**[J-60A-2016 and J-60B-2016] [MO: Wecht, J.]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>MICHAEL R. VEON,<br><br>Appellant | : | No. 69 MAP 2015<br>:<br>Appeal from the Order of the Superior Court at No. 1698 MDA 2012 dated February 6, 2015 Affirming, Vacating & Remanding the Judgment of Sentence of the Dauphin County Court of Common Pleas, Criminal Division, at No. CP-22-CR-0004274-2009 dated November 8, 2012<br>:<br>ARGUED: May 10, 2016 |
| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>MICHAEL R. VEON,<br><br>Appellant | : | No. 70 MAP 2015<br>:<br>Appeal from the Order of the Superior Court at No. 2168 MDA 2012 dated February 6, 2015 Quashing the Order of the Dauphin County Court of Common Pleas, Criminal Division, at No. CP-22-CR-0004274-2009 dated November 8, 2012<br>:<br>ARGUED: May 10, 2016 |

**CONCURRING AND DISSENTING OPINION**

**JUSTICE DONOHUE** **DECIDED: November 22, 2016**

## I. Statutory Interpretation

I join the Majority in its conclusion that to constitute a conflict of interest as defined in 65 Pa.C.S.A. § 1102, the "private pecuniary benefit" must consist of a monetary gain. Having concluded that the trial court improperly expanded the definition of a conflict of interest to include "intangible political gain," I further agree that there is

no basis to engage in an analysis of whether section 1103, which prohibits a public official or public employee from engaging in conduct that constitutes a conflict of interest, was unconstitutional as applied in this case. *See* Mt. Lebanon v. Cnty. Bd. of Elections, 368 A.2d 648, 650 (Pa. 1977) ("we should not decide a constitutional question unless absolutely required to do so"); 65 Pa.C.S.A. § 1103(a).

A decision finding that a statutory provision is unconstitutional as applied is based upon a conclusion that the law, as written, cannot be constitutionally applied to a party under particular circumstances. *See, e.g.,* In re J.B., 107 A.3d 1, 20 (Pa. 2014); Clifton v. Allegheny Cty., 969 A.2d 1197, 1229 (Pa. 2009); Nixon v. Commonwealth, 839 A.2d 277, 286-90 (Pa. 2003). The as-applied challenge posed by Veon arises as a consequence of the trial court's expanded definition of "private pecuniary interest." In this sense, Veon's contention is more aptly expressed as a claim that the statute is "unconstitutional as interpreted" rather than "unconstitutional as applied."

As the question is presented and as a matter of law, we necessarily must address, at the outset, whether the courts below properly interpreted the provision at issue. I therefore agree with the learned Majority that our conclusion that the courts below erred in their interpretation of the statute's plain text obviates the constitutional question.

**II. Remand for Retrial**

We are thus left with a crime that cannot be committed unless there is a private pecuniary benefit, i.e., a financial gain. As the Majority observes, this has always been the correct interpretation of the conflict of interest statute; the plain language of the statute bespeaks of no other definition. The Majority nonetheless declines to review the

sufficiency of the evidence to support a private financial gain, maintaining that Veon waived consideration of this claim by failing to raise the argument before this Court or request discharge in his prayer for relief. Majority Op. at 34-35 n.33. I respectfully disagree with each premise for finding waiver. In his brief before this Court, Veon challenges the sufficiency of the evidence to support his conflict of interest conviction -- specifically as it relates to evidence of a private pecuniary gain -- as part of his broader statutory interpretation claim.[1] Veon asserts that there was "no evidence of record" to support a finding that he received a private pecuniary gain because of his actions, as the "nature of the prosecution" did not involve a financial gain at all; rather, his prosecution for conflict of interest was based solely upon "intangible gains" that Veon experienced in the form of "favorable publicity and free publicity and enhance[d] standing in the community so that he can continue to be reelected." Veon's Brief at 8, 10-11, 21-23 (quoting, in part, the Commonwealth's closing argument, N.T., 3/1/2012, at 74); *see also* id. at 25 ("This case was not about Mr. Veon taking money. It was not about him using a non-profit as his personal bank account. It was not about misappropriation of funds. It was about allowing the jury to speculate on intangible political benefits that were never proven in order to meet a statutory requirement of pecuniary gain."). In my view, under the particular circumstances of this case and

