STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Court of Appeals No. 325856
Berrien County Trial Ct. No. 2014001528-FH

REV. EDWARD PINKNEY,

Defendant-Appellant.
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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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INTRODUCTION

The American Civil Liberties Union (ACLU) of Michigan's interest in this case is rooted in core principles of the organization. At issue is a man's right to be fully engaged in the civic life of his community without fears that his legitimate political activities – perceived by some as controversial – will be inappropriately or unlawfully used against him in a criminal trial. When that happens, there is not only the risk that the attention of an inflamed jury will be improperly diverted from the relevant law and evidence, but also the risk of a consequent broad chill on speech and political participation that the First Amendment was designed to protect.

The ACLU of Michigan is concerned as well that defendant finds himself trapped in a due process dilemma created by a criminal justice system that should have protected him. He was charged, tried and convicted of violating a statute that creates a criminal offense, not with its language, but by way of a judicial construction of that language that post-dates the acts the defendant is accused of committing. This ex post facto prosecution denied the defendant the fair warning that the Fourteenth Amendment guarantees.

While some might dismiss as insignificant the plight of a controversial activist, the strength and integrity of our Constitution and the rights it guarantees are most effectively tested when they are called upon to protect those who do not enjoy the favor of the government and powerful interests within a community. Rev. Edward Pinkney, the defendant in this matter, should be placed squarely within that category because of his long history of activism and perceptions that he has been the repeated target of reprisals and retaliation by his opponents.[1]

Rev. Pinkney is well-known in Berrien County for his advocacy on behalf of the low-income residents of Benton Harbor, a predominantly African American city that is situated

[1] Collier and Ptashnik, *Rev. Edward Pinkney Imprisoned for Fighting the Whirlpool Corporation*, http://www.truth-out.org/news/item/28050-whirlpool-corporation-sentences-edward-pinkney-to-prison-with-no-evidence (accessed November 17, 2015).

directly adjacent to St. Joseph, a predominantly white and significantly more prosperous city. Rev. Pinkney's focus, individually and through his organization "BANCO," has been varied, ranging from issues of the unfair treatment of African American defendants in the criminal justice system[2] to economic development. Some of his supporters believe he has been targeted because he has antagonized the Whirlpool Corporation (headquartered in Benton Harbor), resisted private acquisition and development of a historic beach-front park, and demanded that portions of revenue from a PGA Senior Golf Tournament be used for economic development in Benton Harbor.[3]

The instant case is not the first time that Rev. Pinkney has been the subject of criminal prosecution for his political activities. For example, in 2007 he was convicted of violating Michigan election law and he was sentenced to probation. However, his probation was revoked and he was resentenced to three to ten years in prison because of the rhetoric he directed at a judge in a newspaper column. Relying on the First Amendment implications of that penalty, the ACLU of Michigan represented him in this Court and succeeded in having his probation restored. *People v Pinkney*, 2009 WL 2032030, unpublished opinion *per curiam* of the Court of Appeals, issued July 14, 2009 (Docket Nos. 282144, 286992), p 37.

The current case arises out of Rev. Pinkney's efforts to have Benton Harbor's Mayor recalled. There were allegations that Rev. Pinkney altered dates of signatures on recall petitions. Rather than limit the evidence to these specific allegations at trial, the prosecutor requested, and

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[2] Pinkney, *Why I'm Charged With Election Fraud*, San Francisco Bayview, (Oct. 21, 2014), http://sfbayview.com/2014/10/rev-pinkney-why-im-charged-with-election-fraud/

[3] People Demanding Action, *Free Political Prisoner Rev. Edward Pinkney, Convicted with no Evidence by an All-White Jury*, Daily Kos (Feb. 20, 2015), http://www.dailykos.com/story/2015/02/20/1365768/-Free-Political-Prisoner-Rev-Edward-Pinkney-Convicted-with-no-evidence-by-an-All-White-Jury#

the court allowed, the admission of evidence of Rev. Pinkney's past lawful, unrelated political statements and activities, purportedly for the purpose of establishing his motive for committing a crime.

In an order dated October 27, 2014, (attached as Exhibit A), the trial court allowed Benton Harbor Mayor James Hightower to offer testimony about Rev. Pinkney's "other acts," specifically Pinkney's:

(a) participation in the effort to recall Hightower,

(b) public comments about an "anti-Hightower and a Hightower-Whirlpool alliance" and

(c) advocacy "for a 'yes' vote on the city income tax issue."

