STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-vs-

KEITH ERIC WOOD,

Defendant/Appellant.
/

APPELLANT'S BRIEF ON APPEAL AND PROOF OF SERVICE

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

Brian E. Thiede (P32796)
Mecosta County Prosecutor
Attorney for Plaintiff/Appellee
400 Elm Street, Room 206
Big Rapids, MI 49307
231-592-0141

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

DEFENDANT/APPELLANT'S BRIEF ON APPEAL

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

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES:

STATUTES:

CONSTITUTIONS:

COURT RULES:

ORDER APPEALED

Defendant/Appellant Keith Wood appeals the Mecosta County Circuit Court's February 2, 2018 order denying the appeal of his conviction of Jury Tampering (MCL 750.120a) in the Mecosta County District Court. The Circuit Court's order is attached as Exhibit A. The District Court's Order denying Defendant's Motion to Dismiss and Order denying Defendant's Motion for Reconsideration are attached as Exhibit B. The register of actions is attached as Exhibit C. This Honorable Court granted leave to appeal in its order dated February 22, 2018.

ALLEGATIONS OF ERROR AND RELIEF SOUGHT

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

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

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

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

IV. incorrectly expanded the definition of the word "juror" in the Jury Tampering statute beyond what it has ever meant in Michigan's history;

V. misapplied the elements of Jury Tampering;

VI. incorrectly held that the Jury Tampering statute's application to Mr. Wood's speech is not void for vagueness;

VII. violated fundamental rules of statutory construction; and

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

Further, the lower courts failed to even address or analyze numerous issues Mr. Wood raised below on appeal. The lower courts:

I. failed to address Michigan Supreme Court precedent directly on point regarding the definition of the word "juror;"

II. failed to provide any analysis of the Jury Bribery statute (MCL 750.120) as it relates to the Jury Tampering statute (MCL 750.120a);

III. failed to analyze the State's action under any constitutional scrutiny standard;

IV. failed to provide any analysis as to whether a less-restrictive means was utilized before the prosecution of Mr. Wood; and

V. failed to provide any analysis why Mr. Wood was not deprived of a fair trial, including his being barred from arguing the elements of the crime to the jury and the denial of his right to cross examine a witness as to his bias and credibility.

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

JURISDICTIONAL STATEMENT

The Mecosta County Circuit Court entered its order on February 2, 2018. Defendant/Appellant filed an application for leave to appeal within 21 days of the entry of that order. This Honorable Court granted his application for leave to appeal in its order dated February 22, 2018, and further granted Mr. Wood's motion for stay of his sentence pending appeal. The Court has jurisdiction to consider this appeal pursuant to MCR 7.203(A) and MCR 7.204.

QUESTIONS PRESENTED

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

TRIAL COURT/CIRCUIT COURT'S ANSWER: NO

APPELLANT'S ANSWER: YES

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

TRIAL COURT/CIRCUIT COURT'S ANSWER: NO

APPELLANT'S ANSWER: YES

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

TRIAL COURT/CIRCUIT COURT'S ANSWER: NO

APPELLANT'S ANSWER: YES

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

Mr. Wood filed his Motion to Dismiss on December 21, 2015. Plaintiff/Appellee (hereinafter "Prosecutor") filed his response on January 8, 2016. Mr. Wood filed his reply brief on January 18, 2016. A hearing was held regarding the Motion to Dismiss on March 23, 2016, and the District Court dismissed the felony charge of Obstruction of Justice but did not dismiss the misdemeanor charge of Jury Tampering (Mot. to Dismiss Tr., pg. 39).[1]

[1] The District Court refused to address Mr. Wood's constitutional claims at that time.

The District Court relied on its interpretation of Black's Law Dictionary (4th Edition) when it refused to dismiss the Jury Tampering charge (Mot. to Dismiss Tr., pg. 39). The District Court ruled that a person becomes a "juror" when a person is merely *summoned to appear* for potential jury duty (Mot. to Dismiss Tr., pgs. 37-39). The District Court cited no statute, case law, or any other Michigan precedent to support its conclusion.

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

Mr. Wood then filed an interlocutory appeal to the Court of Appeals and the Court issued an order declining to review Mr. Wood's request for leave to appeal on December 2, 2016. Mr. Wood filed an Application for Leave to Appeal with the Michigan Supreme Court on January 25, 2017. The Supreme Court declined to review Mr. Wood's Application for Leave to Appeal on April 4, 2017. A two-day jury trial was held on May 31st and June 1st of 2017. Over the objection of Mr. Wood, the District Court instructed the jury that a "juror" for the purpose of the jury tampering statute "includes a person who has been summoned to appear in court to decide the facts in a specific trial." (Pre-Trial TR., pgs. 11-12; Trial Tr., Vol II(b), pg. 145). The jury thereafter found Mr. Wood guilty of jury tampering.

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

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

Mr. Wood's Application for Leave to Appeal the District Court's order (Exhibit B), Mr. Wood's wrongful conviction of Jury Tampering, and the Circuit Court's order denying his appeal (Exhibit A) was granted by this Honorable Court on February 22, 2018.

STANDARD OF REVIEW

Regarding the criminal statute in question, MCL 750.120a, issues of statutory construction are questions of law that are reviewed *de novo*. *People v Dowdy*, 489 Mich 373, 379; 236 NW2d 489 (2011). The cardinal rule of statutory construction is to discern and give effect to the intent of

the Legislature. *Id*. Courts must construe a statute in a manner that gives full effect to all its provisions. *Id*.

