STATE OF MICHIGAN
IN THE SUPREME COURT

TOWNSHIP OF WEST BLOOMFIELD, Plaintiff/Appellee, vs. MATTHEW CONNOLLY, WILLIAM GOODMAN, ROBERT KOVALY, MONICA MILLER, and PATRICE WOODWORTH-CRANDALL, Defendants/Appellants.	SC No. COA No. 345428 Circuit No. 2018-164583-AR District Court Nos. 17WB02957, 17WB02958, 7WB02959, 17WB02960 & 17WB02961

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DEFENDANTS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL AND BRIEF IN SUPPORT

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GROUNDS FOR APPEAL

Appellants/Defendants Matthew Connolly, William Goodman, Robert Kovaly, Monica Miller, and Patrice Woodworth-Crandall ("Defendants") seek leave to appeal from the Michigan Court of Appeals' refusal to review the Oakland County Circuit Court's Appeal Opinion and Order of August 23, 2018, affirming the rulings of the 48th Judicial District Court and Defendants' convictions and sentences for trespassing at a local abortion center and passively resisting their arrests. (Mich Ct App Order at Ex 1; Circuit Ct Appeal Op & Order at Ex 2). Review and reversal by this Court is necessary to preserve and protect Defendants' fundamental rights.

This case involves the defense of a criminal defendant's fundamental rights under the United States and Michigan Constitutions. Review by this Court is necessary to protect and preserve these rights.

Prior to the commencement of their jury trial for criminal trespass and interference with police authority for passively resisting their arrests, Defendants filed a motion requesting jury instructions on two related and relevant defenses: necessity and defense of others. As set forth more fully below, the necessity defense has long been recognized under the common law, and it is particularly applicable in the context of this case in light of Michigan law and Michigan's strong public policy favoring the protection of human life. Related to the defense of necessity is the defense of others, which also has application in the context of this case under Michigan law. The lower court refused to provide the requested instructions, thereby depriving Defendants of their due process right to present a defense.

In addition, despite the controversial nature of abortion and its direct relation to this case (a trespass at an abortion center), the trial court would not permit Defendants to inquire during *voir*

dire into juror bias on the abortion issue, thereby depriving Defendants of the right to an unbiased jury.

Finally, during sentencing, the trial court imposed several draconian probation conditions that deprive Defendants of their rights protected by the First and Sixth Amendments to the U.S. Constitution, including, *inter alia*, provisions that Defendants not "picket any facility that performs abortions," and that Defendants not "appear within 500 feet of medical facilit[ies] where abortions are performed."

Review and reversal by this Court is necessary to preserve fundamental constitutional rights. Indeed, the grounds for granting review are two-fold. First, review is proper because the issues presented have significant public interest and the case is one against a local government which sought and received convictions of Defendants in violation of their fundamental right to due process. MCR 7.305(B)(2). And second, review is proper because the issues presented involve legal principles of a major significance to the state's jurisprudence. MCR 7.305(B)(3).

RULINGS, ORDER, AND JUDGMENT APPEALED

Defendants appealed to the Oakland County Circuit Court from the rulings, order, and judgment of the 48th District Court (1) denying Defendants' request for jury instructions on certain defenses; (2) denying Defendants' request for certain *voir dire* questions to expose jury bias; and (3) imposing terms of probation that violate Defendants' fundamental rights secured by the U.S. Constitution.

On February 6, 2018, the District Court issued a written opinion and order, denying Defendants' request for jury instructions on the defense of necessity and the defense of others. (District Ct Opinion & Order at Ex 3). The jury trial commenced on February 20, 2018. During

jury selection, the District Court deprived Defendants of the right to question potential jurors regarding their bias on the controversial issue of abortion.

On February 21, 2018, the jury deliberated and returned guilty verdicts for all Defendants for violating two provisions of the Township of West Bloomfield ("Township") Ordinance Code: Trespass and Interfering with Police Authority. Defendants were sentenced on March 14, 2018. On March 23, 2018, Defendants timely filed their Claim of Appeal.

On August 23, 2018, the Oakland County Circuit Court affirmed the rulings of the District Court and Defendants' convictions and sentences in a two-page, conclusory order which lacked any analysis of the relevant facts and law. (Circuit Ct Appeal Op & Order at Ex 2).

Defendants timely filed an application for leave to appeal to the Michigan Court of Appeals. On March 20, 2019, the Michigan Court of Appeals denied Defendants' request. (Mich Ct of Appeals Order at Ex 1).

This timely application for leave to appeal follows. *See* MCR 7.305(C)(2)(a).

ALLEGATIONS OF ERROR AND RELIEF SOUGHT

The District Court's failure to give Defendants' requested jury instructions deprived Defendants of their due process right to present a defense. Defendants request a new trial with a properly instructed jury.

The District Court's refusal to permit Defendants to engage in relevant *voir dire* deprived them of their right to an unbiased jury. Defendants request a new trial before an unbiased jury.

The District Court's imposition of draconian probation conditions violated Defendants' fundamental rights protected by the U.S. Constitution. Defendants request that the Court declare such conditions unconstitutional.

JURISDICTIONAL STATEMENT

The District Court entered final judgment on March 14, 2018. Defendants filed their claim of appeal on March 23, 2018, which was within 21 days of the entry of judgment. The Circuit Court had jurisdiction pursuant to MCR 7.103(A) and MCR 7.104(A). The Circuit Court entered its Appeal Opinion and Order on August 23, 2018. Defendants sought review in the Court of Appeals by way of application for leave to appeal, filed within 21 days of the entry of the Circuit Court's order. *See* MCR 7.105(A)(2). On March 20, 2019, the Court of Appeals denied Defendants' application for leave to appeal. This timely application for leave to appeal is filed within 56 days after the Court of Appeals denied Defendants' application. MCR 7.305(C)(2)(a).

QUESTIONS PRESENTED

I. Whether the District Court's failure to provide Defendants' requested jury instruction on the defense of necessity deprived Defendants of their due process right to present a defense, thereby warranting a new trial.

District Court's Answer: NO

Defendants' Answer: YES

II. Whether the District Court's failure to provide Defendants' requested jury instruction on the defense of others deprived Defendants of their due process right to present a defense, thereby warranting a new trial.

District Court's Answer: NO

Defendants' Answer: YES

III. Whether the District Court's denial of Defendants' request to inquire into juror bias on the issue of abortion during *voir dire* deprived Defendants of the right to an unbiased jury, thereby warranting a new trial.

District Court's Answer: NO

Defendants' Answer: YES

IV. Whether the District Court's evidentiary rulings, which prevented Defendants from presenting relevant *res gestae* testimony, deprived Defendants of the right to a fair trial, thereby warranting a new trial.

