STATE OF MICHIGAN

IN THE 77TH DISTRICT COURT FOR THE COUNTY OF MECOSTA

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v-

KEITH ERIC WOOD,

Defendant.

HON. KIMBERLY L. BOOHER
(CIRCUIT JUDGE)
DISTRICT COURT
NO. 15-45978-FY

BRIAN E. THEIDE P32796
Prosecuting Attorney
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ANSWER TO MOTION TO DISMISS

NOW COME the People and in Answer to Defendant's Motion to Dismiss, state unto this Honorable Court as follows:

Defendant's Motion to Dismiss should be denied for the reasons stated in the accompanying Brief in Support of Answer to Motion to Dismiss.

WHEREFORE, for the reasons stated above, the People respectfully request that this Honorable Court deny Defendant's Motion.

Respectfully submitted,

Brian E. Thiede P32796
Prosecuting Attorney

Dated: January 8, 2016

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on Jan 8 20 16

By: ☑ U.S. Mail ☑ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☐ Other:

Signature

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BRIEF IN SUPPORT OF ANSWER TO MOTION TO DISMISS

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STATEMENT OF FACTS

Since no witnesses have yet been called in any proceeding, the Statement of Facts will consist of the expectations of the proofs.

Defendant showed a specific interest in the 77th District Court case of *People of the State of Michigan v Yoder*, involving a DEQ wetlands violation, even before the final pre-trial hearing in the case. Defendant's interest was evidenced by his contact with a local reporter in which Defendant made comments about the DEQ and requested that the reporter appear at the pre-trial hearing.

Defendant was in the courtroom for the *Yoder* pre-trial on November 4, 2015. The *Yoder* pre-trial had been set for 11:00 a.m. and was the only case on the District Court docket for 11:00 a.m. and no other matters were scheduled before the District Court for the remainder of the morning. The trial date for the *Yoder* case was discussed at length during the pre-trial in light of concerns that the trial might be protracted and it was scheduled to begin the Tuesday before Thanksgiving. The trial remained scheduled for the pre-Thanksgiving Tuesday.

On Tuesday November 24, 2015, the only case scheduled for jury trial in any court in Mecosta County was the *Yoder* case. Defendant appeared outside the main entrance to the County Building and passed out pamphlets to some of the people as they approached to enter the building. This was the first time witness and Magistrate Tom Lyons, who has worked in the Mecosta County Courts for well over 30 years, has seen anyone passing out pamphlets on the grounds. The pamphlets, a copy of which is attached as exhibit 1, were directed to jurors and bore the title "Your Jury Rights: True or False?" Throughout the pamphlet, the content asserted that jurors had the "right" to decide each case according to their conscience rather than follow the law as instructed by the court. Further, the pamphlet encouraged jurors to assert that right.

Finally, the pamphlet asserted that judges would not and could not be trusted to tell jurors of this right.

Defendant was seen handing the pamphlets to jurors who had been summoned for the Yoder case. Jurors (at least some) said that they were asked if they were jurors and then told they needed or should have the pamphlet and it was given to them. Persons who were obviously not jurors and would not be sympathetic to the cause of Mr. Yoder were not offered the pamphlet. Likewise, no pamphlets were seen in the possession of any of the Amish community members, distinguished by their common dress, who were present in support of Mr. Yoder and would not be jurors.

Defendant's behavior was noted by the Deputy County Clerk who serves as the jury clerk as she approached the county building for work. She encountered Defendant and immediately recognized his voice from having numerous phone conversations with him when he was very difficult with her after he had received a juror questionnaire on a prior date. The jury clerk reported the matter to the District Judge.

The District Judge and Bailiff checked the jurors in the courtroom. It was estimated that at least half of the jurors in the courtroom had pamphlets visibly in hand. The Bailiff collected the pamphlets from the jurors.

The District Judge then instructed the Magistrate to deal with the matter. Magistrate Lyons attempted to talk with Defendant and persuade him to cease his conduct. Defendant resisted the Magistrate's efforts, challenged his authority, and refused the Magistrate's request to come into the building to meet with the Judge.

Defendant remained outside until his activities were ended by the Bailiff who brought Defendant into the Court hallway.

DEFENDANT'S CONDUCT IN DIRECTLY CONTACTING JURORS IN A SPECIFIC CASE IN ORDER TO INFLUENCE THEIR ACTIONS AS JURORS WAS NOT PROTECTED BY THE FIRST AMENDMENT.

> "In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote." Justice Frankfurter concurring *Pennekamp v State of Florida*, 328 U.S. 331, 366 (1946).

The Bill of Rights, the first ten amendments to the Constitution of the United States, insures some of the most precious rights of a free people. Yet, because our country is one built on the concept of ordered liberty, none of those rights are absolute. Nor could they be, as in this case, First Amendment rights to free speech can run head-on into Sixth Amendment rights to fair trials.

Even without a direct conflict with a countervailing constitutional right, freedom of speech is not absolute. *Konigsberg v State Bar of California,* 366 U.S. 36, 50-51 (1961)[1] *Terminiello v City of Chicago,* 337 U.S. 1, 4-5 (1949). The Hatch Act's limitation on political activities by certain governmental employees has been repeatedly upheld. *United Public Workers v Mitchell,* 330 U.S. 75 (1947), *Civil Service Commission v National Association of Letter Carriers,* 413 U.S. 548 (1973), *Bush v Lucas,* 462 U.S. 367 (1983). So called "fighting words," among others, have never been protected speech. *Chaplinsky v New Hampshire,* 315

[1] *Konigsberg,* at 50-51 "general regulatory statues [state bar admission at issue], not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass...."

U.S. 568 (1942)[2] A First Amendment defense was unavailing in a prosecution for burning a draft card in *United States v O'Brien,* 391 U.S. 367, 376-377 (1968).[3]

There is no doubt that, as a general rule, "handing out leaflets in the advocacy of a politically controversial viewpoint...is the essence of First Amendment expression," *McCullen v Coakley,* ___ U.S. ____; 134 S.Ct. 2518, 2536 (2014), even this form of First Amendment activity is not unlimited. Under varying tests the Supreme Court has found conduct such as the Defendant's in this case unprotected by the First Amendment.

In *Schenck v United States,* 249 U.S. 47, 51-52 (1907), applying a clear and present danger test, the court upheld an Espionage Act conviction of an individual who passed out circulars encouraging insubordination in military service. The court noted that the same conduct may be protected "in many places and ordinary times...[b]ut the character of every act depends upon the circumstances in which it is done..." *Schenck* at 51-52. Freedom of speech would not protect one from shouting "fire" in a crowded theater, the court stated, because of the clear and present danger. Likewise, Schenck's targeting of persons called and accepted for military

[2] *Chaplinsky,* at "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. "

[3] *O'Brien,* the statute prohibited any destruction of a draft card. Defendant claimed his actions were political speech (like flag burning) the court said "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element of O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien,* 391 U.S. at 376-77. The *O'Brien* doctrine has been applied for many years. See *Turner Broadcasting System v FCC,* 512 U.S. 622 (1994).

service, created a clear and present danger of the insubordination advocated, therefore, the nature of the speech did not preclude the prosecution.[4]

A variant of the clear and present danger test was applied in *Brandenburg v Ohio,* 395 U.S. 444 (1969) where the court reversed the convictions of Ku Klux Klan members for their advocacy of violent overthrow of the government. The convictions arose out of speeches made by Klan members that were made at rallies under circumstances where the Klan members to whom they spoke were in no position to take immediate action. As well, the content of the speeches were conditional, that is, the speakers only advocated armed insurrection if at some point in the future the government did not address their concerns. The court found the behavior to be "mere advocacy." The holding was simply that the State could not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* at 447.

