STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(Murray, C.J., and Murphy and Cameron, J.J.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-vs-

KEITH ERIC WOOD,

Defendant/Appellant.
/

APPELLANT'S BRIEF ON APPEAL AND PROOF OF SERVICE

SC NO.: 159063
COA NO.: 342424
CIRCUIT CT. NO.: 17-24073-AR
DISTRICT CT. NO.: 15-45978-FY

Brian E. Thiede (P32796)
Mecosta County Prosecutor
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

DEFENDANT/APPELLANT'S BRIEF ON APPEAL

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

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

STATUTES:

CONSTITUTIONS:

COURT RULES:

JURY INSTRUCTIONS:

ORDER APPEALED

Defendant/Appellant Keith Wood appeals the Court of Appeals' December 11, 2018 order denying, in a split decision, the appeal of his conviction of Jury Tampering (MCL 750.120a). The Court of Appeals' order is attached as Appendix ("App.") 173a. The Circuit Court's order is attached (App. 168a). The Mecosta County District Court's Order denying Defendant's Motion to Dismiss and Order denying Defendant's Motion for Reconsideration are attached (App. 11a and 13a).

ALLEGATIONS OF ERROR AND RELIEF SOUGHT

This case presents an issue of first impression involving the interpretation and application of Michigan's Jury Tampering statute to constitutionally protected speech in a public forum. MCL 750.120a. The lower courts misapplied Michigan's Jury Tampering statute in a manner inconsistent with controlling precedent. The lower courts:

I. failed to comply with controlling United States Supreme Court and Michigan Supreme Court precedent;

II. violated Mr. Wood's First Amendment freedom of speech rights by upholding the State's unconstitutional conduct;

III. failed to recognize the State's unlawful content-based restriction of Mr. Wood's speech;

IV. incorrectly redefined the definition of the word "juror" in the Jury Tampering statute;

V. misapplied the elements of Jury Tampering;

VI. incorrectly held that the Jury Tampering statute is not void for vagueness;

VII. violated fundamental rules of statutory construction; and

VIII. rendered part of the Michigan Penal Code surplusage and nugatory (MCL 750.120).

For these reasons, Appellant requests this Honorable Court to correctly interpret and apply the Jury Tampering statute, find that the government violated his constitutional free speech rights, and reverse the decisions of the lower courts.

JURISDICTIONAL STATEMENT

Following its split decision, the Court of Appeals entered its order on December 11, 2018. Defendant/Appellant filed his Application for Leave to Appeal within 56 days of the entry of that order pursuant to MCR 7.305(C)(2). The Court has jurisdiction to consider this appeal pursuant to MCR 7.305. This Honorable Court granted Mr. Wood's Application for Leave to Appeal on October 4, 2019.

QUESTIONS PRESENTED

I. WHETHER THE LOWER COURTS ERRONEOUSLY DEFINED AND THEN APPLIED MICHIGAN'S JURY TAMPERING STATUTE?

COURT OF APPEALS' ANSWER: NO

APPELLANT'S ANSWER: YES

II. WHETHER THE STATE VIOLATED MR. WOOD'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH?

COURT OF APPEALS' ANSWER: NO

APPELLANT'S ANSWER: YES

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

COURT OF APPEALS' ANSWER: NO

APPELLANT'S ANSWER: YES

INTRODUCTION

In Michigan, a person must be sworn as a juror in order to be a juror. See *People v Cain*, 498 Mich 108; 869 NW2d 829 (2015) and *Jochen v County of Saginaw,* 363 Mich 648; 110 NW2d 780 (1961). This Court's controlling precedents clearly establish when and how a person becomes a juror. Until this case, no Michigan court ever reviewed these controlling precedents in the specific context of Michigan's Jury Tampering Statute. MCL 750.120a. This case of first impression turns on whether the word "juror" includes people never sworn in as a juror, as the court below erroneously held contrary to controlling precedents. This case is of major significance to the citizens of the State of Michigan. They have a right to know if distributing information or engaging in free speech on a public sidewalk in front of a courthouse constitutes grounds to charge them with the crime of jury tampering.

These serious First Amendment issues involve legal principles of major significance. Freedom of speech is not needed to protect speech with which government authorities agree; it is needed to protect speech with which government authorities disagree. The Court of Appeals' decision *chills* the exercise of free speech. Under the Court of Appeals' holding, the government can prosecute any citizen for intentionally holding signs, picketing, protesting, or otherwise engaging in free speech on a public sidewalk outside of a courthouse – merely because the government authority disagrees with the topic or viewpoint expressed. If this split decision is allowed to stand, it will encourage lower courts to defy Supreme Court precedent and usurp the role of the legislature by amending statutes via judicial fiat.

This case arises because Mr. Wood peacefully distributed educational pamphlets on a public sidewalk in front of the Mecosta County Courthouse. The information distributed made no mention of any case, party, or trial. The crime of jury tampering cannot occur where no jurors or jury exist. Under controlling Michigan Supreme Court precedent, no "jurors in any case" existed.

In Michigan, a person must be sworn as a juror in order to be a juror. See *People v Cain*, *supra*, and *Jochen v County of Saginaw, supra*.

No person was ever sworn as a juror on the day Mr. Wood distributed his educational pamphlets. Therefore, no jury ever existed. Yet Mr. Wood was arrested, jailed, charged, prosecuted, and convicted of jury tampering. To achieve this remarkable result, the lower court in Mr. Wood's case ignored binding Supreme Court precedent to erroneously define the word "juror" in a way that included people not sworn and not serving on a jury.

Moreover, Mr. Wood's distribution of educational pamphlets on a public sidewalk was protected speech, occurring in the historically most protected forum for speech. The lower court conducted a constitutionally inadequate analysis and erroneously concluded the government did not violate Mr. Wood's constitutionally protected expression.

