

TENNESSEE COURT OF CRIMINAL APPEALS- EASTERN DIVISION

State of Tennessee
Appellee

v.

Lt. Commander Walter Francis Fitzpatrick, III
Appellant

Appellate Court Case Number:
E2014-01864-CCA-R3-CD

Trial Court Docket #: 14CR69

**Defendant's Appeal from McMinn County Criminal Court's Conviction Against Walter
Fitzpatrick**

ORAL ARGUMENT REQUESTED

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Statement of Issues Presented for Review

- A. Whether the Trial Court had jurisdiction.
- B. Whether the Trial Court erred by refusing to dismiss the extortion charge as being based upon a Constitutionally-protected activity.
- C. Whether the Trial Court erred by refusing to dismiss the extortion charge for lack of evidence of intent to unlawfully restrict another's actions.
- D. Whether the Trial Court erred by refusing to dismiss the aggravated perjury charge for lack of materiality of all identified statements made by the defendant.

Statement of the Case

On March 18, 2014 the McMinn County grand jury indicted retired Navy Lieutenant Commander Walter Fitzpatrick alleging harassment, aggravated perjury, stalking, and extortion. (I, 1-3)¹; TCA §§39-17-308; 39-16-703; 39-17-315, and 39-14-112, respectively.

On June 16 the trial court denied defendant's motion to dismiss the indictment, which had been filed on grounds that one of the voting grand jury members was an unnamed victim of the alleged crimes. (III, 85:11-19; 87:14-15). The trial court also denied defendant's motion to dismiss, which had been filed on grounds that all activities alleged were constitutionally protected activities. (V, 133:15-18). The trial court also denied defendant's motion to dismiss the aggravated perjury charge, which had been filed on grounds that all statements identified were immaterial. (II, 122).

After presentation of evidence upon jury trial, on June 24, 2014, defendant's motions to dismiss were renewed. (V, 121:13-133:15-18). The trial court dismissed the stalking charge but denied defendant's motions to dismiss the other charges (V, 133:15-18). The jury then found the defendant not guilty of harassment, but guilty of aggravated perjury and extortion. (II, 123-125; VI, 203:5-19).

On August 12, 2014 the defendant filed motions to arrest judgment, for a suspended sentence pending appeal, and for a new trial. (II, 142-149). The motion to arrest judgment was grounded on an assertion of lack of jurisdiction. (II, 148-149).

On August 19, 2014 the defendant was sentenced to 3 years confinement to be administered by the Tennessee Department of Corrections. (IX, 67:17-21). Bail pending appeal was denied as was the motion to suspend sentence pending appeal. (IX, 69:1-6).

¹ References to the record will be indicated by volume, as marked thereon by the appellate court clerk, and by page number. References to transcripts will also include line numbers.

On October 22, 2014 the trial court denied defendant's motions for a new trial, to suspend sentence, and to arrest judgment. (II, 164).

The defendant appeals the trial court's denial of defendant's motion to dismiss the indictment, which had been filed on grounds that one of the voting grand jury members was an unnamed victim of the alleged crimes; the trial court's denial of defendant's motion to dismiss, which had been filed on grounds that all activities alleged were constitutionally protected activities; the trial court's denial of defendant's motion to arrest judgment; the trial court's denial of defendant's motion to dismiss the aggravated perjury charge; and the trial court's denial of defendant's motion for a new trial.

Statement of Facts

For several years retired Navy Lieutenant Commander Walter Fitzpatrick has investigated jury selection practices used by East Tennessee Criminal Courts. (IV, 148:2-5).

Commander Fitzpatrick was arrested on March 18, 2014 while waiting in the McMinn County Courthouse to present a petition to the grand jury. That grand jury had just indicted him alleging Harassment, Stalking, Aggravated Perjury, and Extortion. (I, 1-3). Fitzpatrick was arrested while he was quietly reading a book just outside the grand jury room.