With this general background we move to the present case.[5]

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[4] The clear and present danger test, though not always used, has not been completely abandoned. Liability for damages on the part of leaders of black protestors was circumscribed by the clear and present danger each presented in encouraging unlawful conduct in *NAACP v Claiborne Hardware, Co.,* 459 U.S. 886 (1982). "The First Amendment does not protect violence....No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence." Id at 916-917.

[5] It should be noted that the case is presently in an awkward position to address any of the issues raised by Defendant, especially the constitutional question. Defendant's Motion to Dismiss has been brought prior to any testimony in the case. This would be appropriate if Defendant was mounting facial challenge to either criminal statute. Defendant is not nor could he raise such a challenge as overbreadth analysis, a facial challenge, is inapplicable to a statute that "is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Virginia v Hicks,* 539 U.S. 113, 119-120, 124 (2003).

The Obstruction of Justice and Jury Tampering statutes are not "specifically addressed to speech or to conduct necessarily associated with speech" therefore, Defendant's challenge must be "as applied" which is necessarily fact intensive. Despite having no facts established in the record, the People will respond in accordance with the People's understanding of the facts.

Defendant is charged with obstructing justice by tainting a panel of jurors and tampering with jurors, attempting to influence a juror's decision. He is no more charged with passing out pamphlets than a bank robber is charged with passing a note to a bank teller. Defendant is charged for the intended end of his conduct, not the means by which he attempted to achieve it.

Either saying out loud or in writing on a piece of paper "put all the small unmarked bills in this bag" can be protected speech, if the statement is made or the paper is passed to a bank teller, not only does the speaker lose any First Amendment protections, the speaker becomes liable for prosecution for attempted bank robbery. The additional fact of the interaction with a bank teller crosses a line. On one side, the speech is protected, on the other, the actor is a felon.

A letter to the editor of a newspaper advocating for a right of jury nullification would unquestionably be protected speech under the First Amendment.[6] An interested citizen's entry into the jury room during deliberations to deliver the same message would, without any doubt, be subject to sanction. The additional fact of the interaction with the jury crosses a line between free speech and criminal conduct. The issue then is not whether there is a line beyond which speech is not protected, the only question is where that line is drawn.

Fortunately, there is no need to wander in the wilderness wondering where the line should be drawn. In addition to the general authority set forth above, other courts have already ruled on the issue.

The most authoritative case which is directly on point with the facts of the instant case is *Turney v Pugh,* 400 F3d 1197 (CA9 2005).[7] Turney was charged under the Alaska jury

[6] See generally *Pennekamp v State of Florida,* 328 U.S. 331 (1946) and *Bridges v California,* 314 U.S. 252 (1941).

[7] There are several cases that are close to the point in the case at bar so the People have limited the review to some of the most relevant. Eg. *United States v Ogle,* 613 F2d 233 (CA10 1980) where the defendant was properly convicted of the Federal offense of "knowingly and corruptly endeavoring to influence, impede and obstruct the due administration of justice in a case pending in the United States District Court." Ogle gave a pamphlet regarding tax law and the jury's supposed right to nullify the law in tax cases to an individual with the intent that it be given (and it was given) to a juror. The trial court properly instructed on the First Amendment question as has been suggested by the People brief herein.

tampering statute. Prior to jury selection in an Alaska criminal case, Turney, a jury nullification proponent like Defendant here, "approached three members of the venire in the courthouse and told them to call the toll-free number of the Fully Informed Jury Association. Some of the individuals Turney lobbied were wearing badges that identified them as jurors." *Turney* at 1198.

The toll free number, 1-800-TEL-JURY provided by Turney, is the same number as appears on the front of the pamphlet Defendant knowingly and intentionally handed to the members of the jury venire in a Michigan criminal case, *Yoder*. The toll free number accessed a message from the Fully Informed Jury Association that advised the caller, in accord with the FIJA pamphlet Defendant gave jurors, that jurors had a right to disregard the law as given by the judge and decide the case according to each juror's inclination.

One of the jurors to whom Turney gave a pamphlet was ultimately chosen for the final jury in the underlying criminal case. That juror called the number. After listening to the message, the juror announced that he was changing his vote because "I can vote what I want." *Turney* at 1199. That juror's vote resulted in a hung jury.

The Alaska jury tampering statute was construed to apply to all persons impaneled, drawn or summoned for jury service. The Alaska Supreme Court further construed the statute to apply only to efforts to "influence a juror in his or her capacity as a juror in a particular case." *Turney* at 1199.

The *Turney* court reviewed much of the case law referenced in this brief and then settled on the following as a summary of the applicable constitutional law:

> 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. *Turney* at 1202.

The *Turney* court noted that "speech to jurors about pending cases presents a special problem because of its grave implications for defendants' right to a fair trial and the public's interest in fair and impartial justice." *Id.* The court went on to note that communications outside the rules of procedure are "*presumptively prejudicial.*" *Turney Id.* The *Turney* court recognized that in the long line of United States Supreme Court cases dealing with the First Amendment and court proceedings "the Court was careful to distinguish the publications it deemed protected under the First Amendment from speech aimed at improperly influencing jurors." The court found particularly important the following:

> The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. *Turney* at 1202 citing *Bridges supra,* 314 U.S. at 271.

The *Turney* court's holding follows:

> Reading all of these cases together leads us to conclude that the First Amendment, while generally quite protective of speech concerning judicial proceedings, does not shield the narrow but significant category of communications to jurors made outside of the auspices of the official proceeding and aimed at improperly influencing the outcome of a particular case. What Alaska's jury tampering statute covers in the main, then, is speech that is not protected by the First Amendment. *Turney* at 1203

Turney's conviction was upheld.

There is no difference between the facts and law in *Turney* from the facts and law in the instant case. Defendant knowingly and intentionally directed his actions at persons who were jurors in a specific case (the only case set for trial that day) Defendant had a specific interest in

that case and attempted to influence the jurors to decide the case contrary to the law. The First Amendment provides Defendant's behavior no protection.

Controlling law, though not the mirror image of the present case as *Turney*, can be found in *Honey v Goodman,* 432 F2d 333 (CA6 1970) where the Sixth Circuit found that the First Amendment was no bar to prosecution for common law embracery. Honey and his cohorts mailed some 1,200 letters to an entire community specifically addressing an upcoming jury trial. The letters went out prior to the date upon which any juror was required to report for court. One of the letters was addressed to and received by a person who had been summoned for jury service on the case addressed in the letter. In denying the First Amendment challenge to the prosecution the court said:

> Although the First and Fourteenth Amendments forbid the making of any law 'abridging the freedom of speech, or of the press,' states may punish for embracery by letter, or any other crime applicable to the exercise of pure speech, where it is proven that the 'words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about' substantive evils that the states have the right to prevent. [citation omitted] One of the substantive evils that the states have a right to regulate is a threat to the administration of justice. [citations omitted]. *Honey v Goodman,* at 338.

