IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

BARBARA TULOP a/k/a BARBARA M. TULOP
and SHIRLEY TULOP,
Appellants,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2021 Palau 9
Criminal Appeal No. 20-002
Appeal from Criminal Case No. 20-084

Argued: January 22, 2021
Decided: March 11, 2021

Counsel for Appellants	C. Quay Polloi
Counsel for Appellee	April D. Cripps, Special Prosecutor, and Jacob Gordin, Assistant Special Prosecutor

BEFORE: GREGORY DOLIN, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

OPINION

DOLIN, Associate Justice:

[¶ 1] Barbara Tulop is a member of the Republic of Palau's Foreign Investment Board and, as a public official, is subject to the provisions of the Code of Ethics, 33 PNC §§ 601-614. Like other citizens and residents of the Republic, she and her children must also comply with the relevant provisions of the Palauan tax code. The Office of the Special Prosecutor ("OSP") alleged

that Barbara and Shirley Tulop (together, "the Tulops")[1] have failed to meet their legal obligations and obtained convictions against them on multiple counts of violations of the Unified Tax Act, 40 PNC §§ 1204 and 1501, as well as a single count of violation of the Code of Ethics, 33 PNC § 605(c)(1), (d).[2]

[¶ 2] The Tulops are appealing their convictions as well as the sentences imposed by the Trial Division. The Tulops argue that the OSP initiated the prosecution based on an improper motive, and that the OSP unlawfully withheld from them information necessary to prove this assertion and rebut the prosecution's case. The Tulops also argue that their "due process" rights were violated when the OSP prosecuted them without first giving them an opportunity to correct their tax filings. According to the Tulops, this alleged prosecutorial misconduct must be remedied by quashing all of the convictions. Next, Barbara Tulop argues that the Trial Division erred in applying the Code of Ethics to certain of her activities that she contends are not covered by the relevant statutory provisions. She further argues that the prosecution failed to prove she had the requisite mens rea to support her conviction. Finally, Barbara Tulop asserts that the fine imposed by the Trial Division for the violation of the Code of Ethics is so excessive as to violate the strictures of Article IV, Section 10 of the Palau Constitution.

[¶ 3] For the reasons set forth below, we **AFFIRM IN PART, REVERSE IN PART**, **VACATE IN PART, AND REMAND**.

BACKGROUND

[¶ 4] Most of the facts underlying this appeal are undisputed.[3] Barbara Tulop maintained two bank accounts in the Bank of Hawaii with the combined value of just over $124,000, and another bank account in BankPacific, which

---

[1] Shirley and Gerald Tulop are the children of Barbara Tulop. Gerald Tulop pleaded guilty and is not a party to the present appeal.

[2] Barbara Tulop was also charged with "Misconduct in Public Office" in violation of 17 PNC §§ 3918 and 4204. She was acquitted on this charge. *See* Verdict at 2 (July 28, 2020).

[3] Defendants-Appellants heavily rely on the Trial Division proceedings to support their Opening Brief. Parties generally may dispense with a transcript, but in cases such as this one, when citations to the Trial Division proceedings are an essential part of the argument in a party's brief, it is strongly recommended to order a transcript. This will ease the cross-referencing to such proceedings as well as assist the Court in its review of the party's arguments.

had a balance of just over $1,200. This information was not disclosed by Barbara Tulop on her Financial Disclosure Statement (Form EC-1), which is a required filing of all government officials. *See* 33 PNC § 605(b). Defendants-Appellants hold a lease to a certain parcel of land in Koror State and derive income therefrom through subleasing that land to Stefano Tansella, who in turn operates a business ("L'Amarena Gelato Shop") on that land.

[¶ 5] On January 7, 2019, Tansella deposited $10,000 into Barbara Tulop's bank account as a rental payment under the lease for the year 2019. However, at the time, Barbara Tulop was engaged in a contract dispute with Tansella. Once she realized that Tansella deposited the money directly into her banking account despite the ongoing dispute, she refused to accept payment and, on February 5, 2019, redeposited the $10,000 payment into Tansella's account.[4] Barbara Tulop acknowledges that she did not report the $10,000 payment, which sat in her account for about a month, either on her EC-1 form or on her tax declaration.

