

IN THE DISTRICT COURT OF APPEAL STATE OF FLORIDA
FIFTH DISTRICT

FULLY INFORMED JURY ASSOCIATION,
ETC., ET AL.,

Petitioners,

CASE NO. 5D11-708

vs.

NINTH JUDICIAL CIRCUIT,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Introduction.

The Response fails on two grounds. First, the brief consistently and repeatedly confounds (a) protected speech, like Petitioners', which is directed to the public, including summoned jurors, that seeks to educate and advocate about jurors' recognized powers and rights, without regard to the outcome of any particular case; and, (b) prohibited communications that tamper with the judicial system by directing jurors to reach a particular result. As set forth in the Petition at 13-16, Petitioners' speech advocates a political position relating to the legal process. As such, their speech is "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 366 (2003) (cross burning is protected expression and core speech). Indeed, the Response does not argue, nor

could it, that Petitioner's speech is *not* protected.¹ Second, the Response mistakenly focuses on whether the Courthouse Complexes are public forums, rather than what Petitioners argued; *i.e.*, that the Administrative Order is unconstitutional on its face, irrespective of whether the communications are occurring in a traditional, limited or non-public forum, since the Order is an overbroad, vague content-based prior restraint on speech.

II. Petitioners' Speech is Not Jury Tampering.

Much of Respondent's Response is based on the foundation that the Administrative Order prohibits only those communications that are intended to obstruct justice by "influencing" potential or sitting jurors, and which would violate § 918.12, *Fla. Stat.* (2010). However, the terms of the Administrative Order demonstrate to the contrary. They restrict any communications that may influence a juror, regardless of whether the speaker knew that the recipient of the communications was a juror and regardless of whether the speaker intended to obstruct justice by directing a juror to a particular result in a case.

Communications which amount to jury tampering are prohibited by state law. However the Administrative Order targets and bans a much broader swath of

¹ Moreover, for purposes of Petitioners' facial challenges to the Administrative Order as content-based and overbroad, the nature of Petitioner's particular message is irrelevant to the constitutional analysis other than as it relates to standing. The Response concedes that Petitioners have standing, and that the issue in this case "concerns free speech principles." Response at n.2.

expressive activity, and thus invades the realm of protected speech. Indeed, if the Administrative Order were limited to prohibiting communications that were already considered illegal as jury tampering, its issuance would be wholly inappropriate as an injunction against the commission of a criminal act. See *Lansky v. State ex rel Gibbs*, 199 So. 46 (Fla. 1940) (“equity will not enjoin criminal violations because there is ample authority in the criminal courts to punish evil-doers”), Thus, regardless of the specific nature of Petitioners’ message, and irrespective of whether the courthouse grounds in the Ninth Circuit of Florida can be considered a public forum, the Administrative Order is doomed to constitutional failure as an overbroad, vague, content-based prior restraint on protected expression.²

To the extent that the protected nature of Petitioners’ speech is at all relevant, Petitioners can readily establish the distinction between their educative efforts and the kind of communications that have traditionally been labeled jury “tampering” under Florida law. Petitioners agree that speech intended to direct a jury or a summoned juror to reach a particular *result* has historically been classified as jury tampering under § 918.12 and carries significant penalties for those who attempt to so direct a juror. However, despite the Respondent’s

² Notably, the doctrines of overbreadth, vagueness, prior restraint and strict scrutiny review are not impacted by whether the offending restriction on speech is limited to a public or non-public forum. See Section III, *infra*.

assertions that Petitioners' expressive conduct falls within the definition of jury tampering and can therefore be prohibited under the First Amendment, the handful of cases that address that crime highlight the dispositive distinctions between Petitioners' protected speech and activity that is prohibited under the statute. *See, e.g., Baumgartner v. Joughin*, 141 So. 2d 185 (Fla. 1932) (affirming conviction for jury tampering where Baumgartner unquestionably sought out a juror with the intent to obtain a particular result, namely the acquittal of a particular person, and offered that juror "a pretty good proposition," and "dropped the remark that he knew Louis Leavine, who was to be tried for murder, but that Louis was not a bad boy, but that it was his brother Wilbur who was the wild one").

