

STATE OF MARYLAND

v.

HELEN L. HOLTON

Defendant

IN THE CIRCUIT COURT

OF MARYLAND

FOR

BALTIMORE CITY

Case No.: 109209024

RECEIVED

SEP 14 2009

Criminal Div.
Circuit Court For
Baltimore City

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**DEFENDANT HOLTON'S MOTION TO DISMISS
COUNT II OF THE INDICTMENT**

Helen L. Holton, Defendant, by her attorneys, Joshua R. Treem, Nicholas J. Vitek, Richard C.B. Woods and Schulman, Treem, Kaminkow & Gilden, P.A., pursuant to Maryland 4-252(a), moves this Honorable Court to dismiss Count II of the indictment against Ms. Holton as the statute is unconstitutionally vague, and even if it is not unconstitutional, the class of persons the statute covers does not include a candidate.

ARGUMENT

I. Maryland Election Law § 13-202(a) Terms Are So Vague That People Of Common Intelligence Must Necessarily Guess As To Its Meaning And Differ As To Its Application Thereby Violating Due Process And Is Thus Unconstitutionally Void For Vagueness.

Because Maryland Election Law § 13-202(a) does not state what is meant by or who is responsible for ensuring that "campaign finance activity" is directed through a campaign finance entity, the statute is unconstitutionally vague. As a basic rule for statutory construction, the paramount objective is to ascertain and give effect to the intent of the Legislature. Harris v. State, 344 Md. 497, 510, 687 A.2d 970, 976 (1997). Where the language is "plain and free from ambiguity and expresses a definite and sensible meaning, no construction or clarification is needed or permitted." Comptroller v. Fairchild Industries, 303 Md. 280, 284, 493 A.2d 341, 343

(1985). In fact, the presumption when evaluating a statute is that the statute is valid. Galloway v. State, 365 Md. 599, 610, 781 A.2d 851, 857 (2001). A court will not find a statute unconstitutional if by any construction it can be sustained. Id. at 611. Nevertheless, a statute is not valid if it violates due process because it is unconstitutionally vague. Id. Vague penal statutes violate due process because “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); see also, Ashton v. Brown, 339 Md. 70, 88, 660 A.2d 447, 456 (1995). Importantly, a penal statute must “be sufficiently explicit to *inform those who are subject to it* what conduct on their part will render them liable to its penalties.” Williams v. State, 329 Md. 1, 9, 616 A.2d 1275, 1279 (1992) citing Connally v. General Const. Co., 269 U.S. 385, 391 (1926) (emphasis added). This is because “the requirement of a specific intent to do a prohibited act ... relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware.” Id. citing Screws v. United States, 325 U.S. 91, 101-02 (1945).

Where the terms are present, a “statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning.” Bowers v. State, 283 Md. 115, 125, 389 A.2d 341, 347 (1978). As such, a law is not unconstitutional simply because “it requires conformity to imprecise normative standard.” Eanes v. State, 318 Md. 436, 459, 569 A.2d 604, 614 (1990). Rather, the central question is “whether persons of common intelligence need reasonably guess at its meaning.” Id. Consequently, as a matter of due process, “a law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. Williams, 329 Md. at 8, 616 A.2d at 1278 citing Connally, 269 U.S at 391. As the Court of

Appeals announced, “[w]hen there is more than one reasonable interpretation of a statute, the statute is ambiguous.” Moore v. State, 388 Md. 446, 452, 879 A.2d 1111, 1115 (2005).

