

NO. 03-11-0087-CR

IN THE COURT OF APPEALS

THIRD JUDICIAL DISTRICT

AT AUSTIN, TEXAS

THOMAS DALE DELAY,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee.

FILED
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Third Court of Appeals
Jeffrey D. Kyle, Clerk

ON APPEAL FROM THE 331ST DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

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BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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IDENTIFICATION OF THE PARTIES

Pursuant to TEX.R.APP.P. 38.1(a), a complete list of the names and addresses of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

Complainant, victim, or aggrieved party:
the State of Texas

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Senior Judge
331st District court
Travis County, Texas

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Rule 402	76

TEXAS ETHICS ADVISORY OPINIONS:

No. 277 (1995)	40,96
No. 208 (1994)	40,94

UNITED STATES CODE:

18 U.S.C. § 1956(a)(1)	32,39
18 U.S.C. § 1956(c)	32
18 U.S.C. § 1957(a)	32,37,39

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will significantly assist this Court in its decision-making process. This novel prosecution, one tried by the State on a theory never before advanced in any court in Texas, presents cutting-edge issues as to the legal sufficiency of the evidence to sustain Appellant's convictions, a stark violation of the prohibition against the jury charge commenting on the weight of the evidence, and the constitutionality of those provisions of the Election Code that informed both counts of the indictment.

STATEMENT OF THE CASE

Appellant, with co-defendants John Dominick Colyandro and James Walter Ellis, was indicted for conspiracy to violate certain provisions of the Election Code, and for conspiracy to engage in money laundering of funds exceeding \$100,000.¹ (CR 26-31).² Appellant moved to quash the count alleging conspiracy to violate the Election Code on the grounds that offenses defined in Title 4 of the Penal Code, which included the criminal conspiracy statute, did not apply to offenses outside the Penal Code. (CR 1763, 1774). The trial judge agreed, and on December 5, 2005, granted Appellant's motion to quash the count alleging conspiracy to violate the Election Code. (CR 415).

The State appealed, and on April 19, 2006, this Court affirmed the trial court's ruling quashing the Election Code conspiracy count of the indictment. State v. DeLay,

¹ The indictments alleged that these offenses were committed in September and October of 2002. (CR 26-31).

² "CR" refers to the clerk's record. "RR" refers to the reporter's record. "DX" and "SX" refer respectively to Defense and State's Exhibits.

208 S.W.3d 603, 607-608 (Tex.App. – Austin 2006). The Court of Criminal Appeals granted discretionary review, and affirmed this Court’s judgment on June 27, 2007.³

State v. Colyandro, 233 S.W.3d 870, 885 (Tex.Crim.App. 2007).

Appellant was then re-indicted for the second-degree felony of conspiracy to commit money laundering of funds in excess of \$100,000 in count one, and for the first-degree felony of money laundering of funds in excess of \$100,000 in count two.⁴ (CR 26-33). The jury found Appellant guilty on both counts of the indictment on November 24, 2010.⁵ (19 RR 14). The trial court assessed Appellant’s punishment at confinement in the penitentiary for three years on count one, and five years community supervision on count two on January 10, 2011. (20 RR 94).

Notice of appeal, (CR 1539), and the trial court’s certification of the right to appeal, (Supp. CR 5), were filed. Appellant was admitted to bond pending appeal. (CR 1548). Appellant was represented below by lead counsel Dick DeGuerin, Matt Hennessy, and Catherine Baen, and on appeal by lead counsel Brian Wice.

³ In a separate proceeding, this Court rejected Colyandro and Ellis’s pre-trial challenges that the Election Code provisions governing political contributions and the money laundering statute were unconstitutionally vague. Ex parte Ellis, 279 S.W.3d 1, 19 (Tex.App. – Austin 2008). The Court of Criminal Appeals granted both parties’ petitions for discretionary review and held that this Court should not have addressed an “as applied” challenge to the money laundering statute in a pre-trial forum, and affirmed this Court’s conclusion that the Election Code provisions are not facially unconstitutional. Ex parte Ellis, 309 S.W.3d 71, 92 (Tex.Crim.App. 2010).

⁴ Effective September 1, 2005, money laundering is not a first-degree felony unless the value of the funds laundered is \$200,000 or more. See TEXAS PENAL CODE, § 34.02(e)(4).

⁵ The judgments in these matters incorrectly reflect that judgment was entered on October 26, 2010. (CR 1533, 1536).

PROLOGUE: "GIVE 'EM THE OLD RAZZLE DAZZLE"

*"Give 'em the old razzle dazzle
Razzle Dazzle 'em
Give 'em an act with lots of flash in it
And the reaction will be passionate
Give 'em the old hocus pocus
Bead and feather 'em
How can they see with sequins in their eyes?
Razzle dazzle 'em
And they'll never catch wise!"*⁶

The indictment, prosecution, and conviction of Tom DeLay for money laundering and conspiracy was, in a word, unprecedented.

Money laundering prosecutions have been brought based upon predicate offenses as varied as identity theft,⁷ drug trafficking,⁸ securing execution of a document by deception,⁹ theft by a public servant,¹⁰ theft,¹¹ and bribery.¹² But never before had any prosecutor used a purported Election Code violation as a predicate crime to indict, try, and convict any defendant for money laundering in Texas. Until now.

⁶ "RAZZLE-DAZZLE" from the 2002 Miramax motion picture "CHICAGO."

⁷ Ajisebutu v. State, 236 S.W.3d 309 (Tex.App.– Houston [1st Dist.] 2007, pet. ref'd).

⁸ Lee v. State, 143 S.W.3d 565 (Tex.App.– Dallas 2004, pet. ref'd).

⁹ Davis v State, 2004 WL 784552 (Tex.App. – Dallas 2004, pet. ref'd)(not designated for publication).

¹⁰ Perez v. State, 2003 WL 2006580 (Tex.App.– Corpus Christi 2003, pet. ref'd)(not designated for publication).

¹¹ Thomas v. State, 31 S.W.3d 422 (Tex.App.– Fort Worth 2000, pet. ref'd).

¹² Gonzales v. State, 2005 WL 1959168 (Tex.App. – San Antonio 2005, pet. ref'd)(not designated for publication).

Intent upon crafting a prosecutorial theory that was, by turns, novel, untested, and unsupported, the Special Prosecutions Division (*nee* the Public Integrity Unit of the Travis County District Attorney's Office), a cadre with state-wide and state-funded jurisdiction "to investigate and prosecute criminal activity involving state government,"¹³ pursued Appellant over the years in a manner reminiscent of Victor Hugo's Inspector Javert.¹⁴ Only after one grand jury refused to indict Appellant, (2 RR 64; CR 231), and with the statute of limitations bearing down upon him, was former Travis County District Attorney Ronnie Earle able to convince a "third and neophyte Grand Jury" to indict "before they were even given their parking passes." (2 RR 64).

Post-indictment, Earle embarked on a whirlwind media blitz, making extrajudicial comments that would form the basis for a co-defendant's motion to dismiss.¹⁵ In media forums such as *ESQUIRE*, "60 MINUTES," and "PBS' NOW," (2 RR 47-48), Earle repeatedly crowed that Appellant's case "is about an organized movement to basically steal an election by using illegal corporate donations to political campaigns" and that it was "not about Democrats and Republicans [but] about cops and robbers." In the midst of this investigation, Earle also provided "extraordinary access" to the producers

¹³ See www.traviscountyda.com/orgchart.htm (last visited June 3, 2011).

¹⁴ Javert's dogged pursuit of Jean Valjean is the plot of Hugo's classic, "**Les Miserables**."

¹⁵ (2 RR 47-48)("So there you have the prosecutor in utter derogation of his obligation not to make prejudicial statements about a pending prosecution, but going on TV and to the movies and doing that very thing, in utter disregard for the rights of the accused and the presumption that they're innocent."); (2 RR 49-50)("Mr. Earle was going on TV self-aggrandizing to talk about politics and his view of politics, and to tell people that these clients are guilty."); (2 RR 51)("[W]hat [Earle] did went way past the boundaries of his duty to see that justice is done and not convict.")

of “The Big Buy: Tom DeLay’s Stolen Congress,” a 2006 documentary about this case, talking to the producers “while [he] chopped wood or worked a late night in his office.”¹⁶

When the smoke had cleared, and at a cost to taxpayers rivaling a 21st-Century king’s ransom, the prosecution team indicted, convicted, and secured a prison term for Appellant on the strength of an untested and unsupportable artifice that one appellate court has likened to “legislating through prosecution ... and judicial fiat.”¹⁷ It was, to be sure, a prosecutorial act with lots of flash in it – redistricting, well-heeled lobbyists, golf outings, cocktail parties, corporate fund-raisers, a hefty dose of partisan politics, and the deftly hyperbolic canard that democracy hung in the balance. And handed a court’s charge with a clearly erroneous judicial comment on the evidence that effectively directed a verdict of guilty, it was not surprising that the jury’s reaction was, as the song says, passionate. Unfortunately for Tom DeLay, a jury with sequins in its eyes never caught wise to the fact that this prosecution was an unprecedented and, ultimately, legally ineffectual attempt to fit the square peg of a purported Election Code violation into the round holes of the money laundering and conspiracy statutes.

The case prosecutors presented against Tom DeLay in November of 2010, one devoid of evidence legally sufficient to sustain his convictions, was built upon the quicksand of innuendo and inference, a tale full of sound and fury, signifying nothing.¹⁸

¹⁶ See en.wikipedia.org/wiki/The_Big_Buy (last visited July 25, 2011).

¹⁷ **Montgomery v. State**, ___ S.W.3d ___, 2011 WL 2150230 at *4 (Tex.App.– Houston [14th Dist.], June 2, 2011, pet. filed).

¹⁸ SHAKESPEARE, “**Macbeth**,” Act V, scene. 5.

APPELLANT'S POINTS OF ERROR

POINT OF ERROR NUMBER ONE

The evidence was legally insufficient to sustain the jury's verdict as to count one of the indictment. [15 RR 66].

POINT OF ERROR NUMBER TWO

The evidence was legally insufficient to sustain the jury's verdict as to count two of the indictment. [15 RR 66].

POINT OF ERROR NUMBER THREE

The trial court erred in overruling Appellant's objection to that portion of the jury charge that referred to "equivalent funds" being donated to Texas Republican candidates. [17 RR 6-8].

POINT OF ERROR NUMBER FOUR

Appellant suffered egregious harm as a result of the trial court's failure to set out the theory of the law of parties in the application paragraph of count two of the indictment. [4 CR 1421-1422].

POINT OF ERROR NUMBER FIVE

The trial court erred in overruling Appellant's objection after the prosecutor improperly argued matters outside the record during his final argument in the guilt-innocence stage of trial. [17 RR 99-100].

POINT OF ERROR NUMBER SIX

The trial court erred in overruling Appellant's "as applied" challenge to the provisions of the Election Code forming the basis for his money laundering and conspiracy convictions. [4 CR 1351].

POINT OF ERROR NUMBER SEVEN

The trial court erred in overruling Appellant's "as applied" challenge to the State's novel and unprecedented use of the money laundering statute in this case. [4 CR 1350-1356; 15 RR 64-66].

POINT OF ERROR NUMBER EIGHT

The prohibition on corporate contributions made to candidates denounced by Sec. 253.003 and Sec. 253.094 of the Texas Election Code is an unconstitutional abridgement of the First Amendment to the United States Constitution. [4 CR 1350-1356; 15 RR 64-66].

SUMMARY OF THE ARGUMENT

1. The evidence was legally insufficient to sustain the jury's verdict as to count one of the indictment which, in fact, alleged a conspiracy to violate the Election Code, conduct that was not a crime in 2002. Because Appellant did not "engage in conduct that would constitute the offense" of money laundering, he could not be guilty of conspiring to commit that offense. At best, the evidence merely showed that Appellant associated with his co-defendants and knew of the conspiracy, but did not rise to the level of proof beyond a reasonable doubt that he wilfully associated himself in some way with a conspiracy, if any, indicating Appellant sought to bring to fruition the object of a conspiracy, if any. That Appellant was not named in any of the overt acts that allegedly furthered the conspiracy underscores the tenet that no rational juror could have found guilt as to the allegation in count one beyond a reasonable doubt.

2. The evidence was legally insufficient to sustain the jury's verdict as to count two of the indictment as either a primary actor or as a party. Prior to 2005, the definition of "funds" in § 34.01(2)(A-C) of the Penal Code did not include checks, a conclusion buttressed by this Court's holding in Ellis, the holdings of Louisiana and New York courts in similar matters, and the action of the Legislature in amending the statute in 2005 to expressly include checks as "funds." The check that TRMPAC sent to RNC was deposited in an account separate from, and never commingled with, individual money that could legally be sent to Texas candidates and the RNC always had sufficient "clean" money on hand in excess of any tainted money. Because the laundering of money cannot occur in the same transaction through which the money

allegedly first become tainted by crime, RNC's act of depositing TRMPAC's check into its corporate account could not have been money laundering because the money deposited was not yet the proceeds of criminal activity. Neither could any alleged agreement between TRMPAC and the RNC, or any claimed *post-hoc* criminal intent on Appellant's part, transform the check into proceeds of criminal activity because at best, this claimed agreement was a conspiracy to violate the Election Code, conduct that did not constitute a crime in 2002. Neither Appellant, nor his co-defendants, "engaged in conduct that would constitute the offense" of money laundering as primary actors, thus, Appellant could not be guilty as a party. Shorn of the inference, innuendo, and hyperbole that turned its case into an ersatz referendum on money as a driving force in partisan politics, the State's proof was legally insufficient as to count two.

3. The trial court erred in overruling Appellant's objection to that portion of the jury charge that referred to "equivalent funds" being donated to Texas Republican candidates. Because neither the indictment, nor any other portion of the charge, nor any of the provisions in Subchapter D of Chapter 253 of the Texas Election Code, made any reference whatsoever to "equivalent funds" being donated as the basis for any criminal liability, this portion of the charge was not part of "the law applicable to the case" and was an improper comment on the weight of the evidence that all but directed a verdict of guilt against Appellant. In light of the entire jury charge, the state of the evidence, and the arguments of counsel, this properly preserved charging error caused Appellant to suffer at least "some harm."

4. Appellant suffered egregious harm as a result of the trial court's failure to apply the law of parties theory to the facts in the application paragraph of count two of the indictment. Rather than merely withholding information from the jury, the application paragraph affirmatively misled the jury by telling the jury it could convict Appellant for conduct allegedly engaged in by his co-defendants, even if he was not a party to that conduct. Given the state of the contested evidence, the fact that the charge contained other clearly erroneous instructions, and the arguments of counsel, this error deprived Appellant of his valuable right to have a jury determination of every element of the alleged offense, and that vitally affected his defensive theories.

5. The trial court erred in overruling Appellant's objection after the prosecutor improperly argued matters outside the record during his final argument in the guilt-innocence stage of trial, with his unsworn testimony that his office was prosecuting a Democrat state legislator in the courtroom next door. This argument was not invited, injected the prosecutor's unsworn testimony into the proceedings, and encouraged the jury to convict Appellant based on matters without foundation in the record. Given that the severity of the prosecutor's misconduct was significant, the trial court did not take any corrective action, and the certainty of conviction absent this clearly improper jury argument was underwhelming, the prosecutor's improper final argument compels a reversal of Appellant's conviction.

6-7. The trial court erred in overruling Appellant's "as applied" challenges to the Election Code provisions that formed the basis for his money laundering and conspiracy convictions, and to his challenges to the State's novel and unprecedented

use of the money laundering statute in this case. Viewed through the lens of strict construction of all penal statutes, the rule of lenity, and the “fair warning” requirements, and because “money swaps” were commonplace by both political parties, a person in Appellant’s position was left to speculate as to whether his conduct violated the money laundering statute, at least in 2002. Men of common intelligence must necessarily have guessed at whether the statute included “funds” included checks in 2002, and differed as to the application of the statute. It was similarly impossible for a person of ordinary intelligence to know with any reasonable degree of certainty that TRMPAC’s \$190,000 check to the RNC, corporate contributions used in connection with non-Texas elections, comprised an impermissible expenditure under the Election Code.

8. The prohibition on corporate contributions made to candidates denounced by §§ 253.003 and 253.094 of the Texas Election Code is an unconstitutional abridgement of the First Amendment to the United States Constitution in light of the Supreme Court’s decision in Citizens United v. Federal Elections Commission. While the Court of Criminal Appeals did not believe that this ruling significantly affected the constitutional landscape with respect to the ban on corporate donations to candidates, this cursory treatment is in conflict with the Supreme Court’s ever-increasing penchant for striking down campaign finance laws on First Amendment grounds. Because the Court of Criminal Appeals’s evanescent treatment of this First Amendment claim in Ellis is in conflict with rulings from a federal court and a state supreme court that Citizens United struck a fatal blow against the federal ban on corporate contributions to candidates, the dicta in Ellis will not be the last word on Appellant’s federal claim.

POINT OF ERROR NUMBER ONE

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN THE JURY'S VERDICT AS TO COUNT ONE OF THE INDICTMENT. [15 RR 66].

POINT OF ERROR NUMBER TWO

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN THE JURY'S VERDICT AS TO COUNT TWO OF THE INDICTMENT. [15 RR 66].

STATEMENT OF FACTS

Viewed in the light most favorable to the jury's verdict, Evans v. State, 202 S.W.3d 158, 161 (Tex.Crim.App. 2006), the evidence at trial showed the following:

A. THE PROSECUTION'S CASE

This prosecution arose from a complaint filed with the Public Integrity Division of the Travis County District Attorney's Office in March, 2003, from Craig McDonald, former executive director of Texans for Public Justice, that a \$190,000 contribution to the Republican National State Elections Commission¹⁹ ["RNSEC"] from the Texans for a Republican Majority²⁰ political action committee ["TRMPAC"], may have violated the Texas Election Code's prohibition against corporate donations to political candidates.²¹

¹⁹ The "RNC" [Republican National Committee] is used interchangeably with RNSEC.

²⁰ Bill Ceverha, noted that Appellant "planted the seed" for TRMPAC, which was patterned after another political action committee, Americans for a Republican Majority ["ARMPAC"]. (6 RR 226). Ceverha did not, however, agree that Appellant was part of TRMPAC. (6 RR 243).

²¹ The only complaints that McDonald, who appeared in "**The Big Buy**," had ever filed with prosecutors for claimed Election Code violations, had been against Republicans. (6 RR 141-142).

(6 RR 128, 170, 178).

Bill Ceverha, the treasurer of TRMPAC, based in Travis County, Texas, testified about a practice that had been in place for decades where corporate donations would be sent to the Republican National Committee ["RNC"] in Washington, D.C., and the RNC would then make contributions to Texas candidates with legal, non-corporate funds. (6 RR 222, 239). No corporate money raised by TRMPAC could be legally sent to Texas candidates, either directly or indirectly. (6 RR 224). They could, however, be used for administrative purposes. (6 RR 241). Ceverha opined that so long as corporate contributions were not sent to candidates, and were used for administrative purposes, which he concluded was anything "that was not directly [sent] to a candidate," there was no violation of the law. (7 RR 26, 28). TRMPAC's advisory board sought legal advice from Ed Shack, one of Texas's foremost experts on election law, and believed they were doing what the law required. (7 RR 28). TRMPAC's decisions were made by John Colyandro, who would then advise the board of what he had done. (7 RR 35).

Kevin Brannon, a campaign consultant, was hired by TRMPAC to be its "eyes and ears in the field." (7 RR 70, 78). Brannon had almost no contact with Appellant, was never on a conference call with him, and took directions from Colyandro, but not from Appellant. (7 RR 120-121, 123).

Drew Maloney, a lobbyist, worked for Appellant from 1999 until 2002. (7 RR 172-173). Maloney helped put on a fund-raising event for ARMPAC, with Appellant as the beneficiary, at the Homestead, a resort-golf course. (7 RR 180; 8 RR 147). The

price of attendance for corporate donors at the event was from \$25,000 and \$50,000.²² (7 RR 191).

Paul Doucette, director of public affairs for Cornell Companies, testified that his company made a \$10,000 donation to TRMPAC. (8 RR 185, 195). Cornell Companies, however, had no intent to violate the law by making this contribution. (8 RR 200).

Chris Chrissman, a senior vice-president for Diversified Collections, testified that his company made a \$50,000 donation to TRMPAC. (8 RR 21, 222). His company had no intent to violate the law by making this contribution. (8 RR 230).

Warren Robold was a fund-raiser for ARMPAC in 2002, when James Ellis was its political director, and Robold later became a fund-raiser for TRMPAC.²³ (8 RR 251, 255, 263). Robold raised a little over \$400,000 in corporate contributions for TRMPAC. (9 RR 45). Although he was indicted in connection with his TRMPAC fund-raising, the indictments were dismissed, and Robold believed he had done nothing to violate the law. (9 RR 47, 86). Ellis and Colyandro assured Robold that his solicitation of

²² El Paso Corp. donated \$50,000 to ARMPAC and \$50,000 to TRMPAC. (8 RR 144). Reliant Energy, which also donated money to Democratic officeholder, Martin Frost, and his political action committee, donated \$50,000 to ARMPAC and \$50,000 to TRMPAC. (10 RR 76, 86). The Williams Cos. donated \$25,000 to TRMPAC. (12 RR 20). Westar Energy Co. donated \$25,000 to TRMPAC. (12 RR 121).