The lower court's decision conflicts with Supreme Court holdings in *Cain* and *Jochen,* as fully analyzed below. The Court of Appeals failed to provide proper analysis as to why *Cain* and *Jochen* do not apply in this case.[1] Consistent with this controlling precedent, Mr. Wood requests that the lower court's definition of the word "juror" be reversed to correctly define a juror as a person who is sworn in to serve as a juror on a specific case. This case must be overturned to not only affirm Mr. Wood's constitutional rights, but to clearly delineate to every Michigan citizen that our First Amendment rights deserve the utmost protection.

STATEMENT OF FACTS

On the morning of November 24, 2015, Defendant/Appellant Keith Wood (hereinafter "Mr. Wood") stood on a public sidewalk by the street in front the Mecosta County courthouse (App. 111a and 117a, Trial Tr., Vol. II(b), June 1, 2017, pgs. 6, 30). Mr. Wood distributed an

[1] Even though *Cain* and *Jochen* specifically address the meaning of the word "juror," the Court of Appeals inexplicably disregarded *Cain* and *Jochen* because neither case factually dealt with the jury tampering statute.

educational pamphlet he obtained from the Fully Informed Jury Association (FIJA), a federally recognized 501(c)(3) non-profit educational organization (App. 121a, Trial Tr., Vol. II(b), pg. 34). The educational pamphlet included information for citizens on a topic and viewpoint concerning the legal authority and power of jurors (App. 126a, Trial Tr., Vol. II(b), pg. 39).

Mr. Wood was aware that *People v Yoder* was calendared for a possible jury trial that day (App. 120a, 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 (App. 118a, Trial Tr., Vol. II(b), pg. 31). He did not, however, know Mr. Yoder and had never met him (App. 116a, Trial Tr., Vol. II(b), pg. 29). Mr. Wood has never had any contact with Mr. Yoder (App. 116a-117a, Trial Tr., Vol. II(b), pgs. 29-30). He had no personal stake in the outcome of *People v Yoder* (App. 116a-117a, 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 (App. 120a, Trial Tr., Vol. II(b), 33).

Mr. Wood never mentioned the *Yoder* case to anyone while he was handing out educational pamphlets (App. 127a, 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 (App. 1a, 127a, Trial Tr., Vol. II(b), pg. 40). Mr. Wood offered the information to everyone who passed him on the sidewalk (App. 123a, 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 (App. 45a-46a, Trial Tr., Vol. I, pgs. 225-226). Mr. Wood obtained the FIJA brochures shortly before the day in question and that was the first day he distributed them publicly (App. 130a, Trial Tr., Vol. II(b), pg. 43).

Magistrate Thomas Lyons went outside to investigate and confront Mr. Wood while he was sharing this information (App. 23a, 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 (App. 23a, Trial Tr., Vol. I, pg. 132). Mecosta County District Court Judge Peter Jaklevic also objected to Mr. Wood sharing information. (App. 77a-78a, Trial Tr., Vol. I, pg. 281-282). Judge Jaklevic and Prosecutor Thiede decided that Mr. Wood should be brought inside to speak with the judge (App. 38a-39a, 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 (App. 94a, Trial Tr., Vol. I, pg. 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 (App. 40a, Trial Tr., Vol. I, pg. 220). Mr. Wood asked DNR Detective Erlandson if he was being detained (App. 41a, Trial Tr., Vol. I, pg. 221). DNR Detective Erlandson told Mr. Wood that he was not being detained (App. 41a, Trial Tr., Vol. I, pg. 221). Court Officer Roberts, however, then told Mr. Wood that if he did not come inside, he would be arrested (App. 53a, 140a, 141a, Trial Tr., Vol. I, pg. 233; Trial Tr., Vol. II(b), pgs. 53-54).

After the threat of arrest by Court Officer Roberts, DNR Detective Erlandson physically escorted Mr. Wood into the courthouse (App. 142a, 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 (App. 42a, 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" (App. 42a, Trial Tr., Vol. I, pg. 222). At no point did Mr. Wood resist arrest (App. 55a, 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 (App. 60a, 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 (App. 145a, 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 (App. 33a, 34a, Trial Tr., Vol. I, pg. 205-206). At the time, no jury existed. No jury had been selected, empaneled, or sworn to serve as jurors in any case, including *People v Yoder* (App. 29a, Trial Tr., Vol. I, pg. 158). No jury was sworn at any time that day in Mecosta County District Court (App. 22a, Trial Tr., Vol. I, pg. 125). The court sent all those summoned as prospective jurors home (App. 30a, 31a, 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 posing no flight risk whatsoever, Magistrate Thomas Lyons set a 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 a Motion to Dismiss on December 21, 2015. Plaintiff/Appellee (hereinafter "Prosecutor") filed a response on January 8, 2016. Mr. Wood filed a reply brief on January 18, 2016. The District Court held a hearing on the Motion to Dismiss on March 23, 2016. The District Court dismissed the felony charge of Obstruction of Justice but allowed the prosecution to proceed on the misdemeanor Jury Tampering charge.[2]

[2] The District Court refused to address Mr. Wood's constitutional claims at this hearing.

The District Court looked to a footnote in Black's Law Dictionary (4th Edition) when it refused to dismiss the Jury Tampering charge (Mot. to Dismiss Tr., pg. 39). Relying on out-of-state law cited in the footnote, the District Court ruled 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 Michigan statute, no Michigan 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 definition of the word juror. Mr. Wood's motion cited 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. 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 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 declining to review Mr. Wood's request for leave to appeal on December 2, 2016. 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." (App. 20a, 21a, 166a, 167a, Pre-Trial Tr., pgs. 11-12; Trial Tr., Vol II(b), pg. 144-145). The jury thereafter found Mr. Wood guilty of jury tampering.

The court sentenced Mr. Wood on July 21, 2017. The court ordered him to serve forty-five days in jail to be served on weekends. The court ordered that Mr. Wood could serve eight weekends in jail if he successfully completed 120 hours of court-ordered community service. Immediately following the sentencing hearing, Mr. Wood filed a claim of appeal and emergency motion to stay Mr. Wood's sentence with the Mecosta County Circuit Court. Every remaining judge in Mecosta county recused themselves from hearing the appeal. The Supreme Court Administrators Office (SCAO) appointed Isabella County District Court Judge Eric R. Janes to hear Mr. Wood's emergency motion to stay. A hearing on the motion was heard a few hours after Mr. Wood's sentencing and Judge Janes granted the stay pending appeal. Shortly thereafter, SCAO appointed Judge Janes to also hear the appeal on the case.

