STATE OF LOUISIANA

VERSUS

BLAISE GRAVOIS

NO. 17-KA-341

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES, STATE OF LOUISIANA
NO. 75,22, DIVISION "D"
HONORABLE JESSIE M. LEBLANC, JUDGE PRESIDING

December 13, 2017

ROBERT M. MURPHY
JUDGE

Panel composed of Judges Fredericka Homberg Wicker,
Robert M. Murphy, and Stephen J. Windhorst

AFFIRMED IN PART, REVERSED IN PART; REMANDED

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MURPHY, J.

Appellant, the State of Louisiana, appeals the trial court's grant of appellee-defendant's two motions to quash his five count indictment. For the reasons that follow, we affirm the trial court's finding of prosecutorial misconduct and its determination that the indictment lacked the required notice to defendant, but reverse the portion of the trial court's judgment that dismissed any portion of defendant's bill of indictment. We remand the proceedings for any further action the trial court deems necessary with respect to prosecutorial misconduct, and to allow the State to comply with the trial court's prior order to file a bill of particulars.

PROCEDURAL HISTORY

On September 28, 2016, a St. James Parish grand jury returned a Bill of Indictment charging appellee-defendant, Blaise Gravois, (hereinafter referred to as "defendant") with five counts of malfeasance in office, violations of La. R.S. 14:134. Defendant pled not guilty to all counts at his arraignment on November 14, 2016. On January 30, 2017, defendant filed a motion for a bill of particulars.[1] On February 10, 2017, the State filed an answer to defendant's bill of particulars, in which it alleged that "defendant does not file an actual Motion for Bill of Particulars, but instead, gives examples of what he perceives as the lack of factual particularities in the indictment." The State then offered what it styled as a response to "bullet points" listed in defendant's memorandum. The trial court granted defendant's second motion for a bill of particulars on March 30, 2017. The trial court gave the State 15 days from the date of the Order, until April 14, 2017, to file the bill of particulars.

[1] The record shows that on February 9, 2017, the State sent a letter to defense counsel confirming that it had provided open file discovery.

Defendant filed a "Motion to Dismiss/Quash the Indictment On the Basis of Prosecutorial Misconduct, or Alternatively, Motion to Dismiss/Quash Count 1of the Indictment on the Basis of Prosecutorial Misconduct, and Request for Evidentiary Hearing," and a "Motion to Dismiss/Quash the Indictment on the Basis of Lack of Notice," both of which were set to be heard on April 10, 2017. On April 3, 2017, the State filed a motion to continue defendant's motions, which was denied.[2] At the April 10, 2017 hearing on defendant's motions to quash, the trial court indicated that it was not going to hold the motions to quash open pending the State's completion of the bill of particulars. On April 25, 2017, the trial court issued a ruling with reasons which granted both of defendant's motions to quash and dismissed defendant's Bill of Indictment in its entirety. The State timely sought the instant appeal.

FACTS

This matter comes before us in a pre-trial posture and, therefore, the record before us is limited. The following facts were extracted from our review of the record, as well as evidence adduced at the hearing on defendant's exceptions.

In its Bill of Indictment, the State alleges that defendant, in his capacity as the St. James Parish Director of Operations and Public Works, committed malfeasance in office when he utilized the resources of St. James Parish for the benefit of a private business, and other individuals, on five separate occasions. With respect to Count 1, the State alleged that defendant

> gave/donated/loaned approximately 4500 feet of gas line and a 10,000-unit gas meter and supplies to Millennium Galvanizing and also authorized St. James Parish employees to install the gas line and meter on the private property of Millennium Galvanizing on Winnie Road at

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The record shows that the State's motion to continue was acknowledged in an April 4, 2017 email that appears to have originated from the trial court's law clerk, and the parties were advised in that same email that the judge had denied the State's motion. The State argued in its motion to continue:

> Defendant has filed two Motions to Dismiss/Quash the Indictment both of which have been set for hearing on April 10, 2017. The motion to quash filed February 22, 2017 specifically alleges the indictment should be quashed for "Lack of Notice". This additional information is precisely what the court has ordered the State to give the defendant through his bill of particulars within 15 days of the signing of the Courts order which will be April 14, 2017.

> a cost to St. James Parish of approximately thirty-three thousand two hundred seventy-nine and 84/100 ($33,279.84) dollars or more without a contract with Millennium Galvanizing for the payment of the gas line, meter and labor costs, for the cost of the gas, or the use of or transportation or distribution of gas through parish lines. Millennium Galvanizing, a private corporation was given/loaned all the materials, labor and usage at the sole cost and expense of the Parish of St. James, in violation of La. R S 42:1461 whereby a public employee shall not misappropriate, misapply, convert, misuse, or otherwise wrongfully take any funds, property, or other thing of value belonging to or under the custody or control of St. James Parish.

Counts 2 through 5, alleged in summary, that defendant committed malfeasance in separate acts, to wit: 2) authorizing the parish's cost of mobilization and pile-driving on private property when the work "served no legitimate public purpose;" 3) authorizing the use of public employees and public equipment to remove a shed from private property upon request of the land owner when the work "served no legitimate public purpose"; 4) authorizing the use of public employees and public equipment to demolish a private mobile home upon request of the land owner when the work "served no legitimate public purpose" and; 5) authorizing the use of public employees and public equipment to remove a playhouse and debris on a private lot when the work "served no legitimate public purpose."

In his motion to dismiss/quash due to prosecutorial misconduct, defendant focused primarily on Count 1 of the Bill of Indictment, and asserted that the State had violated his right to due process by deliberately interfering:

> "in a business arrangement between the Parish of St. James (the "Parish") and Millennium Galvanizing ("Millennium"), which interference prohibited Millennium from honoring an agreement -- made prior to the instant Indictment -- to pay the Parish for the cost of labor and materials in connection the installation of a gas line (and related equipment) for Millennium. This payment would undeniably be considered *Brady* evidence and the State's interference has destroyed the opportunity for this payment, which would have directly contradicted the State's theory in this case, as well as the allegations contained in the Indictment."

Defendant also argued that at the time St. James Parish sought to enforce the "arrangement" with Millennium Galvanizing for the cost of the gas line, St. James Parish was informed that "despite the prior agreement and its desire to honor that

agreement, ***it was instructed <u>not</u> to pay these funds back to the Parish.*"** [Emphasis as in the original.] Defendant contended that "[t]his directive appears to have originated from Bruce Mohon, Esq., an Assistant District Attorney, who is the genesis of the investigation and prosecution of this case." Defendant concluded that the State's interference in prohibiting the payment from Millennium to St. James Parish qualified as the destruction of "materially exculpatory" evidence, as the payment itself "would expressly contradict the Indictment's allegations that Mr. Gravois 'gave' or 'donated' Parish resources to Millennium."

In his Motion to Dismiss/Quash the Indictment on the Basis of Lack of Notice, defendant argued that he could not have known that the conduct alleged in the Bill of Indictment was illegal, given that it was not alleged he received a personal, financial benefit from the alleged misconduct. Defendant also asserted that the alleged acts of malfeasance were conducted as part of the "duties of his job – activities which have never before been declared unlawful."

