THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case № 2019-GS-23-01146A
Appellant Case No. 2019-001815

The State, ... Respondent,

vs.

William D. Lewis ..... Appellant.

FINAL BRIEF OF APPELLANT

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Statement of Issues Presented

Question I: Did the lower court err in failing to declare South Carolina Code § 8-1-80 unduly vague in violation of the Due Process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America as the statute contains undefined and ambiguous words such as "official misconduct," "habitual negligence," "corruption," "fraud," or "oppression" which either separately or collectively fail to put a reasonable public official on notice as to exactly what act or acts are prohibited?

Question II: Did the trial court err in failing to quashing the indictment on the ground the indictment was vague when it alleged William Lewis did "misuse public resources and abuse power and authority of his office for the corrupt purpose of pursuing or facilitating an adulterous relationship" as the allegation did not inform Mr. Lewis of the specific act of omission or commission he committed so that he could properly prepare a defense to refute the allegations, what evidence would be needed to refute the charges contained in the indictment nor what evidence would be sufficient to establish the allegations?

Question III: Did the trial court err in failing to direct a verdict as to fraud as the State produced no evidence of fraud sufficient to sustain a conviction?

Procedural History

On April 17, 2018, the State of South Carolina in indictment №s 2018-GS-23-2466 and 2018-GS-2467, originally indicted William D. Lewis on the common law charge of Misconduct in Office and Obstruction of Justice. Each indictment contained one count. Rec. on App. at 1-4 (original indictments). On December 28, 2018, Mr. Lewis filed a Motion to Quash the two indictments on the ground they were vague. He further contended the common law charge of misconduct in office was unconstitutionally vague. Finally, he contended the State was required to charge him under a statutory violation of S. C. Code § 8-1-80 as the statute was more specific to Mr. Lewis' position. As a sheriff, he was "limited to single election or judicial district" as required by the statute.

Before argument could be had on the motions, the State on March 19, 2019, indicted Mr. Lewis in indictment № 2019-GS-23-1146A-F for six alleged violations of S. C. Code § 8-1-80. He was also indicted in a superseding indictment № 2028-GS-23-2467A-F for six counts of Common Law misconduct in office. The allegations in the six counts of the Common Law violation and the six counts of statutory violations were identical. He was also indicted in indictment № 2019-GS-23-1147A for perjury. The facts of this charge were also contained in count B of the multi-count indictments for statutory and common law misconduct in office.

Upon receipt of the new and superseding indictments, Mr. Lewis filed Motions on May 3, 2019 to quash the various indictments on the ground the wording of the indictments was vague and overly broad. In addition, he moved to quash the indictments on the ground that the common law and statutory misconduct in office laws were vague in violation of the due process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to

the Constitution of the United States of America. He contended that the Due Process clause requires that a criminal statute be specific enough so that a person is not required to guess as to what specific conduct is prohibited.

A hearing was held on the motions on June 17, 2019. Rec. on App. at 80. A written order was issued on June 20, 2019 denying the motions. Rec. on App. at 111. Prior to trial, Mr. Lewis again renewed his motion to quash the indictments on the grounds of vagueness and being overly broad. Rec. on Appeal at 236, ll 13-19.

The case was tried before the Honorable G. Thomas Cooper and a jury from October 21-24, 2019. Mr. Lewis was found not guilty of the common law violation and guilty of the statutory violation. On October 25, 2019, Judge Cooper sentenced Mr. Lewis to the maximum sentence of one year in prison. On October 28, 2019, Mr. Lewis filed his Notice of Appeal and his request for an appeal bond. A bond hearing was held on November 12, 2019 at which Judge Cooper set an appeal bond of $50,000. Mr. Lewis was released on an appeal bond on November 14, 2019.

Argument

Question I

Did the lower court err in failing to declare South Carolina Code § 8-1-80 unduly vague in violation of the Due Process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment of the Constitution of the United States of America as the statute contains undefined and ambiguous words such as "official misconduct," "habitual negligence," "corruption," "fraud," or "oppression" which either separately or collectively fail to put a reasonable public official on notice as to exactly what act or acts are prohibited?

