

**STATE OF MICHIGAN**  
**IN THE COURT OF APPEALS**

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

EDWARD PINKNEY,

Defendant-Appellant.

COA Nos. 282144, 286992

Lower Court No. 2005 401979 FH

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**MOTION TO VACATE OR MODIFY CONDITIONS OF BAIL**

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NOW COMES Defendant-Appellant Edward Pinkney, pursuant to MCL 770.9 and MCR 7.209(D), and hereby moves this Court for an order vacating or modifying the unreasonable and excessive conditions of bail imposed by the trial court.

This Court has already ordered that Rev. Pinkney be admitted to bail pending appeal upon the posting of a bond in an amount to be set by the trial court. (See Order of the Court of Appeals, attached as Exhibit 1.) The trial court, however, went well beyond setting an "amount" of bond -- it imposed conditions of bail so restrictive as to deprive Rev. Pinkney of virtually all liberty, thereby effectively nullifying this Court's order.

In support of this motion to vacate or modify those conditions, Rev. Pinkney states as follows:

### **Background**

1. Defendant-Appellant Pinkney is a Baptist minister in Benton Harbor, Michigan. He has long been an outspoken community organizer and activist, frequently denouncing injustice and racial inequality in Benton Harbor and the Berrien County criminal justice system.

2. In 2007, Rev. Pinkney was found guilty of violating Michigan election law. The conviction arose from Rev. Pinkney's participation in a campaign to recall a Benton Harbor city commissioner. According to the prosecution, Rev. Pinkney paid several patrons at a soup kitchen five dollars to vote in favor of the recall and unlawfully took possession of absentee ballots assigned to other voters. Rev. Pinkney was convicted following a second trial; the first trial ended with a hung jury.

3. Before and during his trials, Judge Alfred M. Butzbaugh released Rev. Pinkney on a pretrial bond in the amount of \$10,000 secured by a 10% cash deposit. See MCL 6.106(E)(1)(a)(ii)[B]. While on pretrial release, Rev. Pinkney appeared for court hearings as

required. He made numerous trips out of state with permission of the court and never failed to return. (See Docket Entries, attached as Exhibit 2.)

4. Following Rev. Pinkney's conviction, Judge Butzbaugh sentenced him to five years of probation which was to include one year in jail. Judge Butzbaugh delayed the one-year jail sentence and Rev. Pinkney immediately began serving his term of probation.

5. While on probation, Rev. Pinkney reported regularly to his probation officer, timely paid all fees and fines assessed, and refrained from criminal activity in all respects. He gave speeches, taught classes, and led religious services. (See Probation Report, attached as Exhibit 3, and 6/26/08 Hearing Tr., attached as Exhibit 4, at 14-15.)

6. On December 14, 2007, Rev. Pinkney was arrested and held without bond solely because of an editorial he wrote in a small Chicago newspaper. In the editorial, Rev. Pinkney expressed strong opinions about Judge Butzbaugh and his handling of his case. Then, quoting the Bible, Rev. Pinkney predicted that God would punish Judge Butzbaugh unless the judge changed his ways. Judge Butzbaugh recused himself, and on June 26, 2008 Judge Wiley ruled that Rev. Pinkney had violated the conditions of his probation by engaging in behavior that was "threatening," "defamatory," and "demeaning."

7. Judge Wiley revoked Rev. Pinkney's probation and imposed a new sentence of three to ten years in prison -- the maximum minimum sentence recommended under the sentencing guidelines and twice that recommended by Rev. Pinkney's probation officer.

8. Rev. Pinkney made two motions in the trial court for bail pending appeal. Both motions were denied.

9. On November 12, 2008, Rev. Pinkney filed a motion for bail pending appeal and supporting brief with this Court. (See Motion and Brief, attached as Exhibit 5 with internal

exhibits omitted.) Rev. Pinkney primarily argued that he had substantial First Amendment grounds for appeal: the Constitution protected his right to criticize Judge Butzbaugh, a public official; his editorial was neither a "true threat" nor defamatory; and the probation condition prohibiting "demeaning" behavior was vague, overbroad, and unconstitutional as applied. Rev. Pinkney also argued that an appeal bond would not create a danger of flight, a potential of harm to the community, or a risk to the proper administration of justice. See *People v Giacalone*, 16 Mich App 352; 167 NW2d 871 (1969) (setting out the factors courts must consider when entertaining a motion for bail pending appeal).

