IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-vs-

KEITH ERIC WOOD,

Defendant/Appellant.

***AMICUS CURIAE* BRIEF OF THE FULLY INFORMED JURY ASSOCIATION**

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

***AMICUS CURIAE* BRIEF OF THE FULLY INFORMED JURY ASSOCIATION**

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INTEREST OF AMICUS CURIAE

The Fully Informed Jury Association (FIJA) is a corporation, duly registered and headquartered in the state of Montana. FIJA is a nonprofit, nonpartisan, educational outreach organization, pursuant to IRC §501(c)(3). Its mission is to preserve the full function of the jury as the final arbiter in our trial courts by informing everyone of jurors' rights and responsibilities—including the right of conscientious acquittal—in delivering just verdicts. FIJA educates people through a variety of programs, publications, research on jury-related issues, outreach via both traditional and modern media, its website at www.FIJA.org, and other appropriate means.

FIJA does not advocate for specific jury verdicts in any case in progress. Rather, FIJA educates the general public, including potential jurors, regarding the historic and constitutional role of the jury as a protector of criminal defendants (and hence the community) from unjust laws, malicious prosecutions, and government abuses.

As part of its educational mission, FIJA files amicus briefs when matters regarding the jury are at issue to clarify and illuminate jurors' full constitutional authority and the crucial role of the jury in protecting rights and restraining government. This case poses First Amendment concerns for FIJA and its volunteers. FIJA believes that its scholarly expertise in the jury-related issues in this case, as well as its knowledge of the materials and outreach efforts at issue, will be of assistance to the Court in this case. This brief is wholly the product of the Fully Informed Jury Association ("FIJA") and its counsel.[1]

[1] Neither the parties nor their counsel authored or contributed anything toward the production, preparation or filing of this brief, and no person or entity other than amicus and its counsel funded its preparation or submission.

SUMMARY OF THIS CASE AND THE ARGUMENTS IN THIS BRIEF

Counsel for FIJA submits that the able counsel for Mr. Wood has adequately summarized the facts and background of this case and appeal. FIJA supports the arguments in Keith Wood's Appellant's brief. However, FIJA focuses on just one topic in this amicus curiae brief: whether the conduct of Mr. Wood and the ideas expressed in FIJA's informational brochure, *Your Jury Rights: True or False,* constitute the crime of jury tampering.

The *Your Jury Rights* brochure asks "True or False: When you sit on a jury, you may vote on the verdict according to your conscience." The brochure references statements by Thomas Jefferson and John Adams, and describes historic events such as the trial of John Peter Zenger. "How can one person make a difference?" the brochure continues with recommendations such as the following:

> 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.

FIJA submits that the brochure is entirely accurate, and that no ideas expressed in the brochure constitute unlawful tampering which might induce any juror to act unlawfully in any specific case. FIJA believes that the arrest, prosecution, and conviction of Keith Wood in this matter constitutes a terrible miscarriage of justice and a stain on the legal history of the state of Michigan.

ARGUMENT

Jury tampering has been recognized as a crime since ancient times.[2] It is the crime of acting to influence a jury's verdict in a specific case by threats, violence, bribery or other criminal pressure.[3] Jury tampering is undoubtedly a problem as old as trial by jury itself. Indeed, ancient Greeks held jury trials before juries of hundreds of people in order to combat the problem of jury tampering.[4] The jury that convicted Socrates was composed of 500 jurors.[5]

In Michigan, the misdemeanor jury tampering statute (MCL 750.120a(1)) states that "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. . ." The evidence asserted in the Court below to convict Keith Wood of jury tampering is insufficient under the plain text and meaning of this statute.

