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Rec'd
JR

STATE OF MAINE
YORK COUNTY, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-12-2049

STATE OF MAINE)	
)	
v.)	DEFENDANT STRONG
)	MOTION TO DISMISS
MARK W. STRONG)	COUNTS 1, 4, 8, 14, 19, 24, 30, 35, 41,
)	46, 51, & 56, PURSUANT TO M.R.
)	CRIM. P. 7(c), 12(b)(2)
)	

NOW COMES Defendant Mark Strong, by and through undersigned counsel, and hereby moves for this Honorable Court to dismiss Counts 1, 4, 8, 14, 19, 24, 30, 35, 41, 46, 51, & 56 (Promotion of Prostitution, in violation of 17-A M.R.S. § 853 (2011)), pursuant to M.R. Crim. P. 7(c) and 12(b)(2), and for the reasons contained herein:

1. Defendant Strong was charged by indictment on October 3, 2012, in which he faced forty-five counts of Violation of Privacy, in violation of 17-A M.R.S. § 511(1)(B) (2011), one count of Conspiracy to Commit the Crime of Violation of Privacy, in violation of 17-A M.R.S. §§ 151(1)(E), 511(1)(B) (2011), twelve counts of Promotion of Prostitution, in violation of 17-A M.R.S. § 853, and one count of Conspiracy to Commit the Crime of Promotion of Prostitution, in violation of 17-A M.R.S. §§ 151(1)(E), 853 (2011).

2. On January 25, 2013, the Superior Court (York County, Mills, J.) dismissed the forty-six privacy charges against Defendant Strong; the Maine Supreme Judicial Court affirmed this decision on February 15, 2013.

3. Currently, Defendant Strong is facing thirteen prostitution-related charges. See Exhibit A (Defendant Strong's indictment, reformatted to remove the privacy-related counts).

4. Twelve of these charges, as alleged in his indictment, are Constitutionally-defective and must be dismissed, with prejudice.

5. The Maine Rules of Criminal Procedure provide: “The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” M.R. Crim. P. 7(c).

6. The Rules further provide: “Defenses and objections based on defects in the institution of the prosecution or in the indictment . . . , *other than it fails to show jurisdiction in the court or to charge an offense* may be raised only by motion before trial. . . . Lack of jurisdiction or the failure of the indictment . . . to charge an offense shall be noticed and acted upon by the court *at any time during pendency of the proceeding.*” M.R. Crim. P. 12(b) (emphasis added).

7. Constitutional sufficiency of an indictment is a jurisdictional matter that may be acted upon at any point in the proceeding. *State v. Coleman*, 452 A.2d 397, 399 (Me. 1982); *see also State v. Levasseur*, 538 A.2d 764, 766 (Me. 1988); *State v. Michaud*, 473 A.2d 399, 402 (Me. 1984).

8. The basis test of the sufficiency of an indictment is “whether a [defendant] of reasonable and normal intelligence, would, by the language of the indictment, be adequately informed of the crime charged and the nature thereof in order to be able to defend, and, if convicted, make use of the conviction as a basis of a plea of former jeopardy, should the occasion arise.” *State v. Charette*, 159 Me. 124, 127, 188 A.2d 898, 900 (1963). The identification of the crime and conduct charged must be *clear*. *State v. Child*, 158 Me. 242, 182 A.2d 675 (1962).

9. As the Law Court recently noted in *State v. Strong*, 2013 ME 21, ¶ 12, --- A.3d ---, “an indictment is subject to dismissal for failure to state an offense only when the facts alleged on its

face fail to make out an offense against the State,” which strips the court of jurisdiction to try the accused.’ (*citing State v. Storer*, 583 A.2d 1016, 1020-21 (Me. 1990)).

10. Maine courts have, the Law Court continued, “consistently rejected the practice of considering facts not alleged on the fact of an indictment in determining whether the indictment [adequately] charges an offense.” *Strong*, 2013 ME 21, ¶ 12 (highlighting the fact that the State did not allege adequately in the indictment at issue here certain essential elements in the violation of privacy counts, including the names of the alleged victims and the “private places” alleged to be involved).

11. An indictment has three functions: (1) to provide the defendant with adequate notice of the offense charged, so that the defendant may prepare to defend against it; (2) to avoid unfair surprise to the defendant at trial; and (3) to protect the defendant from being twice placed in jeopardy for the same offense. *See, e.g., State v. Levasseur*, 538 A.2d 764, 766 (Me. 1988).

