

Kelty filed fraudulent campaign finance reports, including one count (count VI) wholly unrelated to these loans charging that the reporting of an in-kind commission of a public opinion poll was fraudulent. The final two counts, VIII and IX, both relate to the same personal loans accusing Kelty of commingling campaign funds with personal funds.

All of these counts suffer from similar legal defects that are more fully outlined below.

ARGUMENT

I. THE INDICTMENTS ARE DEFECTIVE AND MUST BE DISMISSED.

Indiana law provides that an indictment or a count thereof “*shall* be dismissed upon motion when it is defective.” *See* I.C. § 35-34-1-6 (2007) (emphasis added).

An indictment can be defective if: the statute defining the offense charged is unconstitutional, *see* I.C. § 35-34-1-6(a)(3); the indictment does not state the offense with sufficient certainty, *see* I.C. § 35-34-1-4(a)(4); the facts stated do not constitute an offense, *see* I.C. § 35-34-1-4(a)(5); or there exists some jurisdictional impediment to conviction of the defendant for the offense charged, *see* I.C. § 35-34-1-4(a)(10).

Likewise, both the Indiana Constitution and the United States Constitution require the dismissal of criminal indictments if the defendant has been denied due course and due process of the law respectively. *See* Ind. Const. art. I, § 12; U.S. Const. amend. XIV. The Indiana Constitution further requires that the accused in every criminal prosecution shall have the right “to demand the nature and cause of the accusation against him.” *See* Ind. Const. art. I, § 13.

Each of these statutory and constitutional infirmities exists in this case.

1. The laws with which Kelty has been charged are unconstitutional.

A. *Counts III through VII are unconstitutionally void for vagueness.*

Five of the nine counts of the indictment (counts III through VII) are all charged under I.C. § 3-14-1-13 that says simply “a person who knowingly files a report required by I.C. 3-9 that

is fraudulent commits a class D felony.” Since the word “fraudulent” is not defined by this title of the Indiana Code, this statute is unconstitutionally void for vagueness under the Fifth and Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Indiana Constitution.

“[A]ny statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,” should be invalidated as unconstitutionally vague because it “violates the first essential of due process of law.” *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926).

A statute can be challenged for being unconstitutionally vague in two ways. When “vagueness permeates a [statute],” a facial challenge to the entire law is appropriate. *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). See *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983); *U.S. v. National Dairy Products Corp.*, 372 U.S. 29, 33 (1963) (“[A] bead-sight indictment can [not] correct a blunderbuss statute, for the latter itself must be sufficiently focused to forewarn of both its reach and coverage.”); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Especially where a law implicates First Amendment protections, a court can strike down a statute as being unconstitutionally vague in all instances. See *City of Chicago* at 52. In such a situation, the United States Supreme Court has ruled that campaign contributions and expenditures are forms of political speech and therefore laws regulating campaign finance disclosure, such as I.C. § 3-14-1-13, are subject to limits proscribed by the First Amendment. See *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”).

A statute may also be challenged as being unconstitutionally vague in the way that statute has been enforced against a particular defendant. *See U.S. v. Mazurie*, 419 U.S. 544, 550 (1975). Rather than finding a statute unconstitutional in every circumstance, this Court would simply find that the law is unconstitutional as it has been applied to Kelty.

Under either formulation, the test for vagueness is straightforward. A statute may be fatally vague for *either* of two independent reasons. *See City of Chicago*, 527 U.S. at 56; *Brown v. State*, 868 N.E.2d 464, 467 (Ind. 2007). First, the statute may fail to provide the kind of “fair notice” that will enable ordinary people to understand what conduct it prohibits. *Id.* Second, the statute may authorize and encourage arbitrary and discriminatory enforcement. *Id.* While violating either of these prongs is fatal, I.C. § 3-14-1-13 fails both of these prongs and should be invalidated.

The constitutionality of I.C. § 3-14-1-13 has been tested one time and one time only. *See Wurster v. State*, 708 N.E.2d 587 (Ind. Ct. App. 1999). That decision, however, is not binding on this Court for three reasons.

First, the *Wurster* Court, evidently because of the scope of the defendant’s challenge in *Wurster*, only analyzed a constitutional challenge to I.C. § 3-14-1-13 under the first prong of the void for vagueness test. *Id.* at 598 (“[W]e cannot say that people of ordinary intelligence would be unable to distinguish between the proscribed and permissible conduct.”). This statute has never been challenged in Indiana for authorizing and encouraging discriminatory enforcement, which on its own, is a valid legal basis for invalidating a vague criminal law.

Second, the *Wurster* decision is likely no longer valid in light of two Indiana Supreme Court decisions issued since *Wurster*. *See Brown v. State*, 868 N.E.2d 464, 469 (Ind. 2007);

Healthscript v. State, 770 N.E.2d 810, 816 (Ind. 2002).¹ *Brown* deals with strikingly similar (if not identical) issues to those raised here. In *Brown*, the criminal confinement statute was challenged for its use of the word “fraud”; here I.C. § 3-14-1-13 is being challenged for use of the word “fraudulent.” The *Brown* decision granted a facial void for vagueness challenge to the criminal confinement statute and struck the word “fraud” from the statute in *all* cases. *Brown* at 469.

