Order

Michigan Supreme Court
Lansing, Michigan

February 6, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2023-24

Amendment of Rule 3.701 and
Additions of Rules 3.715, 3.716,
3.717, 3.718, 3.719, 3.720, 3.721, and
3.722 of the Michigan Court Rules

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.701 and additions of Rules 3.715, 3.716, 3.717, 3.718, 3.719, 3.720, 3.721, and 3.722 of the Michigan Court Rules are adopted, effective February 13, 2024.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Subchapter 3.700 Personal Protection and Extreme Risk Protection Proceedings

Rule 3.701 Applicability of Rules; Forms

(A) Scope. Except as provided by this subchapter and the provisions of MCL 600.2950, ~~and~~ MCL 600.2950a, and MCL 691.1801 to MCL 691.1821, actions for personal protection for relief against domestic violence or stalking and actions for extreme risk protection are governed by the Michigan Court Rules. Procedure related to personal protection orders against adults is governed by MCR 3.702 to MCR 3.709, and procedure related to extreme risk protection is governed by MCR 3.715 to MCR 3.722~~this subchapter~~. Procedure related to personal protection orders against minors is governed by subchapter 3.900, except as provided in MCR 3.981.

(B) Forms. The state court administrator shall approve forms for use in personal protection act proceedings and for use in extreme risk protection act proceedings. The forms shall be made available for public distribution by the clerk of the circuit court.

[NEW] Rule 3.715 Definitions

When used in MCR 3.716-3.722, unless the context otherwise indicates:

(1) "Complaint." An individual seeking an extreme risk protection order is petitioning a court for relief. However, the Legislature uses the terms

"complaint" and "summons" throughout the Extreme Risk Protection Order Act, MCL 691.1801 *et seq*., rather than the term "petition." Therefore, for the purposes of MCR 3.716-3.722 only, a complaint means the act of petitioning the court to issue an extreme risk protection order. Petitioning the court in this manner commences an independent action for an extreme risk protection order and is not considered a motion as defined in MCR 2.119.

(2) "Dating relationship" means that term as defined in MCL 691.1803.

(3) "Existing action" means an action in any court in which both the petitioner and the respondent are parties; existing action includes, but is not limited to, pending and completed domestic relations actions, and other actions for personal protection or extreme risk protection orders.

(4) "Extreme risk protection order" means that term as defined in MCL 691.1803.

(5) "Family member," "guardian," "health care provider," "law enforcement agency," and "law enforcement officer," mean those terms as defined in MCL 691.1803.

(6) "Minor" means a person under the age of 18.

(7) "Petitioner" means the party seeking an extreme risk protection order.

(8) "Possession or control" means that term as defined in MCL 691.1803.

(9) "Respondent" means the party to be restrained by the extreme risk protection order.

[NEW] Rule 3.716 Commencing an Extreme Risk Protection Action

(A) Filing.

(1) An extreme risk protection action is an independent action commenced by filing a complaint with the family division of the circuit court. A complaint may be filed regardless of whether the respondent owns or possesses a firearm. A proposed extreme risk protection order must be prepared on a form approved by the State Court Administrative Office and submitted at the same time as the complaint. When completing the proposed order, the petitioner must complete the case caption and the known fields with identifying information, including the race, sex, and date of birth or age of the respondent. The personal identifying information form approved by the

State Court Administrative Office does not need to be completed or filed in extreme risk protection actions. There are no fees for filing an extreme risk protection action, and no summons is issued. An extreme risk protection action may not be commenced by filing a motion in an existing case or by joining a claim to an action.

(2) An extreme risk protection action may only be commenced by the following individuals:

(a) the spouse of the respondent;

(b) a former spouse of the respondent;

(c) an individual who:

(i) has a child in common with the respondent,

(ii) has or has had a dating relationship with the respondent, or

(iii) resides or has resided in the same household with the respondent;

(d) a family member;

(e) a guardian of the respondent;

(f) a law enforcement officer; or

(g) a health care provider, if filing and maintaining the action does not violate requirements of the health insurance portability and accountability act of 1996, Public Law 104-191, or regulations promulgated under that act, 45 CFR parts 160 and 164, or physician-patient confidentiality.

(B) Complaint in General. The complaint must

(1) be in writing;

(2) state the respondent's name and address;

(3) state with particularity any facts that show the issuance of an extreme risk protection order is necessary because the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously

physically injure themselves or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation, including facts that address the factors in MCL 691.1807(1) that the court must consider when determining whether to issue an extreme risk protection order;

(4) if known by the petitioner, state whether any following circumstances are applicable:

(a) the respondent is required to carry a pistol as a condition of the respondent's employment and is issued a license to carry a concealed pistol,

(b) the respondent is any of the following:

(i) a police officer licensed or certified under the Michigan Commission on Law Enforcement Standards Act (MCOLES), MCL 28.601 to MCL 28.615,

