STATE OF MICHIGAN

IN THE MECOSTA COUNTY 77th DISTRICT COURT

PEOPLE OF THE STATE OF MICHIGAN,	**REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**
Plaintiff,	
-vs-	**FILE NO.: 15-45978-FY**
KEITH ERIC WOOD,	**HON. KIMBERLY L. BOOHER**
Defendant.	

/

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REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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The government begins its brief relying on a quote from a concurring opinion in a case[1] applying a standard all but abandoned almost fifty years ago by the United States Supreme Court.[2] It then proceeds to engage in a jurisdictional tour of the United States by citing cases from Alaska, Kentucky, Georgia, North Carolina, South Carolina, Connecticut (a trial court decision), South Dakota, and other non-U.S. Supreme Court cases for interpretation of Michigan statutory and common law. Needless to say, the actual statutes and binding precedent in Michigan do not support its position.

There is not a single published or non-published case in Michigan where a defendant was charged with, or convicted of, statutory jury tampering or common law obstruction of justice for allegedly tampering with a jury pool. To be sure, if there was such a case, Prosecutor Thiede almost certainly would have cited it. Instead, he claims to have found a new, never-before-discovered crime that was unknown to all prosecutors and courts before him. Despite his personal opinion that Mr. Wood committed a crime, "[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 N.W.2d 288 (1991).

I. PROSECUTOR THIEDE MISREPRESENTS THE CURRENT FIRST AMENDMENT STANDARD.

Prosecutor Thiede's brief contains a plethora of cases that are completely irrelevant to the First Amendment analysis required for this case. For example, the prosecutor cites cases regarding the Hatch Act (an irrelevant federal statute relating to the free speech rights of federal employees to work for political campaigns), fighting words (there has been no allegation that fighting words are an issue in this case), and finally a civil case about a NASA federal employee who was demoted.

[1] *Pennekamp v. State of Florida*, 328 U.S. 331 (1946)
[2] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

Instead of addressing the arguments Mr. Wood raised in his motion to dismiss, Prosecutor Thiede erects the straw man argument that Mr. Wood believes free speech protection is absolute (which Mr. Wood never claims), then cites cases that the protection is not absolute (a proposition which no one disputes), and then concludes that he possesses the power to arrest people for handing out pamphlets on a public sidewalk because said free speech protection is not absolute. In short, his argument is that since free speech protection is not absolute, Mr. Wood cannot lawfully hand out political information via educational pamphlets on a public sidewalk. To say that the prosecutor's brief lacks contemporary constitutional analysis of Mr. Wood's rights would be a massive understatement. Indeed, the prosecutor completely ignores the required analysis when fundamental First Amendment constitutional rights are at stake.

In order for Prosecutor Thiede to prevail, he must prove that Mr. Wood's speech falls within one of the very narrow exceptions of unprotected speech. Those exceptions include, for example, fighting words, obscene speech, and incitement of criminal activity. See e.g., *Roth v. United States*, 354 U.S. 476, 484 (1957). Although it is not entirely clear upon which exception the prosecutor relies, due to the numerous irrelevant cases he cites, he appears to contend that Mr. Wood's speech constitutes incitement of illegal activity.

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

It is important to note that *Schenck* took place in an era when the government threw people in jail for simply using speech to oppose the government. Further, when the Court decided *Schenck,*

the First Amendment did not yet apply to the states, state laws, or prosecutors.[3] After *Schenck* was decided, Congress passed the Sedition Act of 1918 which made it a crime to "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" intended to cause contempt or scorn for the form of the United States government, the constitution, or the flag. Relying on *Schenck*, the Supreme Court upheld the Sedition Act as constitutional and that it did not violate the First Amendment. *Abrams v. United States*, 250 U.S. 616, 618-619 (1919). Needless to say, times have changed since that repressive era. Despite the prosecutor's desire to use *Schenck* today to prosecute citizens who are allegedly "disloyal" to Mecosta County, *Schenck* is no longer the standard.

