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57895-2-I  
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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

JOHN GILBERT CONTE, FRANK FRANCIS COLACURCIO, JR.,  
FRANK FRANCIS COLACURCIO, SR.,  
AND MARSHA MARIE FURFARO

Respondents.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MICHAEL J. FOX

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENT OF ERROR**

1. The trial court erred by granting the Defendants' motion to dismiss the Information.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Defendants here were charged in Count I of the Information with Conspiracy to Offer a False Instrument for Filing or Record, in violation of RCW 40.16.030 and RCW 9A.28.040(1). Each of counts II-IX of the Information charges various of the Defendants with knowingly procuring, offering, or causing an innocent person to Offer a False Instrument for Filing or Record, in violation of RCW 40.16.030 and RCW 9A.08.020(1) and (2)(a). Should the trial court have granted the Defendants' First Motion to Dismiss based on the grounds that RCW 40.16.030 and the provisions of RCW 42.17 are concurrent, and that the State is therefore barred from prosecuting these Defendants for violating or causing the violation of RCW 40.16.030?

2. Did the trial court err in granting the Defendants' First Motion to Dismiss the Information, when there is no other basis to find that the provisions of RCW Chapter 42.17 impliedly repeal *pro tanto* the provisions of RCW 40.16.030?

**C. FACTS**

**1. THE CHARGES.**

On July 12, 2005, the State filed a nine-count Information in King County Superior Court. CP 1-5. Count I of the Information charges all four Defendants with Conspiracy to Offer a False Instrument for Filing or Record, in violation of RCW 40.16.030 and RCW 9A.28.040(1). Each of Counts II – IX of the Information charges at least one of the Defendants with knowingly procuring, offering, or causing an innocent person to Offer a False Instrument for Filing or Record, in violation of RCW 40.16.030 and RCW 9A.08.020(1) and (2)(a). Appendix A, attached hereto, contains a chart showing which Defendants are charged in which of the substantive Counts II – IX. CP 1-5 (Information).

According to the Certification for Determination of Probable Cause (“Certification”) filed with the Information, the charges in the Information center on the Defendants’ activities in 2002-03 relating to contributions to the re-election campaigns of three then-members of the Seattle City Council, Heidi Wills, Judy Nicastro, and Jim Compton. CP 6-15. The Certification goes on to explain how the contributions to these City Council members were related to a vote by the Seattle City Council in July 2003 on a rezone issue

involving Rick's, a strip club in the Lake City neighborhood of Seattle operated by Defendants Colacurcio, Sr. and Colacurcio, Jr. The Certification also specifies the campaign finance reports that were filed with the Seattle City Clerk and/or the Washington State Public Disclosure Commission ("PDC") pursuant to particular provisions of the Seattle City Code and RCW Chapter 42.17, and further specifies the precise allegedly false aspect of each such campaign finance report. CP 12-15.

In essence, the Certification alleges that the Defendants caused election campaign committees organized by candidates for the Seattle City Council election of 2003 to file campaign finance reports with the Seattle City Clerk and the PDC that were false. According to the Certification, Counts II and III of the Information involve reports filed with the Seattle City Clerk and the PDC by the Judy Nicastro for City Council 2003 Committee in December 2002. Counts IV and V center on reports filed with the Seattle City Clerk and the PDC by the Campaign to Elect Heidi Wills in April 2003, and Counts VI and VII on reports filed with the Seattle City Clerk and the PDC by the Friends of Jim Compton in May 2003. The last two counts of the Information, Counts VIII and IX, pertain to certain reports filed with the Seattle City Clerk and the PDC by the Friends

to Re-Elect Judy Nicastro in June 2003. The Defendants were arraigned, and each Defendant entered a plea of Not Guilty to each count in which he or she is charged.

## **2. THE DEFENDANTS' MOTIONS TO DISMISS THE INFORMATION.**

On January 20, 2005, the Defendants filed four separate motions to dismiss the Information on various grounds. Only the first of these motions to dismiss, the Defendants' First Motion to Dismiss (hereinafter "Defendants' Motion to Dismiss"), is at issue here. CP 16-68. The Defendants' Motion to Dismiss is captioned "First Motion to Dismiss: The Non-Applicability of RCW 40.16.030 As A Matter of Law". This Motion to Dismiss asserted two separate grounds why the Information should be dismissed as to all Defendants. The first was the argument that "The Specific Civil Enforcement Provisions of RCW 42.17 Preempt The General Criminal Penalties In RCW 40.16.030". CP 19-23. The second ground asserted was the argument that "Criminal Prosecution Under RCW 40.16.030 Would Violate The Defendants' Constitutional Rights to Due Process and Equal Protection". CP 23-24. The Defendants' Motion to Dismiss also attached certain

exhibits thereto, including the Information/Certification and a copy of the Official Voters Pamphlet from the election of November 7, 1972, which in turn included the complete texts of Initiative 276, Referendum 24 and Referendum 25, all of which were on the ballot on November 7, 1972. CP 27-68.

On February 3, 2006, the State filed a Response to the Defendants' First Motion to Dismiss ("State's Response"). CP 69-116. The State's Response asked the trial court to deny the Defendants' Motion to Dismiss. Like the Defendants' Motion to Dismiss, the State's Response also attached a copy of the Official Voters Pamphlet for the November 7, 1972 general election, as well as the complete texts of Initiative 276, Referendum 24, and Referendum 25. CP 90-116. On February 10, 2006, the Defendants filed a "Defendants' Reply Memorandum In Support of First Motion to Dismiss: The Non-Applicability of RCW 40.16.030" ("Defendants' Reply"). CP 117-130.

### **3. HEARING AND DECISION.**

The trial judge, the Honorable Michael J. Fox, held a hearing on the Defendants' Motions to Dismiss on February 16, 2005. Judge Fox asked both defense counsel and the prosecutor about

the fact that there had apparently been no previous prosecutions of allegedly false campaign finance reports based on the provisions of RCW 40.16.030 since Initiative 276 was originally passed by the voters in November 1972. RP (2/16/06) 12-13, 20-21. After hearing argument from defense counsel and the prosecutor only on the Defendant's First Motion to Dismiss, Judge Fox granted the motion and dismissed the Information. RP (2/16/06) 25-29. In his oral ruling, he held that "the specific versus general rule is a rule that applies here." RP (2/16/06) 26. Judge Fox went on to acknowledge that none of the parties had been able to find a case that "dealt with the application of the specific versus general rule with regard to a criminal and a civil statute". *Ibid.* Judge Fox went on to review the nature of the provisions of RCW Chapter 42.17, and concluded that:

Now, here I think that the -- because of the comprehensive nature of the public disclosure law dealing with contributions and reporting and specifically with regard to the precise charges that are before this court, which is individuals reimbursing other individuals to make contributions to campaigns and then submitting information that these contributions are only being made in the name of the so-called pass through people. That is the specific subject that is dealt with very specifically in the statute and it is clear that it is prohibited, and it's prohibited in order to give meaning to the disclosure requirements that will let everybody see, through the public

disclosure commission, who is contributing to what candidate and how much.

