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Constitutional Law - Personal, Civil, and Political Rights: South Dakota Requires a Jury Instruction on Freedom of Speech in Jury Tampering Cases

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CONSTITUTIONAL LAW— PERSONAL, CIVIL, AND POLITICAL RIGHTS: SOUTH DAKOTA REQUIRES A JURY INSTRUCTION ON FREEDOM OF SPEECH IN JURY TAMPERING CASES

State v. Springer-Ertl, 2000 SD 56, 610 N.W.2d 768

I. FACTS

On January 26, 1996, Debra Springer-Ertl's son Shawn allegedly robbed, kidnapped, and murdered a taxicab driver.[1] Although the crime occurred in Stanley County, South Dakota, the trial judge moved the trial to Martin in Bennett County because of extensive pretrial publicity.[2] Prior to trial, Debra made 8.5" x 11" posters that proclaimed her son's innocence.[3] Debra hung approximately thirty posters, mainly at business places in the town of Martin, but she did not hang any at the courthouse.[4]

The posters had a picture of her son, the date of his trial, and the results of an excluded polygraph test that showed that her son had not participated in the crime.[5] The posters were not addressed to anyone in particular.[6] No prospective jurors had been summoned for her son's trial when Debra hung the posters, but 150 people had been drawn from the county master list.[7] Since Debra's son ultimately accepted a plea agreement, no trial was ever held, and no jurors were ever summoned.[8]

Debra was later charged with three counts of attempting to influence jurors under South Dakota's jury tampering statute.[9] The trial court

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1. State v. Springer-Ertl, 2000 SD 56, ¶ 2, 610 N.W.2d 768, 769. Shawn was a juvenile, age sixteen, and was alleged to have committed the crimes with another juvenile. *Id.*
2. *Id.*
3. *Id.* ¶ 3.
4. *Id.* ¶ 4, 610 N.W.2d at 769-70.
5. *Id.* ¶ 3, 610 N.W.2d at 769.
6. *Id.* ¶ 6, 610 N.W.2d at 770.
7. *Id.*
8. *Id.* ¶¶ 5-6.
9. *Id.* ¶ 7; *see also* S.D. CODIFIED LAWS § 22-11-16 (Michie 1998). The statute reads:

> Any person who attempts to influence a juror, or any person summoned or drawn as a juror, or chosen an arbitrator or appointed a referee, in respect to his verdict or decision in any cause or matter pending, or about to be brought before him:
>
> (1) By means of any communication, oral or written, had with him, except in the regular course of proceedings upon the trial of the cause;
>
> (2) By means of any book, paper or instrument exhibited otherwise than in the regular course of proceedings upon the trial of the cause; or
>
> (3) By publishing any statement, argument or observation relating to the cause; is guilty of a Class 6 felony.

Id.

dismissed the information[10] at the arraignment, and the State appealed.[11] The South Dakota Supreme Court remanded, holding that the trial judge did not have the authority to dismiss an information for lack of probable cause.[12]

Ultimately, there was a trial, and the trial court denied the two jury instructions that Debra requested.[13] The jury convicted Debra of one count of jury tampering.[14] The trial court then granted Debra a new trial, citing its own error in failing to include jury instructions on the freedom of speech.[15] The state appealed, and the South Dakota Supreme Court *held* that the trial court did not abuse its discretion in granting a new trial and that at the new trial, Debra was entitled to a jury instruction distinguishing between the right of free speech and the crime of attempting to influence a juror.[16]

II. LEGAL BACKGROUND

There are two fields of law applicable to this case; the first is the freedom of speech guaranteed by the First Amendment of the United States Constitution.[17] The second applicable field of law is the fair administration of justice in the form of a fair trial guaranteed by the Sixth Amendment of the United States Constitution.[18] Both of the aforementioned constitutional guarantees have been incorporated through the Fourteenth Amendment of the United States Constitution, with the result that all States are prohibited from violating these rights of their own citizens.[19]

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10. An information is an accusation of a crime against a person without an indictment. BLACK'S LAW DICTIONARY 776 (7th ed. 1999). It differs from an indictment, which is an accusation of a crime found by a grand jury. *Id.* at 783.

11. State v. Springer-Ertl, 2000 SD 56, ¶ 7, 610 N.W.2d 768, 770.

12. *Id.*

13. *Id.*, 610 N.W.2d at 771 n.2. Debra's proposed instructions were:

> [1] Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.
>
> [2] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Id.

14. *Id.* ¶ 8, 610 N.W.2d at 770.

15. *Id.*

16. *Id.* ¶ 31, 610 N.W.2d at 777-78.

17. *See* U.S. CONST. amend. I (stating, in part, that Congress shall not make any laws abridging the freedom of speech).

18. *See* U.S. CONST. amend. VI (stating, in part, that criminal defendants shall have the right to an impartial jury).

