

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**(On appeal from the Michigan Court of Appeals)**

**PEOPLE OF THE STATE OF MICHIGAN,**

**Plaintiff/Appellee**

**v.**

**S.Ct. No. 138031**

**C.App. No. 276959**

**C.Ct.No. 05-1254-FH**

**GEORGE EVAN FEEZEL,**

**Defendant/Appellant**

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**DEFENDANT GEORGE EVAN FEEZEL'S  
BRIEF ON APPEAL**

**\*\*\*ORAL ARGUMENT REQUESTED\*\*\***

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## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCR 7.301(A)(2). On May 7, 2009, this Court granted leave to appeal from the order and opinion of the Michigan Court of Appeals, issued on November 13, 2008. The Court of Appeals, in a 2-1 decision, affirmed Defendant's convictions for operating a motor vehicle with the presence of a controlled substance in his body causing death, in violation of MCL 257.625(4) and leaving the scene of an accident resulting in death, in violation of MCL 257.617(3). (November 13, 2008, Court of Appeals Opinion and Order, Appendix 4a-21a)

The Court of Appeals had jurisdiction pursuant to MCR 7.203(A)(1) to hear Defendant's Appeal of Right from convictions following jury trial. The judgment of sentence entered on March 7, 2007. Defendant Feezel, through counsel, timely filed his Claim of Appeal on March 19, 2007. A trial court motion for judgment of acquittal or new trial was denied on September 12, 2007. Briefs were timely filed by the parties and the Court of Appeals issued its opinion and order on November 11, 2008.

On January 8, 2009, Defendant Feezel, through counsel, filed his application for leave to appeal in this Court. The State of Michigan responded on February 12, 2009. This Court granted the application on May 27, 2009, as to all issues contained in the brief.

## QUESTIONS PRESENTED

- I. WHETHER DEFENDANT FEEZEL WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT REFUSED TO ALLOW HIM TO PRESENT EVIDENCE THAT THE VICTIM'S HIGH LEVEL OF INTOXICATION, COMBINED WITH HIS ACT OF WALKING IN THE ROAD DURING DANGEROUS CONDITIONS, WAS A SUPERCEDING CAUSE OF THE ACCIDENT?

Defendant Feezel answers, "Yes."  
The People answer, "No."

- II. WHETHER DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE THE JURY REACHED CONTRADICTORY VERDICTS AS THE RESULT OF ERRONEOUS JURY INSTRUCTIONS ON THE ISSUE OF PROXIMATE CAUSE?

Defendant Feezel answers, "Yes."  
The People answer, "No."

- III. WHETHER DEFENSE COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE HE ALLOWED THE TRIAL COURT TO GIVE MISLEADING AND ERRONEOUS JURY INSTRUCTIONS ON THE ISSUE OF PROXIMATE CAUSE?

Defendant Feezel answers, "Yes."  
The People answer, "No."

- IV. WHETHER DEFENDANT'S CONVICTION FOR OPERATING A MOTOR VEHICLE AND CAUSING DEATH WITH CARBOXY THC IN HIS BLOOD VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

Defendant Feezel answers, "Yes."  
The People answer, "No."

## STATEMENT OF FACTS

1. Nature of Action:

On July 21, 2005, Defendant George Evan Feezel was driving a motor vehicle in Washtenaw County when he struck and killed a pedestrian, Kevin Bass. The Washtenaw County Prosecutor's office initially charged Mr. Feezel in a five-count Complaint alleging: Count I, Operating while intoxicated causing death, in violation of MCL 257.625(4)(a); Count II, Leaving the scene of an accident when at fault causing death, in violation of MCL 257.617(3); Count III, Operating while intoxicated, in violation of MCL 257.625(1); Count IV, Driving while license suspended, second offense; and, Count V, Leaving the scene of an accident resulting in death, in violation of MCL 257.617(2).

After the case was bound over for trial, the trial court allowed the prosecutor to amend the information to add two more counts: Count VI, Operating with a schedule 1 controlled substance in his body causing death, MCL 257.625(4); and Count VII, Operating with a schedule 1 controlled substance in his body, in violation of MCL 257.625(8). (Amended Information, Appendix 2a-3a). Defendant Feezel faced enhanced sentencing as a habitual offender, third.

The matter was tried to a jury, which returned a verdict of guilty on Counts II, III, and VI. Prior to trial, Defendant Feezel entered a plea to driving while license suspended. On March 7, 2007, the trial court sentenced Mr. Feezel to serve concurrent terms of 84 months to 30 years on the two felony convictions. (Sentencing Transcript, March 7, 2006, page 44-45, Appendix 127a-128a).

Through new counsel, Defendant Feezel filed a motion for acquittal or new trial, raising the issues presented below in Argument II. On September 12, 2007, the trial court denied that motion.

2. Pretrial Motions

Prior to trial, the prosecution moved to amend the felony information to add two additional counts—operating with the presence of a schedule 1 controlled substance causing death and the lesser charge of operating with the presence of a schedule 1 controlled substance. The amendment was based on this Court’s ruling in *People v Derror*, 475 Mich 316, 715 NW2d 822 (2006), which held that 11-carboxy-THC was a schedule 1 controlled substance. Over the Defendant’s objections on constitutional grounds, as discussed in Argument IV below, the trial court permitted the amendment. (Motion Hearing, July 19, 2006, Appendix 23a).

Prior to trial, the prosecutor moved to preclude evidence of the victim’s high level of intoxication. The victim had a blood alcohol level of 0.28. The prosecution said the only relevant issue was the victim’s presence in the street, not why he was there. (Motion Hearing, November 27, 2006, page 11, Appendix 24a). The defense argued the intoxication level went to the issue of an intervening cause, i.e. gross negligence of the victim. (Id., page 14, Appendix 24a). The trial court granted the motion, holding the state of mind of the victim was irrelevant to causation. (Id., page 19, Appendix 25a) (See Argument I).

3. Trial Testimony

Jeff Hankamp of the Washtenaw County Sheriff’s Department testified he was working the overnight shift on July 21, 2005. With his partner, he responded to a call just

before 2 a.m. regarding a body on Packard Road. (Trial Transcript, Volume I, January 16, 2007, page 184, Appendix 26a) At the scene, they found a dead body in the road and no one else present, he said. (Id., 186, Appendix 26a). Based on debris found at the scene, Hankamp said they issued a BOL for a white motor vehicle. (Id., 194, Appendix 27a).

Hankamp testified he was setting flares on the road when he was approached by a man who said his son was involved in the accident. Hankamp said the man was on his cell phone and told his son several times to return to the accident scene. (Id., 194-195, Appendix 27a). Hankamp said Defendant Feezel came to the scene from Clubview Road, not far away, got out of his white Land Rover and provided identification. (Id., 195, Appendix 27a). Hankamp said Defendant Feezel smelled of intoxicants and was placed in custody in the back of a patrol car. (Id., 201-202, Appendix 28a). A video tape from the patrol car was played to the jury. There is no transcript of that tape.

Thomas Hannah of Huron Valley Ambulance, testified that when he arrived at the scene he found a man down in the road and it was raining very hard. He said the man was declared dead at the scene due to the extensive injuries. A heart monitor was used to verify the lack of a heartbeat, he said. (Id., 208-210, Appendix 29a).

Jordan Griffin testified she was driving from Ann Arbor to Ypsilanti on Packard Road to pick up a friend at about 2 a.m. on July 21, 2005. She said she saw the body in the road and called 911 then continued eastbound on Packard Road. Griffin said no one was near the body. She said the body was face down. She said the road was dangerous because of the lack of lighting and the heavy rain. (Id., 213-221, Appendix 30a-33a).

Julie Fantone testified she was on Packard Road going to her boyfriend's home in Ypsilanti when she saw a man lying face down in the road. She said she was nervous and

no one else was present, so she called 911 but did not stop. She said the rain prevented her from seeing the body until she was two or three car lengths away. (Id., 223-228, Appendix 34a-35a).

George McAllister, Washtenaw County Sheriff's Department, testified that he searched digital 911 recordings on the night of the accident and found three separate calls reporting the body on Packard Road. (Id., 230-239, Appendix 35a-37a).

Lisa Anderson said she was staying with her father at 250 North Clubview, Ypsilanti. She identified the property on a map and showed its close proximity to the accident scene. (Id., 242-245, Appendix 38a-39a). She said her dog woke her by barking at something outside. When she looked outside, she saw a white SUV on the other side of the street. She said she was worried someone might be trying to break in, so she turned on the porch lights. At that point, she noticed the flashing emergency lights at the intersection of Clubview and Packard. (Id., 249, Appendix 40a).

