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CRIMINAL DIVISION
Case No. 23-CR-02816
No. 23-CR-04785
No. 23-CR-06562

State of Vermont v. James Martin	DOB: 5/19/1978

ENTRY REGARDING MOTION

Title: Motion to Dismiss; Memorandum in Opposition to Motion to Dismiss (Motion: 2)
Filer: Robert J. Kaplan; Corina Olteanu
Filed Date: May 17, 2024; Sept. 18, 2024

The State has charged Defendant James Martin with home improvement fraud under 13 V.S.A. § 2029(b)(1) in three separate instances. Defendant has moved the court to dismiss each of these charges against him for lack of prima facie case pursuant to V.R.Cr.P. 12(d)(1). He argues that 13 V.S.A. § 2029, the Vermont statute criminalizing home improvement fraud, violates the Thirteenth Amendment to the United States Constitution. Def.'s Mot. to Dismiss at 2. Defendant also contends that the State has "charged the wrong entity." *Id.* The State objects.

The court held a hearing on the Motion on October 25, 2024. Defendant was present with his attorney, Robert J. Kaplan, Esq. The State was represented by Deputy State's Attorney Corina Olteanu. The State's Exhibits 1 to 9 were admitted without objection for purposes of deciding the motion to dismiss.

For the reasons expressed below the motion to dismiss is GRANTED.

I Background

The court briefly summarizes the relevant facts as presented in the parties' filings and the admitted Exhibits.

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The Spauldings contacted Defendant sometime in August 2022 for the purpose of hiring him as a contractor to renovate an existing room in their house in Barre, Vermont. State's Opp'n to Def.'s Mot. to Dismiss at 1 (filed Sept. 18, 2024). Defendant is the president and director of the Vermont corporation Northern Build Pros. Inc. See Annual Report and Articles of Incorporation on Northern Build Pros. Inc (State's Ex. 9). Defendant provided the Spauldings a quote with a project completion cost of $8,405.50. Sgt. Steven J. Durgin Aff. at 1 (State's Ex. 1). The Spauldings entered into a contract with Northern Build Pros. Inc. on August 16, 2022, and gave Defendant

$2,500.00 as a downpayment. *Id.* They agreed to a start date in September or October. Jonathan Spaulding Aff. 1 (State's Ex. 2).

Defendant started work sometime in October 2022, and the Spauldings gave him a second check in the amount of $2,700.00. State's Ex. 1, Para. 4. At some point—it's not clear when—Mr. Spaulding requested Defendant to apply for a permit for the egress window they had contracted him to install. Spaulding Aff. at 2. Defendant never applied for or received one. *Id.* On November 29, 2022, a crew sent by Defendant cut the foundation of the Spauldings' home to install the window. *Id.* at 2. The work was done poorly, which Mr. Spaulding discussed with Defendant. *Id.* Defendant promised to launder the bedding and other soft goods that had been soiled, and his "agent" picked them up for cleaning in early December. *Id.* Later it became clear that a carpet had been damaged, and Defendant promised to replace it. *Id.* at 3.

Sometime around December 20, 2022, Defendant's subcontractors left and homeowners "eventually realized that Defendant had considered the work completed," and they had serious concerns about the finished and unfinished works. State's Opp'n at 3, referencing Mr. Spauldings deposition. Sometime around Christmas 2022, an employee of Defendant visited the homeowners' residence to do a "punch list," and soon after that, Defendant contacted them via text, "apologizing for the quality of the work, acknowledging the extensive 'punch list,' and promising that the work would be completed and done properly." *Id.*

Around January 4 or 5, 2023, homeowners learned that the workers had cut into a pipe while putting up drywall. *Id.* at 3–4. About January 10, 2023, Defendant came to the residence and discovered the damage to the water pipe. *Id.* at 4. For about two days, Defendant fixed the pipe and removed some of the molding improperly done by the subcontractors. *Id.* This was reportedly the last time homeowners saw Defendant. *Id.* Between January 11 and 25, 2023, homeowners sent numerous messages to Defendant using email and text messages; they also sent him a certified letter to the address listed as his physical address in their contract. *Id.* Defendant never retrieved the certified letter and it was returned to the homeowners on or about February 22, 2023. Eventually, sometime "significantly after February 2022," homeowners saw a car on their driveway and a letter being dropped in their mailbox. *Id.* The undated letter informed homeowners that the work would not be completed, and that Defendant would be filing for bankruptcy. *Id.*

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On August 9, 2022, Kyle and Lisa Zingo and Northern Build Pros. Inc. entered into an agreement concerning the removal and replacement of the Zingos' covered front porch and back deck. State's Ex. 6, Kyle Zingo Aff. at 1. On September 6, 2022, when Defendant was still working on the home, the Zingos and Defendant entered into another agreement for Defendant to add a stone patio and a walkway at the residence. *Id.* There was a further agreement to replace the floors in the house on the main level. Transcript of sworn deposition of Kyle Zingo at 8–9 (State's Ex. 5). Defendant "started off pretty good," but "then it just started becoming less and less that [his workers] would show up." Transcript of sworn deposition of Lisa Zingo at 10 (State's Ex. 4). At least as of December 20922 and for some time thereafter the Zingos were satisfied enough with his work to want him to continue and finish the project. *Id.* at 14. Defendant's explanations for the

delays were "personnel problems," "that he couldn't get the help." Transcript of sworn deposition of Kyle Zingo at 24.

Around Christmas 2022, workers stopped coming to the residence; between December 27, 2022 and January 3, 2023, homeowners attempted multiple times "to have [Defendant] sit down to discuss an acceptable timeline to complete work or be reimbursed for the approximate $25,000.00 [homeowners] have prepaid for materials [they] never received." Ex. 6, Kyle Zingo Aff. at 1. In his last communication to homeowners, January 2, 2023, Defendant expressed that he was aware that the work had taken longer than expected and while he was unavailable for a meeting at the time due to him tending to personal matters out of state, he assured he had not abandoned the project. Ex. 3, Officer Hammond's Probable Cause Affidavit at 3–4.