Likewise, in *Nobles v. State*, 769 So. 2d 1063 (Fla. 1st DCA 2000), the defendant was convicted of jury tampering based upon the following:

As a part of his preparation for trial on a drug charge, the defendant obtained a list of the prospective jurors. He recognized the name Sherri Jones as a person he had gone to high school with and had dated. On November 1, 1998, the day before the trial in the drug case, the defendant encountered Jones in a convenience store and asked her to do him a favor. The defendant asked Jones to say that she did not know him and, if selected on the jury, to vote to find him not guilty. He then told Jones that it would be in her best interest to do as he had asked.

Id. at 1064.

The jury tampering convictions in *Baumgartner* and *Noble* were premised on the defendants' intentional targeting of a juror or venire member in order to

direct or urge them to reach a verdict of “not guilty” in a specific case and those convictions were properly affirmed. Similarly, the findings of contempt of court in *Dawkins v. State*, 208 So. 2d 119 (Fla. 1st DCA 1968), were consistent with the directive of § 918.12. In *Dawkins*, contemnors asserted a free speech defense for distributing “a crudely mimeographed circular or handbill within the Alachua County Courthouse at a place immediately adjacent to the room wherein the grand jury was deliberating a matter regarding which the appellants were the complaining party. Specifically, the matter being investigated by the grand jury was a complaint that police officers were having improper relations with female prisoners at the jail.” *Id.* at 121. The circular included the following:

There are people who are going to be subpoenaed to come to this fixed grandjury [sic], including myself. Many people are afraid to go – which shows WHITE POWER again. WE ARE ASKING THAT EVERYONE IN GAINESVILLE WHO IS MAN AND WOMAN ENOUGH TO STAND UP AND FIGHT AGAINST THIS OPPRESSIVE CITY AND COUNTY GOVERNMENT COME FORWARD AND TESTIFY ON MONDAY, DECEMBER 18, at 9:30 A.M. By the way, where are those so-called Negro-leaders in Gainesville. You know these things have been going on, but you are afraid to stand up. So stay in your chairs, we know you are a part of white oppression.

Id.

Some members of the grand jury received these circulars and felt threatened and intimidated. *Id.* at 122-23. The First District rejected the First Amendment claims of the pamphlets’ distributors, recognizing that “[w]e are not here

confronted with the publication of thoughts and opinions about a matter of general public interest” *Id.* at 123. Affirming the contempt convictions, the court held that “[o]ne cannot *threaten, intimidate, bribe, or otherwise imminently seek to affect the outcome* of grand or petit jury deliberations and then seek refuge in the First Amendment when held to account for his actions.” *Id.* at 124 (emphasis added). Nevertheless, even when faced with the egregious conduct described above, which had the intended effect of threatening, intimidating and frightening the members of the grand jury, the First District recognized the high burden required to punish speech:

No judicial officer should be permitted to resort to the power to hold one in contempt as a device by which to stifle criticism or fair comment on the manner in which his judicial labors are performed. As was held in *Pennekamp v. State of Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295, the exercise of judicial power to punish for contempt within the context of First Amendment rights must be measured against a standard earlier described by the Supreme Court in *Bridges v. State of California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, as a working principle that *the substantive evil must be extremely serious and the degree of imminence extremely high before an utterance, oral or written, may be punished.*

Id. at 123-24 (emphases added).

