COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80202 Certiorari to the Colorado Court of Appeals Case No. 16CA0211 District Court, City and County of Denver, Case No. 2015CR4212	
THE PEOPLE OF THE STATE OF COLORADO, Petitioner, v. ERIC PATRICK BRANDT, Respondent.	▲ COURT USE ONLY ▲ Supreme Court Case No. 2018SC35
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rules 28 and 32 of the Colorado Rules of Appellate Procedure:

- The brief contains 7,194 words. It therefore complies with the word limits set forth in C.A.R. 28(g).
- The brief complies with the formatting requirements set forth in C.A.R. 32(a).
- For each issue raised, the brief contains statements about (1) whether the issue was preserved (with appropriate citations to the record), and (2) the standard of review (with appropriate citations to authority). The brief therefore complies with C.A.R. 28(a)(7).

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INTRODUCTION

This case presents issues at two levels. On the surface, the question is whether the court of appeals properly interpreted Colorado's jury tampering statute. Lurking below are questions about the constitutionality of the tampering statute itself.

The issues are related. In adopting a narrow construction of the tampering statute, the court of appeals acted, at least in part, to protect the statute from overbreadth challenges under the First Amendment. However, the court's interpretation neither comports with the statutory text nor avoids the underlying constitutional concerns.

ISSUES PRESENTED

1. Whether the jury tampering statute requires proof of an intent to influence a juror's vote, opinion, decision, or other action in a specifically identifiable case.

2. Whether the jury tampering statute implicitly modifies the definition of "juror" set forth in § 18-8-601(1), C.R.S. (2017).

STATEMENT OF THE CASE

1. Underlying events

In July 2015, Eric Brandt and Mark Iannicelli went to the Lindsey-Flanigan Courthouse to advance the cause of jury nullification. As people approached the courthouse, Brandt and Iannicelli spoke to them and asked why they were there. If a person was there for jury duty, the two handed that person a pamphlet on jury nullification.[1] (TR 12/16/15, pp 2-4.)

The pamphlets variously emphasized a juror's "right" to thwart existing laws. For example:

> Once you know your rights and powers, you can veto bad laws and hang the jury. It may not be an acquittal, but it will prevent an unjust conviction in this jury trial. Your veto power as a juror keeps corrupt government in check — at least this time!

(Brandt CF, p 75; Iannicelli CF, p 50.)

The pamphlets also suggested that jurors act a certain way during voir dire:

> For you to defend against corrupt politicians and their corrupt laws, you must get on the jury. * * * When you're questioned during jury selection, just say you don't keep track of political issues. Show [an] impartial attitude.

(Brandt CF, p 76; Iannicelli CF, p 51.)

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[1] The parties dispute whether the defendants inquired about each person's reason for coming to court. (TR 12/16/15, pp 2, 4-5.) At this point, that dispute is immaterial.

2. In the trial court

Brandt and Iannicelli were charged with seven counts of jury tampering. (Brandt CF, pp 7-11; Iannicelli CF, pp 7-11.) They filed a motion to dismiss, claiming that the tampering statute was unconstitutional, both on its face and as applied. (Brandt CF, pp 51-72; Iannicelli CF, pp 26-47.)

After hearing from both sides, the trial court granted the defendants' motion. The court rejected the claim of facial unconstitutionality but concluded that the statute was unconstitutional as applied. (TR 12/16/15, pp 48-50.)

3. On appeal

The People appealed the trial court's ruling. In a published opinion, the court of appeals affirmed the order of dismissal. *People v. Iannicelli and Brandt*, 2017 COA 150.

The court of appeals did not decide whether the tampering statute was unconstitutional as applied. Instead, the court affirmed for an alternative reason. Relying on statutory text and the doctrine of constitutional avoidance, the court ruled that the tampering statute "applies only to attempts to improperly influence jurors or those selected for a venire from which a jury in a particular case will be chosen." 2017 COA 150 at ¶ 31. The court affirmed the order of dismissal because the People did not charge Brandt or Iannicelli with attempting to influence such jurors. *Id.*

The People then petitioned for a writ of certiorari. In July 2018, this court granted certiorari on the issues identified above.

