

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Court of Appeals No. 286992
Lower Court No. 2005 401979 FH

vs.

EDWARD PINKNEY,

Defendant-Appellant.

***AMICUS CURIAE* BRIEF OF THOMAS JEFFERSON CENTER FOR THE
PROTECTION OF FREE EXPRESSION IN SUPPORT OF
DEFENDANT-APPELLANT'S BRIEF ON APPEAL**

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STATEMENT OF JURISDICTION

Amicus Curiae relies on the Statement of Jurisdiction set forth in *Defendant-Appellant's Brief on Appeal*.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan institution dedicated solely to the protection of the First Amendment rights of free speech and free press. Since its founding in 1990, the Center has actively participated in the litigation of First Amendment issues and has filed briefs as *amicus curiae* in the United States Supreme Court, in the Federal Courts of Appeal, and in state appellate courts around the country, including this Court. Among the issues raised in this appeal, is whether the language at issue constituted a “true threat.” The Center believes it could be of assistance to this Court in deciding this issue because of its experience in the United States Supreme Court’s most recent decision focusing on “true threats”: *Virginia v Black*, 538 US 343 (2003). The Center filed documents as *amicus curiae* in *Virginia v Black* with the trial court, the Virginia Supreme Court, the United States Supreme Court, and again at the Virginia Supreme Court on remand.

STATEMENT OF FACTS

A full and complete account of the facts of this case is set out in *Defendant-Appellant's Brief on Appeal*. The following more limited statement sets forth the facts that are relevant to the arguments of *amicus curiae*.

Edward Pinkney, a Baptist minister and community activist, was convicted of violating Michigan election law. An appeal of that conviction is now pending. The matter now before this Court concerns the appeal of a final order and judgment sentencing Rev. Pinkney to three to ten years for violating the terms of his probation for the earlier conviction. Specifically, Rev. Pinkney was found to be in violation of the 15th condition of his probation which states: “You must not engage in any assaultive, abusive, defamatory, demeaning, harassing, violent, threatening or intimidating behavior, including the use, through any electronic or print media under your care, custody or control, of the mail, e-mail, or internet.” *Defendant-Appellant’s Brief on Appeal, 6, Michigan v Pinkney*, No. 286992 (Mich. Court of Appeals, Dec. 18, 2008).

The Revocation of Rev. Pinkney’s probation was based entirely on statements he made in a letter to the editor published in the *People’s Tribune*, a local newspaper that appears both in print and on-line. The letter appeared as follows:

VOICES FROM BENTON HARBOR, MI

Corrupt judge denies new jury trial in Pinkney case

By Rev. Edward Pinkney

It is our constitutional duty as American citizens to hold our elected officials accountable for their words, actions and inaction of wrongdoing. We must draw the line and decide what to do if that line is crossed, and we must use our Constitution. Most judges, prosecutors and law enforcement officials have crossed the line in the sand many times. It's time for the people: poor whites, Blacks and Hispanics to stand together and fight for what is right.

We must fight for justice for all anytime you have a Judge like Alfred Butzbaugh, who is a racist. It took over 53 days to render a fifth-grade decision denying me a new trial. I am a man of God, and an innocent man, convicted by an all-white jury that

violated the sanctity of their oath and were motivated by something other than the pursuit of truth and justice.

The corruption and the deceitfulness continues in Berrien County Courthouse. In my motion for a new trial, I argued that I was charged but never arraigned, nor did I receive due process by the dumb Judge and prosecutor. I was denied a public trial when the Judge locked the courtroom doors. One of the jurors reported to the Court that during the recess, she saw one of Rev. Pinkney's attorneys make a drug deal in the parking lot. She lied, saying several Black people came up to her and her husband and asked for money. She was not removed from the jury. The Berrien County Courthouse is so blatantly corrupt that even the legal establishment has been forced to recognize it. It does not provide a just legal system. The corruption starts at the top. They customarily and regularly deprive Blacks and Hispanics of due process.

The corruption and the deceitfulness continues in Berrien County Courthouse. Judge Butzbaugh has violated his oath. I support the constitution of the United States and the State of Michigan; we are still waiting on this racist corrupt judge to do the same. Judge Butzbaugh has failed the people, the community, his duties and his office.

Judge Butzbaugh, it shall come to pass; if thou continue not to hearken unto the voice of the Lord thy God to observe to do all that is right; which I command thee this day, that all these Curses shall come upon you and your family, curses shalt be in the City of St. Joseph and Cursed shalt thou be in the field, cursed shall come upon you and your family and over take thee; cursed shall be the fruit of thy body. The Lord shall smite thee with consumption and with a fever and with an inflammation and with extreme burning. They the demons shall Pursue thee until thou persist.

The Herald Palladium is known as the "Herald Pollution" because of all the racist garbage the newspaper writes. It is led by Julia Swida, Scott Aikens and Dave Brown.

