taken had a value of \$100 or more as mandated by the statute. Id.  
13 This Court has also interpreted "jurisdiction" to mean that the act charged is not  
14 within the statutory definition of a felony. Smith v. First Judicial Dist. Court, 75  
15 Nev. 526, 347 P.2d 526 (1959). In Smith, the State charged the defendant with  
16 Burglary but only alleged that he had placed his hand over the open platform body  
17 of a truck with intent to commit larceny. Id. This Court held that Burglary required  
18 the entering of a structure and because the State failed to allege that defendant  
19 entered a structure, the information was not sufficient and the district court lacked  
20 jurisdiction. Id.

21 This case is considerably different from both Houser and Smith. There is no  
22 allegation that the State failed to plead a material element of either Theft or  
23 Official Misconduct or that the actions by Thomas' alleged by the State do not fall  
24 into the statutory definition of a felony. As discussed below, Thomas' primary  
25 contention was that the Indictment failed to place him on notice of the State's  
26 theory of the case.

27 The pertinent part of the Theft statute states, "a person commits theft, if  
28 without lawful authority, the person knowingly....uses the services or property of

1 another person entrusted to him or her or placed in his or her possession for a  
2 limited, authorized period of determined or prescribed duration or for a limited  
3 use.” NRS 205.0832. In counts 1-5 of the Indictment, the State listed every element  
4 required by the Theft statute. AA, vol. 3, 514-517. In particular the State alleged,  
5 “Defendant did...*knowingly*, feloniously and *without lawful authority*, commit  
6 theft by *using* the services or property of another person entrusted to him, or placed  
7 in his possession of a limited, authorized period or determined or prescribed  
8 duration or for a *limited use*....thereby using the services or property *for another*  
9 *use*.” Id. Every material element required was pled by the State to support the  
10 crime of Theft. In addition, the actual statutes NRS 205.0832 and NRS 205.0835  
11 were listed in the Indictment. Id.

12 In Counts 1-5 of the Indictment, Thomas was alleged to have committed acts  
13 of entering into contracts with longtime friends which were grossly unfavorable to  
14 UMC, unnecessary and entering into contracts for work that Thomas knew would  
15 not be performed and were not performed. Id. There is no dispute that such actions,  
16 if true, constitute embezzlement under the statute. Using money entrusted to one  
17 for any purpose other than what the money is supposed to be used for constitutes  
18 embezzlement. The State alleged that Thomas used money entrusted to him as  
19 CEO of UMC without lawful authority by distributing the funds to friends for work  
20 that is unnecessary or not performed thereby using the money for some purpose  
21 other than what it was supposed to be used for. As the State plead every material  
22 element of the Theft statute and the actions plead are within the definition of Theft,  
23 neither Houser nor Smith’s interpretation of jurisdiction are applicable to this case.

24 The pertinent portion of the Official Misconduct statute states: “Every public  
25 officer who:...employs or uses any person, money or property under the public  
26 officer’s official control or direction, or in the public officer’s official custody, for  
27 the private benefit or gain of the public officer or another is guilty of a category E  
28 felony.” NRS 197.110. In Counts 6-10 of the Indictment, the State alleged that,



1 “Defendant...then and there *knowingly*, feloniously and *without legal authority*,  
2 which *acting as a public officer* as Chief Executive Officer of University Medical  
3 Center, *employ or use money under his official control* or direction, or in his  
4 official custody, *for the private benefit or gain of himself or another...*” AA, vol.  
5 3, 517-519. Every material element required was pled by the State to support the  
6 crime of Misconduct of Public Officer. In addition, the actual statute NRS 197.110  
7 was listed in the Indictment. Id. at 514.

8 As noted above, Thomas, CEO of UMC, was charged with distributing  
9 money to his friends through contracts with UMC that were unnecessary, grossly  
10 unfavorable to UMC and for work that Thomas knew would not be done. Such  
11 conduct falls squarely within the definition of the Official Misconduct statute as  
12 Thomas was using UMC money under his control to distribute money to his  
13 friends constituting a benefit to another. As the State plead every material element  
14 of the Official Misconduct statute and the actions plead are within the definition of  
15 said statute, neither Houser nor Smith’s interpretation of jurisdiction are applicable  
16 to this case. As the Motion to Dismiss cannot be interpreted as a challenge to  
17 jurisdiction as interpreted by this Court, the district court abused its discretion is  
18 dismissing the Indictment on a jurisdiction basis.

19 However, even if this Court were to find that the Indictment failed to allege  
20 a material element of the offense or failed to set forth acts that constituted a felony,  
21 any potential errors do not involve jurisdiction. Therefore, if the district court  
22 granted the Motion based on lack of “jurisdiction” because of alleged errors in the  
23 Indictment, such dismissal was a clear abuse of discretion.

24 In U.S v. Cotton, the United States Supreme Court held that the term  
25 “jurisdiction” means “the courts’ statutory or constitutional *power* to adjudicate a  
26 case.” U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The Court held that  
27 “defects in an indictment do not deprive a court of its power to adjudicate a case.”  
28

1 Cotton, 535 U.S. at 630, 122 S.Ct. 1785.<sup>5</sup> See also U.S. v. Carr, 303 F.3d 539, 543  
2 (4<sup>th</sup> Cir. 2002)(the Indictment's failure to allege an essential element of the offense  
3 and failure to charge a federal crime did not deprive the district court of  
4 jurisdiction to adjudicate Carr's case); U.S. v. Prentiss, 256 F.3d 971 (10<sup>th</sup> Cir.  
5 2001). Even if this Court were to find that the Motion to Dismiss alleged that the  
6 State failed to plead a material element of the crime or failed to allege acts that  
7 constituted a felony, such challenges were not challenges to the district court's  
8 jurisdiction. Therefore, if the district court dismissed the Indictment based on  
9 failure of jurisdiction, such dismissal was in error because any alleged problems  
10 with the Indictment did not require a dismissal. In so much as the district court  
11 may have dismissed based on a jurisdiction defect, such action was a clear abuse of  
12 discretion as it is contrary to established law.

13 **II**  
14 **THE DISTRICT COURT ERRED IN FINDING THAT THE INDICTMENT**  
15 **FAILED TO PLACE RESPONDENT ON NOTICE OF**  
16 **THE CHARGES AGAINST HIM**

17 It is the State's position that the Motion to Dismiss challenged the  
18 Indictment's failure to plead sufficient facts to put Thomas on notice of the State's  
19 theory about what conduct was criminal. In the Motion to Dismiss, Thomas  
20 specifically questioned what theory the prosecution was proceeding on that made  
21 his actions criminal. AA, vol. 3, 600. In essence Thomas argued that the  
22 Indictment failed to put him on notice of what alleged actions constituted "using"  
23 funds entrusted to him for an improper purpose. Id. at 601. At the hearing on the  
24 Motion to Dismiss defense counsel argued:

25 <sup>5</sup> In so holding, the Supreme Court relied upon Lamar v. United States, 240 U.S.  
26 60, 36 S.Ct. 255 (1916) which held that an Indictment that does not charge a crime  
27 against the United States is not a jurisdictional defect but goes only to the merits of  
28 the case. The Court also relied upon United States v. Williams, 341 U.S. 58, 66, 71  
S.Ct. 595 (1951) which held "[that the fact] that the indictment is defective does  
not affect the jurisdiction of the trial court to determine the case presented by the  
Indictment."

1 And at the end of the day, the question becomes what is  
2 the conduct that's criminal? What did Lacy Thomas do in  
3 the procurement of these contracts that commits a crime  
4 under a theft theory or under a misconduct theory? And I,  
5 to this day, still don't know what it is...And so the  
6 question becomes what conduct is criminal? And that's  
7 why in that motion we're saying that number one, the  
8 case should be dismissed because there isn't any conduct  
9 that's a crime...And how can you put somebody on  
10 notice? And that's what the motion speaks to, Judge.  
11 That's the where is the crime...And I would say that  
12 unless the State can tell you what crime is being  
13 committed here, what act constitutes the crime, then the  
14 charges must be dismissed...there isn't a crime  
15 committed because a crime hasn't been alleged...

