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LAW OFFICES OF TAT PARISH, PLLC
134 N. Main Street
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December 10, 2014

Sent by hand delivery and by fax to 982-8643

Hon. Sterling Schrock
Trial Court Judge
Berrien County Courthouse
811 Port Street
St. Joseph, MI 49085

RE: People v Rev. Edward Pinkney

Dear Judge Schrock:

The originals of these are being sent to the Clerk for filing. Enclosed are two copies for yourself of the following;

1. Rev. Pinkney's Motion for Directed Verdict and Brief in support thereof.

2. Defendant Pinkney's Motion for New Trial based on the violation of his rights to Impartial Jurors and Brief in support thereof. As I dictate this, I do not know if we will have all of the exhibits to this Motion available. In the interest of filing this immediately, we will supply by Friday any missing exhibits.

I am requesting that you indicate a convenient date for the hearing of these. You should also be aware that we may file supplement Motions for Directed Verdict as soon as they can be prepared. There may be other issues.

Very truly yours,

Tat Parish
TP/amp
CC Criminal Clerk (w/ original enclosures) (By hand delivery only)
Berrien County Prosecutor (w/enc.) (By hand delivert and by fax to 983-5757)
Client (w/enc.)(By fax and mail)

STATE OF MICHIGAN

IN THE BERRIEN COUNTY TRIAL COURT

FORMERLY KNOWN AS THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN

CRIMINAL DIVISION

oooOooo

PEOPLE OF THE STATE
OF MICHIGAN
Plaintiff

v

File No.2014-001528-FY

HON. Sterling Schrock

Rev. Edward Pinkney
Defendant

_____/

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Defendant Rev. Pinkney's Motion for a Directed Verdict

Now comes Defendant Rev. Pinkney, moves for a directed verdict and states in support:

1. This post-verdict motion is being brought pursuant to MCR 6.419(C) which specifically addresses post-verdict motions for directed verdict.

2. The motion is based on the constitutional requirement that a verdict be based on sufficient evidence for a finding of guilt under the beyond a reasonable doubt standard.

3. The beyond a reasonable doubt standard requires the prosecution to meet a level of proof that is much great than the probable cause standard that allows for a bindover at trial.

4. There was constitutionally insufficient evidence to support a conviction of Pinkney as

either a principal or aider and abettor.

5. While the issue in this motion may ultimately be decided by the appellate court as a post-verdict ruling on the sufficiency of the evidence is subject to appeal by the prosecution, Pinkney is now entitled to be relieved of the burdens from this conviction.

6. Pinkney also hereby re-asserts the statutory and constitutional arguments he made in his pretrial motion to quash, filed on or around June 30, 2014, that argued: (a) MCL 168.937 is a penalty provision for any independent forgery offense specifically proscribed by other section(s) of the election code; (b) MCL 168.932(c) is the only statute in the election code that substantively proscribes forgery; (c) Pinkney is not liable under MCL 168.932(c); and (d) the rule of lenity (which is required by the Due Process clause) and the constitutional vagueness doctrine require that any vagueness and/or ambiguity in relation to this issue be resolved in favor of Pinkney. Pinkney hereby fully incorporates the portions of the previously-filed motion and brief that relate to these issues.

7. Pinkney also asserts that he is entitled to a directed verdict based on the issues that were resolved in favor of the defendant in *People v Hall,* Mich COA # 321045 (10-23-14) (unpublished and attached) which indicated: (a) due process prevents subjecting a petition circulator to a felony conviction and penalty under MCL 168.937 when the notice and warnings on the petition form, that is provided by the government, indicate that one may be subject to a misdemeanor conviction and penalty – thus providing no fair warning that one may be subject to a felony conviction and penalty; and (b) based on statutory construction and the rule of lenity, a misdemeanor conviction and penalty may only be imposed as a more specific statute, MCL168.544c, specifically proscribed acts of falsifying the election petitions herein. For these

reasons, the convictions under MCL 168.937 must be vacated. Due Process also requires this result as the rule of lenity is mandated by Due Process. *Dunn v United States,* 442 US 100, 112-113; 99 SCt 2190; 60 LEd2d 743 (1979); *United States v Lanier,* 520 US 259, 265-266; 117 S Ct 1219; 137 L Ed 2d 432 (1997). Pinkeny intends to file a supplemental brief regarding this issue.

8. Pinkney hereby fully incorporates the brief that he is filing in support of this motion.

WHEREFORE, Pinkney prays that the court enter a directed verdict of acquittal.

Respectfully submitted,

Tat Parish (P18636)
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269/463-3335
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Dated: 12/10/14

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRANDON MICHAEL HALL,

Defendant-Appellee.

UNPUBLISHED
October 23, 2014

No. 321045
Ottawa Circuit Court
LC No. 13-037857-AR

Before: BORRELLO, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted a February 6, 2014, circuit court order affirming an October 21, 2013, district court order, wherein the district court denied the prosecution's motion to bind over defendant on 10 counts of felony election law forgery, MCL 168.937, and instead bound him over on 10 misdemeanor counts under MCL 168.544c. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

The essential facts of this case are not in dispute. Defendant was originally charged with 10 counts of "Election Law – Forgery," contrary to MCL 168.937. Following defendant's arraignment on those charges, and to facilitate the district court's bindover determination, the parties stipulated to the essential facts of the case in lieu of taking testimony at a preliminary examination. Specifically, the parties stipulated that in 2012, defendant worked for Chris Hougtaling's campaign for the office of judicial district court judge to obtain the necessary signatures on nominating petitions. On the night before the nominating petitions were due, realizing that he did not have enough signatures, defendant "worked all night writing names and addresses of individual[s] on the nominating petitions and signing their signatures to the petitions." Defendant used different colored ink pens and used his left and right hand to fill in the signatures. Defendant continued filling in signatures on the way to Lansing the following morning and he was identified on the petitions as the circulator. Defendant submitted the petitions to the Secretary of State. Defendant stipulated that he put "false names and signatures

on the nominating petitions as alleged in the complaint and warranted as well as signed the petitions as the circulator."