No other result should be reached in the case bar. To rule otherwise would leave the citizenry without remedy against an attack on the fair administration of justice. Those who would oppose the government's power in the instant case, would plead for its exercise in another. The fair administration of justice demands a remedy for the attack in this case and in every other regardless of the interests involved.

EACH MEMBER OF THE ENTIRE PANEL SUMMONED FOR JURY SERVICE MET THE DEFINITION OF "JUROR."

The pertinent part of the statute under which Defendant is charged provides as follows:

750.120a Willfully attempting to influence juror by intimidation or other improper means; retaliating against person for having performed duties as juror; penalties.

Sec. 120a.

(1) 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.

Defendant contends that the statute is inapplicable to his conduct because the persons he contacted and attempted to influence were not yet jurors. Defendant's contention is clearly wrong.

The criminal statute itself does not provide a definition of "juror," but the legislature has used that term many times in contexts relevant here.

The Revised Judicature Act, MCL 600.1300ff, establishes the method by which jurors are selected for jury service. An initial list is obtained from the Secretary of State, gleaned from driver's license and personal identification information and limited to the jurisdiction of the court. From that point persons are selected to receive juror qualification questionnaires. The jury board conducts a preliminary screening for qualification of persons referred to in the preliminary screening stage as "prospective jurors." MCL 600.1320(1). Those who qualify through preliminary screening provide the names from which a "second jury list is created." See MCL 600.1320; 600.1321(1).

Once the second list is created, all persons on the second list receive the statutory appellation of "jurors." See MCL 600.1321(2). Persons who are included in each panel drawn from the second list are referred to as "jurors." See MCL 600.1322.

The jury board has the duty "to select jurors for jury service." MCL 600.1324. The referenced "jurors" are clearly all the persons in a jury panel rather than merely those who are ultimately chosen to serve on a given case:

> "Each such order shall contain all of the following information:...
>
> "(b) The number of jurors to be selected for a panel." MCL 600.1324(1)(b).
>
> The usage of the term "juror" continues throughout the remainder of this portion of the Revised Judicature Act to refer to all members of a panel. In fact, the jurors who appeared for court in the District Court case relevant here appeared in response to summons sent out as commanded by MCL 600.1332 which establishes the duty to "summon jurors for court attendance...."

The RJA's usage should be sufficient, but if not, the statute in question, MCL 750.120a, does make a helpful distinction. In subparagraph (3) the statute says that subsections (1) and (2) do not prohibit any **deliberating juror** from attempting to influence other members of the same jury by any proper means.

Had the legislature intended to limit the application of subsections (1) and (2) to influencing only persons actually chosen to serve on a jury, the legislature certainly would have done so, as is evidenced by its use of the qualifier "deliberating" to modify "juror" in the very same statute.

Common sense also argues for the application of the RJA usage. A jury panel list is available to the parties well before trial. If the tampering statute was not broad enough to cover the full panel, mailings, phone calls, personal visits and the like could be standard fare. Some may be encouraged to advise jurors that "many times criminal defendants have taken and flunked polygraphs[8], but you will never be told that;" or "the rules of impeachment allow witnesses to be

[8] In fact, a mother of an accused who had passed a polygraph was held subject to prosecution for jury tampering when she put up posters in the small town where the case had been sent on a change of venue informing the community that her son had passed a polygraph and that the court would not allow the polygraph result into

impeached with some prior convictions that a criminal defendant cannot be impeached with, so if the defendant testifies and isn't impeached with a prior conviction, that doesn't mean there hasn't been a conviction." No fair minded person would find this conduct or the mailing of Defendant's pamphlet to members of the jury panel to be appropriate. Certainly, the legislature intended the term "juror" to have the same breadth as in the RJA, otherwise all the harm could be done before the protections of the statute would apply.

THE CHARGE OF OBSTRUCTION OF JUSTICE HAS NOT BEEN ABROGATED IN THIS CASE BY ENACTMENT OF THE JUROR TAMPERING STATUTE.

Defendant's simultaneous claims that the Obstruction of Justice charge is subsumed within the jury tampering statute and that the jury tampering statute does not apply to the facts of this case is self-contradictory. In any case, Defendant is wrong in both regards.

As is demonstrated above, the term "a juror" in MCL 750.120a applies to each member of the panel. Therefore, the jury tampering statute is applicable in this case. That, however, does not mean that the Obstruction of Justice statute is inapplicable. Defendant's conduct amounted to two separate offenses not just one.

Defendant clearly attempted to influence a juror by trying to persuade the jurors to defy the jury instructions, not follow the law and ultimately acquit the guilty.. The jury tampering statute is violated by efforts to influence "a juror" and Defendant did that. But Defendant's conduct did more than that. Defendant's conduct interfered with the orderly operations of the District Court by attempting to influence all of the summoned jurors.

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evidence.. *State v Springer,* 610 NW2d 768 (2000). The trial of the son's case was adjourned because the trial Judge believed the jury pool had been hopelessly tainted even though no juror summons were ever issued.

The acts of Defendant simultaneously constituted an effort to influence "a juror" and to taint an entire panel, making Defendant liable for prosecution under two statutes. This is no different than extortionate means are used to obstruct justice and leave a Defendant subject to criminal liability for both obstruction of justice and extortion. *People v Pena,* 224 Mich App 650, 658 (1997).

Defendant's assertion that Obstruction of Justice cannot be charged because the legislature enacted the statute proscribing tampering with "a juror" is incorrect. The common law was not entirely displaced by the statute.

Among the many ways in which the common law allowed for conviction for Obstruction of Justice is through "embracery," that is the "attempt to influence the jury corruptly to one side...." *People v Thomas,* 438 Mich 448 n5 (1991). Embracery involves efforts not only to influence a jury through one juror, but an effort to influence an entire jury, thereby spoiling the entire jury pool. See *Summers v State ex rel. Boykin,* (66 Ga.App.648; 19 S.E.2d 28 (1942) emphasizing the application to "a jury." The legislature only addressed efforts to influence an individual juror in the jury tampering statute (though as many counts could be brought as jurors approached, that is not the same as a charge for tainting the entire panel). The remainder of the breadth of embracery is still available under the rubric of Obstruction of Justice.

Again, the actions of Defendant, by spoiling the jury pool thereby preventing the District Court from engaging in its normal operations falls within another aspect of the common law of Obstruction of Justice which makes any act an offense which "prevents, obstructs, impedes or hinders public or legal justice." *Broughton v McClatchy Newspapers, Inc.,* 161 N.C. App. 20, 33; 588 S.E.2d 20, 30 (2003) see likewise *State v Cogdell,* 273 S.C. 563, 567; 257 S.E.2d 748, 750 (1979). 3 Wharton, Criminal Law and Procedure § 1277; 39 AmJur 502; *State v Salafia,* 29

Conn. Supp. 305; 284 A.2d 576 (1971). *Thomas* did not limit Michigan's recognition of the full scope of the common law by its listing of 22 forms of Obstruction of Justice, *People v Vallance,* 216 Mich App 415, 419 (1996). Therefore, since the common law is what all states share together, the authorities above can provide a basis for this prosecution.