As Justice Murphy pointed out in his dissent in the Court of Appeals in the instant case, "the jury-tampering statute, MCL 750.120a, is simply not implicated under the circumstances presented in this case." The statute requires that "'[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. . .'" "With respect to *mens rea*,"

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[2] John H. Langbein, *Bifurcation and the Bench: The Influence of the Jury on English Conceptions of the Judiciary*, 82 in *Judges and Judging in the History of the Common Law* (2012) (mentioning that jury tampering was recognized as a crime in late medieval times).
[3] See Erica Summer (2001) "Post-Trial Jury Payoffs: A Jury Tampering Loophole," 15 *Journal of Civil Rights and Economic Development* 353, 354 (2001) ("For most the term jury tampering conjures images of bribes or threats directed at a jury member. Traditional jury tampering methods such as these are illegal and have been for centuries.").
[4] See Jean Kinney Williams, *Empire of Ancient Greece* 75 (2009).
[5] See James A. Colaiaco, *Socrates Against Athens: Philosophy on Trial* 17 (2013).

wrote Justice Murphy, "under the plain language of the statute, a person's conduct in attempting to influence a juror's decision by way of argument or persuasion must be willful."

Accordingly, Keith Wood was improperly convicted and is entitled to a judgment of reversal with an order for the trial court to dismiss this action. No instruction or set of instructions could cure the error in a new trial.

I. EVEN IF WOOD HAD KNOWINGLY HANDED HIS PAMPHLETS OR ORALLY COMMUNICATED THE IDEAS CONTAINED IN THE PAMPHLETS DIRECTLY TO A KNOWN JUROR, HE WOULD NOT COMMIT THE CRIME OF JURY TAMPERING.

The able counsel for the Appellant has sufficiently described how the individual(s) who took the brochures offered by the Appellant were not "jurors" in any proper, legal, statutory, or dictionary sense. But even if Mr. Wood had handed his flyers to actual jurors currently hearing an actual case, his act of handing out such flyers could not have constituted "willfully attempt[ing] to influence the decision of a juror in any case by argument or persuasion . . ." The brochures contain no argument or persuasion dedicated to any actual case.

Of course, the term "willfully" under Michigan criminal law means done with "an evil intent," "a bad purpose," or a "guilty knowledge," and implies a knowledge and a purpose to do wrong and break the law. *People v. Lerma*, 66 Mich. App. 566, 570; 239 N.W.2d 424 (1976). Yet the record below is utterly devoid of any evidence that appellant Keith Wood distributed the pamphlet with an evil intent or knowing that he was breaking the law to do so. "Nothing can be a crime until it has been recognized as such by the law of the land." *People v. Thomas*, 438 Mich 448, 456 (1991).

Mr. Wood was sharing information on the history, authority, and power of juries, a topic of political, social, and public concern. See, e.g., *Wood v. Georgia*, 370 US 375 (1962) (holding that a letter distributed to grand jury members was speech on public issues). Nothing contained in *Your Jury Rights: True or False?* has been challenged as untrue.

II. MICHIGAN JURIES HAVE ALWAYS HAD THE ABSOLUTE RIGHT TO ACQUIT ANY DEFENDANT DESPITE THE EVIDENCE.

Michigan juries have the absolute right to acquit any defendant no matter how insurmountable the evidence against him. *People v. Allen*, 94 Mich. App. 539, 288 N.W.2d 451, 455 (Mich. App. 1980) (Danhof, C. J., concurring in part, dissenting in part) ("Certainly no one would deny the jury's absolute right to disbelieve all the 'undisputed evidence' and acquit the defendant altogether"). A "jury has the power to bring in a verdict in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920). See, generally, *People v. Jackson*, 390 Mich. 621, 625, n.2; 212 N.W.2d 918 (1973), quoting *Woodin v. Durfee*, 46 Mich. 424, 427; 9 N.W. 457 (1881) ("A jury may disbelieve the most positive evidence, even when it stands uncontradicted"); A jury "may indulge tender mercies even to the point of acquitting the plainly guilty." *People v. Allen*, 94 Mich. App. 539, 288 N.W.2d 451, 456 (Mich. App. 1980) (Danhof, C. J., concurring in part, dissenting in part); *In re Bagley Ave. in Detroit*, 248 Mich. 1, 6, 226 N.W. 688, 689 (1929) ("The jury . . . are not to be interfered with or dictated to by the judge. The jury are judges both of the law and facts" (citing *Toledo, etc., R. Co. v. Dunlap*, 47 Mich. 456; *Port Huron, etc., R. Co. v. Voorheis*, 50 Mich. 506; *Grand Rapids, etc., R. Co. v. Chesebro*, 74 Mich. 466). A judge "cannot give binding instructions, and the jury is the judge of both law and facts." *In re Owen and Memorial Parks*, 244 Mich. 377.

