

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BRANDON MICHAEL HALL,

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 321045

Ottawa County Circuit Court
No. 13-037857-AR

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that the prosecution must charge the more specific misdemeanor offense even though MCL 168.937 and MCL 168.544c address different conduct and require proof of different elements?

Plaintiff-Appellant's answer: Yes.

Defendant-Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

2. Did the Court of Appeals err in concluding that the "Rule of Lenity" operates in favor of the accused in this case?

Plaintiff-Appellant's answer: Yes.

Defendant-Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

3. Did the Court of Appeals err in concluding that the prosecution of the defendant for a felony under MCL 168.937 would violate his right to fundamental fairness?

Plaintiff-Appellant's answer: Yes.

Defendant-Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

A determination of the issues presented herein requires an interpretation of two separate statutory provisions within the Michigan Election Law, and the relationship between these separate provisions.

168.937 Forgery; penalty.

Sec. 937.

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.

168.544c Nominating petition; type size; form; contents; circulation and signing; unlawful signature; false statement; misdemeanor; sanctions; applicability of section.

Sec. 544c.

(1) A nominating petition shall be 8-1/2 inches by 14 inches in size. On a nominating petition, the words "nominating petition" shall be printed in 24-point boldface type. "We, the undersigned," et cetera shall be printed in 8-point type. "Warning" and language in the warning shall be printed in 12-point boldface type. The balance of the petition shall be printed in 8-point type. The name, address, and party affiliation of the candidate and the office for which petitions are signed shall be printed in type not larger than 24-point. The petition shall be in the following form:

NOMINATING PETITION

(PARTISAN)

We, the undersigned, registered and qualified voters
of the city or township of , in the county

(strike 1)

of and state of Michigan, nominate,
..... ,

(Name of Candidate)

..... ,

(Street Address or Rural Route) (City or Township)

as a candidate of the party for the

office of ,

..... ,

(District, if any)

to be voted for at the primary election to be held on

the day of , 20

WARNING

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.

Printed Street Address

Name and or Date of Signing

Signature Rural Route Zip Code Mo. Day Year

1. _____

2. _____

3. _____

4. _____

numbered lines as above

CERTIFICATE OF CIRCULATOR

The undersigned circulator of the above petition asserts that he or she is qualified to circulate this petition and that each signature on the petition was signed in his or her presence; and that, to his or her best knowledge and belief, each signature is the genuine signature of the person purporting to sign the petition, the person signing the petition was at the time of signing a qualified registered elector of the city or township listed in the heading of the petition, and the elector was qualified to sign the petition.

Circulator—Do not sign or date certificate until after circulating petition.

(Printed Name and Signature of Circulator) (Date)

(City or Township Where Registered)

[or, for petitions under section 482,

“(City or Township Where Qualified to be Registered)”]

(Complete Residence Address (Street and Number or Rural Route)

(Zip Code)

Warning-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.

(2) The petition shall be in a form providing a space for the circulator and each elector who signs the petition to print his or her name. The secretary of state shall prescribe the location of the space for the printed name. The failure of the circulator

or an elector who signs the petition to print his or her name, to print his or her name in the location prescribed by the secretary of state, or to enter a zip code or his or her correct zip code does not affect the validity of the signature of the circulator or the elector who signs the petition. A printed name located in the space prescribed for printed names does not constitute the signature of the circulator or elector.

(3) At the time of circulation, the circulator of a petition shall be a registered elector of this state. At the time of executing the certificate of circulator, the circulator shall be registered in the city or township indicated in the certificate of circulator on the petition. However, the circulator of a petition under section 482 need only be qualified to be a registered elector of this state at the time of circulation and at the time of executing the certificate of circulator.

(4) The circulator of a petition shall sign and date the certificate of circulator before the petition is filed. A circulator shall not obtain electors' signatures after the circulator has signed and dated the certificate of circulator. A filing official shall not count electors' signatures that were obtained after the date the circulator signed the certificate or that are contained in a petition that the circulator did not sign and date.

(5) Except as provided in section 544d, a petition sheet shall not be circulated in more than 1 city or township and each signer of a petition sheet shall be a registered elector of the city or township indicated in the heading of the petition sheet. The invalidity of 1 or more signatures on a petition does not affect the validity of the remainder of the signatures on the petition.

(6) An individual shall not sign more nominating petitions for the same office than there are persons to be elected to the office. An individual who violates this subsection is guilty of a misdemeanor.

