**IN THE COURT OF APPEALS OF INDIANA**

**CASE NO. 19A-CR-1086**

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| **DANIEL TANOOS**<br>**Appellant,**<br><br>**v.**<br><br>**STATE OF INDIANA**<br>**Appellee.** | **Appeal from the Marion Superior Court**<br><br>**Trial Court Case No.:**<br>**49G04-1809-FC-032385**<br><br>**The Honorable Lisa Borges,**<br>**Judge** |

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# APPELLANT'S REPLY BRIEF

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James H. Voyles, Jr., #631-49
Jennifer M. Lukemeyer, #17908-49
Tyler D. Helmond, #28850-49
**VOYLES VAIANA LUKEMEYER BALDWIN & WEBB**
One Indiana Square
211 N. Pennsylvania Street, Ste. 2400
Indianapolis IN 46204
(317) 632-4463
(317) 631-1199 (fax)
jvoyles@voyleslegal.com
jlukemeyer@voyleslegal.com
thelmond@voyleslegal.com

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## SUMMARY OF ARGUMENT

Tanoos moved to dismiss the bribery charges filed against him because they failed to state an offense. The State extrapolates facts and cites speculative conclusions beyond the specific charges filed against Tanoos and the facts contained in the record below. Further, the State treats the issue as one purely of notice of the charges. Notice is important and notice is a component of the concerns raised. But notice is not the only issue before this Court. The issue is whether the trial court misapplied precedent that bars a "generalized bribery" theory. Both precedent from this Court and recent precedent from the United States Supreme Court bar a generalized notion of bribery. Because Tanoos has been charged under such a theory, and the facts stated cannot constitute a bribery offense under Indiana law, these charges should be dismissed.

## ARGUMENT

### The facts stated in Counts One through Three do not constitute the offense of bribery.

The State's brief attempts to recast the issue below as one of notice. It's opening brief makes at least four references to Tanoos having sufficient notice of the allegations for which he is charged. (Appellee's Br. 11; 12; 15; 17.) This framing elides the question that is before the Court, which is whether the facts stated in the charging instruments *can* constitute bribery, since Indiana does not recognize "generalized bribery."

In addition to beginning and ending its analysis with notice, the State's

brief is rife with statements and suggestions that are not supported by the record below. Here are three illustrations. First, the State's brief says Tanoos received "money and gifts for his entertainment expenses." (Appellee's Br. 6.) There is no support in the record for Tanoos ever receiving money from Tischbein. Second, the State's brief says "The FBI investigated the VCSC in a public corruption probe, which eventually also included the Indianapolis Metropolitan Police Department and the Marion County Prosecuting Attorney's Office after the FBI determined that many of Tanoos's acts occurred outside of Vigo County and specifically within Marion County." (*Id.*) This implies the FBI handed off the investigation for jurisdictional reasons. In fact, both Vigo County and Marion County are both in the Southern District of Indiana, and there would not have been any jurisdictional impediment to the federal government prosecuting the case if it believed prosecution was warranted. The most critical misstatement contained in the State's brief is how it characterizes the charges.

| | **State's Characterization** | **Charging Information** |
|---|---|---|
| **Count One** | Count I alleges the payment of restaurant charges as a bribe to gain Tanoos's **assistance to ESG in winning the $4 million contract for a project at Hoosier Prairie Elementary School**. (Appellee's Br. 13.)(emphasis added) | DANIEL TANOOS, on or about August 24, 2013, did solicit, accept, or agree to accept any property, that is: food and/or beverages, except property the person is authorized by law to accept, with intent to control the performance of an act, that is: recommendation to award contract and/or continued business with ESG to the Vigo County School Board related to the employment or function of a public servant, that is: Superintendent of Vigo County |