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

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

Professor Erwin Chemerinsky[4] provides an apt summary of the changes in First Amendment jurisprudence in his renowned treatise, *Constitutional Law – Principles and Policies*, 3rd Ed., p. 1000:

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

[4] 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 and amicus briefs. See, e.g. *American*

> *Brandenburg, Hess*, and *NAACP* indicate that the Court has redefined the test for incitement in much more speech protective terms. Under this law, an individual can be convicted for incitement only if it is proved that there was a likelihood of imminent illegal conduct and if the speech was directed at causing imminent illegal conduct. Yet, perhaps the major difference between these cases and the earlier decisions like *Schenck, Gitlow, Whitney*, and *Dennis* is the social climate. The prior cases all were issued in tense times where there were strong pressures to suppress speech.

To further illustrate the point that Prosecutor Thiede is relying upon an old, abandoned standard, one only needs to review his argument and total reliance on *Turney v. Pugh*, 400 F.3d 1197 (CA9 2005). He cites the following from *Turney*:

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

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

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

The prosecutor mischaracterizes Mr. Wood's protected political speech as unprotected incitement of illegal activity. He then uses this mischaracterization as the basis to justify his censorship and criminalization of Mr. Wood's protected speech. Unprotected incitement, however, involves situations where a speaker directs a message at followers with the specific intent to cause them to engage in imminent lawless action against others. *Brandenburg*, supra. It is fundamentally speech that moves the audience beyond mere agreement with the speaker's stated principles to imminent lawless action in support of those principles. The *Brandenburg* Court established the current standard for incitement:

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).

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation **except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.**

Id. at 447 (emphasis added). The prosecutor's analysis of the Supreme Court's clear and present danger test in *Schenck* inaccurately characterizes the current binding Supreme Court jurisprudence found in *Brandenburg*.

Under current constitutional jurisprudence, for speech to be unprotected incitement the government must show the speech was: 1) directed to inciting or producing imminent lawless action, and 2) likely to incite or produce such action. Thus, to constitute incitement under *Brandenburg*, the speaker must not only intend lawlessness to result, but must also directly incite and attempt to immediately induce such lawless action.

Mr. Wood's peaceful political expression on the public sidewalk here cannot constitute incitement (i.e., unprotected expression) as his words were not directed toward followers with intent to incite imminent lawless action. Because Mr. Wood's words here were instead directed at others with the intent to educate on an important political question, it is protected speech and not unprotected incitement. Nothing contained in the pamphlet calls for any lawless action. The prosecutor even admitted in his brief that if the pamphlet was published in a newspaper, it would be protected speech. Again, the prosecutor can point to no criminal law which the pamphlet was encouraging people to violate. No matter how much Prosecutor Thiede may personally disagree, he cannot prosecute anyone for following their conscience, disregarding their juror oath, or hanging a jury. Further, he can point to no case where a juror has been prosecuted for allegedly violating the juror oath, following his or her conscience, or hanging a jury. Mr. Wood thus incited no "imminent illegal conduct" that might suspend his First Amendment rights, and his speech clearly falls under the protection of the First Amendment.

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

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

Clearly, there was ample time for further discussion and education by the court to remedy any potential issues it perceived regarding the contents of the brochure Mr. Wood was distributing. As stated in our initial brief, courts may give curative jury instructions if there are any lingering concerns. Contrary to the prosecutor's opinion that once people are handed this brochure they become mind-numbed robots just waiting to acquit, the answer is more speech, more discussion, and more education. Mr. Wood's speech was neither imminent nor unlawful.

Prosecutor Thiede has failed to provide analysis or response to the following critical First Amendment issues Mr. Wood raised in his first brief:

- Mr. Wood's speech was of public concern and thus receives the highest level of protection.
- Mr. Wood's speech was done in a traditional public forum, a public sidewalk.
- The government has no compelling interest to prohibit Mr. Wood handing out brochures.
- The government did not use the least restrictive means.
- The government's censorship was not subject matter neutral.
- The government's censorship was not viewpoint neutral.
- The government did not utilize any time, place, or manner restrictions.

It is axiomatic that legal briefs should identify the issue, state the rule, and then conduct an analysis applying the rule to the facts to reach a conclusion. However, in this case, Prosecutor Thiede misses the issue, cites an old rule, provides no proper analysis, and yet demands that this Court accept his conclusion regarding First Amendment jurisprudence. Apparently, Prosecutor

Thiede believes that citing a one-hundred-year-old, abandoned First Amendment standard and in inapposite cases from Alaska and other states is enough.

