STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF JASPER	)	Indictment Number: XXXXXXX
STATE OF SOUTH CAROLINA	)	
	)	
	)	
VS.	)	**MOTION TO QUASH THE**
	)	**ABOVE-CAPTIONED INDICTMENT**
	)	
DEFENDANT NAME HERE	)	
Defendant	)	
_____	)	

THIS MATTER IS BROUGHT BEFORE THE COURT by the Defendant seeking an order quashing the above-captioned indictment.

An indictment is a notice document. An indictment which fails to provide notice sufficient to provide the defendant with the ability to discern which criminal acts are alleged or what punishment is attached to those acts is infirm. The proper mechanism to challenge the sufficiency of an indictment is by moving to quash the indictment prior to the swearing of a jury.

The South Carolina Supreme Court discussed the standard regarding unconstitutional statutes subject to arbitrary application in *Main v. Thomason*, 535 S.E.2d 918 (SC 2000). There, the Court pronounced the constitutional standard for vagueness to be the practical criterion of fair notice to those to whom the law applies. *Main v. Thomason*, citing *Toussaint v. State Bd. of Med. Exam'rs*, 400 S.E.2d 488 (SC 1991) (citations omitted).

Conversely, a law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. *Toussaint* at 491; also see, e.g., *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992) (holding "arbitrary" was not unconstitutionally vague because the term was readily definable). However, due process does not require that every word in a statute be

expressly defined.

The United States Supreme Court recently discussed the vagueness doctrine in the cases entitled *US v Davis*, — US —, 139 S. Ct. 2319 (2019). In *Davis*, Justice Gorsuch began the opinion discussing by noting that: "In our constitutional order, a vague law is no law at all. ... Vague laws ... leave people with no sure way to know what consequences will attach to their conduct. ... When [the legislature] passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite [the legislature] to try again." *Davis*, at —, 2323.

Because the offense of Misconduct in Office at issue sub judice is of commonlaw origin, the elements of this offense must be found in caselaw. In *State v Hess*, the South Carolina Supreme Court indicated that such a charge requires an allegation that "...duties imposed by law have not been properly and faithfully discharged." *State v. Hess*, 301 S.E.2d 547, 550 (1983)(internal citation omitted). The "existence of a duty owed to the public is essential ..." and "... includes any act, any omission, in breach of duty of public concern by persons in public office provided it is done wilfully and dishonestly." *Hess*, at 550 (internal citations omitted).

While no cases in South Carolina have reviewed a challenge to the constitutionality of common law misconduct in office, other courts have reviewed this very same common law offense and found it to be unconstitutionally vague.

The District Court of Appeals for the Fifth District of Florida examined the constitutionality of common law misconduct in office in the case of *Clayton v. Willis*. 489 So2d 813 (FL 5th D.CT.App. 1986). In *Clayton*, the Florida Court reviewed a writ of prohibition related to the prosecution of a county judge for the offense of common law Misconduct in Office. The Court issued the writ finding that this common law offense was unconstitutional because it

was susceptible to arbitrary application.

In *Clayton*, the prosecution issued an indictment charging a county judge with common law misconduct in office. This charge was based upon alleged violations of the Code of Judicial Conduct. However, these alleged code violations were not proscribed by any provision of the penal code.

The Florida Court issued the writ prohibiting prosecution. The Court noted that, if upheld, a public official could be charged with violation of a "minor agency rule" even though the rule itself carried no penalty of its own. The Court noted that this offense violated due process because it was susceptible to arbitrary application.

Finally, as to the allegation of misconduct referenced in this case, a violation of SC Code Section 24-3-965, this law does not provide a prohibition on an attempt to commit this misdemeanor offense. The South Carolina appellate courts have held that "[i]t is elementary law that an attempt to commit a misdemeanor is not an indictable offense." *State v Redmon*, 113 SE 467 (SC 1922). The holding in *Redmon* has twice since been cited favorably by the SC Supreme Court. *State v Elliott*, 552 SE2d 727 (SC 2001)(dissenting opinion of Pleicones-n. 26)(majority overruled on other grounds by *State v Gentry*, 610 SE2d 494 (SC 2005) and *State v Totherow*, 210 SE2d 228 (SC 1974).

The common law offense of misconduct in office is unconstitutional because the scope of this prohibition is so vague that a person of common intelligence must guess as to its meaning. Further, the offense is stated in terms so vague as to allowing significant differences as to its application. Finally, because the offense of misconduct in office requires reference to other laws prohibiting certain conduct, the people have no way of knowing what consequences will attach to their conduct.

In the case at bar, the Defendant was arrested for allegedly attempting to furnish tobacco to inmates at the Ridgeland Correctional Institution. His arrest involved two warrants-one alleging a violation of South Carolina Code Section 24-3-950 (prohibiting contraband) and one for the commonlaw offense of Misconduct in Office. The Defendant was only indicted for the commonlaw charge of Misconduct in Office.

The State did not indict for the contraband charge because this offense was restricted to magistrate court by SC Code Section 24-3-965. However, the body of the Misconduct indictment indicates the alleged misconduct involved "attempting to violate Section 24-3-965 of the Code of Laws of South Carolina by possessing tobacco with the intent to furnish to an inmate, all in violation of Section CL-0819-00, et al of the Codes of Law of South Carolina." Violations of SC Code Section 24-3-965 carry a potential penalty different than commonlaw Misconduct in Office.

The vaguesness of this charge is demonstrated in several ways. To begin, it is not clear that any "public duty" was involved in the allegation. The indictment merely references "duties imposed by law" without distinguishing between a public duty and "the private misconduct of one who happens to be an official." *Hess*, at 550-551.

Further, it is not clear what penalty provision would apply to one who furnishes contraband such as tobacco to an inmate. Does this person face a penalty of not more than 30 days or a one hundred dollar fine as is the usual maximum in magistrate court; a "sentence as is conformable to the common usage and practice in this State" as is the penalty for commonlaw offenses for which no other penalty is provided; or not less than one year but not more than 10 years as is provided by the general contraband statute? See SC Code Sections 22-3-540; 17-25-30; and 24-3-950. In fact, even if the violation of the commonlaw offense of Misconduct in

Office is addressed by the penalty provision found at SC Code Section 17-25-30 (see reference to CDR Code 819), this provision itself is unconstitutionally vague.

Therefore, the indictment in the above matter should be quashed as it asserts the commission of an offense which does not involve a public duty and fails to advise a person as to what penalty he will face if he commits such criminal conduct.

Respectfully, submitted,

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James A. Brown, Jr.
Attorney for the Defendant

DATE HERE
Beaufort, SC

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was served upon all counsel of record in this proceeding this DAY day of MONTH, 2020.

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