10. On December 10, 2008, this Court entered the following order:

The Court orders that the motion for bond pending appeal is GRANTED, and the defendant be admitted to bail pending resolution of this appeal or further order of this Court upon filing a bond with the clerk of the trial court in an amount to be set by that court. Notice shall be given to the prosecuting attorney of the time and place the bond will be filed and the bond is subject to the objection procedure of MCR 7.209(G)(2). The defendant-appellant shall make the promises in writing required by MCR 7.209(F)(2).

(Ex. 1, *supra*.)

### **Bond Hearing**

11. On December 18, 2008, eight days after this Court ordered that Rev. Pinkney be released on bond, a hearing was held in Berrien County Circuit Court with Judge Wiley presiding. (See 12/18/08 Hearing Tr., attached as Exhibit 6.)

12. Prior to the hearing, Rev. Pinkney submitted a five-page memorandum to the court reproducing the Court of Appeals' order, describing the purpose of the bond hearing, and arguing for a personal recognizance bond. In the alternative, Rev. Pinkney requested that the bond be set at an amount no higher than his pretrial bond: \$10,000 with admission to bail upon

posting 10 percent. (See Defendant's Memorandum, attached as Exhibit 7 with internal exhibits omitted.)

13. At the hearing, Judge Wiley urged the prosecutor to request additional time to respond in writing to Rev. Pinkney's five-page memorandum, which the judge described as a "very thick brief." (Ex. 6, *supra*, at 8.) The prosecutor replied that he did not wish to "delay the proceedings any further," but Judge Wiley accused defense counsel of orchestrating a "hurry-up offense" and asserted that "[w]e're not here to hurry, hurry, hurry." (*Id.* at 7.) The prosecutor requested a five-minute recess to confer with his superiors and ultimately informed the court that he preferred to respond orally. (*Id.* at 8-9.)

14. The prosecutor requested that bond be set at "\$10,000 ten percent" and that Rev. Pinkney be placed on an electronic tether. (*Id.* at 9).

15. Defense counsel objected to the tether. (*Id.* at 10.)

16. Judge Wiley rejected the proposals of both the defense and the prosecutor. He set bond at \$10,000 cash or surety, stating that he "want[ed] a bondsman to be responsible for [Rev. Pinkney's] appearance." (*Id.* at 13, 16.) Then, in addition to an electronic tether with GPS monitoring, Judge Wiley imposed a long list of bail conditions, including:

- "You must be in your residence twenty-four hours per day, seven days a week."
- "You must not engage in any . . . demeaning . . . behavior . . . ."
- "You are to have no contact with the Berrien County Courthouse, by entering onto their premises unless require[d] for a court hearing to which you are a party to."
- "You shall not participate in any capacity in a campaign for any public election."

- "You must not have verbal, written, electronic, or physical contact, without permission of the field agent, with anyone you know to have a felony record."

(See Bail Bond, attached as Exhibit 8, at 2.)

17. Rev. Pinkney asked the court if he could give speeches in churches and at other events, which he asserted was his only means of earning a living for his family. Judge Wiley denied his request. (Ex. 6, *supra*, at 15-16.)

18. Rev. Pinkney posted bond and was "released" to house arrest on December 24, 2008, after serving over a year in prison.

### **Argument**

19. The Michigan Court Rules provide that the amount of bond pending appeal is "within the discretion of the trial court" and that bond "must be sufficient to guarantee the appearance of the defendant" if the underlying sentence is affirmed. MCR 7.209(B)(2).