19. *See* U.S. CONST. amend. XIV, § 1 (stating, in part, that no State shall "deprive any person of life, liberty or property, without due process of law"); *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (stating that the freedom of speech is a fundamental right protected from impairment by the States by the Fourteenth Amendment); Parker v. Gladden, 385 U.S. 363, 364 (1966) (incorporating the

A. DETERMINING THE VALIDITY OF GOVERNMENT RESTRAINTS ON THE FREEDOM OF SPEECH

The freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom."[20] However, freedom of speech is not absolute.[21] As early as 1919, the Supreme Court began formulating tests to determine whether government restrictions on certain types of expression, such as inciteful speech,[22] were constitutional.[23]

The Supreme Court generally categorizes First Amendment scrutiny into two tiers of analysis: content-based[24] and content-neutral[25] regulations. Content-based regulations are those that focus on the content of the particular speech.[26] These types of regulations are subject to strict scrutiny, the most exacting type of judicial review.[27]

An example of a content-based regulation was one in which the government prohibited signs around a foreign embassy that tended to bring that government into disrepute.[28] The Supreme Court, in *Boos v. Barry*,[29] struck down this statute.[30] The Court stated that the statute was content-based because it prohibited an entire category of speech, that speech which tended to bring a foreign government into disrepute.[31]

In order for a regulation to pass strict scrutiny, the government's interest in regulating the speech must be compelling and the means used to effectuate that interest must be narrowly tailored.[32] In *Boos*, the Court applied strict scrutiny because the regulation was content-based.[33] Accordingly, the Court found that the means (outlawing a whole category of speech) employed to achieve the stated compelling interest (protecting the dignity of foreign governments) were not narrowly

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Sixth Amendment into the Fourteenth Amendment).

20. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

21. *See* Frohwerk v. United States, 249 U.S. 204, 206 (1919) (stating that the First Amendment is not intended to immunize every use of language).

22. *See* BLACK'S LAW DICTIONARY 766 (7th ed. 1999) (defining incitement generally as persuading another to commit a crime).

23. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that Congress can outlaw speech that is used in such circumstances and of such a nature that it presents a "clear and present danger" of bringing out certain evils).

24. *See* Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) (defining content-based as discrimination of the subject matter).

25. *See generally* United States v. O'Brien, 391 U.S. 367 (1968) (developing the test for content-neutral regulations); *see also Mosley*, 408 U.S. at 95.

26. *Mosley*, 408 U.S. at 95.

27. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116-18 (1991).

28. Boos v. Barry, 485 U.S. 312, 316, 318-19 (1988).

29. 485 U.S. 312 (1988).

30. *Boos*, 485 U.S. at 316, 334.

31. *Id.* at 321.

32. *Simon & Schuster*, 502 U.S. at 118.

33. *Boos*, 485 U.S. at 321.

tailored because there were less restrictive alternatives available.[34] The Court pointed out that a statute prohibiting threats to or harassment of foreign public officials would be a less restrictive means.[35]

Contrary to content-based laws, content-neutral regulations are not aimed at the content of the speech but are instead aimed at the non-communicative impact of speech.[36] When presented with a content-neutral regulation, the courts apply an intermediate standard of review.[37] This intermediate scrutiny requires the following: the regulation be within the government's power, the regulation be content-neutral, the government have a substantial interest that it is trying to maintain, and the restriction on the freedom of speech be no greater than necessary to further the interest.[38]

An example of a content-neutral statute was one that outlawed the destruction of Selective Service registration cards even though one may be expressing or communicating an ideal by committing an act such as burning the cards.[39] In *United States v. O'Brien*,[40] the United States Supreme Court decided that this statute was within the government's power because Congress has the power to make laws that are necessary and proper to raise and support armies.[41] The *O'Brien* intermediate test and the time, place, and manner intermediate scrutiny test are now considered the same standard.[42]

The statute was found to be content-neutral because the statute only prohibited the noncommunicative element, the destruction of the card, of the defendant's conduct and not the expression itself.[43] The government's interest in assuring the availability of the certificates was substantial.[44] The Court decided that the statute was no greater a restric-

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34. *Id.* at 323-25.

35. *Id.* at 326-27.

36. *See* United States v. O'Brien, 391 U.S. 367, 382 (1968) (concluding that the defendant's conviction would stand, in part, because the statute prohibiting the destruction of Selective Service cards only made criminal the non-communicative aspect of destroying the card and not the expression of his particular views).

37. *See id.* at 376-77 (stating that in order to justify incidental limitations on the freedom of speech, the government interest needs to be sufficiently important to regulate the nonspeech aspect when speech and nonspeech elements are combined in expression); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (stating that the *O'Brien* test and time, place, and manner test are the same standard) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984)). In *O'Brien*, the Court stated that it was not dealing with a case about speech mixed with conduct. *See O'Brien*, 391 U.S. at 367-77.