When does it all stop! When are the people going to take a stand? The challenge is clear. The case of Rev. Edward Pinkney is a concentration of the criminalization of a generation of people. This is not a Black issue, nor is it just a person of color issue. It is a whole country issue.

Defendant-Appellant's Brief at 5-6. Appendix A: *People's Tribune* (Nov/Dec. 2007). The lower court found that Rev. Pinkney's letter constituted "defamatory, demeaning,...[and] threatening or intimidating behavior."

STATEMENT OF QUESTION PRESENTED

Whether the trial court violated Defendant-Appellant's right to free speech under the First Amendment by Revoking his probation on the basis of his newspaper editorial harshly criticizing the trial judge's handling of his case and predicting that God might punish the judge?

Trial court's answer: No.

Defendant-Appellant's answer: Yes.

Amicus Curiae's answer: Yes.

SUMMARY OF ARGUMENT

A man has been deprived of his liberty because of the ideas he chose to express publicly. That fact is not disputed in the matter before the Court. While such an action is not unprecedented in the United States, it is the rare exception that proves the rule: any governmental effort to restrict or punish speech because of its content must meet the rigorous scrutiny of the First Amendment. *Watts v United States*, 394 US 705, 707 (1969)(per curiam) ("[A] statute ... which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind.") Further, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v California*, 314 US 252, 270 (1941). Even conceding there are circumstances under which the speech of a

probationer may be limited to a greater degree than that of a person not convicted of a crime, none of those circumstances are presented by the facts of this case. In finding that Rev. Pinkney's newspaper editorial violated his conditions of probation, the lower court punished speech at the core of First Amendment protection: public criticism of the judiciary. *Id.*

Specifically, Judge Wiley in his ruling below stated that Rev. Pinkney's editorial in the *People's Tribune* violated three of provisions of the 15th condition of his probation: it expressed a "true threat" against Judge Butzbaugh (the judge who presided over Rev. Pinkney's trial on the underlying charge), and it contained language that both defamed and demeaned the judge. In regard to the first and second probationary conditions noted above, the Supreme Court of the United States and courts around the nation have extensively addressed the issues of what is constitutionally permissible to prohibit either as a "true threat" or a defamatory statement against a public official. There is no authority that holds the probationary status of the speaker changes the reach of these two exceptions to First Amendment protection. This Court similarly should not lessen the degree to which Rev. Pinkney's probation conditions are scrutinized under the First Amendment.

This is not a preface to an argument that probation conditions prohibiting "threatening" or "defamatory" comments are constitutionally impermissible; rather, it is to assert that Judge Wiley's finding that Rev. Pinkney's newspaper editorial violated such conditions was contrary to established First Amendment principles concerning "true threats" and defamatory-actionable statements against public officials.

The imposition of a probationary condition prohibiting "demeaning" behavior raises significant concerns both on its face and as applied to the facts of this case. *Amicus* adopts the

analysis of why this condition is not reasonably related to Rev. Pinkney’s underlying conviction provided in *Defendant-Appellant’s Brief on Appeal*. *Amicus* will forego a repetition of that analysis in order to focus on the free speech implications of prohibiting "demeaning" behavior; specifically, that such a provision is unconstitutionally vague.

ARGUMENT

I. REVEREND PINKNEY’S EDITORIAL CONSTITUTES SPEECH THAT IS AT THE CORE OF FIRST AMENDMENT PROTECTION.

The Supreme Court of the United States has recognized that “it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.” *Richmond Newspapers, Inc, et al, v Virginia et al*, 448 US 555, 575 (1980). “The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations,” the Court declared in *Gentile v State Bar of Nevada*, 501 US 1030, 1035 (1991). In the same case, the Supreme Court ruled that published criticism in particular has an important role to play: “Public vigilance serves us well, for ‘[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . Without publicity, all other checks are insufficient.’” *Id.* at 1035 (quoting *In re Oliver*, 333 US 257, 270–71 (1948)).

The Supreme Court has ensured protection of public comment on the judiciary because “the administration of the law is not the problem of the judge or the prosecuting attorney alone, but necessitates the active cooperation of an enlightened public.” *Wood v Georgia*, 370 US 375,

391 (1962). As a result, “[n]othing is to be gained by an attitude on the part of the citizenry of civic irresponsibility or apathy in voicing their sentiments on community problems.” *Id.* On the contrary, we have much to lose when we risk chilling criticism of the judiciary through the exercise of the state’s power over probationers without a compelling interest on the part of the state.

To be sure, while “the need is great that courts be criticized,” the need is “just as great that they be allowed to do their duty.” *Bridges*, 314 US at 284 [J. Frankfurter, dissenting]. In *Bridges*, the Court acknowledged two “substantive evil[s] sought to be averted” by the suppression of speech critical of the judiciary: “disrespect for the judiciary; and disorderly and unfair administration of justice.” *Id.* at 270. Yet the Court rejected disrespect for the judiciary as a basis for the suppression of criticism by means of a contempt order and required a showing of “clear and present danger” that speech would interfere with the administration of justice in a pending case. *Id.* at 264, 270, 271).