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|---|---|---|
| | | School Corporation |
| **Count Three** | …Count III alleges the payment of concert tickets and expenses as bribes to maintain Tanoos's support for ESG **in the then-ongoing Hoosier Prairie project, avoid Tanoos starting discussions with a competitor to ESG, and secure Tanoos's support for ESG for additional contracts under consideration**. (Appellee's Br. 14.)(emphasis added) | DANIEL TANOOS, on or about August 10, 2014, did solicit, accept, or agree to accept any property, that is: tickets and/or beverages, except property the person is authorized by law to accept, with intent to control the performance of an act, that is: recommendation to award contract and/or continued business with ESG to the Vigo County School Board, related to the employment or function of a public servant, that is: Superintendent of Vigo County School Corporation |

As illustrated above, the bolded material from the State's brief's characterizations of the charges make no appearance in the actual charges. And for good reason – there is no evidence in the record below to support such a charge. Rather, the charging information relies purely on a "generalized bribery" theory which was repudiated – as described in Tanoos's opening brief – by *Wurster v. State*, 708 N.E.2d 587 (Ind. Ct. App. 1999). Not only does the State mischaracterize the actual language of the charges, it then attributes a position to Tanoos which he never advanced: "Nevertheless, Tanoos appears to believe that solicitation and acceptance of bribes is perfectly legal under Indiana law except during the specific times when there are open contracting proposals under active consideration." (Appellee's Br. 15.) In addition to being unduly inflammatory, this statement is also an attempt to recast and obfuscate the problem with the charging information. Indiana precedent is clear: there must be a specific quid pro quo for

there to be bribery. For example, the State could permissibly charge a fact scenario of person X giving money to person Y in exchange for a contract vote for the next project. This is not that. That is not how this case is charged, and there is no evidence that any of these de minimis gifts were made in exchange for any particular action.

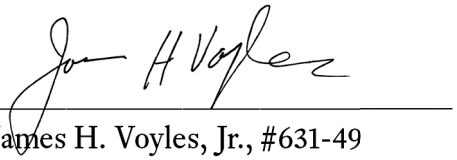
The United States Supreme Court recently addressed some of the constitutional implications of this problem, as Tanoos's opening brief cited, in *McDonnell v. U.S.*, 136 S.Ct. 2355 (2016). The holding of that case is critical because the charging information in this case runs afoul of that rule. A jury must be able to "determine whether the public official agreed to perform an 'official act' at the time of the quid pro quo." *Id*. at 2371 (emphasis added). The term "official act" must therefore be "defined with sufficient definiteness that ordinary people can understand what conduct is prohibited," and "in a manner that does not encourage arbitrary and discriminatory enforcement." *Id*. at 2373 (citations and quotations omitted).

The State's brief does not mention *McDonnell* – and maybe for good reason – this charging information cannot survive *McDonnell*. The charging information's use of the phrase "and/or continued business" should not be considered an official act that is sufficiently definite and in a manner that does not encourage arbitrary and discriminatory enforcement.

## CONCLUSION

For the foregoing reasons and for the reasons stated in Tanoos's opening brief, the judgment of the trial court should be reversed and the charges should be dismissed.

Respectfully Submitted,



James H. Voyles, Jr., #631-49
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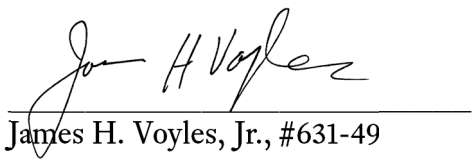
Tyler D. Helmond, #28850-49
**VOYLES VAIANA LUKEMEYER BALDWIN & WEBB**
211 N. Pennsylvania Street, Suite 2400
Indianapolis IN 46204
(317) 632-4463
(317) 631-1199 (fax)
jvoyles@voyleslegal.com
jlukemeyer@voyleslegal.com
thelmond@voyleslegal.com

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following parties of record by electronic filing on October 15, 2019:

Indiana Attorney General's Office
Indiana Government Center South
302 W. Washington Street, 5th Floor
Indianapolis IN 46204



James H. Voyles, Jr., #631-49