SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH,	: Docket No. 2154 MDA 2012
Appellee,	:
v.	: Trial Court Docket No.
	: CP-22-CR-4272-2009
ANNAMARIE PERRETTA-ROSEPINK	: (Dauphin County)
Appellant	:

BRIEF OF APPELLANT, ANNAMARIE PERRETTA-ROSEPINK

Appeal from the May 23, 2012 Sentencing Order of the
Dauphin County Court of Common Pleas
Docket # CP-22-CR-4272-2009

Michael O. Palermo, Jr., Esquire
Attorney for Appellant
3300 Trindle Road
Camp Hill, PA 17011
(717) 635-9591
Supreme Court I.D.93334

Pennsylvania Office of
Attorney General
16th Floor – Strawberry Sq.
Harrisburg, PA 17120
For Appellee, Comm. of PA

TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION

This case is within the jurisdiction of the Superior Court of Pennsylvania in that it is an appeal from a final order of a lower court and not within the original jurisdictional confines of the Supreme Court of Pennsylvania or Commonwealth Court. *See* Pa.R.C.P. 341.

TABLE OF CITATIONS

PAGE(S)

CASES

STATUTES

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court 's standard of review on the constitutional questions raised in this brief are as follows:

> As the constitutionality of a statute is a pure question of law, our standard of review is *de novo* and our scope of review is plenary. Moreover, we presume that statutes are constitutional and require those challenging the constitutionality of a statute to demonstrate that it clearly, plainly, and palpably violates the constitution. Although we must presume that the legislature does not intend to violate the constitution, we do not invoke that presumption where the language is clear. Our rules of statutory construction provide, "[w]hen the words of a statute are clear and free from all ambiguity, ***the letter of it is not to be disregarded under the pretense of pursuing its spirit***." 1 Pa. C.S.A. §1921(b). (Emphasis supplied). Moreover, "[w]ords and phrases shall be construed according to the rules of grammar." 1 Pa. C.S.A. §1903, *Commonwealth v. Omar*, 981 A.2d 179, 185 (Pa. 2009).

When determining questions of sufficiency of the evidence to support a conviction, the following standard governs this Court 's review:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. *Commonwealth v. Karkaria*, 625 A.2d 1167 (Pa. 1993). Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. *Commonwealth v. Santana*, 333 A.2d 876 (Pa. 1975). When reviewing a sufficiency claim,

> the Court is required to view the evidence in the light most favorable to the verdict winner giving prosecution the benefit of all reasonable inferences to be drawn from the evidence. *Commonwealth v. Chambers*, 599 A.2d 630 (Pa. 1991). However, while reasonable inferences must be drawn in the Commonwealth's favor, the inferences must flow from facts and circumstances proven in the record, and must be of "such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt. *Commonwealth v. Clinton,* 137 A.2d 463, 466 (Pa. 1958). The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fall even under the limited scrutiny of appellate review.

Commonwealth v. Robinson, 817 A.2d 1153, 1158 (Pa. Super. 2003), citing *Commonwealth v. Scott,* 597 A.2d 1220, 1221 (Pa. Super. 1991).

Because Perretta-Rosepink challenges the trial Court's admission of evidence regarding rent payments for the Beaver Fall's office, the admission of that evidence is reviewed by this Court under the abuse of discretion standard. *Commonwealth v. Johnson*, 42 A.3d 1017, 1027 (Pa. 2012).

In reviewing a grant to amend an *Information*, the Superior Court must determine whether the Defendant was fully apprised of the charges against her, whether the same basic facts and elements were present in the original information and the amended information, whether the Defendant was placed on timely notice regarding her

alleged criminal conduct, and whether prejudice to the Defendant resulted from the amendment. *Commonwealth v. Picchianti*, 600 A.2d 597, 599 (Pa. Super. 1991).

The claims relating to restitution are reviewed under a different standard: "An appeal from an order of restitution based upon a claim that a restitution order is unsupported by the record challenges the legality, rather than the discretionary aspects, of sentencing. 'The determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary.'" *Commonwealth v. Atanasio*, 997 A.2d 1181, 1182-1183 (Pa. Super. 2010) (citations omitted). *See, also, Commonwealth v. Stradley*, 2012 Pa. Super. 162, 2012 WL 3265097 (filed August 13, 2012).

ORDERS IN QUESTION

Annamarie Perretta-Rosepink appeals from the Judgment of Sentence imposed on May 23, 2012, which became final when her Post Sentence Motions were denied and the Memorandum Opinion and Order of Restitution of November 8, 2012 (RR. 8-11). The pertinent portions of the Sentencing Order of Court and the Order of Restitution are as follows:

ORDER OF COURT AT NO. 4272 CR 2009

AND NOW, May 23, 2012, defendant is sentenced to

AS TO COUNT 1 (Conflict of Interest)

__X__ Intermediate Punishment 48 months, 1st 9 months on electronic Monitoring, $250.00 fine.

AS TO COUNT 2[1] (Theft by Unlawful Taking)

_X_ 9 months electronic monitoring concurrent with Count 1.

AS TO COUNT 5 (Misapplication of Entrusted Property)

_X_ 9 months electronic monitoring concurrent to Count 1

AS TO COUNT 6 (Conspiracy)

_X_ 9 months electronic monitoring concurrent to Count 1

By the Court: Bratton, J.

[1] Counts 3 and 4 merged for Sentencing purposes.

COMMONWEALTH OF PENNSYLVANIA:		IN THE COURT OF COMMON PLEAS, DAUPHIN COUNTY, PENNSYLVANIA
v.	:	Criminal
ANNAMARIE PERRETTA-ROSEPINK,	:	
Defendant.	:	No. 4272 CR 2009

ORDER

AND NOW, THIS 8TH day of November, 2012, following a restitution hearing as requested by counsel and in accordance with the foregoing memorandum opinion, Defendant Annamarie Perretta-Rosepink is hereby ORDERED to pay to the Pennsylvania Department of Community and Economic Development, restitution in the total amount of $116,615, which is itemized as follows:

Beaver Falls Office Rent -Counts 1, 2, 3, 4, 5, 6	$94,915
Midland Office Rent - Counts 1, 2, 3, 4, 5, 6	$21,700

All restitution at this docket shall be joint and several with Mrs. Perretta-Rosepink's co-defendant, Michael Veon, at criminal docket 4274 CR 2009.

BY THE COURT:

Bruce F. Bratton, J.

STATEMENT OF THE QUESTIONS INVOLVED

I. WHETHER THE PENNSYLVANIA CONFLICT OF INTEREST LAW IS UNCONSTITUTIONALLY VAGUE ON ITS FACE, AND WHETHER THE TRIAL COURT IMPROPERLY EXPANDED THE DEFINITION OF, AND AS APPLIED IN THIS CASE, "PRIVATE PECUNIARY INTEREST" TO INCLUDE INTANGIBLE POLITICAL GAIN, THEREBY THREATENING THE CONSTITUTIONAL RIGHTS OF ALL ELECTED OFFICIALS IN PENNSYLVANIA.

Answered in the negative in the Court below.

II. WHETHER THE TRIAL COURT IMPROPERLY PERMITTED THE COMMONWEALTH TO AMEND THE CRIMINAL INFORMATION AFTER THE CLOSE OF THE COMMONWEALTH'S CASE, THEREBY PREJUDICING THE DEFENDANT.

A. WHETHER THE TRIAL COURT IMPROPERLY PERMITTED THE *DE FACTO* AMENDMENT TO THE INFORMATION BY SUBMITTING AN IMPROPER VERDICT SLIP TO THE JURY, AND BY IMPROPERLY ANSWERING THE JURY'S QUESTION, AND BY PERMITTING THE JURY TO DECIDE WHICH DISTRICT OFFICE WAS THE SUBJECT OF THE INFORMATION

This question was answered in the negative in the Court below.

III. WHETHER THE COURT ERRED IN ORDERING RESTITUTION IN THIS CASE IN ANY AMOUNT, AND WHETHER THE AMOUNT ENTERED WAS OTHERWISE IMPROPER.

A. WHETHER THE AMOUNT OF RESTITUTION WAS RATIONALLY RELATED TO THE VERDICT;

B. WHETHER RESTITUTION WAS IMPROPER BECAUSE IT WAS SPECULATIVE, SINCE THE COURT COULD NOT KNOW WHAT LEGISLATIVE OFFICES WERE REPRESENTED BY THE VERDICT;

C. WHETHER THE RESTITUTION ORDER WAS EXCESSIVE BECAUSE THE NON-PROFIT BENEFITTED FROM THE USE OF THE RENTED SPACE;

D. WHETHER THE RESTITUTION ORDER WAS IMPROPER BECAUSE THE COMMONWEALTH CANNOT BE A VICTIM UNDER THE SUBJECT CRIMINAL STATUTES.

All questions answered in the negative in the Court below.

IV. WHETHER THE VERDICT IS IMPROPER BECAUSE THE COMMONWEALTH CANNOT BE A VICTIM UNDER THE SUBJECT CRIMINAL STATUTES.

Answered in the negative in the Court below.

V. WHETHER THE COMMONWEALTH IMPROPERLY DESTROYED WITNESS INTERVIEW NOTES IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS, AND IN VIOLATION OF THE PENNSYLVANIA RULES OF CRIMINAL PROCEDURE AND THE PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT, THEREBY DEPRIVING THE DEFENDANT OF A FAIR TRIAL.

Answered in the negative in the Court below.

STATEMENT OF THE CASE

A. Procedural History

On May 27, 2009, the Office of the Pennsylvania Attorney General filed criminal complaints against Michael Veon and Annamarie Peretta-Rosepink.[2] Perretta-Rosepink was charged with various felony counts including conflict of interests and various theft charges and criminal conspiracy. On February 13, 2012, a jury trial began in the Common Pleas Court in Dauphin County. On March 5, 2012, Perretta-Rosepink was convicted of six-charges. Those convictions consisted of: conflict interest, theft by unlawful taking, theft by deception, theft by familiar to make required disposition of funds, misapplication of entrusted property and criminal conspiracy. On May 23, 2012, the Honorable Bruce Bratton sentenced Perretta-Rosepink to serve a sentence of Intermediate Punishment consisting of 48 months the first 9 months to be served on electronic monitoring.