In *Rev. Pinkney’s* case, there is no support for an argument that the editorial could have affected the orderly or fair administration of justice, because “*Rev. Pinkney’s* trial was in no way ‘pending’ when his editorial was published; the article criticized Judge Butzbaugh’s decision denying his motion for a new trial.” *Defendant-Appellant’s Brief* at 33, n.8. The Court in *Bridges* asserted that the fear of criticism interfering with the fair and orderly administration of justice “is more plausibly associated with restricting publications which touch upon pending litigation.” *Bridges*, 314 US at 271. As the Court acknowledged, “[t]he very word ‘trial’ connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the

newspaper.” *Id.* Where there is no pending case that could be affected, however, these concerns are inapposite.

Even where there is pending litigation, the standard for validating restrictions of criticism in the press presents a very high bar; the First Amendment “require[s] a showing of ‘clear and present danger’ that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial.” *Gentile*, 501 US at 1070–1071. *See also Craig v Harney*, 331 US 367 (1947)(ruling that an editorial criticizing a judge’s ruling, e.g., as a “travesty of justice,” published while a motion for a new trial was still pending, was protected speech that could not be punished by a contempt order); *Wood*, 370 US at 389 (holding that a news release published while a grand jury was in session, criticizing the judge’s instruction to the grand jury as “race agitation,” did not meet the ‘clear and present danger’ standard); *Florida v Pennekamp*, 328 US 331, 348 (1945)(overturning a finding of contempt because, in the newspaper editorials in question, “criticism of the judges’ inclinations or actions in these pending non-jury proceedings could not directly affect such administration [of justice].”) In this line of cases limiting the power of courts to punish out-of-court speech with contempt, the Supreme Court clearly expressed that only “an imminent, not merely a likely, threat to the administration of justice” would make such an exercise of power permissible. *Craig*, 331 US at 376. “The danger must not be remote or even probable; it must immediately imperil.” *Id.*

In finding that Rev. Pinkney’s editorial violated the “demeaning...behavior” condition of his probation, by contrast, the court below focused on the personal impact of the criticism on

Judge Butzbaugh. For instance, the Court’s analysis of Rev. Pinkney’s description of the judge as “dumb” merely reflected on what such a statement would mean to someone personally:

I do not consider Judge Butzbaugh to be dumb in the 30-some years I’ve dealt with him in private practice and on the bench, but one is always entitled to their opinion, and I’m sure many people have a lot of opinions, including some of my teachers in school that thought I was pretty dumb and still [sic] think I’m pretty dumb. I guess I will have to live with that. So I don’t consider that to de [sic] defamatory, though it certainly, is demeaning.

(6/26/08 Probation Violation Hearing Transcript at 74–75 (hereinafter “Hearing Tr.”) With regard to Rev. Pinkney’s references to racism and corruption, the court merely declared that “they clearly are demeaning to Judge Butzbaugh.” *Id.* at 76.

Such blunt forms of public criticism are understandably a heavy burden for public servants to bear, but the Supreme Court has vigorously rejected disrespect for the judiciary as grounds for the suppression of speech: “The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” *Bridges*, 314 US at 270. Crucially, the Court also declared that suppression of speech on those grounds would be likely to cause another substantive harm, as “an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.” *Id.* at 270–71. Even where the published remarks constituted “strong language, intemperate language, and, we assume, an unfair criticism,” the Supreme Court has held that “a judge may not hold in contempt one ‘who ventures to publish anything that tends to make him unpopular or to belittle him.’” *Craig*, 331 US at 376 (quoting *Craig v*

Hecht, 263 US 255, 281 (1923) [J. Holmes, dissenting]).

Likewise, this Court has recognized, when reviewing a case “dealing with a general accusation [of corruption] leveled at an entire bench,” that such speech, especially when published, is so crucial to the public interest that it should not be suppressed in order to defend a judge’s reputation:

What is the best course of action for a judge, a member of the bench so accused? The answer must, we feel, be nothing, ‘for ‘public men, are, as it were, public property,’ and ‘discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.’

In re Turner, 21 Mich App 40, 56-57 (1969)(quoting *New York Times Co v Sullivan*, 376 US 254, 268 (1964)). In that case, the Livingston County judiciary was “made the subject of disparaging statements” in a magazine, yet this Court ruled that the publisher could not be held in contempt, because “[e]ven if the attacks against the Livingston County judiciary. . . are in fact irresponsible or scurrilous, we see no effect upon pending cases.” *Turner*, 21 Mich App at 56. “The best defense judges may present to the public is the unsullied performance of their judicial duties.” *Id.* at 57.

Rev. Pinkney’s editorial is clearly speech that falls well within the protections of the First Amendment. The public interest involved in speech so protected strongly militates for strictly scrutinizing the application of Rev. Pinkney’s probationary conditions to his critical comments of the judiciary.