Juries may also render utterly nonsensical or illogical verdicts to grant mercy to defendants. They may, "on almost any excuse, convict of a lower degree of crime although conviction of a higher degree is clearly warranted." *People v. Clemente*, 285 App Div 258, 264; 136 NYS2d 202, 207 (1954); *People v. Lewis*, 415 Mich 443, 448-449; 330 NW2d 16 (1982); *People v. Phillips*, 385 Mich 30, 37; 187 NW2d 211 (1971) ("Even though the evidence for the people, if believed, shows the defendant to be guilty of the offense charged, this does not preclude a conviction of a lesser offense.") For this reason, a trial court commits reversible error in "affirmatively excluding from the jury's consideration all possible verdicts except guilty or innocent of the principal charge." *People v. Jones*, 48 Mich. App. 470, 210 NW2d 497 (1973).

Thus, even when the Michigan Legislature enacted a statute making any killing of a corrections officer a first-degree murder, the Court of Appeals found that any jury considering such a case may *still* convict a defendant only of second-degree murder if the jury chose to do so. *People v. Herndon*, 246 Mich. App. 371, 388 633 N.W.2d 376 (2001).

Yet while an inconsistent jury verdict in favor of a defendant will be upheld (because of the jury's fundamental powers of nullification), an inconstant jury verdict against a defendant will be struck down as a violation of double jeopardy. In *People v. Allen*, 94 Mich. App. 539, 288 N.W.2d 451 (Mich. App. 1980), the Court of Appeals addressed a verdict wherein a jury had found a defendant guilty of second-degree felony murder (which requires a determination of only a reckless state of mind) and armed robbery (which requires a determination of specific intent). Finding the verdicts were inconsistent, the *Allen* Court, via plurality decision, struck down Allen's armed robbery conviction on double jeopardy grounds.

Michigan case law at times couches this authority under '*factual*' terms, see *People v. Chamblis*, 395 Mich 408, 420-421; 236 NW2d 473 (1975) ("The jury . . . may choose to believe

or disbelieve any or all of the evidence"); *People v. Goodchild*, 68 Mich. App. 226, 235, 242 N.W.2d 465 (1976) ("A jury has the right to disregard all or part of the testimony of a witness"), citing *People v. Berthiaume*, 59 Mich App 451; 229 NW2d 497 (1975). But it is clear that this power also acts as a mask for the jury's prerogative to nullify the application of *the law* to any given case. See *People v. Padgett*, 306 Mich 545, 11 N.W.2d 235 (1943) ("the right of trial by jury' is secured to every person accused of crime, and 'one of its substantial elements is the right of the jury to give a general verdict on the merits").

III. THE ABSOLUTE POWER OF JURIES TO ACQUIT OFFENDERS IS RECOGNIZED BY COURTS OUTSIDE MICHIGAN AS WELL.

The power, right, and authority of criminal juries to issue "nullification" verdicts is recognized in Michigan's federal courts as well. See *United States v. Jones*, 580 F.2d 219, 223 (6th Cir. 1978) ("Congress intended to preserve the jury's traditional prerogative to ignore even uncontroverted facts in reaching a verdict" of not guilty.")