12. These protections are rights afforded a defendant by both the Federal and Maine State Constitutions. U.S. Const. amend. V, VI; Me. Const. art. 1 §§ 6, 8; *Coleman*, 452 A.2d at 399. Maine’s Constitution provides explicitly that the accused in a criminal proceeding has a right to “demand the nature and cause of the accusation.” Me. Const. art. I § 6.

13. The Law Court has held that the reference to a statutory citation in the body of a charging instrument could not substitute for the explicit pleading of an essential element. *State v. Huntley*, 473 A.2d 859, 861 (Me. 1984) (holding that if the mere citation to the statute were sufficient, the constitutional requirement of Me. Const. art. I, § 6, that a charging instrument contain all the elements of the offense charged, would be vitiated; further, a defendant was not required to rely on a statutory citation to supply him with an element of crime charged).

14. The mere use of language from the statute does not eliminate the Constitutional requirement that sufficient facts and circumstances be set forth in the indictment to inform the defendant adequately of the specific offense charged. *State v. Pierce*, 438 A.2d 247, 255 (Me. 1981).

15. In 1978, in an Aggravated Promotion of Prostitution case against Harry “Slim Goodie” Sampson, the Law Court determined that in that case, the State had adequately alleged the crime against Sampson. *State v. Sampson*, 387 A.2d 213, 215-16 (Me. 1978). Sampson was charged with one count of Aggravated Promotion, which focused the indictment on the element of “pecuniary benefit,” 17-A M.R.S. § 851(2)(G). *Id.* The indictment against Sampson read: “The on or about the twenty-sixth day of May, 1977, in the City of Portland, County of Cumberland and State of Maine, the above named defendant . . . did knowingly promote the prostitution of a person less than eighteen years of age, namely, M * * * D * * *, born August 16, 1962, in that he did agree to accept and receive a pecuniary benefit, namely, . . . [\$150], pursuant to an agreement and understanding with said M * * * D * * * *, she not being a patron, whereby he was to participate in the proceeds of prostitution.” *Id.* at 215, n.4.

16. The Law Court determined that Sampson’s indictment included “charging in the language of the statute and specifying the date and general location of the offense, [and] the indictment alleged the name of the victim [prostitute] and the amount of the pecuniary benefit defendant was to receive.” *Id.* at 216.

17. Title 17-A M.R.S. § 853 reads, in full:

Promotion of prostitution

1. A person is guilty of promotion of prostitution if he knowingly promotes prostitution.
2. Promoting prostitution is a Class D crime.

18. Title 17-A M.R.S. § 851(1) defines “prostitution” as:

“Prostitution” means engaging in, or agreeing to engage in, or offering to engage in a sexual act or sexual contact, as those terms are defined in section 251, in return for a pecuniary benefit to be received by the person engaging in prostitution or a 3rd person[.]

19. Title 17-A M.R.S. § 851(2) defines “promotes prostitution” to include a great variety of prohibited behavior:

A. Causing or aiding another to commit or engage in prostitution, other than as a patron;

B. Publicly soliciting patrons for prostitution. Publicly soliciting patrons for prostitution includes, but is not limited to, an offer, made in a public place, to engage in a sexual act or sexual contact, as those terms are defined in section 251, in return for a pecuniary benefit to be received by the person making the offer or a 3rd person;

C. Providing persons for purposes of prostitution;

D. Leasing or otherwise permitting a place controlled by the defendant, alone or in association with others, to be regularly used for prostitution;

E. Owning, controlling, managing, supervising or otherwise operating, in association with others, a house of prostitution or a prostitution business;

F. Transporting a person into or within the State with the intent that such other person engage in prostitution; or

G. Accepting or receiving, or agreeing to accept or receive, a pecuniary benefit pursuant to an agreement or understanding with any person, other than with a patron, whereby the person participates or the person is to participate in the proceeds of prostitution.

20. In Defendant Strong’s indictment, for the Counts previously noted, Defendant Strong is accused thusly:

On or about [various date ranges], in Kennebunk, YORK County, Maine, MARK W STRONG SR, did knowingly promote prostitution as defined in 17-A M.R.S.A. Section 851(2)(A) through (G).

See Exhibit A.

21. These counts are facially invalid, as they do not provide Defendant Strong notice of which “prostitute” or “prostitutes” he is accused of “promoting,” nor do these charges do anything more than perfunctorily recite the statute by which the Maine Legislature defined

“promotes prostitution.” These counts do not adequately provide a reasonable person of average intelligence the Constitutionally-mandated notice to which criminal defendants are entitled. Which behaviors, which conduct is the State alleging Defendant Strong did that would prove him guilty of “promotion of prostitution”? The indictment, on its face, could not be less clear than it reads.