A separate count of forgery was charged for each of ten nominating petitions that defendant submitted to the Secretary of State containing forged signatures.[1] The district court accepted the stipulation, and the prosecution moved to bind over defendant on the 10 felony charges. Defendant objected, asserting that the stipulated facts established only a misdemeanor offense under MCL 168.544c, which proscribed acts of "falsifying electoral nominating petitions" including signing a petition "with a name other than his or her own."

On September 5, 2013, the district court held a hearing on the prosecution's motion for bind over. The parties agreed that, based on the stipulated facts, there was sufficient probable cause to bind defendant over on the 10 felony forgery charges, but identified the issue as whether the charged statute, MCL 168.937, was appropriate in light of the existence of the separate statute, MCL 168.544c.

Defendant argued that MCL 168.937, which proscribed "forgery," was a general statute that did not specifically proscribe defendant's conduct, and that MCL 168.544c, enacted after MCL 168.937, was a more specific statute, in that it specifically proscribed "acts of falsifying electoral nominating petitions," which was the conduct alleged in this case. As a more specific statute, it controlled over the more general forgery statute. Defendant argued this was especially the case where the general forgery statute included the qualifying phrase "unless otherwise provided," which alluded to the fact that there are other, more specific statutes proscribing election law misconduct. Defendant further pointed to the fact that the Legislature requires warnings on nominating petitions which advise that falsifying a petition constitutes a misdemeanor. Defendant asserted that it would be "unseemly" to advise a person that falsifying a petition is a misdemeanor, only to then allow for a felony prosecution. Defendant concluded that the stipulated facts made it "clear" that defendant's conduct was "not a violation of the general forgery statute," but rather fell within the scope of the misdemeanor statute.

The prosecution responded that the misdemeanor offense found in MCL 168.544c required no intent to defraud, whereas the general forgery statute did require such an intent, thereby demonstrating that they were two separate crimes. According to the prosecution, the stipulated facts in this case sufficiently demonstrated that defendant forged multiple signatures on multiple petitions with the intent to defraud the Michigan Secretary of State. Under such circumstances, defendant was properly charged under the felony forgery statute and not the misdemeanor unlawful signing statute.

On October 21, 2013, the district court issued its written opinion and order denying the prosecution's motion to bind over defendant on the 10 felony counts of forgery. The court first

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[1] The prosecution states that each of the ten petitions contained multiple false signatures. However, since defendant was being charged with felony forgery, rather than with the misdemeanor of signing someone else's name to a nominating petition, the charges were based on the number of forged documents rather than the number of false signatures.

acknowledged that the Michigan election law provisions do not define forgery, and therefore indicated its belief that the common law meaning of that term applied. Applying the common law elements of forgery, the court indicated that there was "probable cause to believe that the conduct set forth in the stipulated facts would constitute common law forgery" under MCL 168.937. The court then acknowledged that although MCL 168.544c specifically proscribes falsifying a signature on a nominating petition, that provision contains no intent requirement, and further acknowledged that the prosecution has "considerable discretion" in deciding under which statute to charge a defendant. Notwithstanding these acknowledgments, the district court noted that an exception to the prosecution's charging discretion exists where a more specific statute is enacted after a general statute. Accepting the distinction raised by the prosecution between the intent elements of the two statutes, the court identified the question to be resolved as "whether a prosecution for forgery can take place for unlawful conduct under Section 937 of the Michigan Election Law where the conduct is not expressly identified as forgery and where, as here, that unlawful conduct is expressly punished as a misdemeanor." The district court answered this question in the negative. The court reasoned in part as follows:

> The Court must give meaning to all the words contained in a statute. Section 937 has express language that a person found guilty of forgery ". . . under the provisions of the act, shall unless herein otherwise provided be punished . . ." The designation of forgery as a felony is not expressly indicated but is presumed from the maximum possible penalty which takes the matter outside this Court's jurisdiction.
>
> It would appear to the Court that in order to give meaning to forgery "under the provisions of the act" that the prohibited conduct must be expressly identified as forgery in the provisions of the act prohibiting that conduct. Sections of the Act have in the past and do now expressly identify certain unlawful acts as forgery "under the provisions of the acts" in Section 544c or its statutory antecedents.
>
> Similarly the language of Section 544c(14)[2] that "the provisions of this section, except as otherwise expressly provided apply to all petitions circulated under the authority of the election law" must be considered. Giving the normal meaning to that language suggests to the Court that the conduct prohibited by Section 544c must be punished in accordance with Section 554c, "unless otherwise expressly provided." To hold that the language of Section 937 is an express provision providing for an enhanced punishment would be to infer what is in fact not expressed.
>
> * * *

[2] MCL 168.544c has been amended and renumbered since the time this case was decided. MCL 168.544c(14), referenced by the district court above, is now MCL 168.544c(18). See 2014 PA 94.