Russell Anderson, Lisa's father, testified that when the dog barked he looked out his window and saw a man standing 30 to 40 feet behind a white SUV. (Id., 258, Appendix 41a). Anderson said when the porch lights came on, the man got in the SUV and drove away. Later, Anderson said he went to the scene of the accident and saw the same white SUV. (Id., 260, Appendix 42a). He said the man did not look intoxicated. (Id., 264, Appendix 43a).

Mike Mahalick, Washtenaw County Sheriff's Department, testified that he spoke to Mr. Anderson at the scene. He also said that it was raining heavily. (Id., 270, Appendix 44a).

The parties agreed to read the preliminary examination testimony of Shawn Place to the jury. Mr. Place testified he served Defendant Feezel at the Sidetrack Tavern in Ypsilanti between 10:15 p.m. on July 20 and 1:30 a.m. on July 21, 2005. (Trial Transcript, Volume II, January 17, 2007, pages 13-15, Appendix 45a-46a). He said Mr. Feezel had two 25 oz beers and the woman with him had three drinks. (Id., 17, Appendix 46a). On cross examination, Mr. Place said that during his employment he was trained to spot intoxicated people. He testified he would not have served an intoxicated person and would have called a taxi cab for the patron if necessary. (Id., 26, Appendix 47a). Place said Mr. Feezel did not appear intoxicated and did not smell of marijuana. (Id., 31, 33, Appendix 48a).

Stanley Basktek testified that he was working at Ashley's, a restaurant and bar, on July 20, 2005. He said he remembered serving Mr. Feezel at around 5 p.m. and later, seeing him with an older man at the restaurant. He said Feezel was not intoxicated when he served him and did not know his condition later in the evening. He also said he did not smell any marijuana on Mr. Feezel. (Id., 50, 56, 58, Appendix 49a, 50a).

Mike Williams, Washtenaw County Sheriff's Department, testified that he assisted Deputy McMullen in investigating the accident. (Id., 61-62, Appendix 51a). He said he arrived at 2:30-2:45 a.m. and used a tape measure to mark and identify objects found at the scene. He testified there was a sidewalk beside Packard Road and the only cross walks were located at Golfside Road and at Hewitt Road. (Id., 84, 97, Appendix 52a, 53a). Williams testified there were no skid marks on the wet road. He agreed that it was abnormal for a person to be walking in the road where the accident occurred in the dark and heavy rain. (Id., 98, Appendix 53a).

At a bench conference, the trial court said Deputy Williams could not be asked questions regarding an unbroken bottle of liquor found at the scene. (Id., 103-105, Appendix 54a). However, outside presence of the jury, the trial court listened to proffered testimony regarding the liquor bottle. Trial counsel sought admission of the contents of the bottle to show intoxication by the victim. However, consistent with his prior ruling that victim's intoxication was irrelevant, the court decided to allow only admission of the fact that the bottle was unbroken because it was relevant to the speed of the vehicle. (Id., 103-125, Appendix 54a-59a).

Stephanie Meyers testified that on July 21, 2005, she was a passenger in a car with Nicole Norman driving. She said Ms. Norman had been with Mr. Feezel and they met at Nicole's house at about 1:30 to 2:00 a.m. Ms. Meyers said she left the house located in Ypsilanti with Ms. Norman. She said they passed Mr. Feezel, who was at a stop sign with his interior lights on. (Id., 132-139, Appendix 60a-62a). Ms. Meyers said it began to rain heavily after they got onto Packard Road. (Id., 140, Appendix 62a).

Meyers testified that while on Packard, they passed a man in a white t-shirt who was walking in the road. She said she did not see him until they were right alongside him. (Id., 148, Appendix 63a). She said she heard the sound of him being hit and looked back and saw Mr. Feezel's vehicle with the hood in the air. (Id., 141, Appendix 62a). She said Ms. Norman turned onto Golfside Road and stopped at a gas station on Washtenaw Avenue. She said she did not call 911. (Id., 141-142, Appendix 62a).

Ms. Meyers said there were no streetlights where the man was walking. She said Nicole Norman made a comment that the man was going to get killed as they drove by

him. (Id., 150, 156, Appendix 63a-64a). She also said the man had no reaction as they passed by. (Id., 158, Appendix 64a).

Bader Cassin, the Washtenaw County Medical Examiner, conducted the autopsy of Kevin Bass. He said Bass would have died within minutes after being struck. Cassin said Bass had no chance of survival, even if doctors and equipment were immediately at the scene. (Id., 170-179, Appendix 65a-68a). He said the injuries were consistent with a vehicle going 30 to 40 miles per hour. (Id., 176, Appendix 67a).

Nicole Norman testified she had known Defendant Feezel for about four years and had dated him in 2004. (Trial Transcript, Volume III January 18, 2007, page 6, Appendix 69a). She identified her cell phone number. (Id., 7, Appendix 69a). She said Mr. Feezel called her on July 20, 2007, and picked her up at her house at about 11 p.m. in a white SUV and took her to the Sidetrack Tavern in Ypsilanti. (Id., 8-9, Appendix 70a). Norman testified she had two drinks and Defendant Feezel had a beer and a half. She said he told her he had been at Ashley's earlier. She said she did not notice anything odd about his speech, though she later said it was slightly slurred but not enough to cut him off. (Id., 12, 30, Appendix 71a,75a). Ms. Norman said she had plans to go to a party with Stephanie Meyers and at 1:30 a.m. left the Sidetrack tavern to pick up Meyers. (Id.,13, Appendix 71a).

Ms. Norman said she and Stephanie passed Mr. Feezel, who was at a stop sign on Edison Street with his interior light on. (Id., 14, Appendix 71a). She was not sure if he intended to follow her to the party. (Id., 16, Appendix 72a). Norman said she turned onto Packard Road headed west and just as she came to the top of a hill, she could see a person walking in the left lane, about 50 feet away. (Id., 18, Appendix 72a). She said it

was raining heavily at the time. (Id., 21, Appendix 73a). She said she then turned onto Golfside and went to a gas station and did not see the man struck by the SUV. She denied having a conversation with Stephanie Meyers about an accident. She said at the gas station, she had repeated calls from Defendant Feezel, but did not answer because she did not want him at the party. (Id., 23, Appendix 73a). Norman said she saw the road blocked when she was returning to Ypsilanti at about 4 a.m. (Id., 24, Appendix 74a).

On cross-examination, Ms. Norman said she did not notice any problems with Defendant Feezel's driving and he did not smell of marijuana. (Id., 31, Appendix 75a). She said she had training at her employment at the Washtenaw Country Club in regards to spotting intoxicated patrons. She said Defendant Feezel did not appear intoxicated. (Id., 33-35, Appendix 76a). Norman said it was hard to see anything on Packard Road due to darkness and heavy rain. (Id., 41, Appendix 77a). She remember commenting on the man in the road, telling Meyers he was crazy and she was glad he had not been in her lane. (Id., 44, Appendix 78a). She said if the man had been in her lane, she would not have been able to stop in time. (Id., 45-46, Appendix 78a).

Anne Corrigan, a forensic scientist for the Michigan State Police, testified that she had analyzed Mr. Feezel's blood, which was drawn after the accident. (Id., 60, Appendix 79a). She said she found six nanograms per milliliter of 11-carboxy THC, a metabolite created when the body breaks down marijuana. (Id., 62, Appendix 79a). Corrigan said she also found 0.0958 nanograms per milliliter of THC, which was not previously reported because it was below the state police testing protocol which is set at 0.10 nanograms per milliliter of THC. (Id., 64, Appendix 80a).

Dr. Felix Adatsi, a toxicologist with the Michigan State Police, testified that alcohol would begin impacting a person's reaction time somewhere between .05 and .10 grams per hundred milliliter of blood. (Id., 87, Appendix 81a). He said by using retrograde extrapolation, it was possible to determine a person's BAC at the time of operating a vehicle, as opposed to the time of the blood draw. The parties stipulated that Defendant had the average alcohol dissipation rate of .015 per hour. (Id., 100, Appendix 82a). He said that if Defendant's last drink was at 1:30 a.m., he was still absorbing alcohol, which also had to be considered in his extrapolation formula. In his opinion, Dr. Adatsi believed the Defendant's BAC was 0.091 at time of the accident. (Id., 105, Appendix 83a).