[1] Veon raised the same challenge in the same manner before the Superior Court. *See* Veon's Superior Court Brief at 26-27, 29 (arguing that the trial court improperly permitted the expansion of the conflict of interest statute to include "intangible political benefits," and that there was no evidence presented that Veon or his family experienced any monetary gain as a result of his actions). Because the Superior Court found that the trial court did not impermissibly expand the conflict of interest statute to include intangible political benefits, it did not need to reach the question of whether the evidence was insufficient to establish that Veon received any monetary gain from his conduct.

because of the nature of the issues subject to our review, the sufficiency claim did not need to be raised as a standalone issue, as it is raised within and encompassed by the statutory interpretation question.[2]

Further, Veon's failure to specifically request discharge in his prayer for relief in no way impedes our ability to grant this relief if we conclude it is appropriate. In a case that likewise involved double jeopardy concerns, the United States Supreme Court made clear that in determining the proper resolution of an appeal, courts are not limited by the remedy requested by the appellant. Burks v. United States, 437 U.S. 1, 17 (1978) ("[I]t makes no difference that a defendant sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial.").

I therefore disagree with the esteemed Majority that remand for retrial on the conflict of interest charge is the appropriate outcome here. Instead, drawing upon the teachings of the United States Supreme Court in McDonnell v. United States, __ U.S. __, 136 S. Ct. 2355 (2016), I would conclude that the conflict of interest charge against Veon should be dismissed at this level.

Like the case at bar, McDonnell involved a question of statutory construction; specifically, the definition of the phrase "official act" required for convictions of honest services fraud and Hobbs Act extortion charges. *See* id. at 2361, 2365. As reflected by the United States Supreme Court's lengthy explanation of the precise meaning of the

[2] Thus, contrary to the Majority's accusation, I do not invoke the plain error doctrine to decide that the evidence was insufficient to support Veon's conflict of interest conviction. *See* Majority Op. at 34-35 n. 33. Rather, as discussed, my review of the record and Veon's brief before this Court reveal that he has adequately preserved and presented the argument within his statutory construction claim.

phrase, *see* id. at 2368-71, the language of the statute defining "official act" was, in part, ambiguous and subject to multiple interpretations, requiring the McDonnell Court to "choose between … competing definitions[.]" Id. at 2368. Based upon (1) its novel interpretation of what constitutes an "official act," (2) the fact that the parties had not had the opportunity to brief the question of whether the defendant's actions constituted an "official act" under that new definition, and (3) its conclusion that the evidence presented at trial was susceptible to competing interpretations, the McDonnell Court found that remand was appropriate for the Court of Appeals to determine, in the first instance, whether the evidence was sufficient to convict the defendant of committing or agreeing to commit an official act (per the new definition), thereby warranting retrial. Id. at 2375. In remanding the case, however, the Court included an unequivocal mandate: if the court below found there was insufficient evidence presented at the original trial that the defendant committed or agreed to commit an "official act" as now defined, "the charges against him must be dismissed." Id.

In contrast, in this case, the Majority's vacatur of Veon's conflict of interest conviction is premised upon its conclusion that the Commonwealth and the trial court misinterpreted the clear and unambiguous meaning of the phrase "private pecuniary benefit" contained in section 1102. *See* Majority Op. at 19. No detailed statutory interpretation was required, as the words of the statute supported only one definition. *See* Barasch v. Pennsylvania Pub. Util. Comm'n, 532 A.2d 325, 331 (Pa. 1987) ("where the words of a statute are clear and free from ambiguity, a court may go no further"); 1 Pa.C.S.A. § 1921(b). Nor are we announcing a new definition of "private pecuniary

benefit." To the contrary, the Majority reached its conclusion based upon "the plain language of [s]ection 1102." Majority Op. at 19-20.