At the hearing on defendant's motions to quash, Brad Meyers, an attorney with the Kean Miller law firm in Baton Rouge testified that, in 2014, his firm represented Crest Industries, and its subsidiary Millennium Galvanizing, while Millennium was building its St. James Parish plant. Meyers referenced a letter from May of 2014, in which St. James Parish agreed to install a gas line. Meyers' interpretation of the letter was that Millennium agreed to compensate St. James Parish for the installation of a gas line. To his knowledge, defendant never promised Millennium that the gas line would be installed for free.[3] On or about September 1, 2016,[4] after Millennium received a bill from St. James Parish for

[3] The record reflects that in May, 2014, the period during which St. James Parish was engaged in preliminary discussions with Millennium about the pipeline, Jody Chenier was the St. James Parish Director of Operations. Defendant Gravois did not take over as director until sometime in 2015, after construction of the pipeline in question was well underway. There is no evidence in the record that Defendant Gravois participated in the 2014 per-construction conversations with Millennium. There is also nothing in the record to indicate that Jody Chenier, has been charged criminally.

[4] This communication was prior to defendant's indictment on September 28, 2016.

installation of the gas line, Meyers contacted Charles Long, an assistant district attorney ("ADA") to ask what he should do about the bill. Long told Meyers that he knew nothing of the invoice. Following that communication, Meyers got a call at the end of September from Alvin St. Pierre, Chairman of the St. James Parish Council. St. Pierre told Meyers that St. James Parish was not sure if the amount on the invoice was accurate and for Millennium not to pay the invoice at that time. Then, near the end of December of 2016, after defendant had been indicted, Meyers again communicated with St. Pierre in response to an inquiry from the Finance Director for St. James Parish to Millennium as to why the outstanding invoice had not been paid. St. Pierre then directed Meyers to talk about the matter with the parish's attorney, ADA Bruce Mohon.[5] Meyers testified that Millennium would have paid the invoice for installation of the gas line, but for the calls with St. Pierre and Mohon.

On cross examination, Meyers testified that Millennium never had a contract in place to purchase gas from St. James Parish. In April of 2016, Millennium received, arguably in error, a $22,000 bill from St. James Parish for gas that it had never purchased.

Alvin St. Pierre, Jr., testified that he became Chairman of the St. James Parish Council on January 11, 2016. St. Pierre was not aware of any inducements that Millennium was offered by the Parish Administration in return for locating in St. James Parish. In 2016, following the indictment of the parish president and defendant, St. Pierre received a phone call from Brad Meyers asking if Millennium should pay an outstanding bill. St. Pierre then called "legal counsel," ADA Bruce

[5] At the hearing, Meyers described his interaction with Mohon as follows:

> Q. And please describe for the Court the communications you had with Mr. Mohon?
> A. Same, same as with Mr. St. Pierre. He -- my concern was that I had one parish official telling me, us, we -- they wanted us to pay it, and I had another parish official saying that we shouldn't pay the invoice, and I didn't want Millennium to get sued, so I talked to Mr. Mohon. He told me the same thing Mr. St. Pierre did, was that they were concerned about the accuracy of the invoice and that we shouldn't pay it until he heard back from me, and he assured me that any lawsuit would have to be approved by him and that they wouldn't sue until he let me know beforehand, if they were going to sue.

Mohon, who recommended that payment should be held to see if the amount in the bill was accurate.[6] After he spoke to Mohon, St. Pierre contacted the other parish council members and "got approval" for Millennium not to pay the bill at that time.[7] The parish council had discussed conducting an investigation to determine what amounts may be owed to the parish as a result of the installation of the gas line at Millennium.

Glenn LeBlanc testified that he had been employed by Crest Industries, the parent company of Millennium Galvanizing, for approximately five years. He stated that Millennium never had a contract with St. James Parish for it to supply natural gas. He identified a May 5, 2014 letter from St. James Parish President Timmy Roussel discussing St. James Parish putting in natural gas and water lines, and that Millennium could then purchase water and natural gas from the parish.[8] LeBlanc acknowledged that Millennium received a $22,000 gas bill, which was an error because Millennium did not purchase gas from St. James Parish. He met with Timmy Roussel and defendant at the Millennium plant in July of 2016, prior to defendant's indictment, after the two had requested an appointment with him to discuss reimbursement of money to the parish for construction of the gas line. According to LeBlanc, neither defendant nor Roussel brought an invoice to the meeting.

On cross examination, LeBlanc stated that he never believed that the Millennium plant was getting a free gas line, and he also thought that $26,000 was a fair price for the gas line. Millennium was ready to pay the invoice in the fourth

[6] St. Pierre's testimony on this point at the hearing was as follows:

"I called legal counsel, which was on the -- he was on the way to out of state, asked him, 'Well, what should I do?' He recommended that due to the situation of the indictments that we ought to just hold payment and see if that's a true payment that's being paid."

[7] On cross examination, St. Pierre stated that there was no formal record of the parish council consenting to allowing Millennium not to pay the bill sent to them, as it was done by telephone.

[8] The May 5, 2014 letter was introduced into evidence by defendant as "Gravois Exhibit No. 1."

quarter of 2016, but his understanding was that the company's attorneys were told not to pay the bill.

LAW AND ANALYSIS

Dismissal based on prosecutorial misconduct

Defendant's first motion to quash was based on alleged prosecutorial misconduct by the district attorney's office. Defendant asserted that ADA Mohon, in his capacity as the parish attorney, interfered with Millennium's intended act of paying St. James Parish for the gas line that was installed, which he concludes would have eliminated the basis for Count 1 of the bill of indictment. Defendant also argued that by preventing Millennium from paying for the gas line, it had effectively prevented *Brady*[9] evidence from materializing. On appeal, the State contends that the trial court erred in allowing defendant to present evidence at the hearing on the motion to quash.

In *State v. Walker*, 567 So.2d 581, (La. 1990), the Louisiana Supreme Court, citing the U.S. Supreme Court's opinion in *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L. Ed. 2d 564 (1981), held that "[t]he ultimate issue in a motion to dismiss an indictment on the basis of prosecutorial misconduct is whether the proved misconduct warrants such a drastic remedy." Our survey of Louisiana and federal jurisprudence supports the conclusion that, because of the requirement that the alleged prosecutorial misconduct be "proved," this type of motion to quash is distinguishable from others insofar as it specifically requires the presentation of evidence outside of the face of pleadings themselves.[10] Further, a

[9] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[10] See, *i.e.*, *State v. Walker, supra,* (Defendant presented evidence at the hearing on his motion to quash for prosecutorial misconduct that the assistant district attorney had improperly obtained documents that were presented to the grand jury that ultimately indicted him); *State v. Delcambre*, 97-1447 (La. App. 3 Cir. 04/29/98), 710 So.2d 846, (In connection with defendant's motion to quash indictment, the State introduced a transcript of grand jury proceedings to rebut defendant's claim that his indictment was based solely on illegal evidence); S*tate v. Fontenot*, 616 So.2d 1353 (La. App. 3 Cir.), *writ denied*, 623 So.2d 1334 (La.1993), (At the hearing on defendant's motion to quash the indictment on the ground of prosecutorial misconduct, fourteen defense exhibits were introduced into evidence that included newspaper articles, as well as a video-taped debate and local news broadcast). *See also*; *United States v. Bowen,* 969 F. Supp. 2d 518, 531 (E.D. La. 2012), *aff'd*, 799 F.3d 336 (5th Cir. 2015), (Evidence of pervasive prosecutorial misconduct by members of the U.S. Attorney's Office for the Eastern

motion to dismiss an indictment on the basis of prosecutorial misconduct also specifically requires the defendant to show or demonstrate prejudice resulting from the misconduct.[11]

In the instant case, where defendant's motion to quash was based upon alleged acts of prosecutorial misconduct, we find no error in the trial court's consideration of evidence offered by defendant to prove his allegation.