16 Id. at 709-713. In response the State argued that the Indictment pled sufficient facts  
17 to put Thomas on notice. Id. at 716. The district court clarified that the Motion to  
18 Dismiss challenged the notice requirement when it stated in the Decision on the  
19 Motion, "Thomas challenges the Indictment under a number of legal issues, most  
20 notably that the language of the Indictment does not set forth criminal conduct and,  
21 therefore, does not provide sufficient notice of the charges against him." Id. at 740.  
22 The district court eventually held that, "This court finds that the indictment does  
23 not provide Thomas with due process as to what is a criminal act as alleged in the  
24 indictment and as defined in NRS 205.0832 and 197.110". Id. at 742. It is apparent  
25 that both defense counsel and the district court interpreted this Motion to Dismiss  
26 as a challenge to the notice requirement of Indictment. The district court's  
27 dismissal of the Indictment on this basis was a clear abuse of discretion.

28 While the denying or granting of a motion to dismiss is reviewed for abuse  
of discretion, "we review de novo whether the charging document complied with  
constitutional requirements." West v. State, 119 Nev. 410, 419, 75 P.3d 808, 814  
(2003). The Indictment in this case pled more than sufficient facts to apprise  
Thomas of his specific conduct alleged to constitute Theft and Misconduct.

#### 29 A. Standard for Sufficiency of Indictment

30 NRS 173.075(1) provides that "[t]he indictment or the information must be  
31 a plain, concise and definite written statement of the essential facts constituting the

1 offense charged.”; see also West, 119 Nev. at 419, 75 P.3d at 814. “A charging  
2 document should provide a statement of the acts constituting the offense in  
3 ordinary and concise language as to enable a person of common understanding to  
4 know what is intended.” Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840,  
5 844 (1985). “To satisfy this requirement, ‘the [charging document] standing alone  
6 must contain the elements of the offense intended to be charged and must be  
7 sufficient to apprise the accused of the nature of the offense so he may adequately  
8 prepare a defense.” Hildago v. District Ct., 124 Nev. 330, 339, 184 P.3d 369, 375  
9 (2008). The Indictment must be definite enough to prevent the prosecutor from  
10 changing the theory of the case. Husney v. O’Donnell, 95 Nev. 467, 596 P.2d 230  
11 (1979). The Hildago Court, addressing the factual specificity necessary in a Notice  
12 of Intent to Seek the Death Penalty, analogized it to the specificity necessary in a  
13 charging document and in so doing found that “the State is not required to include  
14 exhaustively detailed factual allegations...the notice of intent must provide a  
15 simple, clear recitation of the critical facts supporting the alleged aggravator.”  
16 Hildago, 124 Nev. at 339, 184 P.3d at 375. The same is true for an Indictment; the  
17 State need only provide the critical facts supporting the charge.

18           The accusation must include a characterization of the  
19           crime and such description of the particular act alleged to  
20           have been committed by the accused as will enable him  
21           properly to defend against the accusation, and the  
22           description of the offense must be sufficiently full and  
23           complete to accord to the accused his constructional right  
24           to due process.

25 Simpson v. District Ct., 88 Nev. 654, 660, 503 P.2d 1225, 1229-30 (1973). The  
26 State is not required to allege each and every fact that will be proven at trial. The  
27 test is not whether the document could have been made more definite or certain but  
28 simply if the elements of the offense have been alleged with enough specificity to  
inform the accused of the charges such that he may prepare a defense. Laney v.  
State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970).

1 This Court has further explained other requirements of the Information or  
2 Indictment. "The charging document should also contain, when possible a  
3 description of the means by which the defendant committed the offense" or a  
4 statement that the method is unknown. Spagnola, 101 Nev. at 514, 706 P.2d at 844.  
5 In Spagnola, each count of the charging document alleged that the defendant  
6 obtained money under false pretenses with the intent to defraud by obtaining  
7 payment in a specific amount by means of submitting duplicate travel expense  
8 claims with regard to certain specified patients and each count delineated the  
9 month during which the act occurred. Id. Based on this information, this Court  
10 found that a sufficient statement of the acts was provided and the defendant had  
11 adequate notice of the theory of guilt on which the State would rely. Id.<sup>6</sup>

12 **B. The Indictment in this Case was Sufficient**

13 The district court clearly erred in dismissing the Indictment based on a  
14 theory that it failed to plead sufficient facts to place Thomas on notice of the  
15 State's theory. Counts 1-5 of the Indictment all allege that Thomas used County  
16 funds in unauthorized fashion and exceeded the County's entrustment for "limited  
17 use[s]" by funneling them to his friends or associates under the pretext of  
18 legitimate contracts. AA, vol. 3, 514-517. The Indictment identified the specific  
19 contracts, counterparties, and bases on which the contracts were not authorized,  
20 e.g., they were "grossly unfavorable" to the County or for work Thomas knew was

21  
22 <sup>6</sup> See also Benigas v. State, 95 Nev. 358, 594 P.2d 724 (1979) ("Count one of the  
23 challenged indictments charged embezzlement as follows: (Defendants) did then  
24 and there willfully, unlawfully and feloniously embezzle \$100.00, or more, lawful  
25 money of the United States, or the equivalent thereof, to-wit: gaming chips, the  
26 property of . . . Hotel . . . in the following manner . . . Defendants, as agents and  
27 employees of . . . Hotel, being entrusted with gaming chips for the purpose of  
28 conducting gaming activities, to-wit: baccarat, did appropriate and use said chips  
for purposes other than that for which the same was entrusted With intent to steal  
the same and defraud the owner thereof. (Emphasis added.).... Indictments, as  
these before us, which set out statements of the acts constituting the offenses in  
such a manner as to inform the accused with reasonable certainty of the specific  
offense with which he is charged are sufficient.")

1 completely “unnecessary” and would never be or was not being performed. Id. For  
2 example, Count 2 of the Indictment read as follows:

3 Defendant did, on or between December, 2004, and  
4 December 2006, then and there knowingly, feloniously,  
5 and without lawful authority, commit theft by using the  
6 services or property of another person entrusted to him,  
7 or placed in his possession of a limited authorized period  
8 of determined or prescribed duration or for a limited use,  
9 having value of \$2500.00 or more, lawful money of the  
10 United States, belonging to University Medical Center  
11 and/or Clark County, Nevada, in the following manner,  
12 to wit: by the Defendant, while employed as the Chief  
13 Executive Officer at said university Medical Center,  
14 entering into contracts with Frasier Systems Group, a  
15 company owned by Gregory Boone, a friend of said  
Defendant, 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, and said  
Defendant causing payments to be made on said contract  
while he knew or should have known that services were  
not being received as contracted for under said contract  
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, thereby using the service or property for another  
use.

16 Id. at 515-516. The Indictment clearly pled sufficient facts for Thomas to know  
17 what allegations he had to defend against. Thomas knew that he had to defend  
18 against the allegations that the contracts were unnecessary, highly unfavorable to  
19 UMC, the work was never completed under the made contracts and Thomas paid  
20 money under the contracts knowing that no work was done. The State is not  
21 required to plead every single fact that they plan to prove at trial. All that is  
22 required is a definite statement sufficient to enable a defendant to know what they  
23 must defend against and a description of how the crime occurred if possible. The  
24 issue is not whether the State will be successful on these charges if presented to a  
25 jury but whether Thomas knew based on the face of the Indictment what he must  
26 defend against. The same applies to the Official Misconduct charges 6-10 of the  
27 Indictment. For example, Count 7 reads:  
28

1 Defendant did, on or between December, 2004 and  
2 December, 2006, then and there knowingly, feloniously,  
3 and without legal authority, while acting as a public  
4 officer as Chief Executive Officer of University Medical  
Center, employ or use money under his official control or  
direction, or in his official custody for the private benefit  
or gain of himself or another, by doing the acts set forth  
in Count 2, hereinabove.