(ii) a sheriff or deputy sheriff,

(iii) a member of the Department of State Police,

(iv) a local corrections officer,

(v) an employee of the Michigan Department of Corrections, or

(vi) a federal law enforcement officer who carries a pistol during the normal course of the officer's employment or an officer of the Federal Bureau of Prisons,

(5) state whether the petitioner knows or believes that the respondent owns or possesses firearms and, to the extent possible, identify the firearms, giving their location and any additional information that would help a law enforcement officer find the firearms;

(6) state the relief sought;

(7) state whether an ex parte order is being sought and, if so, state with particularity the facts that show the issuance of an ex parte order is necessary because

(a) immediate and irreparable injury, loss, or damage will result

from the delay required to effectuate notice, or

(b) the notice will itself precipitate adverse action before an order can be issued,

(8) state whether an extreme risk protection action involving the respondent has been commenced in another jurisdiction and, if so, identify the jurisdiction; and

(9) be signed by the party or attorney as provided in MCR 1.109(E). If the complaint requests an ex parte order, the complaint must also comply with MCR 3.718(A)(2).

(C) The petitioner's address must not be disclosed in any pleading, paper, or in any other manner. The petitioner must provide the court with an address and contact information, including an email address and telephone number if available, in the form and manner established by the State Court Administrative Office. The clerk of the court must maintain the petitioner's address as confidential in the court file.

(D) Complaint Against a Minor. In addition to the requirements outlined in subrule (B), a complaint against a minor must also list, if known or can be easily ascertained, the names and addresses of the minor's parent(s), guardian, or custodian.

(E) Other Pending Actions; Order, Judgments.

(1) The complaint must specify whether there are any other pending actions in this or any other court, or orders or judgments already entered by this or any other court affecting the parties, including the name of the court and the case number, if known.

(a) If the complaint is filed in the same court as a pending action or where an order or judgment has already been entered by that court affecting the parties, it shall be assigned to the same judge.

(b) If there are pending actions in another court or orders or judgments already entered by another court affecting the parties, the court may contact the court where the pending actions were filed or orders or judgments were entered, if practicable, to determine any relevant information.

(2) If the prior action resulted in an order providing for continuing jurisdiction of a minor, and the new action requests relief with regard to the minor, the court must comply with MCR 3.205.

(F) Venue.

(1) If the respondent is an adult, the petitioner may file an extreme risk protection action in any county in Michigan regardless of the parties' residency or location.

(2) If the respondent is a minor, the petitioner must file an extreme risk protection action in either the petitioner's or respondent's county of residence.

(3) If the respondent does not live in Michigan, the petitioner must file an extreme risk protection action in the petitioner's county of residence.

(G) Minor or Legally Incapacitated Individual as Petitioner or Respondent. If a petitioner or respondent is a minor or a legally incapacitated individual, the court must appoint a next friend or guardian ad litem as provided by MCR 2.201(E).

[NEW] Rule 3.717 Dismissals

Except as specified in MCR 3.718(A)(5), MCR 3.718(B), MCR 3.718(D), and MCR 3.720, an action for an extreme risk protection order may only be dismissed upon motion by the petitioner prior to the issuance of an order. There is no fee for such a motion. This rule does not preclude a dismissal as otherwise permitted by law.

[NEW] Rule 3.718 Issuing Extreme Risk Protection Orders

(A) Ex Parte Orders. Except as otherwise provided in this rule:

(1) The court must rule on a request for an ex parte order within one business day of the filing date of the complaint. The court must expedite and give priority to ruling on a request for an ex parte order.

(2) An ex parte order must be granted if it clearly appears from the specific facts shown by a verified, written complaint that

(a) by a preponderance of the evidence after considering the factors identified in MCL 691.1807(1), the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm, and has engaged in an act or acts or made significant threats that substantially support the expectation that the

respondent will intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm; and

(b) pursuant to MCL 691.1807(2), there is clear and convincing evidence that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before an order can be issued.

(3) An ex parte order expires one year after the date of issuance.

(4) If an ex parte order is entered, the complaint and order must be served as provided in MCR 3.719(B). However, failure to effectuate service does not affect the order's validity or effectiveness.

(5) If the court refuses to grant an ex parte order, it must immediately state the reasons in writing and advise the petitioner of the right to request a hearing as provided in subrule (D). If the petitioner does not request a hearing within 21 days of entry of the order, the order denying the complaint is final.

(B) Immediate Emergency Ex Parte Orders.

(1) A petitioner who is a law enforcement officer may verbally request by telephone that a judge or magistrate on duty within that jurisdiction immediately issue an emergency ex parte order under subrule (A) if the officer is responding to a complaint involving the respondent and the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure the respondent or another individual by possessing a firearm.

(2) The judge or magistrate must immediately rule on a verbal request made under this subrule, and if the judge or magistrate issues an immediate emergency ex parte order,

(a) the officer must notify the respondent of the order and advise where they can obtain a copy of the order;

(b) within one business day, the officer must file a sworn written complaint detailing the facts and circumstances presented verbally to the judge or magistrate; and

(c) if the officer does not file the complaint within one business day, the court must, unless good cause is shown,

(i) terminate the immediate emergency ex parte order,

(ii) order that the respondent, subject to the restrictions in MCL 691.1815, may reclaim any seized firearm(s), and

(iii) dismiss the case.

