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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No.

v

Court of Appeals No. 314706

DON DALE YOWCHUANG,

Defendant-Appellee.

Wayne Circuit Court
No. 12-010198-01-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No.

v

Court of Appeals No. 314705

PAUL CHARLES SEEWALD,

Defendant-Appellee.

Wayne Circuit Court
No. 12-010198-02-FH

THE PEOPLE'S APPLICATION FOR LEAVE TO APPEAL

150146

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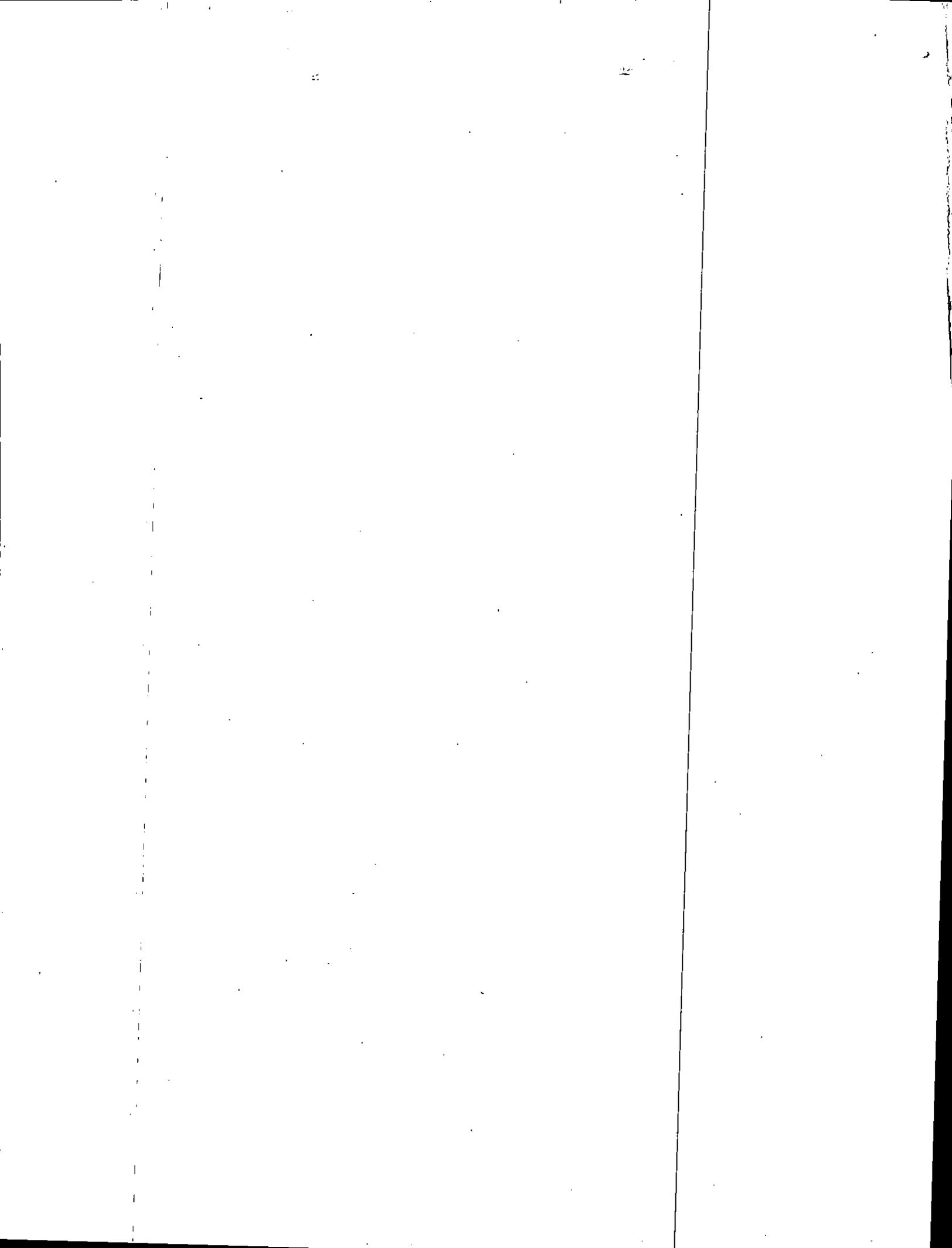


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STATEMENT OF QUESTION PRESENTED

Michigan law makes it a crime to conspire “to commit a legal act in an illegal manner.” MCL 750.157a. Does a conspiracy fall outside the scope of MCL 750.157a if the conspirators agree not just to commit the legal act but also to use the illegal manner?