38. *O'Brien*, 391 U.S. at 377; *see also* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981).

39. *O'Brien*, 391 U.S. at 376, 391.

40. 391 U.S. 367 (1968).

41. *O'Brien*, 391 U.S. at 377.

42. *Ward*, 491 U.S. at 798 (citing *Clark*, 468 U.S. at 298).

43. *O'Brien*, 391 U.S. at 382.

44. *Id.* at 378-79, 382. Some of the substantial interests asserted by the government to ensure the

tion on the freedom of speech than was necessary because the Court could not perceive of any alternative means that would better assure the availability of the cards than one that prohibited the destruction of them.[45]

The Supreme Court also makes a distinction as to the specific scrutiny that the government would have to satisfy based on the type of forum in which the speech took place.[46] If the forum in which speech takes place is government or public property, the court typically analyzes the restraint on speech under a public forum analysis.[47] The same rules of scrutiny that the Court developed for content-based and content-neutral regulations apply in public forum analysis.[48]

Traditional public forums are those locations that have usually been considered places for speech.[49] Examples of traditional public forums would be streets and public parks.[50] If the regulation of speech in a public forum is content-based, then strict scrutiny applies.[51] If the regulation is content-neutral, then the time, place, and manner intermediate scrutiny test applies.[52]

Limited or designated public forums are those public places that the government has opened up for expression.[53] The scrutiny for designated public forums is the same as that for public forums: if the regulation is content-based, strict scrutiny applies; if it is content-neutral, the time, place, and manner test applies.[54]

Non-public forums are those places that have not traditionally been used for public speech and also have not been opened up by the government for speech.[55] Regulations for non-public forums only have to be reasonable and viewpoint neutral.[56] Reasonable means that the regula-

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availability of the certificates were: notification of the registrants, proving that registrants had registered for the draft, and facilitating communication between the registrants and the local draft boards. *Id.*

45. *Id.* at 381.

46. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44 (1983) (stating that the right of access to public property depends on the characterization of the property).

47. *Id.*

48. *Id.* at 45.

49. *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (stating that government control over streets cannot unjustifiably abridge the right of assembly and speech which are immemorially associated with streets (citing Lovell v. Griffin, 303 U.S. 444, 451 (1938))).

50. *Id.*

51. *See Perry*, 460 U.S. at 45 (stating that for content-based regulations the government needs a compelling interest and narrowly drawn means).

52. *See id.* (stating that content-neutral regulations are constitutional if they are time, place, and manner regulations).

53. *See id.* at 45-46 n.7 (stating that there is a second category created when a state has opened an area for limited purposes to the public for expressive activities).

54. *Id.* at 45.

55. *Id.* at 46.

56. *Id.* (citing U.S. Postal Service v. Council of Greenburgh Civic Assn's, 453 U.S. 114, 131 n.7 (1981)).

tion is fair under the circumstances or appropriate for the end in view.[57] A court looks to see if there are ample alternative modes of communication when it determines whether the regulation is reasonable.[58]

In order for a regulation to be viewpoint neutral, it must not forbid certain types of speech simply because the government does not agree with the ideas espoused by the speaker.[59] A government also may not regulate the use of speech based on agreement or disagreement with the underlying message.[60] In *R.A.V. v. City of Saint Paul*,[61] the Court distinguished between content-based and viewpoint-based regulations.[62] The Court stated that a government may proscribe libel, but it cannot proscribe only libel that criticizes the government.[63] Therefore, the Court struck down a city ordinance that outlawed graffiti produced on the basis of race, religion, color, creed, or gender because the ordinance prohibited speech based solely on the subject of the speech.[64]

B. STRIKING A BALANCE BETWEEN THE RIGHT TO FREE SPEECH AND THE RIGHT TO IMPARTIAL JUDICIAL PROCEEDINGS

In situations where the government tries to outlaw certain types of speech based on its interest in the fair administration of justice, the courts apply a balancing test.[65] The courts balance the right to free speech and the right of a court to take steps necessary to ensure a fair judicial proceeding.[66] The United States Supreme Court, in *Bridges v. California*,[67] developed the "clear and present danger" test specifically for dealing with speech versus impartial judicial proceedings.[68] The Court held that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[69]

The Supreme Court has stated that there is no definition for "clear and present danger" with regard to the balance between free speech and

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57. BLACK'S LAW DICTIONARY 1272 (7th ed. 1999).

58. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 49, 53 (1983).

59. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (stating that government, in this instance a city, cannot sanction speech simply because it is about a disfavored subject).

60. *Id.*

61. 505 U.S. 377 (1992).

62. *R.A.V.*, 505 U.S. at 377.

63. *Id.* at 391-92.