District Court's Answer: NO

Defendants' Answer: YES

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On December 2, 2017, Defendants peacefully entered the Western Women's Center ("Women's Center" or "Center"),[1] an abortion center located in the Township. (Trial Tr Vol I at 260:8-10; 278:21-25 to 279:1; 279:24-25 to 280:1; 289:10-25 to 294:1-7 at Ex 4). While inside the Women's Center, Defendants handed out red roses to the women in the waiting room. (Trial Tr Vol I at 273:15-18 to 274:1-16 at Ex 4). Attached to each rose was a card containing a message presenting options for women to choose life for their babies. (*See id.*). A Center employee called the police. (Trial Tr Vol I at 175:15 at Ex 4). When the police arrived, Defendants were arrested, and they passively resisted, a technique frequently employed by civil rights activists as a peaceful way of expressing their dissonance with the current state of the law. (*See* Trial Tr Vol I at 204:20-23; 208:19-22; 285:16-19 at Ex 4). Defendants did not engage in any acts of violence. (Trial Tr Vol I at 216:21-24 at Ex 4).

[1] Relevant portions of the trial (volumes I and II) and sentencing transcripts are attached to this filing.

The Township prosecuted Defendants for two ordinance violations: Trespass (30-day misdemeanor) and Interfering with Police Authority (90-day misdemeanor). (*See* Trial Tr Vol I at 42:4-12 at Ex 4).

Prior to the trial, Defendants filed a motion requesting two jury instructions: an instruction on the defense of necessity and an instruction on the defense of others. More specifically, Defendants requested that the trial court provide the following instruction on the defense of necessity, which is modeled after a similar instruction recommended by the U.S. Court of Appeals for the Ninth Circuit:

> In some situations, necessity may excuse a person's committing what would otherwise be a criminal offense. A person is allowed to commit what would otherwise be a criminal offense if the person acts out of necessity. The rule of necessity exists because it would be unjust and contrary to public policy to impose criminal liability on a person if the harm that results from his breaking the law is significantly less than the harm that would result from his complying with the law in that particular situation.
>
> The defendant contends that [he] [she] acted out of necessity. As I stated, necessity legally excuses the crime charged.
>
> The defendant must prove necessity by a preponderance of the evidence. A preponderance of the evidence means that you must be persuaded that the things the defendant seeks to prove are more probably true than not true. This is a lesser burden of proof than the government's burden to prove beyond a reasonable doubt each element of [*specify crime charged*].
>
> A defendant acts out of necessity only if at the time of the crime charged:
>
> 1. The defendant was faced with a choice of evils and chose the lesser evil;
> 2. The defendant *honestly and reasonably believed* [he] [she] acted to prevent imminent harm;
> 3. The defendant *reasonably* anticipated [his] [her] conduct would prevent such harm; and
> 4. There were no other legal alternatives to violating the law.
>
> If you find that each of these things has been proved by a preponderance of the evidence, you must find the defendant not guilty.[2]

[2] A copy of the Ninth Circuit instruction was attached to Defendants' motion filed in the District Court, and a copy is attached here as Exhibit 5.

Defendants requested the following defense of others instruction, which is modeled after the Michigan instruction (CJI2d 7.21):

> 7.21 Defense of Others
>
> (1) The defendants claim that they acted lawfully to prevent serious harm to others. A person has the right to use force or even take a life to defend someone else under certain circumstances. If a person acts in lawful defense of another, his or her actions are justified and he or she is not guilty of the criminal offense.
>
> (2) You should consider all the evidence and use the following rules to decide whether the defendants acted in lawful defense of another. Remember to judge the defendants' conduct according to how the circumstances appeared to them at the time of their acts.
>
> (3) First, at the time they acted, the defendants must not have been engaged in the commission of a crime.
>
> (4) Second, when they acted, the defendants must have *honestly and reasonably believed* that another was in danger of being killed or seriously injured. If their belief was honest and reasonable, they could act at once to prevent the harm, *even if it turns out later that they were wrong about how much danger anyone was in*.
>
> (5) Third, if the defendants only feared a minor injury, then they were not justified. The defendants must have been afraid that someone would be killed or seriously injured. When you decide whether they were so afraid, you should consider all the circumstances: the conditions of the people involved, including their relative strength, whether anyone was armed with a dangerous weapon or had some other means of injuring another, the nature of the other person's attack or threat, and whether the defendants knew about any previous violent acts or threats made by the attacker.
>
> (6) Fourth, at the time the defendants acted, they must have *honestly and reasonably believed* that what they did was immediately necessary. Under the law, a person may only use as much force as he or she thinks is needed at the time to protect the other person. When you decide whether the force used appeared to be necessary, you may consider whether the defendants knew about any other ways of preventing the harm, and you may also consider how the excitement of the moment affected the choice the defendants made.
>
> (7) *The defendants do not have to prove that they acted in defense of others. Instead, the prosecutor must prove beyond a reasonable doubt that the defendants did not act in defense of others*.[3]

[3] A copy of the proposed instruction was attached to Defendants' motion filed in the District Court, and a copy is attached here as Exhibit 6.

On February 6, 2018, the trial court issued its ruling, denying the request. (*See* District Ct Op & Order at Ex 3).

On February 20, 2018, and prior to jury selection, Defendants' counsel made the following proffer on the record in support of the requested defenses:

> MR. MUISE: Okay. And what they – and with regard to a proffer, the – the evidence that we could present by way of testimony, Your Honor, is that on the day in question, there was a – an elderly – old – not elderly – older gentleman – some – in the – closer to the forties, late thirties, who was there with a – with a girl that was a teenager, who was there for an abortion; the – we found out –
> THE COURT: Who's – who's going to say that they were a teenager?
> MR. MUISE: Dr. Miller, who's the one that was – that confronted the two of them –
> THE COURT: And how would – how would we know that that person was a teenager?
> MR. MUISE: That's a lay opinion based on observations.
> THE COURT: Okay. Well, one – one – depending on what the person said, if that person isn't here to testify. So, for example, if the doctor had a conversation, the conversation would be hearsay.
> MR. MUISE: Not if it goes to – it's – it's –it's not – but it's not offered for the – the truth of the matter –
> THE COURT: Yeah, it's –
> MR. MUISE: – it's offered for her –
> THE COURT: – sure it is. You're trying to –
> MR. MUISE: – observation –
> THE COURT: You're – you're trying to offer it for the illegality of what the clinic – if what you're telling me is you're trying to offer it for the illegality of what the clinic did, then it is going to the truth of the matter. If she's going to – if she – hypothetically, if this person said I'm 12 years old, and this is what I'm going to do today, that would all be hearsay.
> MR. MUISE: It – it would go to the reasonableness of the belief of the necessity defense.
> THE COURT: It would all –
> MR. MUISE: It's an objective standard.
> THE COURT: – it would all be – it would all be hearsay to show that the clinic was allegedly doing something illegal.
> MR. MUISE: Well, we would make the proffer, Your Honor, then by way of preserving this for the record, that we would present evidence of coercion, coercion from a gentleman who was late thirties, perhaps early forties, with a teenager who was there to have an abortion. Coerced abortions are not protected under the constitution, they are illegal as a matter of Michigan statute, and that would be some evidence of illegal activity that would justify in – the Defendants getting an inference for the necessity defense, and we would make that proffer.