The People answer: No.

Defendants answer: Yes.

District court’s answer: No.

Trial court’s answer: Yes.

Court of Appeals’ majority answer: Yes.

STATUTES AND COURT RULE INVOLVED

MCL 750.157a provides in pertinent part:

Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein:

(d) Any person convicted of conspiring to commit a legal act in an illegal manner shall be punished by imprisonment in the state prison for not more than 5 years or by a fine of not more than \$10,000.00, or both such fine and imprisonment in the discretion of the court.

MCL 766.13 provides in pertinent part:

If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county.

MCR 6.110(E) provides in relevant part:

If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial.

**STATEMENT OF JUDGMENT /
ORDER APPEALED FROM AND RELIEF SOUGHT**

The People seek leave to appeal the Court of Appeals' 2-1 decision that affirmed the circuit court's order that quashed the district court's decision to bind over defendants over on a felony charge of conspiracy to commit a legal act in an illegal manner under MCL 750.157a(d). *People v Seewald; People v Yowchuang*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2014 (Docket No. 314705-6) (attached as Appendix A).

This Court should grant leave to appeal, reverse the Court of Appeals, and reinstate the conspiracy charge because the end goal of defendants' conspiracy was to place Congressman McCotter's name on the ballot—itsself a legal act—and not merely to falsely sign the nominating petitions as circulators. Therefore, defendants conspired “to commit a legal act in an illegal manner” within the meaning of MCL 750.157a(d).

Alternatively, this Court should summarily reverse the Court of Appeals' erroneous decision, reinstate the felony conspiracy charge without merits briefing and oral argument, and remand for trial.

INTRODUCTION

Two staffers for Congressman Thaddeus McCotter had a goal, one they admitted under oath: to submit sufficient signatures to get him on the 2012 ballot. They agreed to pursue that ultimate end (itself a perfectly legal act) by committing fraud—by signing their names on nominating petitions to indicate that they had circulated the petitions, when in fact, they hadn't. Reasoning that two wrongs do in fact make a right, the Court of Appeals held that they could not be charged for this “conspir[acy] to commit a legal act in an illegal manner,” MCL 750.157a, because they also had an illegal immediate goal: to defraud the Secretary of State. As the Court of Appeals saw it, the defendants could not violate this provision because “they conspired to commit an *illegal* act in an *illegal* manner.” (Slip op, p 4.)

This reasoning means that a defendant can get away with agreeing to commit a legal act in an illegal manner simply by *also* agreeing to the necessary step of using an illegal manner. Under the Court of Appeals' approach, agreeing to use the illegal manner taints the ultimate act, rendering it also illegal. This approach fails to apply the plain statutory text and essentially eliminates the crime of conspiracy to commit a legal act in an illegal manner. Worse, it makes it a defense to the charge to argue that one's ultimate goal was to break the law.

Leave to appeal should be granted because the proper interpretation of this criminal conspiracy statute is a legal principle of significant public interest, because this case is brought by the Attorney General, and because the Court of Appeals decision was clearly erroneous. MCR 7.302(B)(2), (3), & (5). And it is an issue of first impression in this Court, with little lower-court case law addressing it.

This Court should grant leave to appeal, or it should peremptorily reverse the Court of Appeals for the reasons set forth in the dissent.