STATE OF MICHIGAN

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Brief in Support Defendant Pinkney's Motion for a New Trial Based on the Violation of his Right to Impartial Jurors

Pinkney had a constitutional right to have each of his jurors be impartial and not biased. *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008). This right is based on both the Michigan and United States Constitutional right to a jury trial. *Miller*, 482 Mich at 547 & nn 4 & 5 quoting US Const, Am VI and Const 1963, art 1, § 20,. It is also based on Due Process. *Mays v. Chandler*, 342 F. App'x 159, 166 (6th Cir. 2009) ("Due process requires that a defendant in a criminal case be tried fairly by a panel of impartial, indifferent jurors."). The right is also protected by statutes and court rules. *Miller*, 482 Mich at 544-546 (citations omitted).

When a jurors fails to disclose information during *voir dire*, a defendant is entitled to a

> Finally, this would appear to the Court to be a case where the Rule of Lenity should apply. The Rule of Lenity operates in favor of an accused, mitigating punishment when punishment is unclear . . . In the two sections of the Act where forgery is expressly prohibited the penalty is a misdemeanor. Yet where Section 544c prohibits conduct without specifying it as forgery the People assert that the more severe penalty should apply. The People urge that forgery "under the provisions of this act," means conduct prohibited by the election law can also be charged as forgery even if not so designated by the statute. Brandon Hall would argue that forgery "under the provisions of this act" means conduct expressly identified as forgery by the statute. The Court favors the latter interpretation. The People's position as to the proper interpretation of the statute is not implausible, but it must be fairly said that at best the provisions of Section 937 can be interpreted either way. As a result, the statute is ambiguous in that regard so that the Rule of Lenity would dictate that the less severe penalty of Section 554c would apply.

Based on the above reasoning, the district court denied the prosecution's motion to bind over defendant on the 10 felony counts. However, the court concluded that there was sufficient probable cause to bind over defendant on 10 misdemeanor violations of MCL 168.544c, and therefore expressed its intent to proceed to trial on those 10 misdemeanor counts in the absence of an appeal.

On October 31, 2013, the prosecution appealed the district court's order to the circuit court. The prosecution argued that the district court erred in refusing to bind over on the felony charges. Specifically, the prosecution argued that the district court erred when it applied the rule of lenity in support of its decision because the felony and misdemeanor offenses do not involve the same conduct. The misdemeanor statute simply penalizes the signing of someone else's name to a nominating petition, while the felony statute requires an additional finding that the signing of the document was done with the specific intent to defraud. Accordingly, while the prosecution could have charged defendant with a misdemeanor offense for every single false signature he signed, it decided instead to charge ten felony counts based upon the forging of 10 nominating petitions. The prosecution further argued that the language of MCL 168.937 would mean "absolutely nothing" if it could not be read to create a separate crime of forgery. The district court's construction of the election law renders MCL 168.937 a nullity because it fails to recognize that the statute creates a "separate and distinct offense carrying additional elements over and above those required by the misdemeanor."

Defendant responded that the conduct punished as a felony and the conduct punished as a misdemeanor was the same, i.e., the signing of someone else's name on a nominating petition. Moreover, while MCL 168.937 proscribes "forgery" generally, it does not define the term "forgery." However, MCL 168.544c specifically proscribes the conduct at issue, and is therefore more specific. Accordingly, it controls over MCL 168.937. Finally, defendant responded that his due process rights would be violated by charging him with a felony offense because each petition warns that signing someone else's name constitutes a misdemeanor.

In response, the prosecution reiterated that the intent element present in the felony, but not in the misdemeanor, rendered the two provisions separate. Under the facts in this case,

defendant could properly be charged under either statute, but only because there was evidence of defendant's specific intent to defraud.

The circuit court rejected the prosecution's position and affirmed the district court's ruling. The circuit court first reasoned that MCL 168.544c, as a more recent and more specific statute governing defendant's conduct, controlled over MCL 168.937, the "general forgery statute." Next, the circuit court remarked that it was "relevant" that the Secretary of State had produced nominating petitions, in compliance with the election law, which "specifically state that violation of the statute is a misdemeanor." "That calls forth the argument and the rule cited by [the district court] called the rule of lenity[,]" which operates in favor of mitigating punishment when punishment is unclear. While recognizing the prosecution's argument that the two statutes are different inasmuch as one apparently contains the element of intent to defraud, the circuit court also acknowledged defense counsel's argument that "the conduct of signing a name not one's own is identical in each case."

Finally, the circuit court found a "valid due process argument" in the fact that the nominating petitions required a warning that the prohibited conduct is a misdemeanor. "One doesn't realize it's a felony unless one goes to the general forgery statute or the common law definition of forgery." The circuit court concluded:

> I think there's logical arguments on both sides of the question here. But given that the state has mandated that the public be informed through its nominating petitions that the conduct at issue is a misdemeanor and doesn't clarify at all whether or not intent to defraud is a relevant consideration, it's simply the signing of a false name is a misdemeanor. I think that has to be relied upon whether one cites the rule of lenity or due process and hold the state to its public pronouncements as to what the crime is.
>
> So, I'm going to affirm the decision of the district court. If the legislature wants to retain the right to allow prosecutors to charge those who sign false names on nominating petitions with forgery, it really ought to clarify the statute, and perhaps add to section 544(C) [sic] that the offense is a misdemeanor unless there is an intent to defraud, in which case it's a felony. They could certainly make that distinction, but they didn't when they adopted the misdemeanor penalty, so, the case is affirmed.