Both parties filed their respective briefs and oral argument for the appeal was held on February 2, 2018. Moments after the completion of oral argument, Judge Janes read a pre-written opinion on the record and issued his order denying Mr. Wood's appeal (App. 168a). The Circuit Court's opinion did not address a number of issues Mr. Wood raised on appeal. Judge Janes further lifted his stay of Mr. Wood's sentence and denied Mr. Wood's motion to stay his sentence pending the filing of his Application for Leave to Appeal.

The Court of Appeals granted Mr. Wood's Application for Leave to Appeal on February 22, 2018. The Court of Appeals also granted a stay of Mr. Wood's sentence pending his appeal. In a split decision, the Court of Appeals denied Mr. Wood's appeal on December 11, 2018. This Honorable Court granted Mr. Wood's Application for Leave to Appeal on October 4, 2019.

STANDARD OF REVIEW

Regarding the criminal statute in question, MCL 750.120a, issues of statutory construction are questions of law reviewed *de novo*. *People v Dowdy*, 489 Mich 373, 379; 236 NW2d 489 (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; 821 NW2d 452 (2012). It is presumed that a statute is constitutional and the party challenging the validity of the law 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; 861 NW2d 645 (2014).

ARGUMENT

I. THE LOWER COURTS ERRONEOUSLY REDEFINED AND THEN APPLIED MICHIGAN'S JURY TAMPERING STATUTE.

Mr. Wood can find no published or unpublished Michigan decision in which the State charged a person with jury tampering for distributing educational pamphlets on a public sidewalk when no jury existed. 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. As Judge Murphy stated in his dissent, 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 lower court created *post-hoc* a new crime in Michigan. Despite the lower 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; 475 NW2d 288 (1991).

The District Court manufactured the following elements in the jury instructions in this case (App. 166a, 167a, 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 (App. 16a-18a, Pre-Trial Tr., May 30, 2017, pgs. 7-9) and to the definition of "juror" (App. 20a, 21a, Pre-Trial Tr., pgs. 11-12).

A. The Court of Appeals Committed Reversible Error by Incorrectly Defining the Word "Juror."

Notwithstanding the plain language of the statute, the District Court, relying on a *footnote* citing out-of-state law in the 4th Edition of Black's Law Dictionary (the latest edition published at the time the legislation was enacted), erroneously held that a person becomes a "juror" when a person is merely *summoned to appear* for potential jury duty. The District Court cited no Michigan statute, no Michigan case law, or any other Michigan precedent to support its conclusion. On appeal, the Circuit Court upheld the lower court's definition by citing to the 10th Edition of Black's

Law Dictionary.[3] Rather than rely on Black's Law Dictionary's definition of the word Juror, the Court of Appeals erroneously relied on lay dictionaries, or other dictionaries published after the passage of the statute, thus ignoring the legal definition in use at the time the statute was enacted.[4]

Contrary to the lower court's rulings, "a jury is not a jury until it is sworn." *Cain*, 498 Mich at 139. 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 held 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. Thus, on this legal point, this Honorable Court was unanimous. The only point the justices of the Supreme Court disagreed upon was the form and method through which jurors are sworn. Thus, this Honorable 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. The Court of Appeals in the instant case wrongly rejected this legal principle that a person does not become a juror until the oath is administered.

Finally, the majority in *Cain* held 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 (emphasis added). The Supreme 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

[3] App. 171a, Circuit Court Opinion, February 2, 2018, pg. 4
[4] App. 177a, Court of Appeals Opinion, pg. 5

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 lower court with the *Cain* case and other current case law, the lower court failed to provide proper analysis and merely held that because those cases did not specifically reference the jury tampering statute, they were of no use.[5] However, as clearly outlined above, cases like *Cain*, which provided 13 pages of analysis as to the definition of the word "juror," would obviously be instructive in this case. The Court of Appeals erred by incorrectly defining the word "juror" outside the meaning provided by controlling Michigan Supreme Court precedent.

Similarly, in *Jochen*, the Michigan Supreme Court examined whether Plaintiff, who had merely been summoned to court as a potential juror, 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 despite being *inside* of the courthouse on the day she was summoned to serve as a potential juror, she was not a juror at the time of her injury. *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 comports 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 lower

[5] App. 178a, Court of Appeals Opinion, pg. 6

court's rulings on this issue, Mr. Smith is a juror for the sake of criminal prosecution when he is handed the flier; but the Michigan Supreme Court holds he is not yet a juror for the sake of receiving workers compensation when he breaks his hip inside the courthouse. The lower court cannot have it both ways. This Honorable Court must correct the lower court's erroneous ruling.

Further, the Court of Appeals committed reversible error 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; 528 NW2d 160 (1995) (emphasis added):

> 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; 710 NW2d 46 (2006):

> 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 lower 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*. Thus, the swearing of the oath was a fundamental and necessary element to determine a person's status as a juror and this principle is entirely consistent with the holdings in *Cain* and *Jochen*.

The Court of Appeals erred by utilizing the 10th Edition (2014) of Black's Law Dictionary and other dictionaries published decades after the statute was enacted in order to justify its

holding.[6] However, the Jury Tampering statute was originally passed in 1955 by the Legislature, well before Black's Law Dictionary had changed and expanded its definition of the word "juror." The United States Supreme Court held:

> A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore, we look to the ordinary meaning . . . at the time Congress enacted the statute in 1961.

Perrin v US, 444 US 37, 42 (1979) (internal citations omitted). It is error to ascribe legislative intent by utilizing a dictionary definition not in existence at the time the statute was passed. The Court of Appeals violated this cardinal rule of statutory construction, see, e.g. *Saint Francis College v Al-Khazraji*, 481 US 604 (1987), by holding that Michigan's Legislature was utilizing a dictionary definition from 2014 when it enacted the statute in 1955.

