

MATT KELTY

MOTION TO DISMISS  
ALL CHARGES

OCTOBER 22, 2007

STATE OF INDIANA	)	IN THE ALLEN COUNTY SUPERIOR COURT
	) SS:	
COUNTY OF ALLEN	)	CAUSE NO. 02D04-0708-FD-678
STATE OF INDIANA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
MATTHEW G. KELTY,	)	
	)	
Defendant.	)	

MOTION TO DISMISS INDICTMENT

Defendant, Matthew G. Kelty (“Kelty”), through counsel, respectfully moves the Court to dismiss the indictment in this case, and in support hereof, files a corresponding Memorandum of Law in Support of Motion to Dismiss pursuant to Rule 3 of the Indiana Rules of Criminal Procedure, and states:

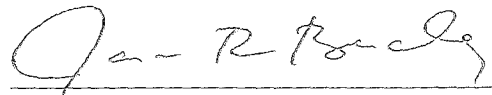
1. On or about August 14, 2007, the Allen County grand jury returned a nine count indictment charging Kelty with crimes he did not commit.
2. The indictment suffers from severe defects that violate Indiana law and the Indiana and United States Constitutions.
3. I.C. § 35-34-1-6 requires the Court to dismiss a “defective” indictment.
4. Article I, sections 12 and 13 of the Indiana Constitution and the Fifth and Fourteenth Amendments to the United States Constitution require dismissal of an indictment that violates due course and due process of the law respectively.
5. Counts I and II of the indictment, charging Kelty with perjury, should be dismissed for failing to allege conduct that violates the law. *See* Memorandum of Law at p. 30.
6. Counts III through VI, should be dismissed for being unconstitutionally void for vagueness, infringing upon Kelty’s constitutionally protected First Amendment rights, failing to

allege sufficient facts and essential elements of a crime, being multiplicitous, and alleging conduct that does not constitute a crime and which is barred from criminal prosecution by Indiana law. *See id.* at p. 7.

7. Count VII should be dismissed for being unconstitutionally void for vagueness, infringing upon Kelty's constitutionally protected First Amendment rights, failing to allege sufficient facts and essential elements of a crime, and alleging conduct that does not constitute a crime and which is barred from criminal prosecution by Indiana law. *See id.* at p. 7

8. Counts VIII and IX should be dismissed for infringing upon Kelty's constitutionally protected First Amendment rights, failing to allege sufficient facts and essential elements of a crime, and alleging conduct that does not constitute a crime and which is barred from criminal prosecution by Indiana law. *See id.* at p. 14.

WHEREFORE, Kelty respectfully requests, after consideration of the corresponding Memorandum of Law in Support of Motion to Dismiss Indictment, the Court dismiss counts I through IX of the indictment for being statutorily and constitutionally defective.



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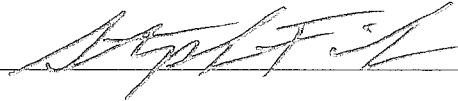
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served this 27  
day of October, 2007, by depositing a copy of the same in the United States First Class Mail,  
postage prepaid to:

Daniel J. Sigler  
Special Prosecuting Attorney  
Bloom Gates Sigler & Whiteleather LLP  
119 South Main Street  
Columbia City, In 46725



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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Matthew Kelty has been wrongly charged by a grand jury with crimes he did not commit. Fair and impartial justice requires the pending indictment against him be dismissed.

The indictment returned by the Allen County grand jury is defective; it violates express provisions of Indiana law and basic protections afforded by the state and federal constitutions.

Furthermore the conduct alleged, even in a light most favorable to the State, is not a violation of Indiana law. The State has taken liberties to extend certain criminal laws well beyond the letter of the law and the intent of the General Assembly. The conduct in question is entirely legal and permissible, and not a proper basis for criminal prosecution.

These defects reflect a badly flawed process that has improperly charged an innocent man with crimes he did not commit. The system provides for those errors to be corrected by this Court at this stage in the proceedings before trial and before Kelty's liberty and personal standing are placed in further jeopardy. *See Schlup v. Delo*, 513 U.S. 298, 325 (1995) (“[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.”).

