PAT PRIEST
SENIOR DISTRICT JUDGE

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December 5, 2005

Amalia Rodriguez-Mendoza
Travis County District Clerk
P. O. Box 679004
Austin, Texas 78767-9004

Re: D1-DC-05-904150, State v. John Dominick Colyandro
D1-DC-05-904151, State v. James Walter Ellis
D1-DC-05-904156, State v. John Dominick Colyandro
D1-DC-05-904157, State v. James Walter Ellis
D1-DC-05-900725, State v. Thomas Dale DeLay
D1-DC-05-904159, State v. John Dominick Colyandro
D1-DC-05-904160, State v. James Walter Ellis
D1-DC-05-904161, State v. Thomas Dale DeLay

Dear Ms. Rodriguez-Mendoza:

Enclosed for filing is a single original order styled ORDER GRANTING IN PART AND DENYING IN PART CERTAIN MOTIONS OF THE DEFENDANTS TO QUASH THE INDICTMENTS addressing certain motions to quash previously filed in each of the above-styled cases. You will have received previously a FAX copy of this document. I am unsure of your filing practices, and it may be that you will have eight separate files for these cases. If that is the case, I would request that you have an assistant certify a copy of this original for each of the seven files in which you do not file the original.

As reflected within the body of the order, the effect of this order is to dismiss cause numbers (omitting D1-DC-05) 914156, 914157 and 900725, to quash Count III in 904150 and 904151, and to delete certain language from Count I of 904159, 904160 and 904161.

Please file these. By e-mail, I am advising all counsel in the case of this order and providing them with a copy thereof.

Cordially,

Pat Priest, Senior District Judge, Presiding by Assignment

Filed In The District Court
of Travis County, Texas

DEC 05 2005

at 3:16 P.M.
Amalia Rodriguez-Mendoza, Clerk

NO. D1-DC-05-904151
NO. D1-DC-05-914156
NO. D1-DC-05-914157
NO. D1-DC-05-900725
NO. D1-DC-05-904159
NO. D1-DC-05-904160
NO. D1-DC-05-904161

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
VERSUS	§	331ST JUDICIAL DISTRICT
JOHN DOMINICK COLYANDRO JAMES WALTER ELLIS AND THOMAS DALE DELAY	§	TRAVIS COUNTY, TEXAS

ORDER GRANTING IN PART AND DENYING IN PART CERTAIN MOTIONS OF THE DEFENDANTS TO QUASH THE INDICTMENTS

On November 22, 2005, the non-evidentiary[1] Motions of the three defendants to quash the several indictments were heard. Because supporting briefs and other material were filed with the court by both the defense and the state at such a late date that the court had not had an adequate opportunity to consider all that had been submitted and the parties had not had an adequate opportunity to respond to each other's filings, the Court took the motions under advisement and allowed the parties an additional week to respond to the material filed by opposing counsel. Certain additional materials were filed on each side and have been fully considered by the Court.

[1] At least one motion to dismiss upon the basis of alleged prosecutorial misconduct was filed by Defendant DeLay and is presumed by the Court to have been adopted by defendants Colyandro and Ellis. This motion may require the hearing of evidence (a matter not yet resolved), and it is not included within the ambit of the present rulings.

THE NATURE OF THE PENDING ACCUSATIONS AND ORDERS OF THE COURT

1. Defendants Colyandro and Ellis are charged by indictments returned on September 13, 2005 (**Nos. 904150 and 904151**)[2] with money laundering under Penal Code §34.02 (Count I), and with making an illegal contribution under Election Code §253.003 (Count II) and with conspiracy to make an unlawful contribution under Penal Code §15.02 and §§253.003 and 253.094 of the Election Code (Count III). For reasons to be set out hereafter, the motions to quash these indictments are **DENIED** as relates to Counts I and II and are **GRANTED** as relates to Count III. Count III is hereby quashed.
2. All three defendants are accused in a single count in cause numbers **914156, 914157 and 900725**, returned on September 28, 2005, with conspiracy under Penal Code §15.02 to violate §§253.003, 253.094 and 253.104 of the Election Code. For reasons to be set out hereafter, the motions to quash these indictments are **GRANTED**, and these indictments are hereby **DISMISSED**.
3. All three defendants are accused in **904159, 904160 and 904161**, returned on October 3, 2005, with Conspiracy under Penal Code §15.02 both to violate Subchapter D of Chapter 253 of the Election Code and to engage in money laundering of funds exceeding $100,000 (Count I) and with a substantive violation of the Money Laundering statute, Penal Code §34.02 (Count II). For reasons to be set forth hereafter, the motions to quash so much of Count I as relates to conspiracy to violate the Election Code are **GRANTED**, and the balance **DENIED**. The following language is stricken from Count I:

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[2] As all of the indictments begin with "D1-DC-05", reference to those beginning letters and numbers will be ignored herein.