> THE COURT: Well, unless either of those people are here, that would be hearsay, and that's hearsay that's attempted to be used to prove the truth of the matter asserted that goes to why your client took the action that she took, and the Court does not find, as it's not admissible, that that would be sufficient evidence for the necessity or the self-defense of others defense.

(Trial Tr Vol I at 25:7-25 to 27:1-16 at Ex 4). The trial court affirmed its denial. (*See id*.).

Prior to jury selection, the trial court prohibited counsel from inquiring into potential juror bias regarding the highly controversial issue of abortion. (*See* Trial Tr. Vo. I at 16:5-7 ["I don't think the views of peoples' belief [of abortion] of whether they're pro, con, really has any relevance."], 19:1-2 [stating, "nor am I going to let you go into the jurors' beliefs or anybody else's"] at Ex 4). Yet, despite this restriction, one juror, in response to the trial court's general inquiry, stated as follows:

> THE COURT: Is there any reason why any of the potential jurors who are seated in front of us today could not render a fair and impartial verdict in this particular case?
> PROSPECTIVE JUROR HOGE: I have to tell you I can just tell by what's going on that this has got to do with abortion, and I can tell you I'm pro-abortion and I am atheist, for whatever that's worth.

(Trial Tr Vol I at 57:24-25 to 58:1-6 at Ex 4). In another instance, a potential juror responded to a question from the prosecutor as follows:

> MR. SHERMAN: Is there anything – any of the questions I asked or any of the questions that the defense counsel asked any of the jurors, would – would any of those questions cause you to hesitate in terms of – of – hesitate for you to sit in the jury?
> PROSPECTIVE JUROR STEWARD: I am pro-abortion.

(Trial Tr Vol I at 100:19-24 at Ex 4). And in yet another instance a potential juror answered as follows:

> PROSPECTIVE JUROR MCKAY: I do have a couple more things.
> THE COURT: Oh, go ahead.
> PROSPECTIVE JUROR MCKAY: I am also pro-abortion and all about women's rights; I feel that a woman should be able to choose what she does with her body,

> and people should not interfere with that. I am very familiar with the Starbucks location. I go there a lot, and I've seen protestors there all the time.

(Trial Tr Vol I at 115:5-13 at Ex 4).

As argued by counsel prior to the presentation of evidence:

> MR. MUISE: And Your Honor, if I just may, to – to make the record here, in his opening he described the actions of my clients as being harassing; in fact, he even went so far as to allege that Dr. Miller committed an assault. And so to refute that, we fully intend to refute that with – with testimony of their peaceful actions. The objection to the reading of the card; the card was part of a rose that was handed out, it's *res gestae*, it's part of this case. And if anything, with the – the jury *voir dire*, and I want to renew an objection here, the jury *voir dire* makes clear that the unspoken issue surrounding all this is the abortion issue. Juror seven brought it up; they know the Women's Center is – what it is and what it's not. And it was very clear from even the *voir dire* that there were biases that we weren't allowed as Defendants to go into, but thankfully some of them brought them up on their own. So now we don't even know, because we weren't allowed those – those questions. So I don't think a curative instruction is actually going to do anything. It's – Dr. Miller had made a comment about this at a prior hearing – it's like pretending the 13th floor on a building doesn't exist. Well, it does. We all know it does.
> THE COURT: Well, but that assumes that the jury has to decide something about a 13th floor, and they don't.
> MR. MUISE: No, but it shows that – that shows that there are biases that people bring into a particular case that can weigh on their – whether or not they are just, and – and oftentimes, you know, when you're confronted, well is that going to affect your decision –
> THE COURT: Yes, the – the –
> MR. MUISE: – you – you know in – in –innately it's going to.
> THE COURT: Jur – the jurors could have a bias on whether a – a hotel or a building had a 13th floor one way or the other, but when that 13th floor and that bias has no relationship to whether the prosecutor can prove their facts beyond a reasonable doubt, that's why the Court has previously ruled, as other courts have ruled, it's not an issue in the case. I realize you and your clients feel differently.

(Tr at 166:11-25 to 168:1-21 at Ex 4).

During the trial, the court would not permit testimony explaining why Defendants entered the abortion center (*see* Trial Tr Vol I at 161; 167:5-25 to 169:1-18; 187:7-14; 191:20-25 to 192:1-3; 194:1-7; 273:19-24; 274:4-25; 275:2-12; 277:20-25; 289:3-8 at Ex 4; *see also id* at 281:4-25 at

Ex 4), thereby sanitizing this case to favor the prosecution. Defendants' counsel explained one of the fundamental problems with the trial court's ruling as follows:

> MR. MUISE: But then you have a jury sitting here scratching their heads why are five people in the women's center. Are they there to purchase Christmas gifts? Maybe they're there to buy groceries. Maybe they're there to – who knows what, and it's – I'll run through the litany then of the Defendants' – all the reasons why they weren't there, if we can't even present some evidence as to why they were there. It just – it makes – it makes zero sense from the defense perspective –

(Trial Tr Vol I at 20:4-13 at Ex 4). As stated further by Defendants' counsel:

> MR. MUISE: – they're going to – they're going to get an incomplete, sanitized, pro-prosecution story, and [we] have to sit mute and can't even explain what it is and why we're there. That –
> THE COURT: Well, that's – that's because it's not a defense to this crime. I – I realize you don't agree with it, but the courts have said it's not a defense. That's what they've said. That's – you know, what I'm –
> MR. MUISE: It's – it's *res gestae*, Your Honor.
> THE COURT: I understand you keep saying –
> MR. MUISE: You're – you're – you're – the Defendants are at an absolute disadvantage now –

(Trial Tr Vol I at 31:11-23 at Ex 4).

Following a jury trial, Defendants were found guilty of both offenses. (Trial Tr Vol II at 50:22-25 to 51:1-19 at Ex 7).

On March 14, 2018, the district court sentenced Defendants to probation (one year for Defendants Connolly, Goodman, Miller, and Woodworth-Crandall and six months for Defendant Kovaly). The sentences of probation include, *inter alia*, provisions that Defendants not "picket any facility that performs abortions," and that Defendants not "appear within 500 feet of medical facility[ies] where abortions are performed."[4]

During sentencing, Defendants' counsel objected, stating, in relevant part:

[4] The 500-foot restriction does not apply to Defendant Kovaly. (*See* Defs' Orders of Probation at Ex 8).

> MR. MUISE: . . . . Obviously, each one of these individuals would engage in peaceful, non-obstructive, sidewalk counseling, praying, holding prolife signs and handing out prolife literature on public sidewalks outside of these medical facilities where abortions are performed in traditional public [fora] – but obviously with these conditions, they are no longer permitted to do so, and we obviously object to those conditions on constitutional grounds.

(*Twp v Woodworth-Crandall*, Sentencing Tr at 21-22 at Ex 9).