A perfect example of the prosecutor's lack of constitutional analysis is illustrated by his inapt comparison of a bank robber passing a teller a note to the speech of Mr. Wood. Such an example demonstrates a complete lack of understanding of constitutional free speech issues. Initially, the First Amendment protects against government suppression of free speech in the public arena. Since almost every bank in America is privately owned, there are very few First Amendment protections inside of a bank. No one has a First Amendment right to engage in free speech on someone else's private property in order to commit a crime. Next, even if the First Amendment did somehow apply, the type of speech a bank robber engages in is not of public interest and certainly could not be called political speech which would give it greater First Amendment protection. Finally, a bank robber's threat is very much likely to produce imminent illegal activity, whereas handing out educational pamphlets on a public sidewalk is not. There is no rational, credible comparison between the threat of violence by a bank robber on private property and the peaceful distribution of political information via an educational pamphlet on a public sidewalk.

The prosecutor cites *Honey v. Goodman*, 432 F.2d 333 (CA6 1970) in support of his unconstitutional censorship. Contrary to his claim that this case is controlling, a federal court case interpreting Kentucky common law is not binding on any Michigan court. In *Goodman*, the Defendant was charged with common law embracery. An out-of-state decision from 46 years ago about embracery is completely irrelevant to this case because embracery is no longer a common law obstruction of justice crime in Michigan. As discussed in our principal brief, the Michigan Supreme Court clearly stated in *People v. Davis*, 408 Mich. 255 (1980) that because there is a jury tampering statute (MCL 750.120a) in Michigan, the common law crime of obstruction of justice can no longer be used for jury tampering. *Id.* at 275 and fn. 15. **Nowhere in the prosecutor's**

response does he ever address, differentiate, or give any explanation whatsoever as to why this controlling Michigan Supreme Court precedent is not applicable to this case. Moreover, *Davis* is never even mentioned in his brief. Instead, he cites irrelevant cases from North Carolina, South Carolina, and a Connecticut county trial court (equivalent to a Michigan Circuit Court). Clearly, controlling Michigan precedent holds that jury tampering cannot be charged as embracery in Michigan under the obstruction of justice statute.

Further, the Kentucky legislature codified jury tampering as a crime four years after *Goodman* (KRS 524.090 and KRS 524.010). Unlike Michigan, the Kentucky legislature defined "juror" in its criminal statute and decided to explicitly include "prospective juror" in its definition. KRS 524.010(2). Again, there is no such definition in Michigan law. As a result, *Goodman's* ruling on common law embracery is not even current law in Kentucky any more, let alone applicable to Michigan. This federal court decision interpreting another state's common law crime, since abrogated by statute, is completely irrelevant. The charges in this case violated Mr. Wood's First Amendment rights and must be dismissed.

II. PROSECUTOR THIEDE MISREPRESENTS THE *TURNEY* CASE.

It is illustrative of the severe weakness of the prosecutor's position that the "most authoritative case" he can cite for interpretation of Michigan law is an Alaskan case interpreting that state's specific jury tampering statute. *Turney*, supra. After his four-page analysis of the case, Prosecutor Thiede states "[t]here is no difference between the facts and law in *Turney* from the facts and law in the instant case." He further claims that *Turney* "mirrors" this case. It is extremely misleading for him to make such a claim, and it is demonstrably false.

First, Mr. Turney was engaging with prospective jurors inside the courthouse. *Id.* at 1198. However, in this case, it is undisputed that Mr. Wood only distributed pamphlets outside, on the public sidewalk. He never distributed anything inside the courthouse. The constitutional

implications and protections are enormously different for free speech inside of a courthouse, versus free speech on a public sidewalk. As discussed in our principal brief, there is a long history of protecting free speech on a public sidewalk, however, there is far less protection of free speech inside of a courthouse. In fact, the inside of a courthouse is one of the most regulated places for free speech and is not considered a traditional public forum for speech.

Second, the jurors spoken to by Mr. Turney had name-badges on their clothing, clearly stating they were jurors. *Id.* Here, the people Mr. Wood interacted with had not even been inside the courthouse yet, nor was there any visible indication who on the sidewalk that day was a prospective juror.