The statute under which William D. Lewis was convicted provides, "Any public officer whose authority is limited to a single election or judicial district who is guilty of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud, or oppression shall be liable to indictment and, upon conviction thereof, shall be fined not more than one thousand dollars and imprisoned not more than one year." S.C. Code § 8-1-80

The Courts of our country have long held a statute passed by the legislature that is so vague and overly broad that people must guess as to what act or acts are prohibited, is a violation of the due process clause. As Justice Southerland said almost 100 years ago:

> [T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

The reason for the rule has several purposes. First, a vague statute does not give a citizen notice as to what act by the citizen is criminal. *State v. Solomon*, 245 S.C. 550, 569, 141 S.E.2d 818, 828 (1965)("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") Second, an overly vague statute may simply delegate to the discretion of law enforcement officers or prosecutors the actual implementation of the social harm the statute is designed to prohibit. *Smith v. Goguen*, 415 U.S. 566, 574 (1974) ("[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.") Third, a statute that is overly broad may infringe upon protected constitutional rights such as the right of free speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973)("It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.") The statute in question here violates all three policies.

In interpreting the meaning of S. C. Code § 8-1-80, this Court should be guided by the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). The terms mentioned in the statute

are not defined. With the exception of fraud, they have no common law meaning.[1] Misconduct in office, habitual negligence, oppression or corruption is subject to the imagination of the officer or prosecutor enforcing the law. What may be misconduct in office to one officer or prosecutor may not be to another. For example, while virtually no one would disagree that stealing money from the office of the sheriff would be misconduct in office, would everyone agree that habitually coming to work late or taking entire days off is misconduct in office? Would such an action make one habitually negligent in the performance of their duties? More applicable to this case, many people would agree that any sheriff having a sexual affair would be misconduct in office. Others would argue it is not misconduct unless it interfered with the performance of his duties. If a sheriff fired a deputy for no reason or perhaps a bad reason is that misconduct in office or oppression even if such an action is permitted by South Carolina Code § 23-13-10? [2]

In *Musser v. Utah*, 333 U.S. 95, 96 (1948) the United States Supreme Court held the statute to be both vague and overly broad. The defendants in *Musser* were convicted of a conspiracy "To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws . . . ." Factually, the state accused the defendants of:

> [T]o advocate, promote, encourage, urge, teach, counsel, advise and practice polygamous or plural marriages and to advocate, promote, encourage, urge,

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[1] North Carolina has recognized a common law crime of "official oppression." *State v. Lackey*, 271 N.C. 171, 155 S.E.2d 465 (1967). *See, also,* Oppression, BLACK'S LAW DICTIONARY (4TH ed. 1951) This Court has not recognized such a crime nor was it charged here.

[2] Count 6 of the indictment in this case, while not a part of this appeal, illustrates the vagueness of the statute. The prosecutor here indicted Mr. Lewis for allegedly using the office of professional responsibility to hire and fire deputies based upon the personal bias of Mr. Lewis. A sheriff in South Carolina has the legal right to do just that. Rec. on App. at 14

> counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following acts:' (1) That from June 1, 1935, to March 1, 1944, in Salt Lake County, State of Utah, defendants published and distributed once each month, a pamphlet called 'Truth'; (2) that on July 1, 1942, defendants purchased a house at 2157 Lincoln Street in Salt Lake City; and (3) that in 1942 and 1943 in Salt Lake County the defendants attempted to convert Helen Smith to believe in and to live in polygamy.
> *State v. Musser*, 110 Utah 534, 542, 175 P.2d 724, 729 (1946), vacated and remanded, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562 (1948).

In holding the statute to be unconstitutionally vague, the Court said,

> Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. In some States the phrase 'injurious to public morals' would be likely to punish acts which it would not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling."
> *Musser*, at 97.

The exact same statement can be made about the crime of "misconduct in office." And to make the case more applicable to this case, would not many people find conduct by a public official which is "injurious to public morals" to be misconduct in office even if people disagree as to what qualified as "injurious to public morals."

Under such a vague concept as "misconduct in office," "corruption," "oppression" "fraud" or "habitually negligent" the act committed does not even have to be a criminal act to be a violation of the statute. The statute defines no conduct which would constitute a specific act. The act need only be what some prosecutor or law enforcement agent decides meets the criteria that they have in mind. As a general concept, virtually everyone would agree that a public official should be removed if they commit misconduct in office. But everyone's list of what actually

constitutes misconduct in office would not be the same. The statute in question simply provides no guidance as to what constitutes the crime.

In discussing vague statutes, this Court has said, "The Due Process Clause protects against 'the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all.' A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application." *Toussaint v. State Bd. of Med. Examiners*, 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991)(internal citations omitted). Similarly, the United States Supreme Court more recently said, "To satisfy due process, 'a penal statute [must] 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 v. United States*, 561 U.S. 358, 402–03 (2010)(internal citations omitted). This statute fails as to both.