5 Id. at 518. Again, Thomas had sufficient notice that he would have to defend  
6 against the allegation that while acting as a public officer, he used money under his  
7 control to give beneficial contracts for work that was unnecessary and not being  
8 performed in order to benefit his friends. In both the Theft charges and the Official  
9 Misconduct charges, the Indictment clearly listed every element of the crime and  
10 gave a specific factual description in each count of how Thomas violated the  
11 statute. Those allegations were clearly sufficient under Nevada's notice pleading  
12 standard. See Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985).  
13 The sufficiency of the Indictment is to be determined by practical rather than  
14 technical considerations, Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669  
15 (1970). As pointed out in the Statement of Facts, the facts underlying the charges  
16 were pled in extensive detail and were thoroughly detailed in the grand jury  
17 transcript which was more than sufficient for Thomas to put on a spirited defense  
18 in the first trial on the Indictment.<sup>7</sup> As the Indictment provided even more than  
19 what is required by notice and due process, the district court erred in dismissing the  
20 Indictment.

21 Finally, even if the Indictment suffered from some notice pleading defect,  
22 the district court abused its discretion in summarily dismissing it, rather than  
23 ordering an amendment. Simpson v. District Court, 88 Nev. 654, 503 P.2d 1225  
24 (1972). The appropriate remedy for inadequate notice in a charging document is  
25 amendment, not dismissal. "The court may permit an indictment or information to  
26

27 <sup>7</sup> To determine an Indictment's adequacy of notice, the court considers the  
28 pleadings and the transcript of the grand jury session together. Logan v. Warden,  
86 Nev. 511, 513, 471 P.2d 249, 251 (1970).

1 be amended at any time before verdict or finding if no additional or different  
2 offense is charged and if substantial rights of the defendant are not prejudiced.  
3 NRS 173.095(1). In Viray, the State was permitted to change its theory of  
4 lewdness during trial by amending the charging document to allege that the victim  
5 was forced to massage the defendant's legs instead of that the defendant massaged  
6 the victim's legs because the defendant's substantial rights were not prejudiced and  
7 the charges remained the same. Viray v. State, 121 Nev. 159, 111 P.3d 1079  
8 (2005). Although the State contends it alleged sufficient facts to give notice of its  
9 theory, to the extent the district court disagreed the court erred in dismissing the  
10 Indictment altogether because deficient notice is not a fatal defect.

11  
12 **III**  
13 **THE DISTRICT COURT IMPROPERLY RULED THAT THE THEFT**  
14 **AND OFFICIAL MISCONDUCT STATUTES WERE**  
15 **UNCONSTITUTIONALLY VAGUE AS APPLIED TO THOMAS**

16 The language utilized in the Motion to Dismiss, at the hearing and by the  
17 district court also implies that the district court in part granted the Motion to  
18 Dismiss because the Theft and Official Misconduct statutes were  
19 unconstitutionally vague when applied to Thomas' case. This ruling was a clear  
20 abuse of discretion. In the Motion to Dismiss, Thomas specifically claimed that  
21 the Theft and Misconduct statutes, as applied to his case were unconstitutionally  
22 vague. AA, vol. 3, 601. At the hearing, defense counsel argued:

23 And so the question becomes what conduct is criminal?  
24 And that's why in that motion we're saying that...and  
25 number two, a citizen isn't able to look at this and say all  
26 right, what I've done—I know there's a right path and I  
27 know there's a wrong path and I'm going to choose the  
28 wrong path and commit the crime....And that's what this  
motion speaks to judge. That's the where is the crime and  
if there is a crime, it's void for vagueness because it  
gives the prosecution such discretion and power to say  
well, we're going to charge one person in this case, but  
we won't charge them where there's other bad contracts.  
And that's exactly the heart of the constitutional issues  
that it gives the State too much discretion. It doesn't put a  
citizen on notice of when their activities and actions  
become criminal...



1 Id. at 709-711. In its decision on the Motion, the district court specifically stated,  
2 “NRS 205.0832 as applied to the factual allegations as in the Indictment, merely  
3 put a person of ordinary intelligence on notice that by entering into an ill-  
4 conceived contract they may at a later date be charged with a crime.” Id. at 741.  
5 From this language it appears the district court at least in part dismissed the  
6 Indictment because the statutes as applied were unconstitutionally vague. This was  
7 clear error.

8 **A. Standard for Determining Whether a Criminal Statute is Void for  
Vagueness As-Applied**

9 “As generally stated, the void-for-vagueness doctrine requires that a penal  
10 statute define the criminal offense with sufficient definiteness that ordinary people  
11 can understand what conduct is prohibited and in a manner that does not encourage  
12 arbitrary and discriminatory enforcement.” Kolender v. Lawson, 461 U.S. 352,  
13 357, 103 S.Ct. 1855, 1858 (1983); see also State v. Castaneda, 126 Nev. Adv. Op.  
14 45, 245 P.3d 550 (2010). When the challenge is vagueness “as-applied,” there is a  
15 two-part test: a court must first determine whether the statute “give[s] the person of  
16 ordinary intelligence a reasonable opportunity to know what is prohibited’ and then  
17 consider whether the law ‘provide[s] explicit standards for those who apply [it].”  
18 Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299 (1972)  
19 (footnote omitted)); see also Gentile v. State Bar of Nev., 501 U.S. 1030, 1050,  
20 111 S.Ct. 2720, 2732 (1991); Vill. of Hoffman Estates v. Flipside, Hoffman  
21 Estates, 455 U.S. 489, 498, 102 S.Ct. 1186, 1193 (1982). The two prongs of the as-  
22 applied vagueness test are independent and not conjunctive; a defendant may  
23 demonstrate a statute’s unconstitutional vagueness based on either prong.  
24 Castaneda, 245 P.3d at 553 n.1. The Nevada Supreme Court has determined that “a  
25 statute will be deemed to give sufficient notice of proscribed conduct when,  
26 viewing the context of the entire statute, the words used have a well-settled and  
27 ordinarily understood meaning.” Nelson v. State, 123 Nev. 534, 540-41 (2007).

1 Because the Court presumes that statutes are constitutional, a party  
2 challenging the statute has the burden of making “a clear showing of invalidity.”  
3 Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). The U.S.  
4 Supreme Court has held that a defendant “who engages in some conduct that is  
5 clearly proscribed cannot complain of the vagueness of the law as applied to the  
6 conduct of others ... [a] court should therefore examine the complainant’s conduct  
7 before analyzing other hypothetical applications of the law.” Village of Hoffman  
8 Estates, 455 U.S. at 495, 102 S.Ct. at 1191 (citation omitted). The mere fact that  
9 hypothetical “close cases” can be envisioned does not render a statute  
10 unconstitutionally vague as-applied. U.S. v. Williams, 553 U.S. 285, 305-306, 128  
11 S.Ct. 1830, 1846 (2008). “Close cases can be imagined under virtually any statute.  
12 The problem that poses is addressed, not by the doctrine of vagueness, but by the  
13 requirement of proof beyond a reasonable doubt.” Id. (citing In re Winship, 397  
14 U.S. 358, 363, 90 S.Ct. 1068 (1970)). “What renders a statute vague is not the  
15 possibility that it will sometimes be difficult to determine whether the  
16 incriminating fact it establishes has been proved; but rather the indeterminacy of  
17 precisely what that fact is.” Id.<sup>8</sup>

18 **B. The District Court’s Vagueness Analysis Was Clearly Erroneous**  
19 **Because the Scope of Thomas’s Contracting Authority and**  
20 **Permissible Uses of County Property Is Readily Ascertainable**  
21 **from Sources of Law Outside the Theft and Misconduct Statutes**

22 There are laws and other readily available sources from which a person of  
23 ordinary intelligence can determine whether Thomas’ negotiation of the contracts  
24 with his friends transgressed the limits on his authority as CEO, i.e., whether he  
25 committed Theft and Official Misconduct by disposing of County funds in pursuit  
26 of unauthorized purposes exceeding their limited entrusted use. Numerous other  
27 state courts have considered identical vagueness challenges to their official

28 <sup>8</sup> A constitutional vagueness challenge to a criminal statute is reviewed de novo.  
See, e.g., U.S. v. Zhi Yong Guo, 634 F.3d 1119, 1121 (9th Cir. 2011) (citing U.S.  
v. Purdy, 264 F.3d 809, 811 (9th Cir. 2001)).