II. REV. PINKNEY'S EDITORIAL IS CONSTITUTIONALLY PROTECTED SPEECH THAT DOES NOT CONSTITUTE A "TRUE THREAT."

Although "true threats" are not protected under the First Amendment, the US Supreme Court has recognized the danger of mistaking threats with the often abusive, but nonetheless constitutionally protected, language of the political arena. "[W]e must interpret [true threats]... 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Watts*, 394 US at 708 (quoting *New York Times Co.*, 376 US at 270. "What is a threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 US at 707. To minimize the danger of confusing unprotected speech with protected, the Court requires that a threat must be genuine, or "true," as proven by an examination of the language, nature, and context of the allegedly threatening statement. *Id.* at 708; *see also Virginia v Black*, 538 US 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

A. The lower court failed to follow this Court's interpretation of *Virginia v Black* as requiring a determination of whether a reasonable person in the position of the speaker would have foreseen the editorial as threatening.

In announcing his decision, Judge Wiley stated that the test for determining what constitutes a "true threat" is "an objective one; namely, whether an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury." (6/26/08

Hearing Tr. at 67.) Although most lower court decisions--both before and after the US Supreme Court's decision in *Black*--are in agreement that an objective standard should determine what constitutes a threat, they differ often over whether the standard should be applied from the vantage point of the speaker or the recipient. See Paul T. Crane, "True Threats" and the Issue of Intent, 92 Va L Rev. 1225, 1243-48, 1261-64 (2006). The difference is significant. Moreover, the lower court's application of a reasonable recipient standard represents a departure from the path previously prescribed by this Court. See *People v Pilette*, 2006 Mich App LEXIS 3477, *19-20 (November 21, 2006) (unpublished opinion attached).

Under a reasonable recipient standard, the required mens rea is merely that the speaker intended to make the statement. See, e.g., *United States v Schneider*, 910 F2d 1569, 1570 (7th Cir 1990). Thus, evidence of what the speaker knew or should have known about how his statement would be perceived is irrelevant. Under a reasonable speaker test, by contrast, the government must prove an additional element; namely, the speaker should have *foreseen* that the statement could be interpreted as a threat. *United States v Miller*, 115 F3d 361, 363 (6th Cir 1997); see also *United States v Alkhabaz*, 104 F3d 1492, 1495 (6th Cir 1997) ("a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation.") In explaining why it believed the reasonable speaker test to be "the appropriate standard," the First Circuit stated:

This standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the "reasonable-recipient standard," namely that the jury will consider the unique sensitivity of the recipient. We find it particularly untenable that, were we to apply a standard guided from the perspective of the recipient, a defendant may be convicted for making an ambiguous statement that the recipient may find

threatening because of events not within the knowledge of the defendant. Therefore, we follow the approach of several circuits by holding that the appropriate focus is on what the defendant reasonably should have foreseen.

United States v Fulmer, 108 F3d 1486, 1491 (1st Cir. 1997).

All of the cases on the reasonable speaker versus the reasonable recipient test discussed thus far were decided before *Black*. This Court is one of the few to specifically consider this question in a post-*Black* world. In an unpublished opinion attached to this brief, this Court's position was made explicitly clear: "Because we believe that the speaker-oriented standard for 'true threats' best comports with the requirements of the First Amendment, we adopt that standard as the appropriate standard for determining whether a threat is proscribable as a 'true threat.'" *People v Pilette*, 2006 Mich App LEXIS 3477, *19-20 (November 21, 2006).

This Court's adoption of the reasonable speaker standard is understandable in that it is far more consistent with the *Black* opinion than is the reasonable recipient test. For example, in *Black* the Court stated, "[t]he hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that that the overwhelming majority of people might find distasteful or discomfoting." 538 US at 358 (citation omitted). By ignoring the perspective of the speaker, the reasonable recipient standard runs the risk of punishing protected speech that a reasonable person nonetheless might find abrasive or offensive. Further, as noted above, the *Black* Court defined "true threats" as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 US at 359. The Court's use of the term "means to communicate" modifies not just "communicate" but the entire phrase "communicate a serious expression of an intent to commit an act of unlawful violence." Although lower courts

have differed in their interpretations of *Black*, the language used by the Court strongly argues in favor of taking the speaker's perspective into account. In interpreting *Black* on this issue, the Tenth Circuit stated:

Unprotected by the Constitution are threats that communicate the speaker's intent to commit an act of unlawful violence against identifiable individuals. The threat must be made "with the intent of placing the victim in fear of bodily harm or death." An intent to threaten is enough; the further intent to carry out the threat is unnecessary.

United States v Magleby, 420 F3d 1136, 1139 (10th Cir. 2005) (quoting *Black*, 538 US at 359) (citations omitted).

Judge Wiley appears not to have considered whether a person in the position of the speaker would have reasonably foreseen that the editorial would be perceived as threatening. In so doing, the lower court departed from this Court's sound interpretation of *Black*. This fact alone warrants Reversal. Yet, even under the less rigorous standard of a "reasonable recipient," Rev. Pinkney's editorial cannot be deemed a "true threat."