This Court granted the prosecution's delayed application for leave to appeal the circuit court's order and granted motions for immediate consideration and to stay the proceedings. *People v Hall*, unpublished order of the Court of Appeals, entered April 24, 2014.

II. STANDARD OF REVIEW

"Whether conduct falls within the scope of a penal statute is a question of statutory interpretation" that we review de novo. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010). We review a district court's decision whether to bind over a defendant for an abuse of discretion, but review the court's rulings concerning questions of law de novo. *Id.* at 9. "A circuit court's decision with respect to a motion to quash a bindover is not entitled to deference because this

Court applies the same standard of review to this issue as the circuit court. This Court essentially sits in the same position as the circuit court when determining whether the district court abused its discretion." *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). An abuse of discretion occurs when "the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

A prosecutor has broad charging discretion and may charge any offense supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). This Court "review[s] a prosecutor's charging determination under an 'abuse of power' standard to determine if the prosecutor acted contrarily to the Constitution or law." *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005). Constitutional issues are reviewed de novo. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

III. ANALYSIS

The first question that must be addressed is whether MCL 168.937 creates the substantive offense of forgery. More specifically, the question is whether MCL 168.937 can be fairly read as proscribing the broad offense of forgery that pertains to the falsifying a document governed by the Michigan election law, or whether it is merely a penalty provision for the specific forgery offenses set forth in other provisions of the Michigan election law.

This question presents an issue of statutory construction. As our Supreme Court stated in *People v Gillis*, 474 Mich 105, 114-115; 712 NW2d 419 (2006),

> our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. The words of a statute provide the most reliable evidence of its intent. The Court must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme . . . If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. [Internal quotation marks and citations omitted.]

The Michigan election law, MCL 168.1 *et seq.*, was enacted for the stated purpose of, among other things, regulating primaries and elections; providing for the "purity" of the election process; and guarding against "the abuse of the elective franchise." 1954 PA 116. Chapter XXXV of the Michigan election law sets forth "Offenses and Penalties." Included within that chapter is MCL 168.937, titled "Forgery; penalty." This statute provides:

> Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

Reviewing this statute in the context of the Michigan election law as a whole, indicates that MCL 168.937 is not merely a penalty provision, but rather creates a substantive offense of forgery. Importantly, MCL 168.935, another statute contained within the "Offenses and Penalties" chapter of the Michigan election law, specifically sets forth the penalties to be imposed for felony offenses under the Michigan election law:

> Any person found guilty of a felony under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

The language of MCL 168.937 and MCL 168.935 is identical, except that MCL 168.935 uses the word "felony" and MCL 168.937 uses the word "forgery." Thus, because MCL 168.935 sets forth the penalties for a felony conviction under the provisions of the Michigan election law, reading MCL 168.937 also as merely a penalty provision would effectively render MCL 168.937 duplicative of MCL 168.935 and mere surplusage. "This Court must avoid a construction that would render any part of a statute surplusage or nugatory." *People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010). In other words, there would be no need for MCL 168.937 to be limited to setting forth the penalty provisions for forgery if MCL 168.935 sets forth the penalty provisions for all felonies under election law. In addition, reading MCL 168.937 as merely a penalty provision, and not a provision creating a substantive offense of forgery, would contravene the expressed intent of the Legislature, which was to ensure the fairness and purity of the election process in part by proscribing misconduct that would foster such unfairness and impurity. See *Gillis*, 474 Mich at 114-115 ("our primary task in construing a statute, is to discern and give effect to the intent of the Legislature.")

Having concluded that MCL 168.937 authorizes a forgery charge, we proceed to consider whether MCL 168.544c is nevertheless controlling in this case.

It is a well-settled principle that "statutes that relate to the same subject or that share a common purpose are *in para* [sic *pari*] *materia* and must be read together as one." *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007) (quotations and citation omitted). "When there is a conflict between statutes that are read *in par[i] materia*, the more recent and more specific statute controls over the older and more general statute." *Id.* This is because "the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *People v Bragg*, 296 Mich App 433, 451; 824 NW2d 170 (2012) (quotation marks and citations omitted). And, while a prosecutor generally has discretion in determining under which of two possible applicable statutes a prosecution will be brought, that discretion is not unlimited; "where the Legislature carves out such an exception [to the general statute] and provides a lesser penalty for the more specific offense, a prosecutor must charge a defendant under the statute fitting the particular facts." *People v Carter*, 106 Mich App 765, 769; 309 NW2d 33 (1981).

In this case, MCL 168.937 and MCL 168.544c(11) concern the same subject matter. MCL 168.544c(11), provides in relevant part that "[a]n individual shall not . . . (a) [s]ign a petition with a name other than his own [or] (b) [m]ake a false statement in a certificate on a petition." MCL 168.544c(11)(a)-(b). "An individual who violates subsection (11) is guilty of a misdemeanor punishable by a fine of not more than $500.00 or imprisonment for not more than 93 days, or both." MCL 168.544c(12). Although MCL 168.937 creates the substantive offense of forgery, no provision of the Michigan election law defines the term "forgery" and where a common law offense is undefined in a statute, the common law definition of that offense applies. *Gillis*, 474 Mich at 118. "The common law definition of 'forgery' is a false making . . . of any

written instrument with intent to defraud." *People v Nasir*, 255 Mich App 38, 42 n 2; 662 NW2d 29 (2003) (quotation marks and citation omitted).