The application of Brady v. Maryland

In its second and third assignments of error, the State contends that the trial court erred in applying *Brady v. Maryland* as a basis to quash Count 1 in the bill of indictment. In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 83 S. Ct. 1194, 1196-1197, 10 L. Ed. 2d 215 (1963). Favorable evidence includes both exculpatory evidence and evidence that impeaches the testimony of a witness whose credibility or reliability may determine guilt or innocence. *In re Jordan*, 04-2397 (La. 6/29/05), 913 So.2d 775, 782, *citing Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *State v. Calloway*, 97-796 (La. App. 5 Cir. 8/25/98), 718 So.2d 559, 562, *writs denied*, 98-2435 and 98-2438 (La. 1/8/99), 734 So.2d 1229, *citing United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L. Ed. 2d 481 (1985).

Evidence is material only if there is a reasonable probability that the results of the proceeding would have been different if the evidence had been disclosed to

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District of Louisiana was established through the court's *in camera* review of internal reports, copies of online posts by AUSAs under pseudonyms, status conferences, as well as one-on-one interviews conducted between the trial court and "certain United States Attorney's Office personnel.")

[11] The federal Fifth Circuit has recognized that dismissal under the court's supervisory powers requires a showing of actual prejudice to the accused. In *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982), *rehearing and rehearing en banc den*., 685 F.2d 1386 (5th Cir. 1982), *cert. den*., 459 U.S. 1038, 103 S. Ct. 450, 74 L. Ed. 2d 604 (1982), the Fifth Circuit recognized that even in the case of the most "egregious prosecutorial misconduct", an indictment may be dismissed only on a showing of actual prejudice to the accused.

the defense. A "reasonable probability" is that which is sufficient to undermine confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L. Ed. 2d 481 (1985). In determining materiality, a reviewing court must ascertain "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995).

The United States Supreme Court has explained that "[t]there are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L. Ed. 2d 286 (1999); *State v. Louviere*, 00-2085 (La. 9/4/02), 833 So.2d 885, 896, *cert. denied*, 540 U.S. 828, 124 S.Ct. 56, 157 L. Ed. 2d 52 (2003).

The trial court's order of April 27, 2017, made no determination that the State committed a *Brady* violation. In its reasons for judgment, [12] the trial court stated that it found evidence of Millennium's intent to pay for the gas line to be "materially exculpatory" as it pertained to Count 1in defendant's bill of indictment because "had the parish accepted payment, there would have been no grounds for Count 1 of the Indictment." However, the court stopped short of providing an analysis of all three *Brady* components, as detailed in *Greene, supra*, and *Louviere, supra*.

[12] We note that appellate Courts do not review reasons for judgment as a part of the judgment itself. La. -C.C.P. art. 1918; *Burmaster v. Plaquemines Parish Government*, 07-1311 (La. 8/31/07), 963 So.2d 378, 379. The written reasons for judgment are merely an explication of the trial court's determinations. *State in the Interest of Mason*, 356 So.2d 530, 532 (La. App. 1 Cir. 1977). The Louisiana Supreme Court has held, however, that a court of appeal can use reasons for judgment to gain insight into the district court's judgment, and we refer to them now for that purpose. *See, Wooley v. Lucksinger*, 09-0571 (La. 4/1/11), 61 So.3d 507.

The Louisiana Supreme Court has found "'[t]here is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source, because in such cases there is really nothing for the government to disclose.'" *State v. Hobley*, 99-3343 (La. 12/8/99), 752 So.2d 771, 786, *cert. denied*, 531 U.S. 839, 121 S. Ct. 102, 148 L. Ed. 2d 61 (2000), *quoting Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998). *See also*, *State v. Kenner*, 05-1052 (La. 12/16/05), 917 So.2d 1081 (*per curiam*). Without question, any undisclosed information in the State's possession that showed Millennium's understanding, prior to the construction of the gas line and prior to defendant's indictment, that it would be billed by the parish for the expenses it incurred, would be very important as to the charges in Count 1. In this case, however, the record makes clear that defendant was aware of the information which showed Millennium's understanding and arguable intent to pay for the gas line, as well as the actions by various parish officials, and ADA Mohon, that prevented payment for the gas line from being made. Thus, pursuant to *Hobley*, *supra*, it does not appear that a *Brady* violation occurred. Rather, the alleged actions undertaken by the State could be more properly categorized as prosecutorial misconduct. As discussed above, the trial court's review of evidence pertaining to the alleged acts of prosecutorial misconduct presented by defendant at the hearing on his motion was proper.

The actions of ADA Bruce Mohon

In connection with its third assignment of error, the State contends that "the trial court erred in concluding that ADA Bruce Mohon's advice to the St. James Parish Council was so egregious and overreaching as to amount to prosecutorial misconduct sufficient to support a *Brady* violation on Count 1 and mandate the quashing of Counts Two through Five." As previously discussed, the trial court's judgment does not make a specific finding of a *Brady* violation on the part of the

State. Further, as discussed more fully below, a *Brady* claim was never raised by defendant with respect to Counts 2 through 5.

Of significance are the facts that are not challenged by the State on appeal, which are also supported by the record. First, Mr. Mohon is an assistant district attorney who, according to the trial judge, serves as the felony prosecutor in her division.[13] Mr. Mohon also serves in an official capacity as legal counsel for St. James Parish. While acting as parish attorney, Mr. Mohon advised parish officials not to accept payment for a gas line for which Millennium had been billed. The statement was dated September 1, 2016, prior to defendant's indictment.[14] In his capacity as a parish attorney, Mohon further advised Millennium's attorney, Brad Meyers, not to pay the bill for the gas line until Meyers heard back from Mohon. At the same time, the State pursued criminal charges against defendant based, in part, on an allegation that defendant built a free gas line for Millennium using parish resources. The unrebutted testimony at the hearing on defendant's motions, through the testimony of Meyers and LeBlanc, was that Millennium would otherwise have paid St. James Parish the balance owed for construction of the gas line. While assistant district attorneys may, and in fact have a duty to, serve as parish attorneys in various parishes under La. R.S. 16:2, each district attorney must still abide by the Professional Rules of Conduct and be cognizant of potential conflicts of interest.

While not directly on point, other cases have previously addressed issues that arise when an attorney employed as a District Attorney also has a private

[13] While there is no evidence that proves defendant's contention that Mr. Mohon is the "genesis of the investigation and prosecution of this case," the record shows that Mr. Mohon was present: on the date of defendant's arraignment on November 14, 2016; at a motion hearing on January 9, 2017; on February 13, 2017 at the hearing on defendant's Motion for Discovery and a Motion for Bill of Particulars, and; at the hearing on defendant's motions to quash on April 10, 2017.

[14] As previously indicated, Alvin St. Pierre, Jr. testified that after defendant had been indicted on September 28, 2017, Mohon advised him to not accept payment until the amount of the invoice could be verified.

practice. For example, in *In re Toups*, 00-0634 (La. 11/28/00), 773 So.2d 709, 716, the Louisiana Supreme Court observed the following:

> Dual representations by an attorney who is first and foremost a district attorney present potential and actual conflicts of interest which have troubled courts for many years. In our system of justice, we entrust vast discretion to the prosecutor in deciding which cases to pursue, what crimes to charge, and how to allocate limited resources. Because the prosecutor is given such great power and discretion, he is also charged with a high ethical standard.