We respectfully ask the Court to dismiss the indictment returned by the grand jury in this case.

## STATEMENT OF FACTS

### *Personal Loans*

Matthew Kelty is a candidate for mayor of Ft. Wayne, Indiana. Indiana law allows individual contributors to donate to a political campaign unlimited amounts of money through that candidate's finance committee. *See* I.C. § 3-9-2 *et seq.* Indiana law allows, and in fact, the United States Constitution protects, the right of any candidate to self-finance, or to fund a political campaign with his or her own personal assets. *See* I.C. § 3-9-2-2; *Buckley v. Valeo*, 424 U.S. 1, 51 (1976).

Sometimes those two legal methods of campaign finance intersect. Rather than *donating* money to a candidate's campaign, an individual can *loan* money to a candidate with the intent and expectation that the candidate will use the proceeds from the loan to finance his or her campaign. The difference between the two methods of support is clear. One is a donation, which the contributor does not expect to be repaid, and the other is a loan, for which that individual expects repayment from the candidate *him or herself* on the terms agreed to at the time the loan is made. One is a matter solely of campaign finance law, the other is a legal agreement between the parties that involves questions of law governing contract, promissory notes, and monetary instruments, in addition to campaign finance laws. Those legal distinctions are reflected in campaign finance laws, where contributions and loans are treated *differently*. *See* I.C. § 3-9-5-14(b)(3) & (b)(6).

Any individual has the option to loan money to a candidate's finance committee. That may not be advisable since a finance committee has no identity or assets of its own, can incur large debt, and can be dissolved following an election. Rather, an individual interested in

getting repaid is more likely to loan money directly to the candidate –a real, live person –who will not disappear after an election, and who presumably has a job and other assets with which to repay a loan long after an election is over.

There can be no question or disagreement that the law allows any candidate to borrow money from any source to finance his or her own campaign. *See* I.C. § 3-9-2-2; I.C. § 3-9-2-5; *See e.g.*, Sharon Theimer, “Personal Loans Kept Kerry Campaign Alive,” *Washington Post*, February 21, 2004 (“Kerry mortgaged his family's Boston home to finance campaign loans.”).

Kelty did precisely that. On or about November, 2006, a Kelty campaign supporter, Fred Rost, agreed to loan \$150,000 directly to Kelty on terms that were later memorialized in a valid and binding legal document drafted by Mr. Rost’s attorney. Mr. Rost fully intends for Kelty to repay the loan, just as Rost intended when the loan documents were executed in December of 2006. *See* Affidavit of Fred Rost, attached (exhibit A).

Similarly, Kelty borrowed \$10,000 from Glenna and Steve Jehl in April, 2007. The parties executed a valid legal agreement ensuring that Kelty himself, and not a defunct finance committee, would be responsible for repaying the loan after the election. To this day, the Jehls still intend to collect on the promissory note with Kelty and intend for Kelty to repay this loan, just as they did when the loan was first extended. *See* Affidavit of Steven Jehl, attached (exhibit B).

The two Kelty loans are legal and binding. They were made pursuant to promissory notes that are valid and legally enforceable. Kelty, and *not* the finance committee, is responsible for repaying the loans, which is entirely permissible under Indiana campaign finance law. Said another way, Rost and the Jehls can only enforce the legal promises made in these documents

against Kelty in his individual capacity and do not have legal recourse against Kelty's campaign committee for breaches of those agreements.

The State has not contended now nor at any other point that any of these actions violated any provision of any Indiana law. To do so would likely implicate the First Amendment to the United States Constitution and years of U.S. Supreme Court precedent on this very topic.

### *Campaign Finance Reports*

Six of the nine counts in the indictment, however, relate to these lawful loans that were all properly documented with promissory notes between the parties. It is evidently not the loans themselves that the State found offensive, but the way they were reported to the Allen County Election Board.

A candidate must form a campaign committee to solicit funds to run the campaign. *The committee* must report from whom it has received contributions and how it has spent that money. Unlike some states, in Indiana, a candidate him or herself is *not* required to file financial disclosure forms with any regulatory body. *See* I.C. § 3-9-5-14; § 3-9-5-15.