SUMMARY OF THE ARGUMENT

1. The tampering statute requires proof that the actor intended "to influence a juror's vote, opinion, decision, or other action in a case." Within the meaning of that phrase, "a case" means an actual, extant case — one that has been scheduled for trial and for which the juror has been impaneled, selected for a venire, or summoned for service. The court of appeals held that the prosecution must identify the specific case that the actor intended to influence. However, in reaching that conclusion, the court erroneously relied on text that defines, not the offense itself, but an exception to the offense.

2. The court of appeals held that the tampering statute applies only if the actor tries to communicate with someone who is actually serving on a jury or who has been selected for a venire from which a particular jury will be chosen. That conclusion frustrates the statute's policy and contravenes an express definitional provision.

3. The court of appeals concluded that its interpretation was compelled by the doctrine of constitutional avoidance. But the court's interpretation doesn't address the real problem that the tampering statute presents. To avoid overbreadth concerns, the phrase "other action in a case" must be read narrowly (under the canon *noscitur a sociis*) to include only the sort of actions that could affect the outcome of a case. The problem is not solved by requiring the prosecution to identify one specific case or by narrowing the definition of "juror."

ARGUMENT

As interpreted by the court of appeals, the jury tampering statute contains two implicit limitations:

1. The statute is "limited to attempts to influence a person's vote, opinion, decision, or other action in a specifically identifiable case." 2017 COA 150 at ¶ 8.
2. Within the meaning of the statute, the term "juror" does not include people who have merely been summoned for jury service. It is limited to those chosen to serve on a particular case and "those selected for a venire from which a jury in a particular case will be chosen." 2017 COA 150 at ¶¶ 13, 24, 31.

The court's interpretation is unfortunate. Neither of those limitations is supported by the text of the tampering statute. And neither is required under the doctrine of constitutional avoidance.

A. Preservation and Standard of Review

Preservation. The trial court did not address the statutory interpretation issues presented here. The court of appeals raised those issues sua sponte and obtained supplemental briefs from the parties. 2017 COA 150 at ¶ 8.

Standard of Review. Statutory interpretation issues are reviewed de novo. *Isom v. People*, 2017 CO 110, ¶ 5.

B. Statutory Text

Here is the pertinent text of the jury tampering statute:

> A person commits jury-tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case.

§ 18-8-609(1), C.R.S. (2017) (*Attachment A*).

C. Discussion

The People first identify the flaws in the court's textual analysis. They then explain why the court's interpretation is not required to ensure constitutionality.

1. The statutory text does not require proof of an intent to influence actions in a specifically identifiable case.

The tampering statute requires proof of an actor's intent to "influence a juror's vote, opinion, decision, or other action in a case." The People believe that, within the meaning of that final prepositional phrase, "a case" means an actual, extant case — one that has been scheduled for trial and for which the juror has been impaneled, selected for a venire, or summoned for service. (In that sense, the People agree that the case must be "identifiable" as one of the cases then scheduled for trial.)

But the court of appeals concluded that the prosecution must *specifically identify* the case that the actor intended to influence. *See* 2017 COA 150 at ¶ 8 (concluding that the tampering statute is limited to attempts to influence a juror's actions "in a

specifically identifiable case," and affirming on the ground that the prosecution did not charge such conduct).

The court of appeals based its conclusion on a different statutory phrase: "other than as a part of the proceedings in the trial of the case." In the court's view, that phrase imposes a specific-case limitation through its use of the definite article "the." 2017 COA 150 at ¶ 16 ("In twice using the definite article 'the,' the General Assembly intended to limit the statute's reach to conduct relating to a trial of a particular case.").

The court's analysis is flawed for two reasons.

First, the court overestimated the significance of the definite article "the." That particular word does not always convey the sense of limitation that the court so confidently identified. *See N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014) (recognizing that the word "the" does not always indicate "a particular thing"); *Wyers v. Am. Med. Response Nw., Inc.*, 77 P.3d 570, 578 (Or. 2016) (noting that "the use of the definite article is not always, so to speak, definitive"); *Craig v. Boye*s, 11 P.2d 673, 674 (Cal. Ct. App. 1932) (citing cases and concluding that "the" means "a").[2]