> MR. MUISE: The – the no contact provision is hopelessly vague. . . . That part violates the First Amendment right of expressive association, where and medical facilities in which abortions are performed; again, vague, over-broad insofar as it infringes upon their right to peacefully be on the public sidewalks, to – to pray, to sidewalk counsel, to hold – to display sign, to distribute literature, all of that is constitutionally-protected activity. There's no rational basis for a simple trespass to prohibit that sort of activity protected by the – by the U.S. Constitution. And it's also protected by the Michigan Constitution. The next one, not to harass, intimidate, or picket any gynecological or abortion family service clinic. Aside from being vague as to what harassment, intimidate [mean], the picket goes directly to First Amendment protected activity; we'd object to that.

(*Twp v Miller*, Sentencing Tr at 14-15 at Ex 10). The lower court dismissed counsel's arguments and imposed the sentence. (*See id* at 29-44).

The lower court also ordered, as a condition of probation, that Defendants not have any contact with each other, even if the contact directly pertains to Defendants' post-conviction and appellate legal representation. (Defs' Orders of Probation; *Twp v Connolly*, Sentencing Tr at 15-16 [Ex 4 to Defs' Mot]). At sentencing, counsel argued that Defendants should at least be allowed contact for the purpose of preparing their legal defense, and the lower court rejected the argument:

> MR. MUISE: *So they can't even meet together for purposes of their – of a defense?*
> THE COURT: *No – no they – no they can't*, and that – that could be one of the reasons why it may not have been the best idea when we went over this about a potential conflict about you representing all of them, and they waived that conflict. So at this point, no.
> MR. MUISE: We obviously would object to that, Your Honor –
> THE COURT: Okay.
> MR. MUISE: – on constitutional grounds as well.

(*Twp v Connolly*, Sentencing Tr at 15-16 at Ex 11). After the sentences were imposed, Defendants motioned for a stay of the sentences. (*See, e.g.*, *Twp v Miller*, Sentencing Tr at 40-41 at Ex 10; *Twp v Goodman*, Sentencing Tr at 26 at Ex 12). The motion was denied by the lower court. (*Id.* at 26).

On August 23, 2018, the Oakland County Circuit Court affirmed the District Court's rulings, convictions, and sentences. (Circuit Ct Appeal Op & Order at Ex 2).

On March 20, 2019, the Michigan Court of Appeals denied Defendants' application for leave to appeal. This timely application follows. (Mich Ct App Order at Ex 1).

ARGUMENT

I. The District Court Committed Reversible Error when It Denied Defendants' Theory of the Case and Requests for Specific Jury Instructions.

A. Standard of Review.

Claims of instructional error are reviewed by this Court *de novo*. *People v Kurr*, 253 Mich App 317, 327, 654 NW2d 651, 656 (2002). This Court also reviews *de novo* the constitutional question of whether a defendant was denied her constitutional right to present a defense as a result of a trial court's refusal to provide a requested instruction. *Id.*

B. A District Court Must Instruct on a Proposed Defense Supported by Evidence.

A criminal defendant has a state and federal constitutional right to present a defense. Const 1963, art 1, § 13; US Const, Ams VI, XIV; *People v Hayes*, 421 Mich 271, 278, 364 NW2d 635 (1984). Instructional errors that directly affect a criminal defendant's theory of defense infringe his due process right to present a defense, warranting a new trial. *See Kurr*, 253 Mich App at 317, 654 NW2d at 651 (holding that the denial of a defense of others instruction deprived the defendant of her due process right to present a defense, thereby warranting a new trial).

Accordingly, a trial court must "properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 583, 556 NW2d 820 (1996). "The instructions must include all elements of the charged offense[s] and ***must not exclude*** material issues, ***defenses***, and ***theories***, if there is evidence to support them." *People v McIntire*, 232 Mich App 71, 115, 591 NW2d 231 (1998), *rev'd on other grounds* 461 Mich 147, 599 NW2d 102 (1999) (emphasis added).

As stated by this Court:

> The court's obligation to instruct on a proposed defense was described in *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995):
>
> > A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Vaughn*, 447 Mich 217; 524 NW2d 217 (1994); *People v Lewis*, 91 Mich App 542; 283 NW2d 790 (1979). However, a trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request. *People v Wilson*, 122 Mich App 1, 3; 329 NW2d 513 (1982). Further, *when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge*. *People v Rone (On Remand)*, 101 Mich App 811; 300 NW2d 705 (1980). A *trial court is required to give a requested instruction*, except where the theory is not supported by evidence. *People v Stubbs*, 99 Mich. App. 643; 298 N.W.2d 612 (1980); *People v Stapf*, 155 Mich. App. 491; 400 N.W.2d 656 (1986).

People v Rodriguez, 463 Mich 466, 472-73, 620 NW2d 13, 16 (2000) (emphasis added).

Here, Defendants requested jury instructions that they would have supported with evidence: a minor under coercion to get an abortion. Indeed, the proffered evidence at a minimum raised the appropriate inference to permit the requested defense instructions and thus permit the jury to find in favor of Defendants. As set forth below, the trial court's refusal to give the instructions was error as a matter of law, and this error violated Defendants' right to due process, warranting a new trial.

C. The Defense of Necessity Is Recognized under Michigan Law, and It Was Appropriate in this Case.

In Michigan,[5] the defense of necessity is, in an appropriate factual situation, a valid defense to a criminal trespass. As stated by the Michigan Court of Appeals:

> [I]n an *appropriate factual situation*, a defense of necessity may be interposed to a criminal trespass action. However, there must be *some* evidence from which each element of such defense may be *inferred* before the defense may be considered by a trier of fact.

People v Hubbard, 115 Mich App 73, 77, 320 NW2d 294, 296 (1982) (emphasis added). Thus, in the appropriate factual situation, necessity is a valid defense to a criminal trespass so long as the defense presents *some* evidence from which each element of the defense may be *inferred* by the jury. Defendants met that standard in this case.

In *Hubbard*, the court did not permit the defense in a trespass case where protestors targeted the Big Rock nuclear power plant. The court denied the defense for two principal reasons. First, the court stated the following:

> The necessity defense is unavailable in an area where there has been exhaustive legislative debate and legislation. The law, by allowing the application of a necessity defense, cannot permit an individual to substitute his own convictions for those of a reasoned and democratic decision-making process. To do so would subvert the very process by which a democracy functions.

Id. at 79, 320 NW2d at 297. Accordingly, the court concluded:

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[5] It is true that a majority of courts have rejected a defense of necessity in the abortion context *in general*. *See, e.g.*, *Allison v Birmingham*, 580 So 2d 1377, 1381-82 (Ala Crim App 1991) (collecting cases); *but see People v Archer*, 143 Misc 2d 390, 401, 537 NYS2d 726, 732-33 (City Ct 1988) (denying motion to preclude necessity defense in the abortion context and stating that "[t]he jury may weigh the loss of the life of the developing fetus against the property rights the trespass statute protects, and the social order values the arrest statute supports"). However, none of the cases rejecting the defense arise in states with such a strong public policy of protecting the unborn as in Michigan. *See infra*. And, more important, none of these cases present the factual situation that is present here—evidence of a coerced abortion. Consequently, they are not controlling nor persuasive.