[¶ 6] Finally, the parties do not appear to dispute that Defendants-Appellants' tax forms for the relevant years were incorrect or incomplete and that therefore the taxes for those years were underpaid.

[¶ 7] On May 21, 2020, the OSP brought ten charges against the Tulops alleging various violations of the Unified Tax Act and the Code of Ethics. After a bench trial, the Trial Division entered a judgment of conviction for the following offenses (with Counts Two and Three being applicable only to Barbara Tulop):

A. "[F]ailure to file proper disclosure of assets including earned income from rental payments on a sublease and assets in bank accounts as charged," Verdict at 2, in violation of the Code of Ethics, 33 PNC § 605(c)(1) (Count Two);[5]

[4] The dispute between Tansella and Barbara Tulop was eventually settled.

[5] Despite the Trial Division's allusion to multiple "rental payments," the charges brought by the OSP only reference the "$10,000.00 earned on a rental payment . . . on or between the dates of January 1, 2019, and December 31, 2019." Information at 4 (May 21, 2020). This decision is premised on an understanding that Count Two relates only to the $10,000 undisclosed rental payment in 2019 and does not include the 2020 rental payment that is charged under Count Five.

B. "[F]ailure to pay taxes on income for the years 2018, 2019 and 2020," *id.*, each in violation of the Unified Tax Act, 40 PNC § 1204 (Counts Three through Five); and

C. "[E]ngaging in business without a valid business license," *id.*, in each of the years from 2016 through 2020, all in violation of the Unified Tax Act, 40 PNC § 1501 (Counts Six through Ten).

[¶ 8] On September 3, 2020, the Trial Division pronounced the following sentence:

A. For the conviction on Count Two, Barbara Tulop was sentenced to a monetary fine of $67,602.08, representing half the "income" not disclosed in the financial statements from the 2019 Payment and the Bank of Hawaii and Bank Pacific accounts (the "Bank Accounts"), as well as one year of supervised probation;

B. For the convictions on Counts Three through Five, each Defendant was sentenced to one year of supervised probation;[6] and

C. For the convictions on Counts Six through Ten, each Defendant was sentenced to a monetary fine of $500 for each violation, for a total of $2,500, and one year of probation.[7]

[¶ 9] According to Defendants-Appellants, the investigation into their activities stems from the aforementioned dispute that Barbara Tulop had with Tansella. Defendants-Appellants allege that the Special Prosecutor is a personal friend of Tansella and that the OSP brought this case against the Tulops in retaliation for Barbara Tulop's actions vis-à-vis Tansella during their dispute. Defendants-Appellants also allege that during the pendency of this case, the OSP concealed the identity of potential witnesses who could testify as to this "true reason" for the investigation and prosecution of Defendants-Appellants.

---

[6] The Trial Division sentenced Shirley Tulop to probation on "Counts Three to Five," even though she was never charged or convicted on Count Three.

[7] The sentences of probation were ordered to run concurrently. *See* Sentencing Order at 5 (Sept. 3, 2020).

[¶ 10] On January 19, 2021, Defendants-Appellants filed a "motion for stay of execution of sentence pending appeal," which we granted on January 25, 2021.

STANDARD OF REVIEW

[¶ 11] We review the Trial Division's findings of fact for clear error and questions of law, including questions of statutory interpretation, de novo. *See Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 4; *Isechal v. ROP*, 15 ROP 78, 79 (2008). Questions of sufficiency of the evidence to support a criminal conviction are subject to clear error review, and we view "the evidence adduced at trial 'in the light most favorable to the prosecution.'" *Xiao v. ROP*, 2020 Palau 4 ¶ 8 (quoting *Wasisang v. ROP*, 19 ROP 87, 90 (2012)). "If the evidence presented was sufficient for a rational fact-finder to conclude that the appellant was guilty beyond a reasonable doubt as to every element of the crime, we will affirm." *Wasisang*, 19 ROP at 90 (internal quotation marks and alterations omitted).