²³ A TRMPAC brochure offered through Robold remarked, *inter alia*, that, "Unlike other organizations, your corporate contribution to TRMPAC will be put to productive use. Rather than just paying for overhead, your support will fund a series of productive and innovative activities designed to increase your level of engagement in the political arena." (9 RR 31). Robold testified, however, that he never told any corporate donors that their money was going to go to candidates. (9 RR 99). Another TRMPAC brochure noted that it "will help Republican candidates successfully run and win campaigns in Texas, and increase [its] majority of statewide and legislative officers for the next decade." (10 RR 199).

corporate donations for TRMPAC were to be used in running TRMPAC and were not illegal. (9 RR 92-93). Robold took his marching orders from Colyandro and not from Appellant. (9 RR 102).

Timothy Milovich, CEO of Questa, testified that his company donated \$25,000 to ARMPAC. (9 RR 173). Milovich noted that Questa never intended to commit any crime by making this donation. (RR 198).

Terry Nelson, who ran all of the RNC's political operations in 2002, testified over Appellant's conditional objection, (9 RR 209-210), that James Ellis told him that TRMPAC had corporate donations it could not spend in Texas and wanted to know if they could contribute it to the RNC, who would then make contributions to some Texas legislative campaigns from money they could use, *i.e.*, individual contributions. (9 RR 212, 242). Ellis told Nelson he wanted a dollar-for-dollar swap and that Appellant "wanted us to do it." (9 RR 215). Nelson testified that he never spoke with Appellant about this transaction, and did not know if the latter even knew about it. (9 RR 238). Ellis brought Nelson a \$190,000 TRMPAC check dated September 13, 2002, made out to RNSEC, and signed by Colyandro. (9 RR 219). RNSEC eventually²⁴ sent checks to seven Texas candidates²⁵ whose names were provided by Ellis. (9 RR 222).

²⁴ It took from September 13 until October 4, 2002, for all of the principles at the RNC to sign off on the transaction. (9 RR 245).

²⁵ Todd Baxter received a \$35,000 check from RNSEC. (11 RR 169). Dwayne Bohac received a \$10,000 check from TRMPAC, and a \$20,000 check from RNSEC. (11 RR 202-204). Jack Stick received two \$10,000 checks from TRMPAC, and a \$35,000 check from RNSEC. (11 RR 244, 246). Dan Flynn, who noted that the average cost of running a Texas state representative race was \$1,000,000, received a \$10,000 check from TRMPAC, a \$1,000 check from ARMPAC,

Nelson stated that the money sent to the seven Texas candidates came from a bank account in which only individual donations were placed that was completely separate, and from which such contributions could be legally made. (9 RR 235-236). Exchanges such as this were routinely engaged in by both political parties and were referred to as “money swaps.”²⁶ (9 RR 238, 246). The Republican Party checked the legality of contributions in every state to ensure that all contributions were legal. (9 RR 244). Nelson stated that the \$190,000 TRMPAC sent to the RNC was not disbursed in Texas. (9 RR 248). The TRMPAC money was never commingled with the RNSEC funds that were disbursed to Texas candidates. (9 RR 252).

Jorge Marquez attended an event in Puerto Rico where Appellant was present, at which Bacardi, for whom Marquez was employed, donated \$20,000 to TRMPAC. (10 RR 15, 17). Bacardi also donated money to Democratic officeholder, Martin Frost’s

and a \$20,000 check from RNSEC. (12 RR 54-57, 67). He also noted that the RNSEC letter pointed out that the RNSEC money was “issued out of its non-federal, non-corporate account.” (12 RR 87). Rick Green received two \$10,000 checks from TRMPAC, a \$2,500 check from ARMPAC, and a \$20,000 check from RNSEC. (12 RR 151-153). Larry Taylor received a \$10,000 check and a \$12,000 check from TRMPAC, and a \$20,000 check from RNSEC. (12 RR 180-183). Glenda Dawson received a \$10,000 check from TRMPAC. (13 RR 199).

²⁶ In September 2003, the National Institute on Money in State Politics studied how national and state political committees in 13 states, including Texas, used soft and hard money in the 1998, 2000, and 2002 election cycles, and issued a report of its findings. This report found, *inter alia*, that: “[E]ight trades of soft money for hard money, all between the Democratic National Committee and the Texas Democratic Party. In two trades in 1998, the DNC sent \$172,500 in soft money to Texas, and the State party sent back \$150,000 in hard money. In two trades in 2000, the DNC sent \$150,000 of soft money and received \$125,000 in hard money. And over a series of four trades in 2002, the DNC gave the state party \$255,000 in soft money, and the Texas Democratic Party sent \$225,000 in hard money to the DNC.” See “Passing the Bucks: Money Games that Political Parties Play,” available at www.followthemoney.org (last visited July 25, 2011).

political action committee. (10 RR 25-26). Bacardi's legal department determined that the contribution to TRMPAC was legal. (10 RR 38).

Penny Cate, a vice-president with Sears, testified that Sears gave TRMPAC \$25,000 in June of 2002, and that Robold told her it would help elect Republicans to Congress in Texas. (10 RR 147-148). Cate did not think that Sears had done anything illegal in making this contribution; the company, however, paid a substantial amount of money to a charitable fund designated by then-District Attorney Ronnie Earle, in exchange for the dismissal of the indictment charging it with a violation of the Texas Election Code. (10 RR 166, 176).

Jack Dillard, director of governmental affairs at Phillip Morris in 2002, stated that his company made a \$10,000 contribution to TRMPAC in July of 2002.²⁷ (11 RR 96, 110). The company took great pains to ensure that its corporate dollars were kept apart from its individual contributions. (11 RR 123).

Larry Forth, governmental relations manager for Cracker Barrel in 2002, noted that the company contributed \$25,000 to TRMPAC in September, 2002. (11 RR 131, 143). The company would not have agreed to make an illegal campaign contribution, and kept its corporate dollars apart from its individual dollars. (11 RR 153-154).²⁸

Russell Anderson, business records custodian for TRMPAC, testified that "hard"

²⁷ The company's legal department insisted on language in a cover letter that its contribution "is being made to support the establishment and administrative costs of [TRMPAC] only and is not to be used in connection with any state or federal election." (11 RR 114).

²⁸ After Larry Forth's testimony concluded, SX 235, a transcript of Appellant's interview conducted by the District Attorney's Office on August 17, 2005, was played. (12 RR 205).

dollars are contributions from individuals or entities comprised of individuals while "soft" dollars are contributions from corporations or entities that have corporations as any part of them. (13 RR 32). Hard money could be used for any purpose while there were legal limits on what soft money could be spent on. (13 RR 34). TRMPAC had three separate bank accounts, including a money market of soft money that was put in an interest-bearing account. (13 RR 33). Anderson deposited the \$50,000 ARMPAC check to TRMPAC into the corporate or soft money account. (13 RR 187). He then wrote checks to the seven Texas candidates out of the hard money account for various amounts. (13 RR 199).

During his time at TRMPAC, Anderson never took a single order or directive from Appellant because John Colyandro "was the guy calling the shots with TRMPAC." (13 RR 207). Anderson made sure that hard money was never commingled with soft money or vice-versa. (13 RR 213). Anderson stressed that Appellant had nothing to do with sending TRMPAC's \$190,000 check to RNSEC. (13 RR 226). Anderson had no intention of violating the law by sending TRMPAC's soft money to RNSEC, and if anything, erred on the side of being overly conservative in the use of soft money. (13 RR 227, 229).

Marshall Vogt, the State's forensic analyst, reviewed the financial records of TRMPAC and RNSEC. (14 RR 24, 29). Check number 1161, TRMPAC's \$190,000 check to RNSEC was sent via Federal Express on September 10, 2002, and received in Washington, D.C. the next day at 11:58 a.m., with Russell Anderson listed as the sender and Jim Ellis listed as the recipient. (14 RR 73-75). All of the checks forwarded

to the Texas candidates were dated October 4, 2002. (14 RR 106). Vogt acknowledged that the \$190,000 came from a separate, non-corporate RNSEC account. (14 RR 118). Appellant was never an authorized signatory on the TRMPAC account; only Colyandro and Ellis were. (14 RR 126). Vogt admitted there was no evidence of any telephone calls from Appellant's home phone to Ellis or Colyandro during this time frame. (14 RR 140). Vogt also admitted that not a single check from the account into which the \$190,000 TRMPAC check had been deposited was ever written to any Texas candidate and that there were no transfers between these two RNSEC accounts or commingling of any donations. (14 RR 155-156).

Steve Bickerstaff, a professor at the University of Texas law school, was the author of myriad books and law review articles on redistricting in Texas. (14 RR 199). Bickerstaff opined that Appellant played a major role in Texas's redistricting in order to increase Republican representation in Congress.²⁹ (14 RR 219).

Laylan Copelin, a reporter for the *Austin American-Statesman*, interviewed Appellant on November 10, 2010. (15 RR 33-34). An audiotape of this interview was played for the jury.³⁰ (15 RR 36). During this brief interview, Appellant remarked, *inter alia*, "So if I knew it was \$190,000, then I knew it after the deal was already cut and Jim Ellis came to me, told me about it. I probably could have stopped it but why would I? It was – it was a legal deal. Had been done for years by Democrats and

²⁹ Bickerstaff's opinion was shared by Harvey Kronberg, a writer who covered politics in Texas. (15 RR 18).

³⁰ A transcript of this interview was also admitted in evidence. (15 RR 35).

Republicans.” (58 RR 250).

The State introduced a video of Appellant’s interview with Chris Wallace of Fox News conducted on October 2, 2005, in which Appellant, *inter alia*, reiterated his belief that he “had nothing to do with the day-to-day operation” of TRMPAC, and that he had not violated any criminal laws. (45 RR 665-666).

After the State rested, (15 RR 49), Appellant’s oral, (15 RR 52-66), and written, (4 CR 1350-1376), motions for instructed verdicts³¹ were denied. (15 RR 66).

B. THE DEFENSE’S CASE

Jay Banning, a defense witness taken out of turn, testified that he was the chief financial officer for the RNC during the 2002 election cycle.³² (13 RR 132). The RNSEC had multiple bank accounts, each of which was fire-walled off from the others because certain states could not take certain kinds of political contributions, and no corporate money could go into a personal account or vice-versa. (13 RR 136). For instance, money sent to individual candidates in Texas would have come out of the operating account which contained all personal money. (13 RR 137). During the 2002 election cycle, RNSEC contributed \$1,105,000 to Texas candidates.³³ (13 RR 140). In these money “swaps,” regarding Texas candidates, which Banning noted were common,

³¹ As recounted below, Appellant not only claimed that the evidence was legally insufficient as to both counts of the indictment for a number of reasons, he advanced “as applied” challenges to both the money laundering statute and certain provisions of the Election Code. (15 RR 63-66).

³² Banning had initially been subpoenaed by the State and had never met Appellant in his life. (13 RR 157-158).

³³ It is worthy of note that the average personal donation to RNSEC was \$80. (13 RR 171).

RNSEC never sent any corporate money to Texas candidates; all such money came from the operating account, which was all personal money, not corporate. (13 RR 141, 156, 170). There was never any commingling of RNSEC's personal and corporate monies and RNSEC only spent corporate money in those states where it could be sent to state parties who could accept corporate contributions. (13 RR 143). None of the seven Texas candidates at issue received any corporate money from RNSEC. (13 RR 145). All requests for money from RNSEC originated in the political division and wound up being vetted by the legal staff. (13 RR 149).

Charlie Spies, former deputy counsel to RNSEC, testified that it was his job to ensure that the Republican Party was in compliance with all state and federal election laws,³⁴ and that money that was spent came from a permissible bank account wherever it was being spent. (15 RR 73, 84). Money swaps were very common in 2002, including swaps in Texas, and both political parties did so. (15 RR 88, 91). Spies recounted that when PAC money came from Texas, where corporate contributions to candidates were illegal, it was assumed that the contributions were corporate, and, out of an abundance of caution, all such money was deposited into a separate account that contained only corporate money. (15 RR 93-94). Because this corporate account was fire-walled off from all RNSEC accounts, no money from this discrete account was ever disbursed in Texas. (15 RR 94, 98). Spies had no personal knowledge of any agreement to exchange the \$190,000 sent to RNSEC by TRMPAC that was allegedly earmarked for the seven

³⁴ To ensure compliance, the RNSEC had a book that contained sections on the election laws of every state, including Texas. (15 RR 102-103).

Texas candidates. (15 RR 111). When asked if the money in the RNSEC operating account that was disbursed to Texas constituted “proceeds of criminal activity,” Spies replied, “I would certainly hope not.” (15 RR 112). In fact, the RNSEC had a policy “absolutely not to accept proceeds of illegal activity.” (15 RR 113). Any sort of sign-off on this transaction would likely have occur before October 2, 2002. (15 RR 117).

Kevin Shuvalov, formerly the regional political director for the RNC, testified that Terry Nelson was one of his direct superiors. (15 RR 123). Nelson called him and said that there was a request from TRMPAC to send money to legislative candidates in Texas some time prior to October 2, 2002. (15 RR 128-129). Shuvalov was aware that TRMPAC sent the \$190,000 to the RNSEC, and that RNSEC was considering sending an equivalent amount to Texas candidates from private donations because such swaps were common in Texas.³⁵ (15 RR 132, 134). Shuvalov never discussed any element of this transaction with Appellant, and was never told that Appellant wanted this transaction to take place. (15 RR 134, 150).

Mary Ellen Bos, Appellant’s full-time scheduler in 2001 and 2002, testified that she was the so-called gatekeeper in Appellant’s Leadership office.³⁶ (15 RR 178). She later became Appellant’s assistant on the floor of the House of Representatives. (15 RR 181). When anyone called Appellant’s offices, Bos noted they could not get through

³⁵ Shuvalov could not recall a situation where corporate money was exchanged for personal money with the intention that it go to candidates. (15 RR 150).

³⁶ Appellant had both a Congressional and Leadership office. The former office involved work within his district and the latter involved his position as House Majority Whip. (15 RR 174).

directly to Appellant, unless it happened to be the President or the Speaker of the House. (15 RR 185). If, for instance, James Ellis called, he would not have been automatically put through to Appellant. (15 RR 187). Bos could not recall Ellis calling Appellant in September or October of 2002. (15 RR 187). Bos admitted that on September 11, 2002, a few hours after Ellis received the \$190,000 check via Federal Express, he was, at least according to Appellant's calendar, slated to meet with Appellant at his office. (15 RR 220-221). But Bos also noted that merely because someone was slated to meet with Appellant did not mean that they, in fact, did. (16 RR 41). Bos was 99.5% sure, certain beyond a reasonable doubt, that Appellant "just wouldn't have gone" to the meeting at which Ellis was to appear. (16 RR 46, 68, 84).

Dan Flynn, Appellant's one-time deputy chief of staff, testified that it was his job to make and keep Appellant's schedule so that "the trains run on time." (16 RR 92). He also recounted that almost all communications with Appellant went through an office staff member. (16 RR 115). September 11, 2002, was both a very busy day and a very somber day for everyone who worked in Appellant's office. (16 RR 106). Flynn recalled the so-called "Grassroots" meeting that was set that day from 1:00 to 2:30 p.m. with Ellis, *et al.* (16 RR 106). Flynn did not believe that Appellant attended that meeting. (16 RR 106).

On November 18, 2010, both sides rested and closed. (16 RR 198).

On November 24, 2010, after deliberations that spanned three days, the jury found Appellant guilty on both counts of the indictment. (19 RR 14).

ARGUMENT AND AUTHORITIES

A. THE STANDARD OF REVIEW

In reviewing the legal sufficiency of the evidence, this Court views the evidence in the light most favorable to the verdict and asks whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In carrying out this task, this Court must remain cognizant that “proof beyond a reasonable doubt” means “proof to a high degree of certainty.” Lane v. State, 151 S.W.3d 188, 192 (Tex.Crim.App. 2004)(citation omitted). If, based on all the evidence, a reasonably-minded jury must necessarily have entertained a reasonable doubt of Appellant’s guilt, due process requires that this Court reverse these convictions and order judgments of acquittal. Swearingen v. State, 101 S.W.3d 89, 95 (Tex.Crim.App. 2003). In essence, a claim of legal insufficiency is an argument that the case never should have been presented to the jury. Wesbrook v. State, 29 S.W.3d 101, 111 (Tex.Crim.App. 2000).

In conducting a legal sufficiency review, this Court does not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witness, as this is the function of the trier of fact. Dewberry v. State, 4 S.W.3d 735, 740 (Tex.Crim.App. 1999). Instead, this Court determines whether the explicit and implicit findings of the trier of fact are rational by viewing all the evidence in the light most favorable to the verdict. Adelman v. State, 828 S.W.2d 418, 422 (Tex.Crim.App. 1992). This Court does not sit as a thirteenth juror in assessing the sufficiency of the evidence, but rather positions itself as a final due process safeguard to ensure the rationality of the fact

finder's decision. Moreno v. State, 755 S.W.2d 866, 867 (Tex.Crim.App. 1988). This Court measures the sufficiency of the evidence against the elements of the offense as defined by a hypothetically correct jury charge. Malik v. State, 953 S.W.2d 234, 240 (Tex.Crim.App. 1997). Such a charge would be one which "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." Id. The legal sufficiency of the evidence under the Jackson standard is a question of law which this Court reviews *de novo*. Roberson v. State, 16 S.W.3d 156, 165 (Tex.App.— Austin 2000, pet. ref'd).

In addition to the illegal conduct of the primary actor, to establish liability as a party, the State must demonstrate that the accused harbored the specific intent to promote or assist the commission of the offense. Lawton v. State, 913 S.W.2d 542, 555 (Tex.Crim.App. 1995). The accused must know that he was assisting in the offense's commission, and the agreement, if any, must be contemporaneous with the criminal event. Amaya v. State, 733 S.W.2d 168, 174-175 (Tex.Crim.App. 1986). The essential principle of parties' culpability is the common design to do a criminal act. Pesina v. State, 949 S.W.2d 374, 383 (Tex.App.— San Antonio 1997, pet. ref'd). The State must show more than mere presence to establish participation in a criminal offense. Valdez v. State, 623 S.W.2d 317, 321 (Tex.Crim.App. 1981). Mere presence or even knowledge of an offense do not make one a party to the offense. Oaks v. State, 642 S.W.2d 174, 177 (Tex.Crim.App. 1982). Acts committed after the offense is complete cannot make the accused a party to the offense. Pesina v. State, 949 S.W.2d at 383.

The Supreme Court has made it clear that the standard of proof beyond a reasonable doubt “plays a vital role in the American scheme of criminal procedure, because it operates to give ‘concrete substance’ to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding.” Jackson v. Virginia, 443 U.S. at 315 (citation omitted). By impressing upon the fact finder the need to reach a subjective state of near certitude of the accused, this standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. Id. The Supreme Court has made it clear that “a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt.” Id. at 317.

For the reasons that follow, this is just such a case.³⁷

B. THE INDICTMENT AND APPLICABLE STATUTES

Count one of the indictment alleged, *inter alia*, that Appellant, John Colyandro and James Ellis conspired to “mak[e] a political contribution to a candidate for the Texas House of Representatives in violation of Subchapter D of Chapter 253 of the Texas Election Code, a felony of the third degree, be committed, and with intent that the offense of money laundering of funds of the value of \$100,000 or more, a felony of the first degree, be committed...” (CR 27). Count two alleged, *inter alia*, that Appellant “conducte[d], supervise[d], and facilitate[d] a transaction involving the proceeds of criminal activity that constituted an offense classified as a felony ..., the offense of

³⁷ Pursuant to TEX.R.APP.P. 38.1(e), the theories as to legal insufficiency set forth below are “subsidiary questions” that are “fairly included” in these two points of error.

knowingly making a political contribution in violation of Subchapter D of Chapter 253 of the Texas Election Code, a felony..."³⁸ (CR 31).

Sec. 15.02(a)(1) & (2) of the Texas Penal Code provides that a person commits the offense of criminal conspiracy if, "with intent that a felony be committed, he agrees with one or more of them engage in conduct that would constitute the offense; and he or one or more of them performs an overt act in pursuance of the agreement." Sec. 34.02 provides that a person commits the offense of money laundering if he "conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity." Sec. 34.01(4) defined "proceeds" as "funds acquired or derived directly or indirectly from, produced through, or realized through an act." At the time of the conduct alleged in the indictment, § 34.01(2)(A-C) defined "funds" as including:

- coin or paper money of the United States or any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issue;
- United States silver certificates, United States treasury notes, and Federal Reserve System notes; and
- official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country and foreign bank drafts.

Sec. 253.003(a) of the Texas Election Code provides that a person may not knowingly make a political contribution in violation of this chapter. Subchapter D of the Election Code, titled "Corporations and Labor Organizations," provides that:

³⁸ The indictment also alleged that Appellant, with the advice and consent of counsel, waived the application of the three-year statute of limitations applicable to count two of the indictment. (CR 33).

- A corporation or labor organization may not make a political contribution or political expenditure that is not authorized by this subchapter. § 253.094(a).
- A corporation, acting alone or with one or more other corporations, may make one or more political expenditures to finance the establishment or administration of a general-purpose committee. § 253.100(a).