The trial court's April 25, 2017 ruling makes no specific finding about the nature and scope of prosecutorial misconduct, but such a finding is inferred from the dismissal of Count 1. However, in its reasons for judgment, the trial court found that the District Attorney's office had breached an ethical canon set forth in the American Bar Association Standards for Criminal Justice. The court concluded in its ruling that:

> The District Attorney's office, through Mr. Mohon, breached its duty to stand as a representative of the people and upholding the integrity of the criminal justice system. No indictment would have been obtained had payment been accepted. Mr. Mohon was not only the legal advisor to the parish, but also the felony prosecutor in this division. He had to have known the precarious position his client was placed in by not accepting payment. Mr. St. Pierre relied on his trusted advisor to tell him what to do, and in doing so, Mr. Mohon's actions were detrimental to the fairness of the proceedings against Mr. Gravois. Count one of the Indictment of Blaise Gravois must be quashed on this basis.

The trial court relied on a pronouncement found in *In re Jordan*, 04-2397 (La. 06/29/2005), 913 So.2d 775, 781:

> In our system of justice, we entrust vast discretion to a prosecutor. *In re Toups*, 2000-0634 p. 10 (La. 11/28/00), 773 So. 2d 709, 715. Because a prosecutor is given such great power and discretion, he is also charged with a high ethical standard. Id. A prosecutor stands as the representative of the people of the State of Louisiana. He is entrusted with upholding the integrity of the criminal justice system by ensuring that justice is served for both the victims of crimes and the accused. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87.

Under the facts of this case, it would certainly appear that Mr. Mohon was in a unique position to arguably assure the existence of an element of the malfeasance

charge needed to prosecute Count 1. Even if his advice to the parish not to accept Millennium's payment was provided based upon other considerations not related to the defendant's prosecution, such advicearguably had the practical effect of ensuring that defendant's prosecution of Count 1 continued. In the alternative, had Mr. Mohon given advice to the parish to accept Millennium's payment, it may have resulted in the creation of evidence exculpatory to defendant for the charge in Count 1 of the indictment.[15] The potential conflict of interest faced by Mr. Mohon is obvious.

While any disclosure by Mohon to the State about this potential conflict of interest is not a part of the record, the record does reflect that Mr. Mohon did not disclose to defendant that he had advised Millennium not to pay for the gas line that St. James Parish constructed and billed for, nor that he had advised St. James Parish not to accept payment. Moreover, at no time did the St. James Parish District Attorney's Office move to recuse itself following Mohon's contact with Millennium's counsel. Based on the record before us, we find no error in the trial court's conclusion that Mr. Mohon's dual representation of St. James Parish and the State of Louisiana in regard to Millennium constitutes prosecutorial misconduct.[16]

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[15] Considerations relevant to the instant case can be found in La. St. Bar Ass'n. Art. XVI § 3.8, *Special Responsibilities of a Prosecutor*, which states, in relevant part:

> The prosecutor in a criminal case shall:
>
> a. refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;. . .
>
> d. make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

The above article mirrors standards set forth by the American Bar Association's Rule 3.8, "Special Responsibilities Of A Prosecutor," sections (a) and (e).

[16] As reasoned by the Louisiana Supreme Court in *Toups, supra*:

> Based on the potential for conflicts of interest presented by the prosecutor's dual role of representing the state in criminal matters as well as representing the interests of a civil client in a domestic proceeding, we hold that a prosecuting attorney has an obligation to use reasonable efforts to ascertain whether there is an actual or potential conflict prior to accepting representation of a civil client. When such a conflict or potential conflict presents itself, the prosecutor must, depending on the circumstances, either refrain from accepting representation or withdraw as counsel. In the event the

Dismissal of Count 1

We next turn to the issue raised in the State's third assignment of error, of whether the trial court erred in dismissing Count 1 based upon Mr. Mohon's misconduct.

The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. Consequently, the aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78 (1982); *State v. Ortiz*, 11-2799 (La. 1/29/13), 110 So.3d 1029, 1034, *cert. denied*, 134 S. Ct. 174, 187 L. Ed. 2d 42 (2013). While a prosecutor should prosecute with "earnestness and vigor" and "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

In this case, defendant argues that Mr. Mohon's actions amounted to a due process violation. In the case of *In re Guerra*, 235 S.W.3d 392, (Tex. App.--Corpus Christi 2007)(orig. proceeding), the court set forth a framework for analysis that it used to consider whether prosecutorial misconduct affected a defendant's right to due process:

> The absence of an impartial and disinterested prosecutor has been held to violate a criminal defendant's due process right to a fundamentally fair trial. Put another way, the due process rights of a criminal defendant are violated when a prosecuting attorney who has a conflict of interest relevant to the defendant's case prosecutes the defendant. [Citations omitted.]
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> . . .
>
> The question whether there is a conflict of interest is dependent upon the circumstances of the individual case. Because there is no bright-line rule for determining whether a conflict rises to the level of a due-process

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conflict arises during the course of representation, the prosecuting attorney has an affirmative obligation to seek appointment of a special prosecuting attorney and remove himself from the case in all respects.

Toups at 716*, citing West Virginia ex rel. Bailey Facemire*, 186 W. Va. 528, 413 S.E.2d 183, 184-85 (W.Va. 1991).

violation, each case must be analyzed on the facts peculiar to it. As the United States Supreme Court has explained:

> Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise [that] must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.[17]

Id. at 429-431.

"To constitute a due process violation, the prosecutorial misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L. Ed. 2d 618 (1987) (*quoting United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L. Ed. 2d 481 (1985)).

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-692, the United States Supreme Court opined regarding the elements of what constitutes a "fair trial:"

> The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:
>
> > "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."
>
> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Id. at 684-685.

[17] *Lassiter v. Dept. of Soc. Servs*., 452 U.S. 18, 24-25, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (*quoting Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961)).

Prejudice to the defendant

In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), the U.S. Supreme Court held that a court has ""no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct." *Bank of Nova Scotia*, 487 U.S. at 263. The U.S. Fifth Circuit Court of Appeal has found that a "district court exceeds the proper bounds of its power to order dismissal of an indictment with prejudice when it fails to consider whether less extreme sanctions might maintain the integrity of the court without punishing the United States for a prosecutor's misconduct." *United States v. Welborn*, 849 F.2d 980, 985 (5th Cir. 1988). A reviewing court's determination of whether the trial court's granting of a motion to dismiss an indictment on the basis of prosecutorial misconduct is proper is based, in part, on whether the remedy for prosecutorial misconduct is generally tailored to the injury suffered from the misconduct. *State v. Walker*, 567 So.2d 581, 586 (La. 1990).

In the instant case, it appears from the record that there are informal allegations by defendant that the State had knowledge of an agreement between Millennium and St. James Parish to pay for the gas line prior to the time defendant was indicted, and failed to present this evidence to the grand jury. However, defendant failed to introduce sufficient testimony or evidence to prove that knowledge. This allegation, if proven, could very well have been a basis for a finding of prosecutorial misconduct sufficient to quash the indictment. The trial court appears to have drawn such a conclusion in finding that "No indictment would have been obtained had payment been accepted." However, the record is not clear as to when the parish or Mohon directly instructed Millennium not to pay the September 1, 2016 invoice. Short of evidence that an agreement to pay was known to Mr. Mohon prior to defendant's indictment and withheld from the grand

jury proceedings, such a conclusion by the trial court is seemingly not supported.[18] Similarly, had defendant only learned of Mr. Mohon's actions *after* trial, yet another basis for dismissing the indictment based on misconduct could very well exist.