STATEMENT OF FACTS

The facts are, for the most part, undisputed. In May 2012, defendant Paul Seewald was Congressman Thaddeus McCotter's district director. (10/11/12 Preliminary Exam [PE], pp 77–78; People's Ex 19, Interview of Paul Seewald, conducted 6/4/12, p 5.) Defendant Don Yowchuang was deputy district director for Congressman McCotter. (10/11/12 PE, pp 78–79; People's Ex 21, Interview of Don Yowchuang, conducted June 4, 2012, p 6.) One of Yowchuang's duties was to collect enough signatures to place Congressman McCotter's name on the ballot. (People's Ex 21, pp 6–11.) Under Michigan's election law, a Congressional candidate must submit 1,000 valid signatures to qualify for the ballot. MCL 168.544f. A candidate may submit a maximum of 2,000 signatures. *Id.* Congressman McCotter required his staff to submit the maximum 2,000 signatures. (10/11/12 PE, p 79; People's Ex 22, Interview of Don Yowchuang, conducted June 29, 2012, pp 69–71.)

On May 14, 2012, Yowchuang noticed that a number of nominating petitions had not been signed by the circulator. (People's Ex 21, pp 26–28.) Yowchuang signed several of them as a circulator, despite the fact that he had not circulated any petitions. (People's Ex 21, p 26.) Yowchuang also approached Lorraine O'Brady, Congressman McCotter's scheduler, and defendant Seewald to sign other unsigned petitions as circulators, even though they had not circulated those petitions. (People's Ex 22, pp 69–71.)

Yowchuang testified that their goal was to submit signatures to get McCotter on the ballot:

Q: You discussed that with him [Seewald] in terms of “would you sign this,” or what did you say to him?

A: You know, I don’t remember the discussion, but it was just something “you know these don’t have a signature. Would you mind signing them?”

Q: Now your purpose in doing that was simply to make these signatures count towards the nomination?

A: Yes.

Q: And you are agreeing to do this simply to get him on the ballot. I mean that is the ultimate purpose here?

A: Yes.

Q: It’s just for the legal purpose of getting him on the ballot?

A: Yes, (People’s Ex 22, pp 69–70.)

Yowchuang further testified that he and Seewald had engaged in—and gotten away with—the same conduct in 2008:

Q: You have turned in petitions before?

A: Yes.

Q: Based on that experience, you didn’t think that the Secretary of State was going to look at them?

A: Well, I knew they would look at them.

Q: You don’t think they can tell a xerox copy from a written copy?

A: In fact, in 2008 we did do the same type of thing, and it did pass through.

Q: Now let’s go back to that, you say “we” in 2008. Who was it?

A: Myself and Paul Seewald.

Q: And so you were a little short on petitions. You xeroxed some extra copies?

A: Yes.

Q: Did you tell the Congressman about that?

A: No.

Q: Never tell the Congressman?

A: Ever (sic), never.

Q: But Paul knew about that. Paul was part of that?

A: Yes.

Q: In 2008?

A: Yes. [People's Ex 22, pp 112-113.]

Seewald confirmed this testimony, admitting that Yowchuang presented him with unsigned petitions to sign as a circulator. (People's Ex 19, pp 12-15.) Seewald testified:

I was asked to sign them.

Q: By whom?

A: Don Yowchuang.

Q: And the purpose in that was to get Mr. McCotter on the ballot?

A: That would be correct.

Q: You signed as circulator for the purpose of having these signatures included in the count?

A: Correct.

Q: It was an agreement you had between the two of you to make this a good petition. Right?

A: Correct.

(10/11/12 PE, pp 77–78; People’s Ex 20, Interview of Paul Seewald, conducted June 29, 2012, pp 49–50.)

Congressman McCotter testified that both Seewald and Yowchuang confessed to him that they had signed petitions as circulators when they did not actually circulate them. (10/11/12 PE, p 120.)

Following its investigation into the irregular signatures, the Attorney General’s Office charged the defendants with signing nominating petitions they did not circulate, a misdemeanor under MCL 168.544c(8), and with conspiracy to commit a legal act in an illegal manner, a felony under MCL 750.157a(d).

PROCEEDINGS BELOW

The district court bound defendants over for trial on several counts.