20. Although Michigan courts have not specifically addressed whether a trial court has discretion to impose non-monetary conditions of bail pending appeal, it is well-established that "[m]oney bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required." *People v Edmond*, 81 Mich App 743, 747-48; 266 NW2d 640 (1978); see *Stack v Boyle*, 342 US 1, 5 (1951). Consistent with that rule, most jurisdictions require that non-monetary bail conditions be the least restrictive conditions necessary to reasonably assure the defendant's appearance. See, e.g., *United States v Himler*, 797 F2d 156, 159 (CA 3, 1986); *Mendoza v Commonwealth*, 673 NE2d 22, 25 (Mass, 1996); *Brill v Gurich*, 965 P.2d 404, 408 (Okla Crim App, 1998); *State v Hance*, 910 A2d 874, 877 (Vt, 2006); *City of Yakima v. Mollett*, 63 P3d 177, 179 (Wash App, 2003).

21. Therefore, assuming trial courts in Michigan do have discretion to impose non-monetary conditions of bail, this Court may conclude that a trial court abuses its discretion if it imposes bail conditions that (a) undermine an appellate court order granting bail, (b) are either unrelated to guaranteeing the defendant's surrender in the event his appeal is unsuccessful or are substantially more restrictive than necessary to achieve that end, or (c) needlessly infringe on the defendant's constitutional rights.

22. This Court is authorized under MCR 7.209(D) to review and amend bail decisions of the trial court.

23. This Court has already ordered Rev. Pinkney admitted to bail upon posting bond "in an amount to be set by" the trial court. (Ex. 1, *supra*.) Judge Wiley went well beyond setting an "amount." He imposed unreasonable and excessive conditions of bail that deny Rev. Pinkney the liberty he should be afforded during the pendency of his appeal.

***The Trial Court's Order Confining Rev. Pinkney to 24-Hour House Arrest Should Be Vacated Because It Undermines This Court's Order That He Be Admitted to Bail Upon Posting Bond***

24. In addition to setting bond at \$10,000 and requiring Rev. Pinkney to submit to an electronic tether with GPS monitoring, Judge Wiley ordered that he "be in [his] residence twenty-four hours per day, seven days a week." This condition should be vacated because it undermines this Court's order granting bail.

25. Under the law of the case doctrine, the trial court "may not take action on remand that is inconsistent with the judgment of the appellate court." *Grievance Adm'r v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). In its order granting Rev. Pinkney's motion for bond pending appeal, this Court explicitly ordered that Rev. Pinkney "be admitted to bail pending resolution of this appeal or further order of this Court upon filing a bond with the clerk of the trial court in an amount to be set by that court." By adding a long list of highly restrictive non-

monetary conditions of bond not required by this Court's order or MCR 7.209(F)(2), the trial court acted contrary to this Court's directive, effectively refusing to admit Rev. Pinkney to bail even if he complied with the order of the Court of Appeals.

26. Although the trial court did purport to admit Rev. Pinkney to bail, practically speaking the trial court's order denies Rev. Pinkney most of the conditional liberty an appeal bond entails. Judge Wiley placed Rev. Pinkney on a twenty-four-hour-per-day, seven-day-per-week curfew for the duration of his appeal, which could be months or could even exceed a year. Although convicted defendants do not enjoy all the liberties of regular citizens when released on bond pending appeal, see MCR 7.209(F)(2) (listing mandatory conditions of an appeal bond), it is unreasonable to deny Rev. Pinkney virtually *all* freedom of movement until his appeal is decided by this Court. The trial court's order imposing unconditional house arrest effectively nullifies this Court's order granting Rev. Pinkney bail pending appeal.

***The 24-Hour House Arrest Condition Should Be Vacated  
Because It Far Exceeds What Is Necessary to Assure Rev.  
Pinkney's Appearance in the Event His Appeal Is Unsuccessful***

27. The 24-hour house arrest condition should be vacated for the additional reason that it is far more restrictive than necessary. MCR 7.209(B)(2) identifies a single criterion for the setting of bond pending appeal: it must be sufficient to guarantee the appearance of the defendant if the lower court judgment is affirmed. The trial court's order placing Rev. Pinkney under 24-hour house arrest is far in excess of what is required to guarantee his appearance in the event he loses his appeal.