(3) In each county, the circuit court must file for approval with the state court administrator a plan to make a judge or magistrate on duty and available each day of the year to immediately review and rule on a verbal request made under this subrule. The court must provide their approved plan to all law enforcement agencies within their jurisdiction.

(C) Anticipatory Search Warrant. If the court orders the firearms immediately surrendered, the law enforcement officer serving the order pursuant to MCR 3.719(B)(2) may file an affidavit requesting that the court issue an anticipatory search warrant authorizing a law enforcement agency to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search in compliance with 1966 PA 189, MCL 780.651 to 780.659. The law enforcement officer's affidavit may include affirmative allegations contained in the complaint. An anticipatory search warrant issued under this subrule is subject to and contingent on the failure or refusal of the respondent, following service of the order, to immediately comply with the order and immediately surrender to a law enforcement officer any firearm or concealed pistol license in the individual's possession or control. The court must issue the anticipatory search warrant if the affidavit establishes probable cause to believe that if the respondent refuses to immediately comply with the order, there is a fair probability that the respondent's firearm(s) or concealed pistol license will be found in the location or locations to be searched.

(D) Hearing.

(1) The court must expedite and give priority to hearings required by the extreme risk protection act.

(2) The court must schedule a hearing for the issuance of an extreme risk protection order in the following instances:

(a) The complaint does not request an ex parte order. If the petitioner does not request an ex parte order, the hearing must occur within 14 days of the date the complaint is filed.

(b) The court refuses to enter an ex parte order and the petitioner timely requests a hearing. If the court refuses to enter an ex parte order, the hearing must occur within 14 days of the petitioner's request for a hearing.

(c) The court entered an ex parte order and the respondent requests a hearing.

(3) If the court enters an ex parte order or an immediate emergency ex parte order and the respondent requests a hearing, the hearing must occur

(a) unless subrule (3)(b) applies, within 14 days after the order is served on the respondent or after the respondent receives actual notice of the order. A respondent must request this hearing within 7 days after the order is served or after the respondent receives actual notice of the order.

(b) within 5 days, excluding weekends and holidays if the court is closed to the public, after the order is served on the respondent or after the respondent receives actual notice of the order, if the respondent is an individual described in MCL 691.1805(5). A respondent must request this hearing within 3 days after the order is served or after the respondent receives actual notice of the order. If the court is closed to the public upon the expiration of this 3-day period, the request must be made not later than the next business day. To ensure timely notice, the clerk of the court must notify the petitioner of this hearing at the email address and telephone number provided by the petitioner under MCR 3.716(C).

A respondent waives their right to a hearing on an ex parte order under subrule (D)(2)(c) if the respondent does not request a hearing within the timeframes specified in subrules (D)(3)(a) and (D)(3)(b).

(4) The petitioner must serve on the respondent the complaint and notice of the hearing as provided in MCR 2.105(A), for a hearing scheduled under subrules (D)(2)(a)-(b). If the respondent is a minor, and the whereabouts of the respondent's parent(s), guardian, or custodian are known, the petitioner must also in the same manner serve the complaint and notice of the hearing on the respondent's parent(s), guardian, or custodian. The clerk of the court must serve the respondent's request for a hearing under subrule (D)(2)(c) on the petitioner, as provided in MCR 2.107(C) and subrule (D)(3)(b), due to the confidential nature of the petitioner's address unless the petitioner

electronically filed the case under MCR 1.109(G) and the respondent has registered with the electronic-filing system. In that instance, the respondent must serve the petitioner electronically at the petitioner's registered email address. If the respondent is a person described in MCL 691.1805(5), providing notice one day before the hearing is deemed as sufficient notice to the petitioner.

(5) The hearing must be held on the record. In accordance with MCR 2.407 and MCR 2.408, the court may allow the use of videoconferencing technology.

(6) The petitioner must attend the hearing and carries the burden of proving, by a preponderance of the evidence, that the respondent can reasonably be expected within the near future to, intentionally or unintentionally, seriously physically injure themselves or another individual by possessing a firearm and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation. If the petitioner fails to attend the hearing, the court may adjourn and reschedule the hearing or dismiss the complaint.

(7) If the respondent fails to appear at a hearing on the complaint under subrules (D)(2)(a)-(b) and the court determines the petitioner made diligent attempts to serve the respondent, whether the respondent was served or not, the order may be entered without further notice to the respondent if the court determines an extreme risk protection order is necessary. If the respondent fails to appear at a hearing on the complaint requested under subrule (D)(2)(c), the court may adjourn and reschedule the hearing or continue the order without further hearing.

(8) At the hearing, the court must consider the factors identified in MCL 691.1807(1) and state on the record the reasons for granting, denying, or continuing an extreme risk protection order and enter an appropriate order. Additionally, the court must immediately state the reasons for granting, denying, or continuing an extreme risk protection order in writing.