The victim named in the indictment is Jeff Cunningham. (I, 1-3). Mr. Cunningham had served as McMinn County grand jury foreman until just before the March 18 meeting. (III, 23:1-10). In January Fitzpatrick had attempted to petition the grand jury, alleging that Cunningham had been illegally appointed. (III, 43:14-23). At the January meeting Cunningham refused to remove himself from the grand jury proceedings as required by Tennessee Rule of Criminal Procedure 6(c)(1)(A), when the grand jury member is charged with an offense. (III, 48:1-6; III, 49:8-14; III, 64:12-15; V, 80:12-81:8). During this meeting and several others Cunningham also refused to follow statutorily required procedures for considering petitions to the grand jury. (*Compare* TCA §40-12-104; *and* TN R. Crim. Proc. 6(c)(1)(A) *with* III, 41:4-6; III, 48:3-10; III, 48:19-48:6; III, 49:8-14; III, 62:3-6; III, 64:12-15; V, 15:22-16:6; V, 17:16-24; V, 21:9-17; V, 34:10-18; V, 37:11-15; V, 38:4-6; V, 38:19-22; V, 40:18-22; V, 59:1-14; V, 74:12-75:5; V, 77:15-21; V, 80:12-81:8; 107:19-22).

At the February grand jury meeting, when Mr. Cunningham learned that Fitzpatrick was still accusing Cunningham of being illegally appointed, Cunningham told Fitzpatrick “when you file things on me as a private citizen you are, in my opinion, committing a felony. You will make no more presentments to the grand jury. I will not, as the grand jury foreman accept anymore

presentations from you.” (V, 41:6-14). A month later one of the other serving grand jury members was temporarily appointed foreman for the purpose of indicting Fitzpatrick. (I, 1-3).²

During the January 2014 grand jury meeting foreman Jeff Cunningham told the grand jury members that Commander Fitzpatrick had tried to make a citizen’s arrest in Monroe County, and that he accused “a litany of people of crimes” in relation to the grand jury and that he had “disrupted the grand jury there.” (III, 59:8-12; III, 60:21-24; III, 61:7-11; V, 113:19-114:3; V, 114:18-115:5; V, 115:19-116:8). He told the jurors to “stay away” from Fitzpatrick and “have nothing to do with him.” (III, 82:20-83:4). One woman on the grand jury panel asked if she should be scared of Fitzpatrick. (III, 112:21-23).

After that grand jury meeting Cunningham requested that court officers “remove him [Fitzpatrick] from the building,” stating “The Grand Jurors don’t want him here.” (III, 69:2-11; IV, 157:14-17). Cunningham made this statement in the presence of the other grand jurors. *Id.* Fitzpatrick was escorted out of the building and the grand jurors were asked by uniformed officers to remain in the building until he left. (III, 68:1-4, III, 105:9-14).

When the grand jurors finally left the building, escorted by uniformed officers, Fitzpatrick was across the street leaning against a car. (III, 81:18-20). Grand juror Kay Hicks testified that “When I went out he was sitting—or standing—he was on my car.” (III, 81:16-17). She also testified that she was scared of Fitzpatrick and felt threatened by him. (III, 83:9-23). Yet she participated in the grand jury proceedings, including voting on the instant indictment. (III, 80:3-5; I, 1-3).

At trial the prosecution presented evidence confirming that the charges against Fitzpatrick arose from his interactions with the grand jury in January, February, and March of 2014. (VII, 110:21-22; VII, 115:19-120:1; VIII, 221:22-222:17; VIII, 229:13-231:18; VIII,

² The third page of the Indictment, with the temporary foreman (Mr. Balkolm)’s signature, is missing from the record. A copy of the entire indictment is attached to this brief. *Compare with* (I, 3).

238:13-18; VIII, 240:19-241:8; VIII, 243:22-245:16; VIII, 249:13-18; VIII, 254:12-15; VIII, 255:13-16; Record Exhibits 3-7 *see also* I, 1-3).