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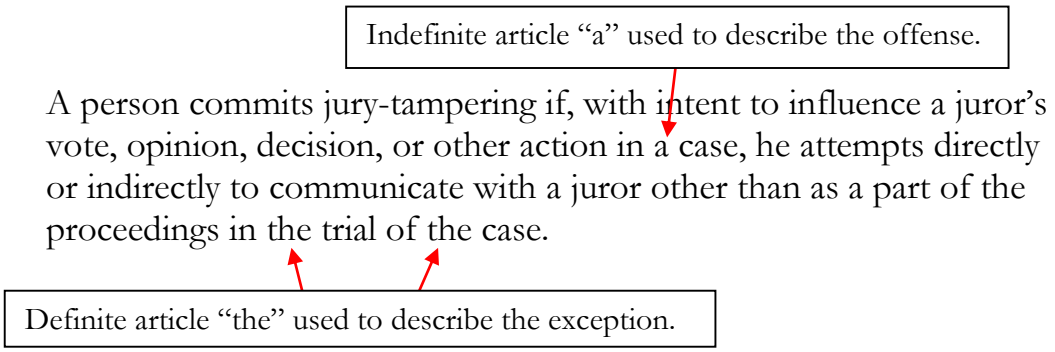
[2] An old opinion from New York makes the point poetically:

> Take the well-worn and well-wearing quotation: "The man that hath not music in his soul is fit for treason, stratagem and spoils." The meaning of the article is not exhausted when one man is found with no music in himself. "The man" means

Second, even if the court were right about the meaning of "the," its conclusion is illogical because that word appears, not in language describing the offense's mental state element, but in prepositional phrases that modify the *exception* to the statute's actus reus:



Consequently, if the statute implies any specific-case limitation, it does so only for the exception. (The exception tells us that, if attempted communication occurs "as a part of the proceedings in the trial of the case," it is exempt from regulation under the statute. Such conduct is instead regulated by the rules — constitutional, statutory, procedural, and ethical — that govern legal proceedings.)

Does it make sense for the legislature to have narrowly described the statutory exception through the use of a definite article ("the"), when it more broadly used an indefinite article ("a") to describe the offense? Sure it does, because the exception is,

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> there "any man." So in this statute, "the party … entitled" means "any party entitled."

Noyes v. Children's Aid Soc., 70 N.Y. 481, 484 (1877).

by its nature, narrower than the offense. An instance of excepted conduct will always occur within the confines of a single case, whereas an instance of improper conduct can affect several cases simultaneously.

Consider, for example, an actor who enters a jury assembly room and urges potential jurors to return "not guilty" verdicts in every drug case. That improper act could influence the outcome of several cases, and for purposes of prosecution, it should be sufficient to show that the actor intended to influence any or all of those cases. But a similar multi-case impact cannot occur through litigation. That sort of proper influence occurs one case at a time.

In concluding that the statute is limited to attempts to influence a specifically identifiable case, the court of appeals relied on *Turney v. State*, 936 P.2d 533 (Alaska 1997). That case addressed an overbreadth challenge to the following statute:

> (a) A person commits the crime of jury tampering if the person directly or indirectly communicates with a juror other than as permitted by the rules governing the official proceeding with intent to
>
> (1) influence the juror's vote, opinion, decision, or other action as a juror; or
>
> (2) otherwise affect the outcome of the official proceeding.

Alaska Stat. § 11.56.590(a).

The *Turney* court ruled that, by using phrase "the official proceeding," Alaska's statute prohibited only communications that could affect a juror's performance in "*an* actual, specific proceeding." *Turney*, 936 P.2d at 540. The Colorado Court of Appeals

was persuaded by that observation, and having concluded that Alaska's statute "doesn't differ materially" from Colorado's, 2017 COA 150 at ¶ 23, it imposed the same limitation.

The People do not quarrel with the analysis set forth in *Turney*. But they think the court of appeals erred in relying on that case.

First, the court of appeals overlooked a material difference in the two statutes. In Alaska's statute, the phrase "the official proceeding" modifies the mens rea element and thus directly limits the scope of the prohibited conduct. As noted, in Colorado's statute, the definite article "the" appears in phrases that modify the scope of *exempt* conduct.