Third, some of the prospective jurors Mr. Turney spoke to inside the courthouse were eventually empaneled and sworn in to serve on a jury. *Id.* In this case, no jury was ever sworn in and Mr. Wood's pamphlet had no effect on any case.

The prosecutor claims Mr. Turney's and Mr. Wood's cases are completely, factually identical, yet that is simply not true. He also erroneously states that the law in Michigan and Alaska is identical regarding jury tampering. However, he conveniently fails to provide the specific Alaskan statutory citation or language. The reason the statute is not included in his brief is obvious; the two statutes are not close to being identical. MCL 750.120a(1) states:

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

Alaska's statute 11.56.590(a) states:

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

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

> A "juror" for purposes of this statute is "a member of an impaneled jury **or a person who has been drawn or summoned to attend as a prospective juror**." *Id.* § 11.56.900(3) (emphasis added).

Most notably, "juror" is not defined in the criminal statutory language in Michigan. There is no statute in Michigan, nor any jury tampering case in Michigan, that defines "juror" to include "prospective juror." Further, Alaska's statute has a second way a person can commit jury tampering by "otherwise" affecting the outcome of the official proceeding, a provision which is nowhere to be found in Michigan's jury tampering law. Finally, the prosecutor's brief states that "[t]he Alaska jury tampering statute was construed to apply to all persons impaneled, drawn or summoned for jury service." This is a blatant attempt to mislead this Court into believing that the Alaskan court had to "construe" or interpret its own jury tampering statute to include prospective jurors. He uses this in an attempt to entice this Court to "construe" Michigan's statute to include prospective jurors as well. The truth is that there was no "construing" of the word "juror" required in *Turney* because it was already clearly defined by the Alaskan legislature. The *Turney* court simply recited the statutory language; it construed or interpreted nothing.

Perhaps the most egregious misrepresentation the prosecutor made to this Court regarding *Turney* is when he stated that communications outside the rules of procedure are "presumptively prejudicial." Yet again, Prosecutor Thiede fails to provide the full quote from the case. The court in *Turney* actually held:

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

Id. at 1202 (citing *Remmer v. United States*, 347 U.S. 227, 229 (1954) (emphasis added).

Clearly, the complete Supreme Court quote in *Turney* was referring to *private communications* to jurors *during a trial* about a case *pending before that jury*. Mr. Wood did not privately speak to any juror during a trial and he did not privately speak about any matter currently pending before a jury. He only provided an informational pamphlet to people on a public sidewalk.

For Prosecutor Thiede to represent to this Court that there is "no difference" between Alaska's and Michigan's laws, and that they "mirror" each other, is clearly not true. It is revealing that Prosecutor Thiede has resorted to distorting both the facts and the law of a non-binding out-of-state case in order to present his "most authoritative case."

III. "JUROR" DOES NOT INCLUDE "PROSPECTIVE JUROR."

The prosecutor gives a lengthy explanation of why this Court should adopt his chain of assumptions, each one predicated upon the validity of the one before. First, Prosecutor Thiede concedes that "juror" is not defined anywhere in Michigan's statutory law to include prospective jurors. To remedy this obvious obstacle to silencing Mr. Wood, the prosecutor refers to the Revised Judicature Act (RJA) (MCL 600.101 et. seq.) which is not a part of Michigan's Penal Code (MCL 750.1 et. seq.), which is simply a list of Michigan's codified crimes. His next problem is that the RJA does not provide any definition of "juror" either. To get around this problem, he assumes that the word "jurors" in the RJA includes "prospective jurors." Next, he then assumes that the legislature intended that the word "juror," as used in the RJA, should mean exactly the same thing as the word "juror" in the context of the criminal jury tampering statute.[5] Fortunately, courts do not allow such tenuous linking of assumptions when determining the definition of a word in a criminal statute that is not defined by the legislature.

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

It is noteworthy that throughout the prosecutor's thorough explanation of his assumptions regarding the RJA he never cites a case to support his position. Indeed, he does not cite a single case in this entire section of his brief. Again, the prosecutor has apparently found a never-before-discovered method to prosecute alleged jury tampering. Thankfully, however, Michigan Courts have developed a method to determine the definition of words not defined by a criminal statute. The Michigan Supreme Court has held:

> 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. *People v. Reese*, 363 Mich. 329, 335; 109 N.W.2d 868 (1961).