All of the exhibits presented by the prosecution at trial as examples of Fitzpatrick's activities are petitions to the government for redress of grievances. (Record Exhibits 3-7 & 9-12). Cunningham testified that Fitzpatrick's goal in presenting all of these petitions was to have Cunningham removed from his position as grand jury foreman because Fitzpatrick believed Cunningham was illegally appointed. (V, 76:5-10). Cunningham testified that Fitzpatrick certainly acts like he believes his assertion that Cunningham was illegally appointed. *Id.*

The indictment and bill of particulars identified Commander Fitzpatrick's petition for a protective order, filed on March 12, 2014, as the only official proceeding relevant to the aggravated perjury charge. (I, 1-3; I, 57; III 29:19-30:4).

The March 12 petition for a protective order was denied for the sole reason that it failed to establish the statutorily required relationship between the parties. (Record Exhibit 7 at p.4; V, 66:9-67:1). Nothing else in the petition was considered by the judge in denying the petition. *Id.*

The petition includes a hand written note from Judge Blackwood stating: "Petition does not state a claim. No hearing required." (Record Exhibit 7 at p.4, bottom of page). At trial Judge Blackwood explained to the jury that he had denied the March 12 petition because there was no domestic relationship between the parties. (V, 66:9-67:1). He went on to explain that he did not consider anything else on the petition because there was no domestic relationship. *Id.*

Argument

I. Summary of Argument

The trial court lacked jurisdiction because the indictment is void. At least one of the grand jury members who voted to indict was a victim of the crime alleged, and was therefore

disqualified to vote on the indictment. Only 12 members of the grand jury voted, including the disqualified member, leaving fewer than the 12 members required to indict.

All factual allegations supporting the extortion charge were based upon constitutionally protected activities. The state alleges that the defendant's petitions to the government for redress of grievances amount to extortion. Because such petitions are protected by the First Amendment the trial court should have dismissed the extortion charges.

No evidence supported the element of the extortion charge that the defendant threatened to harm the victim by performing an illegal act. In fact, the prosecution's evidence in support of its extortion charge proves that the defendant performed only lawful acts in relation to the alleged victim.

Regarding the aggravated perjury charge, the prosecution's bill of particulars specified only one document in support of this charge. Yet no statement made by the defendant in the identified petition was material to the outcome of said petition. Therefore, the perjury charge should have been dismissed.

II. The Trial Court Lacked Jurisdiction

A valid indictment is an essential jurisdictional element, without which there can be no prosecution. Rules Crim.Proc., Rule 12(b)(2), (f); *Wyatt v. State*, 24 S.W.3d 319, (Tenn. 2000).

Questions of jurisdiction are reviewed *de novo*, with no presumption of correctness. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000).

“No member of the grand jury shall be present during—or take part in—the consideration of a charge or the deliberation of the other grand jurors” when “the offense was committed against the member's person or property.” TN Rules Crim.Proc. 6(c)(1)(C).

A. Voting Grand Juror was Also a Victim of the Crime Charged

The record in the instant case reflects that at least one member of the Grand Jury that voted to indict the defendant was also a victim of the alleged crimes for which she voted to indict. (*See* discussion below). Therefore, at least one member of the Grand Jury who voted to indict was disqualified to do so. TN Rules Crim.Proc. 6(c)(1)(C). Disqualification of said juror leaves only eleven Grand Jury members voting on the instant indictment; fewer than required by law to indict. TCA §40-30-105.³ The indictment is, therefore, void and the trial court lacked jurisdiction. TCA §40-30-105; TN Rules Crim.Proc. 6(c)(1)(C); *Wyatt*, 24 S.W.3d 319.

Also, even if 12 qualified grand jurors had remained after elimination of the disqualified juror, as a victim of the crime charged the disqualified juror's participation in the grand jury's consideration of the instant indictment is prohibited. TN Rules Crim.Proc. 6(c)(1)(C). Her voting on the indictment is also prohibited. *Id.* This grand juror testified that she was "scared" and felt "threatened" by the defendant. (III, 83:9-23.). Therefore, her presence and participation in the March 18 grand jury proceedings prejudiced the defendant.