> Defendants have not alleged that the Big Rock Plant at the time of defendants' trespass harbored any *unique condition* that would pose a greater or more imminent threat to life or property *than that commonly incident* to nuclear power facilities in general. The facts as considered for this appeal include *no evidence of a special defect or unique danger* at the Big Rock site sufficient to support a "reasonable" or "well-founded" apprehension of particular harm distinguishable from a general apprehension which might be precipitated by contemplation of any nuclear facility. In view of the decisions by our state Legislature and Congress to facilitate the controlled development of nuclear power, we conclude that such *general apprehension* of harm from a nuclear power facility will not support a defense of necessity to a charge of criminal trespass.

Id. at 79-80, 320 NW2d at 297-98 (emphasis added).

In this case, the Michigan legislature has concluded as a matter of policy that the protection of human life, despite the court-created right to abortion in *Roe v Wade*, 410 US 113 (1973), remains a priority. The Michigan legislature has made clear that not all abortions are "legal" and thus protected under *Roe*. For example, Michigan law prohibits, with a narrow exception for medical emergencies, any physician from performing an abortion without "*informed* written consent, given freely and without coercion." *See* MCL § 333.17015 ("[A] physician shall not perform an abortion otherwise permitted by law without the patient's informed written consent, given freely and without coercion to abort.") (emphasis added). Michigan law also proscribes coerced abortions, providing, *inter alia*, "information that a pregnant female does not want to obtain an abortion includes <u>*any fact*</u> that would clearly demonstrate to a reasonable person that she is unwilling to comply with a request or demand to have an abortion." *See* MCL § 750.213a(2) (emphasis added).

Michigan courts similarly recognize that not all abortions are beyond *criminal* prosecution. Indeed, Michigan is unique in that, as a matter of constitutional interpretation, its law criminalizing abortion is still valid following *Roe v Wade*. *See People v Bricker*, 389 Mich 524 (1973). Consequently, not all abortions performed by medical doctors are lawful in this state.

In *People v Higuera*, 244 Mich App 429, 431, 625 NW2d 444, 446 (2001), for example, the defendant, a medical doctor, sought dismissal of charges brought under Michigan's criminal abortion statute, MCL § 750.14, for allegedly inducing the abortion of a fetus of approximately 28 weeks. The defendant's argument that the statute was repealed by implication was rejected, and his constitutional arguments similarly could not insulate him from prosecution because the statute, as construed, clearly reached the conduct involved in the prosecution. As a result, the dismissal of the charge was reversed. *See Higuera*, 244 Mich App at 449-50.

In sum, nuclear power and abortion are not comparable. Unlike a situation where an individual seeks to substitute his own convictions for those of a reasoned and democratic decision-making process by trying to halt nuclear power *contrary* to that legislative process, an individual (Defendants in this case) who seeks to halt what he *honestly and reasonably believes* is a coerced abortion in Michigan is acting *consistent* with the reasoned and democratic decision-making process.

Thus, unlike the situation in *Hubbard*, Defendants have "alleged that the [Western Women's Center] at the time of defendants' trespass harbored [a] unique condition that would pose a greater or more imminent threat to life or property than that commonly incident to [abortion] facilities in general. The facts as considered for this appeal include . . . evidence of a special defect or unique danger at the [Center] site sufficient to support a 'reasonable' or 'well-founded' apprehension of particular harm distinguishable from a general apprehension which might be precipitated by contemplation of any [abortion] facility." *Hubbard*, 115 Mich App at 79-80, 320 NW2d at 297-98.

The second reason *Hubbard* denied the defense was described as follows:

> [D]efendants have acknowledged that the purpose of their trespass was to inform the company and others of their perceived danger attendant to nuclear power. In

> order to raise the defense of necessity, defendants' criminal act must *support an inference* that the criminal act would *alleviate the impending harm*. We conclude that defendants' *act of criminal trespass alone could not reasonably be presumed to have any effect in halting* the production of nuclear power at Big Rock.

Id. at 80, 320 NW2d at 298 (emphasis added).

Here, unlike the futile attempt to halt the production of nuclear power at a plant by simply trespassing on the property to protest, Defendants' actions could "reasonably be presumed" to have the effect of halting the harm caused to the women and their unborn children who were present in the abortion center on the day in question. Unlike halting a nuclear power plant, Defendants' presence inside the waiting room of an abortion center places them in a position to provide direct assistance to those who are in imminent harm. So long as Defendants were present, the coerced abortion could be halted. Indeed, the evidence does more than "support an inference" that Defendants' actions would alleviate the impending harm, it directly proves it,[6] thereby distinguishing further this case from *Hubbard*.

In sum, Defendants met all of the requirements for a jury instruction on the defense of necessity. The trial court's failure to give the requested instruction deprived Defendants of their right to due process, thereby warranting a new trial before a properly instructed jury.

D. The Defense of Others Is Recognized under Michigan Law, and It Was Appropriate in this Case.

In addition to an instruction on the defense of necessity, Defendants requested that the court instruct the jury on the defense of others. This request was similarly denied, depriving Defendants of their due process right to present a defense.

[6] The prosecution's witness from the Center testified that while Defendants were present, there were no "services being provided" (*i.e.*, no abortions were taking place). (Trial Tr Vol I at 188:10-12). Consequently, Defendants' actions had the effect of halting the impending harm.

In *People v Kurr*, 253 Mich App 317, 321, 654 NW2d 651, 654 (2002), the defendant, who was pregnant at the time with quadruplets, claimed that she stabbed the victim, her boyfriend, killing him in defense of her unborn children. The trial court disallowed a defense of others instruction, noting that the fetuses were not viable. The defendant argued that she was denied her right to present a defense, and the appellate court agreed, reversing and remanding the case for a new trial. *See id*.

In its opinion, the appellate court reviewed Michigan law and noted that Michigan allows a person to use deadly force in defense of another and that "*fetuses are worthy of protection as living entities as a matter of public policy*." *Id*. at 320-22, 654 NW2d at 653-54. Accordingly, the court held that "in this state, the defense [of others] *should also extend to the protection of a fetus*, viable or nonviable, from an assault against the mother, and we base this conclusion primarily on the fetal protection act adopted by the Legislature in 1998." *Id*. at 321, 654 NW2d at 654 (emphasis added).

The court "conclude[d] that the failure to give a defense of others jury instruction deprived the defendant of her due process right to present a defense. . . . Because the jury instructions essentially excluded consideration of defendant's viable defense of others theory, a new trial is warranted." *Id*. at 327-28; 654 N W2d at 657.

In its decision, the court further stated that "[t]he defense of others theory is available only if a person acts to prevent *unlawful* bodily harm against another," and "[b]ecause clinics that perform abortions are engaging in lawful activity, the defense of others theory does not apply," concluding that "[o]ur holding today does not apply to what the United States Supreme Court has held to constitute ***lawful*** abortions." *Id.* at 326, 654 NW2d at 656 (emphasis added).