Third, even if this Court determines that *Wurster* is binding as to Kelty’s facial challenge to the law, the Court must still determine if this law is unconstitutionally vague as it has been applied to Kelty. The *Wurster* case dealt with a uniquely different set of facts and no prosecutor in the State of Indiana has tried to use I.C. § 3-14-1-13 to prosecute an individual for failing to disclose the sources of a candidate’s private, personal loans. *See Wurster* at 598 (In fact, the Court noted that *Wurster*’s vagueness challenge is really to the language in I.C. § 3-9-3-4 and not I.C. § 3-14-1-13). Thus, the application of this statute to this set of facts is a case of first impression in Indiana. It is entirely possible for a court to find this statute not vague as applied to *Wurster*, but unconstitutionally vague as it has been applied to Kelty. Therefore, this Court should not consider *Wurster* as binding precedent in this case.

In analyzing a vagueness challenge under the first “fair notice” prong, a court must determine if the challenged law creates a clear “dividing line between what is lawful and unlawful. . . [so] that the ordinary person can intelligently choose, *in advance*, what course it is lawful for him to pursue.” *Connally v. General Construction Company*, 269 U.S. 385, 393 (1923) (emphasis added). Or as the *Brown* court said, a law must clearly “indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for

¹ It is possible that the Court of Appeals was also not aware of the *City of Chicago* opinion by the U.S. Supreme Court on this topic, which was issued after the *Wurster* opinion was filed.

trivial acts and omissions will not occur. It cannot be left to juries, judges, and prosecutors to draw such lines.” *Brown* at 468 (quoting *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985)).

I.C. § 3-14-1-13 clearly fails that “fair notice” test on its face. The word “fraudulent” is not defined by the Indiana Code. When a word is not defined in the law itself, courts turn to ordinary and common usage of that language and the Supreme Court prefers to “consult standard dictionaries, not a specialized legal dictionary.” *Brown* at 467.

Under that standard, the scope of the definition of “fraudulent”, and therefore the potential conduct it criminalizes, is enormous. The Cambridge Advanced Learner’s Dictionary (Cambridge University Press, 2007) defines “fraudulent” as “dishonest and illegal,” suggesting that there must be some *additional* violation of the law, which has not been alleged here. The American Heritage Dictionary of the English Language (Fourth Edition, 2007) defines “fraudulent” as simply “deceitful.” The *Brown* Court defined “fraud,” from which fraudulent is derived as an adjective, to mean “trickery,” “deception,” or “deceit.” *Brown* at 468. That would suggest that a felony could be alleged under I.C. § 3-14-1-13 every time a factual error was contained in a campaign finance filing because such an error could be misleading, dishonest or deceitful.

For instance, would a campaign finance report be “fraudulent” if it listed a contribution paid out of a husband and wife’s joint checking account as only being donated by the husband? Or what if a report lists an individual donation from a sole shareholder of a corporation who issued himself a dividend and then makes a campaign contribution of \$5,000 from the proceeds of that dividend knowing that the corporate contribution limit in Indiana is \$2,000? Or how about a donation from a sole proprietor that makes a contribution from her business’s checking account but is listed only as an individual contributor on the report? Such entries are arguably

incomplete, misleading, and perhaps dishonest and deceptive. And yet none of these actions are prohibited anywhere in Indiana law. With no clear line drawn as to what is “fraudulent,” however, such de minimus violations would also be felonious under § I.C. 3-14-1-13. There are countless other innocent examples that demonstrate the clear dividing line required by the Indiana and United States Constitutions is missing.

As the Indiana Supreme Court noted in invalidating the criminal confinement law that created a felony for removing “another person by fraud,” “the scope of such a proscription would embrace a *vast assortment* of acceptable and even salutary conduct *that is clearly not criminal in nature.*” *Id.* (emphasis added).

The State has the burden to prove that a clear line between lawful and unlawful conduct existed at the time Kelty filed these reports. It is not enough for them to argue that they were able to define such a line on their own *after the fact*, because it is not their role or even a court’s role to draw that line, but rather it is the role of the General Assembly. *See Healthscript v. State*, 770 N.E.2d 810, 816 (Ind. 2002) (“Legislatures and not courts should define criminal activity.”).

