STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MECOSTA

PEOPLE OF THE STATE OF MICHIGAN,	**APPELLANT'S BRIEF ON APPEAL AND PROOF OF SERVICE**
Plaintiff/Appellee,	
-vs-	**DISTRICT CT. NO.: 15-45978-FY** **CIRCUIT CT. NO.:**
KEITH ERIC WOOD,	**HONORABLE ERIC R. JANES**
Defendant/Appellant.	

BRIAN E. THIEDE (P32796)
NATHAN L. HULL (P72265)
Mecosta County Prosecutor Office
Attorney for Plaintiff/Appellee
400 Elm Street, Room 206
Big Rapids, MI 49307
231-592-0141

DAVID A. KALLMAN (P34200)
STEPHEN P. KALLMAN (P75622)
KALLMAN LEGAL GROUP, PLLC
Attorneys for Defendant/Appellant
5600 W. Mount Hope Hwy.
Lansing, MI 48917
(517) 322-3207/Fax: (517) 322-3208

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

CONSTITUTIONS:

STATUTES:

COURT RULES:

JURY INSTRUCTIONS:

DICTIONARY:

JURISDICTIONAL STATEMENT

The Judgment of Sentence was entered on July 21, 2017. Appellant timely filed his claim of appeal on July 21, 2017. The Circuit Court, therefore, has jurisdiction to consider this appeal pursuant to MCR 7.103(A) and 7.104.

QUESTIONS PRESENTED

I. WHETHER THE STATE VIOLATED MR. WOOD'S FIRST AMENDMENT RIGHTS?

TRIAL COURT'S ANSWER: NO

APPELLANT'S ANSWER: YES

II. WHETHER THE TRIAL COURT ERRONEOUSLY DEFINED AND APPLIED MICHIGAN'S JURY TAMPERING STATUTE?

TRIAL COURT'S ANSWER: NO

APPELLANT'S ANSWER: YES

III. WHETHER THE STATE VIOLATED MR. WOOD'S DUE PROCESS RIGHTS?

TRIAL COURT'S ANSWER: NO

APPELLANT'S ANSWER: YES

STATEMENT OF FACTS

On the morning of November 24, 2015, Defendant/Appellant Keith Wood (hereinafter "Mr. Wood") stood on a public sidewalk near the Mecosta County courthouse (Trial Tr., Vol. II(b), June 1, 2017, pgs. 6, 30). Mr. Wood distributed a pamphlet he obtained from the Fully Informed Jury Association (FIJA), a federally recognized 501(c)(3) non-profit educational organization (Trial Tr., Vol. II(b), pg. 34). The pamphlet included information for citizens on a topic and viewpoint concerning the legal authority and power of jurors (Trial Tr., Vol. II(b), pg. 39).

Mr. Wood was aware that *People v Yoder* was calendared for a possible jury trial (Trial Tr., Vol. II(b), pg. 33). He had, as an interested citizen, sat in the gallery at an earlier court hearing in the Yoder case on November 4, 2015 after receiving an email about it (Trial Tr., Vol. II(b), pg. 31). He did not, however, know Mr. Yoder and had never met him (Trial Tr., Vol. II(b), pg. 29). Mr. Wood has never had any contact with Mr. Yoder (Trial Tr., Vol. II(b), pgs. 29-30). He had no personal stake in the outcome of *People v Yoder* (Trial Tr., Vol. II(b), pgs. 29-30). Further, Mr. Wood did not know that the *Yoder* case was the only jury trial scheduled on November 24, 2015 (Trial Tr., Vol. II(b), 33).

Mr. Wood never mentioned the *Yoder* case to anyone while he was handing out pamphlets (Trial Tr., Vol. II(b), pg. 40). Further, the pamphlet did not discuss any particular defendant, case, county, or state and did not advocate that any juror vote in any particular way (Trial Tr., Vol. II(b), pg. 40, see Prosecutor's Trial Exhibit 1). Mr. Wood handed out the pamphlets to everyone who passed him on the sidewalk (Trial Tr., Vol. II(b), pg. 36). There was no way for Mr. Wood to tell who was coming to the courthouse for potential jury duty (Trial Tr., Vol. I, pg. 226). Mr. Wood had only obtained the FIJA brochures shortly before the day in question and that was the first day he publicly distributed them (Trial Tr., Vol. II(b), pg. 43).

Magistrate Thomas Lyons went outside to investigate and confront Mr. Wood who was sharing the information (Trial Tr., Vol. I, May 31, 2017, pg. 132). Magistrate Lyons told Mr. Wood to not share the information in the pamphlet on a public sidewalk (Trial Tr., Vol. I, pg. 132). Mecosta County District Court Judge Peter Jaklevic also took issue with Mr. Wood sharing information. (Trial Tr., Vol. I, pg. 276). Judge Jaklevic and Prosecutor Thiede decided that Mr. Wood should be brought inside to speak with the judge (Trial Tr., Vol. I, pgs. 218-219). Judge Jaklevic ordered Court Officer Jeffrey Roberts to bring Mr. Wood into the courthouse because he wanted him to stop handing out his pamphlets on the public sidewalk (Trial Tr., Vol. I, 298). Department of Natural Resources (DNR) Detective Janet Erlandson and Court Officer Roberts confronted Mr. Wood outside on the public sidewalk and demanded that he come inside to speak with the judge (Trial Tr., Vol. I, 220). Mr. Wood asked DNR Detective Erlandson if he was being detained (Trial Tr., Vol. I, pg. 221). DNR Detective Erlandson told Mr. Wood that he was not being detained (Trial Tr., Vol. I, pg. 221). However, Court Officer Roberts then told Mr. Wood that if did not come inside, he would be arrested (Trial Tr., Vol. I, pg. 233; Trial Tr., Vol. II(b), pgs. 53-54).

After being coerced by a threat of arrest by Court Officer Roberts, DNR Detective Erlandson physically escorted Mr. Wood into the courthouse (Trial Tr., Vol. II(b), pg. 55). When DNR Detective Erlandson put her hand on Mr. Wood's back as they entered the courthouse, Mr. Wood asked her to not "manhandle" him (Trial Tr., Vol. I, pg. 222). In response, DNR Detective Erlandson testified that she told Mr. Wood, "If I was going to manhandle you, sir, you'd be face down on the ground already" (Trial Tr., Vol. I, pg. 222). At no point did Mr. Wood resist arrest (Trial Tr., Vol. I, pg. 235).

Mr. Wood was taken to a hallway where Judge Jaklevic, Prosecutor Thiede, and Assistant Prosecutor Nathan Hull were waiting (Trial Tr., Vol. I, pg. 240). Despite the coercive demands of

Court Officer Roberts that Mr. Wood come inside the courthouse to speak with the judge, Judge Jaklevic never spoke directly to Mr. Wood (Trial Tr., Vol. II(b), pg. 58).

Judge Jaklevic then ordered Court Officer Roberts and DNR Detective Erlandson to arrest Mr. Wood for jury tampering (Trial Tr., Vol. I, pg. 206). At the time, no jury had been selected, empaneled, or sworn in to serve as jurors in the case of *People v Yoder* (Trial Tr., Vol. I, pg. 158). No jury was sworn in at any time that day in Mecosta County District Court and all the prospective jurors were sent home (Trial Tr., Vol. I, pg. 125; Trial Tr., Vol. I, pgs. 174-175).

Mr. Wood was arraigned on the felony charge of Obstruction of Justice (MCL 750.505) and the misdemeanor charge of Jury Tampering (MCL 750.120a) (Mot. to Dismiss Tr., March 23, 2016, pg. 39). Despite being a long-time local resident, married with seven children, owning his own small business in the area, and being no flight risk whatsoever, Magistrate Thomas Lyons set an excessive, punitive, and unconstitutional bond of $150,000.00 (10%) (Mot. to Dismiss Tr., pg. 40-41; see Register of Actions). After Mr. Wood's arrest, he posted $15,000.00 for his bond on his credit card (Mot. to Dismiss Tr., pg. 41). Nearly five months after posting the bond, the prosecutor stipulated to refund Mr. Wood the $15,000.00 and his bond was converted to a personal recognizance bond (Mot. to Dismiss Tr., pgs. 50-51).