Second, in addressing the claimant's overbreadth challenge, the *Turney* court was focused on the distinction between (a) improper attempts to influence the outcome of real cases, and (b) public speech about legal proceedings generally. *See Turney*, 936 P.2d at 540 (distinguishing between "particular matters" and "messages that are broadcast to the general public on such topics as the adverse effects of insurance fraud or the wisdom of tort reform"); *id.* at 540-41 (distinguishing between "a particular case" and hypothetical advertisements that informed citizens about jury nullification). The *Turney* opinion does not clearly preclude prosecution of an actor whose comments are intended to influence the outcome of a class of cases (*e.g.*, all drug cases scheduled for trial). It therefore is largely consonant with the People's position here.

2. The statutory text does not modify the definition of "juror."

What does the term "juror" mean? That question should have been easy to answer under a rule that this court has long followed: "If the General Assembly has defined a statutory term, a court must apply that definition." *People v. Swain*, 959 P.2d 426, 429 (Colo. 1998).

Here, the legislature defined the term "juror" to include a person who has been summoned for jury service:

> "Juror" means any person who is a member of any jury or grand jury impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The term "juror" also includes any person who has been drawn or summoned to attend as a prospective juror.

§ 18-8-601(1), C.R.S. 2017 (*Attachment B*).

The court of appeals recognized that the statutory definition applied to jury tampering cases. 2017 COA 150 at ¶¶ 13-14. But the court concluded that the provision was implicitly narrowed by language in the tampering statute. *Id.* at ¶ 13 ("But on closer inspection, we conclude that the language of section 18-8-609(1) limits application of the definition in that section.").

The court's conclusion was based on the statute's specific-intent requirement: "intent to influence a juror's vote, opinion, decision, or other action in a case." The court reasoned that the final prepositional phrase — "in a case" — implicitly excludes any person who has merely been summoned for jury duty because such a person is not "*serving in a case*." 2017 COA 150 at ¶ 15 (emphasis added). The court concluded

that the specific-intent element "necessarily limits the statute's reach to jurors or potential jurors selected for a venire from which a jury in a particular case will be chosen." 2017 COA 150 at ¶ 17.

The court's reasoning is not persuasive. Obviously, the tampering statute requires proof of an intent to influence a juror's vote, opinion, decision, or other action in a case. But that intent element does not implicitly narrow the range of people who would qualify as jurors. Under any natural reading of the statute, an actor could form the requisite specific intent, and act on that intent, by communicating with a person who has merely been summoned to jury service.

Consider, for example, our hypothetical actor who has entered a jury assembly room so that he can speak to a room full of prospective jurors. (Assume that the actor does that early in the day, before anyone has been called to a courtroom. And assume that the actor pleads for a verdict of acquittal in a particular case, or a class of cases set for trial.) Although the actor does not know which potential jurors will be selected for the venire, much less who will serve on a jury, he nevertheless is trying to influence (prospectively) those jurors' votes, decisions, opinions, or other actions in a case.

The court of appeals's interpretation of "juror" would be questionable, even in the absence of a specific legislative definition. When construed in light of the statute's underlying purpose, the term "juror" would naturally be understood to include people summoned to jury service. *See State v. Solomon*, 120 A.3d 661, 665 (ME 2015) ("It is

inconceivable that the Legislature intended to prohibit attempts to improperly influence jurors who have been selected to serve, while allowing free rein to anyone who wants to improperly influence potential jurors who are awaiting possible selection in response to a traverse jury summons."); *Nobles v. State*, 769 So. 2d 1063, 1065 (Fla. Ct. App. 2000) ("Because a case might be brought before any person who receives a summons to report for jury duty during the period of time in which the case is scheduled for trial, we conclude that the term 'juror' necessarily refers to prospective jurors as well as active jurors.").

But the presence of a legislative definition makes this issue easy. The court of appeals simply got it wrong.[3]

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Ultimately, the court's textual analysis cannot stand. The clues on which the court relied — "in a case" and "in the trial of the case" — are simply too weak and subtle to support the court's conclusions.

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[3] In adopting a narrow interpretation of the term "juror," the court of appeals noted that the *Turney* court "apparently didn't have to grapple with a statutory definition of the term 'juror.'" 2017 COA 150 at ¶ 23. And it's true that the *Turney* court didn't address the statutory definition of "juror." But that's not because the Alaska statute lacks a definition. As in Colorado, Alaska's scheme defines "juror" to include a person "summoned to attend as a prospective juror." *See Turney*, 936 P.2d at 536 (quoting Alaska Stat. § 11.56.900(3)). The *Turney* court didn't address the statutory definition of "juror" because it confined its analysis to the scope of the prohibited conduct.