B. Grand Jury Member Kay Hicks was a Victim of the Same Alleged Harassment and Stalking Charged on the Indictment

During the January 2014 grand jury meeting foreman Jeff Cunningham told the grand jury members that Commander Fitzpatrick had tried to make a citizen's arrest in Monroe County, and that he accused "a litany of people of crimes" in relation to the grand jury and that he had "disrupted the grand jury there." (III, 59:8-12; III, 60:21-24; III, 61:7-11; V,112:21-113:1; V, 113:19-114:3; V, 114:18-115:5; V, 115:19-116:8). Grand jury member Kay Hicks testified that Cunningham had instructed the grand jurors to "stay away" from Fitzpatrick and "have nothing

³ Elimination of Ms. Hicks left only 11 qualified grand jurors present on March 18, 2014, according to McMinn County Criminal Court Clerk's records.

to do with him.” (III, 82:20-83:4). Cunningham testified that one woman on the grand jury panel asked if she should be scared of Fitzpatrick. (V, 112:21-23; V, 115:19-24).

After that grand jury meeting Cunningham requested that court officers “remove him [Fitzpatrick] from the building,” stating “The Grand Jurors don’t want him here.” (IV, 157:14-17). Cunningham made this statement in the presence of the other grand jurors. *Id.* Fitzpatrick was escorted out of the building and the grand jurors were asked by uniformed officers to remain in the building until he left. (V, 85:16-19; V, 92:14-17; III,90:22-23; III, 105:9-11).

When the grand jurors finally left the building, escorted by uniformed officers, Fitzpatrick was across the street leaning against a car. (III, 81:13-20). Grand juror Kay Hicks testified that “When I went out he was sitting—or standing—he was on my car.” (III, 81:16-17). She further testified:

Q: “Were you aware that Mr. Fitzpatrick was the reason that the court officers were escorting the Grand Jurors out of the building?”

A: “At that time, I guess I was. I knew there was a man.”

Q: “Okay. And you knew that this man leaning on your car was the man that they were referring to?”

A: “Yes. He was the man that spoke to me.”

Q: “What had you been told about him?”

A: “I just knew that that was the man I was supposed to stay away from.” (III, 82:9-22).

Ms. Hicks further testified:

Q: “Did you feel scared at all?”

A: “Yes. I did.”

Q: “Okay. Because Mr. Fitzpatrick--”

A: “Because of that man on my car.”

Q: “All right.”

A: "Because I don't lock my car. And when I got in the car, I locked my doors."

Q: "And you knew that that man was the same man who'd been in the courthouse outside the jury room?"

A: "Yes. Because he spoke to me that morning."

Q: "All right. And you felt—you said you felt scared. Did you feel harassed?"

A: "Just threatened." (III, 83:9-23).

Two months later Commander Fitzpatrick was waiting in the hall outside the grand jury room when the grand jurors arrived for their regular meeting. He spoke to several jurors and was seen by all as they arrived. At that meeting Kay Hicks voted to indict Fitzpatrick for Harassment and Stalking. (I, 1-3; III, 80:3-5).

"'Harassment' means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress." TCA § 39-17-315(a)(3). "Unconsented contact includes, but is not limited to, any of the following: (A) Following or appearing within the sight of that person; (B) Approaching or confronting that person in a public place or on private property." *Id.* at (a)(5).

Stalking means "harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested" TCA § 39-17-315(a)(4).

Kay Hicks testified that she was actually scared of Fitzpatrick and felt threatened by him. (III, 83:9-23).

At trial the prosecution presented evidence confirming that the charges against Fitzpatrick arose from his interactions with the grand jury in January, February, and March of 2014. (VII, 110:21-22; VII, 115:19-120:1; VIII, 221:22-222:17; VIII, 229:13-231:18; VIII, 238:13-18; VIII, 240:19-241:8; VIII, 243:22-245:16; VIII, 249:13-18; VIII, 254:12-15; VIII, 255:13-16; Record Exhibits 3-7 *see also* I, 1-3).

Kay Hicks fits the definition of a victim of the crimes alleged in the indictment against Fitzpatrick, yet she voted on that indictment. (I, 1-3; III, 80:3-5).

