

If an agent of the State affirmatively misleads a party as to the state of the law and that party proceeds to act on that misrepresentation and then is later prosecuted by the State, that party's Fifth and Fourteenth Amendment rights under the U.S. Constitution and his or her rights under art. 1, sec. 12 of the Indiana Constitution have been violated. *See Cox v. Louisiana*, 379 U.S. 559 (1965); *U.S. v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973).

In this case, Kelty relied upon and followed instructions issued by the Indiana Election Commission in its Indiana Campaign Finance Manual, which is described as summarizing "all of the requirements of [article 9]" of the campaign finance laws, and those instructions printed by the Commission on the same campaign finance forms that are the subject of this indictment.

Specifically, on form CFA-4, instructions indicate only those debts owed by the committee and not the debts of the candidate are to be reported. The instruction for item 19 states:

Enter the total debts and loans *owed by the committee* as itemized on Schedule D. This includes debts such as accounts payable, credit card purchases *if made with a credit card issued in the name of the committee* and loans from a lending institution or another entity.

Similarly, in explaining how to fill in the space on form CFA-4 Schedule D, the Commission instructs in the area labeled "Creditor's or Lender's Name":

Enter the creditor's or lender's full name and mailing address. For the purpose of this reporting requirement, a Creditor or Lender may be an individual, business, lending institution, or another committee *who has advanced things of value to the committee* with the understanding that *the committee will pay back the debt* with or without interest. A debt may be evidenced by a promissory note, credit purchase, committee credit card account, or any other document showing an unpaid debt. For a credit card account *in the name of the committee*, list the name of the credit card issuer."

Kelty complied with those directions. His loans to the campaign committee were reported exactly as the Commission had directed. And these directions clearly contemplate that

it is entirely legal and proper for an individual to loan a committee money, including the candidate.

Kelty cannot now be criminally prosecuted for seeking out and following instructions issued by the State Election Commission, which itself is an authority established to instruct candidates, like Kelty, about how to comply with the same laws under which he is now being prosecuted.

3. The findings of the County Election Board bar a subsequent criminal prosecution for campaign finance violations.

The Indiana General Assembly has delegated administrative authority to interpret and enforce provisions of Indiana campaign finance laws over municipal elections to county election boards. *See* I.C. § 3-6-5 *et seq.* A county election board's powers include the power to "conduct all elections and administer the election laws within the county," I.C. § 3-6-5-14, and "if a county election board determines that there is substantial reason to believe an election law violation has occurred, it shall expeditiously make an investigation. If in the judgment of the board, after affording due notice and an opportunity for a hearing, a person has engaged or is about to engage in an act or practice that constitutes or will constitute a violation of a provision of this title or of a rule or order issued under this title, the board shall take the action it considers appropriate under the circumstances," I.C. § 3-6-5-31.

Prior to the grand jury investigation in this case, the Allen County Election Board was asked to interpret Indiana campaign finance laws as applied to Kelty and determine whether there had been violations of those laws. There was an administrative hearing in which evidence was presented and argument, on both sides, was offered. The State was represented by a member of the Board, Andrew Downs. The Board concluded, after that process, that Kelty did

not violate state law. That decision has a preclusive impact on the proceedings in this case in two respects.

First, the interpretations and enforcement decisions of a county election board are entitled to deferential standards of review, and as such, are a valid legal basis for dismissing the campaign finance violations, counts III through IX, in this case. An administrative agency's findings of facts and interpretations of a statute are afforded great deference, if that administrative agency has been charged with enforcing the statute under Indiana law. *See LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). I.C. § 3-6-5-31 clearly confers on the Allen County Election Board the authority to administer and enforce violations of the state election laws in municipal elections in that county. That level of deference does apply to the construction and interpretation of criminal statutes prior to criminal prosecutions.⁴ *See Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984); *Healthscript Inc. v. State*, 770 N.E.2d 810, 814 n.6 (Ind. 2002) (discussing application of *Chevron* doctrine to criminal matters). The State had the ability to intervene in the administrative hearing to stay the proceedings prior to criminal investigation and did not. Therefore, as a matter of law, findings of fact that support a conclusion that the state election laws have not been violated should result in the dismissal of counts III through IX in this case.

Second, other courts have found that a prior administrative proceeding, dealing with criminal violations of administrative laws, has a collateral estoppel effect and bars a subsequent criminal prosecution for the same conduct. *See People v. Garcia*, 141 P.3d 197 (Cal. 2006); *People v. Sims*, 651 P.2d 351 (Cal. 1982); *People v. Watt*, 320 N.W.2d 333 (Mich Ct. App. 1982); *D.C. v. Fisher*, 258 A.2d 456 (D.C. App. 1969).