In the specific context of this case, the vagueness problem becomes even more troublesome. There is no Indiana law that says a candidate cannot take out a personal loan to fund his or her campaign. There is no Indiana law that says a candidate cannot borrow money from a personal acquaintance or friend. There is no Indiana law that says a candidate cannot loan the proceeds of a prior loan to his or her campaign committee. And there certainly is no Indiana law that says if a candidate loans his campaign committee the proceeds of a prior loan, he or she must disclose the source of that prior loan. It must be remembered that Kelty made such disclosure and yet, was still indicted. He filed addendums to his report well before the grand jury ever met. The law requires a clearly defined, bright line that an ordinary citizen can

see in advance. That line clearly does not exist under I.C. § 3-14-1-13 either on its face or as it has been applied to Kelty.

The Indiana Supreme Court made this point in its ruling in *Healthscript* which applies to the statute in this case: “The effect of the statute, then, is to say that a provider is prohibited from filing a Medicaid claim ‘in violation of’ nothing more specific than this vast expanse of the Indiana Code. This is not, in our view, ‘fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.’” *Id.* (internal citations omitted).

The second prong of the vagueness test is even more problematic for this statute. As the United States Supreme Court has held, “even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish *standards* for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.” *City of Chicago*, at 52. This statute gives prosecutors and law enforcement officers unlimited ability to arrest and prosecute anyone for *any* conduct that they determine *after the fact* to be deceitful, trickery, or dishonest. Those are not the type of precise standards required by both the U.S. and Indiana Constitutions. If the State cannot answer the simple question of what objective standards it relied upon to determine that Kelty had violated this law, the Court must dismiss these indictments.

When analyzed in the context of Kelty’s challenge to this law as it has been applied to his case, the second prong is especially problematic. These charges were brought in the middle of an election, while Kelty was actively campaigning for office. The statute of limitations would have certainly allowed these charges to be filed after the election. This statute gives potential political opponents the arbitrary power to file criminal charges for any campaign finance filing that he or

she deems to be “deceitful” during the height of an election with nothing more specific than the generalized accusation that some entry on a campaign finance report involved “trickery.” That approach is clearly fraught with all of the perils the Supreme Court has articulated for years as being grounds for invalidating a law. As the Supreme Court has said, a law that “necessarily entrusts lawmaking to the moment-to-moment judgment of” police officers or prosecutors is *per se* unconstitutional. *Id.* at 60. The State should be required to point to the clearly worded law or guidance from the appropriate regulatory bodies that says precisely how the proceeds of personal loans used to finance a campaign should be reported; if the State cannot do so, the unconstitutional “moment-to-moment judgment” has occurred in this case.

The most compelling fact for the Court to consider in deciding that this prong has been violated should be that the Allen County Election Board, *which is the only administrative body statutorily charged with interpreting and enforcing this provision of the Code*, reviewed the exact same conduct as the grand jury and came to the *opposite* conclusion. It decided Kelty had not violated I.C. § 3-14-1-13 or any other campaign finance law. In fact, Allen County Election Board member Andrew Downs specifically instructed the entire Board on the prohibitions of I.C. § 3-14-1-13 and it concluded that statute had not been violated. Such an outcome demonstrates both that reasonable people can differ as to where the statutorily required dividing law is drawn under this law and that the criminal charges in this case are arbitrary and subjective.

Counts III through VII should be dismissed for being charged under a statute that is unconstitutionally vague on its face and as it has been applied to Kelty.

B. Counts III through IX violate Kelty's First Amendment rights.

Campaign contributions and expenditures are a form of political speech protected by the First Amendment to the Constitution. *See Buckley v. Valeo*, 424 U.S. 1, 14-23 (1976). Limitations on candidate and individual expenditures are direct restraints on speech and have

been found to be unconstitutional violations of the First Amendment. *Id.* The *Buckley* decision also invalidated restrictions placed on candidates who self-finance or fund their campaign with their own assets. As the Court said, “a ceiling on personal expenditures by candidates on their own behalf . . . imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression.” *Id.* at 51.

In the indictment, the State seeks to criminally punish exactly the type of conduct the *Buckley* court said was protected by the First Amendment. The State is asking the Court to treat Kelty’s personal loans, which were Kelty’s personal obligations and therefore personal expenditures for which he and he alone was responsible for repaying, as restricted third party campaign contributions. Third party campaign contributions are subject to limits that personal expenditures and loans are not subject to. Namely under Indiana law, while an individual candidate must disclose the source of a campaign contribution, he or she does not have to disclose the source of a personal loan. The effect of the State’s indictment suggests that such personal loans are impermissible, a likely violation of *Buckley*, or rewrites Indiana law to restrain personal expenditures made with the proceeds of legal and valid personal loans, which is an impermissible amendment to an existing law that unnecessarily restricts First Amendment expression.

This challenge especially applies to Counts VIII and IX. With those counts in particular, the State is criminalizing the very act of placing the proceeds of personal loans in a candidate’s personal bank account in order to fund his or her campaign. If such an act is prohibited and therefore criminal under these set of facts, the State has violated the First Amendment. Such an act is protected by the First Amendment since the practical effect would be to prevent any future candidate from *ever* using a personal loan to finance his or her campaign.