1 Misconduct and Theft statutes and uniformly rejected those challenges after  
2 determining it is possible for an official—and his jury—to ascertain the limits of  
3 his authority. It may be that a jury determines Thomas’ negotiation of grossly one-  
4 sided contracts fell within the legitimate ambit of his authority as UMC CEO, but  
5 such a determination will have everything to do with the *sufficiency* of the State’s  
6 evidence, and *nothing* to do with any purported vagueness in applying the Theft or  
7 Misconduct statutes. By mistaking his own view of the sufficiency of the evidence  
8 for an as-applied vagueness problem, the trial judge clearly committed a legal error  
9 in dismissing the Indictment. By a cursory review of Thomas’ employment duties  
10 and powers as provided in the Nevada Revised Statutes and Administrative Code,  
11 the statutorily incorporated UMC bylaws, and Thomas’ employment contract, a  
12 reasonable person would be on notice that Thomas’s transfer of County wealth to  
13 his friends and associates through grossly one-sided, pretextual contracts was an  
14 unauthorized act constituting Theft and Official Misconduct.

15 In finding the State’s Indictment unconstitutionally vague, the district court  
16 committed a legal error by ignoring the charging documents allegation that  
17 Thomas committed Theft by entering into contracts “knowingly” and “without  
18 legal authority” that exceeded the “limited use” for which he was entrusted to use  
19 County funds. Only by ignoring—and omitting from its order—those aspects of  
20 the charging document, could the district court rationally conclude the Indictment  
21 “does nothing more than put Thomas on notice that he/UMC may have entered into  
22 an ill conceived contract.” AA, vol. 3, 741. Clearly, if Thomas can persuade a jury  
23 that he merely negotiated some bad contracts while acting within the authorized  
24 scope of his powers, he would be entitled to an acquittal. But the Indictment  
25 alleges that he was *not authorized* to enter into the types of contracts formed with  
26 his friends and close associates, and their negotiation exceeded the “limited use”  
27 for which Thomas was entrusted to commit County funds. Id. at 514-519.

1 Numerous courts have considered vagueness challenges to their official  
2 misconduct statutes by defendants like Thomas who are charged with using public  
3 property for personal use; these courts have uniformly found the statutes not  
4 unconstitutionally vague because the scope of a public official's authority to use  
5 state property is readily ascertainable from other sources, such as statutes,  
6 regulations, ethical guidelines, and employment contracts. In State v. Florea, 296  
7 Or. 500, 677 P.2d 698 (1984), the Oregon Supreme Court considered and rejected  
8 a vagueness challenge very similar to Thomas'. Like Thomas, the Florea  
9 defendant, had been charged with Official Misconduct in the First Degree and  
10 Theft. The defendant challenged as void for vagueness the Official Misconduct  
11 statute, which provided: "A public servant commits the crime of official  
12 misconduct in the first degree if with intent to obtain a benefit or to harm  
13 another...He knowingly performs an act constituting an unauthorized exercise in  
14 his official duties." Id. at 502, 677 P.2d at 700. The Oregon Supreme Court  
15 considered whether the statute was vague, focusing on its use of the term  
16 "unauthorized," and concluded: "Even though a question of a public servant's  
17 authority may be one of first impression in a court, it is governed by sources of law  
18 and delegated authorization outside the criminal code itself, sources to which a  
19 public official in any event must turn in order properly to understand his or her job.  
20 If there is vagueness, it does not lie in [the official misconduct statute]." Id. at 504,  
21 677 P.2d at 701.

22 Similarly, in State v. Jensen, 272 Wis.2d 707, 681 N.W.2d 230 (Wis. Ct.  
23 App. 2004), aff'd, 279 Wis.2d 220, 694 N.W.2d 56 (Wis. 2005), defendants  
24 challenged as void for vagueness Wisconsin's official misconduct statute, Wis.  
25 Stat. Ann. § 946.12(3), which establishes a crime where an official "exercises a  
26 discretionary power in a manner inconsistent with the duties of the officer[] or  
27 employee's office or employment or the rights of others and with intent to obtain a  
28 dishonest advantage for the officer or employee or another[.]" The Jensen

1 defendants, who were charged with using state resources for partisan political  
2 campaigning, complained that the statute was unconstitutionally vague because it  
3 did not “adequately delineate[] the duty each defendant allegedly violated,” and  
4 further permitted “prosecutors to apply or create their own subjective theories,  
5 standards and interpretations of the statute.” Id. at 720-721, 681 N.W.2d at 236.  
6 Applying the dual-prong vagueness test, the appellate court rejected that analysis,  
7 determining the defendant-officials’ duties were readily ascertainable from  
8 applicable statutes, legislative rules and guidelines, and employee handbooks.  
9 Among others, the court pointed in particular to a statutorily codified ethical rule  
10 providing: “No state public official may use his or her public position or office to  
11 obtain financial gain or anything of substantial value for the *private benefit* of  
12 himself or herself or his or her immediate family, or for an organization with which  
13 he or she is associated.” Id. at 724-725, 681 N.W.2d at 238 (emphasis added).  
14 Thus, the court concluded, a reasonable person was on notice regarding the  
15 prohibited nature of the defendants’ conduct and the statute was not vague. Id.

16 Likewise, in State v. Heaton, 125 Wash.App. 1035 (Wash. Ct. App. 2005), a  
17 Washington appellate court rejected an identical vagueness challenge to that state’s  
18 Official Misconduct law. The court held that: “[p]eople of common intelligence  
19 can understand the meaning of the statute, which prohibits ‘official misconduct,’  
20 namely, that a public servant violates the law if he or she (1) performs an  
21 unauthorized act under color of law....” Id. at 2. The court further explained that  
22 the statute was not vague as applied because laws defining the defendant-police  
23 officer’s authorized duties provided an objective standard for measuring whether  
24 his actions amounted to official misconduct. Id. The court emphasized that  
25 vagueness is not demonstrated merely because the statute’s application requires a  
26 subjective determination of whether the official’s conduct was authorized. Id.

27 Numerous other courts have come to the same conclusion as to their official  
28 misconduct statutes penalizing an official’s unauthorized use of state property. See,

1 e.g., Margraves v. State, 34 S.W.3d 912, 921-922 (Tex. Crim. App. 2000) (official  
2 misconduct statute providing that “a public servant [may] use government property  
3 only in ways that are authorized” not unconstitutionally vague as applied to official  
4 who used state airplane to travel to son’s graduation, despite pretext of business  
5 purpose), abrogated on unrelated grounds by Laster v. State, 275 S.W.3d 512 (Tex.  
6 Crim. App. 2009); State v. Andersen, 370 N.W.2d 653 (Minn. Ct. App. 1985)  
7 (official misconduct statute’s criminalization of actions in excess of mayor’s  
8 “lawful authority” not vague because bounds of that authority can be ascertained);  
9 People v. Kleffman, 90 Ill.App.3d 1, 3-5, 412 N.E.2d 1057, 1059-1061 (Ill. Ct.  
10 App. 1980).<sup>9</sup> Further, inclusion of a knowledge mens rea element prevents the  
11 misconduct statute from being vague. See State v. Green, 376 A.2d 424, 427 (Del.  
12 Super. Ct. 1977) (citations omitted); accord State v. Wood, 67 Or.App. 218, 223-  
13 224, 678 P.2d 1238, 1241-1242 (Or. Ct. App. 1984).<sup>10</sup> Finally, NRS  
14 205.0832(1)(b) is analogous to an offense known in other jurisdictions as  
15 “misapplication of entrusted property,” and in those jurisdictions, as far as the  
16 State can tell, the offense has never been held to be vague as applied or facially  
17 void for vagueness. See, e.g., N.J. Stat. Ann. § 2C:21-15; N.D. Cent. Code § 12.1-  
18 23-07; Alaska Stat. § 11.46.620; Ind. Code § 35-43-5-3(3); 18 Pa. Cons. Stat. Ann.  
19 § 4113; Ala. Code 1975 § 13A-9-51; Haw. Rev. Stat. § 708-874; Or. Rev. Stat. §  
20  
21

22 <sup>9</sup> (official misconduct statute prohibiting action “in excess of lawful authority” for  
23 “personal advantage” not vague because derives meaning from a set of rules not  
24 contained in the statute; “This court is not prepared to hold that the lawful  
25 authority of the public officers and employees of this State is so poorly defined  
26 that, as a general thing, public officials are unable to determine the propriety of  
27 their actions...[T]hat exceptional cases may arise where opinions might differ does  
28 not render [the statute] unconstitutional.”).