"... knowingly making a political contribution to a candidate for the Texas House of Representatives in violation of Subchapter D of Chapter 253 of the Texas Election Code3, a felony of the third degree, be committed, and with the intent that the offense of..."

The motions to quash Count II are **DENIED.**

BASES FOR THE ABOVE RULINGS

I. CONSPIRACY TO VIOLATE THE ELECTION CODE

The arguments advanced on behalf of the State of Texas regarding alleged applicability of Penal Code §15.05 to Election Code offenses, in 2002, are not persuasive. The arguments basically track arguments advanced by the late Judge Leon Douglas in support of his dissent in the Moore case which has been cited by both sides in the present proceeding, as well as the Davis case and others. A review of the cases decided by the Court of Criminal Appeals on the question of applicability of the inchoate offense provisions of the Texas Penal Code to offenses under the Controlled Substances Act prior to its amendment and subsequent repeal reveals that no other judge of that court ever agreed with Judge Douglas on that issue in any case and Judge Douglas himself ultimately acquiesced in the view of the other members of the court, see Ex Parte Russell, 561 S.W.2d (Tex. Crim. App. 1978). This court does not find the additional argument made by the State, that the rule should be otherwise as to a conspiracy to violate the Election Code because the Election Code was in effect when the Penal Code was enacted, to be persuasive. The action of the Legislature in specifically making §15.02 applicable to Election Code violations after September 1, 2003 would be entirely nugatory if inchoate offenses were deemed to have been already applicable to the Election Code, and the presumption is that the Legislature does not do a useless act and

that the new enactment changes the law, see, e.g., Ex Parte Trahan, 591 S. W. 2d 837 (Tex. Crim. App. 1979); Ex Parte Burgess, 152 S. W. 3d 123 (Tex. Crim. App. 2004) and Porter v. State, 996 S. W. 2d 317 (Tex. App. Austin 1999).

SUBSTANTIVE VIOLATION OF THE ELECTION CODE

The Election Code by its express terms prohibits the giving or receiving of corporate funds for the purpose of financing a candidate's election effort[3]. Section 253.094(a). A person may not knowingly make or accept a political contribution in violation of Chapter 253. Section 253.003. Therefore, a contribution intended by the corporation to be used for financing a candidate is unlawful. Likewise, if 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 corporate giver. Finally, if corporate contributions are received for a lawful purpose but subsequently diverted to an unlawful purpose, a violation of the election code occurs when the funds are so diverted and actually distributed to an individual candidate.[4] Though the court finds that parties to such an agreement could not be prosecuted for conspiracy in 2002, the substantive offense had been "on the books" for a long time. If funds were sought and obtained from corporations in order to channel the funds to individual candidates, or if

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[3] As distinguished from a contribution to defray normal operating and administrative costs incurred by a political party, which is authorized. Section 257.002, Election Code.

[4] It goes without saying, of course, that the court makes no judgment (and in fact has no idea) as to whether the State has competent, admissible or persuasive evidence of what they allege in any count of the indictment. Such considerations are irrelevant to the facial validity of an indictment, which is the issue before the court in these motions.

money was so channeled though originally lawfully received, once the candidates received the funds the crime was complete.[5]

MONEY LAUNDERING

A person commits the offense of money laundering if he knowingly conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity. Penal Code, Section 34.02(a)(2). "Criminal activity" includes any offense, including any preparatory offense that is classified as a felony under Texas law or federal law. Section. 34.01(1)(A). "Proceeds" means funds acquired or derived directly or indirectly from, produced through, or realized through an act. Section 34.01(4).

The defense says that checks are not "funds" and, focusing upon the use of a check to allegedly transmit $190,000 to the Republican National State Elections Committee, declares that (assuming *arguendo* the allegations of the state as to what happened thereafter) there thus was no criminality until checks were issued to the seven individual candidates. They then insist that since issuance of those checks is the first point at which the funds could be said to be "dirty", any "laundering" would have to have been after that.