28. Before and during Rev. Pinkney's trials, Judge Alfred M. Butzbaugh released him on a pretrial bond in the amount of \$10,000 secured by a 10% cash deposit. While on pretrial release, Rev. Pinkney appeared for court hearings as required. He made numerous trips out of state with permission of the court and never failed to return. (See Ex. 2, *supra*.)

29. Following his conviction, Rev. Pinkney was placed on probation without any cash bond. While on probation, Rev. Pinkney gave speeches, taught classes, and led religious services. During this time he reported regularly to his probation officer even though he knew he would be required to serve one year in jail. (See Ex. 3, *supra*, and Ex. 4, *supra*, at 14-15.)

30. Given Rev. Pinkney's demonstrated record of appearing in court and reporting to his probation officer when required, it is unnecessary to place him on 24-hour house arrest for the duration of his appeal in order to guarantee his appearance. Far less restrictive alternatives are available in order to achieve that goal. For example, Rev. Pinkney could be required to call or meet with a field officer on a regular basis.

31. When this Court grants bail pending appeal, the trial court should not impose the most restrictive bail conditions possible when less restrictive alternatives will guarantee the defendant's appearance in the event his appeal is unsuccessful. See *Edmond, supra*, 81 Mich App at 747-48; see also *Himler, supra*, 797 F2d at 159; *Mendoza, supra*, 673 NE2d at 25; *Brill, supra*, 965 P.2d at 408; *Hance, supra*, 910 A2d at 877; *Mollett*, 63 P3d at 179. Although an appeal bond may not entitle a defendant to the same amount of liberty enjoyed by other citizens, 24-hour house arrest is unnecessary to guarantee Rev. Pinkney's appearance at a future court hearing. This excessive condition of bail should be vacated.

***The Trial Court's Order Banning Rev. Pinkney from Giving Speeches  
Should Be Vacated Because It Infringes on His Constitutional Rights  
and Is Unrelated to Guaranteeing His Appearance***

32. When Rev. Pinkney asked Judge Wiley if he could give speeches at churches and other events in order to earn a living for his family, Judge Wiley denied that request. (Ex. 6, *supra*, at 15-16.)

33. Giving speeches is protected activity under the First Amendment, even for defendants on supervised release. In *Hyland v Proconier*, 311 F Supp 749 (ND Cal, 1970), the

court enjoined enforcement of a parole condition that required the parolee to obtain permission before giving any public speech. Similarly, in *In re Mannino*, 14 Cal App 3d 953, 963 (1971), the court granted habeas relief to probationer who was ordered by the trial court not to speak or write about "any . . . matters . . . of vital interest." Here, Judge Wiley's order that Rev. Pinkney not give speeches obviously implicates an important First Amendment right.

34. Additionally, under the Due Process Clause, the government may not unreasonably interfere with the right to hold specific private employment and follow a chosen profession. *Green v McElroy*, 360 US 474, 492 (1959). Rev. Pinkney's only potential source of income is giving speeches at churches and other events. This cannot be accomplished if his house arrest is unconditional.

35. Rev. Pinkney recognizes that the rights to free speech and to pursue a chosen profession are not absolute. In this case, however, the trial court has not justified its order preventing Rev. Pinkney from exercising these rights. To the contrary, Rev. Pinkney's history demonstrates that he would pose no flight risk by making scheduled visits to churches and other events in order to give speeches. Indeed, a defendant is *less* likely to abscond when he is productively engaged in community events and making public appearances.

36. Judge Wiley's order banning Rev. Pinkney from giving speeches raises the serious question whether the bail conditions imposed in this case are designed to prevent Rev. Pinkney from expressing his political opinions rather than to guarantee his appearance at a future court hearing. This should be of particular concern given the background and context of this case, which involves the imprisonment of a political activist for writing a newspaper editorial criticizing the local judiciary.