The Zingos have paid Defendant approximately $69,000.00 in total. Kyle Zingo Aff. at 1. First, Mr. Zingo wrote Defendant a check for $33,212.26 as a downpayment for the back deck and the front porch; that check was cashed on Aug. 11, 2022. Ex. 5. Transcript of sworn deposition of Kyle Zingo at 12. Another check for $13.548.71, which was a downpayment for the patio, the walkway, and the payment for the toilet, was cashed on September 8, 2022. *Id.* On October 12, 2022, there was another check written for the remaining balance for the toilet, the trim, the material, and labor, for $5,148.39. *Id.* at 12–13. Finally, on December 2, 2022, Mr. Zingo wrote Defendant a check for $17,836.83. Id. at 13.

Defendant has finished framing for the deck, "almost all of the porch," inside flooring, moving a toilet and putting in new plumbing. Transcript of sworn deposition of Lisa Zingo at 12. Some of the work is still incomplete, including missing railings on a two-story deck and unfinished Trex waterproofing system on the back deck. Transcript of sworn deposition of Kyle Zingo at 10–11.

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Sarah Wakefield, who found Northern Build Pros. Inc. through their advertisement on Front Porch Forum, hired the company to do renovations/home improvement in her home in Barre, Vermont. Transcript of Video Conference Deposition of Sarah Wakefield at 7 (State's Ex. 8). Defendant began working at Ms. Wakefield's property in July 2022, but by early winter that same year, "communication between her and [Defendant] came to a standstill" with several projects incomplete; the majority of the work was, however, done satisfactorily. Sgt. Steven J. Durgin Aff. at 3 (State's Ex. 7). Defendant stopped communicating with the homeowner in early 2023; the last text message she received from Defendant was sent on March 2, 2023. Transcript of Video Conference Deposition of Sarah Wakefield at 14-15 (State's Ex. 8).

Ms. Wakefield had more than one agreement with Mr. Martin. Transcript of Video Conference Deposition of Sarah Wakefield at 7. She has paid Defendant a total of $42,467.62 for all projects presented in Defendant's proposal, but several of those projects remained uncompleted. Sgt. Steven J. Durgin Aff. at 6 (State's Ex. 7). Ms. Wakefield states that the value of the unfinished projects is $5,580.97. *Id.*

II Conclusions of Law

Pursuant to V.R.Cr.P. 12(d)(1), "[t]he defendant may move for dismissal of the indictment or information on the ground that the prosecution is unable to make out a prima facie case against him." To establish a prima facie case, the State must show with "'substantial, admissible evidence' that is legally sufficient to sustain a verdict of guilty on each element of the crime charged." *State v. Jacobs, Jr.*, 2024 VT 69, ¶ 11 (mem.) (citing *State v. Hugerth*, 2018 VT 89, 208 Vt. 657(mem.)). The essential elements of a home improvement fraud under 13 V.S.A. § 2029(b)(1) are that (1) Defendant; (2) entered into a contract or agreement, written or oral, for home improvement with the homeowner[s], in exchange for receipt of $500 or more; (3) Defendant knowingly failed to perform the contract or agreement, in whole or in part; and (4) Owner requested performance or a refund of payment made, but Defendant knowingly failed to either (a) refund the payment, or (b) make and comply with a definite plan for completion of the work that Owner had agreed to.

Defendant's argument that "Northern Pros Inc. is the Responsible Party, not James Martin"

Acknowledging the "fundamental tenet of judicial restraint that courts will not address constitutional claims when adequate lesser grounds are available," the court addresses first Defendant's second argument, namely that "Northern Pros Inc. is the Responsible Party, not James Martin." See *State v. Bockus*, 2024 VT 4, ¶ 22 (quoting *State v. Bauder*, 2007 VT 16, ¶ 27, 181 Vt. 39) (cleaned up). Defendant contends that as he was "merely a shareholder" in Northern Build Pros. Inc., the State's information is "fundamentally 'defective on its face' insofar as it names the incorrect entity." Def.'s Mot. at 7–8 (citing *State v. Ehrman*, 261 A.3d 351 (N.J. App. Div. 2021). He further maintains that "Northern Build Pros. Inc.'s activities, taken in their totality, do not rise to the level required to pierce the corporate veil and hold Defendant personally accountable for the actions of the corporation." Def.'s Mot. at 8. The State's theory is that Defendant as president and director of Northern Build Pros. Inc. exercised control of the company and thus is personally liable for the criminal fraud. Additionally the State contends he was the agent and officer of the corporation who actively committed the criminal acts constituting the fraud.

Under Defendants "wrong party" argument, Defendant disputes the first essential element of the offense.[1] In the context of civil cases, the Vermont Supreme Court has opined that "[a] corporation is a legal construct, limited to the powers given it by the sovereignty that creates it, and generally independent of the individuals who own its stock even when it is owned by a sole shareholder." *Doherty v. Town of Woodstock*, 2023 VT 56, ¶ 9 (citing *Agway, Inc. v. Brooks*, 173 Vt. 259 (2001). This means that the shareholders can be held liable only if the corporate form has been used

[1] The court notes that *Ehrman*, the New Jersey case cited by Defendant, is beside the issue here. 261 A.3d 351 (N.J. App. Div. 2021). There, a member of an LLC was individually sued for failure to file an annual registration for rental property owned by the LLC. *Id.* at 355. The trial court found that the complaint-summons was intended to the LLC, instead of the individual member, and found the LLC guilty. *Id.* However, for reasons that are not entirely clear, the municipal court record of conviction still listed the individual member as the guilty party; the Appellate Division of the New Jersey Superior Court reversed and remanded for the lower court to vacate the record of conviction of the individual member, and for a new trial as to the LLC. *Id.*

to perpetuate a fraud, or when the needs of justice so dictate. See *Agway, Inc.*, 173 Vt. at 262 (citations omitted); see also 11A V.S.A. § 6.22(b) ("A shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his or her own acts or conduct."). However, it is also "indisputable that a corporation can only act through its agents." *In re McGrath*, 138 Vt. 77, 80 (1980). Further, "a corporate officer may be held liable for a tort in which the officer *personally participated* even though the corporation may also be held liable." *Prive v. Vermont Asbestos Grp.*, 2010 VT 2, ¶ 17, 187 Vt. 280 (quoting *Agency of Natural Res. v. Upper Valley Reg'l Landfill Corp.,* 167 Vt. 228 (1997) (emphasis in original).