At the June 16 hearing Fitzpatrick's attorney moved to dismiss the case for lack of jurisdiction. (III, 85:13-19; III, 86:4-8; III, 86:24-87:2). The trial court denied the motion, stating that the indictment indicated that Cunningham was the named victim. (III, 87:4-5; III, 87:14-15). The trial court concluded that naming one victim on an indictment conclusively proves that no other victims exist.

This conclusion runs contrary to the definition of "victim" given in Tennessee's Stalking statute: "'Victim' means an individual who is the target of a willful course of conduct involving repeated or continuing harassment." TCA § 39-17-315(a)(6). Contrary to the trial court's conclusion, the Tennessee Stalking statute definition of victim does not limit victims to only those named on an indictment.

The trial court's conclusion also runs contrary to the definition of "victim" from Black's Law Dictionary: "A person harmed by a crime, tort, or other wrong." Black's Law Dictionary, 7th Ed. at 1561. Like Tennessee's Stalking statute, Black's Law Dictionary also does not limit "victim" to only the person named on the indictment.

Crimes often have multiple victims. Not all victims are necessarily named on an indictment. If the trial court's conclusion in the instant case is upheld, a hostage in a bank during a robbery could later sit as a grand jury member and vote to indict the robber simply because the

indictment names only the bank manager as the victim. Upholding such a conclusion would eliminate the purpose of Tennessee Rule of Criminal Procedure 6(c)(1)(C).

For this reason the defendant respectfully requests that this Court reverse the trial court's denial of Fitzpatrick's motion to dismiss all charges on the March 18, 2014 indictment, and order that Commander Fitzpatrick be immediately released from prison.

III. Petitioning the Government for Redress of Grievances is Not Criminal

"[D]e novo review is appropriate when reviewing decisions involving the United States Constitution." *State v. Merriman*, 410 S.W.3d 779,790-91 (Tenn.2013); citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

Both the Federal and State governments are prohibited from making any law "abridging the freedom of speech, or...to petition the Government for a redress of grievances." U.S. Const. amd. I; *Marbury v. Madison*, 5 U.S. 137 (1803). "The First Amendment right to petition for redress of grievances is 'among the most precious of the liberties safeguarded by the Bill of Rights.'" *United States v. Hylton*, 558 F.Supp. 872, 874 (S.D. Tex. 1982)(reversing jury conviction for "intimidating" IRS agents by filing a criminal complaint) *quoting United Mine Workers of America v. Illinois State Bar*, 389 U.S. 217, 222 (1967).

"It is axiomatic 'that filing a criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right' to petition government for the redress of grievances." *Jackson v. New York State*, 381 F.Supp.2d 80, 89 (N.D.N.Y. 2005); *quoting Lott v. Andrews Center*, 259 F.Supp.2d 564, 568 (E.D.Tex.2003); *see also Myer v. Board of County Commissioners of Harper County*, 482 F.3d 1232, 1243 (10th Cir. 2007); *quoting Estate of Morris v. Dapolito*, 297 F.Supp.2d 680, 692 (S.D.N.Y.2004); *Hylton*, 558 F.Supp. at 874.

Commander Fitzpatrick's petitions to submit information to the grand jury, pursuant to procedures set forth by Tennessee statute 40-12-104, were quite literally attempts "to petition the Government for a redress of grievances." (Record Exhibits 9-12). Similarly, Commander

Fitzpatrick's petitions for protective orders were literally "petitions" to the government for a redress of grievances. (Record Exhibits 3-7). Also, any written or oral communications by Commander Fitzpatrick regarding the activities of the McMinn County Grand Jury are constitutionally protected free speech. All such communications were expressions of Commander Fitzpatrick's opinion regarding political matters of public importance. Such communications are the highest category of protected speech, given the most protection possible under the Constitution's First Amendment. *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2673 (2011)(citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)). As such, Fitzpatrick's actions were not only lawful activities under state law, they are explicitly protected by the U.S. Constitution. Yet Commander Fitzpatrick is now in prison for exercising these rights.