RP (2/16/06) 27. A little later, Judge Fox concluded his explanation of his decision thus:

Again, for the reasons that I've indicated, I do find that the general versus specific rule does apply in this case and in this circumstance it precludes the state from criminal prosecution under the statute originally passed in 1909, which is the subject matter of all of these counts against the defendants.

RP (2/16/06) 28. Judge Fox indicated he would sign an order dismissing the Information, and told the parties that he would not rule on the three other motions to dismiss the Information that the Defendants had filed. He did inform the parties, however, that his "strong inclination" would be to deny the other three motions to dismiss. RP (2/16/06) 28-29. The trial judge subsequently signed an "Order Granting Defendants' First Motion to Dismiss: The Non-Applicability of RCW 40.16.030 As A Matter of Law" on February 22, 2006. CP 131-133. The State filed its Notice of Appeal to the Court of Appeals that same date. CP 134-135.

**D. ARGUMENT**

The trial court erred in dismissing the Information. The "specific vs. general" rule does not apply here. There is no other

basis on which to hold that the provisions of RCW Chapter 42.17 impliedly repeal RCW 40.16.030 in the context of campaign finance reports filed with the Washington Public Disclosure Commission (“PDC”). The fact that there is no reported decision of a prosecution for violation of RCW 40.16.030 is legally irrelevant to the issue of effecting legislative intent. The trial judge’s order of dismissal should be reversed, and the case should be remanded to the Superior Court for further proceedings.

**1. RCW 40.16.030 AND THE PROVISIONS OF RCW CHAPTER 42.17 ARE NOT CONCURRENT FOR PURPOSES OF THE GENERAL/SPECIFIC RULE.**

- a. RCW 42.17 Is A Law Emphasizing Full Disclosure Of Campaign Contributions, With Civil Penalties Only For Violation Of The Chapter.

In applying the specific vs. general rule (hereinafter “general/specific rule”) in the case at bar, the trial judge appears to have become the first in the State of Washington to hold that a civil statute was concurrent with a criminal statute for purposes of this rule. Analysis of the general/specific rule as a basis for dismissal of the Information here is a matter of statutory interpretation, and thus

a question of law. Review is therefore *de novo*. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); *Western Telepage, Inc. v. City of Tacoma Dep't. of Fin.*, 140 Wn.2d 599, 607, 998 P.3d 884 (2000). Here, Judge Fox ruled that the general statute, RCW 40.16.030, was preempted by the more specific provisions of RCW Chapter 42.17<sup>1</sup>, and that the State was thus precluded from charging the Defendants here with violation of RCW 40.16.030. In order to evaluate this ruling properly, it is helpful, as a start, to take a closer look at the two statutory schemes that are involved in this matter.

Initiative 276 was overwhelmingly approved by the voters of Washington on November 7, 1972. The provisions of Initiative 276 were codified as RCW Chapter 42.17, and that chapter is known today as the Public Disclosure Act.<sup>2</sup> Its original provisions have been modified and supplemented since 1972. One such modification came in 1992, when Washington voters approved Initiative 134, commonly referred to as the Fair Campaign Practices

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<sup>1</sup> The trial judge did not specify any particular section of RCW Chapter 42.17 as the "specific" statute here either in his oral ruling or in his written order of dismissal.

<sup>2</sup> At least one Washington Supreme Court opinion refers to RCW Chapter 42.17 as the "Campaign Financial Disclosure Act". *State v. The (1972) Dan Evans Campaign Comm.*, 86 Wn.2d 503, 546 P.2d 75 (1976).

Act, which supplemented and amended the provisions of RCW Chapter 42.17 in several places. *State Republican Campaign Comm. v. Public Disclosure Comm'n*, 133 Wn.2d 229, 233, 943 P.2d 1358 (1997).

The very first section of Initiative 276, now codified as RCW 42.17.010, contains a declaration of policy. That declaration, and three of the subsections that follow, read thus:

It is hereby declared by the sovereign people to be the public policy of the state of Washington:

(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

\*\*\*

(3) That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interest.

\*\*\*

(10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

RCW 42.17.010(1), (3), and (10). Not long after its adoption by the voters, Initiative 276 was challenged on various constitutional grounds by lobbyists, public officials and others. In upholding the constitutionality of Initiative 276, the Washington Supreme Court noted that the initiative had been adopted by "a

substantial majority of the votes cast.” *Fritz v. Gorton*, 83 Wn.2d 275, 284, 517 P.2d 911, *appeal dismissed*, 417 U.S. 902, 94 S. Ct. 2596, 41 L. Ed. 2d 208 (1974).<sup>3</sup> In its subsequent decisions

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<sup>3</sup> In *Fritz*, the Supreme Court went on to discuss the goals of Initiative 276 in words that are worth quoting at length:

Initiative 276, as we have noted, was created by the people for the expressed purpose of fostering openness in their government. To effectuate this goal, it is important that disclosure be made of the interests that seek to influence governmental decision making. Thus, the requirements of registration under section 15 [now RCW 42.17.150, as amended] and reporting under section 17 [now RCW 42.17.170, as amended] and 18 [now RCW 42.17.180, as amended] are designed to exhibit in the public forum the identities and pecuniary involvements of those individuals and organizations that expend funds to influence government.

Informed as to the identity of the principal of a lobbyist, the members of the legislature, other public officials and also the public may more accurately evaluate the pressures to which public officials are subjected. Forewarned of the principals behind proposed legislation, the legislator and others may appropriately evaluate the “sales pitch” of some lobbyists who claim to espouse the public weal, but, in reality, represent purely private or special interests.

The electorate, we believe, has the right to know of the sources and magnitude of financial and persuasional influences upon government. The voting public should be able to evaluate the performance of their elected officials in terms of representation of the electors’ interest in contradistinction to those interests represented by lobbyists. Public information and the disclosure required by section 24, *supra*, [now RCW 42.17.240, as amended] coupled with that required of lobbyists and their employers may provide the electorate with a heretofore unavailable perspective regarding the role that money and financial influence play in government decision making and other functions performed by public officials. Actually, the mosaic of Initiative 276 is designed to reveal the flow of expenditures incurred in efforts to guide and direct government. The removal of any one element would conceivably leave a loophole area for exploitation by self-serving special interests. Section 18 concerns the reporting of monies paid directly or indirectly to

construing the provisions of RCW Chapter 42.17, the Washington Supreme Court has repeatedly emphasized the importance of public disclosure of campaign funding in the scheme adopted by the voters in approving Initiative 276. A few years after its opinion in *Fritz v. Gorton*, the Supreme Court discussed the goal of Initiative 276 again in *State v. The (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 507-08, 546 P.2d 75 (1976): "Initiative 276 was designed to inform the public and its elected representatives of expenditures made by persons [FN5] whose purpose is to influence or affect the decision-making processes of government" (citations omitted). In its Footnote 5, the Supreme Court noted the broad definition given to the term "person" in RCW 42.17.020(19). *Id.* at 507 n.5.

Initiative 134, the Fair Campaign Practices Act, passed by popular vote with a 72 percent margin in November 1992.

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candidates and to public officials. This provision inhibits the flow of secret money from an inappropriate special interest source to legislators or other government officials for inappropriate special interest purposes. Hence, there is a rational nexus between a legitimate societal purpose of the electorate and the requirements of section 18. *Fritz*, 83 Wn.2d at 309-10.

*Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 533 n. 7, 936 P.2d 1123, *cert. denied*, 522 U.S. 866 (1997).<sup>4</sup> The provisions of Initiative 134 were also codified in RCW Chapter 42.17, for the most part beginning at RCW 42.17.610.<sup>5</sup> In sum, the underlying impetus for the drafting and enactment of both Initiative 276 and Initiative 134, which today make up the bulk of RCW Chapter 42.17, was the demand of the citizens of Washington for greater openness in their government. This demand for reform was focused in particular on the voters' desire for greater transparency with regard to campaign contributions and other influences on their lawmakers. Thus it was that the very first subsection of RCW Chapter 42.17 gives voice to the public's demand that "political campaign and lobbying contributions and expenditures be fully disclosed to the public" and that "secrecy is to be avoided".

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<sup>4</sup> In *Nelson*, 131 Wn.2d at 533, the Supreme Court had this to say about the purpose of Initiative 134:

One of the stated purposes of the initiative was to prevent financially strong organizations from exercising a disproportionate or controlling influence on elections. RCW 42.17.610(1). In 1993, the initiative became codified under the heading of *Campaign Contribution Limitations* under chapter 42.17 RCW, the public disclosure act, the purpose of which is to inform the public of campaign and lobbying contributions and to help ensure, through disclosure, the integrity of government.

<sup>5</sup> RCW 42.17.172, .180, .240, .365, .390, .510, and .550 also codify provisions from Initiative 134 in whole or in part.

b. RCW 40.16.030 Is A Broad, General Criminal Statute Applying To All False Filings With Various Levels Of Government.

The general statute here is RCW 40.16.030, which proscribes the offering of a false instrument for filing or record.

RCW 40.16.030 reads as follows:

**Offering false instrument for filing or record**

Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a Class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

RCW 40.16.030 is designed to apply broadly to any number of possible situations, wherever “any false or forged instrument” is offered for filing, registration or recording “under any law of this state or of the United States” (emphasis added). This statute was first enacted in 1909, and has been revised only twice, and then only slightly.<sup>6</sup> On the face of RCW 40.16.030, then, there does not appear to be any reason why that statute would not apply to any other state or federal statutory scheme whereby instruments (such

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<sup>6</sup> In 1992, it was amended to change “the state penitentiary” to “a state correctional facility”, and in 2003 to add a reference to its classification as a Class C felony.

as campaign finance reports) are required or authorized to be filed with a public office such as the Washington Public Disclosure Commission (PDC).

c. The General/Specific Rule Requires That The Two Statutes Be Concurrent.

The general/specific rule has been described thus by the Washington Supreme Court: “The rule is that where general and special laws are concurrent, the special law applies to the subject matter contemplated by it to the exclusion of the general.” *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982), (quoting *State v. Cann*, 92 Wn.2d 193, 197, 643 P.2d 882 (1982)). The Washington Supreme Court has also explained the principle of statutory construction underlying this rule: “The subsequent enactment of a statute which treats a phase of the same general subject matter in a more minute way consequently repeals *pro tanto* the provisions of the general statute with which it conflicts.” *Walder v. Belnap*, 51 Wn.2d 99, 101, 316 P.2d 119 (1957) (quoting 1 Sutherland, *Statutory Construction* (3d ed.) 488, § 2022) (other citations omitted). See also *City of Airway Heights v. Schroeder*, 53 Wn.2d 625, 629, 335 P.2d 578 (1959).

The test for determining when a general and a specific (or “special”) statute are “concurrent” is this: “The determining factor is that the statutes are concurrent in the sense that the general statute will be violated in each instance where the special statute has been violated.” *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). See also *State v. Williams*, 62 Wn. App. 748, 750, 815 P.2d 825 (1991), *review denied*, 118 Wn.2d 1019 (1992).

As this Court has recently noted:

In order for statutes to be deemed concurrent, the general statute must be violated every time the special statute has been violated. In other words, “[a]ll of the elements required to be proved for a conviction of [the general statute] are also elements that must be proved for conviction of the [specific statute].”

*State v. Presba*, 131 Wn. App. 47, 52, 126 P.3d 1280 (2005) (*quoting Shriner*, 101 Wn.2d at 579-580)) (footnotes omitted). The *Shriner* test does not depend on the specific conduct of the defendant in any particular case. Instead, “the special statute will supersede the general only [s]o long as it is *not possible* to commit the special crime without also committing the general crime.” *Williams*, 62 Wn. App. at 753-54 (*quoting Shriner*, 101 Wn.2d at 583) (emphasis in *Williams* quotation). Finally, it is not relevant that

the specific or special statute may contain additional elements not contained in the general statute. *Shriner*, 101 Wn.2d at 580.

The general statute here is RCW 40.16.030, offering a false instrument for filing or record. Application of the *Shriner* test for concurrency to the statutes involved in the case first requires deciding which of the statutes contained in RCW Chapter 42.17 will serve as the specific or special statute. Although the trial judge did not specify by citation which such statute(s) he had in mind as the “specific” statute here, his comments in his oral ruling about “individuals reimbursing other individuals to make contributions to campaigns and then submitting information that these contributions are only being made in the name of the so-called pass through people” (RP (2/16/06) 27) indicate that he was thinking of one or both of two provisions of RCW 42.17. The first is RCW 42.17.120, which reads:

**Identification of contributions and communications**

No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment.

The second statute is RCW 42.17.780. That statute reads as follows:

### **Reimbursement for Contributions**

A person may not, directly or indirectly, reimburse another person for a contribution to a candidate for public office, political committee, or political party.

Another relevant section of RCW 42.17 is RCW 42.17.390.

RCW 42.17.390 is not a substantive statute, but sets out the remedies and sanctions for violation of the other provisions of RCW 42.17. RCW 42.17.390 reads:

### **Civil Remedies and Sanctions**

One or more of the following civil remedies and sanctions may be imposed by court order in addition to any other remedies provided by law:

(1) If the court finds that the violation of any provision of this chapter by any candidate or political committee probably affected the outcome of any election, the result of said election may be held void and a special election held within sixty days of such finding. Any action to void an election shall be commenced within one year of the date of the election in question. It is intended that this remedy be imposed freely in all appropriate cases to protect the right of the electorate to an informed and knowledgeable vote.

(2) If any lobbyist or sponsor of any grass roots lobbying campaign violates any of the provisions of this chapter, his registration may be revoked or suspended and he may be enjoined from receiving compensation or making expenditures for lobbying: PROVIDED, HOWEVER, That imposition of such a

sanction shall not excuse said lobbyist from filing statements and reports required by this chapter.

(3) Any person who violates any of the provisions of this chapter may be subject to a civil penalty of not more than ten thousand dollars for each such violation. However, a person or entity who violates RCW 42.17.640 may be subject to a civil penalty of ten thousand dollars or three times the amount of the contribution illegally made or accepted, whichever is greater.

(4) Any person who fails to file a properly completed statement or report within the time required by this chapter may be subject to a civil penalty of ten dollars per day for each day each such delinquency continues.