DISCUSSION

[¶ 12] Defendants-Appellants present seven assignments of error on appeal, some of which are intertwined. One argument concerns the constitutionality of the prosecution in the first place, while two others consider Defendants-Appellants' right to examine witnesses and receive information from the Government that they contend would shed light on the OSP's "true motives." Defendants-Appellants also argue that because the usual practice in Palau when a tax declaration is erroneous is to let the taxpayer file an amended form and pay the amount due, a prosecution without affording them this opportunity violates their right to due process. Finally, three arguments concern the statutory basis for Barbara Tulop's conviction on Count Two and the constitutionality of the sentence imposed as a result of that conviction.

I.

[¶ 13] We begin by addressing Defendants-Appellants' challenge to their prosecution on the basis that it violates the "Fair Treatment" Clause of the Palau Constitution. *See* Palau Const. art. IV, § 5. Our Constitution protects citizens against being "treated unfairly in legislative or executive

investigations." *Id.* To date, this Court has not opined on the meaning of this clause, which has no precise analogue in the U.S. Constitution. Though here, we have no need to define the full scope of this clause with precision, we have no trouble concluding that the clause prohibits, at least in part, the Republic from bringing a prosecution it would not otherwise have brought but for personal animus on the part of the prosecutor toward the defendant. *See United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2011) (citing *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982)) (describing the standard for assessing whether a prosecution is impermissibly vindictive). In this case, Defendants-Appellants claim that the prosecutor investigated and charged them because of her friendship with Tansella, who had been involved in a dispute with Defendants-Appellants.[8]

[¶ 14] A much more difficult question, however, is what the appropriate remedy is when "the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). We have never before addressed this issue. Nor have the United States courts (to which we often look as persuasive authority) settled on an approach to this question. *See id.* at 461 n.2 ("We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race."); *Att'y Gen. of U.S. v. Irish People, Inc*., 684 F.2d 928, 949 (D.C. Cir. 1982) ("[D]ismissal may be an inappropriate remedy" even when prosecution was "improperly motivated."). *But see In re Aiken Cty.*, 725 F.3d 255, 264 n.7 (D.C. Cir. 2013) (stating that, "[i]f the Executive selectively prosecutes someone based on impermissible considerations, the equal protection remedy is to dismiss the prosecution"); *United States v. Vazquez*, 145 F.3d 74, 82 n.5 (2d Cir. 1998) (stating that "[s]elective prosecution claims usually come up in litigation as affirmative defenses to prosecution, and the remedy is generally dismissal of the suit that was selectively prosecuted"). Fortunately, we are able

[8] Defendants-Appellants' claim is most akin to a claim of vindictive prosecution. *See United States v. Jarrett*, 447 F.3d 520, 525 (7th Cir. 2006) (defining "prosecutorial vindictiveness" as "prosecutorial conduct . . . motivated by some form of prosecutorial animus, such as a personal stake in the outcome of the case or an attempt to seek self-vindication") (internal quotation marks omitted).

to leave this thorny question for resolution in a later, and more appropriate, case because the issue is not properly before us.

[¶ 15] Generally speaking, "[d]efenses and objections based on defects in the institution of the prosecution . . . must be raised prior to trial." ROP R. Crim. P. 12(b)(1). This includes any challenge to the prosecution on the basis that it was brought for improper purposes. *See United States v. Taylor*, 562 F.2d 1345, 1356 (2d Cir. 1977) ("Under Fed. R. Crim. P. 12(b)(1), the defense based on 'defects in the institution of the prosecution' must be raised before trial . . . ."); *United States v. Oaks*, 508 F.2d 1403, 1404 (9th Cir. 1974) (same). It is undisputed that Defendants-Appellants did not raise the issue in a pre-trial motion. Therefore, they have waived it. *See An Guiling v. ROP*, 11 ROP 132, 134 (2004).