While these precedents are civil cases, the reasoning there is equally applicable in this context. Based on the evidence presented by the State, Defendant was the president and director of Northern Build Pros. Inc., and he personally entered into contracts with homeowners and oversaw the work of subcontractors in the contracted home improvement projects. Northern Build Pros. Inc., per se, is a legal construct; it is the acts of Defendant that have led to these charges.

In addition, although the Vermont Supreme Court has not seemed to have faced the "wrong party" argument in criminal cases – many other states have. A plethora of other states have concluded corporate officers may be criminally liable for their own acts although performed in their official capacity as officer when they participate in a violation of criminal law while conducting corporate business. Corporate officers are not allowed to escape the consequences of their criminal acts that they commit by contending that it was an official act, and not theirs, but the act of the corporation. See *Fletcher Cyclopedia of the Law of Corporations*, Section 1388 (citing cases from 30 states as well as several federal Circuit Courts of Appeals). See example, *State v. Hill*, 333 S.E.2d 789, 790 (S. C. App. 1985)(criminal prosecution for failure to pay materialsmen for materials furnished in erection of a building)(stating"[o]fficers, directors and agents of a corporation may be criminally liable individually for participating in a violation of the criminal law while conducting the corporate business"', quoting and citing *State v. Seufert*, 49 N.C.App. 524, 271 S.E.2d 756, 759-760 (1980)).

The court concludes that Defendant's second argument fails, and proceeds to consider Defendant's constitutional claim.

Defendant's argument that 13 V.S.A. § 2029 is unconstitutional

Defendant's main argument is 13 V.S.A. § 2029 "both on its face, and as applied to Defendant" is unconstitutional under the U.S. and Vermont constitutions. Def.'s Mot. to Dismiss at 3. He maintains that a criminal penalty for the breach of a labor contract "amounts to an imposition of involuntary servitude as it compels the individual to complete work or risk jail." *Id.* at 4.

The United States Supreme Court precedents and cases in other states

Defendant posits that Art. 1 of Chapter I of the Vermont Constitution is "functionally identical" to the Thirteenth Amendment to the Unites States Constitution and thus he primarily relies on the Federal Constitution. Accordingly, the court's analysis is focused on the Thirteenth Amendment of the U.S. Constitution.

The parties provided limited analysis and arguments on the Thirteenth Amendment issues. The court has reviewed those cases to determine the depth and applicability of their holdings and analysis.

Since 1865, the United States Constitution prohibits involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted." U.S. Const. amend. XIII; https://www.archives.gov/milestone-documents/13th-amendment.[2] Two years after the ratification of the Thirteenth Amendment, Congress "raised both a shield and a sword against forced labor because of debt" by enacting the Act of March 2, 1867, which provided that "all laws or usages of any state 'by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise,' are null and void, and denounced it as a crime to hold, arrest, or return a person to the condition of peonage." *Pollock v. Williams*, 322 U.S. 4, 8 (1944) (quoting the Act of March 2, 1876, 14 Stat. 546). Thus, while the Thirteenth Amendment was adopted in the context of abolishing slavery, "the term 'involuntary servitude' is not limited to chattel slavery-like conditions." *McGarry v. Pallito*, 687 F.3d 505, 510–11 (2d Cir. 2012). Instead, "[t]he Amendment was intended to prohibit all forms of involuntary labor." *Id.* (citing *Slaughter–House Cases*, 83 U.S. 36 (1872); *Pollock*, 322 U.S. 4 (1944)) (quotations omitted). In some rare circumstances, "[f]orced labor may be consistent with the general basic system of free labor." *Pollock*, 322 U.S. at 17 (noting forced labor as means of punishing crime and society-compelled duty to work on highways as such circumstances); see also *United States v. Kozminski*, 487 U.S. 931, 943–44 (1988) ("Similarly, the Court has recognized that the prohibition against involuntary servitude does not prevent the State or Federal Governments from compelling their citizens, by threat of criminal sanction, to perform certain civic duties.").

A seminal case in the development of the Thirteenth Amendment law in the context of subjecting debtors to prosecution and criminal punishment for failure to perform labor after receiving an advance payment is *Bailey v. State of Alabama*, where the Supreme Court addressed the constitutionality of an Alabama statute which provided, in relevant parts, as follows:

> "Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300 . . . . And the refusal or failure of any person, who enters into such contract, to perform such act or service . . . or refund such money . . . without just cause, shall be prima facie evidence of the intent to injure his employer . . . or defraud him."