Defendant attempted to influence all of the jurors and in so doing he tainted the entire jury panel. The District Judge concluded after seeing the number of jurors in possession of the pamphlet Defendant had given them and reading the content of the pamphlet, that the entire panel had been tainted.

The District Judge's conclusion is well supported by the facts. The entire theme of the pamphlet is one of distrust of the courts and particularly judges. The only remedy that the District Judge had to cure the problem created by Defendant without discharging the jury was to instruct the jurors to ignore the information in the pamphlet. While it is ordinarily the case that jurors are presumed to follow the instructions of the court, here Defendant had attempted to persuade the jurors that the instructions of the court do not reflect the law because courts are secretive about jurors' rights and are not to be trusted. Any success that Defendant may have achieved by his actions would necessarily negate the District Judge's effort to correct the problem as the jurors would not trust the District Judge's curative instructions.

Defendant's tainting of the entire jury panel precluded the District Court from being prepared to proceed with a jury trial. The United States Supreme Court has made clear that the "orderly operation of courts [is] the primary and dominant requirement in the administration of justice." *Pennekamp v State of Florida,* 328 US 331, 334; 66 S.Ct. 1029 (1946) and relying on *Bridges v California,* 314 US 252; 62 S.Ct.190 (1941) The "substantive evil" against which the state clearly has the right to act, is that which would result in "the disorderly and unfair

administration of justice." *Pennekamp* at 335 quoting again from *Bridges v California.* Defendant obstructed justice by interfering with the orderly empaneling of the jury.

Defendant's conduct, if repeated by others, could grind the wheels of justice to a halt. If every panel could be attacked and tainted, no jury trials could be held and no jury cases resolved. The result would not merely be an obstruction of justice but complete denial of justice.

The type of jury wide attack employed by the Defendant in this case is similar to that employed in *State v Springer-Ertl,* 610 NW2d 768 (2000) where a defendant's mother attempted to reach all the prospective jurors in the small town to which venue had been transferred for her son's case. The mother put up posters around the town prior to summoning of a jury. The mother's actions caused the court to adjourn the trial because of the mass distribution. Likewise in *Honey v Goodman,* 432 F2d 333 (1970) where 1200 letters were mailed out to the community at large in another case where a change of venue had been granted. The taint of the improper letters was so great that the Circuit Judge sent the case back to the original jurisdiction.

Springer-Ertl and *Honey v Goodman* confirm that the District Judge's determination of a tainted jury pool in the underlying case here was accurate. Moreover, the remedies that the courts were forced to employ distinguish this case from merely a jury tampering case. The remedy in a case where "a juror" has been the subject of compromising behavior is to remove the juror so affected. If but one juror is affected the case can go forward, the wheels of justice do not grind to a halt. But here, as in *Springer-Ertl* and *Honey v Goodman,* the tainting of the pool necessarily prevents the trial from going forward. The harm extends beyond the risk of corruption of "a juror" to the entire frustration of the administration of justice. Defendant's conduct makes him liable under both charges.

DEFENDANT ERRONEOUSLY ASSERTS THAT THERE IS A RIGHT TO JURY NULLIFICATION.

Both in the pamphlet distributed by Defendant and in his Motion to Dismiss, Defendant asserts that there is a right to jury nullification, that is, that the jury has the right to ignore the law and instructions of the court to the end of acquitting a factually and legally guilty person. Defendant's position is erroneous.

Defendant's approach has been to ignore the significant difference between "power" and "right" in the context of the idea of jury nullification. In fact, Defendant has relied on the case of *People v St. Cyr,* 129 Mich App 471 (1983) as supposed support for the legal accuracy of the statements he used to taint the panel of jurors and influence given jurors. *People v St. Cyr,* however, stands for the proposition completely opposite of that taken by Defendant. In *St. Cyr* the Court of Appeals affirmed the criminal defendant's conviction where the trial court refused to instruct the jury of nullification. The holding was based on the fact that: "the Supreme Court has also held that, although the jury has the power to disregard the trial court's instructions, it does not have the right to do so. *People v Ward,* 381 Mich 624, 628, 166 N.W.2d 451 (1969)." *St. Cyr* at 474. The Court of Appeals opinion would make no sense if power and right were the one and the same.

An understanding of the jury's "power" is important in evaluating Defendant's claims. There is no statute, court rule, case, nor any other source that affirmatively gives a jury the power of nullification. If there were such a grant, then the "power" would be a "right." The "power" of a jury as relates to nullification can be characterized as a negative power or a power by default. The "power" only exists because there is no remedy for either the mercy (in some cases) or the misconduct of a jury (in others) in rendering a verdict of acquittal (or conviction of a lesser offense) of one who is legally and factually guilty.

The court in *United States v Dougherty,* 473 F2d 1113 (1972) (the case misrepresented in the pamphlet Defendant was passing out in which it is claimed that the court "held" that the jury has certain powers when in fact the holding of the case was that there was no right to a jury nullification instruction), explained the history of jury nullification in an informative opinion. Throughout the opinion, it is clear that the law of the United States has never supported any right to jury nullification. In Judge Learned Hand's words "We interpret the acquittal as no more than their assumption of a power which they [the jury] had no right to exercise, but to which they were disposed through lenity." *Dougherty* at 1133. The recognition that the jury in the absence of any right had "power" is only a recognition that a jury cannot be punished for the acquittal of a guilty person and that double jeopardy would bar retrial or appeal by the prosecution.

It should be noted that there have been times and cases in which jury nullification has worked a greater justice than strict adherence to the law would yield, but jurors have not needed anyone to encourage nullification. Ordered liberty protects both against tyranny and anarchy. Cited within *Dougherty* is the following quote from Judge Sobeloff in *United States v Moylan,* 417 F.2d 1002, 1009 (4th Cir. 1969) cert. denied, 397 U.S. 910 (1970):

> To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic as appellants claim, but inevitably anarchic.

There may be circumstances in which the public at large would agree with acquittal of an individual who was clearly guilty. On the other hand, once the deed is done there is no going back, no matter what the public at large may think. It is reported that most Americans agree that

O.J. Simpson was in fact guilty, but there is no remedy. (https://www.washingtonpost.com/news/the-fix/wp/2015/09/25/black-and-white-americans-can-now-agree-o-j-was-guilty/). As Judge Leventhal said in his lead opinion in *Dougherty*, "What makes for health as an occasional medicine would be disastrous as a daily diet." *Dougherty*, at 1136. That no white man was convicted by a jury for the lynching of a black man in the south during the Jim Crow era is a reminder of the seriousness of such a disastrous daily diet.

Not only does Defendant's pamphlet begin with "Your Jury Rights:" but continues the theme of both a "right" of a juror to follow their own conscience, but it asserts that the judge will not properly instruct the jury, "especially their right to judge the law itself and vote on the verdict according to conscience." The pamphlet even says, "Before a jury reaches a verdict, each member should consider; 1. Is this a good law?" Defendant's pamphlet is a recipe for the disastrous diet warned against.