In the current posture of the proceedings, we have a situation where defendant has been made aware of potentially exculpatory information *prior* to trial, which could still be used in his defense. Stated another way, while there has been a finding of prosecutorial misconduct, there has been no showing of how either Mohon's or the district attorney office's misconduct actually prejudiced defendant's right to a fair trial, when the trial had not yet taken place. Under the specific facts of this case known at this time, while we find that Mr. Mohon's conflict of interest in aiding the district attorney's office in defendant's prosecution while, at the same time, advising St. James Parish not to accept payment, and Millennium not to pay the bill it had received constitutes prosecutorial misconduct, we find that the trial court erred in dismissing Count 1 of the indictment as a result thereof.

Alternate sanctions

While we decline to instruct the trial court on what "less extreme sanction" might be appropriate here, we will note examples of how this issue has been addressed within the federal system. In *Bank of Nova Scotia v. United States*, 108 S.Ct. at 263, the court explained:

> Errors of the kind alleged in these cases can be remedied adequately by means other than dismissal. For example, a knowing violation of Rule 6 may be punished as a contempt of court. See Fed. Rule Crim. Proc. 6(e)(2). In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

[18] It is not implausible, as the State has argued throughout the proceedings, that the billing of Millennium after the investigation began could be interpreted as a calculated attempt to cover up wrongdoing.

In *United States v. Welborn*, 849 F.2d at 985, the court stated:

> A district court exceeds the proper bounds of its power to order dismissal of an indictment with prejudice when it fails to consider whether less extreme sanctions might maintain the integrity of the court without punishing the United States for a prosecutor's misconduct. Cf. *United States v. Sarcinelli*, 667 F.2d 5, 6-7 (5th Cir. Unit B 1982) (least severe sanction should be imposed under Federal Rule of Criminal Procedure 16 for noncompliance with discovery orders). In this case, the district court made no finding of actual or inherent prejudice. Nor did the district court consider imposing sanctions that do not cut off the public interest in having indictments prosecuted. The court should have considered, for example, requiring the prosecutor to show cause why he should not be held in contempt. The negligent, if not contumacious, conduct of this prosecutor can be neither condoned nor excused. On the showing made in this record, however, the district court abused its discretion by ordering dismissal with prejudice as a sanction.

In *Knapper v. Connick*, 96-0434 (La. 10/15/96), 681 So.2d 944, the Louisiana Supreme Court addressed the issue of whether a prosecutor, acting within the course and scope of his responsibilities in a criminal proceeding, is entitled to absolute immunity from a subsequent civil suit for damages for alleged malicious prosecution of the original criminal matter. In that case, after his conviction for murder, the defendant obtained the initial police report and filed a petition for post-conviction relief, claiming that the report contained exculpatory information which should have been given to the defense. The State eventually entered a *nolle prosequi* of the charge and, after his release from prison, the defendant filed a suit for malicious prosecution against the assistant district attorney. After first finding that the prosecutor was entitled to absolute immunity from the charges of malicious prosecution, the Court explained:

> Our opinion in this case should in no way be construed as condoning the suppression of exculpatory information or any other form of prosecutorial misconduct. Criminal defendants who are convicted as a consequence of prosecutorial misconduct will be afforded post-conviction relief where appropriate. If misconduct is detected during the original trial, prosecutors are subject to sanctions pursuant to the inherent authority of the trial judge. Moreover, prosecutorial misconduct can be the basis of independent criminal charges against a prosecutor. Misconduct can also rise to the level of justifying professional disciplinary proceedings. Finally, prosecutorial

> conduct, whether that of the District Attorney or his assistants, is subject to the ultimate test of public approval at the ballot box.

Id. at 950.

Accordingly, we reverse the portion of the trial court's judgment which dismissed the indictment based upon prosecutorial misconduct. However, because we agree with the trial court that prosecutorial conduct was proven, we remand the matter with the instruction for the trial court to consider an appropriate lesser sanction consistent with this opinion, if it deems that a sanction is necessary.

Constitutional Challenge

The State contends that the trial court erred in finding La. R.S. 42:1461 to be "unconstitutionally vague," and in failing to notify Louisiana's Attorney General of defendant's constitutional challenge to La. R.S. 42:1461 as required by law.

La. R.S. 42:1461 provides, in part:

> A. Officials, whether elected or appointed and whether compensated or not, and employees of any "public entity", which, for purposes of this Section shall mean and include any department, division, office, board, agency, commission, or other organizational unit of any of the three branches of state government or of any parish, municipality, school board or district, court of limited jurisdiction, or other political subdivision or district, or the office of any sheriff, district attorney, coroner, or clerk of court, by the act of accepting such office or employment assume a personal obligation not to misappropriate, misapply, convert, misuse, or otherwise wrongfully take any funds, property, or other thing of value belonging to or under the custody or control of the public entity in which they hold office or are employed.

In the instant case, defendant did not file a motion that specifically challenged the constitutionality of La. R.S. 42:1461 itself. Rather, in his Motion to Dismiss/Quash the Indictment on the Basis of Lack of Notice, defendant argued the principle of lenity[19], that his "fundamental and Constitutional right to due process" for counts 2-5 five had been violated because he had not received fair

[19] Criminal statutes are generally subject to strict construction of the statute most favorable to the accused under the rule of lenity. *State v. Carouthers*, 618 So.2d 880, 882 (La. 1993). The principle of lenity is premised on the idea that a person should not be criminally punished unless the law provides a fair warning of what conduct will be considered criminal. *State v. Piazza*, 596 So.2d 817, 820 (La. 1992). The rule is based on principles of due process that no person should be forced to guess as to whether his conduct is prohibited. *Piazza*, 596 So.2d at 820.

notice that the conduct for which he was charged was illegal.[20] The trial court did not declare La. R.S. 42:1461 unconstitutional, but rather granted defendant's Motion to Dismiss/Quash the Indictment on the Basis of Lack of Notice and, in its reasons for judgment cited *U.S. v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed. 2d 432 (1997), to explain the principle that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." The trial court concluded that, for counts 2 through 5 of the indictment, "[t]he State has agreed, at least by acquiescence, that the type of activity Mr. Gravois is accused of illegally doing is the same type of work that has gone on for years, including work for ADA Long, ADA Mohon, and his family members."[21] The court also found:

> In this case, the application of R.S. 42:1461 has not been applied to hold someone criminally liable. Indeed, it has been interpreted to not impose personal liability absent wrongful misuse of public funds where the misuse inures to the benefit of the public official. No allegations have been made that Mr. Gravois received any personal benefit of any kind by providing the work alleged in the Indictment. Assuming all allegations of the Indictment to be true, the misappropriation statute provides for no personal liability because the alleged misuse did not inure to Mr. Gravois' benefit.

Thus, while the trial court did not find that La. R.S. 42:1461 was unconstitutional, *per se*, it did find that, under the facts of this particular case, the State had violated defendant's constitutional right to due process as no notice was provided to defendant that the acts for which he was charged were illegal.

In *State v. Perret*, 563 So.2d 459 (La. App. 1 Cir. 1990), the First Circuit considered the issue of whether La. R.S. 14:134 was unconstitutionally vague. In

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[20] During the hearing on the motion to quash, defense counsel argued:

> DEFENSE COUNSEL:
>
> Just I want to clear up one thing though on the constitutional issue because I think it's getting a little muddied here. We're not saying that the Malfeasance statute is unconstitutionally vague. That's not what we're claiming. Ms. O'Bannon [an assistant district attorney] is right on that. It has been upheld as constitutional, so that's not what we're saying. What we're saying is every defendant is entitled to due process, and in this context, due process is getting fair notice that the conduct they engaged in was a crime before they engaged in that conduct. That's the constitutional issue that's identified time and again by the Supreme Court. That's the particular challenge here. And our argument is that there's no way Mr. Gravois could have had that fair notice because there's never been a case like this.