<sup>10</sup> (official misconduct statute not unconstitutionally vague where “the State must  
prove that the defendant knew that he was refraining from performing a duty which  
is clearly inherent in the nature of his office[,]. . .[and] intend[ed] to obtain a  
personal benefit or to cause harm to another person. Where the State must prove  
that a defendant acted with this knowledge and intent, the definition of the offense  
is not unconstitutionally vague.”).

1 165.095.<sup>11</sup> Because “it would be impossible for the Legislature to specifically  
2 describe in the statute every possible act that would amount to criminal misuse of  
3 government property[.]” Margraves, 34 S.W.3d at 921, a statute is not vague  
4 merely because other sources must be consulted in determining if the official’s  
5 conduct was authorized or exceeded the bounds of a limited entrustment.

6 In Thomas’s case, there is a rich array of sources from which a reasonable  
7 person could ascertain the scope of Thomas’s contracting authority and whether  
8 the contracts at issue exceeded the limited use for which County funds were  
9 entrusted to him. One example is NRS 281A.400(2), which provides that an  
10 official cannot use his office for purposes of benefiting a person with whom he  
11 maintains a personal relationship. Similarly, NRS 281A.420 creates an official’s  
12 duty to disclose certain personal relationships, and County policies create an  
13 official’s duty to put out projects for competitive bidding. AA, vol. 1, 52-53  
14 (testimony that Thomas failed to ever follow County’s Fiscal Directive No. 6  
15 prescribing mandatory public contract bid process); AA, vol. 2, 368-378.  
16 Additionally, Nevada Administrative Code (NAC) 449.314(5) provides that “[t]he  
17 chief executive officer of a hospital is responsible for operating the hospital in  
18 accordance with the authority conferred on him by the governing body.” Thus  
19 incorporated, the UMC bylaws provide that its CEO shall establish “internal  
20 controls to effectively operate the organization by...*conserving* physical and  
21 *financial assets*.” UMC Bylaws, art. 3 § 1 (emphasis added).<sup>12</sup> Moreover, the  
22 bylaws require the CEO to perform his responsibilities in a fashion and provide  
23

24 <sup>11</sup> Cf. also State v. Ferrari, 398 So.2d 804, 807 (Fla. 1981) (criminal embezzlement  
25 statute penalizing misappropriation of construction funds not void for vagueness  
26 because definition of statutory terms could be derived from Florida’s version of the  
27 U.C.C.); State v. Sylvester, 516 N.W.2d 845, 848-850 (Iowa 1994) (no vagueness  
in applying theft statute to embezzlement within a partnership because Uniform  
Partnership Act definition of trustee responsibilities made theft statute applicable).

28 <sup>12</sup> Available  
<http://agenda.co.clark.nv.us/sirepub/cache/0/tua44j45mbmaom451gfxl545/2357408162011101941908.PDF>

1 reporting that enables the County Board “to properly discharge its functions and  
2 responsibilities,” and to “bring all matters requiring Board approval to the Board at  
3 its regularly scheduled meetings.” Id.; cf. AA, vol. 1, 42-45, 48 (Thomas’s failure  
4 to comply with this latter rule). Further, Thomas’s employment contract with the  
5 County contained terms and conditions governing the authorized scope of his use  
6 of County resources, and required him to maximize the financial benefit to the  
7 County when exercising his contracting authority. See AA, vol. 1, 73-82. In light  
8 of these many sources delineating the scope of Thomas’ authorization to dispose of  
9 County property, it cannot be said that the Theft and Misconduct statutes as  
10 applied to him do not have “a meaning sufficiently precise for a man of average  
11 intelligence to ‘reasonably understand that his contemplated conduct is  
12 proscribed.’” U.S. v. Mazurie, 419 U.S. 544, 553, 95 S.Ct. 710, 715-716 (1975).  
13 The district court clearly erred in failing to acknowledge these numerous sources  
14 of Thomas’s authority and instead summarily dismissing the entire Indictment as  
15 unconstitutionally vague.

16 Rather than an appropriate application of constitutional vagueness  
17 principles, the district court’s ruling was tantamount to entry of a directed verdict  
18 based on the trial judge’s view of the sufficiency of the evidence produced at the  
19 first trial. The trial judge was likely influenced by his own memory and impression  
20 of that evidence, which is not a proper consideration in undertaking a constitutional  
21 vagueness analysis of an Indictment yet to be tried to final conclusion before a  
22 jury. It is also clear that, although the court offered him fourteen (14) months to  
23 demonstrate a purported withholding of exculpatory Brady material, Thomas failed  
24 to make such a showing, see generally AA, vol. 3, 589-596, 672-734; dismissing  
25 the Indictment based on a tenuous vagueness analysis appears to have served as a  
26 substitute pretext for dismissing the action. As there was no proper basis for  
27 dismissing the Indictment, the district court erred and the decision should be  
28 reversed.



1 CONCLUSION

2 Wherefore, the State respectfully requests that this Honorable Court  
3 REVERSE the district court's granting of Respondent's Motion to Dismiss.

4 Dated this 8<sup>th</sup> day of June, 2012.

5 Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more and contains no more than 14,000 words or does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8<sup>th</sup> day of June, 2012.

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**CERTIFICATE OF SERVICE**

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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Clerk of Supreme Court

THE STATE OF NEVADA,

Appellant,

vs.

LACY THOMAS,

Respondents.

CASE NO. 58833

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

|                      |   |                             |
|----------------------|---|-----------------------------|
| THE STATE OF NEVADA, | ) |                             |
|                      | ) |                             |
| Appellant,           | ) | CASE NO. 58833              |
|                      | ) |                             |
| vs.                  | ) |                             |
|                      | ) |                             |
| LACY THOMAS,         | ) | <b>NRAP 26.1 DISCLOSURE</b> |
|                      | ) |                             |
| Respondent.          | ) |                             |
| _____                | ) |                             |

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

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No publically held company associated with this corporation;

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## TABLE OF CONTENTS

|                                                                                                                                                                                                                             | <u>PAGE</u> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| RULE 26.1 DISCLOSURE STATEMENT. ....                                                                                                                                                                                        | i           |
| TABLE OF AUTHORITIES.....                                                                                                                                                                                                   | v           |
| STATEMENT OF THE ISSUES. ....                                                                                                                                                                                               | 1           |
| STATEMENT OF THE CASE.....                                                                                                                                                                                                  | 1           |
| STATEMENT OF THE FACTS.....                                                                                                                                                                                                 | 2           |
| ARGUMENT.....                                                                                                                                                                                                               | 3           |
| A.    Summary of Argument. ....                                                                                                                                                                                             | 3           |
| B.    Applicable Standards of Review. ....                                                                                                                                                                                  | 5           |
| C.    The Motion to Dismiss Was Not a Challenge to the Sufficiency<br>of the Evidence to Sustain the Indictment; it Was a Motion to<br>Dismiss Asserting That the Acts Alleged in the Indictment<br>Were Not Crimes. ....   | 6           |
| D.    State Supreme Courts Find Official Misconduct Statutes<br>Unconstitutionally Vague When Specific Conduct Is Not Set<br>Forth in the Statute. ....                                                                     | 9           |
| E.    The State Court Decisions Cited by the State are “As Applied”<br>Cases and Are Inapplicable Due to the Differences in the<br>Statutes and the Conduct at Issue.....                                                   | 13          |
| F.    The United States Supreme Court Limited the Scope of the<br>Federal Official Misconduct Statute to Avoid Invalidating it<br>and Sets Forth the Task of the Court in Analyzing Void-for-<br>Vagueness Challenges. .... | 18          |

|    |                                                                                                                                                                  |    |
|----|------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| G. | The Statutes are Vague Under Nevada Law<br>Void-for-Vagueness in Nevada. ....                                                                                    | 21 |
| H. | The Trial Court Properly Construed the Statutes and<br>Determined That the Conduct Alleged Did Not Constitute<br>the Crimes of Theft or Official Misconduct..... | 27 |
|    | CONCLUSION. ....                                                                                                                                                 | 29 |
|    | CERTIFICATE OF COMPLIANCE.....                                                                                                                                   | 31 |
|    | CERTIFICATE OF SERVICE. ....                                                                                                                                     | 32 |