People v. Reeves, 448 Mich. 1, 13; 528 N.W.2d 160 (1995).

The Supreme Court also held:

> 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. MCL 8.3a, *People v. Libbett*, 251 Mich.App. 353, 365-366; 650 N.W.2d 407 (2002).

People v. Monaco, 474 Mich. 48, 55; 710 N.W.2d 46 (2006).

Because the word "juror" is not defined in the penal code, this Court must give the word its plain and ordinary meaning. The most common way for a court to determine the plain and ordinary meaning of a word is to look at Black's Law Dictionary. In *People v. Lawrence*, 246 Mich. App. 260, 265; 632 N.W.2d 156 (2001), the Court held:

> The phrase "under any criminal process" is not defined in the statute. Where the Legislature has not expressly defined the terms used in a statute, a court may turn to dictionary definitions for aid in construing the terms in accordance with their ordinary and generally accepted meanings. *People v. Morey*, 461 Mich. 325, 330, 603 N.W.2d 250 (1999). The term "process" is defined in Black's Law Dictionary (7th ed), p 1222. . . .

A cursory search of Michigan case law reveals that Black's Law Dictionary has been cited or mentioned over 1,700 times. As discussed in our principal brief, "Juror" is defined in Black's Law Dictionary as a "member of a jury" (Black's Law Dictionary, 5th Ed.). "Jury" is defined as

"a certain number of men and women selected according to law, **and sworn** to inquire of certain matters of fact and declare the truth upon evidence to be laid before them." *Id.* (emphasis added). That is the common sense use of the word, and thus the one this Court must apply.

Again, there were no jurors sworn in on the date in question, therefore it is impossible for Mr. Wood to have committed jury tampering. This may explain why Prosecutor Thiede has no case law to support his position—because other lower courts have followed the law and used the plain and ordinary meaning of "juror," which does not include a prospective juror.

The prosecutor next argues that because the jury tampering statute does not prohibit "deliberating jurors" from attempting to influence each other, this somehow means that jury tampering includes allegations of influencing prospective jurors. MCL 750.120a(3). This is absurd. Jury deliberation is only done at the end of a trial by an existing, empaneled jury after the close of proofs. It is clear that the legislature simply wanted to make sure that no juror would be prosecuted for deliberating at the end of the trial. Despite the prosecutor's arguments, however, the legislature knew what it was doing when it wrote the criminal jury tampering statute and it explicitly did not intend to include prospective jurors. One only needs to look at the statute immediately preceding the jury tampering statute. MCL 750.120 (emphasis added) states:

> Juror, etc., accepting bribe—**Any person summoned as a juror** or chosen or appointed as an appraiser, receiver, trustee, administrator, executor, commissioner, auditor, arbitrator or referee who shall corruptly take anything to give his verdict, award, or report, or 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, or for the hearing or determination of which such appraiser, receiver, trustee, administrator, executor, commissioner, auditor, arbitrator, or referee shall have been chosen or appointed, shall be guilty of a felony.

Compare this to the language in MCL 750.120a(1) (emphasis added):

> 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 statute immediately preceding the jury tampering statute clearly applies to people who are "summoned as a juror," i.e. the jury pool. If the legislature truly intended the jury tampering statute to apply to prospective jurors, why did it not use the same language from the immediately preceding statute? The answer is simple, because the legislature intended jury tampering to apply only to "jurors" in a case, not prospective jurors summoned to a jury pool. Jurors in a case are jurors who have actually been empaneled or sworn. That is why Black's Law Dictionary defines a "juror" in precisely that way. There were no "jurors in any case" here. Again, common sense and a plain reading of the statute bear out its straightforward and true meaning.

Instead of using the plain and ordinary meaning, the prosecutor is attempting to circumvent the legislature to redefine the jury tampering statute according to his own personal assumptions. In essence, this is a request for this Court to usurp the legislature's role. Unless the legislature amends the law, jury tampering only applies to actual sworn-in jurors, not prospective jurors.

Moreover, if this Court were to accept the prosecutor's redefinition of "juror," it would render part of MCL 750.120 surplusage and nugatory, which violates a cardinal rule of statutory construction. The Michigan Supreme Court recently held:

> 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." *People v. Peltola*, 489 Mich. 174, 181, 803 N.W.2d 140 (2011) (citations and quotation marks omitted)

Duffy v. Michigan Dept. of Natural Resources, 490 Mich. 198, 215; 805 N.W.2d 399 (2011).