***The Trial Court's Order Prohibiting "Demeaning . . . Behavior"  
Should Be Vacated Because It Is Unconstitutionally Vague and  
Overbroad and Because Its Unconstitutional Application to Rev.  
Pinkney Is the Subject of This Appeal***

37. At the bond hearing, Judge Wiley reimposed the same vague and overbroad restriction that he used to justify revoking Rev. Pinkney's probation for writing a newspaper editorial: "You must not engage in any . . . demeaning . . . behavior." As argued in Rev. Pinkney's motion for bail pending appeal (Ex. 5, *supra*) and his main appellate brief, this condition is unconstitutionally vague, and it chills or prohibits constitutionally protected speech.

38. At Rev. Pinkney's probation revocation hearing, Judge Wiley ruled that Rev. Pinkney had violated the conditions of probation because, among other things, his newspaper editorial was "demeaning to Judge Butzbaugh." (Ex. 4, *supra*, at 76.) In his motion for bail pending appeal in this Court, Rev. Pinkney argued that the "demeaning . . . behavior" condition of probation was unconstitutionally vague and overbroad in violation of the First Amendment. (Ex. 5, *supra*, Brief at 21-26.) By granting that motion, this Court has strongly suggested that these arguments constitute substantial grounds for appeal. At the December 18 bond hearing, however, Judge Wiley refused to acknowledge that this Court had considered the substantiality of Rev. Pinkney's grounds for appeal, stating "that is yet to be decided by the Court of Appeals." (Ex. 6, *supra*, at 13.)

39. The ban on "demeaning . . . behavior" is unconstitutionally vague. Bail conditions are void for vagueness if (1) they are insufficient to apprise the defendant of what activity is actually forbidden, or (2) if they authorize or encourage arbitrary and discriminatory enforcement. See *Chicago v Morales*, 527 US 41, 56 (1999); *People v Bruce*, 102 Mich App 573, 578; 302 NW2d 238 (1980). As Rev. Pinkney argued in his motion for bail pending appeal and in his main appellate brief, the "demeaning . . . behavior" condition of probation fails both

tests: it does not clearly inform a probationer of what activity is actually forbidden, and it is vulnerable to arbitrary and whimsical enforcement by probation officers and courts.

40. As a bail condition, this restriction is equally problematic. Rev. Pinkney has no way to determine with any level of precision what constitutes "demeaning" behavior, and the trial court could arbitrarily revoke his bail based on virtually any conduct that could be deemed "demeaning." See *Smith v Goguen*, 415 US 566 (1974) (striking down on vagueness grounds a Massachusetts law making it a crime to "treat[] contemptuously the flag of the United States").

41. The ban on "demeaning . . . behavior" also has a profound chilling effect on free speech. As the United States Supreme Court has explained, "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned v City of Rockford*, 408 US 104, 109 (1972) (internal quotation marks, alterations, and footnote omitted). Indeed, it is difficult to conceive of a regulation more chilling of constitutionally protected speech than one which threatens to revoke bail for any behavior that a judge might characterize as "demeaning."

42. These concerns are not merely theoretical or abstract. Rev. Pinkney has already served over a year in prison for writing a newspaper editorial that Judge Wiley ruled was "demeaning to Judge Butzbaugh." Judge Wiley has now reimposed the prohibition on "demeaning . . . behavior," which apparently means that he is willing to revoke bail should Rev. Pinkney republish the offending newspaper article or write another editorial critical of a public official.

43. The chilling effect of such a bail condition is therefore obvious: Rev. Pinkney has little choice but to refrain from expressing *any* political opinion critical of public officials. A defendant who writes a letter to the editor calling former President Bush a "war criminal" or

President Obama a "Marxist" could have his bail revoked for being "demeaning." These statements, while demeaning, are also classic examples of political speech clearly protected under the First Amendment.

