STATE OF INDIANA

COUNTY OF DELAWARE

STATE OF INDIANA

VS.

CHRIS HIATT

IN THE DELAWARE CIRCUIT COURT 1

2010 TERM
CAUSE NO: 18C01-0904-CM-0001

SPECIAL JUDGE: JAY TONEY
RANDOLPH CIRCUIT COURT

FILED
DELAWARE CIRCUIT COURT NO. 1
DELAWARE COUNTY, INDIANA
APR 20 2010
Marianne Vorhees
JUDGE

MOTION TO DISMISS INDICTMENT

Comes now the defendant Chris Hiatt, by council Michael J. Alexander, and moves to dismiss the indictment in this case pursuant to Indiana Rules of Criminal Procedure: Rule 3; and states as follows:

1. On April 17, 2009 a Grand Jury was convened by order of this Court at the request of and conducted by the Prosecutor Mark R. McKinney.

2. The Prosecutor called two witness before said Grand Jury, Steven Craycraft (County Clerk – election board secretary) and Rhonda Eckerty (Treasure of Citizens of Delaware County for Property Tax Repeal, Inc.)

3. That same day the Grand Jury then returned this indictment.

4. Said indictment is defective and should be dismissed for the following reasons:

   A. Prosecutor Mark R. McKinney falsely advised the Grand Jury that "technically, under Indiana Law if you're going to charge a group or a corporation or an organization, you charge the president." (GJ page 4, L 6-9)
   Mark R. McKinney also advised the Grand Jury "You've all heard about the corporate misdeeds and how it's the CEO that always ends up in trouble under federal law. It works the same way in Indiana. You go after the head of the corporation." (GJ page 4 L 10-14)
   This is but one example (see memorandum attached).

5. As a result of the "legal advise" of Mark R. McKinney the Grand Jury returned the indictment against the defendant without any probable cause to believe that he did the acts or was acting outside the scope of his function as

an officer of the corporation, and in fact indicted him for the acts of the corporation.

6. This case should be dismissed for Prosecutorial misconduct by Mark R. McKinney.

7. The indictment charges the wrong "person" under the law of the State of Indiana.

8. The indictment charges a Class A misdemeanor under IC 3-9-2.5 and 3-14-1-3 and as applied in this case these statutes are unconstitutially vague

Wherefore the defendant moves the Court to dismiss this indictment and for all other relief just and proper in the premises.

Respectfully submitted,

Michael J. Alexander 2355-18

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing has been served upon the Del. Co. Prosecutor on or before the date of filing herein.

Michael J. Alexander 2355-18

STATE OF INDIANA	**IN THE DELAWARE CIRCUIT COURT 1**
COUNTY OF DELAWARE	**2010 TERM** **CAUSE NO: 18C01-0904-CM-0001** **SPECIAL JUDGE: JAY TONEY**

STATE OF INDIANA

VS.

CHRIS HIATT

Memorandum in Support of Motion to Dismiss

The law of Indiana is and has been since at least 1898 that a corporation may be charged and convicted of a crime. Paragon Paper Company V. The State, 49 N. E. 600 (1898). The law remains the same today:

35-41-2-3 Liability of a corporation, limited liability company, partnership or unincorporated association.

(a) A corporation, limited liability company, partnership, or unincorporated association may be prosecuted for any offense; it may be convicted of an offense only if it is proved that the offense was committed by its agent acting within the scope of his authority.

(b) Recovery of a fine, costs, or forfeiture from a corporation, limited liability company, partnership, or unincorporated association is limited to the property of the corporation, limited liability company, partnership, unincorporated association.

3-14-1-3 Circulation or Publication of anonymous campaign material Sec 3 An individual, an organization or a committee that circulates or publishes material in an election without the

statement required under IC 3-9-3-2.5 commits a Class a misdemeanor.

3-5-2-34 "Organization"

Sec 34. "organization" means a person that is not an individual. The term includes a business firm or **corporation**, a limited liability company, a labor organization, a religious organization, a political club, a trustee, a receiver, or any other type of association or group of individuals. (bold face added)

In addition to the misadvise of law set out in the motion to dismiss, given by Mr. McKinney, he also affirmed the commits of Steve Craycraft who he led through lengthy testimony about the law (as if he were an expert on law). Including for example the following: "Once they purchased that and they began supporting candidates through that advertisement, they were no longer considered a corporation." (GJ P 12 L 6-9) He also allowed Craycraft to testify to hearsay about the opinions of another attorney who he said represents the State Election Commission, and possibly another un-named attorney for the state. (GJ P12 L 23).

Mr. McKinney, as the legal adviser of the Grand Jury, indorses the testimony as to the election board having the authority to make such determinations. (GJ P 13 L 9-15)

Mr. McKinney then leads the witness through a legal opinion of whether or not the statute (3-9-3-2.5-(d) has been violated without bothering

to establish what it actually says and further has the witness testify to the legislative intent behind the statute. (GJ P14-17) The statute is as follows:

> IC 3-9-3-2.5(d) A communication described in subsection (b) must contain a disclaimer that appears and is presented in a clear and **conspicuous manner to give the reader or observed adequate notice of the identity of persons who paid for and, when required who authorized the communication**. A disclaimer does not comply with this section if the disclaimer is difficult to read or if the placement of the disclaimer is easily overlooked. (**bold face added**)

This statute is unconstitutionally vague and ambiguous as being applied in this case.

The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. There must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrest and convictions for trivial acts and omissions will not occur. Brown v. State 848 N>E> 2d 699 (2006).

As being applied in this case this statute does not define the offense as required.

The bottom line is it requires the person placing the ad clearly states the name of the "person" who paid for the ad but does not require the use of

any particular language. It would seem the ad that is at issue meets this requirement. Can anyone who reads the ad doubt that the corporation paid for and authorized the aid? I don't think anyone would be in doubt about it. Unfortunately the Grand Jury was told by the exchange between the witness (Craycraft) and McKinney that the law required the ad to disclose who had made a contribution to the corporation providing the funds they used for the ad. (GJ P 15 L 10-25 & P16 L 1-6).(set forth below)

Q. Now this ad at the top clearly says Citizens of Delaware County for Property Tax Repeal, but it doesn't indicate who actually paid for the ad does it?

A. No: it does not.

Q. It doesn't say if it was any of the candidates or their committees who contributed to this, whether it was actually the CDCPTR that paid for it, whether it was some individual contributors that paid for it. It doesn't indicate, does it?

A. No, it does not.

Q. Why is that important? Why is it important that there is some kind of disclaimer contained within an advertisement like this?

A. Because the public needs to know who actually is financing things such as this. That could have been paid for by somebody from another state. It could be paid for by anybody. And during the election time, people need to know who is financing candidates, who is financing programs. It just . . . it makes people accountable for what they're doing.

See also (GJ P 20 L8-25, P 21 L 1-25, P 22, 23 24, 25 and 26 L 1-18) Where in summary, Craycaft, "answers" questions by the Grand Jurors - telling them what the law requires the ad to state: including "who is financing all of this organization....".

None of the above is required by the statute. A corporation or for that mater any committee or group can place and ad and if they are the person who pays they are not required to have a disclaimer stating who donated to the committee or the group. The Grand Jury, however, was never advised about the actual requirements of the statute; only McKinney's opinion of its purpose and the implication that non compliance with that opinion was a crime; and was committed by the CEO and not the corporation.

Indiana law is clear that an officer of a Corporation is not criminally liable for the acts of the corporation.

The Grand Jury was without any evidence of individual action by Chris Hiatt. The decision to run an advertisement was made by the board of the corporation. The money was sent by the treasurer of the corporation. There was no one piece of evidence that even inferred that any action was taken by Chris Hiatt that could possibly be outside his authorized agency for and on behalf of the corporation.

McKinney as prosecutor and Legal Advisor to the Grand Jury has a duty and responsibility to advise them on the law not on the opinions of Craycraft or himself. He should have at least read the statute under which he asked the defendant be indicted. . This indictment is severely flawed, obtained by misleading the Grand Jurors, and engaging in prosecutorial misconduct. The indictment was obtained for vindictive reasons and through deliberately and intentionally misleading the Jurors about the law. If not intentional it was grossly negligent. It should be dismissed.

WHEREFORE, counsel prays that the indictment be dismissed and for all other relief just and proper in the premises.

Respectfully submitted,

Michael J. Alexander 2355-18

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Delaware County Prosecutor on or before the date of filing herein.

Michael J. Alexander 2355-18

STATE OF INDIANA	)	IN THE DELAWARE CIRCUIT COURT #3
	) SS.	2009 TERM
COUNTY OF DELAWARE	)	CAUSE NO. 18 C03-0904-CM-01
STATE OF INDIANA	)	
	)	INDICTMENT FOR
	)	Violation of Indiana Election Law
VS.	)	I.C. 3-9-3-2.5 and 3-14-1-3
	)	A CLASS A MISDEMEANOR
CHRIS HIATT	)	
SS # xxx-xx-1096	)	
D.O.B. x/xx/1952	)	

BE IT REMEMBERED, that the Delaware County Grand Jury, upon their oath or affirmation, do present that:

On or about the 3rd day of November, 2008, in Delaware County, State of Indiana, Chris Hiatt, President of the Citizens of Delaware County For Property Tax Repeal did knowingly make an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, through a newspaper, without the required disclaimer and without noting whether the candidates had authorized the communication, contrary to the form of the statutes in such cases made and provided by I.C. 3-9-3-2.5 and 3-14-1-3, and against the peace and dignity of the State of Indiana.

A TRUE BILL

FOREPERSON

Alexandria Armstrong

FILED
CLERKS OFFICE
DELAWARE CO. INDIANA
APR 17 2009
CLERK

Approved by me:

Mark R. McKinney
Prosecuting Attorney

*223 Ind. 606, *; 63 N.E.2d 699, **;*
*1945 Ind. LEXIS 151, ****

Golden Guernsey Farms, Inc. v. State of Indiana

Nos. 28,052, 28,053

Supreme Court of Indiana

223 Ind. 606; 63 N.E.2d 699; 1945 Ind. LEXIS 151

December 3, 1945, Filed

PRIOR HISTORY: [*1]** From the Marion Criminal Court; *Harvey B. Hartsock,* Special Judge.

Golden Guernsey Farms, Inc., was convicted under two affidavits charging sale of adulterated milk with intent to defraud, and it appealed.

DISPOSITION: *Affirmed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of the decision of the Marion Criminal Court (Indiana), which convicted defendant under two affidavits charging sale of adulterated milk with intent to defraud. The appeals involved two of three cases prosecuted upon affidavit against defendant and certain individuals, tried together before a special judge.

OVERVIEW: Defendant contended that a **corporation** may not be prosecuted for either offense. The penalty section, Ind. Stat. Ann. § 35-1233 provided that any person who violated the Act shall be **guilty,** and obviously included a **corporation.** Since defendant's whole argument was based upon a misconception of the effect of the 1881 Act, now Ind. Stat. Ann. § 9-2403, it followed that there was no merit to its contention that there was error in overruling the motion to quash. The remaining question attempted to be presented was the sufficiency of the evidence to sustain the trial court's finding. There was much additional evidence tending to show that these were not two isolated instances of adulteration that might have been accidental. The practices of the **corporation** with reference to the "standardizing" of milk by adding water instead of skimmed milk were shown by the testimony of defendant's former employees. The **guilty** knowledge and intent to defraud or mislead, required to sustain the second count, were adequately shown. A contrary finding by the trial judge would have been hard to explain.

OUTCOME: The court affirmed the judgments of the trial court.

CORE TERMS: milk, prosecuted, adulterated, sub-section, intent to defraud, new trial, assigned, mislead, food, guilty knowledge, criminal intent, assignment of error, obstructing, convicted, admitting, highway, stream, intrastate commerce, homogenized milk', unlawfully, overruling, waived, bottle, dairy, fine

LEXISNEXIS(R) HEADNOTES

Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act
Governments > Agriculture & Food > Product Quality
Transportation Law > Intrastate Commerce

HN1 The Uniform Indiana Food, Drug and Cosmetic Act, Ind. Stat. Ann. § 35-1228 (1933) prohibits the sale in intrastate commerce of any food that is adulterated. Ind. Stat. Ann. § 35-1231(a) (1933). The penalties are prescribed in Ind. Stat. Ann. § 35-1233. Ind. Stat. Ann. § 35-1233(a) makes the mere sale a misdemeanor with penalty of imprisonment or a fine of not less than $ 10.00 nor more than $ 1,000.00. Ind. Stat. Ann. § 35-1233(b) provides that where the sale is made "with intent to defraud or mislead" the fine may be as high as $ 2,000.00.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction
Criminal Law & Procedure > Scienter > General Intent
Governments > Agriculture & Food > Product Quality

HN2 A **corporation** may be convicted of **crimes** involving a criminal intent.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

HN3 Ind. Stat. Ann. § 35-1230(e) provides that the term "person" includes individual, partnership, **corporation** and association.

Criminal Law & Procedure > Scienter > Knowledge
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor

HN4 Where either motive, intent or **guilty** knowledge is involved such evidence is admissible.

COUNSEL: *Rockford & Rockford,* of Indianapolis, for appellant.

James A. Emmert, Attorney General, and *Frank E. Coughlin,* First Assistant Attorney General, for the State.

JUDGES: Richman, J.

OPINION BY: RICHMAN

OPINION

[*608] [700]** These appeals involve two of three cases prosecuted upon affidavit against appellant and certain individuals, tried together before a special judge, a jury having been waived. One of the cases was dismissed and in the two in which appeals have been taken the individual defendants were discharged at the conclusion of the State's evidence.

In No. 28052 appellant was charged in two counts with having sold adulterated milk to Otto T. Law. In No. 28053 the affidavit charged the sale of adulterated milk to the County of Marion, Indiana, for use at the Marion County Tuberculosis Hospital, known as Sunnyside Sanatorium. Otherwise the affidavits in the two cases are identical. The appeals are briefed as one and therefore one **[***2]** opinion will suffice.

Before arraignment appellant filed a motion to quash the affidavit, which was overruled, and this ruling is assigned as error. Later a motion to strike out portions of each count of the affidavit was sustained. Upon appellant's refusal to plead the court entered for it a plea of not **guilty.**

The first count of the affidavit, as it stood after the motion to strike had been sustained, charges that appellant "unlawfully" sold

> "in intrastate commerce an article of adulterated food for human consumption, to-wit: milk, as a dairy product, commonly known as 'homogenized milk' to which had been added water as a substitute in part for said milk . . . so as to increase its bulk and reduce its quality and strength and make it appear better and of greater value than it actually was . . . ."

[*609] The second count characterizes the sale as "unlawfully, knowingly and feloniously" made "with intent to defraud and mislead" the purchaser.

Appellant was found **guilty** on each count in each affidavit and fined "$ 500.00 and costs on each separate affidavit."@ A motion for new trial was filed and overruled and error is assigned on the ruling.

The prosecution **[***3]** is pursuant to the Uniform Indiana Food, Drug and Cosmetic Act, ch. 38 of the Acts of 1939, found in 7 Burns' 1933 (Supp.), beginning at § 35-1228. It HN1 prohibits

> "The sale in intrastate commerce **[**701]** of any food . . . that is adulterated . . . ." § 35-1231(a), Burns' 1933 (Supp.).

The penalties are prescribed in § 35-1233. Sub-section (a) thereof makes the mere sale a misdemeanor with penalty of imprisonment "or a fine of not less than $ 10.00 nor more than $ 1,000.00 . . . ."@ The first count of each affidavit is based upon this sub-section. The second count is based upon sub-section (b), which provides that where the sale is made "with intent to defraud or mislead" the fine may be as high as $ 2,000.00.

Appellant contends that a **corporation** may not be prosecuted for either offense. The idea that a **corporation** is not indictable is said to have originated with Lord Holt. See 13 Am. Jur. ***Corporations,*** § 1132. But this concept has long since been abandoned. HN2 A **corporation** may be convicted of **crimes** involving a criminal intent. See *State* v. *Salisbury Ice & Fuel Co.* (1914), 166 N. C. 366, 81 S. E. 737, Ann. Cas. 1916 C 456, with case note collecting **[***4]** the authorities and citing, on p. 465, *Commonwealth* v. *Graustein* (1911), 209 Mass. 38, 95 N. E. 97, a prosecution for **[*610]** selling adulterated milk. There it appeared that criminal intent was not necessary to create the offense, but in numerous other cases cited in the note, where intent was an element of the **crime,** convictions of **corporations** were sustained.

But appellant seems to think the rule is different in Indiana. Its argument is based on the following cases: *State* v. *the Pres't and Direc'rs of the Ohio and Mississippi R. R. Co.* (1864), 23 Ind. 362; *State* v. *Sullivan County Agricultural Society* (1895), 14 Ind. App. 369, 42 N. E. 963; *Paragon Paper Co.* v. *State* (1898), 19 Ind. App. 314, 49 N. E. 600; *State* v. *Terre Haute Brewing Co.* (1917), 186 Ind. 248, 115 N. E. 772; *State* v. *Fairbanks* (1917), 187 Ind. 648, 115 N. E. 769. The earliest of these opinions was written at a time when Lord Holt's idea was prevalent and contains dicta indicating the same view. But the case may be put on another ground which will also explain the other cases cited. It was a prosecution for obstructing a highway. The statute was directed against **[***5]** *persons.* Since our criminal law is entirely statutory and the word "person" does not necessarily include a **corporation,** the court did not believe that the statute should be extended by implication to include **corporations,** notwithstanding a section of the Civil Code which defined "persons" as including "bodies politic and corporate."@ Later a statute was enacted, now § 9-2403, Burns' 1942 Replacement, which provides that

> "**Corporations** may be prosecuted, by indictment or affidavit, for erecting, continuing or maintaining a public nuisance, or for obstructing a public highway or navigable stream."

It seems first to have appeared in the Criminal Code of 1881, Acts 1881, p. 173, § 319. All the later cases relied upon by appellant refer to this section. The Paragon **[*611]** case was a prosecution for polluting a stream, based upon a statute which did not purport to apply to cororations but it was contended that the section quoted, *supra,* was applicable. The court held otherwise. This case, however, has been cited as holding that a **corporation** as such can not be prosecuted for a criminal offense except as provided in this section. This is expressly declared **[***6]** in *State* v. *Fairbanks, supra*. It is quite true, as stated in *State* v. *Terre Haute Brewing Co., supra,* that

> "As applied to **corporations,** the rule in this State is that they may be indicted only when the legislature has specifically so provided."

The legislature did so specifically provide, as to certain offenses, in the quoted section. At that time, 1881, and also in 1898 when the Paragon opinion was written, there may have been no other statute creating an offense for which a **corporation** could be prosecuted. But the legislature was free to create other statutory offenses and expressly provide in the statutes creating them that a **corporation,** as well as an individual, might be convicted for their violation. This is exactly what was done in the statute under which appellant herein is prosecuted.$

In § 35-1230, which contains the definitions applying to the 1939 Act, sub-section (e) provides that

> HN3"The term 'person' includes individual, partnership, **corporation** and association."

The penalty section, § 35-1233, which provides that any person who violates the Act shall be **guilty,** and so forth, obviously therefore includes a **corporation.** Since **[***7]** appellant's whole argument is based upon a misconception of the effect of the 1881 Act, now § 9-2403, **[*612]** supra, it follows that there is no merit to its contention that there was error in overruling the motion to quash.

There is a separate assignment of error in overruling appellant's motion to discharge, which is included also as a specification in its motion for new trial. But **[**702]** the motion is not set out in the brief, nor are we directed to any argument or authority on the question. It is therefore waived.

In No. 28052 there is a separate assignment of error "in admitting into evidence appellee's Exhibits 7 and 8," and No. 28053 "in admitting into evidence appellee's Exhibits 8 and 13."@ In each case also this assignment verbatim appears in the motion for new trial. These assignments are insufficient to raise any question. Errors in admission of evidence may be assigned only in a motion for new trial and no question is presented for review if the motion fails to state the grounds of objection to the evidence. *Brown* v. *State* (1939), 216 Ind. 106, 23 N. E. (2d) 267; *Kimmick* v. *Linn* (1940), 217 Ind. 485, 29 N. E. (2d) 207; *Wise* v. *Curdes* **[***8]** (1942), 219 Ind. 606, 40 N. E. (2d) 122; *McKee* v. *Mutual Life Ins. Co. of New York* (1943), 222 Ind. 10, 51 N. E. (2d) 474. It is not even shown by the "concise statement of the record" in appellant's brief that there were objections to the admission of these exhibits or that they were admitted in evidence. See Rule 2-17(e).