(7) An individual shall not do any of the following:

(a) **Sign a petition with a name other than his or her own.**

(b) Make a false statement in a certificate on a petition.

(c) **If not a circulator, sign a petition as a circulator.**

(d) Sign a name as circulator other than his or her own.

(8) An individual who violates subsection (7) 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.

(9) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has knowingly and intentionally

failed to comply with subsection (7), the board of state canvassers may impose 1 or more of the following sanctions:

(a) Disqualify obviously fraudulent signatures on a petition form on which the violation of subsection (7) occurred, without checking the signatures against local registration records.

(b) Disqualify from the ballot a candidate who committed, aided or abetted, or knowingly allowed the violation of subsection (7) on a petition to nominate that candidate.

(10) If an individual violates subsection (7) and the affected petition sheet is filed, each of the following who knew of the violation of subsection (7) before the filing of the affected petition sheet and who failed to report the violation to the secretary of state, the filing official, if different, the attorney general, a law enforcement officer, or the county prosecuting attorney is guilty of a misdemeanor, punishable by a fine of not more than \$500.00 or imprisonment for not more than 1 year, or both:

(a) The circulator of the petition, if different than the individual who violated subsection (7).

(b) If the petition is a nominating petition, the candidate whose nomination is sought.

(c) If the petition is a petition for a ballot question or recall, the organization or other person sponsoring the petition drive.

(11) If after a canvass and a hearing on a petition under section 476 or 552 the board of state canvassers determines that an individual has violated subsection (10), the board of state canvassers may impose 1 or more of the following sanctions:

(a) Impose on the organization or other person sponsoring the petition drive an administrative fine of not more than \$5,000.00.

(b) Charge the organization or other person sponsoring the petition drive for the costs of canvassing a petition form on which a violation of subsection (7) occurred.

(c) Disqualify an organization or other person described in subdivision (a) from collecting signatures on a petition for a period of not more than 4 years.

(d) Disqualify obviously fraudulent signatures on a petition form on which a violation of subsection (7) occurred without checking the signatures against local registration records.

(e) Disqualify from the ballot a candidate who committed, aided or abetted, or knowingly allowed a violation of subsection (7) on a petition to nominate that candidate.

(12) If an individual refuses to comply with a subpoena of the board of state canvassers in an investigation of an alleged violation of subsection (7) or (10), the board may hold the canvass of the petitions in abeyance until the individual complies.

(13) A person who aids or abets another in an act that is prohibited by this section is guilty of that act.

(14) The provisions of this section except as otherwise expressly provided apply to all petitions circulated under authority of the election law. (emphasis added)

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

The People seek leave to appeal the per curiam judgment of the Michigan Court of Appeals, which was entered on October 23, 2014. The People ask this Court to grant their application and permit the matter to proceed as a calendar case, or, in the alternative, to summarily reverse the Court of Appeals and remand the case to the district court with instructions to bind Defendant over on the 10 charged counts of Election Law Forgery under MCL 168.937.

INTRODUCTION

The Michigan Legislature has empowered Michigan prosecutors to pursue criminal violations which impact on the integrity of the election process. Under separate statutory provisions, prosecutors have the discretion to charge different offenses which are defined by different elements. Under this legislative scheme, it is completely appropriate for the prosecutor to consider the circumstances surrounding the crime such as the defendant's role and motive when decided which of different possible offenses are charged and prosecuted.

The Legislature has determined that it is a misdemeanor to sign another person's name to a nominating petition. MCL 168.544c. The motive under which a person acts is not relevant to the charge. The only elements of the crime are that the defendant signs a name other than his or her name to the petition, and that he or she intended to do so.

In contrast, the Legislature has provided that it is a five-year felony to commit the offense of election law forgery. That offense requires proof of not only the making of a false document, but also that the making be done with the specific intent to defraud.

Here the facts demonstrate that the defendant signed the names of hundreds of other people to 10 different nominating petitions with the specific intent to defraud the Bureau of Elections. While a separate misdemeanor offense would be established by each of the numerous false signatures on the 10 petitions, the People charged defendant with the more serious felony offense of election law forgery. The

People charged 10 separate counts, based on the 10 separate forged documents, rather than charging a separate count for each of the numerous false signatures.