[¶ 16] All is not lost to the Tulops, however. When evidence of the prosecutor's improper conduct only comes to light after the trial court proceedings, a defendant will not be precluded from seeking a judicial remedy in a habeas proceeding. *See Taylor v. United States*, 798 F.2d 271, 273-74 (7th Cir. 1986). To the extent the Tulops can show "adequate cause" for their failure to bring their claim of improperly motivated prosecution in a pre-trial motion, they can file such a petition. *See id*. at 273.[9] In contrast, a direct appeal is not the right vehicle to seek relief where a claim of improper prosecutorial motivation was not timely raised before the trial court, and this case is a perfect illustration why that is.

[¶ 17] The current record does not permit us to review the Tulops' allegations that their prosecution was improperly motivated. Although the Tulops raise various allegations about the nature of the relationship between Tansella and the Special Prosecutor, a business dispute between him and Barbara Tulop, and the primary catalyst for investigations launched by the OSP against the Tulops, none of these allegations have been tested in adversarial

[9] We offer no opinion on whether the Tulops will be able to clear the preliminary "cause" bar or whether they will be able to ultimately prove an improperly motivated prosecution. Nor do we opine on whether, assuming, *arguendo*, that they will be able to clear those hurdles, dismissal of the charges is an appropriate remedy. For now, it suffices to say that though we are declining to address the merits of Defendants-Appellants' Fair Treatment Clause argument, we are not leaving them without a remedy to the extent they have a viable challenge to their prosecution.

proceedings. The Trial Division was never given an opportunity to evaluate the veracity of the allegations or consider whether (even if true) the allegations require wholesale dismissal of the charges against the Tulops. Simply put, we have nothing to review on appeal. As we do not have fact-finding authority (or ability), this is not the right forum to introduce new evidence on this matter. *See Joseph v. Ngerkodolang Lineage*, 8 ROP Intrm. 256, 256 (2000) ("It is for the trial court, not the Appellate Division, to inquire into critical factual issues."); *see also Pedro v. Carlos*, 9 ROP 101, 103 (2002) (noting that it is a "well-established principle that the Appellate Division cannot consider new evidence, but is confined to the record below"). For this reason, we decline to review this issue.

II.

[¶ 18] Defendants-Appellants argue that their constitutional right to a "full opportunity to examine all witnesses," Palau Const. art. IV, § 7, was violated when the Special Prosecutor objected to certain lines of inquiry at trial. Specifically, they claim that they were unfairly prevented from asking a witness to identify who was present at an unrelated robbery incident at L'Amarena Gelato Shop. The Tulops' argument is not crafted with precision, leaving us unsure whether they meant to argue that the identity of the additional witnesses would have been helpful as to their vindictive prosecution claim or would have helped undermine the OSP's case-in-chief. But whether they meant to argue the former point, the latter, or both, ultimately their argument fails.[10]

[¶ 19] Our Court has had relatively little to say about a defendant's right "to examine all witnesses." However, we have no trouble concluding that, regardless of its exact scope, the right is subject to the ordinary stricture that evidence presented at trial must be relevant. *See* ROP R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence *to the determination of the action* more probable or less probable than it would be without the evidence.") (emphasis added); *id.* 402 ("Evidence which is not relevant is not admissible."). To the extent the Tulops are arguing that the witnesses would have bolstered their claim of

[10] We assume, without deciding, that Defendants-Appellants preserved this assignment of error.

vindictive prosecution, such testimony would be irrelevant to the determination of their guilt or innocence. And to the extent they are suggesting that the witnesses would have somehow undermined the OSP's case-in-chief, they have failed to demonstrate how such information would help rebut the Government's case, which was "largely comprised of public records and bank records, the validity of which were not challenged by Defendant[s] at trial." *See* Resp. Br. at 19. Accordingly, Defendants-Appellants' constitutional right to examine witnesses was not infringed.

III.

[¶ 20] Defendants-Appellants further argue that the OSP violated their rights under *Brady v. Maryland*, 373 U.S. 83 (1963),[11] by failing to disclose "the full extent of the apparent relationship between the S[pecial] P[rosecutor] and Tansella." Opening Br. at 23.[12] Assuming that there was additional information about the "full extent" of the prosecutor's relationship with Tansella that was not disclosed, the Tulops' argument lacks merit.