The order allowed Berrien County Elections Administrator Carolyn Toliver to provide evidence of Pinkney's: "…participation in the Hightower recall… to show the defendant's motive to change dates and gather double signatures."

Berrien County Clerk Sharon Tyler was allowed by the order to provide testimony about Pinkney's "participation relating to recall efforts of [Tyler] due to her function as clerk in the Hightower recall process." (See Exhibit A).

Finally, "petition circulators" were allowed by the order to testify about their "knowledge of defendant's participation in: a.) anti-Hightower and a Hightower-Whirlpool alliance, b.) the recall of Mayor James Hightower."

None of these issues had any probative value as to the criminal allegations made against Rev. Pinkney. For example, the testimony of George Moon, one of the petition circulators, included the following exchanges:

Q. Are there – are there discussions at some BANCO meetings about Whirlpool and that Whirlpool is behind stuff and that sort of thing?

A. No, not – yes. They're not –

Q. There is discussion like that.

A. Oh, absolutely.

Q. Okay

A. Uh-huh (affirmative).

Q. Do you know; have you heard Mr. Pinkney discuss that issue?

A. Absolutely. Yes, sir.

Q. And – and which side of the issue is he on; that is, which side of the issue about Whirlpool being a controlling fact – a controlling negative factor, what – do you know what his position on that is?

MR. PARISH: Your Honor, --

A. Of course.

MR. PARISH: -- I think there –

THE COURT: Excuse me. Just a minute.

MR. PARISH: I think there is a limit to how much this particular dead horse can be beat and have it relevant. I do ask if it's going to go on that the jury be instructed that the defendant's political – any public views are fully protected by the constitution and cannot be used against him, no matter what other people might think about – about that."

(TT III, Moon, 575-576)[4]

[4] "TT III" refers to volume III of the trial transcript.

Notwithstanding the concerns voiced by Rev. Pinkney's counsel, the prosecutor persisted in making an issue not only of Rev. Pinkney's protected speech, but also the speech of others. Later in Mr. Moon's testimony, the following McCarthy-like exchange occurred:

Q. So you've spoken out at BANCO meetings.

A. Yes, sir.

Q. All right.

A. Yes, sir. That's it.

Q. That's it.

A. That's it. Uh-huh (affirmative).

Q. So at – so at BANCO meetings, let's say, have you heard Mary Donald speak out about anti-Whirlpool, anti- Hightower matters?

A. Mary Donald. She's city commissioner right now.

Q. If you don't know her, just tell us that.

A. Well, not personally.

Q. Okay.

A. That's why I did that. But okay.

Q. Have you heard her speak out on those matters?

A. If my memory serves me correct, yes.

Q. Bridget Gilmore?

A. No.

Q. Elza Williams?

A. I don't know him. I –

Q. Okay.

A. -- don't know him.

Q. Mable Avant?

A. I don't know her by – by name.

Q. Marjorie Carter?

A. I'm trying to think, city hall or at a meeting. I don't remember.

Q. Okay. Willie Davis?

A. Not know him.

Q. David Shaw?

A. Don't know.

Q. And so, based on your personal knowledge

A. Yes.

Q. --and hearing some people, including yourself, speak out on these issues--

A. Right. I haven't heard them, but if you say so, they did.

Q. I'm sorry?

A. Did you say they spoke out on those?

Q. No, no, no. I'm saying – I haven't finished the question yet,

A. Oh, okay.

Q. Okay?

A. Okay.

Q. Considering what you know about this and the people that you've said, including yourself, who have spoken out about this –

A. Okay.

Q. -- who – would you say is the most outspoken about these issues?

MR. PARISH Oh, Your Honor, that is so objectionable on so many issues – levels. It's an opinion."