On November 8, 2012, the trial Court ordered restitution in the amount of $116,615.00. The Court denied Perretta-Rosepink's timely filed post-sentence motions as to the trial issues on August 10, 2012[3].

Perretta-Rosepink filed a timely Notice of Appeal. By Order of the trial Court dated December 12, 2012, Perretta-Rosepink was directed to file a statement pursuant to Pennsylvania Rule of Appellate

[2] Dauphin County Criminal Court Docket Nos. 4272 CR 2009 and 4274 CR 2009, respectively.

[3] The Court did grant Perretta-Rosepink's request for a Restitution Hearing.

Procedure 1925. On January 2. 2013, Perretta-Rosepink filed that statement with the trial Court, and the Court issued and Opinion pursuant to 1925(a) in response. *See* RR.12-15.

This appeal follows.

B. Factual History

On May 27, 2009, criminal charges were filed against Mr. Michael Veon, the former Democratic Whip for the Commonwealth of Pennsylvania, as well as your instant Appellant, Annamarie Perretta-Rosepink, a 22 year employee of Veon's Legislative District Office in Beaver Falls, Pennsylvania. The prosecution related to actions by Mr. Veon and Mrs. Perretta-Rosepink in their roles in the non-profit organization established by then Representative Veon known as Beaver Initiative for Growth ("BIG").

In this criminal action, the Commonwealth claimed that Mr. Veon and Mrs. Perretta-Rosepink conspired to somehow steal money belonging to the taxpayers through the vehicle of the non-profit BIG.

The 6-count criminal complaint filed against Perretta-Rosepinlk involved two specific issues including a.) a payment to former representative Terry Van Horne; and b.) rental payment for an office in Midland, Pennsylvania. *See* RR 1-4.

At trial in this action, the Commonwealth attempted to prove that Perretta-Rosepink had engaged in a manner of illegal activities

related to the non-profit, Beaver Initiative for Growth ("BIG"). All of the counts upon which Perretta-Rosepink was convicted related to the alleged improper payment by the non-profit of rent for offices located in Midland, Pennsylvania as the matter regarding Mr. Van Horn was abandoned by the Commonwealth at trial. Generally, the Commonwealth alleged that that Mr. Veon made the non-profit pay for his legislative district office in Midland, Pennsylvania and Perretta-Rosepink, as an employee of BIG conspired to pay said rents. The evidence in trial showed that the Midland office was used by BIG personnel, and that Mr. Veon had excess, unused monies allotted to him as a legislator for rent payments. The Comptroller of the House of Representatives testified that Mr. Veon had no motive to improperly assign these rent payments to the non-profit.

At the close of the Commonwealth's case, the Court permitted the Commonwealth to amend the Criminal Information, in relevant part, permitting the allegation that Perretta-Rosepink [as well as Veon] failed to "staff" the Midland office.

In the Court's charge to the jury, as in the prosecution's closing argument to the jury, the Court told the jury that it could find Perretta-Rosepink guilty of Conflict of Interest if they found that Mr. Veon/Perretta-Rosepink realized some intangible benefit like free publicity or enhanced standing in the community from their actions.

After the jury's charge, the Court sent a Verdict Slip to the jury which included improper language suggesting that the Defendants were being charged with the misappropriation of funds related to multiple district offices, even though the Information charged Perretta-Rosepink with only a single office. Furthermore, the prosecution had maintained from the first preliminary through trial that Perretta-Rosepink was only being charged with alleged misuse of rent payments related to the Midland office. Nevertheless, the Court permitted the jury to find Perretta-Rosepink guilty if it found that she improperly paid rents at either or both of the district offices at issue. This Verdict Slip was submitted to the jury over the objections of the defense that this slip would confuse the jury into believing that Perretta-Rosepink was charged with both offices, and into confusion over whether the charges related to one or both of those offices. Shortly after the jury began deliberations, it returned a question almost identical to the defense objection. The Court at that point refused to correct the error and sent the jury a note that it could consider convicting Perretta-Rosepink on either or both district offices. The jury then returned guilty verdicts on the six counts as indicated. With respect to the theft counts related directly to the charges surrounding the Midland office, the jury returned verdicts of guilty on

Counts 1,2,3,4,5 and 6. As the Verdict Slip evidences[4], there is no way to determine whether in bringing those guilty verdicts the jury convicted Perretta-Rosepink on misuse of funds related one or both of the offices in question.

Perretta-Rosepink timely filed post-trial motions which were denied by the trial Court on August 10, 2012. On November 8, 2012, the Court entered an Order regarding restitution and a Memorandum Opinion in support thereof.

This appeal follows.

[4] RR. 5-6.

SUMMARY OF THE ARGUMENT

I. The Pennsylvania Conflict of Interest statute is unconstitutionally vague and overbroad. The United States Supreme Court's holding in *Skilling v. U.S.* applies to the Pennsylvania statute. The constitutionality of the Pennsylvania statute is a question of first impression in this Court. The statute violates the First Amendment Free Speech rights of Perretta-Rosepink as well as all Pennsylvania elected officials. The trial Court's interpretation of the definition of "private pecuniary gain" has impermissibly expanded the reach of the statute to include all actions, including legitimate legislative actions of all Pennsylvania elected officials.

II. The trial Court improperly permitted the amendment of the criminal information in this case. The Court erred in permitting the *de facto* amendment to the information when it submitted a verdict slip which permitted the jury to find guilt if it found improper rent payments for either or both the Midland and Beaver Falls offices, and when it failed to properly respond to the jury's question regarding which office was being referred to in the verdict slip. The Court's direction to the jury made it appear that Perretta-Rosepink was being charged with improprieties as to both offices, when, from the time of the preliminary hearings to the close of testimony, the Commonwealth maintained that the charges against Perretta-Rosepink related to the Midland office only.

III. The restitution ordered by the Court was improper in several ways. The amount ordered was not rationally related to the evidence adduced at trial. The amount ordered was speculative because the Court could not know which legislative office or offices were the subject of the jury's verdict. The amount ordered was excessive because the non-profit benefitted from the use of the office space, so that an order of restitution of the entire rent amount paid was against the evidence presented. Finally, the restitution order was improper because the Commonwealth cannot be a victim of these crimes for restitution purposes.

IV. The Commonwealth cannot be a victim of the crimes charged based upon the plain language of the statute, and the rules of statutory construction.

V. The wholesale destruction of witness interview notes by the prosecutors was improper, and violated Perretta-Rosepink's constitutional rights, the Rules of Criminal Procedure and the Rules of Ethics, requiring that the verdict be vacated because the Defendant was denied a fair trial.

ARGUMENT

I. THE SCOPE OF THE UNCONSTITUTIONALLY VAGUE CONFLICT OF INTEREST STATUTE HAS NOW BEEN EXPANDED. IT NOW THREATENS THE FIRST AMENDMENT RIGHTS OF ALL ELECTED OFFICIALS

> ~~Private pecuniary benefits include intangible~~ political gain such as garnering favorable publicity, obtaining free publicity, enhancing standing in the community ***or the like.***[5]

It is tempting to suggest that the large number of appeals raising the issue of the vagueness and over breadth of the Pennsylvania Conflict of Interest statute which have passed through this Court, or to the Pennsylvania Supreme Court on direct appeal, foreshadowed the issues raised in this argument.[6] It is further tempting to suggest that the United States Supreme Court anticipated these issues in its landmark holding in *Skilling v. United States,* 130 S.Ct. 2896 (2010). However, neither the high Court, nor the Pennsylvania Supreme Court, nor this Court could have imagined the now unbridled reach of the prosecution that occurred in this case.

---

[5] Hon. Bruce Bratton charging the Jury on the meaning of the language of Pennsylvania's Conflict of Interest statute, 65 Pa.C.S. § 1103, Charge to the Jury, *Commonwealth v. Michael Veon, et al.* No. 4274 CR 2009, Dauphin County Common Pleas Court, March 1, 2012, Trial Day 9, (Jury Charge Transcript) pp. 23-24). (Emphasis supplied).

[6] These include: *Commonwealth v. DeWeese*, Sup.Ct. Docket No. 1528 MDA 2012, *Commonwealth v. Orie*, Supreme Ct. Docket Nos. 31 WM 2011, 33 WDM 2011, 470 WAL 2011, *Commonwealth v. Cott*, Sup.Ct. Docket No. 1192 MDA 2012, *Commonwealth v. Perretta-Rosepink*, Sup.Ct. Docket No. 2154 MDA 2012, 1925 MDA 2012, and *Commonwealth v. Feese*, Sup.Ct. Docket No. 338 MDA 2012.

The standard enunciated by the trial Court, reproduced above, is just what the *Skilling* Court warned against.

In the instant prosecution, the Commonwealth took the feared excesses in the *Skilling* decision far beyond the concerns of the Appellants mentioned. In this trial, the prosecution admitted that Mr. Veon/Perretta-Rosepink took no money, nor any other thing of monetary value. Instead, with the aid of the trial Court, the Commonwealth was permitted to argue that Perretta-Rosepink violated the state's Conflict of Interest statute, 65 Pa.C.S. §1103, by receiving "***intangible*** political gain" by "garnering favorable publicity," "garnering free publicity," and something called "enhanced standing in the community." A searching review of the record will yield no evidence whatsoever to support any of these intangible, alleged gains. Nevertheless, the jury was permitted to reach this verdict with no evidence of pecuniary, or any other gain, by Perretta-Rosepink or anyone else.