B. The language of Rev. Pinkney's editorial does not express a "true threat."

Judge Wiley's finding that Rev. Pinkney engaged in "threatening" behavior was based entirely on a single paragraph of his editorial:

Judge Butzbaugh, it shall come to pass; if thou continue not to hearken unto the voice of the Lord thy God to observe to do all that is right; which I command thee this day, that all these Curses shall come upon you and your family, curses shalt [sic] be in the City of St. Joseph and Cursed shall [sic] thou be in the field, . . . cursed [sic] shall come upon you and your family and over take thee; cursed shall be the fruit of thy body. The Lord shall smite thee with consumption and with a fever and with an inflammation and with extreme burning. They the demons shall Pursue thee until thou persist.

(6/26/08 Hearing Tr. at 68–69.) The passage merely expresses a prediction of what God, not Rev. Pinkney, might do to Judge Butzbaugh. Judge Wiley acknowledged this fact when he interpreted the passage as equivalent to Rev. Pinkney stating, “[Y]ou’re not doing what I want you to do, and therefore, I’m going to invoke these divine powers if you don’t do what I want you to do.” *Id.* at 72 (emphasis added). Yet even this interpretation does not express an intent to inflict physical violence; only by inferring that the minister actually can manipulate the actions of God may the passage be interpreted as an expression of Rev. Pinkney’s intent to personally cause harm to the judge.

Judge Wiley found this to be a reasonable inference because an objective person reading the editorial might believe that

...because of his status as of Reverend, that he has some particular—I guess, direct line to the Lord, and that he is knowledgeable that the Lord is going to do these things.

Consider—I would—I think to a reasonable person, and that is what we need to look at, a reasonable person would consider this to be a threat.

Id.

Assuming, arguendo, that Judge Wiley’s assumption about a reasonable person’s belief in a Christian minister’s ability to *communicate* directly with God is correct, it does not follow that such a belief entails a corresponding ability to *control* God’s actions. The frailty of Judge Wiley’s assumption is especially great when one considers that a fundamental tenet of Christian faith is the omnipotence of God. “With man this is impossible, but with God all things are possible.” *Matthew* 19:26. Judge Wiley’s reasoning essentially reverses the traditional Christian view of the roles of God and humankind.

Additionally, the language of Rev. Pinkney’s editorial explicitly conditions God’s cursing of Judge Butzbaugh on his continued failure “to hearken unto the voice of the Lord to observe to

do all that is right.” *Defendant-Appellant’s Brief*, Appendix A: *People’s Tribune* (Nov/Dec. 2007). Conditional language was also the focus of *Watts* in which a Vietnam War protestor, speaking at a public rally, stated, “If they ever make me carry a rifle the first man I want in my sights is L.B.J.” In finding that the protestor did not express a “true threat,” the US Supreme Court specifically noted the “expressly conditional nature of the statement” as part of the reason for its holding. *Watts*, 394 US, at 708. Judge Wiley considered but dismissed this aspect of *Watts* and instead relied on the 7th Circuit’s decision in *United States v Schneider*, 910 F.2d 1569, 1579 (7th Cir. 1990) for the proposition that the conditional nature of a threat is “immaterial.” (6/28/08 Hearing Tr. at 68.)

Reliance on *Schneider* for this point is questionable for several reasons. First, the *Schneider* court, without explanation, did not consider *Watts*. The reason for this omission might be the readily distinguishable facts of the cases, as indicated by another case cited by Judge Wiley to support his view that the conditional language of a threat is “immaterial,” *United States v Daughenbaugh*, 49 F3d 171 (5th Cir. 1995). (6/28/08 Hearing Tr. at 68.) Both *Schneider* and *Daughenbaugh* involved letters sent directly by mail to a small number of intended recipients. The *Daughenbaugh* defendant argued that the conditional language of his statement was similar to that in *Watts*. The Fifth Circuit stated *Watts* was “inapposite for it involved a public rally, not a private letter.” *Daughenbaugh*, 49 F3d, at 174. “The mode of communication--private letter--is the typical means for delivery of threats.” *Id.* Clearly, a newspaper editorial is more similar to a public rally than is a letter sent to a few targeted individuals, an issue apparently unaddressed by Judge Wiley.

The second reason to question the reliance on *Schneider* is that the case was decided thirteen years before the United States Supreme Court's most recent pronouncement on "true threats." In *Black*, the high Court both declared its continued adherence to *Watts* and held that a "true threat" is a statement in which "the speaker means to communicate a *serious* expression of an intent to commit an act of unlawful violence." *Black*, 538 US at 359. Certainly the determination of what constitutes a "serious" expression of intent encompasses consideration of an expressed condition and the likelihood of it ever actually occurring. *Cf. Brandenburg v Ohio*, 395 US 444, 447 (1969) ("[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*") (emphasis added.)