(TT III, Moon, 586-588)

Rev. Pinkney's counsel was correct that this prosecutorial approach was objectionable on so many levels. A citizen should not be concerned that his or her unpopular political views will be accepted by a court as the basis for criminal liability. Yet, the prosecutor was permitted to argue during closing that Rev. Pinkney's protected political speech somehow made him more likely to commit a crime:

> So he's been described as the minister of the people. He's president of BANCO. He says BANCO provides food, clothing, and – homes for people. Anybody on the witness stand that mentioned BANCO did not include that. They mentioned meetings, activities, they did not mention the food, clothing, home that he did I would suggest to you that the evidence might show that BANCO is not about those things and he's trying to embellish that in the community. He was a member of the NAACP. He goes to commission meetings. Again, remember, there's nothing wrong with doing that, but keep in mind he is a player in the community. He has a radio show, 'Pinkney to Pinkney,' where he discusses of social injustice, I think was sort of the blanket topic. Again, nothing wrong with it, but he's a player. The cartoon strips, it didn't really get developed, but he seemed to know what I was talking about. Pete Santilli, some sort of national radio Internet host, he's been on that show. Speaking engagements. He referred to New York; out of state he speaks on these issues. Again, remember, nothing wrong with that. He indicated he was an outspoken critic of the Harbor Shores development, the Senior PGA, Whirlpool. He has T-shirts with judges' names on them described as 'crimes against humanity.' He's a minister of the people. He's brought Hollywood celebrities to town; Jesse Jackson. And that's interesting. I think you could take all of this together and see what he wants to be. What he wants to be. And to succeed in recalling the mayor of Benton Harbor would be another – what? – feather in his cap.

TT VII, 1688 – 1690.

ARGUMENT

I. REV. PINKNEY WAS DENIED A FAIR TRIAL BECAUSE HIS FIRST AMENDMENT RIGHTS WERE VIOLATED, AND TESTIMONY ABOUT OTHER UNRELATED AND IRRELEVANT ACTS LIKELY DISTRACTED AND INFLAMED THE JURY.

A. Retaliation by the state for lawful First Amendment activity is prohibited, and the use of irrelevant but politically inflammatory evidence against Rev. Pinkney betrays improper motives for prosecuting him.

Unrelated, irrelevant and potentially inflammatory statements and acts should not have been part of the case against Rev. Pinkney. Not only were these statements and acts protected by the First Amendment, but the use of testimony about them suggests the prosecution was driven by disapproval of the nature of Rev. Pinkney's activism.

"…[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v Moore*, 547 US 250, 256 (2006); *Crawford-El v Britton*, 523 US 574, 588 n. 10 (1998).

The Sixth Circuit's test for retaliation brings into focus how and why Rev. Pinkney's rights were violated in this case:

> We evaluate claims that state actors retaliated against a claimant in response to his exercise of free speech under the framework generally set forth in *Mount Healthy City Sch. Dist. Bd. of Educ. v Doyle*, 429 US 274, 97 S Ct 568, 50 L Ed 2d 471 (1977). Under *Mount Healthy* and its progeny, a plaintiff must show that (1) he was participating in a constitutionally protected activity; (2) defendant's action injured plaintiff in a way "likely [to] chill a person of ordinary firmness from" further participation in that activity; and (3) in part, plaintiff's constitutionally protected activity motivated defendant's adverse action. *Bloch v Ribar*, 156 F 3d 673, 678 (CA 6 1998) (internal citations omitted); *see also Thaddeus–X v Blatter*, 175 F 3d 378, 394 (CA 6 1999) (en banc).

Center for Bio-Ethical Reform v Springboro, 477 F 3d 807, 821 (CA6 2007).

When considering these factors, it is indisputable that Rev. Pinkney's statements to the media, participation in political campaigns, public speeches, authorship of newspaper articles and similar activities were all protected by the First Amendment; and criminal prosecution can certainly deter political and civic engagement by most citizens. As to the third inquiry of the Sixth Circuit's three-part test, the improper use of irrelevant and unfairly prejudicial evidence about Rev. Pinkney's constitutionally protected political activity suggests that such activity was a motivating factor behind his prosecution. Implicit in the prosecutor's closing argument are: disdain for Rev. Pinkney's political activities and associations, and a sarcastic wink and nod to jurors who he presumed to share his sentiments.

If, as the prosecutor repeatedly noted, there was "nothing wrong" with the litany of First Amendment activities he recited, there was no reason to raise them during a criminal trial. The Michigan Rules of Evidence should have been the basis for excluding evidence of unrelated, constitutionally protected activities, but, as explained below, the trial court erred in allowing it.

B. The Use of Irrelevant and Inflammatory Evidence of Rev. Pinkney's Political Activities Violated MRE 404(b) and the First Amendment.