As noted above, not all abortions in Michigan are lawful, and Michigan law *expressly* prohibits coerced abortions, and evidence of a coerced abortion includes "*any fact* that would clearly demonstrate to a reasonable person that she is unwilling to comply with a request or demand to have an abortion." *See* MCL § 750.213a(2) (emphasis added). A coerced abortion is thus unlawful, and *it is an assault against the mother* that involves force resulting in the death of a fetus. Consequently, based on the reasoning in *Kurr*, if the "defense of others" justifies the commission of a homicide, a defendant should be permitted to raise this defense in a case involving a simple trespass. Indeed, this defense should be available to a defendant under circumstances similar to those where the necessity defense is available. In other words, this defense should have been available to Defendants in this case, who were confronted with evidence of a coerced abortion.[7]

Accordingly, the trial court's failure to give a defense of others jury instruction deprived Defendants of their due process right to present a defense. Because the jury instructions essentially excluded consideration of Defendants' viable defense of others theory, a new trial is warranted. *See Kurr*, 253 Mich App at 327-28, 654 NW2d at 657.

[7] Both defenses at issue here are based upon the defendant's *honest and reasonable belief* that his or her actions were necessary based on the facts presented. Consequently, evidence directly related to the defendant's state of mind is relevant, and it is not hearsay, as the trial court erroneously concluded. *See* MRE 801 & 803. For example, if someone was told by a bystander that there was a baby in a house that was on fire and the rescuer entered the house (*i.e.*, trespassed) to save the baby, the rescuer's reliance on the bystander's statement would certainly be admissible (and highly relevant) in the rescuer's criminal trial for trespassing.

II. The District Court Committed Reversible Error by Denying Defendants' Request for Certain *Voir Dire* Questions to Expose Jury Bias.

A. Standard of Review.

A district court's decisions regarding *voir dire* is reviewed for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 618-20, 518 NW2d 441, 447-48 (1994) ("The trial court has discretion in both the scope and the conduct of voir dire. . . . Both Michigan and federal law support the conclusion that the superficial and leading questioning that took place here was an abuse of discretion.").

B. The District Court Deprived Defendants of Their Right to an Impartial Jury.

Defendants have an absolute right to a fair and impartial jury. *Duncan v La*, 391 US 145 (1968); *People v Miller*, 411 Mich 321, 326, 307 NW2d 335 (1981). And this right is protected, in large measure, through the jury selection process. Crucial to this process is *voir dire*, the purpose of which is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. *People v Brown*, 46 MichApp. 592, 594, 208 NW2d 590 (1973); *People v Harvey*, 167 MichApp 734, 423 NW2d 335 (1988).

This Court has long recognized the importance of a *voir dire* that allows for the discovery of hidden bias that would render a potential juror incompetent.

> It is the evident intent of the law to secure a jury that shall come to the consideration of the case unaffected by any previous judgment, opinion or bias with respect either to the parties or subject-matter in controversy, and it is important to the rights of parties that they may be permitted inquiries which may be the means of discovering facts which will justify the exclusion of a juror. The success of a challenge depends upon eliciting such information from the juror himself, as well as from other sources, as to his state or condition of mind, as will enable a judgment to be formed by the court as to his competency.

Monaghan v Agricultural Fire Ins Co, 53 Mich 238, 246, 18 NW 797 (1884). Moreover, "[s]tate and federal courts recognize the inherent unreliability of juror self-assessment of impartiality.

Undue reliance on a prospective juror's self-assessment of his capacity to set aside preconceptions, without further exploration, constitutes grounds for reversal." *Tyburski*, 445 Mich at 638, 518 NW2d at 456 (Levin, J). As stated by this Court:

> Courts have long recognized that juror self-assessment of bias is inherently untrustworthy. While sitting as trial judge in *United States v Burr*, 25 Fed Cas 49 (1807), Chief Justice Marshall observed that a juror's assertions of neutrality cannot be trusted:
>
> > Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion . . . .

Tyburski, 445 Mich at 628, 518 NW2d at 451.

By not permitting Defendants' counsel to inquire into potential bias with regard to the highly contentious issue of abortion, but instead, relying on the prospective juror's self-assessment based on generic questions, the trial court committed reversible error. *See id*.

III. The District Court's Terms of Probation Violate Defendants' Fundamental Rights and Are Unlawful.

The District Court's probationary conditions violated Defendants' constitutional rights in two ways: (1) they infringed upon Defendants' First Amendment right to picket or engage in expressive religious activity on the public sidewalks within 500 feet of a medical facility that performs abortions and (2) they interfered with Defendants' right to counsel in violation of the Sixth Amendment.

A. Standard of Review.

While "[p]robation is peculiarly within the province of the sentencing judge," an appellate court should intervene in such matters when a condition of probation amounts to "a violation of

some constitutional right of the defendant." *People v Sattler*, 20 Mich App 665, 669-70, 174 NW2d 605, 607 (1969).

B. Defendants' Pro-Life Activities Are Fully Protected by the First Amendment.

The public streets and sidewalks outside of abortion centers throughout the United States are traditional public fora for free speech activity. *Frisby v Schultz*, 487 US 474, 480-81 (1988) ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora."). Traditional public fora "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v CIO*, 307 US 496, 515 (1939). And there is no exception for public sidewalks adjacent to abortion centers. *McCullen v Coakley*, 134 S Ct 2518, 2529 (2014) (striking down a content-neutral, *35-foot buffer zone* restriction around abortion centers).

Defendants' pro-life activities, which include counseling, praying, handing out literature, and holding signs on public sidewalks outside of abortion centers, are fully protected by the Free Speech *and* Free Exercise Clauses of the First Amendment. *See Schenck v Pro-Choice Network of W NY*, 519 US 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."); *Bd of Educ v Mergens*, 496 US 226, 250 (1990) (O'Connor, J.) (observing that "*private* speech endorsing religion" is protected by "the Free Speech and Free Exercise Clauses"); *Bible Believers v Wayne Cnty*, 805 F3d 228, 255-56 (CA6 2015) ("The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim. . . . Free exercise claims are often considered in tandem with free speech

claims and may rely entirely on the same set of facts."). Thus, we are dealing here with fundamental rights of the highest order. *Connick v Myers*, 461 US 138, 145 (1983) (stating that speech on public issues "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection").

In sum, the lower court's nationwide probation conditions forbid conduct that is fully protected by the First Amendment and subject Defendants to incarceration for engaging in it.[8] These conditions are unreasonable as a matter of law.

C. The Challenged Conditions Are Unreasonable as a Matter of Law.[9]

The gravamen of this case is the commission of a property crime (trespass) at the Women's Center located on Orchard Lake Road in the Township. It is a 30-day misdemeanor. It is not a FACE violation. It is not a felony. It is not a crime of violence. There was no violence nor threats of violence. And there was no vandalism nor any property damage whatsoever. Defendants peacefully handed out red roses in the waiting room of the abortion center. Attached to the roses were cards containing a message of love and presenting options for women to choose life for their babies. The interference with police authority offense was incidental to the trespass offense as Defendants engaged in "passive resistance," a common tactic employed by civil rights advocates and other peaceful protestors from time immemorial. There are no victims of any violent, or

[8] As a result of the restriction, Defendants Connolly, Goodman, Miller, and Woodworth-Crandall were prohibited from engaging in their First Amendment activity for twelve months, which is three times longer than the maximum sentence of incarceration (120 days).