The prosecution contends that the statutes do not conflict because forgery requires proof of intent to defraud whereas MCL 168.544c does not. However, considering the statutory definitions set forth above, proscribe the same conduct—i.e., the falsifying of documents (or signatures thereon) required to be submitted under the Michigan election law. In addition, there can be no doubt that the statutes share a common purpose—to ensure the fairness and purity of the election process and prevent abuse of the elective franchise. Thus, the statutes are "*in pari materia*," such that they must be "read together as one." *Buehler*, 477 Mich at 26. Moreover, because MCL 168.937 makes forgery a felony, while MCL 168.544c makes signing someone else's name on a nominating petition a misdemeanor, the statutes conflict. Therefore, MCL 168.544c, as the more recent and specific statute, controls over MCL 168.937,[3] and the prosecution was bound to proceed on misdemeanor charges under MCL 168.544c. *People v LaRose*, 87 Mich App 298, 304; 274 NW2d 45 (1978); *Buehler*, 477 Mich at 26

Our conclusion that MCL 168.544c is controlling is further supported by language contained in MCL 168.544c(18) and MCL 168.937. MCL 168.544c(18) provides that "[t]he provisions of this section *except as otherwise expressly provided apply to all petitions* circulated under authority of the election law" (emphasis added). MCL 168.937 does not expressly provide that it, as opposed to 544(c), governs misconduct involving nominating petitions. In fact, MCL 168.937 contains a qualifying phrase that indicates that 544(c) governs offenses involving nominating petitions. Specifically, MCL 168.937 provides that "[a]ny person found guilty of forgery under the provisions of this act shall, *unless herein otherwise provided*, be punished . . ." (emphasis added). This qualifying provision indicates that, in the event that there is a more specific provision in the election law, the more specific provision applies and MCL 168.937 is not controlling. Here, although MCL 168.937 provides a five-year offense for forgery, MCL 168.544c(11) "otherwise provide[s]" that, in the event that a defendant falsifies a signature on a nominating provision, he or she is guilty of a misdemeanor. In short, language contained in MCL 168.544c(18) and the qualifying provision in MCL 168.937 further indicate that MCL 168.544c is controlling in this case.

Moreover, even if we were to conclude that MCL 168.937 does not conflict with MCL 168.544c, the lower courts did not err in applying the rule of lenity in this case.

"The 'rule of lenity' provides that courts should mitigate punishment when punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). The rule of lenity applies only if the statute is ambiguous or "in absence of any firm indication of legislative intent." *Id.* at 700 n 12 (quotation marks and citation omitted). An otherwise unambiguous statute may be "rendered ambiguous by its interaction with and its relation to other statutes." *Id.* at 699 (quotation marks and citation omitted).

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[3] The parties do not dispute that MCL 168.544c was enacted after MCL 168.937.

In this case, the interaction between MCL 168.937 and MCL 168.544c renders unclear the punishment for falsifying a signature on a nominating petition. As noted, both statutes concern the same subject matter—i.e. falsifying a document required to be submitted under the Michigan election law. However, the statutes impose vastly different punishments. MCL 168.937 imposes a far harsher penalty for the same conduct that is proscribed in MCL 168.544c—a five year felony as opposed to a misdemeanor. In addition, pursuant to requirements set forth in MCL 168.544c(1), all nominating petitions contain a warning immediately following the space on the nominating petition where the circulator is to sign his name, which provides that "[a] circulator knowingly making a false statement in the above certificate, a person not a circulator who signs as a circulator, or *a person who signs a name other than his or her own as circulator is guilty of a misdemeanor.*" MCL 168.544c(1) (emphasis added). Thus, the penalty for falsifying a signature on a nominating petition is stated to be a misdemeanor. Furthermore, as noted above, MCL 168.544c(18) indicates that MCL 168.544c governs all nominating petitions "except as otherwise provided," and MCL 168.937 contains a qualifying provision that indicates it yields to other more specific statutes. In short, when these provisions are considered together as a whole, the punishment for falsifying a signature on a nominating petition is unclear, at worst, and at best indicates that the crime is a misdemeanor; therefore, the lower courts did not err in applying the rule of lenity. *Denio*, 454 Mich at 699.

Finally, we agree with the circuit court that charging defendant with 10 felonies as opposed to misdemeanor offenses violates defendant's due process rights.

Defendant's due process argument relates to the warnings provided on the nominating petitions, as required by the Michigan election law. MCL 168.544c sets forth very specific requirements regarding the appearance and content of nominating petitions. Relevant to this case, the statute requires that the nominating petitions contain two separate warnings: The first warning, which immediately precedes the space on the nominating petition where voters are to sign their name, provides that "[a] person who knowingly signs more petitions for the same office than there are persons to be elected to the office *or signs a name other than his or her own is violating the provisions of the Michigan election law.*" MCL 168.544c(1) (emphasis added). The second warning, which immediately follows the space on the nominating petition where the circulator is to sign his name, provides that "*[a] circulator knowingly making a false statement in the above certificate*, a person not a circulator who signs as a circulator, or a person who signs a name other than his or her own as circulator *is guilty of a misdemeanor.*" MCL 168.544c(1) (emphasis added). As he did in the lower courts, defendant argues that it would be fundamentally unfair to allow a felony forgery prosecution when the nominating petition itself provides that the conduct at issue in this case is a misdemeanor.