Regarding the First Amendment and due process issues, questions of constitutional law are reviewed de novo. *People v Rapp*, 492 Mich 67, 72; 821 NW2d 452 (2012). It is presumed that a statute is constitutional and the party challenging the validity of the ordinance bears the burden of proving a constitutional violation. *Id*. If the party is challenging a statute as being applied unconstitutionally, the party must show a "present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *People v Wilder*, 307 Mich App 546, 650; 861 NW2d 645 (2014).

ARGUMENT

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

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

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

In short, Mr. Wood was charged with tampering with a jury that did not exist. There is no such crime in Michigan. On the day in question, Mr. Wood had no interaction with a single person who was a "juror in any case." Indeed, no jury was selected, empaneled, or sworn on the day in question. Instead, the lower courts created post-hoc a new crime in Michigan. Despite the lower courts' ruling that Mr. Wood distributing literature on a public sidewalk could amount to criminal activity, "[n]othing can be a crime until it has been recognized as such by the law of the land." *People v Thomas*, 438 Mich 448, 456; 475 NW2d 288 (1991).

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

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

Definitions:

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

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

A. The Lower Courts Committed Reversible Error by Incorrectly Defining the Word "Juror."

Notwithstanding the plain language of the statute, the District Court, relying on a footnote in the 4th Edition of Black's Law Dictionary, erroneously held that a person becomes a "juror" when a person is merely *summoned to appear* for potential jury duty (Mot. to Dismiss Tr., pgs. 37-39). The District Court cited no statute, case law, or any other Michigan precedent to support its conclusion. On appeal, the Circuit Court upheld the lower court's definition by citing to the 10th Edition of Black's Law Dictionary (Exhibit A, pg. 4).

Contrary to the lower courts' rulings, the Michigan Supreme Court recently stated that "a jury is not a jury until it is sworn." *People v Cain*, 498 Mich 108, 139; 869 NW2d 829 (2015). In *Cain*, Justice Viviano's dissent provides a full analysis of the word "juror," including 13 pages discussing the history, definition, and application of the term. Justice Viviano's recitation was

adopted by the majority when it held that "[t]he dissent is correct that '[f]or as long as the institution we know as 'trial by jury' has existed, juries have been sworn.'" *Id*, at 161 fn. 6. Thus, on this legal point, the Court was unanimous. The only point the justices of the Supreme Court disagreed upon was the form and method through which jurors are sworn. Thus, the Supreme Court unanimously held that for someone to be a juror, that person must be sworn.

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

Finally, the majority in *Cain* held that "one of the primary purposes of the oath**—to impart to the members of the jury their duties as jurors**" was fulfilled. *Id*. at 122 (emphasis added). The Supreme Court's holding clearly states that it is the oath which bestows the duties upon the jurors and begins their service. Therefore, no person holds the status of being a juror in a case until she has been sworn and her duties have been bestowed upon her. Again, not a single person ever took an oath to actually become a juror in the *Yoder* case, thus, no jurors existed in that case. It is impossible, therefore, for anyone to have tampered with a juror in the *Yoder* case.

Inexplicably, even after Mr. Wood provided the lower courts with the *Cain* case and other current case law, both lower courts refused to give any reason or analysis as to why *Cain* did not

apply.[2] The lower courts erred by defining the word "juror" outside the meaning provided in Michigan Supreme Court precedent.

Similarly, in *Jochen v County of Saginaw,* 363 Mich 648; 110 NW2d 780 (1961), the Michigan Supreme Court examined whether the Plaintiff, who had merely been summoned to court, was entitled to workers' compensation as a juror. In order to determine if she was eligible, the Court had to decide whether Plaintiff was a "juror" at the time of her accident. The Supreme Court found that despite being *inside* of the courthouse on the day she was summoned to serve as a potential juror, she was not a juror at the time of her injury. *Id.* at 650. The reason for this was because she had not yet been accepted by the court to serve as a juror. This analysis comports with the recent holding in *Cain,* which indicates that a person is not a juror until accepted and sworn in as a member of a jury for the trial of a specific case.

Consider the following scenario. Mr. Smith is on his way to potentially serve as a juror and is handed a flier on the public sidewalk in front of the courthouse. Once Mr. Smith is inside the courthouse, but before he is sworn in as a juror, he slips and breaks his hip. According to the lower courts' rulings on this issue, Mr. Smith is a juror when he is handed the flier; but the Michigan Supreme Court holds he is not yet a juror at that time or even later when he breaks his hip inside the courthouse. The lower courts cannot have it both ways. This Honorable Court must correct the lower courts' erroneous rulings.

The lower courts further committed reversible error by not giving the word "juror" its plain and ordinary meaning according to Michigan precedent. The Michigan Supreme Court held in *People v Reeves*, 448 Mich 1, 13; 528 NW2d 160 (1995) (emphasis added):

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

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

The Supreme Court further held in *People v Monaco*, 474 Mich 48, 55; 710 NW2d 46 (2006):

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

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

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

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

The Circuit Court erred by utilizing the 10th Edition (2014) of Black's Law Dictionary to justify its holding (Exhibit A, pg. 4). However, the Jury Tampering statute was originally passed in 1955 by the Legislature, well before Black's Law Dictionary had changed and expanded its definition of the word "juror." The United States Supreme Court held:

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

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

The lower courts should have exercised restraint before infringing on the rights of citizens like Mr. Wood. The lower courts' ruling that someone who might become a juror is the same as an actual juror, for purposes of this penal statute, plainly violates this principle. Again, the Michigan Supreme Court stated that "a jury is not a jury until it is sworn." *Cain*, 498 Mich at 139.