Vague laws offend several important values. Grayned v. City of Rockford, 408 U.S. 104, 107 (1972). First, a vague statute can violate the requirement of due process by containing terms that are vague, or by failing to include terms, such that a person is not provided with fair notice as to what is prohibited so that he or she may act accordingly. Id.; see also Bowers, 283 Md. at 122, 389 A.2d at 346. Second, laws must provide explicit standards for those who apply them. Id. citing Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). Thus, “a vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Grayned, 408 U.S. at 108-109. Lastly, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, as here, “it operates to inhibit the exercise of those freedoms ...[leading] citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Id. at 108 (internal quotation marks omitted); see also Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (stating that “it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”); see also, Galloway, 365 Md. at 617-618, 781 A.2d at 862 (stating that under Maryland precedent, whether the statute impinges upon First Amendment rights is a principle focused on standing. Thus, if a statute impinges on First Amendment protections, a defendant can challenge the validity of the statute even if it is constitutionally applied to his or her case. However, once standing is established, the criteria remain the same for non-First Amendment cases – fair warning and adequate guidelines). Here, the Maryland Election Law § 13-202(a) violates due process by failing to provide fair notice as to who can be

held accountable for prohibited conduct and by permitting for the discriminatory application of the statute.

a. The Omission Of The Class Of People The Statute Intends To Regulate Makes Maryland Election Law § 13-202(a) Unconstitutionally Vague Since A Person In Violation Of The Law Is Not Provided Notice As To Whether The Statute Includes Them In The Class Of Persons.

Maryland Election Law § 13-202(a) fails to define the class of persons that the statute intends to regulate. Maryland Election Law § 13-202(a)¹ states, in its entirety, “Prerequisite - Campaign finance activity- Unless otherwise expressly authorized by law, all campaign finance activity for an election under this article shall be conducted through a campaign finance entity.” “Campaign finance activity” is the subject of the sentence, where “campaign finance entity” is the direct object. Reduced to its basic elements, the statute mandates that a “campaign finance activity must use a campaign finance entity.” As the statute fails to define the class of people the statute intends to regulate, the question that remains is *who* is responsible for ensuring that campaign finance activities go through a campaign finance entity and, more importantly, whether that person is afforded sufficient notice under the due process requirements of the Constitution. As such, the statute is unconstitutionally vague.

“Campaign finance activity” is undefined in the code. “Campaign finance entity” is defined under §13-101(h) as “a political committee established under Title 13 of [the Election law].” A political committee requires a chairman and a treasurer. § 13-207(c). However, the statute imposes no duties or responsibilities on a candidate, which Ms. Holton was, beyond the duty to create a political entity. *Id.*, § 13-202(b). In fact, candidates are expressly precluded from

¹ The language of 13-202(a) was added in 2002 by the legislature and was intended to state a proposition that “is implicit in the totality of former Art. 33, Title 13.” Md. Legis 291 (2002) Maryland 2002 Session Laws Regular Session Ch. 291 Approved May 6, 2002.

serving as an officer for the campaign finance entities. See, § 13-215(b)(1) (“...a candidate **may not act (i) as the treasurer or subtreasurer of a campaign finance entity of the candidate; or (ii) with respect to any other campaign finance entity (1) as the campaign manager, treasurer or subtreasurer; or (2) in any other position that exercise general overall responsibility for the conduct of the entity.**”) (emphasis added).

Although the Election Law does not define “campaign finance activity,” Part IV of Title 13 of the Election Law is titled “Campaign Finance Activity and Records.” See Maryland Election Law §§ 13-218 to 222. Part IV does not impose any duty or responsibility upon candidates. See e.g., Maryland Election Law, Part IV entitled “Campaign Finance Activity and Records” (dealing with the duties of treasurers (§ 13-218), subtreasurer (§ 13-219), the requirement of a campaign entity to keep a campaign account (§ 13-220), and the requirement that a treasurer keep detailed records (§ 13-221)). Consequently, after reviewing the plain language of the statute, referring to the definition of the terms, as well as looking at the entire structure of the campaign finance law, Ms Holton, as a candidate would not be on notice that she could be imprisoned for a year and face a penalty of \$25,000 for failing to ensure that campaign finance activity go through a campaign entity. See, Bowers, 283 Md. at 125, 389 A.2d at 347. Rather, Ms. Holton would reasonably believe the exact opposite -- that the code specifically precludes her from having any role in campaign finance entities and that the duty to ensure that campaign finance activity go through a campaign finance entity rests with a treasurer or subtreasurer. By reviewing the list of prohibited acts, Ms. Holton, as a candidate, would reasonably determine that the only prohibited act specifically directed to her is that she “may not make a payment, contribution, or expenditure, or incur a liability to pay, contribute, or expend, from the candidate's personal funds any money or valuable thing...” Md. Election Law § 13-

602(c)(2). However, this imposes no duty to ensure that campaign finance activity is conducted through a campaign finance entity.