219 U.S. 219, 227–28 (1911) (quoting Ala. Code § 4730 (1896), *as amended* in 1907). In that case, the defendant, Mr. Bailey, had entered into a written contract with the Riverside Company, agreeing to work as a farm hand for a monthly sum of $12 for 12 months as of December 30, 1907. *Id.* at 229. He received $15 at the time of the signing of the contract and was to receive $10.75 each month. *Id.* at 230. Mr. Bailey worked under the contract through January and for a few days in February 1908, but then—for reasons that are unclear from the record— "without just cause, and without refunding

[2] The Amendment is "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances." *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

the money, ceased to work." *Id.* Mr. Bailey was detained on the charge of "obtaining $15 under a contract in writing with intent to injure or defraud his employer," and finally found guilty by the jury and sentenced by the court to pay the fine and costs assessed by the jury; if Mr. Bailey defaulted on these payments, he was to serve "hard labor 'for twenty days in lieu of said fine, and one hundred and sixteen days on account of said costs.'" *Id.* at 229–31. Mr. Bailey challenged the validity of the statute and the provision creating the presumption throughout the proceedings.[3] *Id.* On appeal, the Alabama Supreme Court upheld the statute and affirmed the judgment. *Id.* at 231.

The United States Supreme Court discussed at length the legislative history of § 4730 of the Code of Alabama and held that as amended in 1903 and enlarged in 1907, the section was in conflict with the Thirteenth Amendment and the legislation authorized by that Amendment "in so far as it makes the refusal or failure to perform the act or service, without refunding the money . . . prima facie evidence of the commission received of the crime which the section defines." *Id.* at 245. Prior to the amendment in 1903, instead:

> [t]he essential ingredient of the offense was the intent of the accused to injure or defraud. To justify conviction, it was necessary that this intent should be [established] by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.

Id. at 232. The Court recited the Alabama Supreme Court's decision in *Ex parte Riley*, 10 So. 528 (Ala. 1892), where—before the amendments—the Alabama High Court had held:

> [a] mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause. That there was an intent to injure or defraud the employer, both when the contract was entered into and when the accused refused performance, are facts which must be shown by the evidence. As the intent is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof.

Id. at 232–33 (citing *Ex parte Riley*, 10 So. at 529). However, the amendment of 1903 had done away with the requirement for the prosecution to establish intent as described in *Ex parte Riley*. *Id.* at 233. The Court took issue with that "the mere breach of a contract for personal service, coupled with the

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[3] It should be noted that per an Alabama rule of evidence in force at the time, defendant, "for the purpose of rebutting the statutory presumption, [was] not . . . allowed to testify 'as to his uncommunicated motives, purpose, or intention.'" *Bailey*, 219 U.S. at 228 (quoting 161 Ala. 77, 78 (1909)). That factor, the Supreme Court noted in *Taylor v. State of Georgia*, was however "far from controlling and . . . its effect was simply to accentuate the harshness of an otherwise invalid statute." 315 U.S. 25, 31 (1942); see also *Pollock*, 322 U.S. at 25 ("In this Florida case appellee is under neither disability, but is at liberty to offer his sworn word as against presumptions. These distinctions we think are without consequence.").

mere failure to pay a debt which was to be liquidated in the course of such service, [was] made sufficient to warrant a conviction." *Id.* at 234. The Court further pointed out that under the statute, there was no punishment for the alleged fraud if the service was performed or the money refunded. *Id.* at 237. It concluded:

> We cannot escape the conclusion that, although[] the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured.

Id. at 238. The judgment convicting Mr. Bailey was reversed. *Id.* at 245.

The Supreme Court returned to *Bailey* and its reasoning a few decades later in *Taylor v. State of Georgia*, 315 U.S. 25 (1942), and *Pollock v. Williams*, 322 U.S. 4 (1944). The Georgia statute challenged in *Taylor* read as follows:

> [§ 7408] Any person who shall contract with another to perform for him services of any kind with intent to procure money, or other thing of value thereby, and not to perform the service contracted for, to the loss and damage of the hirer; or after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as for a misdemeanor.
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> . . . [§ 7409] Satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced with interest thereon at the time said labor was to be performed, without good and sufficient cause and loss or damage to the hirer, shall be deemed presumptive evidence of the intent referred to in the preceding section.

Taylor, 315 U.S. at 27. The Court found that there was no material distinction between the challenged Georgia statute and the Alabama statute found to be unconstitutional in *Bailey*, and consequently held that these sections of the Georgia Code were "repugnant to the Thirteenth Amendment and to the Act of 1867." 315 U.S. at 29, 31. To the state's contention that establishing "without good and sufficient cause," in the Georgia courts' practice, required proof of fraudulent intent at the time of making the contract and obtaining the money, the Court responded:

> [t]he words "without good and sufficient cause" plainly refer to the failure to perform the services or to return the money advanced. Since the subsequent breach of the contract by the defendant, however capricious or reprehensible, does not establish a fraudulent intent at the initial stage of the transaction, the content which has been assigned to the phrase "without good and sufficient cause" by the Georgia courts is immaterial.

Id. at 30 (citing *Bailey*, 219 U.S. at 233–34).

In *Pollock*, the appellant challenged a similar Florida statute, which made it "a misdemeanor to induce advances with intent to defraud by a promise to perform labor" and further provided that "failure to perform labor for which money has been obtained prima facie evidence of intent to defraud." 322 U.S. at 5. Reversing and remanding a judgment of the Florida Supreme Court, the United States Supreme Court admonished the Florida Legislature: "[o]f course the function of the prima facie evidence section is to make it possible to convict where proof of guilt is lacking. No one questions that we clearly have held that such a presumption is prohibited by the Constitution and the federal statute." *Id.* at 15. Notably, the Court pointed out that language regarding the presumption of intent or prima facie intent makes "little difference in its practical effect." *Id.* at 20; see also *id.* at 22 ("It is a mistake to believe that in dealing with statutes of this type we have held the presumption section to be the only source of invalidity. On the contrary, the substantive section has contributed largely to the conclusion of unconstitutionality of the presumption section."). The Court concluded:

> It is true that in each opinion dealing with statutes of this type this Court has expressly recognized the right of the state to punish fraud, even in matters of this kind, by statutes which do not either in form or in operation lend themselves to sheltering the practice of peonage. Deceit is not put beyond the power of the state because the cheat is a laborer nor because the device for swindling is an agreement to labor. But when the state undertakes to deal with this specialized form of fraud, it must respect the constitutional and statutory command that it may not make failure to labor in discharge of a debt any part of a crime. It may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for.