22. The prejudice Defendant Strong has suffered in this trial because of these defective pleadings is apparent: he and his team have had to prepare defenses to *each and every possible element* of these crimes as alleged, as the State has *never* articulated which exact provisions of Section 851(A) through (G) were applicable in these various time frames and for each count.

23. During Friday’s proceedings (March 1, 2013), during which the State’s key witness, Kennebunk Police Department Patrol Officer Audra Presby testified, Defendant Strong’s counsel could not get information required to rebut the alleged element of “pecuniary benefit,” though a plain reading of these overly broad, vague, and defective Counts clearly show that the State did allege “pecuniary benefit” as a *possible* element of the crimes alleged. Officer Presby’s definition of “pimp,” or, at least the definition she was able to explain prior to the State’s vociferous objections and the Court’s ultimate sustaining of those objections, was necessary for the defense to be able to *disprove* one possible element of these overly broad and invalid claims.

24. The State has rested, yet the State has still not specified for *each* of these counts, what prohibited behavior Defendant Strong in which was alleged to have participated.

25. One juror expressed concerns to this Court that the term “promotion” meant very little to her when the charges were read, to the point where she did not understand what those charges meant. There is a sincere risk that other jurors could be similarly confused because of the broadness and vagueness of the language of the indictment, which would prejudice Defendant

Strong.

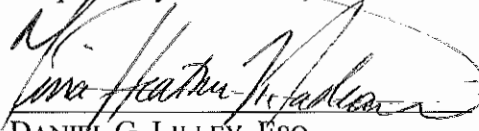
26. The State should not be allowed to allege these counts so broadly in the hopes that some of these behaviors may be proven at trial; this is a scatter-shot approach to pleading that is Constitutionally prohibited and, as the trial of Defendant Strong has dragged on, he has had to mount a defense that rebuts each of these *potential* elements. That burden has prejudiced Defendant Strong irreparably.

27. The State has rested its case-in-chief; the time for a bill of particulars has most certainly passed. To allow the State to amend at this stage would be to deny Defendant Strong the Constitutional rights of due process and fair notice, and his right to present his defense after being fully aware of the scope and content of the charges against him, and thus should not be allowed.

WHEREFORE, based on the foregoing, Defendant Strong respectfully requests that this Honorable Court grant his Motion to Dismiss, with prejudice, the twelve counts as enumerated above.¹

Dated at Portland, Maine, this 4th day of March, 2013.

Respectfully submitted,



DANIEL G. LILLEY, ESQ.

Bar No. 1870

TINA HEATHER NADEAU, ESQ.

Bar No. 4684

¹ It should be noted that, pursuant to 15 M.R.S. § 2115-A (2012), "Appeals by the State," the State may only appeal adverse decisions on successful Motions to Dismiss either before or after trial, not during trial. 15 M.R.S. § 2115-A(1), (2). If this Court determines that these counts should rightfully be dismissed, the State's appellate rights—such as they are—would only reactivate after the conclusion of this trial.

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STATE OF MAINE
YORK COUNTY, ss.

SUPERIOR COURT
CRIMINAL ACTION
DOCKET NO. CR-12-2049

STATE OF MAINE)	ORDER ON DEFENDANT'S MOTION
)	TO DISMISS COUNTS 1, 4, 8, 14, 19, 24,
v.)	30, 35, 41, 46, 51, & 56
)	
MARK W. STRONG)	
)	

Defendant Mark W. Strong's Motion to Dismiss Counts 1, 4, 8, 14, 19, 24, 30, 35, 41, 46, 51, and 56, of the indictment against him is hereby:

GRANTED / DENIED

The Clerk is ordered to incorporate this Order into the docket record by reference, pursuant to M.R. Crim. P. 39(c).

Date: _____

Justice, Maine Superior Court

STATE OF MAINE
YORK, ss

SUPERIOR COURT
LOCATION: ALFRED
DOCKET NO.: CR-12-2049

STATE OF MAINE

INDICTMENT (REVISED)

v.