The remaining question attempted to be presented is the sufficiency of the evidence to sustain the court's finding. On that subject appellant has only two points, both irrelevant, one

to the effect that the burden of proof does not shift in a criminal case and the other attempting to apply the doctrine of reasonable doubt to consideration of the case upon appeal. *Brown* v. *State* (1941), 219 Ind. 21, 36 N. E. **[*613]** (2d) 759. Appellant does not point out in its Propositions, Points and Authorities in what respects it thinks the evidence is insufficient. This is required by Rule 2-17(f). In that part of its brief designated as "Argument," it is said:

> "There is no evidence that during the month of January, 1943, the appellant sold any milk to anyone to which it or anyone in its employ or anyone on its behalf, added any water."

Generalities **[***9]** of this nature do not serve the purpose of informing the court as to the particular issues upon which there was no proof. There, so far as this opinion is concerned, we might let the matter rest, for an appellant is not entitled to a discussion of a question which he has failed properly to present.

But aided by an excellent brief in behalf of appellee, we are able, without much effort, to add a resume of the evidence which sustains every essential part of the State's case.

The fact of appellant's incorporation was proved. During January, 1943, under a contract with Marion County appellant sold and delivered all the milk used in the Sunnyside Sanatorium. The patients complained of its quality and refused to use it, objecting that it was thin, blue and had a sour taste. The superintendent and medical director on January 13, 1943, took a bottle of homogenized milk from the refrigerator in one of the wards and had it analyzed by the State Board of Health. The analysis showed that approximately 15% of water had been added to the milk. Another sample bottle was purchased at the dairy January 18, 1943, by Otto T. Law, an investigator of the State Board of Health, and its analysis **[***10]** showed approximately 9% of added water. This was sufficient to establish guilt under the first count of each affidavit.

[*614] There was much additional evidence tending to show that these were not two isolated instances of adulteration that might have been accidental. The practices of the **corporation** with reference to the "standardizing" of milk by adding water instead of skimmed milk were shown by the testimony of appellant's former employees. An inspection was made by the State Board of Health shortly after the purchases to determine whether there were leaks in appellant's equipment whereby water might get into the milk accidentally and none was found. If, as appellant contends, evidence of other offenses was introduced, its brief shows no objection thereto and appellee says that there was none. HN4 Where either motive, intent or **guilty** knowledge is involved such evidence is admissible. *Anderson* v. *State* (1941), 218 Ind. 299, 32 N. E. (2d) 705; *Shneider* v. *State* (1942), 220 Ind. 28, 40 N. E. (2d) 322. Having carefully read all the evidence we are satisfied that the **guilty** knowledge and intent to defraud or mislead, required to sustain the second count, were **[***11]** adequately shown. A contrary finding by the trial judge would have been hard to explain.

Judgments affirmed.

- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

*848 N.E.2d 699, *; 2006 Ind. App. LEXIS 1067, **

RICHARD BROWN, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.

No. 49A05-0506-CR-321

COURT OF APPEALS OF INDIANA, FIFTH DISTRICT

848 N.E.2d 699; 2006 Ind. App. LEXIS 1067

June 7, 2006, Decided
June 7, 2006, Filed

SUBSEQUENT HISTORY: As Corrected June 12, 2006.
Rehearing granted by Brown v. State, 2006 Ind. App. LEXIS 2382 (Ind. Ct. App., Nov. 13, 2006)
On rehearing at, Reaffirmed Brown v. State, 856 N.E.2d 739, 2006 Ind. App. LEXIS 2332 (Ind. Ct. App., 2006)
Superseded by Brown v. State, 2007 Ind. LEXIS 477 (Ind., June 22, 2007)

DISPOSITION: Affirmed in part, reversed in part, and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The Marion Superior Court (Indiana) denied defendant's motion for a mistrial and entered final judgments of conviction on three findings of guilt the jury made regarding **criminal** confinement charges the State filed against him. Prior to doing so, the trial court merged three findings of guilt on identity deception charges against him into the **criminal** confinement counts. Defendant appealed.

OVERVIEW: Defendant was charged with three counts of class D felony **criminal** confinement and three counts of class D felony identity deception after three separate incidents in which he called three different restaurants pretending to be a radio disc jockey from a specific radio station running a contest in which a restaurant employee would go to defendant's house where the employee would undress in return for winning a prize. At defendant's jury trial, one of the victims identified him by stating that defendant was wearing a "jail armband." The trial court denied defendant's mistrial motion. Defendant was convicted on all charges. Before entering the convictions, the trial court merged the identity deception into the **criminal** confinement counts and convicted defendant only on the **criminal** confinement counts. The trial court also imposed a $400 jury fee. On appeal, the appellate court found the mistrial motion was properly denied, the **criminal** confinement statute was unconstitutionally vague as applied to defendant, the identity deception statute was not unconstitutionally vague as applied to him, and the imposition of a $400 jury fee exceeded the trial court's $2 statutory authority.

OUTCOME: The appellate court reversed defendant's judgments of conviction and sentence for **criminal** confinement, affirmed the guilty verdicts for identity deception, and remanded the case to the trial court for further proceedings.

CORE TERMS: deception, confinement, jail, radio, bracelet, mistrial, contest, waived, identifying information, unconstitutionally vague, enticement, door, radio station, knowingly, dictionary, reasonable doubt, wear, constitutional challenges, jury fee, ordinary

intelligence, clothing, jurors, wearing, defraud, felony, notice, t-shirt, defense counsel, identification, prosecutor

LEXISNEXIS(R) HEADNOTES

Criminal Law & Procedure > Trials > Motions for Mistrial
Criminal Law & Procedure > Appeals > Reversible Errors > Jury Instructions
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Mistrial
Evidence > Inferences & Presumptions > Presumptions

HN1 Whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. A reviewing court will reverse the trial court's ruling only upon an abuse of that discretion. It affords the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. To prevail on appeal from the denial of a motion for mistrial, the defendant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. Reviewing courts determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct. A mistrial is an extreme sanction warranted only when no other cure can be expected to rectify the situation. Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial
Evidence > Inferences & Presumptions > Presumptions

HN2 The presumption of innocence, although not articulated in the constitution, is a basic component of a fair trial under the system of **criminal** justice. The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment.

Criminal Law & Procedure > Trials > Defendant's Rights > General Overview
Criminal Law & Procedure > Jury Instructions > Cautionary Instructions
Evidence > Inferences & Presumptions > Presumptions

HN3 A timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by an objectionable statement.

Criminal Law & Procedure > Trials > Motions for Mistrial
Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN4 A reviewing court will not reverse a trial court's denial of a motion for mistrial unless the defendant demonstrates that he was placed in a position of grave peril to which he should not have been subjected.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Evidence > Procedural Considerations > Objections & Offers of Proof > Objections

HN5 The State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes. However, the failure to object to being tried in prison clothes negates the compulsion necessary to establish a constitutional violation.

Criminal Law & Procedure > Accusatory Instruments > Dismissal > General Overview

Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview
HN6 See Ind. Code § 35-34-1-4.

Criminal Law & Procedure > Accusatory Instruments > Dismissal > General Overview
Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview
HN7 See Ind. Code § 35-34-1-6.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Criminal Law & Procedure > Accusatory Instruments > Dismissal > General Overview
Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview
Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview
HN8 Generally, a challenge to the constitutionality of a **criminal** statute must be raised by a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal. Ind. Code § 35-34-1-4; Ind. Code § 35-34-1-6.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > False Imprisonment > General Overview
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > False Imprisonment > Elements
HN9 See Ind. Code § 35-42-3-3.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview
HN10 Whether a statute is constitutional is a question of law that a reviewing court reviews de novo.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > Presumptions
Governments > Legislation > Vagueness
HN11 When considering the constitutionality of a statute, a reviewing court begins with the presumption of constitutional validity, and, therefore, the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional. All reasonable doubts must be resolved in favor of the statute's constitutionality. A statute will not be found unconstitutionally vague if individuals of ordinary intelligence would comprehend it adequately to inform them of the proscribed conduct. The statute need only inform the individual of the generally proscribed conduct and need not list with exactitude each item of prohibited conduct. A statute will only be found to be void for vagueness if it is vague as applied to the precise facts and circumstances of each case. Finally, a statute is not necessarily vague even if a party can demonstrate that the legislature could have provided more precise language.

Governments > Legislation > Vagueness
HN12 The void for vagueness doctrine requires that a penal statute define the **criminal** offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. There must be something in a **criminal** statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur.

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview
HN13 Fraud is (1) a deception deliberately practiced in order to secure unfair or unlawful gain, (2) a piece of trickery; a trick, (3)(a) one that defrauds; a cheat, (b) one who assumes a false pose, such as an impostor. To entice means to attract by arousing hope or desire, or to lure. Remove means to move from a place or position occupied.

Criminal Law & Procedure > Criminal Offenses > Fraud > General Overview
HN14 Fraud is defined as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. A lie is merely to tell an untruth. Enticement is the act or an instance of wrongfully soliciting or luring a person to do something. A promise is a person's assurance that the person will or will not do something.

Criminal Law & Procedure > Criminal Offenses > Fraud > False Pretenses > General Overview
Criminal Law & Procedure > Criminal Offenses > Fraud > False Pretenses > Elements
HN15 See Ind. Code § 35-43-5-3.5.

Criminal Law & Procedure > Criminal Offenses > Fraud > False Pretenses > General Overview
Criminal Law & Procedure > Criminal Offenses > Fraud > False Pretenses > Elements
HN16 "Identifying information" has been defined as information that identifies an individual, including an individual's (1) name, address, date of birth, place of employment, employer identification number, mother's maiden name, Social Security number, or any identification number issued by a governmental entity. Ind. Code § 35-43-5-1(h).

Criminal Law & Procedure > Criminal Offenses > Fraud > False Pretenses > General Overview
Criminal Law & Procedure > Criminal Offenses > Fraud > False Pretenses > Elements
HN17 "Person," means "a human being, **corporation,** limited liability company, partnership, unincorporated association, or governmental entity." Ind. Code § 35-41-1-22.

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
HN18 A reviewing court's standard of review for sufficiency claims dictates that a reviewing court does not reweigh evidence or assess the credibility of witnesses. Rather, a reviewing court looks to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial > General Overview
HN19 In Indiana, **criminal** defendants are guaranteed the right to a trial by jury through Ind. Const. art. I, § 13 and the Sixth Amendment to the United States Constitution.

Criminal Law & Procedure > Juries & Jurors > General Overview
Governments > Courts > Authority to Adjudicate
HN20 Without statutory authority, a trial court has no power to assess jury costs.

Criminal Law & Procedure > Juries & Jurors > General Overview
Governments > Courts > Clerks of Court
HN21 See Ind. Code § 33-37-5-19(a).

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FOR APPELLEE: STEVE CARTER, Attorney General of Indiana; JODI KATHRYN STEIN, Deputy Attorney General, Indianapolis, Indiana.

JUDGES: CRONE, Judge. FRIEDLANDER, J., and MAY, J., concur.

OPINION BY: CRONE

OPINION

[*702] OPINION - FOR PUBLICATION

CRONE, Judge

Case Summary

Richard Brown appeals his convictions and sentence for three counts of class D felony **criminal** confinement and his guilty verdicts for three counts of class D felony identity deception. [1] We affirm in part, reverse in part, and remand.

FOOTNOTES

1 We held oral argument in Indianapolis on April 25, 2006. We thank counsel for their presentations.

Issues

Brown raises nine issues, which we reorder and restate as the following six:

I. Whether the trial court abused its discretion in denying his motion for mistrial;

II. **[**2]** Whether he waived his constitutional challenges;

III. Whether the **criminal** confinement statute, Indiana Code Section 35-42-3-3, is unconstitutionally vague as applied to him;

IV. Whether the identity deception statute, Indiana Code Section 35-43-5-3.5, is unconstitutionally vague as applied to him;

V. Whether the evidence is sufficient to support the guilty verdicts for identity deception; and

VI. Whether the trial court violated his statutory and constitutional due process rights by imposing a $ 400 jury fee.

Facts and Procedural History

On July 28, 2004, Brown called the Greek Islands Restaurant from his home at 1731 Fletcher Avenue in Indianapolis and spoke to A.H., a twenty-five-year-old server at the restaurant. Brown told A.H. that he was from the "93.1 radio station." Tr. at 52. 93.1 Radio Now is an Indianapolis radio station owned by Emmis Communications. Brown explained that the radio station was having a contest and that A.H. could win a car by going to 1731 Fletcher Avenue and persuading the occupant to give him a t-shirt in exchange for A.H.'s clothes. Brown told A.H. that it sometimes **[**3]** helped to bring food to bribe the **[*703]** person, and that A.H. would have to take a lie detector test the following day to see whether he followed the contest instructions. A.H. believed that Brown was a radio disc jockey and that the contest was legitimate because Brown sounded "very fast, very excited" like a radio personality. *Id.* at 53.

A.H. left the restaurant with a sandwich and drove to the Fletcher Avenue address. A.H. knocked on the front door, and Brown answered. A.H. explained the contest and gave Brown the sandwich. Brown suggested that A.H. drive to the back of the house so that the neighbors would not see him undress. A.H. did so, and Brown let him in the house through the back door. A.H. went to an adjacent room and took off his waiter's uniform while Brown watched from approximately four feet away. Brown gave A.H. a torn t-shirt, and he wrapped it around his waist like a beach towel and left.

On July 29, 2004, at approximately 6:00 a.m., Brown called a Steak 'n Shake restaurant and spoke with J.M., a college freshman employed as a waiter. Brown told J.M. that he was from Radio Now and that the station was holding a "dare contest," in which the contestant could win a **[**4]** new car of his choosing. *Id.* at 88. The dare was to trade his clothing for a t-shirt with the person at 1731 Fletcher Avenue, who knew about the contest, within the next hour. Afterward, J.M. would talk about the experience on the radio. J.M. agreed to enter the contest and drove to 1731 Fletcher Avenue.

J.M. rang the front door bell. When Brown answered, J.M. asked him if he knew anything about the contest. Brown said that he did not, but that his wife had entered Radio Now contests. J.M. explained the contest. Brown agreed to help, invited J.M. in, and gave him a child-sized t-shirt. J.M. asked Brown if he could go into a restroom to change. Brown replied, "No, that's all right. I'll see you anyway. It's not like I get off on that sort of thing." *Id.* at 94. J.M. started to unbutton his shirt but stopped when he saw Brown staring at him. He asked Brown to turn around. Brown turned slightly, but J.M. could see his profile. He also noticed that Brown's hand was shaking.

The situation made J.M. nervous. He asked Brown where his wife was. Brown told J.M. that he and his wife were not currently together. He also told J.M. that he should leave through the back door so that the **[**5]** neighbors would not see him. J.M. felt anxious and turned to open the door, but it was locked. He quickly unbolted the door and ran to his car. J.M. turned on Radio Now and heard about an incident that sounded similar to what he had just experienced. J.M. called the phone number broadcast by Radio Now and spoke to a police officer who happened to be at the radio station.

Around 6:30 that same morning, Brown called a McDonald's restaurant and spoke to M.C., a thirty-one-year-old cashier. Brown told M.C. that he was "Scott Ross" from Radio Now and invited M.C. to enter the "Summer dare to be wild contest" and win a Dodge Viper or any car up to $ 50,000, or elect a cash option of $ 50,000. *Id.* at 113. To win, M.C. had to go to 1731 Fletcher Avenue, "a randomly picked address," within the next forty-five minutes and persuade the occupant to give him a t-shirt in exchange for all his clothing. *Id.* at 131. Then, M.C. should wait by his phone for Radio Now to call and confirm that he had completed the

and identity deception convictions based on statutory vagueness and overbreadth, and (3) a motion to limit any sentence imposed on the identity deception counts to one year based on the proportionality clause of the Indiana Constitution. Notice was provided to the prosecutor and the attorney general.

At the sentencing hearing on May 31, 2005, the prosecutor and the attorney general responded to Brown's motions. The State argued that Brown waived his constitutional claims by failing to raise them in a motion to dismiss prior to trial. However, the trial court declined to find that Brown's constitutional claims were waived as untimely. The trial court granted the double jeopardy motion and denied the other two motions. The trial court merged the identity deception counts into the **criminal** confinement counts and entered judgment of conviction only on the latter. Appellant's App. at 12, 179. The trial court sentenced Brown **[**10]** to an aggregate eight-year sentence, with five years executed and three years suspended or on probation. In addition, over Brown's objection, the trial court imposed a $ 400 jury trial fee but waived it after finding that Brown was indigent. Brown now appeals.

Discussion and Decision

I. Motion for Mistrial

Broadly stated, Brown asserts that the trial court erred in denying his motion for mistrial. He bases this claim of error on his assertion that he was compelled to wear the jail bracelet in violation of the Fourteenth Amendment. Before addressing these assertions, we note that Brown's first objection and motion for mistrial were premised on the *witness's statement* identifying the jail bracelet. Only after the trial court denied Brown's motion for mistrial and denied the State's offer to pay for replacing the jail bracelet did Brown object to *having to wear it* because the witness had identified it. Given these particulars, we think that Brown's two assertions, while interrelated, are actually two distinct claims and are more properly dealt with separately. First, we consider whether the trial court abused its discretion in denying Brown's motion for mistrial **[**11]** premised on the witness's statement identifying the jail bracelet. Then, we address Brown's claim that he was compelled to wear the bracelet in violation of the Fourteenth Amendment.

In reviewing Brown's claim that the trial court erred in denying his motion for mistrial, we are governed by the following standard of review:

> *HN1*
>
> Whether to grant or deny a motion for mistrial is a decision left to the sound discretion of the trial court. We will reverse the trial court's ruling only upon an abuse of that discretion. We afford the trial court such deference on appeal because the trial court is in the best position to evaluate the relevant circumstances of an event and its impact on the jury. To prevail on appeal from the denial of a motion for mistrial, the appellant must demonstrate the statement or conduct in question was so prejudicial and inflammatory that he was placed in a position of grave peril to which he should not have been subjected. We determine the gravity of the peril based upon the probable persuasive effect of the misconduct on the jury's decision rather than upon the degree of impropriety of the conduct.
>
> **[*706]** A mistrial is an extreme sanction warranted only when no other **[**12]** cure can be expected to rectify the situation. Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and

remove any error created by the objectionable statement.

Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003) (citations omitted), *trans. denied.* [2]

FOOTNOTES

[2] In a footnote, Brown asserts that Indiana's standard of review for a mistrial "cannot be squared" with that enunciated by the United States Supreme Court. Appellant's Br. at 26 n.17. In support, he cites *Estelle v. Williams,* 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), for the principle that "[t]he Supreme Court required the State to demonstrate the harmlessness of an error beyond a reasonable doubt." *Id.* (citing *Estelle,* 425 U.S. at 512-13). We note that the principle he asserts (which can be found at 425 U.S. at 506) was not the holding of that case. In *Estelle,* the Supreme Court concluded that there was no constitutional violation, and therefore it did not need to address whether any reversible error was committed. However, in *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1968), which Brown cites in passing, the Supreme Court *held* that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Inasmuch as Brown raised this issue in a footnote and did not provide a thorough analysis for our review, he has waived this issue. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on ...."); *Davis v. State,* 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) ("A party waives an issue where the party fails to develop a cogent argument or provide adequate citation to authority and portions of the record."), *trans. denied* (2006). Consequently, we do not address this issue. We note, however, that even if we applied the standard advocated by Brown, we would conclude that under these particular circumstances, any error that the trial court may have committed in denying Brown's motion for mistrial based upon the identification of the jail bracelet was harmless beyond a reasonable doubt.