Notwithstanding the discretion granted by the Legislature to prosecutors acting within the scope of the executive branch of government, the Court of Appeals and the lower courts addressing the issue have ruled that the People can only bring misdemeanor charges against the defendant, despite clear evidence of the specific intent to defraud. Even though the Legislature has recognized that these separate crimes involve different elements, and that prosecutors may exercise discretion in determining which should be pursued, the courts here have precluded the prosecution from determining the seriousness of the misconduct and the threat posed to the electoral process when deciding how best to prosecute forged nominating petitions.

This Court should grant leave because the issues involve legal principles of major significance to the state's election law jurisprudence. MCR 7.302(B)(3). Moreover, the Court of Appeals' decision is clearly erroneous and will cause material injustice if allowed to go unchallenged. MCR 7.302(B)(5).

STATEMENT OF FACTS

The important facts of the case are not in dispute. Defendant-Appellee Brandon Michael Hall (Defendant) was hired by a non-incumbent candidate to obtain the signatures of qualified voters on a nominating petition for the office of district court judge during the 2012 election cycle. As the filing deadline approached, Defendant realized that there were not sufficient valid nominating signatures to qualify the candidate to appear on the ballot. Defendant then signed other people's names to numerous petitions, and certified that each petition had been properly circulated and signed by qualified voters.

On the eve of the filing deadline, Defendant worked throughout the night writing names and address of voters on the nominating petitions, and then signing their names to those petitions. He used different colored ink pens and used both his left and right hand to make it appear that different persons had signed those petitions. Even though aware that false names and signatures appeared on the petitions, he certified that the signatures were legitimate and that he had actually circulated each petition among qualified voters.

Defendant continued signing false signatures, and making false circulator certifications, during the car ride to Lansing on the filing deadline date. The petitions were filed with the Bureau of Elections, even though Defendant was fully aware that many contained false nominating signatures.

Believing that Defendant's conduct in making multiple false signatures with the intent to defraud the Bureau of Elections presented a greater threat to the

integrity of the election process than simply signing the names of one or two other people to a nominating petition, the People charged Defendant with 10 counts of Election Law Forgery, a five-year felony in violation of MCL 168.937. A separate count was charged for each of ten petitions containing multiple false signatures of voters and circulators. While the People were aware that MCL 168.544c expressly provides that it is a 93-day misdemeanor to sign someone else's name to a nominating petition, the felony forgery crime was charged because the Defendant's conduct demonstrated the additional element of a specific intent to defraud the Bureau of Elections.

Following Defendant's arraignment on the 10 felony counts, the matter came before the 58th District Court for a preliminary examination. In lieu of presenting testimony at the exam, the parties stipulated to a statement of facts. Both parties anticipated that the examining magistrate's bind-over decision would come down to a question of law, and both believed it would be more efficient to simply provide a factual basis for such a determination. A copy of the Stipulated Statement of Facts is appended as Attachment A.

The district judge accepted the stipulation of the parties, and the People then moved to bind the case over to the circuit court for trial. Defendant objected, asserting that the stipulated facts established only the misdemeanor offense set out in MCL 168.544c. That statutory provision prohibits both the signing of a name other than the signer's own on a nominating petition, and the signing of a petition as a circulator when the person knows any signature on the petition is not genuine.

The parties briefed the issue, and appeared before the district judge for oral argument. After considering the briefs and arguments of counsel, the court on October 21, 2013 issued an Opinion and Order denying the motion to bind over on the forgery charges. However, the court indicated that the evidence was sufficient to demonstrate probable cause that the misdemeanor offense under MCL 168.544c had occurred, and thus the People could proceed on 10 misdemeanor counts under that statute.

Rather than proceed on misdemeanor charges, the People appealed the district court's order to the circuit court. The central argument presented on appeal was that MCL 168.937 created the substantive offense of Election Law Forgery, which is separate and distinct from the misdemeanor covered by MCL 168.544c. Arguing that since the felony offense required proof of an additional element not required for the misdemeanor, the prosecutor had the discretion to charge the higher offense when the facts and circumstances so warranted.

The circuit court rejected the People's position, and affirmed the district court's ruling. In doing so, the court first reasoned that MCL 168.544c is a more recent and more specific statute governing Defendant's conduct, and thus this statute must prevail over the more general forgery offense. The court further held that since the conduct covered by both statutes was here identical, the rule of lenity should apply and the possible punishment should be mitigated. Finally, the court ruled that the defendant asserted a valid "due process" argument in noting the fact

that the nominating petitions contain a warning that signing someone else's name is a misdemeanor.