⁴ The degree to which deference is granted to an agency's construction of a criminal statute has not been addressed by an Indiana court to the best of Kelty's research.

In both *Garcia* and *Sims*, the California Supreme Court concluded that when an administrative decision is adjudicatory in nature, in that it applied an existing rule to a specific set of facts, that the doctrine of collateral estoppel applies to subsequent criminal prosecutions on the same set of facts. *See Garcia* at 201. The California Supreme Court found in both cases, relying upon the U.S. Supreme Court decision in *U.S. v. Utah Constr. Co.*, 384 U.S. 394 (1966), that the doctrine of collateral estoppel bars the State from prosecuting a person who was exonerated or cleared of wrongdoing of that same charge in prior administrative proceedings.

The Indiana Supreme Court has likewise found that a prior administrative decision may have res judicata or collateral estoppel effect on subsequent civil litigation in Indiana courts. *See McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 394 (Ind. 1988). This ruling has not been applied to criminal cases, but the four criteria articulated in *McClanahan* for invoking the collateral estoppel doctrine are clearly met by the Allen County Election Board's decision in this case. *See id.* Those four criteria are: (1) whether the issues sought to be estopped were within the statutory jurisdiction of the agency; 2) whether the agency was acting in a judicial capacity; 3) whether both parties had a fair opportunity to litigate the issues; 4) whether the decision of the administrative tribunal could be appealed to a judicial tribunal. The policy reasons articulated in *McClanahan* for applying the collateral estoppel doctrine to an administrative decision are equally persuasive in *Kelty's* case.

Therefore, under either the administrative deference precedence or the collateral estoppel doctrine, the prior Allen County Election Board proceedings in this case bar the present prosecution on counts III through IX.

4. The facts alleged in counts I and II do not amount to perjury.

The United States Supreme Court has held that a perjury conviction can never be based upon a statement that is the "literal truth." *See Bronston v. U.S.*, 409 U.S. 352, 360 (1973). The

State may contend that an answer to a question may be non-responsive or may be subject to conflicting interpretations, or may even be false by implication. Nevertheless, if the answer is literally true, it can never be perjury. *Id.* at 362. Numerous courts have set aside indictments or overturned convictions on these precise grounds. See *U.S. v. Boone*, 951 F.2d 1526, 1536 (9th Cir. 1991); *U.S. v. Lighte*, 782 F.2d 367, 372 (2d Cir. 1986); *U.S. v. Eddy*, 737 F.2d 564, 567 (6th Cir. 1984); *U.S. v. Niemiec*, 611 F.2d 1207, 1210 (7th Cir. 1980).

The Court does not have to know a single fact about this case to conclude that count II can never be perjury as a matter of law under the *Bronston* rule. The State contends in count II, as detailed in the indictment, that the following exchange constitutes perjury under I.C. § 35-44-2-1(a)(1):

Q: So your story is that Fred Rost, your campaign chairman, lender to you of 150 grand [\$150,000], commissions a poll for your benefit to determine the public's sentiments on an issue that's an issue in the campaign and he doesn't tell you about it?

A. Yes, sir.

Q. That's your testimony?

A. Yes, sir (emphasis added).

Now, if the Court reviews only the highlighted version of this exchange the *Bronston* issue becomes apparent. In the first question, Kelty is *not being asked* if his story is truthful, honest, consistent, etc., rather he is only being asked "so your story is?" His answer will always be true. By answering yes, he is *only* indicating that the prosecutor's recitation of the facts is in fact an accurate recitation and that is in fact "his story." Similarly, the question "that's your testimony" is also always going to be true. Again, Kelty is not asked if his testimony or his story is factually true, but merely if "that's your testimony?" His answer of "yes, sir" is literally true.

As *Bronston* clearly holds, the State may argue persuasively that the details or facts of Kelty's story are not responsive, misleading, or even untruthful (the evidence, however, will

fully vindicate Kelty's version), but that is completely irrelevant in a perjury prosecution and in the Court's consideration of this motion. It is the State's burden to establish perjury with the question it asks and they have failed as a matter of law. As the Supreme Court held, "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry . . . [p]recise questioning is imperative as a predicate for the offense of perjury." *Bronston* at 361-362. To that end the State has failed on count II. The State simply had to ask Kelty is "your story" and "your testimony" on this matter true? It never did.

Count I, charging the State's line of questioning to Kelty on support given by Don Willis, also suffers from a *Bronston* problem. For the instant motion, however, Count I is flawed for another glaring reason. When a line of questioning is so vague as to be "fundamentally ambiguous," the answers associated with the questions posed are insufficient as a matter of law to support a perjury conviction or to constitute a crime. *See Lighte* at 375. The court may make this determination prior to trial and dismiss the indictments for perjury that have been improperly issued. *See U.S. v. Lattimore*, 127 F. Supp. 405, 410 (D.D.C. 1955).

