STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Judges: Murray, Murphy, and Cameron

PEOPLE OF THE STATE OF MICHIGAN,	**DEFENDANT/APPELLANT'S REPLY BRIEF FOR APPLICATION FOR LEAVE TO APPEAL AND PROOF OF SERVICE**
Plaintiff/Appellee,	
-vs-	
KEITH ERIC WOOD,	**SC NO.: 159063** **COA NO.: 342424** **CIRCUIT CT. NO.: 17-24073-AR**
Defendant/Appellant.	**DISTRICT CT. NO.: 15-45978-FY**

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DEFENDANT/APPELLANT'S REPLY BRIEF

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I. THE FIRST AMENDMENT PROTECTS MR. WOOD'S SPEECH.

A. THE *TURNEY* CASE.

The Court of Appeals erroneously relied on *Turney v Pugh*, 400 F3d 1197 (9th Cir. 2005). The Prosecutor claims that *Turney* is his "most authoritative case."[1] He claims "very little difference" exists between the facts and law in *Turney* compared to the instant case.[2] However, the facts and the law are fundamentally different between the two cases.

Michigan's jury tampering statute, MCL 750.120a(1), 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.

Alaska's jury tampering statute, 11.56.590(a), states:

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

Id., at 1199. Immediately following the citation of the above jury tampering statute, the *Turney* court cited the relevant portion of Alaska's definitional section of the statute (11.56.900(3)) specifically defining a "juror:"

> A "juror" for purposes of this statute is "a member of an impaneled jury **or a person who has been drawn or summoned to attend as a prospective juror**."

Id. (emphasis added).

"Juror" is not defined this way in Michigan's statute. Indeed, no statute in Michigan, and no jury tampering case in Michigan, defines "juror" so broadly as to include every person who has

[1] See Prosecutor's Response, pg. 34.
[2] See Prosecutor's Response, pg. 36.

merely received a summons in the mail. Because the definition of the word "juror" is so critical to this case, these distinctions are of utmost importance. Further, Alaska's statute provides a second way a person can commit jury tampering by "otherwise" affecting the outcome of the official proceeding. This provision is nowhere to be found in Michigan's jury tampering law.

The Prosecutor provided a partial quote from *Turney* when he stated that it held that communications outside the rules of procedure are "presumptively prejudicial."[3] Interestingly, the full quote in *Turney* stated:

> In a criminal case, **any <u>private</u> communication**, contact, or tampering directly or indirectly, **with a juror <u>during a trial</u>** about the matter **pending before the jury** is, for obvious reasons, deemed **presumptively prejudicial** unless made pursuant to court rules or other instructions.

Id. at 1202 (internal citations omitted) (emphasis added).

Clearly, the complete and accurate quote in *Turney* referred to *private communications* to jurors *during a trial* about a case *pending before that jury*. Mr. Wood did not privately speak to any juror during a trial and he did not privately speak about any matter currently pending before a jury. He only publicly provided an informational pamphlet with a political viewpoint to people on a public sidewalk. Thus, the Prosecutor's assertion that "very little difference" exists between Alaska's and Michigan's laws is wrong, and the Court of Appeals' erred by relying on the Prosecutor's mischaracterization of *Turney*.

B. THE *BRAUN* CASE.

The Prosecutor cites *Braun v Baldwin*, 346 F3d 761 (7th Cir. 2003) to support his contention that Mr. Wood's speech was not protected by the First Amendment. However, *Braun* pertained to conduct inside of a courthouse, not on the public sidewalk. In this case, the only speech at issue occurred on a public sidewalk, a traditional public forum.

[3] See Prosecutor's Response, pg. 36.

The *Braun* Court outlined where First Amendment protections end and the very limited areas where a citizen can be prosecuted. The two sentences *immediately* preceding the Prosecutor's quote,[4] and omitted by the Prosecutor in his brief, state:

> First Amendment rights are not absolute. If they were, it would be unconstitutional for states or the federal government to provide a legal remedy for defamation, to punish the possession and distribution of child pornography, to forbid the publication of military secrets, to ever conduct legal proceedings in camera, or, coming closer to home, **to prevent Currier and Braun from handing their pamphlets advocating jury nullification to <u>jurors sitting in the jury box</u>.**

Id. (emphasis added). The *Braun* Court held that Defendant's conduct was not protected because it occurred in the lobby of the courthouse to actual jurors sitting in an actual case. The Court further explained why this conduct is distinguished from the kind of protected speech present in the case at bar:

> [T]he lobby of the courthouse is not a traditional public forum or a designated public forum, not a place open to the public for the presentation of views …

Id. (citing *Sefick v Gardner*, 164 F3d 370 (7th Cir. 1998)).