Again, the Michigan Supreme Court stated that "a jury is not a jury until it is sworn." *Cain*, 498 Mich at 139. The lower 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 precedent.

Finally, the Michigan Court Rules and Michigan's Criminal Jury Instructions clearly belie the lower 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** juror**s** 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.

[6] App. 177a, Court of Appeals Opinion, pg. 5

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 in Mr. Wood's trial was referred to as "Prospective Jurors.". 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; . . .

The court rule, jury instruction, Trial Judge's statement, and the actual transcript in Mr. Wood's own trial 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 (4th Edition), and the holdings in *Cain* and *Jochen* consistently affirm 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 she 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.

The lower courts had no authority to redefine 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 Support That Mr. Wood's Definition of "Juror" is Correct.

The juror bribery statute, immediately preceding the jury tampering statute, demonstrates that Mr. Wood's definition of "juror" is correct. 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 narrower:

> 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; 475 NW2d 704 (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.

Judge Murphy was correct in his Dissent when he stated:

> In my view, the statutory phrase, "the decision of a juror in any case," tells us all that we need to know in resolving this appeal, making it unnecessary and improper to resort to dictionary definitions of the term "juror" or to engage in a constitutional analysis. I conclude that a person is not "a juror in a[] case," let alone a juror who

> has the capacity to make a "decision," at the point in time that he or she has merely been summoned for jury duty and arrives at the courthouse. Rather, at the very earliest, one who has been selected as a venireperson, as distinguished from the larger group of individuals summoned for jury duty, might perhaps be characterized as a juror in a case, given that a venireperson would be subjected to voir dire for purposes of a particular case. See *People v Bryant*, 491 Mich 575, 583 n 4; 822 NW2d 124 (2012) (differentiating a venire, which consists of a panel of potential jurors called into a courtroom, from a group of people generally summoned to appear for jury duty). In sum, I cannot conclude that MCL 750.120a was intended to be implicated until the trial process in a case is underway, starting with selection of the venire, if even at that point.[7]

Binding precedent from the Supreme Court of the United States justifies Mr. Wood's position and further supports Judge Murphy's dissent:

> [W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v United States, 464 US 16, 23 (1983) (internal citations omitted). The U.S. Supreme Court further held:

> A familiar principle of statutory construction, relevant both in *Lindh* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.

Hamdan v Rumsfeld, 548 US 557, 578 (2006).

In this case, the Michigan Legislature specifically included the qualifying phrase "any person summoned as" in MCL 750.120 but expressly excluded such language from MCL 750.120a. As the Supreme Court has held, it is presumed that the Legislature acted intentionally and purposefully in excluding such language from the jury tampering statute and that a negative inference should be drawn from such an exclusion. In other words, the Court of Appeals erred by holding that two adjacent sections of the code mean the exact same thing when the Legislature explicitly used different language. As much as the Court of Appeals may prefer that the jury

[7] App. 188a, Court of Appeals Dissent, December 11, 2018

tampering statute include persons merely summoned, it is the role of the legislature to make such a change, not the judiciary.

The Court of Appeals' ruling rests entirely 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 lower courts, then the Legislature had no need to include "any person summoned as" and should 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 lower court's definition of the word "juror" is erroneous.

The lower court's rulings violate 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; 805 NW2d 399 (2011) (internal citations omitted).

Judge Murphy in his dissent stated:

> In further support and contrary to the majority's view, I believe that the Legislature's reference to a person "summoned as a juror" in MCL 750.120, absent comparable language in MCL 750.120a(1), reveals that MCL 750.120a(1)'s reference to "a juror" was solely meant to encompass seated jurors and perhaps venirepersons. MCL 750.120 was enacted in 1931 pursuant to 1931 PA 328, and MCL 750.120a was added in 1955 pursuant to 1955 PA 88. Clearly, had the Legislature intended for MCL 750.120a(1) to cover a person summoned as a juror, it would and could have used the previously-employed and more expansive language, yet the Legislature chose not to do so. "Generally, when statutory language is included in one statutory section but omitted from another, we presume that the drafters acted intentionally to include or exclude the language." *People v*

> *Robar*, 321 Mich App 106, 121; 910 NW2d 328 (2017). I find the majority's arguments rejecting application of this statutory principle strained and unavailing.[8]

The Court of Appeals' ruling rendered part of MCL 750.120 redundant, surplusage, nugatory, and completely unnecessary. The lower 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; 870 NW2d 731 (2015) (internal citations omitted) (emphasis added). This Honorable Court has 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 (emphasis added) (internal citations omitted).

Judge Murphy agreed in his dissent when he stated:

[8] App. 189a, Court of Appeals Dissent, December 11, 2018

> This position is buttressed by the language in MCL 750.120a(1), which provides an exception for argument or persuasion that is "part of the proceedings in open court in the trial of the case." (Emphasis added.) This language presupposes that a trial was indeed commenced. Moreover, MCL 750.120a(3) provides that subsection (1) does not "prohibit any deliberating juror from attempting to influence other members of the same jury by any proper means." (Emphasis added.) This language contemplates not only a trial, but a concluded trial, followed by jury deliberations.
>
> Giving meaning to the words in MCL 750.120a(1), such that none of the words are treated as surplusage, and reading the words and phrases in the context of the whole statute, the Legislature plainly envisioned MCL 750.120a(1) being implicated only after the trial process has commenced. Jennifer Johnson and Theresa DeVries were simply not jurors in the case against Andrew Yoder when approached by defendant and given the juror-nullification literature.[9]

The Court of Appeals erred by failing to read MCL 750.120 and MCL 750.120a together. It is clear 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, then it would have written them using the same language. These two statutes, when read together, prove that jury tampering does not apply to people who have merely been summoned. If the lower courts believed the word "juror" should include every person summoned, the remedy was to request the Legislature to amend the statute, not to allow a wrongful prosecution of Mr. Wood or to have the judiciary act as a super-legislature. Again, if that was the Legislature's true intent, it would have used the same language in both statutes. It did not. Therefore, Mr. Wood's conviction must be reversed, and the case dismissed.