44. Because this Court by ordering bail has strongly suggested that there is substantiality to Rev. Pinkney's claim on appeal that his newspaper editorial was constitutionally protected, the trial court should not have imposed bail conditions prohibiting Rev. Pinkney from continuing to express his political opinions. See *Carbo v United States*, 82 S Ct 662, 667 (1962) (Douglas, J, sitting as Circuit Justice) ("[W]here the constitutionality of an Act is at issue, the likelihood that the applicant, if released on bail, might repeat the offense is not a proper circumstance to take into consideration . . . ."); see also *Williamson v United States*, 184 F2d 280, 283, 95 L Ed 1379 (1950) (Jackson, J, sitting as Circuit Justice) (granting bail despite the government's argument that defendants would continue to publish the *Daily Worker*, a Communist newspaper containing articles and editorials "severely critical of the policy of the United States toward Korea and favorable to the Soviet position," some of which "are crudely intemperate, contain falsehoods obvious to the informed, and . . . are plainly designed to embroil different elements of our society and embarrass those who are presently conducting the Government"). The "demeaning . . . behavior" bail condition should therefore be vacated.

***The Trial Court's Order Banning Rev. Pinkney from the  
Berrien County Courthouse Should Be Vacated Because It  
Infringes on His Constitutional Rights and Is Unrelated to  
Guaranteeing His Appearance***

45. Where fundamental rights are implicated, this Court should subject bail conditions to special scrutiny and should vacate or modify conditions that are not necessary to guarantee the defendant's appearance. See *Gentile v State Bar of Nevada*, 501 US 1030, 1075 (1991) ("When a state regulation implicates First Amendment rights, the Court must balance

those interests against the State's legitimate interest in regulating the activity in question."); *United States v O'Brien*, 391 US 367, 377 (1968) (upholding government regulation burdening free expression if it "furthers an important or substantial government interest" and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").\*

46. The trial court ordered that Rev. Pinkney have "no contact with the Berrien County Courthouse." In addition to being redundant, as Rev. Pinkney is not even permitted to leave his own house, this bail condition infringes on Rev. Pinkney's constitutional right of access to the courts under the First and Fourteenth Amendments. See *Tennessee v Lane*, 541 US 509, 531 (2004); *Globe Newspaper Co v Superior Court for Norfolk County*, 457 US 596, 603-06 (1982).

47. There is no substantial or important state interest related to bail that justifies this restriction. Keeping Rev. Pinkney *away* from the courthouse is a bizarre approach to guaranteeing his appearance at a future court appearance in the event he loses his appeal.

48. The trial court's motives for imposing this condition are particularly suspect given Rev. Pinkney's history of organizing peaceful marches in front of the courthouse and speaking out against perceived injustices in the Berrien County criminal justice system. There is an appearance of impropriety whenever a court that has been the object of lawful protests exercises

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\* In the context of probation, courts have held that conditions restricting the exercise of constitutional rights are subject to special scrutiny and should not be upheld unless reasonably related to the purposes of probation and narrowly tailored to achieve those ends. See *United States v Crume*, 422 F3d 728, 733 (CA 8, 2005); *United States v Crandon*, 173 F3d 122, 128 (CA 3, 1999); *United States v Terrigno*, 838 F2d 371, 374 (CA9, 1988); *United States v Holloway*, 740 F2d 1373, 1383 (CA 6, 1984); *United States v Consuelo-Gonzalez*, 521 F2d 259, 265 (CA 9, 1975); *Thomas v State*, 710 P2d 1017, 1019 (Alaska, 1985); *People v Pointer*, 151 Cal App 3d 1128, 1137-39 (1984); *Larson v State*, 572 So2d 1368 (Fla, 1991); *Williams v State*, 661 So2d 59, 61 (Fla App, 1995); *Wilfong v Commonwealth*, 175 SW3d 84, 97 (Ky App, 2004). The same standard should apply when bail conditions implicate fundamental rights.

its power to ban constitutionally protected activity for no good reason. This arbitrary condition of bail should be vacated.