Id. at 24.

In sum, these precedents "clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion." *Kozminski*, 487 U.S. at 942–944 (noting that "in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction").

The parties have identified the few state cases on point, though they disagree as to their application here. Based on the *Bailey* line of decisions, appellate courts in New York and Wisconsin have held similar statutes, without the presumptive provision, unconstitutional. See *People v. Lavender*, 398 N.E.2d 530 (N.Y. 1979); *State v. Brownson*, 459 N.W.2d 877 (Wis. Ct. App. 1990). In *Lavender*, which both parties cite, the New York Court of Appeals struck down section B32–358.0 of the Administrative Code of the City of New York, which made it a misdemeanor to abandon or willfully fail to perform, without justification, a home improvement contract.[4] 398 N.E.2d 530. There, the defendant, president, and sole stockholder of All-Weather Exteriors, Inc., which employed more than 20 people and whose "gross business" in home improvement work amounted

[4] "Subdivision 1 of section B32-358.0 prohibit[ed] '(a)bandonment or willful failure to perform, without justification, any home improvement contract or project engaged in or undertaken by a contractor.'" *Lavender*, 398 N.E.2d at 531 (footnote omitted).

to more than two million dollars per year, was charged with abandonment without justification. *Id.* at 530–31. A client complained that "though some of the walls, ceilings, heating and sanitary facilities had been ripped out by workmen who appeared sporadically in connection with the contract, it remained essentially incomplete at the time of complaint." *Id.* at 531.[5] The Court of Appeals acknowledged that *Bailey* and its progeny in the Supreme Court more clearly involved peonage; still, "the principles they establish dictate[d] the result." *Id.* at 532. In conclusion, since the challenged Administrative Code provision was not directed "at the fraud involved in receiving money in relation to a contract with the present intention not to perform, but solely at the failure to perform the services necessary to carry out the contract, it violate[d] both the Thirteenth Amendment and [the relevant] sections[6] of the United States Code." *Id.* at 533.

Brownson is another home improvement case. 459 N.W.2d 877 (Wis. Ct. App. 1990). There, defendant had made a written offer to a client to build a specified garage; the client accepted the offer, made a down payment and two further advances, but the garage was never completed. *Id.* at 878. The defendant was found guilty of failure to comply with the terms of a home improvement contract under the Wisconsin Administrative Code § Ag 110.05(9)[7], among other counts. *Id.* On

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[5] In response to Defendant's argument that "a corporate officer may not be held criminally liable solely on the basis of acts performed by other officers or agents of the corporation," the court found that the evidence connected Defendant with the Bowman contract, "not when it was made in May of 1972, but as a result of the Bowmans' complaints in December, 1972." *Id.* at 337–38. "Mrs. Bowman testified that Lavender twice appeared at her home in December, 1972 and promised that the work would be completed but never did so. Her testimony was countered by Lavender's that his offer to complete the work was conditioned upon Mrs. Bowman authorizing him to do so and that eventually she was given $2,500 in cash and $3,000 worth of building materials in settlement, which ended the matter. Since the settlement came after the matter was before the District Attorney's staff and defendant Lavender signed a certificate of completion for the Bowman contract which was false, there clearly was sufficient evidence to present an issue for the trier of fact concerning the Bowman contract . . . ." *Id.* at 338.

[6] 42 U.S.C.A. § 1994 ("The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."); 18 U.S.C.A. § 1581(a) ("Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.").

[7] Section Ag 110.05(9) (July 1981) provided that "[t]he seller shall comply with the terms and conditions of oral or written contracts entered into by the seller." *Brownson*, 459 N.W.2d at 880 n.3.

appeal, the defendant argued "that criminalizing the breach of a labor contract, in the absence of any finding of fraudulent intent, constitute[d] involuntary servitude since an individual [was] forced to complete the work or risk criminal penalties." *Id.* at 880. The state countered that unlike in the Supreme Court precedents dealing with southern states, in *Brownson*, the real purpose of the laws was not to "force poor black laborers into peonage." *Id.* at 881. The Wisconsin Court of Appeals was not persuaded, pointing out that the only limited exceptions to the rule expressed by the Thirteenth Amendment were "when the state compels its citizens to perform civic duties such as military service or jury duty" or those exceptional cases such as "granting parents certain powers over their children or laws preventing sailors from deserting." *Id.* (citing *Kozminski*, 487 U.S. 931 (1988). The Court of Appeals concluded that § Ag 110.05(09), as written at that time, violated the Thirteenth Amendment and ordered Mr. Brownson's sentence and fine for violating that section be vacated. *Id.*

While *Bailey*, *Taylor*, and *Pollock* were decided in the first half of the last century, they are still good law, which *Lavender* and *Brownson* confirm. More recently, the Appellate Division of the New York Supreme Court relied on the rationale in *Bailey*, *Taylor*, and *Pollock* when it prohibited the district attorney from prosecuting, and a judge from presiding over the prosecution of, nurses who had resigned their positions at a private nursing home for the misdemeanor offenses of conspiracy in the sixth degree, endangering the welfare of a child, and endangering the welfare of a physically disabled person. *Vinluan v. Doyle*, 60 A.D.3d 237 (N.Y. App. Div. 2009), *as amended* (July 21, 2009). The court there found that while

> the Penal Law provisions relating to endangerment of children and the physically disabled . . . [did] not on their face infringe upon Thirteenth Amendment rights by making the failure to perform labor or services an element of a crime . . . the indictment handed down against the petitioners explicitly ma[de] the nurses' conduct in resigning their positions a component of each of the crimes charged. Thus, the indictment place[d] the nurses in the position of being required to remain in Sentosa's service after submitting their resignations, even if only for a relatively brief period of notice, or being subject to criminal sanction.