Defendant's assertion that the jury instructions encourage jurors to follow their conscience based on the use of that word "conscience" in CJI 3.11(5) is unavailing. It has been wisely said that "a text without a context is a pretext." Such is the case when an argument focuses on a single word in one subsection of one of a multitude of jury instructions.

Contrary to Defendant's out of context reading, CJI 2.24 tells jurors that they "should consider all my instructions as a connected series. Taken all together, they are the law you must follow." From this instruction we learn that all of the instructions must be read together in order to understand their meaning and that the jury **must** follow the instructions.

The functions of the Court and Jury are set forth in CJI 2.4:

> (1) My responsibilities as the judge in this trial are to make sure that the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant

> to reflect my own opinions about the facts of the case. As jurors, you are the ones who will decide this case.
>
> (2) Your responsibility as jurors is to decide what the facts of the case are. This is your job, and no one else's. You must think about all the evidence and all the testimony and then decide what each piece of evidence means and how important you think it is. This includes how much you believe what each of the witnesses said.
>
> (3) What you decide about any fact in this case is final.

From CJI 2.4 we learn that the jurors have the discretion to make the determinations of fact, but the instruction again is mandatory when it says the jurors "**must** take the law as I give it to you."

The same theme is reinforced by CJI 3.1 Duties of Judge and Jury:

> 1) Members of the jury, the evidence and arguments in this case are finished, and I will now instruct you on the law. That is, I will explain the law that applies to this case.
>
> (2) Remember that you have taken an oath to return a true and just verdict, based only on the evidence and my instructions on the law. You must not let sympathy or prejudice influence your decision.
>
> (3) As jurors, you must decide what the facts of this case are. This is your job, and nobody else's. You must think about all the evidence and then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses said. What you decide about any fact in this case is final.
>
> (4) It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer says something different about the law, follow what I say. At various times, I have already given you some instructions about the law. You must take all my instructions together as the law you are to follow. You should not pay attention to some instructions and ignore others.
>
> (5) To sum up, it is your job to decide what the facts of the case are, to apply the law as I give it to you, and, in that way, to decide the case.

CJI 3.1 emphasizes all the more that the Judge is in control of the law, the law is what the Judge says and no one else (sub 4) and the jury "**must** take the law as I give it to you." The jurors are even reminded that it is their duty according to the oath they have taken "to return a true and just verdict, based only on the evidence and my instructions on the law." (sub 2).

CJI 3.11 Deliberations and Verdict does not change the jury's mandate to follow the law as given by the judge:

> (1) When you go to the jury room, you will be provided with a written copy [copies] of the final jury instructions. [A copy of electronically recorded instructions will also be provided to you.] You should first choose a foreperson. The foreperson should see to it that your discussions are carried on in a businesslike way and that everyone has a fair chance to be heard.
>
> (2) During your deliberations please turn off your cellphones or other communications equipment until we recess.
>
> (3) A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each juror.
>
> (4) It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.
>
> (5) However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.
>
> [*Use the next paragraph when there are less serious included crimes:*]
>
> (6) In this case, there are several different crimes that you may consider. When you discuss the case, you must consider the crime of [*name principal charge*] first. [If you all agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict.] If you believe that the defendant is not guilty of [*name principal charge*] or if you cannot agree about that crime, you should consider the less serious crime of [*name less serious charge*]. [You decide how long to spend on (*name principal charge*) before discussing (*name less serious charge*). You can go back to (*name*

> *principal charge*) after discussing (*name less serious charge*) if you want to.]
>
> (7) If you have any questions about the jury instructions before you begin deliberations, or questions about the instructions that arise during deliberations, you may submit them in writing in a sealed envelope to the bailiff.

Nothing in CJI 3.11 relieves the jury of their duty to follow the law as given by the Judge. Read as a whole it is clear that the deliberations are to be conducted consistently with all of the instructions and that the opinions referred to in CJI 3.11 are opinions about the credibility of witnesses, the weight of the evidence and other determinations of fact. A juror is not counseled by CJI 3.11 base a decision on whether their conscience says the law is right or wrong. Rather, CJI 3.11 each juror "must vote honestly and in good conscience" based on each juror's findings of fact, applying the law given by the judge.

As noted in CJI 3.1, for the jury to do otherwise than apply the law as given by the judge is a violation of the juror's oath which says:

> CJI 2.1 Juror Oath Following Selection
>
> (1) Ladies and gentlemen of the jury, you have been chosen to decide a criminal charge made by the State of Michigan against one of your fellow citizens.
>
> (2) I will now ask you to stand and swear to perform your duty to try the case justly and to reach a true verdict. If your religious beliefs do not permit you to take an oath, you may instead affirm to try the case justly and reach a true verdict.
>
> (3) Here is your oath: "Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."

The oath requires each juror to render a "verdict only on the evidence introduced and in accordance with the instructions of the court...." That oath only gives room for a verdict based on the facts of the case and the judge's "instructions on the law." CJI 3.1. Defendant's actions in encouraging jurors to ignore the law and acquit a guilty person according to the individual juror's conscience is contrary to the law and a violation of the jurors' oath. In point of fact, Defendant's pamphlet encourages jurors to violate their oath where it says "2. You cannot be forced to obey a "juror's oath." One would not have to make that argument if the assertions in the pamphlet were consistent with jury instructions.

Defendant's pamphlet clearly encourages unlawful conduct.

ISSUES RELATING TO DEFENDANT'S ARREST ARE IRRELEVANT TO ANY CLAIM FOR DISMISSAL.

Defendant's arrest in this case was lawful, based upon probable cause as the entirety of the brief above makes clear. But the propriety of Defendant's arrest is not an issue before the Court. The law has long been and continues to be that the legality of an arrest has no impact on the Court's jurisdiction:

> The United States Supreme Court has recognized that it is an "established rule that [an] illegal arrest or detention does not void a subsequent conviction." *Gertein v Pugh,* 420 U.S. 103, 119; 95 S.Ct. 854; 43 L.Ed.2d 54 (1975); see also *People v Burrill,* 391 Mich. 124, 133-134; 214 NW2d 823 (1974) (the invalidity of an arrest warrant does not affect the court's jurisdiction to try the defendant), and *People v Carroll,* 49 Mich App 44, 46; 211 NW2d 233 (1973) ("The rule, in fact, is that an unlawful arrest does not prevent the prosecution of a defendant."). "[T]he sole remeby for an illegal arrest is suppression of the evidence, not dismissal of the charges." *City of Lansing v Hartsuff,* 213 Mich App 338, 352; 539 NW2d 781 (1995); ... Defendant identifies no evidence that he claims was obtained as a result of his purportedly illegal arrest or detention that must be suppressed. *People v Kennedy, Unpublished,* Court of Appeals No. 322873 (Dec. 8, 2015).

As in *Kennedy*, there is no evidence that was obtained from Defendant that will be offered in this case, therefore, there is not even a basis for a suppression hearing, let alone dismissal of the case.