## TABLE OF AUTHORITIES

### CASES

|                                                                                     |        |
|-------------------------------------------------------------------------------------|--------|
| <u>Arizona v. Ross</u> ,<br>151P.3d 1261, 1265 (Ariz. App. 2007). . . . .           | 28     |
| <u>Colwell v. State</u> ,<br>59 P.3d 463 (2003). . . . .                            | 9      |
| <u>Gallego v. State</u> ,<br>23 P.3d 227, 239 (Nev. 2001). . . . .                  | 6      |
| <u>Hill v. State</u> ,<br>188 P.3d 51 (Nev. 2008). . . . .                          | 5      |
| <u>Houser v. District Court</u> ,<br>345 P.2d 766 (1959). . . . .                   | 9      |
| <u>Hughes v. Jorgenson</u> ,<br>50 P.3d 821, 823 (Ariz. 2002). . . . .              | 28     |
| <u>Kolsch v. Curtis</u> ,<br>___ F.Supp.___, 2012 WL 1376975 (D.Nev. 2012). . . . . | 22     |
| <u>Margraves v. State</u> ,<br>34 S.W. 3d 912 (Tex. Crim. App. 2000). . . . .       | 16     |
| <u>McNally v. United States</u> ,<br>483 U.S. 350 (1987). . . . .                   | 19, 20 |
| <u>Nolos v. Holder</u> ,<br>611 F.3d 279 (5 <sup>th</sup> Cir., 2010). . . . .      | 22     |
| <u>Peccole v. McNamee</u> ,<br>267 P.2d 243 (Nev. 1954). . . . .                    | 22     |

|                                                                      |                  |
|----------------------------------------------------------------------|------------------|
| <u>People v. Beruman,</u><br>638 P.2d 789, 793 (Colo. 1982).....     | 10               |
| <u>People v. Grever,</u><br>856 N.E.2d 378 (Ill. 2006).....          | 17               |
| <u>People v. Kleffman,</u><br>412 N.E. 2d 1057 (Ill. App. 1980)..... | 17               |
| <u>Skilling v. United States,</u><br>130 S.Ct. 2896 (2010). ....     | 18, 19, 22, 27   |
| <u>Smith v. District Court,</u><br>347 P.2d 52 (1959).....           | 9                |
| <u>State v. Adams,</u><br>866 P.2d 1017, 1023 (Kan. 1994). ....      | 11               |
| <u>State v. Andersen,</u><br>370 N.W. 2d 653 (Minn. App. 1985).....  | 16               |
| <u>State v. Campbell,</u><br>113 S.W.3d 9 (Tex. App. 2000).....      | 16               |
| <u>State v. Castaneda,</u><br>245 P.3d 550, 553 (Nev. 2010). ....    | 4, 5, 21, 24, 27 |
| <u>State v. DeLeo,</u><br>356 So.2d 306, 307 (Fl. 1978). ....        | 12               |
| <u>State v. Florea,</u><br>677 P.2d 698 (Or. 1984).....              | 14               |
| <u>State v. Green,</u><br>376 A.2d 424 (Del. Super. Ct. 1977).....   | 17               |

|                                                                                  |    |
|----------------------------------------------------------------------------------|----|
| <u>State v. Heaton,</u><br>125 Wash. App. 1035 (Wash. Ct. App. 2005).            | 15 |
| <u>State v. Jenkins,</u><br>469 So.2d 733 (Fl. 1985).                            | 13 |
| <u>State v. Jensen,</u><br>681 N.W.2d 230 (Wis. Ct. App. 2004).                  | 15 |
| <u>State v. Lucero,</u><br>249 P.3d 1226, 1228 (Nev. 2011).                      | 5  |
| <u>State v. Perez,</u><br>464 So.2d 737, 739-40 (La. 1985).                      | 29 |
| <u>State v. Rhodig,</u><br>707 P.2d 549 (Nev. 1985).                             | 22 |
| <u>State v. Thompson,</u><br>511 P.2d 1043 (Nev. 1973).                          | 22 |
| <u>State v. Wood,</u><br>678 P.2d 1238 (Or. App. 1984).                          | 14 |
| <u>United States v. Bass,</u><br>404 U.S. 336, 347-49 (1971).                    | 28 |
| <u>United States v. Goyal,</u><br>629 F.3d 912, 922 (9 <sup>th</sup> Cir. 2010). | 3  |
| <u>United States v. Harriss,</u><br>347 U.S. 612, 618 (1954).                    | 20 |
| <u>Walch v. State,</u><br>909 P. 1184 (Nev. 1996).                               | 22 |

## **STATUTES**

|                                           |       |
|-------------------------------------------|-------|
| CRS 18-8-405. ....                        | 10    |
| Del. C. 1211.....                         | 17    |
| Fla. Stat. 839.25.....                    | 12    |
| Ill. Rev. Stat. Crim. Code 33-3( c). .... | 17    |
| K.S.A.. ....                              | 11    |
| La.R.S. 14:134.....                       | 28    |
| Minn. Stat. Ann. 609.43. ....             | 16    |
| NRS 34.500. ....                          | 8     |
| NRS 34.700. ....                          | 8     |
| NRS 34.710. ....                          | 8     |
| NRS 172.155. ....                         | 8     |
| NRS 173.075. ....                         | 23    |
| NRS 174.075(2).....                       | 8     |
| NRS 174.105(3).....                       | 9     |
| NRS 197.110. ....                         | 4, 13 |
| NRS 197.110(2).....                       | 30    |
| NRS 205.0832. ....                        | 5     |
| NRS 205.0832(1)(b). ....                  | 30    |

|                                  |        |
|----------------------------------|--------|
| NRS 281A.400(2). . . . .         | 23     |
| NRS 281A.420. . . . .            | 23, 24 |
| NRS 281.481(2)(a). . . . .       | 24     |
| NRS 281.501. . . . .             | 24     |
| ORS 162.415. . . . .             | 14     |
| RCW 9A.80.010. . . . .           | 15     |
| VTCA 39.02. . . . .              | 16     |
| Wis. Stat. Ann 946.12... . . . . | 15     |
| 18 U.S.C. §1346. . . . .         | 18, 20 |

**OTHER AUTHORITIES**

|                                        |    |
|----------------------------------------|----|
| County Fiscal Directive No. 6. . . . . | 23 |
| NAC 449.314(5). . . . .                | 23 |
| UMC By-laws. . . . .                   | 23 |

## **STATEMENT OF THE ISSUES**

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

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

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

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

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

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

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

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

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

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

## **STATEMENT OF THE CASE**

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

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

### **STATEMENT OF THE FACTS**

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

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

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

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

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

Counts 6-10 of the Indictment (Misconduct by a Public Officer)

incorporated by reference the facts from Counts 1-5.

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

### **ARGUMENT**

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

#### **A. Summary of Argument**

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



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

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

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

Id.

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

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

#### *The Statutes*

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

Every public officer who:

...

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

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

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

...

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

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

B. Applicable Standards of Review

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

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

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

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

The State Failed to Raise this Issue Below

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

239 (2001)<sup>2</sup>.

The pleading which contained the Motion to Dismiss titled the subject as follows: Motion to Dismiss-Failure to State a Crime/Vagueness of the Statute.

AA, p. 600. The argument on the Motion concluded as follows:

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

AA, p. 605.

The State's Opposition failed to address the constitutional issue in any respect and did not argue that there was sufficient evidence to support the charge.