***The Trial Court's Order Banning Rev. Pinkney from Political Participation Also Infringes on His Constitutional Rights and Is Unrelated to Guaranteeing His Appearance***

49. The trial court also ordered that Rev. Pinkney "not participate in any capacity in a campaign for any public election." The First Amendment right to political participation is fundamental. See, e.g., *Buckley v Valeo*, 424 US 1, 14-15 (1976). Like the condition barring Rev. Pinkney from the Berrien County courthouse, the condition prohibiting political participation bears no relationship to the objective of an appeal bond, to guarantee the defendant's appearance.

50. In fact, because Rev. Pinkney is electronically tethered to his house twenty-four hours per day, the political participation ban -- like his banishment from the courthouse -- is apparently designed to prevent Rev. Pinkney from expressing his political opinions on important issues of public concern. The government has no legitimate interest in preventing Rev. Pinkney from endorsing a political candidate, supporting a ballot referendum, or even running for public office. (See *Michigan Minister Runs for Congress from Prison*, attached as Exhibit 9.)

51. Even if the court has discretion to place some limits on Rev. Pinkney's physical activities in order to guarantee his appearance should he lose his appeal, the requirement that he "not participate in *any* capacity in a campaign for any public election" (Ex. 8, *supra*, at 2, emphasis added) is far more restrictive than necessary to achieve that end. The blanket ban on political activity imposed by the trial court should be vacated.

***The Trial Court's Order Prohibiting Contact with Felons Should Be Modified to Permit Rev. Pinkney to Do Ministry Work***

52. Rev. Pinkney has been ordered not to "have verbal, written, electronic, or physical contact, without permission of the field agent, with anyone [he] know[s] to have a felony record." This restriction was originally imposed by Judge Butzbaugh as a condition of probation, and at Rev. Pinkney's request Judge Butzbaugh modified it to permit Rev. Pinkney to have contact with such persons during his ministry work at the Hopewell Baptist Church in Benton Harbor. (See 10/15/07 Opinion and Order, attached as Exhibit 10, at 42.)

53. Now that Rev. Pinkney has been granted bail pending appeal, he wishes to continue his ministry work and community organizing in Benton Harbor. These activities occasionally involve contact with persons who have criminal records. This church-based contact will have no effect on guaranteeing Rev. Pinkney's appearance at future court hearings. His bail conditions should be modified to permit Rev. Pinkney to continue his ministry work and community outreach.

***The Trial Court's Order Requiring Rev. Pinkney to Wear an Electronic Tether Should Be Vacated Because It Is Beyond the Scope of This Court's Remand, It Is Unnecessary to Assure His Appearance, and It Imposes an Undue Financial Hardship***

54. In granting Rev. Pinkney's motion for an appeal bond, this Court ordered that "the defendant be admitted to bail pending resolution of this appeal . . . upon filing a bond with the clerk of the trial court in an *amount* to be set by that court." (Ex. 1, *supra* (emphasis added).) In addition to setting an amount of bond, the trial court required that Rev. Pinkney "Submit to Electronic Monitoring (Tether)." (Ex. 8, *supra*, at 1.) This restriction on Rev. Pinkney's liberty exceeds the scope of this Court's remand. Because Rev. Pinkney has posted the bond in the amount set by the trial court, he should be admitted to bail pursuant to this Court's order without being required to submit to electronic monitoring.

55. In addition to exceeding the scope of this Court's order, the electronic tether requirement is wholly unnecessary to guarantee Rev. Pinkney's appearance in the event he loses his appeal. Rev. Pinkney has a demonstrated record of appearing in court and complying with reporting requirements throughout his two trials and probation period. (See ¶¶ 28-29, *supra*.) He also has strong ties to his community. (See Ex. 5, *supra*, Brief at 29, and Ex. 7, *supra*, at 3.) The \$10,000 bond Rev. Pinkney posted is more than sufficient to guarantee his appearance.