64. *Id.* at 396.

65. Kemner v. Norfolk & Western Ry. Co., 479 N.E.2d 322, 325 (Ill. App. Ct. 1985) (citing State of Florida *ex rel.* Miami Herald Publ'g Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977)).

66. *Id.*

67. 314 U.S. 252 (1941).

68. *Bridges*, 314 U.S. at 262-63 (discussing the "clear and present danger" test with respect to freedom of the press concerning court proceedings).

69. *Id.* at 263.

impartial judicial proceedings.[70] The Court has held that criticism of judicial action already taken, even though the case was still pending, was not a "clear and present danger" to the impartiality of a judicial proceeding.[71] The Court also stated that the judge had a remedy in damages for defamation.[72]

The Court gave a further explanation of a "clear and present danger" in *Craig v. Harney*.[73] In that case, the press was held in contempt of court for printing articles criticizing the judge in a certain case.[74] The articles criticized the judge for taking the case from the jury.[75] The articles also focused on the fact that one party to the litigation was a serviceman and was not personally available to defend himself in the proceeding.[76]

The Court decided that the threat of danger to the fair administration of justice must be imminent, not merely likely.[77] The Court characterized the language in the articles as strong and intemperate and perhaps even unfair to the judge, but it stated that those things were not enough to be contemptuous.[78] The language must present enough danger to "immediately imperil" the fair administration of justice.[79] The Court commented on the fact that judges are supposed to be able to thrive in climates such as this and should not be prone to let public opinion influence their opinions; as such, there was no threat or demand upon the judge to change his decision.[80]

The Alaska Supreme Court had an opportunity to deal with an issue involving jury tampering and the First Amendment in *Turney v. State*.[81] In that case, the defendant had contact with three jurors at one time and two jurors at another time during the course of a case involving his friend.[82] The defendant contacted the jurors and told them to call a phone number that had information on juror rights.[83] When a juror called the number, he or she was told that jurors could judge the law as well as the facts and that jurors could not be punished for their verdict.[84]

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70. Pennekamp v. Florida, 328 U.S. 331, 349 (1946).
71. *Id.*
72. *Id.* at 348-49.
73. 331 U.S. 367 (1947).
74. *Craig*, 331 U.S. at 369.
75. *Id.*
76. *Id.* at 370.
77. *Id.* at 376.
78. *Id.*
79. *Id.*
80. *Id.* at 376-77.
81. 936 P.2d 533 (Alaska 1997).
82. *Turney*, 936 P.2d at 536-37.
83. *Id.*
84. *Id.* at 536 n.1. The information at the other end of the phone call was disseminated by the

The defendant was charged with jury tampering and criminal trespass for his contact with the jurors at the courthouse.[85]

The Alaska Supreme Court construed the jury tampering statute to require specific intent on the part of the defendant to influence a juror's action as a juror, and therefore it did not reach the question of whether the defendant's speech was protected by the First Amendment.[86] The Alaska Supreme Court also stated that the statute would not reach those wishing to inform the public about their rights as jurors because mere advertisements by a person or group would not possess the requisite intent to influence a juror in a particular matter.[87] The court ultimately concluded that the trial court's decision to deny the defendant's motion to dismiss must be affirmed.[88]

III. ANALYSIS

Justice Konenkamp authored the majority opinion which affirmed the grant of a new trial to Debra.[89] Chief Justice Miller concurred specially to state that the issue was not whether Debra committed the crime, but only whether the trial court erred in granting a new trial.[90] Chief Justice Miller also stated that Debra would have been acting within her constitutional rights if she were "standing on a soap box in the town square" or broadcasting on television or radio, and, as such, she was entitled to have a jury hear of her free speech rights.[91] Justice Sabers, joined by Justice Gilbertson, dissented and concluded that Debra was not entitled to a jury instruction on the First Amendment merely because she used words to carry out her illegal act.[92]

A. MAJORITY OPINION

The South Dakota Supreme Court stated that the authority of a trial court to grant a new trial lay within that court's discretion; consequently, the standard of review was abuse of discretion.[93] The court stated that it

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Fully Informed Jury Association (FIJA). *Id.*

85. *Id.* at 535.

86. *Id.* at 540-41.

87. *Id.*

88. *Id.* at 545.

89. State v. Springer-Ertl, 2000 SD 56, ¶ 1, 610 N.W.2d 768, 768-69. Justice Konenkamp was on reassignment and Justice Amundson concurred. *Id.* ¶ 33, 610 N.W.2d at 778.

90. *Id.* ¶ 36 (Miller, C.J., concurring).

91. *Id.*

92. *Id.* ¶ 42, 610 N.W.2d at 779 (Saber, J., dissenting).