The Prosecutor also did not include the Court's holding in the paragraph immediately following the Prosecutor's quote in his brief:

> Newspapers and the **<u>streets outside are open to scathing criticism</u>** of what happens within the courthouse. But the halls of justice may be kept hushed.

Id. at 754 (emphasis added). Even the part of *Braun* quoted by the Prosecutor undercuts his argument that *Braun* applies to Mr. Wood's speech on the public sidewalk.

> Although advocacy of jury nullification could no more be flatly forbidden than advocacy of Marxism, nudism, or Satanism, we cannot think of a more reasonable regulation of the time, place, and manner of speech than to forbid its advocacy **<u>in a courthouse.</u>**

Id. at 763 (Emphasis added).[5]

[4] See Prosecutor's Response, pg. 31.
[5] See Prosecutor's Response, pg. 31.

Mr. Wood did not engage in any speech inside the courthouse that day, and he never handed out his brochures inside the courthouse. The location in which speech occurs impacts the level of constitutional scrutiny it receives. The Prosecutor provided no facts or proper analysis of the *Braun* case. Perhaps this is because *Braun* actually supports Mr. Wood's position that his speech was protected.

It is undisputed that Mr. Wood never handed out any brochures inside the Mecosta County Courthouse. It is also undisputed that Mr. Wood never had any interaction with any person who was or had been "sitting in the jury box." Finally, it is undisputed that there was no jury trial at the time Mr. Wood was handing out the brochures.

Clearly, Mr. Wood's speech and the peaceful distribution of informational pamphlets on a public sidewalk is entirely different than going into a courthouse lobby to speak with jurors who have already been selected, sworn, and are in the process of hearing a case. Despite the clear language immediately surrounding the Prosecutor's quote, he inaccurately claims that *Braun* supports the suppression of Mr. Wood's speech. To the contrary, *Braun* held that speech immediately outside the courthouse is protected.

C. THE STATE'S ARREST AND PROSECUTION WAS CONTENT-BASED.

The Court of Appeals erroneously held that Mr. Wood was not prosecuted because of the content of his speech; however, the facts prove otherwise. In addition to the analysis in Mr. Wood's initial brief (including Judge Jaklevic's testimony), the following statements from Prosecutor Thiede are clear evidence of the State's focus on Mr. Wood's speech and the content of his pamphlet:

- And, of course, **the content of this particular pamphlet was one of the considerations** there in that regard simply because it said you can't trust the judges because they're not going to tell you the truth (App. 5a, Mot. to Dismiss Tr., pg. 22) (emphasis added).

- [The pamphlet] just says ignore the law, ignore the facts, do what your conscience wants and I'm thinking, oh my goodness, we could have the jury who thinks that jihad is righteous and if the San Bernardino shooters had not been killed, they'd say let's acquit (App. 3a, Pre-lim Tr., pg. 13).
- When we get to the point, though, of the constitutional things, again, the activity of the Defendant was illegal. It doesn't matter, again, whether the jurors, however you characterize the jury's activity and response to it, I still contend the jury's violation of their oath is illegal. Even though we don't have a remedy for it (App. 7a, Mot. to Dismiss Tr., pg. 24).
- It's one of the reasons we know that this—the pamphlet was set up to instruct and encourage the jury to go in one direction and one direction only. To favor the Defendant (App. 8a, Mot. to Dismiss Tr., pg. 25).

As much as the Prosecutor attempts to downplay and minimize the State's obvious content-based actions against Mr. Wood, it is readily apparent that the State prosecuted Mr. Wood because of the content of his speech and the content of his pamphlet.

