

STATE OF MARYLAND

*

IN THE CIRCUIT COURT

*

OF MARYLAND

v.

*

FOR

HELEN L. HOLTON

*

BALTIMORE CITY

Defendant

*

Case No.: 109209024

* * * * *

RECEIVED
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BALTIMORE, MARYLAND
OCT 14 2019

**RESPONSE TO STATE’S OPPOSITION TO DEFENDANT’S
MOTION TO DISMISS COUNT II OF THE INDICTMENT**

Helen L. Holton, Defendant, by her attorneys, Joshua R. Treem, Nicholas J. Vitek and Schulman, Treem, Kaminkow & Gilden, P.A., respectfully submits a response to the State’s Opposition to Defendant’s Motion to Dismiss Count II of the Indictment.

ARGUMENT

A. The State’s Response Demonstrates The Attendant Dangers Of A Vague Statute That Permits The State To Create Their Own Interpretation Of The Law.

The unadulterated arrogance of the State in its argument in opposition to Ms. Holton’s motion to dismiss Count II of the indictment demonstrates the very need for due process protection for criminal statutes. The State cannot be trusted to apply the campaign finance laws other than in an “ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” See e.g., Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). Throughout its motion, the State argues without equivocation that the “statute in question is clear and unambiguous.” Id. at 8. The State argues that any unclear terms can be readily supplied by the defendant’s dictionary, and that the statute uses “straightforward language [that is] easily understood and applied by persons of ordinary intelligence.” Id. at 6.

The State is, at a minimum, disingenuous.

The State provides the Court copies of docket entries from a 2007 case where the State prosecuted several individuals for violating § 13-202(a). State Response, Appendix I. The State claims that the earlier prosecution negates any appearance of impropriety in charging Ms. Holton for similar violations. State Response, Page 9. The State claims that “[s]pecifically, [a group was] charged and prosecuted for alleged violations of § 13-202(a) within the last several years,” and quoted the “relevant portions” of the case for the Court. *Id.* Apparently, the State fails to appreciate Ms. Holton’s point. The issue with selective prosecution is not whether the State *has* selectively prosecuted, but whether the statute is so vague that the State *could* selective prosecute individuals. As the Court of Appeals stated, a statute is unconstitutionally vague where the statute is “**susceptible** to irrational and selective patterns of enforcement ... [it] will be held unconstitutional under the second arm of the vagueness principle.” Galloway v. State, 365 Md. 599, 616, 781 A.2d 851 (2001) (emphasis added).

In providing the Court details of the 2007 prosecution and the “relevant portions”, the State tells us more by what it does *not* say than by what it does and reveals the very susceptibility of irrational and selective patters of enforcement that constitute one of the vices of the statute. Although the State offers these 2007 prosecutions as evidence that there is no valid claim of selective prosecution, what the State does not say is that the defendants were found not guilty after a bench trial before Judge Vincent Femia, who at the conclusion of the trial, noted the “uncertainty in this area of the law” and found the statute to be “**very, very ambiguous.**” Laura McCandlish, Carroll GOP Club Officers Are Cleared Of Violations, Campaign Finance Law Called “Ambiguous”, Baltimore Sun, June 5, 2007 at 3B (emphasis added) (Exhibit I, attached).

The State apparently charged each defendant with one count of violating § 13-202(a)

because each defendant “unlawfully did engage in campaign finance activity other than through a campaign finance entity.”¹ After the court acquitted the defendants of the charges because the State failed to prove that the defendants acted with criminal intent, the court commented that the statute was “very, very, ambiguous.” *Id.* State prosecutors, echoing the judge, urged legislators to clarify “loopholes” in the statute. *Id.* The Maryland State Prosecutor himself stated that “[i]t’s now up to the General Assembly, if they want to take action.” *Id.* Since only time has passed in the two year interval, it is hard to comprehend what made a statute that was ambiguous to a court, and, which according to the prosecutors using it in 2007 had “loopholes” that needed clarification, so clear and unambiguous to those same prosecutors in 2009. There has been no legislative amendment clarifying the statute, and no caselaw to provide guidance to the State. Yet, the State now claims that the statute is so clear that anyone can understand it.