[NEW] Rule 3.719 Orders

(A) Form and Scope of Order. An order granting an extreme risk protection order must include the following provisions:

(1) Respondent Responsibilities. The respondent must complete the filing requirements contained in subrule (D)(1). A failure to comply with the filing requirements will result in the issuance of either a warrant or an order to show cause why the respondent should not be held in contempt of court.

(2) Purchase/Possession of Firearms. The respondent must not purchase or possess a firearm. If the respondent has been issued a license under MCL 28.422 that the respondent has not used and that is not yet void, the respondent must not use it and must surrender it to the law enforcement agency designated under MCL 691.1809(1)(g).

(3) Concealed Carry Licenses. The respondent must not apply for a concealed pistol license. If the respondent has been issued a license to carry a concealed pistol, the license will be suspended or revoked under MCL 28.428 once the extreme risk protection order is entered into the law enforcement information network (LEIN). The respondent must surrender the license to carry a concealed pistol as required by MCL 28.428.

(4) Firearm Surrender. The respondent must, within 24 hours, or at the court's discretion, immediately after being served with the order, surrender any firearms in the respondent's possession or control to the law enforcement agency designated under MCL 691.1809(1)(g), or if allowed as ordered by the court, to a licensed firearm dealer on the list prepared under MCL 691.1818.

If the court orders the respondent to immediately surrender the individual's firearms, the order must include a statement that the law enforcement agency designated under MCL 691.1809(1)(g) must proceed to seize the respondent's firearms after the respondent is served with or receives actual notice of the extreme risk protection order, after giving the respondent an opportunity to surrender the respondent's firearms. Unless the petitioner is a law enforcement officer or health care provider, there is a presumption that the respondent will have 24 hours to surrender the firearms.

(5) Firearm Description. If the petitioner has identified any firearms in the complaint, a specific description of the firearms to be surrendered or seized.

(6) Hearing Request. If the extreme risk protection order was issued without written or oral notice to the respondent, the order must include a statement that the respondent may request and attend a hearing to modify or rescind the order as provided in MCR 3.718(D)(3).

(7) Motions. A statement that the respondent may file a motion to modify or rescind the order as allowed under MCL 691.1801 *et seq*., and that motion forms and filing instructions are available from the clerk of the court.

(8) Law Enforcement Agency Designation. A designation of the law enforcement agency that is responsible for forwarding the order to the Federal Bureau of Investigation under MCL 691.1815(1). The designated law enforcement agency must be an agency within whose jurisdiction the respondent resides.

(9) LEIN Entry. Directions to a local entering authority or the law enforcement agency designated under MCL 691.1809(1)(g) to enter the order into LEIN.

(10) Order Violations. A statement that violating the order will subject the respondent to the following:

(a) immediate arrest;

(b) contempt of court;

(c) an automatic extension of the order; and

(d) criminal penalties, including imprisonment for up to one year for an initial violation and up to five years for a subsequent violation.

(11) Right to Attorney. A statement that the respondent has the right to seek the advice of, and be represented by, an attorney.

(12) Expiration Date. An expiration date that is one year after the date of issuance.

(B) Service.

(1) Except as provided in subrule (B)(2), the petitioner must serve the order on the respondent as provided in MCR 2.105(A). If the respondent is a minor, and the whereabouts of the respondent's parent(s), guardian, or custodian is known, the petitioner must also in the same manner serve the order on the respondent's parent(s), guardian, or custodian. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(J). Failure to serve the order does not affect its validity or effectiveness.

(2) If the court ordered the immediate surrender of the respondent's firearms, the order must be served personally by a law enforcement officer.

(3) Proof of service must be filed with the court within one business day after service.

(C) Oral Notice. If oral notice of the order is made by a law enforcement officer as described in MCL 691.1813(3), proof of the notification must be filed with the court by the law enforcement officer within one business day after the notification.

(D) Respondent Responsibilities.

(1) Not later than 24 hours after the respondent receives a copy of the extreme risk protection order or has actual notice of the order, the respondent must do one of the following:

(a) File with the court that issued the order one or more documents or other evidence verifying that all of the following are true:

(i) All firearms previously in the respondent's possession or control were surrendered to or seized by the local law enforcement agency designated under MCL 691.1809(1)(g), or if allowed as ordered by the court, to a licensed firearm dealer on the list prepared under MCL 691.1818.

(ii) Any concealed pistol license was surrendered to or seized by the local law enforcement agency designated under MCL 691.1809(1)(g) or surrendered to the county clerk as required by the order and MCL 28.428.

(iii) At the time of the verification, the respondent does not have any firearms or a concealed pistol license in the respondent's possession or control.

(b) File with the court that issued the order one or more documents or other evidence verifying that both of the following are true:

(i) At the time the order was issued, the respondent did not have a firearm or concealed pistol license in the respondent's possession or control.

(ii) At the time of the verification, the respondent does not have a firearm or concealed pistol license in the respondent's possession or control.