Id. at 247–48.

Statutory interpretation of 13 V.S.A. § 2029(b)(1)

i. Principles of statutory construction

When a litigant argues that a statute is unconstitutional on its face, they contend that "no set of circumstances exists under which a statute or regulation could be valid." *Ferry v. City of Montpelier*, 2023 VT 4, ¶ 26, 217 Vt. 450 (citing *In re Mountain Top Inn & Resort*, 2020 VT 57, 212 Vt. 554) (internal quotation marks omitted). The burden of the proponent of the constitutional challenge is

"very weighty," as "[s]tatutes are presumed constitutional and reasonable." *A.B. v. S.U.*, 2023 VT 32, ¶ 8, 218 Vt. 123 (citing *Badgley v. Walton*, 2010 VT 68, 188 Vt. 367).

"The touchstone of statutory interpretation is legislative intent." *Burnett v. Home Improvement Co. of Vermont*, 2024 VT 41, ¶ 9 (citing *Doyle v. City of Burlington Police Dep't*, 2019 VT 66, 211 Vt. 10). "If legislative intent is clear from the language, we enforce the statute 'according to its terms without resorting to statutory construction.'" *State v. LeBlanc*, 171 Vt. 88, 91 (2000) (quoting *Tarrant v. Department of Taxes*, 169 Vt. 189 (1999)). As particularly relevant here, when the court construes a criminal statute,

> we presume that the Legislature knows how to incorporate a scienter element. The corollary to this assertion is that when the Legislature expressly includes an element of scienter, we presume that it is aware of its effect on the other elements of the statute.

State v. Richland, 2015 VT 126, ¶ 8, 200 Vt. 401 (citations omitted). When, instead, the statute is "silent as to the *mens rea* required for a particular offense, this Court will not simply assume that the statute creates a strict liability offense, but will try to determine the intent of the Legislature." *State v. Stanislaw*, 153 Vt. 517, 522 (1990) (citing *State v. Francis*, 151 Vt. 296 (1989)). The courts are cautioned against "interpreting statutes as eliminating *mens rea* where doing so criminalizes a broad range of innocent conduct." *State v. Witham*, 2016 VT 51, ¶ 16, 202 Vt. 97 (citing *In re Welfare of C.R.M.*, 611 N.W.2d 802 (Minn. 2000)); see also *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."). Finally, "[a]s a general rule, we interpret criminal statutes in the defendant's favor, but we 'must avoid interpretations which defeat the purpose of the statute.'" *Witham*, 2016 VT 51, ¶ 10 (citing *State v. Roy*, 151 Vt. 17 (1989), *partially overruled on other grounds by State v. Brillon*, 2008 VT 35, 183 Vt. 475).

In determining the Legislature's intent where the plain meaning of the words of the statute is not unambiguous, the court looks "beyond the language of a particular section standing alone to the whole statute, the subject matter, its effects and consequences, and the reason and spirit of the law." *State v. Thompson*, 174 Vt. 172, 175 (2002) (citing *In re Wal*Mart Stores, Inc.*, 167 Vt. 75 (1997)). In other words, the court "must examine and consider fairly, not just isolated sentences or phrases, but the whole and every part of the statute, together with other statutes standing in pari materia with it, as parts of a unified statutory system." *Burnett*, 2024 VT 41, ¶ 9 (cleaned up) (citing *Brown v. W.T. Martin Plumbing & Heating, Inc.*, 2013 VT 38, 194 Vt. 12); see also *State v. Davis*, 2020 VT 20, ¶ 47, 211 Vt. 624 (holding that when a section is one component of a broader statutory scheme, the court must consider the statutory scheme as a whole). Nevertheless, "[i]t is inappropriate 'to expand a statute by implication, that is, by reading into it something which is not there, unless it is necessary in order to make it effective.'" *State v. Fuller*, 163 Vt. 523, 527–28 (1995) (quoting *State v. Jacobs*, 144 Vt. 70 (1984)). Moreover, "where the Legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the Legislature did so advisedly." *Witham*, 2016 VT 51, ¶ 11 (citing *State v. Fontaine*, 2014 VT 64, 196 Vt. 579).

The court acknowledges that when the Legislature amends a statute, it intends to change its meaning. *State v. Richland*, 2015 VT 126, ¶ 18, 200 Vt. 401 (citing *Doe v. Vt. Office of Health Access*,

2012 VT 15A, 191 Vt. 517); see also *State v. Brooks*, 2004 VT 88, ¶ 11, 177 Vt. 161 (citations omitted) ("an amendment to the statute is intended to change the law, unless the circumstances clearly show that only a clarification was intended"). At the same time, "[i]t is a well–established rule that a statutory provision should be construed so as, if possible, to make it consistent with the Constitution and the paramount law." *Arthur A. Bishop & Co. v. Thompson*, 99 Vt. 17, 130 A. 701, 704 (1925) (citing *Cady v. Lang*, 95 Vt. 287 (1921); *State v. Clement National Bank*, 84 Vt. 167 (1911)).

ii. Application of statutory construction principles to *13 V.S.A. § 2029(b)(1)*

Defendant argues that the version of the Vermont statute criminalizing home improvement fraud (as amended in 2015) violates the Thirteenth Amendment by imposing "involuntary servitude, peonage, and criminal punishment for failure to perform labor." Def.'s Mot. to Dismiss at 3.