"It is well settled that liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances *only if*...the real purpose is not to obtain governmental action...It is clear that the defendant genuinely sought governmental response to her complaint, namely, the filing of criminal charges by officials of Chambers County. In such a situation, the defendant's intent or purpose in lodging the complaint is of no moment." *United States v. Hylton*, 558 F.Supp. 872 (S.D.Tex. 1982)(emphasis added); citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Commander Fitzpatrick genuinely sought governmental response to his petitions. Nothing in the prosecution's case suggests otherwise. In fact the prosecution asserted that Fitzpatrick's goal was to have Cunningham removed from his position as grand jury foreman. (V, 76:5-10; VIII, 254:23-255:21). No other motive or goal was ever asserted. The prosecution's accusation regarding Fitzpatrick's real purpose for filing all of his petitions is correct: Fitzpatrick followed legal channels to request that Cunningham be removed from his position as grand jury foreman. In other words Fitzpatrick genuinely sought governmental response to his petitions.

Cunningham testified: “I think he’s referring to the same thing he has been throughout. He’s saying that I’m acting as an illegal wrongfully appointed grand jury person...in other words, he was wanting me to leave, but if I’m there, what he says is I’m improperly appointed; which he says makes it illegal.”

Q: “Do you have any doubt that he believed that statement?”

A: “I don’t know what he believed. He sure acts like he believes it.” (V, at 76:5-14).

According to the alleged victim’s own testimony, Fitzpatrick “sure acts like he believes” that Cunningham was wrongfully appointed to the grand jury. *Id.* Fitzpatrick did believe this, which is why he petitioned the government to remove Cunningham. Nothing in the record contradicts this conclusion.

Because Fitzpatrick’s real purpose in filing his petitions was to obtain governmental action, those petitions cannot be used to support any criminal charges. U.S. Const. amd. I; *Marbury*, 5 U.S. 137; *Hylton*, 558 F.Supp. 872; *Otter Tail*, 410 U.S. at 380; *California Motor Transport*, 404 U.S. at 512-13; *Pennington*, 381 U.S. at 670; *Noerr*, 365 U.S. 127.⁴

While it is true that the First Amendment does not apply to fraud or perjury, convictions for fraud or perjury both require evidence proving an intent to deceive. TCA § 39-16-702; *Shook & Fletcher Supply Co. v. City of Nashville*, 47 Tenn.App. 339, 350 (1960)(“[A]n honest but erroneous expression of opinion is not perjury”). Therefore, without evidence proving the intent to deceive, beyond a reasonable doubt, the fraud or perjury exceptions to the First Amendment do not apply. Without such evidence petitions to the government are constitutionally protected activities.

This is true even if the information contained in those petitions turns out to be incorrect. *See Id.*; *See also* TCA § 39-11-106 (a)(6)(A)(i)(“‘Deception’ means that a person knowingly:

⁴ The defendant moved to dismiss before trial on grounds that his petitions are Constitutionally-protected activities. (I, 64-67; I, 75-78; II, 113-117). Objections to evidence of petitions were made at trial. (VII, 140:17-23; VIII, 159:23-160:4; VIII, 24:19-205:3). The motion to dismiss was renewed after close of prosecution’s case, and in defendant’s motion for a new trial. (V, 125:15-126:4; I, 142-3).

Creates or reinforces a false impression...that the person does not believe to be true”(emphasis added); TCA § 39-16-702 Perjury (“with intent to deceive...that the person does not believe to be true).

The accuser in the instant case concluded that Fitzpatrick “sure acts like he believes it,” “referring to the same thing he has been throughout,” that Cunningham was improperly appointed as grand jury foreman. (V, 76:5-14). With this testimony no rational trier of fact could have found beyond a reasonable doubt that Fitzpatrick knew his assertions were false. In other words, the alleged victim confirmed that Fitzpatrick genuinely sought government action on his petitions. Therefore, those petitions cannot support criminal charges. *Hylton*, 558 F.Supp. 872.