Dr. Adatsi said there was no retrograde extrapolation formula for marijuana. (Id., 126, Appendix 85a). He said THC is short-lived in blood and breaks down fairly quickly into 11-carboxy THC. (Id., 127, Appendix 85a). He said carboxy remains in the blood for zero to 18 hours following moderate use, but THC only remains for zero to seven hours. (Id., 120-122, Appendix 84a). He said 11-carboxy THC, by itself, had no pharmacological effect. (Id., 139, Appendix 86a). At the bench, defense counsel said Defendant did not know at the time of the accident that the presence of 11-carboxy THC in his body while he drove was against the law. The trial court said it had already ruled against the defense on the issue. (Id., 140, Appendix 87a).

Dr. Adatsi said the highest results for THC that he had seen were 57 nanograms, but five was about average. He said 30 nanograms was average for 11-carboxy THC. (Id., 150, Appendix 88a). Dr. Adatsi said the presence of 11-carboxy THC indicates recent use of marijuana. (Id., 153, Appendix 89a).

Jeffrey Harvey, Washtenaw County Sheriff's Department, testified he interviewed Defendant Feezel at about 2:40 a.m. the morning of the accident. (Id., 168, Appendix 90a). He said Feezel told him he had one pint-size beer at the Sidetrack Tavern and had a beer earlier with his father (Id., 169, 172, Appendix 90a, 91a). Harvey said the Defendant told him that after leaving a friend's house, he went westbound on Packard Road, at about 10 mph under the speed limit due to the heavy rain. Harvey said Feezel told him that he hit the victim as he moved into the inside westbound lane to pass his friend's car. (Id., 171, Appendix 90a).

Harvey testified that Feezel said he was in shock and did not know what to do, so he pulled over and called his brother who gave the phone to his father. Feezel said his father told him to check on the victim. When he did, two guys also pulled up in a pick up truck and they called 9-1-1. (Id., 173, Appendix 91a).

Harvey testified that Feezel's eyes were bloodshot and watery and he smelled of intoxicants.(Id., 174, Appendix 91a). Harvey said he started to read Feezel his chemical test rights, but Feezel interrupted and said he did not want to proceed. (Id., 175, Appendix 91a). Harvey said he did not smell marijuana on Feezel. (Id., 183, Appendix 92a).

Robert Losey, Washtenaw County Sheriff's Department, testified to cell phone records which showed calls from Defendant's cell phone to his brother's phone and to Nicole Norman's phone after the accident. Losey said there were no calls on the phone records to police, ambulance or emergency numbers. (Id., 199, Appendix 93a).

Douglas McMullen, Washtenaw County Sheriff's Department, testified that he obtained a search warrant for Defendant Feezel's blood and went to the hospital with him for the blood draw. (Id., 227, Appendix 94a). He said he went to the scene around 6 a.m.

to gather data for an accident reconstruction. (Id., 230, Appendix 95a). He determined the speed of the car to be between 46 mph and 55 mph. (Id., 243, Appendix 96a). McMullen conceded that if the victim was not seen until he was 30 feet from the car, the car could not have stopped unless it was doing 15 mph or less. (Id., 277, Appendix 98a).

The defense called Paul Olson, a retired engineer from the Transportation Research Institution, University of Michigan. (Trial Transcript, Volume IV, January 19, 2007, page 8, Appendix 99a). He said he had researched a human's ability to process visual information at night, including perception and response times. (Id., 10, Appendix 99a). He conducted a study to evaluate the visibility of highway signs in 1991 and 1992. He testified that he placed white signs on rural roads in surprise locations that measured response times compared to the same signs without surprise. He said reaction times were twice as bad when unexpected—240 feet as opposed to 120 feet at 46 mph. (Id., 27-29, Appendix 100a). He said with rain on a windshield those response times would drop even further. (Id., 27-29, Appendix 100a). Those distances were detection distances and did not include coming to a stop. (Id., 37, Appendix 101a).

The defense called accident reconstruction expert, Michael Van Dam. He said based on his calculations, which used a larger drag factor for the slope and wetness of the pavement, the Defendant's car was going between 43 and 48 mph. (Id., 73, 83, Appendix 102a, 104a). He said Defendant could not have stopped his car before hitting the victim unless he was driving 15 mph or less. (Id., 99, Appendix 105a).

Mary Kelly testified that she saw the body in the road. (Id., 119, Appendix 106a). She said the man was clearly dead, his lumbar area was flattened and his intestines exposed. She said a boy came out of nowhere after she stopped her car. He knocked on

her window and asked her to call 9-1-1, she said, then he went back to the body and tried to find a pulse. (Id., 123, Appendix 107a). She identified the defendant as the person that asked her to call 9-1-1. (Id., 124, Appendix 107a). The parties stipulated that Ms. Kelley was the third call to 9-1-1 on the morning of the accident. (Id., 142, Appendix 108a).

The trial court denied Defendant's request for a negligent homicide instruction. (Id., 202, Appendix 119a). The following charges were sent to the jury: 1) Count I, Operating while intoxicated or impaired causing death, or a lesser charge of Count III, Operating while intoxicated or impaired; 2) Count II, Failure to stop at the scene of an accident when at fault resulting in death, or the lesser charge of Count IV, failure to stop at an accident resulting in death; and, 3) Count V, operating a motor vehicle with the presence of a schedule 1 controlled substance causing death, or the lesser charge of Count VI, operating a motor vehicle with the presence of a schedule 1 controlled substance. (Id., 215-233, Appendix 121a).

4. Verdict and sentencing:

Following deliberations, the jury found Defendant guilty of Count III, Operating while intoxicated, Count II, Failing to stop at the scene of an accident when at fault resulting in death, and Count V, Operating with the presence of a schedule 1 controlled substance causing death. (Trial Transcript V, January 23, 2007, page 4, Appendix 126a).

5. Motion for Acquittal or New Trial

Following sentence, Defendant through current counsel, filed a motion raising the arguments set out in Argument II below. For the reasons stated on the record at a hearing on September 12, 2007, the motion was denied.

6. Proceedings in the Court of Appeals

On appeal of right, Defendant Feezel raised four arguments. (These arguments are raised again before this Court.)

In his first argument, Defendant argued the trial court denied him the opportunity to present a defense when it excluded evidence of the victim's high level of intoxication at the time of his death. Defendant argued the victim's intoxication was an intervening cause of the accident and relevant to the issue of proximate cause. The majority on the Court of Appeals disagreed. It said the intoxication of the victim did not "impact the foreseeability of an intoxicated driver striking a pedestrian in the road." (Court of Appeals Majority Opinion, page 11, Appendix 14a). In dissent, Judge Saad said the majority opinion was logically flawed because it negated the possibility that a pedestrian could ever be an intervening cause of an accident, no matter how grossly negligent his or her conduct. (Saad Opinion, page 4, Appendix 19a). Judge Saad said the trial court's exclusion of the evidence denied the jury the opportunity to consider relevant evidence regarding the victim's state of mind and therefore "could not properly consider the question of proximate cause." (Id.).

Defendant Feezel also argued the trial court had failed to properly instruct the jury on proximate cause in connection with both of his felony convictions. The majority on the Court of Appeals agreed the jury did not receive a proper instruction on the operating with the presence of a controlled substance charge, but found the trial court's error harmless because Defendant had not presented evidence of an intervening cause. Judge Saad would have vacated the conviction because the trial court's instruction was insufficient as a matter of law and then compounded by the exclusion of evidence of the victim's intoxication, which the jury should have been allowed to consider as an

intervening cause. However, all three judges found no error in failing to instruct on proximate cause in connection with the leaving the scene of an accident resulting in death. The panel held that proximate cause is not an element of the offense. (Majority Opinion, page 4, Appendix 7a).

Defendant Feezel also argued that his trial counsel was ineffective for failing to object to the erroneous jury instructions on proximate cause. The majority denied relief asserting that Defendant was unable to show prejudice as a result of his trial counsel's performance. (Majority Opinion, 9, Appendix 12a). Judge Saad did not address the issue directly, but would have vacated the conviction under MCL 257.625(4) on other grounds.

Finally, Defendant Feezel also argued his conviction for operating a motor vehicle and causing death with the metabolite carboxy-thc in his blood violated the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. The majority said it was bound by its prior decision on the identical issues in *People v Derror*, 475 Mich 316, 715 NW2d 822 (2006). (Majority Opinion, page 12, Appendix 15a). In dissent, Judge Saad disagreed with the holding in *Derror*. (Saad Opinion, page 2, note 1, Appendix 17a).