In fact, an astute scholar of Maryland Election Law would know that prior to 2002 the statute specifically made it “unlawful for any candidateto make any expenditure, to disburse or expend money or any other valuable things, for any purposes until the money or other valuable things, for any purpose until the money or other valuable things so disbursed or expended has passed through the hands of the treasurer.” Article 33, Election Code, Title 13 Campaign Finance § 13-205 (2002). However, in stark contrast, the *current* code does not make the disbursement or expenditure of money for any reason without passing through a treasurer by a candidate an unlawful activity. See e.g., Maryland Election Code (2009). Rather, the current code states only that “[a] person, to defray the costs of a campaign finance entity, may not directly or indirectly pay, give, or promise money or any other valuable thing to any person other than a campaign finance entity.” Md. Election Law § 13-602(a)(4). The obligation and limitation imposed rests with the payor and not with the candidate. Thus, the failure to act, by “a person,” is not criminal under the statute. Even the direction that funds not pass through a campaign finance entity, without a duty that requires that the person ensure such funds pass through a campaign finance entity, is not criminal since that person has not “pa[id], give[n], or promise[d] money or any other valuable thing to any person.” Id.

A review of the case law would not provide any guidance to a candidate that he or she could be found to be in violation of § 13-202(a). In fact, the case law would demonstrate that a candidate has no role or interest in a campaign finance entity and thus can not be held criminally responsible for the failure to ensure that campaign finance activity go through such an entity. In Cicoria v. State, 332 Md. 21, 629 A.2d 742 (1993), the State prosecuted a candidate for stealing

funds from a campaign finance entity. Id. at 27. There, the candidate argued that he was the owner of the campaign funds and thus could not be prosecuted for taking funds from the campaign finance entity. Id. at 33. The court noted that what was most revealing was, “the removal from the candidate’s hands of sole discretion for campaign funds.” The court held that it was the campaign finance entity, “rather than the candidate, that has the requisite possession or other interest in the [campaign funds].” Id. at 36 (internal quotations omitted). Consequently, the Court of Appeals stated, in clear and unambiguous terms, that the candidate has *no role or interest* in the campaign finance entity. Thus, instead of providing support for the argument that a candidate is responsible for ensuring that campaign finance activity be conducted through a campaign finance entity, the case law states that the candidate has no duty or role in the campaign finance activity or campaign finance entity.

As a result, to allow the prosecution to proceed would be to permit the prosecution of a person who is not covered by the statute. The statute, therefore, fails to be “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.” Williams, 329 Md. at 9, 616 A.2d at 1279. In short, because the “act of the legislature is so incomplete, vague, indefinite, or uncertain that persons of common intelligence must necessarily guess at its meaning and as to its application, it denies due process of law.” Williams, 329 Md. at 8, 616 A.2d at 1278 citing Grayned v. City of Rockford, 408 U.S. 104 (1972); Baggett v. Bullitt, 377 U.S. 360 (1964); Connally v. General Const. Co., 269 U.S. 385 (1926); compare with Todd v. State, 161 Md. App. 332, 868 A.2d 944 (2005) (defendant argued that the language in the statute which increased penalties for “life threatening injury” was unconstitutionally vague because it was undefined in the statute. The court held that the terms of the statute could be easily and fairly ascertained by reference to a dictionary and that leaving a

girl with severe head injuries met the definition); Bowers v. State, 283 Md. at 117, 389 A.2d at 344 (defendant argued that the terms “cruel or inhumane treatment” was unconstitutionally vague, and that the term “temporary care or custody” was too indefinite to inform of who came within the ambit of the statute. The court held that terms could be readily defined by reference to a dictionary and through case law).

b. The Omission Of The Class Of People The Statute Intends To Regulate, Makes Maryland Election Law § 13-202(a) Unconstitutionally Vague As It Permits The Discriminatory Application By Law Enforcement Authorities, Prosecutors, Judges And Juries.