(5) Any person who fails to report a contribution or expenditure may be subject to a civil penalty equivalent to the amount he failed to report.

(6) The court may enjoin any person to prevent the doing of any act herein prohibited, or to compel the performance of any act required herein.

The final provision of RCW Chapter 42.17 that should be noted here is RCW 42.17.400. That statute is entitled "Enforcement", and like RCW 42.17.390, it does not itself proscribe any specific conduct. Instead, it contains various remedies for violations of other provisions of RCW Chapter 42.17 that the Attorney General and prosecuting attorneys in Washington may sue to enforce. Because RCW 42.17.400 is rather lengthy, it will not be set out here, but is attached hereto as Appendix B.

d. The Burden Of Proof Is One Of The Elements To Be Included When Analyzing Whether Two Statutes Are Concurrent.

For purposes of the general/specific test, then the specific statute must be one or both of the above-cited substantive provisions, RCW 42.17.120 and/or RCW 42.17.780. The most obvious point of comparison of those statutes with the general statute, RCW 40.16.030, is the fact that while the latter is a criminal statute, the two former statutes (like all the provisions of RCW Chapter 42.17) are civil statutes. RCW 40.16.030 will therefore require that the State prove a violation beyond a reasonable doubt, while a violation of the two civil statutes need only be proved by a preponderance of the evidence. This distinction alone is sufficient to establish that neither RCW 42.17.120 nor RCW 42.17.780 is concurrent with RCW 40.16.030.

In *City of Kennewick v. Fountain*, 116 Wn.2d 189, 802 P.2d 1371 (1991), the defendant was charged with aiding and abetting the crime of driving while under the influence of alcohol, in violation of RCW 46.64.048, a criminal offense. The defendant argued that because RCW 46.61.675, which made it unlawful to require or permit the operation of a motor vehicle "in any manner contrary to the law", and which was a civil traffic infraction, defined the same

offense as RCW 46.64.048, her right to equal protection was violated by the prosecutor's unfettered discretion to charge her under either statute, with no rational basis for doing so. In so arguing, the defendant relied on a line of Washington cases exemplified by *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970), in which Washington courts had held that under the Equal Protection clause of the Fourteenth Amendment and art. 1, § 12 of the Washington Constitution, "acts defining the same offense for the same conduct but prescribing different punishments violate an individual's right to equal protection." *Fountain*, 116 Wn.2d at 192. The Washington Supreme Court held that *State v. Zornes* was inapplicable for two reasons. First, the Court noted that the U.S. Supreme Court's decision in *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979), effectively overruled *Zornes* as to analysis under the Equal Protection clause.<sup>7</sup> But the Washington Supreme Court went on to note that even under the *Zornes* test, where the two statutes in question have different elements, the choice confronting a prosecutor "is not indiscriminate", and there is therefore no equal protection violation.

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<sup>7</sup> The Defendants here made an Equal Protection claim in their Motion to Dismiss (CP 23-24), but withdrew it in their Defendants' Reply (CP 127-128).

*Fountain*, 116 Wn.2d at 193. The Washington Supreme Court then ruled that: “Just as different elements satisfy this requirement, so too do different burdens of proof.” *Id.* at 194. Noting that the burden of proof as to accomplice liability for a civil infraction under RCW 46.61.675 is proof by a preponderance of the evidence, while accomplice liability for a crime under RCW 46.64.048 must be proved beyond a reasonable doubt, the Supreme Court concluded that:

Because the burden of proof under the latter is a much more difficult burden to sustain, the prosecutor must reconcile the strength of his case before proceeding. The prosecutor’s discretion would be limited by this consideration; thus, there would be no equal protection violation.

*Id.* at 194. While the test for an Equal Protection violation is different from the *Shriner* test for concurrency in applying the general/specific rule, there is an obvious similarity, in that both tests require an identity of elements. The *Shriner* test requires that for statutes to be considered concurrent, all of the elements that must be proved to make out a violation of the general statute (RCW 40.16.030) must also be proved to make out a violation of the specific statute (RCW 42.17.120 or RCW 42.17.780). *Shriner*, 101 Wn.2d at 579-580; *Presba*, 131 Wn. App. at 52. The general

statute here, RCW 40.16.030, is a Class C felony, conviction for which requires proof beyond a reasonable doubt. The standard of proof for violations of RCW 42.17.120 and RCW 42.17.780 is a preponderance of the evidence. These different burdens of proof alone suffice to establish that RCW 42.17.120 and 42.17.780 are not concurrent with RCW 40.16.030 for purposes of the general/specific rule. RCW 40.16.030 would not be violated every time that RCW 42.17.120 or RCW 42.17.780 is violated because, among other reasons, there would be some instances where proof would constitute a preponderance of the evidence, but not proof beyond a reasonable doubt.

- e. The Statutes In RCW 42.17 Are Strict Liability Statutes, But RCW 40.16.030 Requires A Knowing Mental State In Addition To The Filing Of A False Instrument.

There are other reasons, moreover, why the two sections of RCW Chapter 42.17 are not concurrent with RCW 40.16.030. A violation of the latter statute requires the filing, registering or recording of a "false or forged instrument". The allegedly false instruments filed in the instant case were certain campaign finance reports, as outlined in the Certification filed with the Information.

CP 12-15. Case law has added the gloss that such “instruments” must be required or permitted to be filed by law. *State v. Hampton*, 143 Wn.2d 789, 798, 24 P.3d 1035 (2001). This element of a false or forged “instrument” is totally lacking in both RCW 42.17.120 and RCW 42.17.780. One could, for instance, use an agent to make a political campaign contribution “in such a manner as to conceal the identity of the source of the contribution” so as to violate RCW 42.17.120, but if for any reason no false or forged campaign finance report is subsequently filed with the PDC, there would be no violation of RCW 40.16.030. Such a combination of events could occur for any number of reasons. A campaign treasurer could simply fail to file any report incorporating the disguised contribution from sheer negligence or for some other reason. Or the campaign treasurer could, despite the machinations to conceal the “source of the contribution”, determine the true source of the contribution in question, and therefore file an accurate campaign finance report with the PDC. Similarly, one might reimburse another, directly or indirectly, for a contribution to a candidate for public office, in violation of RCW 42.17.780, and yet a false or forged campaign finance report filed with the PDC may not ensue for similar reasons. In sum, there are any number of scenarios

under which one might violate RCW Chapter 42.17.120 or 42.17.780 without also violating the felony provisions of RCW 40.16.030 beyond a reasonable doubt.

Finally, violation of RCW 40.16.030 requires that a defendant act “knowingly”, and the substantive counts of the Information here (Counts II-IX) charge the Defendants with “knowingly” procuring or offering, or causing an innocent person to offer, false instruments to be filed or recorded with the PDC. CP 2-5. There is no such element in either RCW 42.17.120 or RCW 42.17.780. This is therefore a third respect in which an element of the general statute, RCW 40.16.030, is not present in either of the specific statutes. The *Shriner* test mandates that “the special statute will supersede the general only ‘[s]o long as it is *not possible* to commit the special crime without also committing the general crime.” *Williams*, 62 Wn. App. at 753-54 (quoting *Shriner*, 101 Wn.2d at 583) (emphasis in *Williams* quotation). It is clearly possible to violate RCW 42.17.120 and RCW 42.17.780 in a number of ways without also violating RCW 40.16.030. The two civil statutes are therefore simply not concurrent with RCW 40.16.030, and do not preempt the application of RCW 40.16.030 against these Defendants.