If the court is closed when the 24-hour period expires, the respondent must complete the required filing not later than the next business day.

(2) Failure to File. The clerk of the court must review the proof of service filed with the court and determine whether the respondent has complied with the filing requirements of subrule (D)(1). If the respondent has not complied with the filing requirements of subrule (D)(1), the clerk and the court must take the following actions:

(a) Clerk of the Court. The clerk of the court must notify the local law enforcement agency identified in MCL 691.1809(1)(g) and the assigned judge of the failure to comply with the filing requirements. If this notice is provided, the clerk of the court must again notify the local law enforcement agency and the assigned judge when the respondent has complied with the filing requirements.

(b) Court. The court must issue either a bench warrant or an order to show cause to initiate contempt proceedings as identified in MCR 3.721. If issuing an order to show cause, the hearing must be scheduled within 5 days of the date the proof of service is filed with the court. The court may recall the bench warrant or cancel the order to show cause if the respondent makes the required filings identified in subrule (D)(1). If the respondent fails to appear for the show cause hearing, the court must issue a bench warrant.

If the court issues a bench warrant under this subrule, a law enforcement officer may file an affidavit requesting that the court issue a search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the complaint. If the affidavit establishes probable cause to believe the location or locations to be searched are places where the firearm(s) or concealed pistol license is believed to be, the court must issue the search warrant.

(E) Clerk of the Court Responsibilities. The clerk of the court that issues an extreme risk protection order must complete the actions identified in MCL 691.1811.

[NEW] Rule 3.720 Modification, Termination, or Extension of Order

(A) Modification or Termination.

(1) Time for Filing and Number of Motions.

(a) The petitioner may file a motion to modify or terminate the extreme risk protection order and request a hearing at any time after the extreme risk protection order is issued.

(b) In addition to requesting a hearing under MCR 3.718(D)(3), the respondent may file one motion to modify or terminate an extreme risk protection order during the first six months that the order is in effect and one motion during the second six months that the order is in effect. If the order is extended under subrule (B), the respondent may file one motion to modify or terminate the order during the first six months that the extended order is in effect, and one motion during the second six months that the extended order is in effect. If the respondent files more than one motion during these times, the court must review the motion before a hearing is held and may summarily dismiss the motion without a response from the petitioner and without a hearing.

(c) The moving party carries the burden and must prove by a preponderance of the evidence that the respondent no longer poses a risk to seriously physically injure another individual or the respondent by possessing a firearm.

(2) Service. The nonmoving party must be served, as provided in MCR 2.107 at the mailing address or addresses provided to the court, the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date. The petitioner must serve the petitioner's motion on the respondent. The clerk of the court must serve the respondent's motion on the petitioner due to the confidential nature of the petitioner's address unless the petitioner electronically filed the case under MCR 1.109(G) and the respondent has registered with the electronic-filing system. In that instance, the respondent must serve the petitioner electronically at the petitioner's registered email address.

(3) Hearing on the Motion. The court must schedule and hold a hearing on a motion to modify or terminate an extreme risk protection order within 14 days of the filing of the motion.

(4) Notice of Modification or Termination. If an extreme risk protection order is modified or terminated, the clerk must immediately notify the law enforcement agency specified in the extreme risk protection order of the change. A modified or terminated order must be served on the respondent as provided in MCR 2.107.

(5) If the extreme risk protection order expires or is terminated, the court must order, subject to the restrictions in MCL 691.1815, that the respondent may reclaim any seized firearm(s). Upon the motion of the respondent, the court may also order, at any time, the transfer of the respondent's firearm(s) seized by law enforcement under the extreme risk protection order to a licensed firearm dealer if the respondent sells or transfers ownership of the firearm to the dealer.

(B) Extension of Order.

(1) Motions.

(a) Time for Filing and Service. Upon motion by the petitioner or the court's own motion, the court may issue an extended extreme risk protection order that is effective for one year after the expiration of the preceding order. The respondent must be served the motion to extend the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.107 at the mailing address or addresses provided to the court. The petitioner must serve the petitioner's motion on the respondent. The clerk of the court must serve both the petitioner and respondent if upon the court's own motion. Failure to timely file a motion to extend the effectiveness of the order does not preclude the petitioner from commencing a new extreme risk protection action regarding the same respondent, as provided in MCR 3.716.

(b) Legal Standard. The court must only issue the extended order under this subrule if the preponderance of the evidence shows that the respondent can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure themselves or another individual by possessing a firearm and has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.

(2) Automatic Extensions. If the court or a jury finds that the respondent has refused or failed to comply with an extreme risk protection order, the court that issued the order must issue an extended extreme risk protection order effective for 1 year after the expiration of the preceding order.

(3) Notice of Extension. If the court issues an extended extreme risk protection order, it must enter an amended order. The clerk must immediately notify the law enforcement agency specified in the extreme risk protection order if

the court enters an amended order. The petitioner must serve an amended order on the respondent as provided in MCR 2.107.