Prosecutor Thiede's case rests upon his personal opinion that the word "juror," standing alone, includes anyone who has been summoned as a juror. If he were correct then the beginning of the phrase in MCL 750.120 stating "Any person summoned as a juror" would be completely unnecessary surplasage because, according to him, the legislature could have just said "juror." But the legislature did not simply say "a juror," it explicitly qualified that term by adding the language "any person summoned as." If this Court were to apply the prosecutor's definition, it would render

part of MCL 750.120 surplusage, nugatory, and completely unnecessary. This is further evidence that the legislature did not intend "juror" to include prospective jurors.

Similarly, assuming arguendo that the term "juror" has the meaning Prosecutor Thiede assumes it to be, the jury tampering statute does not merely use the term "juror," but it modifies that term by adding the language "in any case." MCL 750.120a. Reading the specific meaning of the words "in any case" to include jurors *not* selected for any case is nonsensical.

Finally, if this Court accepts the prosecutor's position that the jury tampering statute's definition of "juror" should be redefined to include the jury pool, then a serious due process violation exists. The statute would then clearly be void on the grounds of vagueness and ambiguity.

> 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. Justice O'Connor said that "[t]he more important aspect of the vagueness doctrine is not actual notice, but the other principle 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."

Erwin Chemerinsky, *Constitutional Law – Principles and Policies*, 3rd Ed., p. 941-942 (citing *Kolender v. Lawson*, 461 U.S. 352 (1983).

All Michigan citizens are entitled to clear and unambiguous notice of what constitutes a crime. 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 U.S. 104 (1972).

IV. THE OBSTRUCTION OF JUSTICE CHARGE MUST BE DISMISSED.

As mentioned above, Prosecutor Thiede provides no explanation as to why the *Davis* Michigan Supreme Court precedent is not controlling in this case. As discussed in our principal brief, *Davis* clearly states that an allegation for common law tampering with a jury is now abrogated by the jury tampering statute. The prosecutor's main argument is that Mr. Wood's conduct amounted to two separate offenses. Besides statutory jury tampering, Prosecutor Thiede never specifies exactly what that second offense may be in this case. As discussed in our first brief, there is no generic obstruction of justice charge in Michigan. The prosecutor must be specific as to what type of obstruction of justice allegedly occurred. He must provide the basis for his charge by citing either a law or case specifying the exact type of common law obstruction being alleged. Despite spending four pages discussing this issue, he never provides a Michigan statute or case which supports his authority to charge Mr. Wood with obstruction of justice.

Instead, the prosecutor cites numerous cases from other states to generically allege that Mr. Wood made an effort to "impede the administration of justice." However, as was clearly argued in our first brief, the Michigan Supreme Court held:

> [T]his Court stated that obstruction of justice is "committed when the effort is made to thwart or impede the administration of justice." **While these definitions adequately summarize the essential concept of obstruction of justice, we believe they lack the specificity necessary to sustain a criminal conviction.** * * * "No principle is more universally settled than that which deprives all courts of power to infer, from their judicial ideas of policy, crimes not defined by statute or by common-law precedents. **Nothing can be a crime until it has been recognized as such by the law of the land.**

People v. Thomas, 438 Mich. 448, 455-456; 475 N.W.2d 288 (1991) (emphasis added).

In an attempt to circumvent the Michigan binding precedent in *Thomas*, the prosecutor cites cases from Georgia, Connecticut, Kentucky, South Dakota, North Carolina, and South Carolina. All of those cases are not binding on this Court, are irrelevant to this case, and demonstrate the lengths the prosecutor is willing to go to support his indefensible position.

The prosecutor cites *People v. Vallance*, 216 Mich. App. 415 (1996) to argue that there can be more than the 22 types of obstruction of justice from the ruling in *Thomas*. However, he then fails to cite a single Michigan case or statute outlining an additional types of obstruction of justice charge for tampering with a jury pool. Instead, he reverts back to the generic argument that Mr. Wood interfered with the "administration of justice" or cites irrelevant out of state cases. It cannot be clearer under *Thomas* that he must do more than make generic claims because such a charge lacks "the specificity necessary to sustain a criminal conviction." *Thomas*, at 455.

