

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
11 CRS 13304

WAKE CO., C.S.C.

STATE OF NORTH CAROLINA)

BY _____)

v.)

TRAWICK HAMILTON STUBBS)

**MOTION TO DISMISS
INDICTMENT FOR FAILURE
TO STATE CRIME
AND FOR VIOLATION OF
DUE PROCESS**

NOW COMES DEFENDANT Trawick Hamilton Stubbs (hereinafter "Stubbs"), through undersigned counsel, and pursuant to NCGS §§ 15A-952, 163-278.27(b)(3), the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 19 of the North Carolina Constitution, moves this Court to dismiss the indictment that attempts to charge the common law offense of felonious obstruction of justice, on the grounds that (1) the indictment does not adequately allege a crime as required by North Carolina law; and (2) any interpretation of the acts alleged in the indictment as felonious obstruction of justice would violate the notice requirements inherent in the Due Process Clause of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. In support of this Motion, Stubbs shows the Court the following:

INTRODUCTION

Trawick Hamilton Stubbs, Jr. (hereinafter referred to as "Stubbs") has been indicted by the Wake County Grand Jury for Obstruction of Justice for allegedly "prevent[ing] the State Board of Election (hereinafter "SBOE) and the public from having information [relating to the value of airplane flights advanced to the Bev Perdue Committee by his law firm, which was subsequently reimbursed to the law firm by the Bev Perdue Committee] to which they were

entitled by law to have.” The indictment, however, does not allege that Stubbs filed any false report with the SBOE about these flights, or even that he had a duty to file any report with the SBOE relating to these flights. Instead, the substance of the charge is that Stubbs allegedly did not inform the Bev Perdue Committee of the funds advanced by his law firm for the flights, and that he “prepared documentation in October 2008 that concealed the true nature of the payments,” although there is no allegation that this documentation was ever submitted to the SBOE.

In short, the indictment presents the novel theory that a person with no obligation to file any report with the SBOE, and who in fact files no report with the SBOE, can be guilty of obstructing justice by not reporting certain information to the SBOE – apparently because the Bev Perdue Committee did not timely file the reports that it was required by law to file. This indictment does not allege any offense under North Carolina common law. Moreover, Stubbs could not have been on notice that his alleged failure to report information to the SBOE, information that he had no obligation to report, would subject him to a felony indictment for obstructing justice because the Bev Perdue Committee apparently did not timely do what it was required by law to do.

OVERVIEW

1. Trawick Hamilton Stubbs, Jr. (hereinafter referred to as “Stubbs”) was directly solicited by then Lieutenant Governor Bev Perdue’s office and the Bev Perdue Committee (hereinafter referred to as “Campaign”) to help arrange airplane flights for Bev Perdue’s campaign for governor between January 2007 and November 2008.

2. Stubbs’s office arranged and advanced the funds for 10 flights between January 1, 2007 and November 1, 2008. Stubbs kept contemporaneous records of the flights for the

Campaign by setting up a separate account at his law firm, Stubbs & Perdue, P.A., in the name of Beverly M. Perdue, on which all of these advances were documented by his office.

3. Stubbs' office furnished the necessary information about the flights to the Campaign to allow the Campaign to report those flights to the SBOE as required.

4. The Campaign failed to report in a timely fashion approximately 41 flights that had been arranged and paid for by various individuals, including the 10 flights arranged and paid for by Stubbs' office.

5. Stubbs' office was reimbursed by the Campaign for the flights on May 27, 2009 and June 19, 2009.

FACTS

The following synopsis, based upon records of the State Bureau of Investigation (hereinafter "SBI") and the SBOE interviews, other discovery furnished by the Wake County District Attorney's office, Stubbs' office and other items of record, establishes the following undisputed facts:

1. The Campaign directly solicited Stubbs' assistance in helping to arrange airplane flights for Beverly Perdue's campaign for Governor between January 1, 2007 and November 1, 2008. Specifically, Peter Reichard (hereinafter "Reichard"), the Finance Director until the end of 2007, various campaign schedulers, and other parties in both the Lieutenant Governor's office and the Campaign communicated with Stubbs' office to help arrange flights for Perdue.