Mr. Wood filed his Motion to Dismiss on December 21, 2015. Plaintiff/Appellee (hereinafter "Prosecutor") filed his response on January 8, 2016. Mr. Wood filed his reply brief on January 18, 2016. A hearing was held regarding the Motion to Dismiss on March 23, 2016, and the District Court dismissed the felony charge of Obstruction of Justice but did not dismiss the misdemeanor charge of Jury Tampering (Mot. to Dismiss Tr., pg. 39).

The District Court relied on its interpretation of Black's Law Dictionary when it refused to dismiss the Jury Tampering charge (Mot. to Dismiss Tr., pg. 39). The District Court held that a person becomes a "juror" when a person is merely *summoned to appear* for potential jury duty

(Mot. to Dismiss Tr., pgs. 37-39). The District Court cited no statute, case law, or any other Michigan precedent to support its conclusion.

Mr. Wood filed a Motion for Reconsideration on April 21, 2016 responding to the Court's new interpretation citing controlling case law from the Michigan Supreme Court. Approximately eight weeks later, the District Court issued an opinion and order denying Mr. Wood's Motion for Reconsideration. This order summarily concluded that "[b]ecause the Court did not commit any palpable error in its ruling on March 23, 2016, Defendant's Motion for Reconsideration is DENIED for the reasons found on the record." Mr. Wood appealed the Mecosta County District Court's order denying his Motion to Dismiss and his Motion for Reconsideration to the Mecosta County Circuit Court on June 28, 2016. The prosecutor filed an answer to Mr. Wood's application on July 18, 2016. Mr. Wood filed a reply brief on July 25, 2016. The Circuit Court of Mecosta County issued an order denying Mr. Wood's appeal on July 29, 2016.

Mr. Wood then filed an interlocutory appeal to the Court of Appeals and the Court issued an order denying Mr. Wood's request for leave to appeal on December 2, 2016, but provided no analysis and simply stated that there was no issue requiring immediate review. Mr. Wood filed an Application for Leave to Appeal with the Michigan Supreme Court on January 25, 2017. The Supreme Court declined to review Mr. Wood's Application for Leave to Appeal on April 4, 2017. A two-day jury trial was held on May 31st and June 1st of 2017. Over the objection of Mr. Wood, the District Court instructed the jury that a "juror" for the purpose of the jury tampering statute "includes a person who has been summoned to appear in court to decide the facts in a specific trial." The jury thereafter found Mr. Wood guilty of jury tampering.

STANDARD OF REVIEW

Regarding the criminal statute in question, MCL 750.120a, issues of statutory construction are questions of law that are reviewed *de novo*. *People v Dowdy*, 489 Mich 373, 379 (2011). The cardinal rule of statutory construction is to discern and give effect to the intent of the Legislature. *Id*. Courts must construe a statute in a manner that gives full effect to all its provisions. *Id*.

Regarding the First Amendment and due process issues, questions of constitutional law are reviewed de novo. *People v Rapp*, 492 Mich 67, 72 (2012). It is presumed that a statute is constitutional and the party challenging the validity of the ordinance bears the burden of proving a constitutional violation. *Id*. If the party is challenging a statute as being applied unconstitutionally, the party must show a "present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *People v Wilder*, 307 Mich App 546, 650 (2014).

ARGUMENT

I. THE STATE VIOLATED MR. WOOD'S FIRST AMENDMENT RIGHTS.

A. THE FIRST AMENDMENT PROTECTS MR. WOOD'S RIGHT TO DISTRIBUTE BROCHURES ON A PUBLIC SIDEWALK.

Judges, prosecutors, and law enforcement officials must discharge their duties within the confines of our Constitution. Citizens hold many differing political views, and they often hold them passionately. They may express those views even in ways that offend government officials. The price for our freedom is that we might be subjected to views that offend us. Democracy is a messy business, and we, as a people, have freely chosen it over the relative tidiness of tyranny.

The First Amendment to the United States Constitution protects citizens against government action substantially interfering with freedom of speech or assembly. US Const, Am 1. The United States Supreme Court currently holds that this limit on the exercise of government

power applies to action by state entities. *Cantwell v Connecticut*, 310 US 296 (1940). Moreover, our state Constitution provides similar protection in Article I, Section 6:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

The United States Supreme Court has clearly affirmed the principle that when a criminal prosecution is based on an unconstitutional application of a statute, it is proper for the trial court to dispose of the criminal case through a motion to dismiss:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury v Madison, 5 US 137, 178 (1803).

The United States Supreme Court calls these kinds of hand-distributed political pamphlets "historical weapons in the defense of liberty." *Schneider v State of New Jersey*, 308 US 147, 162 (1939). By prosecuting Mr. Wood, the State engaged in nothing less than suppression of protected free speech. Few legal principles are more clear than the one stating that "handing out leaflets in the advocacy of a politically controversial viewpoint… is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." *McCullen v Coakley*, 134 SCt 2518, 2536 (2014) (quoting *McIntyre v Ohio Elections Comm'n*, 514 US 334, 347 (1995)). The Court went on to state that "[w]hen the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id*. Thus, Mr. Wood's activities are protected by the First Amendment.

Where the government regulates expressive activity by means of a criminal sanction, the government appropriately bears the burden of proving that its actions pass constitutional muster. *Perry Ed Assn v Perry Local Ed Assn*, 460 US 37, 45-46 (1983). The government's burden to

produce evidence is not satisfied by mere speculation or conjecture. Instead, it must offer evidence establishing that the problem it identifies is real and that the speech restriction will alleviate that problem to a material degree *without* unconstitutionally restricting protected First Amendment activity. *Edenfield v Fane*, 507 US 761, 770-771 (1993); see also *United States v Playboy Entm't Group*, 529 US 803 (2000). "First Amendment standards … 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Citizens United v Federal Election Comm'n*, 130 SCt 876, 891 (2010) (quoting *Federal Election Comm'n v Wisconsin Right To Life, Inc*, 551 US 449, 469 (2007) (opinion of Roberts, C.J.)).

Mr. Wood's political speech is at the core of the First Amendment's protection because it deals with matters of public concern. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v Phelps*, 131 SCt 1207, 1216 (2011) (internal quotations omitted). Speech on matters of public concern is at the heart of the First Amendment's protection. *Id*. at 1215. "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id*. (quoting *New York Times Co v Sullivan*, 376 US 254, 270 (1964)). "The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.'" *Id*. (quoting *Rankin v McPherson*, 483 US 378, 387 (1987)).

Mr. Wood was sharing information on the history, authority, and power of juries, a topic of political, social, and public concern. See, e.g., *Wood v Georgia*, 370 US 375 (1962) (holding that a letter distributed to grand jury members was speech on public issues); *Bridges v State of California*, 314 US 252 (1941) (holding that the First Amendment protects out-of-court publications pertaining to a pending case just as much as it protects other speech on issues of public

concern). Further, neither Mr. Wood's general awareness of *People v Yoder*, nor his previous presence in the courtroom at a pre-trial hearing, negate his First Amendment rights.

Not only is the content of Mr. Wood's speech deserving of special protection, but restrictions on the method through which he delivered his message also historically require the highest scrutiny possible in order to protect our First Amendment rights. Indeed, the United States Supreme Court has stated, "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment," *Schenck v Pro-Choice Network*, 519 US 357, 377 (1997), and that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." *Meyer v Grant*, 486 US 414, 424 (1988). When the government imposes restrictions on "these modes of communication, it imposes an especially significant First Amendment burden." *McCullen*, 134 SCt at 2536.

Mr. Wood's speech is to be afforded the highest protection under the First Amendment both because of its content and because of its mode of delivery. Expressive activity need not make noise to be "speech" for purposes of First Amendment protection. The Court has long considered the distribution of literature to be an expressive activity entitled to the core protection of the First Amendment. See, e.g., *Schneider*, 308 US at 162; *McCullen*, 134 SCt at 2536; *Jamison v Texas*, 318 US 413, 416 (1943) (one rightfully on a public street carries with him there his First Amendment right to the "communication of ideas by handbills"); *Int'l Soc'y for Krishna Consciousness, Inc v Lee*, 505 US 672, 690 (1992) (O'Connor, J., concurring).