This result, fueled by the improper closing argument of the prosecution and the Court's highly objectionable charge to the jury, goes beyond the wildest fears which can be conjured from the arguments raised by *Skilling* counsel, as well as by the highly respected members of the bar in the appeals cited. The trial Court in this case permitted the jury to convict Perretta-Rosepink if they found,

without any evidence whatsoever, that he received an "intangible political gain" like "enhanced standing in the community" or "favorable and/or free publicity" as a result of his conduct. (T.T. 3/1/12, pp. 23-24) In permitting this unbelievable standard to govern the jury's deliberations, the lower Court guaranteed not only a tainted verdict, but the expansion of criminal liability to virtually all political activity of any kind, at any level, undertaken by anyone holding political office, from the dog catcher to the Governor himself. This result, in this case, is the manifestation of the constitutional concerns articulated by the Supreme Court in *Skilling v. U.S.,* 130 U.S. 2896 (2010):

> If Congress were to take up the enterprise of criminalizing "undisclosed self-dealing by a public official" . . . it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns . . .

130 S.Ct. at 2932-33. In *Skilling*, the high Court warned that any attempt to expand the target of conflict of interest prosecutions to activities not related to "bribes" and "kickbacks" would require great care in order to avoid the constitutional issues raised in this and the other identified appeals.

> That formulation, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

(*Id.* at 2933, n.44)

Here, prosecutorial excess went beyond an attempt to criminalize campaign work. Given the facts of this case, with law created by the government and the trial Court, the "successful" prosecution of Mr. Veon and Perretta-Rosepink here has expanded the impact of the Conflict of Interest law beyond anything contemplated by the legislators responsible for the subject amendments. This case brings the vagueness of a law essentially rejected by the Supreme Court into every action taken by any elected official. This is a result abhorrent to the federal and state Constitutions, to the Court's holding in *Skilling,* and to the intent of the Conflict of Interest law that governs the conduct of all elected persons in Pennsylvania.

A. The Pennsylvania Conflict of Interest Statute is Vague and Overbroad

The Pennsylvania Conflict of Interest Statue provides that "[n]o public official or public employee shall engage in conduct which constitutes a conflict of interest." 65 PA CS §1103a. "Conflict of interest" is defined by the statute as

> [U]se by a public official or public employee of the authority of his office or employment ... for the ***private pecuniary benefit*** of himself [or] a member of his immediate family. ...the term does not include an action having a de minimus economic impact...

65 Pa. C.S. §1102. (Emphasis supplied).

Nowhere in the statute do the terms "intangible political gain," "favorable publicity" or "enhancing standing in the community" appear. It is clear from the very words of the statute that the language is vague and overbroad. In light of what occurred in this case, no adequate definition, for example, is provided for the term "private pecuniary gain." Neither is there a definition for the phrase "de minimus economic impact" beyond "an economic consequence which has an insignificant effect." (*Id.*) The word "insignificant" is not defined. It is well settled that a statute which is "so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application" violates due process. *Aiello v. City of Wilmington*, 623 F.2d 845, 850 (3d Cir. 1980), citing *Connally v. General Construction Company,* 269 U.S. 385, 391 (1926). To be constitutionally clear, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Because the statute does not define what conduct is prohibited, nor what is meant by its general, conclusory terms, it creates a significant ambiguity in the law for those who would follow it and for those who would enforce it.

The United States Supreme Court's landmark holding in *Skilling v. United States*, 130 S.Ct. 2896 (2010) gives direct and clear guidance when evaluating Pennsylvania's very similar conflict of interest statute. The *Skilling* Court was confronted with a challenge to the Federal Honest Services Statute (18 U.S.C. §1346). *Skilling* repeated the Supreme Court's two-prong test for facial vagueness, set forth in K*olender v. Lawson,* 461 U.S. 352, 357 (1983). In *Kolender*, the Supreme Court developed a two-prong test for facial vagueness of a penal statute. In order to determine whether a statute has defined a criminal offense with sufficient vagueness, the *Kolender* Court indicated that a determination must be made that the statute's language identifies to an ordinary person what conduct is prohibited, and that the statute does not encourage arbitrary and discriminatory enforcement. 461 U.S. at 2927-2928.

The *Skilling* Court used the language of the federal statute, viewed against the prism of the legislative history of that statute, to determine that the federal statute should be narrowly construed, criminalizing only fraudulent schemes which relate directly to "bribes and kickbacks." 130 S.Ct. at 2928, 2931. The *Skilling* Court's limiting language was inserted to preserve the intent of the statute without "transgressing constitutional limitations." (*Id.*)

The *Skilling* Court went on to reject the attempt in that case by the government to expand the reach of the Honest Services Statute. The Court declined to extend the reach of the statute to include "undisclosed self dealing by a public official." (*Id.* at 2932). The Court said that an attempt to increase the reach of the statute to include official action by the elected official which furthers his own financial interests, would raise the due process concerns underlying the vagueness doctrine. (*Id.* at 2931-32).

For that reason, the *Skilling Court* refused to adopt the government's proposed expansion of the statute, and repeatedly limited the scope of that statute to "bribery and kickback" schemes. (*Id.* at 2931, n. 42). In so holding, the Supreme Court made it clear that expanding the scope of the statute beyond bribery and kickbacks in attempting to criminalize any "undisclosed self dealing by a public official. ....would raise serious constitutional issues." (*Id.* at 2933, n. 44). The *Skilling* holding was premised on the notion that criminalizing undisclosed self dealing by a public official would require statutory definiteness and specificity. The Court's significant concern was than an attempt to create a class of prosecutions based on conflicts of interest would create an "amorphous" class, raising constitutional due process concerns regarding fair notice and arbitrary discriminatory prosecutions. (*Id.* at 2932-33).

Prior to the Supreme Court's decision in *Skilling*, this Court addressed the constitutionality of the conflict of interest statute in *Commonwealth v. Habay*, 934 A.2d 732 (Pa. Super. 2007). In *Habay*, a three-judge panel of this Honorable Court held that the conflict of interest statute was not unconstitutional as applied to the facts of that case. The *Habay Court* did not, however, expressly consider the constitutionality of the Pennsylvania statute in light of the Supreme Court's holding *Skilling*. Neither did the *Habay* Court consider the constitutionality of the statute under the First Amendment. In fact, in *Habay*, the Court indicated that the First Amendment issue, discussed hereinafter below, was waived by the defense. 934 A.2d at 738. As a result, because no Pennsylvania Court, including this Court, has decided whether the conflict of interest statute is vague and overbroad in light of *Skilling*, and in light of the constitutional argument raised below, this issue is one of first impression for this Court. Furthermore, the decision in *Habay* regarding the vagueness of the statute is dictum and, therefore, this Court is not bound by that decision.

B. The Conflict of Interest Statute Violates the First Amendment Political Free Speech Rights of All Elected Officials

In addition to the *Skilling* Court's finding that the federal statute, similar in virtually all substantive respects to the Pennsylvania statute, is unconstitutionally vague, the second issue for this Court is whether

or not the statute, both as drafted, and as applied in this case, constitutes a violation of Perretta-Rosepink's, as well as potentially all elected officials' First Amendment constitutional right to politically free speech.

It is altogether clear that the *Habay* Court did not rule upon the question of whether a conflict interest statute violates the First Amendment. It included no reasoning, no analysis, nor any case citations in support of the observation that "even if appellant's claim did implicate the First Amendment, it is patently clear that the statute at hand is not vague on its face." 934 A.2d at 738. It is altogether obvious that where, as here, the statute implicates the political conduct of an elected official, the issue of political free speech is in the forefront.

A statute is unconstitutionally overbroad "if it punishes lawful constitutionally protected activity as well as illegal activity." *Commonwealth v. Davidson*, 938 A.2d 198, 208 (Pa. 2007). In determining whether a statute is unconstitutionally overbroad, the Court must determine whether the statute "reaches a substantial amount of constitutionally protected conduct." (*Id.*) If a statute's over breadth is substantial, it may not be enforced against anyone until it is narrowed to reach only unprotected activity. (*Id.*)

According to the United States Supreme Court, much of the activity engaged in by elected officials constitutes constitutionally protected free speech. (*See, e.g., Buckley v. Valeo,* 424 U.S. 1, 15 (1976); *Randall v. Sorrell*, 548 U.S. 230, 249 (2006). *See, also, Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 898 (2010).

> The right of citizens to inquire, to hear, to speak and to use information to reach consensus is precondition to enlightened self government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. ...
>
> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office . . .Political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the government to prove that the restriction furthers a compelling interest that is narrowly tailored to achieve that interest.

130 S.Ct. at 898

Pennsylvania's jurisprudence has demonstrated that the state constitution provides even broader protection for speech and political association than the federal constitution. The Supreme Court of Pennsylvania has expressly held that Article I, Section 7 of the state constitution offers deeper, more expanded protection of speech and association than the First Amendment. *See, e.g. Pap's A.M. v. City of*

Erie, 812 A.2d 591, 605 (Pa. 2002)(nude dancing); *Bureau of Professional & Occupational Affairs v. State Board of Physical Therapy*, 728 A.2d 340, 343-44 (Pa. 1999)(advertising by professionals); *Ins. Adjust. Bureau v. Ins. Commr.,* 542 A.2d 1317, 1324 (Pa. 1988)(commercial speech); *Comm. v Tate,* 432 A.2d 1382, 1391 (Pa. 1981)(political leafleting).

In *DePaul v. Commonwealth,* 969 A.2d 536, 553-54 (Pa. 2009), the Pennsylvania Supreme Court discussed political contributions as constitutionally protected expression. In pertinent part, the *DePaul* Court held as follows:

> Where, as here, protected expression is at issue, both the U.S. Supreme Court and this Court have recognized that "the over breadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the ***impermissible applications of the law are substantial*** when judged in relation to the statute's plainly legitimate sweep." (Emphasis supplied)

969 A.2d at 553-54. In banning the statute at issue, the *DePaul* Court reasoned that "it is apparent that the scope of the impermissible effects . . . is quite substantial." (*Id.*)

Here, as in *DePaul,* the apparent scope of the Conflict of Interest statute is likewise "quite substantial." The prosecutors' successful effort to convince the trial Court to expand "private pecuniary interests" to include "intangible" benefits, "free publicity" and "enhanced standing in the community," brings the reach of this statute

into all areas of political effort. In so doing, the Attorney General of Pennsylvania has crafted a powerful new political weapon that can be used by any prosecutor against any elected official. Any official who now gives a speech, or issues a press release, or appears for the opening of a new bridge or cultural center or school, may face prosecution if he used any state money to assist in that appearance or communication. Any time the elected person gets "free publicity" while attending a state function, speaking out against a law that she opposes, sending a newsletter or using the press to urge other legislators to act on a matter of importance, she may be subject to felony prosecution. Most legislators, it seems, make every effort to enhance their standing in their communities through service to their constituents. If, in the arbitrary opinion of a prosecutor, the legislator spends "too much" state money enhancing that standing, that legislator may be facing a jail sentence.