[13]** Specifically, Brown claims that the presumption of innocence and the Fourteenth Amendment to the United States Constitution were violated after M.C. pointed out that Brown was wearing a jail identification bracelet. HN2 "The presumption of innocence, although not articulated in the constitution, is a basic component of a fair trial under our system of **criminal** justice." *Estelle v. Williams,* 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Id.*

The State contends that Brown waived this claim by refusing the trial court's offer to give a cautionary jury instruction and that he fails to articulate how an admonishment would not have corrected the problem. We agree. HN3 "[A] timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement." *Alvies,* 795 N.E.2d at 506. Here, after the witness identified the jail bracelet, defense counsel did not request an admonishment. Instead, he immediately moved for a mistrial. Further, when the trial court offered him the option of a cautionary instruction, he **[**14]** declined. Had defense counsel requested an admonishment, the trial court would have had the opportunity to admonish the jury and presumably cure any error. *See id.*

Waiver notwithstanding, Brown's claim must fail. HN4 We will not reverse the trial court's denial of a motion for mistrial **[*707]** unless the defendant demonstrates that "he was placed in a position of grave peril to which he should not have been subjected." *Alvies,* 795 N.E.2d at 506. Brown has not made that required demonstration here. The record reveals

that defense counsel was not even sure if the jurors heard the witness's reference to the jail bracelet. Even if the jurors had heard the statement, the record is unclear as to whether the jury knew that Brown had to wear it because he was incarcerated. Further, defense counsel asked the trial court to keep the option of an admonishment open in the event that it became apparent that the jurors heard the reference to the "jail armband" and it was "on their minds." Tr. at 125. Defense counsel's decision not to exercise that option suggests that he did not believe that the reference to the jail bracelet had any significant influence on the jurors. Finally, the jail **[**15]** bracelet did not resemble handcuffs or shackles, and we therefore fail to see how its presence implied that Brown was dangerous. Accordingly, we conclude that the trial court did not abuse its discretion in denying Brown's request for a mistrial.

We now turn to Brown's claim that he was compelled to wear the jail bracelet in violation of the Fourteenth Amendment. HN5 "The State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes." *French v. State,* 778 N.E.2d 816, 821 (Ind. 2002) (citing *Estelle,* 425 U.S at 512). However, "[t]he failure to object to being tried in prison clothes negates the compulsion necessary to establish a constitutional violation." *Id.* (citing *Estelle,* 425 U.S. at 512-13). The State asserts that Brown did not object to wearing the jail bracelet until M.C. identified it at trial, and therefore Brown has waived this issue. We agree.

The United States Supreme Court's ruling in *Estelle,* 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126, is relevant to this issue. In *Estelle,* the defendant appeared in clothing distinctly marked as prison **[**16]** issue. He made no objection to the trial court concerning his jail attire before trial. The Supreme Court held that, "[n]othing in this record ... warrants a conclusion that [defendant] was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial." *Id.* at 512.

Our supreme court followed Estelle's reasoning in *French,* 778 N.E.2d 816. There, the defendant appeared at his habitual offender proceeding in bright orange clothing with the word "jail" on the back. He failed to object to wearing the prison garb. Our supreme court held: "if a defendant objects, it is error to require the defendant to appear in jail garb at the habitual offender phase. Here, however, there was no objection and the issue is not preserved." *Id.* at 821.

Here, Brown failed to object to wearing the jail bracelet before trial. He did not object to the requirement that he wear the bracelet until a witness identified it as jail clothing. For all intents and purposes, Brown invited the error by failing to object in a timely manner.

Even if the trial court erred in overruling Brown's objection **[**17]** to wearing the jail bracelet because it had been identified, we think any error was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1968) (holding that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."). We reach this conclusion for the same reasons that we determined that the trial court did not abuse its discretion in denying Brown's **[*708]** motion for mistrial: (1) defense counsel was not even sure that the jurors heard the reference to the jail bracelet; (2) even if the jurors heard the reference, the record is unclear as to whether the jurors knew why Brown was wearing it; (3) defense counsel chose not to request a cautionary instruction indicating that he did not think that the reference was significant; and (4) the jail bracelet does not resemble handcuffs or shackles.

II. Waiver of Constitutional Issues

The State contends that Brown waived his claims challenging the constitutionality of the **criminal** confinement and identity deception statutes by failing to raise them in a motion to

dismiss prior to trial pursuant to Indiana Code Sections 35-34-1-4 **[**18]** and -6. Indiana Code Section 35-34-1-4 provides in pertinent part:

> HN6
>
> (a) The court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds:
>
> (1) The indictment or information, or any count thereof, is *defective under section 6* of this chapter.
>
> . . . .
>
> (b) Except as otherwise provided, a motion under this section shall be made no later than:
>
> (1) twenty (20) days if the defendant is charged with a felony . . . prior to the omnibus date. *A motion made thereafter may be summarily denied if based upon a ground specified in subdivision (a)(1),* (a)(2), (a)(3), (a)(4), or (a)(5) of this section. A motion to dismiss based upon a ground specified in subdivision (a)(6), (a)(7), (a)(8), (a)(9), (a)(10), or (a)(11) of this section may be made or renewed at any time before or during trial. A motion to dismiss based upon lack of jurisdiction over the subject matter may be made at any time.

(Emphases added.) Indiana Code Section 35-34-1-6 provides in relevant part that HN7"[a]n indictment or information is defective when . . . the statute defining the offense is **[**19]** unconstitutional or otherwise invalid."

The State cites *Adams v. State,* 804 N.E.2d 1169 (Ind. Ct. App. 2004), to support its argument that Brown waived his constitutional challenges. In *Adams,* a panel of this Court concluded that the defendant's constitutional claim was waived because the defendant failed to raise it in a motion to dismiss prior to trial. The *Adams* court relied on supreme court precedent in reaching this decision:

> HN8Generally, a challenge to the constitutionality of a **criminal** statute must be raised by a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal. Ind. Code § 35-34-1-4; I.C. § 35-34-1-6; *Payne v. State,* 484 N.E.2d 16, 18 (Ind. 1985); *Smith v. State,* 727 N.E.2d 763, 766 (Ind. Ct. App. 2000). Here, Adams failed to file a motion to dismiss, and he did not object to the constitutionality of the statute at trial. As a result, Adams may not challenge the constitutionality of the statute for the first time on appeal, and the issue is waived.

Id. at 1172.

Brown argues that he has not waived his constitutional **[**20]** challenges because (1) Indiana Code Section 35-34-1-4(b) permits a trial court to summarily deny an untimely motion, and the trial court declined to exercise that discretion; and (2) the constitutionality of a statute may be raised at any stage of the proceedings. In support of the latter, he cites *Vaughn v. State,* 782 N.E.2d 417 (Ind. Ct. App. 2003), *trans. denied.* In *Vaughn,* the

defendant was convicted of domestic battery and challenged the constitutionality of the domestic **[*709]** battery statute for the first time on appeal. The State argued that the defendant waived his constitutional challenge by failing to file a motion to dismiss prior to trial. The *Vaughn* court chose to review the constitutionality of the domestic battery statute because the facts of the case revealed "just how far the words 'living as if a spouse' can arguably be stretched in order to convict an individual under the domestic battery statute." *Id.* at 419. In choosing to review the constitutional claim, the *Vaughn* court noted that "our Supreme Court has chosen on occasion to address the merits of the constitutional challenges to **criminal [**21]** statutes by acknowledging that while the argument would normally be waived, it may still be proper to address the argument." *Id.* Further, the *Vaughn* court quoted our supreme court for the principle that "'the constitutionality of a statute may be raised at any stage of the proceeding including raising the issue *sua sponte* by this Court.'" *Id.* (quoting *Morse v. State,* 593 N.E.2d 194, 197 (Ind. 1992)).

In reviewing the parties' arguments, we first observe that this Court has applied the waiver doctrine and declined to review a constitutional challenge on its merits on many occasions. *See, e.g., Allen v. State,* 798 N.E.2d 490, 502 (Ind. Ct. App. 2003); *Wiggins v. State,* 727 N.E.2d 1, 5 (Ind. Ct. App. 2000), *trans. denied; Newton v. State,* 456 N.E.2d 736, 739 (Ind. Ct. App. 1983); *Marchand v. State,* 435 N.E.2d 284, 287 (Ind. Ct. App. 1982); *Salrin v. State,* 419 N.E.2d 1351, 1354 (Ind. Ct. App. 1981). In other cases, both this Court and our supreme court have addressed the merits of a constitutional challenge after recognizing that the issue was waived. *See, e.g., Payne v. State,* 484 N.E.2d 16, 18 (Ind. 1985); **[**22]** *Rhinehardt v. State,* 477 N.E.2d 89, 93 (Ind. 1985), *criticized on other grounds by Stout v. State,* 528 N.E.2d 476 (Ind. 1988); *Szpunar v. State,* 783 N.E.2d 1213, 1219 (Ind. Ct. App. 2003); *Reed v. State,* 720 N.E.2d 431, 433 (Ind. Ct. App. 1999), *trans. denied* (2000); *Vaillancourt v. State,* 695 N.E.2d 606, 610 (Ind. Ct. App. 1998), *trans. denied.*

We think it proper to address Brown's claims on the merits. Unlike *Adams,* Brown raised his constitutional claim before sentencing and not for the first time on appeal. The trial court declined to find that Brown's claim was waived by its being untimely and considered the claim on its merits. The accused had a fair opportunity to present the issue, the prosecutor and attorney general both received notice and responded to the motion at the hearing, and we have an adequate foundation for addressing the issue. We also think that this case, like *Vaughn,* involves a unique set of facts, which demonstrates that certain terms used in the statute to define **criminal** confinement are subject to widely varying interpretation. Thus, this is a question of **[**23]** great public interest. Accordingly, we address the merits of Brown's claims challenging the constitutionality of the **criminal** confinement statute.

III. Vagueness -- Criminal Confinement Statute

Brown contends that the **criminal** confinement statute, Indiana Code Section 35-42-3-3, is unconstitutionally vague as applied to him, where he "merely lied about a radio contest that led individuals to leave their workplace to go to his home." Appellant's Br. at 12. The **criminal** confinement statute provides in relevant part:

HN9

> (a) A person who knowingly or intentionally:
>
> (1) confines another person without the other person's consent; or
>
> (2) removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another;

[*710] commits **criminal** confinement . . . a Class D felony.

Ind. Code § 35-42-3-3. Brown was charged with knowingly, by fraud and/or enticement, removing three men from their places of employment to his home.

HN10 Whether a statute is constitutional is a question of law that we review de novo. *State v. Moss-Dwyer,* 686 N.E.2d 109, 110 (Ind. 1997). **[**24]**

> HN11 When considering the constitutionality of a statute, we begin with the presumption of constitutional validity, and therefore the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional. All reasonable doubts must be resolved in favor of the statute's constitutionality.
>
> > A statute will not be found unconstitutionally vague if individuals of ordinary intelligence would comprehend it adequately to inform them of the proscribed conduct. The statute need only inform the individual of the generally proscribed conduct and need not list with exactitude each item of prohibited conduct.
>
> A statute will only be found to be void for vagueness if it is vague as applied to the precise facts and circumstances of each case. Finally, a statute is not necessarily vague even if a party can demonstrate that the legislature could have provided more precise language.

Szpunar, 783 N.E.2d at 1219 (citations and quotation marks omitted). HN12 "[T]he void for vagueness doctrine requires that a penal statute define the **criminal** offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and **[**25]** in a manner that does not encourage arbitrary and discriminatory enforcement." *Healthscript, Inc. v. State,* 770 N.E.2d 810, 815-16 (Ind. 2002). "[T]here must be something in a **criminal** statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur." *State v. Downey,* 476 N.E.2d 121, 123 (Ind. 1985). [3]

FOOTNOTES

[3] In *McIntosh v. State,* 638 N.E.2d 1269 (Ind. Ct. App. 1994), *trans. denied,* this Court rejected a vagueness challenge to the **criminal** confinement statute. Brown contends, the State does not dispute, and we agree, that *McIntosh* is inapposite. In that case, McIntosh was involved in a conflict with his former girlfriend and her current boyfriend at her residence. His former girlfriend, Ward, had taken her baby to her car, but the car would not start. McIntosh grabbed the baby from the car and stated, "I have your kid by his feet and I am going to drop him on his head." *Id.* at 1271. Ward ran to a neighbor's home to call the police. McIntosh and his wife drove to the neighbor's house, and McIntosh's wife handed the baby to Ward. McIntosh was charged with and convicted of knowingly or intentionally removing the baby by fraud, enticement, force or threat of force, from one place to another. On appeal, he argued that even if the jury had not believed his version of the facts, i.e., that he was merely returning Ward's abandoned child to her, the jury could not have convicted him under the statute. The *McIntosh* court rejected his argument, concluding that the statute was "sufficiently specific that no person of ordinary

intelligence would be misled into thinking that a person returning an abandoned child to its parent was committing **criminal** confinement." *Id.* at 1276-77.

[26]** The facts presented by the State to establish that Brown knowingly, by fraud and/or enticement, removed three men from one place to another are that (1) Brown called each man and told them that he was from 93.1 Radio Now, which was having a contest to win a car or cash, but Brown was not and had never been an agent, representative, or employee of Radio Now, and there was no such contest; and (2) each man left his place of employment and drove himself to Brown's house based on his statements.

[*711] Specifically, Brown argues that the **criminal** confinement statute is unconstitutionally vague because the key words in the statute -- fraud, enticement, and remove -- are not defined by the statute, and thus the statute fails to provide adequate notice and does not establish minimal guidelines to govern law enforcement, prosecutors, and juries. Specifically, he argues that the statute does not provide notice to persons of ordinary intelligence that devising a fake radio contest, in which persons drive themselves to someone's house and no force is used to make them enter the home or prevent their exit, constitutes **criminal** confinement.

In support of his argument, Brown directs our attention to **[**27]** the definitions of the terms -- fraud, enticement, and remove -- provided by a dictionary an ordinary person would use. HN13 Fraud is "(1) A deception deliberately practiced in order to secure unfair or unlawful gain. (2) A piece of trickery; a trick. (3)(a) One that defrauds; a cheat. (b) One who assumes a false pose; an impostor." Dictionary.com, http://dictionary.reference.com/search?q=fraud (last visited May 1, 2006). To entice means "[t]o attract by arousing hope or desire; lure: *The promise of higher pay enticed me into the new job.*" Dictionary.com, http://dictionary.reference.com/search?q=entice (last visited May 1, 2006). Remove means "[t]o move from a place or position occupied: *removed the cups from the table.*" Dictionary.com, http://dictionary.reference.com/search?q=remove (last visited May 1, 2006).

The State argues that the statute's definition of **criminal** confinement distinguishes between conduct that is trivial, such as a lie or promise, from conduct that is substantial, such as fraud or enticement, and that Brown did not commit a trivial lie. In support of its argument, the State relies upon Black's Law Dictionary. HN14 Fraud is defined as "[a] knowing **[**28]** misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." BLACK'S LAW DICTIONARY 685 (8th ed. 2004). A lie is merely "[t]o tell an untruth." *Id.* at 940. Enticement is "[t]he act or an instance of wrongfully soliciting or luring a person to do something." *Id.* at 573. A promise is "a person's assurance that the person will or will not do something." *Id.* at 1249.

We agree with Brown that the ordinary understanding of the terms fraud and enticement is so broad that there is no discernible standard between lawful and unlawful conduct. [4] The same is true with respect to the definitions in Black's Law Dictionary. In Black's definition of fraud, the words "to act to his or her detriment" could have significantly different meanings to different people. Likewise, the word "wrongfully," used in Black's definition of enticement, is subject to a multitude of interpretations. By way of illustration, we note that many activities frequently engaged in by members of society would constitute **criminal** confinement pursuant to these terms. For example, asking a person to attend a quiet dinner that is actually a surprise birthday **[**29]** party could constitute removal of a person by fraud or enticement because some people do not enjoy surprise parties and might therefore think the lie told to lure them to the party was wrongful. Also, a person participating in a dating service who misrepresents themselves and successfully persuades another person to meet him or her could be subject to a **criminal** confinement conviction. The person who was misled by the **[*712]** misrepresentation might think that he or she had acted to his or her detriment.

FOOTNOTES

[4] We think the term "remove" is sufficiently understood by persons of ordinary intelligence so as not to impair the constitutionality of the **criminal** confinement statute.

During oral argument, the State asserted that an evil motive is inherently an element of a crime, citing *Kinney v. State,* 404 N.E.2d 49 (Ind. Ct. App. 1980). First, we fail to discern how the insertion of "evil motive" into the **criminal** confinement statute would provide sufficient definiteness of the proscribed conduct. "Evil motive" **[**30]** is an ambiguous term, and its meaning would vary from person to person. Thus, even if an "evil motive" were required, we do not think that individuals of ordinary intelligence would be adequately informed that conduct such as Brown's is prohibited by the statute. Further, requiring an "evil motive" would not prevent arbitrary enforcement by police, prosecutors, and juries because its interpretation is so variable.

Second, the State's assertion is a misstatement of Kinney's holding. In *Kinney,* the defendant claimed that the harassment statute, Indiana Code Section 35-45-2-2 (Burns 1979 Repl.), was unconstitutionally vague. In relevant part, the harassment statute read as follows: "Harassment. (a) A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication (1) Makes a telephone call, whether or not a conversation ensues[.]" *Id.* at 51. In rejecting the defendant's constitutional challenge, we concluded that the specific intent required by the language of the statute, "to harass, annoy, or alarm another person but with no intent of legitimate communication," prevented the statute **[**31]** from being unconstitutionally vague. In reaching this conclusion, we stated:

> ". . . The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. ... But where the punishment imposed is only for an act knowingly done *with the purpose of doing that which the statute prohibits,* the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."

Id. (quoting *Screws v. United States,* 325 U.S. 91, 101-102, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) (emphasis added). In other words, specific intent was expressly included as an element of the harassment statute, and therefore the statute provided adequate notice of the prohibited conduct.

Here, we note, the **criminal** confinement statute does not expressly require a specific intent as an element of the crime. Even under Black's definition **[**32]** of fraud and enticement, a specific intent is not included. The best that can be said is that fraud may imply a bad motive, but enticement is completely devoid of such a factor.

We also think that *Vaughn,* 782 N.E.2d 417, is helpful in determining whether the **criminal** confinement statute is unconstitutionally vague. The *Vaughn* court held that the domestic battery statute was unconstitutionally vague because "living as if a spouse" may be based on many things, and therefore different people could interpret the language differently. *Id.* at 419. Here, as in *Vaughn,* different people may interpret the undefined terms in the **criminal** confinement statute -- fraud and enticement -- differently. We conclude that the **criminal** confinement statute does not provide notice to persons of ordinary intelligence that devising a fake radio contest, in which persons drive themselves to some **[*713]** one's house and no

....

(c) It is not a defense in a prosecution under subsection (a) that no person was harmed or defrauded.

Ind. Code § 35-43-5-3.5 (emphases added). At the time of Brown's offenses, HN16 "identifying information" was defined as "information that identifies an individual, *including* an individual's: **[**35]** (1) name, address, date of birth, place of employment, employer identification number, mother's maiden name, Social Security number, or any identification number issued by a governmental entity[.]" Ind. Code § 35-43-5-1(h) (now 35-43-5-1(i)) (Emphasis added). We observe that the term "including" indicates that the list of identifying information provided by the statute is not exclusive. HN17 "Person," means "a human being, **corporation,** limited liability company, partnership, unincorporated association, or governmental entity." Ind. Code § 35-41-1-22.

Brown asserts that persons of ordinary intelligence would not be on notice that pretending to be a radio disc jockey constitutes identity deception and that upholding the constitutionality of the statute as applied to the facts of this case creates an enormous potential for erratic and arbitrary enforcement. Specifically, he claims that he was not aware of, nor did he use, any "identifying information" as defined by **[*714]** Indiana Code Section 35-43-5-1(h). The State argues that there is no ambiguity or risk of arbitrary enforcement in the identity deception **[**36]** statute as applied to Brown and that he knew and used the unique identifying information of a **corporation** and, in so doing, committed identity deception. We agree with the State.

"Person" includes a **corporation.** I.C. § 35-41-1-22. "Radio Now" and "93.1" constitute information that identifies an existing Indianapolis **corporation.** Brown knowingly used the name and call number of the radio station without its consent to harm or defraud three men by luring them to his home to undress in front of him as part of a fictitious radio contest.

Brown asserts that ordinary people associate identity deception with the misuse of credit data. Even if that is true, it does not necessarily lead to the conclusion that the identity deception statute applies only to the misuse of credit data and that ordinary people understand it to be so limited. Brown also contends that the statute is so ambiguous that persons dressing up as someone else on Halloween or providing a false name at a bar are committing identity deception. We think that the statute is written in a manner that excludes such conduct in that it requires the "intent to harm or defraud another person." I.C. § 35-43-5-3.5 **[**37]** ; *see Kinney,* 404 N.E.2d at 51. Further, contrary to Brown's assertion, his conduct is not comparable to that of a person dressing up in a Halloween costume. He was not merely pretending to be a disc jockey for fun, he was purporting to be an agent of an actual radio station by using its identifying information without its consent in order to lure men to his house to undress in front of him. We conclude that the identity deception statute is defined with sufficient definiteness to adequately inform persons of ordinary intelligence that knowingly using the identifying information of a **corporation,** such as a radio station, without its consent and with intent to harm or defraud another person constitutes identity deception. We further conclude that it provides satisfactory guidelines to police, prosecutors, and juries to avoid arbitrary and discriminatory enforcement. Accordingly, the identity deception statute is not unconstitutionally vague as applied to Brown.