C. INSUFFICIENCY OF THE EVIDENCE AS TO COUNT TWO: MONEY LAUNDERING

1. Checks are not "Funds" Within the Meaning of § 34.01(2)(A-C)

As recounted above, prior to 2005, § 34.01(2) defined "funds" as including:

- (A) coin or paper money of the United States or any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issue;
- (B) United States silver certificates, United States treasury notes, and Federal Reserve System notes; and
- (C) official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country and foreign bank drafts.

In 2005, after the acts at issue in this indictment were allegedly committed, § 34.01 was amended to add an additional category of items that the term "funds" would include:

- (D) currency or its equivalent, including an electronic fund, personal check, bank check, traveler's check, money order, bearer negotiable instrument, bearer investment security, bearer security, or certificate of stock in a form that allows title to pass on delivery.

Some three years ago, in a pre-trial challenge to the facial constitutionality of the money laundering statute brought by Appellant's co-defendants, a majority of this Court found that "the term 'funds' in the pre-2005 version of the money laundering statute cannot be fairly read to have tacitly included checks and other negotiable instruments that do not function as cash such as those added to the statute in 2005."

Ex parte Ellis, 279 S.W.3d 1, 25 (Tex.App. – Austin 2008). Former Justice Patterson, joined by Justice Henson, dissented on the grounds, *inter alia*, that because a trial had not occurred, at which evidence could have been elicited as to the exact form of the corporate contributions, a ruling on the vagueness challenge was premature. Id. at 41-42 (Patterson, J., *dissenting*). On discretionary review, the Court of Criminal Appeals reversed this Court, concluding that it “improperly resolved an ‘as applied’ challenge when it held that the money laundering statute did not apply to checks.” Ex parte Ellis, 309 S.W.3d 71, 82 (Tex.Crim.App. 2010)(“There was no need for the court of appeals ... to decide that ‘funds’ covered only forms of cash.”). In the wake of Appellant’s trial, where the State’s proof revealed that the form of the corporate contributions was, in fact, a check, this claim is now ripe for review, and the majority’s reasoning and analysis remains as vibrant and compelling today as it did three years ago.³⁹ And, without re-inventing the judicial wheel, the majority’s holding rested on its belief that:

- Checks and other negotiable instruments are not comparable to or appropriately classified with the items included in the pre-2005 definition of “funds” in § 34.01, which included only mediums of exchange that function as cash or true cash equivalents.
- When the Texas money laundering statute was adopted in 1993, the legislature anticipated that the money laundering statute would primarily apply to the cash proceeds of drug crimes and other activities, and so the list of examples of what constitutes “funds” in the original statute is consistent with the bill’s analysis

³⁹ Aside from the majority’s exhaustive analysis of this issue, University of Texas Law School Professor Susan R. Klein, whose nationally-renown expertise in the area of money laundering is beyond cavil, provides a detailed exegesis on the history, elements, and scope of the Texas money laundering statute that impacts this and other related sufficiency challenges. (4 CR 1358-1369).

statement that the legislature intended that it include only items that functioned as cash or true cash equivalents.

- Given the legislature's amendment in 2005 which added the category of checks and other non-cash monetary instruments to the definition of "funds," and presuming a change when, as here, the amendment alters a statute rather than a clarification, and given the statutory text and the legislative history, "checks and other negotiable instruments were added to the description of the term 'funds' in section 34.01 in 2005 precisely because they were not included in the prior version of the statute."⁴⁰
- The term 'funds' in the pre-2005 money laundering statute did not include checks or other negotiable instruments that are not the functional equivalent of cash.

Ex parte Ellis, 279 S.W.3d at 26-29.

This Court's reasoning and analysis in Ellis finds support in the legislative history informing the enactment of § 34.01. As Professor Susan Klein has pointed out in tracing the evolution of the Texas money laundering statute:

Prior to the 2005 legislative session, there could be no substantive money laundering violation by conducting a transaction involving a personal or business check. The original version of the money laundering provision defined "proceeds" as "anything of value." *The legislature specifically rejected such broad language, adopted in many other states that would have included non-cash items such as real property, conveyances, intangible property, and checks. The Texas legislature similarly rejected the federal model, which prohibits a "financial transaction," another expansive term which includes checks. Instead, the*

⁴⁰ This notion is fortified by the presumption that the legislature, by enacting an amendment, is presumed to change the law. Ex parte Trahan, 591 S.W.2d 837, 842 (Tex.Crim.App. 1979)("In enacting an amendment, the Legislature is presumed to have changed the law, and a construction should be adopted that gives effect to the intended change, rather than one that renders the amendment useless."); State v. Eversole, 889 S.W.2d 418, 425 (Tex.App.— Houston [14th Dist.] 1994, pet. ref'd)("We elect, therefore, to adopt a construction which gives effect to the intended change, as opposed to one that renders the amendment useless.").

legislature enacted a statute which defined “proceeds” very narrowly as including cash and other anonymous cash equivalents that can be spent by the bearer and cannot be traced. This was designed to prevent the funneling of cash profits of crime into the legitimate economy, thereby concealing their source. As the Committee of Criminal Jurisprudence stated when it substituted the narrow language enacted in place of the original bill, the amended statute “combats the economic loss from financial crimes by shifting the emphasis on following the drugs to one that follows the money.”

(4 CR 1362)(footnotes omitted)(emphasis added).

The reasoning and analysis employed by this Court in Ellis was presaged by the Louisiana Court of Appeals just one week before Ellis was decided. In State v. Odom, 993 So.2d 663 (La. App. 1st Cir. 2008), the court was called on to determine whether the definition of “funds” in the Louisiana money laundering statute included “checks.” The Louisiana money laundering statute, virtually identical to its Texas counterpart, made it a crime for any person to “conduct, supervise, or facilitate a financial transaction involving proceeds known to be derived from criminal activity...” The statute defined “proceeds” and “funds” in the exact same language the Texas statute does. Id. at 670. The trial court granted a motion to quash the money laundering and conspiracy counts on the grounds that the definition of “funds” did not include checks and, on appeal, the court of appeals affirmed the trial court’s order, concluding that:

It is clear from the wording of the statute that the word “proceeds” refers to the word “funds,” which is defined [in the statute]. *Checks are not included in the definition.* It is obvious that the definition intended to include items which are accepted as legal tender, that circulate, and that are customarily used and accepted as a medium of exchange.

Id. (emphasis added). Although the state argued that the federal money laundering statute,⁴¹ as well as federal case law interpreting it, buttressed its contention that the trial court erred in granting the motion to quash, the court of appeals disagreed:

We reject the argument that the federal statute offers guidance to determine the issues presented, *because the federal statute contains different terms which broaden the scope of the prohibited activity.*⁴² While our state statute uses the term “funds,” the federal statute refers to “monetary instrument,” which are specifically defined as personal checks, bank checks, money orders, and negotiable instruments, in addition to coin and currency. *Our state statute is obviously not as broad as the federal statute.* As defendant argues, the federal statute predates the enactment of this state’s statute in 1994, and *if the legislature had intended to include the more expansive definitions, it could have done so.*

A criminal statute must be given genuine construction consistent with the plain meaning of the language in light of its context and with reference to the purpose of the provision. Moreover, *it is a well-established tenet of statutory construction that criminal statutes are subject to strict construction under the rule of lenity.*⁴³ ...

⁴¹ The federal money laundering statute, 18 U.S.C. § 1957(a) defines money laundering as “a monetary transaction in criminally derived property that is ... derived from specified unlawful activity.” To sustain a conviction under this provision, the government must prove, pursuant to 18 U.S.C. § 1956(a)(1), the defendant conducted a financial transaction “which in fact involves the proceeds of specified unlawful activity.” United States v. Puig-Infante, 19 F.3d 929, 937 n. 4 (5th Cir. 1994).

⁴² 18 U.S.C. § 1956(c), the federal provision, provides, *inter alia*, that the term “‘monetary instruments’ means (i) coin or currency of the United States or any other country, *travelers’ checks*, *personal checks*, *bank checks*, and money orders...” (emphasis added).

⁴³ The “rule of lenity” mandates strict construction of penal statutes, rooted in a concern for individual rights, an awareness that it is the legislature and not the courts that should define criminal activity, and the belief that fair warning should be accorded as to what conduct is criminal, applies when “after seizing every thing from which aid can be derived, [this] Court is left with an ambiguous statute.” United States v. Marek, 238 F.3d 310, 322 (5th Cir. 2001)(*en banc*). The principle behind

Accordingly, we cannot look to the federal statute for guidance as suggested by the state. *The wording of our statute is clear; the definition of either "proceeds" or "funds" does not include bank checks.*⁴⁴

Id. at 671. (emphasis added)(citations omitted).

In addition to the holdings in Ellis and Odom, Appellant's submission is fortified by the reasoning and analysis in People v. Keller, 673 N.Y.S.2d 563 (Sup. Ct. 1998), where the court held that the term "monetary instruments," the analogue of "funds" in § 34.01(2), did not include personal checks under the New York money laundering statute. Rejecting the State's rote rejoinder in this case, the court concluded:

While the People assert that this was mere oversight and the Legislature intended to include personal checks, the court cannot agree. The inclusion of bank checks, which are independent obligations of the bank issued on behalf of, in some instances an anonymous remitter, shows that the Legislature focused on the issue of checks, but deliberately excluded personal checks. The instruments here are not

the rule of lenity is that no one should be forced to speculate whether his conduct is prohibited. Dunn v. United States, 442 U.S. 110, 112 (1979); see also United States v. Singleton, 946 F.2d 23, 24 (5th Cir. 1991)(rule of lenity requires ambiguous statutes to be construed in favor of the accused "so that members of an innocent citizenry are not surprised by being prosecuted for acts that they could know were criminal"); United States v. Marek, 238 F.3d at 327 (Jolly, J., *dissenting*) ("The rule of lenity counsels us to resolve ambiguity in criminal statutes by construing such statutes narrowly."). These sentiments have long echoed in the judgments of Texas appellate courts. See e.g., Bruner v. State, 463 S.W.2d 205, 215 (Tex.Crim.App. 1970)("A forbidden act must come clearly within the prohibition of the statute and any doubt as to whether an offense has been committed should be resolved in favor of the accused."); Townsend v. State, 427 S.W.2d 55, 62 (Tex.Crim.App. 1968)(penal statutes "are to be construed strictly in favor of the accused"); Wilburn v. State, 824 S.W.2d 755, 760 (Tex.App.—Austin 1992, no writ)(penal statutes "must be strictly construed to protect those individuals against whom liability is sought").

⁴⁴ The Louisiana statute is not *sui generis*. Aside from the New York statute discussed in the text, the money laundering statutes in Utah and Indiana, that are identical to the Texas statute, do not include checks in their definitions of "currency." See Affidavit of Professor Susan R. Klein (4 CR 1362 n. 7)(providing analysis of and citation to the Utah and Indiana provisions).

bank checks. ...

The purpose of the money laundering statutes is to prevent criminals from moving the profits of criminal activity into one or more anonymous forms of consideration. Each of the items included in the statute qualifies as anonymous financial consideration, but a personal check does not.

Id. at 566. (emphasis added).

Although the trial court rejected this claim in a pre-trial order, its reasoning does not survive this Court's contrary conclusion, not to mention the holdings in Odom and Keller, and the trio of state cases the trial court cited⁴⁵ are easily distinguishable. (2 CR 418-420). In Lee v. State, 29 S.W.3d 570, 576 (Tex.App. – Dallas 2000, no pet.), the defendant laundered “funds” by cashing a cashier’s check, *i.e.*, receiving cash, in exchange for the fraudulently obtained check. In Davis v. State, 68 S.W.3d 273, 277 (Tex.App.– Dallas 2002, pet. ref’d), the opinion is unclear as to whether the defendant received cash proceeds of checks which ended up in his accounts, or he received cash from the overseas wire transfers. What is clear is that the defendant did not challenge the sufficiency of the evidence on the grounds that the insurance policies were fraudulently obtained and that the proceeds were “funds” within the meaning of the statute. And in Thomas v. State, 31 S.W.3d 422, 426 (Tex.App. – Fort Worth 2000, pet. ref’d), as in Davis, there is no showing that the “funds” at issue were checks and

⁴⁵ While the federal authority cited by the trial court may be instructive, or even persuasive, it is not, however, binding on this Court. See J.W. Huber Corp. v. Santa Fe Energy, 871 S.W.2d 842, 846 (Tex.App.– Houston [14th Dist.] 1994, writ den’d)(Texas courts “owe obedience to only one .. court, namely, the Supreme Court.”)(citations omitted).

no claim was raised that “funds” did not include checks. As this Court has remarked, contrary to the State’s assertions, no appellate court in Texas has ever held that the definition of “funds” in the money laundering statute includes checks. See Ex parte Ellis, 279 S.W.3d at 29 n. 24 (“The issue in this case was not raised nor litigated in [Lee and Davis], and the courts did not address or express any view on it.”).

Viewed against the backdrop of this Court’s decision in Ellis, not to mention the equally-compelling rationale animating the holdings in Odom and Keller, the \$190,000 check that TRMPAC sent RNSEC could not have constituted “funds” as defined in the pre-2005 version of the statute. At no point in the money swap did any of the entities involved – TRMPAC, RNSEC, or the seven Texas candidates – ever deliver or receive cash money or its equivalent. While at some point, one or more of the Texas candidates *may* have obtained cash from their contributions, such a transaction is not alleged in the indictment. Neither the banks nor the entities obtained or contemplated obtaining coins or paper money from any transaction alleged in the indictment. Because checks representing money on deposit in an individual or corporation’s bank account did not become “funds” until the 2005 legislative amendment, all of the checks at issue could not have constituted “funds” as required and defined by § 34.01(2). Because the State’s proof as to this essential element of the offense was fatally deficient, no rational juror could have found this element beyond a reasonable doubt. Because the evidence was legally insufficient to sustain the jury’s verdict as to count two of the indictment, this Court must enter an appellate acquittal. See King v. State, 254 S.W.3d 579, 584 (Tex.App.– Amarillo 2008, no pet.)(finding evidence legally insufficient as to essential

element in money laundering prosecution); Deschenes v. State, 253 S.W.3d 374, 386 (Tex.App.– Amarillo 2008, pet. refd)(same).

2. TRMPAC's \$190,000 Check did not Constitute "Proceeds of Criminal Activity"

For the evidence to be legally sufficient to sustain Appellant's conviction on the money laundering count, the State had to prove beyond a reasonable doubt:

- a substantive violation of the Election Code that generated proceeds;⁴⁶
- and that Appellant knowingly conducted, supervised, or facilitated a transaction involving the proceeds of criminal activity, *i.e.*, any felony offense, including any preparatory offense.⁴⁷

It is uncontradicted that the RNC deposited the \$190,000 check from TRMPAC into a separate account containing only corporate contributions and that this money was never commingled with money from the RNC account containing only individual donations from which the checks to the seven Texas candidates were drafted. (13 RR 136-137; 141, 145, 156, 170). It is uncontradicted that the RNC only spent corporate money in those states where it could be sent to state parties who could legally accept and spend corporate contributions. (13 RR 143). Thus, the money the RNC sent to Texas was not "acquired or derived directly or indirectly" from an Election Code violation as required to sustain a violation of § 34.01(4). The RNC's bank records that were admitted at trial reveal that all of the checks to the candidates cleared the RNC's

⁴⁶ This assumes, of course, that the Texas legislature intended to include a *mala prohibita* offense such as an Election Code violation as a predicate offense for money laundering.

⁴⁷ Of course, it was not a crime in 2002 to attempt, solicit, or conspire to violate the Election Code at the time of the conduct alleged in the indictment. State v. Colyandro, 233 S.W.3d at 885.

individual dollar account by October 17, 2002.⁴⁸ These records also reflect that no money was transferred from the corporate dollar account to its individual dollar account between the time that the RNC deposited TRMPAC's check in the RNC's corporate account, and when the last check cleared its individual account. Because no money from TRMPAC was used to endow the candidates' campaigns, given that none of its money was transferred into the RNC's individual dollar account, the trial court's diaphanous theory that "money is fungible" does not alter these stubborn facts. Because TRMPAC's check was never commingled with any money in the RNC account containing individual donations, fungibility, at least in this context, is a straw man. See United States v. Ward, 197 F.3d 1076, 1083 (11th Cir. 1999) ("When tainted money is mingled with untainted money in a bank account, there is no longer any way to distinguish the tainted from the untainted because money is fungible.").

This factual backstory fortifies the conclusion that no rational juror could have found beyond a reasonable doubt that Appellant violated § 34.02(a)(2). This provision, like its federal analogue, 18 U.S.C. § 1957, is a *money-spending* statute criminalizing the use of any ill-gotten gains.⁴⁹ While § 34.01 requires that the "funds" involved in the transaction be "dirty," *i.e.*, the proceeds of criminal activity, it does not prohibit an individual from ever conducting any transaction once he has engaged in any criminal

⁴⁸ See Exhibits C & D (September 2002 Bank Statements).

⁴⁹ See United States v. Savage, 67 F.3d 1435, 1441 (9th Cir. 1995) ("Congress passed the money laundering statutes to criminalize the means criminals use to cleanse their ill-gotten gains."). Of course, unlike § 34.01, the federal statute specifically includes financial transactions involving personal checks.

activity that generates proceeds.⁵⁰ Even if the RNC *had* commingled what the State claimed was “dirty” money with the “clean” money in its individual account, which it clearly did not, the transfer of this money to the candidates could not constitute money laundering under § 34.02(a)(2). The State did not, because it could not, join issue with the fact that the RNC account had sufficient “clean” money to cover those payments. “[W]here an account contains clean funds sufficient to cover a withdrawal, the [prosecution] can not prove beyond a reasonable doubt that the withdrawal contained dirty money.” United States v. Loe, 248 F.3d 449, 467 (5th Cir. 2001), *citing* United States v. Davis, 226 F.3d 346, 357 (5th Cir. 2000).⁵¹ Because this reasoning compels the conclusion that no rational juror could have found Appellant guilty on count two, this Court must enter an appellate acquittal as to the money laundering conviction.

3. The Merger Doctrine Precludes Appellant’s Conviction on Count Two

The stark novelty of this prosecution, one dependent upon a purported predicate crime that is *malum prohibitum* and not *malum in se*, is reflected in the paucity of case law interpreting § 34.01, and defining the lengths to which prosecutors may go in securing a money laundering conviction that withstands a legal sufficiency challenge. One such limitation, long recognized by the federal courts is the “merger” doctrine, an

⁵⁰ See United States v. Butler, 211 F.3d 826, 829 (4th Cir. 2000)(Congress “did not fashion the federal money laundering statute to create a new source of criminal liability for every fraudulent monetary transaction.”). While § 34.02(a)(1) prohibits concealing of proceeds of criminal activity, Appellant was not charged with this offense.

⁵¹ In Loe, the transaction forming the basis for the money laundering convictions originated in a \$776,742 transfer from an account containing \$2,205,000, only \$470,790 of which was dirty. Since there was enough clean money in the account to cover the \$776,742 transfer, the Fifth Circuit reversed the money laundering convictions and ordered appellate acquittals. Id. at 467.

additional reason why the evidence is legally insufficient on count two. While this body of federal precedent is not binding on this Court, it is nevertheless persuasive. See Omniphone, Inc. v. Southwestern Bell Tel. Co., 742 S.W.2d 523, 526 n. 3 (Tex.App.– Austin 1987, no writ).

Because “Congress passed the money laundering statutes to criminalize the means criminals use to cleanse their ill-gotten gains,” United States v. Savage, 67 F.3d at 1441, it “did not fashion the federal money laundering statute to create a new source of criminal liability for every fraudulent monetary transaction.” United States v. Butler, 211 F.3d 826, 829 (4th Cir. 2000). Rather, “both the plain language of [the statute] and the legislative history behind it suggest that Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity.” Id. To provide the basis for a money laundering offense, a financial transaction must involve funds that have been “criminally derived.”⁵² Id. Funds are “criminally derived” if they are “derived from an already completed offense, or a completed phase of an ongoing offense.” Id.

Synthesizing these tenets, the merger doctrine provides that:

- “[T]he laundering of funds cannot occur in the same transaction through which funds first become tainted by crime.” United States v. Butler, 211 F.3d at 830.
- The acts that produce the proceeds being laundered must be distinct from the conduct that constitutes money laundering. United States v. Mankarious, 151 F.3d 694, 706 (7th Cir. 1998).

⁵² “Criminally derived property” under § 1957 is equivalent to “proceeds” under § 1956. United States v. Savage, 67 F.3d at 1432.

- “[T]he underlying criminal activity must be complete *before* money laundering can occur.” United States v. Christo, 129 F.3d 578, 580 (11th Cir. 1997) (emphasis in original).
- The money laundering statutes criminalize transactions in proceeds, not the transactions that create the proceeds. United States v. Howard, 271 F.Supp.2d 79, 84-90 (D.D.C. 2002).