> (T)he concern of our over breath jurisprudence is not directed only at the risk of prosecution under overly broad statutes but also ***the chilling of speech in fear of prosecution.*** (Emphasis supplied)

Commonwealth v. Omar, 981 A.2d 179, 188 (Pa. 2009). The *Omar* Court went on to hold that a party may prove a statute is unconstitutional if "the statute's very existence may cause others not

before the Court to refrain from constitutionally protected speech or expression." (*Id.* at 186-187).

Here, the extent to which the trial Court permitted this statute to be expanded has created the very problem which the *Omar* Court identified as indicating the unconstitutionality of a statute, to wit; any elected official may now be subject to prosecution for any legitimate act performed by a legislator in the course of his or her duties. The chilling effect of the lower Court's holding here will no doubt be to curtail or eliminate many legitimate actions by many elected officials at all levels of Pennsylvania government. All political officials will now be at the mercy of the local prosecutor, who gets to decide when an official has experienced too much enhanced community standing or favorable publicity. This case takes the fears already asserted to this Court regarding the chilling effect on campaign speech, and makes them exponentially larger, with an expanded range of the statute now reaching to all elected officials, and virtually any conduct by that official, depending on the opinion of a prosecutor. This is the precise result that the *Omar* and *Davidson* Courts abhorred.

As argued repeatedly in this Court, as well as in direct appeals to the Pennsylvania Supreme Court, the statute was already vague and overbroad when the initial Bonusgate prosecutions began. The expanded reach of the statute, pushed by the prosecutors here, and

embraced by the Court in the charge to the jury, has surely illustrated how such ambiguity and over breadth have led to this improper, unconstitutional prosecution of the Appellant. The outcome has set the stage for future politically motivated prosecutions of elected officials all across the Commonwealth engaging in all manner of proper activity.

> This prosecution itself is evidence of the danger in putting faith in government representations of prosecutorial restraint. . . the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige.*

United States v. Stevens, 130 S.Ct. 1577, 1591 (2010).

This protection against the government described in *Stevens* is required even more so in the instant case. The forced expansion of the Conflict of Interest statute by the prosecution shows the complete absence of prosecutorial restraint. Left unchanged, the chilling effect of the ruling in this case will have only just begun.

C. The Vague Conflict of Interest Statute was Used to Prosecute Perretta-Rosepink for Conduct Which Brought Him No Gain Whatsoever

At trial in this action, the prosecutor convinced the Court to expand the definition of "private pecuniary gain" to include:

- intangible political gain
- garnering favorable publicity

- obtaining free publicity
- enhancing standing in the community.

(TT, Day 9, pp. 23-24).

To support the assertion that this expansion of the statute was proper, the prosecution cited *Keller v. State Ethics Commission*, 816 A.2d 659 (Cmwlth Court 2004). In *Keller*, a civil matter decided by the Commonwealth Court, the *Keller* majority held that because a local mayor solicited and obtained fees for marriages, and because the mayor took those fees and placed them into his personal account, he had committed a violation of the Conflict of Interest statute 65 Pa. C.S.A. §1103. Using the definition of private pecuniary gain from §1102 of the statute, the *Keller Court* held that

> The controlling elements are the performance of marriage ceremonies by Keller followed by the deposit of the fees in his personal bank account when there was no authorization in the law for him to do so. Such actions by Keller violated the Ethics Act.

860 A.2d at 665.

The *Keller* Court went on to make a distinction between the personal financial gain received by Keller and the "***political gain***" which Keller received by making splashy press appearances associated with the giving of the donations. The "political gain" (as distinct from pecuniary gain) included "free publicity, enhanced standing in the

community and incalculable political value to his reelection campaign." (*Id.*)

The dissent in the *Keller* case is most instructive. Judge Friedman, writing for the dissent, declared

> [T]he record is devoid of evidence that Keller's conduct resulted in a "private pecuniary benefit." Although the Act does not define this term, the legal meaning of "pecuniary benefit" is "[a] benefit capable of monetary valuation." Black's Law Dictionary, 167 (8th Edition 2004)...I believe that the commission and the majority mistakenly equate political gain with financial benefit. I recognize that in our society, concepts of political gain and pecuniary gain may appear inextricably intertwined. Nevertheless, ***as a matter of law, they remain distinct***." (Emphasis supplied).

(*Id.* at 670).

Judge Levitt, writing a second dissent, reminded the majority that "the Ethics Act promises 'clear guidelines' by which public officials may order their conduct in order to increase public confidence in government...we are a long way from the clarity promised by the legislature in the Ethics Act." (*Id.* at 672-673).

Reliance on the *Keller* case by the prosecution should have the led the Court to refuse to give the highly prejudicial instruction set forth above. *Keller* stood for the proposition that the Ethics Act was violated when the mayor took the money. Here, Perretta-Rosepink took no money earmarked for B.I.G. for her personal benefit, her salary aside. There is no evidence in the record to suggest that there

was any favorable publicity or enhancement of standing of Mr.Veon in the community by his decision to split the rent in various offices between his legislative budget and the budget for the non-profit BIG. The prosecutor made an argument that was not supported by the record:

> I bring (*Keller*) to the Court's attention because in this case the argument is that there is other value that Representative Veon obtained as a result of these actions, whether it be greater presence in the community because of the ability to operate multiple offices, access to a South Side office for whatever use that was intended...I draw the Court to that case by virtue of the Conflict of Interest charge in this case.

(TT, Day 7, pp. 33-34).

Defense counsel inquired of the Court in counter argument as follows:

> "What is the incalculable political value? First of all, he took nothing. He didn't take the money and give it to someone else. What is the incalculable political value if it's paid by BIG or paid by the legislative office or a combination thereof...? There's no value." (TT, Day 7, pp. 4).

In answer, the Commonwealth argued that splitting the rent at the Midland office (one of the legislative offices which presumably formed the basis of this conviction[7]). "This allows [Veon] to have a presence in Midland without incurring either increased expenses to himself

[7] *See*, Argument II below.

which would allow [Veon] to spend that money he is allotted every year and monthly however he saw fit. (TT, Day 7, pp. 50).[8]

One of the Commonwealth witnesses was Alexis Brown, the Comptroller of the Pennsylvania House of Representatives. Ms. Brown testified that legislators are given an allotment for rent, utilities and office expenses in the of $1,650.00 per month. Ms. Brown also testified that Michael Veon did not use his entire $1,650.00 monthly allotment, and that he only used $1,500.00 of that allotment. Ms. Brown also testified that had Mr. Veon exceeded the $1,650.00 per month allotment, he had an additional $20,000.00 a year that was automatically allotted to each legislator for those types of expenses. Mr. Veon had the opportunity, if he had exceeded both the $1,650.00 per month allowance and the $20,000.00 allowance (which he did not), to go to the leadership of the House for more money had he needed it.[9] (TT, Day 3, pp. 295-299). Finally, this testimony by Ms. Brown trial is instructive:

> Q Now, did any of the money that was not spent by him that was automatically there for him to spend, if he didn't spend it, did he get paid the money?

[8] The Court went on to ask:

> Q. Who got the gain here? A. Representative Veon. Q. In what way? In the evidence. A. In the evidence that he operated this office as a district office. (TT, Day 7, p. 6).

[9] It is beyond argument here that Mr. Veon was a member of the senior leadership of the House at that time, being the Democratic Whip.

A No.

Q It wasn't like he saved it up or got a big check at the end of the year?

A No.

Q If he didn't use the money, what happened to it?

A It just stays in the account.

Q Use it or lose it?

A Right.

Q Would there have been motivation for him before spending all this to go somewhere else for rent money?

A No.

(TT, Day 3, p. 300).

It is clear from the testimony of the comptroller of the House that the prosecutor's argument that Mr. Veon could use the unused rent money "however he saw fit" was plainly untrue, and made to the Court long after the Comptroller, the prosecution's witness, testified to the contrary.

It is also interesting to note from Ms. Brown's testimony that it was not uncommon for members to have multiple district offices. (TT, Day 3, p. 299).

Over the Defendant's objection, the Commonwealth was permitted to inquire as to whether or not right to know requests had

been made regarding expenditures made by legislators on their expenses. Ms. Brown's testimony, obviously not helpful to the prosecution, was that right to know requests ran the gamut of all types of expenses. (*Id.* at 312). There was no evidence introduced into this trial that any individual had ever made a right to know request regarding expenditures by legislators with regard to their rent, or the number of offices that they had. There is plainly no evidence that any person ever made any inquiries about any expense made by Mr. Veon, nor is there any evidence in the record that Mr. Veon considered this remote possibility in determining his actions.[10]

There is likewise no evidence that Mr. Veon obtained any publicity of any kind, let alone free publicity, from the decisions that he made with regard to splitting rent payments between the non-profit and his legislative offices. In fact, as far as this record is concerned, those actions were utterly unknown to the public. Furthermore, even if it were known that Mr. Veon had done this, there is no evidence, nor

[10] The Court may have already perceived the irony of claims made by the Commonwealth. On the one hand, they claim, without evidence, that the Defendants were funneling rent payments through the non-profit for the purpose of hiding from the public how much he spent on an office. On the other hand, they claim, again without evidence, that Mr. Veon obtained enhanced standing in the community from "upscale" offices. There has never been an explanation offered by the prosecution as to how hiding the amount of rent payments from the public, yet showing off supposedly off upscale digs, is conduct which is consistent or makes any sense. Had the prosecution had any evidence on this point, perhaps, the prosecutors would have offered a more concrete explanation of their theory about the criminal intent of the Defendants.

any common sense reason to think that this conduct would somehow enhance his status in the community or help him to get reelected.