The State will argue, as it must, that the prosecution in 2007 for violations of § 13-202(a) is factually fundamentally different than the prosecution of Ms. Holton today. If the State claimed that § 13-202(a) applied only to candidates, that argument might have some validity. However, the State does not claim that § 13-202(a) applies only to candidates. Rather, the State argues that §13-202(a) has breathtaking scope to include “**all persons.**” State Reply, Page 4, (emphasis in original). Given the expansive scope that the State argues the statute has, and the power it has to enforce violations of § 13-202(a), the failure to apprise this Court about a similar case where it *knows* a sister court noted that the scope of the § 13-202(a) was ambiguous, demonstrates the attendant dangers of vague statutes. The only check the State offers is an implicit “trust us.” However, to date, trust us, is not a legal justification to a vague statute.

¹ Tellingly, the State initiated the 2007 prosecutions in the district court, once again demonstrating through its own actions that the district court is the forum where such charges should commence.

B. The Ambiguity Of § 13-202(a) Is Not Cleared By The Mere Requirement That An Individual Act “Knowingly” And “Willfully.”

The State claims that because § 13-603, which criminalizes the entire Maryland Election Law, includes the terms “knowing and willful,” a violation of any section of that law is “unquestionably...a classic specific intent offense.” State Reply, Page 6. As such, they argue that there is no danger that an individual who acts in good faith can be prosecuted. *Id.* However, there is no evidence that the inclusion of terms “knowing and willful” will transform a general *mens rea* offense into a specific intent crime. The State offers no caselaw for this “unquestionable” proposition. Although a requirement that the State prove beyond a reasonable doubt that Ms. Holton had a specific intent to violate § 13-202(a) would be beneficial to the defense, it is unclear whether the inclusion of such terms “unquestionably” creates a specific intent offense. Consequently, the ambiguity surrounding the intent required for the offense serves to only further illustrate the attendant dangers of a vague statute.

Because § 13-202(a) itself is not a criminal statute, the only direction as to the intent required for the offense is found in §13-603. That statute states that if a person “knowingly and willfully violates a provision of this title [he or she] is guilty of a misdemeanor .” Maryland Election Law § 13-603. “Knowing and willfully” is not statutory defined. Neither is the phrase defined in Maryland Criminal Pattern Jury Instructions. Honorable Irma S. Raker, et. al., Maryland Criminal Pattern Jury Instruction (MCPJI) (updated 2007).

Specific intent is defined as “not simply the intent to do an immediate act, but the ‘additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result.’” Chow v. State, 393 Md. 431, 464, 903 A.2d 388, 408 (Md. 2006) (citations omitted). The classic example of general intent is that of an assault, which requires

only the general intent to strike a blow. Id. Thus, an individual need not intend to injure the other person, or be motivated by any ill will. For specific intent, the oft used example is that of first degree homicide, which requires not only the general *actus rea* of striking the blow, but also the additional, more specific intent, of killing the other person. Id. Burglary is also a specific intent offense. Thus a defendant would need not only the intent to have the general *actus rea* intent of breaking and entering into a dwelling, but do so with the specific intent to commit a crime once inside the dwelling. See MPJI 4:06 (burglary in the first degree). Here, a violation of the statute must be “knowing and willful” but it does appear to require a more specific intent to “accomplishing a very specific and more remote result.” Chow v. State, 393 Md. 431, 464, 903 A.2d 388, 408 (Md. 2006)

The Court of Appeals in Chow cited with approval a California distinction between general and specific intent. Id. at 464-5 citing People v. Hood, 1 Cal.3d 444, 82 Cal.Rptr. 618, 462 P.2d 370, 378 (1969). There, the California Court stated that:

When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. Id.

Consequently, it is unclear that the mere inclusion of “knowing and willful” makes a violation of § 13-202(a) a specific intent crime. Adopting the distinction in Chow, it does appear that the statute includes a reference to the defendant’s “intent to do some further act or achieve some additional consequence.” Rather, the requisite intent appears only to do the prohibited act, and that such act be knowing and willful.

In a 1977 case, the Court of Appeals determined whether the inclusion of “willfully” in a

statute made a violation of that crime a specific intent crime. McBurney v. State, 280 Md. 21, 29, 371 A.2d 129, 134 (Md. 1977). There, the Court held that the inclusion of such a term does not impose a specific intent. Id. The Court held that the use of “willfully” in the statute “means only intentionally or purposely as distinguished from accidentally or negligently.” Id. In contrast, the Court held that for specific intent, there must be a requirement that the intent be that the “acts were ... an actual impropriety, that is with a bad purpose or without justifiable excuse.” Id. As such, § 13-202(a) is ambiguous as whether it is a specific intent crime. This ambiguity certainly does *not* “eliminate[] the danger that the statute will be a trap for those who act in good faith.” State Reply, Page 6 (internal quotation marks omitted).