The trial court entered an order (Exhibit A) allowing testimony and evidence about Rev. Pinkney's assorted political activities and his criticism of Mayor James Hightower and the Whirlpool Corporation. While these statements and acts were standard First Amendment activity, in the political climate of Berrien County they were potentially inflammatory and distracting for a jury charged with the task of considering a very specific unrelated crime.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

> crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The Michigan Supreme Court explained the purpose of this rule in *People v Crawford*, 458 Mich 376, 384 (1998):

> The character evidence prohibition is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule "reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence." . . .Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged. Evidence of extrinsic bad acts thus carries the risk of prejudice, for it is antithetical to the precept that "a defendant starts his life afresh when he stands before a jury". . . As the United States Supreme Court recently noted, . . .the problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can "weigh too much with the jury and . . . so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (Citation omitted).

The value of this rule is illustrated by the infamous trial of Nicola Sacco and Bartolomeo Vanzetti in 1921. Even though charges of robbery and murder were essentially disproved during their Massachusetts trial, they were nevertheless convicted and sentenced to death because of what many believe was the prejudice of the judge and jury against them because of the pair's well-known political views, which were regarded as radical at the time.[5]

In the instant case, the trial court's purpose in allowing the proofs regarding Rev. Pinkney's political activities and statements was purportedly to permit the prosecution to establish a motive for the crimes charged. Specifically, the implication, if not clear suggestion, was that Rev. Pinkney's passionate engagement in the political process and community affairs provided him with the motive for altering dates on election petitions. But in allowing the

[5] See: *The Case of Sacco and Vanzetti*, http://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/306625/ (accessed November 16, 2015).

evidence, the trial court created Sacco and Vanzetti conditions for Rev. Pinkney. Efforts to use collateral acts to prove motive in this case was improper.

The standard for use of such evidence was set forth in *People v VanderVliet*, 444 Mich 52, 55 (1993).[6] In that case, Michigan's Supreme Court required:

> [f]irst, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

Consideration of each element of the standard demonstrates that using Rev. Pinkney's protected First Amendment activities to establish motive in the instant case was impermissible.

A. The evidence was not offered for a proper purpose.

Clearly MRE 404(b) allows use of other acts to establish motive. In this case, however, the bare facts regarding Rev. Pinkney's political and civic activism cannot alone be regarded as a basis for establishing that he had a motive for election fraud. If, as alleged, he, like hundreds of other citizens, spoke out against the Mayor and engaged in election activities, then such does not *ipso facto* demonstrate that he was motivated to commit crimes. In fact, there are millions of politically active citizens across the country who cannot be presumed to be predisposed to election fraud.

More important still is the fact that treating a politically engaged citizen in this way chills the type of political involvement that is so important to the democratic process. As the Supreme

[6] This opinion was amended by *People v VanderVliet*, 445 Mich 1205 (1994) as follows: "On order of the Court, on the Court's own motion, the opinion of the Court is amended. The second sentence of the first full paragraph of the text at 444 Mich. 52 at 89, 508 N.W.2d 114 is amended to read as follows: 'To assist the judiciary in this extraordinarily difficult context and to promote the public interest in reliable fact finding, we intend to adopt a modification of Rule 404(b). We require the prosecution to give pretrial notice of its intent to introduce other acts evidence at trial, and authorize the trial judge, consistent with the law in ten other states, to require the defendant to articulate his theory or theories of defense.'"

Court has admonished, "First Amendment freedoms need breathing space to survive," *NAACP v Button*, 371 US 415, 433 (1963), and when government overreach has a chilling effect on the exercise of such freedoms, "society as a whole" is "the loser." *Maryland v Joseph H. Munson Co.*, 467 US 947, 956 (1984). For this reason, using evidence of political involvement as the sole basis for alleging motive is improper, and Rule 404(b) when properly invoked protects these vital First Amendment freedoms.

B. The evidence was not relevant.

This inquiry is guided initially by MRE 401, which provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

In *Crawford* the Michigan Supreme Court explained that this rule demands consideration of whether the evidence is both material and probative. With respect to materiality, the court suggested that a defendant's not guilty plea implicates all issues, and that along with the state's heavy burden of proof renders most if not all evidence material. However, with respect to the question of probative value, the court said:

> In the context of prior acts evidence . . . MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character.

Id. at 390.