**2. APPLICATION OF THE GENERAL/SPECIFIC RULE TO RCW 40.16.030 WOULD ELIMINATE ALL OR ALMOST ALL POTENTIAL PROSECUTIONS UNDER THAT STATUTE.**

Application of the general/specific rule to a prosecution for violation of RCW 40.16.030 must also take into account the framework for prosecution under that statute. As has already been noted, *supra*, the Washington Supreme Court has held that in prosecutions under RCW 40.16.030, the “instrument” in question must be required or permitted to be filed by law. *State v. Hampton*, 143 Wn.2d 789, 798, 24 P.3d 1035 (2001). Given this requirement, a prosecution under RCW 40.16.030 will almost always involve another statutory scheme that permits and/or requires a particular instrument to be filed in a public office. This other statutory scheme will invariably be more “specific” than RCW 40.16.030, in that it will set out the particular requirements and contents of the instruments to be filed, and will dictate the public office where such instruments should be filed. In the instant case, the provisions of RCW Chapter 42.17 are more specific than those of RCW 40.16.030, in that the former detail the contents of the campaign finance reports that must be filed and other pertinent requirements, but that greater specificity

does not indicate an intent to preempt the application of RCW 40.16.030 to instruments required to be filed by RCW Chapter 42.17. Since RCW 40.16.030 was first enacted in 1909, the more specific statutory scheme will also likely have been enacted after RCW 40.16.030.

It is clear that the Legislature that enacted RCW 40.16.030 in the first place fully intended that prosecutions under that statute would be based for the most part on filings required or permitted by other, more specific statutory schemes. To hold that the presence of civil penalty statutes in the statutory scheme authorizing or permitting the filing of the instrument underlying a prosecution under RCW 40.16.030 preempts that prosecution, as the trial judge did here, is in effect to render that statute inapplicable to a number of instruments filed in public offices. The purpose of statutory interpretation is to determine and give effect to legislative intent. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). Application of the general/specific rule here is not only inappropriate because the relevant statutes are not concurrent, but also because application of that rule would not properly give effect to the intent of the Legislature that enacted RCW 40.16.030.

The reasons underlying the general/specific rule also militate against its application here. One such justification was provided by the Washington Supreme Court in *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982), where the Court compared the elements of a general statute, the escape statute (RCW 9A.76.110), a class B felony, with a specific statute proscribing the willful failure to return to a work release program, also a felony under RCW 72.65.070. The Court concluded that the later, more specific statute preempted prosecution of the defendant under the general escape statute. One of the reasons the Court gave for this conclusion was based on its noting that the specific statute, failure to return to a work release program, in imposing the requirement that such failure be “willful”, required proof of “willful action”, whereas the general escape statute required only proof that the “defendant ‘knew that his actions would result in leaving confinement without permission.’” *Id.* at 258-59 (quoting *State v. Descoteaux*, 94 Wn.2d 31, 35, 614 P.2d 179 (1980)). The Washington Supreme Court reasoned that the State must proceed only under the specific statute:

Given the choice, a prosecutor will presumably elect to prosecute under the general escape statute because of its lack of a mental intent requirement. Consequently, the result of allowing prosecution under RCW 9A.76.110 is the complete repeal of RCW

72.65.070. This result is an impermissible potential usurpation of the legislative function by prosecutors.

*Danforth*, 97 Wn.2d at 259. See also *Shriner*, 101 Wn.2d at 582-83; *State v. Shelby*, 61 Wn. App. 214, 219, 811 P.2d 682 (1991). The Defendants explicitly relied on this line of cases, citing the “usurpation of the legislative function by prosecutors” language from *Danforth* in their Motion to Dismiss (at 7) (CP 22), and citing similar language from *Shelby* and *Danforth* in their Reply (at 4 and 6). CP 120 and 122. This rationale for the application of the general/specific rule, however, does not apply to the statutes at issue in the case at bar. Unlike in *Danforth*, the general statute here not only requires proof that the Defendants acted “knowingly” in filing false instruments, it also requires a greater burden of proof, that of proving the Defendants guilty beyond a reasonable doubt. The concern that the Washington Supreme Court expressed in *Danforth*, then, is simply unwarranted here, because in initiating a prosecution of these Defendants for violating RCW 40.16.030, the State has undertaken not only the proof of additional elements not required by either of the specific statutes, but also has undertaken the burden of doing so beyond a reasonable doubt rather than by a preponderance of the evidence. There is, therefore, little likelihood

that prosecutors will flock to RCW 40.16.030 at the expense of RCW 42.17.120 and 42.17.780, since prosecution under the former statute requires proof of elements not found in the latter statutes, as well as a greater burden of proof.

**3. THE PROVISIONS OF RCW CHAPTER 42.17 DO NOT REPEAL RCW 40.16.030 BY IMPLICATION.**

a. Repeal By Implication Is Strongly Disfavored In Washington Law.

RCW 40.16.030 is not superseded by RCW 42.17.120, 42.17.780, or any other provision of RCW Chapter 42.17, by virtue of the general/specific rule, since the former is not concurrent with any of the latter. The question remains whether any other principle of statutory construction leads to the conclusion that enactment of the provisions of RCW 42.17 effected an implied repeal of RCW 40.16.030, or at least a *pro tanto* repeal as to the filing of the campaign finance reports required by RCW 42.17.

Washington courts have adopted the rule of statutory construction disfavoring repeals by implication. In *ATU Legislative Council of Washington v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002), the Washington Supreme Court put it bluntly: "Repeal by implication is strongly disfavored" (citations omitted). The Court

also cited the longstanding test in Washington for determining whether a statute will be deemed to have been implicitly repealed:

[ (1) The subsequent legislation] covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, or ...[ (2)] the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect.

*Id.* at 165 (quoting *Abel v. Diking & Drainage Improvement Dist. No. 4*, 19 Wn.2d 356, 363, 142 P.1017 (1943)).

- b. The Provisions Of Chapter 42.17 RCW Do Not Cover The Entire Subject Matter Of RCW 40.16.030 And There Is No Evidence That Chapter 42.17 RCW Was Intended To Supersede RCW 40.16.030.

In the Defendants' Reply (at 8), they conceded that the first prong of this *Abel* test did not apply, admitting that "the provisions of RCW 42.17, while expansive with respect to campaign finance disclosure requirement, do not 'cover the entire subject matter of the earlier legislation.'" CP 124. Despite this concession, the trial judge, in explaining his ruling to dismiss the Information, seemed to hold that the first prong of the *Abel* test did indeed apply:

In 1973 the Public Disclosure Act was implemented after being passed in an initiative process in 1972, and the initiative basically constituted a

comprehensive statute providing for a series of prohibited acts and requirements on political candidates and contributors, and established a reporting system through the public disclosure commission and also passed certain enforcement mechanisms within the statute that involved some compensatory remedies and some punitive sanctions. And as I said, the initiative was comprehensive and treated the entire subject area of political contributions to local and state-wide campaigns.