Being dissatisfied with the circuit court's holding, the People sought leave to appeal from the Michigan Court of Appeals. The appellate court granted a delayed application for leave to appeal, and granted motions for immediate consideration and to stay proceedings in the lower courts. The parties then proceeded as a calendar case, filing briefs and appearing before the court for oral argument.

On October 23, 2014 the Court of Appeals issued a per curiam opinion which affirmed the denial of the prosecution's motion to bind Defendant over on 10 felony counts of Election Law Forgery. The Court therein recognized that Election Law Forgery is a substantive offense, and that MCL 168.937 is not simply a penalty provision. However, the Court rejected the People's other arguments. In doing so, the Court of Appeals found three separate and distinct reasons to affirm the district court's decision.

The Court first noted that when the Legislature carves out an exception to a general statute which provides a lesser penalty for a more specific offense, the prosecution must charge under the statute best fitting the particular facts. The Court concluded that the two statutes concern the same subject matter, but are in conflict as to the possible sanction for such conduct. It therefore held that the misdemeanor provision, as the more recent and specific statute, controls over the felony forgery offense.

And the Court went on to hold that even if the two statutes were not in conflict, the application of the “rule of lenity” would lead to the same result. The Court noted that this rule provides that courts should mitigate punishment when punishment in a criminal statute is unclear. It found that in this case the interaction of the two statutes renders unclear the punishment for falsifying signatures on a nominating petition. The Court determined that the two statutes really controlled the same conduct, but provided for vastly different punishments.

The final reason discussed by the appellate court for affirming the lower courts’ decisions rises from the fact that the misdemeanor statute requires a warning to be printed on nominating petitions. The Court concluded that because Defendant was only on notice that his conduct constituted a misdemeanor, fundamental fairness mandated that Defendant be charged under the misdemeanor provision of MCL 168.544c, and that it violated his “due process” rights to charge him with a felony under MCL 168.937.

The People now seek leave to appeal this decision.

ARGUMENT

- I. **THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE PROSECUTOR MUST CHARGE THE MORE SPECIFIC MISDEMEANOR OFFENSE SINCE MCL 168.937 AND MCL 168.544c CONCERN THE SAME SUBJECT MATTER. THE TWO STATUTES ACTUALLY ADDRESS DIFFERENT CONDUCT, AND REQUIRE PROOF OF DIFFERENT ELEMENTS.**

Standard of Review

Whether conduct falls within the scope of a penal statute is a question of statutory interpretation. An appellate court reviews questions of statutory interpretation *de novo*. When reviewing a district court's bind-over decision, the appellate court reviews the examining magistrate's determination regarding the sufficiency of the evidence for an abuse of discretion, but the magistrate's rulings concerning questions of law are reviewed *de novo*. *People v Flick*, 487 Mich 1 (2010).

Analysis

The issue presented on appeal is simply the proper application of the well-settled principle that statutes that relate to the same subject or that share a common purpose are *in pari* material and must be read together as one. *People v Buehler*, 477 Mich 18, 26 (2007). When there is a conflict between statutes that are read *in pari* material, the more recent and more specific statute controls over the older and more general statute. *People v Bragg*, 296 Mich App 433, 451 (2012). However, even when read together as one, MCL 168.937 and MCL 168.544c do not present a sufficient conflict to justify reliance on this principle.

The Michigan Election Law is codified at MCL 168.1 *et seq.* Among the purposes stated in its preamble are to provide for the purity of elections and to guard against the abuse of the elective franchise. In keeping with these goals, the act in various provisions requires different types of written documents to be prepared and submitted to appropriate officials. Examples of this are the requirement under MCL 168.467b for a non-incumbent candidate for district court judge to submit nominating petitions, under MCL 168.414 for a circuit judge to submit notice of withdrawal from an election after filing an affidavit of incumbency, and under MCL 168.421 for a circuit judge to give written notice when resigning from office

Chapter XXXV of the Act, being MCL 168.931 through 168.947, is a separate chapter concerning Offenses and Penalties. That chapter contains provisions which provide that certain conduct is criminal and subject to penalty. It is important to note that the chapter is named “Offenses and Penalties,” and not simply “Penalties.”

Among the conduct proscribed by the chapter is Election Law Forgery.