Finally, reliance on *Schneider* is questionable because the 7th Circuit panel applied a reasonable recipient test to the speech at issue (discussed *supra*, Section II, A.)

The absence of language in a statement is sometimes as important to the determination of a "true threat" as the actual language used. In *United States v Olson*, for example, at issue was the defendant's statement, "What do you mean, I didn't threaten the President [of the United States]. I'll blow him away." 629 FSupp 889, 892 (WD Mich. 1986). The comment was deemed protected speech by the court in part because it contained "no specification of time, place or date." *Id.* at 894.

While the literal meaning of a statement is not dispositive in determining whether it constitutes a "true threat," both the United States Supreme Court and common sense dictate that

the plain meaning of Rev. Pinkney’s editorial should have been given far greater consideration than that provided by Judge Wiley.

C. **The context and nature of Rev. Pinkney’s editorial demonstrate it does not constitute a true threat.**

Even if the literal meaning of a statement is threatening, the context in which it is made may demonstrate that it lacks what is required to be considered a “true threat.” To hold otherwise would soon fill the nation’s jails with every father who exclaims, “I am going to kill him!” upon discovering that their teenage son returned the family car with an empty gas tank. In *Watts*, the Supreme Court recognized the critical role of context when it declared that the statement about shooting the US President was merely “political hyperbole” because it was made to a crowd at a public rally protesting the Vietnam War. 394 U S at 708 (“Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.”)

Context was also critical to the *Black* Court’s First Amendment analysis of a Virginia statute prohibiting the burning of a cross with the intent of intimidating (i.e. threatening). Although the Court upheld the statute in part, a plurality found unconstitutional a provision that provided, “Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” In striking down the provision, the Court stated:

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor’s lawn.

538 US at 366.

The context in which a statement was made was also central to the Arizona Supreme Court's decision in *Citizen Publishing Co. v Miller*, 115 P3d 107 (Ariz, 2005). That case, like the one now before this Court, involved an editorial letter printed in a newspaper. The Arizona Supreme Court determined that the editorial about the deaths of American soldiers in Iraq was not a "true threat" despite the fact that the author wrote "we should proceed to the closest mosque and execute five of the first Muslims we encounter." *Id.* at 107. The court noted that the statement was conveyed in the editorial section of a general circulation newspaper, "hardly a traditional medium for making threats, and a public arena dedicated to political speech." *Id.* at 115. "There is a vast constitutional difference between falsely shouting fire in a crowded theater and making precisely the same statement in a letter to the editor." *Id.*; *see also Daughenbaugh*, 49 F3d at 174 (discussed *supra*) (application of *Watts* "inapposite for it involved a public rally, not a private letter"); *McCalden v Cal Library Ass'n*, 955 F2d 1214, 1222 (9th Cir 1990) (stating that "public speeches advocating violence" are entitled to more First Amendment protection than privately communicated threats of violence.")

Letters to the editor of a newspaper are a time-honored means for citizens to express their opinions to as large an audience as possible. Indeed, the intended audience of a statement is probative of whether the speaker intended a "true threat." As noted above, a *Black* plurality struck down the prima facie provision of the Virginia prohibition of burning a cross with the intent to threaten in part because "It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn." 538 US at 366. Rather than sending a letter

directly to Judge Butzbaugh, Rev. Pinkney chose to express his views to a vastly larger audience by publishing them in the *People's Tribune*, a newspaper available both in print and on-line. Nothing in the transcript indicates that Judge Wiley gave any consideration to the fact Rev. Pinkney expressed himself in “a public arena dedicated to political speech.” See *Citizen Publishing*, 115 P3d at 115.

Nor does it appear that the lower court evaluated Rev. Pinkney's alleged threat in the context of the letter itself. In *Citizen Publishing Co.*, the court concluded that the statement concerning executing “five of the first Muslims we encounter” was constitutionally protected in part because it referenced the war in Iraq, “a central political issue.” *Id.* All of Rev. Pinkney's allegedly “threatening” language is found in the fifth paragraph of an eight paragraph letter. Viewed in context, the fifth paragraph appears to be just one part of a call to action to correct what Rev. Pinkney sees as corruption and injustice in the legal system. Indeed, as a preface to all that follows, the first sentence of the letter states, “It is our constitutional duty as American citizens to hold our elected officials accountable for their words, actions and inaction of wrongdoing.” *Defendant-Appellant's Brief*, Appendix A: *People's Tribune* (Nov/Dec. 2007). This is immediately followed a sentence by indicating (if not explicitly stating) that only legal means should be used to respond to transgressions by public officials: “We must draw the line and decide what to do if that line is crossed, and *we must use the Constitution.*” *Id.* (emphasis added.) Rather than view the fifth paragraph as one part of a whole, Judge Wiley isolated its language thereby voiding it of any contextual meaning. When viewed in context, Rev. Pinkney's language is far more similar to the “political hyperbole” of *Watts* than it is to a “true threat.”