To prove that Veon engaged in a conflict of interest, the Commonwealth was required to prove that (1) Veon, as a public official or public employee, (2) used the authority of his office or employment or confidential information (3) to obtain a private pecuniary benefit for himself, a member of his immediate family or a business with which he or his immediate family member is associated, and (4) the economic impact was more than de minimus. 65 Pa.C.S.A. §§ 1102, 1103(a). The jury convicted Veon, at count one, of engaging in a conflict of interest, which charge was based upon Veon improperly diverting money from Beaver Initiative for Growth ("BIG") to make payments related to his legislative offices.[3] *See* Criminal Information at 1; Trial Court Order, 3/5/2012. Throughout the entire case -- from the charging document through closing arguments (and continuing on appeal) -- the Commonwealth contended that the "private

[3] Specifically, the Commonwealth charged Veon, at count one, as follows:

> On or about divers dates in and between 2003 and 2006, the [a]ctor, Michael R. Veon, a public official or public employee, engaged in conduct that constitutes a conflict of interest by using the authority of his office for his own private pecuniary benefit; namely, the actor, while employed as a State Representative by the Commonwealth of Pennsylvania, authorized, directed and/or approved the payment of public funds in the form of [BIG] grant monies for the payment of rent of a legislative district office, and/or the payment to Terry Van Horne for [BIG] work never performed, and/or the payment of the rent of a South Side Pittsburgh office and/or the payment of a monthly retainer to Jeff Foreman as a personal favor and/or as compensation for legislative and/or political work, thereby committing the offense of [c]onflict of [i]nterest[.]

Criminal Information at 1. The jury acquitted Veon of the second conflict of interest charge, which related to allegations that Veon authorized funds to be paid from BIG to Delta Development to secure a higher salary for his brother. *See* id.; Trial Court Order, 3/5/2012.

pecuniary benefit" that Veon received was the political benefit that flowed from his actions. The Commonwealth adduced no evidence that Veon obtained any private pecuniary benefit through the actions alleged.

When viewed in the context of how this case was charged and tried by the Commonwealth, the Majority's decision to limit its discussion to the jury instruction defining private pecuniary benefit is, in my view, a myopic basis for the decision of this matter.[4] As stated herein, and argued by Veon at every level, the entire premise of the Commonwealth's case was that Veon received intangible political benefits from his actions, and the receipt of intangible political benefits satisfies the element of private pecuniary gain to constitute a conflict of interest. There was never an allegation nor any evidence presented that Veon or his family members received a financial benefit from his use of BIG money to pay the rent for his legislative offices. To the contrary, the Commonwealth forcefully argued to the jury that a conflict of interest was "not limited to money," and that Veon was guilty of the crime because of his receipt of "intangible benefits" including "garnering favorable publicity and free publicity and enhancing his standing in the community so he can continue to be reelected." N.T., 3/1/2012, at 74.

Simply put, because of its erroneous interpretation of the statute, the Commonwealth failed to establish a material element of the crime of conflict of interest. As there is no question that the evidence was insufficient to sustain his conflict of interest conviction, the charge "**must** be dismissed." McDonnell, 136 S. Ct. at 2375

[4] Notably, like his sufficiency claim, Veon raises his challenge to the jury instruction within his statutory interpretation claim and not as a standalone issue for this Court's review. I agree with the Majority that the jury instruction in question was erroneous, and his objection thereto was preserved before the trial court. *See* N.T., 03/01/2012, at 50-51.

(emphasis added); *see also* Commonwealth v. Arrington, 86 A.3d 831, 840 (Pa. 2014) (stating that evidence is sufficient if it supports a conclusion that the Commonwealth proved every element of the offense beyond a reasonable doubt); *cf.* Burks, 437 U.S. at 11 ("The Double Jeopardy Clause precludes a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). Thus, I would vacate the judgment of sentence and dismiss the conflict of interest charge.[5]

**III. Restitution**

Turning to the propriety of the restitution award, I agree with the Majority that the Department of Community and Economic Development (the "DCED") is not entitled to restitution pursuant to 18 Pa.C.S.A. § 1106. My review of the statutory language, however, reveals a more fundamental problem than the fact that the DCED is not a person, *see* Majority Op. at 30, as the Legislature has made no provision for restitution for crimes that only result in a loss of property or money.