Mr. Wood was arrested for engaging in political speech in the most protected kind of public forum, a public sidewalk. The United States Supreme Court held:

> "public way[s]" and "sidewalk[s]." …. **occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate.** *United States v Grace*, 461 U.S. 171, 180, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). **These places--which we have labeled "traditional public fora" --" 'have immemorially been held in trust for the use of the public and,**

> **time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions**.'" *Pleasant Grove City v Summum*, 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (quoting *Perry Ed. Assn. v Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

McCullen, 134 SCt at 2528-2529 (2014) (emphasis added).

Mr. Wood's speech was entitled to the highest First Amendment protection. The State did not afford Mr. Wood the constitutional protection to which his speech was entitled. Instead, the State arrested and prosecuted him solely based on the Prosecutor and Judge Jaklevic's disagreement with his topic and viewpoint.

B. THE STATE'S CONDUCT WAS CONTENT-BASED.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v Johnson*, 491 US 397, 414 (1989). State officials in this case unconstitutionally abused the power of the State to arrest and charge Mr. Wood with crimes in order to harass, intimidate, and silence him and because they disagree with the content of his message.

The State's arrest and prosecution of Mr. Wood was a content-based restriction on speech motivated solely by personal animus for his message. Indeed, Judge Jaklevic testified at length about all of the "concerns" he had regarding the content of the information contained in Mr. Wood's nefarious piece of paper. Judge Jaklevic strongly disagreed with the content in Mr. Wood's brochure. For example:

- He was concerned that it stated that jurors should vote according to their conscience (Trial Tr., Vol. I, pg. 293).
- He read the pamphlet and thought "this is not supposed to be happening" (Trial Tr., Vol. I, pg. 276).

- He was concerned that it stated that judges only rarely fully inform jurors of their rights and that jurors have the right to judge the law itself (Trial Tr., Vol. I, pg. 293).

- He was concerned that the content in the brochure conflicted with Michigan's jury instructions and oath (Trial Tr., Vol. I, pg. 294).

- He was concerned because it encouraged jurors to consider whether the law was being justly applied (Trial Tr., Vol. I, pg. 295).

- He was concerned because it encouraged jurors to consider whether the Bill of Rights were honored in the arrest (Trial Tr., Vol. I, pg. 295).

Further, Judge Jaklevic ultimately conceded that he was concerned with the content in the brochure (Trial Tr., Vol. I, pg. 309) (emphasis added):

> ***Q*. Isn't that the content of the pamphlet?**
> ***A*. That was one of my concerns.**

Contrary to Judge Jaklevic's concerns, the United States Supreme Court holds:

> [W]e are here confronted with a statute which, by its own words and as applied, **purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.**

Brandenburg v Ohio, 395 US 444, 449 (1969) (internal citations omitted) (emphasis added). Moreover, the Supreme Court held:

> "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." As a result, **the Constitution "demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality.**"

United States v Alvarez, 132 SCt 2537, 2543-2544 (2012) (emphasis added) (internal citations omitted). The Prosecutor failed to meet his burden and the Trial Court failed to even analyze it.

Thus, even though the State disagrees with Mr. Wood's criticism and interpretation of the law regarding the authority of juries, it has no power to silence his speech. "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only

informed and responsible criticism but the freedom to speak foolishly and without moderations." *Baumgartner v United States*, 322 US 665, 673-674 (1944).

Arbitrarily arresting and charging Mr. Wood on unfounded criminal charges to punish him for expressing a contrary opinion shamelessly violates the First Amendment; and the Trial Court's complete disregard for the First Amendment is equally repugnant. The government officials' unlawful animus was further shown by punishing his speech with an excessive and unconstitutionally high bond of $150,000.00 two days before Thanksgiving, despite Mr. Wood being a married man with seven children who owned a business in the community and was absolutely no flight risk whatsoever.

The United States Court of Appeals for the Sixth Circuit recently issued an *en banc* decision upholding speech in a public forum in the case of *Bible Believers v Wayne County*, 805 F3d 228 (6th Cir 2015). In that case, the Court reviewed allegedly offensive speech on another Michigan public sidewalk. The Court cogently held that "[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Id*. at 243. The Court held that **"[w]hen confronted by offensive, thoughtless, or baseless speech that we believe to be untrue**, **the 'answer is [always] more speech**.**'"** *Id*. (emphasis added).

> Finally, in reference to speech being unlawful, the Court held that:
>
> Because **"[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it**," *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002), speech that fails to specifically advocate for listeners to take "any action" cannot constitute incitement. *Hess*, 414 U.S. at 109.

Id. at 245 (emphasis added).

The Trial Court cited *nothing* in support of its personal opinion that Mr. Wood's conduct was not protected by the First Amendment (Trial Tr., Vol. II(a), pgs. 39-41). In this case, it cannot be argued that the FIJA pamphlet encouraged people to commit an unlawful act. Mr. Wood was

merely sharing information that a juror is entitled to vote their conscience; the same instruction every juror receives in every criminal case (MI CJI 3.11(5)). Truly, instructing a person to follow his conscience could just as much encourage a juror to convict a guilty man who is trying to evade justice as it could encourage a juror to acquit a defendant from an unlawful prosecution.

Even if this Court accepts the proposition that it is an improper act for jurors to violate their juror oath, no law, by statute or at common-law, makes it a crime for a person to follow his or her conscience—even if it means disregarding the juror's oath. In fact, case law clearly affirms that jurors have the power to do so. See *People v St Cyr*, 129 Mich App 471 (1983).

The State's censure of Mr. Wood's speech occurred on a public sidewalk, a quintessential public forum. See *Hague v CIO*, 307 US 496, 515 (1939). The regulation of his expression must, therefore, comply with the following constitutional requirements for a traditional public forum:

1) the regulation must not be content based - unless it can survive strict scrutiny; and

2) the regulation must be a valid time, place and manner regulation (i.e., among other things, the government's action must leave open an adequate alternative place for the speech).

Heffron v International Soc'y of Krishna Consciousness Inc, 452 US 640, 648 (1981); *Perry Educ Ass'n v Perry Local Educator's Ass'n*, 460 US 37 (1983).

First, the government's regulation of Mr. Wood's expression was content-based. The Trial Court, Judge Jaklevic, Magistrate Lyons, Prosecutor Thiede, and Assistant Prosecutor Hull, all objected to the pamphlet being shared by Mr. Wood because of its message and the information it contained. The pamphlet said nothing about any specific case pending before the Court that day, nor did it direct any juror to vote a specific way. See Prosecutor's Trial Exhibit 1. To qualify as content-neutral regulation of speech, the government regulation must be both:

1) subject-matter-neutral, (i.e., government must not regulate speech based on the topic of the speech), and

2) viewpoint-neutral, (i.e., government must not regulate speech based on the ideology of the message).

Perry Local Educator's Ass'n, 460 US at 45.

Here, the government action was neither. It was the subject-matter and viewpoint Mr. Wood expressed that led to the government action suppressing his speech. Prosecutor Thiede demonstrated in his oral argument on December 10, 2015 that it was the content of the brochure that offended him (Pre-lim Tr., December 10, 2015, pg. 13). He was upset by the idea of a potential juror being told to vote his or her conscience (Pre-lim Tr., pgs. 13-14). In fact, he said that there were some consciences out in the public that he would not want voting on a jury (Pre-lim Tr., pg. 14). Prosecutor Thiede even went so far as to say that if people are exposed to the content of the brochure, it would create a lawless nation where terrorists and clinic bombers could potentially go free (Pre-lim Tr., pg. 13).

Prosecutor Thiede has attempted to characterize *the content* in the pamphlet as a veritable Jedi mind trick, containing a message so powerful, so compelling, and so convincing, that no citizen who reads it will be capable of ever rendering a guilty verdict again. This is patently absurd. In any case, it is absolutely clear that it was the content and message that Mr. Wood was spreading that caused the State to silence him.