The lower Court's remarks in regard to restitution are also instructive on this point. In the Court's Opinion on restitution, the Court opined that the Defendant used "grant funds by BIG solely for the purpose of providing larger and "more upscale" office space and more visibility for the personal political desires of Mr. Veon and his staff." (*Memorandum Opinion* dated November 8, 2012, attached hereto at RR. 7, RR. 8-11). This Court is welcome to review the complete record to determine whether there is the slightest evidence of whatsoever type or kind that the Defendant had any greater or lesser visibility with the public in the allegedly "upscale" offices at issue here or that it met any other political or other desires of Mr. Veon to do so beyond the legitimate purpose of providing office space for two distinct entities.

Here, the Court allowed the legal definition of pecuniary gain to be changed, and to be expanded beyond anything previously considered in any court. Even if that standard is allowed to remain, in this case, there was no evidence that Mr. Veon enhanced anything about himself or his political circumstances by the making of these small, obscure rent payments from a non-profit which ostensibly

brought millions and millions of public works improvements to an economically depressed area.

The *Keller* Court made a distinction between financial gain and political gain. The prosecution of Veon and Perretta-Rosepink as a co-conspirator depended upon the claim that alleged political gain, wholly unproven, equated to financial gain. There is no evidence in the record to support this conclusion. Despite that fact, the lower Court agreed to permit the prosecution to argue to the jury that the conflict of interest statute's stricture against private pecuniary gain included these amorphous, wholly intangible concepts. Thus, the prosecution argued as follows

> Private pecuniary benefit that's discussed in the charge that I just read to you, I want to be clear to you. ***We're not limited to money***. All this reference of Mike Veon didn't get paid by Beaver Initiative for Growth, that this money didn't go directly into his pocket, that's not what our burden of proving to you is. There are benefits, intangible benefits, that Mr. Veon received and that's garnering favorable publicity and free publicity and enhancing his standing in the community so that he can continue to be reelected. (Emphasis supplied).

(TT, Day 9, p. 74).

This argument came with no evidentiary support of any kind. This argument was purely speculative by the Commonwealth, and there were no facts, including witnesses or documentation to support

any intangible gain, indeed any gain, by Mr. Veon and no gain with the exception of the salary for Perretta-Rosepink.

Perretta-Rosepink's fate was sealed when the Court, in its charge to the jury echoed the prosecutor's improper argument

> Private pecuniary benefit includes intangible political gain such as garnering favorable publicity, obtaining free publicity, enhancing standing in the community or the like.

(TT, Day 9, pp. 23-24).

The jury returned a verdict that was flawed in many ways not the least of which was by this impermissible expansion of the plain meaning of the Conflict of Interest statute. For this reason, without more, the conviction in this case should be overturned.

II. THE TRIAL COURT ERRED IN PERMITTING THE ELEVENTH HOUR AMENDMENT TO THE CRIMINAL INFORMATION, AS WELL AS THE DE FACTO AMENDMENT OF THE INFORMATION AS THE JURY BEGAN DELIBERATIONS.

The trial Court committed multiple fatal errors in this case, including the grant of the prosecution's motion to amend the Criminal Information, and permitting a *de facto* amendment of the Criminal Information with the language provided, over defense objection, on the Verdict Slip. These errors led to the only convictions by the jury of the Defendant here. These errors were based on improper considerations by the trial Court, supported by improper arguments by the prosecution. These fatal errors require that the verdict in this case be vacated.

The lead case in Pennsylvania regarding the issue of what factors must be considered in determining whether a Defendant is prejudiced by an amendment is *Commonwealth v. Sinclair*, 897 A.2d 1218, 1223 (Pa. Super 2006). In *Sinclair*, this Court declared the six specific factors necessary to determine whether a change in the Information has created prejudice. These factors include:

1. Whether the amendment changes the factual scenario supporting the charges;

2. Whether the amendment adds new facts previously unknown to the Defendant;

3. Whether the entire factual scenario was developed during a preliminary hearing;

4. Whether the description of the charges changed with the amendment;

5. Whether a change in defense strategy was necessitated by the amendment;

6. Whether the timing of the Commonwealth's request for amendment allowed for ample notice and preparation.

897 A.2d at 1223.

It is the Defendant's position that the lower Court's permission to amend the Information after the close of the Commonwealth's case, and the *de facto* amendment of the Information as the jury was about to begin deliberations, violated the holding in *Sinclair,* and severely prejudiced Perretta-Rosepink as Michael Veon's alleged co-conspirator and thus co-Defendant. The Court will note that the only charges upon which Perretta-Rosepink was convicted were those charges subject to those amendments. The prejudice from these amendments, therefore, cannot be overlooked. *See, Commonwealth v. Brown*, 727 A.2d 541, 543-544 (Pa. 1999).

A. The Trial Court Erred in Permitting a De Facto Amendment to the Information.

The amendment to the *Information* came not as a result of a motion by the Commonwealth, but rather as a result of an improper jury Verdict Slip that was sent to the jury, apparently composed by the Court. After the close of all evidence in the case, the Court presented

counsel with a proposed Verdict Slip. That Verdict Slip contained five separate issues for the jury's determination related to payment of rent for a legislative district office.[11] In each of the subject areas of the Verdict Slip, the jury was asked to determine whether Perretta-Rosepink committed various thefts or conflicts of interest related to the rent payments for a legislative district office. The issue here, which was raised by counsel prior to the submission of the Verdict Slip, was that the Information in these counts charged Perretta-Rosepink with these crimes related "***a***" legislative district office. (TT, Day 9, pp. 109-110). The Criminal Information in this case did not designate which legislative district office was at issue. The evidences which was adduced at trial was that Michael Veon maintained offices in Beaver Falls and Midland, Pennsylvania, which were both legislative district offices and shared with the non-profit. Defense counsel objected that the Verdict Slip as constituted retained the fatal flaw, which was present in the *Criminal Information*; to wit, which district office was being referenced by the counts at issue?

This issue was first raised by Mr. Veon and joined by Perretta-Rosepink in a trial brief filed with the Court prior to trial.[12]

---

[11] *See*, Verdict Slip at RR. 5-6. The areas of the *Verdict Slip* at issue relate to Counts 1 and 6.

[12] Filed February 2, 2012. Trial in this matter began on February 6, 2012.

> The Criminal Information in this case limits the charges on this issue to a single legislative district office. The Information does not indicate which legislative office is at issue (i.e., the Beaver Falls office or the Midland office). As a threshold matter, the Commonwealth should be required to indicate which office is at issue since the Presentment refers to both offices. Once the Commonwealth has chosen which office is at issue, then it should be precluded from introducing any evidence of impropriety regarding the other office.

The brief went on to point out to the Court that the Presentment was filled with details about whether or not a Midland office was excessive, unnecessary or inappropriate. Mr. Veon pointed out to the Court that the criminal complaint only charged that non-profit's money was spent to pay for a legislative office for Mr. Veon. (*Id.*) Notwithstanding these objections, raised long before the trial began, the trial Court permitted the Commonwealth, throughout the course of the case, to introduce evidence regarding both legislative district offices and all manner of evidence not relevant to the charges.

One of the issues raised in the trial brief described above was a reference made to the preliminary hearing in this case. The Court will recall that two preliminary hearings occurred in this case. The first ended in all charges being thrown out by the magistrate for lack of probable cause. In a second preliminary hearing, with a different

magistrate,[13] the Commonwealth presented less evidence, and no new evidence. Nevertheless, the second magistrate held all charges for trial.

During both preliminary hearings, the Commonwealth put on evidence and made record statements to the Court which made it emphatically clear that the charges at Counts 1, 2, 3, 4, 5 and 6 which referred to "***a legislative office***" related to the Midland office. The following excerpts from both preliminary hearings are illuminating:

> By the prosecution: Your Honor, the criminal complaint, Your Honor, refers to -- although it references the disproportionate amount that BIG was paying for that space, the fact that the Midland office was then opened up and there was no further reimbursement which means just mathematically that BIG was paying the entire rent for the Midland office although it never used the Midland office. It was simply a district office for Mike Veon.
>
> (RR. 53-58).
>
> By the prosecution: Well, Your Honor, with regard to the rent at the Beaver Falls office, the main district office, whether he was paying 2,100 or 2,900 is of no moment because ***that's not the crime charged***. It is the second amount to the Midland office which is seven hundred dollars a month which is the crime in the criminal complaint. (Emphasis supplied).
>
> (RR 53-55).

[13] A new magistrate was ordered after recusal of the original magistrate. This recusal came after a heated exchange between the prosecutor and the magistrate at the close of the first preliminary hearing.

> "... the total lease amount that's paid by BIG is really irrelevant ... that's what's being charged here, Your Honor. It's that second office.[14]
>
> (RR 53-58).

In the second preliminary hearing, the prosecution continued to make reference to the opening of the Midland office as the issue related to the subject charges.

> By the prosecutor: The gist of the charge is that that office (Midland) was Mike Veon's legislative office. It was staffed by legislative employees that was paid for by BIG.
>
> (RR 63).
>
> By the prosecutor: With regard to the specific counts, Your Honor, the Midland office was hardly used by BIG. It was paid for by BIG, but clearly it was used as a legislative office for Mike Veon.[15]
>
> (RR 71).

With this background in mind, the trial Court and the parties discussed at length the problems that were caused by this failure of the *Criminal Information*, as well as the ambiguity created by the Verdict Slip. After mentioning the Midland office five times in her brief

[14] During the first preliminary hearing, there are at least four additional points in the transcript where the prosecutor made reference to the Midland office in connection with these charges. (RR 53-58).

[15] During the second preliminary hearing, the prosecution made reference to the Midland office during the questioning on at least four other occasions. (RR 59-72).

opening,[16] the prosecutor now, at the close of trial, claimed "we're talking about Beaver Falls and Midland." (TT, Day 9, p. 114). Defense counsel objected saying, "They are talking now about two offices when they charged one." (*Id.*) This bit of sophistry from the senior prosecutor was further illuminating.