## ARGUMENTS

### I

**DEFENDANT FEEZEL WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT REFUSED TO ALLOW HIM TO PRESENT EVIDENCE THAT THE VICTIM'S HIGH LEVEL OF INTOXICATION, COMBINED WITH HIS ACT OF WALKING IN THE ROAD DURING DANGEROUS CONDITIONS, WAS A SUPERCEDING CAUSE OF THE ACCIDENT**

1. Standard of Review:

This Court reviews for an abuse of discretion a trial court's decision regarding the admission of evidence. *People v Watson*, 245 Mich App 572, 575, 629 NW2d 411 (2001). Where a trial court's evidentiary decision involves preliminary questions of law—such as presented below—the Court conducts a de novo review. *People v Lukity*, 460 Mich. 484, 488, 596 N.W.2d 607 (1999).

2. Argument:

At trial, there was no dispute that the accident took place on a hilly five-lane road at night in an area without lighting during a heavy rainstorm. Nor did the parties dispute that the victim, Kevin Bass, was walking in the road nowhere near a cross-walk or an intersection. It was unquestioned that a sidewalk bordered Packard Road where the accident occurred. The trial court ruled all of these facts were relevant in determining issues of proximate cause. However, the trial court refused to allow Defendant to present evidence that the victim's blood alcohol content was 0.28, a fact that went far to explain why Mr. Bass placed himself in such a highly dangerous position.

Both of Defendant Feezel's felony convictions required proof of causation. MCL 257.617(3) imposes an enhanced sentence when a defendant fails to fulfill the obligations of MCL 257.619 "following an accident caused by" the defendant. *Id.* And, MCL

257.625(4) requires proof that a defendant by “operation of (a) motor vehicle causes the death of another person...” Id.

Proximate cause exists where the victim’s injuries—or the accident for MCL 257.216(3)—are a “direct and natural result” of the Defendant’s actions. *People v Schaefer*, 437 Mich 418; 703 at 436-437. Proximate cause prevents criminal liability from attaching where the result of the defendant’s conduct is viewed as remote or unnatural. Accordingly, it is:

necessary to determine whether there was a intervening cause that superceded the defendant’s conduct such that the causal link between the defendant’s conduct and the victim’s injury was broken. If an intervening cause did indeed supercede the defendant’s act as a legally significant causal factor, then the defendant’s conduct will not be deemed a proximate cause of the victim’s injuries.

*Schaefer*, at 437.

The Defendant’s felony convictions must be vacated because the trial court refused to allow Defendant to present evidence of the victim’s high level of intoxication. As a result, Defendant was not allowed to argue to the jury that the victim was grossly negligent by walking on a road in the dark and pouring rain while blind drunk. Defendant was prevented from arguing that because of the high level of intoxication the victim did not avoid the accident by simply staying out of the travel lanes, which certainly would have been a sober person’s choice. In short, the trial court’s ruling barred Defendant from presenting a valid and common sense defense on the causation elements of 15-year felony charges.

In general, proximate cause is a question of whether a result is a reasonably foreseeable outcome of a person’s conduct. If, however, “the intervening act by the victim or a third party was not reasonably foreseeable—e.g. gross negligence or

intentional misconduct—then generally the causal link is severed and the defendant’s conduct is not regarded as the proximate cause of the victim’s injury or death.” *Schaefer*, at 437-438.

By way of example, in *People v. Large*, 473 Mich. 418, 703 N.W.2d 774 (2005), this Court remanded a case for further examination of proximate cause where a child rode a bike without brakes down a driveway that was partially obstructed by vegetation onto a busy road. *Schaefer, supra*, at 445. The question was whether the act of the child was grossly negligent. If so, Mr. Large would not be criminally liable for death of the child.

Here, the trial court instructed the jury on proximate cause in regard to Count I, the drunk driving causing death charge, of which Defendant was acquitted:<sup>1</sup>

To determine if the Defendant’s operation of the motor vehicle was a proximate cause of the death, ask yourself the following question: Was there an intervening cause that superceded the Defendant’s conduct such that the causal link between the Defendant’s conduct and the victim’s injury was broken. The standard by which to gauge whether an intervening cause supercedes and thus severs the causal link is generally one of reasonable foreseeability. The linchpin in the supervening cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the Defendant’s conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable, that is, gross negligence or intentional misconduct then generally, the causal link is severed and the Defendant’s conduct is not regarded as a proximate cause of the victim’s death.

(Trial Transcript, January 19, 2007, 219-220, Appendix 122a).

This instruction correctly directs the jury to consider the actions of the victim in contributing to the accident. It informs the jury that the victim—through gross negligence or intentional conduct—can sever Defendant’s liability. In fact, the trial court gave a specific instruction regarding the victim being in the road:

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<sup>1</sup> The trial court’s failure to instruct the jury on proximate cause on the remaining felony counts is discussed below in Argument II.

The law prohibits j-walking. . . . There's been some evidence that Kevin Bass was j-walking when the alleged offense took place. You may consider this to the extent that it bears upon the question of whether the Defendant's operation of the motor vehicle was a proximate cause of Kevin Bass's death. That is whether Kevin Bass's action was an intervening cause that superceded the Defendant's conduct such that the casual link between the defendant's conduct and the victim's injury was broken.

(Id., 223-224, Appendix 123a).

Despite telling the jury to consider the victim's acts, the trial court declined to allow Defendant to present evidence of the victim's high level of intoxication—the most critical fact in showing the gross negligence of the victim. When granting the prosecution's motion to bar evidence of the victim's BAC of .286, the trial court said:

*(W)hat is relevant is not the state of mind of the person who is walking in the middle of the road. It is what is the causation relationship between the actions of the defendant and finding a person in the middle of the road? . . . the issue is with regard to whether or not the victim's causation is relevant to the causation analysis and I don't find that.*

(Motion Hearing, November 27, 2006, 19, Appendix 25a)(emphasis added).

Contrary to the trial court's ruling, "the victim's causation" is an integral part of any proximate cause analysis. By instructing on j-walking, the trial court acknowledged that fact. If J-walking shows a lack of due care, which could be considered by the jury for proximate cause purposes, why is the act of j-walking while blind drunk irrelevant? Surely it shows even a higher disregard of due care.

A sober person in the road is not the same thing as an intoxicated person in the road with a BAC more than three times the legal driving limit. Allowing the BAC level into evidence would have allowed Defendant to present evidence regarding the effect of that much alcohol on a person's actions and decision making. Many arguments regarding proximate cause arise from the victim's intoxication. Two are obvious:

First, the defense would have been able to argue that given the lack of street lighting and the blinding density of the storm, a sober person would not have been in the street. And, therefore, a person in the street on the night of the accident was a less foreseeable hazard. Most people would agree that a sober person would have realized that, given the conditions, oncoming traffic would have limited visibility. Therefore, a sober person would exercise more caution and have used the adjacent sidewalk as opposed to walking in the street, or used cross-walks at lighted intersections to cross the street. The victim, however, because of severe intoxication recklessly disregarded his own safety.

Second, the defense would have been able to argue that a sober person in the road would have avoided a moving vehicle, whose headlights were no doubt more visible to the pedestrian than the pedestrian was to the vehicle's driver. While trial testimony centered on a driver's ability to react, the ability of a pedestrian to avoid a collision is equally important. And, if due to a high level of intoxication a pedestrian is physically or mentally unable to avoid the car then the level of intoxication is critically relevant.

Accordingly, the trial court abused its discretion in barring evidence of the victim's intoxication. And, as a result, Defendant Feezel was denied his right to a fair trial under the Sixth and Fourteenth Amendment to the United States Constitution.

### 3. Relief Requested

Defendant Feezel asks this Court to vacate his felony convictions and remand for a new trial.

## II

### **DEFENDANT’S RIGHT TO DUE PROCESS AND A FAIR TRIAL PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION WERE VIOLATED AND DEFENDANT IS ENTITLED TO AN ACQUITTAL OR AT A MINIMUM A NEW TRIAL WHERE THE JURY REACHED CONTRADICTORY VERDICTS AS THE RESULT OF ERRONEOUS JURY INSTRUCTIONS ON THE ISSUE OF PROXIMATE CAUSE**

1. Standard of Review:

Where defendant fails to object to the jury instructions at trial, he waives any error unless relief is necessary to avoid manifest injustice.<sup>2</sup> *People v. Swint*, 225 Mich App 353, 376, 572 N.W.2d 666 (1997). A trial court must instruct the jury concerning the law applicable to the case and to present the case fully and fairly to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v. Mills*, 450 Mich. 61, 80, 537 N.W.2d 909 (1995), mod. 450 Mich. 1212, 539 N.W.2d 504 (1995).