93. Delzer v. Penn, 534 N.W.2d 58, 60 (S.D. 1995) (citing Fullmer v. State Farm Ins. Co., 498 N.W.2d 357, 361 (S.D. 1993)). An abuse of discretion is a failure to exercise sound legal discretion. BLACK'S LEGAL DICTIONARY 10 (7th ed. 1999).

required a clearer showing of abuse of discretion when a new trial was granted rather than when it was denied.[94]

The court stated that it had never construed the jury tampering statute.[95] The court also stated that this was no ordinary jury tampering case; most cases of this type involved defendants who directly or indirectly approached and solicited individual jurors.[96] Accordingly, there was no case on point.[97]

The court described the poster as public criticism of government, and, therefore it approached the type of political speech that is fully protected by the First Amendment.[98] Political speech has traditionally been given the utmost protection in our nation's history.[99] The court conceded that the speech in question could hardly be characterized as merely a concerned citizen because the defendant had a personal interest in the case.[100] However, the First Amendment protects biased speech as well as pure, objective political speech because if the First Amendment only protected unbiased speech it would not be protecting much.[101]

The court explained that this case presented a conflict between the fundamental right to free expression and the fundamental right to impartial justice.[102] The court stated that the First Amendment deserved supremacy over other rights in most circumstances; however, the freedom of speech was not absolute.[103] The Supreme Court of the United States said, in *Cox v. Louisiana*,[104] that "[a] State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."[105]

The court, although stating that the only thing that the state sought to outlaw was public communication, did not say that strict scrutiny applied, nor did it classify the statute as content-based.[106] The court did,

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94. *Springer-Ertl*, ¶ 9, 610 N.W.2d at 770; *see also* Fullmer v. State Farm Ins. Co., 498 N.W.2d 357 (S.D. 1993) (stating that new trials may be granted for a number of reasons and that the grant of a new trial will only be set aside after a clear showing of an abuse of discretion by the trial court).

95. *Springer-Ertl*, ¶ 10, 610 N.W.2d at 771.

96. *Id.* One case involved a defendant who had another person give a jury nullification pamphlet to a juror. *See generally* United States v. Ogle, 613 F.2d 233 (10th Cir. 1979).

97. *See Springer-Ertl*, ¶ 10, 610 N.W.2d at 771 (stating ordinary cases are where a defendant solicits jurors through a third person).

98. *Id.* ¶ 11.

99. *See* Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (stating that speech was a fundamental liberty because our political history recognized that freedom of speech was an indispensable condition of other forms of freedom).

100. *Springer-Ertl*, ¶¶ 11-12, 610 N.W.2d at 771-72.

101. *Id.* ¶ 12 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-77, 792 (1978)).

102. *Id.* ¶¶ 16-17, 610 N.W.2d at 773.

103. *Id.*

104. 379 U.S. 559 (1965).

105. *Cox*, 379 U.S. at 562.

106. State v. Springer-Ertl, 2000 SD 56, ¶ 20, 610 N.W.2d 768, 774.

however, cite the United States Supreme Court's statement that "when a newspaper publishes information lawfully obtained, a state may impose punishment, if at all, only when the statute is 'narrowly tailored to a state interest of the highest order.'"[107] The court made it clear that a state has "an interest of the 'highest order' in maintaining the integrity and fairness of its judicial proceedings."[108]

The court did not state that this statute was content-neutral, but it did discuss public forums analysis, which is used by courts when deciding whether the statute passes the *O'Brien* test.[109] The court discussed the fact that Debra's posters were placed mainly in storefronts which were visible from the sidewalk.[110] The court seemed to have been analogizing the storefront placement of the posters to speech on a sidewalk, which is typically considered a traditional public forum.[111]

The court used the clear and present danger test to determine whether this statute was constitutional.[112] The court stated that regulation of public speech on pending court proceedings is constitutional only where there is a "clear and present danger" of actual prejudice to the fairness of the proceeding or an imminent threat thereto.[113]

The court narrowly construed the jury tampering statute so as to find it constitutional.[114] The court stated that a reasonable interpretation

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107. *Id.* ¶ 25, 610 N.W.2d at 775-76 (quoting Florida Star v. B.J.F., 491 U.S. 524, 541 (1989)). Although the court did not use the traditional "strict scrutiny" language, it appeared as though the court was applying strict scrutiny to the statute. If the court had subjected the statute to strict scrutiny, it would have asked whether there was a compelling state interest and if the means to effectuate that interest were narrowly tailored. *See, e.g.*, Simon & Schuster v. N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