C. The Lower Courts 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 on *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998),

[9] App. 189a, Court of Appeals Dissent, December 11, 2018

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.*" Moreover, there were no jurors in any case at the time Mr. Wood exercised his Constitutionally protected right to disseminate the educational 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.[10] 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 Honorable Court were to accept the lower court's definition of the word "juror" to mean any person summoned, Mr. Wood's conviction still must be reversed. 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 lower courts), 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 is also undisputed that none of the summons the individuals 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, rejected by the lower court and provided by the Prosecutor from Michigan's Non-Standard Jury Instructions-Criminal (written by Michigan Court of Appeals

[10] First, the Circuit Court acknowledged in fn. 2 on pg. 4 of its opinion that the people summoned that day were only "potential jurors." Second, to be clear, the *Yoder* trial was never held at any point in time in the future.

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 App. 15a.

Even the proposed jury instruction acknowledged that the juror must have "sat" in the case. Clearly, 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 lower court's interpretation of the statute. If there had been two trials scheduled that day, but neither of them occurred, then it would be impossible to determine in which of the two cases, if any, Jennifer Johnson sat. This reveals the lower court's unjustified 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.*

(App. 16a, Pre-Trial Tr., pg. 7). The trial court gave no reasoning, analysis, or discussion and summarily denied Mr. Wood's request (App. 18a, 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 people who might possibly serve on a jury that might possibly exist at some future time, it would not have used language so clearly stating otherwise.

If this Honorable Court nevertheless believes ambiguity in the statute exists, then the rule of lenity requires it to interpret any ambiguity in a criminal statute in favor of Mr. Wood. 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.

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 this Honorable Court's 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*" (App. 107a, Trial Tr., Vol. II(a), pg. 10). Thus, 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 (App. 107a, 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.

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 (App. 164a, 165a, 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 was irrelevant that no trial occurred while preventing the defense from responding (App. 164a, 165a, 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 lower courts redefined the word "juror" beyond what it has ever meant in Michigan's history and ignored the required element that there be actual jurors in an actual case in order for jury tampering to occur. For all of these reasons, Mr. Wood's conviction must be reversed, and the case must be dismissed.

II. THE STATE VIOLATED MR. WOOD'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

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 I. 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 government action can be challenged based upon an unconstitutional application of a statute:

> 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 educational 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 clearer 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 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 constitutional 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 protected 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 this constitutional protection to which his speech was entitled. Instead, the State arrested and prosecuted him based on the Prosecutor and Judge Jaklevic's disagreement with his topic and viewpoint.

B. Facial and As-Applied Challenges.

The Court of Appeals misunderstood Mr. Wood's argument as to his challenge to Michigan's Jury Tampering statute, MCL 750.120a. Mr. Wood stated that he was not facially challenging the statute as *originally written*. He facially challenged the statute as the lower court had redefined the statute to mean something completely new. Mr. Wood is not objecting to Michigan's jury tampering statute being applied to every person who has been "selected and sworn" for jury service, but he is objecting to the lower court's redefinition of the word "juror" to now include every person who has been merely summoned. Thus, Mr. Wood facially challenges the statute as now redefined by the lower courts.

C. Intent is not an Exception to the First Amendment.

The Court of Appeals majority heavily focused on the point that the jury found Mr. Wood intended to influence people summoned for jury duty that day; thus, his speech was not protected. However, no intent exception to the First Amendment exists, and the Court of Appeals cited no authority to support its position. As outlined above, this Court must afford Mr. Wood's speech on a public sidewalk the greatest of protections. The burden rests with the State to prove that its actions are constitutional. *Ashcroft v ACLU,* 542 US 656, 660 (2004). A jury conviction is not a

universal panacea to First Amendment violations. Otherwise, an appeal of a jury conviction based upon First Amendment grounds would be impossible.

There are numerous examples that illustrate that intent is not an exception to the First Amendment. In *Texas v Johnson*, 491 US 397 (1989), Defendant appealed his conviction by a jury for burning a flag. The jury found that Defendant intended to commit the crime of desecrating a flag. *Id*. at 399. Yet, the Supreme Court still reviewed the State's statute and its application and reversed his conviction. Defendant's intent and the jury's conviction in that case were all but irrelevant to the First Amendment analysis. Indeed, Defendant's intent and the jury's conviction were merely the historical facts giving rise to the appeal, not the grounds for the Supreme Court's decision.

In *Brandenburg v Ohio*, 395 US 444 (1969), Defendant was convicted by a jury under the Ohio Criminal Syndicalism statute. The jury found that Defendant intended to commit a crime and convicted him. Yet, the U.S. Supreme Court never held that such a finding of intent validates State action and relieves the Courts of a full First Amendment analysis. Indeed, the *Brandenburg* Court properly analyzed the State's conduct, the statute, and its application through the lens of the First Amendment and reversed Defendant's conviction.

In this case, the Court of Appeals erred when it held:

> We cannot overemphasize the importance of the jury's finding that defendant intended to influence two jurors summoned for Yoder's case. It is that specific level of intent that takes defendant's case out of the general pamphletting activities protected by the First Amendment.[11]

The Court of Appeals cited no legal authority for such a proposition, and it directly contradicted established First Amendment jurisprudence, as outlined above.

[11] App. 182a, Court of Appeals Opinion, pg. 10

D. The State's Action 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 at 414. 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 because they disagreed 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 animus for his message. Indeed, Judge Jaklevic testified at length about all of the disagreements that he had regarding the content of the information contained in Mr. Wood's 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 (App. 89a, Trial Tr., Vol. I, pg. 293).
- He read the pamphlet and thought "this is not supposed to be happening" (App. 72a, 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 (App. 89a, Trial Tr., Vol. I, pg. 293).
- He was concerned that the content in the brochure conflicted with Michigan's jury instructions and oath (App. 90a, Trial Tr., Vol. I, pg. 294).
- He was concerned because it encouraged jurors to consider whether the law was being justly applied (App. 91a, 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 (App. 91a, Trial Tr., Vol. I, pg. 295).