Ordinary people may have a general concept of what the words mean, but the words would provide no specific guidance as to how to apply them to any given set of facts. As the United States Supreme Court said in another case, "Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)(internal citations omitted). The vague words used in this statute also fail to establish a standard of conduct.

The United States Supreme Court has said, "A vague law impermissibly delegates basic

policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). The vague terms used in this statute certainly encourage arbitrary and discriminatory enforcement. An elected official may, and probably should, understand that, as a general concept, misconduct in office, corruption and fraud would cause one to be criminally prosecuted. But no elected official could understand the vastness of conduct that different prosecutors and different law enforcement officers would deem to come under such broad headings. No elected official would ever understand that habitual negligence or oppression would cause one to be criminally prosecuted. The question is, habitually negligent as to what? What is oppression to one person is simply sternness to another. The dictionary definition of oppress is "To keep down by the cruel or unjust use of power or authority; rule harshly; tyrannize over." Webster's New World Dictionary of American English (3rd College Ed. 1988). Kentucky, by statute, defines it as "(a) 'Oppression' means conduct which is specifically intended by the defendant to subject the plaintiff to cruel and unjust hardship." Ky. Rev. Stat. Ann. § 411.184. This definition is hardly a definitive standard for the imposition of criminal penalties.

Here, the prosecutor contended oppression was simply Mr. Lewis telling the deputies not to date Ms. Nabors. Rec. on App. at 1132, ll 1-8; 1136, 1l 12-14; 1160, ll 6-10. Mr. Lewis surely has the constitutional right to advise the deputies not to date his primary assistant. Can a sheriff, under fear of criminal prosecution, forbid his deputies from dating each other? Can he go to jail for ordering a deputy to stop dating a person with a criminal record? All those would be oppression according to the prosecutor in this case. To hold such action criminal would make

this statute also overly broad as it infringes upon the right of free speech. Too much discretion as to what the law means is given to the prosecutor. "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese,* 92 U.S. 214, 221 (1875)

The State cannot avoid the vagueness problem with this statute by contending the conduct of Mr. Lewis clearly falls under the ambit of the statute. As noted in *Musser*, encouraging and promoting people to violate the laws against bigamy would tend to corrupt public morals. In that case, the United States Supreme Court still found the statute unconstitutionally vague. Suppose a legislature passed a law that said, "All elected official are prohibited from engaging in improper conduct." If an elected official accepted a bribe, which would clearly fall within the ambit of "improper conduct," a court should still find the statute unconstitutionally vague as it gave no guidance to a prosecutor or a law enforcement agent as to what conduct is prohibited. "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939). "No doubt the conduct of the defendant in the instant case was reprehensible. But it is not the accusation but the statute itself that prescribes the rule to govern conduct, and warns against transgression, and 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" *Kahalley v. State*, 254 Ala. 482, 484, 48 So. 2d 794, 796 (1950); "Although knowledge that the municipality considers certain behavior to be a nuisance allows ordinary people to understand that their conduct is prohibited by the ordinance, it does not prevent arbitrary or discriminatory

enforcement of the ordinance in the first place." *State v. Golin*, 363 N.J. Super. 474, 484, 833 A.2d 660, 666 (App. Div. 2003). *See*, *Kolender v. Lawson*, 461 U.S. 352, 361(1983)("We conclude § 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.") Nor can this Court give clarity to an otherwise vague statute. "It is the statute which must, in order to afford due process, be definite and certain, not the opinion of the Court." *Frank v. Kluchesky*, 237 Wis. 510, 297 N.W. 399, 402 (1941)

In making a determination as to whether a statute is vague, a court is looking at the words used in the statute to determine if the conduct is prohibited with specific clarity as to enable a reasonable person to understand what conduct is in fact prohibited. The court does not try to imagine conduct that could be prohibited by the statue, but what is actually prohibited by the words used. The New Jersey Court has said, "A statute that is challenged facially may be voided if it is 'impermissibly vague in all its application,' that is, there is no conduct that it proscribes with sufficient certainty." *State v. Cameron*, 100 N.J. 586, 593, 498 A.2d 1217, 1220 (1985). Here, the statute does not prohibit any conduct with specific certainty.