Viewed through this prism, the money laundering count founders on the shoals of the merger doctrine. In this case, the State’s theory as to when its money laundering allegation reached critical mass came in the opening moments of final argument. “The moment, the moment that the decision was made to send the soft dollar check up to Washington, D.C. with the intent that it ultimately go to candidates for elective office is the moment that this money became proceeds of criminal activity...”⁵³ (17 RR 35). However, under the merger doctrine, the same transaction (the transfer of \$190,000 from TRMPAC to the RNC) cannot be both the predicate crime (the making of the political contribution) and the money laundering transaction because TRMPAC’s check was not proceeds of criminal activity. While the RNC’s act of depositing TRMPAC’s check into the RNC’s corporate money was a transaction, it could not have been money

⁵³ Of course, if, as Ellis, Odom and Keller all hold, checks did not fall within the penumbra of “funds,” then the TRMPAC check was not the proceeds of criminal activity. Moreover, given Jay Banning’s testimony that the RNC only sent Texas corporate contributions to states where it could be legally spent, there could have been no Election Code violation in the first instance. See **Ethics Advisory Opinion** No. 277 (1995)(“Title 15 of the Texas Election Code does not prohibit a Texas corporation from making contributions and expenditures in connection with elections in other states.”); **Ethics Advisory Opinion** No. 208 (1994)(“General-purpose political committees are not required to report political expenditures made in connection with out-of-state campaigns ... under chapter 254 of the Texas Election Code.”). Indeed, this latter analysis would be nugatory if expenditures of this type were prohibited in the first place.

laundrying because the funds deposited were not yet the proceeds of criminal activity. See United States v. Butler, 211 F.3d at 830; United States v. Christo, 129 F.3d at 580; United States v. Mankarious, 151 F.3d at 706. As the Fifth Circuit observed in concluding that the evidence was legally insufficient to sustain a money laundrying conviction based on the merger doctrine where the predicate crime was the sale of illegal drugs, “[A] transaction to pay for illegal drugs is not money laundrying, because the funds involved are not proceeds of an unlawful activity when the transaction occurs, but become so only after the transaction is completed. ... [W]hile it is true that several [drug] transactions took place, none involved the proceeds of unlawful activity.” United States v. Gaytan, 74 F.3d 545, 555-556 (5th Cir. 1996); see also United States v. Puig-Infante, 19 F.3d at 939 (evidence legally insufficient to sustain money laundrying conviction for same reasons explicated in Gaytan).

The reasoning and analysis in these federal cases provides an additional reason for this Court to conclude that the novel, unsupported, and ultimately unsupportable artifice crafted by the State to secure Appellant’s conviction on count two compels the conclusion that the evidence is legally insufficient to support it. See United States v. Carucci, 364 F.3d 339, 345-346 (1st Cir. 2004)(money laundrying conviction reversed where evidence did not establish that the predicate offense was complete before money laundrying transaction); United States v. Napoli, 54 F.3d 63, 68 (2nd Cir. 1995)(because proceeds of bank fraud were realized only when fraudulent checks were successfully negotiated at the bank, negotiation of checks could not be a money laundrying offense).

4. The Alleged Agreement Between TRMPAC and the RNC Did Not

Transform TRMPAC's Check Into the Proceeds of Criminal Activity

As noted above, the State's case as to count two was built upon its allegation in final argument that, "The moment, the moment that the decision was made to send the soft dollar check up to Washington, D.C. with the intent that it ultimately go to candidates for elective office is the moment that this money became proceeds of criminal activity..." (17 RR 35). But like cotton candy that is pleasing to the taste but melts at the touch, this avowal does not support the great weight rested upon it.

Count two alleges, in pertinent part, that Appellant and others engaged "in a transaction involving the proceeds of criminal activity ... to wit, ... a felony violation of the Election Code." (1 CR 31). The "transaction consisted of the transfer of funds of the aggregate value of \$190,000 from the [RNC] ... to several candidates of the Texas House of Representatives..." (1 CR 31). As recounted earlier, in order for the transfer of money to constitute money laundering, it must have been tainted *before* it was transferred to the candidates because the transfer of funds to the candidates cannot both taint the money *and* be the transaction upon which the money laundering charge is based.

At "the moment that the decision was made to send the soft dollar check up to Washington, D.C. with the intent that it ultimately go to candidates for elective office," the transaction that the State claimed constituted money laundering, no candidate contributions had occurred. At best, there was merely an agreement on RNC's behalf to make contributions to candidates. Even viewing this evidence in the light most favorable to the prosecution, when the RNC deposited TRMPAC's check, there was

merely an agreement to make improper political contributions to candidates. But conspiracy to violate the Texas Election Code was not a crime in 2002. Even assuming that such a conspiracy existed, its existence could not have tainted the RNC's deposit because this conspiracy could not – in 2002 – constitute “criminal activity.” Because the money was not tainted *before* it was disbursed to the candidates, the transfer of money to the candidates cannot both taint the money *and* constitute the transaction that sustains the money laundering count. Because the merger doctrine strikes a fatal blow to the money laundering count, not even the claimed agreement between the RNC and TRMPAC, so heavily relied upon by the State, as the gravamen of this offense, can legally resuscitate it. See United States v. Butler, 211 F.3d at 830; United States v. Christo, 129 F.3d at 580; United States v. Mankarious, 151 F.3d at 706.

5. Later-Formed Intent, If Any, Did Not Change the Nature of Money on Hand

In its order, granting in part and denying in part, Appellant's motion to quash the indictments, the trial court posited that the State might prove its case in one of two ways: (1) by proving that Appellant solicited corporate contributions with the unlawful intent to divert funds to a candidate,⁵⁴ or (2) by proving that Appellant decided to use corporate contributions, originally received lawfully, for an unlawful purpose.⁵⁵ To the

⁵⁴ “[I]f one solicits corporate contributions with an unlawful intent to divert the funds to a candidate a violation by the diverter occurs when the funds are actually so diverted, without regard to the intention of the giver.” (2 CR 417).

⁵⁵ “[I]f the State can prove that these defendants entered into an agreement to convert the monies already on hand, though originally received for a lawful purpose, to [send the money for a candidate] to the Republican National State Elections Committee ... then they will have established that money was laundered. The money would have become ‘dirty money’ at the point that it began to be held with the prohibited intent.” (2 CR 419).

extent that soliciting a violation of the Texas Election Code in 2002 was not a crime, the trial court's initial theory was dead on arrival. For the reasons that follow, because Appellant's later-formed intent, if any, did not change the nature of the money already on hand, the trial court's second postulation is also a non-starter.

As a general rule, *mens rea* must exist at the time the act constituting criminal conduct is performed. See e.g., Cook v. State, 884 S.W.2d 485, 487 (Tex.Crim.App. 1994)("in order to constitute a crime, the act or *actus reus* must be accompanied by a criminal mind or *mens rea*"); Hobbs v. State, 175 S.W.3d 777, 782 n. 3 (Tex.Crim.App. 2005)("intent to commit the felony or crime of theft, essentially necessary to constitute the crime of burglary, must exist at the time of and accompany the entry into the house"); Peterson v. State, 645 S.W.2d 807, 811 (Tex.Crim.App. 1983)(to constitute theft, intent to deprive owner of property must exist at time property is taken); see also Christensen v. State, 240 S.W.3d 25, 34-35 (Tex.App.— Houston [1st Dist.] 2007, pet. ref'd)(reversing theft conviction because "[p]roof of intent to commit theft is determined at the time the alleged criminal act is committed ... [and] evidence that only shows deception after the fact is legally insufficient to establish criminal intent at the time [the act] was committed"); Wilson v. State, 663 S.W.2d 834, 836-837 (Tex.Crim.App. 1984)(same).

This well-settled authority fortifies the notion that assigning criminal liability based on intent formulated *after the fact* is anathema in the criminal justice system. To sustain Appellant's money laundering conviction based on the theory that campaign contributions, originally received for a lawful intent, became tainted merely because

of some allegedly later-formulated intent, turns a blind eye to the case law recounted above that one cannot engage in voluntary conduct retroactively.

D. INSUFFICIENCY OF THE EVIDENCE AS TO COUNT 1: CONSPIRACY

1. Because Appellant Did Not Engage in Conduct Constituting Money Laundering, He Could Not Be Guilty of Conspiracy

Sec. 15.02(a)(1) of the Penal Code requires, and the jury was instructed in the abstract, *inter alia*, that, "A person commits the offense of criminal conspiracy if, with intent that a felony be committed he agrees with one or more persons that they or one or more of them *engage in conduct that would constitute the offense...*" (4 CR 1415)(emphasis added). The jury was also instructed in the application paragraph that it could not convict Appellant of conspiracy unless it found beyond a reasonable doubt that he, along with Messrs. Ellis and Colyandro "with intent to commit a felony, to wit: Money Laundering ... *agree that they would engage in conduct that would constitute said offense...*" (4 CR 1418)(emphasis added). For the reasons set out above, Appellant did not "engage in conduct that would constitute the offense" of money laundering. It necessarily follows that Appellant could not be guilty of the offense of conspiracy. See United States v. Grossman, 117 F.3d 255, 261 (5th Cir. 1997)(evidence was legally insufficient to sustain conspiracy count where evidence was legally insufficient to sustain substantive counts forming basis for object of conspiracy). Moreover, because count one does no more than allege a conspiracy to violate the Texas Election Code, a crime that did not exist in 2002, no rational fact finder could have concluded beyond a reasonable doubt that Appellant agreed to engage in conduct that was illegal. See

United States v. Torres, 604 F.3d 58, 65 (2nd Cir. 2010)(conspiracy conviction cannot withstand legal sufficiency challenge if prosecution cannot “prove at least the degree of criminal intent necessary for the substantive offense itself”); United States v. Mackay, 33 F.3d 489, 494 (5th Cir. 1994)(evidence was legally insufficient to sustain conspiracy where there was no evidence that defendant committed predicate offense alleged as the object of the conspiracy).

2. Appellant’s Mere Association With Ellis and Colyandro and his Knowledge of a Conspiracy, if Any, Cannot Sustain his Conviction on Count One

Aside from the fact the conspiracy conviction does not survive the demise of the money laundering count on legal sufficiency grounds, count one does not survive a legal sufficiency challenge for a number of other reasons. While the indictment lists a half-dozen overt acts allegedly performed in pursuance of the conspiracy in mid-September of 2002, (4 CR 1418-1419), it speaks volumes about the State’s gossamer-like proof on count one that *not a single overt act refers to Appellant*. These overt acts are bereft of any conduct Appellant allegedly engaged in, words that he spoke, or even thoughts he may have had impacting the timeline of events alleged as overt acts in the indictment. While the evidence at trial certainly established that Appellant knew Ellis and Colyandro, and may have even known of their self-styled, decidedly insular agreement, if any, to improperly funnel corporate contributions to candidates, this was wholly insufficient to sustain his conviction on the conspiracy count.⁵⁶ See United

⁵⁶ Given the sheer paucity of state precedent on the issue of legal sufficiency of the evidence in conspiracy cases, the legal landscape is essentially comprised of federal authority. And while not binding on this Court, this federal authority is nevertheless persuasive.

States v. Thomas, 284 F.3d 746, 752 (7th Cir. 2002)(emphasis in original) (“*knowing* of a conspiracy differs from joining a conspiracy”). Indeed, the trial court admonished jurors that Appellant’s “mere association” with Ellis and Colyandro was insufficient to prove his participation in a conspiracy, if any, and that Appellant’s participation in a conspiracy could not be proven merely by his association with, or being in the presence of Ellis and Colyandro, not to mention his purported knowledge of it. (4 CR 1415). See United States v. Grassi, 616 F.2d 1295, 1301 (5th Cir. 1980) (“[O]ne does not become a co-conspirator simply by virtue of knowledge of a conspiracy and association with conspirators. The essence of a conspiracy is the agreement to engage in concerted unlawful activity.”); United States v. Hernandez, 141 F.3d 1042, 1053 (11th Cir. 1998)(“At a minimum, the defendant must wilfully associate himself in some way with the criminal venture and wilfully participate in it as he would in something he wished to bring about.”).

The State’s theory that Appellant’s motive to allegedly engage in this conspiracy was his penchant for ram-rodging redistricting through by electing more Republicans to the Texas Legislature, aside from re-stating the obvious,⁵⁷ is too slender a reed for any rational juror, at least on this record, to find beyond a reasonable doubt that Appellant was part of an agreement to engage in the concerted violation of the Election Code. While the court’s charge instructed jurors, that, “An agreement constituting a

⁵⁷ This so-called motive, what the State convinced the jury was the proverbial “smoking gun” of Appellant’s guilt, is clever by half. That Appellant, given his position as one of the most powerful *Republicans* in Congress, would not have wanted to elect more *Democrats* to the Texas House, was hardly the breaking news prosecutors posited it to be at every stage of this proceeding.

conspiracy may be inferred from the acts of the parties,” (4 CR 1415), it is axiomatic that the prosecution “must do more than pile inference upon inference upon which to base a conspiracy charge,” United States v. Mackay, 33 F.3d at 493, and “suspicion, however strong [cannot] serve as proof of a conspiracy.” United States v. Sheikh, 654 F.2d 1057, 1063 (5th Cir. 1981). This Court has concurred in holding that, “With regard to the sufficiency of evidence, one inference cannot be based upon another inference in order to reach a conclusion. ... It will not suffice.” Reedy v. State, 214 S.W.3d 567, 585 (Tex.App.– Austin 2006, pet. refd)(citation omitted); see also Lozano v. Lozano, 52 S.W.3d 141, 148 (Tex. 2001)(jurors “may not reasonably infer an ultimate fact from meager circumstantial evidence which could give rise to any number of inferences none more probable than the other.”); United States v. Lorenzo, 534 F.3d 153, 159 (2nd Cir. 2008)(“specious inferences are not indulged” by appellate court in determining whether proof of conspiracy is legally sufficient). While the evidence may have shown a *de facto* agreement for Appellant, Ellis, and Colyandro to violate the Election Code – conduct that the trial court, this Court, and the Court of Criminal Appeals have all agreed was not a crime in 2002 – no rational trier of fact could have found beyond a reasonable doubt that Appellant agreed to engage in the offense of money laundering, the object of the conspiracy alleged in the indictment. See United States v. Sheikh, 654 F.2d at 1063 (“speculation does not constitute proof beyond a reasonable doubt” that defendant knowingly agreed to commit predicate offense alleged as the object of the conspiracy); United States v. Maltos, 985 F.2d 743, 748 (5th Cir. 1992)(“The evidence in this case shows little beyond that climate of activity that reeks foul proximity to which cannot

sustain a conspiracy conviction.”).

E. THE EVIDENCE WAS INSUFFICIENT AS TO COUNT TWO ON THE PARTIES’S THEORY

As recounted below in Point of Error No. 4, while the jury was instructed on the law of parties in the abstract, the application paragraph in count two failed to apply this theory of culpability to the facts. Assuming the erroneous jury charge nevertheless authorized Appellant’s conviction as a party,⁵⁸ neither Colyandro nor Ellis could have been guilty of money laundering as primary actors for any of the reasons recounted above. Because Appellant, therefore, could not be guilty as a party, the evidence was legally insufficient to sustain his conviction on count two under this theory. See Pesina v. State, 949 S.W.2d at 382 (“If the State is to prove the accused’s guilt as a party, it must first prove the guilt of another person as the primary actor.”).

Moreover, there is no evidence that Appellant solicited, encouraged, directed, aided, or attempted to engage in any conduct likely to overcome the independence of the RNC. While Terry Nelson testified that Jim Ellis told him that Appellant wanted a “one-for-one” exchange of corporate dollars for individual dollars, there is nothing in this record that corroborates that fact-specific statement. Absent corroboration, Ellis’ hearsay statement to Nelson cannot be used to make Appellant a party to the conduct charged in count two. See Bingham v. State, 915 S.W.2d 9, 9-10 (Tex.Crim.App. 1994) (out-of-court declaration of accomplice, repeated in court by non-accomplice witness

⁵⁸ See Malik v. State, 953 S.W.2d at 239-240 (sufficiency of the evidence is measured against “the elements of the offense as defined by a hypothetically correct jury charge for the case”). A hypothetically correct jury charge in the instant case would have included an application paragraph correctly applying the law of parties to the facts of this case.

under hearsay exception may be considered testimony of an accomplice subject to the requirement for corroboration).

**F. CONCLUSION: SPECULATION, INFERENCE AND GUILT BY ASSOCIATION
CANNOT SUSTAIN APPELLANT'S CONVICTIONS**

"It is the obligation and responsibility of appellate courts 'to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged.'" Winfrey v. State, 323 S.W.3d 875, 882 (Tex.Crim.App. 2010). However strong the inference of Appellant's guilt might be, "[T]hat inference is not as strong as, and must yield to, the presumption of innocence which follows the accused throughout the trial of every criminal case." Massey v. State, 226 S.W.2d 856, 860 (Tex.Crim.App. 1950). Neither may this Court engage in supposition to substitute for what has found its way into the appellate record. Henson v. State, 173 S.W.3d 92, 104 (Tex.App.—Tyler 2005, pet. refd). "It has long been a principle in our jurisprudence that where an issue in a criminal case is left in doubt by the evidence, as it is in this case, the doubt should always be resolved in favor of the accused. It is at this point that the presumption of innocence and reasonable doubt have particular meaning." Trejo v. State, 127 S.W. 546, 548 (Tex.Crim.App. 1903). "If the evidence at trial raised only a suspicion of guilt, even a strong one, then that evidence is insufficient." Herrin v. State, 125 S.W.3d 436, 443 (Tex.Crim.App. 2002).

Shorn of the white noise of redistricting, golf outings, and cocktail parties, the State's case, one that could have tried in days, not weeks, was a novel and ultimately legally unsupportable effort to legislate through prosecution by fitting the square peg

of a claimed Election Code violation into the round hole of § 34.01. Because not one overt act in count one of the indictment named Appellant, and given the otherwise reed-thin proof the State brought to bear against Appellant, it is no surprise that the State devoted as much, if not more time, to trying and convicting his two co-defendants in *absentia*, than to convicting Appellant. While this record reveals that Appellant knew Colyandro and Ellis, and was aware of their respective roles in Washington and Austin, this Court has made it clear that the concept of “guilt by association would obviously be contrary to our system of justice.” Allen v. State, 249 S.W.3d 680, 702 (Tex.App. – Austin 2008, no pet.); Wincott v. State, 59 S.W.3d 691, 700-702 (Tex.App.– Austin 2001, pet. ref’d)(rejecting effort to equate guilt by association); see also Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 178-179 (1951)(Douglas, J., *concurring*)(“guilt by association [is] one of the most odious institutions of history ... Guilt under our system of justice is personal.”). This Court has also declared that neither the stacking of inference upon inference, nor the mere probability of guilt, nor the mere opportunity to commit a crime constitutes proof beyond a reasonable doubt that will sustain a criminal conviction. Reedy v. State, 214 S.W.3d at 585.

A dispassionate review of all the evidence, even when viewed in the light most favorable to the verdicts, reveals a prosecution permeated by much heat and very little light, heavy on rhetoric yet devoid of proof from which a rational juror could have found each and every essential element of both crimes charged beyond a reasonable doubt. See Deschenes v. State, 253 S.W.3d at 385-386 (evidence was legally insufficient in money laundering case where “we have no credible evidence of a temporal connection,

or nexus, between the money and some criminal activity.”); King v. State, 254 S.W.3d at 585 (“The jury was free to disbelieve [the defense’s] story, but it could not substitute a conclusion, unsupported by facts” to sustain his money laundering conviction). The fundamental right vouchsafed by the Fourteenth Amendment to the United States Constitution that no one accused of a crime shall be subject to the stigma of conviction except upon proof beyond a reasonable doubt, applies to all citizens, even those whose conduct, while not offending the Penal Code, may offend the public’s sensibility. See United States v. Lanier, 73 F.3d 1380, 1400 (6th Cir. 1996)(Jones, J., *dissenting*, *reversed*, 520 U.S. 259 (1997)) (“One of the cardinal principles that guides the review of criminal cases is to ensure that outrage at the egregiousness of the complained-of conduct has not intruded on the application of neutral principles of law.”). To affirm these convictions on these facts would deny Appellant the presumption of innocence and establish a presumption of guilt on appeal in its stead. See Turner v. McKaskle, 721 F.2d 999, 1001 (5th Cir. 1993); see also United States v. Steen, 634 F.3d 822, 828 (5th Cir. 2011) (“We must conclude that Steen’s conduct did not constitute the crime with which he was charged, and the case should not have gone to the jury.”).

The judgments of conviction entered below on count one and count two must be reversed and the causes remanded for the entry of judgments of acquittal. Burks v. United States, 437 U.S. 1, 18 (1978); Greene v. Massey, 437 U.S. 19, 26 (1978).

POINT OF ERROR NUMBER THREE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THAT PORTION OF THE JURY CHARGE THAT REFERRED TO "EQUIVALENT FUNDS" BEING DONATED TO TEXAS REPUBLICAN CANDIDATES. [17 RR 6-8].

STATEMENT OF FACTS

In the waning moments of the charge conference, Appellant objected to the final two paragraphs on page nine of the jury charge as being "comments on the weight [of the evidence] and incorrect statements of the law." (17 RR 6). These two paragraphs provided that:

Before you can find Mr. DeLay guilty of the conduct alleged in Count I of the indictment, you must find that he was party to an agreement both to send TRMPAC funds in an amount over \$100,000 raised from corporate donors to RNSEC and for *equivalent funds* to be donated to Texas Republican candidates.

Before you can find Mr. DeLay guilty of the conduct alleged in Count II of the indictment, you must find that funds over \$100,000 raised by TRMPAC from corporate donors were forwarded by TRMPAC to RNSEC, that *equivalent funds* were donated to Texas Republican candidates by prior agreement, and that Mr. DeLay was a party to that agreement and conduct.

(CR 1422)(emphasis added). The following colloquy then ensued:

MR. HENNESSY: I *object to them as comments on the weight and incorrect statements of the law*; that what I would ask to be substituted – and *my problem is with, equivalent funds*. That doesn't identify – *it doesn't say corporate funds*.

