

from Matthew G. Kelty to the Kelty Exploratory Committee.” But the State does not allege which of those facts is deceptive or dishonest thereby making the report fraudulent, which at a minimum is what is required by art. I, section 13 of the Indiana Constitution and I.C. § 35-34-1-4(a)(4).

For instance, is the report fraudulent because it was on form CFA-11, and should have been reported on a different form? Was the campaign contribution from someone other than Steve and Glenna Jehl? Or a contribution by either Steve or Glenna Jehl? Was the contribution in an amount other than \$2,000? Was it improperly reported as a *personal* loan from Matthew Kelty? Should it have been reported as a business loan or a loan from the Jehls to the campaign committee? Should the loan have been reported as being given to a different campaign committee, perhaps Kelty’s official campaign committee? Did Kelty simply misidentify the payment as a loan rather than a contribution? Did Kelty violate a provision of I.C. § 3-9 that he was supposed to follow? If so, which provision and how were the reporting requirements in I.C. § 3-9 violated? If I.C. § 3-9 was not violated, how could the report be “fraudulent”? The answers to all of these questions are unknown and therefore, unclear. Instead, Kelty is simply left to guess as to what was “fraudulent” with this report. If Kelty was left to guess, then one wonders whether five of the six grand jurors all had the same understanding of what was fraudulent when they voted on counts III through VII. *See* I.C. § 35-34-2-12.²

Because of the lack of clarity, the State is also allowed to avoid adopting a theory as to how these reports are “fraudulent” but attempts to advance multiple theories, some of which may not constitute criminal conduct. A dismissal of counts III through VII would require the State to be more precise in its charging documents. Kelty anticipates that it will become clear to the

² We also do not know because the State has refused Kelty’s requests to see the grand jury transcripts detailing how the State instructed the grand jury on the law.

Court that the entries that the State believes were fraudulent in fact fully comply with the law. Both this Court and Kelty deserve to know what specifically the State is alleging before this case advances to trial, and the defense should have to look no further than the four corners of the indictment to have that understanding.

The law on this point favors Kelty. “It is neither fair nor reasonable to have [a criminal defendant] speculate, at his peril, as to the particular procedure or mandates he failed to follow.” *Moran* at 104. It is “improper” to use “language from a statute which defines a crime in general terms when many different acts could fall within that general definition.” *Id.* (emphasis added). Without greater specificity, the State could also be exposing Kelty to double jeopardy since it could prosecute Kelty for certain “fraudulent” entries on reports and then prosecute a second time based on a different set of entries. Such ambiguity is *per se* impermissible. *See Wurster v. State*, 708 N.E.2d 587, 596 (Ind. Ct. App. 1999).

If Kelty cannot understand from simply reading the face of the indictment how he has violated the law and how his conduct was “fraudulent,” then counts III through IX should be dismissed.

B. Counts III through IX fail to allege essential elements of the crimes charged.

In order to be valid, an indictment must set forth all of the legal elements of the offense. *See I.C. § 35-34-1-2. See Embry v. State*, 96 N.E.2d 274, 275 (Ind. 1951). Furthermore, “when a statute makes knowledge, or *scienter*, an essential element of an offense, such knowledge on the part of the accused *must be* charged in the indictment or affidavit.” *Id.* (emphasis added).

I.C. § 3-14-1-13 clearly states that to be a crime a criminal defendant must “knowingly file” a report required by I.C. § 3-9. Yet, in counts III through VII, the State does not allege that Kelty “knowingly filed” *any* report. In fact, the word “knowingly”—an essential element of this

offense in order to distinguish a defendant's conduct from reckless or negligent non-criminal conduct— is never used in any of these counts. The State does *not* allege *any other form of scienter* in these counts either.

The State also does not allege that Kelty “filed” these reports, but rather that he simply “fraudulently” reported or failed to report certain facts. The requisite criminal act in I.C. § 3-14-1-13 is not the reporting of any fact, but rather the filing of a report required by § 3-9. The specific report and the provision of § 3-9 that requires that report should also be stated in the indictment. However, neither an allegation that Kelty knowingly filed a report nor the specific report that was required by § 3-9 is stated in these counts of the indictment. Clearly if someone made a fraudulent entry and then never filed the report with the county election board, a crime under I.C. § 3-14-1-13 would never have been consummated. These counts only charge Kelty with the entries and make no mention of the act of knowingly filing fraudulent documents.

Furthermore, while it is not explicit in the statute itself, for this to be a felony offense the State must also prove that Kelty filed these report *knowing* that the reports were fraudulent. This makes sense given the grammatical construction of the statute. If the scienter requirement only modified the action of filing the report itself, it would transform this law into a strict liability offense. That is, without this additional scienter requirement, it would be possible to convict someone (namely an innocent office clerk, treasurer, or mail runner) who “knowingly” filed the report, but did not know the report itself was fraudulent. *See State v. Sanchez*, 749 N.E.2d 509, 516 (Ind. 2001) (“[I]t is necessary to imply intent under some circumstances.”). The State, however, never alleges that Kelty knew these reports were fraudulent at the time they were filed, as the law most certainly requires.