[5] Veon has not challenged his conviction under the conflict of interest statute on any grounds other than his failure to receive any private pecuniary gain. Thus, we were not asked to determine whether, when authorizing or directing the payment of the funds at issue, Veon was acting as a public official or public employee as those terms are defined in the Public Official and Employee Ethics Act, 65 Pa.C.S.A. § 1102. I note, however, that although Veon was a State Representative at the time of the conduct at issue, he did not use the "authority of his office," as required to constitute a conflict of interest, to divert the funds from BIG to his legislative offices. Veon's role as a member of the House of Representatives did not give him any right to access BIG's funds. Rather, it was his role as the co-chair of BIG, a private nonprofit corporation, that permitted the expenditure of the funds.

In arriving at its conclusion, the Majority relies upon the definition of "victim" in section 1106 of the Crimes Code and section 11.103 of the Crime Victims Act,[6] the "mandatory restitution" requirement of section 1106(c)(1), and our prior decisions in Commonwealth v. Brown, 981 A.2d 893 (Pa. 2009), and Commonwealth v. Runion, 662 A.2d 617 (Pa. 1995), both of which interpreted the law to determine whether a Commonwealth agency is entitled to restitution for medical payments made on behalf of a victim of simple assault, a crime involving personal injuries. *See* Majority Op. at 23-32. However, the substance of the restitution statute, including the provisions upon which the Majority relies and the case law it discusses, all relate solely to victims of personal injury crimes.

As the Majority recognizes, section 1106(h) defines "victim" by incorporating the definition of "victim" contained in section 11.103 of the Crime Victims Act.[7] 18 Pa.C.S.A. § 1106(h). Section 11.103 includes the following relevant definitions:

> **"Direct victim."** An individual against whom a crime has been committed or attempted **and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act**. The term shall not include the alleged offender. The term includes a resident of this Commonwealth against whom an act has been committed or attempted which otherwise would constitute a crime as defined in this act but for its occurrence

[6] The definition of "victim" in section 1106(h) refers to the definition of "victim" contained in now-repealed section 180-9.1 of the Administrative Code of 1929. *See* 18 Pa.C.S.A. § 1106(h). When the Legislature repealed sections 180-9 to 180-9.11, it expressly recodified the repealed provisions with the statutory provisions of the Crime Victims Act. 18 P.S. § 11.5102; *see also* S.B. 1192, Act 1998-111, Reg. Sess. (Pa. 1998).

[7] Within its definition of "victim," subsection (h) also "includes the Crime Victim's Compensation Fund if compensation has been paid by the Crime Victim's Compensation Fund to the victim and any insurance company that has compensated the victim for loss under an insurance contract." 18 Pa.C.S.A. § 1106(h).

> in a location other than this Commonwealth and for which the individual would otherwise be compensated by the crime victim compensation program of the location where the act occurred but for the ineligibility of such program under the provisions of the Victims of Crime Act of 1984 (Public Law 98-473, 42 U.S.C. § 10601 et seq.).
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> **"Victim."** The term means the following:
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> (1) **A direct victim**.
>
> (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.
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> (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child's family:
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> Chapter 25 (relating to criminal homicide).
> Section 2702 (relating to aggravated assault).
> Section 3121 (relating to rape).
>
> (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiance, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.

18 P.S. § 11.103 (emphasis added).

As the above-quoted definitions make clear, a "victim," as that term is defined by the Crime Victim's Act, only exists in situations where the result of the crime is death, injury, or a loss of earnings. It follows that the victim of a property crime that does not have such a result is not a "victim" for purposes of section 11.103 and, by extension, section 1106.

I note that section 1106(a), which sets forth the general rule regarding restitution, states:

> **Upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully**

> **obtained,** or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime, **the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor.**

18 Pa.C.S.A. § 1106(a) (emphasis added). Although, at first glance, this suggests that a court must sentence an offender to make restitution for any and all theft-related crimes, further review of section 1106 reveals that the words "property" and "restitution" are both defined terms that expressly apply only to a "victim." The statute defines "property" as "[a]ny real or personal property including currency and negotiable instruments, of **the victim**." 18 Pa.C.S.A. 1106(h) (emphasis added). It defines "restitution" as "[t]he return of the property of **the victim** or payments in cash or the equivalent thereof pursuant to an order of the court." Id. (emphasis added). Thus, pursuant to section 1106(a), the victim of a theft is only entitled to restitution if he or she died, was injured or suffered a loss of earnings as a result of the theft. While we presume the General Assembly did not intend a result that is absurd or incapable of execution, *see* 1 Pa.C.S.A. § 1922(1), we are prohibited from disregarding the plain language of a statute "under the pretext of pursuing its spirit." 1 Pa.C.S.A. § 1921(b).