AA, p.641-652. Nor did the State argue that the Motion should be treated as an untimely Writ of Habeas Corpus. There was no error and it certainly was not plain.

The State has not shown any prejudice, in any event.

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

The trial court concluded that,

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

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<sup>2</sup>No cases applying the plain error standard of review to the State could be found.

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

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

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

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

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

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

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

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

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

language in Nevada's statute.

## Colorado

### *The Statute*

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

### *The Holding*

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

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

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

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

was reversed.

## Kansas

### *The Statute*

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

### *The Holding*

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

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

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



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

### Florida

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

#### *The Statute*

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

#### *The Holdings*

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

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

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

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

Id. at 308.

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

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

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

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<sup>5</sup>Concurring Justice Overton suggested that the legislature revisit the statute and limit its application to “statutorily- or constitutionally-defined duties of the particular offices.”

conduct alleged in this case, are not very instructive.<sup>6</sup> The cases cited by the State in the Opening Brief are summarized below:

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>8</sup>The relevant provisions of NRS 281.501 are now found in NRS 281A.420.

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

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

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

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

Q. Did you also look into whether or not the heads of those companies were acquainted with Lacy Thomas?

A. ...we found out that the majority of the people involved with those companies were all...fraternity members with Lacy Thomas in a fraternity known as Alpha Phi Alpha. So we found out that they were all from the same fraternity and **all black males** all from Chicago...

....

Q. But of the companies and ties that you investigated, [Ross Fidler and Bob Mills] were the only two exceptions to the general rule of being fraternity brothers and **black males** from Chicago; is that right?

A. That's correct.

Q. Lacy Thomas is a **black male** himself?

A. Yes, sir.

Q. The nature of that fraternity, is it exclusively for **blacks** or do you know?

A. I believe it is exclusive for **blacks**.

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

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

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

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

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

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

Arizona

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



rules:

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

### Louisiana

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

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

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

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

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

Id. at 740.

### CONCLUSION

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

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

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

DATED this 8<sup>th</sup> day of August, 2012.

Respectfully Submitted:

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

/s/ Daniel J. Albregts  
Daniel J. Albregts, Esq.  
Nevada Bar No. 4435

### CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X4 in size 14 Times New Roman font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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

☐ [ ] Does not exceed \_\_\_ pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8<sup>th</sup> day of August, 2012.

Respectfully Submitted:

/s/ Franny Forsman  
Nevada Bar No. 000014

/s/ Daniel J. Albregts  
Daniel J. Albregts, Esq.  
Nevada Bar No. 004435

### **CERTIFICATE OF SERVICE**

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

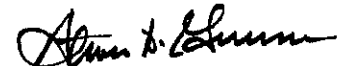
Steven S. Owen  
Chief Deputy District Attorney

Catherine Cortez Masto  
Nevada Attorney General

Daniel J Albregts, Esq.  
Counsel for Respondent

Franny Forsman, Esq.  
Counsel for Respondent

/s/ Kimberly LaPointe  
An Employee of DANIEL J. ALBREGTS, LTD.

  
CLERK OF THE COURT

1 RTRAN

2  
3  
4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA  
7

8 THE STATE OF NEVADA, )  
9 Plaintiff, ) CASE NO. 08C241569  
10 vs. ) DEPT. XVII  
11 LACY L. THOMAS, )  
12 Defendant. )  
13 )

14 BEFORE THE HONORABLE MICHAEL P. VILLANI, DISTRICT COURT JUDGE

15 TUESDAY, MAY 6, 2014

16 **TRANSCRIPT OF PROCEEDINGS RE:**

17 **STATUS CHECK: NV SUPREME COURT REMAND TO RESET TRIAL DATE**  
18

19 **APPEARANCES:**

20 For the State: ALEXANDER G. CHEN, ESQ.,  
21 Deputy District Attorney

22 For the Defendant: DANIEL J. ALBREGTS, ESQ.,  
23

24  
25 RECORDED BY: MICHELLE L. RAMSEY, COURT RECORDER

1 LAS VEGAS, NEVADA; TUESDAY, MAY 6, 2014

2 [Proceeding commenced at 8:45 a.m.]

3  
4 THE COURT: Mr. Albregts, will you be representing Mr. Thomas?

5 MR. ALBREGTS: At this stage, Judge, and if I may, I would ask  
6 his appearance be waived today. I've had -- I have very good  
7 contact with him. I am in the process of talking to Mr. Staudaheer  
8 and a couple of the elder statesman's in the DA's Office to see if  
9 we can do something with this case other than retry it because of a  
10 number of issues related to my schedule and a couple of personal  
11 issues. I have not been able to put together the packet. I need  
12 to be able to meet with them. And so if we can ask for another 30  
13 days before we set for trial so that the parties can get together  
14 and see if we can do something with this case other than retry it.  
15 I don't believe the State has any opposition.

16 THE COURT: Okay.

17 MR. CHEN: Alex Chen for the State. No objection to that 30  
18 days.

19 THE COURT: Was Mr. Hamner contagious?

20 MR. CHEN: Mine's worse than his.

21 THE COURT: Okay. All right. We'll just set it a 30-day  
22 status check today for setting a trial date. And also we can -- I  
23 can set a briefing schedule on a particular issue now or we can  
24 wait until our status check because when I had last this case and  
25 you had a filed a motion to dismiss, Mr. Albregts, there were two

1 issues. One was that you alleged that the allegations in the  
2 indictment did not allege a crime or were insufficient. And then  
3 second was that due to the Brady violation that you were also  
4 seeking to have the case dismissed.

5 And I was reviewing my Court order from back in 2011 and  
6 this is from page 6 and it says, based upon the above, referring to  
7 the allegations in the indictment, the Court need not address  
8 Defendant's argument that the indictment should be dismissed due to  
9 the State's failure to provide exculpatory evidence, okay. So I  
10 didn't need to rule on it because I ruled that what they alleged  
11 was not a crime. The Supreme Court disagreed apparently.

12 And so if we're going to go forward we'll need to set a -  
13 - I want some further briefing on that particular issue.

14 MR. ALBREGTS: And there may be other legal issues that arise  
15 in part out of the opinion that the Supreme Court issued.

16 THE COURT: Right. And that's another thing I was going to  
17 bring up now, but we can -- we can handle it now Mr. Chen if you're  
18 up to speed on this or we can do it in the 30 days because -- just  
19 for the record, I agree with the Supreme Court that the allegations  
20 in indictment are clear, but I was unclear from their opinion did  
21 they address or was it -- was it addressed as to whether or not the  
22 allegations actually constitute a crime. I agree. They're crystal  
23 clear, but I wasn't clear from their opinion is did they -- did you  
24 guys argue that there -- you know you were arguing they weren't  
25 clear, but if you argued that they were clear, did you guys address



1 with the Supreme Court that they're clear, but they don't allege a  
2 crime. I don't know if the Supreme Court really addressed that.

3 MR. ALBREGTS: Let me just say that there appear to be in my  
4 humble opinion with all due respect to the Supreme Court a  
5 disconnect between some of the arguments that were made both in the  
6 briefing and at the oral argument and the opinion. And so I think  
7 that some of those issues are also going to be hashed out or needed  
8 to be hashed out, but I would ask the Court to wait 30 days because  
9 these are all some of the issues that are going to come into play  
10 during our discussions with the Prosecution.

11 THE COURT: Right. And one other issue if you can both takes  
12 notes on this. The Supreme Court dismissed Count 1.

13 MR. ALBREGTS: Right.

14 THE COURT: They did agree -- I don't know if they were just  
15 saying it wasn't clear or they said it didn't constitute a crime.  
16 I really couldn't tell, but -- so they dismissed that one, okay,  
17 Count 1.

18 Now if you go to Count 6 which is misconduct of a Public  
19 Officer, they make certain allegations, but then it says by doing  
20 the acts as set forth in Count 1.

21 MR. ALBREGTS: Right.

22 THE COURT: The Supreme Court didn't address Count 6. They're  
23 saying Count 1 is dismissed then how can you -- how can the State  
24 go forward on Count 6 that references Count 1?