168.937 Forgery; penalty.

Sec. 937.

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.

However, there is no provision anywhere in the Michigan Election Law which provides a definition for forgery within the scope of MCL 168.937. Therefore, one must look to case law for the appropriate definition. Whenever a common law offense is undefined in a statute, the common law elements of the offense apply. *People v Gillis*, 474 Mich 105, 118 (2006); *People v Couch*, 436 Mich 414 (1990).

Forgery is defined at common law as the making of a false document with the intent to defraud. *People v Van Alstine*, 57 Mich 69, 73 (1885). Forgery includes any act which fraudulently makes an instrument purport to be what it is not. *People v Susalla*, 392 Mich 387, 390 (1974).

Recognizing the definition of the term forgery, and noting the purposes of the legislation in which the questioned phrase appears, it is a simple matter of applying the well-established rules of statutory construction to the entire statute to determine the appropriate interpretation for the phrase in question. The controlling rules of statutory construction are set out in *People v Flick, supra*. Therein this Court stated:

The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *People v Lowe*, 484 Mich 718, 721; 773 NW2d 1 (2009). "The touchstone of legislative intent is the statute's language." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. *Lowe*, 484 Mich at 721-722. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007); MCL 8.3a. When we interpret the Michigan Penal Code, we do so "according to the fair import of [the] terms, to promote justice and to effect the objects of the law." MCL 750.2.

Here the plain language of the statute best accomplishes the intended goal of the legislation. The statute requires or permits the preparation and/or filing of specific documents. The forgery of any such document is contrary to the purpose of the statute. The plain language used by the Legislature addresses the forgery of any document prepared or filed under provision of the act. It makes criminal any forgery under provision of the act. MCL 168.937 creates the substantive offense of “election law forgery,” which is separate and distinct from other crimes created in the statute. The offense requires proof of a specific intent to defraud.

Pursuant to MCL 168.544c, a person may commit a misdemeanor offense by simply signing someone else’s name to a nominating petition. However, that crime does not require proof of the intent to defraud. Because the two separate offenses require proof of different elements, they do not present the type of conflict which would indicate that the Legislature intended to carve out an exception to the forgery statute which provides for a lesser penalty even where there is a specific intent to defraud.

The fact that Defendant’s conduct may also violate the misdemeanor statute is not controlling. The prosecutor, acting as the executive, may charge a felony even where a misdemeanor statute is also applicable. *People v Ford*, 417 Mich 66, 93 (1982). Here the Attorney General has elected to charge and prosecute Defendant with the more serious offense. The facts establish that it was not an abuse of discretion to do so. It is completely appropriate for a prosecutor to consider whether the facts demonstrate a clear intent to defraud when bringing charges related to

false signatures on a nominating petition. It is not an abuse of discretion to view the conduct involved in signing hundreds of false signatures to multiple petitions with the intent to defraud the Bureau of Elections as differing from the signing of someone else's name to one petition with the belief that the person whose name was used would consent.

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE “RULE OF LENITY” OPERATES IN FAVOR OF THE ACCUSED IN THIS CASE.

Standard of Review

Whether conduct falls within the scope of a penal statute is a question of statutory interpretation. An appellate court reviews questions of statutory interpretation *de novo*. When reviewing a district court’s bind-over decision, the appellate court reviews the examining magistrate’s determination regarding the sufficiency of the evidence for an abuse of discretion, but the magistrate’s rulings concerning questions of law are reviewed *de novo*. *People v Flick*, 487 Mich 1 (2010).

Analysis

The rule of lenity “provides that courts should mitigate punishment when the punishment in a criminal statute is unclear.” *People v Denio*, 454 Mich 691, 699 (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, quoting *People v Wakeford*, 418 Mich 95, 113-114 (1983). Here application of the rule fails under both of the alternative two necessary predicates. The statute is not ambiguous, and the Legislature has expressed an intent to provide for the purity of elections and to guard against abuse of the elective franchise.

The crimes of “election law forgery” under MCL 168.937 and “signing someone else’s name to a nomination petition” under MCL 168.544c are separate and distinct crimes, with separate and distinct penalties. These two crimes have different elements. The misdemeanor under MCL 168.544c requires only that a

person places a false signature on a petition, while the felony proscribed by MCL 168.937 requires that the false document be made for the purpose of perpetrating a fraud. There is nothing ambiguous about the two statutory provisions. Whenever a false name is signed to a nominating petition, no matter what the reason of purpose, the misdemeanor occurs. But when such an act is done with a fraudulent intent, the crime is aggravated to a felony.