Since the subject has been raised, it may be helpful to note in addition to the arrest powers of the deputy, that the contempt powers of a court follow jurors wherever they go. *Sinclair v United States,* 279 U.S. 749 (1929) (Contempt convictions for having jurors shadowed by private detectives.) and *Ex parte Cuddy,* 131 U.S. 280 (1889).

Another interesting fact is that Judges have the power of arrest in Michigan. Michigan Constitution, 1963, Article VI § 29 provides:

> Sec. 29 Justices of the supreme court, judges of the court of appeals, circuit judges and other judges as provided by law shall be conservators of the peace within their respective jurisdictions.

That Constitutional provision has been construed to give even a municipal judge arrest powers within the municipality in which the judge serves. Thus, in the case at bar, independent of contempt powers, the District Judge had the power to arrest Defendant for his conduct within the Judge's judicial district.

RELIEF REQUESTED

WHEREFORE, for the reasons stated above, the People respectfully request that this Honorable Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

Dated: January 8, 2016

Brian E. Thiede P32796
Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on Jan. 8 20 16

By: ☑ U.S. Mail ☑ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☐ Other

Signature

to disregard instructions of the judge; for example, acquittals under the fugitive slave law." (473 F. 2d 1113)

And let us never forget that in the Nuremburg trials of Nazi war criminals, the defendants argued that they were "only following the law." The Tribunal's response was, quite correctly, that they each had a personal responsibility to judge the morality of the law, and should have acted according to conscience!

How can one person make a difference?

BE ALERT! Almost everyday, new attempts are made to limit jury power, mostly via subtle changes in the rules of the courtroom procedure, sometimes by court decisions, legislation, or by the creation of special courts that do not allow jury trials for the accused.

BE AWARE! Thousands of harmless people are in prison simply because their juries weren't fully informed. U.S. now leads the world in percent of population behind bars! New prisons are springing up everywhere, and too many of them are filling up with people whose only "crime" was to displease the government "master", not to victimize anyone (in other words, political prisoners).

BE ACTIVE! Tell others what you know about jury veto power!* Before a jury reaches a verdict, each member should consider:

1. Is this a good law?

2. If so, is the law being justly applied?

3. Was the Bill of Rights honored in the arrest?

4. Will the punishment fit the crime?

Is there a local FIJA group?

Probably—most people who receive this leaflet get it from someone on a team of local activists. Local activists may also be working with lawmakers for passage of FIJA legislation; others my be participating in radio talk shows or placing ads and public service announcements, speaking to other local groups, or otherwise getting the word out.

Since 1991, local FIJA groups in 18 states have persuaded their state governors to proclaim September 5 (the day of Penn's acquittal) as "Jury Rights Day", often celebrating it by issuing news releases and leafleting courthouses—thus using our First Amendment right to explain how juries can protect the rest of our rights, simply by acquitting defendants charged with breaking a bad law.

*Discretion may be the better part of valor: FIJA activists have been so effective at telling jurors the truth about jury veto power that judges and prosecutors nowadays not only try to keep fully informed citizens off of juries, but also have sometimes charged those who do inform them with contempt of court, even with jury tampering. So, if you decide to "be active", we advise you to observe any court order directed at your leafleting or other educational activity, and if you are empaneled to serve on a jury, not to distribute jury-power educational literature to your fellow jurors.

FIJA

- TO RECEIVE MORE INFORMATION -

Visit www.fija.org, or call **1-800-TEL-JURY**, and tell FIJA where to send your free Jury Power Information Package. It contains a history of jury veto power and tells what to do if you're going to be on a jury (or facing one).

It also includes information on how you can support FIJA and a form for ordering materials.

FIJA maintains a useful web site, www.fija.org. It contains additional information about jury veto power, about FIJA, lists state contacts, a library of documents, and archived files of our newsletters.

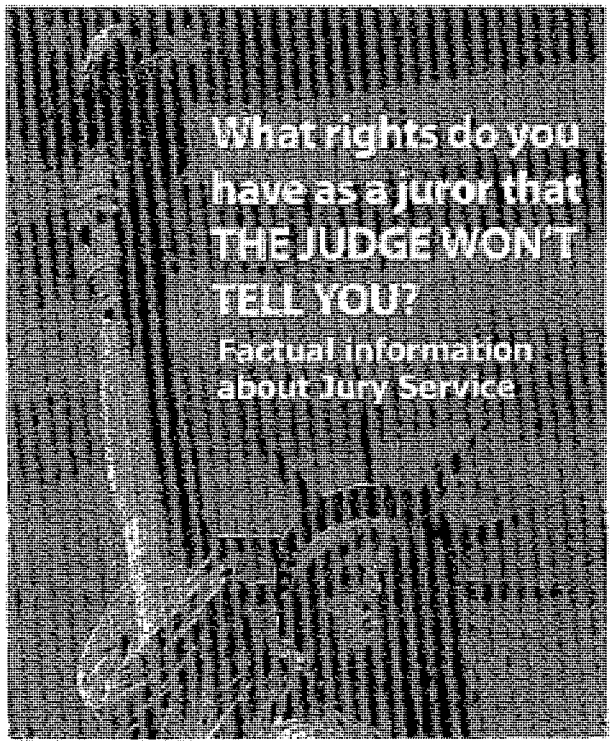
Our web site is www.fija.org.

Restore liberty and justice by jury!

This leaflet is distributed locally by:

Publication # (TOF): last update March 2013

Your Jury Rights: True or False ?



Distributed by
Fully Informed Jury Association
P. O. Box 5570 Helena, MT 59604

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1-800-TEL-JURY

FIJA

Jan. 8. 2016 12:42PM Mecosta County Prosecutor No. 2516 P. 28

True or False?

When you sit on a jury, you may vote on the verdict according to your conscience.

"True", you say—and you're right. But then . . .

Why do most judges tell you that you may consider "only the facts"—that you must not let your conscience, opinion of the law, or the motives of the defendant affect your decision?

In a trial by jury, the judge's job is to referee the event and provide neutral legal advice to the jury, properly beginning with a full explanation of a juror's rights and responsibilities.

But judges only rarely "fully inform" jurors of their rights, especially their right to judge the law itself and vote on the verdict according to conscience. In fact, judges regularly assist the prosecution by dismissing prospective jurors who will admit knowing about this right—beginning with anyone who also admits having qualms with the law.

We can only speculate on why: Disrespect for the idea of government "of, by, and for the people"? Unwillingness to share power? Distrust of the citizenry? Fear that prosecutors may damage their careers, saying they're "soft on crime"? Ignorance of the rights that jurors necessarily acquire when they take on the responsibility of judging an accused person?

How can people get fair trials if the jurors are told they can't use conscience?

Many people don't get fair trials. Jurors often end up apologizing to the person they've convicted—or to the community for acquitting a defendant when evidence of guilt seems perfectly clear.

Something is definitely wrong when the jurors feel apologetic about their verdict. They should never have to explain "I wanted to use my conscience, but the judge made us take an oath to apply the law as given to us, like it or not."

Too often, jurors who try to vote their consciences are talked out of it by other jurors who don't know their rights, or who believe they "have to" reach a unanimous verdict because the judge said that a hung jury would "unduly burden the taxpayers."