C. The Inclusion Of “All Persons” Is Patently Overbroad And Violative Of Constitutional Protections.

The State’s argument that § 13-202(a) includes all persons is an unconstitutional interpretation of the statute as such an interpretation would violate the First Amendment without a compelling state interest. Section 13-202(a) clearly implicates the First Amendment. See State v. Brookins, 380 Md. 345, 363, 844 A.2d 1162, 1173 (2004) (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976) for the proposition that “contribution and expenditure provisions regulate[] “in an area of the most fundamental First Amendment activities.”) “When a law burdens core political speech, [the Court shall] apply ‘exacting scrutiny, and [will] uphold the restriction only if it narrowly tailored to serve an overriding state interest.” Id. at 355 citing McIntyre v. Ohio Elections Comm’n, 514 U.S. 344, 347 (1995).²

² In Brookins the Court of Appeals found § 13-209 to be unconstitutionally overbroad. In addition, the constitutionality of campaign finance laws is at issue before the Supreme Court in Citizens United v. Federal Election Com’n, 129 S.Ct. 2893, 2009 WL 1841614 (2009). In Citizens United, the Supreme Court docketed a case for re-argument on the issue of whether two Supreme Court cases restricting campaign limitations should be overturned. Id. Although the direct focus is on contributions by corporation, the argument centered on corporations as “people.” As a result, a ruling by the Supreme Court may apply broadly to all current campaign finance laws. For example, the D.C. Court of Appeals recently ruled that the “First Amendment, as interpreted by the Supreme

The State in its response appears to offer two arguments as to who is subject to the statute. First, §13-202(a) applies to candidates and that second, it applies to all people. In support of the former, the State notes that it is a prospective candidate who is required to establish an “authorized political committee.” State Reply, Page 4. The State then seemingly skips a logical step and proclaims that “this section applies to **all persons** who engage in such campaign finance activity.” Id. (emphasis in original). Strangely, at one point, the State argues that the statute “clearly states, in unambiguous terms, the legislative intent that all **Maryland citizens** [can be found guilty of violating § 13-202(a)]” See State Reply, Page 6 (emphasis added). The State then jumps back to arguing that the statute is intended to apply to a candidate by specifically noting that § 13-102 which permits independent expenditures by an individual does not apply to candidates. Id.

Although the argument is somewhat obscured, it appears the State is suggesting that the exclusion of candidates in § 13-102(2), which permits an individual, but not a candidate, “to make an expenditure of personal funds to purchase campaign material,” is proof of legislative intent to *include* “candidates” for violations of § 13-202(a). It is unclear how this logical leap is made. Although the State is correct that § 13-102 specifically excludes “candidates,” the more reasonable interpretation of the exclusion is that it makes the statute consistent with statutes regulating money that candidates spend on behalf of their own campaigns. For example, § 13-231(b) requires that contributions by a candidate pass through “the treasurer of the entity” and “be reported.” Obviously, if a candidate was included in §13-102, then a candidate’s personal money spent on campaign materials would be exempted from the Election Law. However, § 13-231 states that if a candidate spends his or her personal money, then such funds are contributions

Court, protects the right of individual citizens to spend unlimited amounts to express their views about policy issues and candidates for public office.” Emily’s List v. Federal Election Com’n, ___ F.3d ___, 2009 WL 2972412 (D.C.C.A. Sept. 18, 2009).

and, like all contributions, they shall be accounted for. How this imposes a mandate upon candidates to ensure that all campaign finance entity pass through a campaign finance entity is unclear. If the State's argument is merely that a candidate has statutory duties and expectations, then there is no argument. The argument is that § 13-202(a) does not impose a duty or expectation on candidates. For that, the State has provided no response.³