Also, the conduct of Mr. Lewis did not clearly fall within the ambit of the statute. Mr. Lewis was not accused of spending a single dime improperly on the affair he had. Nor is there evidence he attempted to take an improper dime from Greenville County. All the State has proven at trial is Mr. Lewis had an affair while out of town conducting legitimate county business. The State in this case is not even clear as to exactly what conduct fell within the prohibition of the statute. As will be discussed in more detail in second issue, the State has argued at various times different theories as to what Mr. Lewis did wrong. One is Mr. Lewis

had an affair in Charlotte and the trip was paid for by the county. Rec. on App. at 1135, ll 14-25. Another is that he hired Savannah Nabors for the purpose of having an affair with her. Rec. on App. at 1119, ll 9-16. Lastly, they argued that simply asking Ms. Nabors to go to Reno with him, a trip which the county would pay for but never taken, violated the statute. Rec. on App. at 1147, ll 9-12; 1389, ll 14-23. None of these three alleged violations clearly fall under the wording of the statute. Whether the jury had a fourth theory and the grand jury had a fifth theory is unknown.

The ambiguity of this statute is perhaps best illustrated by the exchange between the trial judge and the State when defense counsel made a motion for a directed verdict. The exchange was as follows:

> Q. (By trial judge) What is the State's position as to the misconduct of a pubic officer under section 8-180 (sic)?
> MR, BRACKETT: That the defendant did commit acts of official misconduct, that is that he would use his office inappropriately and he did not conduct himself according to what the expectations of the law are, that he would - - that there was corruption, fraud and oppression.
>
> THE COURT: Tell me what you think oppression means?
>
> MR. BRACKETT: Well, in the common everyday sense of the word, it's to deprive another person of their rights or to prevent them from the proper and lawful exercise of their rights.
> Rec. on App. at 741, ll 2-17.

Later, when he was explaining why the hiring of Savannah Nabors was a crime, he stated, "She may have had some other legitimate function, but if one of them was to provide sexual gratification in exchange for salary and pay that he was providing as the purpose and excitement of the job then that would be a corrupt purpose and would constitute official misconduct under

title 8." Rec. on App. at 742, ll 5-11. To argue that hiring a legitimate employee to have sex with the employee is a violation of the misconduct in office statute, makes simply having sex with a subordinate employee misconduct in office.

The terms used in this statute are void of a clear meaning that would put a reasonable elected official on notice as to what conduct is improper. This Court should declare the statute unconstitutional as being a violation of the Due Process clause of Article I, § 3 of the Constitution of the State of South Carolina and the 14th Amendment to the Constitution of the United States of America.

Question II

Did the trial court err in failing to quashing the indictment on the ground the indictment was vague when it alleged William Lewis did "misuse public resources and abuse power and authority of his office for the corrupt purpose of pursuing or facilitating an adulterous relationship" as the allegation did not inform Mr. Lewis of the specific act of omission or commission he committed so that he could properly prepare a defense to refute the allegations, what evidence would be needed to refute the charges contained in the indictment nor what evidence would be sufficient to establish the allegations?

The indictment in this case states, "William D. Lewis committed the crime of misconduct of a public officer by performing acts of official misconduct, habitual negligence, corruption, fraud, or oppression. To wit: Count One A William D. Lewis did, from the date he took office through April 24, 2017, misuse public resources and abuse power and authority of his office for the corrupt purpose or (sic) facilitating an adulterous relationship;" Rec. on App. at 13.

The allegations in the indictment in this case do not comply with either the requirements

of this Court, South Carolina Code § 17-19-20 or Article I, § 14 of the Constitution of the State of South Carolina. This Court has held, "The indictment is a notice document." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). As such, the indictment does not provide Mr. Lewis with any notice when the indictment says Mr. Lewis did "misuse public resources and abuse power and authority of his office. " The indictment does not even allege Mr. Lewis did an unlawful act, but just somehow misused public resources and abused power. The indictment does not allege what is a misuse of public resources. Is a misuse of a scintilla of public resources sufficient to convict? What act Mr. Lewis is alleged to have done is not known. Under such a vague indictment, the grand jury may have one act in mind when they indicted Mr. Lewis, but the jury trying the case may think another act proven at trial was improper. And this Court, on appeal, may have gleamed another theory from the record. Thus, Mr. Lewis could be convicted for an act the grand jury did not consider. This is also illustrated by the argument of the State during the discussion of the charge when the State argued, "We can't put ourselves in the position of deciding how the jury is going to conclude he's guilty when there are two or three different ways that they could arrive at that conclusion." Rec. on App. at 1107, ll 5-8. This would be proper argument if there were multiple counts to the indictment. When there is only one count, the comment simply illustrates that the indictment is vague.

