

Capitol Capsule



MIRS Capitol Capsule, Wednesday, August 16, 2023

QUOTE OF THE DAY

"... Governor Whitmer didn't testify at Fox's trial and provided no affirmative evidence that she didn't consent to the plan."

-- Appellate attorney Steven S. NOLDER, who represents convicted Whitmer kidnapping ringleader Adam FOX. He's making the case that Whitmer was part of a larger government plot to entrap his client and others. His evidence is that she never took the stand and said she didn't consent to it. Because of this and other factors, he believes Fox should receive a new trial.

- 📄 [Fox's Attorney Questions Whitmer Role In Her Own Kidnapping Plot](#)
- 📄 [Lawmakers Exempted From Capitol Gun Ban](#)
- 📄 [Need A Job? About 500,000 Cybersecurity Positions Are Open](#)
- 📄 [Clerks Anxious Over Presidential Primary Uncertainty](#)
- 📄 [Experts Frown On 'Zuckerbucks,' Smile On Multi-State Voter Check](#)
- 📄 [5 Data Privacy Reforms Making Headlines In State Legislatures](#)
- 📄 [Political Attitudes Unchanged In Wake Of COVID-19](#)
- 📄 [Pence Tells Legislators: 'I Had No Right To Overturn The Election'](#)
- 📄 [Spartan Stadium Is East Lansing's Newest Bar \(For 4 Games Anyway\)](#)
- 📄 [Urbanowski New President Of Pride At Work Michigan](#)
- 📄 [Whitmer Gives Keynote Speech At U.P. Building Trades Camp](#)
- 📄 [Karamo Fundraises Off Muskegon Voter Registration Probe](#)
- 📄 [Bits And Tidbits](#)
- 📄 [On This Day In Michigan History](#)

Fox's Attorney Questions Whitmer Role In Her Own Kidnapping Plot

Two of the men convicted of plotting to kidnap and kill Gov. **Gretchen WHITMER** say their convictions should be overturned because the evidence fails to prove Whitmer wasn't part of a government plot to take the men down.

Cleveland, Ohio-based attorney Timothy F. **SWEENEY**, who represents Delaware truck driver **Barry CROFT Jr.** said in an appellate brief Wednesday that the government's own evidence shows that Whitmer "was involved with the 'kidnapping' hoax and, at least through her agents, cooperated with its planning, execution and performance."

Columbus, Ohio-based appellate attorney Steven S. **NOLDER**, who represents convicted ringleader **Adam FOX**, echoed that sentiment in his court filing, writing: "An essential element in every kidnapping case is the victim's lack of consent.

"... Governor Whitmer didn't testify at Fox's trial and provided no affirmative evidence that she didn't consent to the plan," he added. "In fact, the day after the arrests, Governor Whitmer told the media she knew all about the FBI's operation and received regular updates for months . . . This indicated she knew of the plan and casually went along with it knowing the FBI had penetrated the militia groups."

Former U.S. Attorney Matthew **SCHNEIDER**, who now works at Honigman, called the defense's argument "ridiculous."

"There are genuine legal issues on appeal here, such as the judge not allowing the defense to cross examine the government witnesses about their plea agreements, and whether the 'rogue' juror was properly allowed to serve," Schneider said. "Arguing the Governor went along with this plot and that amounts to insufficient proof is a dead loser argument."

East Lansing attorney Mike **NICHOLS** would not opine on whether he believed the defense's argument had merit, but noted that he understands the appellate attorney "simply attacking all the elements" of a crime he can.

A federal grand jury indicted Fox and Croft along with four others on a charge of conspiring to kidnap Whitmer. Fox and Croft were also indicted on a charge of conspiring to use a weapon of mass destruction.

Two of the men pleaded guilty, and a jury acquitted Daniel **HARRIS** and Brandon **CASERTA** in April 2022, but could not reach a verdict in Fox or Croft's cases. The following August, a second jury convicted both Fox and Croft as charged and they were subsequently sentenced to prison.

Both men are appealing their convictions to the U.S. Sixth Circuit Court of Appeals, also arguing U.S. District Court Judge Robert **JONKER** erred when he allowed a rogue juror to continue to serve on the jury after Croft's trial attorney noted he received a tip about potential jury misconduct.

Few details were released about the juror at trial because Jonker sealed the filings, but Nolder and Sweeney noted the juror became the jury foreman. Nolder also noted the juror was distinguishable because his father drove him to and from the courthouse each day.

According to the appellate filings, the juror allegedly expressed bias by telling a co-worker that he wanted to "hang" the defendants.

Croft's and Fox's trial attorneys wanted to question the entire jury, but Jonker wouldn't allow it, instead questioning the juror in private before announcing the juror would remain.

Sweeney's filing indicates that Croft's trial attorney sought a new trial and presented an investigator's affidavit with "additional evidence" to support the claim of misconduct, including a second co-worker who heard the juror's comment, but Jonker denied the request.

Nolder also argues that Jonker's restriction on the defense's cross-examination of co-conspirator Kaleb **FRANKS**, who pleaded guilty and was sentenced to prison, violated Fox's right to confront an accuser and that he was denied a right to present a defense when the trial court did not allow the informants' communications to their FBI handlers (See "[Franks Gets 4 Years In Prison In Whitmer Kidnap Plot](#)," 10/6/22).

At points in the second trial, Jonker warned the prosecution and defense to "start focusing on what the important issues are" and he warned the defense that he would consider time limits because it was "getting, in my view, ridiculous" how long questioning took.

When Franks was set to testify, Jonker told both sides he was implementing the "Bertelsman rule," which references Kentucky's U.S. Senior Judge William **BERTELSMAN**'s time limits on cross-examination imposed in *United States v. Reaves*. He also gave the attorneys a countdown of how much time was left for questions.

"No explanation was provided to the jury as to the meaning of the 'Bertelsman Rule,'" Nolder said. "No explanation was given as to why the rule applied to Franks. No time limits were set on the government."

Nolder said it was "critical" to Fox's defense to show the "complete and incessant communications" between the informants, including Dan "Big Dan" **CHAPPEL** and the FBI handlers. He noted that Chappel and an FBI agent exchanged 3,236 messages between March 16, 2020, and Oct. 8, 2020 – many of which "goaded Chappel into action" and "offered suggestions to move Fox beyond rhetoric into prosecutable actions."

However, Jonker ruled the messages weren't admissible because it would result in a "trial by hearsay."