2. Background:

Defendant George Feezel faced multiple felony charges in connection with the July 21, 2005, death of Kevin Bass. Mr. Bass died after being struck by Mr. Feezel’s sports utility vehicle on Packard Road. Evidence showed Defendant Feezel had been drinking prior to the accident and that his blood contained 11-carboxy-THC.<sup>3</sup> Evidence also suggested that Defendant Feezel did not stay at the scene of the accident and fulfill the identification and aid obligations required by MCL 257.619.

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<sup>2</sup> Manifest injustice has never been precisely defined. See *People v Kelly*, 423 Mich 261, 286; 328 NW2d 365 (1985). Suffice to say it means “actual prejudice,” *People v Woods*, 416 Mich 581, 611 (1983), or a “miscarriage of justice.” *People v Ellis*, 62 Mich App 109; 223 NW2d 205 (1975).

<sup>3</sup> For the purposes of this issue only, Defendant concedes carboxy is a schedule 1 controlled substance.

At trial, the defense argued that Kevin Bass was grossly negligent by walking on a dark hilly road during a heavy rainstorm and, therefore, was an intervening cause of the accident. That defense, if accepted by the jury, would have negated the element of proximate cause found in the three felony charges.

By agreement of the parties, (Trial Transcript, Volume IV, January 19, 2007, page 202, Appendix 119a ), the jury was instructed on three felony counts, with lesser included offenses to each:

1. OWI causing death, in violation of MCL 257.625(4), with the lesser included misdemeanor offenses of operating while intoxicated or impaired;
2. Failing to stop at the scene of an accident causing death when at fault, in violation of MCL 257.617(3), with lesser included offense of failing to stop at the scene of an accident causing death, in violation of MCL 257.617(2);
3. Operating a motor vehicle with a schedule 1 controlled substance in his body causing death, MCL 257.625(4); with the lesser included offense of operating with a schedule 1 controlled substance in his body, in violation of MCL 257.625(8).

The trial court and the parties discussed and modified proposed instructions prior to reading the instructions to the jury. (Id., 161-203, Appendix 109a-120a). The Court also provided written copies of the modified instructions to the jury (Id., 231, Appendix 125a).

In those instructions, the trial court set out the elements of each of the principal charges. During the instruction on OWI causing death, the trial court said: “In order to prove that the Defendant’s operation of the motor vehicle caused Kevin Bass’s death, the People must prove beyond a reasonable doubt that the Defendant’s operation of the vehicle was both the factual and proximate cause of Kevin Bass’s death.” (Id., 218, Appendix 121a).

Within the context of the OWI causing death count, the trial court gave a thorough explanation of proximate cause. (Id., 219-220, Appendix 122a). However, during the instruction on the failure to stop at the scene of accident causing death when at fault, the trial court never used the words “proximate cause” nor gave an instruction as to “proximate” cause. Instead, the trial court instructed: “And seventh, the accident was caused by the Defendant.” (Id., 228, Appendix 124a). And, likewise, in the instruction for the operating with a controlled substance causing death, the court never used the words “proximate cause” nor gave an instruction as to “proximate cause.” Instead, the trial court said: “And fifth, that the Defendant’s operation of the vehicle caused the death of Kevin Bass.” (Id., 233, Appendix 125a).

Following a day of deliberations, the jury acquitted Defendant Feezel of OWI causing death, but found him guilty of the lesser included charge of OWI. The jury convicted Defendant of the remaining two felony charges, on which there had been no mention of proximate cause. (Transcript, Volume V, January 23, 2007, page 4, Appendix 126a).

3. Argument:

a. *The trial court failed to instruct on proximate cause*

Failure to instruct jury on an essential element is a violation of due process rights. *Cahoon vs. Rees*, 820 F.2d 784, 786-787 (6th Cir. 1987); *In Re Winship*, US 358, 90 S. Ct. 1068 (1970).

The three principal charges contained a common element—proof beyond a reasonable doubt that Defendant’s operation of the vehicle was a proximate cause of

Kevin Bass's death.<sup>4</sup> But Defendant was only convicted of the two charges in which the court failed to instruct, to any degree, on proximate cause.

As to the alcohol charges, the jury returned a verdict of guilty on the misdemeanor charge of operating while intoxicated. The only meaningful and additional element the prosecutor needed to prove in order to turn the misdemeanor OWI into the felony OWI causing death was the causal element—that operation of the motor vehicle was a proximate cause of the victim's death. The jury rejected the proof on that element and acquitted Defendant of the felony.

If the jury did not believe the prosecutor established proximate cause for Count I, then it is impossible for them to have found proximate cause for counts II and V. Those counts required exactly the same finding on the same facts—operation of the vehicle was the proximate cause of death (or the accident, for the more serious violation of the leaving the scene statute). The incomplete jury instructions on proximate cause provide the only rational explanation for the inconsistent verdicts.

In *People v Schaefer*, 437 Mich 418, 703 NW2d 774 (2005), this Court held that as an element of MCL 257.625(4), the prosecution must prove beyond a reasonable doubt that a defendant's operation of a motor vehicle was the cause of a person's death.

Further, the Court said:

In the criminal law context, the word "cause" has acquired a unique, technical meaning. Accordingly, pursuant to MCL 8.3a, we must construe the term "according to [its] peculiar and appropriate meaning" in the law. In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause.

Id. at 435.

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<sup>4</sup> Technically, MCL 257.617(3) required the prosecution to prove Defendant was the proximate cause of the accident, instead of the death. In the circumstances of this case, the difference is irrelevant. That issue is discussed at length below.

Proximate cause prevents criminal liability from attaching where the result of the defendant's conduct is viewed as remote or unnatural. Accordingly, it is:

necessary to determine whether there was an intervening cause that superceded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken. If an intervening cause did indeed supercede the defendant's act as a legally significant casual factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injuries.

Id. at 437.

Accordingly, in all three of the felony charges, the causation element consisted of both factual cause and proximate cause. The trial court failed to instruct the jury on proximate cause in connection with two of the three felony charges. On those two charges, the jury convicted Defendant. On the only felony charge where the jury was properly instructed, the jury acquitted the Defendant.

The jury's acquittal of OWI causing death and verdict of guilty of misdemeanor drunk driving establishes that the jury found insufficient evidence of causation.<sup>5</sup> The acquittal establishes the prosecution did not meet its burden of proof and acts as an implicit acquittal on the remaining felony charges. Retrial on those two charges would allow the prosecution a second chance at proving an element of its case, which violates the double jeopardy clauses of the federal and state constitutions. *Green v US*, 355 US 184, 189-190 (1987); *People v Garcia*, 448 Mich 683 (1995). Accordingly, the Court should acquit Defendant on those two counts.

b. *Proximate cause is an element of MCL 257.617(3)*

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<sup>5</sup> "(A)n essential of the due process guaranteed by the Fourteenth Amendment (is) that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable

The Court of Appeals erred in holding that proximate cause was not an element of MCL 257.617(3).<sup>6</sup> In *Williams v Cleary*, 338 Mich 202; 60 NW2d 910 (1953), this Court quoted with approval long established rules of construction:

‘There seems to be no lack of harmony in the rules governing the interpretation of statutes. All are agreed that the primary one is to ascertain and give effect to the intention of the Legislature. All others serve but as guides to assist the courts in determining such intent with a greater degree of certainty. If the language employed in a statute is plain, certain, and unambiguous, a bare reading suffices, and no interpretation is necessary. The rule is no less elementary that effect must be given, if possible, to every word, sentence, and section. To that end, the entire act must be read, and the interpretation to be given to a particular word in one section, arrived at after due consideration of every other section, so as to produce, if possible, a harmonious and consistent enactment as a whole.’ *City of Grand Rapids v Crocker*, 219 Mich 178; 189 NW 221 (1922).

‘No rule is better settled than, in construing a statute, effect must be given to every part of it. One part must not be so construed as to render another part nugatory, or of no effect. The same rule applies to words, in construing a sentence.’ *People v Burns*, 5 Mich 114 (1858)

*Williams v Cleary*, at 207, 60 NW2d at 914.

Section 617 of the Michigan Vehicle Code provides:

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doubt of the existence of every element of the offense.” *Virginia v Jackson*, 443 US 307, 316 (1979); *In re Winship*, 397 U.S. 358 (1970).

<sup>6</sup> Panels of the Court of Appeals have differed on this issue, albeit in unpublished opinions. In *People v Hall*, 2008 WL 203688 (Mich App), the Court of Appeals held that causation was an element of 257.617(3), finding:

Clearly, a conviction under MCL 257.216(3) requires a finding that the defendant caused the accident in question. However, the trial court's instructions omitted the element of causation and instead indicated that defendant must have been “involved in an accident that resulted in a serious impairment of a body function or death.”