[¶ 21] It is well established that "[t]here are three components of a true *Brady* violation: The evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the [prosecution], either willfully or inadvertently; and prejudice must have ensued." *Buck v. ROP*, 2018 Palau 27 ¶ 12 (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). As to the first component, we have explained that there is only a *Brady* violation if the allegedly suppressed

[11] We have previously held that the *Brady* doctrine is applicable in Palau. *See Ngiraked v. ROP*, 5 ROP Intrm. 159, 172 (1996) (holding that "the *Brady* rule applies to the due process clause of the Palau Constitution").

[12] This argument suffers from the same lack of clarity as the previous one. *See ante* ¶ 18. To the extent the Tulops are arguing that the allegedly withheld evidence would have been relevant solely to their vindictive prosecution claim, such evidence is not subject to the *Brady* requirements because evidence "relevant to a selective enforcement claim" is not "ordinarily . . . the sort of discovery material available to a criminal defendant under . . . *Brady* and its progeny." *United States v. Washington*, 869 F.3d 193, 221 (3rd Cir. 2017); *see also Armstrong*, 517 U.S. at 463 (holding that evidence supporting a selective prosecution claim is not subject to criminal procedure discovery rules because the claim "is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution"). To the extent that they argue that the evidence would have helped to rebut the Government's case, they, as discussed below, have failed to show why that is so.

evidence "is 'material to *guilt or punishment*.'" *Id.* ¶ 14 (quoting *Rengiil v. ROP*, 20 ROP 141, 144 (2013)) (emphasis added); *see also Brady*, 373 U.S. at 87 (stating that only "evidence [that] is material either to guilt or to punishment" must be turned over the defendant). In assessing whether there was prejudice from a non-disclosure, "we must ask whether there is a reasonable probability that the result of the trial would have been different if the prosecution had disclosed" the relevant information. *Buck*, 2018 Palau 27 ¶ 16. Defendants-Appellants' claim comes up short both as to the first and the third components. They have provided no reason to believe that further disclosure of the relationship between the prosecutor and Tansella was material to the question of their guilt, nor have they provided any reason to believe that further disclosure would have changed "the result of the trial." *Id.* There was no *Brady* violation.[13]

IV.

[¶ 22] We next address Defendants-Appellants' argument that the prosecution was flawed as a result of the OSP's failure to give the Tulops an opportunity to correct their tax filing and remit proper payment, which the Tulops allege is the Bureau of Revenue and Taxation's general practice. *See* Opening Br. at 27 (citing testimony of the Bureau of Revenue and Taxation's Acting Director Rhinehart Silas). The Tulops argue that "when . . . different executive agencies are sending mixed signals to the public . . . convictions should be overturned to encourage greater attention to due process rights." *Id.* at 28-29.

[¶ 23] We disagree that the prosecution of Defendants-Appellants even in the face of the Bureau of Revenue and Taxation's alleged "general practice" violated the Tulops' due process rights. As the Tulops themselves acknowledge, nothing in our laws or the Constitution prohibits prosecutors from "unilaterally fil[ing] criminal charges for tax code violations." *Id.* at 28. We agree that "prosecutors need not warn a burglar before filing charges

[13] Evidence of the Special Prosecutor's alleged personal relationship with Tansella, being irrelevant to the guilt or innocence of either Defendant, would not have been admissible in any event. *See* ROP R. Evid. 401, 402. This is not to say that such evidence may not be relevant in habeas proceedings alleging improper prosecutorial motivation should the Tulops be able to establish "adequate cause" for not bringing that claim earlier and sufficient evidence in support of the claim for the Trial Division to grant an evidentiary hearing on the matter.

against him." *Id.* Although we have previously held that "a prerequisite to a procedural due process analysis is to determine whether the government actor followed its internal policies in depriving the litigant of life, liberty or property," *April v. Palau Pub. Utils. Corp*., 17 ROP 247, 251 n.1 (2010), nothing in that opinion suggests that policies and procedures of the Bureau of Revenue and Taxation must, as a matter of constitutional law, bind a separate prosecutorial agency. Defendants-Appellants do not claim that filing criminal charges was against the OSP's internal policies.[14] On the record before us, we conclude that the OSP's decision to prosecute Defendants-Appellants for violations of the Unified Tax Act did not violate their due process rights guaranteed by Article IV, Section 6 of the Palau Constitution.