And what the law says is it should be – *what's criminalized is – is the contribution of corporate funds, not equivalent*

funds. That tends toward a Charge saying that – that hard money and soft money is fungible; and it does not require the jury to find that what was transmitted was the proceeds of criminal activity.

THE COURT: This issue came up before, and y'all changed your mind and decided you wanted it; and now you tell me again you don't want it. *You get it. You're overruled.*

(17 RR 6-7)(emphasis added). Just moments later, the defense re-urged its objections with regard to the use of the term “equivalent funds”:

MR. DEGUERIN: Judge, I'm really troubled by this use of, equivalent funds. When we had our Conference before, Mr. Hennessy came and asked me about that; I wasn't focused on it. If there's anybody that screwed up, it's me.

But – but here's my problem with it: *It's a comment on the [weight of] the evidence that equivalent funds would be a crime. It's the Court saying it's a crime for noncorporate funds to come to Texas. And I'm – I'm very, very concerned about it.*

THE COURT: *It is sort of the Court saying that.*

MR. DEGUERIN: Yes, sir. And it –

THE COURT: Because that's been our disagreement from the beginning, Mr. DeGuerin ... *And so one of us ultimately will be vindicated by the Court of Criminal Appeals, I have no doubt...*

(17 RR 7-8)(emphasis added).

ARGUMENT AND AUTHORITIES

A. PRESERVATION OF ERROR

Because Appellant's objections to the charge were leveled before the charge was read, as required by Art. 36.14 of the Code of Criminal Procedure, they were timely.

See McCloud v. State, 527 S.W.2d 885, 887 (Tex.Crim.App. 1975)(objections to charge are timely if made before the charge is read to the jury). Appellant's objections to the inclusion of the phrase "equivalent funds" in both paragraphs were sufficiently specific to call the trial court's attention to the claimed errors, Stone v. State, 703 S.W.2d 652, 655 (Tex.Crim.App. 1986), and enabled the trial court to understand him "at a time when the trial court [was] in a position to do something about it." Lankston v. State, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992). Finally, by dictating his objections on the record in the presence of the trial court and the State, Appellant complied with Art. 36.15 of the Code of Criminal Procedure, and preserved this contention for appellate review. See Chapman v. State, 921 S.W.2d 694, 695 (Tex.Crim.App. 1996).

B. ART. 36.14 AND THE LIMITS ON THE "LAW APPLICABLE TO THE CASE"

Art. 36.14 of the Code of Criminal Procedure requires the trial judge to give the jury, "a written charge distinctly setting forth the law applicable to the case; *not expressing any opinion as to the weight of the evidence*, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury." (emphasis added). The purpose of the trial court's charge is to inform the jury of the applicable law and guide them in its application to the case. Hutch v. State, 922 S.W.2d 166, 170 (Tex.Crim.App. 1996). Because the trial court's charge must allow jurors to determine the defendant's guilt or innocence in light of the evidence and the law, Abdnor v. State, 871 S.W.2d 726, 740 (Tex.Crim.App. 1994), the defendant has a fundamental right to be convicted upon a correct statement of the law. Hutch v. State, 922 S.W.2d at 170. While the trial court

may be required to give a special instruction on the law necessary for the resolution of a factual issue in a case, not all factual issues require a special instruction and there are limitations when the factual issue concerns the State's theory of the case. A proper jury charge incorporates the specific theory alleged in a facially complete indictment or information and no other. Fisher v. State, 887 S.W.2d 49, 57 (Tex.Crim. App. 1994). The trial court may not enlarge upon that facially complete offense and permit the jury to convict on a basis or theory not alleged in the charging instrument, Fella v. State, 573 S.W.2d 548, 548 (Tex. Crim. App. 1978), as to do so violates due process. Dunn v. United States, 442 U.S. 100, 106 (1979).

C. THE INCLUSION OF THE PHRASE "EQUIVALENT FUNDS" WAS NOT PART OF,
AND IMPERMISSIBLY EXPANDED UPON, THE "LAW APPLICABLE TO THE CASE"

The indictment in this case alleged that Appellant committed the offense of money laundering and conspiracy to engage in money laundering by "knowingly making a political contribution [from corporate donors] ... in violation of Subchapter D of Chapter 253 of the Texas Election Code," (CR 27), which was "a felony violation of Section 253.003 of the Election Code." (CR 31). The application paragraphs of the charge authorized convictions if jurors believed beyond a reasonable doubt, *inter alia*, that Appellant knowingly made a political contribution in violation of Subchapter D of the Texas Election Code, (CR 1421-1422), "which applies to corporate contributions." (CR 1420. Neither the indictment, nor any other portion of the court's charge, nor any of the provisions in Subchapter D of Chapter 253 of the Texas Election Code, made any reference whatsoever to "equivalent funds" being donated as the basis for any criminal

liability. Therefore, the law applicable to the case in the court's charge should have been limited to the theory that the predicate violation of the Election Code involved the contribution of corporate donations as alleged in the indictment and not "equivalent funds." See Wooley v. State, 273 S.W.3d 260, 271-272 (Tex.Crim.App. 2008)("In this case we believe that ... appellant's due-process rights were violated when the court of appeals affirmed his conviction under the unsubmitted theory that he aided 'another' to murder the complainant.").

But, as Appellant recognized below, the court's charge criminalized conduct, the transmittal of corporate donations from TRMPAC to RNSEC with equivalent funds – *not corporate funds* – then being donated to Texas Republican candidates by RNSEC, that was not pled in the indictment, is not contained in any of the salient Election Code provisions, and is not alluded to anywhere else in the court's charge. As a result, jurors were not required to find beyond a reasonable doubt that the funds sent to Texas by RNSEC were corporate donations, but merely "equivalent funds," which was not a violation of Chapter 253 of the Election Code, and by extension, could not constitute the proceeds of criminal activity, an essential element of the money laundering count the State was obligated to prove beyond a reasonable doubt. The inclusion of "equivalent funds" in the court's charge was an incorrect statement of the law that "reduce[d] the State's burden of proving guilt beyond a reasonable doubt to the jury's satisfaction." Brown v. State, 122 S.W.3d 794, 798 (Tex.Crim.App. 2003). This impermissible expansion of the State's theory of criminal liability, one not alleged in the indictment nor contained in any provision of Chapter 253 of the Election Code, was

not part of the law applicable to the case, and, as such, constituted a violation of Art. 36.14. See Casteneda-Lerma v. State, 2008 WL 2515700 *2 (Tex.App.– San Antonio 2008, pet. ref'd)(not designated for publication)(“Because the jury charge permitted the jury to convict under a statutory basis ... that was not alleged in the indictment, error existed in the jury charge.”).

D. THE INCLUSION OF THE PHRASE “EQUIVALENT FUNDS” WAS
ALSO AN IMPROPER COMMENT ON THE WEIGHT OF THE EVIDENCE

Art. 36.14 forbids the trial judge from “any discussion in the jury’s presence of evidence adduced at trial which might suggest to the jury the judge’s personal estimation of the strength or credibility of such evidence...” Watts v. State, 99 S.W.3d 604, 611 n. 24 (Tex.Crim.App. 2003). In Texas, a trial judge must also refrain from making any remark calculated to convey to the jury his opinion of the case, id., because “[j]urors are prone to seize with alacrity upon any conduct or language of the trial judge which they may interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved.” Lagrone v. State, 209 S.W. 411, 415 (Tex.Crim.App. 1919); see also Harrell v. State, 47 S.W.2d 311, 311 (Tex.Crim.App. 1932)(“[t]o the jury, the language and the conduct of the trial judge have a special and peculiar weight”). Unless the law provides that the proof of any particular fact is to be taken as either conclusive or presumptive evidence of an ultimate fact, or the law specifically directs that a certain degree of weight is to be attached to a particular fact in evidence, the trial judge should avoid any allusion in the jury charge to a particular fact in evidence, as jurors might consider this as judicial endorsement or imprimatur.

Bartlett v. State, 270 S.W.3d 147, 150 (Tex.Crim.App. 2008); see also Brown v. State, 122 S.W.3d at 801 (jury charge violates Art. 36.14 if it “obliquely or indirectly convey[s] some opinion on the weight of the evidence by singling out that evidence and inviting the jury to pay particular attention to it.”). A jury charge that singles out a particular piece of evidence, but does not serve a legally authorized purpose, risks impinging upon the “independence of the jury in its role as trier of facts, a role long regarded by Texans as essential to the preservation of their liberties.” Atkinson v. State, 923 S.W.2d 21, 24 (Tex.Crim.App. 1996). Even a seemingly neutral jury charge may constitute an impermissible comment on the weight of the evidence in derogation of Art. 36.14, because such an instruction singles out a particular piece of evidence for special attention. Matamoros v. State, 901 S.W.2d 470, 477 (Tex.Crim.App. 1995). It is also a violation of Art. 36.14 if the trial court’s instructions assume a fact allegedly proven against the accused. Hathorn v. State, 848 S.W.2d 101, 114 (Tex.Crim.App. 1992).

Viewed against this unbroken backdrop of authority, the inclusion of the phrase “equivalent funds” assumed, by way of judicial fiat, an established fact critical to the State’s theory of the case in a way that violated the prohibition on judicial comment on the weight of the evidence embodied in Art. 36.14. As even the trial judge admitted, the inclusion of the phrase “equivalent funds” in two critical paragraphs at the tail end of the jury charge was “sort of the Court saying that” it was a crime for non-corporate funds to come to Texas. (17 RR 8). Simply put, this stunning violation of Art. 36.14 assumed facts critical to the State’s case by criminalizing the donation of equivalent funds, torpedoed Appellant’s defensive theory that corporate funds raised by TRMPAC

never came to Texas, and, at the end of the day, essentially directed a verdict for the State. See Selman v. State, 807 S.W.2d 313, 312-313 (Tex.Crim.App. 1991)(improper accomplice-witness instruction in co-defendant's jury charge that defendant was an accomplice as a matter of law was an improper comment on the weight of the evidence that was "tantamount to a constitutionally prohibited directed verdict for the State"); Andrews v. State, 639 S.W.2d 4, 7 (Tex.App.— Houston [1st Dist.] 1982, pet. ref'd)(jury charge assuming essential fact that magazine was "obscene" was an improper comment on weight of the evidence).

The trial court's inclusion of the phrase "equivalent funds" in its jury charge was a stark violation of Art. 36.14 because it: (1) "reduce[d] the State's burden of proving guilt beyond a reasonable doubt to the jury's satisfaction," Brown v. State, 122 S.W.3d at 798; (2) essentially directed a verdict for the State, Selman v. State, 807 S.W.2d 313; (3) "suggest[ed] to the jury the judge's personal estimation of the strength or credibility of such evidence," Watts v. State, 99 S.W.3d at 611; (4) intimated that jurors should resolve a disputed fact question in a certain way, Atkinson v. State, 923 S.W.2d at 25; and (5) assumed an essential fact allegedly proven by the State against Appellant. Hathorn v. State, 848 S.W.2d at 114. For all of these reasons, the trial court erred in including the phrase "equivalent funds" in two critical portions of the jury charge over Appellant's timely and specific objection that this verbiage was an improper comment on the weight of the evidence. See Russell v. State, 694 S.W.2d 207, 210 (Tex.App.— Houston [1st Dist.] 1985), *aff'd*, 749 S.W.2d 77 (Tex.Crim.App. 1988)(jury charge that singled out expert's testimony was improper comment on weight of the evidence);

Bartlett v. State, 270 S.W.3d at 154 (jury instruction highlighting defendant's refusal to take a breath test violated Art. 36.14 because it had the potential to "obliquely or indirectly convey some [judicial] opinion] on the weight of the evidence by singling out that evidence and inviting the jury to pay particularized attention to it"); Talkington v. State, 682 S.W.2d 674, 675 (Tex.App.— Dallas 1984, pet. ref'd)(reference in jury charge to complainant as "the victim" when issue was whether complainant consented to sexual intercourse was improper comment on weight of the evidence).

E. APPELLANT SUFFERED "SOME HARM" FROM THIS PRESERVED CHARGING ERROR

Because this charging error was properly preserved, these convictions must be reversed if this Court finds "the presence of *any* harm, regardless of degree." Arline v. State, 721 S.W.2d 348, 351 (Tex.Crim.App. 1986)(emphasis in original). In other words, reversal is mandated so long as the defendant suffered "some" harm from the charging error. Id. The potential degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including contested issues and weight of probative evidence, the argument of counsel, and any other relevant information shown by the record of the trial as a whole. Navarro v. State, 863 S.W.2d 191, 197 (Tex.App.— Austin 1993, pet. ref'd).

That Appellant suffered at least "some harm" from this charging error is clear. The only fact issue for jurors to resolve was whether the \$190,000 in corporate money that TRMPAC sent to RNSEC was the same money RNSEC sent to Texas candidates, rather than whether through Appellant's efforts the candidates received corporate money. See Russell v. State, 694 S.W.2d at 210 (Art. 36.14 violation calling attention

to psychologist's testimony caused some harm where "only defensive factual issue" was whether defendant was insane and "the instruction given commented subtly but adversely on the weight of the psychologist's testimony"). If, as Appellant argued, the former scenario was true, there could have been no violation of the Election Code, and the \$190,000 could not have constituted the proceeds of criminal activity, an essential element of both the money laundering count, and by extension, the conspiracy count. But the erroneous inclusion of "equivalent funds" in the charge communicated to jurors that the trial court had resolved this contested issue against Appellant and relieved the State from proving an essential element of its case. See Torres v. State, 137 S.W.3d 191, 198 (Tex.App.- Houston [1st Dist.] 2004, no pet.)(defendant suffered some harm from erroneous jury charge where error "would necessarily relieve the State from the burden of proving an element of its case"); Selman v. State, 807 S.W.2d 313 (erroneous jury charge on accomplice-witness testimony that violated Art. 36.14 "was a prejudicial comment on the weight of the evidence").

Defense counsel's final argument also underscores the harm attendant upon this charging error. When defense counsel argued, "Equivalent funds as used in the Charge means just that. If it is corporate, equivalent funds has to be corporate," the State objected that, "That is not the law. That is not the Court's Charge," and the trial judge responded that "the language of the law is in the Charge" and that jurors should "[b]e "guided by what is in the Charge." (17 RR 52). Had the trial court overruled the State's objection, perhaps at least some harm could have been ameliorated. But by not taking *any* corrective action in the face of the State's speaking objection that defense counsel

had misstated the legal import of “equivalent funds,” the trial judge compounded his threshold error by placing its seal of judicial approval on the erroneous verbiage in the jury charge. See Peak v. State, 57 S.W.3d 14, 20 (Tex.App.–Houston [14th Dist.] 2001, pet. ref’d)(“[W]e find that the court’s failure to take curative measures militates toward a finding of harm, against Appellant.”). Although defense counsel did his best to argue his defensive theory, that Appellant was not guilty because no corporate money came to Texas, in spite of the erroneous inclusion of “equivalent funds” in the jury charge,⁴⁸ his advocacy skills did not, because they could not, abate the harm attendant upon the trial court’s charge error. See Hutch v. State, 922 S.W.2d at 173 (“jury arguments do not serve to instruct the jury on the law applicable to the case”). In fact, as the Court of Criminal Appeals has made clear, counsel’s jury argument, as in this case “can be relevant in determining whether a jury was being misled by a misstatement of the law, thus causing harm to a defendant.” Arline v. State, 721 S.W.2d at 353 n. 8.

F. CONCLUSION

If a reasonable possibility existed that this charging error impacted the jurors’ ability to properly apply the law to the facts, the error cannot be harmless. Wedlow v. State, 807 S.W.2d 847, 852 (Tex.App.– Dallas 1991, no pet.). The Court of Criminal Appeals has emphasized that when the trial court fails to correctly charge the jury on the applicable law, “the integrity of the verdict is called into doubt.” Abdnor v. State,

⁴⁸ See e.g., (17 RR 45-46)(“No corporate money went to candidates in Texas. The word or phrase ‘equivalent funds’ means that it has to have the same character. It says, equivalent funds, which means corporate money.”); (17 RR 66)(“It is not equivalent funds if it is of a different character. And the law makes it different character.”).

871 S.W.2d at 731. That court has made it equally clear that, “It is not the function of the charge merely to avoid misleading or confusing the jury; it is the function of the charge to lead and to prevent confusion. *A charge that does not apply the law to the facts fails to lead the jury to the threshold of its duty: to decide those fact issues.*” Williams v. State, 547 S.W.2d 18, 20 (Tex.Crim.App. 1977)(emphasis added). If this Court concludes that Appellant suffered *no harm* from this properly preserved charging error, it must first determine that the State, as the beneficiary of the error, has shown beyond a reasonable doubt that jurors were not influenced to convict as a result of the charging error, a burden the State cannot shoulder in this case.⁴⁹ See Tran v. State, 870 S.W.2d 654, 658 (Tex.App. – Houston [1st Dist.] 1994, pet ref’d). Because this error was calculated to injure Appellant’s rights, this Court cannot say with assurance that he suffered no harm. See Murphy v. State, 44 S.W.3d 656, 666 (Tex.App.– Austin 2001, no pet.) (“Applying the Almanza harm analysis and considering all the relevant information reflected by the record, we cannot say that no harm occurred.”).

The judgments of conviction entered below must be reversed and the causes remanded for a new trial.

⁴⁹ The State argued in its response to Appellant’s motion for new trial that this “complained-of instruction essentially restated the money laundering application paragraph in plain English.” (5 CR 1614). It speaks volumes that the State did not cite a single case in support of this bold claim, aside from its cursory reference to Russell v. State, 749 S.W.2d 77, 78 (Tex.Crim.App. 1988), a case that actually *supports* Appellant’s position. That Appellant’s counsel “explicitly referred the jury to this instruction” and “emphasized that corporate funds and individual funds were not ‘equivalent’ funds,” (5 CR at 1614), is irrelevant in this Court’s harm analysis. After his objection was overruled, Appellant was entitled to present argument to “meet, destroy, or explain” this erroneous instruction and the harm attendant upon this flagrant violation of Art. 36.14 was not abated because Appellant made the best of a bad situation. See Leday v. State, 983 S.W.2d 713, 719 (Tex.Crim.App. 1998).

POINT OF ERROR NUMBER FOUR

APPELLANT SUFFERED EGREGIOUS HARM AS A RESULT OF THE TRIAL COURT'S FAILURE TO SET OUT THE THEORY OF THE LAW OF PARTIES IN THE APPLICATION PARAGRAPH OF COUNT TWO OF THE INDICTMENT. [4 CR 1421-1422].

STATEMENT OF FACTS

Although the jury charge set out the law of parties in the abstract portion under § 7.02(a)(2) of the Penal Code,⁵⁰ (4 CR 1421), the charge *did not* apply this theory to the facts in the application paragraph on count two, the money laundering count, of the indictment. (4 CR 1422).

Appellant did not object to the trial court's failure to set out the theory of the law of parties in the application paragraph of count two. (16 RR 200-241, 17 RR 4-8).

ARGUMENT AND AUTHORITIES

A. THE STANDARD OF REVIEW

Where complaint is raised as to error in the trial court's charge to the jury, an appellate court must determine whether the charge was erroneous, and if so, whether the error was harmful to the defendant. Almanza v. State, 686 S.W.2d 151, 171 (Tex.Crim.App. 1984)(op. on reh'r'g). If the defendant has not objected to the claimed error, reversal is warranted only if he can show that the error was so egregious and created such harm that he has suffered "egregious harm." Bailey v. State, 867 S.W.2d

⁵⁰. "A person is criminally responsible for *an offense committed* by the conduct of another if ... acting with intent to promote or assist the *commission of the offense*, he solicits, encourages, directs, aids, or attempts to aid the other person to *commit the offense*." (emphasis added).

42, 43 (Tex.Crim.App. 1993). Errors resulting in egregious harm are those which affect “the very basis of the case,” deprive the defendant of a “valuable right,” or “vitally affect a defensive theory.” Hutch v. State, 922 S.W.2d 166, 171 (Tex.Crim.App. 1996). Direct evidence of harm is not required to show egregious harm. Castillo-Fuentes v. State, 707 S.W.2d 559, 573 n. 2 (Tex.Crim.App. 1986). The actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole.” Almanza v. State, 686 S.W.3d at 171. In some cases, erroneous jury instructions alone can cause egregious harm. Hutch v. State, 922 S.W.2d at 171. The issue of harm is mainly “an empirical question ... primarily contingent on the individual peculiarities of each trial, considered as a whole.” Saunders v. State, 817 S.W.2d 688, 690 (Tex.Crim.App. 1991).