Although the State in drafting its reply attempts to intimate that a candidate is responsible for violations of § 13-202(a), the State, having no support for that argument, reverts to the claim that the statute refers to "all persons." State Reply, Page 4. In her motion to dismiss Count II of the indictment, Ms. Holton did not argue that the statute included "all persons" since it appeared as a matter of basic law that applying § 13-202(a) to all persons is patently overbroad. See e.g., Brookins, 380 Md. at 363. However, in the State's rush to formulate an argument that would save Count II from dismissal by arguing for the broadest application of the statute, the State has advanced an interpretation that implicates a fundamental constitutional right, but has offered *no* evidence to support its burden. This is because it is the State that "has the burden of showing that there is a sufficiently compelling reason, unrelated to the content of the speech, for enacting the legislation." Id. at 356 citing Burson v. Freeman, 504 U.S. 191, 196-198 (1992). It is the State that "must prove that the statute is narrowly tailored to effectuate that compelling interest and is the least restrictive means to further the articulated interest." Id. The State offers no such evidence.

³ For example, the State in its reply quotes the entire statute for § 13-103, entitled "Summary of campaign finance law; forms." State Reply, Page 5. The State notes, in bold, that a candidate must be provided with "each form the candidate is required to file under this title." Id. The logical leap would be that a candidate is provided with forms that require that he or she ensure that campaign finance activity pass through a campaign finance entity. Although this would not provide definitive proof of a duty on behalf of a candidate, it would provide *some* support. Yet, the State offers *no* such support. They describe *no* such forms. The lack of forms for a candidate is consistent with the statutory framework which relegates the duty and responsibilities of a campaign finance entity to the treasurer and subtreasurer. § 13-215(b); § 13-218; § 13-219; §13-221.

The State in arguing its position seems unaware that its interpretation implicates the First Amendment, and that the constitutional protections of the First Amendment are at “its fullest and most urgent application to speech uttered during a campaign for political office.” *Id.* at 354. Yet, it is the State that asks this Court to trust its interpretation and application of § 13-202(a) and its enforcement. Instead of advancing a narrowly tailored statute to effectuate a compelling state interest, the State advances an argument of breathtakingly broad application. The State imposes *no* restriction on this power. Rather, the definition that the State offers is that “any specific action or pursuit” used for “the financial management” of “a series of organized, planned actions for a particular purpose, as for electing a candidate” and that does not go through a campaign finance entity constitutes a crime. See State Reply, Pages 6-7.

D. The Dictionary Does Not Define “Campaign Finance Activity” In § 13-202(a).

The State claims that any undefined terms in §13-202(a) can readily be defined by reference to a dictionary. State Reply, Page 6. The State provides dictionary definitions for campaign, finance or activity. However, the issue is not the definition of campaign, finance and activity. If this were the case, then *no* statute would ever be unconstitutionally vague since *every English word is in a dictionary*. The meaning of “substantive,” “due” and “process” can all be defined in the dictionary, but the phrase “substantive due process” cannot be found in Webster’s. Thus, the issue is not whether campaign, finance and activity can be defined by a dictionary. The issue is whether “campaign finance activity” is defined in the dictionary or whether it is commonly used as a phrase such that the meaning can be readily determined. Here, the dictionary does not provide a definition for “campaign finance activity.” Even the State’s reply provides shifting, imprecise definitions of what is meant by “campaign finance activity.” First,

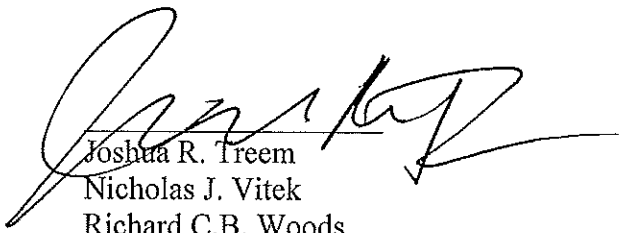
the State provides what it believes the dictionary defines the terms as “any specific action or pursuit” used for “the financial management” of “a series of organized, planned actions for a particular purpose, as for electing a candidate.” State Reply, Page 7. The State then claims that campaign finance activity “refers to those financial activities in connection with an election lawfully engaged in only by and reported by campaign finance entities; that is, “contributions” and “expenditures.” Id. The State then goes on to claim that the definition requires that “a person may not *collect* contributions or *expend* funds to promote or assist in the promotion of the success or defeat of a candidate, political party, or question at an Election.” Id. at 8 (emphasis added) (internal quotation marks omitted). This last definition offered by the State is the definition that the Legislature **omitted** in the most recent version of the Election Law. See Article 33, Election Code, Title 13 Campaign Finance § 13-205(2002). Thus, in the space of three paragraphs the State provides the Court with three *different* definitions of “campaign finance activity.”