III. REV. PINKNEY’S LETTER IS NOT DEFAMATORY BECAUSE IT DOES NOT ALLEGE ANY PROVABLY FALSE FACTS AND IT DOES NOT MEET THE “ACTUAL MALICE” STANDARD.

The editorial by Rev. Pinkney does meet the constitutional requirements for a claim of defamation of a public official. An allegedly defamatory statement must first be provably false. “A statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” *Milkovich v Lorain Journal Co*, 497 US 1, 20 (1990). Just last month, this Court affirmed that principle: “[A]n objectively verifiable event may be actionable, while a subjective assertion is not.” *Smith v Anonymous Joint Enterprise*, 2009 WL 249415, at *2 (Mich App Feb 3, 2009). Further, this Court has recognized that “certain statements, although factual on their face, and provable as false, [which] could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff” are protected speech. *Ireland v Edwards*, 230 Mich App 607, 617 (1998) (citing *Hustler Magazine v Falwell*, 485 US 46, 50 (1988)). In *Ireland*, this Court considered the relevant statements hyperbole because “any reasonable person hearing [the remarks in question] in context would have clearly understood what was intended.” 230 Mich App at 619.

Rev. Pinkney’s editorial fully explains the context of his relationship with Judge Butzbaugh: it is clear he is discussing the judge that convicted him of a criminal offense. Having been apprised of this context, a reasonable reader would be understandably skeptical of Rev. Pinkney’s comments and, rather than accept them at face value, would likely view them as the hyperbole of a convicted criminal.

Three assertions made by Rev. Pinkney were the basis of the lower court’s finding that he had defamed Judge Butzbaugh: Judge Butzbaugh was “racist,” “corrupt,” and “violated his

oath.” In regard to the first assertion, a belief that someone is “racist” is a statement of pure, immeasurable opinion. In the absence of mentioning acts that might be verified or refuted, the statement that Judge Butzbaugh is racist cannot be proven to be either true or false. At most, the state can only offer counter-opinions.

Similarly, without alleging more, the claims that Judge Butzbaugh is corrupt and violated his oath are too vague to be proven false. Judge Wiley’s point that Rev. Pinkney did not state “one scintilla” of evidence that Judge Butzbaugh was racist, corrupt, or violated his oath (6/28/08 Hearing Tr. at 75), illustrates the fact that Rev. Pinkney’s comments do not mention any specific acts capable of being proven false. The claim that Judge Butzbaugh “violated his oath” does not even detail which oath Judge Butzbaugh allegedly violated. Presuming Rev. Pinkney was referencing the oath of office for public officials in Michigan, the comment still lacks the requisite factual underpinnings. That oath reads: “I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of [my office] according to the best of my ability.” Mich Const Art XI, § 1. Whether a public official has faithfully discharged his or her duties according to the best of his or her abilities is a subjective question capable of being answered only with opinion. Whatever the factual basis for Rev. Pinkney's views of Judge Butzbaugh, the First Amendment protects the expression of pure opinion, even when that opinion is wrong.

A. **The lower court failed to apply the proper standard of showing “actual malice” in defamation of a public official which requires that the speaker act with knowledge that the statement was false or with reckless disregard of whether it was false or not.**

Even if the charges of racism, corruption, and violating an oath were capable of being proven false, such findings would be insufficient to prove Rev. Pinkney defamed Judge Butzbaugh. In defamation litigation involving public officials, “actual malice” must be proven on the part of the speaker. *New York Times*, 376 US at 279-80. A finding of actual malice requires a determination that the speaker acted “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *See id.*

Although Judge Wiley correctly designated Judge Butzbaugh a “public official,” he incorrectly applied the standard of “actual malice.” In order to meet this standard, the state must provide evidence that Rev. Pinkney knew or surmised that his statements were untrue. “‘Reckless disregard’ is [measured]... by whether the [speaker] in fact entertained serious doubts concerning the truth of the statements published.” *Grebner v Runyon*, 132 Mich App 327, 333 (1984) (citation omitted); *see also Garrison v Louisiana*, 379 US 64, 74 (1964) (emphasizing the necessity for a showing that a false publication was made with a “high degree of awareness of ... probable falsity.”) In his finding of “actual malice,” Judge Wiley appears not to have considered any evidence that Rev. Pinkney himself knew or suspected his statements were false.

Further, Judge Wiley based his finding of “actual malice” on evidence irrelevant to the standard; specifically that Rev. Pinkney failed to properly investigate his beliefs about Judge Butzbaugh. This Court has explained that “reckless disregard for the truth” is not established by showing only that a speaker made the allegedly libelous statements “on the basis of insufficient investigation.... ‘Insufficient investigation’ simply does not constitute reckless disregard for the

truth.” *Johnson v The Herald Co*, 116 Mich App 523, 526 (1982). *See also Postill v Booth Newspapers, Inc*, 118 Mich App 608, 624-25 (1982). The only evidence that Judge Wiley offered for his finding of “reckless disregard” was that Rev. Pinkney had not submitted his claims about Judge Butzbaugh to the Michigan Judicial Tenure Commission. (6/28/08 Hearing Tr. at 76.) By the standard discussed in *Johnson*, however, whether a prudent person would have investigated his beliefs or attempted some other method of redress is insufficient to prove “reckless disregard.” Required instead is a finding that Rev. Pinkney himself seriously doubted the truth of his statements but published them anyway.