As the United States Supreme Court has said concerning a vague indictment "A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell v. United States*, 369 U.S. 749, 766 (1962). The requirement that the

indictment be specific is for the benefit of the court. The Supreme Court previously said the purpose of an indictment is, "[T]o inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). Under the vague indictment in this case, virtually anything the prosecutor deems to be a misuse of public resources would be admissible. The indictment does not require that Mr. Lewis even steal a dime from the County of Greenville in conducting the adulterous relationship. Mr. Lewis has no basis for knowing what allegations to meet and what witnesses to prepare in his defense nor what argument to make to the jury.

The principles established by the United States Supreme Court have been cited with approval in many states. *See, People v. Tucker,* 631 P.2d 162 (Co. 1981); *State v. Davis,* 1 Or.App. 285, 462 P.2d 448 (1969); *Harris v. State,* 37 Ga.App. 113, 131 S.E. 99 (1927); *Haughn v. State,* 159 Ind. 413, 65 N.E. 287 (1902). The Oregon Court of Appeals in reversing a case because the indictment was not sufficient said, "The quoted language above is taken from ORS 419.476(1)(e) relating to children within the jurisdiction of the juvenile court. It furnishes no guidelines as to what conduct on the part of a mother is necessary for the physical, the mental or the emotional well-being of her child." *Davis* at 289, 462 P.2d at 450. The Court in *Davis* reaffirmed the long established principle in Oregon that a generic term in an indictment is not sufficient. In *State v. Smith*, 182 Or. 497, 188 P.2d 998 (1948), the Court had held "It is not sufficient . . . that the indictment undertake to describe the crime by the use of mere generic terms; it must 'descend to particulars' . . . ." *Smith* at 502, 188 P.2d at 1000. Here, "improper conduct" would not even qualify as a generic term.

The reason for such a rule is simple. When a generic term, such as "fraud,"

"misconduct," "habitually negligent" "corruption" or "oppression" is used, the State must put the defendant on notice of what was done by the defendant to make the act criminal. On the civil side, this theory is embraced in Rule 9(b) of the South Carolina Rules of Civil Procedure. The rule provides "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The indictment in the present case would be subject to a motion to dismiss in civil court. A requirement similar to the civil rule should be imposed in a criminal case for terms such as "fraud," "misconduct," "habitually negligent" "corruption" or "oppression." A defendant in a civil action should not have more protections from a vague accusation than a defendant in a criminal action.

This Court has also recognized the need for particularity in pleadings in an indictment. In *State v. Johnston,* 149 S.C. 195, 146 S.E. 657 (1929) the court first recognized that, "It is quite true that many of the formalities and technicalities required in indictments under the common law have been abrogated under the provisions of Section 89 of the Code of Criminal Procedure, Vol. 1, Code of 1922 . . . ." *Id.* at ___, 146 S.E. at 659-660. Even under the more relaxed standard for reviewing an indictment, the Court reversed the case stating, "The serious objection to the indictment was the second, which challenged the instrument for failure to allege to whom the false statements were made. This should have been done, in our opinion." *Id.* at ___, 146 S.E. at 660. What "misconduct in office" or "fraud" or "obstruction" or "habitually negligent" act did Mr. Lewis do that was illegal? The indictment does not answer this simple question. Portions of the indictment in *Johnston* were held to be adequate. A comparison of the fraud allegations which were held to be constitutional in *Johnston* to the allegations in this case establish that the allegations in this case are lacking. As to the other fraud allegations the court said:

> It is also our opinion that the indictment met the first objection of the appellant, as it distinctly stated the nature of the statements alleged to have been made by the defendants, and further alleged to have been falsely made. The second specification averred that the defendants had made statements that the bank had on deposit a sum of money greatly in excess of the actual deposits. The third specification averred that the statement made failed to show a certain liability of the bank by way of mortgage to the extent of $100,000. These specifications sufficiently advised the defendants as to the false statements charged against them." *Johnston* at ___, 146 S.E. at 660.[3]

Misconduct in office, being at best a generic term, can be committed in numerous ways. What method was used in this case is not alleged. This Court has said sufficient facts must be alleged to notify a defendant as to what he is to answer. "An indictment in a case of breach of trust with fraudulent intention is sufficient if the offense be so described that the defendant may know how to answer it, the Court what judgment to pronounce, and that a conviction or acquittal on it may be pleaded in bar of another indictment for the same offense." *State v. Wells*, 162 S.C. 509, ___, 161 S.E. 177, 181 (1931)

The Court in *Johnston* further noted that the right of the defendant under the present constitutional provision "to be fully informed of the nature and cause of the accusation" is equally strong as the former provision that said, "No person shall be held to answer for any crime or offense until the same is fully, fairly, plainly, substantially and formally described to him." *See, Johnston,* at ___, 146 S.E. at 660. *See, also, State v. Jeffcoat,* 54 S.C. 196, 32 S.E. 298 (1899). The indictment in the present case simply does not "fully, fairly, plainly, substantially and formally" advise Mr. Lewis of the charges against him.