[9] The challenged probation conditions also operate as *prior restraints* on First Amendment activity. *See Alexander v United States*, 509 US 544, 550 (1993) ("The term 'prior restraint' is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.") (internal quotations and citation omitted). And "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc v Sullivan*, 372 US 58, 70 (1963) (collecting cases).

threatened violent, acts in this case. There is no property damage. There was no force or threat of force used. It was a simple trespass.

The authority for probation is set forth in MCL § 771.3. The statute specifically allows a trial court judge to impose certain conditions, such as requiring that a defendant complete community service, pay court costs, participate in certain programs, be subject to monitoring, and abstain from future illegal conduct. However, the statute does not license a trial court judge to impose draconian and unreasonable restrictions on a defendant's rights protected by the First Amendment, particularly when the underlying offense is a simple trespass. "Although the sentencing judge is accorded wide discretion, the exercise of that judgment is ***not*** unfettered: ***the conditions imposed upon the probationer must bear a logical relationship to rehabilitation***." *People v Branson*, 138 Mich App 455, 458, 360 NW2d 614, 616 (1984) (citing *People v Higgins*, 22 Mich App 479; 177 NW2d 716 (1970); *People v Johnson*, 92 Mich App 766; 285 NW2d 453 (1979)) (emphasis added).[10] And they must not unlawfully impinge upon a defendant's constitutional rights. *See Sattler*, 20 Mich. App. at 669-70, 174 N.W.2d at 607 ("[A]n appellate court should not interfere in probation matters ***absent*** a showing of a violation or abuse of statutory authority ***or violation of some constitutional right of the defendant***.") (emphasis added).

Therefore, while the trial court is within its authority to impose a condition on Defendants to not enter the premises of the location that gave rise to their trespass conviction (a condition that bears a logical relationship to the underlying offense), the trial court is without authority to impose

[10] In *State v Tavone*, 446 A2d 741 (RI 1982), the defendant was convicted of presenting an obscene motion picture and received a two-year prison sentence. Pending his appeal, the defendant was released on bail. As a condition of his bail, the trial court forbade the defendant from exhibiting any X-rated motion pictures. The Rhode Island Supreme Court vacated the condition because it failed to see the relationship between the defendant's abstention from showing X-rated movies and assurance of his subsequent appearances as well as his submission to the court's judgment. *Id.* at 742.

a condition, unrelated to illegal trespass, that directly violates Defendants' lawful rights under the First Amendment. The lower court's probationary conditions amount to a ***nationwide*** injunction prohibiting Defendants from engaging in their First Amendment activity on public sidewalks outside of ***every*** abortion center in the United States. This condition is extreme and not logically related to thwarting illegal trespassing activity. Instead, the condition unreasonably and unlawfully seeks to silence Defendants' pro-life message and prevent them from engaging in lawful, *constitutionally protected* activities.

D. Case Law Does Not Support the District Court's Restrictions upon Defendants' First Amendment Rights.

During sentencing, the trial court set forth its rationale for imposing its burdensome restrictions on Defendants' First Amendment freedoms. Upon close inspection, the court's rationale is faulty in the extreme. To begin, the trial court noted that any condition that impinges upon a constitutional freedom must be "narrowly tailored" and "directly related to the rehabilitation of the defendant and to the protection of the public," (*Twp v Miller*, Sentencing Tr at 33 [Ex 3 to Defs' Mot]), yet the court failed to heed its own admonition.

Indeed, there is no comparison between the simple trespass at the Women's Center in this case and a trespass onto military property housing dangerous weapons. (*Twp v Miller*, Sentencing Tr at 34 [stating, without citation, that "[c]ourts have upheld a probation condition prohibiting Trident weapon system protestors from coming within 250 feet of a naval submarine base"] at Ex 10). Unlike a military installation with armed sentries and dangerous military equipment, including weapons, there is nothing inherently dangerous about an abortion center (aside from the harm that Defendants sought to prevent).

The trial court's citation to *United States v Bird*, 124 F3d 667 (CA 5 1997),[11] similarly fails to support the onerous restrictions imposed in this simple trespass case. As a condition of supervised release *for violating the Freedom of Access to Clinic Entrances Act*,[12] the district court in *Bird* ordered the defendant to "stay at least one thousand feet from abortion clinics, specifically the America's Women Clinic in Houston." *Bird*, 1997 U.S. App. LEXIS 33988, at *2-3. The Fifth Circuit upheld the condition, specifically finding that "Bird's conviction *for violent activity under the Act* constitutes a sufficient governmental interest to justify a temporary limitation on Bird's First Amendment rights." *Id*. at *51 (emphasis added). There is no such violent activity at issue here.

Similarly, the trial court cited *United States v Turner*, 44 F3d 900 (CA10 1995), to support its condition that Defendants not "harass, intimidate or picket any facility that performs abortion." However, the defendant in *Turner* was convicted of violating 18 USC § 1509, which requires "threats or force." The defendant was also indicted for assault on a federal officer in violation of 18 USC § 111, but that charge was eventually dropped. In light of the facts of that case, the Tenth Circuit upheld as a condition of the defendant's probation that she not "harass, intimidate or picket *in front of* any gynecological or abortion family planning services center." *Id*. at 903 (emphasis added). Notably, there was no onerous 500-foot restriction in *Turner*, despite the fact that the case involved "threats or force."

Finally, the trial court justified its broad restriction on Defendants' First Amendment activity by asserting:

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[11] The Fifth Circuit's amended opinion is found at *United States v Bird*, No. 95-20792, 1997 US App LEXIS 33988, (CA5 Sept 24, 1997).

[12] To violate the Freedom of Access to Clinic Entrances Act ("FACE"), 42 USC § 248, a defendant must *intentionally* "injure, intimidate, or interfere" with a person seeking an abortion by "*force or threat of force or by physical obstruction*." *Id*. (emphasis added).

> Though the restriction prohibits probationer from approaching within 500 feet of health clinics, the limitation does not prevent probationer or probationers from going door-to door conveying her views, writing their legislatures, protesting on the National Mall, serving as a high-ranking official in a prolife organization, attending meetings or distributing leaflets personally, through the mail, or via publication.

(*Twp v Miller*, Sentencing Tr at 35 at Ex 10). However, the U.S. Supreme Court has held that "the streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v NJ*, 308 US 147, 163 (1939); *Perry Educ Ass'n v Perry Local Educators*, 460 US 37, 55 (1983) (stating that "[i]n a public forum . . . all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers").