But if jurors were supposed to judge "only the facts", their job could be done by a judge. It is precisely because people have individual, independent feelings, opinions, wisdom, experience and conscience that we depend upon jurors to refuse to mindlessly follow the dictates of a judge or of a bad law.

So, when it's your turn to serve, be aware:

1. ***You may, and should, vote your conscience;***
2. ***You cannot be forced to obey a "juror's oath";***
3. ***You have the right to "hang" the jury with your vote if you cannot agree with other jurors!***

What is FIJA, the Fully Informed Jury Association? FIJA is a national educational non-profit organization which tells citizens more about their rights, powers, and duties as jurors than they are likely to be told in court.

FIJA believes that "liberty and justice for all" won't return to America until citizens are again fully informed of — and using — their power as jurors.

Return? Did judges fully inform jurors of their rights in the past?

Yes, it was normal procedure in the early days of our nation, and in colonial times. And if the judge didn't tell them, the defense attorney often would. America's founders realized that trials by juries of ordinary citizens, fully informed of their powers as jurors, would confine the government to its proper role as the servant, not the master, of the people.

Our third president, *Thomas Jefferson*, put it like this: "I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution."

John Adams, our second president had this to say about the juror: " It is not only his right, but his duty. . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."

These sound like voices of experience. Were they?

Yes. Only decades had passed since freedom of the press was established in the colonies when a jury decided *John Peter Zenger* was "not guilty" of seditious libel. He was charged with this "crime" for printing true, but damaging, news stories about the Royal Governor of New York Colony.

"Truth is no defense," the court told the jury! But the jury decided to reject bad law and acquitted Zenger. Why? Because defense attorney *Andrew Hamilton* informed the jury of its rights: he told the story of *William Penn's* trial—of the courageous London jury which refused to find him guilty of preaching what was then an illegal religion (Quakerism). His jurors stood by their verdict even though they were held without food, water, or toilet facilities for several days.

They were then fined and imprisoned for acquitting Penn—until England's highest court acknowledged their right to reject both law and fact, and to find a verdict according to conscience. It was exercise of that right in the Penn trial which eventually led to recognition of free speech, religious freedom, and peaceful assembly as individual rights.

American colonists regularly depended on juries to thwart bad law sent over from England. The British then restricted trial by jury and other rights which juries had helped secure. Result? The Declaration of Independence and the American Revolution. Afterwards, to protect the rights they'd fought for from future attack, the founders of the new nation placed trial by jury—meaning tough, fully informed juries—in both the Constitution and the Bill of Rights.

Bad law—special-interest legislation which tramples our rights—is no longer sent here from Britain. But our own legislatures keep us well supplied. Now more than ever, we need juries to protect us!

Why haven't I heard about "jury veto power" or "juror rights" before?

During the 1800s, powerful special interest groups inspired a series of judicial decisions which tried to limit jury veto power. While no court has yet dared to deny that juries can "nullify" or "veto" a law, or "bring in a general verdict (i.e., judging both law and fact)", the Supreme Court in 1895 held, hypocritically, that jurors need not be told **their** rights!

That's why, these days, it's a rare and courageous attorney who will risk being cited for contempt for informing the jury about its rights without obtaining the judge's prior approval. It's also why the idea of jury rights is not taught in (public) schools.

Still, the jury's power to reject bad law continues to be recognized, as in 1972 when the D.C. Circuit Court of Appeals held that the jury has an ...

"... Unreviewable and irreversible power . . . to acquit in disregard of the instruction on the law given by the trial judge. The pages of history shine upon instances of the jury's exercise of its prerogative

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEO KENNEDY,

Defendant-Appellant.

UNPUBLISHED
December 8, 2015

No. 322873
Wayne Circuit Court
LC No. 00-010568-FC

Before: MURRAY, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life in prison without the possibility of parole for the first-degree murder conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that he was deprived of due process because, following the dismissal of the charges at the first preliminary examination, the prosecutor filed a second complaint charging the same offenses, the case was assigned to a different judge at the second preliminary examination, and no new evidence was discovered. We conclude that there was no due process violation and that the unpreserved error in the assignment of the case to a different judge at the second preliminary examination did not affect the outcome of the proceedings.

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). This issue is unpreserved because defendant failed to raise it below. Defendant did not object to the assignment of the case to a different judge at the second preliminary examination or request that the case be transferred back to the judge who presided over the first preliminary examination.

Issues of constitutional law are reviewed de novo. *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012). "The proper interpretation and application of a court rule is a question of law that is reviewed de novo." *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture of an unpreserved issue, a

defendant must show that a clear or obvious error occurred that caused prejudice by affecting the outcome of the lower court proceedings. *Id.* at 763. If a defendant satisfies these requirements, an appellate court should exercise its discretion to reverse only if the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* at 763-764.

MCR 6.110(F) provides, with respect to a preliminary examination:

> If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony. Except as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge.

MCR 8.111(C)(1) provides that the chief judge may reassign a case if a judge is disqualified or for other good cause cannot undertake an assigned case.

This Court has held "that subjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in 'judge-shopping.' " *People v Robbins*, 223 Mich App 355, 363; 566 NW2d 49 (1997). "Among the factors to be considered in determining whether a due process violation has occurred are the reinstitution of charges without additional, noncumulative evidence not introduced at the first preliminary examination, the reinstitution of charges to harass and judge-shopping to obtain a favorable ruling." *People v Vargo*, 139 Mich App 573, 578; 362 NW2d 840 (1984). Although additional evidence must be presented at the second preliminary examination, the additional evidence need not be newly discovered. *Robbins*, 223 Mich App at 361. For example, in *Vargo*, 139 Mich App at 578, this Court found that there was no due process violation where, although "the new evidence could have been introduced at the first preliminary examination, the failure to do so was more a product of neglect than a deliberate attempt to harass defendant."

Defendant has not established a due process violation. Additional evidence was presented at the second preliminary examination. Dawon Grier, who did not testify at the first preliminary examination, testified at the second preliminary examination that he saw defendant shoot the victim, Anthony Mercer. The prosecutor presented Grier at the second preliminary examination after the witnesses at the first preliminary examination failed to testify in accordance with their earlier statements. There is no indication that the prosecutor was seeking to harass defendant by refiling the charges and holding the second preliminary examination.

An error did occur under MCR 6.110(F) because the second preliminary examination was held before a different judge. However, there is no basis to conclude that the prosecutor had any control or influence on the assignment of the case to a different judge, and defendant did not request a transfer of the case when the judge at the second preliminary examination noted that the case should have been assigned to the original judge. The prosecutor never argued for having the case remain before the second judge. On this record, there is no evidence that the

prosecutor was engaged in judge-shopping. Rather, the charges were refiled and the second preliminary examination was held because the witnesses at the first preliminary examination failed to testify as expected. Finally, the error in assigning the case to a different judge did not affect the outcome. Defendant does not contest that the testimony at the second preliminary examination provided probable cause to bind him over.