Counts VIII and IX are similarly flawed. They were charged under I.C. § 3-14-1-14.5, which punishes a person who “recklessly violates IC § 3-9-2-9(c) by commingling the funds of a committee with the personal funds of an officer, a member, or an associate of the committee.” Yet, there are multiple essential elements of this offense that are not alleged in either count VIII or IX.

Starting with the most important element, see *Embry* at 275, the State again never alleges the scienter requirement, namely that Kelty’s actions were “reckless.” In both counts, all that is alleged is that Kelty placed contributions in a personal account. If the grand jury concluded that those actions were negligent or inadvertent, it would not constitute a crime under I.C. § 3-14-1-14.5. Yet, we do not know what this grand jury concluded because there is no scienter or state of mind alleged.

Second, this statute requires a defendant to violate another statute, namely I.C. § 3-9-2-9(c), and yet the State never alleges that this statute was violated, let alone tell Kelty how it was violated.

Third, the law requires, as an essential element of the offense, that the State prove that the “personal funds” in question were those of an “officer, a member, or an associate of the committee.” And yet, the State does not allege (and the grand jury may not have been told) that the personal account in question belonged to someone who held the legal capacity of an officer, member, or associate of the committee.

Finally, the statute clearly requires an allegation, and ultimately proof, that the funds of a campaign committee were commingled with the personal funds of an individual. Yet in count IX, the State never alleges that the \$10,000 in question were committee funds or even intended to be placed in a committee (let alone *which* committee). In fact, the indictment describes the

\$10,000 simply as a “contribution” and not even a “campaign contribution” essentially criminalizing the innocent transfer of money from one party to another. There is not even a reference to the contribution being made in relation to a political campaign.

Counts III through IX are grossly deficient. It is not the defendant’s burden to surmise that a grand jury actually concluded that there was probable cause for each and every essential element of the crimes that were charged. That clearly is not evident from the face of the indictment. In fact, when an indictment is silent on essential elements of a crime, a court should assume that the grand jury did not find that those elements exist and the indictments should be dismissed forthwith. The Indiana and U.S. Constitutions require much more of the State.

3. Counts III through VI have charged the same conduct multiple times.

The State may not charge in separate counts what amounts to a single offense. The classic test of multiplicity is whether the legislature intended to punish individual acts separately or to punish only once the course of action alleged. *See Blockburger v. U.S.*, 284 U.S. 299, 304 (1932). The Indiana Supreme Court has noted that “a crime that is continuous in its purpose and objective is deemed to be a single uninterrupted transaction.” *Mahone v. State*, 541 N.E.2d 278, 280 (Ind. 1989). That means “[u]nless there appears in the statute a clear intent to fix separate penalties for each [act], the issue should be resolved against turning a single transaction into multiple offenses.” *American Film Distributors, Inc. v. State*, 471 N.E.2d 3, 5 (Ind. Ct. App. 1984). The State has violated this rule in three material ways.

First, counts III through V, all relate to a single financial transaction. These counts relate to the personal loan extended by Steve and Glenna Jehl to Kelty. As noted, Kelty deposited the proceeds of that single loan into a personal account and then transferred the funds to the campaign committee in two separate installments. Since the transfer was done in two installments over \$1,000 each, Kelty had to file two campaign finance reports indicating he had

loaned money to the campaign committee. The grand jury has charged those transfers as two separate acts in counts III and IV. There could be only one count.

But the State did not stop there and filed *another* criminal charge in count V related to the *same* loan. While it is not clear, the State appears to be suggesting that not only were the two prior reports “fraudulent” because of what Kelty *did* report, but by *not* reporting the same \$10,000 loan on a separate form as a contribution from the Jehls that Kelty committed yet another separate criminal act. That simply cannot be the case since all three counts stem from “a single uninterrupted transaction,” which is the legal standard from *Mahone*.

Finally, in count VI, the State does another odd thing. It charges a separate criminal act for the reporting of an in-kind contribution of a Zogby poll on form CFA-4 that was filed on April 20, 2007. Yet, in count V, the State has charged that the filing of that *same* form CFA-4 on April 20, 2007 was a criminal act. Again, the statute under which both of these counts has been charged is I.C. § 3-14-1-13. The sole actus reus, or criminal act, is the *filing* of a “fraudulent” report under that law. There may be several ways that a report could be “fraudulent” (which is evidently the State’s theory), but the statute does not criminalize *each* fraudulent entry on the report. Rather it creates only a single criminal violation for the *filing* of the report itself. This may explain why the State did not allege one of the essential elements of I.C. § 3-14-1-13, namely knowingly “filing” the report, and instead charged Kelty with “fraudulently reporting” so that it could try to seek multiple punishments for what is only one act. That theory is simply not allowed by Indiana law or the state and federal constitutions. All four counts should be dismissed because of these errors.