D. A Proper First Amendment Analysis is Required.

In *Holder v Humanitarian Law Project*, 561 US 1 (2010), the government argued that the application of a generally applicable criminal statute did not deserve a strict scrutiny analysis pursuant to *United States v O'Brien*, 391 US 367 (1968), because it merely regulated conduct—the exact same reasoning the Court of Appeals utilized in this case.[6] The United States Supreme Court disagreed:

> The Government argues that [the criminal statute] should nonetheless receive intermediate scrutiny because it generally functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). *Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace. But when Cohen was convicted for wearing a jacket bearing an epithet, we did not apply *O'Brien*. Instead, **we recognized that the generally applicable law was directed at Cohen because of what his speech communicated-he violated the breach of the peace statute because of the offensive content of his particular message.** We accordingly applied more rigorous scrutiny and reversed his conviction.
>
> This suit falls into the same category. The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, **but as applied**

[6] App. 181a, Court of Appeals opinion, pg. 9.

> **to plaintiffs the conduct triggering coverage under the statute consists of communicating a message**. As we explained in *Texas v. Johnson*: "If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. **If it is, then we are outside of *O'Brien's* test, and we must [apply] a more demanding standard**."

Holder, 561 US at 27-28 (emphasis added) (internal citations omitted).

It is clear that the State prosecuted Mr. Wood because of the content of his message, despite using a generally applicable statute as a vehicle to do so. Indeed, as admitted by the Prosecutor, if Mr. Wood had been handing out information about the Constitution, then he would not have been prosecuted (App. 10a, Mot. to Dismiss Tr., pg. 27). Just as in *Holder*, the conduct in this case which triggered the State's action consisted of Mr. Wood communicating a message. Therefore, the State's action must survive a strict scrutiny analysis.

As stated in Mr. Wood's initial brief, a strict scrutiny analysis requires the State to prove both of the following:

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., *Republican Party of Minnesota v White,* 536 US 765 (2002).

Instead of properly analyzing Mr. Wood's speech pursuant to the well-established First-Amendment jurisprudence, the Court of Appeals erroneously created a new exception to the First Amendment by holding that Mr. Wood's intent exempted his speech from First Amendment protections.[7] Again, there is no "intent" exception to the First Amendment. Whenever speech is being prosecuted, or even merely conduct that communicates, then that speech deserves a proper strict scrutiny analysis. The lower courts failed to do so.

[7] "It is that specific level of intent that takes defendant's case out of the general pamphletting activities protected by the First Amendment." App. 182a, Court of Appeals' opinion, pg. 10.

E. THE CURRENT FIRST AMENDMENT STANDARD.

The Prosecutor inappropriately cites the old, abandoned form of the clear and present danger test from *Schenck v United States*, 249 US 47 (1907), as if it is the current, binding standard for determining whether the speech at issue is unprotected. The Prosecutor then misrepresents *Brandenburg v Ohio*, 395 US 444 (1969) as just "a variant of the clear and present danger test." That is simply not accurate. *Brandenburg* is the current Supreme Court test for determining whether such speech is protected by the First Amendment.

It is important to note that *Schenck* took place in an era of significantly less First Amendment protection when people were thrown in jail for simply using speech to oppose the government. Further, when the Court decided *Schenck,* the First Amendment did not yet apply to the states, state laws, or state prosecutors.[8] After *Schenck* was decided, Congress passed the Sedition Act of 1918 which made it a crime to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" intended to cause contempt or scorn for the form of the United States government, the Constitution, or the flag. Relying on *Schenck*, the Supreme Court upheld the Sedition Act as constitutional and found that it did not violate the First Amendment. *Abrams v United States*, 250 US 616, 618-619 (1919). Needless to say, times have changed since that repressive era.

The Prosecutor omits key facts in *Schenck's* analysis and fails to consider the import of *Brandenburg's* more recent, and therefore controlling, constitutional jurisprudence. This failure results in an incorrect application of the Supreme Court's current, modern-day, clear and present danger test.

[8] The earliest point at which the First Amendment was incorporated and applied to the states was in 1925 in *Gitlow v New York*, 268 US 652 (1925) (dicta).