56. If this Court does not vacate the trial court's order requiring electronic monitoring, the order should be modified to waive the applicable fees which Rev. Pinkney is being assessed despite his financial inability to pay. Rev. Pinkney is billed \$105 per week for the tether. Because Rev. Pinkney has also been placed on 24-hour house arrest, he has no way of earning money to pay these fees. (See Declaration of Edward Pinkney, attached as Exhibit 11.) The electronic tether requirement therefore imposes a crippling and unjustified financial burden on Rev. Pinkney. See *Bearden v Georgia*, 461 US 660, 668-69 (1983) (holding that state court may not revoke probation based on defendant's financial inability to pay fine); *People v Gallagher*, 55 Mich App 613, 620; 223 NW2d 92 (1974) (same). Because "payment is impossible or would constitute an undue hardship," *People v LaPine*, 63 Mich App 554, 558; 234 NW2d 700 (1975), the tether fees should be waived.

***If Another Remand Is Necessary, This Case Should Be  
Reassigned to a Different Trial Judge***

57. Rev. Pinkney requests that this Court vacate or modify his bail conditions and does not believe that there is any need to remand this case to the trial court for further proceedings. See MCR 7.209(D). However, in the event that this Court deems a remand necessary, Rev. Pinkney requests that further proceedings be ordered before a different trial judge.

58. Michigan courts consider three factors when deciding whether proceedings on remand should take place before a different trial judge: "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986). Even when "the record does not indicate any bias towards defendant by the original judge," reassignment may be warranted in order "to preserve the appearance of justice and fairness." *People v Williams*, 168 Mich App 150, 153; 424 NW2d 1 (1988).

59. The appearance of justice and fairness has been severely compromised by Judge Wiley's rulings and statements in this case. When Rev. Pinkney exercised his First Amendment right to publish a newspaper editorial criticizing the Berrien County criminal justice system, Judge Wiley revoked his probation and sentenced him to the maximum minimum sentence under the guidelines, twice that recommended by his probation officer. See *Williams, supra*, 168 Mich App at 152-53 (reassigning case to a different judge after "excessively severe" sentence). At the bond hearing, Judge Wiley accused defense counsel of orchestrating a "hurry up offense" even though it had been over a week since this Court had granted bail pending appeal and Rev. Pinkney remained incarcerated without an opportunity to post bond. (Ex. 6, *supra*, at 8.) Judge Wiley also urged the prosecutor to request additional time to respond in writing to the defendant's five-page memorandum even though the prosecutor stated on the record that he preferred to respond orally so as not to cause any additional delay. (*Id.* at 6-9.) Judge Wiley rejected the prosecutor's recommendation that Rev. Pinkney be released on a \$10,000 / 10%

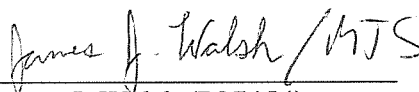
bond and be placed on a tether. (*Id.* at 9.) Instead, he imposed a \$10,000 cash or surety bond and a litany of unjustified and highly restrictive bail conditions, including 24-hour house arrest, that effectively undermined this Court's order granting bail. Some of these bail conditions are unrelated to guaranteeing Rev. Pinkney's appearance and raise serious questions whether Judge Wiley's true aim is to prevent Rev. Pinkney from lawfully exercising his First Amendment right to criticize public officials.

60. Based on the foregoing facts and events, "reassignment is advisable to preserve the appearance of justice." *Evans, supra*, 156 Mich App at 72. The record reflects that Judge Wiley "would have difficult setting aside [his] previously expressed views and justly resolve" this case at future hearings. *People v Pillar*, 233 Mich App 267, 271; 590 NW2d 622 (1998). Furthermore, "reassignment would [not] entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Evans, supra*, 156 Mich App at 72.

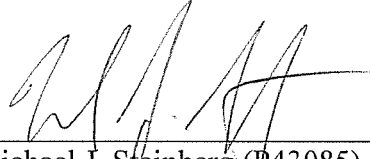
### **Conclusion**

WHEREFORE, Defendant-Appellant respectfully prays that this Court enter an order vacating or modifying the conditions of bail imposed by the trial court. Should a remand be necessary, Defendant-Appellant further requests that this case be reassigned to a different trial judge.

Respectfully submitted,



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