Defendant Yowchuang pleaded nolo contendere to 10 felony counts of forgery for making a false nominating petition with the intent to defraud, MCL 168.937. He also pleaded nolo contendere to six misdemeanor counts of signing a nominating petition with a name other than his own, MCL 168.544c(7)–(8)(a). Yowchuang was sentenced to a term of three years’ probation, with one year in the Wayne County Jail if he violates probation. (1/18/13 Motion & Sentencing Hr’g, p 14.)

Defendant Seewald pleaded guilty to nine misdemeanor counts of signing a nominating petition with a name other than his own, MCL 168.544c(7)-(8)(a). He

was sentenced to a term of two years' probation. (1/18/13 Motion & Sentencing Hr'g, p 15.)

Over the State's opposition, the Third Judicial Circuit Court, Judge Margie R. Braxton, granted defendants' motions to quash the bindover on the remaining felony charge of conspiracy to commit a legal act by illegal means. (1/18/13 Motion & Sentencing Hr'g, p 9.) It based its decision on its conclusion that the defendants conspired to do something illegal, not something legal. (*Id.*)

The People appealed, and the Michigan Court of Appeals affirmed in a 2-1 opinion. *People v Seewald; People v Yowchuang*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2014 (Docket Nos. 314705-6). The majority concluded that the "purpose" and "immediate goal" of the conspiracy was to defraud the Secretary of State, meaning defendants only conspired to commit an illegal act in an illegal manner. (Slip op, pp 4-5.) Judge Jansen dissented, indicating the felony conspiracy charge should be reinstated because "the end goal of defendants' conspiracy was to place Congressman McCotter's name on the ballot—itsself a legal act."

The People now seek leave to appeal.

STANDARD OF REVIEW

Although a district court's decision regarding whether to bind a defendant over for trial is reviewed for an abuse of discretion, when, as here, the appeal challenges the trial court's interpretation of a statute, the reviewing court applies de novo review. *People v Yamat*, 475 Mich 49, 52; 714 NW2d 335 (2006); *People v*

Flick, 487 Mich 1, 8–9; 790 NW2d 295 (2010) (“Whether conduct falls within the scope of a penal statute is a question of statutory interpretation.”). (See also slip op, p 3 (applying de novo review).)

ARGUMENT

I. The defendants agreed to accomplish a lawful act (filing nominating petitions to get Congressman McCotter on the ballot) by unlawful means (falsely signing petitions as the circulators), and the fact that they agreed to use this unlawful means does not shield them from the conspiracy charge.

A. The defendants’ agreement falls within the plain language of the statute.

The plain language of MCL 750.157a provides that “[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy.” It thus prohibits conspiracies where the end—the ultimate goal—of the conspiracy is illegal (“to commit an offense prohibited by law”). And it prohibits conspiracies where the end is legal, but the means are illegal (“to commit a legal act in an illegal manner”). The Legislature’s decision to include both types within the scope of conspiracy makes sense, because “unlawfulness is equally objectionable, whether it represents the end sought to be achieved, or the means to be employed to bring about that result.” Perkins & Boyce, *Criminal Law* (New York: Foundation Press, 3d ed. 1982), p 682. That is why “the fact that unlawfulness of either the end or the means is sufficient for conspiracy has been repeated time and again.” *Id.* at 684–85.

Here, both defendants admitted under oath that the goal of their conspiracy was to get the Congressman's name placed on the ballot. During the preliminary examination, Seewald was asked if "the purpose" of his signing the petitions he did not circulate "was to get Mr. McCotter on the ballot." He answered "that would be correct." (10/11/12 PE, pp 77-78; People's Ex 20, pp 49-50.) Seewald was further asked if he signed as circulator "for the purpose of having the[] signatures included in the count." He answered "Correct," *id.*, thereby admitting that he agreed to the legal act of submitting signatures. Similarly, Yowchuang was asked if the purpose in his asking Seewald to sign as circulator "was simply to make the[] signatures count towards the nomination." He answered "Yes." (10/11/12 PE, People's Ex 22, pp 69-70.) Yowchuang further answered "yes" to the question whether he did this to get the Congressman on the ballot. *Id.* Finally, Yowchuang said that he and Seewald had done something similar in 2008 and that the Secretary of State's office had not discovered the subterfuge. (People's Ex 22, pp 112-113.)