The prosecutor argues that Mr. Wood's speech is criminal because it "interfered with the orderly operations of the District Court" and that it interfered "with the orderly empaneling of the jury." Yet, he fails to properly explain how or why this is so, or to cite a single Michigan case or statute which establishes such conduct as a crime in this state. Again, Prosecutor Thiede refuses to respond to the holding in *Davis* and cites no specific Michigan case which can support his position that common law obstruction of justice is still a separate, chargeable crime from statutory jury tampering. This Court should pay no attention whatsoever to the non-binding, out-of-state cases cited by the prosecutor in derogation of clear Michigan and U.S. Supreme Court precedent.

The prosecutor next argues that the common law crime of embracery was not entirely displaced by the jury tampering statute, yet he cites no authority of any Michigan court that has made such a ruling. The only example the prosecutor provides is a citation to *People v. Pena*, 224 Mich. App. 650 (1997) which held that charging both extortion and obstruction and justice do not constitute double jeopardy. However, Mr. Pena never raised, and the court never addressed, the issue of whether any common law crime is abrogated by a statute under MCL 750.505. This is yet another example of the prosecutor misrepresenting the holding of an irrelevant case to support his position. The court never analyzed whether any of the crimes charged against Mr. Pena included "the punishment of which no provision is expressly made by any statute of this state." MCL

750.505. To cite *Pena* as somehow relevant to Mr. Wood's case is erroneous as it never even discussed the issues raised by Mr. Wood. For all the reasons stated in both briefs and because the prosecutor fails to cite any controlling Michigan law to support his position, the obstruction of justice charge against Mr. Wood must be dismissed.

V. THE DIFFERENCE BETWEEN A "RIGHT" OR "POWER" OF JURY NULLIFICATION IS IRRELEVANT TO THIS CASE.

Prosecutor Thiede spends the majority of the remainder of his brief discussing the differences between a "right" and a "power" as if that distinction was at all relevant to this case. Mr. Wood's First Amendment rights do not rise or fall depending on the syntax or semantics of an educational brochure published by a non-profit organization. Mr. Wood's political speech is no less protected because the prosecutor disagrees with the pamphlet's phrasing. This argument is a red herring, completely irrelevant, and a desperate attempt at muddying the issues in this case.

Prosecutor Thiede ends this section in a conclusory fashion by stating that Mr. Wood's "pamphlet clearly encourages unlawful conduct." Yet, the prosecutor can point to no statutory or common law crime which makes it illegal to engage in jury nullification, to support jury nullification, to vote one's conscience, to disregard jury instructions, to hang a jury, to support the "right" of jury nullification, or to support the "power" of jury nullification.

Consider the following scenario, Mr. Wood goes back to the public sidewalk and distributes a pamphlet that only states "Juries have the power of jury nullification." The next day, Mr. Wood goes back to the public sidewalk and distributes a different pamphlet that only states "Juries have the right to jury nullification." According to Prosecutor Thiede's theory that there is a "significant" difference between a right and a power, Mr. Wood would have committed jury tampering on the second day, but not on the first. Such a position defies logic and common sense. The truth is that neither instance amounts to jury tampering.

Because jury nullification, no matter if it is a right or a power, is not a criminal act in Michigan, such a distinction is meaningless. This was the whole point of our citing *People v. St. Cyr*, 129 Mich. App. 471 (1983) in our principal brief. It was to illustrate that jury nullification in Michigan is not illegal. Again, the prosecutor cannot point to a single case or criminal statute which the pamphlet allegedly violated.

Prosecutor Thiede proceeds to cite pages of jury instructions to show that jurors "must" follow the law. While that is all well and good, what happens if a juror decides to disregard those instructions? Nothing. It is not illegal in Michigan if a juror decides to engage in such conduct and the prosecutor can cite no case to the contrary. The prosecutor's argument is essentially that if a person does something for which they do not have the right to do, it is a criminal act.[6] Thankfully, that is not how our laws work. In order for something to be unlawful or a criminal act, it must be held as such by either our legislature or the common law. While it is understandable that the prosecutor may find it highly offensive for a juror to do such a thing, it is nevertheless completely lawful in Michigan and the prosecutor cannot charge that juror with violating any criminal law. As much as Prosecutor Thiede may desire it, jury instructions are not a part of the Michigan Penal Code and people cannot be forced by threat of criminal prosecution to follow said instructions. Thus, information in a pamphlet indicating this truth cannot be considered unlawful speech.