Defendant next argues that he was unlawfully arrested and detained following the dismissal of the charges at the first preliminary examination. We disagree. This issue is unpreserved because defendant failed to raise it below. *Metamora Water Serv, Inc*, 276 Mich App at 382. Therefore, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Defendant's contention that he was held pursuant to a so-called "reverse writ" is devoid of merit. A "reverse writ" was a colloquial term used in Detroit to describe a procedure in which the police or the prosecutor sought judicial approval for detaining a citizen when no warrant had been issued due to lack of probable cause. *People v Cipriano*, 431 Mich 315, 337-338; 429 NW2d 781 (1988); *People v Casey*, 411 Mich 179, 180; 305 NW2d 247 (1981). "[R]everse writ proceedings are without legal effect and may not be employed to justify the detention of a citizen." *Casey*, 411 Mich at 180. That is because a reverse writ has no constitutional or statutory basis. *Id.* at 181. "A detention which is otherwise illegal is not cleansed of its illegality by the issuance of a reverse writ or by the pendency of such proceedings." *Id.* at 182. A reverse writ has no effect on the legality of a detention. *Cipriano*, 431 Mich at 338. The holding in *Casey* barring the use of a reverse writ to justify an otherwise illegal arrest and detention is inapplicable if the police had probable cause to arrest the defendant. *Id.*

In the present case, the police had probable cause to arrest and detain defendant following the dismissal without prejudice of the charges at the first preliminary examination. On August 31, 2000, the same date as the first preliminary examination in this case, defendant was charged with resisting and obstructing a police officer. He was bound over for trial on the resisting and obstructing charge on September 15, 2000. Defendant fails to address this charge or to argue that the police lacked probable cause to arrest and detain him on this charge. The police also had probable cause to rearrest defendant on the first-degree murder and felony-firearm charges in this case on the basis of information obtained from witnesses who did not testify at the first preliminary examination. Defendant was recharged with murder and felony-firearm on September 3, 2000.

Even if the police lacked probable cause to rearrest and detain defendant, defendant has failed to establish that he is entitled to the vacation of his convictions as a remedy. The United States Supreme Court has recognized that it is an "established rule that [an] illegal arrest or detention does not void a subsequent conviction." *Gerstein v Pugh*, 420 US 103, 119; 95 S Ct 854; 43 L Ed 2d 54 (1975); see also *People v Burrill*, 391 Mich 124, 133-134; 214 NW2d 823 (1974) (the invalidity of an arrest warrant does not affect the court's jurisdiction to try the defendant), and *People v Carroll*, 49 Mich App 44, 46; 211 NW2d 233 (1973) ("The rule, in fact, is that an unlawful arrest does not prevent the prosecution of a defendant."). "[T]he sole remedy for an illegal arrest is suppression of the evidence, not dismissal of the charges." *City of Lansing v Hartsuff*, 213 Mich App 338, 352; 539 NW2d 781 (1995); see also, generally, *People v Harrison*, 163 Mich App 409, 421; 413 NW2d 813 (1987) ("While an improper delay in

arraignment may necessitate the suppression of evidence obtained as a result of that delay, the delay does not entitle a defendant to dismissal of the prosecution."). Defendant identifies no evidence that he claims was obtained as a result of his purportedly illegal arrest or detention that must be suppressed. In addition, the dismissal of the charges without prejudice at the first preliminary examination did not prohibit rearresting and recharging defendant for the same offenses. *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965) ("The discharge by an examining magistrate upon examination of a person accused of a crime is not a bar to his subsequent arrest, examination, and trial for the same offense because he has not been placed in jeopardy."); *People v Hayden*, 205 Mich App 412, 414; 522 NW2d 336 (1994) ("[D]ismissal of a prosecution at preliminary examination raises no bar under res judicata or collateral estoppel to a subsequent prosecution."). Accordingly, defendant has failed to establish a plain error affecting his substantial rights.

Defendant next argues that defense counsel was ineffective for failing to object to the admission of statements that defendant alleges constituted inadmissible hearsay.

We conclude that review of this issue is barred by the law of the case doctrine. "Whether the law of the case doctrine applies is a question of law that we review de novo." *Duncan v Michigan*, 300 Mich App 176, 188; 832 NW2d 761 (2013). "Generally, the law of the case doctrine provides that an appellate court's decision will bind a trial court on remand and the appellate court in subsequent appeals." *Id.* at 188-189 (citation and quotation marks omitted). "The law of the case doctrine has been described as discretionary—as a general practice by the courts to avoid inconsistent judgments—as opposed to a limit on the power of the courts." *Id.* Nonetheless, this Court must apply the law of the case doctrine if there has been no material change in the facts or intervening change in the law. *Id.* "Even if the prior decision was erroneous, that alone is insufficient to avoid application of the law of the case doctrine." *Id.*

In his delayed application for leave to appeal from the judgment of sentence in this case, which defendant filed in a prior appeal,[1] defendant argued that defense counsel was ineffective for failing to move before trial to suppress alleged hearsay statements admitted through the testimony of numerous witnesses, including the same four witnesses whose testimony defendant now argues that defense counsel should have objected to on hearsay grounds. This Court denied the delayed application for leave to appeal "for lack of merit in the grounds presented." *People v Kennedy*, unpublished order of the Court of Appeals, entered April 5, 2002 (Docket No. 239127). Because this Court's prior order denying leave to appeal resolved on the merits the issue regarding the testimony of these four witnesses, that order has preclusive effect. See *People v Hayden*, 132 Mich App 273, 297; 348 NW2d 672 (1984) (concluding that the law of the case doctrine precluded reaching the merits of an issue because this Court had previously denied the defendant's motion to remand on the same issue "for lack of merit in the grounds

[1] Following the resolution of that prior appeal, the trial court reissued the judgment of sentence for the reason that defendant's previous appellate counsel had failed to perfect defendant's otherwise timely appeal of right. Hence, the present appeal arises from the same judgment of sentence from which defendant had previously filed a delayed application for leave to appeal.

presented"). There has been no material change in the facts or intervening change in the law. Accordingly, the law of the case doctrine precludes review of this issue.[2]

Defendant next argues that his Sixth Amendment right of confrontation was violated because witness Michael Dixon's statement referenced remarks by Darnell Parham implicating defendant in the crime, and Parham was not available for cross-examination. Even assuming, without deciding, that an error occurred, it was harmless beyond a reasonable doubt. "Harmless error analysis applies to claims concerning Confrontation Clause errors[.]" *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). A reviewing court must thoroughly examine the record to determine whether it is clear beyond a reasonable doubt that the verdict would have been the same without the error. *Id.* There was significant evidence of defendant's guilt. Two eyewitnesses testified that they saw defendant shoot Mercer. Two other witnesses testified that they heard defendant make statements acknowledging that he shot Mercer. Defendant admitted to the police that he was at the murder scene with Parham when the shooting occurred. Defendant's flight from the police following a traffic stop suggested his consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). We conclude that it is clear beyond a reasonable doubt that defendant would have been found guilty even if the statement at issue had not been used.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Michael J. Riordan

[2] The fact that review of this issue is precluded does not mean that the trial court's order reissuing the judgment of sentence lacks meaningful effect, given that defendant has raised new issues on appeal for which review is not precluded by the law of the case doctrine. We further note that we have briefly reassessed defendant's claims regarding the testimony at issue and have found that, even if review were applicable, the claims would not merit appellate relief.