Further, Judge Jaklevic ultimately conceded that he was concerned with the content in the brochure (App. 105a, 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 at 449 (internal citations omitted) (emphasis added).

Thus, even though the State disagrees with Mr. Wood's message, 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 criminal charges to punish him for expressing a contrary opinion shamelessly violates the First Amendment; and the lower court's disregard for the First Amendment is equally repugnant. The government officials' unlawful animus was further shown by punishing his speech with a punitive, and excessively 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 further 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**," speech that fails to specifically advocate for listeners to take "any action" cannot constitute incitement.

Id. at 245 (internal citations omitted) (emphasis added).

It cannot be argued that the FIJA pamphlet encouraged people to commit an unlawful act. Mr. Wood was sharing information that jurors are 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. In fact, case law clearly affirms that jurors have the power to do so. See *People v St Cyr,* 129 Mich App 471; 341 NW2d 533 (1983).

When determining whether the State's action is unconstitutional, it is the State's action that must be analyzed. See, e.g. *Texas v Johnson, supra; Reed v Town of Gilbert, Ariz,* 135 S Ct 2218 (2015). However, the lower courts failed to conduct such a proper analysis and committed reversible error by completely ignoring the plethora of evidence of the State's content-based actions that deprived Mr. Wood of his First Amendment rights.

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 Ed Assn*, *supra*.

The government's regulation of Mr. Wood's expression was content-based. The District 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 (App. 1a). 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 Ed Assn, 460 US at 45.

Here, the State's action was neither. It was the subject-matter and viewpoint Mr. Wood expressed that led to the State action which suppressed his speech. Prosecutor Thiede clearly demonstrated in his oral argument on December 10, 2015, that it was the content of the brochure that offended him (App. 3a, 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 (App. 3a, 4a, 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 (App. 4a, 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 (App. 3a, Pre-lim Tr., pg. 13).

If Mr. Wood had been advancing a different viewpoint, then 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 (App. 10a, 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.

Further, the Prosecutor also admitted to his content-based justification on the record:

> And, of course, **the content of this particular pamphlet was one of the considerations**....

App. 5a, Mot. to Dismiss Tr., pg. 22 (emphasis added).

This entire case began because Judge Jaklevic disapproved of the expressive content of Mr. Wood's pamphleteering. Indeed, the primary piece of evidence at the trial submitted by the State was Mr. Wood's brochure, and large portions of the trial were dedicated to its contents. Instead of justifying Mr. Wood's prosecution without reference to the content of his speech, the State rested its entire case upon such a justification.

Despite all of the evidence of content-based censorship, the lower courts failed to provide proper analysis as to whether the State action was content-based. The lower court's lack of proper 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. The Circuit Court only analyzed Mr. Wood's interaction with other people on the public sidewalk that day, instead of correctly analyzing the State action in this case. The Court of Appeals improperly held that once criminal intent was found by the jury, no proper First Amendment analysis is required.[12]

[12] App. 182a, Court of Appeals Opinion, pg. 10

The lower courts committed reversible error by not providing any proper First Amendment content-based analysis.

The Court of Appeals acknowledged that content-based State action is presumptively unconstitutional.[13] The Court in *Reed*, held:

> Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and **others are more subtle, <u>defining regulated speech by its function or purpose</u>. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny**.

Reed, 135 S Ct at 2226-2227 (emphasis added). A citizen does not forfeit his First Amendment rights merely because the State has alleged a nefarious purpose behind his speech or because of a jury's finding of intent. The State still must engage in the proper constitutional analysis to determine if the speech is protected. The lower courts failed to do so.

Finally, as outlined above, the silencing of pure speech, either verbal or written, deserves strict scrutiny. Indeed, the distribution of educational pamphlets is a textbook example of such speech. However, the lower courts committed reversible error by reclassifying Mr. Wood's speech as mere conduct and concluding that it was not protected. Even if this Court were to agree that Mr. Wood's speech was mere conduct (which Mr. Wood does not concede), it would still require a strict scrutiny analysis, because it was conduct that communicates.

Texas v Johnson, *supra*, mandates the reversal of the lower courts. In *Johnson*, Defendant was prosecuted for burning a flag in public. The majority held that the burning of the flag was conduct that communicates and thus required a strict scrutiny analysis. The Court held that the State's action of prosecuting Mr. Johnson did not survive a strict scrutiny analysis and his conviction was reversed. The lower courts in this case failed to recognize that conduct that communicates is still deserving of First Amendment protections.

[13] App. 181a, Court of Appeals Opinion, December 11, 2018

The *Johnson* majority held:

> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.

Johnson, 491 US at 404. The Supreme Court acknowledged that, of course spoken and written words were protected, but also held that other forms of speech were protected, such as, wearing black armbands to protest the military, conducting a "sit-in" to protest an issue, and picketing. Despite the Court of Appeals' attempt to recharacterize Mr. Wood's speech as conduct, it is undisputed that Mr. Wood was conveying a message regarding jury rights and he was educating anyone he encountered that day. It is clear that Mr. Wood did have a particularized message (information and history about jury rights), and it was also clear that the people who received his brochure would have understood that message. Therefore, Mr. Wood was engaged in conduct that communicates.

The *Johnson* Court further held:

> **[The government] may not, however, proscribe particular conduct because it has expressive elements.** [W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription. **A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.**

Id. at 406 (emphasis added). In this case, the lower courts wrongfully made a distinction between speech and conduct and thus held that Mr. Wood's speech was not deserving of protection. However, such a distinction between speech and conduct that communicates is not found in our laws and history. The *Johnson* Court held:

> The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here.