V. Sufficiency of the Evidence -- Identity Deception Verdict

Brown contends that there is insufficient evidence to support the jury's verdict that he is guilty of three counts of identity deception. **[**38]** [7]

HN18 Our standard of review for sufficiency claims is well settled. We do not

> reweigh evidence or assess the credibility of witnesses. Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

O'Connell v. State, 742 N.E.2d 943, 949 (Ind. 2001) (citation omitted). To convict Brown as charged, the State had to prove beyond a reasonable doubt that he knowingly used the identifying information of another person without the other person's consent and with the intent to (1) harm or defraud another person and/or (2) profess to be another person.

FOOTNOTES

[7] While both Brown and the State refer to Brown's identity deception "convictions," the trial court merged the identity deception counts with the **criminal** confinement counts and did not enter judgment of conviction on the identity deception verdicts. Appellant's App. at 12, 179.

[39]** **[*715]** The State presented evidence that Brown called each man and claimed to be from "the 93.1 radio station" or "Radio Now." Brown contends that by simply claiming to be an agent of Radio Now (93.1), he did not use "the identifying information" of another "person," as that term is used in the identity deception statute, and therefore the State failed to prove either of these elements beyond a reasonable doubt. In particular, he contends that "person" as used in the identity deception statute refers only to a human being and that he never claimed to be another actual human being.

Brown concedes that Indiana Code Section 35-41-1-22 broadly defines "person" as a human being, **corporation,** limited liability company, partnership, unincorporated association, or governmental entity. Appellant's Br. at 36. However, he asserts that "person" must be considered in conjunction with the definition of "identifying information." He correctly notes that the definition of "identifying information" uses the word "individual" three times and never makes reference to the word "person." He asserts that an "individual" in the context of social security and credit card numbers equates **[**40]** only to a real person -- not a made-up name or a real radio station. Therefore, according to Brown, "person" as it is used in the identity deception statute must be limited to a human being. We disagree.

While the identity deception statute and the identifying information statute in effect at the time Brown committed the crimes contain an unfortunate mixture of the terms "person" and "individual," we do not agree with Brown's conclusion that only a human being may be the victim of identity deception. "Person" is used in the identity deception statute multiple times in reference to the victim: "obtains, possesses, transfers, or uses the identifying information of another *person* without the other *person's* consent . . . to profess to be another *person* . . . It is not a defense . . . that no *person* was harmed or defrauded." "Person" is unambiguously defined to include a **corporation** under Title 35 of the Indiana Code, which governs **criminal** law. I.C. § 35-41-1-22. [8] Brown's narrow interpretation of the statute would render its language meaningless in that its multiple references to "person" would be mere surplusage. As a practical matter, **[**41]** **corporations** require identity protection for the same reasons that human beings do, to safeguard their privacy, financial security, goodwill, reputation, etc. We see no evidence that the legislature excluded **corporations,** or any of the other entities included within the definition of "person" in Indiana Code Section 35-41-1-22, from victimization under the identity deception statute.

FOOTNOTES

8 In fact, "person" is repeatedly defined throughout the Indiana Code to include **corporations.** *See* Ind. Code § 22-2-2-3 (minimum wage law); Ind. Code § 16-18-2-274 (a) (health provisions); Ind. Code § 4-2-6-1(11) (ethics and conflicts of interest for state officers); Ind. Code § 5-14-1.5-2(k) (public records and meetings); Ind. Code § 5-16-8-1 (steel procurement for public works); Ind. Code § 8-1-22.5-1(e) (utilities: gas pipeline safety); Ind. Code § 8-21-3-1(12) (aeronautics: aircraft finance); Ind. Code § 9-13-2-124 (motor vehicles); Ind. Code § 13-29-1-2(p) (environment: low-level radioactive waste); Ind. Code § 14-8-2-202(d) (natural resources department); Ind. Code § 22-9-1-3 (labor and industrial safety: civil rights); Ind. Code § 22-12-1-18 (labor and industrial safety: fire safety and building equipment).

[42]** We now address Brown's contention that there was insufficient evidence that he used "identifying information." As we previously observed, the list provided by Indiana Code Section 35-43-5-1(h) is not exclusive. Radio Now is the station's name and 93.1 is the station's call number. **[*716]** We think that the name and call number of a radio station are its "identifying information." We conclude that there was sufficient evidence to support the jury's verdict that Brown is guilty of three counts of identity deception. We therefore remand so that the trial court may enter judgment of conviction thereon and resentence Brown as appropriate. 9

FOOTNOTES

9 Accordingly, we need not address Brown's claim that the sentence for identity deception is unconstitutionally disproportionate as compared to the sentence for impersonation of a public servant.

VI. Imposition of Jury Fee

Brown contends that the $ 400 jury fee violates both the Indiana Code and the Due Process Clause of the state and federal constitutions. **[**43]** HN19 In Indiana, **criminal** defendants are guaranteed the right to a trial by jury through Article 1, Section 13 of the Indiana Constitution and the Sixth Amendment to the United States Constitution. *Gooch v. State,* 685 N.E.2d 152, 155 (Ind. Ct. App. 1997).

Brown correctly notes that we have held that HN20 without statutory authority, the trial court has no power to assess jury costs. *See id.* at 155; *Cranor v. State,* 699 N.E.2d 284, 287 (Ind. Ct. App. 1998). However, the legislature has now authorized such an assessment. Indiana Code Section 33-37-5-19(a) provides, HN21 "The clerk shall collect a jury fee of two dollars ($ 2) in each action in which a defendant is found to have committed a crime, violated a statute defining an infraction, or violated an ordinance of a municipal **corporation.**" The State concedes that the trial court's assessment of a $ 400 jury fee exceeded its statutory authority. We therefore affirm the imposition of the jury fee but remand for entry of a two-dollar jury fee. Upon remand, the trial court may reconsider whether to waive the fee based on a determination of Brown's indigency.

Conclusion

[44]** In summary, the trial court did not abuse its discretion in denying Brown's motion for mistrial. The **criminal** confinement statute is unconstitutionally vague as applied to Brown, and we therefore reverse those convictions. The identity deception statute is not unconstitutionally vague as applied to Brown. There was sufficient evidence to support Brown's guilty verdicts for three counts of identity deception. We remand for judgment of

conviction to be entered for the identity deception guilty verdicts and for resentencing. Finally, the trial court had statutory authority to impose jury costs, but the $ 400 fee exceeded its statutory authority of two dollars. Consequently, we remand for entry of a two-dollar jury fee.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and MAY, J., concur.

*19 Ind. App. 314, *; 49 N.E. 600, **;*
*1898 Ind. App. LEXIS 37, ***

PARAGON PAPER COMPANY v. THE STATE.

No. 1,737.

COURT OF APPEALS OF INDIANA

19 Ind. App. 314; 49 N.E. 600; 1898 Ind. App. LEXIS 37

February 23, 1898, Filed

PRIOR HISTORY: [*1]** From the Delaware Circuit Court.

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant, a **corporation** that ran a paper mill, appealed the judgment of the Delaware Circuit Court (Indiana), which entered a verdict of **guilty** and fine against defendant for violation of Ind. Code Ann. § 2154 (1894), creating a public nuisance. The trial court overruled defendant's motion to set aside and suppress the summons and return, motion to quash the affidavit and information, and motion for a new trial.

OVERVIEW: Defendant operated a paper mill that released offal and noxious smells into a river and the surrounding areas. The state prosecuted defendant under Ind. Code Ann. § 2154 (1894), for creating a public nuisance. The trial court found defendant **guilty** and assessed a fine. On appeal, the court reversed the decision of the trial court. The court held that defendant's motion to set aside and suppress the summons and return was proper. An affidavit and an information are two separate entities. Defendant was only entitled to the information. Only criminal statutes that specified that a **corporation** was subjected thereto allowed prosecution of a **corporation.** Ind. Code Ann. § 2154(1894) did not state that defendant could be prosecuted for polluting a waterway in the manner charged in the affidavit, and a **corporation** was punishable for an act only when the act charged amounted to a public nuisance. There was not enough in the affidavit to show that defendant's factory itself was a nuisance, but the nuisance was the manner in which it operated.

OUTCOME: The court reversed the decision of the trial court and held that defendant's motion for a new trial should have been sustained.

CORE TERMS: public nuisance, nuisance, river, factory, offensive, prosecuted, punished, act charged, indictment, noxious, summons, pollution, noisome, comfort, smells, miles, public highway, new trial, private nuisances, enumerated, injurious, stream, offal, injuriously, indictable, exhalations, punishable, navigable, highway, declare

LEXISNEXIS(R) HEADNOTES
Civil Procedure > Counsel > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > Not Guilty
Tax Law > State & Local Taxes > Income Tax > Corporations & Unincorporated Associations > General Overview

HN1 Ind. Code Ann. § 1754 (1894) provides that a summons, together with a copy of the indictment or information, shall be served and returned in the manner provided for the service of summons upon such **corporation** in civil actions. The position maintained by counsel derives its principal strength, perhaps, from the concluding part of this section, which provides that, The **corporation,** on or before the return day of a summons duly served, may appear by one of its officers, or by counsel, and answer to the indictment or information by motion or plea; and upon its failure to make such appearance and answer, the clerk shall enter a plea of not **guilty;** and upon such appearance being made or plea entered, the **corporation** shall be deemed, thenceforth, continuously present in court until the case is finally disposed of. It is true that, if an affidavit is defective, both the information and the affidavit must fall before a motion to quash; and, in determining the sufficiency of the information, the court must look to both the affidavit and information.

Criminal Law & Procedure > Accusatory Instruments > Informations > General Overview
Criminal Law & Procedure > Preliminary Proceedings > Entry of Pleas > Types > General Overview
Legal Ethics > Professional Conduct > Illegal Conduct

HN2 Under the criminal code, an information is the official statement made to the court by the prosecuting attorney, that a person has been **guilty** of some designated felony or misdemeanor. It must be filed and signed by the prosecuting attorney, and based upon the affidavit of some competent and reputable person. Ind. Code Ann. § 1747 (1894). It must set forth the act charged as an offense. Ind. Code Ann. § 1802 (1894). But the language used in various statutes makes it clear that the words "affidavit" and "information" are not included in the word "information." Thus, the affidavit and information may both be amended, and, when the affidavit is amended, it shall be done before the defendant pleads, and be verified; but the information may be amended at any time before or on the trial to conform to the affidavit. Ind. Code Ann. § 1804 (1894). A defendant may move to quash an information when it appears, upon the face thereof that the facts stated in the information do not constitute a public offense, or that the information does not state the offense with sufficient certainty. Ind. Code Ann. § 1828 (1894).

Governments > Local Governments > Ordinances & Regulations
Real Property Law > Torts > Nuisance > General Overview
Transportation Law > Water Transportation > Waterways

HN3 Ind. Code Ann. § 2154 (1894) reads as follows: Whoever erects, continues, uses or maintains any building, structure, or place for the exercise of any trade, employment, or business, or for the keeping or feeding of any animal, which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort or property of individuals or the public; or causes or suffers any offal, filth or noisome substance to be collected or to remain in any place, to the damage or prejudice of others or the public; or obstructs or impedes, without legal authority, the passage of any navigable river, harbor or collection of waters; or unlawfully diverts any stream of water from its natural course or state, to the injury of others; or obstructs or encumbers, by fences, buildings, structures, or otherwise, any public grounds; or erects, continues, or maintains any obstruction to the full use of property, so as to injure the property of another or essentially to interfere with the comfortable enjoyment of life, shall be fined not more than five hundred dollars nor less than ten dollars: Provided, That nothing in this section shall prevent the board of trustees of towns and the common councils of cities,

from enacting and enforcing such ordinances within their respective corporate limits as they may deem necessary to protect the public health and comfort.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Nuisances > Public Health Nuisances > Elements
Real Property Law > Torts > Nuisance > Types > Continuing Nuisance
Real Property Law > Torts > Nuisance > Types > Public Nuisance

HN4 Ind. Code Ann. § 1970 (1894) provides, that **corporations** may be prosecuted by indictment or information, for erecting, continuing, or maintaining a public nuisance, or for obstructing a public highway or a navigable stream, and that if appellant was amenable to punishment for the acts charged it is by virtue of Ind. Code Ann. § 2153 (1894), which provides that every person who shall erect, or continue and maintain any public nuisance, to the injury of any part of the citizens of this state, shall be fined not exceeding one hundred dollars.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Nuisances > Public Health Nuisances > Elements
Criminal Law & Procedure > Criminal Offenses > Property Crimes > General Overview
Real Property Law > Torts > Nuisance > Types > Public Nuisance

HN5 It is only by virtue of Ind. Code Ann. § 1970 (1894) that a **corporation** is liable for a criminal prosecution. Ind. Code Ann. § 290 (1894) provides that whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Nuisances > Public Health Nuisances > General Overview
Real Property Law > Torts > Nuisance > Types > Private Nuisance
Real Property Law > Torts > Nuisance > Types > Public Nuisance

HN6 A right to maintain a strictly private nuisance upon the land of another may be acquired by prescription; but a right to maintain a public nuisance cannot be acquired by prescription. If the injury were limited to an individual, it gave a private right of action; if it affected the public, it was the subject of a public prosecution.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview
Criminal Law & Procedure > Criminal Offenses > Property Crimes > General Overview

HN7 The offenses enumerated in Ind. Code Ann. § 2154 are public nuisances. Ind. Code Ann. § 2154 is § 157 of an act, entitled "An act concerning public offenses and their punishment."

Criminal Law & Procedure > Criminal Offenses > Classifications > Misdemeanors
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Riot, Rout & Unlawful Assembly > Elements
Governments > Legislation > Types of Statutes

HN8 **Crimes** and misdemeanors shall be defined, and punishment therefor fixed by statutes of this state and not otherwise. Ind. Code Ann. § 237 (1894). A **crime** is the doing of that which a penal code forbids to be done or omitting to do what it commands. A necessary part of the definition of every **crime** is the designation of the author of the offense, upon whom the penalty is to be inflicted. It has been held that the provision of the civil code that the word "person" shall extend to bodies politic and corporate, does not apply to the criminal code. So that when a criminal statute does not expressly apply to **corporations** it does not create an

offense for which a **corporation** may be punished. And when a statute designates an act of a **corporation** as a **crime,** and prescribes punishment therefor, it creates a criminal offense which otherwise would not exist, and which can be committed only by a **corporation.** So that the criminal offense which the statute says may be committed by a **corporation** cannot be committed by an individual, for the reason that one of its essential ingredients is that it be committed by a **corporation.**

Governments > Courts > Judicial Precedents
Governments > Legislation > Interpretation
Governments > Legislation > Types of Statutes

HN9 Penal statutes must be construed strictly, and that the legislature, and not the court, must define a **crime** and fix the punishment. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of the words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a **crime** not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.

Criminal Law & Procedure > Criminal Offenses > General Overview
Governments > Legislation > Interpretation
Governments > Legislation > Types of Statutes

HN10 Penal statutes must not be so strictly construed that the purpose of the legislature will be defeated, but the words employed must be understood in the sense in which the legislature obviously used them.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Nuisances > General Overview
Criminal Law & Procedure > Accusatory Instruments > Informations > General Overview
Real Property Law > Torts > Nuisance > Types > Public Nuisance

HN11 Maintaining a public nuisance is a **crime,** and the affidavit is not necessarily bad because it might fail to come within the offenses set out in Ind. Code Ann. § 2154 (1894).

HEADNOTES

CRIMINAL LAW. -- *Affidavit and Information.* -- ***Corporations.*** -- Section 1754, Burns' R. S. 1894, requiring that in a criminal prosecution against a **corporation** a copy of the indictment or information shall be served and returned with the summons, does not require service of the affidavit upon which an information is based.

CRIMINAL LAW. -- *Under What Statute a **Corporation** is Indictable for Maintaining Nuisance.* -- For maintaining a public nuisance a **corporation** is indictable only by virtue of section 1970, Burns' R. S. 1894, and upon conviction is amenable to punishment as provided in section 2154, Burns' R. S. 1894.

NUISANCE. -- *Discharging Offal Into River.* -- ***Corporation.*** -- Where a **corporation** by the operation of a factory discharges offal into a river, so as to affect injuriously people along the river, such **corporation** maintains a nuisance within the meaning of section 2153, Burns' R. S. 1894.

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JUDGES: ROBINSON, C. J.

OPINION BY: ROBINSON

OPINION

[*315] **[**600]** ROBINSON, C. J.--Appellant, a **corporation,** was prosecuted by affidavit and information for polluting the waters of the Mississinewa river with refuse from its factory. A trial resulted in a verdict of **guilty** and a fine of five hundred dollars. The errors assigned are the overruling of appellant's motion to set aside and suppress the summons and return, its motions to quash the affidavit and information, and its motion for a new trial. A summons and a copy of the information were served upon appellant. There was a special appearance and motion by appellant to set aside the summons and copy of the information and service thereof, which motion was overruled. It is argued by counsel that the term information as used in section 1754, Burns' R. S. 1894, means the information and the affidavit upon which it is based, and **[***2]** that appellant should have been served with a copy of the information and the affidavit. HN1 Section 1754, *supra,* provides that "Such summons, together with a copy of the indictment or information, shall be served and returned in the manner provided for the service of summons upon such **corporation** in civil actions." The position maintained by counsel derives its principal strength, perhaps, from the concluding part of this section, which provides that, "The **corporation,** on or before the return day of a summons duly served, may appear by one of its officers, or by counsel, and answer to the indictment or information by motion or plea; and upon its failure to make such appearance and answer, the clerk shall enter a plea of 'not **guilty';** and upon such appearance being made or plea entered, the **corporation** shall be deemed, thenceforth, continuously present in court until the case is finally disposed of." It is true that, if an affidavit is defective, both the information and the affidavit must fall before a motion to quash; and, in determining the **[*316]** sufficiency of the information, the court must look to both the affidavit and information. HN2 Under the criminal code, an information **[***3]** is the "official statement made to the court by the prosecuting attorney, that a person has been **guilty** of some designated **[**601]** felony or misdemeanor. It must be filed and signed by the prosecuting attorney, and based upon the affidavit of some competent and reputable person." Section 1747, Burns' R. S. 1894. It must set forth the act charged as an offense. Section 1802, Burns' R. S. 1894. But the language used in various statutes makes it clear that the words "affidavit" and "information" are not included in the word "information." Thus, the affidavit and information may both be amended, and, when the affidavit is amended, it shall be done before the defendant pleads, and be verified; but the information may be amended at any time before or on the trial to conform to the affidavit. Section 1804, Burns' R. S. 1894. A defendant may move to quash an information when it appears, upon the face thereof that the facts stated in the information do not constitute a public offense, or that the information does not state the offense with sufficient certainty. Section 1828, Burns' R. S. 1894.

We think it clear that the information and the affidavit are separate and distinct entities. We see no reason for extending the meaning of the word "information" as used in the section. The service of a copy of the affidavit upon the **corporation** could have no greater effect than to notify the **corporation** of the nature of the offense with which it is charged, and, as the information must set forth the act charged as an offense, it fulfills that purpose. In the absence of some sufficient reason or authority, we are unwilling to say that the intention of the legislature in section 1754, *supra*, was that a copy of both the affidavit and **[*317]** information should be served on the **corporation.** We see no reason for extending the statute to cover what was manifestly not intended to be covered, and which is not necessary to prevent the defendant's rights from being prejudiced. See *Rice* v. *State*, 15 Ind. App. 427, 44 N.E. 319.

In the case of *Lindsey* v. *State*, 72 Ind. 39, cited by appellant's counsel, the appellant was prosecuted upon an affidavit and information for a felony. The affidavit failed to state that appellant was in custody on the charge for which he was prosecuted, and that the grand jury was not in session. The information **[***5]** contained these averments. A motion in arrest of judgment, based upon the alleged insufficiency of the affidavit, was overruled. The statutory causes for arrest of judgment were that the grand jury which found the indictment had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court, and that the facts stated do not constitute a public offense. It was held that, under that particular statute, the affidavit and information constitute "in a certain generic sense," the indictment, and that the judgment may be arrested for the want of any material jurisdictional averment either in the affidavit or information. And in the case of *Hoover* v. *State*, 110 Ind. 349, 11 N.E. 434, it is held that the affidavit and information take the place of an indictment, and are, "in a certain generic sense," the indictment, but the case recognizes the affidavit and information as distinct entities. The motion to set aside the summons and service was properly overruled.