Rev. Pinkney's political activism had no probative value. In *People v Golden*, 121 Mich App 490, 493 (1982), the prosecutor attempted to establish that the defendant's need to finance a serious drinking problem provided the motive for embezzlement. The court found this evidence was not probative:

> There was no basis to infer that defendant was in financial difficulty or that he had an acute and atypical need for money at the time of the offense. Any evidence of financial embarrassment was so tenuous that it was not probative of need and the trial judge should have exercised his discretion to exclude it. Failure to do so under the circumstances here constituted prejudicial and reversible error.

Id. at 495.

In the instant case, the connection between Rev. Pinkney's political activities and the crime charged was also so tenuous that it was not probative. Rev. Pinkney pursued his political activism with zeal, but the suggestion that this is probative as to criminal acts falls flat when placed in the context of a trial record that, according to Rev. Pinkney's brief, is fatally deficient in evidence of the defendant's culpability.

Regardless of any suspicions one might have about the guilt or innocence of Rev. Pinkney, the acts that were the subject of the MRE 404(b) testimony (Rev. Pinkney's public comments about the "Hightower-Whirlpool alliance"; his advocacy for a "yes" vote on city income taxes; and his participation in recall campaigns) are not by themselves in any way probative as to the issue of election fraud. Probative facts in a case like this must include the "logical thread" referenced in *Crawford*. Such acts might include either criminal conduct, or advocacy of criminal conduct. As to the acts that were the subject of testimony, not only is there no logical thread connecting them to the crime, there is a gaping chasm.

C. The evidence was unfairly prejudicial.

Perhaps in some cases, the "other acts" that were the subject of the testimony in question (i.e., public speeches, political campaigning, etc.) would be regarded as benign and seemingly of little consequence. However, in the particular context of Rev. Pinkney's history and past involvement in Berrien County politics, these acts could be regarded by a local jury as highly

controversial, and perhaps even inflammatory. Rev. Pinkney's ideas, tactics, and actions have earned him the hostility of many influential people in the region.

In a profile of Rev. Pinkney's political activities, a local journalist wrote: "Area community leaders and their supporters say regardless of what Pinkney calls himself or them, they've had enough. They say his tendency to play fast and loose with the truth, failure to deliver on his promises and constant agitation have done nothing to solve Benton Harbor's problems."[7]

In the same article, Berrien County's chief trial court judge is quoted as saying: "I have no evidence of growing respect of [Rev. Pinkney's organization] by the courts. And as chief judge, I will not meet with Mr. Pinkney. I don't care to give a group that makes totally unwarranted assertions about my colleagues any of my time. I don't view them as a responsible spokesman for any community group."

Love him or hate him, Rev. Pinkney is entitled to a fair trial, and repeated references during trial to his activities could inflame a jury's passions and prevent them from focusing on the issue of his guilt or innocence of charged crimes. The limitations of MRE 404(b) exist precisely for the purpose of ensuring focused, fair deliberations. For example, in *Dawson v Delaware*, 503 US 159 (1992), a stipulation referenced the defendant's affiliation with a prison gang called the Aryan Brotherhood. In finding the reference improper and irrelevant, the court explained:

> As an initial matter, the second sentence of the stipulation, when carefully parsed, says nothing about the beliefs of the Aryan Brotherhood "chapter" in the Delaware prisons. Prior to trial, the prosecution acknowledged that there are differences among the various offshoots of the Aryan Brotherhood, stating that "there are cells or specific off-shoots within various local jurisdictions that don't see eye to eye or share a union, if you will." … But the juxtaposition of the second sentence with the first sentence, which describes the Aryan Brotherhood in California prisons as a "white racist prison gang," invited the jury to infer that the

[7] Swidwa,"*Pinkney's Protests*," Herald-Palladium (Oct. 3, 2004).

> beliefs of the Delaware chapter are identical to those of the California chapter. Even if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in this case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim.

Id. at 166.

In the same way that jurors bring with them negative feelings about gangs, Berrien County juries bring with them ideas and notions about those who resist the local power structure. In a region where the regional economy depends heavily on a single large corporation (Whirlpool), and where jurors are often drawn from predominantly white St. Joseph, it is easy to understand how some of these jurors might have a special fear of a defendant from predominantly black and poor Benton Harbor who not only comes from the "other" community across the river, but who is also portrayed as an individual who attacks those who are perceived as critical to maintenance of regional prosperity and stability. For such jurors, even a limiting instruction as required by *VanderVliet* would likely be ineffective.