The circulars distributed to the grand jurors in *Dawkins* were designed to direct or effect a particular outcome. They were serious enough, and the “evil” was imminent enough, that the communication “posed a clear and present danger to the orderly administration of the grand jury function.” *Id.* at 124. *See also Strowder v.*

State, 170 So. 2d 327, 330 (Fla. 2d DCA 1964) (“The jury has long been recognized as an appendage of the court. Consequently, approaching a juror to find out how he stands with reference to a case, or sounding out a juror to ascertain whether he can be corruptly influenced, or attempting to influence the results of jury trials by improper means by any acts which have a tendency to enable a person to make certain the result of a litigated case involving a trial by jury, are acts punishable as contempts”).

By contrast, Petitioners’ speech and pamphlets are not intended to direct or effect any particular outcome – as Petitioner Cox averred, “[m]y desire to inform citizens, including potential jurors, of their legal and constitutional rights consistent with the FIJA message is motivated by my belief that individuals are often wrongly prosecuted, and falsely imprisoned.” App. 12 at ¶ 11. The Response offers nothing to contradict that averment, yet incorrectly characterizes Respondents’ speech as falling within the ambit of the jury tampering statute.

Respondent’s argument at p. 21 that “[t]he intent to influence a juror is synonymous with the obstruction of justice ... ,” and its assertion that any and all influential communications directed at the public, which may include potential jurors, are presumptively intended to obstruct justice, are contrary to Florida’s prohibition against jury tampering. Florida’s jury tampering statute requires, as a separate element of the offense, criminal intent to obstruct justice. § 918.12. To be

sanctionable under the statute (and consistent with the Constitution), the defendant's intent in speaking with the juror must be to influence that juror to reach or direct a particular result in a matter being considered (or to be considered) by the juror.³ Because that critical element of scienter is absent from the speech prohibited by the Administrative Order, it is contrary to § 918.12, the interpretative case law, and the First Amendment. See, *U.S. v. X-Citement Video*, 513 U.S. 64 (1994) (statutes that separate criminal acts from First Amendment protected expression must include a scienter element to be constitutional).

Contrary to the suggestions in the Response, Petitioners do not challenge the Court's authority to deter or punish speech or conduct that is directed to a summoned or seated juror with the intent to direct a particular result in any case, or which poses a "clear and present danger" to the orderly administration of justice. See Pet. at n. 6. Instead, Petitioners' challenge is based on the Administrative Order's blanket ban on speech that is clearly protected, as it does not seek to direct a juror to reach a particular result. Respondent's failure to narrowly tailor the Administrative Order to avoid this intrusion into the realm of protected speech

³ For example, a volunteer for MADD – Mothers Against Drunk Driving – is not prohibited under this Order from distributing flyers that urge passersby not to drink and drive. However, that same volunteer could be prohibited from distributing flyers that urge summoned jurors to "find John Doe guilty, punish him and rid our streets of this vermin or else we're coming for you!" if John Doe was on trial for DUI manslaughter.

results in an unconstitutional exercise of judicial authority which must be quashed.

III. The Uncontested Facts Demonstrate that the Courthouse Complexes are, at a Minimum, Limited Public Forums. Regardless, Because the Ban on Protected Speech is Content Based, the Nature of the Forum is Irrelevant to the Constitutional Analysis.

The Response presumes as a matter of law and fact that the Courthouse Complexes are not public forums. It repeatedly references “facts” that are not supported by any affidavits or declarations. *See, e.g.*, Response at 12, 19. Petitioners’ averments are therefore unchallenged, and they establish that at the very least, the Ninth Circuit Courthouse complexes constitute limited public forums. In his Affidavit, Petitioner Cox avers that “I have seen representatives of other groups handing out literature and collecting signatures at the Orange/Osceola Courthouses, but I have never observed law enforcement interfere with the expressive activities of those individuals,” App. 12 at ¶ 9, and that “[v]olunteers of our organization have been threatened and told to move away from the courthouse doors at the Orange County, Florida courthouse in the past.” *Id.* at ¶ 8.