> Mr. Fina: You don't have to read "capital A" in that context in the Information, singular. If you read the Information, the context is ***a legislative district office***. It could be referring to one, two ... (Emphasis supplied).
>
> Mr. Sansone: You can't read a singular noun as a singular, is that what he is saying? The word office is a noun. The word offices is also a noun. One is singular and one is plural. [17]
>
> (TT, Day 9, p. 114).

This final exchange between counsel and the Court sums up this difficulty.

> Mr. Sansone: How do you reconcile? If there is a verdict of guilty on any of these charges related to a legislative district office, how do you know what the verdict is about? How do we know that there hasn't been a verdict on two or three others besides the Pittsburgh South Side office?
>
> Mr. Fina: That's not the function of a Verdict Slip.

[16] TT, Day 1, pp. 14-15.

[17] Counsel for Ms. Rosepink also objected.

Mr. Palermo: I join, Your Honor. That was my question in chambers about the prejudice that occurs when my client -- if my client would be convicted, I would not know what the jury was thinking on what office they convicted her of ... that is how I prepared my examination of witnesses and my closing argument to the jury. I join Mr. Sansone. (TT, Day 9, p. 115).

The Court: I agree. They are not asked to decide which office it applies to...

(TT, Day 9, p. 118).

Shortly after the jury began its deliberations, the following question was returned by the jury:

In regards (sic) to all counts stating (rent/legislative district office), does that refer to Midland, Beaver Falls or both? Alison Mitchell (Jury Foreperson) 3/1/12

(RR 73-74).

This objection was lodged by defense counsel:

Mr. Sansone: Here's the problem we anticipated. It's right in front of us. I renew my same motion.

Now this confusion shows you exactly what we feared would happen has happened and now we cannot really answer to the verdict properly until -- because they are asking the same question I pointed out to the Court.

You can't answer -- how would you answer that? If you say it refers to both and then you read the information which doesn't charge both, you've now given the jury a charge that they have to consider convicting one or both defendants on matters not charged in the information.

Mr. Fina: The answer, Your Honor, to the jury is that's up to them what it is referring to. It's up to them which office or both its referring to. That's their decision.

.... The Court: Consistent with my ruling, the objection raised as to the Verdict Slip. I think the crimes are not dependent on which specific office there is, which is why I said put in legislative district

> office and my response to this will be either, both or none if they so find.
>
> Mr. Sansone: That's not what the Information says. The Information says a legislative district office.
>
> The Court: I heard your argument. I disagree. Objection is noted. ...
>
> Mr. Palermo: I'm joining.
>
> Mr. Fina: Thank you, Judge.
>
> The Court: My intention is to send a note that says just that either, both or none as you find.
>
> Mr. Sansone: Over strong objection.
>
> The Court: Strong objection, write that down, make that bold.
>
> Mr. Sansone: Really strong.
>
> (TT, Day 9, pp. 124-125).

The Court then sent the following note to the jury:

> 1 March 2012 TO THE MEMBERS OF THE JURY: In response to your question regarding the counts regarding "rent/legislative district office", the answer is either, both or neither, as you may find from the evidence presented. Bruce F. Bratton, Judge.

(RR 73-74).

The very clearest reasons for reversal of this verdict lie in these exchanges between the Court and counsel. Applying the *Sinclair* test described above, this *de facto* amendment to the Information to include more than one district office was highly improper. This finding by the Court not only created the confusion that is amply described

here, but also highly prejudiced Mr. Veon. Using the *Sinclair* holding as a measuring stick, and applying those factors, it is easy to conclude that this *de facto* amendment to the *Information*, in the form of a Verdict Slip, was highly improper.

First, this amendment completely changed the factual scenario supporting the original charges brought in the Information, which charged "a" district office. The Court expanded that charge to include (or not) two district offices. The Court's conclusion that the crimes charged in the information "are not dependent on which legislative district office" was involved is obviously improper. (TT, Day 9, p. 125). Perretta-Rosepink should have been permitted to defend the charges brought in the *Information*, not charges added by the prosecution after consistently indicating from the beginning of the process to the end of trial that the case involved only one district office.

Second, under *Sinclair*, it is altogether clear that an entirely different factual scenario was developed at the preliminary hearings in this case. The prosecutor at both hearings made it very clear that these charges directed toward the legislative district office related to the Midland office and no other.

Two weeks prior to the trial, the Defendant requested that the Court clarify or force the prosecution to clarify what acts were being

charged here. The Court declined. The basis of that request was the comments and assertions made by prosecutor at both preliminary hearings. At trial, with the help of the trial judge, the prosecution was able to expand the charges against both Michael Veon and Perretta-Rosepink to include both offices, when only one was charged initially. Under *Sinclair*, this violated the third of the six considerations set forth by that Court.

When the Court permitted this *de facto* amendment, the description of the charges against the Defendant doubled. This violated the holding in *Sinclair* as set forth above.

There was no opportunity to change any defense strategy as called for in the fifth *Sinclair* factor, because the *de facto* change in the Information in the form of a Verdict Slip, came after the close of all evidence.

Finally, it goes without saying that there was no notice of this change. To the contrary, through preliminary hearings, through trial, through and after the closing arguments in this case, the prosecution maintained that the legislative district office being charged was the Midland office. The Court erred in allowing the Verdict Slip to read as

it did, to instruct the jury with the response set forth above, and to permit the jury to render a verdict filled with this uncertainty.[18] There is no way to know now whether the jury found Perretta-Rosepink guilty regarding one or both of the offices involved here. This fatal flaw in the *Information* carried through to the Verdict Slip and the verdict in this case. It is respectfully urged that these flaws require the Court to vacate the verdict in this case

III. RESTITUTION

Perretta-Rosepink contends that the Court's order of restitution in this case is improper and excessive. In the lower Court's Opinion dated November 8, 2012, the Court ordered Perretta-Rosepink to pay restitution in the amount of $116,615.00. The vast majority of the restitution was made up of the rent paid by the non-profit to the Beaver Falls office.[19]

---

[18] It is axiomatic that the material misstatement of the evidence presented in a jury trial may require reversal. If a charge to the jury varies from the elements contained in the information, the charge violates Pennsylvania Rule of Criminal Procedure 564. When the charge introduces new or different elements beyond those contained in the Information, the variance is improper. *See, Commonwealth v. Hobson*, 604 A.2d 717, 722 (Pa. Super. 1992). *See, also, Commonwealth v. Irwin*, 431 A.2d 257, 259-260 (Pa. 1981). Here, the trial judge improperly instructed the jury, through the use of the Verdict Slip and the Court's response to the jury question regarding the elements of this alleged crime.

[19] The Court's break down of restitution was as follows:

Beaver Falls office rent	Counts 1, 3,	$94,915.00
Midland office rent	Counts 1, 3,	$21,700.00

(Memorandum Order and Opinion at RR 7, RR 8-11)

The trial Court's Opinion accurately set forth the test in Pennsylvania for determining the proper measure of restitution to be ordered in any given case. The trial Court's opinion cited to *Commonwealth v. Atanasio*, 997 A.2d 1181 (Pa. Super. 2010) for the proposition that the amount of restitution ordered by the trial Court cannot be "excessive" or "speculative." 997 A.2d at 1183. The trial Court's Opinion, however, did not go on to analyze or even mention the balance of the *Atanasio* holding related to this point. The *Atanasio* Court was careful to provide numerous warnings regarding the dangers of excessive restitution. *Atanasio* held that "when fashioning an order of restitution, the lower Court ***must ensure*** that the record contains a factual basis for the ***appropriate amount of restitution***. (*Id.* citing *Commonwealth v. Pleger*, 934 A.2d 715, 720 (Pa. Super. 2007). The *Pleger* Court was careful to insist that the amount of restitution should be calculated based upon "the dollar value of the injury suffered by the victim." (*Id.*) All of the language from *Pleger* is that of limitation with regard to the amount of restitution to be ordered. The *Pleger* Court went on to draw a hard line by stating "a restitution award must not exceed the victim's losses." (*Id.*)

In the *Atanasio* opinion, this Court provided language which was largely limiting as it related to an order of restitution. The *Atanasio*

Court concluded its holding regarding restitution by admonishing that restitution awards must comport with notions of due process. (*Id.*, citing *Commonwealth v. Ortiz*, 854 A.2d 1280, 1282 (Pa. Super. 2004) [Although it is mandatory ... to award full restitution, it is still necessary that the amount of the "full restitution" be determined under the adversarial system with considerations of due process.]

It is respectfully urged that, with this order of restitution, the trial Court has not followed the dictates of the *Atanasio* which it cited in its Memorandum Opinion. *Atanasio, Ortiz* and *Pleger*, *supra*, are all cases in which this Court has made it clear that restitution must be ordered with reservation, and only after ample support in the record exists to make such an order. Most clearly, in each of the cases cited, this Court has held that restitution orders cannot be excessive or speculative. Here, the trial Court's order of restitution is both.

The Order by the trial Court is speculative because it assumes that Perretta-Rosepink was convicted of improper rent payments by the non-profit in both Midland and Beaver Falls. For the reasons argued at length in Section II above, there is no way to know from the jury's verdict, rendered on the highly objectionable Verdict Slip, whether or not Perretta-Rosepink was convicted of misapplication of funds related to one or both of those offices. The Verdict Slip does not contain any information from which the Court nor either party can say

which office the jury had in mind. As argued at length above, Mr. Veon's Counsel's strong objection [joined by Counsel for Perretta-Rosepink] to the Verdict Slip was prescient. The jury question made it clear that the jury did not know which office or offices were being charged against Perretta-Rosepink. The Court's "answer" did not in any way provide for the jury any answer to the question. This is principally true, as argued above, because the Court did not know either.