2. The Campaign was furnished the following information by Stubbs' office: (i) the destination, point of origination, and time of the flights; (ii) the plane make, model, and tail number; and (iii) the pilot's information. Stubbs' office communicated this information by telephone and/or emails. For example:

a. March 7, 2007. At Reichard's request, Stubbs' office arranged a flight for the Campaign from Morehead City to New Bern, to Chapel Hill, to Charlotte, back to Chapel Hill and then to New Bern. Both Reichard and Zach Ambrose, the Campaign Manager, were informed by Carol Everson of Stubbs' office in an email of the times of the flights, the name of the pilot, the type of plane, and the tail number. Reichard acknowledged receipt of this information that same day. *See* Exhibit 1 (March 7, 2007 Email from Carol Everson to Reichard with copy to Ambrose).¹

b. May 29, 2007. At Reichard's request, Stubbs' office arranged a flight for the Campaign from New Bern to Winston-Salem, to Jefferson, to Asheville, back to Winston-Salem, to Chapel Hill and then back to New Bern. Anne Canady of Lt. Governor Perdue's office was informed by Carol Everson of Stubbs' office in an email of the flight plan, the name of the pilot, his phone number, and the name of the company owning the plane. Canady acknowledged receipt of this information the same day. *See* Exhibit 2 (May 29, 2007 email from Carol Everson to Anne Canady and internal Campaign form).

c. June 16, 2007. At Reichard's request, Stubbs' office arranged a flight for the Campaign from Goldsboro to Greensboro to New Bern. Reichard was informed in an email sent by Carol Everson of Stubbs' office of the times of the flights, the name of the pilot, the type of plane, and the tail number. Reichard acknowledged receipt of this information that same day. *See* Exhibit 3 (June 14,

¹ The Campaign had the means to calculate the value of each flight by using an internet website known as www.planequest.com, and did so on a regular basis, as a number of the Exhibits described in paragraphs 2(a) –(i) show.

2007 email from Carol Everson to Reichard, and internal Campaign documents, DA 008641-42).

d. October 2, 2007. At Reichard's request, Stubbs' office arranged a flight from New Bern to Charlotte to Chapel Hill and back to New Bern. On September 27 and September 28, 2007, Carol Everson of Stubbs' office and Reichard and Christy Agner of the Campaign, communicated about the internal Campaign form that needed to be filled out for the flight. On October 1, Carol Everson of Stubbs' office obtained from the owner of the charter company all the information that the Campaign requested, and forwarded it to the Campaign, as confirmed by internal Campaign documents. *See* Exhibit 4 (September 27 and 28, 2007 emails with attached blank form, October 1, 2007 fax cover sheet from Carol Everson to Mario Fedelli, October 1, 2007 cover letter and completed form from Maro Fedelli to Carol Everson, and internal Campaign documents DA008659-60).

e. January 8, 2008. At Reichard's request, Stubbs' office arranged a flight from New Bern to Raleigh to Asheville to Raleigh to New Bern. Reichard was aware of this flight, and internal Campaign forms show that the Campaign had the information necessary to accurately report the flight to the SBOE. *See* Exhibit 5 (internal Campaign form DA008387-88).

f. February 21, 2008. At Reichard's request, Stubbs' office arranged a flight from Beaufort to New Bern to Charlotte to Chapel Hill then back to Beaufort. Reichard was aware of this flight, and internal Campaign forms show that the Campaign had the information necessary to accurately report the flight to the SBOE. *See* Exhibit 6 (internal Campaign form DA008620).

g. March 21, 2008. At Reichard's request, Stubbs' office arranged a flight from New Bern to Manteo to New Bern. Reichard was aware of this flight, and internal Campaign forms show that the Campaign had the information necessary to accurately report the flight to the SBOE. *See* Exhibit 7 (internal Campaign forms DA008061, 008063-65).

h. April 5, 2008. At Reichard's request, Stubbs' office arranged a flight from New Bern to Hatteras to Washington NC to Chapel Hill to New Bern. Reichard was aware of this flight, and internal Campaign forms show that the Campaign had the information necessary to accurately report the flight to the SBOE. *See* Exhibit 8 (internal Campaign forms DA008089-93).

i. September 23, 2008. At Reichard's request, Stubbs' office told the Campaign to contact the owner of a charter service to arrange a flight from New Bern to Chapel Hill to Washington DC to Chapel Hill to New Bern. Reichard was asked by the Campaign to provide the pilot's name and number so the Campaign could get the information needed to report the flight. Internal Campaign forms show that the Campaign had the information necessary to accurately report the flight to the SBOE. *See* Exhibit 9 (September 19 and 20, 2008 emails between Carol Everson and Peter Reichard and DA008206-09).