Conclusion

As is clear from the State’s reply, § 13-202(a) is unconstitutionally vague. The State cannot even provide a coherent defense of the statute nor provide a consistent definition of the terms of the statute. The state claims that there are *three* different classes of people subject to the statute – candidates, or people, or just the people of Maryland. The state provides this Court with *three* different definitions of what is meant by “campaign finance activity”, one of which was expressly *excluded* from the statute in 2003. Lastly, in an attempt to claim that it has not selectively prosecuted Ms. Holton, the State provides copies of docket entries where it claims it prosecuted individuals for violating § 13-202(a). Yet, what the State does not tell the Court is that those defendants were acquitted because the Court determined that the statute was

ambiguous. If there was any question as to the danger of an imprecise definition of a statute, the Court need look no further than the State's reply.

Respectfully submitted,

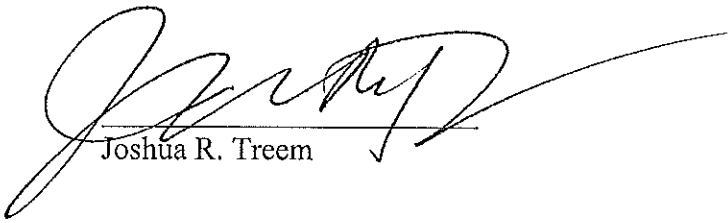


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2009, a copy of the foregoing *Response to State's Opposition to Defendant'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
300 East Joppa Road
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EXHIBIT 1

6/5/07 Balt. Sun 3B
2007 WLNR 10466322

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June 5, 2007

Section: Local

CARROLL GOP CLUB OFFICERS ARE CLEARED OF VIOLATIONS
CAMPAIGN FINANCE LAW CALLED 'AMBIGUOUS'

sun reporter
Laura McCandlish

Two officers of the Carroll County Republican Club Inc. were acquitted of campaign finance violations yesterday in Carroll County Circuit Court.

Club President Scott Hollenbeck, 43, of Westminster and treasurer **Suzanne Primoff**, 56, of Woodbine and Loxahatchee, Fla., had been charged with illegally spending campaign funds on ads endorsing county commissioner candidates in September's Republican primary, according to the November lawsuit filed by the state prosecutor's office.

The political club - formed a month before the primary - did not register as an official political action committee or file financial disclosure reports with the state, the lawsuit stated.

While political committees generally have to register and file financial reports with the state, the law is unclear on whether a political club has to disclose its campaign financial activity, election officials have said.

Judge Vincent J. Femia said the state failed to prove Hollenbeck and Primoff acted with criminal intent by engaging in campaign finance as an unregistered club.

"Given the uncertainty in this area of law, this organization cannot be required to form as a political committee," said Femia, a retired Prince George's County Circuit Court judge brought in after Carroll judges recused themselves from the case. "I find this law is very, very ambiguous."

State prosecutors said legislators should clarify some of these loopholes.

"It's now up to the General Assembly, if they want to take action," state prosecutor Robert A. Rohrbaugh said

after the verdict.

South Carroll Del. Susan W. Krebs, a Republican, said she hoped to redraft a bill, first introduced last spring, that would prohibit political clubs from engaging in campaign finance without forming an affiliated political action committee.

Defense attorney Richard F. Boddie cited another unregistered political group that was not penalized for sponsoring ads for a slate of Carroll County commissioner candidates before the Republican primary in 2002.

State election officials recommended, but did not require, the Responsible Republicans of Carroll County LLC to register as a political action committee. The state did not file charges.

The Responsible Republicans of Carroll County had campaigned against Ed **Primoff**, **Suzanne Primoff's** husband, a conservative Republican county commissioner candidate who lost in the 2002 primary.

The state prosecutor's office said the Carroll County Republican Club had \$23,050 in a bank account, including \$13,000 in contributions from the Primoffs and \$5,000 from Hoby Wolf, a club member. The money funded ads in local papers that attacked the incumbent commissioners and endorsed a conservative slate of GOP challengers.

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---- INDEX REFERENCES ---

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