As argued above, permitting the *Commonwealth* to make a *de facto* amendment to the criminal information in this case after the close of all testimony highly prejudiced Perretta-Rosepink, and also tainted not only the verdict but the order of restitution that grew out of that verdict. Since the Court could not answer which office the jury had in mind, the Court's direction to the jury was that the jury could find one of the offices or both. Nevertheless, as a matter of pure speculation, the Court assumed that the jury returned the verdict regarding both offices. The Court has absolutely no way of knowing which office or offices were included in the verdict, and, therefore, the award against Perretta-Rosepink of all of the rent for both offices paid by the non-profit was based on pure speculation.

Further, as argued above, throughout the two preliminary hearings, the opening statements, the entire trial and up to the closing

arguments, the Commonwealth had maintained that the charges against Perretta-Rosepink related to the Midland office. The remarks of the prosecutor at the two preliminary hearings made it absolutely clear that the rent paid in the Beaver Falls office or differentials in the amount of rent payment were not what the charges were about. Nevertheless, the Court, completely ignored the prosecutor's own words in this case and permitted the jury to return a verdict against one or both of the offices. The Court did not provide any mechanism on the Verdict Slip for indicating which answer the jury was giving, therefore, there is no way to know the jury's intention. Therefore, the Court's order of restitution for both offices was speculative, and, therefore, improper.

Furthermore, contrary to the teachings of *Atanasio*, *supra*, the Court's award was excessive. The transcript is filled with testimony from both prosecution and defense witnesses that the Beaver Falls office was used as the main headquarters of a non-profit that brought incredible prosperity and renewal to an economically starved area. The successes of the projects in Beaver, which were the result of the success of this non-profit, were generally planned and executed at the Beaver Falls office, according to the testimony at trial. Therefore, the Court's order of restitution of the entire amount of rent paid by the non-profit for the use of those offices is highly inappropriate. It is not

as though the non-profit did not see value from the use of the office space. Quite apart from the argument that decisions about how to split the rent payments at Beaver Falls were not a crime (*See, Argument 6, infra.*), it is simply unfair to order that all of the rent paid there was for naught. According to several witnesses, this non-profit did a great deal of good in Beaver County. Even if an argument can be made that this non-profit somehow paid too much in rent, it got value for the rent payment, with no identifiable victim. Furthermore, it is not even clear to whom such restitution payments should or will be made. The trial Court's order does not designate to whom such payments shall be paid, and no victim has been identified beyond the Commonwealth's observation that the victim here is the "taxpayer, the Commonwealth of Pennsylvania." (TT, Day 7, pp. 37-38).

Despite hearing the arguments by defense counsel at the restitution hearing that the Commonwealth cannot be a victim for purposes of restitution, the trial Court essentially ignored the important distinctions raised by this issue. Once again, the trial Court correctly cited the law that is controlling in this matter. In *Commonwealth v. Brown*, 981 A.2d 893 (Pa. 2009), cited by the lower Court, the Supreme Court of Pennsylvania defined "victim" in the context of restitution. The *Brown* Court recognized, in addition to individuals being victims, the statutory language of the restitution

statute permits restitution to be paid to "any other government agency ***which has a provided reimbursement to the victim*** as a result of the Defendant's criminal conduct" and "any insurance company ***which has provided reimbursement to the victim*** as a result of the Defendant's criminal conduct. (18 Pa. C.S.A. §1106(c)(1)(ii)(C) and (D)). The *Brown* Court, construing the 1995 amendments to the statute by the General Assembly, recognized that the statute expanded the definition of victim "to entities that incurred expenses on the victim's behalf." 981 A.2d at 895. The *Brown* Court was very clear to point out that the language of a penal statute "should be interpreted in the light most favorable to the accused. (*Id.* at 898).

> Where doubts exist concerning the proper the scope of the penal statute, it is the accused who should receive the benefit of such doubt.

(*Id.*)

The *Brown* Court went on to hold that the statute as amended is "unclear as to which governmental entities may enjoy restitution." (*Id.*)

Finally, the *Brown* Court examined the additional amendments brought on in 1998 to the statute. The Supreme Court observed in *Brown* that the 1998 amendment was "not the model of clarity." (*Id.* at 899). In its analysis of who was eligible for repayment in light of the 1998 amendment, the *Brown* Court held that

> We believe the legislature intended that a criminal offender not only be required to restitution directly, but to government agencies ***which indirectly provide reimbursement to the victim*** including payment to a medical provider on the victim's behalf. (Emphasis supplied.)

(*Id.* at 902).

Brown made it clear that this "interpretation is limited to those government agencies which make payments on behalf of a victim of a crime." (*Id.* at 901).

The *Brown* Court cited *Commonwealth v. Runion*, 662 A.2d 617 (Pa. 1995) as authoritative on this issue. In *Runion*, Justice Castille made it very clear that the Commonwealth and its agencies are not victims for the purposes of restitution.

> We are constrained to agree as we are bound by the clear definitional language the legislature enacted ... although we acknowledge that the primary purpose of the restitution statute is rehabilitative in nature, and that the lower court's decision in the matter below would achieve this goal, we also recognize that it is for the legislature, ***not*** for this Court to expand the meaning of the term "**victim**" under 18 Pa. CS § 1106 so as to include governmental agencies of this **Commonwealth**. (662 A.2d at 621). (Emphasis in the original.)

The Supreme Court in *Runion* and in *Brown* made it very clear that the statutory amendments by the General Assembly to the restitution statute did not expand the definition of "victim" to include Commonwealth agencies except those specifically enumerated in

Brown, and defined as those agencies which make direct restitution to a victim.

It is therefore mystifying that the lower Court ruled that funds provided by the Department of Community and Economical Development, which were utilized by the non-profit for rent payments, are amounts amendable to restitution. There is no identifiable victim to whom the DCED might return these monies. The Court's holding that the DCED is somehow akin to Medicare or any other governmental agency that pays individuals directly is unexplainable.[20] It is therefore not surprising that the trial Court does not explain how it is that the agency involved in this prosecution is in anyway akin to those agencies identified by the courts in *Brown* and *Runion*.

Because the Commonwealth cannot be a victim, except under the limited circumstances, not present here, which are enumerated by the Supreme Court of Pennsylvania and the holdings in *Brown* and *Runion*, *supra*, the order of restitution by the trial Court is altogether improper. *Accord*, *Commonwealth v. Boyd*, 835 A.2d 812, 818, 819 (Pa. Super. 2003); *Commonwealth v. Figueroa*, 691 A.2d 487, 489-90 (Pa. Super. 1997).

[20] As noted in the Order of Restitution, the Court ordered the restitution to be paid to the DCED. (Memorandum Order and Opinion RR 7, RR 8-11)

IV. THE COMMONWEALTH CANNOT BE A VICTIM FOR THE PURPOSES OF THE THEFT CHARGES BROUGHT AGAINST PERRETTA-ROSEPINK

Annamarie Perretta-Rosepink was convicted of one count of Theft by Unlawful Taking, Pa.C.S.A.. §3921(a), one count of Theft by Deception, 18 Pa. C.S.A. §3922(a)(1), one count of Theft by Failure to Make a Required Disposition, 18 Pa. C.S.A.. §3927(a), and one count each of Conflict of Interest, 65 Pa. C.S.A.. §1103(a) and Conspiracy, 18 Pa. C.S.A. §903.

The Commonwealth cannot be a victim of Theft by Unlawful Taking, Theft by Deception, or Theft by Failure to Make Required Disposition.

None of the theft counts for which Perretta-Rosepink was convicted make any allegation as to the identity of a "victim" of the crime alleged, including from whom monies were "unlawfully taken," who was deceived by the actions of Mr. Veon or his alleged co-conspirator Perretta-Rosepink, and to whom a duty of disposition was owed by Perretta-Rosepink.

Near the close of testimony of the case, during oral arguments related the Plaintiff's motion to demur to the evidence, this exchange between the Court and the prosecutor apparently identified the prosecution's view of the "victim" in these alleged crimes.

> The Court: Who is the victim of the theft by deception?
>
> Ms. Brandstetter: The taxpayer, the Commonwealth of Pennsylvania ...
>
> The Court: Just -- the monies went through BIG.
>
> Ms. Brandstetter: They did.
>
> The Court: The rent payments?
>
> Ms. Brandstetter: Yes.
>
> The Court: BIG is not a victim.
>
> Ms. Brandstetter: Well, I mean that's all state grant funds. That $19,000.00. BIG could arguably be the victim. The source of the money is the Commonwealth, the taxpayer. BIG could be the victim in the sense that the $19,000.00 could have been put to one of their programs or some other use.

(TT, Day 7, pp. 37-38).[21]

The Crimes Code defines Theft by Unlawful Taking, Pa.C.S.A. §3921(a), as follows:

> (a) Movable property. A person is guilty of theft if he unlawful takes, or exercises unlawful control over, movable *property of another* with intent to deprive him thereof.
>
> (b) Immovable Property. A person is guilty of theft if he unlawfully transfers, or exercises unlawful control over, immovable *property of another* or any

[21] The argument that the Commonwealth could be a victim in these theft charges was objected to by both Defendants. (TT, Day 7, pp. 89-90).

interest therein with intent to benefit himself or another not entitled thereto. (Emphasis supplied).

The Crimes Code defines Theft by Deception, 18 Pa. C.S.A. §3922(a)(1), as follows:

> (a) Offense defined. A person is guilty of theft if he intentionally obtains or withholds *property of another* by deception. A person deceives if he intentionally:
>
> (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
>
> (2) prevents *another* from acquiring information which would affect his judgment or a transaction; or
>
> (3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing *another* to whom he stands in a fiduciary or confidential relationship.
>
> (b) Exception. The term "deceive" does not, however, include falsity as to matters having pecuniary significance, or puffing by statements unlikely to deceive *ordinary persons* in the group addressed. (Emphasis added.)

Neither Chapter 1 (General Provisions: See 18 Pa. C.S.A. §103), nor Chapter 39 (Theft and Related Offenses), contains a special definition of the term "person." Chapter 39 does include a definition of "Property of another," as follows:

> "Property of another." Includes property in which any *person* other than the actor has an interest which the actor is not privileges to infringe,

> regardless of the fact that the actor also has an interest in the property and regardless of the fact that the *person* might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed *property of another* who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

18 Pa. C.S.A. 3901 (Emphasis supplied).

In the absence of a definition of "person" in the Crimes Code, the Statutory Construction Act defines "person" as follows:

> "Person." Includes a corporation, partnership, limited liability company, business trust, other association, government entity (*other than the Commonwealth*), estate, trust, foundation or natural person.