3. The information provided by Stubbs' office to the Campaign, at the time of the flights, contained the information that the Campaign needed to report the flights to the SBOE in a timely manner. The SBOE had issued guidance to political campaigns, prior to the time period of this case, that instructed campaigns on how to calculate the value of airplane flights for the purposes of reporting the flights to the SBOE as contributions or advances. For a campaign to

calculate flight cost using the SBOE formula, it needed only the make and model of the airplane, the arrival and destination of the flight (from which flight time could be determined), and the flight crew information, which could then be used with a internet website like www.planequest.com to calculate the value of the flight. *See* Exhibit 10 (Bartlett SBOE memo and AG opinion). Stubbs' office provided that information to the Campaign as to the flights at issue in this case, contemporaneous to the time of the flights.

4. Internal Campaign documents also show that the Campaign had the information necessary from Stubbs' office to report the flights to the SBOE on a timely basis, but failed to do so. For example, according to Carol Young, she began preparing a spreadsheet of all flights relating to Lt. Governor Perdue in November 2007, based on the Lt. Governor's official calendar, and continued adding to this spreadsheet until March of 2008. SBI Interview of Carol Young, DA003825. This spreadsheet indicated flights, time, date, destination, calculation, and whether the flight was Campaign-related or personal, and listed the flights arranged by Stubbs' office as set forth in paragraph 2 above. *See* Exhibit 11.

5. Stubbs was informed by Reichard on August 28, 2007 that the campaign had a "staff attorney" who was "responsible for plane accounting" and the Campaign would provide Stubbs' office with further information regarding the accounting for flights. *See* Exhibit 12 (08/28/07 email).

6. On October 18, 2008, Stubbs received a handwritten faxed note from a Campaign Finance Assistant, stating the following:

Buzzy – I left you a voicemail Saturday afternoon about filling this form out for Plane Rides. Because you have an LLC we need to turn this in to the SBOE. Thank you so much for your help! If you can fax this form as soon as possible it would be wonderful! Please remember to make it to the NCDP.

Attached to the handwritten faxed note was a State Board of Elections form entitled “Contribution from a Business Account, Form CRO-6300 (hereinafter referred to as “form”). See Exhibit 13 (Fax, Form).

7. Stubbs completed the form as instructed by the Campaign, indicating that he was making a contribution to the North Carolina Democratic Party (hereinafter “NCDP”) in the amount of \$28,489.04 from his personal account, and attached a copy of a personal check in that amount to the law firm as reimbursement for the payments previously advanced by the firm for the flights. He also included a cover letter explaining the purpose of the check.. The completed form, letter, and copy of the check to Stubbs & Perdue, P.A. were faxed to the campaign on October 23, 2008. See Exhibit 14 (Fax, Letter, Check). Copies of the letter were sent to Peter Reichard, the Campaign Finance Director, and John Wallace, the Campaign’s attorney.

8. Four days later, on October 27, 2008, pursuant to a call from John Wallace, Stubbs was informed that contrary to the instructions Stubbs had received from the Campaign on October 18, 2008, the cost of the flights could not be treated as a donation to the NCDP. Stubbs therefore voided the check he had written to the law firm. The “Contribution from a Business Account Statement” form that Stubbs had completed at the direction of the Campaign was never submitted by the Campaign or anyone else to the SBOE or the NCDP.

9. The actions taken by Stubbs in October 2008, including the return of the form reporting a contribution of \$28,498.04 to the North Carolina Democratic Party and the subsequent voiding of the check to the law firm in that amount, were done at the direction of the Campaign or after consultation with the Campaign’s attorney. Stubbs did not do anything to cause the Campaign not to file these reports in a timely fashion. Stubbs simply advanced the costs of the flights his office arranged at the request of the Campaign, assumed that the

Campaign would properly report the flights to the SBOE, and waited to be reimbursed for the advances by the Campaign.