If Mr. Wood had been advancing a view that jurors must only decide cases by following the instructions as given to them by the court, there can be little doubt that the State would not have arrested and prosecuted him. Prosecutor Thiede admitted to the State's content-based censorship in Court (Mot. to Dismiss Tr., pg. 27):

> Counsel is absolutely right that if he was out here passing out political pamphlets for a—a candidate, we would've had nothing to say about it. If he would've had pamphlets generally speaking about the constitution, we would've had nothing to say about it. We would've done nothing with those things because that's [his] first amendment right.

Despite all of the evidence of content-based censorship, the Trial Court failed to provide any analysis as to whether the State's conduct was content-based (Trial Tr., Vol. II(a), pgs. 39-41). The Trial Court's complete lack of First Amendment analysis is very troubling. Instead, the Trial Court focused on completely irrelevant facts such as where Mr. Wood was located on the public sidewalk or whether he was blocking the sidewalk to determine whether there was a First Amendment violation (Trial Tr., Vol. II(a), pg. 40). The Trial Court erred by not providing any content-based analysis.

It is clear that the government actors in this case had Mr. Wood arrested and charged because of the content his pamphlet contained. It was Mr. Wood's peaceful expression of his political message that the government targeted for censorship via his arrest, imprisonment, and criminal prosecution. The government, therefore, regulated Mr. Wood's speech in a content-based way and must, therefore, survive a strict scrutiny analysis. It cannot do so.

C. FIRST AMENDMENT STRICT SCRUTINY ANALYSIS

Content-based regulation of expression by government authorities invokes strict scrutiny, the highest standard of review in constitutional analysis. *Turner Broadcasting System v FCC,* 512 US 622, 641 (1994). Under strict scrutiny the government must prove:

1) that it had a compelling governmental interest in regulating the speaker's speech, and

2) that it used the least restrictive means possible to serve that compelling interest.

See, e.g., *McCullen,* 134 SCt at 2530; *Alvarez,* 132 SCt at 2551. Further, the U.S. Supreme Court held:

> When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

Alvarez, 132 SCt at 2543.

Mr. Wood concedes that the State has a compelling interest to prevent jury tampering. What Mr. Wood does not concede is that the State has a compelling interest to criminalize Mr. Wood's distribution of a juror rights pamphlet on a public sidewalk. Mr. Wood does not concede that the State can unconstitutionally redefine the jury tampering statute (after-the-fact) to prohibit highly protected expressive conduct. What he also does not concede is that such a compelling interest relieves the State of its duty to use the least restrictive means. Finally, he does not concede that a compelling interest to prevent jury tampering bestows upon the State *carte blanche* to use any means necessary.

Contrary to the Trial Court's ruling, it is not enough to merely have a compelling interest to prevent jury tampering (Trial Tr., Vol. II(a), pgs. 39-41). The issue here is not the constitutionality of the jury tampering statute itself; the issue is whether the application of the statute to Mr. Wood's conduct was constitutional. Indeed, the Court of Appeals has held:

> While the facial-challenge standard is extremely rigorous, an as-applied challenge is less stringent and requires a court to analyze the constitutionality of the statute against a backdrop of the facts developed in the particular case.

People v Hallak, 310 Mich App 555 (2015) (overruled on unrelated grounds regarding a sentencing issue).

Therefore, the true question is whether the State had a compelling interest to override Mr. Wood's First Amendment rights and prevent him from handing out brochures on a public sidewalk. It clearly does not.

To be clear, Mr. Wood is not facially challenging the constitutionality of the jury tampering statute (MCL 750.120a) as it was originally written. Mr. Wood is challenging the statute as it was applied in this case. He is challenging the Trial Court's redefinition of words, and omission of elements, in order to secure Mr. Wood's conviction. Appellant can find no case law applying the statute in such an inappropriate way. In doing so, the State violated Mr. Wood's rights and unconstitutionally silenced his free speech in violation of *People v Wilder, supra*.

Out of all of the issues required in a First Amendment analysis, the only one the Trial Court addressed was whether the State had a compelling interest to prevent jury tampering. The Trial Court analyzed irrelevant facts, provided no proper analysis, and consequently reached the wrong conclusion. Further, the Trial Court erred by providing no case law, statute, rule, or any other authority to support its conclusory position that the State had a compelling interest to silence Mr. Wood. However, at least the Court acknowledged that Mr. Wood's rights deserved a strict scrutiny analysis by mentioning that the State had a compelling interest (Trial Tr., Vol. II(a), pg. 40).

Even if the government had a compelling interest in ensuring *potential jurors* are not informed of the powers they rightfully and lawfully possess (which we do not concede), the government failed to use the least restrictive means available to accomplish this interest. The First Amendment requires that the government use the least restrictive means possible to further a compelling state interest if it wishes to limit or infringe on a fundamental right, such as freedom of speech. US Const, Am 1; *People v DeJonge*, 442 Mich 266 (1993).

Here the State not only failed to use the least restrictive means, it used the most restrictive. Indeed, the State exercised the nuclear option by using the most extreme, excessive, and punitive route possible by arresting Mr. Wood, charging him with a felony, and setting an unconstitutionally high bond. By arresting and prosecuting Mr. Wood, the State is engaged in overt censorship. Both

the Federal and State Constitutions require that this Honorable Court forcefully reject such oppression.

There were many less restrictive options available to Mecosta County if it was truly concerned about pamphlets being distributed to the public near the courthouse. The government could have, for example, employed a valid time, place, and manner regulation that controlled, not the content of Mr. Wood's speech, but the manner in which Mr. Wood safely manifested it. The county could impose a policy where people may only hand out information at certain times. The county could restrict the distribution of materials on mornings when a potential jury has been summoned. The county could set up a designated protesting/pamphleteering area. The court could utilize curative jury instructions if it were concerned about a specific jury. Indeed, Michigan's jury instructions could be utilized by a court to instruct jurors to not consider any outside information.[1] Again, no less-restrictive means were ever implemented or tried in this case.

Indeed, both Therese Bechler, a clerk for Mecosta County, and Court Officer Roberts indicated that there was no policy regarding people distributing pamphlets (Trial Tr., Vol. I, pg. 185; Trial Tr., Vol. I, pgs. 208-209). The State's failure to utilize any type of less restrictive means violates Mr. Wood's First Amendment rights.

Most troublesome of all, the Trial Court failed to analyze, or even mention, whether any less restrictive means were available or used in this case (Trial Tr., Vol. II(a), pgs. 39-41). This is, in and of itself, grounds for reversal.

The Trial Court's decision cannot stand if it failed to even address the second prong of a two-prong test. Further, it's not as if the Trial Court was unaware of the least restrictive means requirement. Mr. Wood provided the court with a full least restrictive means analysis in his briefs

[1] See M Crim JI 2.16.

and mentioned it no less than six times at trial (Trial Tr., Vol. II(a), pgs. 34, 38-39). Yet, the Trial Court failed to even discuss it. This is reversible error.

Mr. Wood requests that this Court reverse his conviction as violating his First Amendment rights and dismiss this matter with prejudice.

D. UNCONSTITUTIONAL OVERBREADTH

Although the Trial Court should be reversed because of the content-based censorship of Mr. Wood's speech alone, it also violated the Constitution by its overbroad redefinition of the jury tampering statute. "Before ruling that a law is unconstitutionally overbroad, [the] Court must determine whether the law 'reaches a substantial amount of constitutionally protected conduct.'" *Rapp*, 492 Mich at 73. When the Trial Court redefined the word "juror" to mean more than a person actually selected, empaneled, and sworn in a case, it vastly expanded the range and scope of the jury tampering statute to reach a substantial amount of constitutionally protected speech.

According to the Trial Court, the jury tampering statute no longer only covers jurors actually sworn and sitting in a case. MCL 750.120a. The Trial Court's definition is so expansive that it includes thousands of people who merely receive a summons in the mail. Of course, the vast majority of people summoned will never even be called to court. This creates a problem like the one addressed by *Rapp*:

> [I]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.

Id. at 74-75 (Citing *City of Houston v Hill*, 482 US 451, 465-466 (1987)).