In *Hess v Indiana*, 414 US 105 (1973), a citizen went into a street after a demonstration and yelled "[w]e'll take the f***ing street later." The Court held that the speech was protected under a *Brandenburg* analysis because there was "no evidence . . . that his words were intended to produce, and likely to produce, *imminent* disorder." *Id*. at 109 (emphasis in original). In *NAACP v Claiborne Hardware Co*., 458 US 886 (1982), the Court again relied on *Brandenburg* and held that "[t]his Court has made clear, however, that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." *Id*. at 927.

To further illustrate that the Prosecutor erroneously relies upon an abandoned standard, and misapplies *Brandenburg*, one only needs to review his argument regarding *Turney,* supra. He cites the following from *Turney* in his brief:[9]

> In light of the subsequent evolution of the clear and present danger test, it can be extrapolated that, as a general rule, speech concerning judicial proceedings may be restricted only if it 'is directed to inciting or producing' a threat to the administration of justice that is both 'imminent' and 'likely' to materialize.

Id. at 1202. However, the Prosecutor left out the rest of the quote where the Court went on to state:

> *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam) (**setting forth the successor to the clear and present danger test applied in its various incarnations in the Bridges-Wood line of cases**).

Id. (emphasis added).

The Prosecutor improperly mischaracterized Mr. Wood's protected political speech as unprotected illegal activity, and the Court of Appeals erroneously relied upon said mischaracterization. They then used this mischaracterization as the basis to justify the censorship and criminalization of Mr. Wood's protected speech. Further, the Prosecutor's analysis of the Supreme Court's clear and present danger test in *Schenck* inaccurately characterizes current binding Supreme Court jurisprudence.

[9] See Prosecutor's Response, pg. 35.

Moreover, Justice Stevens in his concurring opinion in *Central Hudson Gas & Electric Corp v Public Service Comm'n of New York*, 447 US 557, 582 (1980) (emphasis added) stated:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, **no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.** Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.

Clearly, there was ample time for further discussion and education by the court to remedy any potential issues it perceived regarding the content of the brochure Mr. Wood was distributing. As stated in Mr. Wood's initial brief, courts may give curative jury instructions if there are any lingering concerns or use numerous other less-restrictive means if they are concerned about the integrity of the jury pool. Truly, how could Mr. Wood's speech cause imminent harm, when nothing in his speech or the pamphlet was harmful. Moreover, how could there be imminent harm when every person who was exposed to it had not even been sworn in on any case or been through *voir dire*? Mr. Wood's speech posed no risk for imminent harm and was not unlawful.

Finally, the Prosecutor makes the misguided claim that a mere jury conviction, by itself, "takes this case outside the realm of First Amendment analysis."[10] In short, the Prosecutor erroneously argues that Mr. Wood's First Amendment rights could not have been violated because the jury found him guilty.[11] As Mr. Wood previously argued in his first brief, there are numerous examples of courts overturning jury convictions based upon constitutional violations.[12]

[10] See Prosecutor's Response, pg. 36.
[11] See Prosecutor's Response, pg. 37.
[12] See Mr. Wood's Brief on Appeal, pg. 28.

The Court of Appeals similarly reached the erroneous conclusion that because the jury found that Mr. Wood had a certain "intent," that his speech is not protected by the First Amendment. Indeed, the Court of Appeals wrongly held that "[i]t is that specific level of intent that takes defendant's case out of the general pamphletting activities protected by the First Amendment."[13] Yet, the Court of Appeals provided absolutely no authority or citation for such a sweeping holding. Again, there is no "intent" exception to the First Amendment. In addition, it is a paradoxical argument to claim that the jury decision (regarding the facts) trumps the Court's ruling on the law (the First Amendment).

Next, the Prosecutor provides a lengthy analysis regarding "true threats," a category of unprotected speech (like obscenity or defamation) completely irrelevant to this case. Mr. Wood was not charged with making any threats, a threat was not an element of the crime, and there is absolutely no evidence that anything in Mr. Wood's brochure amounted to a true threat.

Again, it is important to note that it was the State's conduct and suppression of Mr. Wood's speech that was unconstitutional in this case. Jury verdicts are not universal remedies to unconstitutional governmental conduct. The State must be held accountable for its actions, regardless of what a jury decides. A jury verdict cannot shield the State from the consequences of its unconstitutional conduct.