The statute in effect at the time of the incidents in these cases provided in relevant part:

> [a] person commits the offense of home improvement fraud when he or she enters into a contract or agreement, written or oral, for $500.00 or more, with an owner for home improvement, or into several contracts or agreements for $2,500.00 or more in the aggregate, with more than one owner for home improvement, and he or she knowingly:
>
> (1)(A) fails to perform the contract or agreement, in whole or in part; and
> (B) when the owner requests performance or a refund of payment made, the person fails to either:
>
> > (i) refund the payment; or
> > (ii) make and comply with a definite plan for completion of the work that is agreed to by the owner . . . .

13 V.S.A. § 2029(b)(1).[8]

Prior to the 2015 amendments, the statute read quite differently:

> (b) A person commits the offense of home improvement fraud when he or she *knowingly* enters into a contract or agreement, written or oral, for $500.00 or more, with an owner for home improvement, or into several contracts or agreements for $2,500.00 or more in the aggregate, with more than one owner for home improvement, and he or she *knowingly*:
>
> > (1) *promises performance that he or she does not intend to perform or knows will not be performed, in whole or in part*;
> > . . . .
>
> (c) It shall be a permissive inference that the person acted knowingly under subdivision (b)(1) of this section if the person fails to perform the contract or

[8] The statute was recently amended again. 2023, No. 153 (Adj. Sess.), § 1. The court addresses here the version in effect at the time of the underlying events in 2022–2023.

> agreement and, when the owner requests performance of the contract or agreement or a refund of payments made, the person fails to:
>
> > (1) return the payments or deliver the materials or make and comply with a reasonable written repayment plan for the return of the payments; or
> > (2) make and comply with a reasonable written plan for completion of the contract or agreement.

2003, No. 51, § 1 (emphasis added).

In *State v. Rounds*, the Court emphasized that, under the pre-2015 Amendments version of the statute, "[t]he central component of the home-improvement-fraud charge was the mental element: that defendant entered into the contract and knowingly promised performance he did not intend to provide." 2011 VT 39, ¶ 33, 189 Vt. 447. After *Rounds*, however, the Legislature changed the language of the law to remove the mental element of "knowingly" entering into contract, and the element of the promises of future performance that the promisor did not intend to perform or knew would not be performed. The Act's summary shows this was a specifically intended change in the statute. See 2015, No. 153, § 1. The official summary of the amending Act states:

> This act amends the criminal home improvement fraud statute to clarify that a contractor's failure to perform work upon request of the homeowner, together with the contractor's failure to refund the homeowner's money or make a plan for completion of the work is a criminal violation covered by this statute.

Id. (Act Summary).

The deletion of the "knowingly" term in § 2029(b) means under the version of the statute that applies in these cases, no showing of knowing intent to not perform the contract at the contract inception is required to convict the contractor. It cannot be said that the lack of a knowing intent element at the time the contract is entered was the result of omission by the legislature. Under *Richland, supr*a, when the Legislature amends a statute, it intends to change its meaning. The 2015 Act 153 Act Summary leaves no doubt on that score. That Act Summary shows that under the 2015 amendments, the legislature created an amended crime not premised on a showing of intent at the contract's (or contracts') inception. Instead: "a contractor's failure to perform work upon request of the homeowner, together with the contractor's failure to refund the homeowner's money or make a plan for completion of the work is a criminal violation."

Under the operative statute the "knowingly" element only relates to the contractor's actions and mental state later, after contract formation and after the contract is not subsequently performed. The "knowingly" provision or element first appears in the post-2105 amended statute to require the "knowingly" mental state under the § 2029(b)(1)(A) and (B) provisions. These provisions apply to the contractor's mental state upon a later knowing failure to later perform the contract. When the owner then requests performance or refund and the contractor knowingly fails to either refund the payment or make and comply with a definite plan for completion of the work agreed to by the owner - a conviction can result. This inclusion of the "knowingly" element just in the latter part of the revised statute, but not the prior portion (as to contract formation), also supports the presumption the legislature did so advisedly. See *Witham*, 2016 VT 51, ¶ 11.

Thus under the post-2015 amendment version of the statute the contractor, who knowingly fails to perform the contract in whole or part, faces criminal liability (regardless of the intent to perform at the time of contract inception) under certain post-contract circumstances.

Turning to the "knowingly" element at this phase of the incomplete contract: "[a] person acts 'knowingly' when 'he is aware that it is practically certain that his conduct will cause such a result.'" *State v. Jackowski*, 2006 VT 119, ¶ 5, 181 Vt. 73 (quoting Model Penal Code § 2.02(2)(b)(ii)); *State v. Masic*, 2021 VT 56, ¶ 17, 215 Vt. 235. "Knowingly," however, "does not necessarily have any reference to a culpable state of mind or to knowledge of the law." *Bryan v. United States*, 524 U.S. 184, 192 (1998); *Witham*, 2016 VT 51, ¶ 31 (citing *Bryan*, 524 U.S. at 192) (Robinson, J., concurring).

The contractor who knowingly fails to perform the contract after the owner demands refund or performance becomes criminally liable if the contractor **either** fails to pay a refund or make and comply with a definite plan for completion of the work that is agreed to by the owner. For contractors who are unable to pay a refund, the statute requires them to perform further requested services and labor for their customer as a route to avoid criminal liability.

As noted above *State v. Rounds*, the Court emphasized that, in the pre-2015 amendment version of the statute, "[t]he central component of the home-improvement-fraud charge was the mental element: that defendant entered into the contract and knowingly promised performance he did not intend to provide." 2011 VT 39, ¶ 33. In effect, the current statute calls for strict liability for non-completion of the contract if the statutorily described knowing failure to make refund or perform a under a work completion plan occurs after the owner made a demand for refund or work completion.