RP (2/16/06) 26. But RCW Chapter 42.17 is not at all “comprehensive” or “complete in itself” (to use the language of the *Abel* test), particularly with respect to remedies for violations of its provisions. RCW 42.17.390, entitled “Civil remedies and sanctions”, begins as follows: “One or more of the following civil remedies and sanctions may be imposed by court order **in addition to any other remedies provided by law ....**” (emphasis added). This language demonstrates that RCW 42.17 is anything but comprehensive in the area of sanctions for violating its provisions. Even if “remedies” is taken as being limited to civil remedies, as the Defendants argued below, the language of RCW 42.17.390 evinces an inclusive intention, not an exclusive one. If that statute does not preclude the availability of other civil remedies not enumerated therein, it can hardly be said to preclude prosecution under RCW 40.16.030.

Moreover, this prong of the *Abel* test would also require, in order to find a repeal by implication, that RCW 42.17 was “evidently intended to supersede” RCW 40.16.030. As will be argued in more detail, *infra*, there is in fact no evidence that any such superseding was intended by the drafters of Initiatives 276 and 134. Finally, RCW 42.17 does not cover “the entire subject matter of the earlier legislation”, as RCW 40.16.030 covers the filing of a broad range of instruments, including fish tickets (*State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980) and child support orders (*State v. Sanders*, 86 Wn. App. 466, 937 P.2d 193 (1997)). There is good reason why the Defendants abandoned this first prong of the *Abel* test for an implied repeal.

c. There Is No Irreconcilable Conflict Between RCW Chapter 42.17 And RCW 40.16.030.

Unable to fit the statutes within the first prong of the above-quoted test for implicit repeal, the Defendants instead try to fit them within the second prong. They maintain that RCW 40.16.030 and RCW 42.17 are inconsistent with, and repugnant to, each other to the extent that they cannot fairly and reasonably be reconciled and both given effect. According to the Defendants (in their Reply at 9),

this inconsistency is based on the fact that RCW 40.16.030 is a criminal statute, while the provisions of RCW Chapter 42.17 “manifest a clear and unambiguous intent that the conduct proscribed by this statutory scheme not be subject to criminal penalties”. CP 125. The Defendants also cite RCW 42.17.920 as further grounds for this and a related argument. That statute reads: “The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act. In the event of conflict between the provisions of this act and any other act, the provisions of this act shall govern.” In sum, the Defendants are arguing that prosecution of them for their alleged conduct here for violation of RCW 40.16.030 is irreconcilably in conflict with the fact that the provisions of RCW Chapter 42.17 carry only the “[c]ivil remedies and sanctions” listed in RCW 42.17.390.

The flaw in the Defendants’ argument is that there is in fact no such irreconcilable conflict between the provisions of RCW Chapter 42.17 and those of RCW 40.16.030. The legislature is presumed to enact laws with full knowledge of existing laws. *Daly v. Chapman*, 85 Wn.2d 780, 782, 539 P.2d 831 (1975); *Thurston County v. Gorton*, 85 Wn.2d 133, 138, 530 P.2d 309 (1975). A court’s duty is to construe two statutes dealing with the same

subject matter so that the integrity of both will be maintained.

*Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995); *City of Tacoma v. Cavanaugh*, 45 Wn.2d 500, 503, 275 P.2d 933 (1954). And as the Washington Supreme Court has held: "The rule is that legislative enactments which relate to the same subject and are not actually in conflict should be interpreted so as to give meaning and effect to both, even though one statute is general in application and the other is special" (citation omitted). *Pearce v. G.R. Kirk Co.*, 92 Wn.2d 869, 872, 602 P.2d 357 (1979). See also *State v. Bower*, 28 Wn. App. 704, 712, 626 P.2d 39 (1981). Here, it is altogether possible to harmonize the provisions of RCW Chapter 42.17 with those of RCW 40.16.030, and to give effect to them all.

The Attorney General or a county Prosecuting Attorney may, pursuant to RCW 42.17.400, bring an action to impose a fine or another civil remedy for violation of one of the provisions of RCW 42.17, none of which proscribe the knowing offering for filing of a false campaign finance report. RCW 42.17.390 (3) subjects one who violates any of the provisions of RCW 42.17 to a "civil penalty of not more than ten thousand dollars for each such violation", with the potential for a civil penalty of ten thousand dollars or three

times the amount of the amount of contribution illegally made or accepted, whichever is greater, for violations of RCW 42.17.640 (setting campaign contribution limits). RCW 42.17.390(4) subjects any person “who fails to file a properly completed statement or report within the time required by this chapter” to a civil penalty of “ten dollars per day for each day each such delinquency continues”. Finally, RCW 42.17.390(5) subjects anyone who “fails to report a contribution or expenditure” to a civil penalty “equivalent to the amount he failed to report”. None of these civil sanctions require the finding of any *mens rea* on the part of the person to be sanctioned. A campaign treasurer who simply forgot to file the campaign’s finance report with the PDC on time could be fined ten dollars for each day he or she was late with that report under RCW 42.17.390(4), and if the treasurer then filed a late report, which inadvertently omitted a contribution to the campaign, he or she could be liable to pay a civil penalty equal to the amount of the omitted contribution under RCW 42.17.390(5).

It is only when a person actually files, or causes to be filed, a campaign finance report with the PDC that he *knows* to be false that he is then subject to felony liability under RCW 40.16.030, and then only if all its elements can be proven beyond a reasonable

doubt. It is only when, in other words, a person knowingly causes the public to be provided with false information about campaign contributions that he crosses the line into criminal liability. This natural progression of penalties, starting with fines for acts that may be negligent, and culminating in criminal sanctions for causing the filing of campaign finance reports known to be false, is fully consonant with the very first subsection of the "Declaration of Policy" at the beginning of Initiative 276: "It is hereby declared by the sovereign people to be the public policy of the state of Washington: (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided." RCW 42.17.010(1).

The provisions of RCW 42.17 can therefore be harmonized with those of RCW 40.16.030. At the same time, applying the criminal sanction only for those instances in which a person knowingly causes the voters to be provided with false campaign contribution information thereby allows full effect to be given to all of the provisions of RCW 40.16.030 and RCW 42.17. There is no conflict that would support the conclusion that RCW 42.17 impliedly repealed the provisions of RCW 40.16.030 with respect to campaign finance reports.

Cases interpreting the Double Jeopardy clause of the Fifth Amendment to the U.S. Constitution and of article I, section 9 of the Washington Constitution demonstrate that there is no conflict between the availability of civil sanctions and criminal statutes.<sup>8</sup> The Double Jeopardy clause protects only against the imposition of multiple *criminal* punishments for the same offense. *United States v. Hudson*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997); *In re Detention of Turay*, 139 Wn.2d 379, 415 n. 26, 986 P.2d 790 (1999). Thus, consistent with the Double Jeopardy clause, bank officers can be charged with the criminal misapplication of bank funds for which monetary penalties and occupational debarment had previously been imposed by the Comptroller of Currency (*United States v. Hudson, supra*), the Department of Corrections can rehear a prisoner's disciplinary infraction hearing (*In re Pers. Restraint of Higgins*, 152 Wn.2d 155, 163, 95 P.3d 330 (2004)), the State can prosecute an inmate for escape after he has been made subject to prison discipline on the basis of the same escape attempt (*State v. Williams*, 57 Wn.2d 231, 232, 356 P.2d 99 (1960)), and the government can bring a

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<sup>8</sup> The Washington Supreme Court has held that Washington's Double Jeopardy clause offers the same scope of protection as its federal counterpart. *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 49, 75 P.3d 488 (2003).

civil action, remedial in nature, against someone who has been acquitted in a criminal case arising out of the same facts.