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[3] Today the rule concerning an indictment is contained in S. C. Code § 17-19-20. This statute is identical to the rule cited in *State v. Johnston,* 149 S.C. 195, 146 S.E. 657 (1929).

In *Johnston*, the defendant was charged with making a false statement about the financial condition of Citizens' Bank and Trust Company. In holding the indictment invalid, this Court held the failure to allege to whom the false representation was made was fatal to the indictment. This Court said, "To go further and require him to defend himself on the charge of making a false statement to some undisclosed person would not preserve to him his right, as declared by the Constitution, to be fully 'informed' of the accusation against him." *Id.* at ___, 146 S.E.2d at 661. More recently this Court has said:

> [T]he notice function of an indictment necessarily includes an assessment of whether an accused has the opportunity to prepare a defense. More specifically, a sufficient indictment must do more than merely recite the elements of the offense charged. As previously stated, the indictment must also contain sufficient factual allegations to permit the accused to know whether he may plead an acquittal or conviction thereon.
> *State v. Baker*, 411 S.C. 583, 591, 769 S.E.2d 860, 864 (2015) n. 4.

Here, the failure to allege what Mr. Lewis did to "misuse public resources and abuse power and authority of his office," as set forth in the indictment, is equally defective. Mr. Lewis is not fully informed of the charges against him.

In *Tucker* the Court said, "As stated in *Zupancic, supra* and *Donachy, supra*, the indictment must answer the questions of "who, what, where, and how." The question of who (the defendant), what (the amount of money embezzled), and where (the county from which the money was allegedly embezzled), were properly answered by the respective counts of the indictment. But, the question of how the embezzlement was accomplished is not sufficiently stated. It would be fundamentally unfair to require the defendant in this case to defend against twelve counts of the

indictment as they are presently framed." *Tucker,* at 163.[4] This Court has further said, "It is well settled that an indictment is sufficient if the offense is stated with sufficient certainty and particularity to enable the Court to know what judgment to pronounce, the defendant to know what he is called upon to answer, and an acquittal or conviction may be pleaded in bar to any subsequent prosecution." *State v.Solomon,* 245 S.C. 550, 561, 141 S.E.2d 818, 824 (1965).

In this case there are more problems. The questions of "who" and "where" may be sufficiently answered in the present indictment. The questions of "how" and "when" are not, other than an overly broad time frame. No acts, other than an adulterous affair, are alleged. The indictment fails to allege what public resources are used and how they were used. Would simply using a county-issued car or a county-issued cell phone qualify as a public resource? This Court has no basis for determining if what the prosecutor had in mind is sufficient to constitute the crime of statutory misconduct in office nor whether what the grand jury had in mind nor the trial jury. The State argued that turning on a blue light to get to a business before it closes for a personal reason would be misconduct in office. Rec. on App. at 1096, ll 6-13. Without a more specific indictment, this Court is left only to guess as to what acts the jury found to be sufficient to convict Mr. Lewis. He obviously used the county-issued cell phone to talk to Ms. Nabors and used the county-issued car to go to her house. His time as sheriff was obviously spent in pursuit of the

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[4] The indictment in *Tucker* provided " Frank G. E. Tucker, then being a public servant of the State of Colorado, the District Attorney for the Ninth Judicial District, did unlawfully and through false representations obtain possession of public monies of the County of Garfield, a political subdivision of the State of Colorado, in the sum of $155.16, and converted same to his own use and to uses other than the authorized public use, committing a felony in violation of C.R.S. 1973, 18-8-407, Embezzlement of Public Property, and against the peace and dignity of the People of the State of Colorado." *Id* at 163

affair. Those facts are not disputed. Is that misconduct in office?