V.

[¶ 24] Having resolved Defendants-Appellants first four assignments of error, we turn our attention to the arguments challenging Barbara Tulop's conviction on Count Two. These arguments meet with more success.

[¶ 25] Barbara Tulop's conviction on Count Two is based on her failure, as a public official, to report her bank accounts and their balances, as well as her failure to report the $10,000 payment she received from Tansella on January 7, 2019. According to the OSP, both of these omissions constitute a violation of the requirement for all covered individuals to provide financial disclosures. *See* 33 PNC § 605(c)(1). Barbara Tulop contends that a) the disclosure of information about her bank accounts is not mandated by the statute, and b) the prosecution did not prove that her failure to disclose the Tansella payment was "knowing or willful," as required by the statute. We agree.

A.

[¶ 26] We begin our statutory analysis by considering the statute's plain language. "[I]f statutory language is clear and unambiguous, the courts should not look beyond the plain language of the statute and should enforce the statute

[14] We should not be understood as suggesting that a prosecuting agency must develop a specific set of policies as to when and what charges to bring. Indeed, such a requirement would seem to be at odds with the very nature of prosecutorial discretion and the need to respond to often-varied and unpredictable criminal activity. We are merely holding that Defendants-Appellants' argument fails even on its own terms.

as written." *Lin v. ROP*, 13 ROP 55, 58 (2006). We read statutory "language according to its common, ordinary, and usual usage, unless a technical word or phrase is used." *Ucherremasech v. Hiroichi*, 17 ROP 182, 190 (2010). Furthermore, "[p]enal statutes are to be construed strictly against the government and liberally in favor of the accused." *Lin*, 13 ROP at 61. We examine the Code of Ethics with these principles in mind.

[¶ 27] The relevant section of the Code of Ethics reads:

> (c) Financial disclosure statements required by this section shall state for the reporting period:
>
> > (1) The name and mailing address of each *source and amount of income*, including compensation and gifts from persons other than the public official's or candidate's spouse or children, totaling five hundred dollars ($500) or more, received by or promised to the public official or candidate, provided that contributions, and salary and benefits from the national or any state government, need not be reported under this subsection.

33 PNC § 605(c)(1) (emphasis added). The question before us is whether monies deposited in a bank account are "income" and whether a bank account that holds a government official's monies qualifies as a "source of income."

[¶ 28] "Income" is defined as "[t]he money or other form of payment that one receives, usu[ally] periodically, from employment, business, investments, royalties, gifts, and the like." Black's Law Dictionary 912 (11th ed. 2019). The Code of Ethics does not exhaustively define "income" but makes clear that it "includ[es] compensation and gifts, and loans from sources other than commercial lending institutions made in the normal course of business, aggregating $500 or more in value received by or promised to the employee during the preceding 12 months." 33 PNC § 601(i)(4). Applying the *noscitur a sociis* canon of construction, *see Ngiraingas v. Eighth Peleliu State Legislature*, 13 ROP 261, 265 (Tr. Div. 2006), we conclude that while the monies that one receives from others qualifies as "income" and must be reported consistent with the provisions of § 605(c)(1), the mere depositing of these monies into a bank account does not make them "income" for a second time triggering a second and duplicative reporting requirement. Nor is a "bank account" a "source of income." Rather, it is "[a] deposit or credit account with

a bank, such as a demand, time, savings, or passbook account." Black's Law Dictionary 22 (11th ed. 2019).[15]