1 Pa. C.S.A. §1991. (Emphasis supplied).

Since the offenses of Theft by Unlawful Taking and Theft by Deception both employ the terms "property of another" or "another," and both of those terms refer back to the term "person," where each section begins with the common phrase "A person is guilty of theft if ..." it is clear that "property of another" and "another" likewise mean "another person."

While §3927 does not use the term "person" in reference to potential victims of the offense, neither does the section employ the term "government" in the identification of potential victims. This is significant, since the definitions section of the Theft chapter, 18 PA.

C.S.A. §3901, contains a definition of the term "government," as follows:

> The United States, any state, county, municipality, or other political unit, or any department, agency or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government.

Failure of §3927 to include governments among the potential victims within the scope of the section reinforces the conclusion that §3927 must be read consistently with §§3921 and 3922.

In *Commonwealth v. Runion*, 541 Pa. 202, 662 A.2d 617 (1995), the Pennsylvania Department of Public Welfare submitted a claim for restitution following the conviction of a defendant for aggravated assault, where medical care for the victim had been reimbursed by the Medical Assistance program. The Pennsylvania Supreme Court denied the restitution claim, state as follows: "We conclude that a governmental agency of this Commonwealth may not be a victim for the purposes of restitution under the Crimes Code because such agencies are presently excluded from the definition of a 'person' under the Statutory Construction Act and thus, may not be considered as a victim." *Runion* at 617. While the Supreme Court noted that an interpretation of the Crimes Code in favor of the Commonwealth would be preferred public policy, "such a reading would not be consistent with our rules requiring strict interpretation of penal provisions and

would contravene the canons of statutory construction ..." *Runion* at 619. Finally, the Supreme Court observed that "... unless or until the legislature enacts language to the contrary, we must find that the Department of Public Welfare, as a Commonwealth entity, is expressly excluded from the definition of a 'person,' and as such may not be considered a victim under 18 Pa. C.S.A. §1106." *Runion* at 621.

For the purpose of restitution, the Pennsylvania Supreme Court's holding in *Runion* has been modified by a later 1995 legislative amendment which added to the list of persons or entities eligible for restitution (which had previously included only the Crime Victim's Compensation Board) "Any other government agency which has provided reimbursement to the victim as a result of the defendant's criminal conduct." 18 Pa. C.S.A. §1106 (c)(1)(ii)(C). In response to this amendment the Pennsylvania Supreme Court re-visited its decision in *Runion*, holding on October 21, 2009 that government agencies (including Medicare) which provide reimbursement for medical care received by crime victims are now entitled to restitution under 18 Pa. C.S.A. §1106 (c)(1)(ii)(C). *Commonwealth v. Brown*, 981 A.2d 893 (2009). The *Brown* decision, while modifying the restitution rule of *Runion* in light of the amendment to §1106, does not alter the fundamental holding of *Runion* that in the absence of a curative amendment to the Statutory Construction Act exclusion of the

Commonwealth from the definition of "person," the Commonwealth cannot be a victim of offenses for which the term "person" is referenced without further definition, including Theft by Unlawful Taking, Theft by Deception, or Theft.

Since the Statutory Construction Act expressly excludes "the Commonwealth" from the definition of the term "person," it is clear that the Commonwealth cannot be a victim of Theft by Unlawful Taking, Theft by Deception or Theft by Failure to Make Required Disposition. Accordingly, pursuant to Pa.R.Crim.P. 606, the Court should enter a judgment of acquittal on all counts charging those offenses, since the proof submitted by the prosecution is solely that the Commonwealth was the victim of the thefts alleged.

V. THE COMMONWEALTH IMPROPERLY DESTROYED WITNESS INTERVIEW NOTES IN VIOLATION OF MR. VEON'S RIGHTS UNDER THE UNITED STATES CONSTITUTION, THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 573, PENNSYLVANIA RULE OF PROFESSIONAL CONDUCT 3.8 (D) AND DEPRIVED THE DEFENDANT OF A FAIR TRIAL

Either before or during trial in this action, Frank Fina for the prosecution admitted that the Commonwealth had destroyed interview notes related to interviews of witnesses that were called by the prosecution in this case.[22]

---

[22] The original admission by Mr. Fina does not appear in the record. It is referred to by Veon's defense counsel, Daniel R. Raynak, during his motion to the Court that the Commonwealth provide notes related to Commonwealth witness Dan Woodske, as well as other witnesses for the prosecution. (TT, Day 3, pp. 160-161).

> We're being hit by surprise after surprise after surprise after surprise ... Mr. Fina has now admitted that notes were destroyed. His claim was well, we incorporated them into reports.
>
> We don't have any reports relating to Mr. Woodske that deal with those types of topics that I just addressed with the Court. Obviously, they weren't incorporated.

(TT, Day 3, pp. 160-161).

Mr. Raynak went on to mention to the Court that Mr. Fina's admission came in the week prior to trial.

> Mr. Raynak: ...Mr. Fina says why haven't we brought him in front of Judge Feudal. Until last week he wouldn't answer the question of whether the notes were destroyed.
>
> We're being hit by surprise after surprise after surprise after surprise ... Mr. Fina has now admitted that notes were destroyed. His claim was well, we incorporated them into reports.
>
> We don't have any reports relating to Mr. Woodske that deal with those types of topics that I just addressed with the Court. Obviously, they weren't incorporated.

Unfortunately, no transcription is available of the admissions made by the prosecutor regarding the destruction of these notes. It is apparent from a reading of the transcript that the Court did not rule on the defense request for the notes, which were admittedly destroyed by the prosecution.

Accordingly, the destruction of the notes related to the testimony of Dan Woodske will form the basis of Perretta-Rosepink's argument in this regard.

The issue of the destruction of notes of this type related to the Bonusgate prosecutions, has been briefed before this Court already. The specific issue of destruction of notes by the prosecutors in the Bonusgate prosecutions has been raised by the defense in the matter of *Commonwealth v. Brett Feese* at Superior Court No. 338 MDA 2012. In the first argument of the brief filed by Mr. Feese in that appeal, the issue of the destruction of notes of this type is fully and completely briefed by defense counsel for Mr. Feese. Accordingly, Perretta-

---

(TT, Day 3, p. 166).

> It is clear that notes were taken by someone on behalf of the prosecution during the initial interview of Mr. Woodske. We're being hit by surprise after surprise after surprise after surprise ... Mr. Fina has now admitted that notes were destroyed. His claim was well, we incorporated them into reports.
>
> We don't have any reports relating to Mr. Woodske that deal with those types of topics that I just addressed with the Court. Obviously, they weren't incorporated.

(TT, Day 3, pp. 105).

Rosepink adopts the arguments raised by Mr. Feese, in that matter and incorporates them herein by reference as though fully set forth at length. The arguments raised by Mr. Feese in this regard can be found at RR 16-52.

For the reasons argued by Mr. Feese as described above, Perretta-Rosepink was unfairly prejudiced by the wholesale destruction of witness notes in the instant case. The record documents that notes are missing with respect to a key witness and key issues on which he would have been cross examined had the notes not been destroyed. Perretta-Rosepink believes that a full review of the pretrial record will show that the prosecutor made nearly identical admissions with respect to the destruction of notes as those admissions made in connection with the appeal by Mr. Feese. For the reasons set forth in that brief, Perretta-Rosepink respectfully requests that this Honorable Court vacate the verdict in this case due to the unfair prejudice experienced by Perretta-Rosepink as a result of the misconduct of the prosecution and the destruction of the notes regarding Mr. Woodske and other witnesses in the case.

CONCLUSION & RELIEF SOUGHT

WHEREFORE, Annamarie Perretta-Rosepink asks this Honorable Court to REVERSE the Judgment of Sentence, REMAND for a new trial with instructions to the Honorable Trial Court as to the proper jury instruction regarding Conflict of Interest. In addition or in alternative, Appellant respectfully asks the Judges of this Honorable Court to DISCHARGE Defendant as to the charge(s) relating to Conflict of Interest finding the statute unconstitutional in scope and as applied to Appellant. In the alternative, Perretta-Rosepink asks this Honorable Court to VACATE the sentences imposed as to Theft of Services charge as the Commonwealth cannot be a victim of the same and bar retrial of this matter due to prosecutorial misconduct and/or the impermissible amendment of the Information.

Respectfully submitted,
PALERMO LAW OFFICES

Date: 7.16.13

Michael O. Palermo, Jr., Esquire
3300 Trindle Road
Camp Hill, PA 17011
(717) 635-9591
mop@palermolawoffices.com
Supreme Court I.D. 93334
Counsel for Appellant

SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH, Appellee,	: Docket No. 2154 MDA 2012 :	
v.	: Trial Court Docket No. : CP-22-CR-4272-2008	Received in Superior Court
ANNAMARIE PERRETTA-ROSEPINK Appellant	: (Dauphin County) :	JUL 16 2013 MIDDLE

CERTIFICATE OF SERVICE

I, Michael O. Palermo, Jr., Esquire, hereby certify that an Original and six (6) copies of the *Brief of Appellant and 4 total copies of the Reproduced Record* were served upon the Prothonotary of the Superior Court of Pennsylvania, Harrisburg, Pennsylvania, on the date below by USPS Priority Mail. In addition, one (1) copy of the *Brief* of *Appellant and Reproduced Record* was served by first class mail on the date below as follows:

Amy Zapp, Esquire
PA Office of Attorney General
Strawberry Square – 16th Floor
Harrisburg, PA 17120

Respectfully submitted,
Palermo Law Offices

Date: 7/16/13

Michael O. Palermo, Jr., Esquire
3300 Trindle Road
Camp Hill, Pennsylvania 17011
(717) 635-9591
Supreme Court I.D. 93334
Counsel for Appellant