Given this inculpatory testimony from the defendants' own mouths, the district court was correct in concluding that probable cause existed to conclude that the defendants conspired to commit a legal act in an illegal manner. One would be hard pressed to come up with stronger evidence than inculpatory sworn testimony from each defendant as to the goal of a conspiracy. And submitting a nominating petition with signatures to place a name on the ballot is a legal act. It can be done in a legal manner, and is not itself prohibited by law. Quite the contrary, it is expressly authorized by law. MCL 168.133.

The Court of Appeals majority asserted that the People's argument that placing the Congressman on the ballot was the legal objective of the conspiracy "expand[ed] the scope of the conspiracy beyond all reason." (Slip op, p 4.) Not so. In fact, the scope of the conspiracy being argued by the People is exactly what the defendants admitted under oath. Further, the statutory language is "conspiring to commit a legal act in an illegal manner," so the agreement has to encompass *both* the legal act *and* the illegal manner. Indeed, the charge recognizes that the statute itself looks at whether the purpose is to achieve something otherwise legal, and here the defendants admitted that was their overall goal. It is the panel majority that is altering the scope of the conspiracy by focusing on only the defendants' "immediate goal" and using that to excuse "their ultimate goal." (Slip op, pp 4-5.)

While the panel majority accused the district court of misinterpreting MCL 750.157a(d) (slip op, p 5), it was actually the Court of Appeals that misinterpreted the statute. The panel majority treated the presence of an illegal step (here, falsely signing to say they were circulators) as meaning the larger act (submitting the petitions) was therefore illegal too, since it was done fraudulently. This view effectively eliminates the legal-act-in-an-illegal-manner conspiracy crime because the presence of an illegal manner would always mean the ultimate act could not be legal. Indeed, under the Court of Appeals majority's reading of MCL 750.157a(d), it is difficult to see how a defendant could *ever* commit a legal act in an illegal manner.

Judge Jansen made precisely this point in her dissent:

[T]he end goal of defendants' conspiracy was to place Congressman McCotter's name on the ballot—itsself a legal act—and not merely to falsely sign the nominating petitions as circulators. Defendants' decision to falsely sign the nominating petitions as circulators in violation of MCL 168.544c was simply a necessary but illegal step taken in furtherance of their ultimate lawful objective. [Dissent, slip op, p 1.]

B. The fact that the evidence showed that the defendants conspired to commit an illegal act does not foreclose a finding that they also conspired to commit a legal act in an illegal manner.

Both the circuit court and Court of Appeals majority found the evidence at the preliminary examination showed the defendants conspired to commit an illegal act. The People do not dispute this fact. But merely affixing Seewald's or Yowchuang's name to a nominating petition that they did not circulate was not the goal of *the charged* conspiracy. Rather, the evidence also showed a second conspiracy, i.e., a conspiracy to commit a legal act (submitting signatures from qualified and registered electors to the Secretary of State) in an illegal manner (by false attesting that they had circulated the petitions). Contrary to the panel majority on the Court of Appeals, the existence of the first conspiracy did not somehow foreclose or preclude a finding that the defendants also had a second conspiracy. The findings are in no way mutually exclusive. The fact that the evidence at the preliminary examination established a crime that had not been charged (conspiracy to commit an illegal act) is simply unrelated to the question whether the undisputed evidence fell within the scope of the greater charged crime of conspiring to commit a legal act in an illegal manner was shown.