108. *Springer-Ertl*, ¶ 26, 610 N.W.2d at 776. Since the court seemed to find that the first prong of strict scrutiny was satisfied, the means used would still need to be narrowly tailored to achieve that end. *See, e.g., Simon & Schuster*, 502 U.S. at 118. In *Springer-Ertl*, the means used was a criminal prosecution for a violation of a statute that outlawed communicating with jurors with the intent to influence them. *Springer-Ertl*, ¶¶ 7-8, 610 N.W.2d at 770. At least one other court has found that these means are too harsh and not narrowly tailored. *See* Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966) (requiring a judge to consider continuation of a trial, change of venue, sequestration, or a new trial before putting a restraint on the freedom of speech). There are other less-restrictive alternatives that the state could have employed to achieve its stated end. *Id.* The means of continuation of trial, change of venue, sequestration of the jurors, or the granting of a new trial would have had no restrictive effect on speech and would still ensure a fair trial. *Id.*

109. *Springer-Ertl*, ¶ 21, 610 N.W.2d at 774 (stating that public areas, like sidewalks, are examples of traditional public forums (citing Schenck v. United States, 519 U.S. 47, 377 (1919))).

110. *Id.*

111. *Id.* ¶¶ 20-21; *see also* Cox v. Louisiana, 312 U.S. 559, 574 (1965).

112. *Springer-Ertl*, ¶ 23, 610 N.W.2d at 775 (stating that regulation of public speech during cases is justified by a clear and present danger of threat of serious evil (citing Gentile v. State Bar of Nevada, 501 U.S. 1030, 1069 (1991))).

113. *Id.*

114. *See id.* ¶ 29, 610 N.W.2d at 777 (interpreting the statute as prohibiting conduct that is designed to influence, specifically, jurors, including those drawn and summoned). By doing so, the court could not have found the statute to be vague or overbroad because neither of those findings is typically fatal to the statute. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1326, 1337

of the jury tampering statute would be to restrict it to conduct with the specific intent to influence either summoned or drawn jurors.[115] The court found that in order to be guilty of the jury tampering statute, Debra must have had specific intent[116] to commit each element of the offense.[117] General intent[118] was not sufficient because a person who merely wished to inform the public about a situation should not be subject to the statute.[119] The court also stated that its decision to narrowly construe the statute was consistent with decisions of other courts in dealing with the same issue.[120] The court did not answer the question of whether or not Debra had the requisite specific intent; it left that to be resolved at her new trial.[121]

The court held that Debra was entitled to a jury instruction distinguishing between the crime of attempted jury tampering and the right to the freedom of speech.[122] The court explained that the jury could have logically concluded that since Debra attempted to influence the public, and jurors were members of that public, that Debra attempted to influence jurors.[123] The court stated that this reasoning would go against the

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(13th ed. 1997) (stating that overbroad and vague statutes result in facial invalidation). This sort of attempt to only invalidate part of a statute or to construe a statute so that it does pass constitutional muster is commonplace when dealing with the First Amendment. *See id.* at 1334 (stating that a narrowing construction of an overbroad regulation can prevent facial invalidation).

115. *Springer-Ertl*, ¶ 31, 610 N.W.2d at 777.

116. Specific intent is "[t]he intent to accomplish the precise criminal act that one is later charged with" or the specific act prohibited by law. BLACK'S LAW DICTIONARY 814 (7th ed. 1999).

117. *Springer-Ertl*, ¶¶ 30-31, 610 N.W.2d at 777. The South Dakota Supreme Court requires specific intent to influence a juror, meaning that the defendant must know that he or she is communicating with a juror with the intent to influence that juror. *Id.* ¶ 30.

118. *See* State v. Poss, 298 N.W.2d 80, 83 (S.D. 1980). "General intent means the intent to do that which the law prohibits. . . ." *Id.* There is no need for the individual to have intended the actual result that occurred. *Id.*

119. *Springer-Ertl* ¶ 31, 610 N.W.2d at 777. The court stated that it did not matter whether jurors or prospective jurors would be present because the speech would not be designed to influence jurors, only to inform the public. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 777-78. The United States Supreme Court considers the charge in its entirety when determining whether jury instructions are sufficient. United States v. Jackson, 607 F.2d 1219, 1221-22 (8th Cir. 1979) (citing United States v. Cartano, 534 F.2d 788, 793 (8th Cir. 1976)). A court is not required to give an instruction requested by counsel. *Id.* at 1221 (citing United States v. Nance, 502 F.2d 615, 619-20 (8th Cir. 1974)). Furthermore, if the instructions given by the court contain the requested instruction in substance, the court need not give the proposed "extra" instruction. *Id.* A trial judge may also refuse to give an instruction if it gives undue emphasis to the proponent's theory of the case rather than being a simple statement of the appropriate law for the issue and facts of the case. United States v. Jackson, 72 F.3d 1370, 1379 (9th Cir. 1995) (citing United States v. Goland, 959 F.2d 1449, 1453-54 (9th Cir. 1992)). South Dakota considers jury instructions sufficient if the instructions, when considered as a whole, correctly state the law so as to inform the jury. *Poss*, 298 N.W.2d at 84 (citing State v. Westphal, 273 N.W.2d 155 (S.D. 1978)). Additionally, "[a] trial court is not required to instruct on matters that find no support in the evidence." State v. Kafka, 264 N.W.2d 702, 703 (S.D. 1978).