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]" US Const, Amend XIV. Likewise, the Michigan Constitution provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. Relevant to this case, "[i]n general, due process requires that a person know in advance what questionable behavior is prohibited." *People v Bruce*, 102 Mich App 573, 577; 302 NW2d 238 (1980) (citations omitted). The United States Supreme Court has additionally held that due process requires notice of more than just what conduct is proscribed, but also of the severity of

the penalty. See *BMW of North America, Inc v Gore*, 517 US 559, 574; 116 S Ct 1589; 134 L Ed 2d 809 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a state may impose."); *United States v Batchelder*, 442 US at 114, 123; 99 S Ct 2198; 60 L Ed 2d 755 (1979) ("[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.")

At the outset, defendant concedes that the warning provisions contained in MCL 168.544c(1) adequately convey that his conduct—i.e., signing someone else's name on the nominating petition and making a false statement in the certificate—is illegal. However, United States Supreme Court precedent indicates that it is not enough that a defendant knows his conduct is illegal; he must also be aware of the consequences for that conduct—i.e. the severity of the penalty that a state might impose. *Gore*, 517 US at 574; *Batchelder*, 442 US at 123. Here, the nominating petitions indicated that signing a petition with a name other than one's own constituted a misdemeanor offense. Defendant signed nominating petitions with names other than his own. On its face, the nominating petitions stated that this conduct constituted a misdemeanor. Notwithstanding, this warning the prosecution sought to charge defendant with 10 felonies. Yet defendant was not on notice that the severity of the penalty for signing another person's name to a petition was a felony offense. Although the first warning required under MCL 168.544c(1) placed defendant on notice that his conduct violated "the provisions of the Michigan election law," the second warning indicated that such violation constituted a misdemeanor offense. See MCL 168.544c(1). Furthermore, the plain language of MCL 168.544c(11) and (18) in conjunction with the qualifying provision in MCL 168.937 discussed above, did not place defendant on notice that signing a petition with a name other than one's own constitutes a five-year felony offense.

In short, because defendant was only on notice that his conduct constituted a misdemeanor, and there was no other warning concerning the severity of the penalty imposed under MCL 168.937, fundamental elements of fairness mandated that defendant be charged under MCL 168.544c(1).

Affirmed. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro

STATE OF MICHIGAN

IN THE BERRIEN COUNTY TRIAL COURT

FORMERLY KNOWN AS THE CIRCUIT COURT FOR THE COUNTY OF BERRIEN

CRIMINAL DIVISION

oooOooo

PEOPLE OF THE STATE
OF MICHIGAN
Plaintiff

File No.2014-001528-FY

v

HON. Sterling Schrock

Rev. Edward Pinkney
Defendant

_____/

Tat Parish (P18636)
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Defendant Pinkney's Motion for a New Trial Based on the Violation of his Right to Impartial Jurors

Request for an Evidentiary Hearing

Now comes Defendant, Rev. Edward Pinkney, by and through his attorney, Tat Parish, moves the court for a new trial, requests an evidentiary hearing and states in support:

1. Defendant became aware, after the jury verdict herein, that Juror Gail Freehling did not truthfully respond to inquiries as to whether she knew or was connected with one of the prosecution's main witnesses in this case, Sharon Tyler.

2. Freehling was called to the petit jury box around or before 1:39 PM October 23, 2014

3. Attorney Tat Parish specifically asked the jurors during *voir dire*, while Juror Freehling was in the petit jury box, whether they knew or had connections with either of two "particularly important" witnesses, James Hightower and Sharon Tyler. This was around 4:18-4:19 PM in the video for October 23, 2014.

4. The jurors were also asked at other times, more than once, whether they knew or had connections with any of the persons on the witness list, including Sharon Tyler.

5. Juror Freehling said nothing in response to these inquiries and did not honestly respond that she is a friend of Sharon Tyler and has had contact with her through the Three Oaks Flag Day Parade from 2010 through 2014 and through the Miss Blossomtime Festival pageant.

6. Juror Freehling in fact listed Sharon Tyler on Freehling's Facebook web page as a friend. (Exhibit A)

7. Juror Freehling also is chairperson of the Three Oaks Flag Day Parade and has held this position from January 2010 to present. (Exhibit B)

8. Sharon Tyler was a participant in the Three Oaks Flag Day Parade each summer between 2010 and 2014. Defendant is attaching proof that she participated in the parade in 2010 and 2014. (Exhibit C and Exhibit D)

9. The parade in 2014 was held in June, a few months before Pinkney's trial. (Exhibit D)

10. During the voir dire of the jurors, they were asked if they knew or had contact with police officers.

11. Juror Freehling did not respond to these inquiries and did not honestly respond that she knows and has contact with a number of police officers.