Finally, policy considerations unrelated to the First Amendment also support dismissal of the instant indictment. Federal Courts have been unwilling to apply Federal extortion charges to witnesses because of the risk of self-censorship. *United States v. Pendergraft*, 297 F.3d 1198, 1207 (11th Cir. 2002) citing *Butz v. Economou*, 438 U.S. 487, 512 (1978); *Charles v. Wade*, 665 F.2d 661, 667 (5th Cir. 1981); *Imbler v. Pachtman*, 424 U.S. 409, 440 (1976). In *Pendergraft* the Court concluded that even intentional fabrication of evidence should not be prosecuted via the Federal extortion statute. *Pendergraft*, 297 F.3d at 1207.

While these cases relate to the Federal extortion statute, rather than the Tennessee extortion statute, they are still instructive for the instant case. Like a witness giving testimony, Fitzpatrick’s petitions to the government included sworn statements. Even if this Court concludes that Fitzpatrick’s petitions were not protected by the First Amendment, this Court should dismiss the indictment to prevent serious chilling of Tennessee citizens’ willingness to petition their government or testify in legal proceedings. Imprisoning a Naval veteran for extortion simply because he petitioned his grand jury, regardless of the details, would make any reasonable citizen think twice before bringing any petition to the government. For the same

reasons discussed in the above-cited cases, this Court should reverse Commander Fitzpatrick's conviction.

Because petitioning the government for redress of grievances should not be criminalized, the defendant respectfully requests that this Court reverse the trial court's denial of Fitzpatrick's motion to dismiss the extortion charge and order that Fitzpatrick be immediately released from prison.

IV. No Evidence of Coercion or Intent to Unlawfully Restrict Another's Actions

Extortion requires the use of "coercion." TCA §39-14-112(a). Coercion requires a communicated threat. TCA § 39-11-106(a)(3). "By definition a 'threat' in law is a declaration of intention to injure another by some unlawful act." *Armstrong v. Ellington*, 312 F.Supp. 1119 (W.D.Tenn.1970)(emphasis added). Lawful acts cannot support extortion charges because lawful acts do not fulfill the definition of a "'threat' in law." *Id.*

In the instant case there was zero evidence to support a conclusion that Fitzpatrick communicated an intention to injure Cunningham by some unlawful act. Again, the prosecution's own assertion was that Fitzpatrick's goal was to have Cunningham removed from his position as grand jury foreman. (V, 76:5-10; VIII, 254:23-255:21). No other motive or goal was ever asserted. Filing petitions to request that an illegally appointed government official be removed from office is not an unlawful act. *See* U.S. Const. amd. I; *Marbury*, 5 U.S. 137. Following procedures set forth in Tennessee law is not an unlawful act. *See* TCA §40-12-104. Requesting that those with lawful authority to act consider taking a particular action, is not unlawful. *Id.* This is particularly true where those in authority have full discretion to act or not following such a request.

The prosecution's own assertion conclusively shows that Commander Fitzpatrick never intended to injure Cunningham by some *unlawful* act. (V, 76:5-10; VIII, 254:23-255:21). To the contrary, Fitzpatrick was asking the proper government officials to follow the law. *Id.*

While intentional deception can transmute a lawful act into an unlawful act, in the instant case Cunningham's own testimony proves that Fitzpatrick genuinely believed that Cunningham was illegally appointed to the grand jury:

Cunningham testified: "I think he's referring to the same thing he has been throughout. He's saying that I'm acting as an illegal wrongfully appointed grand jury person..."

Q: "Do you have any doubt that he believed that statement?"

A: "I don't know what he believed. He sure acts like he believes it." (V, 76:5-10).

Where the named victim makes such a statement, no rational trier of fact could have found beyond a reasonable doubt that Fitzpatrick knew his assertions were false.⁵

Because communicating an intent to take lawful action does not support extortion charges, the defendant respectfully requests that this Court reverse the trial court's denial of Fitzpatrick's motion to dismiss the extortion charge.

V. Immaterial Statements Cannot Support Perjury

When the findings of fact are based entirely on evidence that does not involve issues of witness credibility, an appellate court conducts a de novo review. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn.2000). Review of a trial court's application of law to the facts is de novo with no presumption of correctness. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn.2001) (citing *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn.1999)).