At the time Kelty signed the promissory note with Rost, as a matter of law, the \$150,000 became the property of Kelty alone and the obligation to repay Rost was Kelty's only, and not an obligation of the campaign committee's. Kelty loaned \$148,000 of the money he borrowed from Rost to the campaign committee in two separate transfers. Loans to a campaign committee, as noted previously, are lawful and are required to be shown on a campaign finance report as both a contribution and debt of the committee (under the theory that the committee both receives funds and at the same time incurs a legal obligation to repay those same funds). *See* § 3-9-5-14(b)(6), (12).

Kelty followed the law both as it is written and as he best understood it at the time. The transfer of funds from his personal account to the campaign was a loan from him to the campaign

committee and had to be reported as such. A report listing the loan from Rost to Kelty as a loan from Rost to the campaign committee would have been false and misleading, and directly contradicted by the written promissory note, and would violate basic tenets of well-established Indiana commercial law on negotiable instruments. To show the Rost loan as a contribution (which is defined as a *donation* under Indiana law) from Rost to the committee would also have been wrong since Kelty himself was obligated to pay Rost back, and Rost did not intend then or now just to give this money to Kelty or the committee with no expectation of repayment. *See* Fred Rost Affidavit, attached (exhibit A).

The January, 2007 Kelty Exploratory Committee Report of Receipts and Expenditures (CFA-4), therefore, shows contributions and debts as loans from Kelty to the committee in the amounts of \$140,000 and \$8,000 respectively. Likewise, in April and May, 2007, the Kelty Committee reported loans from Kelty to the Committee in the amounts of \$8,000 and \$2,000, respectively, on two Supplemental "Large Contribution" reports by a Candidate's Committee, just as the law requires. Those transfers represent the money loaned to Kelty by the Jehls shortly beforehand.

Kelty also *voluntarily* disclosed the sources of his personal loans in a series of Addendums that were filed with the Allen County Election Board on May 24, 2007. Rather than being lauded for going above and beyond the letter of the law to be fully transparent, Kelty was indicted less than three months later.

On June 19, 2007 and prior to the grand jury investigation, the Allen County Election Board, the administrative body that has been delegated authority under Indiana law to interpret and administer the state's campaign finance laws in municipal elections, met and considered whether the Kelty campaign committee reports violated state law. The Board was asked by a

Board member to decide whether there had been any *actual* violation of Indiana law as a result of the way the committee reported these loans. The Board held a public hearing, took evidence and heard argument, afforded full due process to all of the parties and, despite having full authority to sanction Kelty, *see* I.C. § 3-9-4-16, concluded there had been *no* violations of Indiana election laws. The State was represented by Board member Andrew Downs who made a detailed presentation and argument detailing why he believed election laws, including I.C. § 3-14-1-13, had been violated. *See* I.C. § 3-9-4-15 (“A member of . . . a county election board may conduct a hearing or an investigation, take evidence, and report back to the commission or board for its consideration and action.”). If any entity had an interest to ensure Kelty was following the law and being honest, it was the very Board that received Kelty’s campaign finance reports *and* cleared Kelty of any wrongdoing following its hearing on the matter.

#### *Indictment*

It is difficult, therefore, to surmise how the State only three weeks later concluded that Kelty violated the same laws, which the very Board that is statutorily charged with interpreting and enforcing, independently decided had not been violated. That is made more difficult because the indictments themselves are woefully lacking in detail and do not, on their face, indicate that a violation of the campaign finance disclosure laws has occurred.

Rather, in counts III through VII, the State simply charged Kelty under I.C. § 3-14-1-13 with “filing a report required by I.C. § 3-9 that is *fraudulent*.” It is not clear how the grand jury concluded the reports that the committee filed were fraudulent. It is not clear if they even believe any provision of § 3-9 was violated. More importantly, it is not clear what “fraudulent” means in this context because fraudulent is *nowhere* defined in this chapter of the Indiana Code.

The indictment contains other allegations as well. In counts I and II, Kelty was charged with perjury related to his testimony before the grand jury. Counts III through VII all allege that