In addition to being insufficiently explicit as to who is subject to the statute, the vagueness of Maryland Election Law § 13-202(a) permits the discriminatory application of the statute by law enforcement authorities, prosecutors, judges and juries. Grayned, 408 U.S. at 108-109; Bowers, 283 Md. at 122, 389 A.2d at 346. A statute that is vague and thereby permits the selective enforcement of the statute is unconstitutional. Id. There will not be a constitutional violation “merely because it allows for the exercise of discretion on the part of law enforcement and judicial officials.” Galloway v. State, 365 Md. 599, 616, 781 A.2d 851, 861(2001). Rather, only where the statute is “susceptible to irrational and selective patterns of enforcement [...] will [it] be held unconstitutional under the second arm of the vagueness principle.” Id. Because Maryland Election Law § 13-202(a) is, at the very least, unclear as to who can be held liable for its violation, the statute is “susceptible to irrational and selective patterns of enforcement...” See Id.

Although a vague statute need only be *susceptible* to selective patterns of enforcement, here, the State Prosecutor has demonstrated an actual selective pattern of enforcement in its prosecution of violations of § 13-202(a). The statute was enacted in 2003 and Councilwoman Holton is the only person who, to counsel’s knowledge, has been charged with violating § 13-

202(a) for failing to ensure that campaign finance activity be conducted through a campaign finance entity. Of the two reported cases referencing § 13-202, both deal with violations of subsection (b), which requires an individual to establish a political committee prior to filing a certificate of candidacy. Secretary of State v. McGucken, 244 Md. 70, 222 A.2d 693 (1966); Ross v. State Bd. of Elections, 387 Md. 649, 876 A.2d 692 (2005). A search of the Office of the Maryland State Prosecutor website returns no instances of prosecution for violations of § 13-202(a) except those of Councilwoman Holton. Office of the Maryland Prosecutor, <http://www.ospmd.org/> (last visited Sept. 9, 2009). Thus, upon information and belief, the *only* person to have *ever* been prosecuted for violating § 13-202(a) is Councilwoman Holton.

Moreover, even Ronald Lipscomb and John Paterakis, the individuals who are charged with Councilwoman Holton for failing to not ensure that campaign finance activity pass through a campaign finance entity, have not been charged with violating § 13-202(a). The indictments of both men on conspiracy charges include references to § 13-202(a), but neither man is charged with the substantive offense of violating § 13-202(a). Importantly, the indictment does not allege that Councilwoman Holton has a special duty to ensure campaign finance activity pass through a campaign finance entity. Indictment, Count II. Rather, it alleges that she:

“knowingly and willfully did conduct campaign finance activity other than through a campaign finance entity by requesting that an expenditure be made directly to a third party without having the money pass through the hands of the treasurer...” Id.

However, as discussed above, the statute imposes no duty upon a candidate to ensure that such funds pass through a campaign finance entity. Consequently, the decision to charge Councilwoman Holton does not appear to be motivated by a close analysis of the duties of a candidate and her responsibilities under § 13-202(a), but rather, an effort to find a statute under which to charge Councilwoman Holton following the dismissal of the previous indictment.