123. *Springer-Ertl*, ¶ 27, 610 N.W.2d at 776.

narrow construction of the statute, so Debra was entitled to her jury instruction to correct any misunderstanding.[124]

The court also stated that there would be no violation of the statute just because a prospective juror was a part of the public that the speech was directed to.[125] Ultimately, the court affirmed the trial court's grant of a new trial along with a jury instruction delineating between the freedom of speech and the crime of jury tampering.[126]

B. JUSTICE SABERS' DISSENT

Justice Sabers agreed with the majority that specific intent was required in order for one to be guilty of this particular crime.[127] Accordingly, Justice Sabers saw no reason for a discussion of First Amendment issues.[128] However, Justice Sabers did not elaborate on why a requirement of specific intent necessarily negated the need for a discussion on the First Amendment.[129]

Justice Sabers did not agree that Debra was entitled to her requested jury instruction because "the First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out her illegal purpose."[130] Justice Sabers went on in the opinion to determine that the statute was content-neutral and narrowly tailored to prevent criminal behavior.[131] Justice Sabers reasoned that the statute was content-neutral because Debra's intent to influence jurors was at issue, and the statute prohibits using any information to that end, regardless of the content of the information.[132] The statute was narrowly tailored, Justice Sabers said, because only speech that attempted to influence a jury was prohibited.[133]

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124. *Id.* ¶¶ 27-31, 610 N.W.2d at 776-77.

125. *Id.*

126. *Id.* ¶ 31, 610 N.W.2d at 777-78.

127. *Id.* ¶ 40, 610 N.W.2d at 778-79 (Sabers, J., dissenting).

128. *Id.* ¶¶ 41-42, 610 N.W.2d at 779.

129. *Id.* ¶¶ 40-42, 610 N.W.2d at 778-79.

130. *Id.* ¶ 42, 610 N.W.2d at 779 (quoting United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982)).

131. *Id.* ¶ 45, 610 N.W.2d at 780.

132. *Id.* ¶ 40, 610 N.W.2d at 778-79. A court would likely find that this statute was viewpoint-neutral, not content-neutral because while it does address the impact of the content of the communication, it does not outlaw only communications to jurors by the defense or by the prosecution; they are treated the same with respect to the statute. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (stating that the statute was content-based because it outlawed a whole category of speech, that which tended to bring a foreign government into disrepute).

133. State v. Springer-Ertl, 2000 SD 56, ¶¶ 41-42, 610 N.W.2d 768, 779. Justice Sabers, in classifying the statute that way, was incorporating the First Amendment rationale although Justice Sabers stated earlier that the First Amendment was not in issue. *Id.*

Justice Sabers cited an Alaska case, *Turney*, in which the Alaska Supreme Court found a man guilty of jury tampering for prompting jurors to call a hotline to hear information about a jury's veto power.[134] Justice Sabers stated that the present case was indistinguishable from the Alaska case because the defendant in *Turney*, just like Debra in the present case, intended to influence jurors.[135]

C. SUMMARY OF CASE HOLDING

The court, in affirming the grant of a new trial to Debra, did not find that she lacked the specific intent to influence jurors; it simply agreed with the trial court that Debra was entitled to a jury instruction on the First Amendment.[136] The jury may find specific intent present even after hearing the new jury instruction, in which case, Debra will likely be found guilty. It seems that the majority and the dissent agreed on the prerequisite for the conviction—specific intent—but disagreed on procedure; the majority decided to send the case back for a trial, but the dissent would have overruled the trial court and reinstated the jury verdict.[137]

IV. IMPACT

Since the South Dakota Supreme Court did not declare the jury tampering statute unconstitutional, the State Legislature did not have to rewrite it in order to make it constitutional.[138] The court narrowly construed the statute to include the requirement of specific intent to influence a juror.[139] The impact upon South Dakota prosecutors in the future is obvious; they will have to prove specific intent in order to convict someone of jury tampering.[140] The impact on South Dakota judges is that, after this case, they must instruct the jury on the distinction between First Amendment protected speech and speech which is intended to influence a juror.[141] Although the prosecution does not plan to go

134. Turney v. State, 936 P.2d 533, 536-38 (Alaska 1997).

135. *Springer-Ertl*, ¶ 48, 610 N.W.2d at 781 n.10 (agreeing with the Alaska court's rationale in *Turney*). Justice Sabers found the cases indistinguishable even though Debra's information was in the form of a poster, *see id.*, and Turney's was in the form of oral communication with jurors, *see Turney*, 936 P.2d at 536-37.