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

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

MCR 6.412(B) (emphasis added) states:

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

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

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

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

The court rule, jury instruction, the Trial Judge's statement, and the actual transcript in this case clearly indicate that people who have merely been summoned to court are only "prospective jurors." It is not until a person is selected, empaneled, and sworn that the status of "juror" is bestowed. There is no crime in Michigan for "prospective juror tampering." Thus, Mr. Wood committed no crime. Moreover, the jury instructions, court rules, Black's Law Dictionary (4th Edition), and the holdings in *Cain* and *Jochen* are all consistent that a person is not a juror until she is selected and sworn.

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

The lower courts completely failed to properly justify such a redefinition of this dispositive statutory term, especially in light of the controlling precedent in *Cain* and *Jochen*. Because it is uncontroverted that no one was ever sworn in as a juror on the day in question, the proper definition of the word "juror" necessitates the reversal of Mr. Wood's conviction as a matter of law.

B. MCL 750.120 Provides Further Support That Mr. Wood's Definition of "Juror" is Correct.

The juror bribery statute, immediately preceding the jury tampering statute, demonstrates Mr. Wood's definition of "juror" is correct. The lower courts committed reversible error by failing to acknowledge, respond, or even attempt to refute this argument in their rulings. MCL 750.120 states:

> Juror, etc., accepting bribe—**Any person summoned as a juror** or chosen or appointed . . . who shall corruptly receive any gift or gratuity whatever, from a party

> to any suit, cause, or proceeding, **for the trial or decision of which such juror shall have been summoned** . . . shall be guilty of a felony.

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

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

The legislature is presumed to know what it is doing when it passes laws. "It is a well-established principle of statutory construction that the Legislature is presumed to act with knowledge of statutory interpretations[.]" *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991) The legislature added section 120a, immediately following section 120, and specifically used the language, "juror in any case." If the legislature truly intended for jury tampering to include every person who has been summoned, it would have used the same language from the immediately preceding statute. If the legislature intended MCL 750.120 and MCL 750.120a to mean the same thing, why did it use different language? The answer is obvious; it is because the legislature did not intend to include persons who had merely been summoned as potential jurors in MCL 750.120a.

Binding precedent from the Supreme Court of the United States justifies Mr. Wood's position:

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

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

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

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

In this case, the Michigan Legislature specifically included the qualifying phrase "any person summoned as" in MCL 750.120 but excluded such language from MCL 750.120a. As the Supreme Court has held, it is presumed that the legislature acted intentionally and purposefully in excluding such language from the jury tampering statute and that a negative inference should be drawn from such an exclusion. In other words, the Circuit Court erred by holding that two adjacent sections of the code mean the exact same thing when the legislature used explicit and different language. This is clear and obvious error. As much as the lower courts may prefer that the jury tampering statute include persons merely summoned, it is the role of the legislature to make such a change, not the judiciary.

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

The lower courts' rulings violate a cardinal rule of statutory construction.

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

Duffy v Michigan Dept. of Natural Resources, 490 Mich 198, 215; 805 NW2d 399 (2011) (internal citations omitted).

The lower courts' rulings rendered part of MCL 750.120 redundant, surplusage, nugatory, and completely unnecessary. The lower courts should have applied the familiar principles of statutory construction:

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

Adanalic v Harco Nat'l Ins Co, 309 Mich App 173, 179-180; 870 NW2d 731 (2015) (internal citations omitted) (emphasis added). The Michigan Supreme Court has even more specifically held that two consecutive statutes regarding the same subject matter should be read together.

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

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

There is no dispute that the lower courts erred by failing to read MCL 750.120 and MCL 750.120a together. It is obvious that the legislature intended the juror bribery statute (MCL

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

Again, it is worth noting that no lower court has yet to acknowledge, address, or respond to any of Mr. Wood's arguments regarding his analysis of MCL 750.120 and MCL 750.120a. Instead of addressing these serious concerns, the lower courts ignored them. However, what is clear is that the legislature did not intend the word "juror" to include every person merely summoned. Again, if that was the legislature's true intent, it would have used the same language in both statutes. It did not. Therefore, Mr. Wood's conviction must be reversed and the case dismissed.

C. The Lower Courts Misapplied the Elements of Jury Tampering.

The State has the responsibility of proving, beyond a reasonable doubt, each of the elements of the crime before a defendant may be found guilty. No crime exists unless all of its elements are proven. Based upon *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998), the prosecution bears the burden of proving all of the elements of the crime, including that Mr. Wood attempted to influence "jurors in the case of *People v Yoder*." No "jurors in the case of *People v Yoder*" ever existed. Indeed, because the *Yoder* trial never occurred, there were no "jurors in the case of *People v Yoder*" at the time Mr. Wood exercised his Constitutionally protected right to disseminate the political pamphlets at issue on the public sidewalk to those individuals who chose to take and read them. Nor did anyone who received a pamphlet from Mr. Wood ever sit as

part of a jury in any case at any point in the future.[3] Again, it is impossible to influence "jurors in the case of *People v Yoder*" when no "jurors in the case of *People v Yoder*" ever existed.

Even if this Court were to accept the lower courts' definition of the word "juror" to mean any person summoned, Mr. Wood's conviction still must be dismissed. The element did not merely state that Mr. Wood had to improperly influence a juror, it stated that Mr. Wood had to improperly influence "jurors in the case of *People v Yoder*." Thus, it is not enough that Jennifer Johnson and Theresa DeVries were jurors (according to the lower courts), they also must have been jurors "**in the case of *People v Yoder***."