Even outside Michigan, juries are never required to find a defendant guilty when the Government meets its burden of proof, though they may do so. See *United States v. Martin Linen Supply Co*., 430 U.S. 564, 572-73 (1977) (trial judges are prohibited from "directing the jury to come forward with [a guilty] verdict, regardless of how overwhelming the evidence may point in that direction"); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (saying any legal system that would rob jurors of their discretion to acquit against the evidence would be "totally alien to our notions of criminal justice").

As *Your Jury Rights: True or False?* points out, when jurors vote their consciences in trial deliberation, they are exercising the highest ideals behind the institution of trial by jury. See *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947) ("a judge may not direct a

verdict of guilty, no matter how conclusive the evidence"); *United States v. Mentz*, 840 F.2d 315, 319 (6th Cir. 1988) ("Regardless of how overwhelming the evidence may be, the Constitution delegates to the jury, not to the trial judge, the important task of deciding guilt or innocence"); *Konda v. United States*, 166 F.91, 93 (7th Cir. 1908) (an accused has a right to a chance of a jury acquittal even where "the evidence against him is clear and uncontradicted, as he unquestionably would have if it were doubtful and conflicting"); *Buchnanan v. United States*, 244 F.2d 916 (6th Cir. 1957) (a trial judge cannot instruct a jury to convict even if the facts of guilt are undisputed); *Billeci v. United States*, 184 F.2d 394, 399 (D.C. Cir. 1950) (must-convict instruction "is not the law. The law is that if the jury believes beyond a reasonable doubt that the defendant has committed the alleged offense it *should* find a verdict of guilty" (emphasis added)).

Never have the U.S. Supreme Court, the Michigan Supreme Court, or any Federal Court with jurisdiction in Michigan issued a decree that jurors must abandon their senses of justice, their assessment of the justness of laws, or their consciences if the government proves its case beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 317 n.10 (1979) (referring to the jury's "unassailable" power to issue an "unreasonable verdict of 'not guilty'"); *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (criminal juries have an inherent discretionary power to "decline to convict" and such "discretionary exercises of leniency are final and unreviewable"); *Batson v. Kentucky*, 476 U.S. 79, 86-87 n.8 (1986) (the jury's role "as a check on official power" is, in fact, "its intended function"); *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969) (discussing jurors' well-established "power to follow or not to follow the instructions of the court"); *United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980) ("a jury is entitled to acquit the defendant because it has no sympathy for the government's position. It has a general veto power").

Indeed, Michigan Criminal Jury Instructions instruct jurors to do exactly what *Your Jury Rights: True or False?* discusses: "In the end, your vote must be your own, and you must vote honestly and in good conscience." *M Crim JI* 3.11 *Deliberations and Verdict*. Nothing done by the appellant in distributing the brochure could have influenced a juror to do anything other than what is lawful.

Michigan law has always enshrined the principle that no juror can ever be punished for his verdict. See *People v. St Cyr*, 129 Mich App 471 (1983). This principle has been recognized for three centuries. See *Bushell's Case* in 1670 (Howell's State Trials, Vol. 6, Page 999 (6 How. 999)).

Thus, nothing in appellant Keith Wood's conduct in distributing the *Your Jury Rights: True or False* brochure could constitute the crime of jury tampering even if Wood had actually handed the flyer to an actual juror in an actual case.

CONCLUSION

Mr. Wood was NOT discussing any particular case, and was NOT seeking to influence a juror to vote a particular way by unlawful means. The information provided by Mr. Wood was accurate and informational. Accordingly, the judgment of conviction in this case must be reversed, and the case dismissed with prejudice.

Respectfully submitted,

DATED: January 24, 2020

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PROOF OF SERVICE

I, Eric Misterovich, hereby affirm that on the date stated below I delivered a copy of the foregoing *AMICUS CURIAE* BRIEF OF THE FULLY INFORMED JURY ASSOCIATION upon the parties below via the MiFILE System to all email addresses below or, if noted, via US First Class mail, postage prepaid, from Portage, Michigan on the date below:

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