(C) Minors and Legally Incapacitated Individuals. Petitioners or respondents who are minors or legally incapacitated individuals must proceed through a next friend, as provided in MCR 3.716(G).

(D) Fees. There are no motion fees for modifying, terminating, or extending an extreme risk protection order.

[NEW] Rule 3.721 Contempt Proceedings for Violation of Extreme Risk Protection Order

(A) In General. An extreme risk protection order is enforceable under MCL 691.1810(4)-(5), MCL 691.1815(4), and MCL 691.1819.

(B) Motion to Show Cause.

(1) Filing. If the respondent violates the extreme risk protection order, the prosecuting attorney for the county in which the order was issued or a law enforcement officer may file a motion, supported by appropriate affidavit, to have the respondent found in contempt. There is no fee for such a motion. If the motion and affidavit establish probable cause for a finding of contempt, the court must either:

(a) order the respondent to appear at a specified time to answer the contempt charge; or

(b) issue a bench warrant for the arrest of the respondent.

(2) Service. If issuing an order to show cause, the hearing must be held within 5 days. The prosecuting attorney or law enforcement officer must serve the motion to show cause and the order on the respondent and petitioner as provided in MCR 2.107.

(C) Search Warrant. If the violation alleges that the respondent has a firearm or concealed pistol license in the respondent's possession or control, a law enforcement officer or prosecuting attorney may also file an affidavit requesting that the court issue a search warrant to search the location or locations where the firearm(s) or concealed pistol license is believed to be and to seize any firearm(s) or concealed pistol license discovered during the search. The law enforcement officer's affidavit may include affirmative allegations contained in the complaint. If the affidavit establishes probable cause to believe the location or locations to be

searched are places where the firearm(s) or concealed pistol license is believed to be, the court must issue the search warrant.

(D) Arraignment; Advice to Respondent.

At the respondent's first appearance before the court for arraignment on contempt of court, the court must:

(1) advise the respondent

(a) of the alleged violation,

(b) of the right to contest the charge at a contempt hearing, and

(c) that they are entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court, or the local funding unit's appointing authority if the local funding unit has determined that it will provide representation to respondents alleged to have violated an extreme risk protection order, will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one;

(2) if requested and appropriate, appoint a lawyer or refer the matter to the appointing authority;

(3) set a reasonable bond pending a hearing of the alleged violation; and

(4) take a guilty plea as provided in subrule (E) or schedule a hearing as provided in subrule (F).

(E) Pleas of Guilty. The respondent may plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the respondent and receiving the respondent's response, must:

(1) advise the respondent

(a) that by pleading guilty the respondent is giving up the right to a contested hearing, and if the respondent is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule (D)(1)(c);

(b) of the maximum possible jail sentence for the violation; and

(c) that if they plead guilty to violating the extreme risk protection order, the court will automatically extend the duration of the extreme risk protection order for 1 year after the expiration of the preceding order;

(2) ascertain that the plea is understandingly, voluntarily, and knowingly made; and

(3) establish factual support for a finding that the respondent is guilty of the alleged violation.

(F) Scheduling or Postponing Hearing. Following the respondent's appearance or arraignment, the court shall do the following:

(1) Set a date for the hearing at the earliest practicable time.

(a) The hearing of a respondent being held in custody for an alleged violation of an extreme risk protection order must be held within 72 hours after the arrest, unless extended by the court on the motion of the arrested individual or the prosecuting attorney. The court must set a reasonable bond pending the hearing unless the court determines that release will not reasonably ensure the safety of the respondent or any other individual(s).

(b) If a respondent is released on bond pending the hearing, the bond may include any condition specified in MCR 6.106(D) necessary to reasonably ensure the safety of the respondent and other individuals, including continued compliance with the extreme risk protection order. The release order shall comply with MCL 765.6b.

(c) If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, upon motion of the prosecutor, the court may postpone the hearing for the outcome of that prosecution.

(2) Notify the prosecuting attorney of the contempt proceeding.

(3) Notify the petitioner and the petitioner's attorney, if any, and the law enforcement officer that filed the motion, if applicable, of the contempt proceeding and direct the party to appear at the hearing and give evidence on the charge of contempt.

(G) Prosecution After Arrest. If the court holds a contempt proceeding, the prosecuting attorney must prosecute the proceeding.

(H) The Violation Hearing.

(1) Jury. There is no right to a jury trial.

(2) Conduct of the Hearing. The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses.

(3) Evidence; Burden of Proof. The rules of evidence apply to both criminal and civil contempt proceedings. The prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt and the respondent's guilt of civil contempt by clear and convincing evidence.

(4) Judicial Findings. At the conclusion of the hearing, the court must find the facts specifically, state separately its conclusion of law, and direct entry of the appropriate judgment. The court must state its findings and conclusion on the record or in a written opinion made a part of the record.

(5) Sentencing. If the respondent is found in contempt, the court may impose sanctions as provided by MCL 600.1701 *et seq.*

[NEW] Rule 3.722 Appeals

(A) Rules Applicable. Except as provided by this rule, appeals involving an extreme risk protection order must comply with subchapter 7.200.