This prosecution was based on HN3 section 2154, Burns' R. S. 1894, which reads as follows: "Whoever erects, continues, uses or maintains any building, structure, **[***6]** or place for the exercise of any trade, employment, **[*318]** or business, or for the keeping or feeding of any animal, which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort or property of individuals or the public; or causes or suffers any offal, filth or noisome substance to be collected or to remain in any place, to the damage or prejudice of others or the public; or obstructs or impedes, without legal authority the passage of any navigable river, harbor or collection of waters; or unlawfully diverts any stream of water from its natural course or state, to the injury of others; or obstructs or encumbers, by fences, buildings, structures, or otherwise, any public grounds; or erects, continues, or maintains any obstruction to the full use of property, so as to injure the property of another or essentially to interfere with the comfortable enjoyment of life, shall be fined not more than five hundred dollars nor less than ten dollars: *Provided,* That nothing in this section shall prevent the board of trustees of towns and the common councils of cities from enacting and enforcing such ordinances within their respective **[***7]** corporate limits as they may deem necessary to protect the public health and comfort."

Counsel for appellant earnestly insist that a **corporation** is not indictable under the above section, and that a **corporation** is only indictable by force of HN4 section 1970, Burns' 1894, which provides, that "**Corporations** may be prosecuted by indictment or information for erecting, continuing, or maintaining a public nuisance, or for obstructing a public highway or a navigable stream," and that if appellant was amenable to punishment for the acts charged it is by virtue of section 2153, Burns' R. S. 1894, which provides that "Every person who shall erect, or continue and maintain any public nuisance, to the injury of **[*319]** part of the citizens of this state, shall be fined not exceeding one hundred dollars."

It is insisted on behalf of the State, that a **corporation** may be prosecuted under sec...

2154, *supra,* and is amenable to the punishment therein provided, and that it is sufficiently charged in the affidavit to bring the offense in question within the first and second clauses of that section.

As appellant is not charged with having obstructed a public highway or a navigable **[***8]** stream, the prosecution can be maintained only upon the ground that the acts charged constitute **[**602]** a public nuisance. HN5 It is only by virtue of section 1970, *supra,* that a **corporation** is liable for a criminal prosecution. Section 290, Burns' R. S. 1894, provides that "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." While the above statute, in the definition of a "nuisance," has not indicated any distinction between public and private nuisances, yet a distinction is made in the adjudged cases. Thus it has been held that HN6 a right to maintain a strictly private nuisance upon the land of another may be acquired by prescription; but a right to maintain a public nuisance cannot be acquired by prescription. *Sherlock* v. *Louisville, etc., R. W. Co.* 115 Ind. 22, 17 N.E. 171. In *State* v. *Taylor,* 29 Ind. 517, it is held that our statute gives as accurate a definition of the term "nuisance" as understood at common law as can be found elsewhere, and **[***9]** after quoting the statute defining a nuisance the court said: "If the injury were limited to an individual, it gave a private right of action; if it affected the public, it was the subject of a public prosecution."

It is argued that the legislature has declared HN7 the **[*320]** offenses enumerated in section 2154 to be public nuisances. Section 2154 is section 157 of an act, entitled "An act concerning public offenses and their punishment." Immediately preceding section 157 in the published acts of 1881 is the word "nuisances" in brackets, and at the left of the top of the section, and on the margin of the page, are the words "public nuisance." In the enrolled bill on file in the office of the Secretary of State, following section 156 of the act, and immediately preceding section 157, are the words, "Offenses against public health." Immediately following these words is the word "nuisances." Then follows section 157. While it would be proper to look to such words in an act to aid in determining its meaning, yet, such words so used, could not be held to declare that each of the offenses named is a nuisance. All the section undertakes to do is to set out certain offenses and provide a **[***10]** punishment, and it does not undertake to declare each of them to be a nuisance. Even if we should admit that these words in the original act as passed by the General Assembly make each of the offenses enumerated in section 157 a nuisance, yet there is nothing to indicate which are public nuisances and which are private. In order to hold a **corporation** liable for committing all of the offenses named in section 2154 we must say that the word public, used in section 1970, means both public and private, or in other words, that it means nothing, and that a **corporation** may be prosecuted for maintaining a nuisance.

The case of *City of Valparaiso* v. *Moffitt,* 12 Ind. App. 250, 54 Am. St. 522, 39 N.E. 909, cited by appellant's counsel, was a civil action against the city for damages resulting from the pollution by the city of a natural water course. In that case it was held that a municipal **corporation** is liable in a civil action for erecting and **[*321]** maintaining a nuisance, the same as a natural person. It is true the opinion states that by the statute it is made a public nuisance to commit certain offenses set out in section 2154, but, as that question was not involved **[***11]** in the case, the statement must have been made simply by way of illustration. But, even if it was held in that case that the offenses enumerated in that section are public nuisances, it is not held that a **corporation** indicted for the commission of such offenses should be punished under that section. That question was in no sense involved in that case.

It cannot be said that a person who maintains a place which, by occasioning noxious exhalations or offensive smells, becomes injurious to the health, comfort, or property of two individuals, and no more, could be punished for maintaining a public nuisance. And yet such

a person could be punished under section 2154. Nor could a person who maintains any obstruction to the full use of property, so as to injure the property of another, be punished for maintaining a public nuisance. If this act is a nuisance, it is a private nuisance, and the above act makes it punishable by fine. The legislature has in the past declared certain acts to be common or public nuisances, and this was done by the express words of the act. See R. S. 1843, pp. 974, 975, 2 Gavin & Hord, p. 461, 2 Davis R. S. 1876 p. 462. And while it is clear that some of the offenses **[***12]** named in section 2154 are public nuisances, yet it cannot be said that the legislature has declared all the offenses set out in that statute to be public nuisances.

We think it is clear that a **corporation** could not be punished for committing some of the offenses named in that section. If a **corporation** commits any one of the offenses charged in that section which **[*322]** would be a public nuisance, it may be punished. But the **corporation** would be punishable, not for doing a specific act made by statute a criminal offense for which a punishment is provided, but it would be punishable for maintaining a public nuisance. The statute has made a **corporation** criminally liable for three offenses only, and has fixed the punishment for each. It has not said that a **corporation** may be prosecuted for polluting a water course in the manner charged in the affidavit, and a **corporation** becomes punishable for such an act only when the acts charged amount to a public nuisance, and for that a penalty is prescribed. The statute marks out public nuisances as a **crime,** just as it has obstructing a highway or a navigable stream. See *State* v. *Berdetta,* 73 Ind. 185, 38 Am. Rep. 117; **[***13]** *State* v. *Sullivan County Agr. Soc.,* 14 Ind. App. 369, 42 N.E. 963. **[**603]**

It is argued that such a construction would result in imposing one penalty upon a **corporation,** and a greater penalty upon an individual for the same offense. The legislature declared in 1852 that HN8"**crimes** and misdemeanors shall be defined, and punishment therefor fixed by statutes of this state and not otherwise." Section 237, Burns' R. S. 1894. A **crime** is the doing of that which a penal code forbids to be done or omitting to do what it commands. A necessary part of the definition of every **crime** is the designation of the author of the offense, upon whom the penalty is to be inflicted. It has been held that the provision of the civil code that the word "person" shall extend to bodies politic and corporate, does not apply to the criminal code. *State* v. *President, etc.,* 23 Ind. 362. So that when a criminal statute does not expressly apply to **corporations** it does not create an offense for which a **corporation** may be punished. And when a statute designates an act of a **corporation** **[*323]** as a **crime,** and prescribes punishment therefor, it creates a criminal offense **[***14]** which otherwise would not exist, and which can be committed only by a **corporation.** The designation of the **corporation** enters into the definition of the **crime;** just as a county treasurer converting public funds to his own use is **guilty** of embezzlement, while a stranger taking the same funds is **guilty** of a different **crime,** or an affray is an offense committed by two or more persons, or a riot is an offense committed by three or more persons, or profanity is an offense committed by a person over fourteen years of age. In these instances the designation of the person or persons committing the offense is clearly a part of the definition of the offense. So that the criminal offense which the statute says may be committed by a **corporation** cannot be committed by an individual, for the reason that one of its essential ingredients is that it be committed by a **corporation.**

To hold that **corporations** may be punished under section 2154 makes it necessary to say that a part only of the section may be held to apply to a certain class of persons and that the remainder of the section does not apply. If the legislature had not expressly provided a penalty for a **corporation** maintaining a public nuisance, **[***15]** such construction might have some reason to support it. We see no better reason for saying that a **corporation,** prosecuted for an offense which is a public nuisance, should receive the greater punishment provided in section 2154 instead of the lesser punishment provided in section 2153, than for saying that an individual who is prosecuted for obstructing a public highway, an act declared to be a public nuisance, could insist that he should receive the lesser punishment provided in

Whether the affidavit **[***23]** is tested by the definition of a nuisance, as found in the principles and precedents of the common law, or by the definition found in the statute, it avers facts which amount to a public nuisance, for which the statute has provided a punishment. It charges the continuance and maintenance of a public nuisance, to the injury of part of the citizens of the State, and is good under section 2153, Burns' R. S. 1894. It is perhaps true that the court could not make the abatement of such **[**605]** a nuisance a **[*329]** part of the judgment of conviction, for the reason that the factory itself is not the nuisance complained of, but the nuisance consists in the manner in which the factory is operated. *Bloomhuff* v. *State,* 8 Blackf. 205.

The affidavit charges but one offense, and that is that appellant so conducts its trade and business by discharging offal and refuse into the river that it produces the evil effects complained of. The people who are alleged to be injuriously affected are those living along the river and those traveling upon highways which run across the river. It does not appear that injury resulted to any one living near the factory itself. The factory **[***24]** itself is not a nuisance *per se,* and there are no averments in the affidavit that it is in a public place, or that people reside near it, or any other circumstances which show that the public was affected by it. This fact clearly distinguishes the case at bar from the cases of *Knopf* v. *State,* 84 Ind. 316, and *State* v. *Weil,* 89 Ind. 286. Thus, in the case of *Mains* v. *State,* 42 Ind. 327, 13 Am. Rep. 364, the affidavit was held bad for failing to show that the place charged to be a nuisance was situate in any public place, or near any public street or highway, or that any person resided near thereto, or was in the habit of passing thereby, and it was held that, as the place was not a nuisance *per se,* these facts must be averred.

So, in the case at bar, there is not enough in the affidavit to show that the factory itself is a nuisance, but the nuisance results only from the manner in which it is operated, and the particular manner is the pollution of the river with offensive and poisonous substances from the factory. If all the averments of the affidavit concerning the pollution of the river and the evil results flowing **[***25]** therefrom be eliminated, there is not sufficient left to charge an offense. *Herron* **[*330]** v. *State,* 17 Ind. App. 161, 46 N.E. 540; *Henry* v. *State,* 113 Ind. 304, 15 N.E. 593.

It is not charged that the buildings or place occasioned noxious exhalations and offensive smells, or became injurious to the health, comfort, or property of individuals, or the public living near the factory itself, but that appellant in the exercise of the business of paper making occasioned noisome and offensive smells; and the affidavit then particularizes the manner in which these offensive smells were occasioned, that is from the pollution of the river, to the injury of persons living along and near to the river. There was no error in overruling the motions to quash the affidavit and information.

Other alleged errors are discussed, but we deem it unnecessary to extend this opinion with a discussion of them, as the questions presented may not arise on another trial. The trial in the circuit court proceeded throughout on the theory that appellant was prosecuted under section 2154, and subject to the punishment therein provided, and the court so instructed the **[***26]** jury. One of the errors assigned is the overruling of appellant's motion for a new trial, and one of the grounds on which a new trial was asked was that the verdict is contrary to law. The motion for a new trial should have been sustained. Judgment reversed, with instructions to sustain appellant's motion for a new trial.

STATE OF INDIANA)
) ss.
COUNTY OF DELAWARE)

IN THE DELAWARE COUNTY CIRCUIT COURT NO. 3
18C03-0811-MC-05

IN RE THE MATTER OF THE)
GRAND JURY FOR DELAWARE)
COUNTY CIRCUIT COURT NO. 3)

RECORD OF GRAND JURY PROCEEDINGS

HELD ON
APRIL 17, 2009

TESTIMONY OF:

S T E V E C R A Y C R A F T

GRAND JURY CONDUCTED BY:
MARK McKINNEY, PROSECUTING ATTORNEY
MUNCIE, DELAWARE COUNTY, INDIANA

I N D E X O F E X H I B I T S

April 17, 2009
9:10 a.m.

(Seven Grand Jury members present.)

(The Grand Jury witness enters the room.)

MR. MCKINNEY: The first thing we're going to talk about today, I handed you some statutes that are applicable. There was a complaint filed with the County Election Board about an advertisement that was published in a newspaper before the last election. The Election Board dealt with part of it. Referred it to my office. I did the research. Talked to the State Election Board, and they suggested a grand jury to examine; that their opinion was that the ad clearly violated the provisions of the statute, but I'm going to let you all tell me if you believe it should be charged as a crime.

I have today subpoenaed Steve Craycraft, who is our county clerk. He's also a member of the Election Board as a secretary; is that correct?

THE WITNESS: Yes.

MR. MCKINNEY: The complainant was an individual named Joe Evans, who is not available today. So if at the end of the testimony, you

want to hear from Joe, we can bring him in next Friday. That's not a problem.

I have subpoenaed the treasurer for the group that paid for the ad, and I issued a target subpoena for the president of the group that paid for the ad because, technically, under Indiana law if you're going to charge a group or a corporation or an organization, you charge the president.

You've all heard about the corporate misdeeds and how it's the CEO that always ends up in trouble under federal law. It works the same way in Indiana. You go after the head of the corporation.

His attorney did file what's called a motion to quash, which means he's asserting his Fifth Amendment right not to testify. So after the first couple of witnesses, we all need to make a decision whether or not you think his testimony is important enough to give him immunity. And, remember, we talked about that in one of our first meetings. That if we give a target immunity that come in here, can't use anything that they say against them. All we're doing that for is so that we get their side of the story

basically. But it can't be used against them in any proceeding unless they change the story should the case actually go to trial. Okay. All right. We'll go ahead and get him sworn and we'll get started.

(The Oath of Grand Jury witness is read to the witness by the Grand Jury foreman.)

THE WITNESS: So help me God I will.

(The Oath of Grand Jury Witness is signed by the witness.)

S T E V E C R A Y C R A F T,
having been duly sworn to tell the truth, the whole truth, and nothing but the truth relating to said matter, is examined and testifies as follows:

QUESTIONS BY MR. MCKINNEY:

Q. Steve, before we get started, how this goes, typically, I'll ask you a number of questions. This is just like giving a deposition in that you need to answer out loud because we're recording it. The recording devices don't pick up head nods or shakes and uh-huh and huh-uh is very difficult. So make sure that if it's a yes or no question that you answer yes or no.

A. Okay.
Q. The other thing, as you heard in the oath, grand jury proceedings are confidential, so anything that's testified to or talked about today in the grand jury room must be kept confidential.

Once I'm done with my questions, if the grand jurors have any questions, they'll have an opportunity at the end to make their own inquiries.

A. Okay.
Q. Okay. For the record state your full name.
A. My name is Steven Craycraft.
Q. And spell your last.
A. C-R-A-Y-C-R-A-F-T.
Q. Steve, how are you presently employed?
A. I am the clerk of Circuit Court for Delaware County.
Q. I know there are a multitude of them, but, generally, what are your responsibilities as the clerk?
A. The main one here is the -- I'm the secretary of the Election Board by statute, but the clerk's duties are receiving child support, marriage licenses, garnishments, judgments. We keep all court cases in Delaware County. The courts are a

court of record so we have all the files dating back for probably 50 or 60 years or more. Plus, we keep -- anything older than that, we keep in microfilm version. But it's just the clerk's office has many duties.

Q. You also have some responsibility with regard to each election?

A. Right. The clerk is the main oversee person for the election process.

Q. All right. Before getting elected to this position, what was your occupation or profession?

A. I worked 25 years at the Sheriff's Department for Delaware County. Retired in June of 2007.

Q. I want to take you back to, I don't know, sometime towards the end of December of 2008. Did the -- were you a member of the Election Board at that time?

A. Yes, I was.

Q. All right. And did the Board receive a complaint from an individual named Joe Evans with regard to a particular advertisement that ran in the local newspaper?

A. Yes, we did.

(Grand Jury Exhibit(s) 1 marked for identification.)

QUESTIONS BY MR. MCKINNEY:
Q. I'll show you what's been marked as Exhibit 1 for the Grand Jury. Do you recognize that document?
A. Yes, I do.
Q. All right. Is that the complaint that was received from Mr. Evans?
A. Yes, it was.
Q. And what basically were his concerns about this particular advertisement?
A. That the advertisement had no disclaimer on it and -- let me look through here. And that they were not -- this organization was not adhering to the financial laws as either a PAC or as other candidates or committees do by submitting financial reports to the clerk after the election process. That there was no accountability of how things were spent or what was being done.
Q. All right. You refer to a PAC, that's a political action committee?
A. Yes.
Q. And under Indiana law, political action committees are required to file campaign finance reports disclosing their financial expenditures and contributions for the campaign season?
A. Yes, that is right.

Q. And as are any candidate or a candidate's committee, they're also required to file that same --
A. Yes, that's right.
Q. -- finance reports; right?
A. Right.
Q. Now, if they fail to file a campaign finance report, the Election Board has jurisdiction over addressing that failure; is that correct?
A. Yes, that's correct.
Q. And you have the authority to assess some penalties or fines to that candidate's campaign committee, political action committee, whatever?
A. Yes, that is correct.
Q. You do not have any authority to charge a criminal offense?
A. That is correct.
Q. At any time has the Citizens of Delaware County for Property Tax Repeal filed a campaign disclosure statement with the Delaware County Clerk's office?
A. No, they have not.
Q. All right. Let's go then to -- well, once the complaint was filed, what was the process that the Board went through?

A. Once the complaint was filed, I notified the president of the Election Board and advised them that we have a complaint. A meeting is set so we can hear the complaint, and that's what was done. We heard this complaint at the first of January. Do you want me to go through what was --

Q. Yes.

A. Okay. During the first original meeting of hearing this complaint, the president of this organization told the Board that he had not had an opportunity to review the complaint, and he asked for a continuance, so we gave him ten days, I believe, to review the complaint.

Q. Who was that person?

A. Chris Hiatt. And then after ten days we set a hearing ten days later, again, a meeting so we could -- so we could hear this complaint.

Q. Did he come to that second meeting then?

A. Yes, he did.

Q. And talk about what happened at that meeting.

A. That meeting we went over the complaint with him and his organization. There were several members of his organization there. And we were trying to give them the opportunity to straighten out the finance part of this complaint. Because a lot of

people they might not understand what the statute says when it comes to financial disclosure, and so we were trying to give him the opportunity to do that. They kept denying that they were wrong in anything that they did. And so I made the motion that we send a complaint to your office.

Q. Was there a disagreement as to whether or not the Citizens of Delaware County for Property Tax Repeal were a political action committee?

A. Yes.

Q. And they believed they were not?

A. Right.

Q. Under some definition of the statute. What was the Election Board's position?

A. The Election Board's position was that they were operating as a PAC.

Q. And why was that?

A. Just the way the statute was written, that some of the things that they were doing was what a PAC committee does.

Q. What were they doing that was of interest?

A. Okay. They were doing -- do you want me to go over what this advertisement was or do you want me to wait?

Q. Let's talk in generalities then I'll pass around

the advertisement.
A. Once they bought advertisement at the Muncie newspaper, no matter what the amount was, I believe the amount on this was four thousand and some dollars, but I'll have to look back at the check. Once they purchased that and a they be gab supporting candidates through that advertisement, they were no longer considered a corporation. They were acting as a PAC committee and so during -- can I go back a little bit?
Q. Yes.
A. After our first meeting when we gave them the ten days continuance, I contacted the attorney for the State Election Commission, Leslie Barnes. And because I wanted to let her know exactly what we were dealing with and what her opinion was about what she believed was going on. And I was under the opinion that they were acting as a PAC. The president of our board was under the opinion that they were acting as a PAC. I told the attorney at Indianapolis what was going on and it was her opinion that they were operating as a PAC. So that's why when we talked with them at the second meeting, we were telling them that they were actually acting as a PAC. Once they

crossed that threshold of just being an organization, you know, coming to board meetings and things such as that, and that's what their organization has done a lot in the past and they started spending money endorsing candidates and trying to influence elections and things such as that, they've crossed that line and they became a PAC committee instead of just a corporation.