The Trial Court, through its redefinition of the jury tampering statute, has now made a substantial amount of constitutionally protected speech a criminal offense. For example, if Mr. Wood had started handing out pamphlets to the summoned potential jurors *after* the Court released them on the day in question, under the Trial Court's redefinition, he could still be charged with

jury tampering because they were still summoned for that month. As our Supreme Court has held, this is not permissible:

> Before ruling that a law is unconstitutionally overbroad, this Court must determine whether the law "reaches a substantial amount of constitutionally protected conduct." The United States Supreme Court has held that criminal statutes must be scrutinized with particular care, and those that prohibit a substantial amount of constitutionally protected conduct may be facially overbroad even if they have a legitimate application.

Rapp, 492 Mich at 73.

According to the Trial Court, a person could be criminally liable for merely speaking with, giving information to, or communicating in any way with a potential juror. All a prosecutor would have to allege is that an improper influence could have occurred. Such an interpretation creates a virtually limitless minefield for a prosecutor to detonate a citizen's First Amendment rights.

The Trial Court's redefinition of the jury tampering statute, as applied in this case, is overbroad, interferes with a substantial amount of constitutionally protected speech, and runs afoul of controlling precedent. The Trial Court should be reversed and this case dismissed with prejudice.

II. THE TRIAL COURT ERRONEOUSLY REDEFINED AND APPLIED MICHIGAN'S JURY TAMPERING STATUTE.

Mr. Wood can find no published or non-published Michigan case in which the State charged a person with jury tampering for merely handing out pamphlets on a public sidewalk. MCL 750.120a states:

> A person who willfully attempts to influence the decision of a juror in any case by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

In short, Mr. Wood was charged with tampering with a jury that did not exist. There is no such crime in Michigan. On the day in question, Mr. Wood had no interaction with a single person who was a "juror in any case." Indeed, no jury was selected, empaneled, or sworn on the day in question. Instead, the Trial Court created post-hoc a new crime in Michigan. Despite the Trial Court's ruling that Mr. Wood distributing literature on a public sidewalk could amount to criminal activity, "[n]othing can be a crime until it has been recognized as such by the law of the land." *People v Thomas*, 438 Mich 448, 456 (1991).

The Trial Court used the following elements in the jury instructions in this case (Trial Tr., Vol II(b), pgs. 144-145):

1. That Jennifer Johnson and/or Theresa DeVries was a juror/were jurors in the case of *People v Yoder*.
2. That the Defendant willfully attempted to influence that juror by the use of argument or persuasion.
3. That the Defendant's conduct took place outside of proceedings in open court in the trial of the case.

Definitions:

> A person acts "willfully" when he or she acts knowingly and purposefully.
>
> The word "juror" includes a person who has been summoned to appear in court to decide the facts in a specific trial.
>
> An "argument or persuasion" can be oral or written.

Mr. Wood objected to the first element (Pre-Trial Tr., May 30, 2017, pgs. 7-9), to the definition of "willfully" (Pre-Trial Tr., pgs. 10-11), and to the definition of "juror" (Pre-Trial Tr., pgs. 11-12).

A. THE TRIAL COURT ERRED BY INCORRECTLY DEFINING THE WORD "JUROR."

Notwithstanding the plain language of the statute, the Trial Court erroneously held that a person becomes a "juror" when a person is merely *summoned to appear* for potential jury duty (Mot. to Dismiss Tr., pgs. 37-39). The Trial Court cited no statute, case law, or any other Michigan precedent to support its conclusion.

The Michigan Supreme Court recently stated that "a jury is not a jury until it is sworn." *People v Cain*, 498 Mich 108, 139 (2015). In *Cain*, Justice Viviano's dissent provides a full analysis of the word "juror," including 13 pages discussing the history, definition, and application of the term. Justice Viviano's recitation was adopted by the majority when it stated that "[t]he dissent is correct that '[f]or as long as the institution we know as 'trial by jury' has existed, juries have been sworn.'" *Id*, at 161 fn. 6. The only point the justices of the Supreme Court disagreed upon was the form and method through which jurors are sworn. Thus, the Supreme Court unanimously held that for someone to be a juror, that person must be sworn.

Justice Viviano stated in his detailed analysis that "the role of the oath had become so firmly ensconced in the concept of the jury that the body known as "the jury" did not exist until its members swore an oath" and that "[t]he essence of the jury is, and always has been, the swearing of the oath." *Id*. at 133-134. He further explained the origin of the word "juror" through its French and Latin roots and concluded that "the oath was, and has always been, a defining criterion of 'jury.'" *Id*. at 135.

Finally, the majority in *Cain* stated that "one of the primary purposes of the oath**—to impart to the members of the jury their duties as jurors**" was fulfilled. *Id*. at 122. The Court's

holding clearly states that it is the oath which bestows the duties upon the jurors and begins their service. Therefore, no person holds the status of being a juror in a case until she has been sworn and her duties have been bestowed upon her. Again, not a single person ever took an oath to actually become a juror in the *Yoder* case, thus, no jurors existed in that case. It is impossible, therefore, for anyone to have tampered with a juror in the *Yoder* case.

Inexplicably, even after Mr. Wood provided the Trial Court with the *Cain* case and other current case law, the Trial Court refused to give any reason or analysis as to why *Cain* did not apply.[2] The Trial Court erred by defining the word "juror" outside the meaning provided in Michigan Supreme Court precedent.

Similarly, in *Jochen v County of Saginaw,* 363 Mich 648 (1961), the Michigan Supreme Court examined whether the Plaintiff, who had merely been summoned to court, was entitled to workers' compensation as a juror. In order to determine if she was eligible, the Court had to decide whether Plaintiff was a "juror" at the time of her accident. The Supreme Court found that she was not a juror at the time of her injury, despite being *inside* of the courthouse on the day she was summoned to serve as a potential juror. *Id.* at 650. The reason for this was because she had not yet been accepted by the court to serve as a juror. This analysis is consistent with the recent holding in *Cain,* which indicates that a person is not a juror until accepted and sworn in as a member of a jury for the trial of a specific case.

Consider the following scenario. Mr. Smith is on his way to potentially serve as a juror and is handed a flier on the public sidewalk in front of the courthouse. Once Mr. Smith is inside the courthouse, but before he is sworn in as a juror, he slips and breaks his hip. According to the Trial

[2] In the Trial Court's denial of Mr. Wood's motion for reconsideration it never mentioned the *Cain* case and stated that it was denied for the reasons stated on the record at the original motion to dismiss hearing. This was quite a paradoxical ruling because at the time of the motion to dismiss hearing, the Court was not yet aware of the recent *Cain* case. It appears that rather than attempt to respond to the *Cain* case, the Trial Court decided to completely ignore it.

Court's ruling on this issue, Mr. Smith is a juror when he is handed the flier; but the Michigan Supreme Court holds he is not yet a juror at that time or even minutes later, when he breaks his hip, for the purposes of receiving monetary compensation as a juror. The Trial Court cannot have it both ways. This Honorable Court must correct the Trial Court's erroneous ruling.

The Trial Court further erred by not giving the word "juror" its plain and ordinary meaning according to Michigan precedent. The Michigan Supreme Court held in *People v Reeves*, 448 Mich 1, 13 (1995):

> In interpreting penal statutes, this Court "require[s] clarity and explicitness in the defining of the crime and the classification of acts which may constitute it"; however, **we will not usurp the Legislature's role by expanding the scope of the proscribed conduct.**

The Supreme Court further held in *People v Monaco*, 474 Mich 48, 55 (2006) (emphasis added):

> It is a settled rule of statutory construction that, unless otherwise defined in a statute, statutory words or phrases are given their plain and ordinary meanings.

At the time Michigan's jury tampering statute was enacted in 1955, Black's Law Dictionary (4th Edition) defined the word "juror" as "one member of a jury." It then defined a "jury" as (emphasis added):

> A certain number of men, selected according to law, and **sworn** to inquire of certain matters of fact, and declare the truth upon evidence to be laid before them.

Contrary to the Trial Court's opinion, at the time the legislature created the jury tampering statute, the plain and ordinary meaning of the word "juror" only included citizens who had been both selected *and sworn*. This is entirely consistent with the holdings in *Cain* and *Jochen*.