3. The court of appeals erred in relying on the doctrine of constitutional avoidance.

Having concluded that the tampering statute is limited — by its "plain language" — to a narrow set of circumstances, 2017 COA 150 at ¶ 24, the court of appeals then hedged its bet. The court observed: "At the very least, our jury tampering statute is susceptible of two reasonable interpretations, one of which is that it applies only in the limited fashion discussed above." *Id.* at ¶ 25. The court suggested that its interpretation was required under the doctrine of constitutional avoidance so that the tampering statute would not succumb to an overbreadth attack. *Id.* at ¶¶ 25, 30.

That approach is troubling for three reasons.

First, the court of appeals should have decided the issue presented — whether the tampering statute is unconstitutional as applied — before taking any action on the basis of constitutional overbreadth. It is generally better to address as-applied challenges first because those are narrower and easier to resolve. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 484–85 (1989); *People v. Graves*, 2016 CO 15, ¶ 13 (noting that the overbreadth doctrine should be employed "only as a last resort") (citations omitted).

Second, the court of appeals did not conduct any meaningful overbreadth analysis of its own. Instead, it incorporated the views expressed in two federal cases, *Turney v. Pugh*, 400 F.3d 1197 (9th Cir. 2005), and *United States v. Heicklen*, 858 F. Supp.

2d 256 (S.D.N.Y. 2012). *See* 2017 COA 150 at ¶¶ 28-30. But neither of those cases addresses Colorado's statute.

Third, the court's interpretation doesn't solve the problem. It's true that Colorado's tampering statute creates potential overbreadth issues. But the real problem is created by an ambiguity in the final phrase of the mental state element — "other action in a case." That problem is not solved by requiring proof of a specifically identifiable case or by narrowing the definition of "juror."

As an alternative to the court's analysis, the People offer the following.

a. Overbreadth Principles

As a rule, a statute may be invalidated as facially unconstitutional only if it is incapable of being constitutionally applied under any conceivable set of circumstances. *United States v. Stevens*, 559 U.S. 460, 472 (2010); *People v. M.B.*, 90 P.3d 880, 881 (Colo. 2004). But courts recognize an exception for challenges brought under the First Amendment. In that context, a statute may be invalidated as facially overbroad if a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep. *Stevens*, 559 U.S. at 473; *People v. Graves*, 2016 CO 15, ¶ 14.

The first step in overbreadth analysis is to construe the challenged statute. *United States v. Williams*, 553 U.S. 285, 293 (2008); *Graves*, 2016 CO 15 at ¶ 15. "The court should ascertain whether the statute encompasses *any* constitutionally protected

activity before determining whether the statute extends to a 'substantial' amount of protected activity." *Graves*, at ¶15.

The next step is to determine whether the statute is substantially overbroad. That step requires the court to weigh the statute's underlying purpose against the extent of constitutionally-protected speech that the statute may inhibit:

> Where a statute does not directly abridge free speech, but — while regulating a subject within the State's power — tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.

Younger v. Harris, 401 U.S. 37, 51 (1971).

In determining the statute's impact on protected speech, the reviewing court cannot merely rely on a few conceivable hypotheticals. *See Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."). Instead, the court must require the claimant to show — through the text of the statute and actual fact — a danger to free speech that is both realistic and significant. *See Taxpayers for Vincent*, 466 U.S. at 801 ("In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court[.]"); *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (requiring claimants to

demonstrate, "from the text of the law and from actual fact, that substantial overbreadth exists") (quotation marks and citation omitted).

b. Construing the statute

Here again is the pertinent text of the jury tampering statute:

> A person commits jury-tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case.

§ 18-8-609(1), C.R.S. (2017).