**B. THE TRIAL COURT ERRED IN FAILING TO SET OUT THE
LAW OF PARTIES IN THE APPLICATION PARAGRAPH IN COUNT TWO**

The purpose of the trial court’s charge is to inform the jury of the applicable law and guide them in its application to the case. Hutch v. State, 922 S.W.2d at 170. Because the trial court’s charge must allow jurors to determine the defendant’s guilt or innocence in light of the evidence and the law, Abdnor v. State, 871 S.W.2d 726, 740 (Tex.Crim.App. 1994), the defendant has a fundamental right to be convicted upon a correct statement of the law. Hutch v. State, 922 S.W.2d at 170. A jury charge is fundamentally defective if it omits an essential element of the offense or authorizes conviction on a set of facts that do not constitute an offense. Zuckerman v. State, 591

S.W.2d 495, 496 (Tex.Crim.App. 1979). This Court need not linger long in finding that the application paragraph of count two was fundamentally defective by failing to set out the law of parties theory after defining it in the abstract, in light of an unbroken line of authority so holding. See e.g., McFarland v. State, 928 S.W.2d 482, 515 (Tex.Crim.App. 1996), *overruled on other grounds*, Mosley v. State, 983 S.W.2d 249 (Tex.Crim.App. 1998)(“The application paragraph of a jury charge is that which authorizes conviction, and an abstract charge on a theory of law which is not applied to the facts is insufficient to bring that theory before the jury.”); Johnson v. State, 739 S.W.2d 299, 303-305 (Tex.Crim.App. 1987)(trial court erred in referring to the law of parties in the abstract portion of the charge and not applying that law in application paragraph); Vazquez v. State, ___ S.W.3d ___, 2011 WL 1706233 *7 (Tex.App. – Houston [14th Dist.] May 5, 2011, no pet.)(op. on reh’g)(“Johnson is still good law, and under Johnson, a trial court errs if it ... does not apply the law of parties in the application paragraph of the charge”); Green v. State, 233 S.W.3d 72, 80 (Tex.App.– Houston [14th Dist.] 2007, pet. ref’d)(“This charge contains an abstract instruction on the law of parties, but does not contain any instruction applying the law to [the co-defendant’s] conduct in the complained-of paragraph. Thus ... this jury was given no guidance whatsoever concerning how it should apply the law of parties to [the co-defendant’s] conduct. This was error.”); Frost v. State, 25 S.W.3d 395, 400 (Tex.App.– Austin 2000, no pet.)(“But the application paragraphs of the charge are clearly in error, and the portion of the charge that applies the law to the facts of the case determines if the charge is fundamentally defective.”).

C. THIS CHARGING ERROR RESULTED IN EGREGIOUS HARM

Whether Appellant suffered egregious harm from this charging error is assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole. Hutch v. State, 92 S.W.2d at 171.

1. The Charge

The jury was instructed that “[y]ou are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given their testimony, *but you are bound to receive the law from the court which is herein given to you and be governed thereby.*” (4 CR 1423)(emphasis added). In short, the jury was expressly told to follow the law as presented in the charge.

The jury was abstractly charged on the law of parties, meaning that they were told that Appellant was criminally responsible for the actions of Colyandro and Ellis if the jury found that Appellant solicited, encouraged, directed, aided, or attempted to aid them. But the application paragraph that authorized the jury to accept or reject Appellant’s culpability for the offense of money laundering as a party omitted the party language. That this factor clearly falls on Appellant’s side of the ledger was succinctly stated by the Fourteenth Court of Appeals in an identical situation:

Taken together, these instructions were inadequate, for between the abstract instruction and the application paragraph on murder as a party, neither specifically explained to the jury which facts it could properly consider to convict appellant as a party. *In fact, the instructions*

were worse than that because, rather than merely withholding information from the jury, the application paragraph affirmatively misled the jury by telling the jury it could convict appellant for a murder committed by [the co-defendant] – even if appellant was not a party to the murder. This was a legally incorrect instruction that completely misstated the law, and to worsen matters, we cannot tell if the jury convicted appellant as a party based on the legally incorrect instruction or as a principal. We cannot assume the jury realized that the parties language was erroneously omitted, inserted appropriate language, and then applied it correctly.

Green v. State, 233 S.W.3d at 81 (citations omitted)(emphasis added).

Moreover, the remainder of the jury charge was not without fatal flaws. As set out in Point of Error No.3, two critical paragraphs of the charge contained language referring to “equivalent funds” that not only constituted an improper comment on the weight of the evidence, but was not part of, and impermissibly expanded on, the law applicable to the case. This factor, accordingly, weighs heavily in favor of a finding that Appellant suffered egregious harm.

2. The Evidence

The State’s evidence tended to suggest that Appellant, as a primary actor and as a party with Colyandro and Ellis, committed the offense of money laundering, and conspired with them to commit the offense of money laundering. The State’s case turned on the theory that corporate contributions raised by TRMPAC made their way back to Texas, after being laundered by RNSEC, in the form of checks to seven candidates, that Appellant knew about and blessed the agreement, and was guilty of money laundering, under the primary actor or parties liability theory.

In contrast, Appellant argued that he did not know of this transaction until it was done, and that no one in Texas or Washington involved in this transaction intended to violate the hopelessly and unconstitutionally vague provisions of the Election Code. He also presented evidence that while he started TRMPAC, he turned it over to Ellis, Colynadro, *et al.*, had no authority for its day-to-day operations, could not sign checks, and so could not have directed, encouraged, or solicited the others who acted. And, Appellant presented extensive testimony that no corporate contributions came back to Texas because RNSEC took pains to ensure that the corporate donations raised by TRMPAC were fire-walled off from RNSEC's individual contributions. Thus, the parties clearly joined issue on the elemental issues of whether Appellant was guilty of money laundering as a primary actor, or, as a party to that offense. But because the jury was not authorized to convict on the latter theory, this factor, too, weighs in favor of a finding of egregious harm. See *id.* at 82 ("Thus, the parties fully joined the contested issue of appellant's guilt as either a primary actor or as a party.").

3. The Arguments of Counsel

The critical role that the law of parties' instruction played in this case, and the egregious harm suffered by Appellant, is fortified by the prosecutor capitalizing on this unauthorized theory during her final argument, urging jurors to convict Appellant as a party:

I want to talk for just a moment about the Law of Parties. Tom DeLay, and this is the concept of Law of Parties and the law regarding it is spelled out in the Court's Charge. *Tom DeLay is criminally responsible for his own conduct as well as the conduct of Jim Ellis and John Colyandro.* Tom

DeLay blessed this deal; that was his own conduct. *But he also encouraged Jim Ellis and John Colyandro with the intent to promote or assist in the commission of this offense.*⁵¹

(17 RR 42-43)(emphasis added).

In Frost v. State, 25 S.W.3d at 395, this Court held that the State's reference to the erroneous portion of the jury instructions in final argument was a critical factor in egregious harm. That the State urged the jury in this case to find Appellant guilty as a party, in spite of the fact the charge did not authorize a conviction on this theory, is compelling evidence that this factor falls on Appellant's side of the ledger. See also Sanchez v. State, 209 S.W.3d 117, 124 (Tex.Crim.App. 2006)(prosecutor's reference to erroneous jury charge in final argument contributed to finding that defendant was egregiously harmed); Green v. State, 233 S.W.3d at 83 ("The charge ... did not clarify the prosecutor's comments for the jury and, instead, misled the jury into believing it could find appellant guilty of murder if [the co-defendant] committed the murder."); Clear v. State, 76 S.W.3d 622, 624 (Tex.App.— Corpus Christi 2002, no pet.) ("Given the ... argument by the prosecutor, we conclude that the error in the charge is egregious...")

4. Conclusion: the Error Resulted in Egregious Harm

This Court will never know for sure whether jurors convicted Appellant of money laundering as a primary actor or as a party based on an unauthorized legal theory.

⁵¹ Not surprisingly, Appellant was obligated to respond to this argument. (17 RR 49)("There is no evidence that Tom DeLay did anything except that he found out about the deal. And when he found out, really doesn't matter. Knowledge is not enough. And the judge tells you that. Even coupled with knowledge that others are engaging in conduct constituting the offense is not sufficient for you to write a verdict of guilty, because that doesn't make somebody a party.").

But this much is clear: the jury was instructed in the application paragraph that it could convict Appellant as a party to the offense of money laundering, an invalid legal theory unauthorized by the court's charge. See Green v. State, 23 S.W.3d at 83 ("But we do know one important fact: the jury was told in the application paragraph in the charge that it could convict appellant on an invalid legal theory."). Accordingly, this Court must conclude that this error was so harmful that it affected the very basis of this case, vitally affected Appellant's defensive theory, and effectively denied him a fair trial. See Sanchez v. State, 209 S.W.3d at 125 ("On the facts of this case it is no exaggeration to say that the appellant was deprived of his valuable right to have a jury determination of every element of the alleged offense, and that one of his defensive theories was vitally affected, to his substantial detriment."); Green v. State, 233 S.W.3d at 84-85 ("[W]e hold that the charge error affected the very basis of the case and deprived appellant of a valuable right; it authorized the jury to convict him of a murder committed by someone else without requiring the jury to find the elements of party responsibility beyond a reasonable doubt; this is not an offense under the laws of our state."); Hammock v. State, 211 S.W.3d 874, 879 (Tex.App.—Texarkana 2006, no pet.)(finding egregious harm where "the court's charge authorized the jury to convict ... for conduct not defined as a criminal offense."); Brooks v. State, 967 S.W.2d 946, 950 (Tex.App. — Austin 1998, no pet.)(finding egregious harm where charging error affected the very basis of the case and vitally affected accused's defensive theory).

The judgment of conviction entered on count two must be reversed and the cause remanded for a new trial.

POINT OF ERROR NUMBER FIVE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AFTER THE PROSECUTOR IMPROPERLY ARGUED MATTERS OUTSIDE THE RECORD DURING HIS FINAL ARGUMENT IN THE GUILT-INNOCENCE STAGE OF TRIAL. [17 RR 99-100].

STATEMENT OF FACTS

In the very first moments of his rebuttal argument, the prosecutor directed the jury to matters outside the record as set forth in the following exchange:

MR. COBB: At the end of Mr. DeGuerin's closing argument, he accused us of having a political vendetta against Tom DeLay. Let me talk about the criminal justice system. Remember how when this trial started, we were over in the civil courtroom. *Because we could not use the courtroom next door, Judge Perkins' courtroom, because the Public Integrity Unit of the Travis County District Attorney's office was prosecuting Democrat –*

MR. DEGUERIN: Excuse me. I didn't raise that at all. I object to that. And that is not –

THE COURT: Overruled.

MR. COBB: You see what I'm talking about? *The Public Integrity Unit of the Travis County District Attorney's office in Travis County, Texas, was prosecuting a State Legislator who is a Democrat. And you can bet –*

MR. DEGUERIN: Excuse me, Judge. The evidence doesn't – *beyond the evidence. It's outside of the record. And we object to it.*

THE COURT: Overruled. I think its invited.

MR. COBB: *We get accused of it all the time...*

(17 RR 99-100)(emphasis added).

ARGUMENT AND AUTHORITIES

A. PRESERVATION OF ERROR

Appellant's objection that the prosecutor's argument was outside the record was sufficient to call the trial court's attention to this claim of error "at a time when the trial court [was] in a position to do something about it." Lankston v. State, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992). Because Appellant obtained an adverse ruling when the trial court overruled his objection, this contention has been preserved for appellate review. Cockrell v. State, 933 S.W.2d 73, 89 (Tex.Crim.App. 1996).

B. THE STANDARD OF REVIEW

Permissible jury argument generally falls within four areas: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) responses to opposing counsel's arguments; and (4) pleas for law enforcement. Wilson v. State, 938 S.W.2d 57, 59 (Tex.Crim.App. 1996). The Court of Criminal Appeals made it clear almost forty years ago that, "The arguments that go beyond these areas too often place before the jury unsworn, and most times believable testimony of the attorney." Alejandro v. State, 493 S.W.2d 230, 231 (Tex.Crim.App. 1973). Because the law provides for, and presumes a fair trial for the accused, free from improper prosecutorial argument, Borjan v. State, 787 S.W.2d 53, 56 (Tex.Crim.App. 1990), appellate courts should not hesitate to reverse when the prosecution has departed from one of these permissible areas in final argument and has engaged in conduct designed to deny the accused a fair and impartial trial. Washington v. State, 16 S.W.3d 70, 73 (Tex.App.—Houston [1st Dist.] 2000, pet. ref'd); Branch v. State, 335 S.W.3d 893, 908-910 (Tex.App.—Austin

2011, pet. filed)(granting new punishment hearing based on ineffective assistance of counsel where defense counsel failed to object to prosecutor's inaccurate statement of the parole law during final argument in punishment stage of trial); see also United States v. Murrah, 888 F.2d 24, 27 (5th Cir. 1989)(internal quotation marks omitted) ("Rules of fair play apply to all counsel and are to be observed by the prosecution and defense counsel alike. ... If anything, the obligation of fair play by the lawyer representing the government is accentuated. Prosecutors do not have a hunting license exempt from the ethical constraints on advocacy.").

C. THE PROSECUTOR'S ARGUMENT WAS OUTSIDE THE RECORD

Appellate courts have shown a special concern for prosecutorial final argument that improperly invites the jury to speculate about or consider matters not in evidence. See e.g., Johnson v. State, 662 S.W.2d 368, 370 (Tex.Crim.App. 1984). Indeed, some forms of prosecutorial final argument outside the record can so infect the trial with unfairness as to be a denial of due process. See Thompson v. State, 89 S.W.3d 843, 852 (Tex.App.--Houston [1st Dist.] 2002, pet. ref'd)(prosecutor's invitation to jurors in final argument to speculate on matters outside the record in assessing punishment was so unfair as to be a denial of due process). The effect of the prosecutor's remarks in this case "ask[s] the jury to determine the appellant's guilt or innocence based on collateral matters which the prosecutor improperly interjected by way of his jury argument." Everett v. State, 707 S.W.2d 638, 641 (Tex.Crim.App. 1986). While prosecutors are permitted in final argument to draw from the facts in evidence all inferences which are reasonable, fair, and legitimate, he may not use final argument to get before the jury,

either directly or indirectly, evidence which is either outside of or unsupported by the record. Jordan v. State, 646 S.W.2d 946, 948 (Tex.Crim.App. 1983). As the Court of Criminal Appeals explained almost four decades ago why forensic misconduct of this ilk is so strongly condemned, “Argument injecting matters not in the record is clearly improper; *but argument inviting speculation is even more dangerous* because it leaves to the imagination of each juror whatever extraneous “facts” may be needed to support a conviction. *Logical deductions from evidence do not permit within the rule logical deductions from non-evidence.*” Berryhill v. State, 501 S.W.2d 86, 87 (Tex.Crim.App. 1973)(emphasis added).

Viewed through his prism, the prosecutor’s unsworn testimony that the Public Integrity Unit of the Travis County District Attorney’s office was trying a Democrat officeholder next door was outside of and unsupported by the record. Simply put, there was no evidence of this so-called “fact,” the spawn of media reports jurors were warned to avoid, and any such evidence was patently irrelevant pursuant to TEX.R.EVID. 401⁵² and TEX.R.EVID. 402.⁵³ The prosecutor’s self-serving protestation to the contrary, this Court must conclude that the trial court erred in overruling Appellant’s objection to the prosecutor’s unsworn testimony that was clearly outside of and unsupported by the record. See Esquivel v. State, 180 S.W.3d 689, 693 (Tex.App.–Eastland 2005, no pet. (argument that defendant could receive sex offender counseling while in prison was

⁵² “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

⁵³ “...Evidence which is not relevant is inadmissible.”

outside the record where record contained no such evidence); Washington v. State, 16 S.W.3d at 73 (argument that defense witness told complainant he would give her a hundred dollars if she would dismiss the case was outside the record where record contained no such evidence); Ortiz v. State, 999 S.W.2d 600, 605 (Tex.App.— Houston [14th Dist.] 1999, pet. refd)(argument referring to two pages of a document that was not admitted into evidence was outside the record)

D. THIS ARGUMENT EXCEEDED THE SCOPE OF COUNSEL'S INVITATION, IF ANY

In overruling Appellant's objection to the prosecutor's final argument, the trial court noted in passing that, "I think it's invited." (17 RR 100). For the reasons that follow, the trial court's belief is belied by both the record and controlling case law.

The record reveals that the first reference to partisan politics actually came from *the prosecution* at the end of its opening argument.⁵⁴ Aside from two passing references to politics in the abstract, defense counsel's final argument advanced the theme that Appellant did not try to circumvent the law but rather tried to follow the law.⁵⁵ (17 RR 45). At the conclusion of his final argument, defense counsel argued that the novelty of Appellant's prosecution was animated by his success in re-drawing

⁵⁴ "This is not a case about Republicans versus Democrats. It does not matter what label, what Party, what identity any of the co-conspirators have or had." (17 RR 44).

⁵⁵ The first of two reference to politics in defense counsel's final argument was that Appellant modeled TRMPAC and ARMPAC after the PAC set up by Democratic congressman Martin Frost. (17 RR 72). The second reminded jurors that "just because [Appellant] was a Republican" didn't mean he wasn't entitled to the presumption of innocence. (17 RR 83).

Congressional districts,⁵⁶ electing Republicans in Texas,⁵⁷ (17 RR 97), and the necessity of Appellant having to resign his Congressional leadership post once he was charged.⁵⁸ (17 RR 98). And while expressing his distaste for what he believed was an improper use of the courts in this case,⁵⁹ defense counsel took great care in the final moments of his closing argument to make it clear that he was “not trying to cast any kind of aspersions on any individual person that’s sitting at this [counsel] table.” (17 RR 97). Viewed against this factual milieu, the State’s predictable, albeit hollow, reply that defense counsel’s concluding remarks opened the door to the prosecutor’s unsworn testimony is devoid of merit.

As a threshold matter, the invited argument rule only permits the prosecutor to argue outside the record in response to defense counsel’s argument which goes *outside* the record. Walker v. State, 664 S.W.2d 338, 340 (Tex.Crim.App. 1984)(emphasis in original). Defense counsel’s penultimate remarks did not, as the prosecutor asserted, allege that Appellant was the victim of “a political vendetta.” They merely posited that this prosecution was driven by Appellant’s success in electing Republicans to the Texas

⁵⁶ “This law has never been applied to this situation before in Texas. Never. The first time. And why? The answer comes from the prosecution, redistricting.” (17 RR 97).

⁵⁷ “Tom DeLay and other Republicans succeeded. And the other side failed. And when Tom DeLay beat the Democrats at their own game ... when he was successful in electing – helping to elect Republicans in Texas ... we got redistricting for the first time in many, many decades.” (17 RR 97).

⁵⁸ “So why charge Tom DeLay? Well, we know what he had to do. He had to step down as Republican Whip. Not because he was guilty, but just because he was charged.” (17 RR 98).

⁵⁹ “I’m a life-long Democrat. But this is not what I see as the proper use of the Courts. I don’t agree with criminalizing the debate that ought to go on in a free society. I don’t agree with tearing down someone because of what his beliefs are.” (17 RR 98).

Legislature and in orchestrating congressional redistricting – exactly what the State argued from its opening statement⁶⁰ until its final argument.⁶¹ Defense counsel's concluding remarks that this stunningly ground-breaking prosecution was an improper use of the courts because it criminalized politics and punished Appellant for his beliefs, was not outside the record.⁶² In reality, it was a mere rhetorical flourish that was itself a reasonable deduction from the evidence giving effect to – and a shorthand rendition of – his defensive theory that Appellant was not guilty of the conduct forming the basis for the prosecution's jerry-rigged and baseless charges. Because defense counsel made no assertions of fact outside the record, the prosecutor's outside-the-record riposte was not invited. See Fant-Caughman v. State, 61 S.W.3d 25, 30 (Tex.App.– Amarillo 2001, pet. ref'd)(State's argument was outside the record and uninvited where "appellant's counsel ... made no assertions of fact contrary to the record").

Even if this Court holds that defense counsel's argument was outside the record, the prosecutor's right to respond to it was not without limits, as an unbroken line of authority mandates that the prosecutor's response may not exceed the scope of his opponent's invitation. See Harris v. State, 56 S.W.3d 52, 57 (Tex.App.–Houston [14th

⁶⁰ "[Appellant] publicly stated back then and now that he wanted redistricting in Texas. How would this be accomplished? By gaining a Republican majority in the Texas House, who would then elect a Republican Speaker of the House, who would then push through an unusual mid-decade redistricting..." (6 RR 44)

⁶¹ "So what was Tom DeLay's motive to do this? Back in 2002, Tom DeLay's motive was redistricting. Pure and simple." (17 RR 26).

⁶² While defense counsel's claim that he was a "life-long Democrat" was outside the record, this self-disclosure was as irrelevant to this proceeding as last week's losing Lotto ticket.