Finally, the prosecutor's emphasis on the difference between "power" and "right" only confirms that the prosecutor's actions in this case against Mr. Wood are entirely based upon the content of the speech contained in the pamphlet. If anything, making such an argument only strengthens Mr. Wood's position that Prosecutor Thiede is engaged in silencing speech he finds

[6] Even if this Court were to accept that jurors do not have the right or power to jury nullification, that doesn't automatically mean they are engaging in unlawful activity when they do.

offensive because of its content. As discussed in our principal brief, this is strictly forbidden under the First Amendment.

> 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 U.S. 397, 414 (1989). Prosecutor Thiede's entire argument is essentially that he finds Mr. Wood's speech offensive and disagreeable, thus, Mr. Wood must be silenced.

Again, the U.S. Supreme Court has held:

> 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.

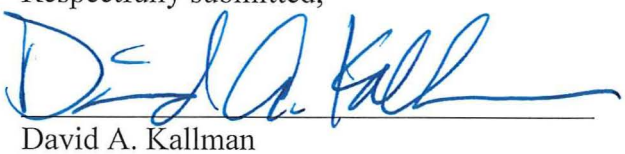
Baumgartner v. United States, 322 U.S. 665, 673-674 (1944).

Prosecutor Thiede obviously disagrees with Mr. Wood, but he cannot unilaterally and improperly use the power of the state to silence him.

CONCLUSION

What is most apparent in the prosecutor's response is the lack of citation to binding Michigan case law. It is also instructive that the prosecutor felt he had to distort the facts and law of his "most authoritative case" from Alaska. Prosecutor Thiede failed to address numerous significant issues and arguments raised by Mr. Wood. For all the reasons stated above and in his principal brief, Keith Wood respectfully requests that this Honorable Court dismiss all charges against him with prejudice and grant such other and further relief as is just and appropriate.

Respectfully submitted,



David A. Kallman
Stephen P. Kallman
Attorneys for Keith Wood

Dated: January 18, 2016.

Of Counsel:
William R. Wagner
President/Sr. Legal Counsel
Great Lakes Justice Center

STATE OF MICHIGAN
IN THE MECOSTA COUNTY 77th DISTRICT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

KEITH ERIC WOOD,

Defendant.

_____/

PROOF OF SERVICE

FILE NO.: 15-45978-FY

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PROOF OF MAILING

I, David A. Kallman, hereby state that on the date stated below I mailed a copy of the Reply Brief in Support of Defendant's Motion to Dismiss, upon Brian E. Thiede, Mecosta County Prosecuting Attorney at the above address, by first class mail, postage prepaid thereon. Also, a copy was faxed to Mr. Thiede at 271-796-3050. I hereby declare that this statement is true to the best of my information, knowledge and belief.

Dated: January 19, 2016.

David A. Kallman

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January 19, 2016

Via Fax & First Class Mail

Clerk of the Court
Mecosta County District Court
400 Elm Street
Big Rapids MI 49307

RE: **People v Keith Eric Wood**
File No: 15-45978-FY

Dear Sir/Madam:

Enclosed please find the following items in regard to the above-entitled matters:

☐	Affirmative Defenses	☐	Notice of Hearing
☐	Answer to Prosecutor's Motion	☐	Waiver of Arraignment
☐	Appearance	☐	Defendant's Motion to Dismiss
☐	Summons and Complaint	☐	Brief in Support of Motion
☐	Counterclaim – 1st Amended	☒	Proof of Service/Mailing
☐	Default	☐	Subpoena

☒ Other: Reply Brief in Support of Defendant's Motion to Dismiss

☒ Please file, record and/or deposit.

☒ Please submit the Judge's copy to Judge Booher for her review.

☐ Please return the true copies in the enclosed, self-addressed stamped envelope.

☐ Filing Fee in the amount of: $0.00

Sincerely,

David A. Kallman
Attorney at Law
DAK/hfb
Enclosure(s)