The Trial Court should have exercised restraint before infringing on the rights of citizens like Mr. Wood. The Trial Court's ruling that someone who might become a juror is the same as an

actual juror, for purposes of this penal statute, plainly violates this principle. Again, the Michigan Supreme Court stated that "a jury is not a jury until it is sworn." *Cain*, 498 Mich at 139.

Finally, the Michigan Court Rules and Michigan's Criminal Jury Instructions clearly belie the Trial Court's redefinition of the word "juror." Michigan Criminal Jury Instruction 1.1 is entitled "Preliminary Instructions to **Prospective Jurors**." The "End Note" for instruction 1.1 (emphasis added) states:

> MCR 6.412(B) states that the court should give the **prospective jurors** appropriate preliminary instructions before beginning the jury selection process.

MCR 6.412(B) (emphasis added) states:

> Instructions and Oath Before Selection. Before beginning the jury selection process, the court should give the **prospective jurors** appropriate preliminary instructions and must have them sworn.

It is worth noting that during all of Voir Dire and all the way up until the actual jury was chosen and sworn, the entire panel was referred to as "Prospective Jurors" (Trial Tr., Vol I., pgs. 1-94). This complies with MCR 8.108(B)(1) (emphasis added) which states:

> The court reporter or recorder shall attend the court sessions under the direction of the court and take a verbatim record of the following:
> (a) the voir dire of **prospective jurors**; . . .

Further, the Trial Court admitted that the people called for Mr. Wood's trial were only prospective jurors when she stated (Trial Tr., Vol I., pg. 24) (emphasis added): "We will now pick eight names out of the **prospective jurors** that are here."

The court rule, jury instruction, the Judge's statement, and the actual transcript in this case clearly indicate that people who have merely been summoned to court are only "prospective jurors." It is not until a person is selected, empaneled, and sworn that the status of "juror" is bestowed. There is no crime in Michigan for "prospective juror tampering." Thus, Mr. Wood committed no crime. Moreover, the jury instructions, court rules, Black's Law Dictionary, and the

holdings in *Cain* and *Jochen* are all consistent that a person is not a juror until she is selected and sworn.

Logic and common sense also demonstrate that a juror is not a juror until he is sworn. One only needs to look at numerous other examples in society. A police cadet becomes a police officer when he is sworn. A law student becomes a lawyer when she is sworn. A gubernatorial candidate becomes the governor when he is sworn. It is the taking of the oath which confers the authority and title of the position. It logically follows that a person summoned for potential jury duty only becomes a juror when she is sworn.

Again, it is important to note that the Trial Court's entire ruling was not based on any Michigan statute, case, or court rule. The Trial Court completely failed to justify such a redefinition of this dispositive statutory term, especially in light of the controlling precedent in *Cain* and *Jochen*. Because it is uncontroverted that no one was ever sworn in as a juror on the day in question, the proper definition of the word "juror" necessitates the reversal of Mr. Wood's conviction as a matter of law.

B. MCL 750.120 PROVIDES FURTHER PROOF THAT MR. WOOD'S DEFINITION OF "JUROR" IS CORRECT.

The juror bribery statute, immediately preceding the jury tampering statute, proves Mr. Wood's definition of "juror" is correct. The Trial Court erred by failing to acknowledge, respond, or even attempt to refute this argument in its ruling. MCL 750.120 states:

> Juror, etc., accepting bribe—**Any person summoned as a juror** or chosen or appointed . . . who shall corruptly receive any gift or gratuity whatever, from a party to any suit, cause, or proceeding, **for the trial or decision of which such juror shall have been summoned** . . . shall be guilty of a felony.

This statute was passed in 1931. In contrast, MCL 750.120a, which was passed in 1955, is much more narrow:

> A person who willfully attempts to influence the decision of a **juror in any case** by argument or persuasion, other than as part of the proceedings in open court in the trial of the case, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

The legislature is presumed to know what it is doing when it passes laws. "It is a well-established principle of statutory construction that the Legislature is presumed to act with knowledge of statutory interpretations[.]" *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506 (1991) The legislature added section 120a, immediately following section 120, and specifically used the language, "juror in any case." If the legislature truly intended for jury tampering to include every person who has been summoned, it would have used the same language from the immediately preceding statute. If the legislature intended MCL 750.120 and MCL 750.120a to mean the same thing, why did it use different language? The answer is obvious; it is because the legislature did not intend to include persons who had merely been summoned as potential jurors in MCL 750.120a.

The Trial Court's ruling rests on its opinion that the word "juror," standing alone, includes anyone who has been summoned to appear for a potential jury pool. If it were correct then the beginning of the phrase in MCL 750.120 stating "[a]ny person summoned as a juror" would be completely redundant because, according to the Trial Court, the legislature had no need to include "any person summoned as" and could have just said "juror." But the legislature did not simply say "juror." It explicitly qualified that term by adding the language "any person summoned as." Clearly, MCL 750.120 proves that the Trial Court's definition of the word "juror" is erroneous.

The Trial Court's ruling violates a cardinal rule of statutory construction.

> It is axiomatic that "every word [in the statute] should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory."

Duffy v Michigan Dept. of Natural Resources, 490 Mich 198, 215 (2011) (internal citations omitted).

The Trial Court's ruling rendered part of MCL 750.120 redundant, surplusage, nugatory, and completely unnecessary. The Trial Court should have applied the familiar principles of statutory construction:

> As our Supreme Court has instructed: [T]he purpose of statutory construction is to discern and give effect to the intent of the Legislature. In determining the intent of the Legislature, this Court must first look to the language of the statute. The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature. **As far as possible, effect should be given to every phrase, clause, and word in the statute**. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. Moreover, when considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. **A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained.**

Adanalic v Harco Nat'l Ins Co, 309 Mich App 173, 179-180 (2015) (internal citations omitted) (emphasis added). The Michigan Supreme Court has even more specifically held that two consecutive statutes regarding the same subject matter should be read together.

> "It is elementary that statutes in *pari materia* are to be taken together in ascertaining the intention of the legislature, and **that courts will regard all statutes upon the same general subject matter as part of one system**." In this case, both MCL 691.1401 and MCL 691.1402 are in the GTLA, MCL 691.1401 immediately precedes MCL 691.1402, and MCL 691.1401 expressly [defines several terms] "[a]s used in this act...." See also *Remus v Grand Rapids*, 274 Mich. 577, 581, 265 N.W. 755 (1936) ("**In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law**.")

Duffy, 490 Mich at 206-207 (2011) (emphasis added) (internal citations omitted).

There is no dispute that the Trial Court erred by not reading MCL 750.120 and MCL 750.120a together. It is obvious that the legislature intended the juror bribery statute (MCL

750.120) to encompass every person summoned as a juror, but it did *not* intend the general jury tampering statute (MCL 750.120a) to be so broad as to include every person summoned. If the legislature intended these two statutes to mean the same thing, it would have written them using the same language. These two statutes, when read together, prove that jury tampering does not apply to everyone who has been summoned. If the Trial Court believes the word "juror" should include every person summoned, the remedy to this issue is to ask the legislature to amend the statute, not to allow a wrongful prosecution of Mr. Wood or to act as a legislature.

It is clear that the legislature did not intend the word "juror" to include every person merely summoned. Therefore, Mr. Wood's conviction must be reversed and the case dismissed.

C. THE TRIAL COURT MISAPPLIED THE ELEMENTS OF JURY TAMPERING.

The State has the responsibility of proving, beyond a reasonable doubt, each of the elements of the crime before a defendant may be found guilty. No crime exists unless all of its elements are proven. Based upon *People v Crawford*, 458 Mich 376, 389 (1998), the prosecution bears the burden of proving all of the elements of the crime, including that Mr. Wood attempted to influence "jurors in the case of *People v Yoder*." No "jurors in the case of *People v Yoder*" ever existed. Indeed, because the *Yoder* trial never occurred, there were no "jurors in the case of *People v Yoder*" at the time Mr. Wood exercised his Constitutionally protected right to disseminate the political pamphlets at issue on the public sidewalk to those individuals who chose to take and read them. Nor did anyone who received a pamphlet from Mr. Wood ever sit as part of a jury in any case at any point in the future. Again, it is impossible to influence "jurors in the case of *People v Yoder*" when no "jurors in the case of *People v Yoder*" ever existed.