(*Winchester v. Stein*, 135 Wn.2d 835, 844, 959 P.2d 1077 (1998)).<sup>9</sup>

There is, then, no reason why the criminal sanction provided for in RCW 40.16.030 cannot coexist with the civil sanctions and remedies provided for in RCW 42.17.390. It is therefore possible to give meaning and effect to both statutes, with RCW 42.17.390 applying civil sanctions for violations of the provisions of RCW 42.17, and RCW 40.16.030 applying criminal sanctions to instances in which a defendant knowingly causes false information about campaign contributions to be filed with the PDC and then disseminated to the voters. The irreconcilable conflict conjured up by the Defendants does not in fact exist. RCW 42.17 cannot be construed as having repealed RCW 40.16.030 by implication.

Almost every crime described in Title 9A and elsewhere in the Revised Code of Washington has a civil counterpart. Murder and wrongful death, theft and conversion, and kidnapping and unlawful imprisonment are just some examples. The Defendants

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<sup>9</sup> “[O]nly the clearest proof” will suffice to show that a statutory scheme is so punitive either in purpose or in effect to transform what has been denominated a civil remedy into a criminal penalty. *Hudson*, 522 U.S. at 100; *Turay*, 139 Wn.2d at 417.

cannot overcome the disfavoring of statutory repeal by implication here simply by virtue of the fact that RCW 42.17 has civil sanctions and remedies, while RCW 40.16.030 is a criminal statute.

One final point demonstrates that the Defendants' burden of overcoming the disfavoring of repeal by implication is especially heavy here. In *Paulson v. County of Pierce*, 99 Wn.2d 645, 664 P.2d 1202, *appeal dismissed*, 464 U.S. 957 (1983), the Washington Supreme Court noted as follows: "While implied repeals of statutes are disfavored by Washington courts, the disinclination to repeal by implication is especially acute when, as here, a later act contains a schedule of statutes repealed and the schedule does not include the statute under consideration" (citations omitted). Initiative 276 explicitly repealed specific statutes, but RCW 40.16.030 was not among them. RCW 42.17.940, which is the codification of § 50 of Initiative 276, repealed several statutes, including RCW 29.18.140 and RCW Chapter 44.64. RCW 40.16.030 was not among the statutes repealed by Initiative 276. This Court's disinclination to find a repeal by implication of RCW 40.16.030 should therefore be "especially acute".

d. The Reasoning And Holding Of *United States v. Hansen* Are Apposite And Compelling.

A situation strikingly analogous to that in the case at bar was presented in *United States v. Hansen*, 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986). In *Hansen*, an Idaho congressman was convicted of violating 18 U.S.C. §1001, the federal false statement statute, based on his omission of material financial information from an annual financial disclosure statement he was required to file under the Ethics in Government Act of 1978 (“EIGA”). On appeal, Hansen argued that: “Congress prescribed only a civil remedy and did not authorize criminal punishment for the submission of a false EIGA statement.” *Hansen*, 772 F.2d at 944 (*quoting* the Brief for Appellant). One hundred twenty-three members of Congress filed an *amicus* brief arguing that Congress did not intend to attach criminal sanctions to violations of the EIGA. *Id.* at 943 n.1.

The District of Columbia Circuit began its discussion of Hansen’s claim by noting that 18 U.S.C. §1001 “is a statute of general applicability, designed to protect a ‘myriad [of]

governmental activities.” *Id.* at 943 (quoting *United States v. Rodgers*, 466 U.S. 476, 104 S. Ct. 1942, 1946, 80 L. Ed. 2d 492 (1984)). The Court then countered the defendant’s argument and framed the ultimate issue thus:

It was not necessary for the Congress that enacted the EIGA to authorize criminal punishment, for that authorization had been conferred by an earlier Congress, and remained on the statute books. The precise issue is whether the Congress that enacted the EIGA *precluded* the criminal sanctions that would otherwise attach.

*Hansen*, 772 F.2d at 944. The Court then noted that in the absence of repeal of 18 U.S.C. §1001 by the EIGA, the operative legal rule is “the venerable rule, frequently reaffirmed by the Supreme Court”, that repeals by implication are not favored. *Ibid.* In support of this proposition, the *Hansen* Court cited a line of Supreme Court cases, including *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189, 98 S. Ct. 2279, 2299, 57 L. Ed. 2d 117 (1978), *Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 2482, 41 L. Ed. 2d 290 (1974), and *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 352, 80 L. Ed. 2d 351 (1936), as well as 1A Sutherland Statutory Construction §23.10 (C. Sands 4<sup>th</sup> Ed.1972 & 1985 Supp.). The Court went on to note that such an implied repeal will not be found “unless an intent to repeal is ‘clear and

manifest.” *Hansen*, 772 F.2d at 944 (quoting *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S. Ct. 182, 188, 84 L. Ed. 2d 181 (1939), quoting *Red Rock v. Henry*, 16 Otto 596, 602, 106 U.S. 596, 602, 1 S. Ct. 434, 439, 27 L. Ed. 251 (1883)).<sup>10</sup>

Like the Defendants here, who argued below that the remedies for violations of RCW 42.17 were limited to the fines and

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<sup>10</sup> The *Hansen* Court then provided this eloquent explanation of the important and fundamental nature of this principle:

It will not do to give this principle of statutory interpretation mere lip service and vacillating practical application. A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose.

*Hansen*, 772 F.2d at 944. A little later in its opinion, at 944-45, the *Hansen* court expounded further on the purpose of this principle:

The major rationale of the presumption, in modern times at least, is not that Congress is unlikely to change the law—so that in the present case, where there was no preexisting criminal liability for this particular filing, the presumption would be inapplicable; but rather, that Congress “legislate[s] with knowledge of former related statutes,” *Continental Insurance Co. v. Simpson*, 8 F.2d 439, 442 (4<sup>th</sup> Cir. 1925), and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction. The terms of § 1001 cover falsification of EIGA financial disclosure forms; if Congress wished to exclude that coverage it would normally have said so; we will not readily conclude that it did so by implication.