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

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

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

See Exhibit F. Even the proposed jury instruction acknowledged that the juror must have "sat" in the case. Thus, the juror must have been more than merely summoned. This is consistent with both Mr. Wood's definition of the word "juror" and his claim that the juror must actually be sitting in the *Yoder* case. Further, the jury instruction template is completely incompatible with the lower

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

courts' interpretation of the statute. If there had been two trials scheduled that day, but neither of them occurred, it would be impossible to determine in which of the two cases, if any, Jennifer Johnson sat. This reveals the lower courts' unjustified belief that merely receiving a summons in the mail determines in what case a potential juror will sit, which is a necessary element of the crime.

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

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

(Pre-Trial Tr., pg. 7). The trial court gave no reasoning, analysis, or discussion and summarily denied Mr. Wood's request (Pre-Trial Tr., pg. 9). Similarly, the Circuit Court gave no reasoning, analysis, or discussion as to why the District Court was correct on this point. This was also reversible error.

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

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

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

Further, the lower courts prohibited Mr. Wood from making any argument to the jury that the *Yoder* trial never occurred and therefore there were no "jurors in the case of *People v Yoder*" (Trial Tr., Vol. II(a), pg. 10). In other words, Mr. Wood was prohibited from arguing an element of the offense to the jury. Inexplicably, the trial court held that Mr. Wood arguing the actual language of the elements would be the same as adding an extra element that was not required for a conviction (Trial Tr., Vol. II(a), pg. 10). Not only did the trial court use improper elements for the crime, it ruled that Mr. Wood could not argue the actual words of the trial court's own erroneous elements to the jury (Trial Tr., Vol II(a), pg. 10).

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

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

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

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

A. The First Amendment Protects Mr. Wood's Right to Distribute Brochures on a Public Sidewalk.

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

The First Amendment to the United States Constitution protects citizens against government action substantially interfering with freedom of speech or assembly. US Const, Am 1. The United States Supreme Court currently holds that this limit on the exercise of government power applies to action by state entities. *Cantwell v Connecticut*, 310 US 296 (1940). Moreover, our state Constitution provides similar protection in Article I, Section 6:

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

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

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

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

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

Where the government regulates expressive activity by means of a criminal sanction, the government appropriately bears the burden of proving that its actions pass constitutional muster. *Perry Ed Assn v Perry Local Ed Assn*, 460 US 37, 45-46 (1983). The government's burden to produce evidence is not satisfied by mere speculation or conjecture. Instead, it must offer evidence establishing that the problem it identifies is real and that the speech restriction will alleviate that problem to a material degree *without* unconstitutionally restricting protected First Amendment activity. *Edenfield v Fane*, 507 US 761, 770-771 (1993); see also *United States v Playboy Entm't*

Group, 529 US 803 (2000). "First Amendment standards … 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Citizens United v Federal Election Comm'n*, 130 SCt 876, 891 (2010) (quoting *Federal Election Comm'n v Wisconsin Right To Life, Inc*, 551 US 449, 469 (2007) (opinion of Roberts, C.J.)).

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

Mr. Wood was sharing information on the history, authority, and power of juries, a topic of political, social, and public concern. See, e.g., *Wood v Georgia*, 370 US 375 (1962) (holding that a letter distributed to grand jury members was speech on public issues); *Bridges v State of California*, 314 US 252 (1941) (holding that the First Amendment protects out-of-court publications pertaining to a pending case just as much as it protects other speech on issues of public concern). Further, neither Mr. Wood's general awareness of *People v Yoder*, nor his previous presence in the courtroom at a pre-trial hearing, negate his First Amendment rights.

Not only is the content of Mr. Wood's speech deserving of special protection, but restrictions on the method through which he delivered his message also historically require the

highest scrutiny possible in order to protect our First Amendment rights. Indeed, the United States Supreme Court has stated, "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment," *Schenck v Pro-Choice Network*, 519 US 357, 377 (1997), and that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." *Meyer v Grant*, 486 US 414, 424 (1988). When the government imposes restrictions on "these modes of communication, it imposes an especially significant First Amendment burden." *McCullen*, 134 SCt at 2536.

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

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

> "public way[s]" and "sidewalk[s]." …. **occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate.** *United States v Grace*, 461 U.S. 171, 180, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). **These places--which we have labeled "traditional public fora" --" 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions**.'" *Pleasant Grove City v Summum*, 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (quoting *Perry Ed. Assn. v Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

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

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

B. The State's Action was Content-Based.

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

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

- He was concerned that it stated that jurors should vote according to their conscience (Trial Tr., Vol. I, pg. 293).
- He read the pamphlet and thought "this is not supposed to be happening" (Trial Tr., Vol. I, pg. 276).
- He was concerned that it stated that judges only rarely fully inform jurors of their rights and that jurors have the right to judge the law itself (Trial Tr., Vol. I, pg. 293).
- He was concerned that the content in the brochure conflicted with Michigan's jury instructions and oath (Trial Tr., Vol. I, pg. 294).
- He was concerned because it encouraged jurors to consider whether the law was being justly applied (Trial Tr., Vol. I, pg. 295).

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

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

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

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

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

Brandenburg v Ohio, 395 US 444, 449 (1969) (internal citations omitted) (emphasis added).

