

Before the
INDIANA RECOUNT COMMISSION

In re Election Contest

INDIANA DEMOCRATIC PARTY,
by its Chairperson, DANIEL J. PARKER

Petitioner,

v.

CHARLIE WHITE,

Respondent.

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INDIANA ELECTIONS DIVISION

Motion for Use Immunity For Charlie White, Michelle Quigley-White, Nicole Mills, and Bill Mills

Respondent Charlie White, by counsel, respectfully moves the Indiana Recount Commission to grant his *Motion for Use Immunity For Charlie White, Michelle Quigley-White, Nicole Mills, and Bill Mills*. In support of his motion, Secretary White states as follows:

1. On May 25, 2011, the Commission issued order 2011-08, subpoenaing Charlie White, Michelle Quigley-White, Nicole Mills, and Bill Mills to attend and testify at the June 21, 2011, contest hearing in this matter.
2. Because of concurrent criminal proceedings against him and the unconscionable dilemma the parallel proceedings places him in, Secretary White sought to protect his Fifth Amendment interests to stay these proceedings pending resolution of the criminal proceedings. Likewise, on June 3, 2011, a Motion to Quash Subpoena was filed on behalf of Michelle Quigley-White to protect her Fifth Amendment interests in light of possible criminal proceedings against her. The

circuit court denied Secretary White's request and directed this Commission to expeditiously proceeding with this matter. The Motion to Quash is still pending.

3. Because these Fifth Amendment interests remain, Secretary White seeks use immunity for those subpoenaed in the 2011-08 order, namely Charlie White, Michelle Quigley-White, Nicole Mills, and Bill Mills.

4. Trial courts can grant three types of immunity to witnesses subpoenaed to testify:

(1) transactional immunity: which prohibits the State from criminally prosecuting the witness for any transaction concerning that to which the witness testifies; (2) use immunity: where the testimony compelled of the witness may not be used at a subsequent criminal proceeding; and (3) derivative use immunity: whereby any evidence obtained as a result of the witness' compelled testimony may not be admitted against him in a subsequent criminal prosecution.

In re Caito, 459 N.E.2d 1179, 1182-83 (1984). The second of these, use immunity, which Secretary White seeks, gives those protected under it immunity from their testimony being used in other, typically criminal, proceedings. *Id.* at 1183. It does not preclude subsequent proceedings from being brought against such witnesses, but does require that such proceedings demonstrate an independent basis (i.e., other than the protected testimony) for the charges brought. *Jackson v. State*, 644 N.E.2d 607, 609 (Ind. App. 1994). It does not protect a witness that testifies untruthfully during those proceedings, but does protect a witness from prior perjurious statements revealed through those proceedings. *Furrer v. State*, 709 N.E.2d 744, 746 (Ind. App. 1999).

5. Affording Charlie White, Michelle Quigley-White, Nicole Mills, and Bill Mills use immunity for their testimony would allow them to testify candidly without perpetually assessing with each and every question asked whether they should seek Fifth Amendment protection. And

it would avoid improper inferences about the significance of witnesses' refusal to testify. Petitioner acknowledges that "the Commission as the finder of fact may draw an adverse inference" from the refusal to testify. (Resp. Opp. Mot. Quash at ¶ 3.) The Commission would be better served with all of the facts before it in the form of affirmative testimony, rather than inferring what is true or not true based on the absence of testimony.

6. The voter's decision to election Secretary White to his office is entitled to a full defense. Contests of elections are to be conducted "with the longstanding respect of the right of the people to free and equal election" in mind and must ensure "that the will of the people in the choice of public officers [is] not [] defeated." *Burke v. Bennett*, 907 N.E.2d 529, 532-33 (Ind. 2009). To this end, use immunity would allow Secretary White to defend that choice while also expediting the hearing by allowing each witness to testify candidly and completely, allowing the complete truth to more readily be presented. The Indiana Supreme Court acknowledged in this case "the benefits to be obtained by prompt resolution of all the matters now pending." (May 20, 2011, Published Order at 2.) Granting use immunity serves as such a benefit, and thus is in the public's interest.

7. The Commission serves in the role of a trial court in these contest proceedings. (*See* Circuit Court's April 7, 2011, Judgment) (tacitly acknowledging its appellate role by reversing and remanding the Commission's decision). Consequently, its has the authority to grant such immunity as would a trial court, which appellate courts have recognized as proper. *See, e.g., Jackson v. State*, 644 N.E.2d at 609 (Ind. App. 1994) (affirming the trial court's ruling to hold witness in contempt when he refused to testify but never questioning the trial court's authority to grant immunity for his testimony).

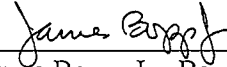
8. Additionally, the Commission has the authority to grant protective orders and can “exercise any other necessary power to perform its functions” pursuant to IC 3-12-10-5(2) & (6). Use immunity serves to protect witnesses and allows the Commission to promptly and accurately perform its functions.

9. Counsel for Secretary White has conferred with counsel for Petitioner, who objects to this motion because Petitioner does “not believe the Commission has the authority to grant use immunity and that it would be inappropriate to potentially hinder or otherwise direct a pending criminal investigation and prosecution.” Notably, criminal investigations and proceedings would not be hampered in any way, since to this point the State has had to build its case without the benefit of any testimony in this proceeding.

WHEREFORE, Secretary White respectfully requests the Indiana Recount Commission grant his *Motion for Use Immunity For Charlie White, Michelle Quigley-White, Nicole Mills, and Bill Mills*.

Dated: June 13, 2011

Respectfully Submitted,

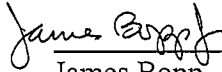


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on June 13, 2011, by U.S. Mail, first class postage prepaid, on the following individual(s) at the following address(es):

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