Q. Okay. And that, again, that's a determination that falls within the jurisdiction of the County Election Board, and you all have the authority to impose some penalties and fines if they refuse to follow the campaign finance laws; is that correct?

A. That's right.

Q. All right. Now let's talk about the second portion of the complaint which deals with the disclaimer that's required. I've handed each of the -- each of the grand jurors have a copy of the law that applies to the disclaimer requirements.

The issue of whether or not the Citizens of Delaware County for Property Tax Repeal is a political action committee or not doesn't change or doesn't affect the analysis of what must be

contained in their advertisement. So whether they're an organization, whether they're an individual, whether they're a political action committee, however they are defined or however they define themselves, really doesn't matter. As I read the law, and you can read the law and then you can tell me, but with the complaint, did you also get a copy of the advertisement itself?

A. Yes, I did.

Q. This is a full page ad that ran in the November 3, 2008, edition of the Star Press?

A. Yes, it did.

(Grand Jury Exhibit(s) 2 marked for identification.)

QUESTIONS BY MR. MCKINNEY:

Q. I'll show you what's been marked as Exhibit 2. Is that a copy of the -- or, actually, an edition of the Star Press containing this full-page ad that was at issue?

A. Yes, it is.

Q. Anywhere on that full page ad did the Election Board find the disclaimer that was required -- I can't find my statute.

A. It's 3-9-3-2.5.

Q. Right. 3-9-3-2.5(B) and (D). If you look at

(B), it says the section applies whenever a person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate. First of all, does that ad advocate for the election or the defeat of clearly identified candidates?

A. Yes, it does.

Q. All right. And, obviously, it was through a newspaper. And then under Section (D) it requires this communication or this ad contain a disclaimer that appears and is presented in a clear and conspicuous manner to give the reader or observer adequate notice of the identity of the persons who paid for, and, when required, who authorized the communication.

Is there a disclaimer that you located anywhere on that advertisement that indicates who actually paid for that ad?

A. No, there's no disclaimer.

Q. You've been involved in a number of political campaigns over the course of your career; correct?

A. Yes, that's true.

Q. All right. And whenever your own campaign

committee or campaign committee that you were helping in purchased an ad like that, what type of disclaimer would be placed on the advertisement?

A. It usually says -- if it was for me, it would say paid for by friends of Steve Craycraft. But it's always a disclaimer that says who actually paid for that advertisement or paid for fliers or paid for whatever type of political thing is done.

Q. Now this ad at the top clearly says Citizens of Delaware County for Property Tax Repeal, but it doesn't indicate who actually paid for the ad, does it?

A. No, it does not.

Q. It doesn't say if it was any of the candidates or their committees who contributed to this, whether it was actually the CDCPTR that paid for it, whether it was some individual contributors that paid for it. It doesn't indicate, does it?

A. No, it does not.

Q. Why is that important? Why is it important that there is some kind of disclaimer contained within an advertisement like this?

A. Because the public needs to know who actually is financing things such as this. That could have

been paid for by somebody from another state. It could be paid for by anybody. And during the election time, people need to know who is financing candidates, who is financing programs. It just -- it makes people accountable for what they're doing.

Q. There's a -- further down in that same section, I believe it's Subsection (G), if a campaign committee or a candidate has authorized an advertisement like this, they have to indicate on that ad that they authorized it; correct?

A. Yes.

Q. Or that they paid for it, one or the other?

A. Yes, that's correct.

Q. All right. If it was not authorized by a particular candidate or their committee, it also must state that; correct?

A. Yes, that is correct.

Q. And that goes down -- I guess that's (G) 1, 2 and 3. (G)1 refers to if the candidate or the committee pays for it. (G)2 pertains to if it's paid for other persons but authorized by candidate or their committee. And (G)3 is if the communication was not authorized by any of the candidates. There isn't any indication in this

ad either if any of these candidates authorized or did not authorize this advertisement; correct?
A. Yes, that is correct.
Q. Now, do you know if any of the candidates who were endorsed by the CDCPTR, do you know if any of them declared in their campaign finance reports this contribution?
A. No, I do not.
(Grand Jury Exhibit(s) 3 marked for identification.).
QUESTIONS BY MR. MCKINNEY:
Q. Steve, I'm going to show you what's been marked as Exhibit 3.
A. Okay.
Q. Do you recognize that document?
A. Yes, I did. I pulled that up off of the State website.
Q. You say the "State website," you're talking about the Indiana Secretary of State?
A. Yes.
Q. And this is the registered information regarding the Citizens of Delaware County for Property Tax Repeal; is that correct?
A. Yes, that is.
(Grand Jury Exhibit(s) 4 and 5 marked

for identification.)
QUESTIONS BY MR. MCKINNEY:
Q. Next I'll hand you Exhibits 4 and 5, and ask if you recognize those two documents?
A. Yes, I do.
Q. And are those documents that were received by the Election Board that pertained to this particular ad?
A. Yes, it is.
Q. All right. And Grand Jury Exhibit 4, two pages of invoice for the ad; is that correct?
A. Yes, it is. It's from the Muncie Star Press.
Q. All right. And just for clarification purposes, the County Election Board has subpoena powers; correct?
A. Yes, we do.
Q. You're able to subpoena individuals to come in and testify, and you're able to subpoena documents to be brought in; correct?
A. Yes, we do. We have that.
Q. Okay. And then Exhibit 5 is a copy of the cashier's check paying for the ad to the Star Press?
A. Yes, it is.
MR. MCKINNEY: Take one of each and

pass them down.
Q. Is there anything else, Steve, that the Election Board had issue with or was concerned about this case or have we pretty much covered the issues?
A. I believe we've covered all the issues.
MR. MCKINNEY: Does anybody have any questions for Mr. Craycraft? Nobody?
QUESTIONS BY A GRAND JUROR:
Q. I was just wondering when you met with Chris Hiatt, and you talked about giving them the opportunity to kind of understand the disclaimer and so on.
A. Right.
Q. I'm just curious as to what he said about that, what his response was.
A. What we originally talked about was they being a PAC. We felt like that they were a PAC committee. And he went through statutes that covered a corporation. He did not go through statutes that cover a PAC committee. They are under the belief, this is what they basically told our Board, that because they filed as a nonprofit corporation, they don't follow any of those statutes that -- they don't have to follow any of those. But what we told him was is once

you start placing advertisement like was done in the newspaper, whether it was $50 or $5,000, when you start influencing elections and trying to beat candidates and get candidates elected, you have crossed that line where you're no longer considered a corporation. They should have been filing paperwork as a PAC.

And the reason why the state requires that is because the public has the right to know who is financing people's campaigns, who is financing people's organizations. You know, if you come to my office now, it's all public record, everything that we have that concerns campaigns. You can look at anybody's campaign report. You can look at mine. You can look at Mr. McKinney's. You can look at anybody. They're all public record. And that way the public knows who is helping us raise funds. Who -- you know, where we are spending funds at.

But they believe because they're a corporation they don't have to follow any of those guidelines. But once they became involved in the political arena, they stepped past that boundary, and they are bound by what the State election law says they have to do after that.

Q. So his response was we don't need to follow that because we're actually a corporation?
A. Right. That was his response. He don't have to follow any of that.
Q. All right. And then another question. I don't know if it's more for you or not, but I was just wondering with that ad clearly saying that organization endorses the candidates, you can't assume that they paid for the ad?
A. No, can't assume that.
Q. Okay.
A. Because there's a lot of times -- I could buy advertisement for you if you were running for office, and you wouldn't expect people to assume that you paid for it. If I paid for it, I would have to put my name. It happens a lot with people who send letters out for candidates and things such as that. They put on the bottom of the letter, this is paid for -- postage and stamps and stuff is paid for by such and such. Because that -- technically, all that is that we saw in that advertisement is -- just says CDCPTR, that's -- I don't know how many different people run that. It doesn't say who actually paid for that. And so the statute is clear when it comes

to a disclaimer that it has to say this was paid for by friends of or by this person or by that person.

A GRAND JUROR: Okay. Thank you.

QUESTIONS BY A GRAND JUROR:

Q. Who would have been the one that -- like, would Chris have been the one that laid out that ad --

A. I don't know who put the ad together.

Q. -- and left that off or would the newspaper -- because I know in particular circumstances when those type things -- you advise someone usually -- like, I would think that the newspaper would have advised him, hey, you need to put a disclaimer on the bottom of this if it runs if he's -- this is the first time he's ever done that.

A. Yeah.

Q. I didn't know if that would be --

A. Not necessarily. The newspaper really that's not their position --

Q. Right.

A. -- to do that. You're coming there to buy advertisement from them, and people do different type advertisement. That's what the newspaper deals with all the time. Now I can look back

through my minutes and stuff and see. I know we asked that question, but I cannot remember what Mr. Hiatt's response was. I would have to listen to the tape of that meeting.

Q. I just think sometimes it's a professional courtesy, you know, if you know something that needs to be done --

A. Yeah.

Q. -- you would point that out to the customer, but that's just -- that was just what I --

A. But a lot -- a lot of the people that are involved in the media don't understand the election law. I mean this is your election law book, and it's got so many pages that cover so many different things from advertisement to how you can run your campaigns to all kinds of different things. And we get one every year. And a lot of times people, they're just not -- they're not familiar with that at the newspaper where they can start giving legal advice; you need to put this on it, this on it. You know, they don't give me that advice when I run an ad down there. That's my job to know that. That when I go down there, I know what goes on my ad.

QUESTIONS BY MR. MCKINNEY:

Q. I'm trying to think of a good example, Steve, of why it's important to know where the money is coming from. I suppose --

A. Well, those election laws are put in place -- and if you think of the question, let me know. They're put in place so there's transparency in the election laws. You know, so people that -- somebody might be out trying to beat you, you would really like to know who they are and who's spending the funds and who's -- you know, is this group raising the money, is this group -- is somebody doing something else. I mean that's the questions that we had as the Election Board. And that's what the public asks too. They want to know, you know, who is financing all of this organization, who's financing those ads. And the public has the right to know that.

QUESTIONS BY A GRAND JUROR:

Q. So how detailed do they have to be in the ad? Just -- like that full page ad, do they just need to say CDCPTR paid for this ad?

A. Yes.

Q. That's all they really have to do?

A. Right, right. And the statute is clear about

that.
Q. And they don't have to say who gave them funds --
A. No.
Q. -- for this organization?
A. No. That is our -- that will be our decision at the Election Board meeting dealing with the PAC. That will be the Election Board's decision. But the disclaimer decision, it says it's a violation of state statute if that is not met, if it is not on there who actually paid for that advertisement. And it just -- and it doesn't have to just be advertisement. It can be -- yesterday -- we had a lunch yesterday, and you put on the bottom of your fliers who paid for that lunch. You put on the bottom of things who actually is paying for it. And that way when somebody reads it, they know who is paying for your ads or who's paying for the function that you're having.
QUESTIONS BY MR. MCKINNEY:
Q. Here's an example, and this is just a hypothetical, but, say, there was an issue on the ballot to privatize the Bureau of Motor Vehicles. All right. So we're putting it to a public vote to decide whether or not we privatize the BMV.

And there's a company out there that they specialize in running bureaus of motor vehicles. And they want to, obviously, support this issue of privatization. And they're called the International Bureau of Motor Vehicles. But they buy an advertisement under the title of Committee for Good Government. And they run a full page ad espousing the benefits of privatization of the BMV. Well, if you know that that ad was actually paid for by the International Bureau of Motor Vehicles, you probably are going to read that a little bit differently than if you know it's paid for by this Committee for Good Government or whatever.

And that's what we're talking about. You really -- you need to understand where the money comes from or is behind the advertisement, so that you can decide whether -- you know, whether or not this is an ad that you want to get behind or a position that you want to get behind. It makes it -- it can make a difference in your own personal determination whether or not you're going to support an issue.

And that's just a wild hypothetical, but just an illustration of why, even though it seems

such a minor point, you know, that while they have their name at the top, they didn't have this disclaimer that says this ad paid for by. And it doesn't say whether or not this ad was endorsed by any of the candidates or was not authorized by any of the candidates, which is the second side of the question.

Any more questions?

(No audible response by the Grand Jury.)

MR. MCKINNEY: Thank you, Steve.

THE WITNESS: Uh-huh. You're welcome.

(The Grand Jury witness leaves the room.)

STATE OF INDIANA)
) SS.
COUNTY OF DELAWARE)

I, Mary Beth Schafer, RPR, Notary Public, and official Grand Jury reporter of Circuit Court No. 3 of the County of Delaware, State of Indiana, duly appointed and qualified, do hereby certify that upon Cause No. 18C03-0811-MC-05, I reported all oral evidence given and offered, including questions and answers and all documentary evidence given and offered before the Grand Jury; that having been requested by Mark McKinney, Delaware County Prosecutor, to furnish him with a typewritten transcript of evidence so taken and noted by me upon the Grand Jury proceedings;

That I reported these proceedings in verbatim stenographic shorthand and afterwards personally reduced my shorthand notes into the foregoing typewritten transcript form, and hereby certify that it is a true and accurate transcript and contains all the testimony given and offered as aforesaid on the 17th day of April, 2009.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 17th of June 2009.

Mary Beth Schafer, RPR, Notary Public

My Commission Expires:
April 11, 2015

FORMAL COMPLAINT

3-9-3-2.5 This Code Section applies to the CDCPTR as a Political Action Committee. The newspaper advertisement in the Star Press, (included as Exhibit A) dated 10-31-08 failed to identify who paid for and authorized the advertisement. The CDCPTR endorsed candidates for the 2008 general election.

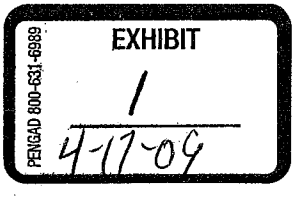
3-9-4-16 The CDCPTR has failed to file a financial report and a statement of organization required under I.C. 3-9-1. The CDCPTR has spent money without said money passing through a treasurer or the committee. There is no accountability as to where this money has come from and how it was spent or donated.

3-0-4-17 The CDCPTR has not followed any of the election laws and this section allows the election board to impose penalties including a fine of two times the cost of the contribution, in this case, the cost of the advertisement.

3-14-1-3 Under this section, the Prosecutor's Office can charge individual or an organization with a Class A Misdemeanor, if that individual or organization "circulates or publishes election material without a statement" in accordance with I.C. 3-9-3-2.5.

CDCPTR has violated many sections of the election code and needs to be held to the same standards of all other groups and organizations. I am requesting the election board to impose sanctions and for the Delaware County Prosecutor to look into criminal charges against those responsible.

Joe Evans



Citizens of Delaware County for PROPERTY TAX REPEAL

CDCPTR's 2008 LOCAL ELECTIONS

www.propertytaxrepeal.com

CANDIDATE ENDORSEMENTS

Good Government Begins With You!

BASED UPON OUR CANDIDATE FORUM THE CDCPTR ENDORSES THE FOLLOWING CANDIDATES:

Indiana House of Representatives Candidates

Indiana House of Representatives District 33

Republican	Democrat
Bill Davis	*~~Andy Schemenaur~~ Not interested in addressing the issues

Bill Davis is the CDCPTR's pick in this race. Bill has consistently served the best interests of the taxpayers of Indiana during his tenure as State Representative for District 33. He has vowed to continue his support for the many local and state government reforms yet to be considered on the floor of the Indiana General Assembly. A consistent requirement of all of the CDCPTR's endorsee's is their unqualified support of SJR1. Bill Davis will lead the charge.

Indiana House of Representatives District 34

Republican	Democrat
Ted Baker	*~~Dennis Tyler~~ Not interested in addressing the issues

Political newcomer, Ted Baker earns the CDCPTR's endorsement for this seat. Ted brings a fresh perspective and sound understanding of the many issues affecting our County and its communities without the inhibiting influences of special interests. Unlike his opponent, Ted has vowed never to consider the constituents of his District as "unrepresentable" irrespective of their political differences. Ted Baker will be a great Representative for the future of Indiana.

Indiana House of Representatives District 35

Republican	Democrat
Jack Lutz	Lee Ann Mengelt

The CDCPTR finds this race just too close to call. Jack Lutz's record speaks for itself. Jack has routinely supported taxpayer friendly legislation and is unquestionable in his support of the second reading of SJR1. On the other hand, Lee Ann Mengelt is a fresh face bringing new energy and the ability to reach across the aisle on many important issues. Lee Ann promises to be very supportive of taxpayer's concerns and has firmly stated she will support SJR1.

Delaware County Commissioners Candidates

District 1

Republican	Democrat
Bob Wilson	*~~Don Dunnuck~~ Not interested in addressing the issues

Outgoing Commissioner, John Brooke, will be a tough act to follow. Brooke's defeat during the Primary Elections was a direct result of a carefully orchestrated, self-serving effort by special interests that had taken exception to Brooke's proactive, community friendly leadership. Therefore, the CDCPTR strongly recommends and endorses Bob Wilson for this seat. Bob understands the needs of this County and can make the tough decisions to move it forward.

District 2

Republican	Democrat
Tom Bennington	*~~Todd Donati~~ Not interested in addressing the issues

The CDCPTR endorses Tom Bennington in this race. Tom and the CDCPTR have not seen eye-to-eye on everything, but in the long run we feel that he has effectively supported taxpayer friendly efforts and will continue to do so. The current Commissioners have been leaders in the effort to modernize, consolidate and cut costs. Keeping Tom Bennington in office will insure that this very important effort survives.

EXHIBIT 2

Delaware County Council Candidates

At Large (3 elected)

Republican	Democrat
Mel Botkin	*~~Brad Bookout~~ Not interested in addressing the issues
Brad Razor	*~~James King~~ Not interested in addressing the issues
Joe Russell	*~~Kevin Nemyer~~ Not interested in addressing the issues

Mel Botkin and Joe Russell have both been staunch advocates of continued reform and efficiency in the face of the growing costs of County government and a shrinking tax base. Brad Razor, like Mel and Joe, understands his primary responsibility lies with the citizens and their tax dollars. The CDCPTR believes their combined capabilities of making the tough decisions independent of external influences, is the team Delaware County needs for realistic fiscal management.

Delaware County Judicial, Treasurer and Surveyor Candidates

The Judicial candidates have always steered away from stating positions and policies during their campaigns. It is the CDCPTR's opinion that their positions of administering justice as opposed to dictating policies and fiscal decisions regarding our local government renders an endorsement of the three Circuit Court races irrelevant. The same issues regarding policy making and fiscal decisions remain true for the Treasurer and Surveyor races. Therefore the CDCPTR is not specifically endorsing any of the Judicial, Treasurer or Surveyor candidates but will acknowledge that there are several very well qualified individuals to choose from. We urge voters to consider the unbiased character and taxpayer friendly positions of each before voting.

* Denotes candidates that were contacted by the CDCPTR by mail, telephone and in person numerous times starting in June, 2008. These candidates did not respond, or in many cases even acknowledge our invitation to participate in the Forum and respond to the tough questions that we, the voters and the taxpayers, have a right to know the answers to. It is our opinion that if they won't step up and answer to the inquiries of the public now, they won't when elected. Therefore, we don't think that they are deserving of your vote on Election Day.

Name Searched On:
PROPERTY TAX (Legal)

Current Information

Entity Legal Name:
CITIZENS OF DELAWARE COUNTY FOR PROPERTY TAX REPEAL, INC.

Entity Address:
1716 N. Wheeling Ave., Muncie, IN 47303

General Entity Information:

Control Number: **2007083100268**
Status: **Active**
Entity Type: **Non-Profit Domestic Corporation**

Entity Creation Date: **8/31/2007 9:31:49 AM**
Entity Date to Expire:
Entity Inactive Date:

This entity is current with Business Entity Report(s).

There are no other names on file for this Entity.