[21] We understand the phrase, "same type of work that has gone on for years," in this context to mean parish resources used to perform work on private property.

that case, the defendant, assistant secretary of the Department of Wildlife and Fisheries, was indicted for malfeasance in office. He thereafter filed a motion to quash the indictment which asserted, in part, that "the indictment contained disjunctive and alternative allegations and charges which violated his constitutional right under La. Const. Art. I, § 13, to be informed of the nature and cause of the accusations against him." *Id*. at 461. After the trial court denied the defendant's motion to quash on that basis, the defendant filed a writ, which was consolidated with the State's appeal. In finding that the trial court did not err in denying the defendant's motion to quash, the First Circuit opined that the defendant had received his constitutionally required notice because the bill of indictment's general charge of malfeasance under La. R.S. 14:134, and the affirmative duty required therein, was defined by reference to specific applicable statutes by the State in a bill of particulars,.[22]

In *State v. Petitto*, 10-0581 (La. 03/15/11), 59 So.3d 1245, the defendant, a parish councilman, was indicted of two counts of malfeasance in office, violations of a.-R.S. 14:134. The defendant filed a motion to quash, arguing that "the indictment failed to adequately state or identify a criminal offense as the vehicle through which he intentionally performed one of his duties as a councilman in an unlawful manner." *Id*. at 1248. In reviewing the defendant's challenge to his indictment, the Louisiana Supreme Court explained:

> The crime of malfeasance in office, which has been a part of Louisiana's penal laws for close to a century, is intended to protect the public by deterring public officers and employees from abusing their positions of public trust. *State v. McGuffie*, 42,069, p. 11-12 (La. App. 2 Cir. 8/1/07), 962 So.2d 1111, 1118, *writ denied*, 07-2033 (La. 2/22/08), 976 So.2d 1283. The language of the malfeasance statute is comprehensive. The law applies to "any public officer or public employee" who intentionally refuses or fails to perform or who intentionally performs in an unlawful manner "any duty lawfully required of him." In enacting this provision, the legislature deliberately chose not to specify or name a particular duty or duties, the abuse of which could lead to prosecution for malfeasance. This decision not

[22] In that case, the statutes pertained to definable aspects of the defendant's job, such as enforcing prohibitions against harvesting oysters below a certain size.

> to further define the duty element is understandable given the multitude of different public employees and officials covered by the statute. Indeed, it would be difficult, if not impossible, to construct a definition of duty that would encompass all the derelictions of duty the statute seeks to proscribe. Instead, the legislature chose to restrict the duty element of the crime to "any duty lawfully required" of the public officer or employee.

Id. at 1250.

The *Petitto* Court further articulated how courts determined whether a defendant charged with malfeasance had adequate notice of the crime he was alleged to have committed:

> As demonstrated by the foregoing, in determining the meaning of the phrase "duty lawfully required" in the malfeasance statute, the focus of the courts has been on whether there is a statute or provision of law which imposes an affirmative, personal duty on the public officer or employee in his role as such which he has intentionally failed to perform or intentionally violated, *i.e.*, performed in an unlawful manner.

Id. at 1251.

In both *Perret* and *Petito*, the defendants' motions to quash were based on the premise that the respective bills of indictment alleging malfeasance were deficient, *inter alia*, because they failed to specify what affirmative duty the defendants breached. The courts in those cases declined to address the constitutionality of La. R.S. 14:134 itself, but rather resolved the issues by looking at whether a crime was indeed charged by referring to a statute, or other provision of law, which imposed an affirmative duty upon the defendants. It is clear that the State fulfills its requirement of ensuring a defendant's due process rights when either the charging instrument, or a bill of particulars, communicates this information to a defendant.

In *State v. Hatton*, 07-2377 (La. 7/1/08), 985 So.2d 709, the Louisiana Supreme detailed a general procedure for challenging the constitutionality of a statute:

> While there is no single procedure for attacking the constitutionality of a statute, it has long been held that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. *State v.*

> *Schoening*, 00-0903, p. 3 (La. 10/17/00), 770 So. 2d 762, 764 (citing *Vallo v. Gayle Oil Co*., 94-1238, p. 8 (La. 11/30/94), 646 So. 2d 859, 864-65). This Court has expressed the challenger's burden as a three step analysis. First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized. *Vallo v. Gayle Oil Co., Inc.*, 94-1238, p. 8 (La. 11/30/94), 646 So. 2d 859, 864-865.

Id. at 719.

In the instant case, defendant's challenge to his indictment was premised upon a lack of notice of the crime which he is alleged to have committed, which would be a violation of his right to due process.[23] As can be seen from a reading of *Perret* and *Petito*, this argument is distinguishable from a direct challenge of a statute as unconstitutional. We do not find that defendant's motion to quash the bill of indictment on the basis of lenity particularized the grounds for a constitutional challenge.[24] Further, as noted above, the trial court apparently granted defendant's motion to quash based upon the same considerations detailed in *Perret* and *Petito*, specifically that the bill of indictment in this case failed to provide sufficient notice to defendant of what crimes he was alleged to have committed. Accordingly, we do not find that the issue of constitutionality of the statutes at issue is presently before us.

[23] As articulated by the United States Supreme Court in *Johnson v. United States*, 135 S.Ct. 2551, 192 L. Ed. 2d 569:

> The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

[24] In *State v. Grant*, 16-0104 (La. App. 4 Cir. 08/24/16), 198 So.3d 1219, the Fourth Circuit considered a similar issue and found that a defendant generally arguing the principle of lenity had failed to "sufficiently particularize the grounds for his constitutional challenge".

Notice to the Attorney General

The State asserts that the trial court erred in failing to notify the Louisiana Attorney General about defendant's constitutional challenge of La. R.S. 42:1461, as required by La. C.C.P. art. 1880, which provides in relevant part:

> If the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

In addition, the Louisiana Attorney General has filed a brief in this matter, asserting that defendant's motion to quash is not properly before this court because his office was not given notice and an opportunity to be heard before the trial court.

As discussed above, defendant's motion did not seek a ruling on the constitutionality of La. R.S. 42:1461 and the trial court did not so rule. Instead, defendant challenged his indictment under the principles of lenity. Accordingly, because the constitutionality of the statue under which defendant was charged was not at issue, and the trial judge's ruling has no finding of unconstitutionality, we find that the mandatory notice requirements of La. C.C.P. art. 1880 were not triggered.

Motion To Quash for lack of notice

In considering a motion to quash, a court must accept as true the facts contained in the bills of information and in the bill of particulars, and determine as a matter of law and from the face of the pleadings, whether a crime has been charged. *State v. Byrd*, 96-2302 (La. 3/13/98), 708 So.2d 401. When the issue presented in a motion to quash is exclusively a question of law, appellate courts review the ruling *de novo*. *See State v. Hamdan*, 12-1986 (La. 3/19/13); 112 So.3d 812, 816.

La. Const. Art. I, § 13 requires the State to inform the accused in a criminal prosecution of the nature and cause of the accusation against him. The State may

provide the information in the indictment alone or in its responses to a defendant's request for a bill of particulars. *State v. DeJesus*, 94-0264 (La. 9/16/94), 642 So.2d 854, 855. Before a public official can be charged with malfeasance in office, there must be a statute or provision of the law[25] which delineates an affirmative duty upon the official. *State v. Passman*, 391 So.2d 1140 (La. 1980). The 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. *State v. Perez*, 464 So.2d 737 (La. 1985).