II. THE FACTS ALLEGED BY THE GRAND JURY DO NOT CONSTITUTE CRIMES UNDER INDIANA LAW.

An indictment shall be dismissed if the “facts stated do not constitute an offense” or if “there exists some jurisdictional impediment to conviction of the defendant for the offense charged.” *See* I.C. § 35-34-1-4. Similarly, allowing a grand jury to return indictments for conduct that does not constitute a crime under Indiana law would violate art. I, sec. 12 of the Indiana Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution.

1. As a matter of law, a valid, legally enforceable personal loan can never be a campaign contribution.

While the State’s theory of the case remains unclear, in counts III through IX, the State seems to be advancing the argument that a personal loan to a candidate is also a campaign contribution to the candidate’s campaign committee and should have been disclosed as such on the committee’s campaign finance forms. However, that proposition as a matter of law is incorrect. A valid and legitimate personal loan evidenced by a promissory note can *never* be a contribution under Indiana law. *See* I.C. § 3-5-2-15(a). Therefore, if the Court concludes that the promissory notes in this case were in fact valid and legitimate, as a matter of law, the proceeds from those promissory notes are not campaign contributions and the facts that have been alleged do not constitute a violation of I.C. § 3-14-1-13.

In order to make that determination, the Court should start with the long line of cases in Indiana that sets out what constitutes a legal promissory note. A promissory note is “a written engagement by one person to pay another person, therein named, absolutely and unconditionally, a certain sum of money at a time specified therein.” *See Brown v. First National Bank*, 18 N.E. 56 (Ind. 1888). To become valid, a promissory note must become “negotiable” or under common law, meet at least five essential requisites. “First, it must be an open promise for the payment of money; second, it must contain a certain, definite, and fixed promise; third, it must

be payable unconditionally and at all events; fourth, the amount to be paid, the date, and the place of payment must be certain; and fifth, the instrument must be delivered.” *See Nicely v. Winnebago National Bank of Rockford*, 47 N.E. 476 (Ind. Ct. App. 1897). If the Court finds that a promissory note meets these five criteria and is negotiable or valid, it is as a matter of law concluding that the promissory note requires the payment of money from one party to another. *Id.*

That payment or repayment of money separates a loan or valid promissory note from a campaign contribution. I.C. § 3-5-2-15(a) defines a contribution, for purposes of § 3-9 reporting (and therefore also I.C. § 3-14-1-13 violations), as “a *donation* (whether characterized as an advance, a deposit, a gift, a loan, a subscription, or a contract or promise to make a donation) of property (as defined in IC 35-41-1)” (emphasis added).

A “donation” is not further defined by these provisions of the Indiana Code, which means the Court looks to a standard dictionary to determine the ordinary usage of the word. *See Brown* at 467. Donation is defined as a “gift” which is defined as “something given voluntarily *without payment in return*.” *See Dictionary.com Unabridged* (v. 1.1) (emphasis added). Therefore, money borrowed pursuant to a valid promissory note must be repaid and can never be a donation or contribution under Indiana law. *See* I.C. § 3-5-2-15(a). That is also consistent with the instructions given to campaign committees when completing campaign finance forms (see discussion at p. 27 *infra*).

Whether the Rost and Jehl promissory notes are valid are questions of law for this Court to decide and not to be left as findings of fact for a jury. *See Beavers v. State*, 141 N.E.2d 118, 122 (Ind. 1957) (“Juries are not at liberty to create new offenses, or find a defendant guilty of an offense not charged even though they might attempt to do so, because the judge in the last

analysis has a duty under his oath to invoke the constitution, and prevent a travesty of justice.”). The Court can make that determination by simply viewing the promissory notes in question in light of the five-part test for negotiability in *Nicely*. Both notes meet those standards thereby legally requiring repayment by Kelty. The affidavits attached also indicate that both Rost and the Jehls have always intended for Kelty to repay the money they loaned him and were not campaign contributors – the significance of which is that at the time of the filing of the campaign finance reports, these notes were not donations as a matter of law.

The State may point to the word “loan” in the definition of contribution to argue that a loan can be both a contribution and a loan. However, the use of the word “loan” in this context only modifies “donation” and is likely used to illustrate exactly the point Kelty is making here; *no matter how a payment is characterized, it does not change what that payment is as a matter of law.*

Money that is to be repaid cannot be a donation under Indiana law. I.C. § 3-5-2-15(a) also cannot be read to single-handedly abolish over a hundred years of legal precedence in the state of Indiana law that clearly holds that a valid promissory note requires repayment while a donation does not. This is also consistent with other parts of the campaign finance code that treat contributions and loans *differently*. See I.C. § 3-9-5-14(b) (treats contributions and loans to a campaign committee distinctly and directs that they be reported differently).³

The most compelling argument perhaps that a valid loan can *never* be a campaign contribution is the practical effect that the State’s theory of prosecution would have on *all*

³ There is also support for this interpretation in other areas of Indiana law. See I.C. § 23-2-6-6 (an agreement is a commodity contract regardless of how it is characterized by the parties if it meets legal standards); *Green v. Perry*, 549 N.E.2d 385, 387 (Ind. Ct. App. 1990)(summarizing long line of Indiana cases holding that even if a person is characterized as an independent contractor, they are an employee as a matter of law if a valid employer-employee agency relationship exists).