Thus, even though the State disagrees with Mr. Wood's criticism and interpretation of the law regarding the authority of juries, it has no power to silence his speech. "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderations." *Baumgartner v United States*, 322 US 665, 673-674 (1944).

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

The United States Court of Appeals for the Sixth Circuit recently issued an *en banc* decision upholding speech in a public forum in the case of *Bible Believers v Wayne County*, 805

F3d 228 (6th Cir 2015). In that case, the Court reviewed allegedly offensive speech on another Michigan public sidewalk. The Court cogently held that "[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Id*. at 243. The Court held that **"[w]hen confronted by offensive, thoughtless, or baseless speech that we believe to be untrue**, **the 'answer is [always] more speech**.'**"** *Id*. (emphasis added).

> Finally, in reference to speech being unlawful, the Court held that:
>
> Because **"[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it**," speech that fails to specifically advocate for listeners to take "any action" cannot constitute incitement.

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

The Trial court cited *nothing* in support of its opinion that Mr. Wood's conduct was not protected by the First Amendment (Trial Tr., Vol. II(a), pgs. 39-41). In addition, the Circuit Court failed to apply the proper First Amendment content-based analysis (Exhibit A, pg. 3). The Circuit Court's entire content-based analysis irrelevantly revolved around the interaction between Mr. Wood and the potential jurors walking on the sidewalk that day. However, such an analysis is highly inapt because a proper content-based analysis must examine the State's conduct and action taken against Mr. Wood, not solely what he said to people on the public sidewalk that day. When determining whether the State's action is unconstitutional, it seems rather obvious that it is the State's action that must be analyzed. See, e.g. *Texas v Johnson, supra; Reed v Town of Gilbert, Ariz*, 135 S Ct 2218 (2015). However, the lower courts failed to conduct such an analysis. Further, the lower courts committed reversible error by completely ignoring the plethora of evidence of the State's content-based actions which deprived Mr. Wood of his First Amendment rights.

In this case, it cannot be argued that the FIJA pamphlet encouraged people to commit an unlawful act. Mr. Wood was sharing information that a juror is entitled to vote their conscience; the same instruction every juror receives in every criminal case (MI CJI 3.11(5)). Truly, instructing

a person to follow his conscience could just as much encourage a juror to convict a guilty man who is trying to evade justice as it could encourage a juror to acquit a defendant from an unlawful prosecution.

Even if this Court accepts the proposition that it is an improper act for jurors to violate their juror oath, no law, by statute or at common-law, makes it a crime for a person to follow his or her conscience—even if it means disregarding the juror's oath. In fact, case law clearly affirms that jurors have the power to do so. See *People v St Cyr,* 129 Mich App 471; 341 NW2d 533 (1983).

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

> 1) the regulation must not be content based - unless it can survive strict scrutiny; and
>
> 2) the regulation must be a valid time, place and manner regulation (i.e., among other things, the government's action must leave open an adequate alternative place for the speech).

Heffron v International Soc'y of Krishna Consciousness Inc, 452 US 640, 648 (1981); *Perry Ed Assn v Perry Local Ed Assn,* 460 US 37 (1983).

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

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

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

Perry Ed Assn, 460 US at 45.

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

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

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

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

> And, of course, **the content of this particular pamphlet was one of the considerations** there in that regard simply because it said you can't trust the judges because they're not going to tell you the truth.

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

The Circuit Court erred by stating that *Outdoor Sys, Inc v City of Clawson*, 262 Mich App 716; 686 NW2d 815 (2004) supports its inaccurate analysis of the State's content-based actions (Exhibit A, pg. 2). The Circuit Court stated:

> Therefore, if the government does not regulate speech based on content, the law is content neutral and will survive constitutional inquiry.

Id. at 722. In other words, the Circuit Court held that any content-neutral law will be constitutional. According to this standard, a city could ban all speech on public sidewalks as long as the ban was "content-neutral." Moreover, the State could ban all speech in public, so long as the ban was "content-neutral" according to this standard. Content neutrality does not function as a silver bullet to the First Amendment. Further, no such holding, statement, quotation, or sentiment exists in the *Outdoor* case. The *Outdoor* case actually states the exact opposite. The Court in *Outdoor* held that the State action was content-neutral, yet it still violated the First Amendment and was struck down. *Id*. at 724. In addition, the *Outdoor* Court explicitly held:

> Nonetheless, even a content neutral restriction on speech must be narrowly tailored to achieve a significant governmental interest, meaning that it "directly advances" the governmental interest and "reaches no further than necessary to accomplish the given objective.

Id. at 723 (internal citations omitted).

The *Outdoor* Court further held that "[g]overnment regulation of expressive activity is content neutral **so long as it is 'justified <u>without reference</u> to the content of the regulated speech**." *Id*. at 722 (emphasis added). This entire case began because Judge Jaklevic saw the brochure Mr. Wood was handing out that day including the speech it contained and worked with his deputy and Prosecutor Theide to make sure Mr. Wood was arrested and charged. Indeed, the primary piece of evidence at the trial submitted by the State was Mr. Wood's brochure, and large portions of the trial were dedicated to its contents.

Instead of justifying Mr. Wood's prosecution without reference to the content of his speech, the State rested its entire case upon such a justification. The Circuit Court clearly erred by misapplying the *Outdoor* case to support an untenable position. In fact, the *Outdoor* case does the opposite, it supports Mr. Wood's position that the State acted unlawfully.