For purposes of our present discussion, it is important to distinguish between the statute's actus reus and mens rea elements. The actus reus element is broad. Subject to a limited exception (for communication that occurs during litigation), one commits the prohibited act merely by attempting to communicate with a juror. But the mens rea element is narrow. It includes both explicit and implicit mental state requirements:

- *Explicit*. The statute expressly requires proof of specific intent. The actor must intend to influence a juror's vote, opinion, decision, or other action in a case.
- *Implicit*. The statute implicitly requires proof that the actor *knowingly* attempted to communicate with a juror. That mental state is required as a component of both the actus reus and specific intent elements. *See* § 18-1-503(2) ("Although no culpable mental state is expressly designated . . . a culpable mental state may nevertheless be required . . . if the proscribed conduct necessarily involves such

a culpable mental state."); *Turney,* 936 P.2d at 541 (agreeing that the specific intent element necessarily requires proof that "the defendant *knew* that he was communicating with a juror" and agreeing that such knowledge is historically required for the offense) (citing *Commonwealth v. Riley,* 172 A. 22, 24 (Penn. 1934), and *Pettibone v. United States,* 148 U.S. 197, 206 (1893)).

Like many criminal statutes, the tampering statute's intent element will be "the determinative factor separating protected expression from unprotected criminal behavior." *United States v. Cassel*, 408 F.3d 622, 631-32 (9th Cir. 2005) (quoting *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987); *Ford v. State*, 262 P.3d 1123, 1130 (Nev. 2011) (noting that, while the state's pandering statute broadly prohibits a certain kind of speech, its specific intent element "narrows the statute to illegal employment proposals"). Consequently, we must determine precisely what is meant by the phrase: "with intent to influence a juror's vote, opinion, decision, or other action in a case."

The first part of that phrase is easy enough. Because the listed objects — "vote, opinion, decision" — synonymously describe the means by which a juror determines the outcome of a case, the phrase requires proof of intent to influence the result of an actual, extant case. *See Turney*, 936 P.2d at 540 ("The words 'vote, opinion, decision' specify salient components of the principal duty of a juror — to decide the outcome of the case.").

The last part of the phrase is more difficult because the catch-all object — "or other action in a case" — can be read in either of two ways. The phrase can be read

broadly to include anything that a person might do in his or her capacity as a juror. Alternatively, it can be read narrowly so that "other action" takes on the characteristics of the specific outcome-determinative actions listed before — "vote, opinion, decision."

The narrow interpretation is better for two reasons.

First, it comports with the interpretive canon *noscitur a sociis*.[4] *See Young v. Brighton Sch. Dist. 27J*, 2014 CO 32, ¶ 24 (relying on the canon to conclude that the term "public facility" does not include a school walkway); *Yates v. United States*, 135 S. Ct. 1074, 1077 (2015) (relying in part on the canon to conclude that the term "tangible object" does not include a fish); *United States v. Bronstein*, 849 F.3d 1101, 1108-09 (D.C. Cir. 2017) (relying on the canon to conclude that the terms "harangue" and "oration"

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[4] The canon of noscitur a sociis has been explained this way:

> When several nouns or verbs or adjectives or adverbs — any words — are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar. The canon especially holds that words grouped in a list should be given related meanings.

A. Scalia & B. Garner, *Reading Law* 195 (2012). *See also* 2A N. Singer & J. Singer, *Sutherland Statutes and Statutory Construction* § 47.16 (7th ed. September 2018 Update) ("Noscitur a sociis means literally 'it is known from its associates,' and means practically that a word may be defined by an accompanying word).

refer, not to public speech generally, but only to "public speeches that tend to disrupt the Court's operations").

Second, the narrow interpretation minimizes the risk that the statute will be overbroad. *See Graves*, 2016 CO 15, ¶ 16 (noting that, when a statute is challenged for overbreadth, a court should apply a limiting construction to preserve the statute's constitutionality). If the statute broadly prohibited attempts to influence *any* aspect of a juror's conduct, then it might well inhibit a substantial amount of protected speech:

- "Jury duty is an important responsibility. Take it seriously and listen carefully to the evidence."
- "Jury duty is a waste of time. Tell them you're too busy."
- "Be yourself. Wear the T-shirt that says 'Born to Kick Ass.'"

See Turney, 936 P.2d at 540 & n.9 (rejecting similar hypothetical statements as "unavailing because it is the intent to influence the outcome that is critical").

Consequently, to violate the tampering statute, an actor must knowingly attempt to communicate with a juror (including someone summoned to jury service), with the specific intent to influence the result of a case through that juror's vote, opinion, decision, or other outcome-determining action.

c. Properly interpreted, the tampering statute has no overbreadth problem.