other civil sanctions provided for in RCW 42.17.390, former Congressman Hansen pointed to 2 U.S.C. § 706, which authorized the U.S. Attorney General to bring a civil action in federal court against any one who knowingly and willfully falsified, or knowingly and willfully failed to file or report, any information required to be reported pursuant to 2 U.S.C. § 702. Hansen argued that § 706 “contain[ed] the complete sanction that Congress has prescribed for any knowing and willful falsification.” *Id.* at 945, *quoting* the Brief for Appellant. The Court of Appeals countered as follows: “It does indeed represent the complete sanction that the 1978 Congress provided, but the question remains whether it clearly suggests a repeal of the sanction provided by earlier legislators. We think not. There is no difficulty in applying both 18 U.S.C. § 1001 and 2 U.S.C. § 706.” *Ibid.* Finally, the Court of Appeals noted that the United States Supreme Court has required an “irreconcilable conflict” between a statute and an existing statute as “textual evidence of an implicit repeal.” *Ibid.* (*citing Red Rock v. Henry*, 106 U.S. at 601, 1 S. Ct. 438). The District of Columbia Circuit found no such irreconcilable conflict between 18 U.S.C. § 1001 and 2 U.S.C. § 706, and the State respectfully submits that

likewise there is no such irreconcilable conflict between RCW 40.16.020 and RCW 42.17.400.<sup>11</sup>

**4. THE FACT THAT THERE MIGHT NOT EVER HAVE BEEN A PROSECUTION FOR FALSE CAMPAIGN FINANCE REPORTS UNDER RCW 40.16.030 IS IRRELEVANT.**

One final issue concerns the trial judge's questions and comments during the hearing on the Defendants' motion to dismiss the Information. The judge asked both defense counsel and the prosecutor about the fact that there was no reported decision in Washington in which a defendant had been charged with violation of RCW 40.16.030 on the basis of a false campaign finance report. RP (2/16/06) 12-13, 20-21. Although the trial judge did not mention this subject as a factor in announcing his oral ruling or in his subsequent written order of dismissal, it appears from his questioning at the hearing that he may have taken the absence of any prior such prosecution to be legally significant.

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<sup>11</sup> Hansen's conviction was later vacated after the U.S. Supreme Court reversed *United States v. Bramblett*, 348 U.S. 503, 75 S. Ct. 504, 99 L. Ed. 2d 594 (1955), with its opinion in *Hubbard v. United States*, 514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995), where the Court in essence limited the reach of 18 U.S.C. § 1001 to false statements to departments and agencies of the executive branch of the federal government. The ruling in *Hubbard* did not in any way affect the statutory construction analysis discussed in *Hansen, supra*. See *United States v. Hansen*, 906 F.Supp. 688 (D.D.C. 1995).

There is no legal relevance to the absence of any reported decision in Washington in which a defendant has been charged with violating RCW 40.16.030 in connection with false or forged campaign finance reports. Before the Washington Supreme Court issued its opinion in *State v. Price, supra*, on December 11, 1980, more than seventy years after statute was first enacted in 1909, there was no reported decision in Washington of a prosecution under RCW 40.16.030. Although the defendants in *Price* do not seem to have raised any issue related to this gap in prosecutions, the Washington Supreme Court had no trouble in affirming the defendants' convictions there.

A similar issue has arisen on several occasions in federal courts. The issue has come up there most frequently in the context of prosecutions for securities fraud and tax fraud, in which a defendant claims that such a lack of any precedent for prosecuting his particular variety of fraud violates the fair warning requirement of the Due Process Clause.<sup>12</sup> In *United States v. Tannenbaum*, 934 F.2d 8 (2d Cir. 1991), the defendant was charged with various criminal violations arising out of a scheme to avoid the filing of

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<sup>12</sup> The Due Process Clause is applicable in Washington via the 14<sup>th</sup> Amendment to the U.S. Constitution.

currency transaction reports. Tannenbaum claimed that his prosecution did not provide him with due process because he had not been provided with fair warning that his conduct could be violative of criminal statutes. The Second Circuit had no problem rejecting this argument: “[I]t is immaterial that [at the time Tannenbaum committed the acts] ‘there [was] no litigated fact pattern precisely in point,’ ....” *Tannenbaum*, 934 F.2d at 12 (quoting *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 96 (2d Cir.), cert. denied, 462 U.S. 1131 (1983), quoting *United States v. Brown*, 555 F.2d 336, 339-340 (2d Cir. 1977)).<sup>13</sup>

The same logic applies to the instant case. The lack of any prior reported decision involving a prosecution under RCW 40.16.030 for knowingly filing false campaign finance reports with the PDC is simply irrelevant. Being the first to be prosecuted in Washington for causing the knowing filing of false campaign

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<sup>13</sup> The Eleventh Circuit came to a similar conclusion in a case in which the defendants were charged criminally with having devised and implemented fraudulent tax shelters. In *United States v. Heller*, 866 F.2d 1336, 1342-43, cert. denied, 493 U.S. 818 (1989), the defendants claimed that they could not, as a matter of law, have formed the requisite criminal intent because of the “legal uncertainty” of the tax consequences of their tax scheme. The Eleventh Circuit rejected this argument, noting that “[c]lever swindlers could rarely be prosecuted if a particular sham must be ruled illegal before its use can be criminal ....” *Id.* at 1343 n.15.

finance reports, in violation of RCW 40.16.030, does not provide a defense to these Defendants.

**E. CONCLUSION**

The trial court erred in dismissing the Information against the Defendants. For that reason, the State respectfully requests this Court to reverse the trial court's order dismissing the Information, and remand this matter to the trial court for trial on the merits.

DATED this 2<sup>nd</sup> day of May, 2006.

Respectfully submitted,

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**APPENDIX A**

**DEFENDANTS - COUNTS I-IX**



## **APPENDIX B**

**RCW 42.17.400**

## **APPENDIX B**

### **RCW 42.17.400**

#### **Enforcement**

(1) The attorney general and the prosecuting authorities of political subdivisions of this state may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17.390.

(2) The attorney general and the prosecuting authorities of political subdivisions of this state may investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter, and may require any such person or any other person reasonably believed to have information concerning the activities of such person to appear at a time and place designated in the county in which such person resides or is found, to give such information under oath and to produce all accounts, bills, receipts, books, paper and documents which may be relevant or material to any investigation authorized under this chapter.

(3) When the attorney general or the prosecuting authority of any political subdivision of this state requires the attendance of any person to obtain such information or the production of the accounts, bills, receipts, books, papers, and documents which may be relevant or material to any investigation authorized under this chapter, he shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. Such order shall have the same force and effect as a subpoena, shall be effective statewide, and, upon application of the attorney general or said prosecuting authority, obedience to the order may be enforced by any superior court judge in the county where the person receiving it resides or is found, in the same manner as though the order were a subpoena. The court, after hearing, for good cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend, or postpone all or any part of

its provisions. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in writing, and such action shall be subject to review by the appellate courts by certiorari or other appropriate proceeding.

(4) Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter. This citizen action may be brought only if the attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after such notice and such person has thereafter further notified the attorney general and prosecuting attorney that said person will commence a citizen's action within ten days upon their failure so to do, and the attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice. If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he shall be entitled to be reimbursed by the state of Washington for costs and attorney's fees he has incurred: PROVIDED, That in the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

(5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including a reasonable attorney's fee to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. If damages or trebled damages are awarded in such an action brought against a lobbyist, the judgment may be awarded against the lobbyist, and the lobbyist's employer or employers joined as defendants, jointly, severally, or both. If the defendant prevails, he shall be awarded all costs of trial, and may be awarded a reasonable attorney's fee to be fixed by the court to be paid by the State of Washington.