What is the theory of the case by the prosecutor? The theory certainly cannot be gleamed from the indictment. In closing, the State had several theories which are not set forth in the indictment. The first is Mr. Lewis was given 47 million dollars by the county which he used to "get in Savannah Nabors pants." Rec. on App. at 1119, ll 9-16. He also seems to suggest that Savannah Nabors is over paid with too many perks. Rec. on App. at 1121, l 5 to 1122, l 13. The State either ignores or did not consider, that the salary of Ms. Nabors was set by the county administrator based upon the job description. Rec. on App. at 827, l 12 to 829, l 24. He suggested that having a meeting with county officials out of state to have an affair was a violation. Rec. on App. at 1135, ll 14-25. The State ignores that Joe Kernell, the county administrator, approved of the trip. Had Mr. Kernell not approved of the trip, it would not have happened. Rec. on App. at 442, ll 14-21; 447, ll 3-14. The State suggested that Mr. Lewis telling the deputies that Savannah Nabors was "off limits" was oppressive conduct in violation of the statute. Rec. on App. at 1132, ll 1-8; 1136, 11 12-14; 1160, ll 6-10. Lastly, he suggested that Mr. Lewis simply planning to go to Reno with Ms. Nabors was a violation of the statute and not an attempt to violate the statute. Rec. on App. at 1147, ll 9-12; Rec. on App. at 1389, ll 14-23. Mr. Lewis was not indicted for an attempt to commit the statutory violation.

This Court has decided several statutory misconduct in office cases in which the indictment was substantially more specific than the indictment in this case. *State v. Sharpe,* 132 S.C. 236, 128 S.E. 722 (1925); *State v. Elliott*, 94 S.C. 35, 77 S.E. 728 (1913); *State v. Jacques,* 65 S.C. 178, 43 S.E. 515 (1903). In *Elliott,* this Court suggested that the duty imposed upon the defendant must be statutory. This Court said, "The indictment does not charge him with a failure to perform

a duty simply imposed upon him by the board of trustees, but by the statute." *Id.* at ___, 77 S.E. at 729-730. The State did not argue Mr. Lewis had to violate a duty imposed by statute to be convicted. The judge in this case charged the jury the State must prove a violation of the law. Rec. on App. at 1230, l 23 to 1231, l 3. The State has cited no law that Mr. Lewis violated.

In *Jacques*, one of the specific allegations in the indictment was that he failed to issue the bid to the lowest bidder. On that specific issue, this Court said, "After careful investigation, we are unable to find any statute requiring that contracts such as those mentioned in this count of indictment should be let to the lowest responsible bidder." *Id.* at ___, 43 S.E. at 517. Again, the Court implies there has to be a duty imposed by statute or common law. As to the fraud allegation in the indictment in *Jacques,* this Court said, "In alleging fraud, it is well settled, both at law and in equity, that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient." *Id.* at __, 43 S.E. at 517. In *Sharpe*, the indictment set forth in great detail the acts committed by Mr. Sharpe that constituted misconduct in office. That specificity is missing in this case.

As to the common law charge of misconduct in office, this Court has said "Misconduct in office occurs when duties imposed by law have not been properly and faithfully discharged." *State v. Hess,* 279 S.C. 14, 20, 301 S.E.2d 547, 550 (1983). Arguably, the same rule should apply to the statutory violation. In deciding *Hess,* this Court relied heavily upon New Jersey cases in determining the meaning of misconduct in office. This Court said, "New Jersey normally requires that a criminal indictment for official misconduct recite the duty that has been breached." *Id.* at 20, 301 S.E.2d at 551. The New Jersey Supreme Court has held "In those instances where the duties are prescribed by some special or private law, the indictment must

show the source of the duties, but where the duties are imposed by a general statute or arise out of the very nature of the office, the source of the duty need not be alleged in the indictment for the courts will take judicial notice of such duties." *State v. Weleck,* 10 N.J. 355, ___, 91 A.2d 751, 756-757 (1952). The New Jersey Court later said, "The reason for the rule is found in the requirement that the indictment charge a crime, and where the duty rests in common law or on a general statute, a *statement of the facts* constituting a breach of that duty is sufficient to make the offense judicially apparent, which is the fundamental purpose towards which the form of the indictment is directed." *State v. Cohen*, 32 N.J. 1, 7, 158 A.2d 497, 500 (1960)(emphasis added).

In quashing an indictment for common law misconduct in office, the District Court of Appeals for the Fifth District of Florida said "No specific rule or order is identified anywhere in the indictment. It is clear the failure of a judge to comply with a procedural rule or administrative order, whether at the county court level or supreme court level, is not a statutory crime in Florida." *Clayton v. Willis*, 489 So.813, 815 (1986). The indictment in this case by alleging "improper conduct" and the other vague terms likewise alleges no violation of any legal duty imposed by the law upon Mr. Lewis. *Sullivan v. Leatherman*, 48 So. 2d 836, 838 (Fla. 1950) ("So it follows that if the State relies on an indictment charging official misconduct or failure of official conduct in any respect, whether common law or statutory, the offense must be charged in direct and specific terms and that it was wilfully or corruptly done or omitted. Count one, in fact none of the counts meets the simple academic requirements of precise pleading, neither do they charge that petitioner wilfully or corruptly failed to perform any duty imposed on him by law or that he acted corruptly in the performance of any duty imposed on him."). Does a statutory violation of misconduct in office also require a violations of a duty imposed by law? The statute itself does not say so. To

add such a requirement would certainly make the statute more definite and certain. But to do so would also substantially re-write the statute.