Dist.] 2001, pet. refd)(“This argument went too far to be within the scope of a response to defense counsel’s argument. ... ‘The wall, attacked at one point, may not be fortified at another and distinct point.’”); Franks v. State, 574 S.W.2d 124, 126 (Tex.Crim.App. 1978)(“We hold that the prosecutor’s argument ... exceeded the scope of defense counsel’s invitation...”); United States v. Thomas, 12 F.3d 1350, 1367 (5th Cir. 1994) (while prosecution may respond to opposing counsel’s argument, responses are proper “only if done specifically to rebut assertions by defense counsel”). That the prosecutor did far more than rebut defense counsel’s argument and exceeded the scope of whatever invitation was extended is clear. In inviting jurors to consider his unsworn testimony as to the prosecution of a Democrat lawmaker allegedly transpiring in a courtroom next door, the prosecutor’s comments were not appropriate in scale, and transmitted the improper emotional appeal that Appellant’s guilt was as clear as that of his fellow lawmaker in the adjacent courtroom being prosecuted by the same entity. See United States v. Aguilar, ___ F.3d ___, 2011 WL 2481592 *3 (5th Cir. June 23, 2011)(footnotes omitted)(“Because Aguilar’s counsel asserted that Agents Vincent and Minnick were either lying or mistaken, the prosecutor was entitled to rebut the assertion. However, the prosecutor also had a responsibility not to go beyond the evidence and to make his comments appropriate in scale.”). The State’s uncritical acceptance of the trial court’s ill-fated belief that the prosecutor’s unsworn testimony that invited jurors to consider matters outside of and unsupported by the record will not support the great weight rested upon it. See e.g., McKenzie v. State, 617 S.W.2d 211, 221 (Tex.Crim.App. 1981) (rejecting State’s claim that defense counsel’s argument about suitability for probation

invited outside the record reply); Branch v. State, 335 S.W.3d 893, 907 n. 5 (Tex.App.—Austin 2011, pet. filed)(prosecutor’s improper comment was not “merely an answer to defense counsel’s argument regarding parole” where it “went far beyond defense counsel’s comments...”); Rodriguez v. State, 520 S.W.2d 778, 780 (Tex.Crim.App. 1975)(defense argument that defendant was not “a big drug dealer” did not “invite a response unsupported by the record relative to the number of lives defendant had touched ‘with the heroin he helps disburse’”); Ortiz v. State, 999 S.W.2d at 605 (rejecting State’s claim that prosecutor’s argument was invited); Blessing v. State, 927 S.W.2d 266, 270 (Tex.App.—El Paso 1996, no pet.)(defense counsel’s argument that defendant “will serve [jail] time” did not invite prosecutor to go outside the record to tell jury that prisoners in the county jail received two-for-one time credit); Hyde v. State, 1997 WL 197859 *1 (Tex.App—Houston [14th Dist.] 1997, no pet.)(not designated for publication)(“The State clearly went beyond any invitation given by the defendant in injecting the evidence concerning peace officers as home invaders.”); United States v. Pittman, 401 Fed.Appx. 895, 899 (5th Cir. 2010)(not designated for publication)(“At most, defense counsel made a single reference to the agents lying; it was not the theme of the closing, which focused on asking the jury to believe Pittman’s story. As such, the prosecutor went too far in rebutting defense counsel’s closing argument.”).

E. THIS ERROR AFFECTED APPELLANT’S SUBSTANTIAL RIGHTS

Because this error is generally not of constitutional dimension, Mosley v. State, 983 S.W.2d 249, 259 (Tex.Crim.App. 1998), this Court must decide if this argument “had a substantial and injurious effect or influence in determining the jury’s verdict.”

King v. State, 953 S.W.2d 266, 270 (Tex.Crim.App. 1997). This error is reviewed under a three-part test to determine if reversal is warranted: (1) severity of the misconduct, that is, magnitude of the prejudicial effect of the remarks at issue; (2) measures adopted to cure the misconduct, that is, the efficacy of any cautionary instruction by the judge; and (3) certainty of conviction absent the misconduct, that is, the strength of the evidence supporting the jury's verdict. Mosley v. State, 983 S.W.2d at 259.

1. Severity of the Misconduct

"One of the main reasons for restraining the prosecutor and demanding a high standard of care in closing argument is that, due to the position of a prosecutor as a public official, an illusion [*sic*] to extrinsic evidence and interjection of his own views may be given undue weight by the jurors." Monkhouse v. State, 861 S.W.2d 473, 478 (Tex.App.—Texarkana 1993, no pet.); see also United States v. Young, 470 U.S. 1, 18-19 (1985) ("A prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."). The State's argument not only injected new facts harmful to Appellant into the record, it encouraged jurors to look past the evidence and to convict Appellant, a man who was one of the most powerful Republicans in Texas, indeed, in America, because the Public Integrity Section of the Travis County District Attorney's Office had only recently prosecuted a Democrat. The effect of the prosecutor's unsworn testimony was to unfairly tip the scales in the State's favor on this issue "by unsworn testimony ... which was outside the record and extremely harmful to the accused." Lookabaugh v. State, 352 S.W.2d 279, 280 (Tex.Crim.App. 1961). The severity of this misconduct

is also exacerbated by the fact that this error did not occur in the middle of trial where its harmful effect may have been attenuated. Instead, it was made immediately before the jury deliberated Appellant's fate. See Brown v. State, 978 S.W.2d 708, 715 (Tex.App.— Amarillo 1998, pet. ref'd)("[T]he harm arose immediately before the jury was to retire and deliberate. Thus, its potential effect was not as attenuated as it would have been had the misconduct occurred elsewhere."); Barnum v. State, 7 S.W.3d 782, 794 (Tex.App.— Amarillo 1999, pet. ref'd)(same); Washington v. State, 16 S.W.3d at 74 (same). This factor, therefore, weighs heavily in Appellant's favor.

2. Steps Taken to Cure the Misconduct

This factor clearly falls on Appellant's side of the ledger because the trial court, by overruling Appellant's objection, placed the stamp of judicial approval on the State's improper argument, Person v. State, 706 S.W.2d 153, 155 (Tex.App.— Houston [1st Dist.] 1986, no pet.)("[T]he prosecutor ... made repeated speculative ventures outside the record, and the trial court fully condoned such argument over timely objection."), and magnified the harm by incorrectly stating that this argument was invited. Harris v. State, 56 S.W.3d at 58 ("[W]e note that the trial court not only overruled Harris's objection, but also incorrectly stated that this argument was a reasonable deduction from the evidence. In short, the court adopted no measures to cure the misconduct, and, in fact, seemed to agree with the argument."). Given the trial court's failure to take *any* corrective action, it is altogether likely that jurors placed at least some weight on the prosecutor's unsworn testimony. See Massey v. State, 1999 WL 792454 *6 (Tex.App.— San Antonio 1999, pet. ref'd)(opinion not designated for publication)("The

prosecutor must have believed that the jury would place at least some weight on its improper argument; otherwise the State would not have included the reference in its soliloquy to the jury.”); see also Peak v. State, 57 S.W.3d 14, 20 (Tex.App.–Houston [14th Dist.] 2001, pet. ref’d)(“[W]e find that the court’s failure to take curative measures militates toward a finding of harm, against Appellant.”); Ortiz v. State, 999 S.W.2d at 606 (because “the court took no steps or measures to cure the misconduct ... the trial court compounded the error”).

3. Certainty of Conviction Absent the Error

While there are cases where this third factor alone, if found in the State’s favor, might be sufficient to warrant a finding that this error did not affect the defendant’s substantial rights, this case is not one of them. While the State will doubtless claim that the evidence of Appellant’s guilt was “overwhelming,” on both the conspiracy and money laundering counts, as it does in virtually every case, no matter how tenuous the evidence, a dispassionate review of this record reveals that this hollow refrain is devoid of merit, and foreclosed by controlling authority.

As recounted in detail in Appellant’s first and second points of error, even when viewed in the light most favorable to the verdict, the evidence adduced at trial falls far short of the standard required to withstand the test for legal sufficiency. This Court can only conclude that, contrary to the State’s rote rejoinder, the certainty of conviction absent the prosecutor’s forensic excess, is underwhelming. Washington v. State, 16 S.W.3d at 75; Ortiz v. State, 999 S.W.2d at 606. See also Hicks v. State, 815 S.W.2d 299, 303 (Tex.App.–Houston [1st Dist.] 1991, pet. ref’d)(“The State claims appellant was

not harmed by the prosecutor's comments because the testimony provided overwhelming evidence of his guilt. We are not persuaded to use this type of analysis in determining whether error was harmful.").

4. Conclusion

Because all three Mosley factors fall on Appellant's side of the ledger, this Court can have no fair assurance that the improper prosecutorial argument did not influence, or had only a slight effect on the jury's verdict. See Ortiz v. State, 999 S.W.2d at 607 ("Given the offensiveness of the prosecutor's argument, the exacerbation by the trial judge, and the marginal nature of the state's case, we find the error to be harmful."); Stein v. State, 492 S.W.2d 548, 552 (Tex.Crim.App. 1973) ("The present case is rather easily resolved, since the prosecutor left little room for reasonable minds to differ as to whether his actions would be labeled harmless."); Harris v. State, 56 S.W.3d at 59 ("This judicial ratification of an improper jury argument clearly could have been calculated to prejudice the defendant's rights."). The State's departure from the four permissible areas of final argument denied Appellant his right to one tolerably fair trial and compels a reversal of his convictions. See Wilson v. State, 938 S.W.2d at 62. Indeed, as one appellate court has noted, it is a "foul blow" when the State urges jurors to convict based on an incriminating "fact" unsupported by and outside the record. Washington v. State, 16 S.W.3d at 75.

The judgments of conviction entered below must be reversed and the causes remanded for a new trial.

POINT OF ERROR NUMBER SIX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S "AS APPLIED" CHALLENGE TO THE ELECTION CODE PROVISIONS FORMING THE BASIS FOR HIS MONEY LAUNDERING AND CONSPIRACY CONVICTIONS. [4 CR 1350-1356; 15 RR 64-66].

POINT OF ERROR NUMBER SEVEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S "AS APPLIED" CHALLENGE TO THE STATE'S NOVEL AND UNPRECEDENTED USE OF THE MONEY LAUNDERING STATUTE IN THIS CASE. [4 CR 1350-1356; 15 RR 64-66].

STATEMENT OF FACTS

After the State rested, Appellant moved for instructed verdicts on both counts of the indictment based on due process and free speech grounds. (4 CR 1350-1356). Alluding to the unalloyed novelty of this prosecution, Appellant asserted that the provisions of the Election Code at issue were, as applied to him, unconstitutionally vague because of its conflicting, albeit reasonable interpretations.⁶³ (15 RR 64).

Appellant also advanced an "as applied" constitutional challenge to the State's use of the money laundering statute because he could not have reasonably known in advance that the prosecution would seek to impart such a novel interpretation of the statute – the first time an Election Code violation was used as a predicate offense –

⁶³ Appellant also averred that in light of the Supreme Court's decision in Citizens United v. Federal Election Commission, 130 S.Ct. 876 (2010), the applicable Election Code provisions were unconstitutional as applied in this case. (4 CR 1356; 15 RR 64). This claim is discussed in Point of Error No. 8, *infra*.

especially because these “money swaps” were common and conducted by both political parties. (15 RR 64-66). Appellant argued that the application of the money laundering statute in this case was akin to “legislation by indictment,” (15 RR 65), unconstitutionally enlarged the money laundering statute, and failed to provide fair warning that the statute’s definition of “funds” included checks. (4 CR 1354-1356). As Appellant phrased it, “We’re not saying ... because everybody did it, it is okay. We’re saying it was okay, so everybody did it.” (15 RR 65). Appellant noted that “now that the facts are in ... this Court can resolve the as applied challenge.” (15 RR 63).

Without calling on the State for a response, the trial court denied Appellant’s motion. (15 RR 66).

ARGUMENT AND AUTHORITIES

A. PROLOGUE: THE LONG AND WINDING ROAD IN EX PARTE ELLIS

In 2005, Appellant’s co-defendants, James Ellis and John Colyandro, filed pre-trial writs claiming, *inter alia*, that §§ 253.003 and 253.094 of the Election Code were unconstitutionally vague and overbroad on their face because the definition of “campaign contribution” was “insufficiently tailored and precise to avoid criminalizing protected conduct or chilling the exercise of First Amendment rights.” Ex parte Ellis, 279 S.W.3d 1, 7 (Tex.App.– Austin 2008). They further argued that the requirement that a campaign contribution be “offered or given with the intent that it be used in connection with a campaign” as too imprecise to give constitutionally adequate notice of what conduct is prohibited as well as criminalizing conduct that comes within the protections of the First Amendment right to free speech. Id. This Court rejected these

challenges, concluding that neither statute was unconstitutionally vague or overbroad. Id. at 23.

Colyandro and Ellis also contended that the pre-2005 version of the money laundering statute was unconstitutionally vague on its face because it failed to give constitutionally adequate notice that a person could be convicted of money laundering based solely on handling checks, money orders, or other negotiable instruments. Id. at 24. As this Court distilled their submission, “[I]f the pre-2005 version of the money laundering statute is read to criminalize transactions in which the ‘proceeds of criminal activity’ were something other than funds in the form of cash or cash equivalent, the statute is unconstitutionally vague on its face because a reasonable person of ordinary intelligence would not know from reading the statute that a check, money order, or other negotiable instrument (items added by the 2005 amendment to the statute) fall within the ambit of term ‘funds.’” Id. A majority of this Court⁶⁴ held that because the pre-2005 definition of “funds” did not include checks or other negotiable instruments that were not the functional equivalent of cash, the claim that the money laundering statute at issue was unconstitutionally vague on its face was without merit. Id. at 29.

After both parties obtained discretionary review, the Court of Criminal Appeals affirmed this Court’s decision that §§ 253.003 and 253.094 of the Election Code were not facially unconstitutional, concluding that these provisions were neither vague nor

⁶⁴ Former Justice Patterson, joined by Justice Henson, dissented on the grounds, *inter alia*, that because a trial had not occurred, at which evidence could have been elicited as to the exact form of the corporate contributions, any ruling on the vagueness challenge was premature. Id. at 41-42 (Patterson, J., *dissenting*).

overbroad. Ex parte Ellis, 309 S.W.3d 71, 85-92 (Tex.Crim.App. 2010). The court reversed the majority's decision, holding that, because pre-trial habeas can be used to bring a facial challenge to the constitutionality of the statute that defines the offense but may not be used to advance an "as applied" challenge, it "improperly resolved an 'as applied' challenge when it found that the money laundering statute did not apply to checks." Id. at 82. The court held that the majority's conclusion that the term "funds" clearly covered at a minimum, the items contained in the statutory definition, along with cashier's checks, "would have itself been sufficient to defeat a facial vagueness challenge" and, accordingly, "[t]here was no need for the court of appeals to go further and decide that 'funds' covered only forms of cash." Id.

In the wake of Appellant's trial, his "as applied" challenge⁶⁵ to the Election Code provisions and money laundering statute is now ripe for review. For the reasons that follow, Appellant's claims, *inter alia*, that §§ 253.003 and 253.094 of the Election Code are unconstitutionally vague, and the State's novel use of the money laundering statute failed to afford fair warning that his conduct was criminal, are well-taken.⁶⁶

B. THE STANDARD OF REVIEW: "FAIR WARNING"

In United States v. McBoyle, 283 U.S. 25, 27 (1931), where the Supreme Court first announced the seminal doctrine of "fair warning," Justice Oliver Wendell Holmes

⁶⁵ The contention that a statute is unconstitutional "as applied" posits that the statute operates unconstitutionally with regard to the claimant because of his particular circumstances. Gillenwaters v. State, 205 S.W.3d 534, 536 n. 3 (Tex.Crim.App. 2006).

⁶⁶ Pursuant to TEX.R.APP.P. 38.1(e), these "subsidiary questions" are "fairly included" in these two points of error.

opined, "It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." The fundamental tenet that a criminal statute must give fair warning of the conduct that it makes a crime has long echoed in the judgments of the Supreme Court. See Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."). The Court has held that there are three related manifestations of the fair warning doctrine:

- The vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."
- As a sort of "junior version of the vagueness doctrine," the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.
- Although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.

United States v. Lanier, 520 U.S. 259, 266-267 (1997)(citations omitted). In each of these guises, the Supreme Court has held that the "touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." Id. at 267.

C. STRICT CONSTRUCTION AND THE RULE OF LENITY

The “rule of lenity” in Lanier is an axiom that mandates strict construction of penal statutes, rooted in a concern for individual rights, an awareness that it is the legislature and not the courts that should define criminal activity, and the belief that fair warning should be given to what conduct is criminal, applies when “after seizing every thing from which aid can be derived, [this] Court is left with an ambiguous statute.” United States v. Marek, 238 F.3d 310, 322 (5th Cir. 2001)(*en banc*). The principle behind the rule of lenity is that no one should be forced to speculate whether his conduct is prohibited. Dunn v. United States, 442 U.S. 110, 112 (1979); see also United States v. Singleton, 946 F.2d 23, 24 (5th Cir. 1991)(rule of lenity requires ambiguous statutes to be construed in favor of the accused “so that members of an innocent citizenry are not surprised by being prosecuted for acts that they could not know were criminal”); United States v. Marek, 238 F.3d at 327 (Jolly, J., *dissenting*) (“The rule of lenity counsels us to resolve ambiguity in criminal statutes by construing such statutes narrowly.”). These sentiments have echoed in the judgments of the Court of Criminal Appeals and this Court. See e.g., Bruner v. State, 463 S.W.2d 205,215 (Tex.Crim.App. 1970)(“A forbidden act must come clearly within the prohibition of the statute and any doubt as to whether an offense has been committed should be resolved in favor of the accused.”); Townsend v. State, 427 S.W.2d 55, 62 (Tex.Crim.App. 1968)(penal statutes “are to be construed strictly in favor of the accused”); Wilburn v. State, 824 S.W.2d 755, 760 (Tex.App.– Austin 1992, no writ)(penal statutes “must be strictly construed to protect those individuals against whom liability is sought”).

D. UNCONSTITUTIONAL APPLICATION OF THE MONEY LAUNDERING STATUTE

1. *The Novelty of the State's Theory Failed to Give Appellant Fair Warning*

As recounted above in detail, the RNC deposited TRMPAC's \$190,000 check in the RNC's corporate bank account where it was fire-walled off from RNC's individual contributions. Indeed, if there is one fact beyond cavil, it is that the RNC's corporate contributions were never commingled with its individual contributions.

Section 34.02(a)(2) of the Penal Code provides that a person commits the offense of money laundering if he "conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity." Unless a rational fact finder could conclude beyond a reasonable doubt that the funds at issue are the proceeds of criminal activity, the evidence would be legally insufficient. Because the RNC's corporate contributions were never commingled with its individual contributions, the only conceivable legal theory that animated this prosecution is that a check deposited in one account tainted money in a separate, indisputably segregated account. Unfortunately for the State, it has yet to favor any court with a single case that supports this novel theory. Indeed, the fact that such money swaps were commonplace by both political parties fortifies the notion that "[a] person in appellant's position – even a person with legal training – is left to speculate as to whether he may engage in the conduct in question." Fogo v. State, 830 S.W.2d 592, 595 (Tex.Crim.App. 1992)(holding then § 253.003(a) unconstitutional as applied). The legal landscape of the Supreme Court's "fair warning" precedent fortifies the conclusion that due process precludes this Court from sanctioning the State's novel construction of the money laundering statute as to conduct that neither the statute *nor*

any prior judicial decision had fairly disclosed to be within its scope.⁶⁷ See United States v. Lanier, 520 U.S. at 267.

2. Section 34.01 Failed to Give Fair Warning that Checks were “Funds”

Now that Appellant’s “as applied” attack on the validity of the money laundering statute is ripe, the majority’s reasoning and analysis in Ellis bolsters the conclusion that in 2002, Appellant was necessarily “left to speculate” as to whether the definition of “funds” in the § 34.01 included checks.⁶⁸ See Fogo v. State, 830 S.W.2d at 595. That “men of common intelligence must necessarily guess at ... the meaning [of § 34.01] and differ as to its application,” United States v. Lanier, 520 U.S. at 266, at least in 2002 before the legislature’s amendment to this provision cured its fatal ambiguity, is clear. Likewise, as the majority’s holding in Ellis reflected, it is a violation of due process⁶⁹ to apply the State’s novel construction of § 34.01 to conduct that neither the statute nor any prior judicial decision⁷⁰ has fairly disclosed to be within its scope. Id. And, finally,

⁶⁷ See note 70, *infra*.

⁶⁸ Ex parte Ellis, 279 S.W.3d at 25 (“We are of the opinion that the term ‘funds’ in the pre-2005 version of the money laundering statute cannot be fairly read to have tacitly included checks and other negotiable instruments that do not function as cash such as those added to the statute in 2005.”).

⁶⁹ A statute maybe unduly vague, in violation of the Due Process Clause of the Fourteenth Amendment, if it does not: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) establish definite guidelines for law enforcement. Scott v. State, 322 S.W.3d 662, 665 n. 2 (Tex.Crim.App. 2010).

⁷⁰ Contrary to the State’s avowal, no Texas court has ever held that the definition of “funds” in the money laundering statute includes checks, and the cases the trial court cited in support of this bald assertion, (2 CR 418-420), are distinguishable. In Lee v. State, 29 S.W.3d 570, 576 (Tex.App. – Dallas 2000, no pet.), the defendant laundered “funds” by cashing a cashier’s check, *i.e.*, receiving cash, in exchange for the fraudulently obtained check. In Davis v. State, 68 S.W.3d 273, 277

the canon of strict construction of criminal statutes and the rule of lenity alluded to in Lanier, that resolves the ambiguity in § 34.01 to apply it only to conduct that is clearly covered, also compels the conclusion that the pre-2005 version of § 34.01 failed to give Appellant fair warning that his conduct was prohibited, especially given the decidedly novel and untested theory of this prosecution.⁷¹ See Dunn v. United States, 442 U.S. at 112; United States v. Singleton, 946 F.2d at 24; Bruner v. State, 463 S.W.2d at 215; Townsend v. State, 427 S.W.2d at 62; Wilburn v. State, 824 S.W.2d at 760.