There are continuing efforts to ensure that our system of justice is not tainted by policies and practices that permit the manipulation of juror prejudices and the exploitation of passions. See *Batson v Kentucky*, 476 US 79 (1986). In the instant case, which arises out of emotional community conflicts over political and economic power, it was critically important that every effort was made to ensure that the jury remained focused on the admissible evidence and was not swayed by irrelevant facts. This did not happen, and evidence that should have been barred by MRE 404(b) was allowed to find its way into trial proceedings to the detriment of Rev. Pinkney.

II. REV. PINKNEY DID NOT RECEIVE CONSTITUTIONALLY REQUIRED FAIR WARNING ABOUT THE POTENTIAL FOR CRIMINAL LIABILITY FOR ACTS HE IS ACCUSED OF COMMITTING BECAUSE OF AN AFTER-THE–FACT JUDICIAL CONSTRUCTION OF STATUTORY LANGUAGE.

Rev. Pinkney was charged with, and convicted of violating MCL 168.937. Because it is not reasonable to presume that statute gave him notice that his alleged acts were crimes, his due process rights were violated and his conviction must be reversed.

MCL 168.937 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.

On its face, this language suggests that the statute's ***only*** purpose is to specify a penalty for forgery crimes created and defined by the election law. However, in *People v Hall*, 2014 WL 5409079, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2014 (Docket No. 321045) (appended), the court held, for purposes of that case, that MCL 168.937 is a statute that creates a substantive forgery crime.

In this case, the critical question is whether Rev. Pinkney could reasonably have been expected to discern that the statute in question was something other than a penalty statute. Notwithstanding its conclusions in *Hall*, the Court of Appeals recognized that its own conclusion was not obvious, and it was necessary to resolve the issue. The opinion states:

> 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 [of] 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.

Id. at 6.

Even though the court went on to answer its own question, Rev. Pinkney could not have had the benefit of the court's opinion, not only because it was unpublished, but also because Rev. Pinkney was accused of having altered petition dates in or about November, 2013, almost a full year before the court's ruling in *Hall*. Rev. Pinkney's trial began on October 27, 2014, only four days after the ruling.

There are many reasons why Rev. Pinkney, or anyone else, would reach a conclusion exactly opposite that of the *Hall* court. The statute states in part: "Any person found guilty of forgery ***under the provisions of this act***…" (emphasis added). Any reasonable interpretation of that language is that elsewhere/somewhere in the election law there are specified forgery offenses, and the penalty for those offenses is found in MCL 168.937. It is entirely reasonable that a person would never conclude that this statute, on its own, creates a substantive crime.

The Fourteenth Amendment requires that a defendant receive fair notice that his conduct is regarded as criminal. In *Lanzetta v New Jersey*, 306 US 451 (1939), the Supreme Court explained:

> It is the statute, not the accusation under it that prescribes the rule to govern conduct and warns against transgression … No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

Id. at 453.

A criminal law must define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v Lawson*, 461 US 352, 357 (1983) (citations omitted); See also *Grayned v City of Rockford*, 408 US 104 (1972)

The importance of due process is substantial in criminal cases because of the serious consequences of criminal liability.

> [That] the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Lanzetta, *supra*, 306 US at 453 (quoting *Connally v General Const. Co.*, 269 US 385, 391 (1926)).

Arguably, the language of the challenged statutes in the cited cases is vague, and therefore distinguishable from the statute in the instant case which contains language that is clear and precise. Nevertheless, the evil of lack of fair warning is no less great when the uncertainty arises from judicial construction rather than from the vagaries of the statutory language itself. This was made clear in *Bouie v Columbia*, 378 US 347 (1964).

In *Bouie* student civil rights activists staged a sit-in at a drug store lunch counter. After the students were seated, an employee posted a "no trespassing" sign and the students were arrested. The students were convicted of criminal trespassing. Because "entry upon the lands of another" was an element of the offense, the students asserted on appeal that they had already entered the premises before they were given notice not to enter. The South Carolina Supreme Court affirmed the convictions by construing the "entry upon the lands of another" language to mean not only entry, but also *remaining* on property after notice has been given to leave.

The U.S. Supreme Court reversed, holding that an individual who lacks fair warning because of a judicial construction subsequent to the purported criminal conduct is deprived of due process. In fact, the court explained that depriving an individual of notice in this manner is even more troubling than charging a person under a statute that is void for vagueness:

> When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that

> conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," as in *Lanzetta,* or to "guess at (the statute's) meaning and differ as to its application," as in *Connally*, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

Id. at 352.