[¶ 29] The OSP attempts to get around this straightforward statutory construction by arguing that because § 605 is titled "[d]isclosure of financial interests," and because § 601(i)(3) includes "personal property" within the definition of "financial interest," and because bank accounts are "personal property," it follows that such accounts must be reported on the financial disclosure form. We are not persuaded. "[R]eliance upon headings to determine the meaning of a statute is not a favored method of statutory construction. Section headings cannot limit the plain meaning of the text and may be utilized to interpret a statute, if at all, only where the statute is ambiguous." *Scarborough v. Office of Pers. Mgmt.*, 723 F.2d 801, 811 (11th Cir. 1984). "A section heading may be helpful in construing a statute's meaning, but 'it may not be used as a means of creating an ambiguity when the body of the act itself is clear.'" *Bautista v. Star Cruises*, 396 F.3d 1289, 1298 n.12 (11th Cir. 2005) (quoting 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction § 47:07 (6th ed. 2000)). Thus, for us to accept the OSP's argument we would first have to conclude that the reporting requirements of § 605(c)(1) are ambiguous. Because we do not believe any ambiguity exists, we reject the OSP's argument.

[¶ 30] Finally, we note that section 605(c) provides an exhaustive list of interests that must be disclosed by a covered public official on her annual disclosure form. The section does not merely cross-reference the definition of "financial interest" in § 601. "It is a cardinal rule of statutory construction that significance and effect should, if possible, be accorded to every word, phrase, sentence, and part of an act." *Gulibert v. Borja*, 16 ROP 7, 10 (2008) (quoting 73 Am. Jur. 2d Statutes § 120). Construing the statute as the OSP would have us construe it would render most of the text of § 605(c) superfluous. Had our Legislature meant to require disclosure of all "financial interests" as that term is defined in § 601(i), it would have had no need to give a more precise and detailed list in § 605(c). Because "we are bound to construe and apply a statute

[15] An interest-bearing account may produce "income" and may therefore trigger reporting requirements if the amount of interest paid is above the statutory threshold. *See* 33 PNC §§ 601(i)(4), 605(c)(1). However, there is no allegation that Barbara Tulop received such payments and we do not opine on this issue.

in the form in which it was enacted," *Anastacio v. Haruo*, 8 ROP Intrm. 128, 131 (2000) (Munson, J., dissenting) (citing *In the Matter of the Application of Won and Song*, 1 ROP Intrm. 311, 312-13 (1986)), we must not read out of the statute the specific provisions of § 605(c) and substitute the somewhat different definitions of § 601(i)(4), *see Roll 'Em Prods., Inc. v. Diaz Broad. Co.*, 19 ROP 148, 151 (2012).

B.

[¶ 31] As an independent basis for sustaining Barbara Tulop's conviction on Count Two, the OSP points to the fact that she failed to report the $10,000 payment she received on January 7, 2019, from Tansella. In response, Barbara Tulop argues that because the payment was returned almost a full year prior to the day the financial disclosure was filed, she "had forgotten about" it and therefore any failure to disclose was not knowing or willful, as required for a criminal conviction under 33 PNC § 611(a).[16] Opening Br. at 38-39.

[¶ 32] Title 33 includes a mens rea requirement. Namely, "[a]ny person who *knowingly or willfully* violates any provision of this chapter is guilty of a misdemeanor." 33 PNC § 611(a) (emphasis added). In finding Barbara Tulop guilty on Count Two, the Trial Division necessarily found that all the conditions for guilt were met. On appeal of a conviction, "we review the evidence adduced at trial 'in the light most favorable to the prosecution'" and only reverse for clear error. *Xiao*, 2020 Palau 4 ¶ 8 (quoting *Wasisang*, 19 ROP at 90).

[¶ 33] The "knowing or willful" standard does not require that the person charged with a crime knows "that he is breaking the law," but merely requires that he appreciates the nature of the act he is engaged in. *Uchau v. ROP*, 2017 Palau 34 ¶ 25 (quoting *An Guiling*, 11 ROP at 136). We therefore must decide whether Barbara Tulop knew that the $10,000 payment she received from Tansella was "income."