The *Hall* Court based its holding on the enhanced penalty in subsection 3: “For a defendant to be subjected to the greater statutory maximum penalty provided in MCL 257.617(3), the trier of fact must conclude that the defendant caused the accident in question.” *Id.* (Appendix 129a-131a )

(1) The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by the public shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of section 619<sup>7</sup> are fulfilled or immediately report the accident to the nearest or most convenient police agency or officer to fulfill the requirements of section 619 (a) and (b) if there is a reasonable and honest belief that remaining at the scene will result in further harm. The stop shall be made without obstructing traffic more than is necessary.

(2) Except as provided in subsection (3), if the individual violates subsection (1) and the accident results in serious impairment of a body function or death, the individual is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine of not more than \$5, 000.00, or both.

(3) If the individual violates subsection (1) following an accident caused by that individual and the accident results in the death of another individual, the individual is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$10,000.00, or both.

MCL 257.617

Two penalties are established in the statute, a clear indication of the legislature's intent to establish different levels of culpability. See *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1, 2 (1990) ("The Legislature in establishing differing sentence ranges for different offenses across the spectrum of criminal behavior has clearly expressed its value

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<sup>7</sup> Section 619 provides:

The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident with an individual or with another vehicle that is operated or attended by another individual shall do all of the following:

(a) Give his or her name and address, and the registration number of the vehicle he or she is operating, including the name and address of the owner, to a police officer, the individual struck, or the driver or occupants of the vehicle with which he or she has collided.

(b) Exhibit his or her operator's or chauffeur's license to a police officer, individual struck, or the driver or occupants of the vehicle with which he or she has collided.

(c) Render to any individual injured in the accident reasonable assistance in securing medical aid or arrange for or provide transportation to any injured individual.

judgments concerning the relative seriousness and severity of individual criminal offenses.”)

Accordingly, the legislature viewed subsection (3) as a more serious offense than subsection (2). A violation of subsection (3) permits a maximum penalty of 15 years and a fine of \$10,000.00. A violation of subsection (2) results in a maximum penalty of five years and a \$5,000.00 fine. Further evidence of the legislature’s belief that subsection (3) is the more serious crime is found in statutory sentencing guidelines, which classify subsection (3) as a Class C felony, but make subsection (2) a Class E felony. MCL 777.12e. In the guidelines, the legislature designated Class C felony a “high severity felony,” MCL 777.51, and a Class E felony a “low severity felony.” MCL 777.52.

The preceding begs the question: What is the difference between the two subsections of the statute, making one far more serious than the other? As an initial matter, subsection (1) establishes that the obligation to fulfill the reporting duties of Section 619 are triggered when a person “knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by the public...” MCL 257.617(1). Subsections (2) and (3) then set different penalties for failing to fulfill the reporting duties.

Subsection (2) provides a five-year penalty if a person fails to satisfy Section 619 requirements and “the accident results in serious impairment of a body function or death...” Id. Subsection (3) provides a higher penalty if a person fails to satisfy Section 619 “following an accident caused by that individual and the accident results in the death of another individual...” Id. The only meaningful difference between the two subsections in Defendant’s case is the phrase “following an accident caused by that

individual.” The legislature’s intent to carve out a higher penalty for the person who causes an accident resulting in death is also evident in subsection (2), which starts with the phrase, “Except as provided in subsection (3)...” MCL 257.617(2).

Accordingly, the prosecution’s burden of proving the two offenses also differs. To prove the more serious offense, the prosecution must prove the accident resulting in death was “caused by the individual” charged. No such burden to prove causation exists under subsection (2).

As stated earlier, this Court has said:

In the criminal law context, the word “cause” has acquired a unique, technical meaning. Accordingly, pursuant to MCL 8.3a, we must construe the term “according to [its] peculiar and appropriate meaning” in the law. In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause.

*People v Schaefer*, 437 Mich at 435.

Accordingly, where causation is an element of an offense, the prosecution must prove both factual and proximate cause. So, in a prosecution under MCL 257.617(3), the prosecutor must prove a defendant’s operation of the vehicle was the proximate cause of an accident that resulted in death. That obligation does not exist for a prosecution under subsection (2).<sup>8</sup>

All three members of the Court of Appeals panel ruled that proximate cause was not an element of MCL 257.617(3). The Court of Appeals based that decision on language from *Schaefer* in which this Court said the legislature intended proximate cause to be an element of the operating while intoxicated causing death statute. The *Schaefer*

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<sup>8</sup> The parties and trial court understood the burden to prove causation at trial. The jury was given the alternative of convicting for either subsection (2) or (3). The argument here is that due to improper instruction, the jury did not understand that proximate cause for

Court said by using the words “causes death” in MCL 257.625(4) the legislature intended proof of proximate cause. Otherwise, this Court said, the legislature would have used the words “results in death,” as in MCL 257.617(2), where proximate cause is not an element. *Schaefer*, 439-440.

Here, the lower court failed to note the difference between subsection (2), referred to by the *Schaefer* Court, and subsection (3), which included the word “cause.” The majority opinion quoted at length from *Schaefer* and then jumped to its conclusion: “In light of *Schaefer*, the trial court did not err in failing to repeat the proximate cause instruction for the failure to stop at the scene of an accident resulting in death offense because proximate causation is not an element of MCL 257.617(3).” (Majority Opinion, 5, Appendix 8a). The fact that *Schaefer* never mentions subsection (3) was ignored in the court below.

In this case, the prosecutor would present the same evidence to prove Defendant was the proximate cause of the accident for MCL 257.617(3) that it did to prove Defendant’s operation of the vehicle was the proximate cause of Kevin Bass’s death for MCL 257.625(4). So, if the trial court erred in failing to instruct on proximate cause under MCL 257.625(4), then it erred in failing to instruct on proximate cause under MCL 257.617(3).

c. *Proximate cause was the only disputed element*

At the motion for acquittal or new trial, the prosecution for the first time suggested that Defendant Feezel may not have known he was intoxicated when he operated his vehicle, an element of the acquitted felony charge, but not the two charges of

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subsection (3) was the same as for the OWI causing death on which they acquitted Defendant.

which Mr. Feezel was convicted. The parties never believed knowledge was at issue during the trial, and during opening and closing arguments the prosecutor never mentioned this novel claim.

The history of this element shows it is rarely the subject of a factual dispute at trial. The “knowledge one might be intoxicated” element comes from *Lardie, supra*. The issue in that case was whether OWI causing death could be construed as a strict liability crime. The court held that it was a general intent crime: “(T)he Legislature must reasonably have intended that the people prove a *mens rea* by demonstrating that the defendant purposefully drove while intoxicated or, in other words, that he had the general intent to perform the wrongful act.”

Critically, the *Lardie* court did not think it was imposing a burden on a prosecution: “This distinction is important *only in the rare circumstances* where a defendant was driving when he *honestly did not know he had consumed alcohol*, which subsequently caused him to be intoxicated, or where *he was forced to drive* for some reason despite his intoxication.” *Lardie*, at 241 (emphasis added). Defendant Feezel’s case was not one of those “rare circumstances.”

In most cases, this element is as easy to prove as venue. *Schaefer* requires the prosecutor to prove that “the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent and *might* be intoxicated.” *Schaefer*, at 434. Consider how simple it is to prove *as a general intent crime* that a reasonable person drove after drinking with knowledge they *might* be intoxicated.

The first and primary evidence of knowledge would always be the defendant’s blood alcohol content. Here, trial counsel conceded the BAC was somewhere between

.07 and .11. Trial counsel told the jury to convict on the OWI because they would have “laughed him out of the room” if he had tried to tell them Feezel “wasn’t really drunk...” (287). The prosecution presented testimony from Dr. Adatsi to extrapolate a BAC at the time of driving. That rate—at least 0.91—was well above the legal limit.

Second, the number of drinks that a person consumed would be highly relevant. Here, the prosecution reasonably claimed that the evidence supported a finding that Feezel had, at least, the equivalent of 10 twelve-ounce beers from dinner until the accident. “Might” someone think they were intoxicated? Yes, without question.

Third, evidence suggested Feezel minimized the amount of alcohol he had consumed, telling police he had one beer at the Sidetrack a couple hours before the accident and another beer at dinner. When the evidence comes in that Feezel was drinking 24-ounce beers and drinking from dinner time until close, it seems clear that Feezel was attempting to hide his knowledge of how much he had to drink and whether he “might” have been intoxicated.