The Prosecutor erroneously states that "[p]roof of the elements of the offense guarantee that no First Amendment violation can possibly occur."[14] Instead of supporting such a conclusion, the Prosecutor cites very narrow cases relating to "true threats." To be sure, none of the Prosecutor's cases pertain to the charge or facts in this case. Again, no true threats existed in this

[13] App. 182a, Court of Appeals opinion, pg. 10.
[14] See Prosecutor's Response, pg. 40.

case. Further, the "true threat" doctrine is a very narrow exception and only applies to actual threats of physical violence.

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of **unlawful violence** to a particular individual or group of individuals.

Virginia v Black, 538 U.S. 343, 359; 123 S.Ct. 1536 (2003) (emphasis added). In this case, there have been no allegations, nor any evidence presented, of Mr. Wood engaging in any true threats or threatened acts of unlawful violence. Clearly, the true threat doctrine does not apply in any way to this case.

In addition, the Prosecutor misrepresents that "true threat" cases "take them out of the context of First Amendment analysis[.]"[15] In *Watts v United States*, 394 US 705; 89 S Ct 1399 (1969), Mr. Watts was convicted by a jury for making a true threat against the President. According to the Prosecutor, this should have been the end of the case because the jury convicted Mr. Watts and he should have lost on appeal because a jury conviction apparently ensures there were no constitutional violations. However, the Supreme Court of United States not only recognized the First Amendment, but it overturned Mr. Watts' jury conviction. The Supreme Court held:

> Certainly the statute under which petitioner was convicted is constitutional on its face. The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence. **Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.**

Id. at 707 (emphasis added) (internal citations omitted).

As outlined in Mr. Wood's initial brief, public speech on public issues on a public sidewalk is one of, if not the most, protected forms of pure speech in our country. Because the Supreme

[15] See Prosecutor's Response, pg. 40.

Court in *Watts* held that recognition of the First Amendment was necessary regarding an already established category of unprotected speech (a "true threat"), then surely a First Amendment analysis is necessary regarding Mr. Wood's speech, which does not fall under any of the unprotected categories.

A jury determination cannot, in and of itself, deprive someone of their First Amendment constitutional rights. Indeed, if this were true, then no jury conviction could ever be overturned based upon constitutional violations. However, numerous cases already cited in Mr. Wood's initial brief easily dispose of such an erroneous argument because they provide multiple examples of juries who were overturned on constitutional grounds.[16]

F. THE *GOODMAN* CASE.

The Prosecutor continues to rely on *Honey v Goodman*, 432 F2d 333 (6th Cir. 1970) (a common-law embracery case),[17] even though that case is no longer good law even in Kentucky. The Kentucky legislature codified jury tampering as a crime four years after *Goodman* was decided (KRS 524.090 and KRS 524.010). Unlike Michigan, the Kentucky legislature defined "juror" in its criminal statute to explicitly include "prospective juror" in its definition. KRS 524.010(2).

The Michigan Legislature, by contrast, chose not to do so. As a result, *Goodman's* ruling on common law embracery is not even the law in Kentucky anymore, let alone applicable to Michigan. This federal court decision interpreting another state's common law crime, since abrogated by statute, also fails to support the Prosecutor's untenable position in this case.

[16] See, e.g., *Texas v Johnson*, 491 US 397 (1989); *Wood v Georgia*, 370 US 375 (1962); *State v Springer-Ertl*, 2000 SD 56, 610 NW2d 768 (SD 2000).
[17] See Prosecutor's Response, pg. 37.

G. THE *PATTERSON* CASE.

The Prosecutor misrepresented *Patterson v Colorado*, 205 US 454 (1907), by failing to disclose that Defendant in that case was not charged with jury tampering, embracery, or obstruction of justice. Defendant in *Patterson* was held in contempt of court for publishing a cartoon criticizing the Colorado court.

Moreover, this case is irrelevant because the First Amendment was not incorporated and applied to the states until 1925[18] and this case was decided in 1907. Thus, at this point in our history, the First Amendment provided no protection to state action which violated a citizen's free speech rights. The Court in *Patterson* acknowledged this when it held:

> We have scrutinized the case, but cannot say that it shows an infraction of rights under the Constitution of the United States or discloses more than the formal appeal to that instrument in the answer to found the jurisdiction of this Court.