25 MR. ALBREGTS: That was puzzling to the defense.

1 THE COURT: Maybe it was clear in our argument. I'm not  
2 making the judgment call on that regard, but that's just something  
3 that has to be hashed out.

4 MR. ALBREGTS: Right.

5 THE COURT: So, we'll come back in 30 days.

6 MR. ALBREGTS: Could I ask for June 10<sup>th</sup> if I could be so  
7 presumptuous?

8 THE CLERK: Yes. June 10<sup>th</sup>.

9 MR. ALBREGTS: As my wife says I can always ask.

10 THE COURT: And while I have both counsel here some other  
11 issues that we can address in 30 days, but I just want to give both  
12 sides a heads up. Since I do still need to address the discovery  
13 issue, and I'm going to -- I'll invite supplemental briefing in  
14 that regard, for both sides the failure to turn over, I think it  
15 was 586 pages of discovery, should the Court look at that as  
16 negligence on the DA, gross negligence, inexcusable negligence or  
17 intentional.

18 And also whichever I'm supposed to look at, how does this  
19 apply to the Hilton case which is 743 P2d 622; that's a Nevada  
20 case. Did you get that, Mr. Chen? I know you're using your --

21 MR. CHEN: P2d --

22 THE COURT: -- thumbs there; 743 P2d 622, it's a Nevada case.  
23 And then again this -- if we need to have the briefing and also I'd  
24 have both parties look at U.S. versus Chapman, it's a Ninth Circuit  
25 case out of Las -- Las Vegas.

1 MR. ALBREGTS: I'm very familiar with that, Judge.

2 THE COURT: And that's 524 Fed3d 1073.

3 MR. ALBREGTS: My former District Court Judge here who was  
4 appointed to the Federal bench.

5 THE COURT: Judge Mahan.

6 MR. ALBREGTS: Judge Mahan.

7 THE COURT: So we don't need to do any briefing on those at  
8 this point. We'll see what -- what you guys can do in the next 30  
9 days.

10 MR. ALBREGTS: But that help -- that is very helpful bringing  
11 not only those issues, but our meeting.

12 THE COURT: Do we need more than 30 days? I rather just come  
13 back once and see -- I mean are you in -- you guys getting together  
14 for your -- your big meeting?

15 MR. ALBREGTS: You know I'd like to think we can get it done  
16 in 30 days. Can we keep it on for 30 days and if it looks like  
17 maybe a week before that we need a little more time, perhaps we can  
18 call -- jointly call chambers --

19 THE COURT: Right.

20 MR. ALBREGTS: -- and just have a minute order bucking it?

21 THE COURT: Sure.

22 MR. ALBREGTS: Okay. Thank you. 'Cause I'd like to try to  
23 make 30 days.

24 THE COURT: All right.

25 MR. ALBREGTS: All right.

1 THE COURT: Okay. Oh, one other thing I was thinking about;  
2 there was this -- you know there's five or six vendors, I think  
3 five vendors identified, and I know one filed a lawsuit and  
4 actually the County paid that one vendor.

5 MR. ALBREGTS: Right.

6 THE COURT: We might want, both sides, look at -- double check  
7 with the County counsel, civil DA's Office, to see if claims were  
8 made on those other vendors in the civil -- civil round. Because  
9 if there was I'm assuming there would be discovery in the civil  
10 cases.

11 MR. ALBREGTS: I'm fairly confident there were not, but I'll  
12 double check.

13 THE COURT: Okay.

14 MR. ALBREGTS: Thank you very much.

15 THE COURT: We'll see you back.

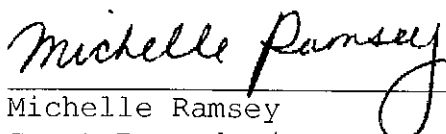
16 MR. CHEN: Thank you, Your Honor.

17 THE COURT: Thank you.

18 [Proceeding concluded at 8:52 a.m.]

19 \* \* \* \* \*

20  
21 ATTEST: I hereby certify that I have truly and correctly  
22 transcribed the audio/video proceedings in the above-entitled case  
23 to the best of my ability.

24   
25 Michelle Ramsey  
Court Recorder/Transcriber

# REGISTER OF ACTIONS

CASE NO. 08C241569

The State of Nevada vs Lacy L Thomas

§  
§  
§  
§  
§  
§  
§  
§

Case Type: **Felony/Gross  
Misdemeanor**  
Date Filed: **02/20/2008**  
Location: **Department 2**  
Cross-Reference Case  
Number: **C241569**  
Defendant's Scope ID #: **2576662**  
Lower Court Case Number: **07GJ00094**  
Supreme Court No.: **58833**

## PARTY INFORMATION

|           |                 |                                                                   |
|-----------|-----------------|-------------------------------------------------------------------|
| Defendant | Thomas, Lacy L  | Lead Attorneys<br>Daniel J. Albregts<br>Retained<br>7024744004(W) |
| Plaintiff | State of Nevada | Steven B Wolfson<br>702-671-2700(W)                               |

## CHARGE INFORMATION

| Charges: Thomas, Lacy L           | Statute  | Level  | Date       |
|-----------------------------------|----------|--------|------------|
| 1. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 1. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 2. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 2. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 3. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 3. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 4. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 4. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 5. ACTIONS WHICH CONSTITUTE THEFT | 205.0832 | Felony | 01/01/1900 |
| 5. THEFT-PENALTIES                | 205.0835 | Felony | 01/01/1900 |
| 6. MISCONDUCT OF PUBLIC OFFICER.  | 197.110  | Felony | 01/01/1900 |
| 7. MISCONDUCT OF PUBLIC OFFICER.  | 197.110  | Felony | 01/01/1900 |
| 8. MISCONDUCT OF PUBLIC OFFICER.  | 197.110  | Felony | 01/01/1900 |
| 9. MISCONDUCT OF PUBLIC OFFICER.  | 197.110  | Felony | 01/01/1900 |
| 10. MISCONDUCT OF PUBLIC OFFICER. | 197.110  | Felony | 01/01/1900 |

## EVENTS & ORDERS OF THE COURT

03/20/2014 | Status Check (8:15 AM) (Judicial Officer Villani, Michael)

RA 000122

03/20/2014, 05/06/2014, 07/08/2014, 07/31/2014

Status Check: Nv Supreme Court Remand to Reset Trial Date

Minutes

07/31/2014 8:15 AM

- Michael Staudaheer, Chf Dep DA, present on behalf of the State and Dan Albregts, present on behalf of Deft. Thomas, who is not present. This is the time set for the Status Check with regard to the Nevada Supreme Court Remand to Reset Trial Date. Upon Court's inquiry, Mr. Albregts advised that he would be representing the Deft.; a trial date needs to be set and some motion hearings also need to be set. Pursuant to the Supreme Court Order Affirming in Part, Reversing in Part, and Remanding, which was filed with the Court on January 17, 2014, Count 1 was DISMISSED; therefore, a Superseding Indictment will need to be filed with the Court striking Count 1. Ms. Staudaheer advised he would get one filed. Colloquy regarding scheduling issues; State believes the trial will take approximately two (2) weeks but Defense believes the trial will be closer to three (3) weeks. COURT ORDERED, matter set for trial. Court directed Mr. Albregts to file a written acknowledgement regarding the trial dates within the next two (2) weeks. Additionally, Court advised that it did not rule on Deft.'s Motion to Dismiss Indictment (Failure to Present Exculpatory Evidence) because it instead dismissed the case as it believed that was sufficient; however, pursuant to the Supreme Court REMAND a hearing dates does need to be set. Therefore, Court set the following briefing schedule: 09/26/14 - Mr. Albregt's Supplemental Brief 10/17/14 - State's Response 10/24/14 - Mr. Albregt's Reply, if any COURT ORDERED, matter set for hearing. NIC 11/21/14 9:30 AM HEARING: MOTION TO DISMISS INDICTMENT (FAILURE TO PRESENT EXCULPATORY EVIDENCE) 03/03/15 8:15 AM STATUS CHECK: CALENDAR CALL 03/09/15 9:00 AM JURY TRIAL

RA 000123