In short, it is wholly unreasonable to believe the prosecution proved proximate cause but failed to establish the almost imputed *mens rea* of this crime. At the hearing on the Motion for Acquittal or New Trial, the prosecution offered the red herring to undermine the sound argument regarding the inconsistency of the verdicts. The trial court, in error, bought into the fallacy.

On appeal, all three judges agreed the trial court erred by failing to instruct on proximate cause on the count of operating a motor vehicle with a schedule 1 controlled substance in his body causing death. But the majority seized on the “knowledge”

element to rescue the conviction, finding the error was harmless. (Majority Opinion, page 7, Appendix 10a). The dissenting judge found the mistake prejudicial:

The court's deficient instruction and its incorrect evidentiary ruling deprived defendant of the opportunity to present a viable and substantial defense and it removed from the jury's consideration an essential element of the crime. Under the circumstances of this case, I believe that the errors affected the fairness and integrity of the proceedings.

(Saad opinion, page 6, Appendix 21a).

d. *The instructional error was prejudicial*

As noted above, the jury acquitted on the OWI causing death charge, while finding Defendant guilty of misdemeanor drunk driving. The jury's decision on the alcohol charges rested on the disputed issue of proximate cause, which was clearly instructed on that count alone. The jury considered proximate cause and found it unproven by the evidence.

But, on the two felony convictions where the trial court did not instruct on proximate cause, the jury found Defendant guilty. As argued above, proximate cause is an element of both felony convictions. The inconsistent verdicts demonstrate that the instructions, as a whole, failed to inform the jury of law applicable to the case.

To find that no prejudice accrued to the Defendant, despite a clear indication that the jury did not find proximate cause, would be a miscarriage of justice. It is manifestly unjust to allow the two remaining felony convictions to stand when both require proof of the same causation element. If that is not a miscarriage of justice, then none can ever be found.

4. Relief Requested:

This Court should vacate the two felony charges, which cannot be retried without Defendant being placed twice in jeopardy. Alternatively, this Court should remand the matter for new trial—there is surely enough doubt created by the inconsistency of the verdicts to justify that remedy.

### III

#### **DEFENSE COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE HE ALLOWED THE TRIAL COURT TO GIVE MISLEADING AND ERRONEOUS JURY INSTRUCTIONS ON THE ISSUE OF PROXIMATE CAUSE**

1. Standard of Review

To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error, a different outcome reasonably would have resulted. *Strickland v. Washington*, 466 U.S. 668; 104 S Ct 2052 (1984). The Court of Appeals reviews constitutional questions *de novo*. *People v. LeBlanc*, 465 Mich. 575, 579; 640 NW2d 246 (2002).

2. Factual Background

The facts contained in the preceding argument regarding jury instructions and proximate cause should be considered in deciding the question of whether Defendant Feezel received effective assistance of counsel.

3. Argument

While the obligation to properly instruct a jury falls squarely on the trial court, MCL 768.29, defense counsel does not act effectively under the Sixth Amendment to the United States Constitution if he does not request relevant instructions or object to

erroneous or misleading instructions. Here, where the defense relied primarily on the issue of proximate cause, defense counsel committed a substantial error in failing to demand an accurate statement of law to the jury on each of the felony counts.

The failure to request instructions consistent with the defense or to raise an objection at trial contributed to the misleading instructions given to the jury. There is no valid deference to trial strategy on this issue because the proper instructions were critical to the primary defense of a superceding cause. And, as noted above, actual prejudice resulted from the error because the defense actually prevailed on the issue of proximate cause in the properly instructed count of OWI causing death.

4. Relief requested:

Defendant Feezel asks this Court to vacate his felony convictions and remand the case for a new trial.

#### IV

### **DEFENDANT’S CONVICTION FOR OPERATING A MOTOR VEHICLE AND CAUSING DEATH WITH 11-CARBOXY THC IN HIS BLOOD VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.**

A. Standard of Review

This Court reviews preserved issues of constitutional law *de novo*. *People v. Carpentier*, 446 Mich. 19, 521 N.W.2d 195 (1994).

B. Factual Background

The automobile accident underlying Mr. Feezel’s convictions occurred on July 2, 2005. Nearly a year later, in the case of *People v Derror*, 475 Mich 316, 715 NW2d 822 (2006), the Michigan Supreme Court held that 11-carboxy THC, a metabolite created by

the human body in processing THC, was a schedule 1 controlled substance, and, therefore, could support a conviction for operating a motor vehicle with any amount of a schedule 1 controlled substance in the operator's body. MCL 257.625(8) and (4). Because 11-carboxy THC has no intoxicating effect, the *Derror* Court also said impairment to a person's ability to drive was not an element of the crime.

Upon release of the *Derror* opinion, the prosecutor in Mr. Feezel's case quickly moved to amend the felony information to add counts related to the presence of 11-carboxy THC in Mr. Feezel's blood. At trial, the prosecution presented evidence that Mr. Feezel's blood contained a scant 6 nanograms per liter of carboxy the morning after the accident. The jury returned a verdict of guilty to the amended charge.

C. Argument

In this appeal, Defendant Feezel argues that his conviction under MCL 257.625(4) for operating a motor vehicle causing death with 11-carboxy THC in his body violates Due Process under the Fifth and Fourteenth Amendments to the United States Constitution. The conviction is unconstitutional because 1) the statute fails to give notice of the prohibited conduct; 2) the statute, as interpreted by the Michigan Supreme Court, is unconstitutionally vague thus creating the high potential for arbitrary and discriminatory enforcement; and 3) the statute, as interpreted by the Michigan Supreme Court, is unconstitutional because it is not rationally related to the objective of the statute.

Contained within MCL 257.625, a statute aimed at prohibiting and punishing intoxicated or impaired operation of a motor vehicle, section (8) provides:

A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in

schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212 or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

Id.

Section 4 of the same statute provides:

(4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows:

(a) Except as provided in subdivision (b), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than \$2,500.00 or more than \$10,000.00, or both...

Id.

Defendant Feezel was convicted for violating Section 4 by having 11-carboxy THC in his blood in violation of Section 8.

Marijuana is listed as a controlled schedule 1 substance, MCL 333.7212(1)(c), and, therefore, within the proscription of section 8. The active chemical compound of marijuana is tetrahydrocannabinol (THC). 11-carboxy THC is a metabolite created when the body metabolizes THC. *Derror*, at 326. It can result from active or passive inhalation of marijuana. *Derror*, at 358.

According to the majority opinion in *Derror, supra*, 11- carboxy THC is unambiguously “derivative” of marijuana, and, therefore, a controlled schedule 1 substance that exists separate from marijuana. Because the majority found the term “derivative” unambiguous, they believed it unnecessary to consider legislative history, similar federal law or any other sources, to determine whether the Legislature intended a benign non-euphoric compound such as 11-carboxy THC to be a schedule 1 controlled substance.

The *Derror* Court’s holding rests on a single definition of derivative culled from several definitions of the word found in *Merriam-Webster's Online Medical Dictionary* and *Stedman's Online Medical Dictionary*. The *Derror* Court conceded that other definitions of the derivative contained in those dictionaries were overly broad. Nonetheless, the Court held the legislature’s intent was not ambiguous and the word “derivative” must have been used to mean: “a chemical substance related structurally to another substance and theoretically derivable from it.” *Id.*, at 329-330.

As the dissenting opinion in *Derror* notes, the mere existence of multiple scientific definitions of the word “derivative” renders the term ambiguous:

To decide this case, the majority recognizes that the term “derivative” needs to be defined, so it consulted scientific dictionaries to do so. The majority found that there were “divergent” definitions of “derivative” to such a degree that the members of the majority had to choose the one they *believed* would best effectuate the Legislature's intent, using nothing to guide them except their beliefs. Notably, the majority even states that it decided not to follow “most” definitions. Instead, the majority chooses to ignore most definitions because these definitions would not support the majority's outcome, and the majority ultimately settles on the one definition that would allow it to best support its position.

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Simply, contrary to the majority's bold assertions, there is nothing plain or unambiguous about a statute that uses a term with definitions that are so diverse that they can support two totally different outcomes. In fact, this is the very meaning of the term “ambiguous.” A statute is ambiguous when “reasonable minds could differ with respect to its meaning ...” *In re MCI, supra* at 411, 596 N.W.2d 164; see also *Perez v. Keeler Brass Co.*, 461 Mich. 602, 610, 608 N.W.2d 45 (2000). ... And in cases in which statutory language is ambiguous, such as the case before us, and the cases involving similar language before the federal courts, use of legislative history to try and best effectuate the intent of the Legislature when interpreting unclear and ambiguous statutory language is a better method than an analysis that attempts to divine the Legislature's intent using nothing more than the personal beliefs of those in the majority.