Id., at 463. Yet again, this is an example of the Prosecutor citing cases that rely on outdated laws and abandoned legal standards. What is clear, however, is that the State's action in this case was unconstitutional, and Mr. Wood conviction must be overturned.

II. THE LOWER COURTS INCORRECTLY DEFINED "JUROR."

A. BLACK'S LAW DICTIONARY.

Despite Mr. Wood providing the full definition of the word "juror" from Black's Law Dictionary (4th Edition, the edition in use at the time the jury tampering statute was enacted) in his initial brief, the Court of Appeals erroneously redefined the word "juror." The Prosecutor stated in his brief that the definition is "not simply being those who have sworn an oath, but also including those 'selected for jury service.'"[19] This is demonstrably false. First of all, there is no such quote in the definition. The actual definition states:

[18] The earliest point at which the First Amendment was applied to the states was in 1925 in *Gitlow v New York*, 268 US 652 (1925) (dicta).
[19] See Prosecutor's Response, pg. 17.

> 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.

Black's Law Dictionary (4th Edition) (emphasis added).

Clearly, the definition does not state that a person can also merely be "selected." It requires that a person be selected "and sworn." Both requirements must be met for a person to become a juror. Further, it is important to note that the definition does not include any mention of being summoned. Indeed, it is ubiquitous that the first thing that happens on the day of a trial is commonly known as "jury selection" or "jury pick" – not "jury summons." It makes perfect sense that the definition would comport with this commonly known practice and thus state that a person does not become a juror until she is selected and sworn.

B. THE JURY TAMPERING ELEMENTS.

The trial court established three elements for the jury tampering statute (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.

The Prosecutor bears the responsibility of proving, beyond a reasonable doubt, each of the three elements of the crime before a defendant may be found guilty.

The Court of Appeals essentially held that only the second element matters in this case. In other words, all that the Prosecutor is required to prove is that Mr. Wood intended to "attempt" to commit the crime. However, no crime can be committed unless all of its elements are satisfied. Under *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998), the prosecution bears the burden of proving all of the elements of the crime, including that Jennifer Johnson and/or Theresa

DeVries were jurors in the case of *People v. Yoder* and that Mr. Wood's conduct took place outside the proceedings in open court in the trial of the case.

Inconceivably, the Prosecutor argues that "regardless [of] the status" of Jennifer Johnson or Theresa DeVries, Mr. Wood is still guilty of jury tampering.[20] In other words, the Prosecutor believes that regardless of whether the first element of the crime was met, Mr. Wood should have been convicted. This is absurd. The issue is not whether Mr. Wood merely made an "attempt;" the issue is whether all of the elements of the crime were properly proven. A person's status as a "juror" is a critical and necessary element as to whether jury tampering occurred.

Since both Jennifer Johnson and Theresa DeVries were never jurors in the case of *People v Yoder*, it was completely improper for Mr. Wood to even be charged, let alone be convicted. It is untenable for the Prosecutor to argue that the second element is the only requirement necessary to sustain a conviction of jury tampering. Finally, the Prosecutor cites no case law to support his position that only the second element of the crime (the attempt) is necessary to sustain a conviction. Rather, the case law is clear that the Prosecutor must prove all elements of the crime. *Crawford*, supra.

C. THE *CAIN* AND *JOCHEN* CASES.

The Prosecutor next misrepresents that it was harmless error for the jury to not be sworn in *People v Cain*, 498 Mich 108 (2015).[21] Again, it is not that the trial court in *Cain* failed to swear in the jurors, it is that the jury was sworn in by using improper oath language. Nevertheless, the jury in *Cain* was sworn. The primary purpose of the oath, to impart the duties of the jurors, was fulfilled. *Cain*, 498 Mich at 122. The true issue is that for a jury to become a jury, it must be sworn,

[20] See Prosecutor's Response, pg. 19.
[21] See Prosecutor's Response, pg. 15.

a requirement the Prosecutor never disputes in his analysis of *Cain*. This only reaffirms Mr. Wood's position that a jury must be sworn.