Registered Agent(name, address, city , state , zip):
Christopher N. Hiatt
1716 N. Wheeling Ave.
Muncie , IN 47303

Principals(name, address, city, state, zip - when provided)
Christopher N. Hiatt
Incorporator
1716 N. Wheeling Ave.
Muncie , IN 47303

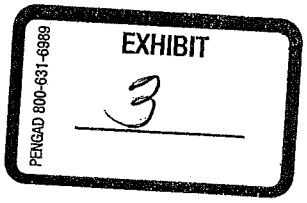
Christopher N. Hiatt
President
1716 N. Wheeling Ave.
Muncie , IN 47303

Transactions:

Date Filed	Effective Date	Type
08/31/2007	08/31/2007	Articles of Incorporation

Corporate Reports:
Years Paid
2008

Years Due
None



Additional Services Available:

Generate an official Certificate of Existence/Authorization.
There is a fee of $20.00 for *accessIndiana* subscribers and a fee of $21.42 for credit card users.
Example Certificate

Get it. Daily.
The Star Press
www.thestarpress.com

CURRENT NET AMOUNT DUE	30 DAYS	60 DAYS	OVER 90 DAYS
5,095.76	.00	.00	.00

TOTAL AMOUNT DUE		TERMS OF PAYMENT
5,095.76	DUE NET 20	DUE ON - 12/13/08

BILLING PERIOD	INVOICE NUMBER	ACCOUNT NUMBER
10/27/08 - 11/23/08	0000176462	015246

PAGE #	BILLED ACCOUNT NAME AND ADDRESS	ADVERTISER/CLIENT NAME
1	TAXPAYERS GROUP, Chris Hiatt 1716 N Wheeling Ave Muncie, IN 47303	TAXPAYERS GROUP,
BILLING DATE		REMITTANCE ADDRESS
11/24/08		The Star Press P.O. Box 677560 Dallas, TX 75267-7560

01524600000017646200509576153 57

PLEASE DETACH AND RETURN UPPER PORTION WITH YOUR REMITTANCE

THE STAR PRESS P.O. BOX 677560 DALLAS, TEXAS 75267 – 7560 RETAIN FOR YOUR RECORDS

DATE	NEWSPAPER REFERENCE	DESCRIPTION – OTHER COMMENTS / CHARGES	SAU SIZE BILLED UNITS	TIMES RUN	RATE	GROSS AMOUNT	NET
10/27		BALANCE FORWARD					.00
11/21		C NOT BILLED AS QUOTED					406.80-
10/28	STAR PRESS 0000077057	RETAPROPERTY TAX-P76682 W/CHG	1	3X	8.00= 27.67	24.00 664.08	
10/28		THREE COLOR CHARGE PCI AD TOTAL				168.00 832.08	500.04
10/29	STAR PRESS 0000077057	RETAPROPERTY TAX-P76682 W/CHG	1	3X	8.00= 27.67	24.00 664.08	
10/29		50% REPEAT DISCOUNT				332.04-	
10/29		THREE COLOR CHARGE PCI AD TOTAL				168.00 500.04	
10/30	STAR PRESS 0000077057	RETAPROPERTY TAX-P76682 W/CHG	1	3X	8.00= 27.67	24.00 664.08	
10/30		50% REPEAT DISCOUNT				332.04-	

(CONTINUED ON NEXT PAGE)

EXHIBIT 4 4-17-09 PENGAD 800-631-6989

STATEMENT OF ACCOUNT AGING OF PAST DUE AMOUNTS

CURRENT NET AMOUNT DUE	30 DAYS	60 DAYS	OVER 90 DAYS		TOTAL AMOUNT DUE
5,095.76	.00	.00			5,095.76

12/12/08 Per TSP — 332.04 CREDIT

ADVERTISER INFORMATION

INVOICE NUMBER	BILLING PERIOD	BILLED ACCOUNT #	ADVERTISER/CLIENT NAME
0000176462	10/27/08 - 11/23/08	015246	TAXPAYERS GROUP,

Due = $4,763.72

A finance charge of 1.5% per month (18% per annum) charged on past due balances 60 days or greater.

* On next billing

Get it. Daily.
The Star Press
www.thestarpress.com

CURRENT NET AMOUNT DUE	30 DAYS	60 DAYS	OVER 90 DAYS
5,095.76	.00	.00	.00

TOTAL AMOUNT DUE		TERMS OF PAYMENT
5,095.76	DUE NET 20	DUE ON - 12/13/08

BILLING PERIOD	INVOICE NUMBER	ACCOUNT NUMBER
10/27/08 - 11/23/08	0000176462	015246

PAGE #	BILLED ACCOUNT NAME AND ADDRESS	ADVERTISER/CLIENT NAME
2	TAXPAYERS GROUP, RHONDA ECKERTY 10200 W RIVER RD YORKTOWN IN 47396-9369	TAXPAYERS GROUP,
BILLING DATE		REMITTANCE ADDRESS
11/24/08		The Star Press P.O. Box 677560 Dallas, TX 75267-7560

01524600000017646200509576153 57

PLEASE DETACH AND RETURN UPPER PORTION WITH YOUR REMITTANCE

THE STAR PRESS P.O. BOX 677560 DALLAS, TEXAS 75267 – 7560 RETAIN FOR YOUR RECORDS

DATE	NEWSPAPER REFERENCE	DESCRIPTION – OTHER COMMENTS / CHARGES	SAU SIZE BILLED UNITS	TIMES RUN RATE	GROSS NET AMOUNT
10/30		THREE COLOR CHARGE PCI			168.00
		AD TOTAL			500.04
11/03	STAR PRESS	RETAFULL PAGE CANDIDATE ENDOR	1 6X 20.00	= 120.00	
	0000077405		27.67		3,320.40
11/03		THREE COLOR CHARGE			350.00
		AD TOTAL			3,670.40
		SALESPERSON: ROBINSON			

STATEMENT OF ACCOUNT AGING OF PAST DUE AMOUNTS

CURRENT NET AMOUNT DUE	30 DAYS	60 DAYS	OVER 90 DAYS		TOTAL AMOUNT DUE
5,095.76	.00	.00	.00		5,095.76

ADVERTISER INFORMATION

INVOICE NUMBER	BILLING PERIOD	BILLED ACCOUNT #	ADVERTISER/CLIENT NAME
0000176462	10/27/08 - 11/23/08	015246	TAXPAYERS GROUP,

A finance charge of 1.5% per month (18% per annum) charged on past due balances 60 days or greater.

1261

CHASE

Keep this receipt as a record of your purchase.

FOR YOUR PROTECTION SAVE THIS COPY
CASHIER'S CHECK

Customer Copy

9167100402

12/12/2008

Indiana

Remitter CDCPTR

$ **********4,763.72 ***

Pay To The Order Of THE STAR PRESS

Drawer: JPMORGAN CHASE BANK, N.A.

NON NEGOTIABLE

TERMS

KEEP THIS COPY FOR YOUR RECORD OF THE TRANSACTION.
PLEASE CONTACT CHASE TO REPORT A LOSS OR FOR ANY OTHER INFORMATION ABOUT THIS ITEM.

PENGAD 800-631-6989

EXHIBIT

5

4-17-09

STATE OF INDIANA)
) ss.
COUNTY OF DELAWARE)

IN THE DELAWARE COUNTY CIRCUIT COURT NO. 3
18C03-0811-MC-05

IN RE THE MATTER OF THE)
GRAND JURY FOR DELAWARE)
COUNTY CIRCUIT COURT NO. 3)

RECORD OF GRAND JURY PROCEEDINGS

HELD ON
APRIL 17, 2009

TESTIMONY OF:

R O N D A E C K E R T Y

GRAND JURY CONDUCTED BY:
MARK McKINNEY, PROSECUTING ATTORNEY
MUNCIE, DELAWARE COUNTY, INDIANA

I N D E X O F E X H I B I T S

April 17, 2009
9:45 a.m.

(Seven Grand Jury members present.)

(The Grand Jury witness enters the room.)

(The Oath of Grand Jury witness is read to the witness by the Grand Jury foreman.)

(The Oath of Grand Jury Witness is signed by the witness.)

R O N D A E C K E R T Y,

having been duly sworn to tell the truth, the whole truth, and nothing but the truth relating to said matter, is examined and testifies as follows:

MR. MCKINNEY: Ronda, before we get started, how this will proceed, I'll ask you a few questions. And then when I'm done, the grand jurors will also an opportunity to ask you questions.

THE WITNESS: Okay.

MR. MCKINNEY: They may or may not have any.

THE WITNESS: Sure. Okay.

MR. MCKINNEY: We're recording, so your

answers need to be out loud and clear. Head shakes --

THE WITNESS: Okay.

MR. MCKINNEY: -- and uh-huhs don't work very well, so make sure that you answer out loud. And then, finally, it is important and the foreman of the Grand Jury in reading your oath indicated to you the confidentiality of the proceedings, that it is a violation of Indiana Code if you disclose without a court order anything that went on in this room.

THE WITNESS: I understand.

MR. MCKINNEY: Okay.

QUESTIONS BY MR. MCKINNEY:

Q. For the record please state your name and spell it.

A. Ronda Eckerty, R-O-N-D-A, E-C-K-E-R-T-Y.

Q. Ronda, what is your occupation or profession?

A. I am self-employed for Seasons Window & Door and also I have rentals.

Q. Are you currently affiliated with this CDC group?

A. I am the bookkeeper.

Q. Okay. Do you have an official title or office with the group?

A. I did -- I was treasurer.

Q. And for how long were you treasurer?
A. When it started? I'm not for sure of the month. It was May, June of last year or so.
Q. Early summer of '08?
A. I assume. I guess, I didn't know why I was here -- coming.
Q. That's okay.
A. So I didn't -- I didn't look at the dates.
Q. That's all right. It's not critical. We're trying to get some generalities here. So sometime late spring, early summer?
A. I would guess.
Q. Of '08? And then for how long were you the treasurer?
A. Probably up to December, January of this year.
Q. Okay. So six months, seven months, eight months, somewhere around there was the length of your office?
A. You know, it could have -- I'm trying to think. I probably -- it might have been eight months that -- but I'm continuing right now to be bookkeeper.
Q. Who's the treasurer now then?
A. You know what, I don't know.
Q. Did they have a regular meeting where they

elected officers?
A. I'm sure they did. I wasn't present.
Q. Were you present when you were elected treasurer?
A. Yes.
Q. All right. And who were the other officers that were elected at that meeting and what were their offices?
A. You know, I don't know. I don't know all of them.
Q. How many offices were there?
A. Pardon me?
Q. How many other offices are there in the corporation?
A. Offices? Officers?
Q. Offices and officers, yeah.
A. There's just one group.
Q. Okay. Typically a corporation has a president, vice president.
A. Right.
Q. Treasurer and maybe a secretary.
A. Right.
Q. Or sometimes those two are combined --
A. Okay.
Q. -- into a secretary/treasurer.
A. Okay.

Q. There are various other titleholders that can be within the corporation. I'm just trying to get a basic idea of what the makeup of the corporation was.
A. Can I consult my attorney out there? I'm not for sure how to answer that.
Q. Actually you cannot. You're not --
A. I was told I could.
Q. You're not subpoenaed as a target.
A. Okay. Well --
Q. You're not under any suspicion.
A. Okay, I don't -- I don't know what you're asking.
Q. The CDCPTR, is that right, Citizens of Delaware County for Property Tax Repeal?
A. Sure.
Q. It was established as a corporation.
A. Right.
Q. Right?
A. Mm-hmm.
Q. And as a corporation it has to have a president --
A. Right.
Q. -- or a CEO?
A. Right.
Q. Did this corporation have a president or CEO?

A. Yes.
Q. And was it a president or CEO? Do you know what the person's title was?
A. No, I don't.
Q. Who filled that position?
A. Chris Hiatt.
Q. Was there a vice president?
A. I don't know.
Q. There was a treasurer because that was you; right?
A. Mm-hmm.
THE COURT REPORTER: Say yes or no, please.
Q. Yes?
A. Oh. Yes.
Q. And you said you were there when you were elected?
A. Yes. I -- yes.
Q. But you don't remember who was elected vice president?
A. I only went to the first two or three meetings.
Q. I understand, but you were at the meeting --
A. Yes.
Q. -- where the elections were held?
A. Yes.

Q. And you don't remember who was the vice president?
A. No, I don't.
Q. Okay. Were there any other offices or officers that were elected at that meeting? Was there a secretary?
A. I don't know.
Q. Was there a board of directors?
A. I don't know.
Q. What was your participation at this meeting? I'm having a little hard time believing that you can't remember who the officers were when you yourself are an officer.
A. All right. I went the first two or three meetings not knowing a whole lot of the people that were there. And because of my having my own business and have backgrounds (sic) of bookkeeping, I volunteered that, you know, I would do this for the group. And so, basically, you know, you're asking me these names of these people, and, you know, I don't know. I can't remember because it's been a year, and I haven't gone back to the meeting since a year ago, so -- but just I knew that I was available to put in the very minimal time, 15, 20 minutes a month to

write a check or two, and so that's how I volunteered. And then they elected me as treasurer. So beyond that, you know, I haven't gone to the meetings or anything.

Q. Do they have regular meetings?

A. Yes, they do.

Q. Are those meetings -- are there minutes that are created from those meetings?

A. Yes.

Q. Who had those?

A. And that, see, I don't know because I haven't gone to -- I haven't gone to the meetings, but I do know that they do have.

Q. At the second or third meeting that you went to, were there minutes from the previous meetings that were presented --

A. Yes.

Q. -- for approval?

A. Yes.

Q. Who presented those?

A. Actually back then it was Doug Eckerty.

Q. Is that your husband?

A. Yes.

Q. Did he also hold an office in this group?

A. I don't know if it was actually at the time -- I

don't know whether it was actually a corporation at the time or just a time of -- you know, just a few people meeting. I'm not for sure.

Q. How many people attended these meetings that you were at?

A. There were probably ten, eight or ten.

Q. As treasurer and bookkeeper, do you keep records of contributions that are made to the entity?

A. Yes, I do.

Q. And, obviously, you're responsible for writing the checks or making the expenditures?

A. I am.

Q. Is there a second signature that's required on the checks or are you the primary or the only sole signatory?

A. Chris Hiatt is second, but he's never written a check. I've written them all. Actually I do everything on line, so I don't have any checks to write. It's just on line.

Q. Oh, okay. Where does CDCPTR get their operating funds?

A. Donations.

Q. There's no product that is sold or service that is provided in return for a fee. It's all donation run?

A. Yes.
Q. And when those donations come in, do they come directly to you or do they go to Chris and then to you?
A. Most of the time -- most -- well, most of the time they come directly to me.
Q. And then you place them in a bank account?
A. Mm-hmm.
Q. Yes?
A. Yes. I'm sorry.
Q. What bank does CDCPTR utilize?
A. Chase.
Q. When you took over as treasurer in May or June, whenever that was, in '08, was there already an existing fund balance or was that the start of the corporation's finances?
A. That was the start.
Q. There was --
A. Do I need to get my glasses out?
Q. Maybe.
A. Okay.
Q. Okay. Exhibit 4, it's two pages and it's an invoice from the Star Press.
A. Right.
Q. For an advertisement?

A. Right.
Q. One of those invoices has your name and address on it.
A. Uh-huh.
Q. And one has Chris Hiatt's name and address?
A. Okay. Uh-huh. Yes.
Q. Is that for one advertisement that the group purchased from the Star Press?
A. When was this? Are you asking me if it was one run?
Q. Yes.
A. Well, it looks like to me that it ran on 10-28, 29 and 30.
Q. Okay. Take a look at the second page as well.
A. Yeah, I'm -- and 11-3.
Q. The ads that ran on 10-28, 10-29 and 10-30, those were -- well, they're for much smaller amounts than the one on 11-3; correct?
A. Right.
Q. So I would assume that those were smaller advertisements?
A. You know what, I -- not knowing what I was coming in here for, I assume so. Without me looking at my records, I can't remember what advertisement this actually was for.

Q. But the one dated 11-3 next to it refers to a full page?
A. It says full page.
Q. Candidate endorsement; correct?
A. That's -- yeah, that's what it says. But I don't know.
Q. I'll show you Exhibit 2. Do you recognize that advertisement?
A. You know what, I don't read the paper so this is -- but I -- yes.
Q. All right. Have you seen that before? Have you seen that ad before?
A. No. I haven't.
Q. Do you know who created that ad for Citizens of Delaware County for Property Tax Repeal?
A. No, I don't.
Q. Were you at any of the meetings when these endorsements were discussed?
A. No.
Q. Other than Chris Hiatt, who do you think we should hear from that might be able to clear some of these questions up?
A. Well, I would assume that Chris Hiatt probably knows the answer of who created this. I -- I don't because, like I said, I only went to the

first couple of meetings.
Q. Listen to my question.
A. Okay.
Q. And answer my question.
A. Okay.
Q. Who should we hear from other than Chris Hiatt that can give us answers to these questions?
A. Probably anybody that goes to the meetings on the Board.
Q. And who would that be?
A. I'm not for sure.
Q. You don't know any of them?
A. Well, Scott -- Scott Alexander; I know him. My husband might know. I'm trying to think. I know at the time Sam -- Sam Pierce and -- used to go to the meetings. Don't know if he still does. Attorney -- any other time I'd be able to -- let's see. Pete Drumm, I don't know if he still goes, but he was there, and then the other gentlemen I'm not for sure who they are.
Q. Were there any other females that were involved in the group?
A. I was the only -- well, like I said, I only went the first two meetings, so, no, I was probably the only female.

Q. Did you have any involvement in the articles of incorporation or any other corporate documents that were submitted to the Indiana Supreme Court or the Indiana Secretary of State?
A. No.
Q. All right. So really all you've done is collect and deposit the money and write the checks?
A. Exactly. I mean 15 minutes a month is -- is it.
Q. And you don't have to go to a meeting to do that?
A. No.
Q. Who tells you who to write checks to?
A. The Board. Actually the bills come to me. You know, like the newspaper would come to me. You know, I would call Chris and ask him, you know, if this is, you know, the right amount and what's supposed to be done, and, yes -- and he said yes.
Q. When you say the Board, it's Chris Hiatt that you check with?
A. Yes.
Q. Is there anybody else that you have ever consulted with on whether or not to pay an invoice or a bill?
A. Oh. Tom Parker.
Q. Tom Parker?
A. Yeah, he's one that was there.

Q. Did you ever consult with Tom Parker on what bills to pay?
A. I think one time a long time ago.
Q. Other than Chris Hiatt and Tom Parker, anybody else that you ever talked to?
A. No, because usually the bills come directly to me.
Q. Well, I understand that, but are you authorized to simply pay those bills without any direction from anybody?
A. There's not that many bills to pay.
Q. Okay.
A. I mean, you know.
Q. Well, that brings up a good question. How many bills, what kind of expenses do you have on a monthly basis?
A. A cell phone bill, $54 on a regular -- yeah. I mean, you know, unless we rented a building or something for -- yeah, it's -- you know, probably no more than two bills, you know, a month. Very little.
Q. Who carries the cell phone?
A. Chris Hiatt.
Q. The contributions that you receive, are those mainly from these individuals who attend the

meetings; Scott Alexander, Doug Eckerty, Sam Pierce, Pete Drumm, Tom Parker, Chris Hiatt, or do they come from other areas as well?

A. Some other. Them, plus some others.

Q. And do you maintain a record of donors?

A. Yes, I do.

Q. Have those records ever been filed with the Delaware County Clerk's office?

A. Not that I know of.

Q. Have you ever filed a campaign finance report with the Delaware County Clerk's office?

A. I haven't.

Q. Do you know if one has ever been filed?

A. I don't know.

Q. As treasurer and then later bookkeeper, would you think that that would be your responsibility? If that was required of the group, would that be -- would that fall on your shoulders to create that campaign finance report?

A. I don't -- I don't know.

Q. Have you ever seen any bylaws for the organization?

A. I haven't.

Q. Do you know if there are any?

A. I don't know. Sorry.

MR. MCKINNEY: I don't think I have any more questions. Anybody?

(No audible response from the Grand Jury.)

MR. MCKINNEY: Thank you, Ronda.

(The Grand Jury witness leaves the room.)

THE GRAND JURY FOREMAN: Hey, Mark, I do know Chris Hiatt pretty well, so I just want to make that clear. I mean it's not going to influence me one way or another. I just want you to know.

MR. MCKINNEY: That was my next question. Do you think that would affect your ability to make a decision in this scenario?

THE GRAND JURY FOREMAN: No, I just do all his -- I do a lot of work for him.

MR. MCKINNEY: In what capacity?

THE GRAND JURY FOREMAN: Sign company.

MR. MCKINNEY: Oh. Okay.

THE GRAND JURY FOREMAN: Then he does our invoices, stuff like that, some of our printed stuff.

THE COURT REPORTER: Are we off now, Mark?

MR. MCKINNEY: Yes.

(A discussion is held off the record.)

(Mr. McKinney and the court reporter leave the room. The Grand Jury begins deliberations at 10:10 a.m.)