Id. at 416. Clearly, the lower courts committed reversible error by reclassifying Mr. Wood's speech as non-communicative and unprotected conduct. Such a holding must be overturned. The State cannot punish Mr. Wood for handing out his brochures any more than it could for Mr. Wood standing on that public sidewalk and reading his brochure aloud.

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

E. 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.

Further, the U.S. Supreme Court held:

> Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality.

Ashcroft, 542 US at 660 (internal citations omitted).

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 an educational 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.

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 I; *People v DeJonge*, 442 Mich 266; 501 NW2d 127 (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 excessively high bond. By arresting and prosecuting Mr. Wood, the State engaged in overt censorship. Both the Federal and State Constitutions require that this Honorable Court 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.[14] No less restrictive means were ever implemented by the State in this case, as the First Amendment unquestionably requires. See *Heffron supra.*

Indeed, both Therese Bechler, a clerk for Mecosta County, and Court Officer Roberts indicated that there was no policy regarding people distributing pamphlets (App. 32a, 36a, 37a, 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 prior to prosecuting Mr. Wood violates his First Amendment rights.

Again, the lower courts' most egregious error was their failure to properly conduct a strict scrutiny analysis of the State's conduct. See *Ashcroft*, *supra*. Instead, the Court of Appeals analyzed Mr. Wood's intent, claiming that such intent relieves the State of such scrutiny requirements. The Court of Appeals failed to cite to any case, statute, or any authority that relieves it of the duty to analyze the State's suppression of citizens' political speech. This is reversible error.

F. This Court Must Construe the Jury Tampering Statute Narrowly.

The Court of Appeals held all that matters is whether Defendant intended, or that his purpose was, to influence a juror. The South Dakota Attorney General made the exact same argument in *State v Springer-Ertl*, 2000 SD 56, 610 NW2d 768 (SD 2000).[15] However, the South Dakota Supreme Court *affirmed* that Defendant must receive a new trial because of the serious First Amendment implications and *rejected* the South Dakota Attorney General's arguments. *Springer-Ertl*, and its analysis of current United States Supreme Court precedent, supports Mr. Wood's position that his speech is protected by the First Amendment. The *Springer-Ertl* Court held:

[14] See M Crim JI 2.16.
[15] The Prosecutor first raised and previously relied numerous times on the *Springer-Ertl* case to support his position.

> **Americans have long maintained the right to challenge and criticize government in its handling of affairs, including the arrests and trials of those charged as criminals.** Indeed, the freedom to speak in opposition to acts of law enforcement is "one of the principal characteristics by which we distinguish a free nation from a police state."

Id. at 774 (emphasis added) (internal citations omitted).

> **First Amendment protections become meaningless if one can be punished for merely speaking on a pending case to a public that may contain future jurors.** In this case, where the only communication charged as criminal was **made in a public setting**, it is vital to fix a precise standard for when the State may lawfully punish data dissemination about a pending trial. If an **overbroad** interpretation of a statute infringes on the right of free speech, it tends to discourage the exercise of that right. "**Ambiguous meanings cause citizens to' "steer far wider of the unlawful zone" ... than if the boundaries of the forbidden areas were clearly marked.'"**

Id. at 775 (internal citations omitted) (emphasis added).

It is apparent that the Court of Appeals believes that Michigan's Jury Tampering statute should be read expansively. However, the South Dakota Supreme Court, citing the United States Supreme Court, held:

> In First Amendment cases, appellate courts must "make an independent examination of the whole record" to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." **It is incumbent on us, therefore, to give our jury tampering statute a *narrowing* construction sufficient to keep it from encroaching on First Amendment liberties.**

Id. (emphasis added) (internal citations omitted).

> Although our criminal justice system retains the power to protect the integrity of its processes, in "borderline instances where it is difficult to say upon which side the alleged offense falls, ... **the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases**." When it is alleged that an attempt to influence jurors was made by addressing the public, **the balance must be inclined in favor of free speech by *narrowly* construing our statute.**

Id. at 777 (emphasis added) (internal citations omitted).

By contrast, the Court of Appeals held that Michigan's jury tampering statute should be construed so broadly as to encompass any speech where a jury might find there was intent to

influence any person summoned as a potential juror. However, the *Springer-Ertl* Court wisely observed:

> That a future juror might somehow hear or read of someone's public statement cannot feasibly constitute the precisely tailored restriction necessary to justify punishing speech otherwise protected by the First Amendment. If that conduct can be punished, then why not other types of public comment about a pending case? A letter to the editor, a newspaper op-ed piece, a television or radio commentary, a political speech, even an aside to one's neighbor, all may be latent criminal acts if prospective jurors might learn of them. **If this is how the statute is meant to operate, then what a fearful instrument it is to repress criticism and stifle debate.**

Id. at 776 (emphasis added).

It is also significant that after the South Dakota Supreme Court ordered that Defendant receive a new trial, the charges against her were dismissed even though the South Dakota jury tampering statute is substantially broader than Michigan's statute:

> Attempt to influence jurors, arbitrators, or referees--Felony. Any person who attempts to influence a juror, **or any person summoned or drawn as a juror**, or chosen an arbitrator or appointed a referee, in respect to any verdict or decision **in any cause or matter pending, or about to be brought before such person . . .**

SDCL 22-11-16 (now known as SDCL 22-12A-12) (emphasis added).

South Dakota's statute thus specifically covers jurors, as well as any person summoned or drawn as a juror. Michigan has no such language in its statute. The lower court in this case has unconstitutionally rewritten Michigan's jury tampering statute according to what they believed it should prohibit, rather than interpreting it according to the plain language of the statute and current legal precedent. If the lower court truly believed the jury tampering statute should include summoned, potential jurors, then it is the role of the legislature to amend the statute, not the judiciary.

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

G. Unconstitutional Overbreadth

Although the lower courts should be reversed because of the content-based censorship of Mr. Wood's speech alone, they also violated the Constitution by their 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 lower courts redefined the word "juror" to mean more than a person actually selected, empaneled, and sworn in a case, they vastly expanded the range and scope of the jury tampering statute to reach a substantial amount of constitutionally protected speech.