The panel majority's analysis conflicts with a prior Court of Appeals' decision, *People v Duncan*, 55 Mich App 403; 222 NW2d 261 (1974). In *Duncan*, two police officers were convicted of conspiracy to do a legal act in an illegal manner and of solicitation of a bribe after offering to return certain property that was then being held in the police department's property room upon the payment of \$800 by the owner. Returning property to a citizen from the police property room is obviously a legal act, but the defendants in *Duncan* did it in an illegal manner, i.e., while soliciting a bribe. The fact that the defendants conspired to solicit a bribe, an illegal act, in no way precluded a finding that they had also conspired to commit a legal act, returning property, in an illegal manner (while soliciting a bribe). In contrast, the panel majority here said that the "purpose" and "immediate goal" of Seewald and Yowchuang's conspiracy was to defraud the Secretary of State meaning defendants only conspired to commit an illegal act. But if that reasoning had been applied in *Duncan*, the court would have held that the defendants did *not* conspire to commit a legal act in an illegal manner because they solicited a bribe and thus committed an illegal act. Again, the majority on the Court of Appeals improperly limited the scope of the defendants' admitted conspiracy.

The Court of Appeals majority also stated "at no time during their conspiracy did defendants engage in a 'legal act.'" (Slip op, p 4.) But the relevant question is not what the defendants did, but what they agreed to do. The crime of conspiracy focuses on the agreement, recognizing that the law should discourage people from working together to break the law. For example, a conspiracy is complete when the

agreement is reached, and no overt act in furtherance of the conspiracy must be shown to support a conviction. *People v Bushard*, 444 Mich 384, 394; 508 NW2d 745 (1993); *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). Defendants reached their agreement before they signed the petitions they had not circulated. Thus, the district court did not misinterpret the statute in binding defendants over on the charge that they conspired to commit a legal act in an illegal manner.

C. When the evidence supports the existence of two crimes, the prosecutor has discretion which crime to charge.

“[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor.” *People v Venticinqu*, 459 Mich 90, 100; 586 NW2d 732 (1998). If two statutes prohibit different conduct (i.e., an additional element is required to convict the defendant of one crime, but not the other), the prosecutor has the discretion to charge under either statute. *People v Werner*, 254 Mich App 528, 536-537; 659 NW2d 688 (2002).

Here the evidence supported a finding that defendants conspired to commit an illegal act contrary to MCL 750.157a(a), and also conspired to commit a legal act in an illegal manner contrary to MCL 750.157a(d). The Court of Appeals majority was correct in noting that the evidence showed defendants committed the misdemeanor offense under MCL 750.157a(a) (see slip op, p 5 n 5), but wrong in concluding the greater felony conspiracy offense had not also been shown.

When a court determines under which statute a defendant can be prosecuted, the court intrudes on the power of the executive branch to exercise prosecutorial

discretion, violating the separation-of-powers doctrine. Const 1963, art 3, § 2; *People v Jones*, 252 Mich App 1, 6; 650 NW2d 717 (2002). Here, the prosecution had good reason to exercise its discretion by charging the higher offense. The defendants, after all, were attempting to subvert the electoral process. And unless the prosecutor's actions are unconstitutional, illegal, or ultra vires, none of which are the case here, the charging decision made by the prosecutor is exempt from judicial review. *Id.* at 6–7.

The Court of Appeals majority decision should be reversed because it is inconsistent with prosecutorial discretion and negatively impacts the People's ability to prosecute other conspiracies to commit a legal act in an illegal manner.

CONCLUSION AND RELIEF REQUESTED

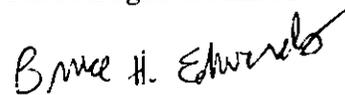
Here, the defendants' own inculpatory admissions established probable cause to believe that the defendants conspired to commit a legal act in an illegal manner. The goal of their conspiracy was to commit the legal act of filing a nominating petition to procure Congressman McCotter's placement on the ballot. The defendants conspired to commit this legal act in an illegal manner—by signing the nominating petitions as circulators when they had not been the people to collect the signatures. Given the evidence admitted at the preliminary examination, the Court of Appeals clearly erred in interpreting the plain statutory text as not reaching the defendants' conspiracy. This Court should grant leave to appeal, reverse the Court of Appeals' erroneous decision, reinstate the felony charge of conspiracy to commit a legal act in an illegal manner, and remand the case for trial.

Respectfully submitted,

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