When the Supreme Court reversed the convictions of the protesters it compared what happened in the lower courts to application of an ex post facto law.

In the case at bar, Rev. Pinkney found himself in much the same situation as the civil rights activists in *Bouie*. He could not have known that the acts he is accused of committing were proscribed by MCL 168.937; and he could not have known until the trial court allowed the prosecutor to proceed against him using that statute. After the fact, the law was construed to fit the allegations against Rev. Pinkney, rendering it essentially an ex post facto law by judicial construction – at least with respect to this case. The prosecution of Rev. Pinkney was therefore a denial of his due process rights, and his conviction should be reversed.

CONCLUSION

The conviction of Rev. Pinkney is fatally flawed because irrelevant "other acts" evidence was improperly admitted despite the risk that the jury would be distracted and inflamed by the subject matter. Additionally, Rev. Pinkney's right to due process was violated because he was convicted of violating a statute that he could not have recognized as creating a substantive offense. For all of the reasons discussed above, his conviction should be reversed.

Respectfully submitted,

/s/ Mark P. Fancher_____
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November 20, 2015

EXHIBIT A

THE STATE OF MICHIGAN

IN THE CRIMINAL COURT FOR THE COUNTY OF BERRIEN

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-v-

EDWARD PINKNEY,

Defendant.

_____/

File No.
2014 001528 FY

JUDGE STERLING SCHROCK

ORDER ON SPECIFIC REFERENCES OF OTHER ACTS

At a session of said Court held on the 27th day of October, 2014, in the Berrien County Courthouse, City of St. Joseph, Michigan.

PRESENT: THE HONORABLE STERLING SCHROCK, CRIMINAL TRIAL JUDGE.

Upon the reading and filing of the People's Specific References of Other Acts Relating to the Second Amended Notice of Intent to Introduce Other Acts Evidence Under MRE 404(b); and the Court hearing the oral arguments of counsel; and the court being fully advised in the premises;

IT IS HEREBY ORDERED that the People's Motion For Specific References of Other is hereby granted as follows:

Benton Harbor Mayor James Hightower

1. Evidence from Hightower of the defendant's participation in public comments relative to anti-Hightower and a Hightower-Whirlpool alliance.

2. Evidence from Hightower of the defendant's participation in advocating for a "yes" vote on the city income tax issue.

3. Evidence from Hightower of the defendant's participation in the effort to recall Hightower.

Berrien County Elections Administrator Carolyn Toliver

1. Evidence from Toliver of the defendant's participation in recalls in general, his knowledge of the process including the date parameters and the requirements of a circulator and signer as this would show the absence of mistake.

2. Evidence from Toliver of the defendant's participation in the Hightower recall (largely similar to the preliminary examination testimony) is relevant to show the defendant's motive to change dates and gather double signatures.

Berrien County Clerk Sharon Tyler

1. Evidence from Tyler of the defendant's participation relating to recall efforts of her due to her function as clerk in the Hightower recall process.

Petition Circulators

1. Evidence from circulators of their knowledge of defendant's participation in:

a. anti-Hightower and a Hightower-Whirlpool alliance,

b. the recall of Mayor James Hightower.

DATED:
10/27/14

Sterling S. Schrock
Criminal Trial Court Judge

Approved as to form:

Tat Parish
Attorney for Defendant

EXHIBIT B

2014 WL 5409079
Only the Westlaw citation
is currently available.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of
Michigan, Plaintiff–Appellant,
v.
Brandon Michael HALL,
Defendant–Appellee.

Docket No. **321045**.
| Oct. 23, 2014.

Ottawa Circuit Court; LC No. 13–037857–AR.

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

Opinion

PER CURIAM.

***1** 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.

***2** 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 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.

***3** 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.

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."

***4** 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.

***5** 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:

> ***6** 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).

***7** 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.

***8** 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).

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.

***9** 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 U.S. 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 U.S. 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 U.S. at 574; *Batchelder,* 442 U.S. 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.

***10** 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.

Footnotes

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.

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.

* * *

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

CERTIFICATE OF SERVICE

I, Mark P. Fancher, hereby certify that on November 20, 2015, I filed the foregoing document through the court's electronic filing service, and served a copy of same on each of the counsel of record through the court's electronic filing service.

/s/ Mark P. Fancher
Mark P. Fancher