The face of the bill of indictment herein charges defendant with malfeasance in office, alleging violations of La. R.S. 14:134. That statute provides, in relevant part:

> A. Malfeasance in office is committed when any public officer or public employee shall:
> (1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or
> (2) Intentionally perform any such duty in an unlawful manner; or
> (3) Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner.

The State further alleges in the bill of indictment that his alleged acts of malfeasance violate a duty enunciated in La. R.S. 14:162, which states in part:

> A. Officials, whether elected or appointed and whether compensated or not, and employees of any "public entity", which, for purposes of this Section shall mean and include any department, division, office, board, agency, commission, or other organizational unit of any of the three branches of state government or of any parish, municipality, school board or district, court of limited jurisdiction, or other political subdivision or district, or the office of any sheriff, district attorney, coroner, or clerk of court, by the act of accepting such office or employment assume a personal obligation not to misappropriate, misapply, convert, misuse, or otherwise wrongfully take any funds, property, or other thing of value belonging to or under the custody or control of the public entity in which they hold office or are employed.

[25] As noted by the Third Circuit in *State v. Coker*, 625 So.2d 190 (La. App. 3d Cir. 1993), *writ denied*, 624 So.2d 1204, (La. 1993), ordinances can also be used to support malfeasance convictions.

In his motion to quash the indictment on the basis of lack of notice defendant argued that he "could not have known *ex ante* that the conduct alleged -- participating in certain operations for private individuals who request it, such as clearing blighted property, shoring up a drainage canal, and installing a gas line -- was wrong, *let alone criminal*." (Emphasis as in the original). Conversely, the State argued that defendant was seeking nonessential details and a recital of the State's evidence. The State also contended that the indictment, and open file discovery, sufficiently informed defendant of the nature and cause of the offense upon which he was charged.

The articles of the criminal code "cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and to effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." La. R.S. 14:3. Further, although criminal statutes are subject to strict construction under the rule of lenity, the rule is not to be applied with "such unreasonable technicality as to defeat the purpose of all rules of statutory construction, which purpose is to ascertain and enforce the true meaning and intent of the statute." *State v. Shaw*, 06-2467 (La. 11/27/07), 969 So.2d 1233.

In *State v. Davis*, 93-0599 (La. 4/11/94), 634 So.2d 1168, the defendant, a former mayor of the Town of Ferriday, Louisiana, was convicted of malfeasance in office. The evidence at trial showed that the defendant, after being defeated for re-election, on his last day in office had payroll checks issued to himself and several employees who were not going to remain employed by the incoming administration. The payroll checks included pay for the last pay period and amounts for accrued sick leave and annual leave in excess of the amounts purportedly authorized by municipal ordinance. In that case, the Louisiana

Supreme Court held that the State's failure to prove the existence of an ordinance which defendant was alleged to have violated was a basis for the reversal of a defendant's conviction.

> Having failed to prove the existence of a valid town ordinance establishing the duty of the mayor in regard to payment of annual and sick leave, which duty defendant is alleged to have unlawfully performed, the state has failed to prove an essential element of the crime. Although the defendant did not set forth this error with specificity in his assignment of errors, the fact that the state's case lacked such an essential element of the charged offense requires us to set aside defendant's conviction, "regardless of how the error [was] brought to the attention of the reviewing court." *State v. Raymo*, 419 So. 2d 858, 861 (La.1982). See also *State ex rel. Womack v. Blackburn*, 393 So.2d 1216, 1220 (La.1981) (per Lemmon, J., concurring). Accordingly, the conviction and sentence are reversed and set aside, and the defendant is ordered discharged on the count of malfeasance in office for which he was tried.

Id. at 1170-1172.

In *State v. Passman*, *supra*, defendant, Director of the Louisiana Real Estate Commission, was indicted by a grand jury for malfeasance in office for intentionally issuing licenses without valid testing and falsifying completed examinations of applicants in order to insure the issuance or non-issuance of licenses without regard to actual test scores. The defendant filed two motions to quash the indictment, one of which contended that the indictment failed to charge an offense "proscribed by statute, ordinance, or any valid rule or regulation" applicable to him in his official capacity. The trial court granted the defendant's motions and the State appealed. In affirming the trial court's grant of the defendant's motions to quash, the Louisiana Supreme Court held:

> It is unnecessary for us to reach the issues of unlawful creation of a crime or improper delegation of legislative authority because, even if we refer to the administrative regulations promulgated by the Commission and La. R.S. 37:1431, *et seq*., we find no provisions delineating affirmative duties required of defendant to administer fair and accurate testing procedures. In absence of any express requirement of him in his official capacity, he cannot be charged with refusing or failing to perform a "duty lawfully required of him." Hence, even accepting all facts alleged in the indictment as true, Passman cannot lawfully be charged with the criminal offense of malfeasance in office. The trial judge properly sustained defendant's motion

> to quash on the ground that the indictment failed to charge an offense punishable under a valid statute.

Passman, 391 So.2d at 1144.

In another malfeasance in office case, *State v. Espejel*, 38,071 (La. App. 2 Cir. 03/03/04), 867 So.2d 863, the Second Circuit addressed the issue of whether the State's failure to introduce the ordinance which purportedly imposed a duty upon the defendant warranted a reversal of the conviction. In that case, defendant, a former sergeant with the City of Winnfield Police Department, was convicted, among other charges, with malfeasance in office related to the theft of marijuana, which was in the evidence room at the police station. The defendant challenged his malfeasance conviction on appeal, claiming that the State's evidence was insufficient. Citing *Davis, supra*, the court conducted an independent review of the entire record and concluded that because the State had failed to introduce a certified copy of the local provision of law the defendant was charged with violating, the defendant's conviction for malfeasance had to be reversed.[26]

La. R.S. 14:134 requires the existence of a "lawful duty." In the instant case, defendant's "duties" in the performance of his job as Director of Operation are circumscribed by the St. James Code of Ordinances. However, while the State may have made general references to ordinances it believed applied, and even attached a copied section of ordinances to one of its pleadings, in the bill of indictment the State failed to cite to the specific St. James parish ordinances that defendant is accused of performing unlawfully. As discussed above, in similar cases Louisiana courts have held that charging a defendant with malfeasance in office, without

[26] In *Espejel, supra*, the second circuit recognized that *Davis, supra*, provided a means through which a trial court could take judicial notice of a political subdivision's ordinances under La. R.S. 13:3712 and La. C.E. art. 202, "whenever certified copies of the ordinances have been filed with the clerk of that court" and in instances when a party requests judicial notice and provides the court with information needed by it to comply with the request. *Id.* at 868. The record in this case does not show that the State filed a certified copy of the St. James ordinances with the clerk of court, nor did it request the district court to take judicial notice of the ordinances.

specifying the affirmative duty under local law that the defendant is alleged to have failed to perform, is a basis for quashing the indictment.

Based on the foregoing, and the limited record before us, we cannot say that the trial court erred in finding the indictment, as filed, lacked required notice to defendant.