136. *Springer-Ertl*, ¶ 31, 610 N.W.2d at 777-78.

137. *Id.* ¶¶ 31, 49, 610 N.W.2d at 777-78, 782.

138. S.D. CODIFIED LAWS § 22-11-16 (Michie 1998).

139. *Springer-Ertl*, ¶ 29, 610 N.W.2d at 777.

140. *See id.* ¶¶ 29-31 (construing the jury tampering statute to require specific intent to influence a juror).

141. *Id.* ¶ 31, 610 N.W.2d at 777-78.

through with a new trial in Debra's case,[142] the jury could have found specific intent present even after hearing the new jury instruction. In that case, Debra would have likely been found guilty.

At this time, only the Alaska Supreme Court has also construed its jury tampering statute to require specific intent and knowledge on the part of the defendant.[143] The South Dakota Supreme Court cited that case and seemed to agree with the logic and holding, even though the court distinguished it from the present case.[144]

North Dakota currently has a statute prohibiting jury tampering.[145] North Dakota's statute differs from South Dakota's in two substantial ways; the first difference is that South Dakota's statute covers both oral communication and written communication.[146] North Dakota's statute does not include written communications, so it appears that Debra could have hung her posters in North Dakota and not been subject to the plain meaning of the statute.[147] The second difference is that North Dakota's statute includes the language "with intent to influence."[148] It seems that there is no need for a court in North Dakota to construe the statute as requiring specific intent because this is already present in the statute.[149]

Thus, it seems that even if North Dakota had occasion to adopt the reasoning of the South Dakota Supreme Court, one impact would be to require trial judges to include another jury instruction.[150] This instruction would explain to the jury the types of speech protected by the First Amendment and that speech specifically used to influence a juror is not protected, according to the South Dakota Supreme Court.[151]

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142. Letter from Craig M. Eichstadt, South Dakota Deputy Attorney General, to author (Sept. 29, 2000) (on file with the author).

143. *See* Turney v. State, 936 P.2d 533, 540-41 (Alaska 1997) (agreeing with the knowledge requirement proposed by the prosecution and stating that specific intent was required).

144. *Springer-Ertl*, 610 N.W.2d at 778 n.4.

145. N.D. CENT. CODE § 12.1-09-04 (1997). The statute states:

> 1. A person is guilty of a class A misdemeanor if, with intent to influence the official action of another as juror, he communicates with him orally or by means of a sound broadcasting or transmitting device, other than as part of the proceedings in a case, or harasses or alarms him. Conduct directed against the juror's spouse or other relative residing in the same household with the juror shall be deemed conduct directed against the juror.
>
> 2. In this section, "juror" means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror, and any referee, arbitrator, umpire, or assessor authorized by law to hear and determine the controversy.

Id.

146. S.D. CODIFIED LAWS § 22-11-16 (Michie 1998).

147. N.D. CENT. CODE § 12.1-09-04.

148. *Id.*

149. *Id.*

150. *See* State v. Springer-Ertl, 2000 SD 56, ¶ 31, 610 N.W.2d 768, 777-78 (stating that, on remand with jury instruction, the question for the jury to answer was whether Debra knowingly targeted jurors with specific intent to influence them).

151. *Id.*

Another important limitation on North Dakota would be that the courts would need to satisfy the clear and present danger test applied by the South Dakota Supreme Court.[152] North Dakota courts also could not construe their jury tampering statute so broadly that a person could be held in violation of it simply because a prospective juror was a part of the public the speech was directed to.[153]

V. CONCLUSION

The South Dakota Supreme Court held that the hanging of posters regarding a pending case in a town approaches speech fully protected by the First Amendment.[154] The court stated that the case presented a conflict between the fundamental right to free expression and the fundamental right to impartial justice.[155] The court ultimately found that there was not a clear and present danger of actual prejudice to the fairness of the proceeding or an imminent threat thereto.[156] Additionally, the court stated that specific intent is necessary for a person to be guilty of jury tampering.[157] The South Dakota Supreme Court also held that a person tried for jury tampering is entitled to a jury instruction distinguishing between the crime of attempted jury tampering and the right to freedom of speech.[158]

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152. *See id.* ¶ 23, 610 N.W.2d at 775 (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1069 (1991)) (stating that regulation of public speech during pending court cases is justified by a clear and present danger of threat of serious evil or an actual prejudice to the fairness of the proceeding).

153. *Id.* ¶¶ 27-30, 610 N.W.2d at 776-77.

154. *Id.* ¶ 11, 610 N.W.2d at 771.

155. *Id.* ¶ 16, 610 N.W.2d at 773.

156. *Id.* ¶ 25, 610 N.W.2d at 775.

157. *Id.* ¶ 30, 610 N.W.2d at 777.

158. *Id.* ¶ 31, 610 N.W.2d at 777-78.

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