In the final analysis, Defendants were unreasonably punished because they are pro-life. More specifically, Defendants were punished because of their deeply held religious conviction that abortion is an intrinsic evil. While the trial court stated throughout the trial that this case had <u>nothing</u> to do with abortion, its sentencing proved otherwise. During sentencing, the court stated that "this courtroom will not become a legislative hearing room on the pros and cons of abortion," (*Twp v Miller*, Sentencing Tr at 39 at Ex 10), yet that is precisely what it became when the court sentenced Defendants. The court admitted as much: "Given the Defendant's strongly-held convictions regarding abortion, it is not implausible to speculate that if Defendant were permitted to protest at clinics, Defendant might not be able to restrict her activities within the lawful perimeters." (*Id*. at 37-38). In sum, this case involves a simple trespass ordinance violation. It does <u>not</u> involve violence, threats of violence, or some other physical force, obstruction, or danger

to society.[13] There is no basis for the trial court's draconian conditions—conditions which infringe upon fundamental rights protected by the First Amendment.

E. The District Court's Condition of Probation Ordering that Defendants Have No Contact with Each Other, Even on Matters Concerning Their Legal Defense, Interferes with Defendants' Sixth Amendment Right to Counsel.[14]

A defendant's constitutionally protected right to counsel continues through the appellate process. *Halbert v Mich*, 545 US 605, 609 (2005). A defendant's right to counsel encompasses "(1) the qualified right to be represented by counsel of one's choice, and (2) the right to a defense conducted by an attorney who is free of conflicts of interest." *Wheat v United States*, 486 US 153, 157 (1988).

Defendants seek to avail themselves to the post-conviction proceedings and appellate review of their cases. The lower court, however, wishes to interfere with Defendants' legal representation by prohibiting Defendants from having any contact with each other, including when necessary for their legal defense. (*Twp v Connolly*, Sentencing Tr at 15-16 [Ex 4 to Defs' Mot]).

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[13] For example, in *United States v Dinwiddie*, 76 F3d 913, 918-19 (CA8 1996), upon finding a violation of FACE, the district court imposed a 500-foot buffer zone, but it had exceptions for "legitimate personal activity," including carrying signs and distributing literature—activity protected by the First Amendment. Despite these exceptions, the Eight Circuit struck down portions of the injunction because they impermissibly burdened free speech. *Id*. at 927-28. As another example, in *Madsen v Women's Health Center*, 512 US 753, 774 (1994), the U.S. Supreme Court invalidated an injunction's requirement that, within 300 feet of an abortion center, protestors refrain from physically approaching any person seeking services at the center, explaining that "absent evidence that the protestor's speech is independently proscribable (*i.e.*, fighting words or threats) or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand."

[14] This provision also violates Defendants' First Amendment right to expressive association. (*Twp v Miller*, Sentencing Tr at 14-15 at Ex 10); *Healy v James*, 408 US 169, 181 (1972) ("Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."); *Roberts v US Jaycees*, 468 US 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.") (citations omitted); *NAACP v Ala*, 357 US 449, 460 (1958) ("Effective advocacy . . . is undeniably enhanced by group association . . . .").

Defendants were on bond without any such "no contact" provision from December 2, 2017 to March 14, 2018. At their arraignment, Defendants elected to share the same counsel, who is providing their legal defense *pro bono*—Defendants cannot afford counsel. The lower court did not have a "no contact" provision in place when Defendants waived any conflict,[15] and the court never saw need for this "no contact" provision at all of the pre-trials, the trial, and the post-trial sentencing hearing. It was not until imposing the conditions of probation at sentencing that the court imposed this "no contact" provision. As noted throughout, this case involves a simple trespass—an ordinance violation. It does not involve a crime of violence, nor was there any property damage or vandalism associated with the trespass. Indeed, there was no charge of a criminal conspiracy. In short, there is no basis for the "no contact' provision and certainly no basis for imposing it in a way that adversely impacts Defendants' right to legal counsel. The court dismissed Defendants' objections, claiming that months prior and with no knowledge that such a "no contact" provision would ever be created and imposed by the court, Defendants waived any conflicts associated with joint representation. However, the waiver was made because there were no known nor anticipated conflicts that would arise as a result of the joint representation. There was a common set of facts and common defenses. There was no conflict. Now, however, the lower court created undue *interference* by imposing this unreasonable restriction.

The lower court has the duty to ascertain whether separate counsel is necessary. *Holloway v Ark*, 435 US 475, 482 (1978). The lower court, however, never presented Defendants with any indication that its counsel would have to fracture its representation by communicating with each Defendant separately based on a later-imposed probation condition. The lower court never

[15] Technically, the court's condition does not create a "conflict" *per se*. Rather, it causes *interference* with Defendants' right to counsel.

presented Defendants with the possibility that they would not be allowed to share their thoughts and concerns pertaining to their legal defense with each other through counsel during the appellate process. Indeed, the lower court's condition of probation impairs defense counsel, as defense counsel now has to spend an inordinate amount of time communicating with each of the five Defendants separately. For example, instead of having one email conversation pertaining to an appellate issue, defense counsel now has to create and balance five different conversations pertaining to the same issue. Instead of placing one conference call where Defendants can freely discuss the appeal, defense counsel has to place five or more calls to discuss the same material, and then place follow up calls with each Defendant to discuss questions and issues that arise during the separate calls. Meanwhile, each Defendant does not get the benefit of hearing the actual conversation and contemporaneously contributing to it or asking questions. Requiring the "no contact" provisions handicaps Defendants' legal representation on appeal, as now Defendants' counsel is tied up with its communications with Defendants instead of having the time to focus on the legal arguments and advocacy of their cases. Further, Defendants do not have access to the communications of their co-Defendants, so they do not have access to certain matters that might give rise to additional concerns or even potential conflicts of interest in their cases. Defendants never anticipated that the lower court would create such a complication. In sum, the lower court has interfered with Defendants' constitutional right to appellate counsel, and the "no contact" provision must be lifted (or, at a minimum stayed) to preserve Defendants' constitutional right to legal representation.

CONCLUSION

The District Court's failure to properly instruct the jury deprived Defendants of their due process right to present a defense, and the court's refusal to permit Defendants to engage in relevant *voir dire* deprived them of their right to an unbiased jury. Consequently, the jury verdicts must be reversed and this case remanded for a new trial before a properly instructed and unbiased jury. Alternatively, the District Court's imposition of draconian probation conditions violate Defendants' fundamental rights protected by the U.S. Constitution. Therefore, this Court should declare those conditions unlawful and accordingly modify Defendants' sentences.

DATED: May 9, 2019.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert Muise
Robert Muise (P62849)
Erin Mersino (P70886)

Counsel for Appellants/Defendants

PROOF OF SERVICE

I, Erin Mersino, hereby affirm that on the date stated below I delivered a copy of Defendants' Application for Leave to Appeal and Brief in Support and attached exhibits, upon the Township of West Bloomfield Prosecutor, by e-mail to larryhsherman@shermanpc.com and via First Class Mail, postage prepaid thereon to the address stated above. I further sent notice of the Application for Leave to Appeal to the 48th District Court and the Michigan Court of Appeals. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: May 9, 2019.

/s/ Erin Mersino
Erin Mersino (P70886)