Section 1106, as it is currently written, has no provision requiring or permitting restitution for a crime where the victim suffers only a loss of money or property, regardless of whether the victim is a government agency or a person.[8] We are bound

[8] It is obvious that a legislative remedy for this appreciable gap in the statute is necessary. That being said, the Legislature, by its definitions, excluded restitution in these instances.

It is worth noting that the prior definition of "victim," contained in 71 P.S. § 180-9.1, accounted for restitution payable to the victim of a theft-related crime, but the DCED would not have been entitled to restitution. Section 180-9.1 defined "victim," in relevant part, as: "A **person** against whom a crime is being or has been perpetrated or attempted." 71 P.S. § 180-9.1 (repealed Nov. 24, 1998) (emphasis added). Section 1991 of the Statutory Construction Act defines "person" as "a corporation, partnership, limited liability company, business trust, other association, government entity **(other** (continued…)

by the plain language of the current statute, which clearly and unambiguously requires restitution to be paid only to a "victim" as defined by section 11.103.[9] As we have repeatedly held, "restitution is a creature of statute and, without express legislative direction, a court is powerless to direct a defendant to make restitution as part of a sentence." Commonwealth v. Harner, 617 A.2d 702, 704 (Pa. 1992) (citing Commonwealth v. Walton, 397 A.2d 1179 (Pa. 1979)). Because Veon was not convicted of any personal injury-related crimes, the trial court was not empowered to order that he pay restitution to anyone, including the DCED.

## IV. Conclusion

For the foregoing reasons, I join sections I, II(A) and II(B) of the Majority Opinion. I join section II(C) of the Majority Opinion (with the exception of footnote 29) and its

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(…continued)
**than the Commonwealth)**, estate, trust, foundation or natural person." 1 Pa.C.S.A. § 1991 (emphasis added). The General Assembly, however, expressly disavowed its adherence to this definition of "victim" when it passed the Crime Victims Act.

[9] The Majority suggests that the language of subsection (a) that requires restitution for "any crime wherein property has been stolen," combined with the definition of "victim" adopted in subsection (h), renders section 1106 ambiguous with regard to whether restitution can be required in relation to property crimes that do not result in personal injury. *See* Majority Op. at 31 n.29. This Court has stated, however, that an ambiguity only exists where there are at least two reasonable interpretations of the statutory text under review. *See* Del. Cnty. v. First Union Corp., 992 A.2d 112, 118 (Pa. 2010). Although an undeniable tension arises in light of the universal directive of section 1106(a) and the limited definition of "victim" contained in section 11.103 (adopted in section 1106(h)), in my view, this tension does not stem from an ambiguity. It is unreasonable to read sections 1106(a) and 1106(h) together as permitting restitution where no victim, as expressly defined by section 11.103, exists. *See generally* Majority Op. at 22 (stating that section 11.103's definition of victim applies in the context of section 1106). Rather, in my view, the tension stems from a legislative oversight in failing to broaden the definition of "victim" -- an oversight that would be improper for this Court to cure via statutory construction. *See* Burke v. Independence Blue Cross, 103 A.3d 1267, 1273-74 (Pa. 2014) (concluding that the statutory text "reveals, not an ambiguity, but an asymmetry stemming from an apparent legislative oversight").

finding that the DCED is not entitled to restitution, subject to my additional analysis of the restitution statute. I respectfully dissent from the Majority's determination, contained in section III(A), that Veon may be retried on the conflict of interest charge, but join the Majority's conclusion, contained in section III(B), that we must remand the matter for resentencing.

Chief Justice Saylor joins this concurring and dissenting opinion.

Justice Todd joins this concurring and dissenting opinion with respect to Part II.