A question is fundamentally ambiguous when it is not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony. *See id.* The context of the offending question and answer is important. As courts have said, the "defense . . . may not be established isolating a statement from context, giving it in this manner a meaning entirely different from that which it has when the testimony is considered as a whole." *See U.S. v. Bonacorsa*, 528 F.2d 1218, 1221 (2d Cir. 1976).

In this case, the entire context is important to the defense and should be considered by the Court because it *illustrates* the ambiguity and confusion of this line of questioning and the merits

of this legal challenge. In count I, Kelty is charged with perjury because of the following passage:

Q: Don Willis, do you know him?

A: Yes, sir.

Q: Has he ever provided any support to your campaign other than what has been – what has been delineated in your reports?

A: Not that I know of.

Clearly, Kelty's answer to the first question (whether Kelty knows Don Willis), must be true and cannot form the basis for perjury. The context in which the second question is asked is striking. *See* relevant portions of grand jury testimony attached hereto under seal (exhibit C).

[REDACTED GRAND JURY MATERIAL; UNREDACTED VERSION FILED WITH THE COURT ON OCTOBER 22, 2007 PURSUANT TO THE PROCEDURES IN RULE 5(G)(2) OF THE INDIANA RULES OF TRIAL PROCEDURE]

It is impossible to determine how a reasonable person could conclude what this line of questioning then (or even now) relates to. That is made even more difficult because the State does not explain how this statement was false in the indictment itself. Since perjury is a specific intent crime, a defendant cannot be found to be intentionally giving false testimony if there is substantial and legitimate disagreement over what he was actually being asked.

Additionally, the phrase "support to your campaign" is inherently and fundamentally ambiguous especially when evaluated in the broader context of the questions asked immediately before and after this question. It was also never defined for Kelty by the questioner. The State

did not specify whether this meant public support, as in a public endorsement or participation at campaign event, financial support as in hosting fundraisers or donating checks or cash to the campaign, expert support, as in advising the candidate on public policy or political strategy, or even moral support.

This ambiguity is further compounded by the expression “other than what has been delineated in your reports.” First, the question never specifies which reports and the context of the question gives no additional clues since there is no follow-up questions about reports, Kelty is never shown a report or an entry on a report, and the expression “other than” seems to suggest the questioner is actually asking about support “other than” or “outside” of the campaign finance context, namely public support or endorsement.

In the questioner’s mind, he may have known exactly what he was trying to ask, but that does not matter for purposes of this challenge. The fact is that a reasonable person, after the fact and faced with an *objective* legal standard, cannot conclude from this line of questioning what the State was truly trying to ask, and therefore, it is impossible to determine if Kelty’s answer was in fact false. Just the opposite appears to be true, the objective evidence and Don Willis’s own grand jury testimony appear to be entirely consistent with Kelty’s answer.

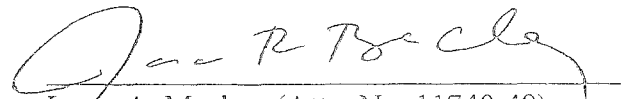
If the line of questioning related to Don Willis’s involvement with the Zogby poll, there are dozens of additional direct questions the State could have asked Kelty that would have been both material and relevant and far from ambiguous. For instance, the State could have asked, “do you know if Don Willis paid for the Zogby poll at the time it was commissioned?” But they did not do so. Again, a defendant should not be placed in criminal jeopardy because the State failed to do its job with completeness and precision. Why did the State not ask Kelty a single follow-up question about Don Willis after this question? And if the question actually related to

the Zogby poll, why did the State hide that ball from Kelty? Depending on the answer to that question, there may also be a “perjury trap” defense available to Kelty.

This is precisely the problem the Court faced in the *Lattimore* case when the Court dismissed the perjury indictment for what it determined was an “inherently ambiguous” question to a defendant asking him if he had ever been a “promoter of Communist interest.” A perjury count “cannot stand, being anchored to, partaking of, and plagued by, all its vagueness and indefiniteness.” *Lattimore* at 412. The definition of “support,” especially in this context, is a far too ambiguous basis upon which to allege a perjury allegation. Kelty did not lie or ever intend to mislead the grand jury and these counts give an unfair impression otherwise.

Neither count I nor count II constitute perjury as a matter of law and therefore, should be dismissed.

For the reasons set for above, Kelty respectfully moves the Court to grant his motion to dismiss the indictment in this case.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served this 22
day of October, 2007, by depositing a copy of the same in the United States First Class Mail,
postage prepaid to:

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