[¶ 34] The record reflects that $10,000 was deposited by Tansella into Barbara Tulop's bank account on January 7, 2019, and was returned less than

[16] We note that the Code of Ethics also provides for civil penalties for the violation of its provisions. *See* 33 PNC § 611(b). Under that subsection, negligent failure to disclose required information gives rise to liability. *Id.*

a month later. Furthermore, it is not contested that Tansella deposited this sum in 2019 unbeknownst to Barbara Tulop and that she refunded the money shortly after becoming aware of deposit. There is no indication that this money was a loan or that Barbara Tulop otherwise solicited the funds.

[¶ 35] Because we are required to view the evidence in the light most favorable to the prosecution, we cannot credit Barbara Tulop's claim that she had forgotten about the $10,000 deposit when it came time to complete her financial disclosure statement. At the same time, we recognize that the question of whether a rejected and returned payment is "income" in the first place is a close one.[17] In light of the closeness of the question, it was a clear error for the Trial Division to conclude that Barbara Tulop knowingly or willfully withheld information regarding payment when it is most likely that she believed in good faith that the deposit, which was never expected or solicited and was returned as soon as it was discovered, was not "income." Even assuming the 2019 Payment was "income" for the purpose of the Code of Ethics, we do not find that Barbara Tulop's actions reflect a degree of mental culpability meeting the high standard imposed by the statute.

* * *

[¶ 36] In summary, because we find that § 605(c)(1) is unambiguous and, when properly construed, does not require disclosure of bank accounts, and because we conclude that on the facts of this case, the failure to report the $10,000 payment received from and later returned to Tansella was not "knowing or willful," we reverse Barbara Tulop's conviction on Count Two and necessarily vacate the sentence associated with the conviction on that Count. Accordingly, we do not address Barbara Tulop's argument that the fine imposed for her conviction on Count Two violates the constitutional prohibition on excessive fines.

[17] We are not prepared to categorically hold that such a payment can *never* be "income." For example, a payment received in December of Year 1 but not returned until January of Year 2 may, depending on the provision of the tax code, be "income" in Year 1 and a "loss" in Year 2. Such a question is not before us, and we merely hold that given the closeness and novelty of the legal question, we are "left with a definite and firm conviction that" the Trial Division erred in finding the failure to report the payment to be knowing or willful. *Koror State Pub. Lands Auth. v. Idid Clan*, 2016 Palau 9 ¶ 9 (quoting *Ngirausui v. KSPLA*, 18 ROP 200, 202 (2011)).

VI.

[¶ 37] Having reversed Barbara Tulop's conviction on Count Two, we remand the matter for resentencing because, in light of the reversed conviction, the Trial Division may now "have a different view of what constitutes an appropriate overall sentence in this case." *Xiao*, 2020 Palau 4 ¶ 35; *see also* 17 PNC § 618 (requiring the sentencing court to consider "the history and characteristics of the defendant"). On remand, the Trial Division may (or may not) conclude that a more lenient sentence on the remaining counts is appropriate. *See Xiao*, 2020 Palau 4 ¶ 35. As always, we leave the sentencing to the Trial Division's considered discretion, *see id.*, but remind the trial court that it may not *increase* the previously imposed sentence, *see* 17 PNC § 620.

[¶ 38] Finally, although we affirm all of Shirley Tulop's convictions, we are constrained to vacate her sentences and remand the matter for resentencing as well because the Trial Division, in addition to sentencing her on the counts of conviction, also sentenced her on Count Three, for which she was not charged. While that was most likely little more than a clerical error, it is a fundamental principle of due process that no person can be sentenced for an uncharged crime. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.").

CONCLUSION

[¶ 39] We **REVERSE** Barbara Tulop's conviction on Count Two but **AFFIRM** Defendants-Appellants' remaining convictions. We **VACATE** the sentences imposed on both Barbara and Shirley Tulop and **REMAND** to the Trial Division for resentencing. Finally, because we vacate the sentences imposed, we also **VACATE** the Stay Order we previously entered.