The law recognizes a distinction based upon the intent of the actor. If one signed sign a nominating petition for a judicial candidate he supported, and then also signed his wife's name because they had previously discussed that candidate; and he knew that she would want him to express her support, he would be committing the misdemeanor offense recognized in MCL 168.544c. But since he would have had no fraudulent intent in signing the petition, there would be no forgery.

Likewise, if a person who circulated a nominating petition among registered voters in the district, but erroneously believed she could not sign as a circulator because she was registered in a different district, and thus had another person who lived in the district sign as the circulator, the person who signed as the circulator would commit the misdemeanor. But since all the persons who had signed the petition before the false signature as circulator were qualified voters in the district eligible to nominate the candidate, there was no intent to defraud.

Here, there was a very big difference in the conduct and intent of the defendant from that proscribed by the misdemeanor provisions. Defendant

intentionally signed other people's names, fully recognizing that it was improper to do so. He acted with a specific intent to defraud. He recognized that a certain number of nominating signatures were necessary in order to get the candidate he supported on the ballot, and he signed others' names with the specific intent to accomplish that purpose.

There is no ambiguity in the separate purposes of the two statutory provisions. The clear distinction between the two is the necessary intent of the actor. The felony offense requires the intent to defraud, but the misdemeanor does not.

Furthermore, the rule of lenity should not apply when construing the Michigan Election Law, MCL 168.1 *et seq.*, because of the legislative intent ascertained from the entire act, its nature and its object. As the preamble to the Act expressly indicates, its purpose is to provide for the purity of elections and to guard against the abuse of the elective franchise. This purpose is reflected throughout the statute.

In *Stamos v Genesee County Board Of Canvassers*, 46 Mich App 636 (1973) the Court of Appeals addressed the situation where a city clerk failed to comply with the provision of the Act requiring the deposit of absentee ballots with the proper election board before the closing of the polls on election day. The question was whether this failure to comply should deny effect to ballots lawfully cast by certain voters. The issue involved whether the language of the statute was mandatory or directory.

In deciding this issue, the *Stamos* Court cited and adopted the language used by the Illinois Supreme Court in *Siedschlag v May*, 363 Ill 538 (1936):

Whether a statute is mandatory or directory does not depend on its form, but upon the legislative intention, to be ascertained from a consideration of the entire act, its nature, its object, and the consequences which would result from construing it one way or the other. Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end.

While not directly on point, this language recognizes that a statute controlling elections should be interpreted so as best to accomplish the main purpose of obtaining a fair election and an honest return.

Recognizing this purpose, here there is no absence of legislative intent such as to justify the “rule of lenity.” The different conduct proscribed by the respective statutes reflects different levels of danger to the elective process. The person who signs one name that is not his or her own to a nominating petition presents a far less threat to the integrity of an election than the person who signs hundreds of other names with the specific intent to defraud the Elections Bureau.

III. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE PROSECUTION OF DEFENDANT FOR A FELONY UNDER MCL 168.937 WOULD VIOLATE HIS RIGHT TO “FUNDAMENTAL FAIRNESS.”

Standard of Review

Whether conduct falls within the scope of a penal statute is a question of statutory interpretation. An appellate court reviews questions of statutory interpretation *de novo*. When reviewing a district court’s bind-over decision, the appellate court reviews the examining magistrate’s determination regarding the sufficiency of the evidence for an abuse of discretion, but the magistrate’s rulings concerning questions of law are reviewed *de novo*. *People v Flick*, 487 Mich 1 (2010).

Analysis

While Defendant asserted a “due process” argument when opposing the bind-over, the district court judge did not address this issue in his Opinion and Order. Defendant noted this during oral argument on the circuit court appeal, and asserted that this was one more reason why the People should not prevail in their attempt to prosecute for a felony under MCL 168.937. (TR 1/27/14, p 11). The circuit judge accepted this argument, and held that felony charges violated Defendant’s right to “due process.” The Court of Appeals affirmed, finding that fundamental elements of fairness mandated that Defendant be charged with only a misdemeanor.

The essence of this holding is that since MCL 168.544c(1) requires a nominating petition to be printed with specific warnings, Defendant was entitled to

rely on those warnings when deciding whether or not to commit the crime. The applicable language of this statutory provision is:

Warning – 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.