MARK W. STRONG, SR.
DOB 9/4/1955
SIN:
53 Knox Street
Thomaston, ME 04861

G: Male Ht: 5'9" Wt: 198 H: White
E: Blue R: White

COUNT 1: PROMOTION OF PROSTITUTION
COUNT 2: CONSPIRACY TO COMMIT THE
CRIME OF PROMOTION OF
PROSTITUTION
COUNT 4: PROMOTION OF PROSTITUTION
COUNT 8: PROMOTION OF PROSTITUTION
COUNT 14: PROMOTION OF PROSTITUTION
COUNT 19: PROMOTION OF PROSTITUTION
COUNT 24: PROMOTION OF PROSTITUTION
COUNT 30: PROMOTION OF PROSTITUTION
COUNT 35: PROMOTION OF PROSTITUTION
COUNT 41: PROMOTION OF PROSTITUTION
COUNT 46: PROMOTION OF PROSTITUTION
COUNT 51: PROMOTION OF PROSTITUTION
COUNT 56: PROMOTION OF PROSTITUTION

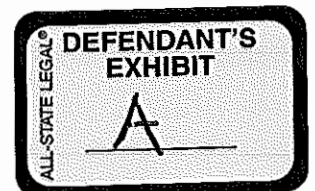
COUNT 1:

17-A M.R.S.A. § 853
Seq. No: 783
PROMOTION OF PROSTITUTION
CLASS D
ATN/CTN 973962A/001

On or about between October 1, 2010, and February 13, 2012, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, did knowingly promote prostitution as defined in 17-A MRSA Section 851(2)(A) through (G).

COUNT 2:

17-A M.R.S.A. §§ 151(1)(E), 853
Seq. No: 783C



**CONSPIRACY TO COMMIT THE
CRIME OF PROMOTION OF
PROSTITUTION
CLASS E
ATN/CTN 973962A/002**

On or about between October 1, 2010, and February 29, 2012, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, with the intent that conduct be performed that in fact would constitute a crime or crimes, did take a substantial step toward the commission of the crime of promotion of prostitution by agreeing with Alexis S Wright to cause or aid her in the performance of the conduct by assisting her with the investigation of patrons and/or controlling, managing, supervising or otherwise operating a prostitution business in association with Alexis S Wright where Alexis S Wright met persons and received a pecuniary benefit for engaging in sex acts with them. The most serious crime that is the object of conspiracy is the crime of Promotion of Prostitution, a Class D Crime.

COUNT 4:

**17-A M.R.S.A. § 853
Seq. No: 783
PROMOTION OF PROSTITUTION
CLASS D
ATN/CTN 973962A/004**

On or about between April 12, 2011, and April 29, 2011, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, did knowingly promote prostitution as defined in 17-A MRSA Section 851(2)(A) through (G).

COUNT 8:

**17-A M.R.S.A. § 853
Seq. No: 783
PROMOTION OF PROSTITUTION
CLASS D
ATN/CTN 973962A/008**

On or about between May 2, 2011, and May 26, 2011, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, did knowingly promote prostitution as defined in 17-A MRSA Section 851(2)(A) through (G).

COUNT 14:

**17-A M.R.S.A. § 853
Seq. No: 783
PROMOTION OF PROSTITUTION
CLASS D
ATN/CTN 973962A/014**

On or about between June 1, 2011, and June 30, 2011, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, did knowingly promote prostitution as defined in 17-A MRSA Section 851(2)(A) through (G).

COUNT 19:

17-A M.R.S.A. § 853
Seq. No: 783
PROMOTION OF PROSTITUTION
CLASS D
ATN/CTN 973962A/019

On or about between July 1, 2011, and July 28, 2011, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, did knowingly promote prostitution as defined in 17-A MRSA Section 851(2)(A) through (G).

COUNT 24:

17-A.M.R.S.A. 853
Seq. No: 783
PROMOTION OF PROSTITUTION
CLASS D
ATN/CTN 973962A/024

On or about between August 2, 2011, and August 31, 2011, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, did knowingly promote prostitution as defined in 17-A MRSA Section 851(2)(A) through (G).

COUNT 30:

17-A M.R.S.A. § 853
Seq. No: 783
PROMOTION OF PROSTITUTION
CLASS D
ATN/CTN 973962A/030

On or about between September 1, 2011, and September 29, 2011, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, did knowingly promote prostitution as defined in 17-A MRSA Section 851(2)(A) through (G).

COUNT 35:

17-A M.R.S.A. § 853
Seq. No: 783
PROMOTION OF PROSTITUTION

COUNT 56:

**17-A M.R.S.A. § 853
Seq. No: 783
PROMOTION OF PROSTITUTION
CLASS D
ATN/CTN 973962A/056**

On or about between February 1, 2012, and February 13, 2012, in Kennebunk, YORK County, Maine, **MARK W STRONG SR**, did knowingly promote prostitution as defined in 17-A MRSA Section 851(2)(A) through (G).

DATED: 10-3-12

A TRUE BILL

/s/ Grand Jury Foreman

OFFICER: Audra Presby
DEPT: Kennebunk Police Department
JW#: 12-5291

NOTE: Revised on January 25, 2013, to reflect the dismissal of the forty-six (46) privacy-related counts.