10. Stubbs was repaid by the Campaign for the flights on May 27, 2009 and June 19, 2009. *See* Exhibit 15 (two checks).

11. At all times Stubbs knew, based on the communications between his office and officials with the Campaign at the time of the flights, that the information necessary for the Campaign to compute the value of the flights and report this information to the SBOE in a timely fashion had been provided to the Lieutenant Governor's office and/or to the Campaign.

12. Stubbs' emails and the discovery furnished by the Wake County District Attorney's office show that at least nine (9) individuals associated with the Lieutenant Governor's office and the Campaign were aware of Stubbs' flights and the information needed to complete the necessary reports for the SBOE in a timely manner.

13. The Campaign failed to report to the SBOE a large number of flights arranged or provided by various individuals other than Stubbs. As stated in the SBI and SBOE interviews, and as affirmed by most of these individuals, they (like Stubbs) were expecting to be repaid by the Campaign in some manner for the flights, and were in fact repaid or credited with in-kind contributions during approximately the same period as Stubbs was repaid.

14. Stubbs, upon request of the SBOE appeared before Kim Strach, investigator for the SBOE, on June 10, 2010 and truthfully answered all questions and offered such continuing cooperation as might be requested. On June 25, 2010, the SBOE issued a report of its investigation, finding that "[e]very gubernatorial campaign had reporting issues," that all "struggled with timely disclosure and documentation of flights used during the campaigns," but

that “*no evidence surfaced indicating any intent of wrongdoing.*” See Exhibit 16 (Memorandum of Gary O. Bartlett, Executive Director of SBOE, dated 6/25/10).

15. On May 11, 2011, Stubbs appeared before the SBI, and the Wake County District Attorney, Colon Willoughby, and truthfully answered all questions relating to the airplane flights his office had helped to arrange at the request of the Campaign. In addition, Stubbs furnished a series of documents relative to the communication between his office and the Lieutenant Governor’s office and Campaign.

16. Throughout the period in which Stubbs and his office helped to arrange airplane flights for the Campaign, Stubbs’s office made extensive efforts to communicate fully and accurately with the Lieutenant Governor’s office, the Campaign, and other parties all information relating to the airplane flights.

17. In short, Stubbs did nothing to intentionally deprive the SBOE or the public of information to which it was entitled. To the contrary, the documents provided in discovery show that Stubbs did everything he could to ensure that the Campaign had the information it needed to file the required reports with the SBOE in a timely fashion. Stubbs was never provided with any notice that (a) he had any personal obligation whatsoever to report anything to the SBOE relating to the flights in question at the time they were occurring; or (b) that now, four years later, he could be facing a criminal charge of felonious obstruction of justice for allegedly depriving the public of information to which it is entitled through the SBOE, when he had no legal obligation to personally provide any information about the flights to the SBOE, and he had no reason to believe that the Campaign was not complying with its reporting obligations to the SBOE.

ALLEGATIONS OF THE INDICTMENT

Stubbs is charged in 11 CRS 13304 with felony common law obstruction of justice. The indictment alleges that Stubbs obstructed public justice, “with deceit and with intend to defraud,” during the period January 1, 2007 through November 1, 2008 through the following alleged acts:

[T]he defendant contributed and/or loaned or paid expenses of over \$28,000, by and through defendant’s law firm, Stubbs and Perdue, PA by paying for numerous flights for the use and benefit of the [Bev Perdue] Committee between January 1, 2007 and November 1, 2008, the cost of which exceeded \$28,000. The payment of over \$28,000 worth of airplane flights by the law firm was not reported to the Committee, the treasurer of the Committee or the State Board of Elections, and the defendant prepared documentation in October 2008 that concealed the true nature of the payments and purported that the payment of the flights had been contributed to the North Carolina Democratic Party when in fact the contributions were for the benefit of the Committee. This scheme prevented the State Board of Elections and the public from having information to which they were entitled by law to have. This was done in violation of the common law and against the peace and dignity of the State.