Despite all of the evidence of content-based censorship, the lower courts failed to provide any proper analysis as to whether the State action was content-based (Trial Tr., Vol. II(a), pgs. 39-41). The lower courts' lack of proper First Amendment analysis is very troubling. Instead, the trial court focused on completely irrelevant facts such as where Mr. Wood was located on the public sidewalk or whether he was blocking the sidewalk to determine whether there was a First Amendment violation (Trial Tr., Vol. II(a), pg. 40). The Circuit Court only analyzed Mr. Wood's interaction with other people on the public sidewalk that day, instead of correctly analyzing the State action in this case. The lower courts committed reversible error by not providing any proper First Amendment content-based analysis.

The Circuit Court acknowledged that content-based State action is presumptively unconstitutional (Exhibit A, pg. 2; citing *RAV v St Paul*, 505 US 377; 395 (1992)). The Circuit Court then cited *Reed, supra*, which held:

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

Reed, 135 S Ct at 2226-2227 (emphasis added). Despite the Circuit Court using this direct quote from *Reed*, it incongruently held that because of the function and purpose behind Mr. Wood handing out his brochures (allegedly influencing a potential juror), his speech does not deserve First Amendment protection (Exhibit A, pg. 2). However, a citizen does not forfeit his First Amendment rights merely because the State has alleged a nefarious purpose behind his speech.

The State still must engage in the proper constitutional analysis to determine if the speech is protected. Both lower courts utterly failed to do so.

One of the most glaring errors by the lower courts is that they neither analyzed, nor applied, any constitutional standard (Strict Scrutiny, Intermediate Scrutiny, or even Rational Basis) to the State's conduct. Despite the overabundance of evidence, including the State's own acknowledgment on the record and in open court of the importance of the content of Mr. Wood's speech, the Circuit Court conclusively held that "[t]he pamphlets' content is simply not the issue" and moved on (Exhibit A, pg. 3). Citing constitutional standards for review, and never discussing such standards ever again, does not serve as a proper constitutional analysis. This lack of analysis, in and of itself, is grounds for reversal.

Finally, as outlined above, the silencing of pure speech, either verbal or written, deserves strict scrutiny. Indeed, the distribution of political pamphlets is a textbook example of such speech.[4] However, the lower courts committed reversible error by reclassifying Mr. Wood's speech as mere conduct, concluding that it was not protected, and failing to provide any further analysis. Even if this Court were to agree that Mr. Wood's speech was mere conduct (which Mr. Wood does not concede), it would still require a strict scrutiny analysis because it was conduct that communicates.

Texas v Johnson, *supra*, mandates the reversal of the Circuit Court. In *Johnson*, the Defendant was prosecuted for burning a flag in public. The majority held that the burning of the flag was conduct that communicates and thus required a strict scrutiny analysis. The Court held

[4] Again, few legal principles are more clear than the one stating that "handing out leaflets in the advocacy of a politically controversial viewpoint… is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." *McCullen v Coakley*, 134 SCt 2518, 2536 (2014) (quoting *McIntyre v Ohio Elections Comm'n*, 514 US 334, 347 (1995)).

that the State's action of prosecuting Mr. Johnson did not survive a strict scrutiny analysis and his conviction was reversed. However, Justice Stevens, in his dissent, stated:

> **The content of respondent's message has no relevance whatsoever to the case.** The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. . . . **The case has nothing to do with "disagreeable ideas[.]" It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.**

Johnson, 491 US at 438 (internal citations omitted) (emphasis added). The Circuit Court's analysis is identical to Justice Stevens' dissent.

In this case, the Circuit Court stated:

> Therefore, there seems to be little doubt that appellant willfully attempted to influence people he believed to be, and confirmed, were jurors by handing them his pamphlets. **The pamphlets' content is simply not the issue, only that he intended to give the pamphlets to at least two people whom he believed were jurors.**

Exhibit A, pg. 3 (internal citations omitted) (emphasis added). Both Justice Stevens in his dissent and the Circuit Court here only focused on the alleged intent of the Defendant and the effect on the people who heard the speech. They both believed that such an intent negated the Defendants' First Amendment rights and thus the content of the speech was irrelevant. The United States Supreme Court rejected such a restrictive standard, and this Court must do so as well. The Circuit Court failed to recognize that conduct that communicates is still deserving of First Amendment protections.

The *Johnson* majority held:

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

Johnson, 491 US at 404. The Court acknowledged that, of course spoken and written words were protected, but also held that other forms of speech were protected, such as, wearing black armbands

to protest the military, conducting a "sit-in" to protest an issue, and picketing. Despite the Circuit Court's attempt to recharacterize Mr. Wood's speech as conduct, it is undisputed (and even the Circuit Court recognized) that Mr. Wood was conveying a message regarding jury rights and he was educating anyone he encountered that day. It is clear that Mr. Wood did have a particularized message (information and history about jury rights), and it was also clear that the people who received his brochure would have understood that message. Therefore, Mr. Wood was engaged in conduct that communicates.

The *Johnson* Court further held:

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

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

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

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

necessitates a proper strict scrutiny analysis, an analysis that has yet to be done by any lower court in this case.

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

C. First Amendment Strict Scrutiny Analysis

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

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

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

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

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

Ashcroft v ACLU, 542 US 656, 660 (2004) (internal citations omitted).

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

that a compelling interest to prevent jury tampering bestows upon the State *carte blanche* to use any means necessary.