For example, Mr. Paterakis was charged in a two-count indictment. The first count alleged conspiracy and the second alleged the willful and knowing violation of Maryland Election Law § 13-604(a)(4)(i). Mr. Paterakis was *not* charged with violating § 13-202(a). This is true even though the charges against Mr. Paterakis stemmed from the same investigation, center on the same facts and were, in fact, announced in the same press release by the State Prosecutor. Mr. Paterakis was charged with violating § 13-604(a)(4)(i) which criminalizes “a person” from defraying the costs of a campaign finance entity by giving anything of value unless it first went through a campaign finance entity. *Id.* However, Councilwoman Holton could not have violated this statute since she never gave “anything of value.” Thus, the State could not charge her with violating § 13-604(a)(4)(i). Seeking to find some law to proceed against Ms. Holton, the State charged her with violating § 13-202(a) – the proverbial square peg in a round hole.² As noted above, the previous version of the statute criminalized a candidate who made “any expenditure, to disburse or expend moneyuntil the money...has passed through the hands of the treasurer.” Article 33, Election Code, Title 13 Campaign Finance § 13-205 (2002). However, the legislature chose to decriminalize such conduct and did not include a comparable mandate in the current version of the code. See Maryland Election Law.

Regardless of the purposes of the State Prosecutor, the issue centers not on the *actual* discriminatory pattern of enforcement, but rather whether the lack of precision in the statute

² Interestingly, in its investigation of Councilwoman Holton, the State learned of a similar violation as that alleged against Holton. In Ronald Lester’s grand jury testimony, he stated that Mr. Lipscomb’s company had paid for a poll for Jill Carter who was running for mayor against Sheila Dixon. See Ronald Lester Grand Jury Testimony, page 1-4. Mr. Lester testified that he paid approximately \$1,600.00 for that poll. *Id.* at 4. The individual contribution limit for a candidate is \$4,000.00. Importantly, the check was produced by Jill Clark’s campaign manager who issued a check for \$8,750.00, which was not drawn on the campaign’s account, but was instead a check from Mr. Lipscomb’s company. *Id.* Mr. Lester testified that he, “thought that the campaign was to pay me but then [the campaign manager] showed up with this check from [Mr. Lipscomb’s company].” *Id.* at 5-6. However, the State Prosecutor never filed charges against Jill Carter or anyone in her campaign for conducting “campaign finance activity” outside of a campaign finance entity.

makes it *susceptible* to selective patterns of enforcement. Here, there is *no* direction to prosecutors, judges or juries as to who is subject to the statute or what is meant by campaign finance activity. Consequently, the decision to charge one individual over another rests *entirely* within the discretion of the prosecutor. If the duty resided only with those responsible for campaign finance entities, a reasonable supposition, then that would restrict prosecution only to the officers of such entities such as treasurers and subtreasurers. Here, however, the essential terms as to who can be prosecuted are absent from the statute, thereby making the statute susceptible to selective patters of enforcement. Moreover, the omission of a readily accessible definition of campaign finance activity “delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis” as to what constitutes such activity. See, Grayned, 408 U.S. at 10-109. Thus, a defendant is left with no greater definiteness of what conduct could potentially expose him to criminal liability than the now cliché of “it cannot be defined, but a prosecutor will know it when he sees it.” See e.g., Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Justice Stewart stating, in reference to whether a film at issue was obscene, “I know it when I see it.”)

II. A Candidate Is Not A Class Of Persons Who Is Regulated By Election Law § 13-202(a), And Thus A Candidate Cannot Be Held Accountable For Violating The Section.

Even if the Court believes that Maryland Election Law § 13-202(a) is not unconstitutionally vague, the statute does not impose liability upon a candidate. Although this argument is interposed in Part I of Councilwoman Holton’s motion above, it is important to distinguish between whether a candidate would have reasonable notice as to whether she is subject to the statute, versus the fact that she is not subject to the statute at all. Consequently, the two issues are interrelated but nevertheless separate.