Although this court does not perceive the $190,000 check to be "the funds" allegedly laundered, response will nonetheless be made to the defense argument. Dealing first with the issue of "funds": Not only is the money in Texans for a Republican Majority PAC's bank account intuitively "funds", it is also legally so. The Government Code does say that the word

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[5] It is noted that such a violation of the Election Code would be a necessary predicate for money laundering, and it may well be that the state may not prosecute for both under the Blockburger test, though no reason appears why the conspiracy to money launder could not be prosecuted.

"includes", as used in Section 34.01(4) of the Penal Code is a term of enlargement and not of limitation or exclusive enumeration. Section 311.005(13), Government Code. And though Section 1.05(b) of the Penal Code does not reference Section 311.005 of the Government Code, Section 311.002 of the Government Code provides that the Code Construction Act (Chapter 311 of the Government Code) applies to every code enacted by the 60th or any subsequent legislature and every amendment, repeal, revision, and reenactment of a code or code provision. Even taking Section 1.05(b) of the Penal Code to be in conflict with Section 311.002 of the Government Code (which this court does not), the statutes clearly deal with the same issue and it is this court's duty under the doctrine of *pari materia* to give effect to both. See, e.g., Cheney v. State, 755 S. W. 2d 123 (Tex. Crim. App. 1988). Therefore, the enumerated sections of the Code Construction Act apply to the Penal Code, and so do the non-enumerated sections.

Therefore, taking the word "including" as a word of enlargement and using what this court perceives to be basic common sense, sums of money (or claims against a bank for money) on deposit to one's account with a bank are clearly funds, and can be the subject of money laundering.

If the State can prove that funds were obtained from corporate contributors by these defendants with the express intent of converting those funds to the use of individual candidates, or if the state can prove that these defendants entered into an agreement to convert the monies already on hand, though originally received for lawful purposes, to that use by sending the money to the Republican National State Elections Committee with an agreement that funds of the same amount would then be made available by that committee to individual candidates for Texas political office, and can prove that funds in the same

amount were in fact contributed to individual candidates by 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. Of course, if the state cannot establish that beyond a reasonable doubt, then the defendants will be entitled to be acquitted.

Because the parties have been so insistent upon these issues, the court will now review some of the state and federal case law in the area.

The courts of Texas have repeatedly affirmed convictions in cases wherein checks have underlain the transactions. In Lee v. State, 29 S. W. 3d 570 (Tex. App. Dallas 2000), the court held that, because the defendant knew the check the victim gave him had been fraudulently obtained (because it was for repairs that had not been done and were not going to be done), he was guilty of money laundering when he cashed the cashier's check purchased with it. In Thomas v. State, 31 S. W. 3d 422 (Tex. App. Ft. Worth, petition refused), the defendant induced a woman to part with over $440,000 by false representations as to what he was doing with the money. When he used some of the proceeds to purchase an airplane, he was guilty of money laundering. In Davis v. State, 68 S. W. 3d 273, (Tex. App. Dallas 2002, petition refused) a defendant who ran a phony viatical scheme[6] and collected checks that were subsequently deposited to his offshore accounts, committed money laundering when he made those deposits. None of these cases involved cash, and all involved personal checks.

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[6] A scheme whereby false representations were made as to the medical health of persons with AIDS and life insurance policies were fraudulently obtained and benefits collected when the insured died.

In United States v. Werner, 787 F Supp 353, (SD NY 1992) the defendant uttered counterfeit bank cashier's checks to purchase automobiles and then sold or attempted to sell the automobiles. The utterance of the counterfeit checks was within the ambit of the unlawful activity required to bring the matter within the federal money laundering statute, and when he sold the cars he committed money laundering. Even conceding for the sake of argument that the principal focus of Congress in enacting the money laundering statutes was "dirty *money*", the court said, still "proceeds" could be property other than money or cash equivalents.

In United States v. Fuller , 974 F2d 1474 (United States Court of Appeals for the Fifth Circuit 1992, cert. den. 114 S Ct 112) , a defendant simply accepted cash and walked to a hotel door where he was arrested. Because the federal law does not require a completed transaction, but merely an attempt, to constitute the offense[7] and because the defendant had been plotting for months how he would receive the cash and circumvent currency reporting requirements, the offense of money laundering was complete when he accepted the money with that intent. It is likely he would not have been held to have committed the offense under Texas law until he did something with the money (though he did commit conspiracy to money launder, even under our law).

In United States v Montoya, 845 F2d 1068 (9th Cir. 1991), a state senator who received a bribe in the form of a check and then deposited it into his account committed money laundering when he made the deposit.