(B) From Entry of Extreme Risk Protection Order.

(1) Either party has an appeal of right from:

(a) an order granting, denying, or continuing an extreme risk protection order after a hearing under MCR 3.718(D).

(b) an order granting or denying an extended extreme risk protection order after a hearing under MCR 3.720(B).

(2) Appeals of all other orders are by leave to appeal.

(C) From Finding After Violation Hearing. The respondent has an appeal of right from a judgment of sentence for criminal contempt entered after a contested hearing.

Staff Comment (ADM File No. 2023-24): The amendments adopt new rules MCR 3.715-3.722 to implement procedures for handling extreme risk protection order actions.

See Extreme Risk Protection Order Act, MCL 691.1801 *et seq*.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

CLEMENT, C.J. (*concurring*). I concur with the Court's adoption of the proposed extreme risk protection order (ERPO) court rules, but write separately to address inconsistent legal terminology used throughout the Extreme Risk Protection Order Act (the Act). MCL 691.1805(3) requires an individual to file "a summons and complaint" to initiate an ERPO action. Civil actions are commenced by filing a complaint with the court, and the parties are respectively referred to as the "plaintiff" and "defendant." See MCL 600.1901 *et seq*. However, complaints are used to set forth specific allegations against defendants and inform them of the claims against which they are being called on to defend. MCR 2.111(A) and (B). Defendants, in turn, are generally required to file responsive pleadings addressing the plaintiff's allegations and setting forth any legal or equitable defenses. MCR 2.111(C) and (F).

On the other hand, a "petition" is "a formal written request presented to a court or other official body." *Black's Law Dictionary* (11th ed). The individual requesting a petition is the "petitioner," whereas the party against whom the petition is filed is the "respondent." The Act appears to conflate these legal concepts, requiring a complaint to initiate an ERPO action but referring to the parties as the petitioner and the respondent.

The nature of ERPO actions is consistent with that of a petition—not a complaint—and I therefore encourage the Legislature to amend the Act to clarify that actions should be initiated by filing a petition with the court. This is the same approach used in personal protection actions under MCL 600.2950 and MCL 600.2950a, which are initiated by filing a petition. The rules we adopt today use the term "complaint" to be consistent with the language of the Act. However, we have defined the term to clarify that a complaint, in the context of ERPO actions, means the act of *petitioning* the court to issue an order.

ZAHRA, J., would decline to adopt these amendments.

VIVIANO, J. (*dissenting*). I dissent from the Court's adoption of these rules intended to implement the Extreme Risk Protection Order Act (the ERPO Act), MCL 691.1801 *et seq*. The ERPO Act sets forth elaborate procedures for the issuance and service of extreme risk protection orders, along with procedures designed to ensure compliance with such orders once they are issued. The act has many procedural flaws and raises serious constitutional concerns. While the rules adopted today attempt to implement the statutory directives and fill in some of the gaps, in my view they only exacerbate the constitutional problems.

The most significant constitutional problem is presented by MCL 691.1807(8), the anticipatory search warrant provision in the ERPO Act, and MCR 3.718(C), the rule adopted today to implement it. MCL 691.1807(8) provides that if a court issues an extreme risk protection order and orders the firearms immediately surrendered, the court

> shall also issue an anticipatory search warrant, subject to and contingent on the failure or refusal of the restrained individual, following the service of the order, to immediately comply with the order and immediately surrender to a law enforcement officer any firearm or concealed pistol license in the individual's possession or control, authorizing a law enforcement agency to search the location or locations where the firearm, or firearms, or concealed pistol license is believed to be and to seize any firearm or concealed pistol license discovered during the search in compliance with 1966 PA 189, MCL 780.651 to 780.659.

Because this provision does not mention probable cause, it may be read as requiring issuance of an anticipatory search warrant even without a probable cause determination. However, although the provision was clumsily drafted, a better reading of it—and one that would avoid any constitutional infirmities—is that a search warrant may only be issued "in compliance with" our state's laws governing the issuance of search warrants, i.e., "1966 PA 189, MCL 780.651 to 780.659."[1] The rule adopted today appears to follow this view. See MCR 3.718(C) ("If the affidavit establishes probable cause to believe the location or locations to be searched are places where the firearm(s) or concealed pistol license is believed to be, the court must issue the anticipatory search warrant.").