Thus, the Indictment alleges that Stubbs obstructed justice (a) by providing flights to the Perdue Campaign (in the form of either a contribution or advance) worth over \$28,000 through his law firm, the payment of the flights not being reported to the Perdue Committee or the SBOE; and (b) by Stubbs preparing documentation in October 2008 that “concealed the true nature of the payments and purported that the payment of the flights had been contributed to the North Carolina Democratic Party when in fact the contributions were for the benefit of the Committee.” The indictment alleges that these acts “prevented the State Board of Elections and the public from having information to which they were entitled by law to have,” thereby allegedly constituting an obstruction of justice.

ARGUMENT

I. The Indictment Should Be Dismissed Because It Fails to Allege the Offense of Felonious Common Law Obstruction of Justice Under North Carolina Law.

The North Carolina Constitution requires that an indictment allege all the elements of the offense purported to be charged. *State v. Stokes*, 274 N.C. 409 (1968). North Carolina law provides that a criminal pleading must contain: “A plain and concise factual statement in each count which ... asserts facts supporting every element of a criminal offense and the defendant’s commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.” NCGS § 15A-924(a)(5). With respect to a common law offense like obstruction of justice, “an indictment ... must set forth all essential factual elements necessary to identify and to constitute the crime” charged. *State v. Lackey*, 271 N.C. 171, 175 (1967) (dismissing indictment charging common law offense of official oppression where indictment did not allege facts constituting that offense; permitting case to go forward on charge of simple assault because facts alleged in indictment constituted that crime).

In this case, the State presumably contends that the charge of obstruction of justice is authorized by the decision of the Court of Appeals in *State v. Wright*, No. COA09-674, 696 S.E.2d 832 (N.C.App. 2010) (unpublished). In *Wright*, the defendant was a state legislator who, while standing as a candidate for reelection, made affirmative misrepresentations in his own campaign’s reports filed with the SBOE about the collection and expenditure of campaign contributions, which reports he personally certified to be “complete, true, and accurate.” The defendant’s misrepresentations on his SBOE reports had the effect of hiding from the SBOE that he had transferred over \$76,000 to his personal benefit. He was indicted for and convicted of felony obstruction of justice in Wake County Superior Court. On appeal, Wright argued that his conviction should be reversed because, among other reasons, the allegations of the indictment in his case did not constitute the crime of obstruction of justice. The indictment in Wright’s case

alleged that Wright, as a state legislator running for reelection, committed felonious obstruction of justice by:

the way in which he concealed and failed to account for campaign contributions and expenditures. The defendant collected a substantial number and amount of campaign contributions ... and failed to report those campaign contributions as required by law to the North Carolina Board of Elections (The Board), and to the Campaign treasurer for the Thomas Wright Campaign Committee ... (The Committee). The defendant converted those campaign contributions to his own use and benefit, and also failed to report the expenditures of those contributions as required by law to the Board and to the treasurer of The Committee. By failing to report the contributions and expenditures, as required by law, the defendant filed and caused to be filed a campaign disclosure report with the Board that were [sic] not complete, true, and correct, in that the reports did not disclose campaign contributions and expenditures of The Committee. By concealing the financial activities of the defendant's political committee(s) and by filing and causing to be filed reports that the defendant knew were not complete, true, and correct, the defendant obstructed public access to information that the defendant was required to disclose and concealed his illegal campaign activity. This act was in violation of the Common Law and against the peace and dignity of the State.

Wright, 696 S.E.2d at 838-39 (emphasis added).

The Court of Appeals rejected Wright's contention that his acts did not constitute felonious obstruction of justice, finding that he personally had an obligation under state law to disclose the information at issue truthfully to the SBOE, and instead he certified his own campaign finance reports as true to the SBOE when he knew that the reports contained false information. The Court of Appeals focused on Wright's obligations under state law, as a candidate, to report certain information to the SBOE, in finding that he had obstructed public justice by withholding the true information:

The legislature has required candidates to file specified reports, including certain required information, with the SBOE. N.C. Gen. Stat. § 163-278.9, -278.22 (2009). The legislature has granted the SBOE "the duty and power" to "make statements, and other information filed with it available to the public" and to "preserve reports and statements filed" with it for a period of 10 years. N.C. Gen. Stat. § 163-278.22(4), (5). The SBOE also has the "duty and power" to make investigations regarding statements filed with it, N.C. Gen. Stat. § 163-278.22(7),

and to determine, within four months after each election, “whether the statement conforms to the law and to the truth,” N.C. Gen. Stat. § 163-278.24.