The Response has conceded, by the absence of any contradictory evidentiary facts, that the Courthouse Complexes are open to other pamphleteers and petition-gatherers. Because it is uncontested that (a) other groups hand out literature and collect signatures at the courthouse complexes, free from interference or threat of arrest, and it is also uncontested that (b) Petitioner Cox has been threatened with arrest for distributing the FIJA literature, and remains subject to seizure, contempt,

and confinement if he violates the Order, the Courthouse Complexes are permitted forums for some speakers, but not for others.

But whether the Courthouse complexes are limited public forums, or not public forums at all, the Administrative Order's overbroad, content-based prohibition on protected political speech constitutes a patent violation of the First Amendment. *See Bynum v. U.S. Capitol Police Dept.*, 93 F. Supp. 2d 50 (D. D.C. 2000) (holding that although Capitol was not a public forum, the government could only restrict First Amendment activity if the restrictions were viewpoint neutral and reasonable in light of the purpose served by the forum). "The relationship between functional forum analysis and the overbreadth doctrine was explained by the Supreme Court in *Forsyth County, Georgia v. Nationalist Movement: A* government regulation that allows arbitrary application, and is thus unconstitutionally overbroad, is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Id.* at 57 n.4. The potential for arbitrary application of the Administrative Order is apparent from its terms. As argued in the Petition, the Administrative Order requires law enforcement officials to make *ad hoc* determinations, with no objective criteria, as to whether a given speaker's message is sufficiently "influential" to justify issuance of a warning and/or physical arrest for contempt proceedings. Thus, the overbreadth and

vagueness of the Administrative Order renders the public forum analysis irrelevant.

The Response misses the mark when characterizing the Administrative Order as content neutral. Respondent, through the Administrative Order on appeal, prohibited all expressive activity of a specific type of speech while allowing other forms of expressive activity in the same location.⁴ Thus, the Administrative Order is content-based. *See State v. O’Daniels*, 911 So. 2d 247, 251 (Fla. 3d DCA 2005) (“An ordinance is content based when the government adopts it as a regulation on speech because of disagreement with the message the speech conveys”). “The First Amendment generally prevents government from proscribing speech ... because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Even in non-public forums, government prohibitions on speech and expressive conduct must be viewpoint neutral. *See Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content

⁴ Respondent is wrong in its assertion that “[a]ny group advocating for or against any topics ranging from tort reform, abortion, drug laws, to the protection of animals would not be allowed to contact summoned jurors on courthouse grounds to influence them on whatever position the group was advocating – either for or against. Response at 15. Advocacy for anything that is not pending, or will not be brought before a juror, is simply not barred by the Administrative Order. *See* Order, ¶¶ 1, 2. It is precisely because some advocacy is permitted that a law enforcement officer must inspect, and evaluate, the content of the speech to determine whether it is prohibited.

based.”); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811-12 (2000). See also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and* are viewpoint neutral”) (emphasis added). In contrast, content-neutral statutes are those which can be “justified without reference to the content of the regulated speech.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, the Administrative Order cannot be administered without looking at, and evaluating, the content of the speech.

Tellingly, the Response does not address Petitioners’ argument that “the literal terms of the Administrative Order even prevent lawyers from tendering relevant exhibits or making final arguments to jurors, or witnesses testifying during trial, since such activities are certain to ‘influence’ those jurors on the case under consideration.” Petition at 19-20. This unchallenged potential application further illustrates the substantial overbreadth of the Administrative Order, rendering it unconstitutional irrespective of the nature of the forum in which the speech is occurring.

Notably, Respondent cannot explain how a Sheriff’s deputy could determine whether to bring a pamphleteer to the Court’s attention for violating the Order without: (1) examining the document; (2) using his or her discretion to determine

whether its content violates the Order; (3) ascertaining the identity of the pamphleteer; and (4) taking the pamphleteer into custody for an appearance before the Court. As Petitioners set forth in detail in the Petition, the unbridled discretion leading to the potential seizure of speakers for their expressive activity must be examined through the lens of strict scrutiny. The Administrative Order fails such exacting review. Petition at 31-32. *See also* Section IV, *infra*.