3. *The Election Code's Provisions Limiting the Use of Corporate Contributions is Unconstitutionally Vague and Overbroad as Applied to Appellant*

The Election Code limits how corporate funds may be spent in connection with Texas elections,⁷² by prohibiting a corporation from making a political contribution to a candidate for Texas office. Similarly, although a general-purpose political action committee such as TRMPAC may not pass corporate contributions on to a Texas

(Tex.App.—Dallas 2002, pet. ref'd), it is unclear from the opinion whether the defendant received cash proceeds of checks which ended up in his accounts, or whether he received cash from the overseas wire transfers. What is clear is that the defendant did not challenge the sufficiency of the evidence on the grounds that the insurance policies were fraudulently obtained and that the proceeds were “funds” within the meaning of the statute. See Ex parte Ellis, 279 S.W.3d at 29 n. 24 (“The issue in this case was not raised nor litigated in those cases, and the courts did not address or express any view on it.”). Thomas v. State, 31 S.W.3d 422, 426 (Tex.App. – Fort Worth 2000, pet. ref'd), also cited by the State, is not to the contrary. In Davis, unlike the case at bar, there is no showing that the “funds” at issue were checks and no claim was raised that “funds” did not include checks.

⁷¹ See Long v. State, 931 S.W.2d 285, 295 n. 12 (Tex.Crim.App. 1996) (“Charging ordinary citizens ... with knowledge of constitutional law” to defeat a challenge to the constitutionality of a statute “seems especially inappropriate in an area of law ... that is relatively new.”).

⁷² See Ethics Advisory Opinion No. 208 (1994) (“It is clear, however, from the Texas campaign laws, taken as a whole, that the offices and campaigns referred to are Texas offices and Texas campaigns.”).

candidate, it may use those corporate contributions to finance its own “establishment or administration” pursuant to § 253.100 of the Election Code.

Terry Nelson testified that the money sent to the seven Texas candidates came from a RNSEC account in which only individual donations were placed, and that was completely separate and legally permitted to send such contributions. (9 RR 235-236). Nelson stated that the \$190,000 TRMPAC sent to the RNC was *not* disbursed in Texas because “the RNC is very much in the business of spending money appropriately and legally every place that it spends it.” (9 RR 247-248).

The State contended below that TRMPAC’s \$190,000 check to the RNC was not a legitimate political outlay because it was not used for TRMPAC’s “establishment and administration.” The 2002 version of the Election Code did not define “establishment and administration” and even when the legislature amended § 253.100 in 2003, it still did not define “establishment and administration.”⁷³ The 2002 version of § 253.100 necessarily leaves a person of ordinary intelligence to guess at what “establishment and administration” means. In fact, it appears that the 2003 amendment complicated, rather than clarified the 2002 analogue of the statute.

This inherent vagueness in the statute’s language is compounded as applied to the facts of this case. While the Election Code’s prohibitions of the use of corporate

⁷³ The amended version reiterated that corporate contributions may be used to finance the “establishment and administration” of a Texas PAC without elaboration, and added “in addition to any other expenditure that is considered permissible under this section [corporate contributions may be used for the] maintenance and operation” of a Texas PAC. At a minimum, therefore, it appears that “establishment and administration” is broader than but includes “maintenance and operation.”

contributions apply only to activity connected to Texas elections, there is no Texas law that prohibits a Texas PAC from using corporate contributions on anything unrelated to Texas elections,⁷⁴ and no limitation on how a Texas PAC can use corporate donations with regard to political activity in other states.⁷⁵ In 2002, therefore, it was impossible for a person of ordinary intelligence to know with any reasonable degree of certainty that TRMPAC's \$190,000 check to the RNC – corporate contributions that were used in connection with non-Texas elections – constituted an impermissible expenditure as defined by § 253.100. The canon of strict construction of criminal statutes and the rule of lenity that resolves the ambiguity in § 253.100, to apply it only to conduct that is clearly covered, also compels the conclusion that this statute failed to give Appellant fair warning that his conduct was prohibited, especially given the distinctly novel and untested theory of this prosecution. See Dunn v. United States, 442 U.S. at 112; United States v. Singleton, 946 F.2d at 24; Bruner v. State, 463 S.W.2d at 215; Townsend v. State, 427 S.W.2d at 62; Wilburn v. State, 824 S.W.2d at 760.

The judgments of conviction entered on both counts of the indictment must be reversed and the causes remanded to the trial court to enter an order dismissing the indictment. See Long v. State, 931 S.W.2d at 297.

⁷⁴ Indeed, as this Court recognized, “[A]s the State acknowledges, a payment or transfer to a campaign or political committee is not a ‘political contribution’ – and therefore, not regulated by the election code at all – if it is not ‘offered or given with the intent that it be used in connection with a campaign for [Texas] elective office or on a [Texas] measure.’” Ex parte Ellis, 279 S.W.3d at 9 (interpreting § 251.001(3) of the Election Code).

⁷⁵ See Ethics Advisory Opinion No. 277 (1995) (“Title 15 of the Texas Election Code does not prohibit Texas corporation from [or Texas PAC] from making contributions and expenditures in connection with elections in other states.”).

POINT OF ERROR NUMBER EIGHT

THE PROHIBITION ON CORPORATE CONTRIBUTIONS MADE TO CANDIDATES DENOUNCED BY SEC. 253.003 AND SEC. 253.094 OF THE TEXAS ELECTION CODE IS AN UNCONSTITUTIONAL ABRIDGMENT OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION. [4 CR 1350-1356; 15 RR 64-66].

STATEMENT OF FACTS

After the State rested its case-in-chief, Appellant moved for instructed verdicts on both counts of the indictment based on due process and free speech grounds. (4 CR 1350-1356). Appellant posited that §§ 253.003 and 253.094 of the Texas Election Code were unconstitutional in light of the Supreme Court's decision in Citizens United v. Federal Election Commission, 130 S.Ct. 876 (2010). (4 CR 1356; 15 RR 64).

Without calling on the State for a response, the trial court denied Appellant's motion. (15 RR 66).

ARGUMENT AND AUTHORITIES

A. CAMPAIGN FINANCE LAWS AND THE FIRST AMENDMENT: AN OVERVIEW

In Buckley v. Valeo, 424 U.S. 1, 39 (1976)(*per curiam*), the Supreme Court considered constitutional challenges to myriad provisions of the Federal Election Campaign Act of 1971 ["FECA"], including a ceiling on campaign expenditures by individuals and groups "relative to a clearly identified candidate." While recognizing various government interests in regulating campaign finance, the Court stressed that "[c]lose examination of the specificity of the statutory language is required where, as here, the legislation imposes criminal penalties in an area permeated by First

Amendment interests.”⁷⁶ Id. at 40-41.

The Court upheld limitations on the amount of money a person may contribute to a campaign but struck down limitations on independent expenditures made on behalf of a political cause or candidate.⁷⁷ Dealing first with direct contribution limits, the Court found a “sufficiently important government interest in “the prevention of corruption and the appearance of corruption” justifying the amount a person could contribute to a federal campaign. Id. at 25. The Court was concerned that large direct contributions, *i.e.*, those above the limits, could be used to “secure a political *quid pro quo* for independent expenditure limits “because [of] the absence of prearrangement and coordination” between the donor and any specific candidate. Id. at 47-48. Because of the strong government interest in preventing *quid pro quo* corruption or its appearance, Buckley permitted federal limits on direct contribution even though those limits implicate fundamental First Amendment interests.”⁷⁸ Id. at 23; see also First National Bank of Boston v. Bellotti, 435 U.S. 784, 787 (1978)(while declining to rule

⁷⁶ It is clear that limits on political contributions operate in an area of the most fundamental First Amendment activities. “Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” Id. at 14, *quoting* Roth v. United States, 354 U.S. 476, 484 (1957).

⁷⁷ Citing Buckley, the Texas Supreme Court held that the Election Code’s definition of “campaign expenditure” as an expenditure “in connection with a campaign for elective office” was unconstitutionally vague. Osterberg v. Peca, 12 S.W.3d 31, 51 (Tex. 2000).

⁷⁸ The federal analogue of §§ 253.003 and 253.094, 2 U.S.C. § 441b(a), makes it a federal offense for “any corporation whatever ... to make a contribution or expenditure in connection with” certain federal elections, and for “any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section.”

on constitutionality of ban on corporate contributions or expenditures to influence the outcome of any state referendum, Court reaffirmed that identity of a corporation as a “speaker,” especially in the context of political speech, is of no consequence to the First Amendment protection its speech is afforded).

In Federal Election Commission v. Beaumont, 539 U.S. 146 (2003), the Supreme Court dealt with a First Amendment challenge by a non-profit advocacy corporation to the federal ban against corporate contributions. The Court upheld the ban *vis a vis* non-profit advocacy corporations, reconciling the disparate treatment between contributions and expenditures based on the differing level of scrutiny applied to the two types of activity. *Id.* at 161-162. Contribution regulations were justified so long as they were “closely drawn to match a sufficiently important interest,” while expenditure regulations had to be “narrowly tailored to serve a compelling government interest.” *Id.* at 162. In addition to preventing “war-chest” corruption, the Court found that a ban on corporate contributions also served to prevent individuals from using the corporate form to circumvent valid contribution limits. *Id.* at 155.

In Citizens United v. Federal Election Commission, 558 U.S. ___, 130 S.Ct. 876, (2010), the Supreme Court held that the government’s attempt to place limitations upon independent corporate expenditures violated the First Amendment. The Court held that because Buckley found that independent expenditures by individuals do not corrupt, and because the “central principle” in Bellotti was that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity,” *id.* at 903, “corporations cannot be banned from making the same independent

expenditures as individuals.” Id. at 899. The Court noted that, “When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom of thought for ourselves.” Id. at 908. But the Court did not resolve the issue of whether its jurisprudence on direct corporate contributions should be reexamined, noting in part, that, “Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.”⁷⁹ Id. at 909.

B. THE IMPACT OF CITIZENS UNITED IN APPELLANT’S CASE

Admittedly, this is not the first time that a defendant in this case has relied upon Citizens United in support of a constitutional challenge to the provisions of the Election Code animating this novel prosecution. Called upon to gauge the impact of Citizens United on the Election Code’s prohibition against corporate contributions to Texas candidates, the Court of Criminal Appeals⁸⁰ agreed “that Citizens United has significantly affected the constitutional landscape with respect to corporate free speech by removing restrictions on independent corporate expenditures.” Ex parte Ellis, 309 S.W.3d at 85. The court disagreed with the contention that Citizens United “has had any effect on the Court’s jurisprudence relating to corporate contributions,” reasoning

⁷⁹ In resolving Appellant’s First Amendment challenge, it is axiomatic that this Court must be guided by the decisions of the United States Supreme Court. Ex parte Ellis, 279 S.W.3d at 19.

⁸⁰ Because Citizens United was not decided until January of 2010, this Court did not have the opportunity to consider it in resolving the constitutional challenges advanced in Ellis.

that “if it is legitimate to limit an individual’s contributions (Buckley), then it follows that laws can be enacted to prevent associations of individuals from being used to circumvent those contribution limits (Beaumont).” Id. at 85-86. For the reasons that follow, Appellant respectfully contends that the Court of Criminal Appeals’s cursory allusion to Citizens United, and its overly-simplistic Buckley-Beaumont syllogism are, by no means, the last words on Appellant’s constitutional challenge, especially in light of events that marked the end of the Supreme Court’s October 2010 Term.

On June 27, 2011, the Court handed down one of two decisions underscoring its deeply-felt belief that governmental efforts to curtail free speech face a Herculean burden to survive a First Amendment challenge.⁸¹ In Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett, 131 S.Ct. 2806, No. 10-238, the Court struck down an Arizona statute that provided escalating matching funds to candidates who accept public financing because it violated the First Amendment rights of candidates who raise private money. Writing for the majority, Chief Justice Roberts reaffirmed the fundamental principles extant in First Amendment jurisprudence that:

- “Discussion of public issues and debate on the qualifications of candidates are integral to the operation” of our system of government.
- The First Amendment “has its fullest and most urgent application” to speech uttered during a campaign for political office.
- “Laws that burden political speech [are] “subject to strict scrutiny, which

⁸¹ The other decision, Brown v. Entertainment Merchants Association, 131 S.Ct. 2729, *slip op.* at 3, struck down a California law that restricted the sale or rental of violent video games to minors on the grounds that it violated the First Amendment because, *inter alia*, the law did not define “violent video games” with the “‘narrow specificity’ that the Constitution demands.”

requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”

- “[R]estrict[ing] the speech of some elements of our society in order to enhance the relative voice of others” – is “wholly foreign to the First Amendment.”
- “[T]he First Amendment does not permit the State to sacrifice speech for efficiency.”
- “Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election,” – a dangerous enterprise and one that cannot justify burdening protected speech.
- “The Amendment embodies our choice as a Nation that, when it comes to such [political] speech, the guiding principle is freedom – the “unfettered interchange of ideas” – not whatever the State may view as fair.

Id. at ___; *slip op.* at 8, 15, 21, 24, 25 (citations omitted).

To be sure, the majority also alluded to the sentiments expressed in Buckley v. Valeo, 424 U.S. 1, 23-35 (1976), that “[l]imiting contributions ... is the primary means we have to combat corruption,” *slip op.* at 23, once again distinguishing, at least for the time being, restrictions on corporate contributions and corporate expenditures. *Slip op.* at 26. But given the path that the Roberts Court appears to be taking when called upon to analyze the constitutionality of governmental efforts to regulate and restrict campaign finance laws through the prism of the First Amendment,⁸² whether the rule in Buckley will remain the law is far from settled.

Indeed, one federal judge has recently held that Beaumont did not survive the

⁸² Arizona Free Enterprise was “the fifth ruling from the Roberts court cutting back on the government’s ability to regulate campaign finance.” See LIPTAK, “Justices Strike Down Arizona Campaign Finance Law,” available at www.nytimes.com (last visited July 14, 2011).

holding in Citizens United. In United States v. Danielczyk, ___ F.Supp.2d ___, 2011 WL 2268063 (E.D. Va. June 7, 2011) United States District Judge James Cacheris held that the federal ban on corporate contributions to candidates, one that parallels §§ 253.003 and 253.094 of the Election Code, violated the First Amendment. Despite Citizens United, the government argued that the decision in Beaumont upholding the ban on corporate contributions to candidates remained intact.⁸³ Concluding that it did not, Judge Cacheris opined that Beaumont was expressly limited to nonprofit advocacy corporations and that the Court “*assumed – but never held –* that the extensive ‘historical prologue [behind the federal ban] would discourage any broadside attack on corporate campaign finance’ (in a pre-Citizens United world, of course).” (emphasis in original). In the wake of Citizens United, Judge Cacheris believed that the reasoning in Beaumont was “no longer viable on several fronts,” notably:

- Beaumont relies significantly on Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), which was explicitly overruled in Citizens United.
- Beaumont cites Congress’s concern for preventing corruption and its appearance, a “worry again foreclosed here by Citizens United’s ruling that corporations have equal political speech rights to individuals, who can directly contribute within FECA’s limits without risking corruption or its appearance.”

⁸³ The Eighth Circuit recently took a contrary view in Minnesota Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. 2011), The Eighth Circuit reasoned that Beaumont is “controlling precedent” for the constitutionality of the corporate contributions ban and that Beaumont must be applied, even if Citizens United seemed to overrule Beaumont by implication. Id. at 318. As Judge Cacheris noted in declining to follow the Eighth Circuit, “The Eighth Circuit’s reasoning is persuasive but not controlling in the [Fourth] Circuit.” United States v. Danielczyk, *supra*, at *3. Moreover, because “[t]here is ... a difference between following a precedent and extending a precedent ... Beaumont’s facts and holding do not compel an outcome in this case.” Id. at *3-4 (citation omitted).

Id. at *4-5.

Viewed through the lens of these critical distinctions, Judge Cacheris concluded:

This Court has little choice between Beaumont's now "gravely wounded" reasoning and that of the case that struck the blow: Citizens United. Again, for better or worse, Citizens United held that the First Amendment treats corporations and individuals equally for purposes of political speech. 130 S.Ct. at 913. This leaves no logical room for an individual to be able to donate \$2,500 to a campaign while a corporation like Galen cannot donate a cent. Thus, as applied here, [the federal ban on corporate contributions] is unconstitutional.

This finding does not, as the Government argued, "equat[el] apples and oranges by equating independent expenditures with direct contributions. Taken seriously, Citizens United requires that corporations and individuals be afforded equal rights to political speech, unqualified. 130 S.Ct. at 913 ("We return to the principle established in Buckley and Bellotti that the Government may not suppress political speech on the basis of the speaker's corporate identity."). Thus, following Citizens United, individuals and corporations must have equal rights to engage in *both* independent expenditures *and* direct contributions. They must have the same right to *both* the "apple" *and* the "orange."

Id. at *5 (emphasis in original)(footnote omitted).

Appellant recognizes that a memorandum opinion issued by a federal district judge, especially one that has not withstood appellate review,⁸⁴ is not binding on this Court. Stewart v. State, 686 S.W.2d 118, 121 (Tex.Crim.App. 1984). But this Court has recognized the decisions of the lower federal courts "may be persuasive in a state court on a federal matter." Omniphone, Inc. v. Southwestern Bell Tel. Co., 742 S.W.2d

⁸⁴ See United States v. Danielczyk, No. 11-4667 (notice of appeal filed June 16, 2011).

523, 526 n. 3 (Tex.App.— Austin 1987, no writ); see also Olson v. Holmes, 571 S.W.2d 211, 213 (Tex.Civ.App.— Austin 1978, writ ref'd n.r.e.) (“This appeal involves, of course, rights conferred by federal statute and regulation. Accordingly, our determination of the appeal should be governed by the federal courts’ construction of the statute and regulation.”). But Judge Cacheris’s view is not an outlier: the Colorado Supreme Court has also held that the Colorado law prohibiting corporate contributions to candidates violates the First Amendment in light of Citizens United. In re Interrogatories by Ritter, 227 P.3d 892, 894 (Colo. 2010). Respectfully, the Court of Criminal Appeals’s cursory treatment of this cutting-edge First Amendment contention was limited to its wholesale reliance on Beaumont. Ex parte Ellis, 309 S.W.3d at 89. While this Court must apply “directly controlling” Supreme Court precedent, the reasoning and analysis in Danielczyk and Ritter fortifies the notion that Beaumont is not “directly controlling” in the wake of Citizens United.⁸⁵ Because this issue involves rights conferred by the First Amendment, this Court should be governed by the holdings in Danielczyk and Ritter construing Citizens United. See Olson v. Holmes, 571 S.W.2d at 213.

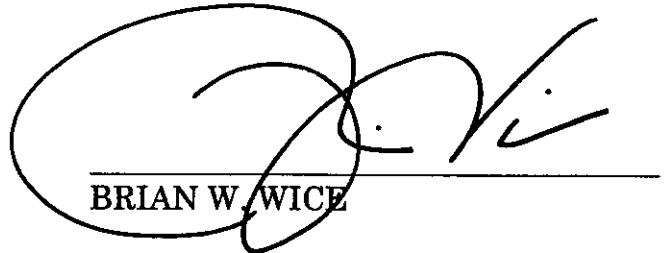
The judgments of conviction entered on both counts of the indictment must be reversed and the causes remanded to the trial court to enter an order dismissing the indictment. See Long v. State, 931 S.W.2d 285, 297 (Tex.Crim.App. 1996).

⁸⁵ See Jefferson County v. Acker, 210 F.3d 1317, 1320 (11th Cir. 2000) (“The difference, as it relates to a lower court’s duty to follow moribund Supreme Court decisions, is manifest in the words ‘which directly controls.’ ... [I]f the facts of a gravely wounded Supreme Court decision do not line up closely with the facts before us – if it cannot be said that decision ‘directly controls’ this case – then we are free to apply the later reasoning in later Supreme Court decisions to the case at hand.”).

CONCLUSION AND PRAYER

Appellant prays that this Honorable Court sustain the appellate contentions here advanced, reverse the judgments of conviction entered below, and remand the causes for the entry of judgments of acquittal, or, in the alternative, to reverse the judgments of conviction and remand the causes for a new trial, or in the alternative, to reverse the judgments of conviction and dismiss the indictments.

RESPECTFULLY SUBMITTED,



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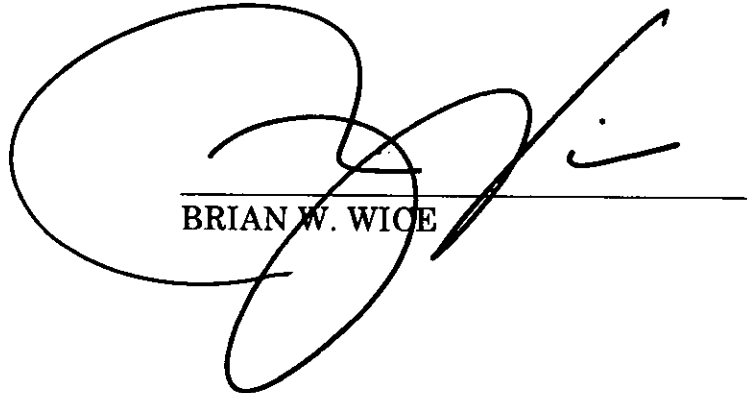
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CERTIFICATE OF SERVICE

Pursuant to TEX.R.APP.P. 9.5(d), this brief was served on opposing counsel, Assistant Travis County District Attorney Holly Taylor, 509 W. 11th Street, Austin, Texas, 78701, by hand-delivery on August 12, 2011.



A handwritten signature in black ink, consisting of a large, stylized 'B' followed by a checkmark-like flourish, is written over a horizontal line.

BRIAN W. WICE