As interpreted by the People, the tampering statute is not substantially overbroad in relation to its plainly legitimate sweep.

The state has a compelling interest in protecting the integrity of trials generally and jury verdicts in particular. Public confidence in legal proceedings rests on the belief that jurors act fairly and impartially in reaching their decisions. Were actors allowed to undermine that impartiality by influencing jurors outside the courtroom, public confidence would erode, and criminal defendants would be deprived of their Sixth Amendment rights:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

Remmer v. United States, 347 U.S. 227, 229 (1954); *see also People v. Zupancic*, 192 Colo. 231, 233, 557 P.2d 1195, 1196 (1976) ("Any effort to tamper with or obstruct the due administration of its function is reprehensible. Jurors and witnesses should be protected vigorously from outside influences.").

Because it addresses the sort of speech that constitutes a serious and imminent threat to the administration of justice, Colorado's jury tampering statute is a justifiable limitation on free speech. *See Craig v. Harney*, 331 U.S. 367, 373 (1947) (recognizing that freedom of speech should not be impaired "unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice"); *see also Turney v. Pugh*, 400 F.3d 1197, 1202 (9th Cir. 2005) (upholding Alaska's jury tampering statute against a claim of overbreadth and noting that "speech

to jurors about pending cases presents a special problem because of its grave implications for defendant's right to a fair trial and the public's interest in fair and impartial justice"); *Dawkins v. State*, 208 So. 2d 119, 122 (Fla. Dist. Ct. App. 1968) (finding no First Amendment protection for speech intended to influence grand jury deliberations).

Colorado's tampering statute is narrowly drawn. It does not regulate the content of speech so much as the time, place, and manner of that speech. (Consistent with the statute, an actor can say anything about any legal action, as long as he or she is (1) litigating in court, or (2) addressing a non-juror, or (3) addressing a juror who has completed his or her service.)

The statute has little effect on public speech. That is true for two related reasons:

1. As noted, the tampering statute implicitly requires proof that the actor knowingly attempted to communicate with a juror. Absent highly unusual circumstances, that element will be missing from cases involving public speech. *See State v. Springer-Ertl*, 610 N.W.2d 768, 777–78 (S.D. 2000) (noting that, in light of its mental state element, the state's tampering statute "would not include situations where a person intends to inform the public or express a public opinion, regardless of whether jurors — drawn, summoned, or sworn — may be among the public"); *Turney*, 936 P.2d at 541 (agreeing that hypothetical TV ads about jury nullification would not be covered, in part because the facts

would not show that the "defendant *knew* that he was communicating with a juror"); *United States v. Smith,* 555 F.2d 249, 250–51 (9th Cir. 1977) (reversing a contempt conviction because the actor spoke to jurors, not knowingly or intentionally, but merely with willful and wanton disregard of whether they might hear him).

2. The message itself is shaped by its context. When uttered, in private, to a juror serving on a capital case, the words "The death penalty is wrong" may suggest an intent to influence the outcome of a case. But when spoken in public — at the 16th Street Mall, in a letter to the editor, or in a comment posted on-line — the same words convey a broader political message about the death penalty generally. Because of its context, public speech is less likely to suggest an intent to influence a juror's vote, opinion, decision, or other action in a case.

For speech directed at jurors, the statute prohibits only a narrow range of messages. The statute applies only if the message is intended to influence the outcome of an extant case. Consequently, many communications — even ones that are wrong and misleading — will stand outside the statute's reach.

Good examples abound in the pamphlets that Brandt and Iannicelli distributed. Some of the messages in those pamphlets could be prohibited by the tampering statute because they suggest an intent to influence the outcome of criminal cases. For

example, some messages were designed to influence the way that potential jurors handled voir dire:

> For you to defend against corrupt politicians and their corrupt laws, you must get on the jury. * * * When you're questioned during jury selection, just say you don't keep track of political issues. Show impartial attitude.

(Brandt CF, p 76; Iannicelli CF, p 51.)

> Since knowing about jury nullification may get you excused from sitting on a jury, and the best place for informed jurors to be is on a jury rather than excused from it, the best answer to give is: "I have heard about jury nullification, but I'm not a lawyer, so I don't think I fully understand it."