Thus, the means by which the public obtains access to information about a candidate’s contributions and expenses is through the reports filed with the SBOE. It is the responsibility of the SBOE to maintain the reports, provide public access to the reports, and to determine the accuracy of the reports to ensure that the public has accurate information. Consequently, a candidate obstructs the public’s access to information required by law by obstructing the access of the SBOE. When a candidate conceals information from the SBOE or deceives the SBOE, he necessary also does so to the public.

Wright, 696 S.E.2d at 839 (emphasis added).

But *Wright*, by its very terms, does not apply to the facts alleged in the indictment here. The key difference between *Wright* and this case are the terms underlined in the passages above: the terms “required by law” and “candidate”. In *Wright*, the defendant’s acts in intentionally not providing certain information to the SBOE were found to constitute felonious obstruction of justice because the defendant was “required by law” to provide that information truthfully and accurately under Article 22A of Chapter 163 of the General Statutes. The defendant in *Wright* was so required because he was a “candidate” for office as defined in Article 22A of Chapter 163 of the General Statutes.

In this case, on the other hand, Stubbs is not a “candidate,” he is an individual. Nor does the indictment allege that Stubbs was “required by law” to report anything to the SBOE, because the law of North Carolina contains no such requirement. As an individual, under Article 22A of Chapter 163 of the General Statutes, Stubbs had ***no requirement whatsoever*** to provide any information to the SBOE about the flights in question, whether they are characterized as contributions or loans to the Perdue campaign.² *Wright* holds that it is an obstruction of justice

² Individuals who make contributions or loans to a political campaign are not personally required under Article 22A of Chapter 163 of the General Statutes to make any report of the contribution or loan to the SBOE. Individuals are required, under NCGS § 163-278.12, to report to the SBOE

for a candidate to knowingly provide false information to the SBOE in a report where that candidate is required by law to accurately provide that information to the SBOE. Stubbs, as an individual who is not a candidate, is not “required by law” to provide any information whatsoever to the SBOE under Article 22A of Chapter 163 of the General Statutes regarding the flights at issue, and therefore the holding in *Wright* does not authorize a prosecution in this case.

Nor can the State argue that the indictment here falls under *Wright* because Stubbs’ alleged acts caused the campaign to not have the information necessary to file a complete report. In *Wright*, the defendant candidate was alleged to have intentionally and personally provided false information to the SBOE, which the candidate had a personal legal obligation to accurate report to the SBOE. Nothing in *Wright* suggests that criminal liability can be extended past a candidate, who is obliged by law to provide certain correct information to the SBOE, to an individual who is under no such legal obligation to provide the information at issue to the SBOE, and create obstruction of justice liability for an individual who is under no duty of disclosure.³

In sum, nothing in North Carolina law authorizes the novel prosecution theory here -- that a person with no obligation to file any report with the SBOE, and who in fact files no report with the SBOE, can be guilty of obstructing justice by not reporting certain information to the SBOE. The State’s theory in this case seeks to *extend* reporting requirements (and attendant criminal liability) beyond the candidate and his or her treasurer, who are obliged by law to provide certain correct information about campaign finances to the SBOE, to all individual donors whose

any “independent expenditure” in excess of \$1,000. “Independent expenditures” are not at issue in the indictment.

³ Moreover, it is difficult to conceive factually how Stubbs could have deprived the Perdue Campaign of the information necessary to report the flights as advances, when Stubbs provided to the Campaign all of the information necessary for the Campaign to report the flights to the SBOE at the time the flights occurred. Any failure to report the flights to the SBOE was due to the Campaign’s actions, not some action by Stubbs. *See supra* at 6-7.

contributions or advances ultimately are not properly reported by the campaign, despite the fact that such donors have no legal duty whatsoever to personally report the contribution or advance to the SBOE. Nothing in the Article 22A of Chapter 163 of the General Statutes creates such an obligation, and nothing in *Wright* or any other North Carolina case supports such a radical expansion of the common law offense of obstruction of justice.