*Id.*, at 346-347.

Here, the statute is ambiguous because clearly “reasonable minds could differ with respect to its meaning...” *In re MCI Telecom. Complaint*, 460 Mich. 396, 411, 596 N.W.2d 164 (1999). Accordingly, judicial construction is necessary to determine the intent of the Legislature. *Id.*

Michigan’s Public Health Code instructs that its provisions are “intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency.” MCL 333.1111(1). The federal definition of marijuana is substantially similar to Michigan’s statute. No federal court has held that 11-carboxy THC is a schedule 1 controlled substance. See *United States v. Sanapaw*, 366 F.3d 492, 495 (C.A.7, 2004)(purpose of banning marijuana was to ban the euphoric effects produced by THC); *United States v. Walton*, 168 U.S.App.D.C.305, 307, 514 F.2d 201 (1975)(the definition of marijuana was intended to include those parts of marijuana which contain THC and to exclude those parts which do not); *United States v. Lupo*, 652 F.2d 723, 728 (C.A.7, 1981)(statute outlaws all species of marijuana containing tetrahydrocannabinol).

In deciding 11-carboxy THC is a schedule 1 controlled substance, the *Derror* Court disregarded the Legislature’s express instructions regarding placement of a substance on the list of schedule 1 substances. First, as noted above, the substance must have a high potential for abuse and have no accepted medical use in treatment or lack accepted safety for use in treatment under medical supervision. MCL 333.7211. Because carboxy THC has no pharmaceutical purpose, it cannot be abused and has no use in medical treatment.

Further, in the Public Health Code, the Legislature listed other factors to use in determining the classification of a substance:

- (a) The actual or relative potential for abuse.
- (b) The scientific evidence of its pharmacological effect, if known.
- (c) The state of current scientific knowledge regarding the substance.
- (d) The history and current pattern of abuse.
- (e) The scope, duration, and significance of abuse.
- (f) The risk to the public health.
- (g) The potential of the substance to produce psychic or physiological dependence liability.
- (h) Whether the substance is an immediate precursor of a substance already controlled under this article.

MCL 333.7202.

Clearly, these factors weigh against a finding that 11-carboxy THC is a schedule 1 controlled substance. By summarily deciding the term “derivative” was unambiguous, the *Derror* majority was able to avoid the well-established rule of statutory construction that requires provisions of a statute to be “construed in light of the other provisions of the statute to carry out the apparent purpose of the Legislature.” *Farrington v. Total Petroleum, Inc.*, 442 Mich. 201, 209, 501 N.W.2d 76 (1993). As the minority opinion in *Derror* notes: “The majority’s analysis ignores the very reasons that a substance is classified as a schedule 1 controlled substance, and it reaches a result that completely disregards other relevant provisions of the statute.” *Derror, supra*, at 350.

Under its narrow definition of derivative, the *Derror* majority asserted that 11-carboxy THC was “a compound of similar structure” to THC because they are identical except that “two oxygen atoms are added to and three hydrogen atoms are removed from

the eleventh carbon to make it more water soluble and easier to excrete.” *Derror*, at 327.

The minority opinion believed that chemical “analysis” was overly simplified:

(M)erely because a compound *looks* similar in its basic chemical formula does not mean that it is a compound of similar structure for the purposes of controlled substance classification methods. Water and hydrogen peroxide look similar-H<sub>2</sub>O and H<sub>2</sub>O<sub>2</sub>-but they are, of course, very different substances. One is a substance you must drink to survive; the other will kill you if you drink it.

*Id.*, at 350.

In holding 11-carboxy THC to be a schedule 1 controlled substance under MCL 333.7212(1)(d), the majority in *Derror* also disregarded the plain language of the statute, which was aimed at substances produced synthetically—not by metabolic process within the human body itself. That section prohibits:

*synthetic* equivalents of the substances contained in the plant, or in the resinous extractives of cannabis and synthetic substances, derivatives, and their isomers with similar chemical structure or pharmacological activity, or both...

*Id.*

Moreover, the *Derror* majority also disregarded the fact that in a section discussing child abuse reporting requirements the Legislature referred to “a metabolite of a controlled substance.” MCL 722.623a. Accordingly, if the Legislature had intended to include metabolized compounds as controlled substances, it would have used the term “metabolite.” *Walen v. Dep't of Corrections*, 443 Mich. 240, 248, 505 N.W.2d 519 (1993)(The Legislature is presumed to be aware of all existing statutes when it enacts another).

For the reasons discussed above, Mr. Feezel’s conviction on the carboxy THC count is unconstitutional. First, the statute fails entirely to provide notice. “The constitutional requirement of definiteness is violated by a criminal statute that fails to

give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” *United States v Harris*, 347 US 612, 617, 74 SCt 808 (1954). No person “shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Id.* For a criminal statute to be constitutional, it “must define the criminal offense ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’ ” *People v. Lino*, 447 Mich. 567, 575, 527 N.W.2d 434 (1994), quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Moreover, if the general class of offenses affected by a statute “can be made constitutionally definite by a reasonable construction of the statute, [a court] is under a duty to give the statute that construction.” *Harris, supra* at 618, 74 S.Ct. 808.

An ordinary person has no ability to determine when 11-carboxy THC is no longer present in the blood stream. Because the substance has no ability to cause an impairment by itself, and can remain in the body long after the use of marijuana, a person cannot operate a motor vehicle without risk of violating the law. In fact, depending on testing procedures and laboratory detection levels, the ability to drive may be essentially forfeited for weeks after any inhalation of marijuana, whether the smoke was inhaled first- or second-hand. Huestis, *Cannabis (marijuana)-Effects on human behavior and performance*, 14 Forensic Sci. Rev. 15, 32 (2002)( “Environmental exposure to cannabis smoke can occur through passive inhalation of side-stream and exhaled smoke by non-users. Several research studies have indicated that it is possible to produce detectable concentrations of cannabinoid metabolites in the urine and plasma after passive inhalation of cannabis smoke.”)

The vagueness doctrine sets “the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Smith v. Goguen*, 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). But given the multiple detection levels of the metabolite, a person’s potential criminal liability is subject to varying and improving laboratory testing methods. And, unlike alcohol blood content levels, even 0.01 nanograms of carboxy THC would permit criminal charges. The vagueness in the law, created by result-oriented judicial fiat, renders a conviction under the statute unconstitutional.

Further, the statute, as interpreted by the *Derror* Court, is unconstitutional because it has no rational relation to the object of the statute. It therefore violates the equal protection clause of the Fourth Amendment. Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). To prevail under this standard of review, a challenger must show that the legislation is “arbitrary and wholly unrelated in a rational way to the objective of the statute.” *Smith v. Employment Security Comm.*, 410 Mich. 231, 271, 301 N.W.2d 285 (1981).

The statute, MCL 257.625, clearly targets the operation of motor vehicles while impaired or intoxicated. The inclusion of a substance which has no ability whatsoever to impair a person is “arbitrarily and wholly unrelated in a rational way to the objective of the statute.”

#### 4. Conclusion

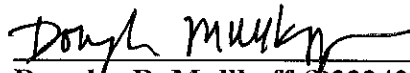
The conviction is unconstitutional because 1) the statute fails to give notice of the prohibited conduct; 2) the statute, as interpreted by the Michigan Supreme Court, is

unconstitutionally vague creating the high potential for arbitrary and discriminatory enforcement; 3) the statute, as interpreted by the Michigan Supreme Court, is unconstitutional because it is not rationally related to the objective of the statute.<sup>9</sup>

**REMEDY REQUESTED**

Defendant Feezel requests this Court to vacate his felony convictions for the reasons stated in the argument above and remand this matter to the trial court for further proceedings.

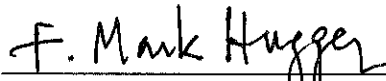
**RESPECTFULLY SUBMITTED**



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Douglas R. Mullkoff (P33242)

Attorney for Appellant George Evan Feezel

Dated: 7-21-09



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F. Mark Hugger (P53542)

Attorney for Appellant George Evan Feezel

Dated: 7-21-09

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<sup>9</sup> Despite this Court's opinion in *Derror, supra*, trial courts continue to struggle with the practicality of imposing harsh sentences on citizens who are unaware of carboxy levels in their blood, and, therefore, unknowingly break the law while driving. *See People v Malik*, Barry County Circuit Court, No. 09-48-FH (Finding MCL 257.625(8) unconstitutional as applied to carboxy-THC). (Appendix 132a-138a)