IV. THE ADMINISTRATIVE ORDER IS VOID FOR VAGUENESS BECAUSE IT ALLOWS ARRESTING OFFICERS TO MAKE *AD HOC* DETERMINATIONS OF THE PURPOSE.

The vagueness of the prohibitions set forth in the Administrative Order compounds the unfettered discretion afforded to law enforcement officials who must make the decision whether to warn and/or seize violators for purposes of enforcing indirect criminal contempt.⁵ *Virginia v Black* held unconstitutional a

⁵ Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abut [s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “‘steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (citations omitted).

Virginia statute insofar as it presumed intent to intimidate based solely on the burning of a cross; the presumption permitted both arrest and conviction for core political speech. 538 U.S. 343 (2003). The Administrative Order similarly empowers a police officer to arrest solely on the basis of publication of a flyer, leaving to the officer's unfettered discretion whether the information contained therein tends "to influence summoned jurors." Just as a statute that permits a jury to convict solely on the basis of potentially protected speech is overbroad, an administrative order that imbues unguided discretion in police officers to arrest merely on the basis of speech is unconstitutionally vague. In *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998), the court considered an ordinance that prohibited parking with the intent to attract public attention to a sign void for vagueness because it required an enforcing officer to make an *ad hoc* determination of the purpose for which a car was parked. The court wrote that "to enforce the ordinance, a Menlo Park law enforcement officer must decipher the driver's subjective intent to communicate from the positioning of tires and the chosen parking spot." *Id.* The lack of standards for that determination rendered the statute unconstitutionally vague. *Id.* See also: *Johnson v. Carson*, 569 F.Supp. 974, 979 (M.D. Fla. 1983) (municipal ordinance prohibiting loitering for purpose of prostitution, which prohibited constitutionally protected as well as unprotected conduct, was constitutionally overbroad); *Sult v. State*, 906 So.2d 1013 (Fla. 2005)

(statute criminalizing unauthorized use of police badge or other indicia of authority was unconstitutional as overbroad, vague, and violative of substantive due process).

V. The Administrative Order is Not Narrowly Tailored.

Aside from the facial overbreadth and vagueness of the Administrative Order, it is due to be quashed given its failure to meet strict scrutiny requirements. Respondent tellingly asserts (without evidentiary support) that “summoned jurors are readily identifiable.” Response at 19. A narrowly-tailored restriction on expressive activities would, at the very least, be limited to directing influential communications at *known* jurors.⁶ Less restrictive alternatives could also include curative instructions given at the commencement of trials (or jury selection), or court-issued pamphlets instructing jurors to ignore extra-judicial communications relating to the court process. But an all-out ban on any expressive communications that might be overheard by a potential juror, on any subject that might tend to influence that individual, constitutes an affront to the First Amendment and must be quashed.

Wherefore, Petitioners request that the Court grant the relief requested in the Petition.

⁶ Indeed, FIJA supporters and volunteers “do not target identifiable jurors” App. Cox Affidavit, ¶4.

Dated this 7th day of April, 2011.

Respectfully Submitted,

ACLU FOUNDATION OF
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Reply in Support of Petition for Writ of Certiorari was served via U.S. Mail this 7th day of April, 2011, on counsel for Respondent: John Edwin Fisher and Jamie Billotte Moses, FISHER, RUSHMER, WERREN RATH, DICKSON TALLEY & DUNLAP, PA, Post Office Box 712, Orlando, FL 32802, and Robin S. Berghorn, General Counsel, Ninth Judicial Circuit Court, 425 N. Orange Ave., Suite 2130, Orlando, FL 32801.



Randall C. Marshall

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, in compliance with *Florida Rule of Appellate Procedure* 9.210(2), that the size and style of type used in this Petition is 14 point, Times New Roman.



Randall C. Marshall