Bill of particulars

On January 30, 2017, defendant filed a motion for a bill of particulars requesting "details as to the nature and cause of the charges contained in the pending Indictment against him." The record shows that on February 9, 2017, the State sent a letter to defense counsel confirming that it had provided open file discovery to defendant in the form of five boxes of documents that were hand delivered to counsel.[27] Attached to the letter is a copy of what purports to be a section of the St. James Parish Code of Ordinances, Article 1, Sections 118-1 through 118-111, identified at the bottom of each page as "Supplemental Discovery." On February 10, 2017, the State filed an answer to defendant's bill of particulars, in which it alleged that "defendant does not file an actual Motion for Bill of Particulars, but instead, gives examples of what he perceives as the lack of factual particularities in the indictment." The State then offered what it styled as a response to "bullet points" listed in defendant's memorandum. For Counts 1 through 5, the State generically references "St. James Parish Code of Ordinances, Chapter 118; St. James Code of Ordinances, Chapter 18, Article V." Neither portion of the St. James Parish Code of Ordinances referred to by the State in its February 10, 2017 answer to defendant's bill of particulars is included with that

[27] To the extent that the State relies on open file discovery to notify defendant of his affirmative duty, we note that open file discovery is not the equivalent of a bill of particulars. *State v. Arnold*, 99-742 (La. App. 3 Cir. 04/11/01), 801 So.2d 408, 414. In addition, the 17,000 pages of proffered discovery by the State likewise is no substitute for the required notice to defendant.

filing, nor does the record show that these ordinances were offered into evidence by the State at any point in the proceedings.

The trial court granted defendant's motion for a bill of particulars and found in its Order of March 30, 2017, that "the Indictment is deficient in placing Mr. Gravois on notice of the specific duty that he has violated and the manner in which it was violated." The trial court gave the State 15 days from the signing of the order to provide defendant with this information. The record does not show that the order was satisfied. Thereafter, at the hearing on defendant's motions to quash, the trial court indicated that it was not going to hold the motions to quash open pending the State's completion of the bill of particulars. The trial court stated on the record that the bill of particulars would not "remedy the constitutional concern that is there before the Court on the lack of notice".

The purpose of the bill of particulars is to inform the accused more fully of the nature and scope of the charge against him so that he will be able to defend himself properly and to avoid any possibility of ever being charged again with the same criminal conduct." *DeJesus* at 855; *State v. Ferguson*, 2014-1305 (La. App. 4 Cir. 09/02/15), 176 So.3d 449, 453-454. La. C.Cr.P. art. 532(4) provides that one basis for granting a motion to quash an indictment exists when:

> (4) The district attorney failed to furnish a sufficient bill of particulars when ordered to do so by the court. In such case the court may overrule the motion if a sufficient bill of particulars is furnished within the delay fixed by the court.

As discussed by the Louisiana Supreme Court in *State v. Butler*, 229 La. 788, 86 So.2d 906, the granting of a defendant's motion for a bill of particulars is not always discretionary:

> The general rule is that the granting of a Bill of Particulars is within the discretion of the trial judge. *State v. Poe*, 214 La. 606, 38 So.2d 359; *State v. Shourds*, 224 La. 955, 71 So.2d 340; *State v. Michel*, 225 La. 1040, 74 So.2d 207; *State v. Labat*, 226 La. 201, 75 So.2d 333. However, there will be found exceptions to the general rule, such as will be found in *State v. Chanet*, 209 La. 410, 24 So.2d 670, 671, which reads:

> While it is discretionary with the trial judge, yet, he cannot arbitrarily refuse to order the State to furnish essential particulars."
> While it is true that the Court had in mind Article 235 of the Code of Criminal Procedure, LSA-Revised Statutes 15:235, when it made the preceding statement, we believe that the same ruling applies in the instant case.
>
> We reiterate that the matter of furnishing a Bill of Particulars rests largely in the discretion of the trial judge, and his discretion will not be disturbed unless there is error in the ruling complained of to the detriment or disadvantage of the accused. *State v. Ezell*, 189 La. 151, 179 So. 64; *State v. Gould*, 155 La. 639, 99 So. 490, 491. However, while it is discretionary with the trial judge, he cannot arbitrarily refuse to order the State to furnish "essential particulars". That is exactly what the trial judge refused to do in this case.

Id. at 791.

The record suggests that the trial court's dismissal of all counts was based on a finding of prosecutorial misconduct. Our opinion affirms the finding of misconduct but reverses the trial court's dismissal of the entire indictment on that basis. The remaining issue then, is whether the trial court's dismissal on the grounds of lack of notice to defendant was supported. As discussed above, we agree with the trial court finding that the Bill of Indictment, as filed, failed to provide required notice to defendant. However, we disagree with the trial court's finding that lack of notice could not have been cured by allowing the State to file a Bill of Particulars.

It is noteworthy that the State argues in its reply to appellee's brief, "Here, appellee's affirmative duties are delineated in LSA-R.S. 42:1461, the Louisiana Constitution and the St. James Parish Code of Ordinances, all as outlined in the Bill of Indictment and First Bill of Particulars." As stated above, the Bill of Indictment, as filed, does not provide adequate notice to defendant. Further, as the record demonstrates, the trial court, in effect, prevented the State from filing a second bill of particulars by first ruling on defendant's motion to quash and not allowing a continuance for the bill of particulars to be completed.

To the extent that the State contends that defendant could have received notice of the specific duties he allegedly violated in this case, which resulted in his criminal indictment, by poring over the 123 pages 14 articles, subsections and ancillaries of the Louisiana Constitution, and the 122 chapters contained in the St. James Parish Code of Ordinances, "revised statutes," the 17,000 pages of discovery, and by reviewing the State's file, we find this assertion to be, at best, disingenuous.

To illustrate his point that the charges in the bill of indictment did not provide notice, defendant argued, and introduced an affidavit from a St. James Parish Engineering Supervisor in support of the fact that St. James Parish provided services on private property to the benefit of ADA Long (using St. James Parish resources to install a flatbed trailer as a bridge across a bayou where he hunts,) and ADA Mohon (using St. James Parish employees and resources to install a culvert in front of his house.) While the State sought to exclude this evidence from the record, neither Mohon nor Long denied that parish work on their respective properties had taken place. There is no allegation that this work was illegal. For his part, Mr. Long argued at the hearing on defendant's motion to quash that "what was done for me is legal." This begs the question, "what, if any, legal criteria did he use to arrive at that conclusion?" It also raises another question: what was the criteria, if it exists, used to determine the legality of St. James Parish doing "legal" work on private land? Unfortunately, the record, specifically the Bill of Indictment, is not clear on this point.[28]

In the instant case, the trial court had already ordered the State to file the bill of particulars, but essentially prevented the State from complying with that order by ruling on defendant's motions to quash before the allotted time to file the bill of

[28] Mr. Mohon and Mr. Long, are both public officials who have a duty to St. James Parish similar to that of defendant Gravois. Their alleged use of St. James Parish assets, which was similar in nature to those alleged as criminal acts in 1 through 5, point to other potential conflicts of interest by the district attorney's office.

particulars had expired. Under these facts, we find the most judicially economic course is to allow the State to file the bill of particulars, as previously ordered by the district court.[29]

Accordingly, the trial court's order granting defendant's motion to quash based on a lack of notice is reversed, and we remand the matter back to the trial court to set a new deadline and a hearing date, if necessary, for the State to comply with its previous order granting defendant's motion for a bill of particulars.

DECREE

For the foregoing reasons, we affirm the trial court's finding of prosecutorial misconduct, but reverse the portion of the trial court's judgment that dismissed any portion of defendant's bill of indictment on that basis. We affirm the portion of the trial court's judgment that found the indictment lacked required notice to defendant, but reverse the portion of the trial court's judgment that dismissed any portion of appellee's bill of indictment on that basis. We remand the proceedings for any further action the trial court deems necessary with respect to prosecutorial misconduct, and to allow the State to comply with the trial court's prior order to file a bill of particulars.

AFFIRMED IN PART, REVERSED IN PART; REMANDED

[29] *See, State v. Moses*, 425 So.2d 1015, 1983 La. App. LEXIS 7569, where the Fourth Circuit found that the trial court erred in not allowing the State to file an amended bill of particulars.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 13, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-341

E-NOTIFIED

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