IV. THE “DEMEANING...BEHAVIOR” CONDITION OF REV. PINKNEY’S PROBATION IS UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT INFORM THE DEFENDANT OF WHAT ACTIVITY IS ACTUALLY FORBIDDEN AND AUTHORIZES ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

The condition placed in Rev. Pinkney’s probation concerning “demeaning behavior” is unconstitutionally vague. The void-for-vagueness doctrine is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments. *Columbia Natural Resources v Tatum*, 58 F3d 1101 (6th Cir 1995). Due Process requires that “laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Grayned v City of Rockford*, 408 US 104, 108 (1972). Vagueness is even more dangerous when it involves fundamental First Amendment freedoms. “Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.” *Ashton v Kentucky*, 384 US 195, 200 (1966). Similarly, in *Gentile* the Supreme Court stated “[t]he prohibition against

vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law.” 501 US. at 1051; *see also Smith v Goguen*, 415 US 566, 573 (1974) (“Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.”).

While courts have acknowledged that “probationers, like parolees and prisoners, properly are subject to limitations from which ordinary persons are free” *United States v Consuelo-Gonzalez*, 521 F2d 259, 265 (9th Cir 1975), any such probation condition must still guard against vagueness, especially when it “abuts upon sensitive areas of basic First Amendment freedoms...” *United States v Loy*, 237 F3d 251, 262 (3rd Cir 2001) quoting *Grayned*, 408 US at 108-09. This Court has also held that prior notice of the conditions of probation that clearly inform the defendant of what is expected of him is required. *People v Bruce*, 102 Mich App 573, 578 (1980) (“[I]t has long been held in Michigan that a probationer is entitled to prior notice of the conditions on his probation and that the conditions must clearly inform the probationer of just what is expected of him.”).

The “demeaning...behavior” prohibition in Rev. Pinkney’s probation is unconstitutionally vague because it would be unreasonable to expect him to conform his actions in such a way that would avoid behavior that is “demeaning” when such a legal definition does not exist. During Rev. Pinkney’s probation hearing, the trial court stated “It doesn’t take a rocket scientist to pickup a dictionary to figure out what “demeaning” means...[it is] very well, defined in every dictionary that’s been printed, as well as in Black’s Law Dictionary.” (6/26/08 Hearing

Tr. at 76-77.) *Amicus* was unable to find a listing for “demeaning” in Black’s Law Dictionary. Moreover, other dictionaries provide little guidance for consistent application. Webster’s Dictionary defines “demean” as, “to lower in character, status, or reputation.” Merriam-Webster’s Collegiate Dictionary, Eleventh Edition 615 (11th ed 2003). It would be impossible for Rev. Pinkney to know for sure whether he was fully comporting with such an opaque term especially when assiduous adherence to such a prohibition would likely have the effect of chilling what would otherwise be protected First Amendment speech. As a result, Rev. Pinkney would have no way of knowing whether an angry remark directed at a colleague over the telephone or the sending of an email to a family member in which he speaks critically about President Obama’s first thirty days in office could be grounds for the revocation of his probation. While it would be appropriate to require that a probationer avoid making comments that could legally be considered “threatening” or “defamatory,” it would be unreasonable to ask a defendant to conform his or her actions to avoid any semblance of “demeaning” behavior when no such legally cognizable definition exists.

Similar to the vagueness implicit in a probationary condition concerning “demeaning. . .behavior,” this Court has previously held that a probationary condition prohibiting a defendant from engaging in “anti-social” conduct, without more, is impermissibly vague. *Bruce*, 102 Mich App at 578. The *Bruce* Court found that the term “anti-social” behavior was too vague to withstand Due Process scrutiny.

While it is undoubtedly true that there are forms of conduct which all segments of society would consider “antisocial,” it is also true that there would be vast disagreement as to whether a great many other forms of conduct were “antisocial.” “The terms of the condition of probation

itself are insufficient to apprise the probationer of what activity is actually forbidden.” *Id.* at 578, citing *People v Peterson*, 62 Mich App 258 (1975). Similarly, the probationary term prohibiting “demeaning...behavior” was insufficient to inform Rev. Pinkney that his newspaper editorial was not a constitutionally-protected expression of his political and religious beliefs.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to reverse the judgment revoking Edward Pinkney’s probation.

Respectfully submitted,

Dated: March 18, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of March, 2009, I have caused to be sent via United States mail, first class mail, postage prepaid, a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF DEFENDANT-APPELLANT'S BRIEF ON APPEAL** addressed to the following:

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