Moreover, the Circuit Court inaccurately stated that Mr. Wood conceded in his appellate brief that the Jury Tampering statute "does not regulate content of speech in any way" (Exhibit A, pg. 3, fn. 1). Mr. Wood stated in his first appellate brief that the state has a compelling interest to prevent jury tampering, which is only one aspect of one prong of the strict scrutiny analysis. Mr. Wood did not, at any point in time, concede that the jury tampering statute does not regulate the content of speech in any way.

The issue here is not the constitutionality of the jury tampering statute *as it was originally written*; the issue is whether the application of the statute to Mr. Wood's speech was constitutional. Indeed, the Court of Appeals has held:

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

People v Hallak, 310 Mich App 555, 567; 873 NW2d 811 (2015) (overruled on unrelated grounds regarding a sentencing issue).

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

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

Out of all of the issues required in a First Amendment analysis, the only one the District Court addressed was whether the State had a compelling interest to prevent jury tampering. The Circuit Court failed to address either prong of the strict scrutiny analysis, or for that matter, any constitutional test. Instead, as stated above, the Circuit Court mistakenly held that content-neutrality permits all State restrictions on speech. The lower courts analyzed irrelevant facts, provided no proper analysis, and consequently reached the wrong conclusion. Further, the lower courts erred by providing no case law, statute, rule, or any other authority to support their conclusory position that the State had a compelling interest to silence Mr. Wood. At least the District Court acknowledged that Mr. Wood's rights deserved a strict scrutiny analysis by mentioning that the State had a compelling interest (Trial Tr., Vol. II(a), pg. 40). The Circuit Court failed to use any constitutional standard in its analysis.

Even if the government had a compelling interest in ensuring *potential jurors* are not informed of the powers they rightfully and lawfully possess (which we do not concede), the government failed to use the least restrictive means available to accomplish this interest. The First Amendment requires that the government use the least restrictive means possible to further a compelling state interest if it wishes to limit or infringe on a fundamental right, such as freedom of speech. US Const, Am 1; *People v DeJonge*, 442 Mich 266; 501 NW2d 127 (1993).

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

There were many less restrictive options available to Mecosta County if it was truly concerned about pamphlets being distributed to the public near the courthouse. The government

could have, for example, employed a valid time, place, and manner regulation that controlled, not the content of Mr. Wood's speech, but the manner in which Mr. Wood safely manifested it. The county could impose a policy where people may only hand out information at certain times. The county could restrict the distribution of materials on mornings when a potential jury has been summoned. The county could set up a designated protesting/pamphleteering area. The court could utilize curative jury instructions if it were concerned about a specific jury. Indeed, Michigan's jury instructions could be utilized by a court to instruct jurors to not consider any outside information.[5] Again, neither lower court conducted a least restrictive means analysis. Here, no less restrictive means were ever implemented by the State in this case.

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

Most troublesome of all, the lower courts failed to analyze, or even mention, whether any less restrictive means were available or used in this case (Trial Tr., Vol. II(a), pgs. 39-41, Exhibit A). This is reversible error.

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

The Circuit Court held that all that matters is whether the Defendant attempted, or that his purpose was, to influence a juror (Exhibit A, pg. 3). The South Dakota Attorney General made the exact same argument in *State v Springer-Ertl*, 2000 SD 56, 610 NW2d 768 (SD 2000).[6] However, the South Dakota Supreme Court *affirmed* that the Defendant must receive a new trial because of

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

the serious First Amendment implications and *rejected* the South Dakota Attorney General's arguments. *Springer-Ertl*, and its analysis of current United States Supreme Court precedent, supports Mr. Wood's position that his speech is protected by the First Amendment. The *Springer-Ertl* Court held:

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

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

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

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

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

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

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

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

> **balance must be inclined in favor of free speech by *narrowly* construing our statute.**

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

By contrast, the Circuit Court held that Michigan's jury tampering statute should be construed so broadly as to encompass any speech that might tend to influence any person summoned as a potential juror.

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

Id. at 776 (emphasis added).

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

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

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

South Dakota's statute thus specifically covers jurors as well as any person summoned or drawn as a juror. Michigan has no such language in its statute. The lower courts in this case have unconstitutionally rewritten Michigan's jury tampering statute according to what they believed it should prohibit, rather than interpreting it according to the plain language of the statute and current legal precedent. If the lower courts truly believed the jury tampering statute should include

summoned, potential jurors, then it is the role of the legislature to amend the statute, not the judiciary.

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

E. Unconstitutional Overbreadth

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

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

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

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

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

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

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

Rapp, 492 Mich at 73.

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

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

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

A. The Lower Courts' Redefinition of the Jury Tampering Statute is Void for Vagueness.

The Due Process clauses of the United States Constitution and the Michigan Constitution require that the law provide predictability for all citizens. US Const, Am 14; Const 1963, art 1, § 17. An unambiguously drafted criminal statute affords prior notice to the citizenry of conduct proscribed. A fundamental principle of due process, embodied in the right to prior notice, is that a criminal statute is void for vagueness where its prohibitions are not clearly defined. Although citizens may choose to roam between legal and illegal actions, governments of free nations insist

that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly. If a person has to guess at what a criminal statute means, or if the crime is not clearly defined, then this Court must dismiss the charges. See, e.g., *Grayned v City of Rockford*, 408 US 104 (1972).

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

> A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated. For example, in *Kolender v. Lawson*, the Court declared unconstitutional California's loitering law and declared that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. * * *
> In part, the vagueness doctrine is about fairness; it is unjust to punish a person without providing clear notice as to what conduct was prohibited. Vague laws also risk selective prosecution; under vague statutes and ordinances the government can choose who to prosecute based on their views or politics.