Even if this Court were to accept the Trial Court's definition of the word "juror" to mean any person summoned, Mr. Wood's conviction still must be dismissed. The element did not merely state that Mr. Wood had to improperly influence a juror, it stated that Mr. Wood had to improperly

influence "jurors in the case of *People v Yoder*." Thus, it is not enough that Jennifer Johnson and Theresa DeVries were jurors (according to the Trial Court), they also must have been jurors "**in the case of *People v Yoder***."

Since it is undisputed that no jurors were ever selected, empaneled, or sworn in the case of *People v Yoder*, it is impossible for Jennifer Johnson or Theresa DeVries to have been jurors in the *Yoder* case. It's also undisputed that none of the summons the jurors received in the mail stated that they were being summoned for the *People v Yoder* case (Trial Tr., Vol. II(b), pg. 17).

The proposed jury instructions provided by the Prosecutor from Michigan's Non-Standard Jury Instructions-Criminal (written by Michigan Court of Appeals Judge William B. Murphy) also supports Mr. Wood's position. The original proposed jury instruction template stated for the first element:

> *That [name juror involved] was a juror in the case of [name case in which juror sat]*

See Exhibit A (emphasis added). Even the proposed jury instruction acknowledged that the juror must have "sat" in the case. Thus, the juror must have been more than merely summoned. This is consistent with both Mr. Wood's definition of the word "juror" and his claim that the juror must actually be sitting in the *Yoder* case. Further, the jury instruction template is completely incompatible with the Trial Court's interpretation of the statute. If there had been two trials scheduled that day, but neither of them occurred, it would be impossible to determine in which of the two cases, if any, Jennifer Johnson sat. This reveals the Trial Court's illogical belief that merely receiving a summons in the mail determines in what case a potential juror will sit, which is a necessary element of the crime.

Mr. Wood requested that the jury instruction for the first element state:

> *That Jennifer Johnson and/or Therese DeVries sat as a juror in the case of People v Yoder.*

(Pre-Trial Tr., pg. 7). The Trial Court gave no reasoning, analysis, or discussion and summarily denied Mr. Wood's request (Pre-Trial Tr., pg. 9). This was also reversible error.

The Michigan Legislature designed the jury tampering statute to prevent people from influencing an actual juror on an actual jury sitting on an actual case. Had the legislature intended to include within the ambit of the crime people who might serve on a jury that might exist at some future time, it would not have used language so clearly stating otherwise.

If this Court nevertheless believes ambiguity in the statute exists, the rule of lenity requires this Court to interpret any ambiguity in a criminal statute in favor of the defendant. See *United States v Bass*, 404 US 336 (1971); *McBoyle v United States*, 283 US 25 (1931); *United States v Gradwell*, 243 US 476 (1917). Again, if the Michigan Legislature intended this statute to sweepingly apply to potential, non-existent jurors in a potential, non-existent jury, the Legislature would have made that clear in the statute. Its failure to do so prohibits a broad application of the language used under the rule of lenity.

No one disputes that actual jurors sworn to decide an actual case should be free from outside, improper influence. That is not what this case is about. Mr. Wood believes the language of the statute is plain and obvious; a juror does not exist until she is sworn. However, after a person is sworn and becomes a juror, she is absolutely protected by the jury tampering statute from any person who would attempt to improperly influence her. This is consistent with the Michigan Supreme Court holdings in *Jochen* and *Cain*. It is the role of the legislature, not the courts, to amend the law to cover a person merely summoned to possibly serve as a potential juror.

Further, the Trial Court prohibited Mr. Wood from making any argument to the jury that the *Yoder* trial never occurred and therefore there were no "jurors in the case of *People v Yoder*" (Trial Tr., Vol. II(a), pg. 10). In other words, Mr. Wood was prohibited from arguing an element of the offense to the jury. Inexplicably, the Trial Court held that Mr. Wood arguing the actual

language of the elements would be the same as adding an extra element that was not required for a conviction (Trial Tr., Vol. II(a), pg. 10). Not only did the Trial Court use improper elements for the crime, it ruled that Mr. Wood could not argue the actual words of the Trial Court's own erroneous elements to the jury (Trial Tr., Vol II(a), pg. 10).

To add insult to injury, the Trial Court permitted the Prosecutor to argue to the jury that it was irrelevant that the *Yoder* trial did not occur, but prevented Mr. Wood from addressing that very same issue in closing arguments (Trial Tr., Vol. II(b), pgs. 99-100). During the Prosecutor's closing argument, Mr. Wood attempted to address this issue at the bench, however, the Trial Court did not put anything on the record and indicated at the bench that it was proper for the Prosecutor to argue it's irrelevant that no trial occurred while preventing the defense from responding (Trial Tr., Vol. II(b), pgs. 99-100).

The Trial Court not only rewrote the requirements of the jury tampering statute, it deprived Mr. Wood of his right to a fair trial by refusing to allow him to argue the elements of the crime. The Trial Court redefined the word "juror" beyond what it has ever meant in Michigan's history and ignored the requirement that there be actual jurors in a case. In short, the Trial Court rewrote the statute in a way that would ensure Mr. Wood's conviction.

For all of these reasons, Mr. Wood's conviction must be reversed and the case must be dismissed.

III. THE STATE VIOLATED MR. WOOD'S DUE PROCESS RIGHTS.

A. THE TRIAL COURT'S REDEFINITION OF THE JURY TAMPERING STATUTE IS VOID FOR VAGUENESS.

The Due Process clauses of the United States Constitution and the Michigan Constitution require that the law provide predictability for all citizens. US Const, Am 14; Const 1963, art 1, § 17. An unambiguously drafted criminal statute affords prior notice to the citizenry of conduct proscribed. A fundamental principle of due process, embodied in the right to prior notice, is that a criminal statute is void for vagueness where its prohibitions are not clearly defined. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly. If a person has to guess at what a criminal statute means, or if the crime is not clearly defined, then this Court must dismiss the charges. See, e.g., *Grayned v City of Rockford*, 408 US 104 (1972).

The Trial Court unconstitutionally rewrote Michigan's jury tampering statute to such a degree that it is now void for vagueness.

> A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated. For example, in *Kolender v. Lawson*, the Court declared unconstitutional California's loitering law and declared that "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. * * *
> In part, the vagueness doctrine is about fairness; it is unjust to punish a person without providing clear notice as to what conduct was prohibited. Vague laws also risk selective prosecution; under vague statutes and ordinances the government can choose who to prosecute based on their views or politics.

Erwin Chemerinsky, *Constitutional Law – Principles and Policies*, 3rd Ed, pgs. 941-942 (citing *Kolender v Lawson*, 461 US 352 (1983).[3]

> The Michigan Supreme Court has held:
>
> [T]here are at least three ways a penal statute may be found unconstitutionally vague:
>
> (1) failure to provide fair notice of what conduct is prohibited,
> (2) encouragement of arbitrary and discriminatory enforcement, or
> (3) being overbroad and impinging on First Amendment freedoms.

People v Lino, 447 Mich 567, 575-576 (1994). The United States Supreme Court has further explained the vagueness doctrine:

> As generally stated, 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. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." **Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.**"

Kolender, 461 US at 357-358 (1983) (emphasis added) (internal citations omitted). The Supreme Court further held that "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC v Fox*, 132 SCt. 2307, 2317 (2012). In this case, the Trial Court's redefinition and application of the jury tampering statute rendered it unconstitutionally vague pursuant to all three vagueness doctrines.

First, there was no proper notice to the citizens of the State of Michigan that the distribution of a pamphlet of general information on a public sidewalk to a person who was merely summoned

[3] Erwin Chemerinsky is one of the most prominent constitutional scholars of our time. He has been cited numerous times by the United States Supreme Court for his constitutional analysis, amicus briefs, and treatises. See, e.g. *American National Red Cross v. S.G.*, 505 U.S. 247 (1992); *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Duncan v. Walker*, 533 U.S. 167 (2001); *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998).

for jury duty is a criminal act. When, as here, ambiguous statutory language prevents notice of what constitutes a criminal offense, government authorities can arbitrarily define the criminal offense after the commission of the act. That is exactly what happened to Mr. Wood.