In the *Bailey*, *Taylor*, and *Pollock* cases, the U.S. Supreme Court, in its Thirteenth Amendment analysis, noted the view that to qualify as criminal fraud under the statutes considered in those cases, the intent to defraud must exist at the time the contract was entered into. See *Bailey*, 219 U.S. at 232–33 (holding that "[t]he criminal feature of the transaction is wanting unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause."); *Taylor*, 315 U.S. at 30 (citing *Bailey*, 219 U.S. at 233–34) (stating that "the subsequent breach of the contract by the defendant, however capricious or reprehensible, does not establish a fraudulent intent at the initial stage of the transaction"); *Pollock*, 322 U.S. at 21 (noting the Florida statutes criminalizing failure to perform promised labor after receiving payment or property either penalize promissory representations which relate to future action or conduct, or they penalize a misrepresentation of the present intent or state of mind of the laborer). In those cases, (and apparently under the former pre-2015 amendment version of the Vermont statute), the presumptions of original intent to defraud the customer could be found upon the contractor's later failure to perform the contract. Those statutory schemes which included the requirement that the contractor perform labor, or have the failure to do so allow for a presumption of fraud and conviction, were found to conflict with and violated the Thirteenth Amendment.

The Thirteenth Amendment proscription against involuntary servitude extends beyond the use of statutory provisions that allow for a presumption of fraud at contract inception by the defendant's failure, among other things, to perform the contracted services In *Bailey,* the Court recognized that states may validly prescribe and adopt evidentiary presumptions; and so long as the

inferences are not purely arbitrary, the presumption provisions do not violate due process of law. 219 U.S. 238–39. However, the *Bailey* Court noted that where the conduct or fact, the existence of which forms the basis of the presumption, also falls within the scope of another provision of the Federal Constitution

> a further question arises . . . . The power to create presumptions is not a means to escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe.

Id. at 239. After reviewing that criminal sanctions violate the Thirteenth Amendment when premised on the mere failure or refusal to provide labor, absent payment of the debt, the *Bailey* Court stated that Alabama could not indirectly accomplish that result by creating a statutory presumption, which, upon proof of no other fact, exposed the person to conviction and punishment. 219 U.S. at 244. Under this reasoning, use of other criminal law provisions, seeking to coerce labor for services upon pain of possible conviction, similarly may intrude on Thirteenth Amendment restrictions in ways that the state lacks the power to proscribe.

In *Pollock,* the Court again recognized that states may validly prescribe and adopt non-arbitrary evidentiary presumptions that do not violate due process of law, but in doing so need to not intrude upon prohibited Thirteenth Amendment principles while enforcing services contracts for alleged fraud. 322 U.S. at 22-24. Reviewing the *Bailey* and *Taylor* decisions, the *Pollock* Court observed,

> [w]here in the same substantive context the State threatens by statute to convict on a presumption, its inherent coercive power is such that we are constrained to hold that it is equally useful in attempts to enforce involuntary service in discharge of a debt, and the whole is invalid.

Id. at 23–24. The *Pollock* Court recognized the right of states to punish fraud in cases involving fraud at the inception of the contract for services "by statutes which do not in form or operation lend themselves to sheltering the practice of peonage". *Id.* at 24. As previously noted the *Pollock* Court continued:

> Deceit is not put beyond the power of the state because the cheat is a laborer nor because the device for swindling is an agreement to labor. But when the state undertakes to deal with this specialized form of fraud, it must respect the constitutional and statutory command that it **may not make failure to labor in discharge of a debt any part of a crime.** It may not directly **or indirectly** command involuntary servitude, even if it was voluntarily contracted for.

322 U.S. at 24 (bolding added).

The post-2015 amended version of § 2029(b)(1) creates strict criminal liability for a contractor, regardless of his or her actual intent at the contract conception, who upon contract non-completion, and following owner demand for payment or contract completion knowingly does not pay a refund or engage in a work completion plan at the owner's approval. In creating this post-2015 Amendment version of the statute, the legislature incorporated a statutory provision that

substantively makes the failure to provide labor in discharge of the debt "part of the crime". The contractor's refusal or failure to agree to or participate in such a requested completion plan of services exposes the contractor to criminal liability. Use of this criminal law structure creates and serves as a State coercive inducement to require such labor in discharge of the incomplete contract to evade criminal exposure for all contractors, not just those who cannot provide a refund.[9] Like the invalidated presumption in *Bailey*, the inclusion of this kind of provision in the criminal statute supports the conclusion that

> althought [sic] the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured.

219 U.S. at 238. Similar to the case in *Taylor,* the Vermont provision has the "natural consequence" that a contractor who received an advance on a contract for services which he is unable to repay is "by threat of penal sanction" pressured to resume the work until the debt has been discharged. With no needed showing of knowing fraud at the contract inception, the Vermont statute's substantive terms indirectly command or coerce involuntary servitude if the defendant otherwise fails to provide additional labor in discharge of the debt when unable to pay a refund.

iii.

Based on the foregoing, the court holds that the post-2015 Amendment version of 13 V.S.A. § 2029(b)(1) facially violates the Thirteen Amendment's prohibition against involuntary servitude. The court concludes that 13 V.S.A. § 2029(b)(1), as applied in these cases, and interpreted under case law, violates the Thirteenth Amendment of the United States Constitution.

The Motions to dismiss these cases are GRANTED.

Electronically Signed on 3/24/2025 6:45 AM Pursuant to V.R.E.F. 9(d)

Michael J. Harris
Superior Court Judge

[9] In *Bailey* and *Taylor* the statutes were found to be unconstitutional where the presumption of intent could be defeated by giving a refund OR performing the remaining portion of the act or service. The fact the charged party might provide a refund and not be subject to the threat of coerced labor did not prevent invalidation of the statutes. Similarly the substantive provisions of the Vermont statute may prevent a charged party from being convicted in some cases if the contractor can provide a refund and avoid being required to perform labor under the owner-requested work completion plan. Like the statutes considered in *Bailey* and *Taylor*, Vermont's inclusion of such a provision - coercing additional labor to evade a conviction - is constitutionally infirm.