12. Several police officers and police entities are at the forefront of the Three Oaks Flag

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PEOPLE OF THE STATE
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Plaintiff

v

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HON. Sterling Schrock

Rev. Edward Pinkney
Defendant

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Tat Parish (P18636)
Law Offices of Tat Parish, PLLC
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Brief in Support of Defendant Pinkney's Motion for Directed Verdict

Pinkney moves for a directed verdict after the jury verdict pursuant to MCR 6.419(C). This motion must be decided under the beyond a reasonable doubt standard. In order to support a finding of guilt under the beyond a reasonable doubt standard, the prosecution is required to meet a much higher standard of proof than the standard applicable to a bind over based on probable cause (which was litigated in this matter prior to the trial). The much more stringent nature involved with the beyond a reasonable doubt standard was made very clear in *People v Justice,* 454 Mich 334; 562 NW2d 652 (1997) quoting *Coleman v Burnett,* 155 US App DC 302, 316-317; 477 F2d 1187 (1973) (emphasis in bold added) (italicized emphasis added by the Michigan

Supreme Court in the *Justice* opinion) where it was stated:

> It is the contrast of probable cause and proof beyond a reasonable doubt that inevitably makes for examinatorial differences between the preliminary hearing and the trial. Probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. Proof beyond a reasonable doubt, on the other hand, connotes evidence strong enough to create an abiding conviction of guilt to a moral certainty. **The gap between these two concepts is broad.** *A magistrate may become satisfied about probable cause on much less than he would need to be convinced. Since he does not sit to pass on guilt or innocence, he could legitimately find probable cause while personally entertaining some reservations.* By the same token, a showing of probable cause may stop considerably short of proof beyond a reasonable doubt, and evidence that leaves some doubt may yet demonstrate probable cause. [155 U.S. App. D.C. at 316-317, 477 F.2d at 1202 (emphasis added).]

Whether there is sufficient evidence to support a conviction is a constitutional issue that is reviewed *de novo. Jackson v Virginia,* 443 US 307, 99 S Ct 2781, 61 L Ed 2d 560 (1979); *People v Wolfe,* 440 Mich 508, 489 NW2d 748 (1992). The appropriate standard of review for sufficiency of evidence is whether, when viewed in a light most favorable to the prosecution, the evidence is sufficient to support a finding by a rational jury of guilt beyond a reasonable doubt. 443 US at 318; 440 Mich at 515.

Pinkney also previously moved for a directed verdict, by oral motion, during the trial. However, it should be noted that sufficiency of the evidence arguments are preserved, even for appeal, without any motions for directed verdict in the trial court. *Wolfe,* 440 Mich at 516 n6 (1992) (directed verdict motion not necessary to preserve question of sufficiency of evidence to support verdict; issue may be raised for first time on appeal); *People v. Cain,* 238 Mich App 95, 116-17, 605 NW2d 28 (1999) ("Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence.") citing *People v. Lyles,* 148 Mich App

583, 594, 385 NW2d 676 (1986); *People v Patterson,* 428 Mich 502, 410 NW2d 733 (1987).

In the case at bar, the evidence at trial essentially indicated nothing more than the following: (a) Pinkney circulated petitions that ultimately wound up having changed dates; (b) Pinkney did not have exclusive control and possession of the petitions; (c) Pinkney was involved with submitting petitions to the county clerk; and (d) Pinkney has been very active in exercising his constitutional rights in relation to elections and the political process.

Under the circumstances of this case, there was insufficient evidence for the jury to convict Pinkney. He is now entitled, as a matter of constitutional law, to a directed verdict.

The circumstances involved in this case raise, at most, a suspicion that Pinkney could have been involved with or knew the name of the person who changed the dates. This is far from the amount of evidence that was necessary for a finding, beyond a reasonable doubt, that Pinkney forged the documents by changing the dates. His possession of the petitions, at some points during the recall campaign effort, was not nearly enough to allow for a conviction.

While Pinkney could find no Michigan cases on point, other courts have made it very clear that a defendant's possession of a forged document, even under circumstances far more suspicious than the circumstances herein, is insufficient to prove the defendant was the person who forged the document or even that the defendant had knowledge that the document was forged. *Sneed v Smith,* 670 F2d 1348,1352-53 (4th Cir 1982) (evidence was constitutionally insufficient to show defendant forged a check when checkbooks were stolen from a room in which defendant was present and defendant drove another person to a market and gave her a forged check taken from one of the stolen checkbooks, which she presented); *State v Tomlinson,* 457 So 2d 651 (La SCt 1984) (where defendant deposited checks, with forged endorsements, into

his account – but handwriting analysis could not determine who forged signatures, the possession and depositing of the checks was insufficient to prove that defendant forged the signatures or had knowledge that they were forged); *State v Ravenna* ,151 Vt 96; 557 A2d 484 (1988) (defendant's possession of forged checks and other alleged misconduct in relation to the checks was insufficient to prove that the defendant knew the checks were forged); *Taylor v State,* 626 S.W.2d 543 (1981) (insufficient evidence to prove defendant committed the forgery where defendant attempted to pass one dollar bills that had been altered to appear to be five dollar bills); *Reid v Warden,* 708 F Supp 730, 731 & 738 (WD NC 1989) (without the use of an unconstitutional presumption, evidence was insufficient to prove defendant forged a check where the government's case consisted of the defendant "and his girlfriend proceed[ing] to a Sherwin Williams paint store, where [the defendant] purchased with a forged check several gallons of paint [and a]fter making the purchase at one paint store, [the defendant] and his girlfriend attempted three times to return the paint for a cash refund to paint stores other than the paint store from which [the defendant] had purchased the paint" and where the defendant testified to circumstances indicating someone else forged the check).