Warning – A circulator knowingly making a false statement in the above certification, 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.

Accepting Defendant’s “due process” argument, the circuit judge ruled that the state must be held to its public pronouncement that the conduct was only a misdemeanor. (TR 1/27/14, p 21).

First of all, it must be recognized that the court was factually incorrect in saying that the state mandated that the public be informed through its nominating petitions that the conduct at issue is a misdemeanor. The “conduct at issue” involves both the signing of other people’s names as well as making a false declaration as the circulator.

The warnings mandated by the Legislature are different as to the type of misconduct involved. Persons are warned that signing someone else’s name is violating provisions of the Election Law. This warning does *not* state or infer that such conduct is only a misdemeanor. It simply warns that it is illegal to sign someone else’s name to the petition, and it applies only to those who sign as a nominator.

There is, however, a separate warning for those purporting to be the circulator. That warning cautions that a person who signs as the circulator, but was not in fact the circulator, and someone who signs someone else's name, is guilty of a misdemeanor. That warning is limited to purported circulators, and has no application to those persons signing as nominators.

Here the charged forgery was based on both the false nominator signatures and the false circulator signatures. But any false statement of any kind or nature would be sufficient to establish the felony, so long as the false signing was done with intent to defraud. Even if there were some merit in the finding that the Legislature intended by the warning to advise citizens that false circulator statements were only misdemeanors, the fact that it did not require such language in the warning regarding signing someone else's name would not limit this second type of false statement to a misdemeanor. The warning regarding signing someone else's name gives fair notice only that the act of signing someone else's name is a violation of Election Law. And MCL 168.937 is a provision within that Election Law.

But even if the lower courts had been correct and both the warnings had included language to the effect that all false signings were misdemeanors, "due process" would still not preclude prosecution for the identified felony. In general, the test to determine whether a law or its enforcement violates substantive due process is whether the law is rationally related to a legitimate government purpose. *Cummins v Robinson Twp*, 283 Mich App 677 (2009). Procedural due process, on the

other hand, serves as a limitation on government action and requires a government to institute safe guards in proceedings that might result in a deprivation of life, liberty or property. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184 (2008). While the Court of Appeals was not specific as to the type of “due process” violation they believed to be present, the content of their ruling implies they see a violation of procedural due process. The Court seems to believe that the warning that falsely signing as a circulator is a misdemeanor deprives a defendant of fair notice that he might be subject to a felony forgery charge if the false signing was done with a fraudulent intent.

Such a position is best refuted by analogy. All Michigan drivers are very familiar with the signs placed at highway work zones, warning that if one were to kill or injure a workman a driver could be subject to up to 15 years in prison. There is a specific Michigan statute which provides that a person who commits a moving violation in a work zone for which not fewer than 3 points are assigned, and as a result causes death to another person in the work zone, is guilty of a felony punishable by a fine of not more than \$7,500.00 or by imprisonment for not more than 15 years, or both. MCL 257.601b(3).

But no one could seriously argue that the warning signs placed by the Michigan Department of Transportation (MDOT) would protect a driver who intentionally kills a highway worker, with premeditation and deliberation, from a first-degree murder charge simply because the killing occurred in a work zone. The warning signs do not limit the ability to prosecute such a driver for first degree

murder, and would not preclude a court from imposing a life sentence. The intent of the warning is to protect highway workers by reminding drivers that a moving violation causing death in a work zone is by itself a 15-year felony. “Due process” does not require that motorists also be informed that aggravating circumstances, such as the actual premeditated intent to kill, will result in exposure to a greater charge and heavier penalty than the 15 years stated in the warning.

Taking the Court of Appeals’ holding to its logical conclusion, a defendant who intentionally, and with premeditation and deliberation, murdered a highway worker within a death zone could rely upon such “fundamental fairness” and argue that the warning signs indicating a 15 year penalty for killing the worker precludes a heavier sentence. “Due process” does not require such an absurd result.

CONCLUSION AND RELIEF REQUESTED

For the reasons herein stated and discussed, this Honorable Court should grant this application and permit the matter to proceed as a calendar case, or, in the alternative, summarily reverse the Court of Appeals and remand the case to the district court with instructions to bind Defendant over on the 10 charged counts of Election Law Forgery under MCL 168.937.

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