Without merely restating the issues presented above, a candidate is not subject to §13-202(a). First, a candidate is prohibited from having any duty or responsibilities with a campaign finance entity. See e.g., Cicoria v. State, 332 Md. at 36, 629 A.2d at 750 (stating that a candidate has no interest in a campaign finance entity); § 13-215(b)(1) (“...a candidate may not act (i) as the treasurer or subtreasurer of a campaign finance entity of the candidate; or (ii) with respect to any other campaign finance entity ... **in any other position that exercise general overall responsibility for the conduct of the entity.**”) (emphasis added). Additionally, although “campaign finance activity” is undefined, the overall statutory framework of the Maryland Election Law clearly establishes that the responsibility for such activity falls to treasurers and subtreasurers. See e.g., Maryland Election Law, Part IV entitled “Campaign Finance Activity and Records” (dealing with the duties of treasurers (§ 13-218), subtreasurer (§ 13-219), the requirement of a campaign entity to keep a campaign account (§ 13-220), and the requirement that a treasurer keep detailed records (§ 13-221)). Consequently, there is no affirmative duty on candidates to ensure that campaign finance activity go through a campaign finance entity and absent such a duty there can be no criminal liability. As such, Councilwoman Holton, as a candidate and not an officer of the campaign finance entity cannot be subject to § 13-202(a).

Conclusion

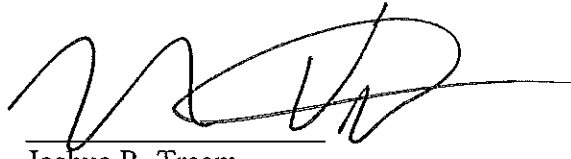
Maryland Election Law § 13-202(a) violates due process by failing to provide fair notice as to who can be held accountable for prohibited conduct and by permitting for the discriminatory application of the statute. In short, by not stating what is meant by or who is responsible for ensuring that “campaign finance activity” be directed through a campaign finance entity, the statute is unconstitutionally vague. As a candidate, Ms. Holton is provided no fair notice that her alleged action of requesting that funds not go through a campaign entity would

subject her to criminal penalties. Moreover, a careful analysis of the statute, its construction and the case law would not provide notice to Ms. Holton that she could be subject to criminal penalties for her actions.

In addition, the failure to include who is responsible for ensuring that campaign finance activity goes through a campaign finance entity makes it susceptible to selective patterns of enforcement. Here, Ms. Holton is the only person to have ever been accused of violating § 13-202(a) and even her co-defendants have not been charged with a substantive violation of the statute. Rather, it appears, that the State, finding that it could not find a substantive violation of the Maryland Election Law, selectively brought a prosecution against her for violating § 13-202(a). Because Count II of the indictment is unconstitutionally vague, it must be dismissed.

However, even if the Court finds that § 13-202(a) does not violate due process, the statute does not impose liability upon a candidate. The case law states that a candidate has no role or interest in a campaign finance entity. Moreover, an analysis of the overall construction of the Maryland Election Law establishes that a candidate has no affirmative duty or legal duty to ensure that campaign finance activity goes through a campaign finance entity, and thus cannot be held criminally responsible for its violation. Because Count II of the indictment does not hold a candidate criminally responsible, it must be dismissed.

Respectfully submitted,

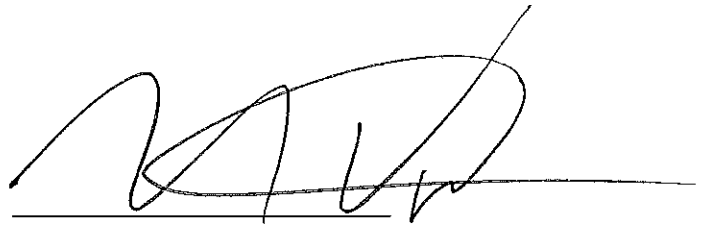


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September, 2009, a copy of *Defendant Holton's Motion to Dismiss Count II Of The Indictment* was sent via first class mail, postage paid to:

Robert Rohrbaugh, State Prosecutor
Thomas M. McDonough, Deputy State Prosecutor
Hampton Plaza, Suite 410
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