(The Grand Jury concludes deliberations at 10:50 a.m.)

MR. MCKINNEY: I've prepared an indictment for violation of Indiana election law under the two statutes that you've got, 3-9-3-2.5 and 3-14-1-3, a Class A misdemeanor, reads as follows: "Be it remembered that the Delaware County Grand Jury upon their oath or affirmation do present that on or about the 3rd day of November 2008 in Delaware County, State of Indiana, Chris Hiatt, president of the Citizens of Delaware County for Property Tax Repeal, did knowingly make an expenditure for purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through a newspaper without the required disclaimer and without noting whether the candidates had authorized the communication contrary to the form of the statutes, the ones I just cited, and against the peace and dignity of

the State of Indiana.

Then it indicates a True Bill. There's a signature line for the foreperson and then the other five grand jurors, and then me authorizing it.

The green one has Mr. Hiatt's date of birth and Social Security number and then I have the ones on white paper have his Social Security and date of birth basically X'd out so that those are the ones that go into the public record, and the green one remains confidential in the Court's record. That's why they have us put it on green paper. So I need you to sign both of them.

(Proceedings concluded.)

STATE OF INDIANA)
) SS.
COUNTY OF DELAWARE)

I, Mary Beth Schafer, RPR, Notary Public, and official Grand Jury reporter of Circuit Court No. 3 of the County of Delaware, State of Indiana, duly appointed and qualified, do hereby certify that upon Cause No. 18C03-0811-MC-05, I reported all oral evidence given and offered, including questions and answers and all documentary evidence given and offered before the Grand Jury; that having been requested by Mark McKinney, Delaware County Prosecutor, to furnish him with a typewritten transcript of evidence so taken and noted by me upon the Grand Jury proceedings;

That I reported these proceedings in verbatim stenographic shorthand and afterwards personally reduced my shorthand notes into the foregoing typewritten transcript form, and hereby certify that it is a true and accurate transcript and contains all the testimony given and offered as aforesaid on the 17th day of April, 2009.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 17th of June 2009.

Mary Beth Schafer, RPR, Notary Public

My Commission Expires:
April 11, 2015

Citizens of Delaware County for PROPERTY TAX REPEAL

CDCPTR's 2008 LOCAL ELECTIONS

www.propertytaxrepeal.com

CANDIDATE ENDORSEMENTS

Good Government Begins With You!

BASED UPON OUR CANDIDATE FORUM THE CDCPTR ENDORSES THE FOLLOWING CANDIDATES:

Indiana House of Representatives Candidates

Indiana House of Representatives District 33

Republican	Democrat
Bill Davis	*~~Andy Schomenaur~~ Not interested in addressing the issues

Bill Davis is the CDCPTR's pick in this race. Bill has consistently served the best interests of the taxpayers of Indiana during his tenure as State Representative for District 33. He has vowed to continue his support for the many local and state government reforms yet to be considered on the floor of the Indiana General Assembly. A consistent requirement of all of the CDCPTR's endorsee's is their unqualified support of SJR1. Bill Davis will lead the charge.

Indiana House of Representatives District 34

Republican	Democrat
Ted Baker	*~~Dennis Tyler~~ Not interested in addressing the issues

Political newcomer, Ted Baker earns the CDCPTR's endorsement for this seat. Ted brings a fresh perspective and sound understanding of the many issues affecting our County and its communities without the inhibiting influences of special interests. Unlike his opponent, Ted has vowed never to consider the constituents of his District as "unrepresentable" irrespective of their political differences. Ted Baker will be a great Representative for the future of Indiana.

Indiana House of Representatives District 35

Republican	Democrat
Jack Lutz	Lee Ann Mengelt

The CDCPTR finds this race just too close to call. Jack Lutz's record speaks for itself. Jack has routinely supported taxpayer friendly legislation and is unquestionable in his support of the second reading of SJR1. On the other hand, Lee Ann Mengelt is a fresh face bringing new energy and the ability to reach across the aisle on many important issues. Lee Ann promises to be very supportive of taxpayer's concerns and has firmly stated she will support SJR1.

Delaware County Commissioners Candidates

District 1

Republican	Democrat
Bob Wilson	*~~Don Dunnuck~~ Not interested in addressing the issues

Outgoing Commissioner, John Brooke, will be a tough act to follow. Brooke's defeat during the Primary Elections was a direct result of a carefully orchestrated, self-serving effort by special interests that had taken exception to Brooke's proactive, community friendly leadership. Therefore, the CDCPTR strongly recommends and endorses Bob Wilson for this seat. Bob understands the needs of this County and can make the tough decisions to move it forward.

District 2

Republican	Democrat
Tom Bennington	*~~Todd Donati~~ Not interested in addressing the issues

The CDCPTR endorses Tom Bennington in this race. Tom and the CDCPTR have not seen eye-to-eye on everything, but in the long run we feel that he has effectively supported taxpayer friendly efforts and will continue to do so. The current Commissioners have been leaders in the effort to modernize, consolidate and cut costs. Keeping Tom Bennington in office will insure that this very important effort survives.

EXHIBIT 2

Delaware County Council Candidates

At Large (3 elected)

Republican	Democrat
Mel Botkin	*~~Brad Beckout~~ Not interested in addressing the issues
Brad Razor	*~~James King~~ Not interested in addressing the issues
Joe Russell	*~~Kevin Nemyer~~ Not interested in addressing the issues

Mel Botkin and Joe Russell have both been staunch advocates of continued reform and efficiency in the face of the growing costs of County government and a shrinking tax base. Brad Razor, like Mel and Joe, understands his primary responsibility lies with the citizens and their tax dollars. The CDCPTR believes their combined capabilities of making the tough decisions independent of external influences, is the team Delaware County needs for realistic fiscal management.

Delaware County Judicial, Treasurer and Surveyor Candidates

The Judicial candidates have always steered away from stating positions and policies during their campaigns. It is the CDCPTR's opinion that their positions of administering justice as opposed to dictating policies and fiscal decisions regarding our local government renders an endorsement of the three Circuit Court races irrelevant. The same issues regarding policy making and fiscal decisions remain true for the Treasurer and Surveyor races. Therefore the CDCPTR is not specifically endorsing any of the Judicial, Treasurer or Surveyor candidates but will acknowledge that there are several very well qualified individuals to choose from. We urge voters to consider the unbiased character and taxpayer friendly positions of each before voting.

* Denotes candidates that were contacted by the CDCPTR by mail, telephone and in person numerous times starting in June, 2008. These candidates did not respond, or in many cases even acknowledge our invitation to participate in the Forum and respond to the tough questions that we, the voters and the taxpayers, have a right to know the answers to. It is our opinion that if they won't step up and answer to the inquiries of the public now, they won't when elected. Therefore, we don't think that they are deserving of your vote on Election Day.

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CURRENT NET AMOUNT DUE	30 DAYS	60 DAYS	OVER 90 DAYS
5,095.76	.00	.00	.00

TOTAL AMOUNT DUE		TERMS OF PAYMENT
5,095.76	DUE NET 20	DUE ON - 12/13/08

BILLING PERIOD	INVOICE NUMBER	ACCOUNT NUMBER
10/27/08 - 11/23/08	0000176462	015246

PAGE #	BILLED ACCOUNT NAME AND ADDRESS	ADVERTISER/CLIENT NAME
1	TAXPAYERS GROUP, Chris Hiatt 1716 N Wheeling Ave Muncie, IN 47303	TAXPAYERS GROUP,
BILLING DATE 11/24/08		REMITTANCE ADDRESS The Star Press P.O. Box 677560 Dallas, TX 75267-7560

0152460000001764620050957615357

PLEASE DETACH AND RETURN UPPER PORTION WITH YOUR REMITTANCE

THE STAR PRESS P.O. BOX 677560 DALLAS, TEXAS 75267 – 7560 RETAIN FOR YOUR RECORDS

DATE	NEWSPAPER REFERENCE	DESCRIPTION – OTHER COMMENTS / CHARGES	SAU SIZE BILLED UNITS	TIMES RUN RATE	GROSS AMOUNT	NET
10/27		BALANCE FORWARD				.00
11/21		C NOT BILLED AS QUOTED				406.80-
10/28	STAR PRESS 0000077057	RETAPROPERTY TAX-P76682 W/CHG	1 3X 8.00= 27.67		24.00 664.08	
10/28		THREE COLOR CHARGE PCI AD TOTAL			168.00 832.08	500.04
10/29	STAR PRESS 0000077057	RETAPROPERTY TAX-P76682 W/CHG	1 3X 8.00= 27.67		24.00 664.08	
10/29		50% REPEAT DISCOUNT			332.04-	
10/29		THREE COLOR CHARGE PCI AD TOTAL			168.00 500.04	
10/30	STAR PRESS 0000077057	RETAPROPERTY TAX-P76682 W/CHG	1 3X 8.00= 27.67		24.00 664.08	
10/30		50% REPEAT DISCOUNT			332.04-	

(CONTINUED ON NEXT PAGE)

EXHIBIT 4 4-17-09 PENGAD 800-631-6989

STATEMENT OF ACCOUNT AGING OF PAST DUE AMOUNTS

CURRENT NET AMOUNT DUE	30 DAYS	60 DAYS	OVER 90 DAYS		TOTAL AMOUNT DUE
5,095.76	.00	.00			5,095.76

12/12/08 *Per TSP — 332.04 CREDIT

ADVERTISER INFORMATION			
INVOICE NUMBER	BILLING PERIOD	BILLED ACCOUNT #	ADVERTISER/CLIENT NAME
0000176462	10/27/08 - 11/23/08	015246	TAXPAYERS GROUP,

One = $4,763.72

A finance charge of 1.5% per month (18% per annum) charged on past due balances 60 days or greater.

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CURRENT NET AMOUNT DUE	30 DAYS	60 DAYS	OVER 90 DAYS
5,095.76	.00	.00	.00

TOTAL AMOUNT DUE		TERMS OF PAYMENT
5,095.76	DUE NET 20	DUE ON - 12/13/08

BILLING PERIOD	INVOICE NUMBER	ACCOUNT NUMBER
10/27/08 - 11/23/08	0000176462	015246

PAGE #	BILLED ACCOUNT NAME AND ADDRESS	ADVERTISER/CLIENT NAME
2	TAXPAYERS GROUP, RHONDA ECKERTY 10200 W RIVER RD YORKTOWN IN 47396-9369	TAXPAYERS GROUP,
BILLING DATE		REMITTANCE ADDRESS
11/24/08		The Star Press P.O. Box 677560 Dallas, TX 75267-7560

01524600000017646200509576153 57

PLEASE DETACH AND RETURN UPPER PORTION WITH YOUR REMITTANCE

RETAIN FOR YOUR RECORDS

THE STAR PRESS P.O. BOX 677560 DALLAS, TEXAS 75267 – 7560

DATE	NEWSPAPER REFERENCE	DESCRIPTION – OTHER COMMENTS / CHARGES	SAU SIZE BILLED UNITS	TIMES RUN RATE	GROSS AMOUNT	NET
10/30		THREE COLOR CHARGE PCI AD TOTAL			168.00 500.04	
11/03	STAR PRESS 0000077405	RETAFULL PAGE CANDIDATE ENDOR	1 6X 20.00 27.67	= 120.00	3,320.40	
11/03		THREE COLOR CHARGE AD TOTAL			350.00 3,670.40	
		SALESPERSON: ROBINSON				

STATEMENT OF ACCOUNT AGING OF PAST DUE AMOUNTS

CURRENT NET AMOUNT DUE	30 DAYS	60 DAYS	OVER 90 DAYS		TOTAL AMOUNT DUE
5,095.76	.00	.00	.00		5,095.76

ADVERTISER INFORMATION

INVOICE NUMBER	BILLING PERIOD	BILLED ACCOUNT #	ADVERTISER/CLIENT NAME
0000176462	10/27/08 - 11/23/08	015246	TAXPAYERS GROUP,

A finance charge of 1.5% per month (18% per annum) charged on past due balances 60 days or greater.

IC 3-14-1-3

Circulation or publication of anonymous campaign material

Sec. 3. An individual, an organization, or a committee that circulates or publishes material in an election without the statement required under IC 3-9-3-2.5 commits a Class A misdemeanor.

As added by P.L.5-1986, SEC.10. Amended by P.L.10-1988, SEC.206; P.L.5-1989, SEC.71; P.L.3-1997, SEC.400.

IC 3-14-1-4

Repealed

(Repealed by P.L.3-1997, SEC.475.)

IC 3-14-1-5

Repealed

(Repealed by P.L.5-1989, SEC.120.)

IC 3-14-1-6

Solicitation, challenge, or performance of election function by state police department employee, police officer, or firefighter

Sec. 6. (a) A state police department employee or a police officer or firefighter (including a special duty, auxiliary, or volunteer police officer or firefighter) of a political subdivision who recklessly:

(1) solicits votes or campaign funds;

(2) challenges voters; or

(3) performs any other election related function;

while wearing any identifying insignia or article of clothing that is part of an official uniform or while on duty commits a Class A misdemeanor.

(b) This section does not prohibit any of the following:

(1) A state police department civilian employee from voting while on duty.

(2) A police officer or firefighter from voting while wearing any part of an official uniform or while on duty.

(3) An individual described in subsection (a) from consenting to a photograph (or other visual depiction) of the individual wearing any part of the individual's official uniform appearing in an advertisement in support of a candidate or political party.

(4) An individual from serving as a pollbook holder under IC 3-6-6-36.

(5) A police officer wearing any identifying insignia or article of clothing that is part of an official uniform or while on duty from serving as an absentee ballot courier appointed under IC 3-11.5-4-22.

As added by P.L.5-1986, SEC.10. Amended by P.L.16-1987, SEC.1; P.L.12-1989, SEC.1; P.L.3-1997, SEC.401; P.L.176-1999, SEC.117.

IC 3-14-1-7

Collection, receipt, or disbursement of money or property by committee without appointment of treasurer

Sec. 7. A committee subject to IC 3-9 or any of its members that recklessly collects, receives, keeps, or disburses money or other property to promote any activity to which IC 3-9 applies without appointing and maintaining a treasurer as required by IC 3-9-1 commits a Class B misdemeanor.

As added by P.L.5-1986, SEC.10.

IC 3-14-1-8

Repealed

(Repealed by P.L.3-1995, SEC.157.)

*** Statutes current through P.L.1-2010 thru P.L.5-2010, P.L.7-2010, P.L.8-2010, P.L.10-2010 thru P.L.17-2010, P.L.20-2010 thru P.L.23-2010, P.L.32-2010, P.L.36-2010, P.L.43-2010 thru P.L.57-2010, P.L.62-2010, P.L.69-2010, P.L.75-2010, P.L.78-2010, P.L.79-2010, P.L.82-2010, P.L.85-2010, P.L.95-2010, P.L.101-2010, and P.L.104-2010 of the 2010 Second Regular Session ***
*** Annotations current through January 28, 2010 ***

Title 35 Criminal Law and Procedure
Article 41 Crimes -- General Substantive Provisions
Chapter 2 Basis of Liability

Burns Ind. Code Ann. § 35-41-2-3 (2010)

Legislative Alert:
LEXSEE 2010 Ind. ALS 106 -- See section 14.

35-41-2-3. Liability of a corporation, limited liability company, partnership or unincorporated association.

(a) A corporation, limited liability company, partnership, or unincorporated association may be prosecuted for any offense; it may be convicted of an offense only if it is proved that the offense was committed by its agent acting within the scope of his authority.

(b) Recovery of a fine, costs, or forfeiture from a corporation, limited liability company, partnership, or unincorporated association is limited to the property of the corporation, limited liability company, partnership, or unincorporated association.

HISTORY: IC 35-42-3-2, as added by Acts 1976, P.L.148, § 2; 1977, P.L.340, § 34; 1978, P.L.144, § 4; P.L.8-1993, § 510.

Information Maintained by the Office of Code Revision Indiana Legislative Services Agency
01/19/2009 06:04:35 AM EST

IC 3-9-3

Chapter 3. Campaign Expenses

IC 3-9-3-1

Application of chapter; certain exception for political party offices

Sec. 1. (a) Except as provided in subsections (b) and (c), this chapter applies to candidates in all elections and caucuses and to the following types of committees:

(1) Candidate's committees.

(2) Regular party committees.

(3) Political action committees.

(4) An auxiliary party organization.

(5) A legislative caucus committee.

(b) Section 4 of this chapter does not apply to candidates for federal office.

(c) Section 2.5 of this chapter does not apply to candidates for the following:

(1) Precinct committeeman.

(2) State convention delegate.

As added by P.L.5-1986, SEC.5. Amended by P.L.3-1987, SEC.145; P.L.4-1991, SEC.47; P.L.3-1993, SEC.86; P.L.3-1995, SEC.69; P.L.3-1997, SEC.182; P.L.66-2003, SEC.20.

IC 3-9-3-2

Repealed

(Repealed by P.L.3-1997, SEC.475.)

IC 3-9-3-2.5

Communications regarding clearly identified candidates; soliciting contributions

Sec. 2.5. (a) This section does not apply to any of the following:

(1) A communication relating to an election to a federal office.

(2) A communication relating to the outcome of a public question.

(3) A communication described by this section in a medium regulated by federal law to the extent that federal law regulates the appearance, content, or placement of the communication in the medium.

(4) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer required by this section cannot be conveniently printed.

(5) Skywriting, water towers, wearing apparel, or other means of displaying an advertisement on which the inclusion of a disclaimer would be impracticable.

(6) Checks, receipts, and similar items of minimal value that do not contain a political message and are used for purely administrative purposes.

(7) A communication by a political action committee organized and controlled by a corporation soliciting contributions to the political action committee by the stockholders, executives, or employees of the corporation and the families of those individuals.

(8) A communication by a political action committee organized and controlled by a labor organization soliciting contributions to the political action committee by the members or executive personnel of the labor organization and the families of those individuals.

(9) A direct mailing of one hundred (100) or less substantially similar pieces of mail.

(b) This section applies whenever a person:

(1) makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate; or

(2) solicits a contribution;

through a newspaper, a magazine, an outdoor advertising facility, a poster, a yard sign, a direct mailing, or any other type of general public political advertising.

(c) For purposes of this section, a candidate is clearly identified if any of the following apply:

(1) The name of the candidate involved appears.

(2) A photograph or drawing of the candidate appears.

(3) The identity of the candidate is apparent by unambiguous reference.

(d) A communication described in subsection (b) must contain a disclaimer that appears and is presented in a clear and conspicuous manner to give the reader or observer adequate notice of the identity of persons who paid for and, when required, who authorized the communication. A disclaimer does not comply with this section if the disclaimer is difficult to read or if the placement of the disclaimer is easily overlooked.

(e) A communication that would require a disclaimer if distributed separately must contain the required disclaimer if included in a package of materials.

(f) This subsection does not apply to a communication, such as a billboard, that contains only a front face. The disclaimer need not appear on the front or cover page of the communication if the disclaimer appears within the communication.

(g) Except as provided in subsection (h), a communication described in subsection (b) must satisfy one (1) of the following:

(1) If the communication is paid for and authorized by:

(A) a candidate;

(B) an authorized political committee of a candidate; or

(C) the committee's agents;

the communication must clearly state that the communication has been paid for by the authorized political committee.

(2) If the communication is paid for by other persons but authorized by:

(A) a candidate;

(B) an authorized political committee of a candidate; or

(C) the committee's agents;

the communication must clearly state that the communication is paid for by the other persons and authorized by the authorized political committee.

(3) If the communication is not authorized by:

(A) a candidate;

(B) an authorized political committee of a candidate; or

(C) the committee's agents;

the communication must clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(4) If the communication is a solicitation directed to the general public on behalf of a political committee that is not a candidate's committee, the solicitation must clearly state the full name of the person who paid for the communication.

(h) A communication by a regular party committee consisting of:

(1) a printed slate card, a sample ballot, or other printed listing of three (3) or more candidates for public office at an election;

(2) campaign materials such as handbills, brochures, posters, party tabloids or newsletters, and yard signs distributed by volunteers and used by the regular party committee in connection with volunteer activities on behalf of any nominee of the party; or

(3) materials distributed by volunteers as part of the regular party's voter registration or get-out-the-vote efforts;

must clearly state the name of the person who paid for the communication but is not required to state that the communication is authorized by any candidate or committee.

As added by P.L.3-1997, SEC.183. Amended by P.L.38-1999, SEC.31; P.L.176-1999, SEC.42.

IC 3-9-3-3

Repealed

(Repealed by P.L.3-1997, SEC.475.)