The State's theory here would make every illegal campaign contribution or advance a felonious obstruction of justice, which has never been, and is not, the law in North Carolina. The indictment fails to allege the crime of felonious obstruction of justice under the law of North Carolina, and should be dismissed.

II. The Indictment Should Be Dismissed Because Any Interpretation of the Facts Alleged In the Indictment as the Crime of Felonious Common Law Obstruction of Justice Under North Carolina Law Would Violate the Due Process Clause of the United States Constitution and the Provisions of the North Carolina Constitution.

Even if a court could accept the State's tortured theory that the facts alleged in the indictment should constitute felonious obstruction of justice, the indictment should nonetheless be dismissed because neither Stubbs, nor any other member of the general public, has been on notice that the conduct alleged of an individual like him in the indictment constitutes the crime of felonious common law obstruction of justice. Application of any new extension of the law to Stubbs would violate due process. The due process clause of the United States Constitution, and the analogous provisions of the North Carolina Constitution, mandate dismissal of the indictment on these grounds.

The Fifth and Fourteenth Amendments prohibit the retrospective application of unforeseeable judicial modifications of criminal law to the detriment of a defendant. *State v. Vance*, 328 N.C. 613, 620-21 (1991) (abrogating common law year-and-a-day rule for murder cases, but only applying the change prospectively); *State v. Barnes*, 345 N.C. 184, 234 (1997);

accord State v. Waddell, 282 N.C. 431, 446 (1973) (“[T]he constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect”). This holding is premised upon the well-settled principle “that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (“due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope”).

In this case, there is nothing in the previous common law of North Carolina to inform a citizen who is not a candidate for office that he is committing felonious obstruction of justice merely by making a contribution or advance to a campaign in technical violation of the provisions of Article 22A of Chapter 163 of the General Statutes that is not properly reported by the campaign to the SBOE as required of the campaign by state law, where that individual has no personal reporting obligation to the SBOE under that state law as to the contribution or advance. In fact, at the time of the conduct at issue in the indictment (2007 through 2008), *Wright* had not yet been decided, and nothing in the law of North Carolina applied the crime of felonious obstruction of justice to the reporting provisions of the campaign finance laws at all. There simply is no basis in the law for the State to assert that a citizen who is not a candidate for office could be on notice that the conduct alleged in the indictment of a non-candidate could, four years later, be held to be felonious obstruction of justice.

In Section 4-1 of the North Carolina General Statutes, “[o]ur General Assembly has declared that so much of the common law as has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state.” *Vance*, 328 N.C. at 616-17. The

“common law” referred to in § 4-1 is “the common law of England as of the date of the signing of the Declaration of Independence.” *Vance*, 328 N.C. at 617. Furthermore, the North Carolina Supreme Court has made clear in criminal cases that the “General Assembly is not presumed to intend innovations upon the common law and, accordingly, innovations not within the Assembly’s intentions shall not be carried into effect.” *State v. Jones*, 353 N.C. 159, 172 (2000) (citing *Price v. Edwards*, 178 N.C. 493 (1919)).

In *Jones*, the defendant was convicted of first degree murder, under the felony murder rule, based upon his culpable negligence in driving while intoxicated and causing an automobile wreck wherein several persons were killed and seriously injured. The State sought to convict the defendant for first degree murder under a novel theory of felony murder, asserting that the defendant’s felony assault on the injured passengers (which was based not on intent but culpable negligence) provided the underlying felony for application of the felony murder rule as to the deceased passengers, thereby permitting a first degree murder conviction as to the deceased passengers. The North Carolina Supreme Court rejected the State’s novel and unprecedented approach, noting that never before in North Carolina law had a first degree felony murder conviction been based upon an underlying felony where the defendant had not been proven to have engaged in intentional conduct in the underlying felony. In terms directly applicable to this case, the North Carolina Supreme Court refused to create a new common-law rule applicable to the defendant in *Jones*:

If culpable negligence is to be a building block of a capital case, it must be by clear mandate of the legislature and not by judicial fiat or through innovative application by prosecutors.