This Court should declare the indictment in this case to be overly vague as they do not fully inform William D. Lewis of the charges against him as required by the prior decisions of this Court, South Carolina Code § 17-19-20 or Article I, § 14 of the Constitution of the State of South Carolina.

Question III

Did the trial court err failing to direct a verdict as to fraud as the State produced no evidence of fraud sufficient to sustain a conviction?

In the event this Court finds the Misconduct of a Public Officer to be unconstitutional because of its vagueness but elects to severe the vague terms from the common law term of "fraud," this Court should find the evidence in this case does not support a claim of fraud by the prosecution. The State at the time of the motion for directed verdict did not argue specific acts of fraud to the trial judge nor did the State give any evidence as to fraud upon which the jury could base their verdict. The trial judge in this case gave the jury no guidance as to fraud nor did the State request they be so instructed. The State argued at the jury charge that "And he could be guilty of under the misuse of money under the fraud." Rec. on Appeal at 1107, ll 2-4. In closing as to fraud, the State argued, "Fraud in that he has this money that's given to him for one purpose and then he's using it for another, not wanting to tell anybody about it despite his love of transparency." Rec. on App. at 1160, ll 2-6. What the State describes here is breach of trust and not fraud.

At the directed verdict motion at the end of the State's case, defense counsel specifically

asked for a directed verdict on the fraud issue. Rec.on App. at 740, ll 4-17. The State never argued as to any act of fraud in its reply. Assuming, as the indictment is not specific, that the fraud was the hiring of Ms. Nabors at her salary, the only individual who had first hand knowledge about the hiring was the County Administrator Joe Kernel. He did not testify. Thus, the record is devoid of any evidence as to fraud. At the very least, there is no substantial evidence, circumstantial or otherwise to support any finding of fraud. *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009); *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) ("N]o person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.")

This Court has said to establish criminal fraud the State must prove all of the following:

> It may be stated generally that the elements of actionable fraud consist of (1) A representation. (2) Its falsity. (3) Its materiality. (4) The speaker's knowledge of its falsity or ignorance of its truth. (5) His intent that it should be acted upon by the person and in the manner reasonably contemplated. (6) The hearer's ignorance of its falsity. (7) His reliance on its truth. (8) His right to rely thereon. (9) And his consequent and proximate injury."
> *State v. Bolyn*, 143 S.C. 63, 141 S.E. 165, 173 (1928)

In the present case, all of the above elements of fraud are missing. For there to be a failure of proof, all that needs to be established is a failure of one element. Of particular importance is that the State never identified a hearer, the hearer's ignorance nor the hearer's reliance. If this Court were to give the word "fraud" as used in the statute a meaning other than the common law meaning, then the statute is either vague or does not apply to Mr. Lewis as the interpretation would be an ex post facto violation. As the United States Supreme Court has said, "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must

follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964)

Mr. Lewis has argued that the Misconduct of a Public Officer statute is unconstitutionally vague as well as the indictment. This Court should not remand the case on a single charge of fraud when the State failed to establish fraud at the trial. To do otherwise would violate the double jeopardy provision of Article I, § 12 of the Constitution of the State of South Carolina and the Fifth Amendment to the Constitution of the United States of America. In the event this Court were to uphold the statute as to fraud, Mr. Lewis is entitled to a judgment of acquittal on that issue as the record establishes a complete failure of the elements of fraud.

CONCLUSION

For the foregoing reasons, this Court should declare S.C. Code § 8-1-80 unconstitutional as being vague and overly broad in violation of the Due Process clause of Article I, § 3 of the Constitution of the State of South Carolina and the Fourteenth Amendment to the Constitution of the United States of America. In the event this Court declares the word "fraud" is severable from the other vague words in the statute, this Court should further reverse the conviction of William D. Lewis on the ground the State failed to prove the crime of fraud. Alternatively, this Court should declared the indictment in this matter as being vague and not fully informing William D. Lewis of the charges against him and reverse the conviction.

December 2, 2020

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case № 2019-001815

The State, ... Respondent,

vs.

William D. Lewis . . . . . Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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