Also, any suggestion that the conviction can be supported on an aiding and abetting theory is not valid. The evidence showed that Pinkney was involved with this recall effort and that he was associated with many people involved with this recall effort. Even if the evidence had indicated Pinkney was present when someone else changed the dates, this alone would have been insufficient evidence to support a conviction. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris,* 236 Mich App 411,

419-420; 600 NW2d 658 (1999) citing *People v Wilson,* 196 Mich App 604, 614; 493 NW2d 471 (1992); *accord, People v Burrel,* 253 Mich 321, 323; 235 NW 170 (1931) (quoting 1 Cyc Crim Law (Brill) § 233) ("Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent."). The Sixth Circuit has granted habeas relief on this basis – for constitutionally insufficient evidence to support the verdict – many times as indicated in *Newman v Metrish,* 543 F3d 793, 796-797 (6th Cir 2008) (emphasis added) cert denied 130 S Ct 1134 (2010):

> **Although circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence.** See, eg, *Parker v Renico,* 506 F3d 444, 452 (6th Cir 2007) (evidence that Parker was in a car containing guns with men who planned a murder was too speculative to support a finding that Parker constructively possessed the firearm); *Brown v Palmer,* 441 F3d 347, 352 (6th Cir 2006) (finding evidence that Brown was present at the scene and had some acquaintance with the perpetrator insufficient to support a conviction of armed robbery and car-jacking under an aiding and abetting theory); *Fuller v. Anderson,* 662 F2d 420, 423-24 (6th Cir. 1981) (verdict for felony murder not supported by evidence showing only that Fuller was present at the scene of the arson where evidence did not establish beyond a reasonable doubt that Fuller consciously acted to aid in the arson); *Hopson v Foltz,* No. 86-1155, 818 F2d 866, 1987 US App LEXIS 6596, at *5 (6th Cir May 20, 1987) (evidence insufficient to support conviction of second-degree murder on theory of aiding and abetting where there was no proof "that Hopson acted in pre-concert with [the shooter] to commit the murder or that he said or did anything to support, encourage, or incite the commission of the crime.").

It should also be noted that Pinkney could not be convicted as an aider and abettor on the theory that assisted the person who changed the dates at some point after the dates were changed – even if it could be proved that Pinkney knew the documents had been forged. As stated in *Davis v. Lafler,* 658 F.3d 525 (6th Cir. 2011) (Moore, dissenting) (emphasis added), this cannot

new trial if that "failure to disclose denied [the defendant the] right to an impartial jury." *Miller,* 428 Mich at 548-549 quoting *McDonough Power Equip, Inc v Greenwood,* 464 US 548, 549; 104 S Ct 845; 78 L Ed 2d 663 (1984). "'The misconduct must be such as to reasonably indicate that a fair and impartial trial was not had . . . .'" *Miller,* 428 Mich at 549 quoting *People v Nick,* 360 Mich 219, 230; 103 NW2d 435 (1960), in turn quoting 39 Am Jur, New Trial, § 70, p 85. In Michigan, the violation of constitutional right to an impartial jury is established when the defendant shows "that the juror was not impartial or **at least that the juror's impartiality is in reasonable doubt**." *Miller,* 482 Mich at 550 (emphasis added) citing *Holt v People,* 13 Mich 224, 228 (1865).

Under the US Constitution and *McDonough, supra,* the right to an impartial juror can be violated regardless of whether the failure to disclose was intentional or unintentional. *Zack v Green,* 49 F3d 1181, 1185 (6th Cir 1995) (citations omitted). The two-part test set forth in *McDonough*, 464 US at 555-556 is as follows:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

This language in *McDonough* applies to any challenge for cause that is related to the issue of bias or a lack of impartiality. *See, Miller,* 482 Mich at 551, n 13.

While the motive for failing to disclose is certainly relevant, the fact that a juror states he could be impartial does not indicate the juror was actually impartial for purposes of the constitution under *McDonough.* The failure to disclose a material fact, whether deliberately or unintentionally, is very probative of whether the juror cannot be considered impartial. As stated

in *Zack,* 49 F3d at 1185 (emphasis added):

> The *McDonough* standard is more concerned with actual prejudice than with a juror's subjective mental state, although the latter can be evidence of the former. Thus, a juror's motive for concealing information is relevant, but not dispositive. *464 U.S. at 556* ("The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.") Rather, the Court's two-part test requires a party to offer more than the mere possibility that, given the chance, counsel might have removed a prospective juror.
>
> The nature of the undisclosed information is more probative than the juror's particular state of mind; **a well-intentioned juror omitting a material fact can do more damage than one who deliberately conceals an inconsequential fact.** *See Scott, 854 F.2d at 699* ("**A finding of 'sincerity' is not the same as a finding that the juror was unbiased.** A juror may not conceal material facts disqualifying him simply because he sincerely believes he can be fair in spite of them .")

Also, when the relationship between a juror and a key player in the trial is too close, bias or lack of impartiality must be inferred as a matter of law and does not require a showing of actual bias or lack of impartiality as stated in *United States v Wood,* 299 US 123, 133; 57 S Ct 177; 81 L Ed 78 (1936) (emphasis added):

> The Sixth Amendment requires that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The Amendment prescribes no specific tests. The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or **bias conclusively presumed as matter of law**.

Justice O'Connor, who join the majority opinion in *Smith v Phillips,* 455 U.S. 209, 102 SCt 940, 71 LEd2d 78 (1982) also indicated that, under some circumstances, a lack of impartiality must be conclusively inferred due to the closeness of the relationship of the juror with a key player in the trial. In her concurring opinion in *Smith,* 455 U.S. at 221-223 (emphasis