To be clear, Mr. Wood is not alleging that the jury tampering statute is unconstitutionally vague as written by the legislature. However, the Trial Court's interpretation and application of the statute, to mean something it has never meant in Michigan's history, has rendered it unconstitutionally vague.

The Supreme Court has held that "[w]hen making a vagueness determination, a court must also take into consideration any judicial constructions of the statute." *Lino*, 447 Mich at 575. It is only because the Trial Court judicially rewrote the statute that it is now unconstitutionally vague. No statute, case, or any other Michigan authority exists which would had given notice to the citizenry that the word "juror" included anyone who had simply received a summons in the mail. No ordinary person could have had proper notice of what conduct was illegal, therefore, the Trial Court's ruling must be overturned.

Second, arbitrary and discriminatory enforcement has been the hallmark of this case. The State officials arrested and charged Mr. Wood because of their personal animus towards the content of his pamphlet (see above). Again, Prosecutor Thiede acknowledged that he would look to the content of a brochure to determine, in his opinion, if the exact same conduct (handing out information on a public sidewalk) rises to the level of criminal activity (Mot. to Dismiss Tr., pg. 27). This is the epitome of arbitrary and discriminatory enforcement and illustrates the Trial Court's unconstitutional ruling. Further, the Trial Court's erroneous application of the statute enabled government authorities to arbitrarily decide (after the fact) that Mr. Wood's expression fell within Michigan's jury tampering statute.

Third, the Trial Court's erroneous interpretation and application of the jury tampering statute impinged on Mr. Wood's First Amendment freedoms (see above for full the First Amendment overbreadth analysis). Clearly, the Trial Court violated Mr. Wood's due process rights by rewriting Michigan's jury tampering statute to be unconstitutionally vague pursuant to all three vagueness doctrines. This cannot stand. The Trial Court rewriting of the statute and Mr. Wood's conviction must be reversed.

B. MR. WOOD DID NOT RECEIVE A FAIR TRIAL.

The constitution guarantees the right to a fair trial, in particular when a citizen's liberty is at stake. The United States Supreme Court has held that "[f]ew interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors[.]" *Gentile v State Bar of Nevada*, 501 US 1030, 1031 (1991). Despite Judge Jaklevic's repeated references to the Sixth Amendment guarantee of a fair trial, the Trial Court failed to provide a fair trial for Mr. Wood. The first issue which deprived Mr. Wood of a fair trial was the Trial Court's ruling that only the Prosecutor was permitted to argue the elements of the crime, i.e. whether or not a trial occurred and whether or not there were jurors in the *Yoder* case (Trial Tr., Vol. II(a), pg. 10; Trial Tr., Vol II(b), pgs. 99-100) (for full analysis on this issue, please see above).

The second issue which deprived Mr. Wood of a fair trial was that he was not permitted to properly cross-examine a witness. "[T]he Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Pointer v Texas*, 380 US 400, 403 (1965). The Trial Court improperly prohibited Mr. Wood from cross-examining Magistrate Lyons regarding three issues of bias and credibility (Trial Tr., Vol. I, pgs. 140-144).

The first example of bias the Trial Court prohibited was how Magistrate Lyons was a witness to the crime, confronted Mr. Wood outside the courthouse, yet he also improperly presided

over Mr. Wood's arraignment on that same day. The second example of bias was how Magistrate Lyons set an unconstitutionally high bond of $150,000.00 (10%) for Mr. Wood two days before Thanksgiving, for a married man with seven children who owned a business in the community and was absolutely no flight risk whatsoever. The third example of bias was that Magistrate Lyons refused to appoint Mr. Wood an attorney at the arraignment.

The Trial Court prohibited all of these issues from being raised at trial. The right of cross-examination is "one of the safeguards essential to a fair trial," yet the Trial Court refused to permit Mr. Wood to cross-examine Magistrate Lyons on these issues. *Id*. at 404. Our Supreme Court has held:

> It is always permissible upon the cross-examination of an adverse witness to draw from him **any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may disclose a motive to injure the one party or to befriend or favor the other.** The party producing a witness may not shield him from such proper cross-examination for the reason that the facts thus elicited may not be competent upon the merits of the cause.

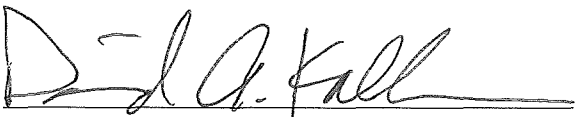
Hayes v Coleman, 338 Mich 371, 381 (1953) (emphasis added). Further, contrary to the Prosecutor's objection at trial, the "interest or bias of a witness has never been regarded as irrelevant." *People v Layher*, 464 Mich 756, 764 (2001). The Trial Court was presented with the above cases during the trial but completely ignored them (Trial Tr., Vol. I, pgs. 143-144). In effect, the Trial Court constructively prevented Mr. Wood from cross-examining Magistrate Lyons because he could not go into the issues which would demonstrate his bias or lack of credibility. The Trial Court's rulings violated Mr. Wood's constitutional rights and prevented him from receiving a fair trial. Therefore, Mr. Wood's conviction must be overturned.

CONCLUSION

Our jury system is predicated upon responsible citizens voting their conscience on a jury. There is no better system in the world. Mr. Wood believes that freedom of speech leads to more justice and more freedom, not less, and that citizens are competent to shape their own opinions without the "protection" of government officials.

For all the reasons stated above, the Trial Court violated Mr. Wood's rights and his conviction must be overturned. The Trial Court ignored Michigan Supreme Court precedent and failed to address numerous significant arguments raised by Mr. Wood. He respectfully requests that this Honorable Court reverse the Trial Court, vacate Mr. Wood's conviction, dismiss the case with prejudice, and grant such other and further relief as is just and appropriate.

Respectfully submitted,

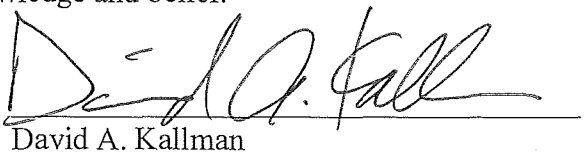


DATED: September 6, 2017.

David A. Kallman (P34200)
Stephen P. Kallman (P75622)
Attorneys for Mr. Wood

PROOF OF SERVICE

I, David A. Kallman, hereby affirm that on the date stated below I delivered a copy of the above Brief on Appeal, with supporting exhibits, upon the Mecosta County Prosecutor via First Class Mail, postage prepaid thereon, and by e-mail to bthiede@co.mecosta.mi.us and nhull@co.mecosta.mi.us and to the Mecosta County Circuit Court Clerk. I hereby declare that this statement is true to the best of my information, knowledge and belief.



DATED: September 6, 2017.

David A. Kallman

EXHIBIT A

Michigan Non-Standard Jury Instr. Criminal § 2:22

Michigan Non-Standard Jury Instructions Criminal | August 2016 Update
Hon. William Murphy & John VandenHombergh

Criminal
Chapter 2. In General

§ 2:22. Consideration of defendant's actions—Attempt to influence juror

Correlation Table

The defendant is charged with willfully attempting to influence the decision of a juror by use of argument or persuasion outside of the proceedings in open court in the trial of the case. The prosecution must prove beyond a reasonable doubt:

(1) *That [name juror involved] was a juror in the case of [name case in which juror sat];*

(2) *That the defendant willfully attempted to influence that juror by the use of argument or persuasion; and*

(3) *That defendant's conduct took place outside of proceedings in open court in the trial of the case.*

A person acts willfully when he or she acts voluntarily and intentionally.

Comment and Authority

1. This instruction was contributed by Timothy Baughman, Special Assistant Prosecuting Attorney, Wayne County Prosecutor's Office, Detroit, Michigan.

2. This offense was created by MCLA § 750.120a, and the instruction is drawn from the act. The act creates a series of offenses involving what is commonly known as jury tampering, that might, prior to the enactment of the statute, have constituted obstruction of justice.

3. This offense, involving only attempts to persuade through argument, is a misdemeanor, punishable by not more than one year in jail, or a fine of not more than $1000, or both.