A charge of Aggravated Perjury requires proof that the allegedly false statement was material to an official proceeding. *See* TCA §39-16-703(a)(3). "Material" means the statement,

⁵ After presentation of evidence by the prosecution at trial, the defendant moved to dismiss for lack of evidence of coercion. (V, 121:13-133:18). The motion was also renewed in defendant's motion for a new trial. (II, 142-3).

irrespective of its admissibility under the rules of evidence, could have affected the course or outcome of the proceeding.” TCA §39-16-701(1).

In the instant case the government’s indictment and bill of particulars identified Commander Fitzpatrick’s petition for a protective order, filed on March 12, 2014, as the only official proceeding relevant to the aggravated perjury charge. (I, 1-3; I, 57-58). The alleged victim named on indictment also confirmed that Fitzpatrick had no interactions or communications with the alleged victim on March 12, with the exception of Fitzpatrick’s petition for a protective order. (III, 29:19-30:4). Therefore, statements made by the defendant in this single document (the petition) were the only statements relevant to the aggravated perjury charge.

However, the March 12 petition for a protective order was denied for the sole reason that it failed to establish the statutorily required relationship between the parties. (Record Exhibit 7; V, 66:9-67:1). Nothing else in the petition was considered. *Id.*

The petition includes a hand written note from Judge Blackwood stating: “Petition does not state a claim. No hearing required.” (Record Exhibit 7 at p.4, bottom of page). At trial Judge Blackwood explained to the jury that he had denied the March 12 petition because there was no domestic relationship between the parties. (V, 66:9-67:1). He went on to explain that he did not consider anything else on the petition because there was no domestic relationship. *Id.* In other words, once Judge Blackwood determined that there was no domestic relationship, no further statement by the petitioner made any difference. Judge Blackwood explained that he did not consider any statements made by the defendant because once it was established that the statutorily required relationship between the parties did not exist, nothing that the defendant said could have changed the outcome: denial of the petition. *See Id.*

Since no statement made in the petition could have affected the course or outcome of the proceeding (the petition), then no statement made in support of the petition was material. *See* TCA §39-16-701(1). By definition, all statements made by the defendant were not material to the outcome of the petition.

Judge Blackwood's statement to the jury, explaining why he did not consider any statements made by the defendant in his March 12 petition, also shows that the trial court's ruling on Fitzpatrick's motion to dismiss the aggravated perjury charge did not involve issues of witness credibility. Judge Blackwood himself determined the only fact at issue: that the statements made by the defendant in the petition were immaterial to his denial of the petition. (V, 66:9-67:1). Therefore, de novo review is appropriate. However, these facts show that the trial court's refusal to dismiss the aggravated perjury charge should be reversed under any standard of review. *State v. Turner*, 352 S.W.3d 425, 428 (Tenn.2011) (A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision that is against logic or reasoning and that causes an injustice to the party complaining). In this case the trial court's denial of Fitzpatrick's motion to dismiss the aggravated perjury charge is against logic or reasoning because the trial court's own statement proves that all statements made by Fitzpatrick in the March 12 petition were immaterial to the outcome of that petition.⁶

For this reason the defendant respectfully requests that this Court reverse the trial court's denial of Fitzpatrick's motion to dismiss the aggravated perjury charge.

⁶ The defendant moved to dismiss the aggravated perjury charge on these grounds before trial. (II, 122). The motion was renewed after close of prosecution's case, and in defendant's motion for a new trial. (V, 125:15-126:4; I, 142-3).

Conclusion

For all the reasons set forth above the Appellant respectfully requests that this Court reverse the McMinn County Criminal Court's denial of Commander Fitzpatrick's motions to dismiss.

Dated: February 5, 2015.



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CERTIFICATE OF SERVICE

It is hereby certified that on February 5, 2015, the undersigned has served by U.S. mail a true and correct copy of the foregoing "Appellants' Reply Brief" upon the State Attorney General, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202.



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