However, while MCL 691.1807(8) may not be facially unconstitutional, it does not adequately spell out the additional probable cause findings required for anticipatory search warrants, as distinct from ordinary, run-of-the-mill search warrants. An "anticipatory search warrant" is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." LaFave, 2 Search & Seizure (6th ed), § 3.7(c). In *United States v Grubbs*, 547 US 90, 96-97 (2006), the Supreme Court held that anticipatory search warrants are not categorically unconstitutional. However, the Court held that they are only permissible if the issuing court makes two specific findings of probable cause: "It must be true not only that *if* the triggering condition occurs 'there is a fair probability that contraband or evidence

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[1] In other words, MCL 691.1807(8) should be read so that the phrase requiring compliance with 1966 PA 189 governs the issuance of an anticipatory search warrant, not just the latter phrase in which it appears regarding the authority of a law enforcement agency to conduct a search. The Legislature appears to have omitted a comma before the word "in," which would have made this interpretation flow more naturally. This reading is supported by the fact that the other two times 1966 PA 189 is mentioned in the act, it is mentioned in connection with the *issuance* of a search warrant. See MCL 600.1810(4) and (5).

of a crime will be found in a particular place,' but also that there is probable cause to believe the triggering condition *will occur*." *Id*. (citations omitted). For an anticipatory search warrant sought under MCL 691.1807(8), the "triggering condition" is explicitly set forth in the statute—the respondent's refusal to immediately comply with the order. Therefore, to ensure compliance with the Fourth Amendment as interpreted by *Grubbs*, before issuing an anticipatory search warrant under the ERPO Act, the court must find that the affidavit establishes (1) probable cause to believe that if the respondent refuses to immediately comply with the order, there is a fair probability that the respondent's firearm(s) or concealed pistol license will be found in the location or locations to be searched, *and* (2) probable cause that the respondent will refuse to immediately comply with the order. The rule adopted today confusingly omits this second required finding, and it will likely result in the issuance and execution of anticipatory search warrants that violate the Fourth Amendment. Since the United States Constitution trumps our court rule, trial judges should carefully adhere to the Fourth Amendment and make the requisite probable cause findings, even if our rule omits one of them.

Indeed, rather than skirting the constitutional requirements for anticipatory search warrants, I believe the rule should have additional safeguards to protect against unreasonable searches and seizures. In particular, the rule should require that anticipatory search warrants specify the "condition placed by the issuing magistrate on the authorization to search," i.e. the "triggering condition." *Grubbs*, 547 US at 100 (Souter, J., concurring in part and concurring in the judgment). While the *Grubbs* majority found that this was not required by the Fourth Amendment, other jurisdictions have nonetheless required anticipatory search warrants to specify the triggering condition. See, e.g., *State v Curtis*, 139 Haw 486, 497-499 (2017). This appears to be the practice followed by the federal district courts, since the federal form for anticipatory search warrants includes a section directing the issuing judge to specify the triggering condition.[2] Justice Souter explained the rationale for this added safeguard as follows:

> An issuing magistrate's failure to mention that condition can lead to several untoward consequences with constitutional significance. To begin with, a warrant that fails to tell the truth about what a magistrate authorized cannot inform the police officer's responsibility to respect the limits of authorization, a failing as suming real significance when the warrant is not executed by the official who applied for it and happens to know the unstated condition. . . .

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[2] See United States Courts, *Anticipatory Search and Seizure Warrant, Form AO 93B* (revised November 2013), available at <https://www.uscourts.gov/sites/default/files/ao093b.pdf> (accessed February 2, 2024) [https://perma.cc/E8GH-Q27Y].

> Nor does an incomplete anticipatory warrant address an owner's interest in an accurate statement of the government's authority to search property. [*Id*. at 100-101 (Souter, J., concurring in part and concurring in the judgment) (citation omitted).]

Because I agree that this is the better practice, and even though it is omitted from the present rule, I would encourage trial judges to require anticipatory search warrants to state the triggering condition and to further state that the warrant may not be executed unless the triggering condition has occurred. See generally *United States v Brack*, 188 F3d 748, 757 (CA 7, 1999) (explaining that the "purpose of the requirement that warrants conditioned on future events be narrowly drawn is to avoid premature execution as a result of manipulation or misunderstanding by the police").

The rules adopted today create another significant constitutional infirmity by eliminating the compliance hearing required by MCL 691.1810(4) and, instead, delegating to the clerk of the court the duty of determining whether a respondent has complied with the filing requirements following issuance of an extreme risk protection order. See MCR 3.719(D)(2) ("The clerk of the court must review the proof of service filed with the court and determine whether the respondent has complied with the filing requirements of subrule (D)(1)."). This is significant because a finding of noncompliance results either in the issuance of a bench warrant or an order to show cause to initiate contempt proceedings and may also result in the issuance of a search warrant. See MCR 3.719(D)(2)(b). This raises serious due process concerns. See *Sabbe v Wayne Co*, 322 Mich 501, 503 (1948) ("We have held that the duties and functions of county clerks are purely ministerial and that judicial functions cannot be performed by court clerks, nor may the power to do so be conferred upon them."); see also *Toms v Jeffries*, 237 Mich 413, 416-417 (1927) (holding that the clerk may sign a warrant *nunc pro tunc*, but only after the judge makes a probable cause finding).

I believe the rules adopted today unnecessarily risk violations of our citizens' due process rights and right to be protected against unreasonable searches and seizures. This Court should show more concern for the constitutional rights of our citizens than these rules demonstrate. Rather than rush to adopt these rules before the act's effective date, I would take more time to address the constitutional issues noted above. For these reasons, I respectfully dissent.