Jones, 353 N.C. at 172 (emphasis added).

Likewise, in this case, there is no prior precedent in North Carolina for holding that a person who advances flights or contributes to a political campaign in technical violation of the legal limits engages in felonious obstruction of justice simply because his advance or contribution is not properly reported by the campaign to the SBOE on the campaign's reports, where that individual has no personal reporting requirement as to that advance or contribution himself under state law. The basis of the holding in *Wright* is that it is an obstruction of justice for a candidate to intentionally "obstruct[] the public's access to the information required by law [to be reported to the SBOE by the candidate] ... [by] conceal[ing] information from the SBOE or deceiv[ing] the SBOE" through the reports filed by that candidate with the SBOE. *Wright*, 696 S.E.2d at 839. But an individual like Stubbs is not required by law to provide any information whatsoever to the SBOE about an advance or contribution, and therefore nothing in *Wright* establishes that the common law of North Carolina would give notice that the conduct alleged of Stubbs in the indictment could constitute felonious obstruction of justice. To the contrary, no prior case in North Carolina extends the crime of felonious obstruction of justice to a non-candidate in the area of campaign finance, who is under no reporting obligation to the SBOE, and therefore cannot obstruct the public's access to information through the SBOE.

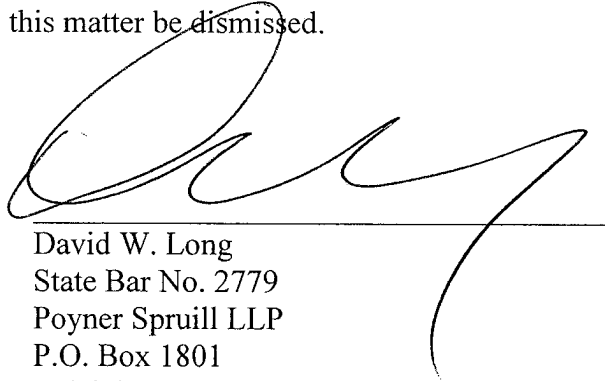
There is no prior case in North Carolina applying the facts at issue herein to the crime of felonious obstruction of justice. The State's theory is a novel extension of *Wright* far beyond current North Carolina law. Nor can there be any argument that there is anything in the common law of England at the time of the signing of the Declaration of Independence that would alert Stubbs or individuals similarly situated to him that conduct allegedly in technical violation of campaign finance statutes would constitute felonious common law obstruction of justice. It is for these reasons that the Due Process Clause of the United States Constitution prohibits

prosecution of Stubbs under the “innovative application by prosecutors” espoused by the indictment. *Jones*, 353 N.C. at 172; *see also, e.g. Vance*, 328 N.C. at 621-23 (abrogating common law year and day rule but applying it prospectively only); *Waddell*, 282 N.C. at 444-46 (judicial decision that in effect changed penalty for capital crimes from death or life imprisonment in discretion of jury to mandatory death would be *ex post facto* as to such offenses committed prior to that judicial decision). The indictment should be dismissed, because it is barred by the due process clause.⁴

CONCLUSION

For the reasons set out herein, Defendant Trawick Hamilton Stubbs respectfully requests that this Motion be allowed, and the indictment in this matter be dismissed.

This the 7 day of March, 2012.



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Counsel for Trawick Hamilton Stubbs


⁴ The facts to be offered by Stubbs in defense of this case -- set out above -- only confirm that there has been no notice to him (or any other citizen) that the acts alleged in the indictment could constitute felonious obstruction of justice. All of these facts show that it is difficult to conceive how Stubbs’ acts could be construed as intentionally depriving the public of information to which it was entitled. The indictment alleges a criminal theory that is so novel and radical that the Due Process Clause should require dismissal.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing MOTION by placing a copy thereof in the United States Mail, first class prepaid, addressed as follows:

C. Colon Willoughby
District Attorney -- Tenth Judicial District
P.O. Box 31
Raleigh, NC 27602

This the 7 day of March, 2012.



Counsel for Defendant