In United States v Butler, 211 F3d 826 (4th Cir. , cert. den.) a bankrupt received checks when he settled an old claim, and he did not advise the trustee in bankruptcy of receipt of

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[7] See United States v Lamb, 985 F2d 1284 (4th Cir. 1993)

the funds. Rather, he directed a friend to purchase cashier's checks with the funds and deposit them in a third party's account. He argued that there was no money laundering transaction until the fraudulent transactions were complete, but the court held that because he had already committed the crime of concealing assets from the trustee, the funds were criminally derived property at that point in time and money laundering took place when cashier's checks were thereafter purchased and distributed in accordance with the defendant's directive.

In United States v Napoli , 54 F3d 63 (2d Cir. 1995) the defendant was a minor player in a scheme wherein cancelled and/or stolen blank checks were counterfeited and negotiated. The court did not reach the question of whether the stolen checks themselves might represent proceeds of specified criminal activity (as required by the federal, though not the Texas statute, which includes any felony offense) because the trial court had not done so in this guilty plea proceeding. (The case was before the appellate court because the trial court had deviated upward under sentencing guidelines by reason of the judge's belief that money laundering was shown. As indicated, the court did not reach that issue, for the reason given).

In United States v Johnson, 971 F2d 562 (10th Cir. 1992) the defendant told potential investors that, because he had high level contacts in Mexico, he could buy pesos at a discount and sell them at par, realizing huge profits. When investors wired him small checks, he quickly wired them checks of 15-20% of the amount they had sent him, calling the checks "profit", thereby inducing larger investments. After the larger sums came in, he used the other money to pay off a mortgage on an elegant home and to buy a Mercedes automobile, both of which were used by him, along with the so-called profit checks, to induce yet larger

investments by creating client confidence in his success. Paying off the home mortgage and buying the Mercedes were held to be money laundering, as were the wires of "profits" from defendant to the investors. Incidentally, the court also held that the fact that dirty money is commingled with other, non-dirty money does not prohibit a finding of money laundering. To similar effect, see United States v. Certain Funds on Deposit in Account No. 01-0-71417, 769 F Supp (ED NY 1991).

Since the money laundering statute and the conspiracy statute are both parts of the Penal Code, no reasons appears why conspiracy to money launder would not be an offense, and this court holds that it is, and was in 2002.

NOTICE AND LIMITATIONS

Indictments for election code violations, money laundering and conspiracy are not required to plead evidence relied upon by the state, and are sufficient if they track the language of the relevant penal statute, here the Election Code, the conspiracy statute and the money laundering statute. Adams v. State, 707 S. W. 2d 900 (Tex. Crim. App. 1986); Moreno v. State, 721 S. W. 2d 295 (Tex. Crim. App. 1986); Farrington v. State, 489 S. W. 2d 607 (Tex. Crim. App. 1972); United States v Willis, 583 F2d 203 (United States Court of Appeals for the Fifth Circuit 1978). These indictments track the relevant statutes, and thus give fair notice.

According to the indictments, the Republican National State Elections Committee checks were issued to candidates for state office on October 4, 2002. All of these indictments were returned prior to the expiration of the three year statute of limitations. No indictment is barred by limitation.

AUTHORITY OF A COURT TO QUASH A PORTION ONLY OF AN INDICTMENT

Article 44.01(a)(1), Code of Criminal Procedure, gives the state the right to appeal an order of the court dismissing "...any portion of an indictment...". This clearly implies the authority of the court to dismiss a portion of the indictment, and the following cases support that proposition: State v Garrett, 824 S. W. 2d 181 (Tex. Crim. App. 1992); State v Eaves, 786 S. W. 2d 396 (Tex. App. Amarillo 1990); State v Mohsene, 936 S. W. 2d 732 (Tex. App. Dallas 1996); State v Abrego, 974 S. W. 2d 177 (Tex. App. San Antonio 1998); State v McGuffey, 69 S. W. 3d 654 (Tex. App. Tyler 2002). To be distinguished is State v Hancox, 762 S. W. 2d 312 (Tex. App. Ft. Worth 1989), in which the trial court struck certain language in the indictment but did not prohibit amendment by the state. Leave to amend is not granted to the State, as the counts and language that are quashed or dismissed are quashed or dismissed because they charge an offense not recognized by Texas law in 2002.

All relief sought in the motions herein dealt with and not herein granted is denied.

SIGNED AND ENTERED THIS 5th day of December, 2005.

PAT PRIEST, SENIOR DISTRICT JUDGE
PRESIDING BY ASSIGNMENT