Erwin Chemerinsky, *Constitutional Law – Principles and Policies*, 3rd Ed, pgs. 941-942 (citing *Kolender v Lawson*, 461 US 352 (1983).[7]

The Michigan Supreme Court has held:

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

People v Lino, 447 Mich 567, 575-576; 527 NW2d 434 (1994). The United States Supreme Court has further explained the vagueness doctrine:

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

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." **Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.**"

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

First, there was no proper notice to the citizens of the State of Michigan that the distribution of a pamphlet of general information on a public sidewalk to a person who was merely summoned for potential jury duty is a criminal act. When, as here, ambiguous statutory language prevents notice of what constitutes a criminal offense, government authorities can arbitrarily define the criminal offense after the commission of the act. That is exactly what happened to Mr. Wood.

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

The Supreme Court has held that "[w]hen making a vagueness determination, a court must also take into consideration any judicial constructions of the statute." *Lino*, 447 Mich at 575. It is only because the lower courts judicially rewrote the statute that it is now unconstitutionally vague. No statute, case, or any other Michigan authority exists which would had given notice to the

citizenry that the word "juror" included anyone who had simply received a summons in the mail. No ordinary person could have had proper notice of what conduct was illegal, therefore, the lower courts' rulings must be overturned.

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

Third, the lower courts' erroneous interpretation and application of the jury tampering statute impinged on Mr. Wood's First Amendment freedoms (see above for full the First Amendment overbreadth analysis).

Rather than properly address these issues, the Circuit Court improperly relied on *People v Lynch*, 410 Mich 343; 301 NW2d 796 (1981) to support its conclusion. However, *Lynch* specifically states that its analysis is based upon the fact that there were no First Amendment issues in that vagueness case. *Id*. at 352. Thus, *Lynch* is wholly inapplicable for a First Amendment analysis for vagueness. In short, the Circuit Court incorrectly relied upon a non-First Amendment vagueness case to decide a First Amendment vagueness case.

Consider an average citizen analyzing Michigan's two statutes regarding influencing juries, MCL 750.120 and MCL 750.120a. Again, while MCL 750.120 clearly states that it includes "[a]ny person summoned as a juror," MCL 750.120a expressly applies only to a "juror in any

case." A person of ordinary intelligence would look at those two statues and naturally conclude that one covers a person who has been summoned, while the other does not. However, according to the lower courts, a person of ordinary intelligence should be able to look at both statutes, see that only one uses the word "summoned," yet conclude that *both* statutes include people summoned for jury duty. This is nonsensical. No person of ordinary intelligence could possibly look at these statutes and conclude that the one expressly omitting the word "summoned" must include people summoned. Likewise, no person of ordinary intelligence would look at the phrase "juror in any case" and conclude that it meant merely receiving a summons in the mail. Therefore, because of the lower courts' rewriting of the statute, the statute failed to provide proper notice of what conduct was prohibited and the lower courts must be reversed.

Clearly, the lower courts violated Mr. Wood's due process rights by rewriting Michigan's jury tampering statute to be unconstitutionally vague pursuant to all three vagueness doctrines. This cannot stand. The lower courts' rewriting of the statute and Mr. Wood's conviction must be reversed.

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

The constitution guarantees the right to a fair trial, in particular when a citizen's liberty is at stake. The United States Supreme Court has held that "[f]ew interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors[.]" *Gentile v State Bar of Nevada*, 501 US 1030, 1031 (1991). The trial court failed to provide a fair trial for Mr. Wood. The first issue which deprived Mr. Wood of a fair trial was the trial court's ruling that only the Prosecutor was permitted to argue the elements of the crime, i.e. whether or not a trial occurred and whether or not there were actual jurors in the *Yoder* case (Trial Tr., Vol. II(a), pg. 10; Trial Tr., Vol II(b), pgs. 99-100) (for full analysis on this issue, please see above, pgs. 18-19).

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

The first example of bias was how Magistrate Lyons was a witness to the crime, confronted Mr. Wood outside the courthouse, yet he also improperly presided over Mr. Wood's arraignment on that same day. Yet, the trial court improperly prohibited Mr. Wood from delving into these issues. The second example of bias was how Magistrate Lyons set an unconstitutionally high bond of $150,000.00 (10%) for Mr. Wood two days before Thanksgiving, for a married man with seven children who owned a business in the community and was absolutely no flight risk whatsoever. The third example of bias was that Magistrate Lyons refused to appoint Mr. Wood an attorney at the arraignment.

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

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

Hayes v Coleman, 338 Mich 371, 381; 61 NW2d 634 (1953) (emphasis added). Further, contrary to the Prosecutor's objection at trial, the "interest or bias of a witness has never been regarded as

irrelevant." *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). The trial court was presented with the above cases during the trial but completely ignored them (Trial Tr., Vol. I, pgs. 143-144). Similarly, the Circuit Court ignored these issues as well. In effect, the trial court constructively prevented Mr. Wood from cross-examining Magistrate Lyons because he could not go into the issues which would demonstrate his bias or lack of credibility. In addition, rather than discuss or analyze any of these issues, the Circuit Court merely stated that Mr. Wood did receive a fair trial and was represented by counsel. The lower courts' rulings violated Mr. Wood's constitutional rights and prevented him from receiving a fair trial. Therefore, Mr. Wood's conviction must be overturned.

CONCLUSION

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

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

Respectfully submitted,

DATED: February 23, 2018.

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

PROOF OF SERVICE

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

DATED: February 23, 2018.

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