The Court of Appeals also erroneously held that *Cain* did not interpret the term "juror."[22] As stated in Mr. Wood's initial brief, Justice Viviano, in his dissent, spent 13 pages defining the word "juror" and found that the swearing in or oath was a necessary component to be a juror. Again, the majority agreed with Justice Viviano on this legal issue when it stated that "[t]he dissent is correct that '[f]or as long as the institution we know as 'trial by jury' has existed, juries have been sworn.'" *Id.*, at 161 fn. 6.

The Prosecutor also misrepresents *Jochen v County of Saginaw*, 363 Mich 648; 110 NW2d 780 (1961), by arguing that the only determination the Court made was whether Mrs. Jochen was an "employee."[23] However, this is incorrect because the Court had to first determine whether Mrs. Jochen was actually a juror before it could then determine if jurors were employees. The Court held:

> **Whether or not she was exempt from such service or otherwise subject to being excused therefrom had not been determined at the time of her injury, nor could it be determined until she presented herself to the court for determination of her qualification to serve.** In short, **Mrs. Jochen was injured before she was accepted as qualified for service as a petit juror** and, consequently, it cannot be said that at the time of her injury she was a 'person in the service of the * * * county' within the meaning of section 7 of part 1 of the act.

Id. at 650 (emphasis added).

Clearly, the *Jochen* Court did make a determination as to Mrs. Jochen's status as a juror, and it is illustrative to the case at bar. Despite the Court of Appeals and Prosecutor's mischaracterizations of *Cain* and *Jochen*, they provide ample evidence of the lower courts' improper analysis.

[22] App. 178a, Court of Appeals opinion, pg. 6.
[23] See Prosecutor's Response, pg. 16.

D. THE PROPER DEFINITION OF "JUROR" IN NO WAY FRUSTRATES THE PURPOSE OF THE STATUTE.

The Prosecutor argues that Mr. Wood's plain reading of the statute approach to understanding the true meaning of "juror" would "abrogate the court of any ability to insulate juries from improper third party contacts."[24] He provides no proper reasoning, analysis, or justification for such a claim. No one disputes that actual jurors sworn to decide an actual case should be free from improper outside influence. That is not what this case is about. The language of the jury tampering statute is plain and obvious; a juror does not exist until a person is selected and sworn in on a case. Only after a person is selected, sworn, and becomes a juror, is that person covered by the jury tampering statute. This is consistent with the Michigan Supreme Court holdings in *Jochen* and *Cain*. If it so desires, it is the duty of the legislature, not the judiciary, to amend the law to cover a person merely summoned to possibly serve as a potential juror.

The express language and purpose of the statute is to protect actual "jurors in any case" from being subjected to improper outside influences. MCL 750.120a. The definition used by the Michigan Supreme Court in *Cain* and *Jochen* is perfectly consistent with the plain and ordinary reading of the jury tampering statute. As the statute states, for as long as a person is a "juror in any case," that person is protected. Mr. Wood is at a loss as to how a court would lose "any ability" to protect juries if the proper definition is used. Actual selected and sworn jurors do have contact with third parties throughout every trial and Michigan's statute protects them during that time from any improper influence. To argue that a court loses *any* ability to prohibit jury tampering is without merit.

[24] See Prosecutor's Response, pg. 15.

E. THE REVISED JUDICATURE ACT.

The Prosecutor provides a lengthy explanation urging acceptance of his chain of improper assumptions. First, the Prosecutor concedes that Michigan's statutory law does not define "juror" to include prospective jurors. In an attempt to get around this obstacle, the Prosecutor looks to the Revised Judicature Act (RJA) (MCL 600.101 et. seq.) which, of course, is not a part of Michigan's Penal Code (MCL 750.1 et. seq.). Because the RJA also does not define "juror," the Prosecutor assumes that the word "jurors" in the RJA includes "prospective jurors." Next, the Prosecutor contends that the legislature intended that the word "juror," in the context of the criminal jury tampering statute,[25] means what the Prosecutor assumes what the word "juror" means in the RJA. This Court must not allow such an attenuated linking of unreasonable assumptions, especially when doing so undermines the plain and ordinary meaning of a word in a criminal statute and violates the rule of lenity.