(Brandt CF, p 148; Iannicelli CF, p 149.)

Those messages were placed alongside messages that could influence a juror's vote, opinion, or decision in an extant case:

> Once you know your rights and powers, you can veto bad laws and hang the jury. It may not be an acquittal, but it will prevent an unjust conviction in this jury trial. Your veto power as a juror keeps corrupt government in check —at least this time!

(CF, p 75; Iannicelli CF, p 50.)

> If the law violates any human rights, you ***must vote no*** against that law by voting "not guilty." Don't let the judge threaten you!

(Brandt CF, p 75; Iannicelli CF, p 50.)

> The jury has the power to nullify any law. It also means the jury has the power to ignore previous rulings by the Supreme Court and still find the defendant not guilty if they judge the law and previous court rulings to be wrong.

(Brandt CF, p 148; Iannicelli CF, p 149.)

However, most of the messages in the pamphlets stand outside the statute's reach. Regardless of their truth or merit, those messages do not indicate an intent to influence the outcome of any extant case.

Here are just two examples:

> Jury nullification of law is your right, defended by America's Founders. Those Patriots intended jurors to have the final vote on laws — before those laws could be enforced. Each law must pass all these reviews before it gains the authority to be enforced. Thomas Jefferson said, "I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." Your right to own and manage your body is a right you can protect when you are a juror. When you are a juror, you can protect your right to keep your property, your right to privacy, and your right to self defense — simply by refusing to enforce bad laws that violate these rights.

(Brandt CF, p 74; Iannicelli CF p 49.)

> In a trial by jury, the judge's job is to referee the event and provide neutral legal advice to the jury, properly beginning with a full explanation of a juror's rights and responsibilities.
>
> But judges only rarely "fully inform" jurors of their rights, especially their right to judge the law itself and vote on the verdict according to conscience. In fact, judges regularly assist the prosecution by dismissing prospective jurors who will admit knowing about this right — beginning with anyone who also admits having qualms with the law.
>
> **We can only speculate on why:** Disrespect for the idea of government "of, by, and for the people"? Unwillingness to share power? Distrust of the citizenry? Fear that prosecutors may damage their careers, saying they're "soft on crime"? Ignorance of the rights that jurors necessarily acquire when they take on the responsibility of judging an accused person?

(Brandt CF, p 79; Iannicelli CF, p 54.)

*

Ultimately, it is possible that the tampering statute could be applied to an instance of protected speech. But such examples will be rare, and courts can guard against any injustice by determining that the statute is unconstitutional as applied. *See Graves*, 2016 CO 15, ¶ 15 (noting that if a statute encompasses protected speech but is not substantially overbroad, then its constitutionality may be addressed on a case-by-case basis).

Consequently, there is no need, under the doctrine of constitutional avoidance, to adopt the strained construction that the court of appeals employed.

CONCLUSION

This court should reverse the decision below and remand to the court of appeals with directions to determine whether the charges against Brandt and Iannicelli were properly dismissed on the ground that the tampering statute is unconstitutional as applied.

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CERTIFICATE OF SERVICE

I certify that on October 29, 2018, I electronically filed this Opening Brief via the Colorado Courts E-Filing system, which will send notification to all persons registered in this case.

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DA's Appellate Division

ATTACHMENTS

A. § 18-8-609. Jury-tampering

(1) A person commits jury-tampering if, with intent to influence a juror's vote, opinion, decision, or other action in a case, he attempts directly or indirectly to communicate with a juror other than as a part of the proceedings in the trial of the case.

(1.5) A person commits jury-tampering if he knowingly participates in the fraudulent processing or selection of jurors or prospective jurors.

(2) Jury-tampering is a class 5 felony; except that jury-tampering in any class 1 felony trial is a class 4 felony.

B. § 18-8-601. Definitions

The definitions contained in sections 18-8-101, 18-8-301, and 18-8-501 are applicable to the provisions of this part 6, and, in addition to those definitions:

(1) "Juror" means any person who is a member of any jury or grand jury impaneled by any court of this state or by any public servant authorized by law to impanel a jury. The term "juror" also includes any person who has been drawn or summoned to attend as a prospective juror.

(2) "Testimony" includes oral or written statements, documents, or any other evidence that may be offered by or through a witness in an official proceeding.