According to the lower courts, the jury tampering statute no longer only covers jurors actually sworn and sitting in a case. MCL 750.120a. The lower 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 lower courts, through their redefinition of the jury tampering statute, have 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 lower court's redefinition, then he could still be charged with jury tampering because they were still summoned for that entire month to be on call for potential jury duty. 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 lower courts, 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 intentional improper influence could have occurred. Such an interpretation creates a virtually limitless minefield for concerned citizens seeking to express their opinions on matters of justice.

The lower courts' 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 lower court should be reversed and the case dismissed with prejudice.

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

A. The Court of Appeals' 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 XIV; 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 Honorable Court must dismiss the charges. See, e.g., *Grayned v City of Rockford*, 408 US 104 (1972).

The lower courts unconstitutionally rewrote Michigan's jury tampering statute to such a degree that it is now void for vagueness and facially invalid.

> 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)).[16]

> 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; 527 NW2d 434 (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

[16] Erwin Chemerinsky 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).

> 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 S Ct. 2307, 2317 (2012). In this case, the lower court's redefinition and application of the jury tampering statute rendered it unconstitutionally vague under all three vagueness doctrines.

First, there was no proper notice to the citizens of the State of Michigan that the distribution of an educational pamphlet on a public sidewalk to a person who was merely summoned for potential 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.

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. Under the precedent governing interpretation of the term "juror", only those sworn for jury duty should be understood to come within the scope of the jury-tampering statute. The lower courts' judicial rewrite of the statute made it 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 lower courts' rulings must be overturned.

Indeed, under the lower courts' rulings, if the Fully Informed Jury Association (FIJA) had mailed its pamphlet to every citizen in Mecosta county, then it almost certainly would have delivered some to potential jurors and would be guilty of jury-tampering. In fact, the lower courts

would apparently hold FJIA liable if some prospective jurors viewed the FJIA information on its website. Thus, according to the lower courts, intentionally educating the citizenry regarding their rights is unlawful.

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 (App. 10a, Mot. to Dismiss Tr., pg. 27). This is the epitome of arbitrary and discriminatory enforcement and illustrates the lower courts' unconstitutional rulings. Further, the lower courts' 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 lower courts' 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).

Consider an average citizen analyzing Michigan's two statutes regarding influencing juries, MCL 750.120 and MCL 750.120a. Again, while MCL 750.120 clearly states that it includes "[a]ny person summoned as a juror," MCL 750.120a expressly applies only to a "juror in any case." A person of ordinary intelligence would look at those two statues and naturally conclude that one covers a person who has been summoned, while the other does not. However, according to the lower court, a person of ordinary intelligence should be able to look at both statutes, see that only one uses the word "summoned," yet conclude that *both* statutes include people summoned for jury duty. This is nonsensical. No person of ordinary intelligence could possibly look at these

statutes and conclude that the one expressly omitting the word "summoned" must include people summoned.

Likewise, no person of ordinary intelligence would look at the phrase "juror in any case" and conclude that it meant merely receiving a summons in the mail. Therefore, because of the lower court's rewriting of the statute, the statute failed to provide proper notice of what conduct was prohibited and the lower courts must be reversed. Clearly, the lower courts 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 lower courts' rewriting of the statute and Mr. Wood's conviction must be reversed.

In the alternative, if the lower courts are correct in their interpretation of the statute, then the statute is facially unconstitutional and infringes upon Mr. Wood's First Amendment rights. So it is incumbent on this Honorable Court to reverse either the lower courts' incorrect redefinition of the word "juror," or strike down the Jury Tampering statute as facially unconstitutional.

B. Mr. Wood Did Not Receive a Fair Trial.

The constitution guarantees a criminal defendant the right to a fair trial. 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). The trial court failed to provide a fair trial for Mr. Wood. The first error that 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 actual jurors in the *Yoder* case (App. 107a, 164, 165a, Trial Tr., Vol. II(a), pg. 10; Trial Tr., Vol II(b), pgs. 99-100) (for full analysis on this issue, please see above, pgs. 20-23).

The second error that 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 (App. 24a-28a, Trial Tr., Vol. I, pgs. 140-144).

The first example of bias 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. Yet, the trial court improperly prohibited Mr. Wood from delving into these issues. 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 improperly 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. This Honorable Court 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; 61 NW2d 634 (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; 631 NW2d 281 (2001). The trial court was presented with the above cases during the trial but completely ignored them (App. 27a-28a, Trial

Tr., Vol. I, pgs. 143-144). Similarly, the Circuit Court ignored these issues as well. 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. Therefore, the lower court's ruling violated Mr. Wood's constitutional rights and prevented him from receiving a fair trial. 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.

In this case of first impression and for all the reasons stated above, the State violated Mr. Wood's rights and his conviction must be overturned. The lower courts ignored United States Supreme Court and Michigan Supreme Court precedent and failed to address numerous significant arguments raised by Mr. Wood. If this Honorable Court agrees with the lower courts' interpretation of the term "juror" in the jury tampering statue, then the statute is facially unconstitutional and must be stricken to avoid violation of the First Amendment and Due Process Clauses. Mr. Wood respectfully requests that this Honorable Court reverse the Court of Appeals, vacate his conviction, dismiss the case with prejudice, and grant such other and further relief as is just and appropriate.

Respectfully submitted,

DATED: November 27, 2019.

/s/ David A. Kallman
David A. Kallman (P34200)
Attorney for Mr. Wood

PROOF OF SERVICE

I, David A. Kallman, hereby affirm that on the date stated below I delivered a copy of Appellant's Brief on Appeal and attached Appendix, upon the Mecosta County Prosecutor, by e-mail to bthiede@co.mecosta.mi.us and via First Class Mail, postage prepaid thereon to the address stated above. I further delivered the said documents to the Michigan Attorney General's office at 525 W. Ottawa Street, PO Box 30212, Lansing, MI 48909 via First Class Mail, postage prepaid thereon. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: November 27, 2019.

/s/ David A. Kallman
David A. Kallman (P34200)