The dissent in *Jochen* also extensively cited the Revised Judicature Act (RJA) to support its interpretation of when a person becomes a juror.[26] However, the majority in *Jochen* unequivocally rejected that argument, refusing to even recognize it. The dissent in *Jochen* further cited out-of-state definitions of the word "juror," just as the trial court did when it cited the Black's Law Dictionary comment referencing Illinois and Kentucky cases. Throughout the Prosecutor's explanation of his assumptions regarding the RJA, he never cites a single Michigan case to support his conclusion. This Court should affirm the *Jochen* majority, not its dissent.

[25] This attempt to intermix terms is particularly inappropriate given the "remedial" nature of that act and its rule of "liberal" construction. MCL 600.102.

[26] Technically, at the time *Jochen* was decided, the law outlining the selection of people to receive summons for jury duty was entitled the Judicature Act, CL 602.120 et. seq.

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

A. THE LOWER COURTS' REWRITING OF MICHIGAN'S JURY TAMPERING STATUTE RENDERS IT VOID FOR VAGUENESS.

After the Prosecutor's lengthy recitation of case law regarding the vagueness doctrine, he failed to provide proper analysis as to why the statute was not vague. Instead, he states in a conclusory fashion that it did provide clear notice of what conduct is proscribed and then relies on *Turney*, supra, to demonstrate its supposed clarity. However, as stated above, the Alaskan statute in *Turney* actually defined the word juror to include prospective jurors, thus, Alaskan citizens would have had clear notice of what was proscribed. However, Michigan has no such definition. Therefore, citizens are left to guess as to what Michigan's statute prohibits.

In addition, the Prosecutor failed to explain how (if the lower courts' rewriting of the statute is correct) Michigan's jury tampering statute would have given a "person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *Hackel v Macomb County Com'n*, 298 Mich App 311, 333; 826 NW2d 753 (2012). Because of the lower courts' rewriting of the statute after the State charged Mr. Wood, the statute failed to provide proper notice of what conduct was prohibited and Mr. Wood's conviction must be overturned.

B. THOMAS LYONS' TESTIMONY.

The reason Mr. Wood desired to cross-examine Magistrate Lyons was to show to the jury his bias and prejudice against Mr. Wood and his speech. Clearly, as outlined in Mr. Wood's initial brief, cross-examination regarding bias is always relevant.

The entire purpose of the cross-examination of Mr. Lyons would have been to refute his portrayal of Mr. Wood that day. It would have been to show his bias and animus for Mr. Wood and the message he was communicating that day. Mr. Lyons stated that he told Mr. Wood to stop handing out the flyers and come into the courthouse, but he refused (App. 23a, Trial Tr., Vol. I,

pg. 132). Mr. Lyons stated that he told Mr. Wood who he was and his position. He also testified that instead of coming inside, Mr. Wood sarcastically asked him "[h]ave you ever heard of the First Amendment?" (Trial Tr., Vol. I, pgs. 133). Mr. Wood refuted all of this testimony (App. 134a, Trial Tr., Vol. II(b), pg. 47). Mr. Lyons was attempting to portray Mr. Wood as obstinate and unwilling to cooperate or follow orders. He was trying to make it seem like Mr. Wood had been warned to not hand out the brochures but continued to do so anyway. The Court of Appeals strongly emphasized the importance of Mr. Wood's alleged intent. Yet, Mr. Wood was prevented from cross-examining a key witness regarding his bias towards Mr. Wood, thus demonstrating that his testimony was not reliable regarding Mr. Wood's demeanor and alleged intent. This prevented Mr. Wood from having a fair trial and his conviction must be reversed.

CONCLUSION

For all the reasons stated above and in Mr. Wood's initial brief, the lower courts violated Mr. Wood's rights and his conviction must be overturned. He respectfully requests that this Honorable Court reverse the lower courts, vacate Mr. Wood's conviction, dismiss the case with prejudice, and grant such other and further relief as is just and appropriate.

Respectfully submitted,

DATED: January 16, 2020.

/s/ David A. Kallman
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PROOF OF SERVICE

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

DATED: January 16, 2020.

/s/ David A. Kallman
David A. Kallman